

CAUSE NO. 202161470

ARTHUR DEKENIPP,	:	IN THE DISTRICT COURT OF
individually and on behalf of all others	:	
similarly situated,	:	
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	:	
Plaintiff,	:	
	:	HARRIS COUNTY, TEXAS
v.	:	
	:	
GASTROENTEROLOGY CONSULTANTS, P.A.,	:	
	:	
Defendant.	:	295TH JUDICIAL DISTRICT
	:	

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**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR  
ATTORNEYS’ FEES, COSTS, AND SERVICE AWARDS**

Plaintiff Arthur Dekenipp (“Plaintiff”) submits this Memorandum in Support of Plaintiffs’ Motion for Attorneys’ Fees, Costs and Service Awards.

**I. INTRODUCTION**

On June 3, 2022, after a full briefing and hearing, this Court issued an order that preliminarily approved the class action settlement between Plaintiff and Defendant Gastroenterology Consultants, P.A. (“Defendant” or “GCPA”) and directed notice to issue to the class. Class Counsel’s efforts created a settlement valued at over \$550,000—including attorneys’ fees, costs, administration costs, and recovery for the Settlement Class.

Class Counsel have zealously prosecuted Plaintiff’s claims, achieving the Settlement only after extensive research and informal exchange of information; protracted arms’ length negotiations including an an all-day mediation with respected mediator Rodney A. Max; and weeks of drafting and finalizing of the agreement.

As compensation for the significant benefit conferred on the Settlement Class, Class Counsel respectfully move the Court for an award of fees and costs in the amount of \$150,000, the fees portion of which represents approximately 25.6% of the benefit negotiated for the Class—not including the significant additional equitable relief implemented by GCPA—and represents a lodestar multiplier of only 1.1. This request should be approved because it represents only a modest multiplier of Class Counsels’ combined lodestar, and a positive multiplier is appropriate in light of the substantial risks presented in prosecuting this action in a rapidly evolving area of law, and the skills and experience required to carry out the work necessary to do so. Plaintiff also respectfully moves the Court for an award of \$2,500 for his work on behalf of the Class. Defendant does not oppose Plaintiffs’ request for attorneys’ fees, costs, and service awards,<sup>1</sup> and thus far, Class Counsel has received no class member objections.<sup>2</sup>

## **II. CASE SUMMARY<sup>3</sup>**

### **A. The Data Incident**

GCPA is a comprehensive gastrointestinal health care provider that services the communities of Houston, Nassau Bay, Webster, Pasadena, and Pearland. Mason MPA Dec., ¶ 15.a. In the ordinary course of receiving healthcare services from GCPA, patients provide GCPA with sensitive, personal and private information such as their: name, address, phone number and email address; date of birth; social security number; information relating to individual medical history; medical record information; insurance information and coverage; and treatment details.

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<sup>1</sup> See Settlement Agreement, filed with the Declaration of Gary E. Mason in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement (“Mason MPA Dec.”), at Ex. 1 (“Agr.”), at § 7.

<sup>2</sup> Under the terms of the Settlement Agreement as approved by this Court in the Preliminary Approval Order (“PA Order”), Class Members have until August 4, 2022 to object to any part of the Settlement Agreement, including Plaintiff’s request for fees, costs and service awards. Plaintiff will report fully on objections, if any, when Plaintiff files his Motion for Final Approval of Class Action Settlement on or about September 21, 2022, and at the Final Approval Hearing on October 21, 2022.

<sup>3</sup> This section has been adopted, in large part, from the memorandum in Support of Plaintiff’s Unopposed Motion for Preliminary Approval of Modified Class Action Settlement, filed on or about April 26, 2021 (“MPA Memo.”).

*Id.* ¶ 15.b. GCPA also creates and stores medical records and other protected health information for its patients, including records of treatments and diagnoses. *Id.* ¶ 15.c.

All of GCPA’s employees, staff, entities, sites, and locations may share patient information with each other for various purposes, as disclosed in the HIPAA compliant privacy notice that GCPA is required to maintain. *Id.* ¶ 15.d. GCPA agreed to and undertook to maintain the protected health information entrusted to it by Plaintiff and Class Members safely, confidentially, and in compliance with all applicable laws. *Id.* ¶ 15.e. The patient information held by Defendant in its computer system and network included the Private Information of Plaintiff and Class Members. *Id.* ¶ 15.f.

