COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
TRIAL COURT DEPARTMENT

JANE DOE 1 and JANE DOE 2, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

John Hancock Life Insurance Company (U.S.A.), First Fitness Management, LLC, and Commonwealth Flats Development Corp. d/b/a Second Wave Health & Fitness,

Defendants.

No. 2284CV00831

PLAINTIFFS' OPPOSITION TO JOINT MOTION TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS AND MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR NOTICE PURSUANT TO RULE 23(d)

INTRODUCTION

This Court should deny the motion to strike because: (1) all of Plaintiffs' allegations relating to the placement by John Hancock Life Insurance Company (U.S.A.) ("John Hancock") of the hidden camera, destruction of evidence, and efforts to cover up crimes, rest on a sufficient constellation of common issues to bind the class members together under *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 367, 893 N.E.2d 1187, 1212 (2008); (2) John Hancock and First Fitness Management LLC ("First Fitness") cannot meet the ***impossibility*** standard for dismissing a class action before discovery; (3) class certification should be dealt with only on a fulsome factual record; (4) under Rule 23 this court has a myriad of flexible ways to adjudicate this action in a way that preserves judicial resources and protects the interests of all class members; and (5) the time for a motion to strike under Rule 12(f) previously expired when, prior to bringing this motion, John Hancock filed its answer and First Fitness brought its motion to dismiss the Amended Complaint.

The motion to strike exemplifies how John Hancock attempts to maintain a strategic "information monopoly" with respect to the identity of class members. Indeed, at this early stage in this case, John Hancock has yet to produce even one document in response to Plaintiff's document request that served on John Hancock over a year ago, on June 21, 2022. Affidavit of Michael J. Duran,¶¶ 3-4. John Hancock's withholding of fitness club member names is not a reason to deny recognizing a class. *Gammella v. P.F. Chang's China Bistro, Inc.*, 482 Mass. 1, 20, 120 N.E.3d 690, 706–07 (2019) ("the plaintiff

did not know the identities of the putative class members because the defendant used aggressive discovery tactics to maintain a strategic "information monopoly.")

CLASS-WIDE FACTUAL ALLEGATIONS

The gym at issue was located within a John Hancock-owned building, offering employees a convenient place for employees to work out, change clothing, and shower. *See* Amended Complaint (Am. Compl."), ¶ 32. Plaintiffs regularly used the gym at issue in this case to undress, shower, and change clothing. *Id.* ¶¶ 19-20.

John Hancock and its employees purchased and installed the hidden camera in the women's locker room of the employee gym (Am. Compl., ¶¶ 66-67), strung a coaxial cable in the space above the ceiling of the women's locker room to the Third Floor Fan Room (*id.* at ¶ 68), provided power to the camera and connected a monitor (*Id.* at ¶¶ 69-70) and "[u]sing the hidden camera directed at the changing area of the women's locker room…viewed and surveilled the Plaintiffs and other women, who used the gym and were in a state of undress, from sometime in 2015 until December 28, 2018." *Id.* at ¶ 71. John Hancock's employees then adjusted the camera several times. *Id.* at ¶¶ 72-74.

From sometime in 2015 until December 28, 2018, the hidden camera directed at the changing area of the women's locker room in the employee gym was used to view and surveille the Plaintiffs in a state of undress. *Id.* ¶¶ 3, 71, 309. When the camera was discovered, John Hancock removed the equipment, touched it with bare hands, tampered with or destroyed evidence in violation of G.L. c. 268, § 13E, and delayed reporting the crime to the police for 48 days. *Id.* at ¶¶ 106-09. John Hancock also withheld critical information from the police in an effort to avoid incrimination because

John Hancock actually owned the surveillance equipment. *Id.* at ¶¶ 127-28. John Hancock also delayed reporting the crimes to the victims. (*Id.*, ¶¶ 8, 111-12). The State Police's Investigative Report provides as follows:

Synopsis
SGT Lopes and Trooper D. Walsh meet with Lead Forensic Investigator John F. McCloskey, Senior Director Charles Ziegenbein and Investigator tom Samoluk, all of John Hancock to discuss a suspicious video monitoring device discovered on 4/16/19. Said device was believed to be positioned in such a manner as to view a women's'-only locker room. The device was dismantled by an on-sight engineer before MSP investigators could view it. MSP Investigators were notified of the situation on 6/3/19. Trooper Walsh and SGT Lopes will work in conjunction with the John Hancock Security Team to investigate this matter. Physical Evidence was secured (Evidence Submission Form Completed). All evidence was secured in evidence to be later transferred for forensic analysis. This investigation is open and on-going.

