

**IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

M.S., D.H., C.C. and Nicole Tokarski,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

MED-DATA, Inc.,

Defendant.

Civil Action No. 4:22-cv-00187

Hon. Judge Charles Eskridge

**PLAINTIFFS' UNOPPOSED MOTION FOR AN AWARD OF ATTORNEY'S  
FEES, REIMBURSEMENT OF COSTS AND EXPENSES, AND SERVICE  
AWARDS AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT**

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. THE NATURE AND STAGE OF PROCEEDINGS ..... 2

III. LEGAL STANDARD..... 2

IV. ARGUMENT..... 3

    A. The Award Sought for Attorney’s Fees is Reasonable and Appropriate. .... 3

        1. Plaintiffs’ Fee Request is Reasonable and Appropriate Under the Percentage of the Fund Method..... 4

        2. Plaintiffs’ Fee Request is Reasonable and Appropriate Under the Lodestar Method..... 5

        i. The Johnson Factors Support the Requested Fee Under the Lodestar Method. 7

            a. The Time and Labor Required for the Litigation..... 7

            b. The Novelty and Difficulty of the Questions..... 8

            c. The Skill Required to Perform the Legal Service Properly. .... 9

            d. Preclusion of Other Employment by the Attorney Due to Acceptance of the Case. .... 10

            e. Customary Fee for Similar Work in the Community..... 10

            f. Whether the Fee is Fixed or Contingent..... 12

            g. Time Limitations Imposed by the Client or the Circumstances..... 12

            h. The Amount Involved and the Results Obtained. .... 13

            i. The Experience, Reputation, and Ability of the Attorneys..... 13

            j. The Undesirability of the Case..... 14

k. The Nature and Length of the Professional Relationship with the Client... 14

l. Awards in Similar Cases. .... 15

B. Class Counsel’s Expense Reimbursement Request is Reasonable. .... 16

C. The Requested Service Awards are Warranted..... 17

V. CONCLUSION..... 18

**TABLE OF AUTHORITIES**

CASES

*Al's Pals Pet Care v. Woodforest Nat'l Bank, NA*,  
No. 4:17-CV-3852, 2019 WL 387409 (S.D. Tex. Jan. 30, 2019)..... 18

*Batchelder v. Kerr-McGee Corp.*,  
246 F. Supp. 2d 525 (N.D. Miss. 2003)..... 5

*Blum v. Stenson*,  
465 U.S. 886 (1984)..... 13

*Boeing Co. v. Van Gemert*,  
444 U.S. 472 (1980)..... 2

*Brantley v. Surles*,  
804 F.2d 321 (5th Cir. 1986) ..... 9

*Burford v. Cargill, Inc.*,  
No. CIV.A. 05-0283, 2012 WL 5471985 (W.D. La. Nov. 8, 2012)..... 19

*City of San Antonio, Texas v. Hotels.com, L.P.*,  
No. 5-06-CV-381-OLG, 2017 WL 1382553 (W.D. Tex. Apr. 17, 2017) ..... 8, 20

*Cunningham v. Kitchen Collection, LLC*,  
No. 4:17-CV-770, 2019 WL 2865080 (E.D. Tex. July 3, 2019)..... 5

*DeHoyos v. Allstate Corp.*,  
240 F.R.D. 269 (W.D. Tex. 2007) ..... 20

*Erica P. John Fund, Inc. v. Halliburton Co.*,  
No. 3:02-CV-1152-M, 2018 WL 1942227 (N.D. Tex. Apr. 25, 2018) ..... 6, 18

*Farrar v. Hobby*,  
506 U.S. 103 (1992)..... 16

*Fessler v. Porcelana Corona de Mex., S.A. de C.V.*,  
No. 4:17-CV-00001, 2020 WL 1974246 (E.D. Tex. Apr. 24, 2020) ..... 8

*Fessler v. Porcelana Corona De Mexico, S.A. DE C.V.*,  
23 F.4th 408 (5th Cir. 2022) ..... 16

*Fulton-Green v. Accolade, Inc.*,  
No. CV 18-274, 2019 WL 4677954 (E.D. Pa. Sept. 24, 2019) ..... 14

*Garcia v. Matson*,  
No. 21-51151, 2022 WL 6935303 (5th Cir. Oct. 12, 2022) ..... 21

*Gordon v. Chipotle Mexican Grill, Inc.*,  
No. 17-cv-01415-CMA-SKC, 2019 WL 6972701 (D. Colo. Dec. 16, 2019) ..... 11

*Guadalupe v. Am. Campus Communities Servs., Inc.*,  
No. 1:16-CV-967-RP, 2020 WL 12029307 (W.D. Tex. Oct. 23, 2020) ..... 21

*Heath v. Insurance Technologies Corp.*,  
No. 3:21-cv-014444 (N.D. Tex.) ..... 6

*Henderson v. KalispellRegional Healthcare*,  
No. CDV 19-0761 (Montana Eighth Judicial District Court, Cascade County) ..... 19

*In re Anthem, Inc. Data Breach Litig.*,  
No. 15-MD-02617-LHK, 2018 WL 3960068 (N.D. Cal. Aug. 17, 2018)..... 15

*In re Catfish Antitrust Litig.*,  
 939 F. Supp. 493 (N.D. Miss. 1996)..... 6

*In re Equifax Inc. Customer Data Sec. Breach Litig.*,  
 No. 1:17-MD-2800-TWT, 2020 WL 256132 (N.D. Ga. Mar. 17, 2020) ..... 14

*In re Forefront Data Breach Litig.*,  
 No. 21-CV-887, 2023 WL 6215366 (E.D. Wis. Mar. 22, 2023)..... 19

*In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*,  
 851 F. Supp. 2d 1040 (S.D. Tex. 2012)..... 20

*In re High Sulfur Content Gasoline Prod. Liab. Litig.*,  
 517 F.3d 220 (5th Cir. 2008) ..... 2

*In re TikTok, Inc., Consumer Priv. Litig.*,  
 617 F. Supp. 3d 904 (N.D. Ill. 2022)..... 19

*In re Yahoo! Inc. Customer Data Sec. Breach Litig.*,  
 No. 16-MD-02752-LHK, 2020 WL 4212811 (N.D. Cal. July 22, 2020)..... 14

*Johnson v. Georgia Highway Exp., Inc.*,  
 488 F.2d 714 (5th Cir. 1974) ..... 4, 9

*Johnson. Forbush v. J.C. Penney Co.*,  
 98 F.3d 817 (5th Cir. 1996) ..... 7

*King v. United SA Fed. Credit Union*,  
 744 F. Supp. 2d 607 (W.D. Tex. 2010) ..... 11