On January 10, 2021, Defendant learned that an unauthorized actor had gained access to its system to deploy ransomware, encrypt its system and copy files (the “Data Incident”). *Id.* ¶ 15.g. GCPA reached a “negotiated resolution” with the cyber-criminals. *Id.* ¶ 15.h. GCPA engaged a forensic investigation firm that determined that the ransomware was introduced by an unknown individual or individuals outside of its organization who gained access to part of its network where GCPA stored files that contained confidential patient information of its clients. *Id.* ¶ 15.i. Defendant’s investigation further determined that, as a result of this incident, certain personal or protected health information was potentially compromised, including names, addresses, personal health information, Social Security numbers and other protected healthcare information (the “Private Information”). *Id.* ¶ 15.j.

On or about August 6, 2021, GCPA notified all potentially affected persons of the Data Incident. *Id.* ¶ 16. As a result of the Data Incident, approximately 162,163 patients’ private and personal health information was impacted and potentially compromised. *Id.* ¶ 14.

## **B. The Petition**

On September 22, 2021, Plaintiff filed his original class action petition in the District Court for Harris County, Texas. *Id.* ¶ 17. GCPA filed a motion to dismiss Plaintiff’s complaint on November 15, 2021, pursuant to Texas Rule of Civil Procedure 91(a). *Id.* ¶ 18. On December 1, 2021, Plaintiff filed his operative and amended class action petition, alleging seven causes of action: negligence; breach of implied contract; negligence *per se*; breach of fiduciary duty; intrusion upon seclusion / invasion of privacy; unjust enrichment; and violation of the Texas Deceptive Trade Practices Consumer Protection Act. *Id.* ¶ 19. Plaintiff sought certification of a class of persons including “[a]ll persons whose Private Information was compromised as a result of the Ransomware Attack announced by Gastroenterology on or about August 6, 2021.” *Id.* ¶ 20.

By his operative and amended petition, Plaintiff seeks equitable relief enjoining GCPA from engaging in the wrongful conduct complained of and compelling GCPA to utilize appropriate methods and policies with respect to consumer data collection, storage, and safety. *Id.* ¶ 21. Plaintiff further seeks an order requiring GCPA to provide credit monitoring services to himself and the rest of the Class. *Id.* ¶ 22. Finally, Plaintiff seeks an award of actual, compensatory, and statutory damages as well as attorneys’ fees and costs, and any such further relief as may be deemed just and proper. *Id.* ¶ 23.

Plaintiff and GCPA agreed that an early mediation of the above-captioned litigation (the “Litigation”) was warranted. *Id.* ¶ 26. After the Settling Parties began to discuss the potential for early resolution, GCPA withdrew its motion to dismiss. *Id.* ¶ 24. On or about December 20, 2021, the Settling Parties confirmed, via correspondence to the Court, that they agreed to a litigation stay pursuant to Rule 11 and had scheduled a mediation. *Id.* ¶ 25.

On January 26, 2022, a virtual mediation was conducted before Rodney A. Max of Upchurch Watson White & Max Mediation Group in Miami, Florida. *Id.* ¶ 27. Arms’ length settlement discussions continued following the virtual mediation session, and a Confidential Settlement Term Sheet was fully executed on March 7, 2022. The Settling Parties notified the Court of the Settlement on March 9, 2022. *Id.* ¶ 28. Over the next six-plus weeks, the parties continued to diligently negotiate, draft, and finalize the settlement agreement, notice forms, and came to an agreement on a claims process and administrator. *Id.* ¶ 29. The Settlement Agreement was finalized by the Parties in April 2022. *Id.* ¶ 31, Ex. 1.

Plaintiff moved for preliminary approval of the Settlement Agreement in April 2022. Through their respective counsel, the Parties appeared before this Court on June 3, 2022 on Plaintiff’s Motion for Preliminary Approval. At the hearing, this Court granted preliminary approval and directed Notice be sent to the Settlement Class via both direct mail and where email addresses were available, by email. *See* Preliminary Approval Order (“PA Order”).

