**IN THE IOWA DISTRICT COURT IN AND FOR MARSHALL COUNTY**

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| ROBERT MYSCHKA AND DANIEL STUMME individually and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>WOLFE CLINIC, P.C. d/b/a WOLFE EYE CLINIC,<br><br>Defendant. | ) | Case No. 02641 CVCI011151 |

**PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM IN SUPPORT**

## I. INTRODUCTION

On February 14, 2022, this Court preliminarily approved a proposed class action settlement between Plaintiffs Robert Myschka and Daniel Stumme (collectively, the "Plaintiffs") and Defendant Wolfe Clinic, P.C. d/b/a Wolfe Eye Clinic (hereinafter, "Wolfe"). The approved Settlement is an outstanding result for the Class. Through Class Counsel's efforts, three distinct benefits were created for Plaintiffs and putative Class Members: (1) up to $5,500 per Settlement Class Member in cash reimbursements for time and expenses related to the Data Incident; (2) credit monitoring and identity theft restoration services provided to all Settlement Class Members; and (3) equitable relief in the form of security enhancements designed to ensure Settlement Class Members' Personally Identifiable Information and Private Health Information is better protected in the future.

Settlement Class Counsel zealously prosecuted Plaintiffs' claims, reaching agreement only after extensive investigation and negotiations. After this Court granted preliminary approval of the Settlement, the Settlement Administrator—with the help of the Parties—disseminated Notice to

the Settlement Class. As provided for in the Settlement and approved by the Court, individual notice was provided directly to each of the Settlement Class Members. The notice provided each Settlement Class Member with information regarding how to reach the Settlement Website, make a claim, and how to opt-out or object to the Settlement. The response to the Settlement has been overwhelmingly positive. Out of nearly 500,000 Settlement Class Members, only 36 have sought to exclude themselves from the Settlement, ***and not a single person has objected***. The claims period is still open and will run through June 14, 2022.

Plaintiffs previously moved for attorneys' fees, costs, and service awards on February 8, 2022. Plaintiffs now move for final approval of this class action settlement. Because the Notice (direct notice to Settlement Class Members via US Postal Service postcard mailing was the best practical under the circumstances – and is estimated to reach 86% of the Settlement Class, which far exceeds the Federal Judicial Guideline of 70% -- and the Settlement is fair, adequate, and reasonable, this Court should grant final approval.

## II. CASE SUMMARY

### A. The Data Breach

Defendant Wolfe is a specialty medical eye care and surgical treatment center with locations across the State of Iowa. See Dec. of Gary M. Klinger in Supp. of Pls.' Mot. for Preliminary Approval of Class Action Settlement ¶ 32 ("Klinger MPA Dec."), filed previously with the Court. Wolfe owns and operates eleven clinics in Iowa, as well as nine family vision centers, a state-of-the-art surgical center and more than twenty-five outreach locations. *Id.* In the ordinary course of receiving treatment and health care services from Wolfe, patients are required to provide sensitive personal and private information such as: dates of birth; Social Security numbers; driver's license numbers; financial account information; payment card information;

information relating to individual medical history; insurance information and coverage; information concerning an individual's doctor, nurse or other medical providers; photo identification; employer information; and other information that may be deemed necessary to provide care. *Id.*

On June 22, 2021, Wolfe announced that it was the victim of a ransomware attack that occurred on or about February 8, 2021. Id. ¶ 28. According to Wolfe's "Notice of Data Incident," as well as certain media reports, hackers gained access to its systems and used ransomware to encrypt files. Id. ¶ 29. During the attack, the attackers exfiltrated records of approximately 500,000 affected persons from Wolfe's systems. Id. ¶ 31. According to those reports, a ransom demand was issued for the keys to decrypt those files and delete the information which had already been exfiltrated, but Wolfe refused to pay and opted to recover files from backups. Id. ¶ 30.

**B. Plaintiff's Complaint**

As a result of the Data Incident, Plaintiffs filed their Class Action Petition and Demand for Jury Trial on July 9, 2021, asserting causes of action for: (1) Negligence; (2) Breach of Implied Contract; (3) Unjust Enrichment; and (4) Breach of Confidence. See Id. ¶ 34. On September 10, 2021, Wolfe filed its Answer and Affirmative Defenses by which it denied (and continues to deny) any and all liability, as well as asserted twenty-eight affirmative and other defenses. See Id. ¶ 35. Soon after, the Parties began discussing the prospect for early resolution after an exchange of information necessary to evaluate the strengths and weaknesses of Plaintiffs' claims and Wolfe's defenses. Id. ¶ 36.

