O'STEEN & HARRISON
ATTORNEYS AT LAW

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

DAVID ANDREONI, individually, and on behalf of all others similarly situated, Plaintiff, v. RADIOLOGY ASSOCIATES OF ALBUQUERQUE, P.A., d/b/a RAA IMAGING; ADVANCED IMAGING, LLC, d/b/a/ HIGH RESOLUTION, Defendants.	Case No. D-202-cv-2022-05463 **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARD** (Assigned to The Hon. Joshua A. Allison)

The Court should grant Plaintiff's Motion for Approval of Attorneys' Fees, Expenses, and Service Award because the requested payments of fees, expenses, and service award from the $3,080,475 non-reversionary Settlement Fund created by the Settlement of this class action are fair and reasonable and are in amounts routinely awarded in similar litigation. The requested payments compensate Class Counsel and the Class Representative for taking this litigation on a contingent basis—with no guarantee they would ever be compensated for their time or reimbursed for their expenses—and recognizes the results they achieved for the thousands of Class Members in this risky litigation.

FACTS

I. The parties litigate Plaintiff's claims relating to the exposure of personal health information in a data breach of Defendants' systems

On September 16, 2022, the Class Representative, Plaintiff David Andreoni, filed this class action against Defendants. The complaint alleges that from July 22, 2021, to August 3, 2021, Defendant Radiology Associates of Albuquerque, P.A.'s computer systems were accessed by

unauthorized third parties and that from December 20, 2020 to July 15, 2021, Defendant's email systems were accessed by unauthorized third parties, resulting in exposure of Mr. Andreoni's and thousands of other persons' personal health information.

On December 12, 2022, Defendants moved to dismiss the complaint; Mr. Andreoni responded on December 22, 2022; and Defendants replied on January 20, 2022. The Court held a hearing on the motion on March 1, 2023. On March 10, 2023, the Court entered an order granting in part and denying in part Defendants' motion to dismiss. The Court granted the motion as to the claim for intrusion upon solitude/invasion of privacy, but denied the motion as to claims for negligence, breach of express and implied contract, and violation of the New Mexico Unfair Practices Act (NMSA 1978, Section 57-12-2).

On March 21, 2023, Defendants filed their answer, denying all liability and asserting affirmative defenses.

II. The parties mediate multiple times before reaching an agreement in principle to settle.

In February 2023, the parties participated in a mediation facilitated by mediator Rodney A. Max. The mediation was unsuccessful and the parties were unable to resolve the dispute.

On July 19, 2023, the parties participated in a second mediation facilitated by a different mediator, the Honorable (ret.) Wayne Andersen of JAMS. Once again, the case did not settle.

On September 29, 2023, Mr. Andreoni served interrogatories and document requests on Defendants.

The parties continued settlement negotiations. Ultimately, in early November 2023, the parties reached an agreement in principle to settle the lawsuit, subject to formal documentation.

In litigating and mediating the case, Class Counsel advanced expenses of $16,500, comprised of: (a) $14,500 in mediator fees and (b) $2,000 in filing and pro hac vice fees.

Declaration of Lynn A. Toops in Support of Plaintiff's Motion for Approval of Attorneys' Fees, Expenses, and Service Award ("Toops Decl.") ¶ 7.

III. The Settlement provides significant benefits to the proposed Settlement Class.

Under the terms of the Settlement, the Class Members will receive the following benefits:

- Defendants will agree to the certification of the Settlement Class defined as:

  All individuals whose Personal Information was potentially compromised as a result of the Data Incident.[1] The Class specifically excludes (i) the Judge assigned to evaluate the fairness of this settlement (including any members of the Court's staff assigned to this case); (ii) Defendants' officers and directors, and (iii) 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.

- Defendants will pay $3,080,475 into a non-reversionary Settlement Fund. The net Settlement Fund will be used to provide:

  (a) 3 years of 3-bureau credit monitoring with a $1,000,000 identity theft insurance policy;

  (b) reimbursement for claims of lost time related to the data incident at $20 per hour up to 4 hours per Class Member;

  (c) reimbursement of ordinary losses (such as bank fees, credit monitoring, and other out of pocket costs associated with the data incident) of up to $400 per Class Member;

  (d) reimbursement for extraordinary losses (such as losses due to actual fraud) of up to $4,000 per Class Members; or

  (e) Class Members may choose to forego the other benefits and instead claim an alternative cash payment, which is estimated to be approximately $80 per Class Member, but which may be more or less depending on the number of claims for other benefits. If any funds remain uncollected from the Settlement Fund, they will not revert to Defendant but will instead be paid to a non-profit charity.

