IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MICHAEL BAHNMAIER, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No. 2:20-cv-02246-JAR-TJJ
WICHITA STATE UNIVERSITY,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Plaintiff Michael Bahnmaier ("Plaintiff") submits this memorandum of law in support of his Unopposed Motion for Preliminary Approval of the Class Action Settlement with Defendant Wichita State University ("WSU" or "Defendant"). This is a class action brought by Plaintiff, individually and on behalf of similarly situated individuals (the "Class"), whose personal identifying information ("PII") was potentially stolen from WSU's systems by unauthorized users between December 3, 2019 and December 5, 2019 (the "Data Incident" or "Breach"). The proposed settlement reached by the parties will, if approved by the Court, provide immediate and significant benefits to all persons affected by the Data Incident and result in the dismissal of this case with prejudice. As detailed below, the Court should preliminarily approve the Settlement because it will provide fair, reasonable, and adequate relief for the Class, includes a comprehensive notice plan that is the best means of providing notice under the circumstances, and satisfies the requirements of FED. R. CIV. P. 23(e). Defendant does not oppose the relief requested in the motion.

I. NATURE OF THE LITIGATION AND PROCEDURAL HISTORY

This case involves a putative class action against WSU relating to a data security breach that potentially exposed the PII of former and current WSU students and employees. Specifically, on March 6, 2020, WSU announced that between December 3, 2019 and December 5, 2019 "an unauthorized person gained access" to a "computer server that WSU used to operate various student and employee web portals." The breached server contained information about certain WSU students and employees, including names, email addresses, dates of birth, and Social Security numbers.

On May 14, 2020, Plaintiff, a former WSU student, filed his Complaint alleging, among other things, that Defendant failed to take adequate measures to protect his and other putative class members' PII and failed to disclose that WSU's systems were susceptible to a cyber-attack. *See*

Dkt. No. 1. Rather than committing to protracted litigation, after WSU was served, counsel for the parties began to exchange information and discuss the possibility of resolving the case. Accordingly, WSU sought and was granted three (3) extensions of time to answer while the parties conferred about possible settlement terms. *See* Dkt. Nos. 10, 13, and 14 (granting Defendant's unopposed motions to extend time to answer). On August 19, 2020, WSU ultimately filed a Motion to Dismiss Plaintiff's Class Action Complaint. Dkt. No. 18. During this time, the parties continued to make meaningful progress towards reaching a settlement. Accordingly, Plaintiff requested and was granted two (2) extensions on his time to file a response in opposition to WSU's motion to dismiss. *See* Dkt. Nos. 21 and 23 (granting Plaintiff's unopposed requests to extend time to respond). On October 30, 2020, following multiple exchanges of information and negotiations of terms, the parties were able to reach a settlement in principle. *Id.* Thereafter, the parties negotiated the remaining terms, circulating drafts back and forth of the Settlement Agreement and its exhibits.[1] The Agreement was finalized and executed on January 12, 2021. Plaintiff now seeks preliminary approval of that Agreement.

II. SUMMARY OF THE SETTLEMENT

A. The Settlement Class

Under the terms of the Settlement, the parties agreed to certification pursuant to Federal Rule of Civil Procedure 23(b)(3) of the following Settlement Class for settlement purposes only:

> All persons who were sent notification by WSU that their personal identifying information may have been exposed in the Data Incident announced by WSU in March 2020.

Settlement Agreement ¶ 1.20. The Settlement Class specifically excludes: (i) WSU and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from

[1] All capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreement, filed contemporaneously herewith as Exhibit 1 to the Motion.

the Settlement Class; (iii) the Judge assigned to evaluate the fairness of this settlement; and (iv) 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 contender* to any such charge. *Id.*

B. Benefits to Settlement Class Members

Pursuant to the Settlement and without admitting or conceding any liability, WSU agrees to provide Settlement Class Members with payments that will compensate them for lost time and expenses associated with the potential exposure of their PII.

