Filed: 01/19/2021 16:29:30
Sixth Judicial District, Bannock County
Jason Dixon, Clerk of the Court
By: Deputy Clerk - Hilgert, April

SIXTH JUDICIAL DISTRICT, STATE OF IDAHO
BANNOCK COUNTY

Kyle Nelson, Michael Lewis, and Christie Lewis, *on behalf of themselves and all others similarly situated*, Plaintiffs, v. **Idaho Central Credit Union**, Defendant.	Case No. CV03-20-00831 CV03-20-03221 **ORDER GRANTING PRELIMINARY APPROVAL AND CERTIFYING SETTLEMENT CLASS**

I. INTRODUCTION

Plaintiffs Michael Lewis, Christie Lewis, and Kyle Nelson ("Plaintiffs") brought this putative class action suit against Defendant Idaho Central Credit Union ("ICCU" or "Defendant") 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 approximately 17,831 of ICCU's customers (the "Data Breaches"). Plaintiffs alleged that ICCU violated statutory and common law by virtue of its alleged its failure to maintain adequate data security, as well as its alleged failure to timely notify Plaintiffs and the putative class of the Data Breaches. ICCU denies any wrongdoing.

The parties reached a settlement on behalf of the putative class, and now seek preliminary approval of the settlement. *See* Mot. for Prelim. Approval of Class Action Settlement and for Certification of Settlement Class ("Motion" or "Mot"). For the reasons discussed below, the Court **GRANTS** the Motion.

II. BACKGROUND

Plaintiffs Michael Lewis and Christie Lewis commenced litigation against ICCU on February 24, 2020 by filing a complaint in Fourth Judicial District of the State of Idaho on behalf of themselves and other similarly situated ICCU customers who were victims of the Data Breaches. *See* Complaint, *Christie Lewis and Michael Lewis v. Idaho Central Credit Union*, Case No. CV01-20-03733 (the "Lewis case" or "*Lewis*"). The *Lewis* Complaint brough claims for negligence, negligence *per se*, bailment, breach of implied contract, and violation of the Idaho Consumer Protection Act, I.C. § 48-601, et seq. *Id.* at 11-20. On February 26, 2020, Plaintiff Kyle Nelson commenced litigation against ICCU by filing a complaint in this Court on behalf of himself and other similarly situated ICCU customers who were victims of the Data Breaches. *See* Complaint, *Kyle Nelson v. Idaho Central Credit Union*, Case No. CV03-20-00831 (Feb. 28, 2020) (the "Nelson case" or "*Nelson*"). The *Nelson* Complaint brought claims for negligence, intrusion upon solitude / invasion of privacy, breach of express contract, breach of implied contract, negligence *per se*, and violation of the Idaho Consumer

Protection Act, I.C. § 48-601, et seq. *Id.* at 22-34.

The complaints both allege a data breach by ICCU and seek to certify a class of account holders who were injured as a direct result thereof. Specifically, the complaints allege that ICCU's inadequate security practices resulted in the compromise of PII, including financial information and Social Security Numbers ("SSNs"), of over 17,000 of ICCU's customers, including Plaintiffs and class members. *See generally id.* The breaches purportedly arose out of (1) unknown parties' unauthorized access to a third-party mortgage portal utilized by ICCU employees; and (2) unknown parties' unauthorized access to an ICCU employee's email account. *Id.* The breaches compromised some or all of the following information for each Settlement Class Member: date of birth, Social Security number, financial account information, tax identification number, borrower information, liability information, assets information, employment information, and income information. *Id.*

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.

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 preliminary approval. *Id.* On December 4, 2020, the Parties filed the Motion for Preliminary Approval now before the Court. On January 19, 2021, this Court held a hearing on the Parties' Motion.

III. SETTLEMENT TERMS

A. The Proposed Class

The Settlement Agreement defines the proposed settlement class as: *All individuals who were mailed a notification by or on behalf of ICCU on or about February 7, 2020 regarding the Data Breach. See* Settlement Agreement, Zavareei Decl. Ex. 1 ("SA") ¶ 36. ICCU estimates that the Settlement Class consists of approximately 17,831 of ICCU's customers.

B. Benefits to the Settlement Class

1. Cash Payments to Settlement Class Members

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. After payment of costs of administration and notice and any fees, expenses, taxes, and service awards authorized by the Court, the Net Settlement Fund will be distributed to Class Members submitting a valid and timely Claim Form, with any remaining funds to be distributed via residual cash payment to any Class Member who does not request exclusion from the Settlement by the opt-out deadline. *Id.* ¶¶ 6, 21, 49-52.

