STATE OF NORTH CAROLINA COUNTY OF JOHNSTON	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO.:22CVS00873-500
MICHAEL POPE, on behalf of himself and all others similarly situated, Plaintiff, v. **BENSON AREA MEDICAL CENTER, INC. a/k/a BENSON HEALTH,** Defendant	**MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARD**

Plaintiff, Michael Pope ("Plaintiff"), individually and on behalf of all others similarly situated, submits the following memorandum and exhibits in support of his motion for attorneys' fees, expenses, and service award.

I. INTRODUCTION

On November 11, 2024, this Court preliminarily approved a proposed class action settlement between Plaintiff and Defendant Benson Area Medical Center, Inc. ("Defendant"). The Settlement provides significant benefits to the Settlement Class, all of whom were victims of a May 2021 ransomware attack that was perpetrated upon Benson Health that allowed a third-party access to some of Benson Health's computer systems and data resulting in access to allegedly sensitive Private Information associated with current and former Benson Health patients, including Plaintiff (the "Data Incident"). Pursuant to the parties' Settlement, Defendant agreed to pay up to $350,000 in monetary benefits directly to the Settlement Class along with credit monitoring and data security improvements. In addition, Defendant agreed to pay $115,000 in attorneys' fees and costs as well as a $2,500 service award to Plaintiff

in recognition of his work on behalf of the Settlement Class. Finally, Defendant agreed to pay all costs of notice and claims administration.

Specifically, Class Members may claim one year of credit monitoring that includes up to $1,000,000 in identity theft protection insurance, documented ordinary losses up to $300, up to four hours of lost time spent dealing with issues arising out of the Data Incident at the rate of $17.50 per hour, and documents extraordinary losses up to $1,000. Defendant will pay all valid claims for monetary benefits up to $350,000. The credit monitoring benefit is not subject to this cap. These are substantial, tangible benefits to the Class Members.

Settlement Class Counsel have zealously prosecuted Plaintiff's claims, achieving the Settlement Agreement only after an extensive investigation, dispositive motion briefing where Plaintiff defeated Defendant's motion to dismiss, formal fact discovery, an unsuccessful mediation, and additional months of negotiation between highly experienced counsel on both sides. The arm's-length nature of the settlement negotiations between adversarial (yet collegial), competent and experienced counsel on both sides shows that this settlement was achieved free of collusion, Even after coming to an agreement to settle, Settlement Class Counsel worked for weeks to finalize the Settlement Agreement and associated exhibits pertaining to notice, preliminary approval, and final approval.

As compensation for the substantial benefit conferred upon the Settlement Class, Settlement Class Counsel respectfully moves the Court for an award of attorneys' fees and reasonable litigation costs totaling $115,000, which represents, at most, less than 33% of the value of the Settlement, when only looking at the monetary

benefits available to the Settlement Class (and not including the value of the credit monitoring (up to approximately $3,230,604[1]), the value of Defendant's cybersecurity improvements, attorneys' fees and costs, and notice and claims administration), and not removing Settlement Class Counsel's reasonable litigation costs of $5,200.14. North Carolina courts have expressly and repeatedly approved fees that equal 25% to 40% of the common fund created. To the extent a lodestar crosscheck is necessary, the requested attorneys' fees represent a negative multiplier, which is certainly within the range of reasonableness.

Plaintiff also seeks $5,200.14 in reimbursement of modest out-of-pocket costs and expenses actually spent on this litigation (from the $115,000 total attorneys' fees and costs). Plaintiff's motion should be granted because: (1) the request is reasonable and appropriate in light of the substantial risks presented in prosecuting this action, the quality and extent of work conducted, and the stakes of the case; (2) the requested fees and costs were clearly delineated in notice to the class, and no class member has objected; and (3) the costs incurred were reasonable and necessary for the litigation. Plaintiff also respectfully moves the Court for an award of $2,500 to the Plaintiff for his work on behalf of the Settlement Class.[2]

II. INCORPORATION BY REFERENCE

[1] One year of credit monitoring costs approximately $9/month. *See* https://lifelock.norton.com/learn/credit-finance/credit-monitoring?srsltid=AfmBOooXgh9vhRzw3q3KDq284bLG3MeSj504CPm1tjSDVNYdKrBc63zu.