*Longden v. Sunderman*,  
 979 F.2d 1095 (5th Cir. 1992) ..... 4

*Louisiana Power & Light Co. v. Kellstrom*,  
50 F.3d 319 (5th Cir.) ..... 7

*Matson v. NIBCO Inc.*,  
No. 5-19-CV-00717-RBF, 2021 WL 4895915 (W.D. Tex. Oct. 20, 2021) ..... 21

*Matthews v. Priority Energy Servs., LLC*,  
No. 6:15CV448, 2018 WL 1939327 (E.D. Tex. Apr. 20, 2018) ..... 3

*McClain v. Lufkin Indus.*,  
649 F.3d 374 (5th Cir. 2011) ..... 8

*Miller v. Glob. Geophysical Servs., Inc.*,  
No. 14-CV-0708, 2016 WL 11645372 (S.D. Tex. Jan. 14, 2016)..... 18

*Missouri v. Jenkins*,  
491 U.S. 274 (1989)..... 7

*Perdue v. Hy-Vee, Inc.*,  
No. 19-1330, 2021 WL 3081051 (C.D. Ill. July 21, 2021) ..... 14

*Ramirez v. J. C. Penney Corp., Inc.*,  
No. 6:14-CV-601, 2017 WL 6462355 (E.D. Tex. Nov. 30, 2017)..... 5

*Spano v. Boeing Co.*,  
No. 06-CV-743-NJR-DGW, 2016 WL 3791123 (S.D. Ill. Mar. 31, 2016)..... 13

*Union Asset Mgmt. Holding A.G. v. Dell, Inc.*,  
669 F.3d 632 (5th Cir. 2012) ..... 3, 4

*Welsh v. Navy Fed. Credit Union*,  
No. 5:16-CV-1062-DAE, 2018 WL 7283639 (W.D. Tex. Aug. 20, 2018)..... 6

RULES

Fed. R. Civ. P. 23.....2, 20

TREATISES

Manual for Complex Litigation (4th ed. May 2023 update).....3



## I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23 and the Court’s February 6, 2024, Order Granting Preliminary Approval of Class Action Settlement (the “Preliminary Approval Order”) (ECF No. 88) in the above-captioned class action, Plaintiffs M.S., D.H., C.C., and Nicole Tokarsi (collectively, “Plaintiffs” or “Representative Plaintiffs”), by and through Beth E. Terrell and Ryan Tack-Hooper of Terrell Marshall Law Group, Jean S. Martin of Morgan & Morgan, Maureen Brady of McShane & Brady, William B. Federman of Federman & Sherwood, and John Heenan of Heenan & Cook (together, “Class Counsel”), respectfully submit this Motion for an Award of Attorney’s Fees, Reimbursement of Costs and Expenses, and Service Awards (“Fee Motion”). Specifically, Plaintiffs move this Court to approve (i) an award of attorney’s fees in the amount of \$2,333,100.00 which is 33.33% of the Settlement Fund; (ii) reimbursement of reasonable costs and expenses in the amount of \$200,000.00; and (iii) a service award of \$5,000.00 to each of the Representative Plaintiffs, for a total of \$20,000.00.

In common fund cases such as this one, precedent in this Circuit establishes that this Court has discretion to use either the percentage or lodestar method to determine whether the requested fee award is appropriate. As demonstrated below, under either method, the requested fee award is reasonable and well within the range of fees awarded in this Circuit. The requested costs and expenses of \$200,000.00 are also reasonable and were necessary for the litigation. Finally, the requested service awards constitute modest compensation to acknowledge Plaintiffs’ time, commitment, and zealous prosecution of this action

alongside Class Counsel. Respectfully, this Court should grant Class Counsel's Fee Motion.

## II. THE NATURE AND STAGE OF PROCEEDINGS

In the interest of judicial efficiency, for the factual and procedural background of this litigation, Plaintiffs respectfully refer this Court to and hereby incorporate Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (ECF No. 82), and the accompanying Exhibits, including the proposed Settlement Agreement, filed in conjunction therewith. *See also* Ex. 1 ("Joint Decl."), ¶¶ 3–9.

## III. LEGAL STANDARD

Under the well-settled "common fund" doctrine, attorneys who achieve a recovery for the benefit of a class in the form of a common fund are entitled to an award of fees and expenses from that fund as compensation for their work. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). District courts may "award reasonable attorney's fees that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). In class action settlements, district courts retain an "independent duty" to "ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel." *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008); *see also* Fed. R. Civ. P. 23, advisory committee's notes to the 2003 Amendments, subdivision (h) ("The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee."); Manual for Complex Litigation § 14.231 (4th ed. May 2023 update).

#### IV. ARGUMENT

##### A. The Award Sought for Attorney’s Fees is Reasonable and Appropriate.

To calculate attorney’s fees in common fund cases, courts in the Fifth Circuit will typically use: (i) the percentage of the fund method, in which the court awards fees as a reasonable percentage of the common fund; cross-checked with (ii) the lodestar method, in which the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or downward multiplier. *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012) (endorsing “the district courts’ continued use of the percentage method cross-checked with the Johnson factors”); *see also Matthews v. Priority Energy Servs., LLC*, No. 6:15CV448, 2018 WL 1939327, at \*1 (E.D. Tex. Apr. 20, 2018), report and recommendation adopted, No. 6:15CV448, 2018 WL 2193030 (E.D. Tex. May 11, 2018) (awarding “40% of the gross total award”). In cross-checking the percentage fee, “courts set the lodestar multiplier by applying the Johnson factors.” *Union Asset Mgmt. Holding A.G.*, 669 F.3d at 643 n.26. The twelve Johnson factors are:

- (1) The time and labor required....
- (2) The novelty and difficulty of the questions....
- (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 [for similar work in the community]....
- (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.

*Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). Here, the reasonableness of the fee request is demonstrated under the percentage of the fund method and is further confirmed by a lodestar cross-check.

**1. Plaintiffs’ Fee Request is Reasonable and Appropriate Under the Percentage of the Fund Method.**

The Fifth Circuit has employed, and prefers, the percentage of the fund method when assessing whether the awards sought for attorney’s fees are reasonable and appropriate. *See Longden v. Sunderman*, 979 F.2d 1095, 1100 n.11 (5th Cir. 1992) (affirming district court’s percentage fee award in securities class action, noting that the district court stated its preference for the percentage of recovery approach “as a matter of policy.”); *Ramirez v. J. C. Penney Corp., Inc.*, No. 6:14-CV-601, 2017 WL 6462355, at \*5 (E.D. Tex. Nov. 30, 2017), report and recommendation adopted, No. 6:14CV601, 2017 WL 6453012 (E.D. Tex. Dec. 18, 2017); *Cunningham v. Kitchen Collection, LLC*, No. 4:17-CV-770, 2019 WL 2865080, at \*3 (E.D. Tex. July 3, 2019); *Batchelder v. Kerr-McGee Corp.*, 246 F. Supp. 2d 525, 531 (N.D. Miss. 2003) (“A percentage fee approach, as opposed to a lodestar computation, is the preferred method for determining awards of attorney’s fees in common fund, or class action, cases.”).