John Hancock made misstatements to the victims which falsely indicated that John Hancock had done everything in its power to discover the culprit (*id.* at ¶¶ 132-39) and engaged in an effort to dissuade victims from coming forward to vindicate their rights and assist the police in their investigation. *Id.* at ¶¶ 152-54. By allowing this to happen John Hancock breached their duties to Plaintiff Jane Doe 1 and all Class Plaintiffs. *Id.* ¶ 397. Plaintiffs allege that each person who used the women's locker room during the applicable period to change clothes or shower at least once is a member of the class of victims and a Class Plaintiff. *Id.* ¶ 375. A reasonable person would have suffered emotional distress under the same circumstances, and the emotional distress suffered by Plaintiffs and all Class Plaintiffs, "was the foreseeable result of Defendants' negligence." *Id.* ¶¶ 265-66, 486, 492, 493.

John Hancock also prevented victims from publicly sharing anything related to this violation of privacy in an effort to silence victims. *Id.* ¶¶ 152-53. John Hancock told victims that it "fix this" and "right this wrong." *Id.* ¶ 156. In so doing, John Hancock took on a duty to "ensure that the harms against the Plaintiffs were remediated fully." *Id.* ¶ 146. John Hancock breached this duty and took no efforts to remediate the privacy

violations it caused. ¶¶ 345, 384, 408, 470. For example, John Hancock falsely stated that a "dark web scan" had been conducted when in fact no such forensic examination had been conducted. *Id.* ¶ 209. As a result of John Hancock's many breaches, remediation and monitoring tools and services will be necessary to reduce or eliminate the likelihood of further privacy violations to take place, such as further viewing or dissemination of compromised images of class members. *Id.* ¶ 385. For example, the hiring of forensic data services will be necessary to determine the extent to which infringing images have been disseminated. John Hancock should be liable to pay all fees for the use of forensic data services. *Id.* ¶ 386. The hiring of services that scan or search the "deep web" or "dark web" for infringing images will also be necessary to locate any infringing images or to monitor if new infringing images are posted or shared on the internet. John Hancock should be liable to pay all fees for the use of "deep web" or "dark web" scanning services. *Id.* ¶ 387. Finally, the hiring of a "takedown service" will be necessary to force the operators of internet sites or social media platforms to remove infringing images. John Hancock should be liable to pay all fees for the use of takedown services. *Id.* ¶ 388.

To the extent there are any differences in the amount of damages of each class member, Plaintiffs will be requesting a two-stage process whereby the first phase will be to determine Defendants' liability on a class-wide basis, and the second phase will be to determine the process by which: (a) individualized damages will be determined, and (b) class-wide remediation efforts will be undertaken and/or funded. *Id.* ¶ 389.

ARGUMENT

In Massachusetts, motions to strike are limited in both timing and scope. Specifically, Mass. R. Civ. P. 12(f) provides that motions to strike may be made "***before responding to a pleading.***" Moreover, the general rule is that motions to strike should rarely be granted. *See Manning v. Boston Medical Center Corp.*, 725 F.3d 34 (1st. Cir. 2013); *Hennessy v. Brookdale Senior Living Communities, Inc.*, No. 1784CV04215BLS2, 2018 WL 4427020, at *5 (Mass. Super. Ct. Aug. 1, 2018). A motion to strike class allegations before a plaintiff has had any opportunity to seek discovery of information relevant to the merits of class certification should be granted only when "it is obvious from the pleadings that the proceeding cannot possibly move forward on a class-wide basis." *See Manning*, 725 F.3d, at 59; *Hennessy,* 2018 WL 4427020, at *5; *Grabau*, 2018 WL 4700547, at *2. Because "striking a portion of a pleading is a drastic remedy," courts must consider whether the motion is "sought by the movant simply as a dilatory or harassing tactic." *See Kantzelis v. Com. Ins. Co.*, No. SUCV20163144BLS1, 2017 WL 7053905, at *4 (Mass. Super. Ct. Nov. 13, 2017). Here, Defendants' motion fails to demonstrate an entitlement to the drastic remedy of depriving plaintiffs of an opportunity to seek class certification based on a more fulsome record. Accordingly, the motion to strike must be denied.

