IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN CHACON and LEONARD BRADLEY, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NEBRASKA MEDICINE,

Defendant.

CASE NO. 8:21-cv-00070-RFR-CRZ

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiffs John Chacon and Leonard Bradley ("Plaintiffs") submit this Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement.

I. INTRODUCTION

This case arises from a data breach that Plaintiffs allege compromised their private and protected health information, and the private and protected health information of the putative Class.

II. CASE SUMMARY

a. The Data Breach

Defendant Nebraska Medicine ("Nebraska Medicine" or "Defendant") is a comprehensive health network in the Omaha, Nebraska region, with two major hospitals, more than 1,000 doctors and 40 clinics in the Omaha area. *See* Decl. of David K. Lietz ¶ 9.a, attached hereto as **Exhibit 1** ("Lietz Decl."). Nebraska Medicine advertises that it is the region's only 24/7 trauma center providing comprehensive care for adults and children, a regional leader in cardiovascular and neurosciences, and that it has an international reputation in oncology, transplant, and biocontainment. Lietz Decl. ¶ 9.b. In the ordinary course of receiving treatment and healthcare services from Nebraska Medicine, patients are required to provide Defendant with sensitive, personal and private information such as: name, address, phone number, and mailing address; date of birth; demographic information; information related to medical history; insurance information and coverage; information concerning an individual's doctor, nurse, or other medical providers; photo identification; employer information; and other information that may be deemed necessary to provide care. *Id.* ¶ 9.c. Nebraska Medicine publicly recognizes and affirms its duties and responsibilities to keep its patients' personal information private and confidential. *Id.* ¶ 9.d.

Plaintiffs allege that between August 27, 2020 and September 20, 2020, Nebraska Medicine experienced a targeted cybersecurity incident where cyberthieves had unauthorized access to Nebraska Medicine's network for approximately twenty-four (24) days (the "Data Incident"). *Id.* ¶ 9.e. Nebraska Medicine hired forensic experts to perform an investigation into the full nature and scope of the cyberattack. *Id.* ¶ 9.e. Plaintiffs allege that investigators found that cyber-criminals had been able to access patient data that included names, addresses, dates of birth, health insurance information, medical record numbers, and/or clinical information (including physician notes, laboratory results, imaging, diagnosis information, treatment information, and/or prescription information) and Social Security numbers. *Id.*

As a result of the discovery of the Data Incident, notification was mailed to approximately 125,902 individuals that their personally identifiable information ("PII") may have been impacted. *Id.* ¶ 10. Of those approximately 125,902 individuals, approximately 13,497 individuals were mailed notification indicating that their Social Security numbers and/or driver's license numbers may have been potentially accessed. *Id.*

Subsequently, this lawsuit was filed asserting claims against Nebraska Medicine relating to the Data Incident.

b. Plaintiffs' Complaint

Plaintiffs filed their Complaint in this Court on February 24, 2020. They allege six causes of action: (1) Negligence; (2) Invasion of Privacy by Trespass or Intrusion; (3) Breach of Implied Contract; (4) Breach of Fiduciary Duty; (5) Violation of Nebraska Consumer Protection Act; and (6) Violation of Nebraska Uniform Deceptive Trade Practices Act. Lietz Decl. ¶ 12. Plaintiffs sought equitable relief enjoining Nebraska Medicine from engaging in the wrongful conduct complained of and compelling Nebraska Medicine to utilize appropriate methods and policies with

respect to consumer data collection, storage, and safety. *Id.* ¶ 13. Plaintiffs further sought an order requiring Defendant to provide credit monitoring services to themselves and the rest of the Class. *Id.* ¶ 14. Finally, Plaintiffs sought an award of actual, compensatory, and statutory damages as well as attorneys' fees and costs, and any such further relief as may be deemed just and proper. *Id.* ¶ 15.

c. History of Negotiations

From approximately March to May 2020, Plaintiffs and Defendant, through their respective counsel, engaged in arm's length negotiations on behalf of the Settlement Class. Lietz Decl. ¶ 17. Counsel for Plaintiffs brought extensive experience in hospital data breach class actions to the table, which, along with their internal investigation and informal discovery produced by Nebraska Medicine, allowed proposed Class Counsel to effectively negotiate Settlement terms that are fair, adequate and reasonable. *Id.* ¶ 18. After extensive negotiations and an informal exchange of relevant information, in late March 2021, the Parties reached an Agreement on the material terms of the Settlement. *Id.* ¶ 19.

On March 29, 2021, the Parties filed a Joint Notice of Settlement and Request to Set Deadline to File Motion for Preliminary Approval of Class Action Settlement. *Id.* ¶ 20. The Court approved the Parties' Motion and set May 25, 2021 as the deadline by which the Preliminary Approval Motion was required to be filed. *Id.* ¶ 21. Over the following weeks, the Parties diligently negotiated final terms, drafted, and finalized the Settlement Agreement along with the corresponding exhibits. *Id.* ¶ 22. The Settlement Agreement was finalized by the Parties in late-May 2021. *Id*. at ¶ 23, Ex. 1 ("Agr.").