Defendant GCPA denies all charges of wrongdoing or liability. Plaintiff here was able to complete an independent investigation sufficient to reach a full understanding of the value of the case, as well as the attendant risks of continued litigation. *Id.* at ¶ 9. It is proposed Class Counsel’s opinion, based on their experience and investigation in this case, that the Settlement Agreement presents a favorable result for the Class. *Id.* at ¶ 32.

### **III. SUMMARY OF SETTLEMENT<sup>4</sup>**

The Settlement negotiated on behalf of the class provides for four separate types of relief: up to \$500 per claimant in ordinary expense reimbursements and compensation for lost time; up to \$4,000 in extraordinary expense reimbursements; identity monitoring services; and equitable

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<sup>4</sup> The Settlement Agreement (“Agr.”) can be found at Mason MPA Dec., Ex. 1, filed in this court on or about April 26, 2022.

relief in the form of data security enhancements. Mason MPA Dec. ¶ 37. The Settlement Class includes approximately 162,163 people and is defined as “all persons residing in the United States whose PII/PHI was potentially compromised as a result of the ransomware attack announced by GCPA on or about August 6, 2021 and were sent notice of the ransomware attack.” *Id.* ¶ 35. Included within the Settlement Class is the Social Security Number Subclass, which includes: “all persons residing in the United States whose PII/PHI, including their Social Security Numbers, was potentially compromised as a result of the ransomware attack announced by GCPA on or about August 6, 2021 and were sent notice of the ransomware attack.” *Id.* The Settlement Class and Social Security Subclass specifically excludes: (i) GCPA 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 under criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Data Incident or who pleads *nolo contendere* to any such charge. *Id.*

#### **A. Settlement Benefits**

##### **1. Ordinary Expense Reimbursements and Lost Time**

The first category of benefits provides Settlement Class Members who submit a valid claim may receive up to \$500 per person for reimbursement of out-of-pocket expenses incurred as a result of the Data Incident including: unreimbursed losses relating to fraud or identity theft; professional fees including attorneys’ fees, accountants’ fees, and other fees for credit repair or similar services; costs associated with freezing or unfreezing credit with any credit reporting agency; credit monitoring costs that were incurred in 2021 but before claimant received any offer of credit monitoring by GCPA; and miscellaneous associated expenses such as notary, fax,

postage, copying, mileage, and long-distance phone calls. Unreimbursed losses must: (i) be actual, documented, and unreimbursed monetary loss; (ii) more likely than not been caused by the Data Incident; (iii) have occurred in 2021 or 2022; (iv) not already be covered by the Extraordinary Expense Reimbursement category; and (v) the claimant is required to have made reasonable efforts to avoid, or seek reimbursement for the loss, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance. Mason MPA Dec. ¶ 38.

Additionally, included within the \$500, each Settlement Class Member with documented expenses can also claim up to three (3) hours of documented lost time spent in response to the Data Incident, e.g., time spent dealing with replacement card issues, reversing fraudulent charges, (calculated at the rate of Twenty Dollars and Zero Cents (\$20.00) per hour), but only if at least one full hour was spent. *Id.*

## 2. Extraordinary Expense Reimbursements

The second category of benefits allows Settlement Class Members to submit a claim for reimbursement of up to \$4,000 in extraordinary expenses, incurred as a result of the Data Incident. *Id.* ¶ 39.

## 3. Identity Monitoring Services

In addition to the monetary compensation available, each Settlement Class Member is eligible to submit a claim to be enrolled in identity monitoring services. *Id.* ¶ 40. All Settlement Class Members can submit a claim for a total of 18-months of IdentityForce RapidResponse ID. *Id.* RapidResponse ID provides such services as: advanced fraud monitoring; dark web ID monitoring; a convenient app and two factor authentication; fully managed restoration services; identify theft insurance up to \$1,000,000; stolen funds reimbursement, tax fraud coverage and medical identity theft coverage. *Id.* All Social Security Number Subclass Members are eligible to

enroll in a total of 18-months of IdentityForce RapidResponse Premium. *Id.* In addition to the services provided by RapidResponse ID described above, RapidResponse Premium also provides such services as: bank and credit card activity alerts; change of address monitoring; court record monitoring; medical ID fraud protection; online protection tools; and three-bureau credit monitoring; three bureau quarterly credit score and score tracker. *Id.* Enrollment in credit monitoring services shall be available to Settlement Class Members regardless of whether the Settlement Class Member has submitted a claim for expense reimbursement. *Id.*

In return for a release tailored to the claims that have been plead or could have been plead in this case, the Settlement Agreement provides that GCPA will pay up to \$400,000 (less costs of Settlement Administration) to compensate Settlement Class Members and provide identity monitoring services. *Id.* at ¶¶ 37-42.