**C. History of Negotiations**

To facilitate those negotiations, the Parties agreed to mediate Plaintiffs' claims with Hon. Wayne Andersen (Ret.) of JAMS. Id. ¶ 37. Judge Andersen is a widely respected mediator with

significant experience in settling privacy and data breach cases. Id. In advance of mediation, Wolfe provided informal discovery related to the merits of Plaintiffs' claims and class certification, and the Parties discussed their respective positions on the merits of the claims and class certification. Id. ¶ 38. This informal exchange of information, combined with Plaintiffs' individual research, and the relevant experience of Class Counsel, allowed counsel to fully evaluate the strengths and weaknesses of Plaintiffs' case, and to conduct informed settlement negotiations. Id. ¶ 39; see also id. ¶¶ 2–27.

On December 7, 2021 the Parties attended a full-day mediation via Zoom Video Conference with Judge Wayne Andersen (Ret.). Id. ¶ 40. After a full day of arm's-length negotiations, and with the assistance of Judge Andersen, the Parties agreed to a memorandum of understanding setting forth the essential terms of the Settlement Agreement. Id. ¶ 41. On December 14, 2021, the Parties filed an Amended Joint Status Report and Motion for 60-Days to File a Motion for Preliminary Approval, which the Court granted. Id. ¶ 42. Over the next several weeks, the Parties drafted, negotiated, and finalized the Settlement Agreement, Notice forms, and agreed upon a Claims Administrator. Id. ¶ 43.

Despite the grounds that exist for each of Plaintiffs' claims—which Wolfe denies—none are certain to resolve in Plaintiffs' favor on the merits. Id. ¶ 44. Further litigation would subject Plaintiffs to numerous risks, including the risk that they and the other Class Members obtain no recovery at all. Id. ¶ 45. The Settlement provides significant relief to Members of the Class and Plaintiffs strongly believe that it is favorable for the Settlement Class, fair, reasonable, adequate, and worthy of preliminary approval. Id. ¶ 46.

**D. The Settlement Agreement**

The Settlement negotiated on behalf of the Class provides for three separate forms of relief: (1) cash reimbursements for time and expenses; (2) credit monitoring and identity theft restoration services; and (3) equitable relief in the form of security enhancements. *See gen.*, Settlement Agreement at Klinger MPA Dec. Ex. 1 ("Agr."). The Settlement Agreement calls for a Settlement Class which consists of:

> **Settlement Class**. "[A]ll persons whose Private Information was maintained on Defendant's computer systems and/or network that was potentially compromised in the Data Incident."

Agr. ¶ 42. Excluded from the Settlement Class are: (1) Defendant and its officers and directors, and the Related Entities and their officers and directors; (2) all Settlement Class Members who timely and validly submit requests for exclusion from the Settlement Class; (3) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding, or abetting the criminal activity occurrence of the Data Incident or who pleads *nolo contendre* to any such charge; and (4) members of the judiciary to whom this case is assigned, their families, and members of their staff. *Id.*

1. Expense and Time Reimbursement

Under the terms of the Settlement Agreement, Settlement Class Members can submit a claim for both ordinary and extraordinary expense reimbursements. Agr. ¶ 50.

Settlement Class Members can claim reimbursement for ordinary out-of-pocket expenses, up to $500 per Settlement Class Member, incurred as a result of the Data Incident, including: (i) unreimbursed bank fees; (ii) long distance phone charges; (iii) cell phone charges (if charged by the minute); (iv) data charges (if charged based on the amount of data used); (v) postage; (vi) gasoline for local travel; and (vii) fees for credit reports, credit monitoring, or other identity theft

insurance products purchased by Settlement Class Members between June 29, 2021 and prior to the Preliminary Approval Order (February 14, 2022). *Id.* Claims for ordinary expense reimbursements may also include reimbursement for up to five (5) hours of lost time spent dealing with the Data Incident (calculated at the rate of $20 per hour), but only if at least one full hour was spent. *Id.* Settlement Class Members may receive up to five (5) hours of lost time if the Settlement Class Member (i) attests that any claimed lost time was spent related to the Data Incident; and (ii) provides a written description of how the claimed lost time was spent related to the Data Incident. *Id.* Settlement Class Members may claim up to an additional twenty (20) hours of lost time if the claimant submits reasonable supporting documentation of the time spent (e.g. employment records showing time off of work to deal with effects of the Data Incident). *Id.*