A. The Motion to Strike is Untimely Under Mass. R. Civ. P. 12(f) Because It Was Brought After John Hancock Filed its Answer and After First Fitness Served its Motion to Dismiss the Amended Complaint

The joint motion to strike is untimely. Rule 12(f) states that a motion to strike may be made "[u]pon motion made by a party ***before*** responding to a pleading." Rule 12(f) (emphasis added).Here, the motion to strike was served by John Hancock and First

Fitness at **7:35 pm** on August 25, 2023, after First Fitness served its Motion to Dismiss the Amended Complaint at **4:08 pm** and after John Hancock electronically filed its Answer to the Amended Complaint at **5:12 pm** on the same day. Accordingly, the motion violates Rule 12(f) and need not be heard.

B. John Hancock and First Fitness Have Not Shown that Plaintiffs Cannot *Possibly* Move Forward on a Class-wide Basis

Untimeliness aside, Defendants' attempt to defeat a class action via a motion to strike faces two insurmountable hurdles. First, unlike its federal counterpart,[1] which allows defendants to "eliminate allegations about representation of absent persons," Mass. R. Civ. P. 23 contains no such provision. *Compare* Fed. R. Civ. P. 23(d)(1)(D) *with* Mass. R. Civ. P. 23. Thus, Defendants can only succeed under the more rigorous standard for striking pleadings under Rule 12(f), which mirrors Rule 12(b)(6). *Deutsche Bank Nat. Trust Co. v. Gabriel*, 81 Mass.App.Ct. 564 (2012). The Amended Complaint must be taken as true and all inferences must be drawn in the Plaintiffs' favor. *See id.* As discussed below, Defendants are unable to meet this standard.

Second, motions to strike class allegations face a high huddle that Defendants are unable to clear. Preemptive motions to strike class allegations—which seek to deprive plaintiffs of the opportunity to move for class certification and conduct the necessary discovery—are a "drastic remedy" that is "disfavored." *See Kantzelis*, 2017 WL 7053905, at *4. For this reason, "courts should exercise caution when striking class action

[1] Another difference between Federal Rule 23 motions to strike and motions to strike under state law is that the federal rule requires motions to strike only after "giving appropriate notice to some or all class members." Fed. R. Civ. P. 23(d). It is notable that Defendants have not proposed or requested any such notice to all victims. Regrettably, there is part of a consistent approach by Defendants to keep victims in the dark.

allegations based solely on the pleadings…" *Id.* Not only do such motions seek to sidestep the court's discretion in certifying a class, they are "even more disfavored because it requires a reviewing court to preemptively terminate the class aspects of ... litigation, solely on the basis of what is alleged in the complaint, and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification." *Id.* The standard governing a motion to strike allegations is essentially one of patent impossibility—a motion to strike should be granted only when "it is obvious from the pleadings that the proceeding ***cannot possibly*** move forward on a class-wide basis." *See Manning*, 725 F.3d, at 59 (emphasis added); *see also Hennessy*, 2018 WL 4427020, at *5; *Grabau*, 2018 WL 4700547, at *2.

Even under the conventional class certification standard (*i.e.* on a fulsome factual record[2]), neither the mere possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which satisfies Rule 23. *Salvas*, 452 Mass., at 363; *Weld v. Glaxo Wellcome Inc.*, 434 Mass. 81, 87, (2001), *quoting Barrack*, 524 F.2d, at 901 ("The amount of damages is invariably an individual question and does not defeat class action treatment").

