

**IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI**

Susan McGann, Mary Lowe, Joseph Lumetta, Steven Kane, Darrius Stewart, Sarah Lamb, Steve Skurat, Kristen MacDonald, and John Gaffigan, individually and on behalf of all others similarly situated,
Plaintiffs,
vs.
Schnuck Markets, Inc., a Missouri corporation,
Defendant.

Cause No. 1322-CC00800
Division: 1

MOTION FOR AND INCORPORATED MEMORANDUM IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, PUBLISHING OF NOTICE, AND SETTING OF A FINAL FAIRNESS HEARING

COME NOW Plaintiffs, Susan McGann, Mary Lowe, Joseph Lumetta, Steven Kane, Darrius Stewart, Sarah Lamb, Steve Skurat, Kristen MacDonald, and John Gaffigan (“Representative Plaintiffs”), individually and on behalf of the Settlement Class (as defined in the Settlement Agreement and set forth below), by and through counsel, and respectfully request that this Court enter an order: (a) granting preliminary approval of the Settlement Agreement attached hereto as Exhibit 1; (b) approving the Notice and methods for dissemination of the Notice set forth in the Settlement Agreement; and (c) setting deadlines for opt-outs, objections, submission of Settlement Class Members’ claims, and a date for the Final Fairness Hearing. In support of their Motion for and Incorporated Memorandum in Support of Preliminary Approval of Class Action Settlement, Publishing of Notice, and Setting of a Final Fairness Hearing, Representative Plaintiffs state as follows:

After careful analysis and extensive, hard fought, and arm’s length negotiation,

Representative Plaintiffs and Schnuck Markets, Inc. (collectively the “Settling Parties”) have agreed to settle the above-captioned class action, subject to approval of the Court. The settlement set forth in the Settlement Agreement (hereinafter “Settlement”) provides substantial and valuable benefits to the Settlement Class, while protecting each Settlement Class Member’s due process rights, and removes the delay, risk of non-recovery, and expense that is inherent in further litigation.

I. NATURE OF THE ACTION

On or about March 15, 2013, Schnuck Markets, Inc. (“Schnucks”) detected that its computer systems had been compromised by an individual or group of individuals who had planted a malicious computer code on its systems (the “Security Incident”). The Security Incident involved the insertion of malicious computer code that targeted data in the magnetic stripe of payment cards swiped at certain affected Schnucks stores. Representative Plaintiffs filed their Class Action Petition alleging that Schnucks failed to secure and safeguard its customers’ personal financial data—including, but not limited to, credit and debit card information, personal identification numbers (“PIN”), and Plaintiffs’ and Class members’ names (collectively, “Personal identifying information” or “PII”)—and failed to provide clear, conspicuous, and timely notice to Representative Plaintiffs and the other members of the Class that their information had been stolen.

Subject to the Court’s approval, Representative Plaintiffs have agreed to settle the litigation pursuant to the provisions of the Settlement Agreement after considering, *inter alia*: (a) the benefit that Settlement Class Members will receive from the Settlement; (b) the attendant risks and delays of further litigation; (c) the desirability of permitting the Settlement to be promptly consummated according to its terms; (d) the conclusions of Proposed Co-Lead

Settlement Class Counsel and Representative Plaintiffs that resolution of the litigation is in the best interests of the Settlement Class; and (e) the public interest served by the implementation of the Settlement. While Schnucks denies it did anything wrong, Schnucks recognizes the uncertainties inherent in continued litigation and considers it desirable that the litigation be settled and dismissed because the Settlement Agreement, if approved by the Court, will: (a) avoid further expense and disruption of the management and operation of its business due to the pendency and defense of the litigation; and (b) resolve the claims of Representative Plaintiffs and the Settlement Class, thereby avoiding the uncertainties, costs, and expenses associated with continued litigation of those claims.

As the Court is aware, settlement of a class action requires judicial approval, which usually consists of three major stages: (1) preliminary approval of the settlement; (2) dissemination of notice to the class; and (3) a Final Fairness Hearing to determine whether the settlement should be granted final approval as fair, reasonable, and adequate for the class. The Settling Parties are now taking the first step in the process by seeking preliminary approval of the Settlement and asking that the Court enter the accompanying proposed order.

II. SUMMARY OF THE SETTLEMENT

After extensive and arm's length negotiations, the Settling Parties entered into the Settlement Agreement. The Settlement provides valuable and important benefits to Settlement Class Members and readily meets the standard for preliminary approval.

A. The Settlement Class

Under the terms of the proposed Settlement Agreement,¹ Schnucks consents to certification, for settlement-purposes only, of a Settlement Class defined as:

¹ The definitions contained in the Settlement Agreement attached hereto as Exhibit 1 are incorporated herein by reference.

All persons who made an authorized in-store purchase using a credit or debit card at a Schnucks store between December 9, 2012 through and including March 30, 2013.