III. SUMMARY OF SETTLEMENT

a. Settlement Benefits

The Settlement negotiated on behalf of the Class provides for three separate forms of relief: (1) cash reimbursements for time and expenses; (2) credit monitoring and identity theft restoration services; and (3) equitable relief in the form of information security enhancements. *See generally* Settlement Agreement at Lietz Decl. Ex. 1 ("Agr."). The Settlement Agreement calls for a Settlement Class, as well as a smaller subset referred to as the Credit Monitoring Subclass:

> **Settlement Class:**
> The approximately 125,902 persons who were mailed notification that their PII was potentially impacted as a result of the Data Incident that occurred between August 27, 2020 and September 20, 2020;
>
> **Credit Monitoring Subclass:**
> The approximately 13,497 persons who were mailed notification that their Social Security and/or driver's license numbers were potentially accessed as a result of the Data Incident that occurred between August 27, 2020 and September 20, 2020.

Agr. ¶¶ 1.7, 1.25. The Settlement specifically excludes: (i) Nebraska Medicine, the Related Entities, and their officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) Judge Robert F. Rossiter and his staff and family; (iv) Magistrate Judge Cheryl R. Zwart and her staff and family; and (v) any other person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Data Incident or who pleads *nolo contendere* to any such charge. *Id.* at ¶ 1.25.

i. Expense Reimbursements.

Under the terms of the Settlement Agreement, Settlement Class Members can submit a claim for both ordinary and extraordinary expense reimbursements. Agr. ¶¶ 2.1–2.3.

Settlement Class Members can claim reimbursement for ordinary out-of-pocket expenses, up to $300 per Settlement Class Member, that were incurred as a result of the Data Incident for: (i) unreimbursed bank fees; (ii) long distance phone charges; (iii) cell phone charges (if charged by the minute); (iv) data charges (if charged based on the amount of data used); (v) postage; (vi) gasoline for local travel; and (vii) fees for credit reports, credit monitoring, or other identity theft insurance products purchased by Settlement Class Members between August 27, 2020 and the Claims Deadline. Agr. ¶ 2.1.1. Claims for ordinary expense reimbursements may also include reimbursement for up to six (6) hours of lost time spent dealing with the Data Incident (calculated at the rate of $20 per hour), but only if at least one (1) full hour was spent. Agr. ¶ 2.1.3. Settlement Class Members may receive up to three (3) hours of lost time if the Settlement Class Member (i) attests that any claimed lost time was spent related to the Data Incident; and (ii) provides a written description of how the claimed lost time was spent related to the Data Incident. *Id.* Settlement Class Members may claim up to an additional three (3) hours of lost time if the claimant submits reasonable supporting documentation of the time spent (*e.g.*, employment records showing time off work to deal with effects of the Data Incident). *Id.*

Settlement Class Members are also eligible to receive reimbursement for documented extraordinary losses, up to $3,000 per Settlement Class Member for documented monetary loss that: (i) is actual, documented, and unreimbursed; (ii) was more likely than not caused by the Data Incident; (iii) occurred between August 27, 2020 and the Claims Deadline; and (iv) is not already covered by one or more of the above-referenced reimbursed expenses. Agr. ¶ 2.1.4. Settlement Class Members must also provide documentation that he or she made reasonable efforts to avoid, or seek reimbursement for, such extraordinary losses, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance. *Id.*

Importantly, while both ordinary and extraordinary expense reimbursements are capped at an individual level, *because there is no aggregate cap there will be no pro rata reductions of the valid amounts claimed by Settlement Class Members.* Lietz Decl. ¶ 30 (emphasis added).

ii. Credit Monitoring and Identity Theft Restoration.

Additionally, Members of the Credit Monitoring Subclass will be automatically provided one (1) year of additional credit monitoring services, *without* the need to make any affirmative claim. Agr. ¶ 2.3. This one (1) year of credit monitoring is in addition to any credit monitoring previously offered by Nebraska Medicine and/or UNMC following the Data Incident. *Id.* This service is valued at a minimum of $100.00 per person.[1]

iii. Equitable and Prospective Relief.

In addition to the monetary relief and credit monitoring services provided, the Parties have also agreed that Nebraska Medicine will implement and keep in place, through December 31, 2022, specific security-related measures and enhancements. Agr. ¶ 2.4; *see also* App. A. These measures are detailed in a confidential Appendix A that the Settling Parties have agreed to file under seal with the Court. Lietz Decl. ¶ 32. Generally, Nebraska Medicine will implement and enhance password and user-identity protocols and email and user-browsing protocols. *Id.* Nebraska Medicine will also enhance and limit its remote access capabilities. *Id.* Further, Nebraska Medicine will update, strengthen, and enhance its network security and system security measures including additional endpoint, vulnerability, and firewall measures. *Id.* Nebraska Medicine will also

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

implement, update, and enhance its security operations center and conduct periodic, enhanced risk assessments. *Id.*

iv. Release.

