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Sixth Judicial District, Bannock County
Jason Dixon, Clerk of the Court
By: Deputy Clerk - Hilgert, April

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

KYLE NELSON, CHRISTIE L. LEWIS, and MICHAEL W. LEWIS, individually and on behalf of themselves and all others similarly situated, Plaintiffs, vs. IDAHO CENTRAL CREDIT UNION; and John Does 1-10, Defendants.	Case Nos. CV03-20-00831 CV03-20-03221 **PROPOSED ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

This matter is before the Court on Plaintiffs' Unopposed Motion for Final Approval of the Settlement Agreement that Plaintiffs Kyle Nelson, Michael Lewis, and Christie Lewis ("Plaintiffs") have reached with Idaho Central Credit Union ("ICCU"). In connection with that Motion, the Court has considered and reviewed the following materials: (1) Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement (the "Motion"), along with its accompanying declarations and other materials; and (2) the Settlement Agreement and Release and the exhibits attached thereto (the "Settlement Agreement").[1] In addition, the Court has considered the arguments of counsel as well as the pleadings and record in this case. As part of the Settlement Agreement, ICCU is not objecting to the certification of the Settlement Class for settlement purposes only. Having considered all the foregoing materials and information, this Court finds that there is good cause for granting the Motion.

[1] Unless otherwise stated, all defined terms herein have the meaning given to such terms in the Settlement Agreement.

I. BACKGROUND

1. As discussed in the Parties' briefing and at the June 1, 2021, Final Approval Hearing in this action, Plaintiffs brought this putative class action suit against ICCU on behalf of a proposed class of ICCU customers who were the victims of two data breaches resulting in the unlawful access and compromise of personal identifying information ("PII") of over 17,000 of ICCU's customers (the "Data Breaches"). Plaintiffs alleged that ICCU violated statutory and common law by virtue of its alleged failure to maintain adequate data security, as well as its alleged failure to timely notify Plaintiffs and the putative class of the Data Breaches. Sharp ICCU Plaintiffs' allegations and any wrongdoing.

2. In May 2020, after discussions among counsel, the Parties agreed to engage in mediation with the assistance of the Honorable Jay Gandhi (Ret.), an experienced class action mediator, to explore whether a negotiated resolution was possible. *See* Declaration of Hassan A. Zavareei in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("Zavareei Decl.") ¶ 4. The Parties exchanged mediation memoranda and ICCU provided informal discovery and necessary class data to Plaintiffs' counsel. *Id.* On July 16, 2020, the parties mediated before Judge Gandhi for a full day. *Id.* After a full day of negotiations, the Parties reached an agreement in principle. *Id.* ¶ 5.

3. The Parties continued to negotiate by phone and email in order to finalize the details of a preliminary term sheet. *Id.* In August 2020, the parties signed a term sheet. *Id.* Over the following couple months, the parties represent that they spent significant time negotiating the specific terms and language of the Settlement Agreement. *Id.* ¶ 6. On or about October 19, 2020, the Parties executed a Settlement Agreement. On or about November 17, 2020, the Parties executed a revised Settlement Agreement, which is now before the Court for final approval. *Id.*[2]

[2] All references to the Settlement Agreement are to the revised Settlement Agreement ("SA") executed on or about November 17, 2020, and attached as Exhibit 1 to the Declaration of Benjamin A. Schwartzman In Support of Plaintiffs' Motion for Final Approval ("Schwartzman Dec.").

4. On December 4, 2020, the Parties filed a Motion for Preliminary Approval. On January 19, 2021, this Court held a hearing on the Parties' Motion for Preliminary Approval. That same day, this Court entered an order granting the Parties' Motion for Preliminary Approval ("PA Order").

II. TERMS OF THE SETTLEMENT AGREEMENT

5. The Settlement provides immediate benefits to Settlement Class Members. The terms of the Settlement Agreement are discussed in greater detail in this Court's January 19, 2021, Preliminary Approval Order. *See generally* PA Order. In short, the Settlement Agreement provides for a Settlement Fund of $1,550,000, from which (a) all payments to Settlement Class Members, (b) Notice and Administrative Costs, (c) any Taxes and Tax-Related Expenses, (d) any Service Award to Plaintiffs, and (e) any award of Attorneys' Fees and Expenses shall be paid. *See* SA ¶¶ 21, 39. In addition to the cash payments, ICCU offered all Settlement Class Members twelve (12) months of Credit Monitoring Services provided by Kroll at no cost to the Settlement Class Members, regardless of whether the Settlement Class Member submits a claim for Ordinary or Extraordinary Losses.

6. Additionally, ICCU represents that, in response to the Data Breaches, it has employed information security enhancements including external review of security controls, implemented whitelisting and multifactor authentication where possible for third party system access; provisioned for free identity protection services for those impacted; increased training of all ICCU team members regarding cybersecurity; reviewed security posture and updated risk assessments for all ICCU vendors and implemented additional controls upon them, where possible; implemented dark web data scans searching for ICCU data; and increased staff in the following areas: Vendor Management, Audit and Compliance.