SA ¶¶ 1.25, 2.7.² The Settlement Class specifically excludes: (i) Schnucks and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge assigned to evaluate the fairness of this settlement; and (iv) any other Person found by a court of competent jurisdiction to be guilty of initiating, causing, aiding or abetting the criminal activity occurrence of the Security Incident or who pleads *nolo contendere* to any such charge. SA ¶ 1.25.

B. Settlement Benefits

As discussed in detail in the Settlement Agreement and below, the Settlement provides, *inter alia*, that Schnucks will pay: (1) certain unreimbursed out-of-pocket expenses incurred, and up to three hours of documented time spent (at the rate of \$10 per hour), by Settlement Class Members as a result of the Security Incident in an amount up to \$175.00 per Settlement Class Member; (2) \$10 payments for *each* credit or debit card account on which, as a result of the Security Incident, a fraudulent charge was posted and such charge was reversed or credited; (3) payments of up to \$10,000 per Settlement Class Member for Identity Theft losses that are proven to be more likely than not caused by the Security Incident; (4) all costs of Notice to the Settlement Class, Administration of the Settlement and Dispute Resolution; (5) Representative Plaintiffs' and the Settlement Class' attorneys' fees in an amount up to \$635,000 and reasonable costs and expenses; and (6) incentive awards to each of Representative Plaintiffs in the amount of \$500.

² Citations to paragraphs of the Settlement Agreement are denoted by "SA."

1. Cash Payments for Settlement Class Members' Expenses and Time

Settlement Class Members may submit expense reimbursement claims for the following out-of-pocket expenses, not to exceed \$175.00 per Settlement Class Member, that were incurred as a result of the Security Incident: (i) unreimbursed bank fees; (ii) unreimbursed card reissuance fees; (iii) unreimbursed overdraft fees; (iv) unreimbursed charges related to unavailability of funds; (v) unreimbursed late fees; (vi) other unreimbursed fees related to fraudulent charges or credit card or debit card reissuance; (vii) unreimbursed over-limit fees; (viii) long distance telephone charges; (ix) cell minutes (if charged by minute), Internet usage charges (if charged by the minute or by the amount of data usage and incurred solely as a result of the Security Incident) and text messages (if charged by the message and incurred solely as a result of the Security Incident); (x) unreimbursed charges from banks or credit card companies; (xi) postage; (xii) interest on payday loans due to card cancelation or due to over-limit situation; (xiii) up to three hours of documented lost time spent dealing with replacement card issues or in reversing fraudulent charges (calculated at the rate of \$10 per hour), but only if at least one full hour was spent, and only if the time can be documented with reasonable specificity by answering the questions on the claim form; (xiv) costs of credit report(s) purchased by Settlement Class Members between March 15, 2013, and the date of the Preliminary Approval Order (with affirmative statement by Settlement Class Member that it was purchased primarily because of the Security Incident); and (xv) costs of credit monitoring and identity theft protection (not to exceed \$80) purchased by Settlement Class Member between March 15, 2013, and the end of the Claims Period (with affirmative statement by Settlement Class Member that it was purchased primarily because of the Security Incident and not for other purposes with proof of purchase and payment).

See SA ¶ 2.1.

In order to obtain benefits under this provision, a Settlement Class Member must complete and submit a written claim form that must be verified by the Settlement Class Member 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. These claim form submissions must also include reasonable documentation of the amounts claimed. These benefits are in addition to the other benefits available to Settlement Class Members under the Settlement.

2. Cash Payments for Settlement Class Members Who Were Notified of Fraudulent Charges That Were Later Reversed

Settlement Class Members who, due to the Security Incident, had fraudulent charges posted to their credit or debit card account(s) that were reversed or credited may submit claims for a \$10 payment for *each* credit card or debit card account that had such fraudulent charges. SA ¶ 2.2. To obtain this benefit, a Settlement Class Member must complete and submit a valid claim form showing, to the best of his or her knowledge and belief, under penalty of perjury, that an unauthorized charge was made on his or her credit card or debit card, along with a copy of the Settlement Class Member's applicable credit card or debit card statement(s)³ showing and identifying the fraudulent charges posted to the credit card or debit card account and showing that those charges were reversed or credited. *Id.* These benefits are in addition to the other benefits available to Settlement Class Members under the Settlement.

3. Cash Payments for Identity Theft Losses

Settlement Class Members may submit claims for Identity Theft losses. Schnucks shall reimburse each Settlement Class Member in the amount of his or her proven loss, but not to exceed \$10,000 per claim (and only one claim per Settlement Class Member), for a monetary out-of-pocket loss that is claimed and proven by the Settlement Class Member to have occurred

³ A claimant may redact their credit card or debit card statement(s) of all information other than the unlawful charge(s) and the date(s) of same.

more likely than not as a result of the Security Incident, regardless of whether the Settlement Class Member elects to make a claim for any other benefit available under the Settlement, and further that: (a) it is an actual, documented, and unreimbursed monetary loss; (b) resulted from Identity Theft proven to be more likely than not caused by the Security Incident; (c) occurred during the time period from December 9, 2012 through and including the end of the applicable claims period (*see* SA ¶ 2.3.2); and (d) the Settlement Class Member reported the Identity Theft to law enforcement and can produce a written law enforcement report relating to the Identity Theft. SA ¶ 2.3.

