THE HONORABLE MAFÉ RAJUL
Noted for Consideration: June 10, 2021
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JANICE BUSBY RICHARDSON, individually and on behalf of others similarly situated,

Plaintiff,

v.

OVERLAKE HOSPITAL MEDICAL CENTER and OVERLAKE MEDICAL CLINICS, LLC,

Defendants.

No. 20-2-07460-8 SEA

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM IN SUPPORT

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Plaintiff Janice Busby Richardson ("Plaintiff") submits this Unopposed Motion for Preliminary Approval of Class Action Settlement and Memorandum in Support.

I. INTRODUCTION

This case arises from a data incident that Plaintiff alleges compromised her protected health information, and the protected health information of the putative Class. In December 2019, a third party gained access to the email address of several of Defendants' employees (the "Data Incident"). Defendant carried out a forensic investigation and found that an estimated 24,439 of its clients' personal identifying information had been potentially impacted. Plaintiff alleges Overlake Hospital Medical Center and Overlake Medical Clinics, LLC's ("Overlake" or "Defendants") failed to secure and safeguard the personal identifying information ("PII") and personal health information ("PHI") that it collected and maintained from Plaintiff and Class Members (collectively, the "Private Information"), and failed to provide adequate and timely notice of the breach. Overlake denies all liability.

After extensive arm's length negotiations with the assistance of an independent third-party mediator, the Parties have reached a Settlement that is fair, adequate, and reasonable. The Agreement provides for monetary relief to be paid by Overlake to eligible claimants of a Class that includes all individuals whose private information was received, gathered, shared, obtained, or otherwise found itself in the possession of Defendants and potentially affected by the Data Incident. The monetary relief provides for reimbursements of ordinary and extraordinary expenses reasonably tied to the Data Incident up to $250 and $2,500, respectively. It further requires Overlake to complete a series of ongoing improvements to its data security systems that are estimated will cost Overlake a total of $722,460 over the course of 2021, 2022, and 2023. Plaintiff strongly believes the Settlement is favorable for the Settlement Class.[1]

[1] *See* Decl. of David K. Lietz ¶ 10 ("Lietz Decl."), attached hereto as **Exhibit 1**. The Settlement Agreement ("Agreement" or "Agr.") and related exhibits are attached as an exhibit to the Lietz Decl.

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II. STATEMENT OF ISSUES AND RELIEF REQUESTED

Accordingly, and relying on the following memorandum of points and authorities, the Declaration of Plaintiff's Counsel David K. Lietz and attached exhibits filed herewith, Plaintiff respectfully requests the Court preliminarily approve the Parties' Settlement Agreement and enter an order that:

(1) Certifies the Settlement Class for purposes of settlement only;

(2) Preliminarily approves the Settlement Agreement;

(3) Appoints Proposed Settlement Class Counsel, David K. Lietz, Gary M. Klinger, and Danielle L. Perry of Mason Klinger & Lietz LLP, as Class Counsel;

(4) Appoints Plaintiff Janice Busby Richardson as Class Representative;

(5) Approves a customary Short Form Notice to be mailed to Settlement Class Members (the "Short Notice") in a form substantially similar to that attached as Exhibit B to the Settlement Agreement;

(6) Approves a customary Long Form Notice ("Long Notice") to be posted on the settlement website in a form substantially similar to the one attached as Exhibit C to the Settlement Agreement;

(7) Directs Notice to be sent to the Settlement Class in the form and manner proposed as set forth in the Settlement Agreement and Exhibits A and B thereto;

(8) Appoints Postlewaite & Netterville ("P&N") to serve as the Notice Specialist and Claims Administrator;

(9) Appoints Mark G. Honeywell to serve as a claims referee;

(10) Approves the use of a Claim Form substantially similar to that attached as Exhibit A to the Settlement Agreement; and

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(11) Sets a hearing date and schedule for Final Approval of the Settlement and consideration of Settlement Class Counsel's Motion for Award of Fees, Costs, Expenses, and Service Awards.