Settlement Class Members are also eligible to receive reimbursement for documented extraordinary losses, up to $5,000 per Settlement Class Member for documented monetary loss that: (i) is actual, documented, and unreimbursed; (ii) was more likely than not caused by the Data Incident; (iii) occurred between February 8, 2021 to the Claims Deadline; and (iv) is not already covered by one or more of the above-referenced reimbursed expenses. *Id.* Settlement Class Members must also provide documentation that he or she made reasonable efforts to avoid, or seek reimbursement for, such extraordinary losses, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance. *Id.*

2. Credit Monitoring

Additionally, members of the Settlement Class will be provided two (2) years of additional credit monitoring services, *without* the need to make any affirmative claim. Agr. ¶ 54. This service

is conservatively valued at approximately $100.00 per person.[1]

3. Equitable and Prospective Relief

In addition to the monetary relief and the credit monitoring services being provided, the Parties have agreed that Defendant will implement (and keep in place) specific security-related measures and enhancements though December 31, 2023. Agr. ¶ 63.

4. Release

The release in this case is tailored to the claims that have been plead or could have been plead in this case, arising out of the events and circumstances surrounding the Data Incident. Agr. ¶ 80.

**E. The Notice and Claims Process**

The notice and claims process was implemented pursuant to the Court's Preliminary Approval Order. The current estimated cost for Settlement Administration, including both notice and claims administration, is $435,000, which is to be borne by Defendant from the total cap on the Settlement Class payout.

1. Class Notice

The Settlement Administrator received two electronic files from Defendant: the first file was received on December 16, 2021 that contained 528,256 names, mailing addresses, enrollment codes, minor statuses, deceased statuses, and a notation noting if a National Change of Address ("NCOA") search was performed on the record and the second file was received on February 10,

[1] The per-class-member value was determined by a comparison to comparable products marketed to retail consumers. See, e.g., *https://www.experian.com/consumer-products/compare-identity-theft-products.html;https://www.experian.com/consumer-products/compare-identity-theft-products.html* (basic identity protection plan at $9.99 per month). The $100 value thus represents a conservative estimate of the benefit to each class member. *See In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 323 (N.D. Cal. 2018) ("Obviously, the credit monitoring services themselves confer an economic benefit, as they can retail for $9 to $20 a month.").

2022 that contained 527,377 names with mailing addresses and Social Security numbers for potential Class Members. Dec. of Paul Ferruzzi of Kroll Settlement Administration LLC in Support of Final Approval, filed herewith as Exhibit A ("Kroll Dec.") at ¶¶ 4-5. Kroll then undertook several steps to reconcile the two lists, and subsequently was able to identify 524,219 unique records for potential Class Members. *Id.*

After receiving the updated Settlement Class data, the Settlement Administrator checked all the mailing addresses against the NCOA database maintained by the USPS and, subsequently, the Settlement Administrator updated the Class List with address changes received from the NCOA. *Id.*

On March 16, 2022, the Settlement Administrator sent Postcard Notices via First Class Mail to the 524,219 Class Members. *Id* ¶ 9. To prevent Claim Forms from individuals outside the Class and to prevent fraud, the Postcard Notices also provided potential Class Members with a unique Class Member ID on their respective Notices. *Id.* As of June 1, 2022, 2,016 Notices were returned by USPS with a forwarding address and were remailed. *Id* ¶ 10. Additionally, as of June 1, 2022, 180,599 Notices were returned by the USPS as undeliverable. *Id* ¶ 11. The Settlement Administrator then ran an advanced address search, which produced 100,049 updated addresses – and, subsequently, the Settlement Administrator re-mailed Notices to those updated addresses obtained from the advanced address search. *Id.* It is estimated that the direct mail notice reached 86% of the Settlement Class. *Id*.