Settlement Class Members must exhaust all applicable insurance policies, including, if coverage is provided for and available, homeowner's insurance, credit monitoring insurance, and identity theft insurance, before Schnucks is responsible for any Identity Theft Reimbursement claimed pursuant to the Identity Theft Reimbursement provision in the Settlement Agreement. SA ¶2.3.2.

Settlement Class Members seeking Identity Theft Reimbursement must complete and submit a valid claim form under penalty of perjury to the Claims Administrator, together with proof of such losses. In order to prevent claims for out-of-pocket losses or fraudulent credit card charges from being erroneously submitted on the wrong claim form, the claim form for Identity Theft Reimbursement shall not be made available until a Settlement Class Member first makes a threshold showing that he or she is claiming Identity Theft as defined in the Settlement Agreement by answering the multiple choice questions listed in ¶ 2.3.1 of the Settlement Agreement (to be asked by an operator or prompted on the Settlement website).

4. Settlement Expenses.

Schnucks shall pay all costs for notice to the Settlement Class as required under SA ¶¶ 3.1 and 3.2, Costs of Claims Administration under SA ¶¶ 8.1, 8.2, and 8.3 (except those related to Identity Theft Claims under SA ¶ 2.3), and the costs of Dispute Resolution described in SA ¶ 2.5. Schnucks shall have the right to apply the costs of notice and Costs of Claims Administration toward the Aggregate Cap in SA ¶ 2.4, but only after all Approved Claims under SA ¶ 2.1 have been paid. Any administrative expenses associated with the handling, evaluation, and payment of any Identity Theft claims shall be applied separately toward the separate aggregate cap set forth in SA ¶ 2.3.

5. Attorneys' Fees, Costs, and Expenses and Representative Plaintiff Incentive Awards.

The Settling Parties did not discuss the payment of attorneys' fees, costs, expenses and/or incentive awards to Representative Plaintiffs until after the substantive terms of the Settlement had been agreed upon, other than that Schnucks would pay reasonable attorneys' fees, costs, expenses and incentive awards to Representative Plaintiffs as may be agreed to by Schnucks and Proposed Co-Lead Settlement Class Counsel and approved by the Court, or in the event of no agreement, then as ordered by the Court. SA ¶ 7.1. Thereafter, the Settling Parties negotiated and agreed to terms regarding same. *Id.* The amount(s) of any award of attorneys' fees, costs and expenses, and the incentive awards to Representative Plaintiffs, are intended to be considered by the Court separately from the Court's consideration of the fairness, reasonableness and adequacy of the Settlement. SA ¶ 7.5.

Schnucks has agreed to pay Proposed Co-Lead Settlement Class Counsel, subject to Court approval, up to the amount of \$635,000 for attorneys' fees and, additionally, reasonable costs and expenses. SA ¶ 7.2. Subject to Court approval, Schnucks has agreed to pay incentive

awards in the amount of \$500 to each of Representative Plaintiffs for their time and effort in fulfilling their obligations and responsibilities as Class Representatives. SA ¶7.3. These attorneys' fees, costs, expenses and incentive awards will be paid separate from any other Settlement benefit and will not reduce any benefits payable to the Settlement Class under the Settlement.

6. Aggregate Caps on Payments by Schnucks under the Settlement

Total aggregate payments made by Schnucks for: (1) expense and time reimbursement claims, under SA ¶ 2.1; (2) cash payments for claimants who were notified of fraudulent charges which were later reversed, under SA ¶ 2.2; and (3) Settlement Expenses, under SA ¶ 2.6, shall be subject to an aggregate cap of \$1,600,000 (the "Aggregate Cap"). Claims made under SA ¶2.1 are to be given highest priority, then Settlement Expenses under SA ¶ 2.6, and then claims made under SA ¶ 2.2, as follows: If the total amount of Administrative Expenses, plus the value of Approved Claims under SA ¶ 2.1, exceeds the Aggregate Cap, then the amount of Administrative Expenses that may be deducted from the Aggregate Cap shall be limited to an amount that will ensure that all Approved Claims under SA ¶ 2.1 will be paid. If the amount of Approved Claims under SA ¶ 2.1 exceeds the Aggregate Cap, payments for such claims shall be reduced pro-rata in proportion to the amount of each Approved Claim. If the total value of all Administrative Expenses, plus Approved Claims submitted under SA ¶ 2.1 does not exceed the Aggregate Cap, but the total value of Administrative Expenses, plus Approved Claims submitted under SA ¶¶ 2.1 and 2.2, collectively, exceeds the Aggregate Cap, then payments for claims made under SA ¶ 2.2 shall be reduced pro-rata in proportion to the amount of each Approved Claim. However, notwithstanding the Aggregate Cap, valid claims made under SA ¶ 2.2 shall in

no event be reduced to less than \$5 for each credit card or debit card on which fraudulent charges were posted as a result of the Security Incident.