7. In exchange for the benefits conferred by the Settlement, all Settlement Class Members will be deemed to have released the Released Parties[3] from all claims and causes of

[3] The "Released Parties" are ICCU and its present and former predecessors, successors, assigns, parents, subsidiaries, divisions, affiliates, departments, and any and all of their past, present, and

action pleaded or that could have been pleaded that are related in any way to the activities stemming from the ICCU Data Breaches. SA ¶¶ 82-83.

III. CERTIFICATION OF SETTLEMENT CLASS

8. In its Preliminary Approval Order, the Court found that Idaho Rule of Civil Procedure 77 certification was appropriate for preliminary approval. *See* PA Order at 11-13. Based on the facts and argument stated herein and for the reasons set forth in the Memorandum in support of the Motion for Preliminary for Approval, and Plaintiffs' Motion for Final Approval, class certification of the Settlement Class is well warranted here. For the same reasons, also warranted are the designations of Class Counsel and the Plaintiffs as Class Representatives. *Id.*

9. The Court finds that the prerequisites for a class action set forth pursuant to Rule 77 of the Idaho Rules of Civil Procedure have been met, and, therefore, the Court certifies a nationwide Settlement Class consisting of the following, as more fully defined in paragraph 36 of the Settlement Agreement:

> All individuals who were mailed a notification by or on behalf of ICCU on or about February 7, 2020 regarding the Data Breach.

10. The Court finds that, based on Plaintiffs' Motion for Preliminary Approval and Motion for Final Approval (which ICCU is not opposing for purposes of this Settlement only) that:

- The Settlement Class as defined meets Rule 77(a)'s numerosity requirement. The class definition encompasses more than 17,000 Class Members. This number of Class Members demonstrates that joinder is a logistical impossibility. See, e.g. Celano v. Marriott Int'l Inc., 242 F.R.D. 544, 548-49 (N.D. Cal. 2007) (numerosity is generally satisfied when a class has at least 40 members); see also Rannis v. Recchia, 380 Fed. App'x 646, 651 (9th Cir. 2010) (same).

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future officers, directors, employees, stockholders, partners, servants, agents, successors, attorneys, advisors, consultants, representatives, insurers, reinsurers, subrogees and the predecessors, successors, and assigns of any of the foregoing.

The Settlement Class also satisfies the Rule 77(a)'s commonality requirement, which requires that class members' claims "depend upon a common contention," of such a nature that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Here, as in most data breach cases, "[t]hese common issues all center on [Defendant's] conduct, satisfying the commonality requirement." *In re the Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 1:14-MD-02583-TWT, 2016 WL 6902351, at *2 (N.D. Ga. Aug. 23, 2016). For the same reason, the predominance requirement of Rule 77(b)(3) is readily met here "where the class is a 'cohesive group of individuals [who] suffered the same harm in the same way because of the [defendant's] conduct.' *In re Google LLC St. View Elec. Commc'ns Litig*., No. 10-MD-02184-CRB, 2020 WL 1288377, at *5 (N.D. Cal. Mar. 18, 2020) (quoting *In re Hyundai & Kia Fuel Economy Litig*., 926 F.3d 539, 559 (9th Cir. 2019)). Thus, common questions include, *inter alia*, whether ICCU engaged in the wrongful conduct alleged; whether Class Members' PII was compromised in the Data Breaches; whether ICCU owed a duty to Plaintiffs and Class members; whether ICCU breached its duties; whether ICCU unreasonably delayed in notifying Plaintiffs and class members of the material facts of the Data Breach; and whether ICCU violated the common law and statutory violations alleged in the Complaints.

The Settlement Class also satisfies the Typicality requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." I.R.C.P. 77(a)(3). Plaintiffs' claims are typical of the claims of Settlement

Class Members because they arise from the same course of alleged conduct. *See id.* Plaintiffs suffered the same injuries as the putative class members—theft of their PII—and their injuries all arise from a single source: Defendant's alleged unlawful conduct. *"*The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Gibson v. Credit Suisse AG,* No. CV 10-1-EJL-REB, 2013 WL 5375648, at *4 (D. Idaho Aug. 16, 2013), *report and recommendation adopted,* No. 1:10 CV 001-EJL-REB, 2013 WL 5375597 (D. Idaho Sept. 24, 2013) (citation omitted).

The Settlement Class also satisfies the adequacy requirement. The adequacy requirement is satisfied when the class representatives will "fairly and adequately protect the interests of the class." I.R.C.P. 77(a)(4). To make this determination, "courts must resolve two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (citing *Hanlon*, 150 F.3d at 1020); *Longest v. Green Tree Servicing LLC*, 308 F.R.D. 310, 325 (C.D. Cal. 2015). Here, Plaintiffs have no conflicts of interest with other class members, are subject to no unique defenses, and they and their counsel have and continue to vigorously prosecute this case on behalf of the class.