In this action, Defendant agreed to pay \$7,000,000.00 into a Settlement Fund, which will fund, in addition to the claims of Settlement Class Members, the service awards, attorney’s fees, and costs and expenses. *See* ECF No. 82-2, Settlement Agreement (“SA”), § V.5. Class Counsel request an award of one-third (33.33%) of the Settlement Fund, or \$2,333,100.00. This fee is both reasonable and appropriate. Courts in the Fifth Circuit

regularly award fees in this range. *See, e.g., Welsh v. Navy Fed. Credit Union*, No. 5:16-CV-1062-DAE, 2018 WL 7283639, at \*16 (W.D. Tex. Aug. 20, 2018) (“When the percentage method is used, fee awards commonly fall between 20% at the low end and 50% at the upper end[.]”) (citing *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 503 (N.D. Miss. 1996) (“The petitioners present to the court citations of numerous cases wherein the presiding judge awarded fees within a range of fifteen (15) to fifty (50) percent.”); *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152-M, 2018 WL 1942227, at \*17 (N.D. Tex. Apr. 25, 2018) (awarding one-third of the Settlement Fund); *Heath v. Insurance Technologies Corp.*, No. 3:21-cv-014444 (N.D. Tex.) (ECF No. 52) (awarding one-third of the Settlement Fund in a data breach case).

Here, the work that Class Counsel performed supports the requested percentage. Class Counsel conducted multiple depositions, defended depositions of each of the Plaintiffs, briefed motions to dismiss in each case, briefed motions for class certification in each case, and conducted two mediations. *See* Joint Decl., ¶¶ 3–9, 13, 19. Based upon the work performed and result achieved, the requested attorney’s fees of one-third of the Settlement Fund, or \$2,333,100.00, is reasonable.

## **2. Plaintiffs’ Fee Request is Reasonable and Appropriate Under the Lodestar Method.**

Under the lodestar approach, courts first multiply the number of hours reasonably spent on the case by each attorney's reasonable hourly rate to compute the lodestar, and then adjust that figure (by applying a multiplier) depending on the respective weights of the twelve factors set forth in *Johnson. Forbush v. J.C. Penney Co.*, 98 F.3d 817, 821 (5th

Cir. 1996) (citing *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir.), cert. denied, 133 L. Ed. 2d 113, 116 S. Ct. 173 (1995); *Johnson*, 488 F.2d at 717–19). To compensate Class Counsel for their work in prosecuting this case, it is appropriate to use current billing rates in calculating the lodestar. *See Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989) (current rates, rather than historical rates, should be applied to compensate for delay in payment). Courts also determine whether the hourly rates are reasonable by comparing them to prevailing hourly rates in the community for similar services by lawyers of comparable caliber in their skills, legal reputation, experience, and status (e.g., partner, counsel, associate). *See, e.g., City of San Antonio, Texas v. Hotels.com, L.P.*, No. 5-06-CV-381-OLG, 2017 WL 1382553, at \*9 (W.D. Tex. Apr. 17, 2017); *McClain v. Lufkin Indus.*, 649 F.3d 374, 381 (5th Cir. 2011). “The reasonable hourly rate is the rate ‘prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.’ The relevant legal community is the community where the district court sits.” *Fessler v. Porcelana Corona de Mex., S.A. de C.V.*, No. 4:17-CV-00001, 2020 WL 1974246, at \*5 (E.D. Tex. Apr. 24, 2020).

Here, as reflected in the Joint Declaration, attached hereto as Exhibit 1, Class Counsel collectively spent 3,452.05 hours litigating this action (and the other three actions), for a total lodestar of \$2,367,657.50. *See* Joint Decl., ¶¶ 3, 20. The time reflected in Class Counsel’s lodestar calculations is reasonable and was necessary for the effective and efficient prosecution and resolution of this litigation. *See id.* ¶¶ 18–20. In addition, the fees and expenses incurred in this litigation are all of a type that would normally be charged to a fee-paying client in the private legal marketplace. *See id.* ¶ 22. Class Counsel’s current

rates are also appropriate in light of prevailing rates for similar legal services provided by lawyers of reasonably comparable skill, experience, and reputation. *See id.* ¶ 23. Other courts have found Class Counsel’s rates to be reasonable and have approved them. *See id.* ¶ 23. Further, the requested fee award represents a negative multiplier of 0.98 of Class Counsel’s collective lodestar. *Id.* ¶ 25. Because there is additional work required to obtain final approval, monitor the settlement, and assist Class Members through the claims process, this multiplier will ultimately decrease. *Id.* Therefore, the one-third (33.33%) fee request under the lodestar/multiplier method verifies its reasonableness.

**i. *The Johnson Factors Support the Requested Fee Under the Lodestar Method.***

Application of the Johnson factors confirms that the requested fee is fair and reasonable under the lodestar method. *Johnson*, 488 F.2d at 717–19. Each of the Johnson factors will vary, depending on the case, and rather than imposing a rigid application of each factor, the Fifth Circuit has entrusted the lower courts to apply those factors in view of the circumstances of a particular case. *Brantley v. Surlles*, 804 F.2d 321, 325–26 (5th Cir. 1986). Here, all the Johnson factors support the requested fee award.

**a. *The Time and Labor Required for the Litigation.***

The first *Johnson* factor supports a finding that the requested fee award is appropriate because this case consumed the attention of several reputable law firms and partners, associates, and paralegals, who devoted a substantial amount of hours focused on the issues, and flexibility and cooperation to meet the deadlines required. In particular, pursuant to the joint declaration of Class Counsel submitted herewith, Class Counsel

dedicated a total of 3,452.05 hours on this matter as of the date of this filing, for a total collective lodestar of \$2,367,657.50. *See* Joint Decl. ¶¶ 20, 24.