[2] While Plaintiff here moves for attorneys' fees, expenses, and service awards, they will move for final approval of the settlement by separate motion, which will be filed prior to the final fairness hearing.

In the interest of judicial efficiency, for factual and procedural background on this case, Plaintiff refers this Court to and hereby incorporate Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement filed on August 7, 2024 and the accompanying Exhibits, including the proposed Settlement Agreement, filed in conjunction therewith.

III. SUMMARY OF SETTLEMENT

The settlement's key terms are as follows:

A. Certification of the Settlement Class

The settlement provides for certifying the Settlement Class for settlement purposes only. S.A. ¶2.6. The "Class" is defined as:

> All individuals residing in the United States to whom Defendant sent a notice concerning the Data Incident. The Class specifically excludes: (i) Benson Health; and (ii) The judge presiding over this case and their staff and family.

S.A. ¶1.23. The Class contains approximately 28,913 individuals (each, a "Settlement Class Member"). *Id.* ¶1.23. The Settlement Class refers to all Settlement Class Members who do not timely and validly request exclusion from the Class (i.e., opt-out). Id. ¶1.24.

B. Settlement Benefits to the Settlement Class

The Settlement secures substantial benefits for the Class, remediating and mitigating the harms Defendant's Data Incident has caused and will continue to cause.

1. Credit Monitoring. Settlement Class Members are eligible to claim one (1) year of one credit bureau credit monitoring and $1 million in identity

theft insurance protections. No supporting documentation is necessary to receive this Settlement benefit. S.A. ¶2.3.

2. Documented Ordinary Losses. All Settlement Class Members who submit a valid Claim using the Claim Form are eligible for reimbursement for documented ordinary out-of-pocket expenses, not to exceed $300 per Settlement Class Member, that were incurred as a result of the Data Incident, including: (i) unreimbursed bank fees; (ii) long distance phone charges; (iii) cell phone charges (only if charged by the minute); (iv) data charges (only if charged based on the amount of data used); (v) postage; (vi) gasoline for local travel; and (viii) fees for credit reports, or other identity theft protection services and plans purchased between May 1, 2021 and the claims deadline. S.A. ¶2.1.1. Settlement Class Members with Ordinary Losses must submit documentation supporting their claims. *Id.*

3. Attested Time Spent. Settlement Class Members are also eligible to receive up to four (4) hours of lost time spent dealing with issues arising out of the Data Incident (calculated at the rate of $17.50 per hour). *Id.* ¶2.1.2. Settlement Class Members may receive reimbursement for lost time if the Settlement Class Member includes a brief description of activities engaged in responding to the incident and the time spent on each such activity, and attests that any claimed lost time was spent responding to issues raised by the Data Incident, but no further documentation is required. *Id.* Claims made for lost time can be combined with claims made for Ordinary Losses and, together with the Ordinary Losses, are subject to the $300 cap for each Settlement Class Member. *Id.*

4. Documented Extraordinary Losses: Settlement Class Members are also eligible to receive reimbursement for documented extraordinary losses, not to exceed $1,000 per Settlement Class Member for documented monetary loss that: (i) is actual, documented, and unreimbursed; (ii) was more likely than not caused by the Data Incident; (iii) occurred between May 1, 2021 and the claims deadline; and (iv) is not already covered by one or more of the above-referenced reimbursed expenses in ¶2.1.1 and the Settlement Class Member made reasonable efforts to avoid, or seek reimbursement for, the loss, including but not limited to exhaustion, if applicable, of the Settlement Class Member's credit monitoring insurance and identity theft insurance. *Id.* ¶2.1.3. To receive reimbursement for any Documented Extraordinary Loss, Settlement Class Members must submit supporting documentation of the loss, *id.* ¶2.1.3, and a description of how the loss was actually incurred and plausibly arose from the Data Incident, *id.* ¶2.1.4.