2. Settlement Website and Toll-Free Number

On January 20, 2022, Kroll created and is currently hosting a dedicated Settlement Website entitled www.WECSettlement.com. *Id* ¶ 7. The Settlement Website "went live" on March 15, 2022. *Id.* The Settlement Website contains details of the Settlement, frequently asked questions,

all related court documents, Notices, and allows Class Members an opportunity to file a Claim Form online. *Id.*

On January 27, 2022, Kroll established a toll-free number, 833-910-4491, for Class Members to call and obtain additional information regarding the Settlement through an Interactive Voice Response ("IVR") system and by being connected to a live agent if selected by the caller. *Id* ¶ 8. As of May 31, 2022, 2,648 Class Members have called the IVR, and 474 Class Members have called to speak to Live Operators. *Id.*

3. Class Response

Through the notice process, Settlement Class Members have been given the means to make a claim, request exclusion, or object to the Settlement Agreement.

As of June 1, 2022, the Settlement Administrator received only 36 timely exclusion requests and *zero* objections to the Settlement Agreement. *Id* ¶ 13. Class Counsel is not aware of any other objections or exclusions to the Settlement Agreement.

The last day to submit a Claim Form is June 14, 2022. Kroll Dec. ¶ 13.

As of June 1, 2022, the Settlement Administrator received 51 Claim Forms through the mail and 2,836 Claim Forms filed electronically through the Settlement Website. *Id.*

## III. LEGAL STANDARD

Under Iowa law, the Supreme Court of Iowa has stated that "Iowa Rules of Civil Procedure 1.261 to 1.263, the rules [governing] class actions, closely resemble Federal Rule of Civil Procedure 23… Therefore, we may rely on federal authorities construing similar provisions of Federal Rule of Civil Procedure 23. *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 743 (Iowa 1985)." *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36 (Iowa 2003). Thus, Plaintiffs and the

Class Members will be following 8th Circuit law with respect to the Final Approval of this case's Class Action Settlement.

Courts in the 8th Circuit must consider whether it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making that determination, a district court considers: (1) the merits of the plaintiff's case weighed against the terms of the settlement, (2) the defendant's financial condition, (3) the complexity and expense of further litigation, and (4) the amount of opposition to the settlement. *Lee v. Anthem Inc. Cos.*, 2015 WL 3645208, at *1 (E.D. Mo. June 10, 2015) (quoting *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.,* 716 F.3d 1057, 1063 (8th Cir. 2013); *see also Van Horn v. Trickey,* 840 F.2d 604, 607 (8th Cir. 1988); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005).

Before a court can reach that analysis however, it must ensure that interested parties were adequately informed of the Settlement Agreement and provided an opportunity to voice their objections. *Grunin v. International House of Pancakes*, 513 F. 2d 114, 123 (8th Cir. 1975). The purpose of the approval procedure is to ensure that the interests of absent class members are adequately protected. *Grunin v. International House of Pancakes,* 513 F.2d at 123. The district court acts as a fiduciary who serves as guardian of the rights of the absent class members, and the court may approve a settlement only if the proponents of it show that the settlement is fair, reasonable, and adequate. *Id.*

## IV. LEGAL ARGUMENT

### a. The Individual Direct Notice Provided to Settlement Class Members is the Best Practicable Method and Should Be Approved

Because an action maintained as a class suit under Rule 23 has res judicata effect on all members of the class, due process requires that notice of a proposed class settlement be provided

to settlement class members. *Grunin v. International House of Pancakes*, 513 F.2d at 123, *citing Eisen v. Carlisle & Jaquelin,* 417 U.S. 156, 172-177 (1974). What a court must determine in each individual case is that the notice provided was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). In addition, the notice must convey the required information and allow a reasonable time for those interested in making an appearance to do so. *Grunin v. International House of Pancakes*, 513 F.2d at 123, *citing Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. at 314. Because Rule 23 provides that notice must be given "in such a manner as the court directs," the mechanics of the notice process are left to the broad discretion of the court. *Grunin v. International House of Pancakes*, 513 F.2d at 123, *citing* C. Wright and A. Miller, *Federal Practice and Procedure,* at 237 (1972).