Class Counsel, among other things, have: (i) before filing the complaint, investigated the potential claims against Med-Data, interviewed potential plaintiffs, and gathered information about the Data Incident and its potential impact; (ii) interviewed and obtained a declaration from Jelle Ursem, the security researcher who discovered the exposed data on GitHub; (iii) served multiple sets of written discovery requests on Med-Data, which led to Med-Data producing over 26,000 pages of documents, which Class Counsel reviewed; (iv) obtained and reviewed documents from Med-Data's cybersecurity consultant, Crowe LLP; (v) took the Rule 30(b)(6) depositions of Med-Data and Shawnee Mission; prepared Plaintiffs for depositions and defended Plaintiffs' depositions; (vi) responded to multiple sets of written discovery requests and produced documents; (vii) attended two mediation sessions; (viii) drafted motions for class certification and responses in opposition to Defendant's motions to dismiss; and (ix) engaged and interacted with experts to support Plaintiffs' motions for class certification. *Id.* ¶¶ 4, 19. Therefore, the time and labor required supports the requested fee.

**b. The Novelty and Difficulty of the Questions.**

The second Johnson factor also weighs in favor of awarding the requested fee because data breach class actions are an evolving area of law that present novel and complex issues, making the outcome difficult to predict. *See id.* ¶¶ 14, 16. Also, a successful outcome would ensue, if at all, only after significantly more prolonged and costly litigation with an attendant risk of drawn-out appeals. *See id.* ¶ 14. Among national



consumer protection class action litigation, data breach cases are some of the most complex and involve a rapidly evolving area of law. *See id.* ¶ 16. Courts have certified very few classes in this area *See id.* ¶ 14. Moreover, the theories of damages remains untested at trial and on appeal. *See id.* As one federal district court recently observed: 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.”). These cases are particularly risky for plaintiffs’ attorneys. Consequently, the requested fee award appropriately compensates Class Counsel for the risks undertaken in this litigation.

**c. The Skill Required to Perform the Legal Service Properly.**

The next Johnson factor evaluates the skill needed to perform the legal service properly. Counsel exemplify this factor when they “performed diligently and skillfully, achieving a speedy and fair settlement, distinguished by the use of informal discovery and cooperative investigation to provide the information necessary to analyze the case and reach a resolution.” *King v. United SA Fed. Credit Union*, 744 F. Supp. 2d 607, 614 (W.D. Tex. 2010) (citation omitted).

Class Counsel are some of the most experienced attorneys in this area of practice and have successfully litigated some of the largest data breach cases in this country to date. *See Joint Decl.*, ¶ 12. The result achieved in this Settlement is notable because the parties were able, through capable and experienced counsel, to negotiate a Settlement that provides significant benefits to the Settlement Class. *Id.* ¶¶ 10–14. The negotiations took place only

after Class Counsel obtained significant documents and information in discovery from Defendant regarding the Data Incident that, combined with their experience and insight from litigating other data breach class actions, allowed them to evaluate the claims and reach a beneficial compromise. *Id.* The Settlement is outstanding because of (i) the simplicity of the claims process; (ii) the relief, which addresses the risk and harm Settlement Class Members faced in the wake of the Data Incident; (iii) the hard fought litigation Class Counsel pursued to secure the Settlement for the Class; (vi) and the cooperation of Class Counsel which aided in the ability to resolve this matter efficiently. *Id.* ¶¶ 10–15. Therefore, this factor also weighs in favor of approval of the requested fee.

**d. Preclusion of Other Employment by the Attorney Due to Acceptance of the Case.**

The application of the fourth Johnson factor provides further support for the requested fees because the pursuit of this litigation required a concentration of effort that impacted counsel’s ability to engage in other litigation. *Id.* ¶¶ 30–31. Class Counsel invested substantial time, effort, and resources into the litigation of this risky and uncertain case with no guarantee or promise of return on their investment. *Id.* ¶¶ 26, 29–33. Accordingly, this factor supports the requested fee.

**e. Customary Fee for Similar Work in the Community.**

As discussed previously, the requested customary billing rates reflect the particular legal expertise of Class Counsel and are also based on established competitive market rates for national cases involving complex and class action litigation. Reasonable hourly rates are determined by “prevailing market rates in the relevant community.” *Blum v. Stenson*,

465 U.S. 886, 895 (1984). The prevailing market rate takes into account the hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Id.* at 895 n.11. Here, the relevant community is that of attorneys practicing multi-state class action litigation.

Class Counsel's lodestar is calculated using rates that have been accepted in numerous other data breach and consumer class action cases. Joint Decl., ¶ 23. The hourly rates charged by Class Counsel are also commensurate with hourly rates charged by their contemporaries around the country, including those rates charged by lawyers with similar experience who practice in the area of data breach class litigation. *Id.*; *see, e.g., Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at \*3 (S.D. Ill. Mar. 31, 2016) (approving these hourly rates: attorneys with at least 25 years of experience, \$998 per hour; for attorneys with 15–24 years of experience, \$850 per hour; for attorneys with 5–14 years of experience, \$612 per hour; for attorneys with 2–4 years of experience, \$460 per hour; for paralegals and law clerks, \$309 per hour; for legal assistants, \$190 per hour); *Perdue v. Hy-Vee, Inc.*, No. 19-1330, 2021 WL 3081051, at \*5 (C.D. Ill. July 21, 2021) (approving reasonable hourly rates requested by Class Counsel in data breach settlement of \$700–\$815 for partners, \$325–\$700 for associates, \$200–\$275 for paralegals, and \$150–\$225 for law clerks); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at \*39 (N.D. Ga. Mar. 17, 2020) (finding reasonable hourly rates charged by partners who billed \$1,050, \$1,000, \$750, and \$935 per hour); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at

\*26 (N.D. Cal. July 22, 2020) (finding reasonable rates from \$450–\$900 for partners, \$160–\$850 for non-partner attorneys, and \$50–\$380 for paralegals); *Fulton-Green v. Accolade, Inc.*, No. CV 18-274, 2019 WL 4677954, at \*12 (E.D. Pa. Sept. 24, 2019) (finding reasonable hourly rates range \$202–\$975 per hour in data breach settlement); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at \*16 (N.D. Cal. Aug. 17, 2018) (finding reasonable hourly rates of partners from \$400–\$970, non-partner attorneys from \$185– \$850, and non-attorneys from \$95–\$440). Class Counsel’s significant experience coupled with their comparable hourly rates supports the requested attorneys’ fees.

**f. Whether the Fee is Fixed or Contingent.**

Class Counsel undertook this litigation on a purely contingent basis, with no assurance of recovery of expenses or compensation for their time. Joint Decl., ¶¶ 26, 29–33. The nature of contingency fees is that they are inherently uncertain and require counsel to assume more risk than in cases where compensation is based on billable hours. *Id.* Accordingly, Johnson factor 6 tips the scales in favor of the requested award because the percentage of fee applied to the total recovery obtained for the client reflects the uncertain nature of contingency fee agreements.

**g. Time Limitations Imposed by the Client or the Circumstances.**

The time constraints here were typical of like litigation; this factor is therefore neutral.