III. STATEMENT OF FACTS AND EVIDENCE RELIED ON

a. Initial Investigation and Communications

Overlake operates a 349-bed medical center offering a full range of advanced medical services. In addition, Defendants operate primary care clinics, urgent care clinics, specialty clinics, and an emergency and trauma center. It is accredited by the Healthcare Facilities Accreditation Program and has a Level III trauma center. *See* Decl. of David K. Lietz ¶ 13.b ("Lietz DecL."), attached hereto as **Exhibit 1**. Overlake employs nearly 3,000 people and have some 1,000 active and courtesy providers on their medical staff, including more than 200 providers who are employed by the organization. *Id.* at ¶ 13.c. In the ordinary course of receiving treatment and health care services from Overlake, patients are required to provide sensitive personal and private information such as: dates of birth; demographic information; Social Security numbers; information relating to individual medical history; insurance information and coverage; information concerning an individual's doctor, nurse or other medical providers; photo identification; employer information; and other information that may be deemed necessary to provide care. *Id.* at ¶ 13.c.

Plaintiff alleges the Data Incident, which occurred between December 6–9, 2019, occurred when unauthorized person(s) accessed email accounts of Overlake employees. *Id.* at ¶ 13.e. The email accounts accessed by the Data Breach included information such as: names, demographic information, dates of birth, identification card numbers, health insurance information, medical information, other protected health information as defined in HIPAA, and additional PII and PHI. *Id.* at ¶ 13.f. Overlake provided notice to affected individuals of the Data Breach on or about February 7, 2020, nearly two months after the data breach was discovered. *Id.* at ¶ 13.g. Although initial investigations suggested approximately 109,000 individuals' information could be

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impacted, Overlake's further investigation demonstrated only 23,439 persons PII and PHI was actually potentially compromised. *Id.* at ¶ 14.

b. Procedural Posture

As a result of the Data Incident, Plaintiff filed her initial complaint on April 3, 2020, bringing causes of action for: (1) violation Washington State Uniform Health Care Information Act ("UHCIA"); (2) violation of the Washington State Consumer Protection Act ("CPA"); (3) Negligence; (4) Intrusion Upon Seclusion / Invasion of Privacy; (5) violation of the Washington State Constitutional Right to Privacy; (6) Breach of Express Contract, and (7) Breach of Implied Contract. *Id.* at ¶ 15.

On or about June 17, 2020, Overlake moved to dismiss Plaintiff's Complaint, arguing, among other things, that there is no private right of action for Washington's constitutional right to privacy, and that the "possibility of future harm is not sufficient to confer standing." *See, id.* at ¶ 16. In response, on or about July 16, 2020, Plaintiff filed her Amended Class Action Complaint, removing her causes of action for Intrusion Upon Seclusion / Invasion of Privacy and violation of the Washington State Constitutional Right to Privacy. *Id.* at ¶ 17. Overlake withdrew its initial Motion to Dismiss, and on or about July 27, 2020 filed its Motion to Dismiss Plaintiff's Amended Complaint, again arguing, among other things, that Plaintiff had not sufficiently plead the harm required to establish standing. *Id.* at ¶ 18.

After a full briefing and oral argument via Zoom on September 11, 2020, this Court granted Defendants' Motion to Dismiss with regard to Plaintiff's First, Fourth, and Fifth causes of action for violation of the UHCIA, Breach of Express Contract, and Breach of Implied Contract, respectively, and denied Defendants' Motion as to Plaintiff's Second and Third causes of action, allowing her to proceed with her claims for violation of the CPA and Negligence. *Id.* at ¶ 19. Overlake filed its Answer to Plaintiff's Amended Class Action Complaint on or about October 12, 2020. *Id*. at ¶ 20.