Each Settlement Class Member may submit a Claim for reimbursement for Out-of-Pocket Losses. *Id.* ¶¶ 49-52. Claims will be subject to review for completeness and plausibility by a Settlement Administrator. *Id.* ¶ 49. In the event the Settlement Administrator determines a Claim is deficient in whole or part, the Settlement Administrator shall provide the Settlement Class Member with an opportunity to cure the deficiencies. *Id.* ¶ 52. Settlement Class Members may submit a Claim for "Ordinary Losses," capped at $1,000 per person, and/or "Extraordinary Losses," capped at $20,000 per person. *Id.* ¶ 49.

"Ordinary Losses" include (1) "Out of pocket expenses incurred as a result of the ICCU Data Breach, including bank fees, long distance phone charges, cell phone charges (only if charged by the minute), data charges (only if charged based on the amount of data used), postage, or gasoline for local travel"; (2) "Fees for additional credit reports, credit monitoring, or other identity

theft insurance products purchased between February 1, 2020 and the date of the Preliminary Approval Order"; and (3) "Up to 40 hours of Attested Time, at $25/hour, if at least one full hour was spent dealing with the Data Breach."[1] *Id.* "For Attested Time, a sworn attestation detailing how the time was spent shall constitute 'supporting documentation.'." *Id.*

"Extraordinary Losses" are "losses arising from financial fraud or identity theft if:" (1) "The loss is an actual, documented, and unreimbursed monetary loss"; (2) "The loss is fairly traceable to the Data Breach"; (3) "The loss is not already covered by one or more of the normal reimbursement categories"; and (4) "The settlement class member made reasonable efforts to avoid, or seek reimbursement for, the loss." *Id.*

Cash payments will be made by the Settlement Administrator and will either (1) be mailed by check (a "Settlement Check"); or (2) sent electronically by PayPal or Venmo. *Id.* ¶ 55 & Ex. 2 (Claim Form). From the monies remaining in the Settlement Fund after all payments are made for (i) Notice and Administrative Expenses; (ii) Taxes and Tax-Related Expenses; (iii) Service Award Payments approved by the Court; (iv) Fee Award and Costs; and (v) reimbursement for Out-of-Pocket Losses and Attested Time ("Remaining Funds"), an additional cash payment will be paid to each Participating Settlement Class Member—i.e., a Settlement Class Member who does not submit a valid Request for Exclusion prior to the Opt-Out deadline—on a *pro rata* basis, subject to an individual aggregate cap of $20,000 for total payments under the Settlement. *Id.* ¶ 54.

If there is any amount in the Settlement Fund following the secondary distribution (i.e., if Settlement Checks are not cashed within the provided time limit) then upon approval by this Court, pursuant to the *cy pres* doctrine, the remaining amount shall be paid to the Non-Profit Residual Recipient, The Public Justice Foundation. *Id.* ¶ 59. The Public Justice Foundation's mission is aligned with the objectives of the litigation, addresses the objectives of the underlying law, and targets the class members. *See Nachshin v. AOL LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011).

[1] Attested Time "means time spent remedying issues related to the Data Breach." Zavareei Decl. Ex. 1 ¶ 4.

2. Free Credit Monitoring Services

In addition to the cash payments, ICCU shall offer to 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. These services will include daily credit monitoring of the Settlement Class Member's credit file at Experian; a $1 million identity theft insurance policy; identity restoration services; and other additional features ("Credit Monitoring and Identity Restoration Services"). Class Members who already accepted credit monitoring services offered by ICCU in the initial aftermath of the Data Breaches will automatically receive an extra twelve (12) month extension of credit monitoring. For all other Class Members, such Credit Monitoring and Identity Restoration Services shall be provided on an opt-in basis using the same Claims Form that is submitted for Out-of-Pocket Losses and Attested Time. *See Id.* ¶ 53, Exhibit 2 (Claims Form). The cost of Credit Monitoring Services will be paid by ICCU separate and apart from the Settlement Fund. *Id.* ¶ 53.

3. Equitable Relief: Data Security Improvements

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.

C. Class Member Release

In exchange for the benefits conferred by the Settlement, all Settlement Class Members will

be deemed to have released the Released Parties[2] from all claims and causes of 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.