The release in this case is tailored to the claims that have been plead or could have been plead in this case, arising out of the events and circumstances of the Data Incident. Agr. ¶ 1.22. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release claims against Defendant and Related Entities related to the Data Incident and/or the recordkeeping or data security practices in place at the time of the Data Incident. *See* Agr. ¶¶ 1.21.

b. The Notice and Claim Process

i. Notice.

The Parties agreed to use Heffler Claims Group as the Notice Specialist and Claims Administrator in this case. Lietz Decl. ¶ 35. Nebraska Medicine has agreed to pay for the cost of providing Notice and Claims Administration separate and apart from the Settlement Payments available to Settlement Class Members. Agr. ¶ 2.6.

The current and agreed upon Notice Plan requires direct Notice be provided via mail, to the last postal provided to Nebraska Medicine and/or the Released Entities by the Settlement Class Members. Agr. ¶ 3.2(d). Prior to mailing, the Claims Administrator shall run the postal addresses of Settlement Class Members through the United States Postal Service ("USPS") National Change of Address database to update any change of address on file with the USPS. *Id.* The mailing is to be completed within forty-five (45) days of entry of the Preliminary Approval Order. *Id.*

In the event that a Short Notice is returned to the Claims Administrator by the USPS because the address of the recipient is not valid, and the envelope contains a forwarding address, the Claims Administrator shall re-send the Short Notice to the forwarding address shall re-send

the Short Notice to the forwarding address within seven (7) days of receiving the returned Short Notice. *Id.* Where in subsequent to the first mailing of a Short Notice, and at least fourteen (14) days prior to the Opt-Out Date and the Objection Date, a Short Notice is returned to the Claims Administrator by the USPS because the address of the recipient is no longer valid, *i.e.*, the envelope is marked "Return to Sender" and does not contain a new forwarding address, the Claims Administrator shall perform a standard skip trace, in the manner that the Claims Administrator customarily performs skip traces, in an effort to attempt to ascertain the current address of the particular Settlement Class Member in question and, if such an address is ascertained, the Claims Administrator will re-send the Short Notice within seven (7) days of receiving such information. *Id.*

The Claims Administrator will also establish a dedicated Settlement Website and toll-free help line. The Settlement Website will be maintained and updated throughout the Claims Period, and will provide the forms of Short Notice, Long Notice, and Claim Form approved by the Court. Agr. ¶ 3.2(e); *see also* Agr. Exs. A, B, C. Class Members will be able to submit Claim Forms through the Settlement Website. *See* Agr. ¶ 1.4. The toll-free help line will be made available to provide Settlement Class Members with additional information about the Settlement, and to allow Settlement Class Members to request the Short Notice, Long Notice, and paper Claim Form, as well as this Settlement Agreement be provided to them. Agr. ¶ 3.2(f).

ii. Claims.

The timing of the Claims Process is structured to ensure that all Class Members have adequate time to review the terms of the Settlement Agreement, compile documents supporting their claim, and decide whether they would like to opt-out or object. Lietz Decl. ¶ 41. Class Members will have until ninety (90) days after the commencement of Notice to complete and

submit their Claim Form to the Claims Administrator, either by mail or online. Agr. ¶ 2.1.5. The Claim Form, attached to the Settlement Agreement at Exhibit C, is written in plain language to facilitate Settlement Class Members' ease in completing it. *See* Agr. Ex. C. Claim Forms must be verified by the Settlement Class Members with a statement that his or her claim is true and correct, to the best of his or her knowledge and belief, and is being made under penalty of perjury. Agr. ¶ 2.1.5. Notarization shall not be required. *Id.* The Settlement Class Member must however submit reasonable documentation that the out-of-pocket expenses and charges claimed were both actually incurred and plausibly arose from the Data Incident. *Id.* The Parties have agreed to a dispute resolution process that allows the Claims Administrator to request supplementation, and Class Members to accept or reject offers for reimbursement. *See* Agr. ¶¶ 2.5.3–2.5.4.

iii. Requests for Exclusion and Objections.

Settlement Class Members will have up to and including sixty (60) days following commencement of the Notice Program to exclude themselves from or object to the Settlement. Agr. ¶¶ 4.1, 5.2. Similar to the timing of the Claims Process, the timing with regard to objections and requests for exclusion is structured to give Settlement Class Members sufficient time to access and review the Settlement documents—including Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, which will be filed fourteen (14) days prior to the deadline for Settlement Class Members to object or exclude themselves from the Settlement. *See* Agr. Ex. D.

Any Settlement Class Member who wishes to exclude him/herself from the Settlement must make an individual request in writing, signed, and clearly manifesting their intent to be excluded from the Settlement. Agr. ¶ 4.1. The request must be postmarked by the Exclusion Deadline and include their name, address, telephone number, the name and number of the case, and a signature. *Id*. Any Member of the Settlement Class who elects to be excluded shall not (shall

not receive any cash benefits of and/or be bound by the terms of this Settlement Agreement. Agr. ¶ 4.2.