In exchange for the Settlement benefits, if final approval is granted, the Class Members

[1] "Data Incident" means the incident from approximately July 22, 2021 to August 3, 2021, and from December 22, 2020, to July 15, 2021, during which an unauthorized third party gained access to Defendants' data systems, resulting in unauthorized access to the Plaintiff's and Class Members' personally identifying information and protected health information (collectively, "Personal Information").

will release their claims against Defendants relating to the data incident, and this litigation will be resolved.

IV. The Court grants preliminary approval to the Settlement.

On March 15, 2024, the Court granted preliminary approval to the Settlement. Court-approved notice of the Settlement, including the requested amounts foe fees, expenses, and a service award, was sent to Class Members on April 1, 2024, and Class Members have until May 1, 2024, to file any objections to the Settlement or this request for fees, expenses, and service award. A copy of this motion will be posted to the Settlement Website for Class Members to review if they wish.

LEGAL STANDARDS

I. Courts in New Mexico and the Tenth Circuit commonly award attorneys' fees of one-third of the common fund.

Courts historically utilize two main approaches to analyzing a request for attorneys' fees: the lodestar approach and the percent-of-benefit approach. As set forth below, federal courts, including the Tenth Circuit Court of Appeals, have expressed a decided preference for the percentage of the fund method, and in the absence of any agreement to the contrary, that is presumptively the method to be used in determining a reasonable fee. As the District of New Mexico recently wrote:

> The percentage of the fund method is 'the appropriate means to determine a reasonable fee . . . a lodestar analysis would not be helpful in setting or even evaluating a reasonable percentage of the Common Fund.' *See Ramah I.*, 50 F.Supp.2d at 1097 (D.N.M. 1999). The Tenth Circuit has made it clear that district courts need not calculate a lodestar when applying the percentage method. *See Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994) (holding that the district court had abused its discretion by using the 'lodestar plus multiplier method' in evaluating reasonable attorney's fees paid out of a settlement fund in a securities class action). The percentage approach is also more efficient. Importantly, it aligns the interests of class counsel with the interests of the class because the more the class recovers, the more class counsel recovers. The lodestar analysis, even when

> used as a cross check to determine a reasonable percentage award, has the effect of rewarding attorneys for the same undesirable activities that the percentage method was designed to discourage, namely 'incentiviz[ing] [class counsel] to multiply filings and drag along proceedings to increase their lodestar.'

Ramah Navajo Chapter v. Jewell, 167 F. Supp. 3d 1217, 1241–42 (D. N.M. 2016).[2]

Under the 'common fund' doctrine, Class Counsel is entitled to an award of reasonable attorneys' fees from the settlement proceeds" in a class action. The Tenth Circuit has observed that despite advantages and disadvantages to the lodestar and percentage of the fund methodologies, the "recent trend has been toward utilizing the percentage method in common fund cases." *Gottlieb*, 43 F.3d at 482; *see also Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995) ("[w]e have recently implied 'a preference for the percentage of the fund' method in common fund cases"); Manual for Complex Litigation (Fourth), § 14.121 (the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases).

In calculating the percentage, it is appropriate to compare the fee to the total amount recovered for the benefit of the class, even if—unlike here—some of the fund ultimately reverts