**h. The Amount Involved and the Results Obtained.**

The most critical factor in determining the reasonableness of a fee award is the “degree of the success obtained.” *Fessler v. Porcelana Corona De Mexico, S.A. DE C.V.*, 23 F.4th 408, 418 (5th Cir. 2022) (citing *Farrar v. Hobby*, 506 U.S. 103, 114 (1992)). The result achieved by this Settlement weighs in favor of the requested attorney’s fee award. The Settlement Agreement provides significant monetary benefits and mitigative relief. Joint Decl., ¶¶ 10–11. Specifically, Defendant will establish a Settlement Fund of \$7,000,000, which will be the source of all settlement costs and awards payments to Settlement Class Members, administrative costs, service awards, and attorneys’ fees, and costs and expenses. *Id.* ¶ 10. Settlement Class Members are eligible to submit claims for one of two payment options. SA § IV.6. Settlement Class Members may submit a “Tier 1 Claim” for up to five hours of lost time reimbursed at \$25.00 per hour and compensation for documented Out-of-Pocket Losses, up to a total of \$5,000.00. *Id.* §§ IV.1.a–d. In the alternative, Settlement Class Members may submit a “Tier 2 Claim” for an alternative cash payment of up to \$500 *Id.* § IV.2. All Settlement Class Members will also be eligible for “Tier 3 Automatic Benefits” of 36 months of Medical Shield Premium—a health data/fraud monitoring service with \$1,000,000.00 in identity theft insurance coverage—even if they do not file a claim. *Id.* § IV.3. This factor weighs heavily in favor of the requested fee.

**i. The Experience, Reputation, and Ability of the Attorneys.**

This factor has been addressed under factors 1 and 3 above. Throughout this litigation, Class Counsel have demonstrated to the Court that they have competently

handled this litigation. *See also* factors 1 and 3, discussed *supra*. This case was defended by highly qualified and nationally recognized counsel with a great deal of experience in data breach cases. Class Counsel managed this litigation skillfully, advancing Plaintiffs' and Class Members' best interests while facing challenging opponents, further attesting to the experience and ability of the attorneys involved.

**j. The Undesirability of the Case.**

Given that data breach cases pose unique challenges because this area of law is not yet settled, and the outcome is hard to predict and the cases may therefore be considered as a less than desirable undertaking, even for seasoned class action attorneys. *See* Joint Decl., ¶¶ 29–34. Moreover, class action litigation is more involved and lengthier, and requires more discovery and more investigation than other types of litigation. Finally, Class Counsel undertook this litigation on a contingency fee basis, which in itself carries more risk. *See id.* ¶¶ 29–34. All these factors contribute to the undesirability of the case and support awarding the requested fee.

**k. The Nature and Length of the Professional Relationship with the Client.**

Class Counsel spent time building relationships with Plaintiffs, discussing Plaintiffs' claims, and addressing Plaintiffs' questions and concerns. *Id.* ¶ 19(h). As addressed under Johnson factor 1, before filing the Complaint, Class Counsel investigated the potential claims against Defendant, interviewed potential plaintiffs, and gathered information about the Data Incident and its potential impact. *Id.* ¶¶ 4, 19(b). Plaintiffs were consistently involved throughout discovery and settlement negotiations. *Id.* ¶ 36. Class

Counsel also regularly conferred with Plaintiffs about the status, strategy, and direction of the case and settlement negotiations. *Id.* ¶ 36. Thus, the nature and length of the professional relationship is a beneficial factor.

### **I. Awards in Similar Cases.**

Finally, Johnson factor 12 also supports the requested fee award. The requested fee award is similar to the attorney's fees awarded in other class action litigation. *See Al's Pals Pet Care v. Woodforest Nat'l Bank, NA*, No. 4:17-CV-3852, 2019 WL 387409, at \*4 (S.D. Tex. Jan. 30, 2019) (“[T]he requested one-third fee is reasonable, customary, and standard for contingency litigation in this District”); *Miller v. Glob. Geophysical Servs., Inc.*, No. 14-CV-0708, 2016 WL 11645372, at \*1 (S.D. Tex. Jan. 14, 2016) (awarding one-third of the settlement fund) *Erica P. John Fund, Inc.*, 2018 WL 1942227, at \*13 (awarding one-third of the settlement fund); *Burford v. Cargill, Inc.*, No. CIV.A. 05-0283, 2012 WL 5471985, at \*7 (W.D. La. Nov. 8, 2012) (awarding one-third of the total recovery); *see also Inre TikTok, Inc., Consumer Priv. Litig.*, 617 F. Supp. 3d 904, 941 (N.D. Ill. 2022) (awarding one-third of the settlement fund and noting that “a flat percentage fee award of one-third of the net common fund is typical in other data privacy settlements”); *In re Forefront Data Breach Litig.*, No. 21-CV-887, 2023 WL 6215366, at \*10 (E.D. Wis. Mar. 22, 2023) (awarding one-third of the settlement fund in data privacy case); *Henderson v. Kalispell Regional Healthcare*, No. CDV 19-0761 (Montana Eighth Judicial District Court, Cascade County) (awarding attorney's fees of 33% of the common fund of \$4.2 million in data privacy case). For these reasons, Class Counsel should be reasonably compensated for

their successful efforts in representing the Class and achieving an outstanding settlement for Plaintiffs and the Class.

In sum, Class Counsel's requested fee of \$2,333,100.00, or (33.33%) of the Settlement Fund, is reasonable and consistent with awards in this Circuit and in similar cases. A lodestar cross-check and application of the Johnson factors confirms the appropriateness of the requested fee award.

**B. Class Counsel's Expense Reimbursement Request is Reasonable.**

District courts allow counsel to recover costs and expenses from the common fund that are of the sort that lawyers ordinarily include in their bills to clients. *See City of San Antonio*, 2017 WL 1382553, at \*17; *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1089 (S.D. Tex. 2012); Fed. R. Civ. P. 23(h) (authorizing the recovery of “nontaxable costs”); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 334 (W.D. Tex. 2007) (“The appropriate analysis to apply in determining which expenses are compensable in a class action case is whether such costs are of the variety typically billed by attorneys to clients.”). The joint declaration filed herewith demonstrates that the expenses sought to be reimbursed were all advanced by Class Counsel, were necessarily incurred in the prosecution of this case, and were also properly documented and prepared using contemporaneous time records. *See* Joint Decl., ¶¶ 22, 24, 28, 33–34. Such costs and expenses included research, court fees, mediation fees, and other services that are necessary and reasonable to prosecuting a class action. *Id.* Class Counsel incurred \$205,244.27 in costs and expenses but only seek reimbursement of \$200,000.00, pursuant to the terms of the Settlement Agreement. The requested reimbursement of \$200,000.00 in



costs and expenses typically billed to clients are therefore appropriately reimbursable to Class Counsel.