Finally, certification of the Settlement Class is warranted because "a class action is superior to other available methods for . . . fairly and efficiently adjudicating the

controversy." I.R.C.P. 77(b)(3). Classwide resolution is the only practical method of addressing the alleged violations at issue in this case. There are thousands of class members with modest individual claims, most of whom likely lack the resources necessary to seek individual legal redress. *See Local Joint Exec. Bd. of Culinary/ Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) (cases involving "multiple claims for relatively small individual sums" are particularly well suited to class treatment); *see also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) ("Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification.").

11. The Court finds that the proposed Class Counsel are competent and capable of exercising their responsibilities, and that they and the proposed Class Representatives have fairly and adequately represented the interests of the Settlement Class.

12. The Court affirms its appointment of the following counsel as Class Counsel for the Settlement Class:

[redacted]Ben Schwartzman of Bailey & Glasser LLP;

[redacted]Hassan Zavareei of Tycko & Zavareei LLP;

[redacted]Gary M. Klinger of Mason Lietz & Klinger LLP; and

[redacted]Brandon Wise of Peiffer Wolf Carr & Kane, APLC.

13. The Court affirms its appointment of Plaintiffs Kyle Nelson, Christie Lewis, and Michael Lewis as Class Representatives for the Settlement Class in this Action.

IV. SATISFACTION OF NOTICE REQUIREMENTS

14. The Court has determined that the Notice given to the Settlement Class fully and accurately informed the Settlement Class of all material elements of the proposed Settlement and constituted valid, due, and sufficient notice with all applicable requirements. The Court further finds that the Notice Plan satisfies due process and has been fully implemented.

15. Due process under Rule 77 (and its federal corollary) requires that class members receive notice of the settlement and an opportunity to be heard and participate in the litigation. *See* I.R.C.P. 77(c)(2)(B); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 175-76 (1974) ("[I]ndividual notice must be provided to those class members who are identifiable through reasonable effort."). The mechanics of the notice process are left to the discretion of the Court, subject only to the broad "reasonableness" standards imposed by due process. *See Tapia v. Zale Del. Inc.*, No. 13cv1565-PCL, 2017 WL 1399987, at *4 (S.D. Cal. April 18, 2017); *see also Rosenburg v. I.B.M.*, No. CV06–00430PJH, 2007 WL 128232, *5 (N.D. Cal. Jan. 11, 2007) (stating that notice should inform class members of essential terms of settlement including claims procedure and their rights to accept, object or opt-out of settlement).

16. This Court previously reviewed and approved Plaintiffs' Class Notice plan. *See* PA Order at 20-22. The Court affirms once more that notice was adequate.

17. In addition to the adequacy of the notice, Plaintiffs have also submitted evidence showing the notice given to the Settlement Class fully and accurately informed the Settlement Class of all material elements of the proposed Settlement and constituted valid, due, and sufficient notice with all applicable requirements. Rust, the Settlement Administrator, implemented the multi-part Notice Plan. *See generally* Declaration of Brian Devery Re: Implementation of Notice Program ("Devery Dec."),

18. Specifically On February 18, 2021, Angeion caused the Postcard Notice to be sent via the United States Postal Service ("USPS") first-class mail to the 17,815 individuals on the Settlement Class List (the "Initial Mailing"). *Id.* ¶¶ 3-5. The Postcard Notice directed Settlement Class Members to the settlement website, www.ICCUDataBreachSettlement.com ("Settlement Website"), which contains the Settlement Agreement and Release, Long Form Notice in both English and Spanish, the Claim Form, and other important documents. *Id.* ¶ 5, Exs. A-C.

19. To help ensure delivery, prior to mailing the Postcard Notice, Angeion caused the mailing address information for members of the Settlement Class to be updated utilizing the National Change of Address ("NCOA") database, which provides updated address information for individuals or entities who have moved during the previous four years and filed a change of address with the USPS. *Id*. ¶ 6. Additionally, Postcard Notices returned to Angeion by USPS with a forwarding address were re-mailed to the new address provided by the USPS, and Postcard Notices returned to Angeion by the USPS without forwarding addresses were subjected to an address verification search (commonly referred to as "skip tracing") utilizing a wide variety of data sources, including public records, real estate records, and electronic directory assistance listings, to locate updated addresses. *Id.* For any Settlement Class Member where a new address was identified through the skip tracing process, the Settlement Class Member database was updated with the new address information and a notice was re-mailed to that address. *Id.* For Settlement Class Members whose Postcard Notice was returned as undeliverable by the USPS without a forwarding address and where Angeion was unable to locate an updated address through a skip trace, Angeion emailed them a copy of the Notice. *Id.*

20. As of April 27, 2021, 299 Postcard Notices were returned by the USPS with a forwarding address. Angeion updated its database with the new addresses, and Postcard Notices

were forwarded to the new addresses. *Id.* ¶ 8. As of April 27, 2021, 722 Postcard Notices were returned as undeliverable by the USPS without a forwarding address. *Id.* ¶ 9. Angeion conducted address verification searches ("skip traces") to locate updated addresses. *Id.* Angeion identified 542 updated addresses via skip tracing, updated its database with the new addresses, and Postcard Notices were re-mailed to the new addresses. *Id.* As of April 27, 2021, Angeion sent the Email Notice to 152 Settlement Class Members with a valid email address on the Email List whose postcard notice was returned undeliverable and where no updated address was found via the skip trace process. *Id.* ¶ 10, Ex. D.