[2] Numerous courts in the federal Tenth Circuit have awarded attorneys' fees under the percentage of the fund method without calculating the lodestar. *See, e.g., Fankhouser v. XTO Energy, Inc*., No. CIV–07–798–L, 2012, 2012 WL 4867715, at *3 (W.D. Okla. Oct. 12, 2012) (awarding 36% without lodestar cross check); *Droegemueller v. Petroleum Devel. Corp*., Civil Action Nos. 07–cv–1362–JLK–CBS, 07–cv–2508, 2009 WL 961539, at *4 (D. Colo. Apr. 7, 2009) (awarding 33 1/3% without a lodestar cross check*); Lewis v. Wal–Mart Stores, Inc*., No. 02-CV-0944-CVE-FHM, 2006 WL 3505851, at *2 (N.D. Okla. Dec. 4, 2006) (awarding 33 1/3% without calculating lodestar); *Millsap v. McDonnell Douglas Corp*., No. 94–CV–633–H(M), 2003 WL 21277124, at *9 (N.D. Okla. May 28, 2003) (awarding 25% without lodestar calculation); *Johnson v. Camino Nat'l Resources, LLC*, No. 19-cv-02742-CMA-SKC, 2021 WL 2550165, at *2 (D. Colo. June 22, 2021) (slip copy) (awarding 40% of gross settlement value); *Farley v. Family Dollar Stores, Inc*., Civil Action No. 12–cv–00325–RM–MJW, 2014 WL 5488897 (D. Colo. Oct. 30, 2014) (awarding 33% attorneys' fees and costs of total settlement without performing lodestar crosscheck);see also *Chieftain Royalty Co. v. XTO Energy Inc*., No. CIV-11-29-KEW, 2018 WL 2296588, at *3 (E.D. Okla. Mar. 27, 2018) (stating lodestar crosscheck not required in Tenth Circuit); *Chieftain Royalty Co. v. Marathon Oil Co.,* No. CIV-17-334-SPS, 2019 WL 7758915, at *3 (E.D. Okla. Mar. 8, 2019) (slip copy) ("The Tenth Circuit has repeatedly held that a lodestar crosscheck is not required.").

to the defendant because some class members choose not to claim their share. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 481 (1980) (attorneys' fees must be based on the value of the entire common fund, even if some beneficiaries make no claim); *accord Waters v. Intern. Precious Metals Corp*., 190 F.3d 1291, 1298-98 (11th Cir. 1999); *Williams v. MGM-Pathe Communications Co*., 129 F.3d 1026, 1027 (9th Cir. 1997). It is also appropriate to include the amount of the attorneys' fees in the common fund when calculating the proper percentage. *See* Manual for Complex Litigation, *supra*, § 21.7.

A leading commentator on class action litigation concluded as far back as 1992 that "no general rule" can be articulated as to what is a reasonable percentage of a common fund, but "[u]sually fifty percent of the fund is the upper limit on a reasonable fee award . . . though somewhat larger percentages are not unprecedented." 3 Alba Conte & Hebert Newberg, *Newberg on Class Actions* § 14.03 (3d ed. 1992). Most courts that have surveyed fee awards in common fund settlements have reached similar conclusions. *See, e.g., Brown v. Phillips Petroleum Co*., 838 F.2d 451, 455 (10th Cir. 1988) (surveying cases in which the percentage fee awarded ranged between 22% and 37.3%).

"Courts in this district implicitly agree that fee awards in class actions average around one-third of the recovery." *Key v. Butch's Rat Hole & Anchor Serv., Inc*., No. CIV 17-1171 RB/KRS, 2022 WL 457915, at *5 (D.N.M. Feb. 15, 2022) (approving 33.3% fee). Some courts in the Tenth Circuit refer to 25% of the fund as a "benchmark" award, to be adjusted upwards or downwards based on the circumstances. *See, e.g., Ramah Navajo Chapter v. Norton*, 50 F. Supp. 2d 1091, 1108 (D. N.M. 2002).[3] Factors to be considered in adjusting this benchmark include the twelve

[3] Other courts in the Tenth Circuit refer to a "presumptively reasonable" range of an award of attorneys' fees of 20% to 50% of the common fund. *See, e.g., Vaszlavik v. Storage Co*., No. 95-B-2525, 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000) ("requested fee of 30% percent of the settlement in a percent-of-fund case was in the middle of the ordinary 20%-50% range [for class

factors articulated in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974), discussed below. *See Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974); *see, e.g., Ramah Navajo Chapter*, 50 F. Supp. 2d at 1108 (applying *Johnson* factors); *Vizcaino v. Microsoft*, 290 F.3d 1043 (9th Cir. 2002) (applying similar factors).