The Defendants further fail to recognize that under Rule 23, there are a myriad of ways this Court may eventually choose to employ to properly adjudicate the class claims. *Salvas*, 452 Mass., at 368 ("Where damages issues are likely to require more

[2] John Hancock seeks to strike all class allegations while at the same time refusing to produce even a single page of documents, thumbing its nose at a Rule 34 request served over a year ago.

individualized treatment, a judge has available a number of creative methods of managing questions of remedy in a manner that protects the defendant's rights while redressing harms to individual plaintiffs."), *quoting* Conte & H.B. Newberg, Class Actions § 4.24, at 287–288 (4th ed. 2002) ("With reference to problems of complexity or numerousness of individual questions remaining in a class action, courts have pointed to or have agreed to use devices such as conditional class certification[,] ... limitation of the class to particular issues[,] ... bifurcated trials for liability and damages, common proof of class damages, use of special masters or magistrates, use of liaison and lead counsel for the parties, class recovery distribution techniques…").

1. The Class Allegations Meet the Prerequisites of Rule 23

Despite their almost insurmountable bar at the pleading stage the Defendants contend that the Plaintiffs cannot meet the prerequisites of commonality, typicality, predominance, or ascertainability.[3] (Motion, at 7.) As set forth below, Plaintiffs have sufficiently pleaded each of the required factors:

a. Numerosity

Here, John Hancock violated the privacy of a "large number of women." (Am. Compl., ¶ 377.) Courts may draw reasonable inferences to find the requisite numerosity." *Gammella*, 482 Mass., at 12.

b. Commonality

Rule 23's commonality requirement merely requires that "there are common questions of law and fact." *Weld.*, 434 Mass., at 86. *See e.g. Olson v. Energy N., Inc.*,

[3] Defendants make no express challenge to numerosity, adequacy of representation, or superiority. Nevertheless, Plaintiffs will address the unchallenged factors for the sake of a complete record.

No. 9800228, 1999 WL 1332362, at *7 (Mass. Super. Ct. Jan. 14, 1999). Even a single common question "will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). What matters to class certification is "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.*

Here, there are clearly common issues as to the nature and scope of the privacy violation, the culpability of the defendants, duty, foreseeability, and actions the Defendants failed to take to remedy the violation and prevent further dissemination. This action will "generate common answers apt to drive the resolution of the litigation." Thus, commonality is firmly established.

In seeking to strike ***all*** class allegations, however, Defendants erroneously contend that Plaintiffs' class claims depend ***exclusively*** on emotional distress. Yet from the very first paragraph, the Amended Complaint makes clear that the class claims are predicated on the privacy violation caused by Defendants' malfeasance:

> This case arises out of John Hancock's use of a hidden camera to monitor women changing clothes in the locker room of John Hancock's employee gym. This case also arises from John Hancock's effort to cover-up and minimize these crimes, John Hancock's destruction of evidence of these crimes (in violation of G.L. c. 268, § 13E), and John Hancock's effort to silence victims and prevent them from receiving the closure they still need.

(Am. Compl., ¶ 1.) The Amended Complaint proceeds to set out in copious detail the invasion of privacy that has occurred in this case. The Amended Complaint then brings ten separate counts for relief, only two of which involve or even reference emotional distress. Defendants falsely suggest that these two claims disprove commonality, while ignoring the overwhelming number of claims that address the invasion of their privacy

without regard to any emotional harm. The factual and legal issues concerning the privacy violation and the resulting injury—the unacceptable intrusion into a person's most basic right to seclusion—are identical for each gym member.

Defendants also ignore the stated purpose and structure of the class action. Count Count IX's injunctive claim alleges that: "If Defendants are found to have negligently or intentionally violated the privacy of one Class member, they will be found to have been negligently or intentionally violated the privacy of all Class members." (Am. Compl., ¶ 506.) Similarly, Count X's claim for class remediation damages also alleges that: "If Defendants are found to have negligently or intentionally violated the privacy of one Class member, they will be found to have been negligently or intentionally violated the privacy of all Class members." *Id.*, ¶ 515. These class claims neither depend on emotional distress nor require that they be pleaded. Accordingly, Defendants' arguments concerning the lack of commonality are unfounded.