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On December 23, 2020, the Parties notified the Court of their intention to attend a mediation on January 26, 2021, in an effort to resolve Plaintiff's claims without further litigation. *Id.* at ¶ 21.

c. History of Negotiations

To facilitate their negotiations, the Parties agreed to mediate the remaining claims with Mark G. Honeywell of Gordon Thomas Honeywell LLP in Seattle, Washington. *Id.* at ¶ 22. In advance of mediation, the Parties began negotiations regarding the potential structure of a settlement, and exchanged letter briefs that outlined the various strengths and weaknesses of Plaintiff's claims and Defendants' defenses. *Id.* at ¶ 23. Prior to mediation, and to help focus the Parties on the outstanding issues, Defendants proposed (and submitted to the mediator) a term sheet, outlining a potential structure for the Settlement, but including no concrete monetary figures or measures. *Id.* at ¶ 24. On January 26, 2021, after a full day of arm's length negotiations through Zoom Video Conference mediation, and with the assistance of Mark G. Honeywell, the Parties agreed to a memorandum of understanding describing the key terms of the Settlement Agreement. *Id*. at ¶¶ 25–26. Over the following six weeks, the Parties diligently drafted, negotiated, and finalized the Settlement Agreement, Notice Forms, and agreed upon a Claims Administrator. *Id.* at ¶ 27.

Despite the grounds that exist for each of Plaintiff's claims, which Overlake denies, none are certain to resolve in her favor on the merits. Further litigation would subject Plaintiff to numerous risks, including the risk that she and the other Class Members get no recovery at all. The Settlement provides significant relief to Members of the Class and Plaintiff strongly believes that it is favorable for the Settlement Class, fair, reasonable, adequate, and worthy of preliminary approval. *Id.* at ¶ 9.

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IV. SUMMARY OF SETTLEMENT

a. Settlement Class

The Settlement Class includes Plaintiff and all individuals whose private information was received, gathered, shared, obtained, or otherwise found itself in the possession of Defendants and potentially affected by the Data Incident.

b. Settlement Benefits

The Settlement negotiated on behalf of the Class provides for two separate forms of relief. *Id.* at ¶ 28. First, Overlake will provide direct monetary relief to Class Members for reimbursement of actual ordinary and extraordinary expenses stemming from the Data Incident. *Id.* Further, Overlake will provide equitable relief in the form of information security enhancements which has cost Overlake $218,460 in February 2021 on email filter enhancements, and for which Overlake has expects to spend approximately $504,000 ($168,000 per year), to be paid in each year of 2021 through 2023 for its malware protection solution. *Id*.

The payments available to Settlement Class Members are divided into two separate categories. The first category is to provide expense reimbursement for out-of-pocket expenses up to $250 per Class Member, incurred as a result of the Data Incident 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; fees for credit reports, credit monitoring, or other identity theft insurance product purchased between February 4, 2020 and the date of the Preliminary Approval Order (with affirmative statement by the Settlement Class Member that it was purchased primarily because of the Data Incident); up to three hours of documented lost time spent dealing with the Data Incident, *e.g.*, time spent dealing with replacement card issues, reversing fraudulent charges, rescheduling medical appointments and/or finding alternative medical care and treatment, retaking or submitting to medical tests, locating medical records, retracing medical history, and any other demonstrable form of disruption to

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medical care and treatment (calculated at the rate of $20 per hour). *Id.* at ¶ 30.a. The second category of payments to Class Members is for reimbursement of more extraordinary expenses up to $2,500 per Class Member for monetary out-of-pocket losses claimed to have occurred as a result of the Data Incident. *Id.* at ¶ 30.b.