21. On or about February 17, 2021, Angeion activated the case-specific Settlement Website. *Id.* ¶ 12. The Settlement Website was designed to be user-friendly and to make it easy for Settlement Class Members to find information about the Settlement, including general information about this class action Settlement; to review relevant Court documents, including a copy of the Settlement Agreement and Release, Long Form Notice (in English and Spanish), the Claim Form, and Frequently Asked Questions; and to view important dates and deadlines (including opt-out and objection deadlines) pertinent to the Settlement. *Id.* The Settlement Website also has a "Contact Us" page whereby Settlement Class Members can send an email with any additional questions to a dedicated email address. *Id.* Likewise, Settlement Class Members were able to file a claim directly on the Settlement Website. As of April 27, 2021, the Settlement Website has received 2,699 unique visitors and 5,000 page-views. *Id.* ¶ 13.

22. On or about February 17, 2021, Angeion caused the following toll-free hotline devoted to this Settlement to be activated: 1-833-640-0650. *Id.* ¶ 14. The toll-free hotline was listed on the Summary Notices and the Settlement Website referenced in the preceding paragraph. *Id.* The toll-free hotline utilizes an interactive voice response ("IVR") system to provide Settlement

Class Members with responses to frequently asked questions and provide essential information regarding the Settlement. *Id.* Settlement Class Members were also able to request a copy of the Claim Form through the IVR. *Id.* This hotline is accessible 24 hours a day, 7 days a week. *Id.* As of April 27, 2021, the toll-free hotline has received 260 calls totaling 1,255 minutes. *Id.* at ¶ 15.

23. Based on this record, the Court concludes that Plaintiffs complied with the Notice Plan for the settlement process approved by the Court.

V. FINAL APPROVAL OF SETTLEMENT

24. Idaho rule of Civil Procedure 77 requires court approval of a class action settlement. I.R.C.P. 77. In considering a proposed settlement, voluntary dismissal, or compromise prior to formal certification of a (b)(3) class, (1) the court must direct notice in a reasonable manner to all class members who would be bound by the proposed settlement; (2) if the proposed settlement would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate; (3) the parties seeking approval must file a statement identifying any agreement made in connection with the proposal; and (4) any class member must be given the opportunity to object. *See* I.R.C.P. 77(e).

25. As there is not significant case law addressing the standards for granting final approval under Idaho Rule of Civil Procedure 77, the Court also refers to the standards provided by Federal Rule of Civil Procedure 23. *See O'Boskey v, First Fed. Sav. & Loan Ass'n of Boise*, 112 Idaho 1002, 1005 (1987) ("As Idaho rules on class actions are taken from the federal rules, federal authority is relevant.").

26. Under Rule 23(e)(2), in order to give a settlement final approval, the court must consider whether the proposed settlement is "fair, reasonable, and adequate after considering 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 . . . ; 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)." *Id.* 23(e)(2)(C)(i)-(iv).

27. Before the 2018 revisions to Rule 23(e), the Ninth Circuit had developed its own list of factors for consideration on final approval, including: "[T]he strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Staton v. Boeing Co.*, 327 F. 3d. 938, 959 (9th Cir. 2003) (cleaned up). The Court will address the factors relevant to both standards.

A. Notice to Class Members was Directed and Carried Out in a Reasonable Manner. (I.R.C.P. 77(e)(1)

28. For the reasons already provided above, the Court finds that the Notice to Class Members was directed and carried out in a reasonable manner, thus satisfying the requirement of Idaho Rule of Civil Procedure 77(e)(1).

B. The Settlement is Fair, Reasonable, and Adequate. (I.R.C.P. 77(e)(2) & Fed. R. Civ. P. 23(e)(2))

29. For the reasons set forth below, the Court finds that the settlement is fair, reasonable, and adequate, satisfying the requirements of Idaho Rule of Civil Procedure 77(e)(2) and its federal counterpart.

1. Adequacy of Class Representatives and Class Counsel. (Fed. R. Civ. P. 23(e)(2)(A))

30. For the reasons already provided above, the Court finds that Class Counsel and the Class Representatives have adequately represented and have no conflict with the members of the Settlement Class. This factor weighs in favor of final approval.