The twelve factors evaluated under the *Johnson* test include: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and, (12) awards in similar cases. *See Johnson*, 488 F.2d at 717-19. A court does not need to specifically address each *Johnson* factor in a case. *See Blanco v. Xtreme Drilling & Coil Services, Inc.*, No. 16-cv-00249-PAB-SKC, 2020 WL 40414456, at *4 (D. Colo. July 7, 2020) (citing *Gudenkauf v. Stauffer Commc'ns, Inc.*, 158 F.3d 1074, 1083 (10th Cir. 1998)). Furthermore, "a court may assign different relative weights to the factors—that is, none of the factors is inherently equiponderant, preponderant, or dispositive." *Stalcup v. Schlage Lock Co.*, 505 F. Supp. 2d 704, 705-06 (D. Colo. 2007). The factors also need not be exhausted in every case. *See Jenkins v. Pech*, No. 8:14CV41**,** 2016 WL 715780, at *1 (D. Ne. Feb. 22, 2016) (citing *Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001). In a common fund case, the greatest weight is to be given to the monetary results

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action lawsuits]"); *Shaw v. Interthinx, Civil Action* No.: 13–cv–01229–REB–NYW, 2015, WL 1867861, at *6 (D. Colo. Apr. 22. 2015) (citing cases holding that fees within the 20%-50% range are "presumptively reasonable"). Moreover, other courts in other circuits refer to higher "benchmarks." *See, e.g., In re Activision Sec. Litig*., 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) (reviewing numerous cases to conclude that "in most recent cases the benchmark award is closer to 30%").

achieved. In fact, the monetary results may be considered "decisive." *Brown*, 838 F.2d at 456. Although the time and labor involved is a "relevant" factor, it should be assigned a lesser weight than the monetary results achieved, risks undertaken, and other factors that "predominate." *Id*

Regardless of which benchmark or method is used, courts typically approve fee awards at the higher end of the scale in an approximation of typical contingency fees in non-class actions of one-third or higher. *See Uselton v. Commercial Lovelace Motor Freight, Inc*., 9 F.3d 849, 853 (10th Cir. 1993) (awarding fees of 29% of common fund). Tenth Circuit courts, including courts within the District of New Mexico, have consistently approved class action fee amounts that are in accord with these percentages:

- *In re Boston Chicken, Inc., Sec. Lit*., Civil Action No. 97–cv–1308–WDM–PAC, 2006 WL 2338188 (D. Colo. 2006) ($6.5 million fee, representing 28% of fund);
- *Millsap v. McDonnell Douglas Corp*., No. 94–CV–633–H(M), 2003 WL 21277124 (N.D. Okla. 2003) ($8.75 million fee, representing 25% of fund);
- *Law v. Nat'l Collegiate Athletic Ass'n,* 108 F. Supp. 2d 1193 (D. Kan. 2000) ($18.2 million fee, representing 33.4% of fund);
- *Feerer v. Amoco Prod. Co*., No. 95-012 JC/WWD (D. N.M. 1998) ($20.54 million fee, representing 29.5% of fund);
- *In re Storage Tech. Sec. Lit*., No. 92-V-750 (D. Colo. 1995) ($16.5 million fee, representing 30% of fund);
- *Fuss, et al., v. Diagnostek, et al*., No. 92-1274 JC/WWD (D. N.M. 1994) ($5 million fee, representing 31.2% of fund);
- *In re United Tel., Inc., Sec. Lit.*, Civ. A. No. 90–2251–0, 1994 WL 326007 (D. Kan. 1994) ($9.33 million fee, representing 33.33% of fund);
- *Cimarron Pipeline Const., Inc., v. Nat'l Council on Comp. Ins.*, Nos. CIV 89–822–T, CIV 89–1186–T, 1993 WL 355466 (W.D. Okla. 1993) ($11.77 million fee, representing 33.33% of fund);
- *Robertson v. Whitman Consulting Org., Inc.*, No. 19-cv-2508-RM-KLM, 2021 WL 4947349, at *5 (D. Colo. Oct. 22, 2021) (slip copy) (awarding 40% of gross settlement amount plus costs);
- *Whittington v. Taco Bell of America, Inc.*, No. 10–cv–01884–KMT–MEH, 2013 WL 6022972, at *6 (D. Colo. Nov. 13, 2013) (awarding fees and costs amounting to approximately 39% of the fund as a whole as "within the normal range" in a common fund case);
- *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849 (10th Cir. 1993) ($507,500 fee, representing 29% of fund); and
- *In re Public Service Co. of New Mexico*, No. 91–0536M, 1992 WL 278452 (S.D. Cal. 1992) (litigated in part in New Mexico federal court) ($10.5 million fee,

representing 33% of fund).