#### 4. Equitable Relief

GCPA has adopted and implemented significant data security measures following the Data Incident, including multifactor authentication, VPN remote access protocols, EDR software implementation, operating system and backup upgrades, and restricted access procedures. *Id.* ¶ 41. GCPA has committed to completing a security risk assessment in 2022 and 2023, and to enact reasonable and appropriate security enhancements identified in the security risk assessments. *Id.* To date, GCPA estimates that the total costs of improvements is approximately \$3,500 and that the improvements will cost an additional \$11,500 in 2022. *Id.*

#### 5. Release

The release in this case is tailored to the claims that have been plead or could have been plead in this case. *Id.* ¶ 43. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release claims against GCPA and Related Persons. *Id.* ¶ 44.

## **B. The Notice and Claims Process**

The Court appointed Postlethwaite & Netterville (“P&N”) as the Notice Specialist and Claims Administrator in this case. *See* PA Order. Pursuant to the PA Order, the court-approved Notice was issued via mail and email on July 5, 2022. P&N will submit a declaration to the Court detailing the notice and claims administration process prior to the Final Approval Hearing and with Plaintiff’s Motion for Final Approval.

### 2. Claims

The timing of the claims process is structured to ensure that all Class Members have adequate time to review the terms of the Settlement Agreement, make a claim, or decide whether they would like to opt-out or object. Mason MPA Dec. ¶ 54. Class Members will have until ninety (90) days after notice was completed to submit their Claim Form to the Claims Administrator online or via mail. *Id.* ¶ 55. The Claim Form, which will be presented to the Court in its final form by P&N with Plaintiff’s Motion for Final Approval, is written in plain language to facilitate Settlement Class Members’ ease in completing it.

### 3. Exclusion Requests

Settlement Class Members will have up to and including sixty (60) days following entry of the Preliminary Approval Order to exclude themselves from the Settlement. *Id.* ¶ 57. To be excluded from the Settlement, Settlement Class Members must make their request in writing or via the Settlement Website. *Id.* ¶ 58. Any Member of the Settlement Class who elects to be excluded shall not (i) be bound by any order or the Judgment; (ii) be entitled to relief under the Settlement Agreement; (iii) gain any rights by virtue of the Settlement Agreement; or (iv) be entitled to object to any aspect of the Settlement Agreement. *Id.* ¶ 59.

#### 4. Objections

Similar to their deadline by which to exclude themselves from the class, Settlement Class Members will also have up to and including sixty (60) days following entry of the Preliminary Approval Order to object to the Settlement. *Id.* ¶ 60. The timing with regard to objections is structured to give Settlement Class Members sufficient time to review the Settlement documents—including this motion, which is being filed forty-five (45) days following entry of the Preliminary Approval Order—and two weeks prior to the deadline for Settlement Class Members to object or exclude themselves from the Settlement, and will be posted to the Settlement Website. *Id.* ¶ 61.

Any Settlement Class Member who wishes to object shall file notice of his/her intention to do so with the Clerk of Court and at the same time serve copies upon both Class Counsel and Counsel for GCPA. *Id.* ¶ 62. The objection to the Settlement Agreement must include: (i) the objector's full name, address, telephone number, and e-mail address (if any); (ii) information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class (e.g., copy of notice, copy of original notice of the Data Incident); (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection the objector believes applicable; (iv) the identity of all counsel representing the objector; (v) a statement whether the objector and/or his or her counsel will appear at the Final Fairness Hearing; (vi) the objector's signature and the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation); and (vii) a list, by case name, court, and docket number, of all other cases in which the objector and/or the objector's counsel has filed an objection to any proposed class action settlement within the last three (3) years. *Id.* ¶ 63.