Under the Agreement, Settlement Class Members are eligible to receive payments of $20.00 per hour for up to three (3) hours of time spent dealing with issues relating to the Data Incident. *Id.* at ¶ 2.1.2. To receive this benefit, Settlement Class Members need only attest that any claimed lost time was spent related to the Data Incident and provide a written description of how the claimed lost time was spent related to the Data Incident. *Id.*

Pursuant to the Agreement, Settlement Class Members are also eligible for reimbursement of up to $300.00 for out-of-pocket costs to mitigate damage due to the Data Incident and/or for losses associated with any identity theft or misuse of PII. *Id.* at ¶ 2.1.1.[2] Examples of out-of-pocket costs that are eligible for reimbursement through the Settlement include (but are not limited to): (i) costs of credit report(s) purchased by class members; (ii) costs of credit monitoring and identity theft protection; (iii) unreimbursed bank fees or card fees as well as unreimbursed charges from banks or credit card companies (iv) cell minutes, internet usage charges, and text message charges where such charges are incurred as a result of the Data Incident; (v) interest on payday loans

[2] Claims made for lost time can be combined with reimbursement for out-of-pocket expenses but are subject to the same $300.00 cap for all Settlement Class Members.

incurred solely as a result of the Data Incident; and (v) other losses incurred that are fairly traceable to the Data Incident. *Id.* The "fairly traceable" standard will allow class members to be compensated for a broad range of harm likely to flow from the Data Incident.

C. Class Representative Service Award

Class Counsel will make an application to the Court for $1,500 to be paid by WSU to Plaintiff as a Class Representative Service Award in recognition of his efforts spent in prosecuting this action on behalf of the Settlement Class. *Id.* at ¶ 7.3. WSU has agreed not to oppose or object to any such application that is consistent with the terms of the Agreement. *Id.* Plaintiff's support for the Settlement as fair and reasonable is not conditioned upon the Court's award of the requested Service Award, and the terms and enforcement of the Settlement Agreement is not conditioned on the approval of the requested Service Award. *Id.* at ¶ 7.5.

D. Attorneys' Fees and Expenses

Class Counsel will make an application to the Court for and award of up to $325,000 for attorneys' fees and reimbursement of expenses to be paid by WSU. *Id.* at ¶ 7.2. WSU has agreed not to oppose any such application. *Id.* Class Counsel's support of the Settlement Agreement as fair and reasonable is not conditioned upon the Court's award of the requested fees and expenses, and the terms and enforcement of the Settlement Agreement are not conditioned on the approval of an award of the requested fees and expenses. *Id.* at ¶ 7.5. WSU will pay any awarded attorneys' fees and expenses in addition to relief it is providing to the Settlement Class. *Id.* Thus, the attorneys' fees and expenses will not in any way reduce the Settlement benefits to the Class. *Id.*

E. Settlement Class Notice

The Agreement provides that Notice and Claims Administration Costs shall be paid by WSU. *Id.* at ¶ 3.2 Further, the Agreement provides for a comprehensive notice program to be

administered by the Claims Administrator, subject to Court approval. *Id.* at ¶ 3. The parties seek approval of the following forms of notice attached as exhibits to the Settlement Agreement: Exhibit A (Short Notice) and Exhibit B (Long Notice) (collectively, the "Notices"). The Notices provide a clear and concise description of the action, the Settlement terms, the rights and responsibilities of the Settlement Class Members (*e.g.*, how to submit a claim, opt-out, or object), and the date and location of the final approval hearing. The notice program provides for emailing and/or mailing the Short Notice to Settlement Class Members. *Id.* at ¶ 3.2. In addition, the Settlement Agreement provides that the Claims Administrator shall set up and maintain a Settlement Website where Settlement Class Members may review the Long Notice and other relevant documents and information about the Settlement. *Id*. To supplement the direct notice to Settlement Class Members, WSU will also publish hyperlinks on WSU's website and in WSU's alumni e-newsletter that will link to the Settlement Website. *See* Settlement Agreement at ¶¶ 3.2, 3.3, and 3.4. The notice program is reasonably calculated to apprise the Settlement Class Members of the action and their right to participate in, object to, or exclude themselves from the Settlement.

F. Settlement Class Members' Right to Opt-Out

Any Settlement Class Member seeking to opt-out of the Settlement must submit a request for exclusion from the Settlement Class to the Settlement Administrator—postmarked on or before the opt-out deadline—which must simply include a signed statement that he/she wants to be excluded from the Settlement Class in this action. *Id.* at ¶ 4.1. All Settlement Class Members who properly file a timely Request for Exclusion from the Settlement Class shall not be entitled to any benefits or compensation under the Settlement and shall not be bound by the Settlement Agreement. *Id.* ¶ 4.2.