The additional equitable relief—provided for in the form of information security enhancements—will, by the end of 2023, cost Overlake and estimated $722,460. *Id.* at ¶ 31. Implementation of email filter enhancements in February 2021 cost Overlake an estimated $218,460. *Id.* at ¶ 28. Overlake further estimates that the agreed-upon data security enhancements will cost an estimated $168,00 per year in each of 2021, 2022, and 2023. *Id.* Such security measures will include: resetting passwords for all compromised accounts to prevent further unauthorized access; enhancing the already mandatory education for employees to help them better recognize and avoid phishing emails; enhancing the technology in use to identify and block suspicious external emails; and implementing multi-factor authentication, which requires users to go through multiple steps to verify their identity in order to access systems; and implementing new email retention policies to reduce risk of exposure. *Id.* at ¶ 31.

c. The Notice and Claims Process

The Parties agreed to use Postlewaite & Netterville ("P&N") as the Notice Specialist and Claims Administrator in this case. *Id.* at ¶ 33. Overlake has agreed to pay for providing Notice to the Settlement Class. *Id.* at ¶ 34. The Notice and Claim Forms negotiated by the Parties are clear and concise and inform Settlement Class Members of their rights and options under the Settlement, including detailed instructions on how to make a claim, object to the Settlement, or opt-out of the Settlement. *Id.* at ¶ 34, Exs. 1A, 1B, 1C. The current and agreed upon Notice Plan calls for Notice to be provided to Settlement Class Members via mail to the postal address provided when the Settlement Class Members conducted transactions with Overlake. *Id.* at ¶ 35. The Claims Administrator will mail a Postcard Summary Notice directly to each of the approximate 23,459

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Class Members. Where postcards are returned undeliverable, the Claims Administrator will process the undeliverable mail and run a skip trace to find updated addresses. *Id.* at ¶ 37.

The Claims Administrator will also establish a dedicated Settlement Website and will maintain and update the website throughout the Claims Period, with the forms of Short Notice, Long Notice, and Claim Form approved by the Court, as well as the Settlement Agreement. *Id.* at ¶ 38, Exs. 1A, 1B, 1C. The Claims Administrator will also make a toll-free help line available to provide Settlement Class Members with additional information about the Settlement. *Id.* at ¶ 39. The Claims Administrator is also authorized and required to provide copies of the forms of Short Notice, Long Notice, and Claim Form approved by the Court, as well as the Settlement Agreement, upon request. *Id.* at ¶ 40.

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 if they would like to opt-out or object. *Id.* at ¶ 41. Class Members will have 150 days from the completion of the notice mailing to submit their Claim Form to the Claim Administrator, either by mail or online. *Id.* at ¶ 42. The Claims Administrator is given the authority to assess the validity of claims, and to ask for additional documentation. *Id.* at ¶ 43. Should any Class Member wish to dispute the amount offered after making a claim, there is a process by which he or she can do so. *Id.*

Any Class Member who wishes to opt-out of the Settlement will have 60 days from the date preliminary approval is granted to provide such Notice to the Claims Administrator. *Id.* at ¶ 44. Class Members who wish to object to the terms of the Settlement Agreement must do so in writing, and file such writing with the clerk of Court within 60 days from the date on which the Court issues an order granting preliminary approval of the Settlement. *Id.* at ¶ 45. The written objection must also be served concurrently on Class Counsel. *Id.*

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V. LEGAL AUTHORITY

Plaintiff brings this Motion pursuant to CR 23(e). The Rule provides in pertinent part: "a class action cannot be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." CR 23(e). Rule 23 is nearly identical to its federal counterpart, and thus, federal cases interpreting the analogous federal provision are highly persuasive. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188 (2001). "The primary concern of this subsection is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Id.* (compiling cases). The requirements of Rule 23(e) are primarily procedural, requiring notice of the proposed settlement be given to class members and that those class members be given an opportunity to object. *Id.*

Washington courts endorse the three step process described by The *Manual for Complex Litigation*: (1) preliminary approval of the proposed settlement; (2) dissemination of notice of the settlement to settlement class members; and (3) a fairness hearing or final approval hearing where class members may be heard regarding the settlement, evidence regarding the fairness, adequacy and reasonableness of the settlement can be presented, and the court can safeguard class member interests and determine whether to provide final approval.