c. Typicality

Jane Doe 1 and Jane Doe 2 meet the typicality requirement because the wrongs committed by John Hancock against them are identical to wrongs committed against all class members. Defendants argue that Plaintiffs "make no specific allegations about the injuries sustained by absent members of their putative class." This is simply incorrect. Typicality is established when there is "a sufficient relationship ... between the injury to the named plaintiff and the conduct affecting the class," and the claims of the named plaintiff and those of the class "are based on the same legal theory." *Weld*, 434 Mass., at 87 (affirming class certification where CVS allegedly violated the privacy of customers

by disclosing their private health information with drug manufacturers). A plaintiff representative normally satisfies the typicality requirement with "an allegation that the defendant acted consistently toward the [representative and the] members of a putative class." *Id.* For this reason, typicality is clearly met where the claim of the class representative and those of the class are based on a "single course of conduct engaged by defendants." *Id.*

Here, each gym member suffered the same privacy violation as the Plaintiffs. Each member was further victimized by John Hancock's subsequent destruction of evidence and failure to prevent further privacy violations. Viewed appropriately, all claims including the Plaintiffs' are based on a single course of conduct engaged by the Defendants. For instance, the Plaintiff has alleged that: John Hancock and its employees purchased and installed the hidden camera in the women's locker room of the employee gym (Am. Compl., ¶¶ 66-67), strung a coaxial cable in the space above the ceiling of the women's locker room to the Third Floor Fan Room (*id.*, ¶ 68), provided power to the camera and connected a monitor (*id.*, ¶¶ 69-70) and "[u]sing the hidden camera directed at the changing area of the women's locker room, John Hancock and its employees viewed and surveilled the Plaintiffs and other women ,who used the gym and were in a state of undress, from sometime in 2015 until December 28, 2018." (*Id.*, ¶ 71.) John Hancock then adjusted the camera on multiple occasions. (*Id.*, ¶¶ 72-74.) When the hidden camera was discovered, John Hancock delayed reporting it to the police for 48 days, tampered with and destroyed evidence in violation of G.L. c. 268, § 13E (*id.*, ¶¶ 106-09), withheld critical information—namely that John Hancock owned the

surveillance equipment—from the police in an effort to shield John Hancock from incrimination (*id.*, ¶¶ 127-28), and delayed reporting to the victims (*id.*, ¶¶ 8, 111-112). John Hancock then made misstatements to the victims which were intended to falsely indicate that John Hancock had done everything in its power to discover the culprit (*id.*, ¶¶ 132-139), and thereafter engaged in an effort to dissuade victims from coming forward to vindicate their rights and assist the police in their investigation. (*Id.*, ¶¶ 152-154). All of these allegations stem from a single course of conduct and an "alignment of claims and legal theories ensures." *Weld*, 434 Mass., at 87.

Going outside of the pleadings, Defendants attempt to circumvent a finding of typicality by advancing a speculative and unproven argument that because the Plaintiffs did not sign First Fitness's membership agreement, then they cannot be typical of the other members who did. This argument fails for multiple reasons. First, the possibility of affirmative defenses regarding some of the class members, is not a grounds for denying class certification. *Gammella.*, 482 Mass., at 13. Second, there is no allegation in the Amended Complaint that any class members signed this membership agreement. Thus under Rule 12(f) this argument is unavailable. Third, the Defendants make ***no assertion*** that any women ***actually signed*** the membership agreement. Presumably, if scores of women had signed such an agreement, this Court would have an affidavit to such effect in its hands. Such speculation finds no home in a motion to strike at this stage.[4] Finally, the arbitration clause at issue only covers claims based on the membership agreement itself: "any dispute, controversy, or claim arising out of or

[4] The fact that one of the defendants – First Fitness – may have a defense against some class members, and not others, does not make the Plaintiffs' claims atypical. *See Weld.*, 434 Mass., 90.

relating in any way to the Membership Agreement."Motion at 17. It does not cover tort claims that arose due to John Hancock's intentional conduct and First Fitness' negligence. It will not change any members' claims or rights in this action.

d. Adequacy of Representation

Jane Doe 1 and Jane Doe 2 fairly and adequately protect the interests of the class.