Any Settlement Class Member who wishes to object shall file written notice of his/her objection with the Clerk of Court, and serve it concurrently on Class Counsel. Agr. ¶ 5.1. The objection must state: (i) the objector's full name, address, telephone number, and e-mail address (if any); (ii) information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class (*e.g.*, copy of notice, copy of original notice of the Data Incident); (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection the objector believes applicable; (iv) the identity of any and all counsel representing the objector in connection with the objection; (v) a statement as to whether the objector and/or his or her counsel will appear at the Final Fairness Hearing; (vi) the objector's signature and the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation); and (vii) a list, by case name, court, and docket number, of all other cases in which the objector and/or the objector's counsel has filed an objection to any proposed class action settlement within the last three (3) years. Agr. ¶ 5.1.

c. Fees, Costs, and Service Awards

The Settlement Agreement calls for a reasonable service award to be sought for Plaintiffs in the amount of $2,000 per Plaintiff. Agr. ¶ 7.3. Nebraska Medicine has agreed not to oppose Plaintiffs' request for Service Awards. *Id.*; Lietz Decl. ¶ 54. The Service Award is meant to compensate Plaintiffs for their efforts on behalf of the Settlement Class, including maintaining contact with counsel, assisting in the investigation of the case, remaining available for consultation throughout the mediation and answering counsel's many questions. *Id*. ¶ 54.

After agreeing to the terms of the Settlement on behalf of the Class, counsel for Plaintiffs negotiated their fees and costs separate from the benefit to Class Members, in the amount of $195,000 for fees and costs combined, subject to Court approval. Lietz Decl. ¶ 55; *see also* Agr. ¶ 7.1.

Class Counsel will submit a separate Motion seeking Attorneys' Fees, Costs, and Plaintiffs' Service Awards prior to filing the Motion for Final Approval of Class Action Settlement, and prior to Settlement Class Members' deadline to exclude themselves from or object to the Settlement Agreement. Lietz Decl. ¶ 57.

IV. LEGAL AUTHORITY

Federal Courts strongly encourage settlements, particularly in class actions and other complex matters where inherent costs, delays, and risks of continued litigation might otherwise outweigh any potential benefit the individual Plaintiff—or the Class—could hope to obtain. *See Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." (quoting *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)); *see also In re Charter Commc'ns, Inc. Secs. Litig.*, No. 4:02-CV-1186 CAS, 2005 WL 4045741 (E.D. Mo. June 30, 2005); *Liddell v. Bd. of Educ. of St. Louis*, No. 4:72CV100 SNL, 1999 WL 33314210, at *4 (E.D. Mo. Mar. 12, 1999) (noting policy in favor of settlement); *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist.*, 921 F.2d 1371, 1383 (8th Cir. 1990) (same). Because cases like the one at issue here, if handled on an individual basis, would heavily tax the system, and cause large and unwarranted expenditures of both public and private resources, the proposed Settlement is the best vehicle for Settlement Class Members to receive relief in a prompt and efficient manner.

At the first, or preliminary approval stage, trial courts typically first certify the class for settlement purposes, and then consider the fairness of the settlement. *Briles v. Turban,* No. 8:15CV241, 2016 WL 4094866, at *5 (D. Neb. Aug. 1, 2016) (citing 4 *Newberg on Class Actions* § 11.26). "[T]he 'fair, reasonable, and adequate' standard is lowered, with emphasis only on whether the settlement is within the range of possible approval due to an absence of any glaring substantive or procedural deficiencies." *Schoenbaum v. E.I. Dupont De Nemours Co.*, No. 4:05CV01108 ERW, 2009 WL 4782082, at *2 (E.D. Mo. Dec. 8, 2009). "The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the "range of reasonableness" such that notice should be issued to the class." *Briles v. Turban,* 2016 WL 4094866, at *5 (citing 4 *Newberg on Class Actions* § 11.26) (internal quotations omitted). If the Court finds preliminary approval is warranted, Notice of the Settlement will be disseminated to Settlement Class Members who will have the opportunity to make a claim, object, or exclude themselves prior to the second—or final approval—stage of the Settlement.

As set forth below, the Settlement Class and Subclass proposed warrant certification for settlement purposes. Because the Settlement terms fall with the "range of reasonableness" under both the revised Rule 23 and the factors typically considered by Eight Circuit Courts, it should be preliminarily approved so that persons in the Settlement Class can be notified of the Settlement and provided an opportunity to voice approval or opposition.