The decision to approve or reject a proposed settlement lies firmly within the Court's discretion. *See Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 190 (2001). Granting preliminary approval will allow Settlement Class Members the opportunity to learn about the Settlement, make a claim, opt-out, or object and be heard by the court.

Plaintiff seeks preliminary approval of the proposed Settlement. Because the Settlement proposed here falls firmly within the range of possible approval required to obtain preliminary approval, this Court should grant Plaintiff's Motion. *See Newberg* § 13:13.

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VI. LEGAL DISCUSSION

Washington courts strongly encourage settlements as a matter of "express public policy." *City of Seattle v. Blume*, 134 Wn.2d 243, 258 (1997). This is particularly true in class actions where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could otherwise obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (acknowledging a strong judicial policy of favoring class action settlements). Traditional means of handling claims like those at issue here—individually—would cause an undue burden on the court system and would require an enormous amount of public and private resources. Where the value of individual claims, like those here, is relatively small, such an individual case is rendered completely impractical. The proposed Settlement is the best vehicle by which the Settlement Class Members can receive relief in a prompt and efficient manner.

a. The Settlement Class Should be Preliminarily Approved

Plaintiff here seeks certification of a Settlement Class consisting of Plaintiff and "[a]ll individuals whose private information was received, gathered, shared, obtained, or otherwise found itself in the possession of Defendants and potentially affected by the Data Incident." with specific and limited exclusions. *See* Lietz Decl. ¶ 29; *see also* Agr. § 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.

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

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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.*

Washington law regarding class actions mirrors its federal counterpart, making federal court cases regarding the certification of class actions "highly persuasive" authority. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188 (2001). Under Superior Court Civil Rule 23 a party seeking certification of a class must demonstrate four things: (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 and defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. CR 23. Additionally, pursuant to Rule 23(b), to maintain a class action the court must also find that common questions of law or fact predominate over individualized issues, making the class device the superior mechanism for resolving the case. *Id*.

Class actions are regularly certified for settlement. In fact, similar data breach cases have been certified—on a *national* basis—including most recently the 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 is no different. Because the proposed Settlement Class meets all of Washington's class action requirements, this Court should certify the Class for purposes of Settlement.

i. The proposed Class is sufficiently numerous.

While there is no fixed point where the numerosity requirement is met, as a general rule where a class contains at least forty (40) individuals, courts have recognized a rebuttable

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presumption that joinder is impracticable. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 821 (2003) (collecting cases). Numbering approximately 24,440 individuals, the proposed Settlement Class easily satisfies Rule 23's numerosity requirement. Joinder of the 23,460 individuals whose personal information was impacted by the Data Incident is clearly impracticable—thus the numerosity prong is satisfied.

ii. Questions of law and fact are common to the Class.

The threshold for meeting the commonality requirement of Superior Court Civil Rule 23 is a low one. "The commonality test is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320 (2002) (internal quotations omitted). Here Plaintiff can demonstrate numerous common issues exist. Overlake had a policy and practice of failing to adequately safeguard the records of Plaintiff and Class Members. Overlake's data security safeguards at the time of the breach were common across the Class, and those applied to one Class Member did not differ from those safeguards applied to another.

Other specific common questions at issue include:

- Whether Overlake unlawfully used, maintained, and/or disclosed Plaintiff and proposed Class Members' Personal Information;
- Whether Overlake unreasonably delayed in providing notification of the Data Incident;
- Whether Overlake failed to maintain reasonable security procedures and practices appropriate to the nature and scope of information compromised in the breach; and
- Whether Overlake's conduct rose to the level of negligence.

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

iii. Plaintiff's claims and defenses are typical to those of the Settlement Class.

A plaintiff will satisfy the typicality requirement of Civil Rule 23 if the claim or claims at issue arise from "the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 684 (2011) (quoting *Smith v. Behr Process Corp.*, 113 Wn. App. at 320.