D. Attorneys' Fees and Costs and Service Award

The Settlement Agreement contemplates Class Counsel petitioning the Court for attorneys' fees, as well as documented, customary costs incurred by Class Counsel. SA ¶¶ 15, 20, 88. It further provides that Class Counsel may seek attorneys' fees and expenses in an amount not to exceed one third of the total settlement value. *Id.* ¶ 88. Any approved attorneys' fees and Litigation Costs and Expenses will be paid from the Settlement Fund prior to distribution to the Settlement Class Members. *Id.* ¶ 63. The Settlement Agreement also provides that Class Counsel may also petition the Court for up to $5,000 for each of Christie Lewis, Michael Lewis, and Kyle Nelson as a Service Award as compensation for their time and effort in the Action. *Id.* ¶ 86. Any approved awards will be deducted from the Settlement Fund prior to distribution to the Settlement Class Members. *Id.* ¶ 63. The Parties represent that the Attorneys' Fees and Expenses and Service Award amounts were not negotiated until after other material settlement terms were agreed upon.

E. Settlement Administrator and Administration Costs

The Parties have proposed Angeion Group, a leading class action administration firm in the United States, to serve as the Settlement Administrator. *See* SA ¶ 35. *See also generally* Declaration of Steven Weisbrot On Settlement Notice Program ("Weisbrot Decl."). All Notice and Administrative Costs shall be paid from the Settlement Fund. *See* SA ¶¶ 25, 47, 63. The Settlement Administrator will oversee the provision of notice to the Class Members and administration of the Settlement Fund. *Id.* ¶¶ 69-70.

F. Proposed Plan of Notice

[2] 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 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 Parties' propose notice via U.S. Mail, electronic mail, and via a settlement website. ICCU has committed to providing the Settlement Administrator with the Settlement Class List within two (2) business days of the Preliminary Approval Order. *See* Zavareei Decl. ¶ 28. Within twenty-eight (28) days after receipt of the Settlement Class List, unless such other time is specified in the Preliminary Approval Order, the Settlement Administrator shall disseminate Notice to members of the Settlement Class. SA ¶¶ 24, 65 (the "Notice Deadline"). The Settlement Agreement states that Notice shall be provided to Settlement Class Members in each of the following ways:

- **Email Notice.** As soon as practicable, but starting no later than 14 days from receipt of the Settlement Class List, the Settlement Administrator shall send the Email Notice to all Settlement Class Members for whom ICCU provided an email address. It will be conclusively presumed that the intended recipients received the Email Notice if the Settlement Administrator did not receive a hard bounce-back message.
- **Postcard Notice.** As soon as practicable, but starting no later than 14 days from receipt of the Settlement Class List, the Settlement Administrator shall disseminate the Postcard Notice via First Class Mail to all Settlement Class Members. Before mailing the Postcard Notice, the Settlement Administrator will update the addresses provided by ICCU with the National Change of Address database. It shall be conclusively presumed that the intended recipients received the Postcard Notice if the mailed Postcard Notices have not been returned to the Settlement Administrator as undeliverable within fifteen (15) days of mailing.
- **Settlement Website.** Prior to the date on which the Settlement Administrator initiates the Notice, the Settlement Administrator shall establish the Settlement Website at the following URL: www.ICCUDataBreachSettlement.com. The Settlement Website shall remain accessible until at least sixty (60) days after all Settlement Payments have been distributed. The Settlement Website shall contain: the Settlement Agreement; contact information for Class Counsel and ICCU's

> Counsel; contact information for the Settlement Administrator; the publicly filed motion for preliminary approval, motion for final approval and for attorneys' fees and expenses (when they become available); the signed Preliminary Approval Order; and a downloadable and online version of the Claim Form and Longform Notice.

Id. ¶ 66.

The proposed class notice was submitted with the Motion as attachments to the Settlement Agreement. *See* SA, Ex. A ("Postcard Notice"), Ex. B ("Email Notice"), and Ex. C ("Long Form Notice") (collectively, "Notice"). The Notice informs the Settlement Class Members of who is included in the Settlement Class, the material terms of the Benefits to the Settlement Class, described above, the order of distribution of the Settlement Fund (i.e., benefits are paid after the distribution of attorneys' fees, costs, and service awards) and that they must file a claim to receive a benefit. *See* SA, Exs. A-C.