In addition, total aggregate payments made by Schnucks for Identity Theft Reimbursement Claims, under SA ¶ 2.3, shall be subject to a separate aggregate cap of \$300,000, inclusive of all such claims and all administrative expenses associated with the receipt, review, and payment of those claims. Payment to Settlement Class Members under this Identity Theft Provision of the Settlement shall be made on a first-valid-claim-received basis.

7. Disputed Claims Resolution Procedures

The Settling Parties have agreed upon Garden City Group, Inc., a nationally-recognized company experienced in administering class action claims, to be the Claims Administrator. SA ¶ 1.4.A. The Claims Administrator will decide, based on Claim Forms and additional documentation, whether a claim should be paid under the Settlement. SA ¶¶ 2.3.3, 2.5. Additionally, the Settling Parties have agreed, subject to Court Approval, that Richard P. Sher, Esq., shall serve as the Claims Referee. SA ¶ 1.5. The resume of Mr. Sher is attached hereto as Exhibit 5. The Claims Referee will make final decisions about disputed claims for Settlement benefits. The Settlement provides a fair and practical dispute resolution process for claims. SA ¶ 2.5.

III. THE COURT SHOULD GRANT PRELIMINARY APPROVAL BECAUSE THE SETTLEMENT IS PRESUMPTIVELY FAIR, REASONABLE AND ADEQUATE, AND IT SHOULD BE SUBMITTED TO THE SETTLEMENT CLASS

The Settlement before the Court is the product of extensive, arms-length, and hard fought negotiations over several months. The negotiations were conducted by, on the one hand, plaintiff's counsel highly experienced in litigating and settling consumer class actions and, in particular, data breach consumer class actions, and, on the other hand, defense counsel similarly

experienced in defending such cases and, in particular, defending data breach consumer class actions. Accordingly, the Settlement is entitled at least to a preliminary presumption of fairness. *See, e.g., In re Austrian and German Bank Holocaust Litig.*, 80 F.,Supp.,2d 164, 173-174 (S.D.N.Y. 2000) (“If the Court finds that the Settlement is the product of arm’s length negotiations conducted by experienced counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness.”).

The initial presumption of fairness is confirmed by a preliminary assessment of the Settlement’s terms, which, as discussed herein, provide substantial and valuable relief for the Settlement Class. Each of the “fairness” factors identified in *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369 (Mo. App. W.D. 1997), strongly favors preliminary approval of the Settlement.

1. There is No Fraud or Collusion Behind the Settlement

The Settling Parties have engaged in extensive, arms-length settlement negotiations. The Settlement Agreement, if approved, will provide the Settlement Class with substantial and valuable monetary relief in that it provides: (1) out-of-pocket expense reimbursement and up to three hours of documented time spent (at the rate of \$10 per hour) up to \$175 for valid claims submitted by Settlement Class Members; (2) cash payments of \$10 (but in no event less than \$5) for valid claims submitted by Settlement Class Members for *each* credit card or debit card on which fraudulent charges were posted and subsequently reversed or credited as a result of the Security Incident; (3) identity theft reimbursement of up to \$10,000 for valid claims submitted by Settlement Class Members (up to a maximum of \$300,000 for such identity theft claims and all administrative expenses); (4) costs of Notice that complies with Missouri Rule 52.08 and due process; (5) Costs of Claims Administration; and (6) Representative Plaintiffs’ and the Settlement Class’s attorneys’ fees, costs, and expenses, and Representative Plaintiff incentive

awards, which are separate and in addition to all other relief.

The substantial benefits conferred to the Settlement Class also make clear the absence of any fraud or collusion behind the Settlement. This Settlement is an excellent result for the Settlement Class.

2. The Complexity, Expense, and Likely Duration of Litigation

Representative Plaintiffs and Proposed Co-Lead Settlement Class Counsel recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the litigation against Schnucks through motion practice, discovery, trial, and potential appeals. Proposed Co-Lead Settlement Class Counsel believe that the claims asserted in the litigation have merit. However, Proposed Co-Lead Settlement Class Counsel have taken into account the uncertain outcome and the risk of further litigation. Schnucks denies the claims and contentions alleged against it in the litigation. Proposed Co-Lead Settlement Class Counsel are also mindful of the inherent problems of proof and possible defenses to the claims asserted in the litigation. They also recognize the difficulties in establishing liability on a class-wide basis at trial and in achieving a result better than that offered by the Settlement Agreement here. *See Ring v. Metro. St. Louis Sewer Dist.*, 41 S.W.3d 487, 493 (Mo. Ct. App. 2000) (“The trial court was entitled to take into account the delays and risks of protracted litigation and the benefits of certainty of settlement compared to the uncertainty of litigation.”).

It is almost assured that any decision on the merits would be appealed, which would then cause further delay, as it would require briefing, oral argument, and awaiting a decision. In contrast, the Settlement provides for significant benefits for the members of Settlement Class without the delays described herein. Due to the significant risks in this litigation and the

uncertainty of prevailing on the merits and of establishing damages, this factor favors preliminary approval of the Settlement Agreement.