### C. Plaintiff's Service Award, Attorneys' Fees and Costs

The Settling Parties did not discuss the payment of attorneys' fees, costs, expenses and/or service award to Representative Plaintiff, until after the substantive terms of the settlement had been agreed upon, other than that GCPA would pay reasonable attorneys' fees, costs, expenses, and an service award to Representative Plaintiff as may be agreed to by the Settling Parties and/or as ordered by the Court, or, in the event of no agreement, then as ordered by the Court. *Id.* ¶ 64. The Settlement Agreement calls for a reasonable service award to Plaintiff in the amount of \$2,500. *Id.* ¶ 65. GCPA has agreed to pay the service award outside of and separate from the \$400,000 Settlement Cap. *Id.* ¶¶ 65-67. The Service Award is meant to compensate Plaintiff for his efforts on behalf of the Settlement Class, including maintaining contact with counsel, reviewing pleadings, assisting in the investigation of the case, remaining available for consultation throughout the mediation and answering counsel's many questions. *Id.* ¶ 66.

After agreeing to the terms of the settlement on behalf of the Class, counsel for Plaintiff negotiated their fees and costs separate from the benefit to Class Members, in the amount not to exceed \$150,000 for fees and costs combined. *Id.* ¶ 67. Subject to approval of the Court, this sum is to be paid separate and apart from the settlement available to Class Members. *Id.* ¶ 68.

Thus far, Plaintiff's counsel has incurred a lodestar of \$124,202, and expects to incur an additional \$20,000 in fees in connection with drafting the final approval motion, preparing for argument at the final approval hearing, and miscellaneous matters, including responding to class member inquiries and claims administration. Mason Fees Dec., ¶¶ 19-22. Class Counsel has also incurred \$8,855.92 in reasonable expenses necessary to the litigation, including filing fees, research expenses, mediation costs and the costs of traveling to the preliminary approval hearing.

*Id.* ¶ 29. Plaintiff's counsel expect to incur limited additional costs in traveling to and appearing at the Final Approval Hearing. *Id.*

#### **IV. THE COURT SHOULD APPROVE THE REQUEST FOR SERVICE AWARDS TO THE CLASS REPRESENTATIVES, ATTORNEYS' FEES, AND COSTS.**

##### **a. Plaintiff's Service Award is Justified.**

Plaintiff seeks a Service Award in the amount of \$2,500. The award, if granted by this Court, will not impact the amount available to Settlement Class Members. Mason Fees Dec. ¶ 32; Agr. § 7. The Service Award awards Plaintiff for his efforts on behalf of the Settlement Class. *Id.* Not only did Mr. Dekenipp take on the burden of putting his name on a public filing against GCPA, but he committed to working to obtain relief for the whole class and over the course of the last eleven months has carried out numerous duties including: maintaining contact with counsel, assisting in the investigation of the case, reviewing pleadings, remaining available for consultation throughout the mediation, reviewing the Settlement Agreement, and answering counsel's many questions. Mason Fees Dec. ¶ 32.

The Texas Court of Appeals has noted that courts "typically award and justify incentive compensation when the named plaintiffs expend time and effort beyond that of the other class members in assisting class counsel with litigation by actively reviewing the case and advising counsel in prosecuting the case, or when the named plaintiffs faced the risk of retaliation or threats as a result of their participation as class representatives." *Morris v. Thibodeau*, 2001 WL 1390444, \*4 (Tex. Ct. App. 2001) (approving incentive awards in varying amounts between \$6,000 and \$10,000); *see also Shields v. Bridgestone*, 2004 WL 546883, \*20 (finding incentive awards for Plaintiffs in the amount of \$2,500 fair, reasonable, and adequate). The plaintiff here actively assisted Counsel in the litigation on behalf of Settlement Class Members. The request for a \$2,500 compares favorably to incentive awards provided by Texas Courts, and is fair, reasonable, and

adequate in light of Plaintiff's contributions on behalf of the Settlement Class. As such, Plaintiff respectfully requests this Court grant his request.

**b. Attorneys' Fees Sought by Settlement Class Counsel are Reasonable and Should be Approved.**

Texas Courts calculate attorneys' fees in class action lawsuits on a lodestar basis. Rule 42(i)(2). To do so, they multiply the number of hours reasonably worked by a reasonable hourly rate. *Id.* Attorney fees are required by statute to be in the range of 25% to 400% of the lodestar figure. *Id.* In making a determination of the reasonableness of the requested lodestar, Courts must consider the factors set forth by Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct, namely: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer or lawyers performing the services; and whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *El Apple I, Ltd. v. Olivas*, 370S.W.3d 757, 761 (Tex. 2012).