Settlement Class Members who wish to make a claim for credit monitoring or monetary reimbursement need only complete and submit a Claim Form (S.A. Exhibit A) to the Claims Administrator, postmarked or submitted online before the 60th day after the Notice Deadline. S.A. ¶¶1.4, 2.1.4, 3.2.

5. Security Enhancements: Benson Health has implemented or agreed to implement enhancements to its data system security-related measures, which will provide additional protection of the Private Information of Plaintiff and Settlement Class Members still in its possession. Id. ¶2.4. Settlement Class Members do not need to submit a claim to be entitled to these benefits, which are being provided by Defendant separate and apart from the other benefits provided in this Settlement.

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The maximum payment obligation for Defendant under this Settlement for all monetary benefits is $350,000. This does not apply to costs for credit monitoring and security enhancements.

C. Other Aspects of the Settlement

Defendant will also pay for the cost of notice and administration separate from its payments for Settlement Class Member benefits. S.A. ¶2.5.5. Additionally, Defendant agreed to pay requested attorneys' fees and expenses up to $115,000 and a service award up to $2,500. *Id.* ¶7.2.

IV. LEGAL ARGUMENT

Settlement Class Counsel requests an award of attorneys' fees and costs in the amount of $115,000. The amount of the requested attorneys' fees amounts to less than 33% of the benefits available to the Settlement Class (not including the value of attorneys' fees and costs, notice and claims administration, and Defendant's cybersecurity enhancements). From that $115,000, Settlement Class Counsel requests $5,200.14 in actual out-of-pocket case expenses, to be awarded in addition to the fees requested. This expenses reimbursement request is modest, and the amounts spent were all reasonably incurred costs necessary for the prosecution and settlement of this case. Settlement Class Counsel also recommends and requests an award of $2,500 to the Settlement Class Representative.

1. The Fee Request Should Be Approved Under the Percentage of Common Benefit Method.

North Carolina has long approved granting attorneys' fees upon the creation of a common allocation of money. This doctrine was first recognized in *Horner v.*

Chamber of Commerce, Inc., 236 N.C. 96, 97-98 (1952), in which the Court stated the following:

> the rule is well established that a court of equity, or a court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him.

Plaintiffs' attorneys in a successful class action lawsuit may petition the Court for compensation relating to any benefits to the Class that result from the attorneys' efforts. *See, e.g., Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980). Under this "common benefit" approach, attorneys' fees are awarded as a percentage of the common benefit created by the settlement. The doctrine's foundation rests on the principle that "where one litigant has borne the burden and expense of the litigation that has inured to the benefit of others as well as to himself, those who have shared in its benefits should contribute to the expense." *Horner*, 236 N.C. at 98, 72 S.E.2d at 22. "Courts routinely impose enhanced common fund awards to compensate counsel for litigation risk at the expense of beneficiaries who do not shoulder this risk.". *Brundle on behalf of Constellis Employee Stock Ownership Plan v. Wilmington Tr., NA*, 919 F.3d 763, 786 (4th Cir. 2019), *as amended* (Mar. 22, 2019).

The percentage-of-the fund method is the preferred method of calculating attorneys' fees in cases involving common fund settlements in federal courts as well. "Indeed, there is a consensus among the federal circuit courts of appeal that the award of attorneys' fees in common fund cases may be based on a percentage of the recovery." *Ferris v. Sprint Comm'ns Co. L.P.*, No. 5:11-cv-667, 2012 WL 12914716, at *6

(E.D.N.C. Dec. 13, 2012) (quoting *Muhammad v. Nat'l City Mortgage, Inc.*, No. 2:07-0423, 2008 WL 5377783, at *7 (S.D. W. Va. Dec. 19, 2008)); s*ee also Phillips v. Triad Guaranty Inc.,* No. 1:09CV71, 2016 WL 2636289, at *2 (M.D.N.C. May 9, 2016) (noting that district courts within the Fourth Circuit "overwhelmingly" prefer the percentage-of-the-fund method in common fund settlement); *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) (Internal citation omitted))(noting that within the Fourth Circuit, the percentage-of-the-fund method "is the preferred approach to determine attorneys' fees."); *In re The Mills Corp. Sec. Litig*., 265 F.R.D. 246, 260 (E.D. Va. 2009) (explaining that "[w]hile the Fourth Circuit has not definitively answered this debate, other districts within this Circuit, and the vast majority of courts in other jurisdictions consistently apply a percentage of the fund method[.]").