G. Settlement Class Members' Right to Object

Any Settlement Class Member who does not opt out of the Settlement Class may object to the Settlement or any portion of the Agreement. *Id.* at ¶ 5.1. To be timely, written notice of the objection must be filed with the Clerk of the Court, and served upon Class Counsel and WSU Counsel, by the Objection Date—ninety (90) days from the Preliminary Approval Date. *Id*. The Agreement provides, and the Long Notice specifies, that any person who wants to object to the Settlement, must state in writing: (i) the objector's full name, address, telephone number, and e-mail address (if any); (ii) information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class (e.g., copy of notice, copy of original notice of the Data Incident); (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection the objector believes applicable; (iv) the identity of any and all counsel representing the objector in connection with the objection; (v) a statement whether the objector and/or his or her counsel will appear at the Final Fairness Hearing; (vi) the objector's signature and the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation); and (vii) a list, by case name, court, and docket number, of all other cases in which the objector and/or the objector's counsel has filed an objection to any proposed class action settlement within the last three (3) years. *Id*.

H. Schedule for Settlement Administration

The parties request that the Court set the following schedule for the proposed Settlement:

- Within fourteen (14) days of entry of the Preliminary Approval Order, WSU shall provide the Claims Administrator with the name, email address, and physical address of each Settlement Class Member that WSU possesses (*id.* at ¶ 3.2).

- Within thirty (30) days of entry of the Preliminary Approval Order and to be substantially completed not later than forty-five (45) days after entry of the

Preliminary Approval Order, the Claims Administrator shall email and/or mail the Short Notice to the Settlement Class Members and create a dedicated Settlement Website through which claims can be submitted (*id.*).

- Settlement Class Members may object or request to be excluded from the Settlement within ninety (90) days after the commencement of the notice program (*id.* at ¶¶ 4.1, 5.1).

- Settlement Class Members shall have one hundred and twenty (120) days from commencement of the notice program to submit a Claim Form (*id.* at ¶ 2.1.3).

- A final hearing on the fairness and reasonableness of the Agreement and whether the final approval shall be given to it, and the requests for fees, expenses and service award to Plaintiff, will be held before this Court approximately ninety (90) days after commencement of the notice program.

A table of the proposed Settlement dates is provided in the proposed Preliminary Approval Order. All Settlement dates are calculated from the date of Preliminary Approval.

III. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

A. Legal Standard

As a matter of public policy, the law favors and encourages settlements. *Amoco Prod. Co. v. Fed. Power Comm'n*, 465 F.2d 1350, 1354-55 (10th Cir. 1972). Indeed, there is an "overriding public interest in favor of settlement" in class actions. *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981); *see also Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755, 758 (10th Cir. 1993) (agreeing that "encouragement of out-of-court settlement is desirable"), *aff'd*, 511 U.S. 863 (1994).

The Court's review of a proposed class action settlement generally involves three steps:

1. Consideration of a written motion for preliminary approval;

2. Dissemination of notice of the Settlement to Class Members; and

3. Conducting a final approval hearing where, among other things, Settlement Class Members have an opportunity to present their views regarding the settlement.

See Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §§11.22 *et seq.* (5th ed. 2011); *Rhodes v. Olson Assocs., P.C.,* 308 F.R.D. 664, 666 (D. Colo. 2015). Courts use this three-step process to act as an independent guardian of class interests and safeguard class members' procedural due process rights. *Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013).

Under this first step of the settlement process, the Court conducts a preliminary evaluation to determine "whether there is any reason not to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). The primary question is whether the proposed settlement "falls within the range of possible approval." *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 671, 675 (D. Kan. 2009). Courts "will ordinarily grant preliminary approval where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval." *Id.* (internal citations omitted).

Accordingly, at the preliminary approval stage, the Court's role is to determine whether "notice of the proposed settlement should be sent to the class, not to make a final determination of the settlement's fairness." *Rhodes*, 308 F.R.D. at 666. The Court assesses the ultimate question of fairness only after the final hearing, after notice of the settlement has been given to the class members, and after the class members have had the opportunity to voice their view of the settlement. *See* Moore's Federal Practice, 23.165[3] (3d ed. 2005); *In re Crocs, Inc. Sec. Litig.*, No. 07-cv-02351-PAB-KLM, 2013 WL 4547404, at *3 (D. Colo. Aug. 28, 2013) ("Preliminary approval of a class action settlement, in contrast to final approval, is at most a determination that

there is . . . 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness.") (citation omitted).

At this juncture, Plaintiff requests that the Court grant preliminary approval of the settlement, which only requires that the Court find that the proposed settlement is "within the range of possible approval, *i.e.* whether there is any reason not to notify class members of the proposed settlement and proceed with a fairness hearing." *Freebird, Inc. v. Merit Energy Co.*, No. 10-1154-KHV, 2012 WL 6085135, at *5 (D. Kan. Dec. 6, 2012) (citation omitted).