Plaintiff's claims are typical of those of other Class Members because she and the other Class Members allege their Private Information was misused, disclosed, and/or inadequately safeguarded by Overlake. Plaintiff alleges that in allowing—or not taking reasonable measures to prevent—the Data Incident, Overlake caused herself and other Class Members to live with the anxiety of not knowing if and when their most private health information could be made public. These claims arise out of the same legal theory and are typical of those of other Class Members, who were also subject to and notified of the Data Incident.

iv. Plaintiff will adequately protect the interests of the Class.

The adequacy requirement of Civil Rule 23 is satisfied where (1) there are no antagonistic or conflicting interests between named plaintiffs and their counsel and the absent class members; and (2) the named plaintiffs and their counsel will vigorously prosecute the action on behalf of the class. CR 23(a)(4); *see also Hansen v. Ticket Track, Inc.*, 213 F.R.D. 412, 415 (W.D. Wash. 2003).

Here, Plaintiff is a Member of the Class who alleges the same injuries and seeks, like other Class Members, both reimbursement for costs incurred due to the Data Incident and assurances that the Private Information that Overlake holds is and will remain better safeguarded than it was at the time of the Data Incident. As such, her interests and the interests of her counsel are not inconsistent with those of other Class Members.

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Further, counsel for Plaintiff have decades of combined experience as vigorous class action litigators and are well suited to advocate on behalf of the Class. *See* Lietz Decl. ¶¶ 4–10, Ex. 2.

v. Because common issues predominate over individualized ones, class treatment is superior.

Common questions of law and fact predominate here because the most significant aspects of the case arise out of a common nucleus of operative facts and can be resolved for all Settlement Class Members. *See* CR 23(b)(3); *see also Pellino v. Brink's, Inc.* 164 Wn. App. 668, 683, n. 5. By the very class definition, each of the Settlement Class Members' private information was potentially impacted by the same Data Incident for which Overlake sent notice. As such, any claims of Class Members arise out of the same common nucleus of operative facts—the December 6–9, 2019 Data Incident and the circumstances that both allowed it to happen and led to the delay in notice.

To meet the superiority prong for class certification, a Plaintiff must demonstrate that a class action is superior to other available methods for fairly and efficiently adjudicating this controversy. CR 23(b)(3). Here, because all claims on behalf of Plaintiff and approximately 24,439 Class Members arise out of the same single Data Incident, a class action is vastly superior to attempting to litigate each Class Member's claims individually.

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

Although Superior Court Civil Rule 23 is silent in guiding courts in their review of class settlements, it is universally stated that a proposed class settlement may be approved by the trial court if it is determined to be "fair, adequate, and reasonable." *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178 (2001) (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (additional citations omitted)). Factors considered by courts in making this determination at final approval typically include: the likelihood of success by plaintiffs; the amount of discovery or evidence; the settlement terms and conditions; recommendation and experience of

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counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and the presence of good faith and the absence of collusion. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn. 2d 178, 192 (2001). The purpose of preliminary approval is to determine whether the settlement is within the range of possible approval, and to determine whether notice of the settlement should be provided to the class. *Newberg* § 13:13. The Agreement reached by Plaintiff here falls firmly within the range of potential approval.

i. The Settlement Agreement was the result of arm's length negotiations between the Parties.

Courts recognize that arm's-length negotiations conducted by competent counsel are prima facie evidence of fair settlements. The Court's role is to ensure "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1027 (9th Cir. 1998) (internal quotations omitted). Courts will approve class action settlements entered into after good-faith, arm's-length negotiations. *See Hughes v. Microsoft Corp.,* No. C98-1646C, 2001 WL 34089697, at *7 (W.D. Wash. 2001); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.,* 227 F.R.D. 553, 567 (W.D. Wash 2004).