The percentage-of-the-fund method provides a strong incentive to plaintiff's counsel to obtain the maximum possible recovery in the shortest time possible under the circumstances by removing the incentive, which occurs under the lodestar method, for class counsel to "over-litigate" or "draw out" cases in an effort to increase the number of hours used to calculate their fees. *See Jones v. Dominion Res. Servs., Inc.,* 601 F. Supp. 2d 756, 759 (S.D.W. Va. 2009); *see also Ferris*, 2012 WL 12914716, at *6 (noting that the percentage method "better aligns the interests of class counsel and class members because it ties the attorneys' award to the overall result achieved rather than the hours expended by the attorneys"); *DeWitt v. Darlington Cty.*, No. 4:11-cv-00740, 2013 WL 6408371, at *6 (D.S.C. Dec. 6, 2013) ("The percentage-of-the fund approach rewards counsel for efficiently and effectively bringing a class action

case to a resolution, rather than prolonging the case in the hopes of artificially increasing the number of hours worked on the case to inflate the amount of attorneys' fees on an hourly basis.").[3]

The fundamental test for awarding attorneys' fees in class action settlements is whether the request is "fair and reasonable." *Ehrenhaus v. Baker*, 243 N.C. App. 17, 30 (2015). The Court has discretion to determine what is reasonable. *In re Hatteras Fin., Inc., Shareholder Litig.,* 286 F. Supp. 3d, 727, 735 (M.D.N.C. 2017).

The reasonableness of an attorneys' fee award is determined by a set of non-exclusive factors, including "1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular

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[3] This is just one of several drawbacks to the lodestar approach. *See Manual for Complex Litigation*, § 14.121 (4th ed. 2018) ("In practice, the lodestar method is difficult to apply, time consuming to administer, inconsistent in result, . . . capable of manipulation, . . . [and] creates inherent incentive to prolong the litigation . . . ."); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 255 (1985) (enumerating nine deficiencies in the lodestar process and concluding that in common fund cases the best determinant of the reasonable value of services rendered to the class by counsel is a percentage of the fund); *Lopez v. Youngblood*, No. CV-F-07-0474 DLB, 2011 WL 10483569, at *4 (E.D. Cal. Sept. 2, 2011) "Among the drawbacks to the lodestar method . . . are that the lodestar method increases the amount of fee litigation; the lodestar method lacks objectivity; the lodestar method can result in churning, padding of hours, and inefficient use of resources; when the lodestar method is used, class counsel may be less willing to take an early settlement since settlement reduces the amount of time available for the attorneys to record hours; and the lodestar method inadequately responds to the problem of risk."). Perhaps it is unsurprising, then, that the lodestar method has fallen increasingly out of favor. *See, e.g.*, Theodore Eisenberg, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Review 937, 945 (2017) (finding that the lodestar method used only 6.29% of the time from 2009–2013, down from 13.6% from 1993–2002 and 9.6% from 2003–2008); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 832 (2010) (finding that the lodestar method used in only 12% of settlements).

employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent." *Ehrenhaus*, 216 N.C. App. at 96-97. No single *Ehrenhaus* factor is dispositive. However, attorney fee requests are presumptively fair and reasonable when they seek a third or less of value of the settlement. For example, the North Carolina Business Court in *Byers v. Carpenter,* 1998 NCBC 1, 1998 NCBC LEXIS 3, 32 (January 30, 1998) held that the appropriate level of compensation using a percentage-of-recovery method is typically 25% of the relief obtained if the case is settled before filing; 33% if after filing; and 40% if after an appeal has been taken. Federal courts in North Carolina often award fees equal to 33 percent of the settlement value. *See e.g. In re Cotton,* 3:18-cv-00499, 2019 WL 1233740, at *4 (W.D.N.C. March 15, 2019) (approving an award of 33 percent of the total settlement value); *Neal v. Wal-Mart Stores, Inc.*, 3L17-cv-00022, 2021 WL 1108602, at *2 (W.D.N.C. March 19, 2021) (same). Here, the 21.4% requested is less than the North Carolina benchmark for filed cases, and is reasonable. An examination of the *Ehrenhaus* factors further bears this out.