State courts in New Mexico, relying on federal precedent, have also consistently approved fees in this same range:

- *In re N.M. Indirect Purchasers Microsoft Corp.,* 2007-NMCA-007, ¶ 87, 140 N.M. 879, 909, 149 P.3d 976, 1006 (affirming $6.1 million fee award, representing 25% of fund);
- *Nava v. City of Santa Fe*, 2004–NMSC–039, ¶ 25, 136 N.M. 647, 103 P.3d 571 (concluding that the district court did not abuse its discretion by awarding attorneys' fees equivalent to approximately 34% of the total judgment);
- *Lucero v. Aladdin Beauty Colls., Inc*., 117 N.M. 269, 272, 871 P.2d 365, 368 (1994) (holding that the district court did not abuse its discretion by awarding about 27% of the total judgment, including attorney fees);
- *Dichter v. BP America Production Co*., No. D-0101-CV-2000-01620 (Judge Vigil, First Jud. Dist., May 12, 2006) ($7 million fee, representing 24.5% of fund);
- *Berry v. Federal Kemper Life Ass. Co*., No. D-0101-CV-2000-2602 (Judge Hall, First Jud. Dist., June 2, 2006) ($4.77 million fee, representing 25% of fund); and
- *Mareau v. Regents of the Univ. of Cal.*, No. SF-96-2430(c) (Judge Hall, First Jud. Dist., Jan. 1, 2002) ($2.66 million fee, representing 25% of fund).

A. Courts routinely award reasonably incurred litigation expenses.

In addition to fees, it is well-settled that Class Counsel are entitled to an award of their litigation expenses reasonably and necessarily incurred:

> Lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover . . . expenses reasonable in amount, that were necessary to bring the action to a climax.

Newberg, *supra*, § 14.03.

B. Service awards are commonly awarded by New Mexico courts.

"Incentive awards [otherwise known as 'service awards'] are typical in class action cases." *Key*, 2022 WL 457915, at *3 (quoting *Acevedo v. Sw. Airlines Co*., No. 1:16-CV-00024-MV-LF, 2019 WL 6712298, at *4 (D. N.M. Dec. 10, 2019), *adopting report and recommendation*, 2020 WL 85132 (Jan. 7, 2020) (citing 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:38 (4th ed. 2008)). "Courts have stated that incentive awards for class representatives are justified to

give incentive to a class representative to come forward when none are forthcoming, and to compensate a class representative for risks they take and work they perform on behalf of the class." *Id*. (citing *UFCW Local 880-Retail Food Emp'rs Joint Pension Fund v. Newmont Mining Corp.*, 352 F. App'x 232, 235–36 (10th Cir. 2009) (subsequent citation omitted)). "[A] class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class." *Id*. (citations omitted).

DISCUSSION

Under these standards, the Court should grant the requested attorneys' fees, expenses, and service award. All of the requested amounts are reasonable, consistent with amounts routinely approved by New Mexico courts and in the Tenth Circuit, and well within the Court's discretion.

A. The Court should award Class Counsel attorneys' fees of one-third of the Settlement Fund.

Class Counsel took on this litigation on a contingent fee basis, meaning they expended their own labor to litigate, and their own money to cover litigation expenses, with no guarantee that they would ever receive any compensation for their time or be reimbursed their out of pocket expenses unless this risky litigation resolved favorably for their clients. Nonetheless, against a well-funded defense, Class Counsel achieved a non-reversionary Settlement Fund of $3,080,475 for the Class Members, including the option for Class Members to request an alternative cash payment that is estimated to be $80 (or more) without having to provide proof of any actual loss from the data incident. Payment of the standard one-third contingent fee in these circumstances is reasonable and is well-warranted considering the applicable factors.

First, under the *Johnson* factors, primary consideration is given to the results obtained. *See Brown*, 838 F.2d at 456. Here, there is no question that the results obtained weigh heavily in favor of approving the attorneys' fees requested. The benefit conferred upon the Settlement Class is

substantial, and includes valuable three-bureau credit monitoring, the ability to claim up to $80 for lost time spent mitigating the effects of the data security incident, up to $400 for ordinary losses, and up to $4,000 for documented out-of-pocket losses, plus the ability for Class Members to obtain an estimated $80 alternative cash payment with *no* requirement to submit any proof of actual harm or loss. All Settlement Class Members can claim any of these benefits. Class Counsel here obtained an outstanding result for the Settlement Class.