The Settlement here is the result of intensive arm's-length negotiations between attorneys experienced in both class actions generally, and data breach cases in particular. *See* Lietz Decl. ¶¶ 4–10, Ex. 2. The Agreement was reached with the assistance of mediator Mark G. Honeywell, and was only finalized after a full-day mediation and weeks of post-mediation negotiations. Lietz Decl. ¶¶ 22–27.

ii. The Settlement guarantees Class Members relief for real harms and assurance that they are less likely to be subject to similar breaches due to Overlake's data security systems in the future.

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Although trial courts are not required to decide the ultimate merits of class members' claims before approving a proposed settlement, an informed evaluation should include an understanding of the likelihood of success by plaintiffs—the strength of the merits of the case, the available defenses, the amount in controversy, and the realistic range of outcomes of the litigation. *See Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wash. 2d at 193.

The Settlement Agreement provides real relief for Plaintiff and Settlement Class Members. Not only can Plaintiff and Class Members be reimbursed for costs they incurred related to the Data Incident, but they can also be assured that Overlake will have increased ability to protect their Personal Information from the risk of similar data incidents in the future. Expense reimbursement will run up to $250 per person for standard expenses delineated in the Settlement agreement and up to $2,500 per person for other extraordinary expense reimbursements also described in the Settlement Agreement. *See* Lietz Decl. ¶ 30; *see also* Agr. ¶¶ 2.1, 2.2. Moreover, Overlake estimates it will spend a total of $722,460 through 2023 in implementing various increased data security measures. *See* Agr. ¶ 2.2.

This Settlement Agreement includes terms within the range of those approved by other courts for similar data breaches. *See, e.g.,* Final Order and Judgment Granting Final Approval of the Class Action Settlement, *Bailey v. Grays Harbor Cnty. Hosp. Dist. No. 2*, No. 20-2-00217-14 (Wash. Super. Ct. Sept. 21, 2021) (granting approval of data breach class action settlement providing for up to $210 per valid claimant for ordinary expense reimbursements, up to $1,500 per valid claimant for extraordinary expense reimbursements, and increased cybersecurity measures valued at $480,000); Order Granting Final Approval, *Fulton-Green v. Accolade, Inc.*, No. 2:18-cv-00274 (E.D. Pa. Sept. 24, 2019), ECF No. 39 (granting approval of data breach class action settlement providing for expense reimbursement up to $1500 per class member, and increased cyber security measures of undisclosed worth for two years following the Data Incident).

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This proposed Settlement provides full, fair, and adequate compensation for any actual injuries sustained as a consequence of the ransomware attack. Moreover, the substantial and immediate benefits achieved by the Settlement avoid the risks, uncertainties, and delays of continued litigation. If this lawsuit were to continue, Plaintiff and Class Members would face a number of difficult challenges, including surviving a motion to dismiss, obtaining class certification, and maintaining certification through trial and likely motions for summary judgment. Thus, absent a settlement, Plaintiff faces serious obstacles in this Lawsuit. This is another indication that the proposed Settlement is fair, reasonable, and adequate and should be approved.

iii. The proposed Settlement Administrator will provide adequate Notice.

To satisfy due process, Notice to Class Members must be the best practicable, and reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. CR 23(c)(2); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Class Settlement Notices must present information about a proposed Settlement simply, neutrally, and understandably. *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 567 (9th Cir. 2019). Notice is adequate if it generally describes the terms of the class action settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard. *Id.*

The Notice and Claim Forms negotiated by the Parties are clear and concise, and inform Settlement Class Members of their rights and options under the Settlement, including detailed instructions on how to make a claim, object to the Settlement, or opt-out of the Settlement. *Id.* at ¶ 35, Exs. 1A, 1B, 1C. Settlement Class Members will receive direct and individual Notice of the Settlement. After receiving addresses for all Class Members, the Claims Administrator will direct mail a Postcard Summary Notice to each of the approximate 23,460 Class Members. *Id.* at ¶ 37. Where postcards are returned undeliverable, the Claims Administrator will process the undeliverable mail and run a skip trace to find updated addresses. *Id.* The Claims Administrator

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will also maintain a Settlement Website on which Class Members can obtain additional information regarding the case, access case documents, review answers to frequently asked questions, access Notice documents, and submit Claim Forms. *Id.* at ¶ 38. Additionally, the Claims Administrator will maintain a toll-free telephone line to handle any client inquiries and fulfill all additional Notice Packet requests. *Id*.