The Postcard Notice and Email Notice also explain that any Settlement Class Member may request exclusion from the Settlement by a date to be specified in the Notice. *See* SA, Exs. A & B. The Settlement Agreement contemplates that this date will be sixty days after the Notice Deadline—i.e., ninety days after the entry of this Preliminary Approval Order. *See* SA ¶ 67. The Postcard Notice and Email Notice also explain that any Settlement Class Member may object to the Settlement by a date to be specified in the Notice. *See* SA, Exs. A & B. The Settlement Agreement contemplates that this date will be thirty days after the Notice Deadline—i.e., sixty days after the entry of this Preliminary Approval Order. *See* SA ¶ 68. The Postcard Notice and Email Notice also explain that Settlement Class Members can visit the settlement website or call a toll-free number to obtain a more detailed notice (the Long Form Notice) that explains how to exclude themselves from or object to the Settlement. *See* SA, Exs. A & B.

The Long Form Notice explains that any request for exclusion must be postmarked on or before the deadline set by the Court and specified in the Class Notice, which shall be no less than sixty calendar days after the Notice Deadline. *See* SA, Ex. C. The Request for Exclusion must include the name of the proceeding, the individual's full name, current address, personal signature,

and the words "Request for Exclusion" or a comparable statement that the individual does not wish to participate in the Settlement at the top of the communication. *Id.* (Question 18). Any person who receives the Class Notice and does not submit a request to opt out in accordance with the deadlines and other requirements will be bound by the Settlement absent a court order to the contrary. *Id.* Likewise, the Long Form Notice explains that Class Members who wish to object to the Settlement must send a written Objection to the Settlement Administrator. *Id.* (Question 19). Objections must be postmarked on or before the deadline set by the Court and specified in the Class Notice, which shall be no less than 30 calendar days after the Notice Deadline. *Id.* The written objection must include (i) the name of the proceedings; (ii) the Settlement Class Member's full name, current mailing address, and telephone number; (iii) a statement of the specific grounds for the objection, as well as any documents supporting the objection; (iv) a statement as to whether the objection applies only to the objector, to a specific subset of the class, or to the entire class; (v) the identity of any attorneys representing the objector; (vi) a statement regarding whether the Settlement Class Member (or his/her attorney) intends to appear at the Final Approval Hearing; and (vii) the signature of the Settlement Class Member or the Settlement Class Member's attorney. *Id.* The Long Form Notice will also specify the date and time of the Final Approval hearing. *Id.*

IV. ANALYSIS

The Court must first address whether the class may be provisionally certified for settlement purposes only, then evaluate the fairness, adequacy, and reasonableness of the proposed settlement, and finally review the adequacy of the proposed Notice.

A. Legal Standard for Preliminary Approval

Idaho Rule of Civil Procedure 77 requires court approval of a class action settlement. I.R.C.P. 77. Idaho Courts consider at preliminary approval whether a proposed settlement "is sufficiently fair, reasonable and adequate to the Settlement Class certified." *Ricky G. & Logan D. Robinson Hill-View Mobile Home Parks et al. v. City of Pocatello*, Case No. CV-2015-1250(OC) (Dist. Ct., Bannock Cty.) (Order Granting Preliminary Approval) (July 08, 2019).

As there is not significant case law addressing the standards for granting preliminary

approval under Idaho Rule of Civil Procedure 77, the Court refers to the standards provided by Federal Rule of Civil Procedure 23 as persuasive authority. *See O'Boskey v. First Fed. Sav. & Loan Ass'n of Boise*, 112 Idaho 1002, 1005 (1987) ("As the Idaho rules on class actions are taken from the federal rules, federal authority is relevant.").

"[U]nder Rule 23(e)(1), the issue at preliminary approval turns on whether the Court 'will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.'" *Reyes v. Experian Info. Sols., Inc.*, No. SACV1600563AGAFMX, 2020 WL 466638, at *1 (C.D. Cal. Jan. 27, 2020). The Rule 23(e)(2) factors speak to whether "the settlement is 'fair, reasonable, and adequate.'" *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 966 (N.D. Cal. 2019) (quoting Fed. R. Civ. P. 23(e)(2)). Those factors include:

(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)(2).