2. John Hancock and First Fitness Have Not Shown that Plaintiffs Cannot *Possibly* Meet the Predominance Requirement

"The predominance test expressly directs the court to make a comparison between the common and individual questions involved." *Salvas,* 452 Mass., at 363. All that is required is that certified claims be "sufficiently cohesive to warrant adjudication by representation." *Salvas,* 452 Mass., at 364. Here, common questions of law or fact will predominate, as required by Rule 23(b) because the essential factual questions of liability - did John Hancock intentionally or negligently invade the Plaintiff's privacy and then intentionally or negligently destroy evidence and cover its own tracks? - rest on a sufficient constellation of common issues to bind the class members together. *See Salvas,* 452 Mass., at 367 ("sufficient constellation of common issues [to] bind[ ] class members together' for purposes of certification."); *Weld,* 434 Mass., at 91.

Defendants wring their hands about the "difference in damages," but in so doing Defendants lose sight of the reality that the mere placement of functioning surveillance equipment in the women's locker room constitutes ***the*** class-wide harm. There is no need for individualized proof because the proof of privacy violation will be identical to each member of the class. Defendants conflate the class members' primary claims for

invasions of privacy claims, which do not require any individualized damages determination, with Plaintiffs' emotional distress claims.[5]

To sustain a claim for invasion of privacy, all that is required is that the invasion must be both unreasonable and substantial or serious. *Nelson v. Salem State College*, 446 Mass. 525, 536, 845 N.E.2d 338 (2006); *Ayash v. Dana-Farber Cancer Inst.*, 443 Mass. 367, 382 n. 16, 822 N.E.2d 667 (2005). The ***sole*** inquiry is the conduct of the ***defendant***, not the plaintiffs. *Polay v. McMahon*, 468 Mass. 379, 382–85, 10 N.E.3d 1122, 1126–28 (2014).

Because privacy violations may result in individualized damages, Defendants imply that they are never amenable to class certification. This is refuted by a burgeoning body of digital-era case law that Defendants avoid. This includes *Weld v. Glaxo Wellcome Inc.*, where the SJC affirmed class certification and found predominance where CVS violated customer ***privacy*** by disclosing their health information to drug manufacturers, despite defendants' claims that "individualized inquiry" was necessary to determine "subjective emotional reaction of each customer to the letter received." 434 Mass., at 92. Similarly, the Ninth Circuit affirmed class certification and found predominance where Facebook violated user biometric ***privacy***, despite Facebook's argument that geographic reach of biometric privacy law required "countless mini trials" to determine the location of privacy violations. *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1276 (9th Cir. 2019). In *Patel*, Facebook expressly made the same argument implied

[5] Tellingly, Defendants contend that the "core question" in this case is "whether class members were injured. " (Motion, at 15.) As stated above, the breach of privacy constitutes the common injury in this case. And for this injury, John Hancock through its former CEO Marianne Harrison has already admitted liability: "This act was an invasion of privacy and completely unacceptable." (Am. Compl., ¶ 132.)

by the Defendants here, that privacy violations alone do not cause injury, and thus that something more "concrete" is required.[6] The Ninth Circuit roundly rejected this argument, noting that "***privacy*** torts do not always require additional consequences to be actionable." *Id.* at 1274, *citing Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017) (emphasis added); Restatement (Second) of Torts § 652B cmt. b. Put most succinctly, the "intrusion into privacy itself is what makes a defendant liable." *Brown v. Google LLC*, No. 4:20-CV-3664-YGR, 2023 WL 5029899, at *5 (N.D. Cal. Aug. 7, 2023) (denying summary judgment where court certified a class seeking injunctive relief to prevent Google from further violations of its privacy policy). Importantly, in this case, unlike cases where consent or comparative fault are issues, there is no scintilla of suggestion that there would be any individualized issues with respect to Defendants' liability for the privacy violations. *See e.g. Layes v. RHP Properties, Inc.*, 95 Mass. App. Ct. 804, 826, 133 N.E.3d 353, 373 (2019).