V. LEGAL DISCUSSION

a. The Settlement Class Should be Preliminarily Approved

Plaintiffs here seek certification of a Settlement Class consisting of individuals who were mailed notification that their PII was potentially impacted as a result of the Data Incident. Agr. ¶ 1.7. Plaintiffs also seek certification of a subclass of those individuals who were mailed

notification that their Social Security numbers and/or driver's license numbers were potentially accessed as a result of the Data Incident. *Id.* ¶ 1.25. The *Manual for Complex Litigation (Fourth)* advises that in cases presented for both preliminary approval and class certification, the "judge should make a preliminary determination that the proposed class satisfies the criteria[.]" § 21.632.

Rule 23(a) sets out four specific prerequisites to class certification: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law and fact common to the class; (3) the claims or defenses of the class representatives must typical of the claims or defenses of the class; and (4) the representative parties must fairly and adequately protect the interests of the class. Further, under Rule 23(b)(3), the Court must find that common questions of law or fact predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Because a court evaluating certification of a class action that settled is considering certification only in the context of settlement, the court's evaluation is somewhat different than in a case that has not yet settled. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). In some ways, the court's review of certification of a settlement-only class is lessened: as no trial is anticipated in a settlement-only class case, the case management issues inherent in the ascertainable class determination need not be confronted. *See id.* Other certification issues however, such as "those designed to protect absentees by blocking unwarranted or overbroad class definitions" require heightened scrutiny in the settlement-only class context "for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Id*.

Class actions are regularly certified for settlement. In fact, similar data breach cases have been certified—on a *national* basis—including the recent record-breaking settlement in *In re Equifax. See In re Equifax, Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-2800-TWT (N.D. Ga. July 25, 2019); *see, also, e.g., In re Target Corp. Customer Data Sec. Breach Litig.*, 309 F.R.D. 482 (D. Minn. 2015); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig*., 851 F. Supp. 2d 1040 (S.D. Tex. 2012). This case should be similarly certified.

i. The Proposed Class is Sufficiently Numerous.

Numerosity requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). While there is no numerical requirement for satisfying the numerosity requirement, forty (40) class members generally satisfies the numerosity requirement. *Chorosevic v. MetLife Choices*, No. 4:05-CV-2394 CAS, 2007 WL 2159475, at *10 (E.D. Mo. July 26, 2007), *aff'd*, 600 F.3d 934 (8th Cir. 2010) (citing 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 3.5 at 247–48 (4th ed. 2002)). Here, the Parties have identified 125,902 individuals whose data was impacted by the Data Incident, 13,497 of whom whose Social Security numbers and/or driver's license numbers were potentially accessed. Lietz Decl. ¶ 25; Agr. ¶¶ 1.7, 1.25. The large number of persons in the Settlement Class and Credit Monitoring Subclass render joinder impracticable. *See, e.g., Caroline C. ex rel. Carter v. Johnson*, 174 F.R.D. 452, 463 (D. Neb. 1996) (finding a class potentially numbering up to 1,037 sufficient to satisfy the requirement for numerosity); *Simmons v. Enter. Holdings, Inc.*, No. 4:10CV00625 AGF, 2012 WL 718640 (E.D. Mo. Mar. 6, 2012) (certifying a class in excess of 200 persons sufficiently numerous to warrant certification); *Morgan v. United Parcel Serv. of Am., Inc*., 169 F.R.D. 349, 355 (E.D. Mo. 1996) (finding numerosity met for class of at least 19 putative members). As such, the numerosity requirement is easily satisfied.

ii. Questions of Law and Fact are Common to the Class.

Commonality requires Plaintiffs to demonstrate "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The threshold for meeting this prong is not high—commonality does not require that every question be common to every member of the class, but rather that the questions linking class members are substantially related to the resolution of the litigation even where the individuals are not identically situated. *White v. Nat'l Football League*, 822 F. Supp. 1389, 1403 (D. Minn. Apr. 30, 1993) (citing *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (citations and quotations omitted)).

Here, the commonality requirement is met because Plaintiffs can demonstrate numerous common issues exist. For example, whether Nebraska Medicine failed to adequately safeguard the records of Plaintiffs and other Settlement Class Members is a common class-wide question. Nebraska Medicine's data security safeguards were common across the Class, and those applied to the data of one Settlement Class Member did not differ from those safeguards applied to another.

Other specific common issues include (but are not limited to):

- Whether Nebraska Medicine unlawfully used, maintained, lost, or disclosed Plaintiffs' and Settlement Class Members' private information;
- Whether Nebraska Medicine failed to implement and maintain reasonable security procedures and practices appropriate to the nature and scope of information compromised in the Data Incident;
- Whether Nebraska Medicine's data security systems prior to and during the Data Incident complied with applicable data security laws and regulations including, *e.g.*, HIPAA; and
- Whether Nebraska Medicine's conduct rose to the level of negligence.

These common questions, and others alleged by Plaintiffs in their Complaint, are central to the causes of action brought here and can be addressed on a class-wide basis. Thus, Plaintiffs have met the commonality requirement of Rule 23.

iii. Plaintiffs' Claims and Defenses are Typical of the Class.