2. The Settlement is the product of good-faith, informed, arm's-length negotiations. (Fed. R. Civ. P. 23(e)(2)(B))

31. The Settlement Agreement is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and the legal and factual issues in this Action. Zavareei Dec. ¶ 8. A presumption of fairness applies when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for Court approval. *See, e.g., In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig*., 295 F.R.D. 438, 450 (C.D. Cal. 2014) (*citing Rodriguez v. West Publishing Corp*., 563 F.3d 948, 965 (9th Cir.2009)). Moreover, "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Adams v. Inter-Con Sec. Sys. Inc*., No. C-06-05248-MHP, 2007 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007)*; see also Cohorst v. BRE Props*., No. 3:10-CV-2666-JM-BGS, 2011 WL 7061923, at *12 (S.D. Cal. Nov. 9, 2011) ("[V]oluntary mediation before a retired judge in which the parties reached an agreement-in-principle to settle the claims in the litigation are highly indicative of fairness . . . . We put a good deal of stock in the product of arms-length, non-collusive, negotiated resolution." (cleaned up)).

32. Here, the Parties engaged in a formal mediation before the Hon. Jay Gandhi (Ret.) of JAMS before reaching the Settlement Agreement now sought to be approved. Zavareei Dec. ¶¶ 4-5. The Parties mediated for a full day before Judge Gandhi on July 16, 2020. *Id*. ¶ 5. In advance of that mediation, ICCU provided Plaintiffs with information about the scope of the Data Breaches,

the number of class members, and remedial efforts undertaken in the wake of the Data Breaches. *Id*. ¶ 4. The Parties also exchanged lengthy mediation briefs wherein they discussed the strengths and weaknesses of their respective claims and defenses. *Id*. This free exchange of information, and the guidance of Judge Gandhi, allowed the parties to reach an agreement in principle as to the material terms of the Settlement, including the size of the common fund and the offer of credit monitoring. *Id*. ¶¶ 4-5. The Parties then continued their settlement discussions as they finalized the terms of the Settlement Agreement. *Id*. ¶ 6. The Parties' vigorous negotiation of the claims in this action evidences an absence of collusion and the presence of fairness and good faith. Thus, this settlement, reached after informed negotiations, "is entitled to deference as the private consensual decision of the parties." *Fraley v. Facebook, Inc.,* 966 F. Supp. 2d 939, 942 (N.D. Cal. 2013). Accordingly, this factor also weighs in favor of final approval.

3. The Settlement Agreement provides the Class with significant relief. (Fed. R. Civ. P. 23(e)(2)(C))

33. The Settlement Agreement calls for equitable relief in the form of data security enhancements, credit monitoring for Class Members who submitted a valid claim, and creates a nonreversionary $1,550,000 fund from which (1) all payments to Settlement Class Members; (2) Notice and Administration costs, (3) any taxes and tax-related expenses; (4) any service awards to Plaintiffs; and (5) any award of Attorneys' Fees and Expenses shall be paid. *See* SA ¶¶ 21, 39. Settlement Class Members can make a claim for reimbursements of documented ordinary losses up to $1,000 per person and documented extraordinary losses up to $20,000 per person. Moreover, any residual funds remaining in the fund after payments to valid claimants, notice and claims administration expenses, and court approved attorneys' fees, costs, and Plaintiffs' service awards will be distributed *pro rata* to any Settlement Class Member who did not exclude themselves from the Settlement.

34. This relief is consistent with relief provided in other similar data breach cases approved by Courts across the United States. *See* Settlement Agreement, *Fox v. Iowa Health System*, No. 3:18-cv-00327-jdp (W.D. Wis.) (in case where PII and health information for 1.4 million hospital patients was exposed, defendant will pay up to $1,000 in ordinary expense reimbursements and lost time up to 3 hours at $15/hour; up to $6,000 in extraordinary expense reimbursements per class member; provide credit monitoring; and change business practices); Settlement Agreement, *In re: Citrix Data Breach Litigation*, No. 0:19-cv-61350-RKA (S.D. Fla.) (in case involving financial account information and Social Security Numbers, defendant will pay up to $15,000 in expense reimbursements per class member and lost time up to 5 hours at $25/hour; provide credit monitoring; and change business practices); Settlement Agreement, *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc*., No. 1:16-cv-03025-JKB (D. Md.) (in case where names and Social Security Numbers of class members were exposed, defendant will provide up to $7,500 in reimbursement of expenses per class member including for lost time). *See* Zavareei Dec. ¶¶ 27-29, Exs. 4-6. Accordingly, this factor also weighs in favor of final approval.

a. The likely costs, risks, and delay of trial and appeal are great. (Fed. R. Civ. P. 23(e)(2)(C)(i))