Thus far, Plaintiffs' Counsel have devoted significant time and resources to this case, and have incurred a combined lodestar of \$124,202.<sup>5</sup> Mason Fees Dec., ¶ 18. Counsel expects the lodestar to increase by approximately \$20,000 before closure of the case, due to the time required to carry out settlement administration and to prepare and argue Plaintiff's motion for Final

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<sup>5</sup> Counsel's rates are consistent with, and often lower than, the Legal Services Institute *Laffey* Matrix—a widely accepted fees matrix, and consistent with those charged by similarly experienced attorneys in other nationwide class actions, including cases in brought in the State of Texas.

Approval. Mason Fees Dec., ¶ 21. The requested fee of approximately \$141,000<sup>6</sup> should be approved, as it will represent only a modest multiplier (110%) of the actual fees incurred, is well within the parameters permitted under the statute, and is reasonable given the factors to be considered under Rule 1.04(b).

1. *Plaintiff's requested attorneys' fees are reasonable given the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.*

The amount of work and complexity of the legal questions, as well as the experience and skills utilized by Class Counsel necessary to ensure such a significant benefit to the Class favor approval of Plaintiff's requested fees. Data breach law is rapidly evolving, as Courts and legislatures are regularly expanding their expertise and understanding of acceptable and appropriate data security protocols implemented to protect the private identifying information and protected health information of individuals like Settlement Class Members here. In negotiating the present Settlement, Class Counsel brought significant experience in data breach litigation to the table—a skill set unique to only a handful of firms currently litigating in this area. *See* Mason Fees Dec., ¶¶ 2-6.

Specifically, just since the founding of his current firm in March 2020, Mr. Mason and Ms. Perry either individually or as a member of their firm, have served as appointed Class Counsel and/or successfully worked to obtain final resolution in similar data breach class actions including: *Chatelain et al. v. C, L, and W PLLC, d/b/a Affordacare Urgent Care Clinics*, Case No. 50742-A (42nd Dist. Tex.); *Baksh v. Ivy Rehab Network, Inc.*, Case No. 7:20-cv-01845-CS (S.D. N.Y.); *Mowery et al. v. Saint Francis Healthcare System*, Case No. 1:20-cv-00013-SRC (E.D. Mo.)

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<sup>6</sup> Plaintiffs' Counsel seek \$150,000 in attorneys' fees and costs combined. As Counsel has incurred \$8,855.92 in costs necessary to the litigation thus far, and not including additional costs that will be incurred to bring the case to close, the most that would remain for allocation as fees is \$141,000.

(appointed class counsel); *Jackson-Battle v. Navicent Health, Inc.*, Civil Action No. 2020-CV-072287 (Superior Court of Bibb County, Georgia); *Bailey v. Grays Harbor County Public Hospital District et al.*, Case No. 20-2-00217-14 (Grays Harbor County Superior Court, State of Washington); *Kenney et al. v. Centerstone of America, Inc.*, Case No. 3:20-cv-01007 (M.D. Tenn.); *North et al. v. Hunt Memorial Hospital District*, Case No. 89642 (196th Dist. Tex.); *Chacon v. Nebraska Medicine*, Case No. 8:21-cv-00070-RFR-CRZ (D. Neb); and *Richardson v. Overlake Hospital Medical Center et al.*, Case No. 20-2-07460-8 SEA (King County Superior Court, State of Washington).

Class Counsel's experience is a huge asset, especially in a case that involves such novel and complex areas of law. Due at least in part to their cutting-edge nature, data breach cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See 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 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).