2. The Requested Attorneys' Fees Are Reasonable Under the *Ehrenhaus* Factors.

The first and seventh *Ehrenhaus* factors – the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the service properly, and the experience, reputation, and ability of the lawyers involved

– overwhelmingly support the requested fee award. The skill required to litigate data breach cases is great, in part due to the quickly evolving nature of data breach and privacy law. Here, the lawyers representing Plaintiff are some of the most experienced in this area of the practice. Class Counsel brought this established track record and experience to work in litigating Plaintiff's and Class Members' claims. The significant experience and qualifications of counsel easily justify the attorneys' fee award.

Class Counsel's expertise is important because this was a case where Plaintiff faced substantial hurdles on a case that involved novel and difficult legal questions. *See, e.g.*, *In re Sonic Corp. Customer Data Sec. Breach Litig.,* No. 1:17-md-2807, 2019 WL 3773737m at *7 (N.D. Ohio Aug. 12, 2019) ("Data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts. And of course, juries are always unpredictable."); *In re Anthem, Inc. Data Breach Litig.,*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (noting that "many of the legal issues presented in [] data-breach case[s] are novel"). While Plaintiff believes he would have ultimately prevailed on the merits at trial or summary judgment, the risk of nonpayment was substantial.

Class Counsel already devoted significant time to this matter, as shown in the summary lodestar crosscheck below. Of course, Class Counsel's work was not over after negotiating the Settlement. After preliminary approval of the Settlement Agreement was granted, Class Counsel has worked diligently to ensure that Class members would be able benefit from the Settlement. The work performed by Class

Counsel to date has been comprehensive, complex, and wide-ranging. Thus, the first and seventh factors amply support the requested fee award.

The second, and eighth factors – the preclusion of other employment and whether the fee was fixed or contingent – likewise support the requested fee award. Class Counsel took this case on a purely contingent basis. Joint Decl. ¶¶ 7-12. Class Counsel took on this case to the exclusion of other employment. *Id*. The retainer agreement Class Counsel has with Plaintiff does not provide for fees apart from those earned on a contingent basis, and, in the case of class settlement, attorneys' fees would only be awarded to Class Counsel, if approved by the Court. *Id.* ¶ 12. As such, attorneys' fees were not guaranteed in this case. *Id.* Class Counsel assumed significant risk of nonpayment or underpayment of attorneys' fees. *Id*. ¶¶ 7-12. Class Counsel took on these significant risks knowing full well their efforts may not bear fruit.

Here, Class Counsel took on significant risks. While Plaintiff believed he could prevail on his claims against Defendant, he was also aware that he would likely face several strong legal defenses and difficulties in demonstrating causation and injury. Indeed, Defendant filed a motion to dismiss in November 2022, laying out many of its defenses. Although that motion was denied, such defenses, if successful after discovery, could drastically decrease or eliminate any recovery for Plaintiff and putative class members. *Id*. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on either certification or merits. The general risks of litigation are further heightened in the data breach arena. Among national consumer protection class action litigation, data

breach cases are some of the most complex and involve a rapidly evolving area of law. Moreover, the theories of damages remain untested at trial and appeal. As another 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.").

Fox v. Iowa Health Sys., No. 3:18-CV-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021). These cases are particularly risky for plaintiffs' attorneys. Consequently, the requested fee award appropriately compensates for the risk undertaken by Plaintiff's counsel here.

Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data breach cases like this one are particularly complex and face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp*., No. 08 Civ. 6060 (RMB)(RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013). Another significant risk faced by Plaintiff here is the risk of maintaining class action status through trial. The class has not yet been certified, and Defendant will certainly oppose certification if the case proceeds. Thus, Plaintiff "necessarily risk[s] losing class action status." *Grimm v. American Eagle Airlines, Inc*., No. LA CV 11-00406 JAK(MANx), 2014 WL 1274376, at *10 (C.D. Cal. Sept. 24, 2014). Class certification in contested consumer data breach cases is not common—first occurring in *Smith v.*

Triad of Ala., LLC, No. 1:14-CV-324-WKW, 2017 U.S. Dist. LEXIS 38574, at *45-46 (M.D. Ala. Mar. 17, 2017). In one of the few significant data breach class actions that have been certified on a national basis (the Marriott data breach litigation), this risk was very real, with certification overruled by the Fourth Circuit once, and the case currently back on appeal again after re-certification. This over-arching risk simply puts a point on what is true in all class actions – class certification through trial is never a settled issue, and is always a risk for the Plaintiff and their Counsel. "Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (citing *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986)). Accordingly, these factors weigh in favor of approval of the attorneys' fees request here.

The third factor – the fee customarily charged for similar services – weighs heavily in favor of approving the fee requested here. In data breach cases with similar class relief, there have been fee awards well exceeding a million dollars. *See Fox*, supra, 2021 WL 826741, at *6 (approving attorneys' fees and costs in the amount of $1,575,000 in data breach settlement with similar class relief). The class relief here is similar to results obtained in other data breach cases, and which include, for instance: *Culbertson, et al v. Deloitte Consulting LLP*, Case No. 1:20-cv-3962-LJL (S.D.N.Y. 2022); *Carrera Aguallo v. Kemper Corp.*, Case No. 1:21-cv-01883 (N.D. Ill. Oct. 27, 2021), ECF 33 (finally approving $2,500,000 in attorneys' fees in data breach class action involving 6 million class members); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, 2019 U.S. Dist. LEXIS 135573, at *24 (N.D. Ohio Aug. 12, 2019)

("Considering the above factors, the Court finds that 30 percent [request for attorneys' fees] of the $4,325,000 aggregate amount is appropriate."); *Henderson V. Kalispell Reg'l Healthcare*, No. CDV 19-0761 (Mont. Dist. Ct., Cascade Cnty. Nov. 25 2020) (court awarded attorneys fee of 33% of the common fund of $4.2 million). A modest $115,000 is fully in line with other cases with similar results obtained for the Class.

The fourth factor – the amount involved and the results obtained – strongly favors the requested award. This is, without question, the most important inquiry. *Hensley v. Eckerhart,* 461 U.S. 424, 436 (1983) ("the most critical factor is the degree of success obtained"). As shown above, the Settlement provides a significant benefit to Class Members, including the ability of each and every Class Member to be reimbursed for out-of-pocket losses attributable to the Data Incident as well as for time spent responding to the Data Incident, along with free credit monitoring. These are real, tangible benefits—that without the efforts of Plaintiff and Class Counsel, and their willingness to take on the attendant risks of litigation, would not have been available to Class Members. This factor weighs heavily in favor of granting this fee request.

Finally, the result achieved in this Settlement is notable because the parties were able, through capable and experienced counsel, to reach a negotiated Settlement without involvement of the Court in managing this litigation or discovery disputes. Class Counsel worked on behalf of the Settlement Class to litigate a dispositive motion and prevail, conduct fact discovery, and negotiate the Settlement. And the

benefits available to the Settlement Class directly address the harms claimed in Plaintiff's Complaint.

The fifth and sixth factors – the time limitations imposed by the client or circumstances and the nature and length of the professional relationship with the client – are neutral factors. Class Counsel did not have a professional relationship with Plaintiff prior to this case, and there were no time limitations.

Therefore, all factors set out in *Ehrenhaus* to analyze in a class action settlement overwhelmingly support the requested fee award.