The Parties caused individual notice to be provided via US mail to 524,219 Settlement Class Members and reached 86% of the Class. Kroll Dec. ¶ 9. This notice was the best practicable under the circumstances. It was clear, concise, and pointed each Settlement Class Member to the resources necessary to get additional information, review pleadings, make a claim, request exclusion, object, or to reach class counsel should they have any additional questions. *See id.,* Ex. B. The U.S. Supreme Court has specifically held that individualized notice by mail to the last known address is the "best notice practicable" in a class action context. *Eisen v. Carlisle & Jaquelin,* 417 U.S. at 174-177. In contrast with notice via publication, providing individualized mail notice to Settlement Class Members— coupled with the Settlement Administrator' efforts to search for, locate, and confirm current information for Settlement Class Members—*ensures* that Settlement Class Members are provided with the best practicable notice of the Settlement, and the

opportunity to make a claim, opt-out, or object. Courts regularly approve the use of mail to directly notify potential class members of a class action settlement. *Petrovic v. Amoco Oil Co.,* 200 F.3c 1140, 1153 (8th Cir, 1999) (finding notice provided by U.S. Mail comported with the requirements of due process). The Settlement Website and Toll-free hotline provide additional forums for Settlement Class Members to access information about the Settlement and relevant filings.

Accordingly, the Notice program satisfies the requirements of both Rule 23 and due process.

**b. The Settlement Terms are Fair, Reasonable, and Adequate**

Public policy favors settlements — "courts should approach them with a presumption in their favor." *Bassett v. Credit Management Services, Inc.,* No. 8:17cv69, 2019 WL 4262019, *2 (D. Ne. Aug. 6, 2019) quoting *Petrovic v. Amoco Oil Co*., 200 F.3d 1140, 1148 (8th Cir. 1999) Courts have recognized that a class action settlement is a private contract negotiated between the parties. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d at 932 (citing *Christina A. ex rel. Jennifer A. v. Bloomberg,* 315 F.3d at 992 (8th Cir. 2003). "Rule 23(e) requires the court to intrude on that private consensual agreement merely to ensure that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned." *Id.*

Federal Rule 23(e)(2) requires certain factors to be considered by a court before granting final approval of a class action settlement: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate; and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(A)-(D). In determining whether the relief provided is adequate, Courts must consider: (i) the costs, risks, and delay of trial and appeal; (ii) the

effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).

Before the 2018 revisions to Rule 23(e), the Eighth Circuit developed its own list of factors for consideration in determining whether to grant final approval of a class action settlement: (1) the merits of the plaintiff's case weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *Bassett v. Credit Management Services, Inc.,* No. 8:17cv69, 2019 WL 4262019, *2 (D. Ne. Aug. 6, 2019), citing *Prof. Firefighters Ass'n. or Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 648 (8th Cir. 2012); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005).

The Settlement meets the criteria set forth by both Rule 23 and the Eighth Circuit. Because the Settlement Agreement here is not the product of fraud or collusion, has zero objections, and does in fact provide the opportunity for significant relief for Settlement Class Members, final approval should be granted. *See Schoenbaum v. E. I. Dupont De Nemours Co.,* 2009 WL 4782082, at *2 (E.D. Mo. Dec. 8, 2009).

**i. The Settlement Meets the Requirements of Rule 23**

**1. Class Representatives and Counsel Have Adequately Represented the Class**

The adequacy inquiry examines whether (1) the class representatives have common interests with the members of the class and (2) whether class representatives will vigorously prosecute the interests of the class through qualified counsel. *Paxton v. Union Nat. Bank,* 688 F.2d 552, 562-563 (8th Cir. 1982). Here, the Class Representatives, like all Class Members, have been victims of the same Data Incident, and thus have common interests with the Class. Moreover, they

have ably represented the Class, maintaining contact with counsel, assisting in the investigation of the case, producing relevant documents, remaining available for consultation throughout settlement negotiations, answering counsel's many questions, and reviewing the material terms of the Settlement Agreement.

Proposed Class Counsel too have vigorously pursued the interests of the Class in securing a Settlement that brings immediate benefits to Class while avoiding the risks of continued litigation. In doing so, they leaned on their extensive experience in data breach litigation, their detailed investigation of this particular matter, and informal discovery exchanged during the course of their negotiations. Klinger MPA Dec. ¶¶ 4-27, 41. Their efforts resulted in the excellent Settlement before the Court, guaranteeing relief to Settlement Class that compares favorably to that approved in other data breach cases. As such, this factor warrants preliminary approval.