At its core, the class certification that Plaintiffs' will seek is injunctive relief. (Am. Compl., ¶¶ 382, 512.) It is well settled that injunctive claims may be certified on a class-wide basis and that individualized issues as to damages do not change that. *See e.g. Cantell v. Comm'r of Correction*, 475 Mass. 745, 748 n.6, 60 N.E.3d 1149, 1151 (2016). Plaintiffs intend to proceed on class-wide injunctive relief, on issues of liability, and on privacy invasions that are common to all class members. For this reason, Defendants' excessive preoccupation with individualized damages is misplaced.

[6] Facebook couched its argument in terms of a "lack of standing."

But even if the class claims only sought class-wide damages, Defendants would still be trying to read "predominance" out of Rule 23 entirely and replace it instead with a requirement that there be *no* individual issues. It is well settled that this gambit cannot succeed. Courts routinely find class certification appropriate where common issues of law and fact are shown to form the nucleus of a liability claim, even though the appropriateness of class action treatment in the damages phase is an open question. *See Salvas*, 452 Mass., at 364, *quoting Barrack*, 524 F.2d, at 905 ("The amount of damages is invariably an individual question and does not defeat class action treatment").

At bottom, courts have the discretion to limit the class to "particular issues," rather than all possible issues. *Salvas*, 452 Mass., at 368. Even if this Court were to limit class issues to proving the invasion of privacy and providing injunctive relief, such a limitation would not bar subsequent individual suits for damages. *Longval v. Comm'r of Correction*, 448 Mass. 412, 418, 861 N.E.2d 760, 765 (2007); *Brown*, 2023 WL 5029899, at 3.

3. Plaintiffs Have Demonstrated Superiority

Although Defendants only mention superiority in passing, the Plaintiffs have demonstrated that a class action is a superior method for adjudication. Defendants suggest that each claimant should be forced to individually litigate identical invasion of privacy claims, which would be inefficient, wasteful, and risk inconsistent verdicts. *See Weld*, 434 Mass., at 94–95 ("It has been the tradition of the common law to adapt... For this litigation ... [a class action] offers the best means to adapt an established and tested structure to a modern phenomenon."). Here, the skyrocketing modern "phenomenon" of electronic privacy violations capable of causing widespread harm at the click of a

button make a class action in this case both necessary and superior to the available alternatives. *See Smith v. Wal-Mart Stores, Inc.*, 870 So. 2d 531, 537 (La. App. Ct. 3d Cir. 2004) (affirming superiority where a Walmart employee committed a privacy violation by allegedly placing a hidden camera in the women's bathroom).

4. The Class Is Ascertainable and this Is An Issue of Class Certification

As an initial matter, ascertainability is not mentioned in Rule 23 and Defendants cite no binding authority on this Court that requires it to consider it at this (or any other) stage of the litigation. Even if ascertainability were a pleading requirement, however, it would merely require identification by "stable and objective factors." *Kent v. SunAmerica Life Ins. Co.*, 190 F.R.D. 271, 278 (D. Mass. 2000). Here, there is no subjectivity in determining which members used the gym between 2015 and the end of 2018. Indeed, First Fitness was required to keep a log of each time a member used the gym, putting ascertainability beyond dispute. Even more importantly, the Plaintiff can already identify and ascertain many members of the class at issue. Duran Aff. ¶ 8, Ex. D.[7] Plaintiffs also possess access logs to the 3rd Floor Fan Room showing when employees of John Hancock viewed women changing in real time. These records, cross-referenced with gym logs, will reveal who was viewed by John Hancock employees and when.

The fact that the Plaintiff has not identified all of the class members at this stage of the litigation, when very little discovery has occurred, is not a reason to deny class certification. *Gammella*, 482 Mass., at 20 ("Given the hundreds of potential

[7] Plaintiffs note that the list of members currently possessed predates First Fitness's tenure, meaning that none of the listed members would have signed the membership agreement that First Fitness contends (without factual support) that all new members who joined during its tenure had to sign.

plaintiffs…and the possibility of further discovery, we do not consider this to be a proper grounds to deny certification"). John Hancock employs a strategic "information monopoly" through its continued withholding of discovery from the Plaintiff, but this " is not a reason to deny recognizing a class. *Id.*

Further, the possible presence of ***uninjured*** class members does not defeat class certification where there is sufficient evidence to infer a prohibited class-wide wrong. *Salvas*, 452 Mass., at 357, 370; *Gammella*, 482 Mass., at 14, *quoting Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 380 (7th Cir. 2015) ("[p]laintiffs need not prove that every member of the proposed class has been harmed before the class can be certified").