"Typicality under Rule 23(a)(3) means that there are 'other members of the class who have the same or similar grievances as the plaintiff.'" *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996) (quoting *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977)). "The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) (citation omitted). A plaintiff can meet the typicality requirement by showing that the claims of the representatives and members of the class both stem from a single event. *Paxton v. Union Nat'l Bank*, 688 F.2d at 561.

Here, Plaintiffs' and Settlement Class Members' claims all stem from the same event—the cybersecurity breach to Nebraska Medicine's systems that occurred between August 27, 2020 and September 20, 2020. Thus, Plaintiffs' claims are typical of the Settlement Class Members' and the typicality requirement is satisfied.

iv. Plaintiffs and their Counsel will Provide Fair and Adequate Representation for the Class.

Representative Plaintiffs must be able to provide fair and adequate representation for the Class. The focus of the adequacy requirement is whether (1) the class representatives have common interests with the members of the class, and (2) whether class representatives will vigorously prosecute the interests of the class through qualified counsel. *Paxton v. Union Nat'l Bank*, 688 F.2d at 562–63.

Here, Plaintiffs' interests are aligned with those of the Settlement Class in that they seek relief for injuries arising out of the same Data Incident. Plaintiffs' and Settlement Class Members' data was all allegedly compromised by Nebraska Medicine in the same manner. Under the terms of the Settlement Agreement, Plaintiffs and Settlement Class Members will all be eligible for reimbursement for costs and time expended in managing the personal impact that the Data Incident may have had on them. Moreover, all Credit Monitoring Subclass Members whose Social Security numbers and/or driver's license numbers were impacted will be automatically provided with credit monitoring services designed to ameliorate the potential impact of such a breach. Moreover, each Settlement Class Member's data will be more surely safeguarded in the future by the increased security protections Nebraska Medicine has agreed to put into place.

Further, counsel for Plaintiffs have decades of combined experience as vigorous class action litigators and are well suited to advocate on behalf of the Class. *See* Lietz Decl. ¶¶ 2–3, Ex. 2. Thus, the requirements of Rule 23(a) are satisfied.

v. Because Common Issues Predominate over Individualized Ones, Class Treatment is Superior.

To show that common issue predominate, Plaintiffs must demonstrate that their claims can be proven on a systematic, class-wide basis. *Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–57 (2011). This requirement "tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor,* 521 U.S. at 623.

In this case, the key predominating questions are whether Nebraska Medicine had a duty to exercise reasonable care in safeguarding, securing, and protecting the PII of Plaintiffs and the Settlement Class, and whether Nebraska Medicine breached that duty. The common questions that arise from Nebraska Medicine's conduct predominate over any individualized issues. Other courts

have recognized that the types of common issues arising from data breaches predominate over any individualized issues. *See, e.g., In re Anthem, Inc. Data Breach Litig*., 327 F.R.D. 299, 312–15 (N.D. Cal. 2018) (finding predominance was satisfied because "Plaintiffs' case for liability depend[ed], first and foremost, on whether [the defendant] used reasonable data security to protect Plaintiffs' personal information," such that "the claims rise or fall on whether [the defendant] properly secured the stolen personal information," and that these issues predominated over potential individual issues); *see also Hapka v. CareCentrix, Inc.*, No. 2:16-cv-02372-KGG, 2018 WL 1871449, at *2 (D. Kan. Feb. 15, 2018) (finding predominance was satisfied in a data breach case, stating "[t]he many common questions of fact and law that arise from the E-mail Security Incident and [Defendant's] alleged conduct predominate over any individualized issues"); *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) (finding common predominating questions included whether Home Depot failed to reasonably protect class members' personal and financial information, whether it had a legal duty to do so, and whether it failed to timely notify class members of the data breach); *In re Heartland*, 851 F. Supp. 2d at 1059 (finding predominance satisfied in data breach case despite variations in state laws at issue, concluding such variations went only to trial management, which was inapplicable for settlement class).

Additionally, because the claims are being certified for purposes of settlement, there are no issues with manageability, and resolution of thousands of claims in one action is far superior to individual lawsuits. *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

The resolution of tens of thousands of claims in one action is far superior to litigation via individual lawsuits. Class certification—and class resolution—guarantee an increase in judicial efficiency and conservation of resources over the alternative of individually litigating tens of thousands of individual data breach cases arising out of the *same* Data Incident.

The common questions of fact and law that arise from Defendant's conduct predominate over any individualized issues, a class action is the superior vehicle by which to resolve these issues, and the requirements of Rule 23(b)(3) are met. Accordingly, the Class should be certified for settlement purposes.

b. The Settlement Terms Warrant Preliminary Approval

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)." Fed. R. Civ. P. 23(e)(2)(C)(i)–(iv).

Before the 2018 revisions to Rule 23(e), The Eight Circuit had developed its own factors for consideration on final approval including consideration of: (1) the merits of the plaintiff's case weighed against the terms of the settlement, (2) the defendant's financial condition, (3) the

complexity and expense of further litigation, and (4) the amount of opposition to the settlement. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005).