**2. The Settlement is the Product of Good-Faith, Arms' Length Negotiations, and is Absent of Any Collusion**

Here, the Settlement was reached only after months of arms' length negotiations between counsel for the Parties. Klinger MPA Dec. ¶¶ 38-41. Proposed Class Counsel conducted an extensive investigation into the merits of Plaintiffs' claims prior to filing their Complaint, and engaged in an informal exchange of discovery with Defendant thereafter. *Id.* Accordingly, Class Counsel was well positioned throughout settlement negotiations to have a full understanding of the value of Plaintiffs' and Class Members' claims. As such, Plaintiffs have met the requirement for settlement approval set forth in Rule 23(e)(2)(B). *See White v. National Football League*, 836 F. Supp. 1458, (D. Minn. 1993) (finding no evidence of collusion and concluding settlement was the result of arm's length negotiations); *Pollard v. Remington Arms Company, LLC*, 320 F.R.D. 198, 220 (W.D. Mo. 2017) (finding a settlement reached after extensive investigation and

discovery by class counsel was reached in good faith). As such, the Settlement was the product of good faith, non-collusive, and arm's length negotiations and should be approved.

### 3. The Settlement Agreement Provides Substantial Relief to the Settlement Class, Particularly in the Light of the Uncertainty of Prevailing on the Merits

Most importantly, the Settlement guarantees Class Members real relief for harms and assurance that they are less likely to be subject to similar breaches due to Defendant's data security systems in the future. Thus, the third and most important factor weighs heavily in favor of preliminary approval.

Claims for ordinary expense reimbursements may also include reimbursement for up to five (5) hours of lost time spent dealing with the Data Incident (calculated at the rate of $20 per hour), but only if at least one full hour was spent. *Id.* Settlement Class Members may receive up to five (5) hours of lost time if the Settlement Class Member (i) attests that any claimed lost time was spent related to the Data Incident; and (ii) provides a written description of how the claimed lost time was spent related to the Data Incident. Agr. ¶ 50. Settlement Class Members may claim up to an additional twenty (20) hours of lost time if the claimant submits reasonable supporting documentation of the time spent (e.g. employment records showing time off of work to deal with effects of the Data Incident). *Id.* Additionally, settlement Class Members are also eligible to receive reimbursement for documented extraordinary losses, up to $5,000 per Settlement Class Member for documented monetary loss that: (i) is actual, documented, and unreimbursed; (ii) was more likely than not caused by the Data Incident; (iii) occurred between February 8, 2021 to the Claims Deadline; and (iv) is not already covered by one or more of the above-referenced reimbursed expenses. *Id.*

This Settlement compares favorably with monetary relief provided in settlements approved by Courts in other, similar data breach cases. *See e.g. Mowery et al. v. Saint Francis Healthcare*

*System*, No. 1:20-cv-00013-SPC (E.D. Mo.) (data breach settlement providing up to $280 in value to Settlement Class Members in the form of: reimbursement up to $180 of out of pocket expenses and time spent dealing with the data breach; credit monitoring services valued at $100; and equitable relief in the form of data security enhancements); *Baksh et al. v. Ivy Rehab Network, Inc*., No. 7:20-CV-01845 (S.D.N.Y.) (providing up to $75 per class member out of pocket expenses incurred related to the data breach and $20 reimbursement for lost time, with payments capped at $75,000 in aggregate; credit monitoring for claimants; and equitable relief in the form of data security enhancements); *Kenney et al. v. Centerstone of America, Inc.,* No. 3:20-67-01007 (M.D.Tenn.) (providing up to $500 for ordinary losses and $2500 for extraordinary losses, with a fund capped at $1,500,000); *Jackson- Battle v. Navicent Health Inc.,* No. 2020-CV-072287 (Ga.) (providing up to $200 per person for reimbursement of ordinary expenses and lost time, up to $2,500 per person for reimbursement of extraordinary expenses, and equitable relief in the form of data security enhancements).

Additionally, members of the Settlement Class will be provided two (2) years of additional credit monitoring services, *without* the need to make any affirmative claim. Agr. ¶ 54. Such protections will help ensure that, should Plaintiffs' and Class Members data be misused, that they will have the means to mitigate any potential ill consequences.