These Settlement terms are consistent with, and in fact exceed, agreement terms approved by Courts in other, similar data breach cases. *See Rutledge et al v. Saint Francis Healthcare System*, No. 1:20-cv-00013-SPC (E.D. Mo.) (data breach settlement providing up to $280 in value to Settlement Class Members in the form of: reimbursement up to $180 of out-of-pocket expenses and time spent dealing with the data breach; credit monitoring services valued at $100; and equitable relief in the form of data security enhancements); *Baksh et al. v. IvyRehab Network, Inc*. No. 7:20-CV-01845 (S.D.N.Y.) (providing up to $75 per class member out-of-pocket expenses incurred related to the data breach and $20 reimbursement for lost time, with payments capped at $75,000 in aggregate; credit monitoring for claimants; and equitable relief in the form of data security enhancements); *Chacon et al. v. Nebraska Medicine*, No. 8:21-cv-00070 (Dist. Nebr.) (data breach settlement providing up to $300 in ordinary expense reimbursements including to six hours of lost time at $20 per hour; up to $3,000 in extraordinary expense reimbursements; one-year of automatic credit monitoring; data security enhancements); *Chatelain et al. v. C, L and W PLLC, d/b/a Affordacare Urgent Care Clinics*, No. 50742-A (42nd Dist. Tex.) (data breach settlement providing 12-months of credit monitoring services and no expense reimbursements).

Second, the risks of the litigation for Class Counsel were high. Class Counsel took this highly complex class action case on a purely contingent basis. *See* Toops Decl. ¶ 11. As such,

Class Counsel assumed significant risk of nonpayment or underpayment. *See id.* Class Counsel took on these risks knowing full well their efforts may not bear fruit. Fees were not guaranteed—the retainer agreements Class Counsel has with Plaintiff do not provide for fees apart from those earned on a contingent basis, and in the case of class settlement, approved by the Court. *See id.* ¶ 16.

Class Counsel labored and advanced their own funds to prosecute the case all at the risk of never being paid for their work or reimbursed for their expenses. Class Counsel devoted their time and energy to this matter, instead of pursuing other income, all at the risk of never getting paid and, at best, being paid at some point potentially many years down the road. Had Defendants prevailed on the merits, on class certification, or on appeal, Class Counsel might have recovered nothing for the time and expense they invested in representing the Settlement Class. *See id.* ¶ 17.

Third, this case involved complexities of data breach that are novel and evolving. The highly technical aspects of the data breach mechanism (*i.e.,* the means by which Defendants' systems were breached), not to mention the knowledge of class action procedure required to achieve certification, let alone settlement, required the specialized skills and experience possessed by Class Counsel. While Mr. Andreoni is confident his claims would prevail, he faced several strong legal defenses and difficulties in demonstrating causation and injury. Such defenses, if successful, could drastically decrease or eliminate any recovery for Plaintiff and the putative class members. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on either certification or merits. The general risks of litigation are further heightened in the data breach arena. Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data breach cases like this one are particularly complex and face substantial hurdles—even just to make it past the pleading stage. As

one federal district court recently observed in finally approving a data breach settlement with similar class relief and similar attorneys' fees:

> Data breach litigation is evolving; there is no guarantee of the ultimate result. *See Gordon v. Chipotle Mexican Grill, Inc.,* No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases ... are particularly risky, expensive, and complex."). Plaintiffs also faced the risk that [defendant] would successfully oppose class certification, obtain summary judgment on one or more of their claims, or win at trial or on appeal. Also, the cost for [defendant] and Plaintiffs to maintain the lawsuit would be high, given the amount of documentary evidence as well as the expert costs both parties would incur in the context of class certification, summary judgment, and trial. As such, the current Settlement strikes an appropriate balance between Plaintiffs' "likelihood of success on the merits" and "the amount and form of the relief offered in the settlement." *See Carson v. Am. Brands, Inc*., 450 U.S. 79, 88 n.14 (1981).