Despite the early stage of litigation at which this case settled, Class counsel expended significant effort—at the expense of other potentially fee-generating cases—to negotiate and finalize the Settlement Agreement on behalf of the Class. Mason Fees Dec., ¶¶ 9-14. Class Counsel devoted significant time and resources to this case to date, including: conducting an investigation into the facts regarding Plaintiff's claims and class members' claims; researching law relevant to, and preparing, Plaintiff's class action complaint; preparing for and attending mediation with Rodney A. Max, including researching and preparing a detailed mediation statement, as well as

attending pre-mediation conferences and calls with Mr. Max; negotiating and preparing the Parties' class action settlement agreement, along with the proposed class notice and claim form; negotiating with settlement administration companies to secure the best notice plan practicable; preparing Plaintiff's motion for preliminary approval of the class action settlement and preparing a detailed declaration in support; appearing for a hearing on Plaintiff's motion for preliminary approval; working with the Settlement Administrator to ensure the timely completion of Notice and processing of claims; preparing the instant motion for attorneys' fees, costs, and a service award; closely monitoring evolving law regarding data security and its potential impacts on the case; and conferring with Plaintiff throughout the case. *Id.* at ¶ 24. Counsel further anticipates completing additional work throughout settlement administration, and in preparing and arguing Plaintiff's motion for final approval of the settlement. *Id.* at ¶ 21.

Given the skill and expertise required to successfully litigate data breach cases, the novelty of evolving questions at issue, and the time and labor required of Class Counsel, Counsel could easily justify a request for a significant multiplier. As such, the requested fees, which rest at a modest multiplier of 1.1, are reasonable and should be approved.

*2. Class Counsel took this litigation on a contingency basis, and spent time on this litigation that would have been spent on other potentially fee-generating cases.*

Class Counsel took this case on a purely contingent basis. Mason Fees Dec., ¶ 9. This matter has required Class Counsel to spend significant time on this litigation that could have been spent on other fee-generating matters. *Id.* at ¶¶ 9-14. Because Class Counsel undertook representation of this matter on a contingency-fee basis, they shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment. *Id.* If not devoted to litigating this action, from which any remuneration is

wholly contingent on a successful outcome, the time Class Counsel spent working on this case could and would have been spent pursuing other potentially fee generating matters. *Id.* at ¶ 12.

Given the risk Class Counsel took in this matter, and the time dedicated to the exclusion of other matters, these factors weigh in favor of finding the requested fee—which represents counsel’s lodestar with a modest multiplier of 1.1—reasonable and appropriate.

3. *The fees sought by Class Counsel represent a percent of the benefit regularly awarded by Courts; the rate used by Class Counsel is consistent with that charged for similar legal services.*

The fees requested by Class Counsel here are inherently reasonable under both the percent-of-benefit method *and* in comparison with rates charged for similar legal services.

Courts regularly employ the percent-of benefit approach in determining the reasonableness of requested attorneys’ fees in common fund class actions. *See e.g., In re OCA, Inc. Sec.*, 2009 WL 512081, \*18 (noting the Fifth Circuit had never explicitly disapproved of the percentage method of calculating fees in common fund cases); *Schwartz v. TXU Corp.*, 2005 WL 3148350, \*25 (N.D. Tex. Nov. 8, 2005) (collecting cases). Moreover, the Supreme Court has indicated that the percentage method is proper in common fund cases. *Schwartz v. TXU Corp.*, 2005 WL 3148350, \*25, *citing Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984). Although the Fifth Circuit has not explicitly adopted a particular means of calculating fees, district courts have concluded that, “it does appear to be amenable to its use, so long as the *Johnson* framework is utilized to ensure that the fee awarded is reasonable.” *Klein v. O’Neal, Inc.*, 705 F. Supp.2d 632, 671 (N.D. Tex. 2010), *citing Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 860 (E.D. La. Jan, 30, 2007). The factors described in *Johnson* in contemplating the reasonableness of a fee under the percent-of-benefit approach largely mirror those considered by Texas state courts in assessing the reasonableness of a requested fee. *Compare, Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d

714, 717 (5th Cir. 1974) *with* Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct.

The methodology used in determining the percent-of-the-benefit is instructive because the cash value benefit available to Settlement Class Members here is measurable and can be compared directly with the requested fees. Here, the *cash* value of the Settlement is over \$550,000. Thus, Class Counsel seeks a fee representing approximately 25.6% of the total potential benefit to the Class.<sup>7</sup> Such requests are routinely approved. *See In re Combustion, Inc.*, 968 F. Supp. at 1142 (approving 36% fee based on \$127 million settlement fund); *see also Klein v. O'Neal*, 705 F. Supp. 2d 632, 674 (N.D. Tex. Apr. 9, 2010), *citing* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees in Class Action Settlements: An Empirical Study*, 1 Journal of Empirical Legal Studies 1, 37–38 (2004) (noting that fee requests falling between 26.8% and 36% should be considered potentially reasonable, provided there is some affirmative justification for the figure).