In addition to the monetary relief and the credit monitoring services being provided, the Parties have agreed that Defendant will implement (and keep in place) specific security-related measures and enhancements though December 31, 2023. Agr. ¶ 63. Such injunctive relief has real value, and lends further weight in favor of Settlement approval. *In re Target Corp. Customer Data Sec. Breach Litig*., 892 F.3d 968, 974 n.6, 978 (8th Cir. 2018) (finding injunctive relief in the form of data security measures "has value to all class members," and the district court properly

considered non-monetary relief when weighing the merits of the plaintiff's case against the terms of the settlement); *see Keil v. Lopez*, 862 F.3d 685, 697 (8th Cir. 2017) (finding settlement to be fair, reasonable, and adequate in part because "class members ... will benefit from the additional injunctive relief that the settlement provides"); *Bezdek v. Vibram USA, Inc*., 809 F.3d 78, 84 (1st Cir. 2015) (finding there was no abuse of discretion where a district court concluded that injunctive relief against continuation of the allegedly false advertising was 'a valuable contribution to this settlement agreement.' "); *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig*., No. 08-1967-MD-W-ODS, 2011 WL 1790603, at *3-4 (W.D. Mo. May 10, 2011) (noting the presence of injunctive relief as a factor indicating the fairness, adequacy, and reasonableness of the settlement). This is true even if, as here, the settlement class is certified under Rule 23(b)(3) rather than Rule 23(b)(2). *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 862 (S.D. Iowa 2020) (citing cases).

**a. The Costs, Risks, and Delay of Trial and Appeal Weigh in Favor of Approval**

The value achieved through the Settlement Agreement is guaranteed, where chances of prevailing on the merits are uncertain. While Plaintiffs strongly believe in the merits of their case, they also understand that Defendant will assert a number of potentially case-dispositive defenses. Due at least in part to their cutting-edge nature and the rapidly evolving law, data breach cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp*., 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013).

Plaintiffs dispute the defenses Defendant will likely assert—but it is obvious that their success at trial is far from certain. Through the Settlement, Plaintiffs and Class Members gain significant benefits without having to face further risk of not receiving any relief at all.

**b. The Effectiveness of the Proposed Method of Distributing Relief to the Class, Including the Method of Processing Class Members' Claims, Weigh in Favor of Approval**

All Class Members have until June 14, 2022 to submit a claim for ordinary and/or extraordinary expense reimbursements, and credit monitoring services will be automatically provided on final approval of the settlement. Kroll Dec. ¶ 12. The Settlement Administrator is responsible for reviewing, determining the validity of, and processing all claims submitted by Settlement Class Members. Klinger MPA Dec. ¶¶ 56-71. Class Counsel and Defendant both have the right to review and obtain supporting documentation. Agr. ¶ 70. After the Settlement is approved and the time for any appeal has passed, the Settlement Administrator will also be responsible for processing and transmitting Settlement Class Member payments and providing enrollment codes for those Class Members who made a claim for credit monitoring services. Id.

**c. The Terms of Any Proposed Award of Attorney's Fees, Including Timing of Payment, Lends Support to Approval**

On May 2, 2022, Plaintiffs moved for an award of attorneys' fees and costs equal to $666,666.67—less than 1% of the total benefit negotiated for the class—as well as Service Awards in the amount of $2,500 to each of the Representative Plaintiffs. As discussed at length in Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards and Memorandum in Support filed on May 2, 2022. Plaintiffs' requests are reasonable and fall well below the 25% to 36% of common fund fees regularly approved by Eighth Circuit Courts. *Caligiuri v. Symantec Corp*., 855 F.3d at 865– 66 (8th Cir. 2017); *see also In re Xcel Energy, Inc., Sec. Derivative & "ERISA" Litig.*,

364 F. Supp. 2d 980, 998 (D. Minn. 2005) (collecting cases); *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (8th Cir. 2002) (awarding 36% of a common fund of $3.5 million); *West v. PSS World Med., Inc.,* No. 4:13-cv-574, 2014 WL 1648741, at *1 (approving attorneys' fees of 33%); *Harris v. Republic Airlines, Inc.,* No. 4-88-1076, 1991 WL 238992 at *2 (D. Minn. Nov. 12, 1991) (awarding "a sum slightly in excess of 30% of the common fund"); *see also Powers v. Credit Management Services, Inc.,* No. 8:11cv436, 2016 WL 6994080 (D. Nebr. Nov. 29, 2016) (approving $7,000 to each of the lead plaintiffs as service awards); *In re Charter Commc'ns, Inc., Sec. Litig.*, 2005 WL 4045741, at *25 (awarding $26,625 compensatory award to lead plaintiff); *In re Aquila ERISA Litig.*, 2007 WL 4244994, at *3 (W.D. Mo. Nov. 29, 2007) (awarding $25,000 incentive award); *Wineland v. Casey's Gen. Store s, Inc.*, 267 F.R.D. 669, 677 (S.D. Iowa 2009) (awarding $10,000).