3. Stage of Proceedings and Discovery Completed

In the interest of resolution of this matter and delivering a prompt, valuable, fair, reasonable and adequate remedy to the Settlement Class, counsel for Representative Plaintiffs and counsel for Schnucks began discussing the possibility of settlement at an early stage of the litigation. Throughout the months of settlement negotiations, Proposed Co-Lead Settlement Class Counsel also pursued informal discovery from Schnucks, which was appropriately targeted at information relevant to making an informed decision regarding settlement and which was shared by Schnucks. Further, pursuant to ¶ 10.4 of the Settlement Agreement, formal confirmatory discovery will be conducted by Proposed Co-Lead Settlement Class Counsel, members of their firms, or such other Plaintiffs' Counsel as Proposed Co-Lead Settlement Class Counsel may designate. *See* Manual for Complex Litigation (Fourth) at § 11.423 (2004) (noting that informal discovery is a recognized method of minimizing the cost, delay, and burden associated with formal discovery). As a further safeguard, at the conclusion of formal confirmatory discovery, if Proposed Co-Lead Settlement Class Counsel determine that the Settlement is no longer, in their opinion, fair, reasonable and adequate, Proposed Co-Lead Settlement Class Counsel shall terminate the Settlement. This factor also favors preliminary approval of the Settlement Agreement.

4. Probability of Success on the Merits

Schnucks denies the allegations in this case. While Representative Plaintiffs believe they have valid claims, the favorable terms of the Settlement are considered by Representative Plaintiffs to be a fair reflection of the probabilities of success in this case. *See, e.g., Mills v. Am.*

Mut. Ass'n, 151 S.W.2d 459, 461 (Mo. App. 1941) (“[T]he law favors avoidance of litigation by compromise and settlement.”).

5. Range of Possible Recovery

There is always the risk that this case could be thrown out at the motion to dismiss or summary judgment stages, on appeal, and/or that class certification could be denied—thus providing no recovery for Settlement Class Members. Conversely, it could be tried to verdict with damages awarded. As such, the realistic range for this case is anywhere from no recovery at all to actual damages of Settlement Class Members plus attorneys’ fees and litigation costs. As discussed, the Settlement Agreement, if approved, provides significant relief without protracted litigation and the uncertainties inherent in continued litigation.

6. Plaintiffs’ Counsel and Representative Plaintiffs Support the Settlement

Proposed Co-Lead Settlement Class Counsel are highly experienced in data breach litigation and very knowledgeable regarding the relevant claims, remedies, and defenses at issue generally in such litigation and in this litigation. *See* Resumes of Ben Barnow and John Steward attached hereto as Exhibit 2. Ben Barnow has been appointed a lead class counsel and has settled a number of the nation’s largest data security breach consumer class actions, including:

In Re: TJX Retail Security Breach Litigation, MDL No. 1838. Ben Barnow served as one of Co-Lead Settlement Class Counsel for the Consumer Track in this MDL proceeding relating to the theft of approximately 45,000,000 credit and debit card numbers used at TJX stores and the personal information of over 454,000 TJX customers. The Honorable Judge Young granted final approval to the settlement, which he referred to as “excellent” and as containing “innovative” and “groundbreaking” elements.

Lockwood v. Certegy Check Services, Inc. Ben Barnow served as one of Co-Lead Settlement Class Counsel in this consolidated proceeding relating to the theft of approximately 37 million individuals’ private and confidential information from Certegy Check Services, Inc.’s computer databases. At the final fairness hearing, the Honorable Judge Merryday described the settlement as a “good deal,” providing “a real benefit to a large class of persons” as “the result of the focused attention of skilled counsel for a protracted time.”

In Re: Countrywide Fin. Corp. Customer Data Security Breach Litigation, MDL No. 1998. Ben Barnow served as one of Co-Lead Settlement Class Counsel in this forty-case MDL proceeding relating to a former Countrywide employee's theft and sale of millions of Countrywide customers' private and confidential information. In the opinion granting final approval to the settlement, the Honorable Chief Judge Russell noted that "Co-Lead Settlement Counsel are nationally recognized in the field of class actions, particularly those involving security breaches," and stated that "the Court was impressed with Co-Lead Counsel and Countrywide counsels' knowledge and skill, as represented in the various motions and hearings that took place throughout this settlement process."

Rowe v. Unicare Life and Health Insurance Co. Ben Barnow was Lead Counsel in this proceeding relating to the defendants' alleged failure to secure the private health information of approximately 220,000 individuals enrolled in the defendants' health insurance plans, resulting in such information being accessible to the public via the Internet. At the preliminary approval hearing, the Honorable Judge Hibbler described the efforts of the parties as "exemplary."