Before the 2018 revisions to Rule 23(e), the Ninth Circuit had developed its own list of factors to be considered when approving a settlement. *See e.g., In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 964 (9th Cir. 2011) (citing *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). These factors include: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed

and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement. *See Churchill Vill.,* 361 F.3d at 575; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *K.W. v. Armstrong*, 180 F. Supp. 3d 703, 723 (D. Idaho 2016). The Court will address the factors relevant to both standards, many of which overlap.

B. Class Certification

The ability to certify a Settlement Class is a prerequisite to preliminary settlement approval. Certification is appropriate only if each of the four requirements of Idaho Rule of Civil Procedure 77(a) and at least one of the four requirements of Rule77(b) are met. Under Rule 77(a), Plaintiffs must show that "(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." I.R.C.P. 77(a).

Next, the proposed class must meet at least one of the requirements of Rule 77(b), specifically here, Rule 77(b)(3): (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for . . . fairly and efficiently adjudicating the controversy." *Id.* 77(b)(3). After careful consideration of the Parties' submissions, the Court finds that the requirements of Rule 77(a) and 77(b)(3) are met here.

1. The Settlement Class Satisfies the Numerosity Requirement.

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).

2. The Settlement Class Satisfies the Commonality and Predominance Requirements.

The Settlement Class also satisfies the 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.

3. The Settlement Class Satisfies the Typicality Requirement.

Typicality is satisfied if "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).

4. The Settlement Class 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.

5. The Settlement Class Satisfies the Superiority Requirement.

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.").

Accordingly, the Court finds that the relevant factors of Rule 77 are satisfied and that the Settlement Class warrants preliminary approval.

C. Analysis of the Preliminary Approval Factors

Each of the relevant factors weighs in favor of Preliminary Approval of this Settlement. First, the Settlement was reached in the absence of collusion and is the result of good-faith, informed, arms' length negotiation between competent counsel, in conjunction with an experienced

mediator, Hon. Jay Gandhi of JAMS. Second, the Settlement is fair, adequate, and reasonable.

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Plaintiffs believe their claims are meritorious and they would prevail if this case proceeded to trial. ICCU argues that Plaintiffs' claims are unfounded, denies any liability, and has indicated a willingness to litigate vigorously. Plaintiffs face the challenge of a motion to dismiss, motion for summary judgment, and opposition to a motion for class certification, as well as the risk of a loss at trial. The only thing that is certain is that if this case continues in litigation, the Class Members will need to wait much longer before receiving any recovery. In the Court's judgment, the benefits of settling outweigh the risks and uncertainties of continued litigation, as well as the attendant time and expenses associated with litigation, discovery, and possible appellate review.

1. The Class Representatives and Class Counsel Have Adequately Represented The Proposed Class.

Plaintiffs represent they assisted Class Counsel by providing documents, reviewing the pleadings, and reviewing the Settlement Agreement. Plaintiffs further represent they do not have any conflicts with the proposed class and have adequately represented them in the litigation. The Court accepts these representations and find they support a finding of adequacy.

The Court further finds that Class Counsel has adequately represented the class. Class Counsel is particularly experienced in the litigation, certification, trial, and settlement of class action cases. *See* Zavarei Decl. ¶¶ 17-22. Class Counsel have represented they investigated the potential claims against ICCU, interviewed potential plaintiffs, gathered information about the Data Breaches and their potential impact on consumers, and expended resources researching and developing the legal claims at issue in this litigation. *Id.* ¶¶ 3, 24. The Court is confident this preparation work, as well as Class Counsel's experience with class actions and other data breach matters, means that Class Counsel adequately represented the interests of the class in reaching a settlement with ICCU. This factor weighs in favor of granting preliminary approval.

2. The Settlement is The Product of Good-faith, Informed, Arms-length Negotiations.

The Parties represent that the Settlement Agreement is the result of intensive, arms' length negotiation between experienced attorneys who are familiar with class action litigation and the legal and factual issues in this Action. 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 an arms'-length, non-collusive, negotiated resolution." (internal citation and quotation marks omitted)).

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. 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. Zavareei Decl. ¶ 4. The Parties also exchanged lengthy mediation briefs wherein they discussed the strengths and weaknesses of their respective claims and defenses. *Id.* This parties represent that 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.* ¶ 5. The Parties then continued their settlement discussions as they finalized the terms of the Settlement Agreement. *Id.* ¶ 6. The Court finds that the Parties' vigorous negotiation of the claims in this action evidences an absence of collusion and the presence of fairness and good faith. This factor weighs in favor of granting preliminary approval.