The Settlement here falls with the range of possible approval in consideration of both the Rule 23 and Eight Circuit factors. As such, preliminary approval is warranted.

i. Class Representatives and Counsel have Adequately Represented the Class.

As discussed at Section V(a)(iv), *supra,* the adequacy inquiry examines whether (1) the class representatives have common interests with the members of the class, and (2) whether class representatives will vigorously prosecute the interests of the class through qualified counsel. *Paxton v. Union Nat'l Bank*, 688 F.2d at 562–63. Here, the Class Representatives, like all Class Members, have been victims of the same Data Incident, and thus have common interests with the Class. Moreover, they have ably represented the Class, maintaining contact with counsel, assisting in the investigation of the case, reviewing the material terms of the Settlement Agreement, remaining available for consultation throughout the mediation and answering counsel's many questions. Lietz Decl. ¶ 55.

Proposed Class Counsel too have vigorously pursued the interests of the Class in securing a Settlement that brings immediate benefits to Class and Subclass Members while avoiding the risks of continued litigation. In doing so, they leaned on their extensive experience in hospital data breach litigation, their detailed investigation of this particular matter, and informal discovery exchanged during the course of their negotiations. Lietz Decl. ¶ 3–11, 17–24. As such, this factor warrants preliminary approval.

ii. The Settlement is the Product of Good-Faith Arm's Length Negotiations, and is Absent of any Collusion.

Here, the Settlement was reached only after months of arm's length negotiations between counsel for the Parties. Proposed Class Counsel conducted an extensive investigation into the

merits of Plaintiffs' claims prior to filing their Complaint, and were well positioned throughout settlement negotiations to have a full understanding of the value of Plaintiffs' and Class Members' claims. *See White v. Nat'l Football League*, 836 F. Supp. 1458 (D. Minn. Aug. 19, 1993) (finding no evidence of collusion and concluding settlement was the result of arm's length negotiations); *Pollard v. Remington Arms Co.*, 320 F.R.D. 198, 220 (W.D. Mo. 2017) (finding a settlement reached after extensive investigation and discovery by class counsel was reached in good faith). As such, the Settlement was the product of good faith, non-collusive, and arm's length negotiations and should be approved.

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

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

Settlement Class Members who submit valid claims are eligible to receive up to $300 in reimbursements for ordinary incurred as a result of the Data Incident, as well as reimbursement at the rate of $20 per hour for up to six (6) hours spent addressing issues pertaining to the Data Incident. Agr. ¶ 2.1.1. Settlement Class Members can also each recover up to $3,000 in extraordinary expense reimbursements related to the Data Incident. *Id.* ¶ 2.1.4. These payments are not subject to a cap, and thus will not be subject to pro rata reductions, regardless of how many Settlement Class Members make claims. *Id.*; Lietz Decl. ¶ 30.

Moreover, members of the Credit Monitoring Subclass will automatically receive one (1) year of credit monitoring services. Agr. ¶ 2.3. Additionally, Nebraska Medicine will be implementing extensive security enhancement protocols that will guarantee that Settlement Class

Members' personal identifying information and personal health information will be better safeguarded in the future. Agr. ¶ 2.4.

Moreover, as will be discussed at length in Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, the attorneys' fees agreed to here constitute *less than 15%* of the value received *by the Credit Monitoring Subclass alone*, and not even considering the value of claims that will be made or the value of the equitable relief implemented by Nebraska Medicine as part of the Agreement. This sum is well below the 25% to 36% of percent-of benefit fees regularly approved by Eighth Circuit Courts. *Caligiuri v. Symantec Corp*., 855 F.3d 860, 865–66 (8th Cir. 2017); *see also In re Xcel Energy, Inc., Secs. Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005) (collecting cases); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (awarding 36% of a common fund of $3.5 million); *West v. PSS World Med., Inc.*, No. 4:13-cv-574, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014) (approving attorneys' fees of 33%); *Harris v. Republic Airlines, Inc.*, No. 4-88-1076, 1991 WL 238992, at *2 (D. Minn. Nov. 12, 1991) (awarding a sum slightly in excess of 30% of the common benefit).

The value achieved through the Settlement Agreement is guaranteed, where chances of prevailing on the merits are uncertain. While Plaintiffs strongly believe in the merits of their case, they also understand that Nebraska Medicine will assert a number of potentially case-dispositive defenses. In fact, should litigation continue, Plaintiffs would likely have to immediately survive a motion to dismiss in order to proceed with litigation. 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. Bank of N.Y. Mellon Corp*., No. 08 Civ. 6060(RMB)(RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another

hurdle that would have to be met—and one that been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013).

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

iv. The Proposed Settlement Treats Settlement Class Members Equitably.