Proposed Co-Lead Class Counsel have determined that the Settlement is fair, reasonable, and adequate, and in the best interests of the Settlement Class. Proposed Co-Lead Class Counsel and Representative Plaintiffs agree that given the strengths of this case and uncertainties inherent in litigation, a settlement providing class members with real, significant and valuable relief now, as the Settlement does, is a fair, reasonable and adequate resolution of this case. *See, e.g., Ring v. Metro. St. Louis Sewer Dist.*, 41 S.W.3d 487, 493 (Mo. Ct. App. 2000) (approving of class action settlement where class counsel, who had experience in the particular type of litigation, testified that he did not feel the plaintiff's case was a "slam dunk"). After weighing all relevant factors, Proposed Co-Lead Settlement Class Counsel are of the opinion that the settlement is fair, reasonable and adequate.

Based upon the foregoing, as well as the judgment of experienced counsel, this Court should grant preliminary approval of the Settlement.

V. CERTIFICATION OF THE SETTLEMENT CLASS FOR SETTLEMENT PURPOSES

To preliminarily approve a class action settlement, the Court must determine whether it should preliminarily approve certification of a settlement class. Regarding the settlement of class actions, Rule 52.08(e) states:

A class action shall not 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.

The primary difference between certification of a class for litigation purposes, as compared to certification for purposes of settlement only, is that the “manageability” concerns at issue in litigation classes under Rule 52.08(b)(3)(D) disappear (because the case is not to be tried) and the “adequacy of representation” requirement of Rule 52.08(a)(4) is more closely scrutinized. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 308 (3rd Cir. 1998).

The Settling Parties stipulate that this action is certifiable as a class action for settlement purposes only pursuant to Missouri Rule 52.08(a) in that:

A. The Settlement Class is so numerous that joinder of all members is impracticable.

The Settlement Class consists of thousands of members;

B. There are questions of law or fact common to the Settlement Class. These include,

inter alia:

1. Whether Schnucks failed to use reasonable care and commercially reasonable methods to secure and safeguard Representative Plaintiffs’ and Settlement Class Members’ PII;
2. Whether Schnucks properly implemented its purported security measures to protect Representative Plaintiffs’ and Settlement Class Members’ PII from unauthorized capture, dissemination, and misuse;
3. Whether Schnucks took reasonable measures to determine the

extent of the Security Incident after it first learned of same;

4. Whether Schnucks' delay in informing Plaintiffs and Settlement Class Members of the Security Incident was unreasonable;
5. Whether Schnucks' method of informing Plaintiffs and Settlement Class Members of the Security Incident (and its description of the breach and potential exposure to damages as a result of same) was unreasonable;
6. Whether Schnucks' conduct violated the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.*;
7. Whether Schnucks' conduct constitutes breach of an implied contract;
8. Whether Schnucks willfully, recklessly and/or negligently failed to maintain and/or execute reasonable procedures designed to prevent unauthorized access to Representative Plaintiffs' and Settlement Class Members' PII;
9. Whether Schnucks was negligent in failing to properly secure and protect its PIN pads and Representative Plaintiffs' and Settlement Class Members' PII;
10. Whether by publicly disclosing Representative Plaintiffs' and Class members' PII without authorization, Schnucks invaded Representative Plaintiffs' and Settlement Class Members' privacy; and
11. Whether Schnucks concealed the Security Incident from Representative Plaintiffs and Settlement Class Members.

Thus, common issues exist;

C. The claims of Representative Plaintiffs (the proposed Class Representatives) are typical of the claims of the Settlement Class. Representative Plaintiffs alleged uniform misconduct by Schnucks in relation to the Security Incident that injured Representative Plaintiffs and Settlement Class Members in the same way. Further, there are no defenses available to Schnucks that are unique to Representative Plaintiffs. Further, Representative Plaintiffs seek the same relief for themselves as they seek for the Settlement Class; and

D. Representative Plaintiffs have and will fairly and adequately protect the interests of the Settlement Class. Representative Plaintiffs have been involved in this litigation and have no interests adverse to the Settlement Class. Further, Representative Plaintiffs have retained attorneys who have extensive experience in class action litigation generally, and in data breach class actions, and who have been approved as adequate counsel in multiple other class actions. *See* Group Exhibit 2 (Resumes of Ben Barnow and John Steward).

Further, the Settling Parties also stipulate for settlement purposes only that, within the meaning of Rule 52.08(b)(1), (b)(2) and (b)(3):

A. The prosecution of separate actions by or against individual members of the Settlement Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Settlement Class;

B. Questions of law or fact common to members of the Settlement Class predominate over any questions affecting individual members; and

C. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. This is palpably true in this case because the individual damages are likely too small to justify individual actions by Settlement Class Members.