3. The Settlement is Fair, Adequate, and Reasonable.

For the reasons set forth below, the Court finds the Proposed Settlement falls within the "range of reason" such that the Court should preliminarily approve the Settlement, order that notice be sent to the Class, and schedule a Final Approval Hearing. While the Class Members cannot react to the settlement until after notice goes out, the Court can evaluate whether the "settlement [i]s fair, reasonable, and adequate" at the preliminary approval stage. *See Russell v. Kohl's Dep't Stores, Inc.*, 755 F. App'x 605, 608 (9th Cir. 2018) (affirming district court's review of *Hanlon* factors in preliminary approval order); *K.W.*, 180 F. Supp. 3d at 723 (applying *Hanlon* factors).

First, the Settlement is fair, adequate, and reasonable in light of the strengths and risks of Plaintiffs' case. While they represent they are confident in the strength of their claims, Plaintiffs and Class Counsel have conceded that there are risks inherent in litigation of a complex data breach case. *See* Zavareei Decl. ¶¶ 11-13. Should the case proceed in litigation, Plaintiffs could see their claims dismissed or narrowed at the motion to dismiss stage, summary judgment, at trial, or on a subsequent appeal. They also face the risk that class certification could be denied. Each risk, by itself, could impede the successful prosecution of these claims at trial and in an eventual appeal—which would result in a *zero* recovery to the class. *Id.* And even if Plaintiffs prevailed at trial, any recovery would likely be delayed for years by an appeal. *Id.* In contrast, the Settlement provides immediate and substantial benefits to over 17,000 Class Members. *Id.* ¶¶ 10, 14.

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 preliminary approval.

Second, the risks, expense, complexity, and likely duration of further litigation support preliminary approval of the Settlement. This case is settling in its early stages; if the Settlement is

not approved, the parties will likely need to litigate through multiple dispositive motions and a motion for class certification. That process would likely take years to resolve and involve expensive expert discovery. Yet there is no guarantee that lengthy litigation and expensive discovery would lead to greater benefits for the Class Members. *Id.* Instead, there would be multiple points at which the Class's claims could be narrowed or dismissed. "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 preliminary approval.

Third, the risk of maintaining class action status through trial supports preliminary approval of the Settlement. The class has not yet been certified, and the parties represent that ICCU will oppose certification if the case proceeds. Thus, Plaintiffs "necessarily risk[s] 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."). This factor favors preliminary approval.

Fourth, the Court finds that the Settlement Fund amount supports preliminary approval. "In assessing the consideration obtained by the class members in a class action settlement, it is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Norton v. Maximus, Inc.*, No. CV 1:14-0030 WBS, 2017 WL 1424636, at *5 (D. Idaho Apr. 17, 2017) (quotation marks and citation omitted). The Settlement Fund of $1,550,000 will allow for reimbursement of up to $1,000 in out-of-pocket expenses, lost time of up to 40 hours at $25/hour, up to $20,000 in documented extraordinary losses, and a residual cash payment. Moreover, the Settlement provides for an additional year of credit monitoring paid for

separately by ICCU, and assurances from ICCU that it has implemented changes to its data security practices and procedures. The Court thus agrees with the Parties that the settlement is a strong result for the Class and in line with other settlements in cases involving data breaches of similar scope. *See, e.g.*, 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 attested out-of-pocket expenses and lost time up to 3 hours at $15/hour; up to $6,000 in document expenses; credit monitoring; and business practice changes); Settlement Agreement, *In re: Citrix Data Breach Litigation*, No. 0:19-cv-61350-RKA (S.D. Fla.) ($2,275,000 common fund involving financial account information and Social Security Numbers and a putative class of 24,316 consumers); Settlement Agreement, *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, No. 1:16-cv-03025-JKB (D. Md.) ($3,250,000 settlement where names and Social Security Numbers of 61,000 class members were exposed). Because the settlement amount here is similar to other settlements reached and approved in similar cases (when taking into account the size of the class), this factor reflects that the Settlement is fair. *See Calderon v. Wolf Firm*, No. SACV 16-1622-JLS(KESx), 2018 WL 6843723, at *7-8 (C.D. Cal. Mar. 13, 2018) (comparing class settlement with other settlements in similar cases). In light of the difficulties and expenses Class Members would face to pursue individual claims, and the likelihood that they might be unaware of their claims, this Settlement Amount is appropriate. *See id.*