35. The costs, risks, and delay of continued litigation weigh in favor of settlement approval. As discussed in the Preliminary Approval Order, this case presents significant risk. *See* PA Order at 16-17. Data breach cases like the one at hand involve extremely complex issues of liability and damages, the determination of which would consume considerable resources. In fact, 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 has 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). Should litigation continue, Plaintiffs would likely need to defeat Defendant's motion to dismiss, 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. This factor weighs in favor of final approval.

b. The Settlement provides for effective distribution of relief. (Fed. R. Civ. P. 23(e)(2)(C)(ii))

36. Distribution of relief is effective in that all Settlement Class Members were eligible to make claims for reimbursements and credit monitoring, and any residual funds will be distributed *pro rata*, regardless of whether the Class Member made a claim for reimbursement. Funds are to be issued by the Settlement Administrator as soon as practicable after the Effective Date. SA ¶ 55. Settlement Class Members shall have 180 days to cash their checks, and the Settlement Administrator is required to make reasonable efforts to locate updated addresses and re-mail checks for any recipient whose check is returned. *Id.* ¶¶ 56-57. This factor weighs in favor of final approval.

c. The terms pertaining to the award for attorneys' fees are fair and reasonable. (Fed. R. Civ. P. 23(e)(2)(C)(iii))

37. Plaintiff here seeks attorneys' fees in the amount of $1,000,000—approximately 30% of the $3,333,100 settlement value. These fees are reasonable in light of the work and skills required to litigate the matter, the contingent nature of the case and market value of services provided, and the extraordinary results obtained on behalf of Plaintiffs and Settlement Class Members. Moreover, the requested percent fee falls well within the range of fees regularly granted in the Ninth Circuit. *See Heritage Bond Litig*., Nos. 02-ML-1475 DT, CV 01-5752 DT (RCx), et

al., 2005 U.S. Dist. LEXIS 13555, at *74 (C.D. Cal. June 10, 2005) (awarding 33 1/3 % of $27,783,000.00 fund); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL 3:07-md-1827 SI, 2011 LEXIS 154287, at *1–3 (N.D. Cal. Dec. 27, 2011) ("LCD I") (awarding 30% of fund as fees); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M07-1827 SI, 2013 LEXIS 6607, at *42-45 (N.D. Cal. Jan. 14, 2013) ("LCD II") (same); *Gerstein v. Micron Tech., Inc*., Civil No: 89-1262, 1993 U.S. Dist. LEXIS 21215, at *16 (D. Idaho Sep. 10, 1993) (30% of the net settlement fund found reasonable); *Young v. Safelite Fulfillment, Inc*., No. 2:19-CV-01027-JLR, 2020 U.S. Dist. LEXIS 227277, at *51 (W.D. Wash. Dec. 3, 2020) (recent decision preliminarily approving class action settlement with provision for 30% of the fund to be paid as attorneys' fees). Further confirming the reasonableness of the attorneys' fees request is that no Settlement Class Member has objected to the request. This factor weighs in favor of final approval.

d. <u>There are no additional agreements that need to be considered by the Court. (I.R.C.P. 77(e)(3) and Fed. R. Civ. P. 23(e)(2)(C)(iv))</u>

38. The Settlement Agreement and attachments, including the stipulated injunction, are the only agreements impacting the settlement at issue here. This factor weighs in favor of approval.

4. The Settlement treats class members equitably relative to each other, and class members had the opportunity to object to or opt-out of the Settlement. (I.R.C.P. 77(e)(4) & Fed. R. Civ. P. 23(e)(2)(D))

39. In determining whether this factor weights in favor of final approval, a Court must determine whether the Settlement "improperly grant[s] preferential treatment to class representatives or segments of the class." *Hudson v. Libre Technology Inc.,* No. 3:18-cv-1371-GPC-KSC, 2020 WL 2467060, *9 (S.D. Cal. May 13, 2020) (slip copy) (*quoting In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)) (cleaned up). Here, the Settlement does not improperly discriminate between any segments of the class, as all class members are entitled to the same relief. Each and every Class Member has the opportunity: (1) to make a claim

for up to $1,000 in reimbursements for ordinary expenses or up to $20,000 in reimbursements for extraordinary expenses; (2) to make a claim for credit monitoring services; and (3) to object to or opt-out of the Settlement. Moreover, the requested service awards are in line with awards granted in similar cases, are presumptively reasonable, and do not call into question Plaintiffs' adequacy or the validity of the Settlement. *See e.g. Roe v. Frito-Lay, Inc.,* No. 14-cv-00751, 2017 WL 1315626, at *8 (N.D. Cal. Apr. 7, 2017) (noting a $5,000 Service Award is presumptively reasonable in the Ninth Circuit); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947-48 (9th Cir. 2015) (approving service awards of $5,000); *Presley v. Carter Hawley Hale Profit Sharing Plan*, No. C9704316SC, 2000 WL 16437, at *2 (N.D. Cal. 2000) (approving $25,000 service awards); *In re McKesson HBOC, Inc. ERISA Litig*., 391 F. Supp. 2d 844, 851 (N.D. Cal. 2005) (approving $5,000 service awards); *In re Sorbates Direct Purchaser Antitrust Litig*., No. 99-1358MMC, 2002 WL 31655191, at *3 (N.D. Cal. Nov. 15, 2002) (approving $7,500 service award); *Williams v. Costco Wholesale Corp*., 2010 WL 2721452, at *7 (S.D. Cal. July 7, 2010) (approving $5,000 award in an case settling for $440,000). As such, this factor also weighs in favor of final approval.