IV. NOTICE OF THE CLASS ACTION SETTLEMENT AND THE NOTICE PLAN

Missouri Supreme Court Rule 52.08(e) governs the settlement of class actions and provides, among other things, that notice of the proposed compromise shall be given to all members of the class as the court directs. Under Rule 52.08(e), the notice must satisfy due process and, thus, must “fairly apprise the prospective members of the class of the terms of the settlement and of the options that are open to them in connection with [the] proceedings.” *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 385 (Mo. App. 1997) (citing, *inter alia*, *Grunin v.*

Int'l House of Pancakes, 513 F.2d 114, 122 (8th Cir. 1975)). “The information need only be general in nature and can refer the putative class members to the court or counsel for detailed information.” *Id.* (citing *Grunin*, 513 F.2d at 122). The notice must be the “best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Rule 52.08(c)(2); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

The Settling Parties have agreed upon Hilsoft Notifications to be the Notice Specialist for this Settlement and request the Court’s approval and appointment of Hilsoft Notifications as Notice Specialist. SA ¶ 1.13. Hilsoft Notifications is a nationally recognized class action notice provider. *See* Exhibit 3: Hilsoft Notifications Settlement Notice Plan (“Notice Plan”), at Attachment 1 – Hilsoft Notifications Curriculum Vitae. Hilsoft Notifications has created a comprehensive plan that satisfies the “best notice practicable” standard for Notice. *See* Notice Plan.

As explained more fully in the Notice Plan, the Notice Plan includes: (1) individual direct notice by email or first-class postal mail to reasonably identifiable potential Settlement Class Members; (2) publication in 19 local newspapers covering the affected market area; (3) approximately 80 30-second radio spots on local radio; (4) an informational release to be issued nationally to approximately 910 press outlets throughout the Midwest region; (5) sponsored search listings on the three most highly-visited Internet search engines: Google, Yahoo!, and Bing; and (6) an informational website with an easy to remember domain name. *See* Notice Plan at 4-5.

A. Contents of Notice

Notice documents were designed to provide information that the Settlement Class has

been certified, along with clear, concise, easily understood information about Settlement Class Members' legal rights. *See* Notice Plan at 5. Notice documents include a Summary Publication Notice, a Radio Notice Script for the paid radio spots, a Detailed Notice for the website and to be sent to anyone who requests it, a Postcard Notice, E-mail Notice, and a neutral Informational Release (collectively, "Proposed Notices"). *See* Notice Plan at Attachment 2. The Proposed Notices collectively include a fair summary of the Settling Parties' respective litigation positions, the general terms of the Settlement set forth in the Settlement Agreement, instructions for how to object to or opt-out of the Settlement, the process and instructions for making claims to the extent contemplated herein, an explanation that claims will be paid as set forth in the Settlement Agreement and that the amount of recovery for each Settlement Class Member may be allocated on a pro rata basis depending on the number of valid claims submitted, and sets forth the date, time and place of the Final Fairness Hearing.⁴

1. Opting Out

Each Person wishing to opt out of the Settlement Class shall individually sign and timely submit written notice of such intent to the designated Post Office box established by the Claims Administrator. The written notice must clearly manifest a Person's intent to be excluded from the Settlement Class. To be effective, written notice must be postmarked at least twenty-one (21) days prior to the date set in the Notice for the Final Fairness Hearing.

2. Objecting

Each Settlement Class Member desiring to object to the Settlement Agreement shall submit a timely written notice of his or her objection.⁵ Any Settlement Class Member who fails

⁴ The date and time of the Final Fairness Hearing is to be set by the Court.

⁵ The written statement of objection must set forth: (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

to comply with the requirements for objecting in SA ¶ 5.1 shall waive and forfeit any and all rights he or she may have to appear separately and/or to object to the Settlement Agreement, and shall be bound by all the terms of the Settlement Agreement and by all proceedings, orders and judgments in the litigation. The exclusive means for any challenge to the Settlement Agreement shall be through the provisions of SA ¶ 5.1. Without limiting the foregoing, any challenge to the Settlement Agreement, the Final Approval Order, or the Judgment shall be pursuant to appeal under the Missouri Supreme Court Rules and not through a collateral attack.

The Proposed Notices comply with Missouri Rule 52.08 and due process because they contain information that a reasonable person would consider material in making an informed, intelligent decision of whether to opt out or remain a member of the Settlement Class and be bound by a final judgment, or they direct the recipient to a convenient location to obtain more detailed information. The Proposed Notices fairly apprise the Settlement Class Members of the terms of the Settlement and the options that are open to them in connection with the proceedings.

B. Scope of Notice

Schnucks has agreed to provide notice to the Settlement Class in a manner certified by the Notice Specialist to have a reach sufficient to satisfy due process standards and targeted to

(e.g., a receipt showing a purchase made during the relevant time period from one of the stores that had compromised payment card information or an appropriate affidavit in lieu of such a receipt if the objector does not have such a receipt); (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 all counsel representing the objector; (v) the identity of all counsel representing the objector who will appear at the Final Fairness Hearing; (vi) a list of all persons who will be called to testify at the Final Fairness Hearing in support of the objection; (vii) a statement confirming whether the objector intends to personally appear and/or testify at the Final Fairness Hearing; (viii) the objector's signature or the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation); (ix) a list, by case name, court, and docket number, of all other cases in which the objector (directly or through counsel) has filed an objection to any proposed class action settlement within the last 3 years; (x) a list, by case name, court, and docket number, of all other cases in which the objector's counsel (on behalf of any person or entity) has filed an objection to any proposed class action settlement within the last 3 years; and (xi) a list, by case name, court, and docket number, of all other cases in which the objector has been a named plaintiff in any class action or served as a lead plaintiff or class representative. SA ¶5.1.