Plaintiff has negotiated a notice program that is reasonably calculated under all the circumstances to apprise Class Members of the pendency of the action and afford them an opportunity to present their objections. Class Members here provided Defendant their contact info in the process of receiving medical services: it is not known to be a particularly transient Class, thus direct notice via mail is the best practicable. *Compare Roes 1-2 v. SFBSC Management LLC,* 944 F.3d 1035, 1046 (9th Cir. 2019). The combination of the direct mailing to each and every Class Member as well as the 150 days provided to make a claim ensures maximum participation. As such this Court should approve the notice program negotiated by Plaintiff.

iv. The requested attorneys' fees, costs, and service award are justified and well within the range of reason.

While prior to the Final Approval Hearing Plaintiff will submit a formal Motion for Approval of Attorneys' Fees, Costs, and Plaintiff's Service Award, below is a brief summary and explanation of why the fees, costs and service award Plaintiff intends to seek are reasonable and should be approved.

The Settlement Agreement provides for a service award to Plaintiff in the amount of $1,000. Lietz Decl. ¶ 48. The rationale for making service or incentive awards to named plaintiffs is that he or she should be compensated for the expense or risk he has incurred in conferring a benefit on other members of the class. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). They serve as premiums in addition to any claims-based recovery, and promote the public policy of representative lawsuits. *Id.* at 958–59. The modest service award here serves the

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purpose of compensating Plaintiff for her efforts, which include maintaining contact with counsel, assisting in the investigation of the case, remaining available for consultation throughout mediation and for answering counsel's many questions. It is further justified by the benefits conferred on the Class due to Plaintiff's willingness to serve as a representative. Because of Plaintiff's desire to file suit here, Class Members are able to make a claim for up to $250 of standard expense reimbursements, $2,500 of extraordinary expense reimbursements, and gain the benefit of an estimated $722,460 worth of increased data protection measures designed to protect their Private Information that remains in Overlake's possession. As such, the service award requested for Plaintiff is reasonable.

After agreeing to the terms of the settlement on behalf of the class, counsel for Plaintiff negotiated their fees and costs separate from the benefit to Class Members, in the amount of $195,000. Lietz Decl. ¶ 47. Under Washington law, the percentage-of-recovery approach is used in calculating fees in common fund/common benefit cases. *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043 (9th Cir. 2002); *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 72 (1993). Acceptable fees in Washington often range between 20% to 30% of a common fund. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d at 72. Although this case does not present a true common fund settlement, the percent of fund assessment is instructive. Here, even ignoring the claims-made potion of the Settlement, the fees provided amount to just over one-fourth of the *guaranteed* benefit conferred on the Class—which is an estimated $722,460 in equitable relief. When factoring in the additional claims-made portion of the Settlement, the agreed upon attorneys' fees are even more reasonable, and will easily meet the 25% benchmark regularly used by Washington courts. *See Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 72 (1993).

As such, and as will be briefed more fully in Plaintiff's Motion for Attorneys' Fees, Costs and Plaintiff's Service Award, this request is reasonable and warrants preliminary approval.

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VII. CONCLUSION

Plaintiff has negotiated a fair, adequate, and reasonable Settlement that will provide Class Members with both significant monetary and equitable relief. For and the above reasons, Plaintiff respectfully requests this Court grant Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement.

Dated this 27th day of May 2021.

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WORD COUNT CERTIFICATION

I certify that this memorandum contains 6,197 words.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via King County E-Service and/or email upon the following:

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