**C. The Requested Service Awards are Warranted.**

Class Counsel move this Court to approve a service award of \$5,000.00 to each Plaintiff for their service as Class Representatives. Courts regularly approve reasonable service awards to compensate the named plaintiffs for their services. *See Guadalupe v. Am. Campus Communities Servs., Inc.*, No. 1:16-CV-967-RP, 2020 WL 12029307, at \*2 (W.D. Tex. Oct. 23, 2020) (awarding service award of \$12,000 to the plaintiff); *see also Matson v. NIBCO Inc.*, No. 5-19-CV-00717-RBF, 2021 WL 4895915, at \*13 (W.D. Tex. Oct. 20, 2021), *aff'd sub nom. Garcia v. Matson*, No. 21-51151, 2022 WL 6935303 (5th Cir. Oct. 12, 2022) (finding that an award of \$10,000 to each plaintiff was appropriate under the circumstances of the case and would adequately compensate plaintiffs for the service they provided and the burdens they shouldered.).

Plaintiffs here have been instrumental in assisting Class Counsel throughout the litigation. Joint Decl., ¶ 36. Plaintiffs initiated and remained in contact with Class Counsel; reviewed various pleadings in this case, including the settlement papers; monitored and periodically visited with Class Counsel; were deposed; provided documents during discovery to Class Counsel; and have been actively involved in the prosecution of the case, to ensure that Class Members received the best recovery possible given the particular circumstances and risks of the case. *Id.* Balancing the services that Plaintiffs rendered against the modest amount of the \$5,000.00 for each of the Plaintiffs (*i.e.*, \$20,000.00), the Court should find such amount is reasonable.

## V. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court approve (i) an award of attorneys' fees in the amount of \$2,333,100.00 to Class Counsel; (ii) reimbursement of reasonable costs and expenses in the amount of \$200,000.00; and (iii) a service award of \$5,000.00 to each of the Representative Plaintiffs, for a total of \$20,000.00.

Date: May 6, 2024

Respectfully Submitted,

### **FEDERMAN & SHERWOOD**

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*Class Counsel*

**CERTIFICATE OF WORD COUNT**

I hereby certify that this document complies with Rule 18(c) of this Court's Procedures, being 4,727 words, exclusive of case caption, table of contents, table of authorities, signature blocks, and certificates.

/s/ William B. Federman  
William B. Federman

**CERTIFICATE OF CONFERENCE**

I hereby certify that I conferred with Defendant and Defendant does not oppose the relief sought herein.

/s/ William B. Federman  
William B. Federman

**CERTIFICATE OF SERVICE**

I hereby certify that on May 6, 2024, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using CM/ECF. Copies of the foregoing document will be served upon interested counsel via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ William B. Federman  
William B. Federman

# Exhibit 1

**IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

M.S., D.H., C.C. and Nicole Tokarski,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

MED-DATA, Inc.,

Defendant.

Civil Action No. 4:22-cv-00187

Hon. Judge Charles Eskridge

**JOINT DECLARATION OF WILLIAM B. FEDERMAN, MAUREEN BRADY,  
BETH E. TERRELL, RYAN TACK-HOOPER, JEAN S. MARTIN, AND JOHN  
HEENAN IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION  
FOR AN AWARD OF ATTORNEY'S FEES, REIMBURSEMENT  
OF COSTS AND EXPENSES, AND SERVICE AWARDS**

We, Beth E. Terrell and Ryan Tack-Hooper of Terrell Marshall Law Group, Jean S. Martin of Morgan & Morgan, Maureen Brady of McShane & Brady, William B. Federman of Federman & Sherwood, and John Heenan of Heenan & Cook (together, "Class Counsel"), being competent to testify, make this declaration based on our own personal knowledge, and if called to do so, could and would testify to the matters contained herein.

1. Beth E. Terrell and Ryan Tack-Hooper of Terrell Marshall Law Group, Jean Martin of Morgan & Morgan, Maureen Brady of McShane & Brady, William B. Federman of Federman & Sherwood, and John Heenan of Heenan & Cook were appointed by the Court as Class Counsel in this matter pursuant to the Court's February 6, 2024, Order Granting Preliminary Approval of Class Action Settlement (the "Preliminary Approval

Order”) (ECF No. 88).

2. Class Counsel submit this Declaration in support of Plaintiffs’ Motion for an Award of Attorney’s Fees, Reimbursement of Costs and Expenses, and Service Awards (the “Fee Motion”) on behalf of Plaintiffs M.S., D.H., C.C., and Nicole Tokarsi (collectively, “Plaintiffs”) and the Settlement Class.

### **I. PROCEDURAL BACKGROUND**

3. Plaintiffs M.S. and D.H. filed the present action after Med-Data announced that patient data had been exposed on a publicly accessible website, Github.com. Four additional class action lawsuits were filed in various jurisdictions: (i) *Tokarski v. Med-Data, Inc.*, No. 2:21-cv-00631-TL (W.D. Wash.); (ii) *C.C. v. Shawnee Mission Medical Center*, No. 21CV01724, (Johnson County, Kansas); (iii) *C.C. v. Med-Data, Inc.*, No. 21CV01716, (Johnson County, Kansas); and (iv) *D.H. v. Shawnee Mission Medical Center*, No. 2116-CV09159, (Jackson County, Missouri).

4. Class Counsel have cooperatively litigated the claims in the Litigation. Class Counsel, among other things, have: (i) before filing the complaint, investigated the potential claims against Med-Data, interviewed potential plaintiffs, and gathered information about the Data Incident and its potential impact; (ii) interviewed and obtained a declaration from Jelle Ursem, the security researcher who discovered the exposed data on GitHub; (iii) served multiple sets of written discovery requests on Med-Data, which led to Med-Data producing over 26,000 pages of documents, which Class Counsel reviewed; (iv) obtained and reviewed documents from Med-Data’s cybersecurity consultant, Crowe LLP; (v) took the Rule 30(b)(6) depositions of Med-Data and Shawnee Mission; prepared

Plaintiffs for depositions and defended Plaintiffs' depositions; (vi) responded to multiple sets of written discovery requests and produced documents; (vii) attended two mediation sessions; (viii) drafted motions for class certification and responses in opposition to Defendant's motions to dismiss; and (ix) obtained and interacted with expert Gary Olsen to support Plaintiffs' motions for class certification.