adults with credit or debit cards over 18 years of age who are reasonably likely to have shopped at an affected Schnucks store. SA ¶3.1(d). The Claims Administrator shall establish a dedicated settlement website and shall maintain and update the website throughout the claims period, with the forms of Summary Notice, Long Form Notice and Claim Forms approved by the Court, as well as the Settlement Agreement. SA ¶ 3.2. A toll-free help line staffed with a reasonable number of live operators shall be made available to address Settlement Class Members' inquiries. *Id.* The Claims Administrator also will provide copies of the forms of Summary Notice, Long Form Notice and Claim Forms approved by the Court, as well as the Settlement Agreement, upon request.⁶ *Id.*

The Notice Plan provides for e-mail and mailed Notice to potential Settlement Class Members for whom Schnucks has contact information. *See* Notice Plan at 7-9. Further, Notice placements will appear two times each in 18 daily newspapers and two times in one weekly newspaper for a total of 38 insertions in 19 newspapers. *Id.* at 12, 15-16. Notices will also air on radio networks covering all eight affected designated market areas. *Id.* at 17-18. The combined publication and radio effort alone is estimated to reach 80.0% of adults 18+ in the affected Schnuck market areas; each of these people reached will have multiple opportunities for exposure to notice owing to the significant frequency of notice exposure provided: adults 18+ reached will, on average, be exposed 2.9 times. *Id.* at 4, 12-13; *see also id.* at 10 (Publication Notice Methodology) and 11 (Media Selection). Coverage will be further enhanced by a neutral, informational press release and website efforts. *Id.* at 20-21.

Accordingly, the Proposed Notices and the Notice Plan are the best notice practicable under the circumstances, constitutes due and sufficient notice to the Settlement Class, and

⁶ The Summary Notice, Notice and Claim Forms approved by the Court may be adjusted by the Notice Specialist and/or Claims Administrator, respectively, in consultation and agreement with the Settling Parties, as may be reasonable and not inconsistent with such approval. SA ¶ 3.2.

comply with Rule 52.08 and due process. Therefore, the Proposed Notices and Notice Plan should be approved.

V. CONCLUSION

As the above analysis shows, the Settlement Agreement easily meets the standard for preliminary approval. Accordingly, Representative Plaintiffs, individually and on behalf of the Settlement Class, by and through counsel, respectfully request that this Court enter an order⁷:

- A. granting class certification of the Settlement Class for settlement purposes only as requested herein;
- B. appointing John Steward and Ben Barnow as Co-Lead Settlement Class Counsel and appointing plaintiffs Susan McGann, Mary Lowe, Joseph Lumetta, Steven Kane, Darrius Stewart, Sarah Lamb, Steve Skurat, Kristen MacDonald, and John Gaffigan as Class Representatives;
- C. granting preliminary approval to the Settlement Agreement and finding the Settlement Agreement to be within the range of fair, reasonable, and adequate, and in the best interest of the Class;
- D. authorizing Notice of the Settlement and preliminary approval of the Settlement to the Settlement Class in the manner set forth in the Settlement Agreement (*see* SA ¶¶3.1(e), 3.2 and described above);
- E. appointing Hilsoft Notifications as Notice Specialist;
- F. appointing Garden City Group, Inc., as the Claims Administrator;
- G. granting approval of claim forms substantially similar to those attached to the Settlement Agreement as Exhibits A, B, and C. *See* SA ¶¶ 2.1, 2.2, and 2.3;
- H. appointing Richard P. Sher, Esq., to serve as Claims Referee;
- I. setting a date for the Final Fairness Hearing to consider entry of a final order approving the Settlement Agreement; the request for attorneys' fees, costs, and expenses; and the request for incentive awards to Representative Plaintiffs; and
- J. granting such other and additional relief as the Court may deem just and appropriate.

⁷ A proposed preliminary approval order is attached hereto as Exhibit 4.

Respectfully submitted,

/s/ John S. Steward
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LIST OF EXHIBITS

Settlement Agreement	Exhibit 1
Claim Form A	Exhibit A
Claim Form B	Exhibit B
Claim Form C	Exhibit C
Resumes of Ben Barnow and John Steward	Group Exhibit 2
Hilsoft Notifications Notice Plan	Exhibit 3
Hilsoft Notifications Curriculum Vitae	Attachment 1
Drafts of Notice	Attachment 2
List of Affected Schnuck Markets	Attachment 3
List of Potential Radio Stations	Attachment 4
Proposed Preliminary Approval Order	Exhibit 4
Resume of Richard P. Sher, Esq.	Exhibit 5

Certificate of Service

The undersigned hereby certifies a true and correct copy of the foregoing was served via filing with the Court's e-filing service, on this 1st day of October, 2013.

/s/ John Steward