Fifth, the Court find that the allocation of the Settlement is fair and reasonable, and the manner of administrating relief will be effective. Payments will be made based on documented out-of-pocket losses and attested lost time, with a pro-rata distribution of remaining funds to all Participating Settlement Class Members. SA ¶¶ 49, 54. According to this allocation, Class Members are treated fairly as to one another because they are all offered compensation according to the same standard. *See* Fed. R. Civ. P. 23(e)(2)(D). Moreover, the proposed method of distributing relief is effective. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). The Parties have agreed upon an experienced Settlement Administrator to administer the settlement. Class Members need only submit a simple claims form. And the Settlement Administrator will mail checks to the Class Members or will provide payment

directly through the electronic payment platforms PayPal or Venmo. The court finds that this factor weighs in favor of preliminary approval.

Sixth, the Parties represent that Class Counsel will seek fair and reasonable attorneys' fees and reimbursement of reasonable litigation expenses. The Settlement Agreement authorizes Class Counsel to seek an award of up to one third of the total settlement value, and authorizes Plaintiffs to each seek a service award of up to $5,000. SA ¶¶ 86-88. These amounts are well within the range of approval for class action settlements that provide significant benefits to the class. *See, e.g.*, *Hickcox-Huffman v. U.S. Airways, Inc.*, No. 10-cv-05193, 2019 WL 1571877, at *2 (N.D. Cal. April 11, 2019) (approving service award of $10,000); *Noroma v. Home Point Fin. Corp.*, No. 17-cv-07205, 2019 WL 1589980, at *4 (N.D. Cal. April 12, 2019) (approving service award of $10,000); *see also Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir. 2000) (upward departure from 25% acceptable); *In re Heritage Bond Litig.*, No. 02-ML-1475-DT(RCX), 2005 WL 1594389, at *9 (C.D. Cal. June 10, 2005) (approving attorneys' fees of one-third of the settlement fund); *Norton*, 2017 WL 1424636, at *7 (approving attorneys' fees award "constitut[ing] approximately 37% of the total money paid by defendant in this settlement"). The court finds that this factor weighs in favor of preliminary approval.

Seventh, the Court finds that early resolution of the case, before both sides spend significant sums on litigation costs, is in the best interest of the class. The Parties represent that prior to filing, Class Counsel engaged in investigation of the ICCU Data Breaches and the potential claims that may arise therefrom. 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. "[T]he efficiency with which the Parties were able to reach an agreement need not prevent this Court from granting preliminary approval." *Hillman v. Lexicon Consulting, Inc.*, No. EDCV 16-01186-VAP(SPx), 2017 WL 10433869, at *8 (C.D. Cal. April 27, 2017). The Court finds this factors weighs in favor of preliminary approval.

Eighth, Class Counsel represent that their view is that this Settlement is an outstanding recovery for the Class. As noted above, Class Counsel is experienced in class action litigation,

including cases concerning data breaches and consumer privacy. 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 preliminary approval.

Ninth, there is no government participant and, because the Court has not yet approved the notice, the Class has not had an opportunity to react, so these factors are neutral. *See Norton*, 2017 WL 1424636, at *6.

In total, the Court finds that the Settlement Agreement will provide a fair and reasonable recovery for the Class Members, all of which militates towards preliminary approval.

G. The Proposed Notice Plan Will Be Approved.

1. The Proposed Notice Plan is Reasonable and Warrants Preliminary Approval.

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).

The Court finds that the Proposed Notice here is tailored to this Class and designed to ensure broad and effective reach to it. Notice of the Settlement is to be provided as follows: ICCU will provide class members' physical addresses and email addresses (where available) to the Settlement Administrator, which will run those addresses through the National Change of Address database, then send the Postcard Notice via first class mail to all Settlement Class Members. SA ¶¶

65-66. Concurrently, the Settlement Administrator will distribute Email Notice to all Settlement Class Members for whom ICCU provided an email address. *Id.* ¶ 66. The Settlement Administrator will run a skip trace for Postcard Notices returned as undeliverable and will resend the notices to an updated address. *See* Weisbrot Decl. ¶ 15. The Notice will summarize the settlement, and direct class members to a settlement website, established by the Settlement Administrator. *See* SA, Exs. A & B. The settlement website will contain information about the settlement, the Claim Form, a form to opt out, and information on how to object to the settlement. *See* SA ¶ 41; Weisbrot Decl. ¶ 20. Additionally, the settlement website will contain a toll-free number that Class Members may call to request additional information or documents. Weisbrot Decl. ¶ 21. Finally, it will make available for download the operative complaint, the Settlement Agreement, motions and memoranda seeking approval of the Settlement Agreement, and any orders related to the Settlement Agreement. *Id.* ¶ 20.