5. Plaintiffs opposed Med-Data's motions to dismiss in this case and the *Tokarski* and *C.C.* cases. Plaintiffs here and in *Tokarski* moved for class certification, and Med-Data opposed. Plaintiffs' motions were supported by a report from Gary Olsen, an expert in valuing intangible assets in healthcare. Med-Data filed its own expert report and motions to exclude Olsen's testimony.

6. The parties mediated in September 2022 with the assistance of mediator Louis Peterson, without success. The parties continued litigation, including the preparation of motions for class certification. On March 28, 2023, the parties attended a second mediation with mediator Robert A. Meyer. During this second mediation, the parties agreed to key terms and, thereafter, continued negotiating the final terms of the settlement.

7. Over the following weeks, the Parties drafted, negotiated, and finalized the settlement agreement, notice forms, and agreed upon a claims administrator and identity theft protection services.

8. The parties also agreed that approval for the Settlement would be sought through the present litigation.

9. Plaintiffs filed their Motion for Preliminary Approval of Class Action Settlement (ECF No. 82) on November 16, 2023. The Court granted preliminary approval



of the Settlement on February 6, 2024 (ECF No. 88), after preliminarily finding that the Settlement was fair, adequate, and reasonable.

## II. THE SETTLEMENT

10. This Settlement is an outstanding result for Plaintiffs and the Settlement Class. Med-Data will establish a \$7,000,000.00 non-reversionary Settlement Fund to pay for settlement awards, notice and administration costs, and any court-approved service awards and attorney's fees and costs.

11. Settlement Class Members are eligible to submit claims for one of two payment options. *See* ECF No. 82-2, Settlement Agreement (“SA”) § IV.6. Settlement Class Members may submit a “Tier 1 Claim” for up to five hours of lost time reimbursed at \$25.00 per hour and compensation for documented Out-of-Pocket Losses, up to a total of \$5,000.00. *Id.* §§ IV.1.a–d. In the alternative, Settlement Class Members may submit a “Tier 2 Claim” for an alternative cash payment of up to \$500. *Id.* § IV.2. All Settlement Class Members will also be eligible for “Tier 3 Automatic Benefits” of 36 months of Medical Shield Premium—a health data/fraud monitoring service with \$1,000,000.00 in identity theft insurance coverage—even if they do not file a claim. *Id.* § IV.3.

12. Class Counsel are some of the most experienced attorneys in this area of practice and have successfully litigated some of the largest data breach cases in this country to date. Based on our years of practice litigating class and other complex actions, we endorse the Settlement and believe it benefits and provides substantial relief to the Settlement Class Members. Of the various forms of relief available in national consumer protection class actions (injunctive, declaratory, coupons, gift cards, cash compensation,

etc.), the relief obtained by Class Counsel in this case is of the most preferable form: cash compensation plus mitigative relief.

13. The result achieved in this Settlement is notable because the Parties were able, through capable and experienced counsel, to negotiate a Settlement only after hard-fought litigation. The negotiations took place only after Class Counsel obtained significant documents and information in discovery from Defendant regarding the Data Incident that, combined with their experience and insight from litigating other data breach class actions, allowed them to evaluate the claims and reach a beneficial compromise.. Class Counsel were well-informed of the strengths and weaknesses of the cases before negotiating the Settlement.

14. Our years of experience representing individuals in complex class actions—including data breach class actions—contributed to an awareness of Plaintiffs’ and the Class’s settlement leverage, as well as their needs. Although we believe that our clients would ultimately prevail in the litigation on a class-wide basis, data breach class actions are still new and can present novel and complex issues, making a successful outcome difficult to predict. Also, a successful outcome would ensue, if at all, only after a prolonged and costly trial with an attendant risk of drawn-out appeals. Courts have certified very few classes in this area. Moreover, the theories of damages remain untested at trial and on appeal.

15. The Settlement is also notable for the simplicity of the claims process. Class Members need only fill out a simple claim form to receive benefits under the Settlement.

16. Among national consumer protection class action litigation, data breach

cases are some of the most complex and involve a rapidly evolving area of law. As such, these cases are particularly risky for plaintiffs' attorneys. Accordingly, the value of the services received by the Plaintiffs and the Settlement Class in this case is commensurate with the attorneys' fees, costs and expenses, and service awards sought here.

17. In the process of reaching this Settlement, this case was defended by highly qualified and nationally recognized counsel with a great deal of experience in data breach cases. This Settlement occurred as the result of lengthy, arm's-length negotiations facilitated by a well-respected mediator, which supports the fee award requested here.

### **III. TIME AND EXPENSES**

18. Each of us served as the principal lawyers in charge of all aspects of the litigation and worked collaboratively in the case to ensure that Plaintiffs and the Class which they sought to represent were zealously represented, while also ensuring efficiency and reducing duplicative effort.

19. In prosecuting this case, Class Counsel performed a significant amount of work including:

- a. before filing the complaints, Class Counsel investigated the potential claims against Defendant, interviewed potential plaintiffs, and gathered information about the Data Incident and its potential impact;
- b. conducted a pre-suit factual investigation including interviewing the Plaintiffs and reviewing their documents, background and damages, and continued the investigation during the pendency of this case, by attempting to locate and interview potential witnesses and reviewing hundreds of pages

of public documents, including Defendant's public statements, letters to consumers, and websites, developing information from third parties, and scouring internet websites for information about the Data Incident and Defendants' business operations in general and specifically pertinent to the Data Incident;

- c. interviewed and obtained a declaration from Jelle Ursem, the security researcher who discovered the exposed data on GitHub;
- d. prepared and exchanged initial disclosures;
- e. served multiple sets of written discovery requests on Med-Data, which led to Med-Data producing over 26,000 pages of documents, which Class Counsel reviewed and analyzed;
- f. obtained, reviewed, and analyzed documents from Med-Data's cybersecurity consultant, Crowe LLP;
- g. prepared for and took the Rule 30(b)(6) depositions of Med-Data and Shawnee Mission;
- h. Spent time building relationships with Plaintiffs, discussing Plaintiffs' claims, and addressing Plaintiffs' questions and concerns throughout the litigation;
- i. prepared Plaintiffs for depositions and defended Plaintiffs' depositions;
- j. responded to multiple sets of written discovery requests and produced documents responsive to these requests;
- k. attended and participated in two mediation sessions;

- l. drafted and filed motions for class certification and oppositions to Defendant's motions to dismiss;
- m. researched and vetted potential experts to support Plaintiffs' claims;
- n. engaged expert Gary Olsen to support Plaintiffs' motions for class certification;
- o. prepared the Settlement Agreement and supporting documents, including the notices, claim form, proposed preliminary approval order, and proposed final approval order; and
- p. prepared and submitted Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (ECF No. 82) which was ultimately granted when the Court preliminarily approved the Settlement on February 6, 2024 (ECF No. 88).