5. The additional factors considered by the Ninth Circuit support final approval.

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

41. *First*, the strength of Plaintiffs' case supports settlement. Plaintiffs' success at trial was not guaranteed. It is "plainly reasonable for the parties at this stage to agree that the actual recovery realized and risks avoided here outweigh the opportunity to pursue potentially more favorable results through full adjudication." *Dennis v. Kellogg Co*., No. 09-cv-1786-L(WMc), 2013 WL 6055326, at *3 (S.D. Cal. Nov. 14, 2013). "Here, as with most class actions, there was risk to both sides in continuing towards trial. The settlement avoids uncertainty for all parties

involved." *Chester v. TJX Cos*., No. 5:15-cv-01437-ODW(DTB), 2017 WL 6205788, at *6 (C.D. Cal. Dec. 5, 2017). This factor favors final approval.

42. *Second*, protracted litigation is likely to be expensive, complex and risky for Plaintiffs, Class Members, and ICCU. As described in Section V(b)(3)(i), *supra*, hurdles that would need to be overcome include:

- Survival of a likely motion to dismiss;
- the certification and maintenance of Plaintiffs' class through trial and any appeals; and
- survival of a likely motion for summary judgment.

Each risk, by itself, could impede the successful prosecution of these claims at trial and in an eventual appeal—which would result in zero recovery to the class. "Regardless of the risk, litigation is always expensive, and both sides would bear those costs if the litigation continued." *Paz v. AG Adriano Goldschmeid, Inc*., No. 14CV1372DMS(DHB), 2016 WL 4427439, at *5 (S.D. Cal. Feb. 29, 2016); *see also Fenn v. Hewlett-Packard Co*., No. 1:11-CV-00244-BLW, 2012 WL 6680358, at *1 (D. Idaho Dec. 21, 2012) ("It appears that counsel have reasonably evaluated their respective positions, and that settlement will likely avoid substantial additional costs to the parties. Accordingly, the Court will preliminarily approve the settlement.") Thus, this factor favors final approval.

43. *Third,* if they were to proceed to litigate their claims through trial, Plaintiffs would encounter risks in obtaining and maintaining certification of the class. The class has not yet been certified, and ICCU will oppose certification if the case proceeds. Thus, Plaintiffs "necessarily risk losing class action status." *Grimm v. American Eagle Airlines, Inc*., No. LA CV 11-00406 JAK(MANx), 2014 WL 1274376, at *10 (C.D. Cal. Sept. 24, 2014); *see also Norton v. Maximus,*

Inc., No. CV 1:14-0030 WBS, 2017 WL 1424636, at *5 (D. Idaho Apr. 17, 2017) ("The risk that supervisors would not have been able to maintain class action status throughout trial favors settlement."). Accordingly, this factor favors final approval.

44. *Fourth,* as explained above, the value of the Settlement favors final approval. The Settlement offers significant relief, conservatively valued at $3,333,100. This settlement is a strong result for the Class and is in line with other settlements in cases involving data breaches of similar scope. Accordingly, this factor favors final approval.

45. *Fifth,* although the Parties reached settlement early in litigation, Class Counsel engaged in investigation of the ICCU Data Breaches and the potential claims that may arise therefrom prior to filing the Complaints. Moreover, the parties engaged in a full day of formal mediation before a respected retired judge, and conducted informal discovery prior to reaching the Settlement. Zavareei Dec. ¶¶ 4-5. "[T]he efficiency with which the Parties were able to reach an agreement need not prevent this Court from granting . . . approval." *Hillman v. Lexicon Consulting, Inc*., No. EDCV 16-01186-VAP(SPx), 2017 WL 10433869, at *8 (C.D. Cal. April 27, 2017). This factor favors final approval.

46. *Sixth*, Class Counsel have extensive experience in data breach class actions, and represent that the settlement is an "outstanding result" for the Class. Zavareei Dec. ¶¶ 10, 17-22. A great deal of weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation. *See, e.g., Norton*, 2017 WL 1424636, at *6; *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc*., 221 F.R.D. 523, 528 (C.D. Cal. 2004). Thus, this factor supports final approval.

47. *Seventh,* there is no governmental participant in this matter. This factor is neutral.