Defendants argue that the class definition is "overbroad because it does not take into account whether the individuals were actually viewed or surveilled or in a state of 'undress' when they changed clothes." Defendants go on to make a troubling assertion[8] that "If a potential class member was not viewed at all… or did not undress, they were not injured." Motion at 10..

The Defendants misconstrue the Plaintiff's allegation regarding what the invasion of privacy at issue in this case actually is; the placing of the camera in a space where it should not have been, was itself an invasion of the Plaintiffs' privacy. The viewing of Plaintiffs with the camera was yet another invasion of privacy. It does not matter which of the Plaintiffs were actually viewed by a live person on the monitor; all the Plaintiffs

[8] Defendants' myopic view of privacy invasions in this case is inconsistent with other laws on this topic. For instance, even if a person were to record and then delete an "upskirt" picture without viewing it, the person would still violate the "upskirt" law. *See* Mass. Gen. Laws Ann. ch. 272, § 105.

were surveilled. Even John Hancock's CEO admitted this in a written communication to class members. Duran Aff. ¶ 9, Ex. E; (Am. Compl. ¶ 132.)

Finally, Defendants' ascertainability arguments place the cart before the horse. Once discovery on this matter is completed, the Court will have sufficient information to further define the class as the Court sees fit, and as Rule 23 allows. A judge has discretion to redefine a class at any time. *Gammella*, 482 Mass., at 15; *Escorbor v. Helping Hands Co., Inc.*, No. SUCV20152053D, 2017 WL 4872657, at *6 (Mass. Super. Ct. Sept. 13, 2017) ("it may not invariably be improper to delay defining the class with precision until the time of judgment."). In any event, Plaintiffs' class definition hews closely to approved class definitions in cases with similar fact patterns. *See Smith*, 870 So. 2d, at 534, 537 (La. App. Ct. 3d Cir. 2004). In *Smith*, the class definition affirmed had similar language concerning "all" women… "who can establish presence in the customers' ladies restroom" during the period of time prior to discovery of the hidden camera placed by an employee).

C. Cross-Motion to Serve Notice to Absent Class Member pursuant to Mass. R. Civ. P. 23(d)

Mass. R. Civ. P. 23(d) states that a court "at any stage of an action under this rule may require such security and impose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended." Specifically, the court "may order that notice be given, in such manner as it may direct, of the pendency of the action…or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire." *Id.* Under the plain language of Rule 23(d) vests the court with the discretionary

power to order notice during class actions. *Kingara v. Secure Home Health Care Inc.*, 489 Mass. 393, 396, 183 N.E.3d 1140, 1143 (2022).

Here, notice is to putative class members is appropriate to alert them of Defendants efforts to defeat a class action and the "significant prejudice" to their interests that could result. *Id.* The stated purpose of Rule 23(d) is to "fairly and adequately protect the interests of the class in whose behalf the action is brought or defended." *Id.* ("we conclude that while courts may, in limited circumstances, order notice under rule 23 (d) to putative class members prior to class certification, it is a clear abuse of discretion to do so without finding that putative class members would face significant prejudice absent such notice."). If Defendants were to succeed in striking the class allegations, the prejudice to absent class members would be manifest. Further, because this Court is obligated to treat this as a class action "for the purposes of dismissal or compromise," the Court should provide notice to all absent class members prior to any dismissal. *See Wolf v. Comm'r of Pub. Welfare*, 367 Mass. 293, 298, 327 N.E.2d 885, 889 (1975).

The time is ripe to provide notice to absent class members.

CONCLUSION

For these reasons, the Court should deny John Hancock and First Fitness's motion to strike allegations in the Amended Complaint.

Respectfully submitted,

Dated: September 25, 2023

/s/ Ilyas J. Rona

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CERTIFICATE OF SERVICE

I, Ilyas J. Rona, hereby certify that on the September 25, 2023, a true copy of the above document was served upon on the attorney of record for each party by email as follows:

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