Fox v. Iowa Health Sys., No. 3:18-CV-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021) (also approving attorneys' fees and costs in the amount of $1,575,000); *see also Hammond v. The Bank of N.Y. Mellon Corp*., 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013).

Fourth, the complexity of the case is further shown by the skill of the lawyers involved on both sides of the case. Class Counsel have national class action practices involving many areas of complex litigation, but particularly data breach cases of this very type. *See* Declaration of J. Gerard Stranch, IV, in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement, filed Feb. 8, 2024, ("Stranch Decl.") ¶ 3 and attached Firm Resumes. Class Counsel has been recognized by courts across the country for their skill. *See id.* On the other side of the case, Defendants are represented by Mullen Coughlin, LLC, which dedicates its practice to defending and addressing data incidents and that is a formidable opponent.

Fifth, the requested fee award is commensurate with the amount that Class Counsel has

been awarded in similar data breach litigation and in class action litigation in general in courts across the country. *See* Toops Decl. ¶ 6; *see also Fox*, No. 3:18-CV-00327-JDP, 2021 WL 826741, at *6 (approving attorneys' fees and costs in the amount of $1,575,000 in data breach settlement with similar class relief). The requested fees here are one-third of the total value of the non-reversionary Settlement Fund, which is well within the Court's discretion to award.

B. The Court should approve reimbursement to Class Counsel of reasonable litigation expenses they advanced.

The Court should likewise award Class Counsel reimbursement of the expenses they advanced in litigating this case. Due to the stage of litigation at which Plaintiff was able to reach settlement, costs incurred by Plaintiff are relatively low. Here, Class Counsel has advanced $16,500 in expenses for necessary litigation expenses, most of which are costs of mediation ($14,500) with the remainder being for filing and pro hac vice fees ($2,000). *See* Toops Decl., ¶ 7. As repayment of these expenses was contingent on judgment or settlement, Class Counsel's incentive was to incur only those expenses necessary to resolve the case. The requested expenses are reasonable and were all necessarily incurred for this litigation. The Court should approve the requested reimbursement.

C. The Court should approve a $2,500 service award to the Class Representative.

The Court should grant the Class Representative a service award of $2,500 in recognition of the time he spent and the results he obtained on behalf of the absent Settlement Class Members who will receive compensation without ever having to do anything. The Class Representative has regularly consulted with Class Counsel, provided documents and information, reviewed pleadings, and participated in the settlement process. *See* Toops Decl. ¶ 8. Without the Class Representative's efforts, the significant obtained on behalf of the Settlement Classes would never have been achieved. These factors support granting a service award. *See In re U.S. Bancorp Litig.*, 291 F.3d

1035, 1038 (8th Cir. 2002); *Ziegler v. Dale*, Civil Action No. 18-CV-71-SWS, 2021 WL 8999336, at *7 (D. Wy. Oct. 22, 2021) (awarding $5,000 incentive award to each Plaintiff for their services on behalf of class).. Now that the case has achieved a significant recovery, the Class Representative should be rewarded for having obtained the benefits of the Settlement on behalf the Class.

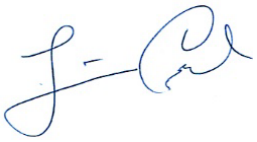
The requested service award is also reasonable and in line with similar awards approved in other cases. *See In re Universal Serv. Fund Tel. Billing Practices Litig*., No. 02-MD-1468-JWL, 2011 WL 1808038, at *2 (D. Kan. May 12, 2011) ($10,000 incentive award); *Lucken Family Ltd. P'ship v. Ultra Resources, Inc.,* No. 09-cv-01543 REB-KMT, 2010 WL 5387559, at *2 (D. Colo. Dec. 22, 2010) ($10,000 incentive award). The Court is well within its discretion to award the requested $2,500 service awards.

CONCLUSION

Upon granting final approval to the Settlement, the Court should approve the requested fees, expenses, and service aware by entering the proposed Order Approving Attorneys' Fees, Expenses, and Service Award.

DATED: April 16.2024 Respectfully submitted,

O'STEEN & HARRISON, PLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 16, 2024, I filed the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARD electronically through the Odyssey File & Serve system, which caused the following parties to be served by electronic means, as per the Notice of Electronic Filing.

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