B. Preliminary Approval is Warranted Pursuant to Tenth Circuit Factors

Pursuant to Rule 23(e)(2), a class action settlement must be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Tenth Circuit directs courts to consider the following four factors in determining whether a proposed settlement is fair, reasonable, and adequate:

> (1) whether the proposed settlement was fairly and honestly negotiated; (2) the judgment of the parties that the settlement is fair and reasonable; (3) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; and (4) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation.

Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir.2002). Although the Court need not consider these factors in depth until the final approval hearing, they can provide a useful guide at the preliminary approval stage. *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. at 680.

This Settlement satisfies all four factors. Therefore, Plaintiff respectfully requests that the Court preliminarily approve the Settlement so that notice can be provided to Class Members.

1. The Settlement was Fairly and Honestly Negotiated

"The fairness of the negotiating process is to be examined 'in light of the experience of counsel, the vigor with which the case was prosecuted, and [any] coercion or collusion that may

have marred the negotiations themselves.'" *Ashley v. Reg'l Transp. Dist.*, 2008 WL 38457 at *5 (D. Colo. Feb. 11, 2008) (citation omitted); *see City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996) ("[When] the parties have bargained at arms' length, there is a presumption in favor of the settlement").

The Settlement took many months to negotiate, during which time Defendant filed an aggressive motion to dismiss—a motion which Plaintiff was in the process of opposing when the Settlement was reached. During the months of negotiation of the Settlement terms, the parties exchanged key information relating to the facts and scope of Data Incident. Based on their familiarity with the factual and legal issues, the parties were able to negotiate a fair settlement, taking into account the costs and risks of continued litigation. The negotiations were at all times hard-fought and at arm's length, and have produced a result that the parties believe to be in their respective best interests.

Counsels' vast experience with class-action litigation further suggests that the negotiations were fair, and likewise weighs in favor of approval. *Marcus v. State of Kan., Dep't of Revenue*, 209 F. Supp. 2d 1179, 1182 (D. Kan. 2002) ("When a settlement is reached by experienced counsel after negotiations in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable."). Counsel who negotiated this Settlement are highly experienced in complex consumer class action litigation, including data breach class actions. Defense counsel, Baker & Hostetler, LLP and Husch Blackwell, LLP, are prominent national firms with considerable experience, and they proved to be formidable adversaries in this litigation. Proposed Class Counsel for Plaintiff, Federman & Sherwood, has successfully prosecuted and settled numerous data breach class actions, consumer class actions, and other complex litigation throughout the country and has a strong reputation in this field. *See* Exhibit A to the Declaration of William B. Federman in

Support of Plaintiff's Unopposed Motion for Preliminary Approval of Settlement (the "Federman Decl."), filed contemporaneously herewith as Exhibit 2 to the Motion.

In sum, because the Settlement "resulted from arm's length negotiations between experienced counsel . . . the Court may presume the settlement to be fair, adequate, and reasonable" for purposes of preliminary approval. *Lucas*, 234 F.R.D. at 693.

2. The Action Involves Serious Questions of Law and Fact

"Although it is not the role of the Court at this stage of the litigation to evaluate the merits, it is clear that the parties could reasonably conclude that there are serious questions of law and fact that exist such that they could significantly impact this case if it were litigated." *Lucas v. Kmart Corp.*, 234 F.R.D. at 693-94 (internal citation omitted); *see also Rhodes*, 2015 WL 3657586 at *2.

This case faced serious obstacles. Defendant filed an extensive motion to dismiss that challenged nearly every aspect of Plaintiff's allegations. Dkt. No. 19. Among other things, WSU argued that Plaintiff lacked standing to bring the present action, that Plaintiff's tort claims were barred under the economic loss doctrine, that Plaintiff's Kansas Consumer Protection Act Claims were unsustainable, that Plaintiff's breach of implied contract claims were too attenuated, and that WSU was immune from liability. *See id*. While Plaintiff had arguments and authorities that could support his allegations, the number of issues in this case, which centers around an emerging area of law—data breach litigation—created significant uncertainty. Indeed, the Tenth Circuit has not yet considered what a plaintiff must allege in order to demonstrate standing to bring a data breach action. Even assuming Plaintiff could defeat Defendant's motion to dismiss, WSU was prepared to vigorously argue, among other things, that no class member data was actually stolen in the Data Incident. There is no guarantee that the Court or a jury would find Plaintiff's arguments more persuasive. Accordingly, despite Plaintiff's confidence in the strength of this case, numerous legal

issues and factual disputes existed that undermined the certainty of a more favorable outcome for the Class.