Here, the proposed Settlement does not improperly discriminate between any segments of the Class, as all Settlement Class Members and Credit Monitoring Subclass Members are entitled to the same relief respectively. All Settlement Class Members are eligible to make a claim for the same amount of ordinary and extraordinary expense reimbursements. Moreover, all Members of the Credit Monitoring Subclass will also *automatically* receive a code for credit monitoring services. Importantly, direct Notice will be sent to Settlement Class Members, and all Settlement Class Members will also have the opportunity to object to or exclude themselves from the Settlement. And, while Plaintiffs will each be seeking a $2,000 award for their services on behalf of the Class, this award is *less than* the amount that any given Class Member can claim in reimbursements.

Accordingly, this factor also weighs in favor of preliminary approval.

v. Other Factors Considered by Eight Circuit Courts Weigh in Favor of Preliminary Approval.

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

First, the Settlement provides for significant relief in light of the risks of proceeding with further litigation. As discussed extensively in Section V(b)(iii), *supra*, while Plaintiffs are confident in the merits of their claims, they face significant risk in further litigation due in part to

the constantly evolving nature of data breach litigation. Thus, this factor weighs in favor of preliminary approval.

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

Third, continued litigation is likely to be complex, lengthy, and expensive. Although Plaintiffs are confident in the merits of their claims, the risks discussed above cannot be disregarded. Aside from the potential that either side will lose at trial, the Plaintiffs anticipate incurring substantial additional costs in pursuing this litigation further. Should litigation continue, Plaintiffs would likely need to defeat a 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. As at least one court has found in this Circuit, because the "legal issues involved in [in data breach litigation] are cutting-edge and unsettled . . . many resources would necessarily be spent litigating substantive law as well as other issues." *In re Target Corp. Customer Data Sec. Breach Litig*., No. 14-2522 (PAM/JJK), 2015 WL 7253765, at *2 (D. Minn. Nov. 17, 2015).

Fourth, while no opposition to the Settlement is currently known, this factor is better examined after notice has been issued to the Class, and thus does not weigh either for or against preliminary approval of the Settlement.

Thus, these additional factors weigh in favor of approving a result exactly like that obtained by Plaintiffs and Class Counsel: significant cash reimbursements for all Settlement Class Members who submit valid claims, credit monitoring services automatically provided to Credit Monitoring Subclass Members, and equitable relief in the form of increased data security safeguards, which

will serve to better safeguard all Settlement Class Members' PII. Accordingly, the Settlement should be preliminarily approved.

c. The Proposed Settlement Administrator will Provide Adequate Notice

Rule 23(e)(1) requires the Court to "direct reasonable notice to all class members who would be bound by" a proposed settlement. For classes, like this one, certified under Rule 23(b)(3), parties must provide "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The best practicable notice is that which "is reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The Notice provided for by the Settlement Agreement is designed to meet all the criteria set forth by Rule 23 and the Manual for Complex Litigation. *See* Agr. Exs. A–C. Here, Nebraska Medicine has agreed to disseminate direct and individual Notice, via first class mail to the last postal address provided to Nebraska Medicine by the Settlement Class Members. Agr. ¶ 3.2(d). The mailing will be completed only after the Settlement Administrator has run the postal addresses of Class Members through the United States Postal Service ("USPS") National Change of Address database to update any change of address on file with the USPS, and any Notices returned as undeliverable will either be forwarded where a forwarding address is provided or, if time allows, will be resent after performance of a standard skip trace. *Id.*

Not only has Nebraska Medicine agreed to provide Settlement Class Members with individualized Notice via a direct mail, but all versions of the Settlement Notice will be available to Settlement Class Members on the Settlement Website, along with all relevant filings. Agr. ¶ 1.4.

The Settlement Administrator will also make a toll-free telephone number available by which Settlement Class members can seek answers to questions or request a Notice or Claim Form be mailed to them at their address. Agr. ¶ 3.2(f).

The Notices themselves are clear and straightforward. They define the Class; clearly describe the options available to Class Members and the deadlines for taking action; describe the essential terms of the Settlement; disclose the requested service award for the Class Representatives as well as the amount that proposed Settlement Class Counsel intends to seek in fees and costs; explain procedures for making claims, objections, or requesting exclusion; provide information that will enable Settlement Class Members to calculate their individual recovery; describe the date, time, and place of the Final Fairness Hearing; and prominently display the address and phone number of Class Counsel. *See* Agr. Exs. A–C.

The Notice is designed to be the best practicable under the circumstances, apprises Settlement Class Members of the pendency of the action, and gives them an opportunity to object or exclude themselves from the Settlement. Accordingly, the Notice Process should be approved by this Court.

VI. CONCLUSION

Plaintiffs have negotiated a fair, adequate, and reasonable Settlement that guarantees Settlement Class Members significant relief in the form of cost and time reimbursements, credit monitoring, and equitable relief consisting of increased data security safeguards. For these and the above reasons, the Settlement Agreement clearly falls within the range of reasonableness and Plaintiffs respectfully request this Court grant their Motion for Preliminary Approval of Class Action Settlement.

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Respectfully submitted,

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