48. *Eighth*, after completion of notice as approved by this Court and the close of the objection period, only seven Class Members requested exclusion, and no Class Members have objected to the Settlement. Devery Dec. ¶¶ 16, 17. The lack of objections and small number of exclusions strongly support approval of the settlement. *See Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 523 (C.D. Cal. Jan. 5, 2004) ("It is established that the absence of a large number of objections to proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members"); *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 833–34 (N.D. Cal. Aug. 22, 2017) (finding the reaction of class members weighed in favor of settlement where .03 percent of the class opted out, and 14 individuals objected); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043–44 (approving settlement with three objections out of 57, 630 potential class members); *Churchill Village LLC v. Gen. Elec.,* 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement with 45 objections out of 90,000 notices sent). Here, the limited number of exclusions and absence of any objections supports final approval.

CONCLUSION

For the reasons discussed herein:

49. The Court hereby finally approves the Settlement Agreement and the Settlement contemplated thereby, and finds that the terms constitute, in all respects, a fair, adequate and reasonable settlement as to all Settlement Class Members in accordance with Rule 77 of the Idaho Rules of Civil Procedure, and directs its consummation pursuant to its terms and conditions. Further, the class definition is sufficiently ascertainable such that an individual can ascertain whether he or she is in the Settlement Class based on objective criteria.

50. The Court hereby finds that the Settlement Class Members have been adequately represented by the Class Representatives and Class Counsel, and that the relief provided is fair,

adequate, and reasonable, considering the costs, risks, and delay of trial and appeal, the effectiveness of the proposed method of distributing relief and method of processing claims, and all other relevant factors, and that the Settlement treats Class Members equitably relative to each other.

51. The Court hereby finds and concludes that the Settlement Class Notice and procedures set forth in the Settlement Agreement fully satisfy Rule 77 of the Idaho Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, and support the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Settlement and this Order.

52. The Court hereby orders that each of those individuals listed in Exhibit E of the Declaration of Brian Devery is excluded from the Settlement Class.

53. The Court hereby affirms its appointment of the following counsel as Class Counsel for the Settlement Class:

[redacted]Ben Schwartzman of Bailey & Glasser LLP;

[redacted]Hassan Zavareei of Tycko & Zavareei LLP;

[redacted]Gary M. Klinger of Mason Lietz & Klinger LLP; and

[redacted]Brandon Wise of Peiffer Wolf Carr & Kane, APLC.

54. The Court hereby affirms its appointment of Plaintiffs Kyle Nelson, Christie Lewis, and Michael Lewis as Class Representatives for the Settlement Class in this Action.

55. The court hereby orders that the Class Representatives shall each be awarded a $5,000 Service Award, to be paid from the Settlement Fund in accordance with the Settlement Agreement.

56. The Court hereby orders that Class Counsel shall be reimbursed for $15,405.58 in reasonably incurred litigation costs, to be paid from the Settlement Fund in accordance with the Settlement Agreement.

57. The Court hereby orders that Class Counsel shall be awarded $1,000,000 in attorneys' fees, to be paid from the Settlement Fund in accordance with the Settlement Agreement.

58. The Court hereby orders Angeion to begin the process of payments for Approved Claims and oversee any additional payments pursuant to the terms of the Settlement Agreement.

59. Plaintiffs and each and every one of the Settlement Class Members who have not requested exclusion from the Settlement Class, hereby unconditionally, fully, and finally release and forever discharge the Released Parties from the Released Claims. Each and every Participating Settlement Class Member, and any person actually or purportedly acting on behalf of any Participating Settlement Class Member(s), is hereby barred from commencing, instituting, continuing, pursuing, maintaining, prosecuting, or enforcing any Released Claims (including, without limitation, in any individual, class or putative class, representative or other action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum, against the Released Parties.

60. If for any reason the Settlement terminates, then certification of the Settlement Class shall be deemed vacated. In such an event, the certification of the Settlement Class for settlement purposes or any briefing or materials submitted seeking certification of the Settlement Class shall not be considered in connection with any subsequent class certification issues, and the Parties shall return to the status quo ante in the Action, without prejudice to the right of any of the Parties to assert any right or position that could have been asserted if the Settlement had never been reached or proposed to the Court.

61. Nothing stated in the Settlement Agreement or in this Order shall be deemed an admission or waiver of any kind by any of the Parties or used as evidence against, or over the objection of, any of the Parties for any purpose in this Action, the Related Actions, or in any other action or proceeding of any kind.

62. The Court hereby dismisses the Action, with prejudice, without costs to any party, except as expressly provided for in the Settlement Agreement.

63. The Clerk of the Court is directed to enter this Order on the docket and enter final judgment forthwith.

64. The Court retains exclusive jurisdiction to consider all further matters arising out of or connected with the Settlement Agreement.

IT IS SO ORDERED.

Dated: **6/1/2021 03:46 PM**

Robert C. Naftz

HON. ROBERT C. NAFTZ
DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the following date: 6/1/2021 4:01:17 PM, a true and correct copy of the foregoing was served electronically on the following parties or counsel via the following e-mail service addresses set forth below.

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