**d. There Are No Additional Requirements to be Identified under Rule 23(e)(3)**

There are no additional agreements that require identification and/or examination under Rule 23(e)(3).

**4. The Proposed Settlement Treats Settlement Class Members Equitably**

Here, the proposed Settlement does not improperly discriminate between any segments of the class, as all Settlement Class Members are entitled to the same relief respectively. All Settlement Class Members are eligible to make a claim for the same amount of ordinary and extraordinary expense reimbursements. Any difference in recovery will be based purely on the actual expenses they have incurred and time they have spent to mitigate the effects of the Data Incident.

There is no requirement that all class members in a settlement be treated equally. *See Marshall v. National Football League*, 787 F.3d 502, 510 (8th Cir. 2015). The difference in

recovery between the Class is reasonably justified. *See Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d at 875 (approving settlement where the differences in recovery between class members reflect the differences in their respective injuries and the strength of their respective claims). And, while Plaintiffs will each be seeking a $2,500 award for their services on behalf of the class, this award is *less than* the amount that any given Class Member can claim in reimbursements.

Importantly, direct notice was sent to Settlement Class Members, and all Settlement Class Members had equal opportunity to object to or exclude themselves from the Settlement. As of June 1, 2022, 36 Settlement Class Members had requested exclusion, and *zero* had objected. Thus, the settlement does not unfairly benefit the Class Representatives or any particular Class Member or subset of Class Members, and this factor weighs in favor of preliminary approval.

**ii. Other Factors Considered by Eighth Circuit Courts Weigh in Favor of Preliminary Approval**

The factors considered by Eighth Circuit Courts prior to the amendment of Rule 23, and still considered by those Courts today, also weigh in favor of final approval.

*First,* the Settlement provides for significant relief in light of the risks of proceeding with further litigation. As discussed extensively *supra*, while Plaintiffs are confident in the merits of their claims, they face significant risk in further litigation due in part to the constantly evolving nature of data breach litigation. Thus, this factor weighs in favor of preliminary approval.

*Second,* the Defendant's financial condition is not at issue here, and thus does not weigh either for or against approval of the Settlement.

*Third,* continued litigation is likely to be complex, lengthy, and expensive. Although Plaintiffs are confident in the merits of their claims, the risks discussed above cannot be disregarded. Aside from the potential that either side will lose at trial, the Plaintiffs anticipate incurring substantial additional costs in pursuing this litigation further. Should litigation continue,

Plaintiffs would likely need to counter a later motion for summary judgement, and both gain and maintain certification of the class. The level of additional costs would significantly increase as Plaintiffs began their preparations for the certification argument and if successful, a near inevitable interlocutory appeal attempt. As at least one court has found in this Circuit, because the "legal issues involved in [in data breach litigation] are cutting-edge and unsettled . . . many resources would necessarily be spent litigating substantive law as well as other issues." *In re Target Corp. Customer Data Sec. Breach Litig*., 2015 WL 7253765, at *2 (D. Minn. Nov. 17, 2015). Thus this factor weighs in favor of final approval.

Thus, these additional factors weigh in favor of approving a result exactly like that obtained by Plaintiffs and Class Counsel: significant cash reimbursements for all Settlement Class Members who submit valid claims, credit monitoring services provided to Class Members, and equitable relief in the form of increased data security safeguards, which will serve to better safeguard all Settlement Class Members' PII. Accordingly, the Settlement should be preliminarily approved.

## V. CONCLUSION

Settlement Class Counsel, with the help of Plaintiffs, have made significant benefits available to class members during a time where the law surrounding data breaches is evolving and uncertain. The Settlement Class Members were provided direct and individual notice of the Settlement, and given additional resources by which they can get more information about the Settlement Agreement. Zero Settlement Class Members have objected to either the Settlement Agreement or to Plaintiffs' request for fees, costs, and service awards. For these reasons, for the arguments for certification and appointment of Class Representatives and Counsel set forth in Plaintiffs' Motion for Preliminary Approval, and because the Settlement Agreement is fair, adequate, and reasonable, Plaintiffs respectfully request this Court grant their motion for final approval.

Dated: June 3, 2022

Respectfully submitted,

*s/ Gary M. Klinger*

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of June, 2022, a true and correct copy of the above and foregoing was served through the Iowa Courts online electronic filing system, which sent notification of the same to the following:

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