20. Class Counsel's contemporaneous records of their work on this case reflect that attorneys and paralegals worked a combined 3,452.05 hours through the date of this Declaration on this litigation, which, when multiplied by the current hourly rates, amounts to \$2,367,657.50 in lodestar.

21. These hours do not include time Class Counsel will spend on continuing services to the Class, including drafting and filing the final approval motion, attending the final settlement hearing, responding to Class Members' inquiries, supervising the claims administration in the review and processing of claims, and overseeing the distribution of payments and of identity-theft protection services to Class Members.

22. These hours also do not include time that Class Counsel eliminated as

inefficient, duplicative, or purely administrative after a careful review of their records.

23. Class Counsel's current hourly rates are appropriate in light of prevailing rates for similar legal services provided by lawyers of reasonably comparable skill, experience, and reputation. Many other courts have found Class Counsel's current rates to be reasonable in the settlement context.

24. Class Counsel kept contemporaneous records and provided detailed itemizations of their time, lodestar and expenses. The hours, lodestar and expense information are as follows:

**COMBINED LODESTAR**

<b>Firm</b>	<b>Hours</b>	<b>Hourly Rate Range</b>	<b>Lodestar</b>	<b>Expenses</b>
Federman & Sherwood	858.40	\$300.00 to \$1,050.00	\$631,522.50	\$50,800.73
Terrell Marshall Law Group	874.25	\$125.00 to \$775.00	\$453,647.50	\$6,729.22
Morgan & Morgan	526.10	\$650.00 to \$1,600.00	\$503,725.00	\$72,175.59
McShane & Brady	991.20	\$175.00 to \$850.00	\$657,502.50	\$75,013.61
Heenan & Cook	202.10	\$600.00	\$121,260.00	\$525.12
<b>TOTAL:</b>	<b>3,452.05</b>		<b>\$2,367,657.50</b>	<b>\$205,244.27</b>

**EXPENSES**

<b>Expense</b>	<b>Amount</b>
Court Fees/Filing Fees	\$4,495.91
Deposition Fees	\$9,347.89
Pacer Fees	\$505.12
Research Fees	\$5,660.37
Mediation Fees	\$18,103.50
Copies	\$1,795.00
Postage	\$151.61
Phone/Zoom	\$291.84
Expert Fees	\$136,551.83
Travel/Hotel/Meals	\$22,699.92
Courier/Process Server	\$1,046.65
Epiq E-Discovery/ShareFile/Melio	\$4,594.63
<b>TOTAL:</b>	<b>\$205,244.27</b>

25. Plaintiffs' requested fee award represents a negative multiplier of 0.98 of Class Counsel's collective lodestar.

26. Class Counsel undertook this litigation on a purely contingent basis, with no assurance of recovery of expenses or attorneys' fees. The nature of contingency fees is that they are inherently uncertain and require counsel to assume more risk than in cases where compensation is based on billable hours.

27. The Fee Motion comports with the terms of the Settlement Agreement. The Settlement Agreement reflects Plaintiffs' counsel would apply for and Defendants would not object to a fee request of an amount not to exceed 33.33% of the Settlement Fund (or \$2,333,100.00). This provision was negotiated only after all of the other settlement terms had been finalized.

28. Class Counsel have also incurred a total of **\$205,244.27** in unreimbursed expenses for this litigation, including costs associated with research, filing fees, travel, and mediation. These costs also reflect typical expenses of the type ordinarily passed on to fee-paying clients in a general legal practice and are also typically recoverable in a specialized complex class action practice as they are necessary and reasonable to prosecuting a class action. The total of the expenses for which Plaintiffs' counsel seek reimbursement, and which Defendants have agreed to pay, was calculated from receipts, expense vouchers, check records and other documents maintained by the respective law firms. Class Counsel agreed in the Settlement Agreement to seek reimbursement of no more than \$200,000.00 in expenses from the Settlement Fund. Therefore, Class Counsel request reimbursement of \$200,000.00 in expenses.

29. Given that data breach cases pose unique challenges because this area of law is not yet settled, these cases are often uncertain and hard to predict and may be considered as a less than desirable undertaking, even for seasoned class action attorneys. Class Counsel invested substantial time, effort, and resources into the litigation of this risky and uncertain case with no guarantee or promise of return on their investment. The pursuit of this



litigation was an economic risk for Class Counsel and diverted their resources from other cases, some of which were less risky.

30. This matter has required us, and other attorneys at our law firms, to spend time on this litigation that could have been spent on other matters. At various times during the litigation of this class action, this lawsuit has consumed significant amounts of our time and our firms' time. Such time could otherwise have been spent on other fee-generating work. Because our firms undertook representation of this matter on a contingency-fee basis, we shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment.

31. If not devoted to litigating this action, from which any remuneration is wholly contingent on a successful outcome, the time our firms spent working on this case could and would have been spent pursuing other potentially fee generating matters.

32. Litigation is inherently unpredictable and therefore risky. Here, that risk was very real, due to the rapidly evolving nature of case law pertaining to data breach litigation, and the state of data privacy law. Therefore, despite our firms' devotion to the case and our confidence in the claims alleged against Defendant, there have been many factors beyond our control that posed significant risks.

33. An award of the requested fees, costs and expenses is justified under the circumstances of this case, in light of the risk, work performed, and the results achieved. The Settlement makes available an immediate cash payment to Settlement Class Members and provides for necessary and mitigative identity-theft protection services to protect Class Members' PII and PHI.

34. Based on our years of practice litigating complex class actions, we believe that Plaintiffs' requested attorneys' fees, costs and expenses sought here are reasonable.

#### **IV. SERVICE AWARDS**

35. Pursuant to the Settlement Agreement, Plaintiffs will each be awarded, subject to Court approval, \$5,000.00 for their services as Class Representatives, for a total of Twenty Thousand Dollars (\$20,000.00).

36. Plaintiffs here have been instrumental in assisting Class Counsel throughout the litigation. Their involvement was not merely nominal. Plaintiffs initiated and remained in contact with Class Counsel; reviewed various pleadings in this case, including the settlement papers; monitored and periodically visited with Class Counsel; sat for their depositions; provided documents during discovery to Class Counsel; and have been actively involved in the prosecution of the case, to ensure that Class Members received the best recovery possible given the particular circumstances and risks of the case. Accordingly, we support the Court's approval of service awards to Plaintiffs for their investment of time and energy in this class action.

We declare under the penalty of perjury of the laws of the United States that the foregoing is true and correct. Class Counsel will allocate the fees, if awarded by the Court, among themselves.

Date: May 6, 2024

Respectfully Submitted,

**FEDERMAN & SHERWOOD**

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