3. The Settlement Provides Exceptional Immediate Relief to the Class, Outweighing the Mere Possibility of Future Relief after Protracted Litigation

The Settlement provides substantial relief for all 443,000 Settlement Class Members. As explained above, all Settlement Class Members are eligible for cash payments of $20.00 per hour for up to three (3) hours for time spent dealing with issues relating to the Data Incident plus reimbursement for out-of-pocket costs to mitigate damage due to the Data Incident and/or for losses associated with any identity theft or misuse of PII up to $300.00. *See* Settlement Agreement at ¶ 2. These amounts are well within the range of fair, reasonable, and adequate, particularly when considered in light of reported average out-of-pocket expenses attributable to a data breach. According to a research study sponsored by Experian Data Breach Resolution and conducted and reported by Ponemon Institute, "[e]ighty-one percent of respondents who were victims of a data breach did not have any out-of-pocket costs" and nine percent had less than $10 in out-of-pocket costs. *See* Federman Decl. at Exhibit B, pgs. 7, 18. Further, for those respondents who incurred out-of-pocket costs, the average amount was $38.00. *Id*. at 7.

The Agreement provides for a claims-made Settlement, under which the amounts payable to Settlement Class Members do not diminish based on the number of claim forms that are submitted. As such, the economic recovery available under the Settlement is objectively substantial.[3]

[3] Indeed, were every Settlement Class Member to submit a valid claim for the maximum reimbursement of $300.00, the Settlement would provide more than $130 million in aggregate cash payments to the Class.

By settling the action now, Plaintiff and the Class can share in significant all-cash compensation and avoid the risk that continued litigation may result in a smaller recovery or quite possibly no recovery at all.

4. The Judgment of the Parties is that the Settlement is Fair and Reasonable

"Counsel's judgment as to the fairness of the agreement is entitled to considerable weight" and supports approval of the Settlement. *Marcus*, 209 F. Supp. 2d at 1183; *accord Lucas*, 234 F.R.D. at 695; *Rhodes*, 308 F.R.D. at 667. Plaintiff's attorneys have carefully evaluated the Settlement, and believe it provides exceptional value to Plaintiff and the Class, especially given that, despite the apparent strength of Plaintiff's case, there is no guarantee that the Class would not walk away empty-handed. Furthermore, the Settlement is supported by Plaintiff, who has been apprised of the strengths and weaknesses of this case. Other proposed class members will have the opportunity to weigh in on the Settlement at the Fairness Hearing if the Court grants preliminary approval.

C. The Settlement is Fair, Adequate and Reasonable Under Rule 23(e)(2)

Under Rule 23(e)(2), courts determining the fairness of a class action settlement must consider whether:

> (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, taking into account: (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); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e). The proposed Settlement readily satisfies all of the foregoing factors such that the Court will likely be able to grant final approval of the Settlement. *See* Fed. R. Civ. P. 23(e)(1)(B) (requiring courts at the preliminary approval stage to consider whether it will "likely

be able to (i) approve the proposal [as fair, reasonable, and adequate] under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the propos[ed settlement].").

The first two factors—that the class representatives and counsel adequately represent the class and that the settlement was negotiated at arm's length, Fed. R. Civ. P. 23(e)(2)(A) and (B)—largely parallel the first *Rutter* factor (fair and honest negotiation) and are satisfied for the reasons the Settlement satisfies that *Rutter* factor. *See* Section III.B.1, *supra.* Class counsel are highly experienced in complex consumer class-action litigation and negotiated this settlement at arm's length. Plaintiff has no conflicts of interest with the other members of the Settlement Class, had the same PII potentially exposed in the Data Incident as the other Settlement Class Members, and shares the Class's interests of maximizing their recovery.

The proposed Settlement also satisfies the third factor, which focus on the adequacy of relief to the class. In particular, the Court must "take into account":

- "[T]he costs, risks, and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2)(C)(i). This parallels the second and third *Rutter* factors (whether serious questions of law and fact exist and whether the value of an immediate recovery outweighs the mere possibility of future relief). Thus, this factor is satisfied for the same reasons Plaintiff satisfies the *Rutter* factors. *See* Section III.B.2-3, *supra.*

- The method of processing claims and distributing relief to the class. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). Here, the Settlement builds on the notification process WSU undertook in response to the Data Incident and the class member information gathered through it. Accordingly, the notice program includes a high rate of direct notice to Settlement Class Members. *See* Section VI, *infra.* Further, the Settlement provides for a claims-made procedure that requires minimal documentation from Settlement Class Members while conferring significant benefits to the Class. *See* Settlement Agreement at ¶ 2.