The Parties represent that the operative notice plan is the best notice practicable and is reasonably designed to reach the settlement class members. The Court agrees. When available, direct mail notice is generally considered the "best notice practicable." *See Simpao v. Gov't of Guam,* 369 Fed. Appx. 837, 838-39 (9th Cir. 2010) (holding potential class members received "best notice practicable under the circumstances" when they received direct mail notice to their last known addresses). Here, class members will receive direct mail notice to their last known mailing address. Contact information will initially be provided from ICCU, which, as a financial institution regularly communicating with class members, is highly likely to have the most accurate contact information. When combined with the Email Notice, as well as a process to confirm addresses through the National Change of Address Database before sending notice and subsequent skip tracing in the unlikely instance that any notice is returned as undeliverable, the notice program should cause nearly every class member to receive direct mail notice at their actual addresses. And in addition to direct notice, there will also be a publicly available website that will allow class members to view all information regarding their rights under the Settlement. This design will bring awareness to as many class members as practicable and should be approved.

Moreover, the substance of the proposed Notice will fully apprise class members of their rights. Under Rule 77(c)(2)(B), notice to class members "must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney" if desired, (v) that class members may request exclusion; (vi) that the judgment will include and bind class members not excluded; and (vii) "the time and manner for requesting exclusion." I.R.C.P. 77(c)(2)(B). The Notice contains all of this critical information required to apprise Class Members of their rights under the settlement, directs them to the settlement website, where they can obtain more detailed information, and provides a toll-free number for Class Members to call with questions. This approach to notice is adequate. *See e.g. Sarabri v. Weltman, Weinberg & Reis Co., L.P.A,* No. 10cv1777 AJB (NLS), 2012 WL 3809123, at *2 (S.D. Cal. Sept. 4, 2012) (approving mailed notice where notice would include the settlement website with a full settlement details and the claim administrator's toll free number); *Knutson v. Schwan's Home Serv., Inc.,* No. 3:12-cv-00964-GPC-DHB, 2014 WL 3519064, at *5 (S.D. Cal. 2014) (same). This information undoubtedly provides "sufficient detail" to allow class members with adverse viewpoints to conduct further investigation and "come forward to be heard." *Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012) (holding the sufficient detail standard "does not require detailed analysis of the statutes or causes of action forming the basis for the plaintiff class's claims"). Accordingly, this notice program will fully apprise Class Members of their rights under Rule 77 and the court will approve it.

For the reasons set forth above, the Court **GRANTS** Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and for Certification of Settlement Class. It is hereby **ORDERED** that:

1. The Settlement Class, as defined in paragraph 36 of the Settlement Agreement, is CERTIFIED as a class for the purposes of settlement.
2. The Notice Plan as described herein is APPROVED. ICCU SHALL provide to the Settlement Administrator a complete Settlement Class List no later than two (2) business

days following entry of this Preliminary Approval Order. The Settlement Administrator SHALL ensure distribution of all Email and Postcard Notices to potential Settlement Class Members within thirty (30) days following entry of this Preliminary Approval Order.

3. Plaintiffs Michael Lewis, Christie Lewis, and Kyle Nelson are appointed as Class Representatives for the Settlement Class.

4. Benjamin Schwartzman of Andersen Schwartzman PLLC; Hassan Zavareei of Tycko & Zavareei LLP; Gary M. Klinger of Mason Lietz & Klinger LLP; and Brandon Wise of Peiffer Wolf Carr & Kane, APLC are appointed as Class Counsel for the Settlement Class.

5. The Final Approval Hearing shall be held on June 1, 2021 at 2:30 p.m. at the 6th Judicial District Court, 624 E. Center, Room 303, Pocatello, Idaho 83201. Zoom Meeting ID: 918 2013 0796 Passcode: 645242

IT IS SO ORDERED.

Dated: January 19, 2021.

Robert C. Naftz

HON. ROBERT C. NAFTZ
DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the following date: 1/19/2021 4:29:41 PM, a true and correct copy of the foregoing was served electronically on the following parties or counsel via Idaho iCourt E-File system at the service addresses set forth below.

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