Moreover, the rates used by Class Counsel in their fee calculations are consistent with the LSI *Laffey* Matrix, which is widely accepted as the authority for reasonable attorney rates. *See Salazar ex rel. Salazar v. District of Columbia*, 809 F.3d 58, 64 (D.C. Ct. App. 2015) (noting that the attorney rates listed in the LSA *Laffey* Matrix were in fact conservative estimates of the actual costs of legal services in the area). Fee requests based on lodestar analyses with counsel's same rates have been accepted by Texas state courts. *See Chatelain et al. v. C, L, and W PLLC, d/b/a Affordacare Urgent Care Clinics*, Case No. 50742-A (42<sup>nd</sup> Dist. Tex.); *North et al. v. Hunt Memorial Hospital District*, Case No. 89642 (196th Dist. Tex.). And, Counsel's rates are consistent with those regularly approved by Courts across the country for attorneys with similar experience, skills, and practice areas. Mason Fees Dec. ¶ 19.

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<sup>7</sup> This Settlement is comprised of \$550,000, which represents the Settlement Cap of \$400,000 plus \$150,000 in attorneys' fees and costs, and does not include the \$2,500 service award requested for the Class Representative.

Because Class Counsel’s requested fees are in line with those that would be reasonably awarded under the widely accepted percent-of-the-benefit approach, *and* the rates used in the lodestar calculation are consistent with rates charged for similar legal services, these factors weigh in favor of approval.

4. *Class Counsel secured a significant benefit on behalf of the Class within a limited time frame.*

As discussed above, Class Counsel here secured a significant benefit for Settlement Class Members—with individual claims valued at up to \$4,500 per person, *plus* 18 months of Identity Force Rapid Response monitoring considerable equitable relief in the form of data security enhancements. The Settlement created a fund of \$400,000 for payment of valid claims and the costs of notice and claims administration. In calculating the total value of a Settlement Fund, courts recognize inclusion of the fund as a whole, even if part of the fund may revert back to defendant. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Even if class members do not claim the entirety of the amount available to them, their “right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel[.]” *Id.* at 480. Thus, the total benefit negotiated has an actual value of \$550,000—the \$400,000 fund, plus the \$150,000 requested attorneys’ fees and costs.

The benefit negotiated has both real cash value, *and* ensures that Settlement Class Members receive relief from any negative consequences potentially arising from the Data Incident—such as the actual misuse of their private identifying information and personal health information, and compensation for time they spent dealing with any misuse. The timeliness of these reimbursements and protections is a boon to the class; the longer they go without reimbursement, the greater the value of their damages.

As such, the benefit provided by Class Counsel is significant, and weighs in favor of granting Plaintiff's request for attorneys' fees.

**c. Costs sought by Plaintiff are reasonable and warrant approval.**

Included within the \$150,000 in attorneys' fees and costs agreed to in the Settlement, are Plaintiffs' costs, which total at least \$8,855.92. Mason Fees Dec., ¶ 29. These reasonable costs were necessary to litigation and included filing fees, research expenses, mediation costs, and travel expenses. *Id.* The class was provided notice of Plaintiffs' intent to seek \$150,000 in attorneys' fees and costs. Mason Fees Dec. ¶ 30. In approving class action settlements, Courts regularly award costs and expenses. *See for example, Northrup v. Southwestern Bell Telephone Co.*, 72 S.W. 3d 16, 21 (Ct. App. Tex. 2002) (upholding trial court's award of \$21,000,000 in combined fees and expenses); *Hall v. Pedernales Elec. Co-op., Inc.*, 278 S.W.3d 536 (Ct. App. Tex. 2009) (affirming trial court's approval of settlement and award of attorneys' fees and costs). Because the costs in this case were minimal, and necessary for furtherance of the litigation, they should be approved.

**V. CONCLUSION**

Settlement Class Counsel, with the help of Plaintiff, have made benefits of significant cash value available to class members. In return, they seek fees, costs, and service awards well within the ranges regularly approved by Texas Courts. The fees, costs, and service awards are inherently reasonable, and as such Plaintiff respectfully request their approval.

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Respectfully submitted,

*/s/ Gary E. Mason*

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