- The terms of the Settlement regarding attorneys' fees. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). The proposed attorneys' fees and expenses are fair and, importantly, do not deduct from the relief secured for the Class. *See* Settlement Agreement at ¶ 7.5. Such fees were negotiated as an independent term of the Settlement and were only negotiated after the parties had agreed to the benefits that would be provided to the Settlement Class. *Id.* at ¶ 7.1. Further, payment of attorneys' fees comes only after final approval of the Settlement. *Id.* at ¶ 7.4.

- The presence of any agreements between the parties separate from the Settlement Agreement. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv). There are no such agreements in this case. As such, this factor weighs in favor of preliminary approval.

The fourth factor, whether class members are treated equitably relative to each other, Fed. R. Civ. P. 23(e)(2)(D), also supports preliminary approval. The proposed Settlement treats the Settlement Class Members equitably relative to each other, as all class members whose PII was potentially exposed in the Data Incident will have the same remedy options. *See* Section II.B *supra*.

IV. CERTIFICATION OF THE SETTLEMENT CLASS

As the Supreme Court recognized, the "settlement only class" has become a "stock device" and all federal Circuits have recognized its utility. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 618 (1997); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (stating that courts favor the use of settlement classes "to foster negotiated conclusions to class actions"). A settlement class in complex litigation "actually enhances absent class members' opt-out rights because the right to exclusion is provided simultaneously with the opportunity to accept or reject the terms of a proposed settlement." *In re Prudential Sec. Ltd. P'ship Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995). When granting preliminary approval of a class action settlement, it is appropriate for a court to certify a class for settlement purposes. *See Amchem*, 521 U.S. at 620 (explaining that the same standards apply to class certification for purposes of settlement as to any other motion for class certification, except that an inquiry into trial management problems is unnecessary); *Pliego v. Los Arcos Mexican Rest., Inc.*, 313 F.R.D. 117, 125 (D. Colo. 2016).

A. The Requirements Under Fed. R. Civ. P. 23(a) Are Satisfied

Rule 23(a) sets forth the following prerequisites for certifying a class: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact

common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Additionally, where certification is sought under Rule 23(b)(3), the plaintiffs must demonstrate that common questions of law or fact predominate over individual issue and that a class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3). These requirements are satisfied here.

1. The Settlement Class is so Numerous that Joinder of Individual Members is Impracticable

First, the Settlement Class is so numerous that joinder of all individual members is impracticable. Here, numerosity is satisfied because, according to WSU's investigation into the Data Incident, approximately 443,000 individuals had PII that was potentially viewed as a result of the Incident. *See* Settlement Agreement at p. 2. This meets the numerosity requirement. *See Pliego*, 313 F.R.D. at 126 (finding that class of 177 members met the numerosity requirement).

2. There are Questions of Law and Fact Common to the Settlement Class

Second, there are questions of law and fact common to all Settlement Class Members. Rule 23(a)(2) is satisfied if class claims raise at least one common question that will generate "common answers" likely to "drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *accord DG v. Devaughn*, 594 F.3d 1188, 1194-95 (10th Cir. 2010). Here, there are questions of law and fact common to the proposed Settlement Class that predominate over any individual questions. These questions include, but are not limited to:

- Whether Defendant owed a duty to Plaintiff and the Class to protect their PII;
- Whether Defendant breached this duty;
- Whether Defendant violated data security statutes and data breach notification statutes applicable to Plaintiff and the Class;

- Whether Defendant knew or should have known that its email, computer systems, and/or data security practices were inadequate and vulnerable to attack;
- Whether Defendant's conduct, including its failure to act, was the proximate cause of the Data Incident resulting in the potential compromise of class members' PII;
- Whether Defendant failed to notify Plaintiff and the Class about the Data Incident expeditiously and without unreasonable delay;
- Whether Plaintiff and members of the Class suffered injury as a proximate result of Defendant's conduct or failure to act; and
- Whether Plaintiff and the Class are entitled to recover damages from Defendant.

These common questions predominate over any individual questions that may exist. *See Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1216 (10th Cir. 2014) (single common question of law, whether defendants' stores violated disability statute, satisfied Rule 23(a)(2)).

3. Plaintiff's Claims are Typical of the Claims of the Settlement Class

Third, the claims and defenses of Plaintiff are typical of the claims and defenses of the Settlement Class. The facts surrounding all the claims need not be identical, but the claims of the class representative and the class must be "based on the same legal or remedial theory." *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988). Here, Plaintiff's claims are typical because the claims brought by the Plaintiff arise out of the same course of conduct by Defendant and rest on exactly the same legal theory as those of the potential class members. *In re Ribozyme Pharms., Inc. Sec. Litig.*, 205 F.R.D. 572, 578 (D. Colo. 2001); *see also Colo. Cross*, 765 F.3d at 1216 ("Differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory."). In this case, Rule 23(a)(3)'s typicality requirement is satisfied.

4. The Interests of Plaintiff and Proposed Settlement Class Counsel are Aligned with the Interests of the Settlement Class

Fourth, Plaintiff and Class Counsel will fairly and adequately protect the interests of the Settlement Class. Plaintiff has demonstrated that he is well-suited to represent the Settlement Class, as he has prosecuted this action on behalf of and to the benefit of the Settlement Class. Representative Plaintiff has already provided information for pleadings and settlement discussions, engaged with Plaintiff's Counsel regarding the litigation, participated in the settlement negotiations via email, and approved the proposed Settlement terms. *See Pliego*, 313 F.R.D. at 127 ("[I]n this 'settlement only class' determination, it is clear from the settlement itself that Plaintiff has prosecuted the action vigorously on behalf of the class through counsel."). Similarly, Class Counsel is well-qualified to represent the Settlement Class, as the firm has handled many complex class actions, including data breach class actions. *See* Federman Decl. at Exhibit A. Indeed, Class Counsel has worked diligently on behalf of the Class to obtain information from WSU regarding the Data Incident and used that information to negotiate the Settlement now before the Court.

B. The Requirements Under Fed. R. Civ. P. 23(b)(3) Are Satisfied

Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members of the class, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

Here, the numerous questions common to the Class, including those listed above to demonstrate commonality under Rule 23(a)(2), predominate over any individual issues. The key elements of the Plaintiff's claims—the existence of inadequate data security protections, WSU's knowledge or constructive knowledge of those failures, the exposure of class members' PII as a result of the data breach, and the existence and amount of resulting damages, for example—are

common issues, and thus the class is "sufficiently cohesive to warrant adjudication by representation." *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014).

Further, class resolution is superior to other available means for the fair and efficient adjudication of the claims in this case. Here, the potential damages suffered by individual class members have relatively low-dollar amounts and may be uneconomical to pursue on an individual basis given the burden and expense of prosecuting individual claims. Moreover, there is little doubt that resolving all class members' claims jointly, particularly through a class-wide settlement negotiated on their behalf by counsel well-versed in class action litigation, is superior to a series of individual lawsuits and promotes judicial economy. *See In re Universal Serv. Fund. Tele. Billing Practices Litig.*, 219 F.R.D. 661, 679 (D. Kan. 2004).

In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, certification of the proposed Settlement Class is appropriate.

V. APPOINTMENT OF SETTLEMENT CLASS REPRESENTATIVE AND SETTLEMENT CLASS COUNSEL

"An order certifying a class action . . . must also appoint class counsel under Rule 23(g)." Fed. R. Civ. P. 23(c)(1)(B). In appointing class counsel, courts should consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

The work of proposed Class Counsel in this action to date, as well as their experience prosecuting complex litigation matters, demonstrate that proposed Class Counsel are well-qualified to represent the Settlement Class. *See* Section III.C, *supra*; *see also* Federman Decl. at Exhibit A. Accordingly, the Court should appoint Federman & Sherwood as Class Counsel for

purposes of approval and administration of the Settlement. The Court should also appoint as Class Representative, for Settlement purposes, Plaintiff Bahnmaier, who has ably represented the interests of all class members. *See* Section IV.A.4, *supra*.

VI. THE NOTICE PROGRAM SATISFIES ALL APPLICABLE REQUIREMENTS

Under Rule 23(e), the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Thus, Rule 23(e) requires notice that is "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the [settlement proposed] and to afford them an opportunity to present their objections." *Tennille v. W. Union Co.*, 785 F.3d 422, 436 (10th Cir. 2015). The key "hallmark of the notice inquiry . . . is reasonableness." *Lucas*, 234 F.R.D. at 696 (quoting *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 436 (D.N.M. 1988)).

The proposed notice meets these requirements. Because the Settlement notice program builds upon the notification process that WSU undertook in response to the Data Incident, the Claims Administrator will be able to provide direct notice to the Settlement Class Members. Indeed, following preliminary approval, WSU will provide the Claims Administrator with the names, email, and mailing addresses of the Settlement Class Members. Within thirty (30) days of the Court's order preliminarily approving the Settlement, the Claims Administrator will use this recent contact information to email, where email addresses are available, and mail by U.S. mail, where email addresses are unavailable or if an email is undeliverable or bounced back, the Short Notice to the Settlement Class Members.[4] In addition to this direct notice of Settlement, WSU will

[4] Before any mailings, the Claims Administrator will run the postal addresses of Settlement Class Members through the United States Postal Service ("USPS") National Change of Address database to update any change of address on file with the USPS. In the event that a mailing is returned, the Claims Administrator will run a skip trace and will re-send the notice. *See* Settlement Agreement at ¶ 3.2(d).

publish hyperlinks on WSU's website and in WSU's alumni e-newsletter that will link to the Settlement Website. *See* Settlement Agreement at ¶¶ 3.2, 3.3, and 3.4.

The Short Notice, attached as Exhibit A to the Settlement Agreement, includes all information required by Fed. R. Civ. P. 23(c)(2)(B). Specifically, it provides detailed information concerning: (a) the rights of Settlement Class Members, including the how and by when to lodge objections or opt out; (b) the nature of the litigation and the claims at issue; (c) the proposed Settlement; (d) the available recoveries to Settlement Class Members; (e) the process for filing a proof of claim; (f) the fees and expenses to be sought by Plaintiff's counsel; and (g) the date of the Fairness Hearing. It further advises Settlement Class Members on how to obtain additional information about the Settlement, including the Long Notice and Settlement Agreement, from the Settlement Website. The Settlement Website will also enable Settlement Class Members to electronically fill out and submit a Claim Form. Further, the Claims Administrator shall establish a toll-free telephone number that Settlement Class Members can call with questions or for more information regarding the Settlement. *See* Settlement Agreement at ¶ 3.2.

The proposed notice program is "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. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Thus, the proposed method of notice described above satisfies due process requirements. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

VII. PROPOSED SCHEDULE OF EVENTS

The parties propose the following schedule of events leading to the final Fairness Hearing as set forth in the proposed Order Conditionally Certifying a Settlement Class, Granting Preliminary Approval of the Class Action Settlement, Approving the Form and Manner of Notice, and Scheduling a Final Approval Hearing ("Preliminary Approval Order") submitted herewith:

Event	Date
WSU Provides CAFA Notice required by 28 U.S.C. § 1715(b)	Within 10 days after the filing of this Motion
Notice Program Commences	Within 30 days after entry of Preliminary Approval Order
Notice Program Concludes	Within 45 days after entry of Preliminary Approval Order
Compliance with CAFA Waiting Period under 28 U.S.C. § 1715(d)	90 days after the Appropriate Governmental Officials are Served with CAFA Notice
Postmark Deadline for Request for Exclusion (Opt-Out) or Objections	90 days after Commencement of Notice Program
Postmark Deadline for Objections	90 days after Commencement of Notice Program
Postmark / Filing Deadline for Filing Claims	120 days after Commencement of the Notice Program
Filing Motion for Attorneys' Fees, Reimbursement of Expenses, and Service Award filed by Class Counsel	At Least 15 days before the Objection Deadline
Filing Motion for Final Approval to be filed by Class Counsel	60 days after Commencement of Notice Program
Final Approval Hearing	At the Court's convenience, approximately on or after 90 days after Commencement of the Notice Program

The schedule is similar to those used in numerous class action settlements and provides due process for Settlement Class Members with respect to their rights concerning the Settlement.

VIII. CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that the Court: (1) certify the Settlement Class for purposes of the Settlement; (2) preliminarily approve the Settlement as set forth in the Settlement Agreement; (3) approve the form and manner of notice of the Settlement to the Settlement Class; and (4) set a hearing date for final approval of the proposed Settlement.

Dated: January 13, 2021

Respectfully Submitted,

/s/ Brandon J. B. Boulware
Brandon J.B. Boulware (KS # 25840)
BOULWARE LAW LLC
1600 Genessee Street, Suite 416
Kansas City, MO 64102
Tel: (816) 492-2826
Email: Brandon@boulware-law.com

William B. Federman (admitted *pro hac vice*)
FEDERMAN & SHERWOOD
10205 N. Pennsylvania Ave.
Oklahoma City, Oklahoma 73120
-and-
212 W. Spring Valley Road
Richardson, Texas 75801
(405) 235-1560
(405) 239-2112 (facsimile)
wbf@federmanlaw.com

Counsel for Plaintiff and the Putative Class

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 13, 2021, the foregoing document was filed via the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on the following ECF-registered counsel of record.

/s/ Brandon J. B. Boulware
Brandon J.B. Boulware