3. Other Factors Support the Reasonableness of the Requested Award

In addition to satisfying the *Ehrenhaus* factors, there are additional reasons to support the requested award. Notably, the requested fee award has been approved by the Settlement Class members themselves. Settlement Class members received direct notice of the Settlement, which provides the best possible and most practicable notice in a class settlement. The settlement notice described the amount that Settlement Class Counsel intended to request in attorneys' fees and costs in plain and clear language. As of January 14, 2024, no Settlement Class member has objected to the requested attorneys' fee, the case expenses sought, or the proposed service award. *See Varacallo v. Massachusetts Mutual Life Insurance Company*, 226 F.R.D. 207, 251 (D.N.J. 2005) (even a small number of objectors to a fee award favors approval of request); Joint Decl., ¶ 6. Accordingly, Settlement Class members have approved the requested award.

The requested award also falls comfortably within the percentage typically approved in class settlements. The North Carolina Business Court in *Byers v.*

Carpenter, 1998 NCBC LEXIS 3, **32 (January 30, 1998) held that the appropriate level of compensation in class cases are typically 25% of the relief obtained if the case is settled before filing; one-third if after filing; and 40% if after an appeal has been taken. Here, as outlined above, Class Counsel seeks, conservatively, less than 33% of the common benefit recovered for the Class. Under *Byers* and the ample North Carolina case law cited throughout herein, Plaintiff's attorneys' fee request is therefore well within the range of reasonable fees in this state.

4. A Summary Lodestar Crosscheck Confirms the Reasonableness of the Fees Requested

Although no lodestar crosscheck is required, a summary lodestar crosscheck confirms the reasonableness of the fees requested here. Class Counsel has expended 357.6 hours of work on this matter to date, and will expend another 20-40 hours of time obtaining final approval and consummating this Settlement. Joint Decl. ¶ 13. At the normal billing rates that have been approved by courts across the country, this equates to a lodestar of $200,771.10, and the fees requested represent a negative lodestar multiplier of 0.57. North Carolina courts have found that positive lodestar multipliers of 2 to 4 are well within the range of fees customarily awarded in complex litigation. *Byers v. Carpenter*, No. 94 CVS 04489, 1998 WL 34031740, at *11 (N.C. Super. Jan. 30, 1998) ("A reasonable multiplier based on these factors would be 2 to 4."); *see also Kirkpatrick v. Cardinal Innovations Healthcare Sols.*, 352 F. Supp. 3d 499, 507 (M.D.N.C. 2018) (citing cases where "courts have found that lodestar multipliers ranging from 2 to 4.5 demonstrate the (of a requested percentage fee."). Thus, the negative lodestar multiplier falls within the range of reasonableness.

Also, if Class Counsel completes the additional 20-40 hours of work estimated to final approval, the accrued lodestar will be significantly more, and the lodestar will likely be at least double the fees sought. Joint Decl., ¶ 16. "The lodestar fee is presumptively reasonable." *Ford v. Cardinal Innovations Healthcare Sols*., No. 1:20-CV-736, 2022 WL 558376, at *5 (M.D.N.C. Jan. 21, 2022). As presumptively reasonable, the $115,000 in combined fees and expenses should be approved by this Court.

5. Class Counsel's Request for Expenses is Reasonable.

Class Counsel seeks to recover reasonable litigation expenses as part of requested fee award of $5,200.14, representing court fees, service fees, postage, travel costs, and mediation costs. Courts regularly award litigation expenses in addition to attorneys' fees in class action cases. Courts in North Carolina and the federal Fourth Circuit have explained that such costs and expenses may include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (internal quotations omitted). Counsel's expenses here were all reasonably incurred in pursuing this litigation. Joint Decl., ¶ 20. Counsel's expenses were reasonable and necessary to litigate this case, and the Court should therefore include them in any fee award. *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, No. CIV.A. DKC 11-1823, 2013 WL 5506027, at *17 (D. Md. Oct. 2, 2013) (awarding expenses that the court deemed were "reasonable and typical.").

Class Counsel's requested fee award of $115,000 includes the $5,200.14 in expenses incurred in this litigation. This is yet another factor demonstrating the reasonableness of the attorneys fee award.

6. The Requested Incentive Award to the Class Representative is Reasonable.

Class litigation cannot proceed without the willingness of an individual to step up and litigate on behalf of others. A putative class representative must devote time and energy to carry out tasks that are far above and beyond what absent class members are asked to do. In recognition, courts often award service awards to class representatives. Service awards are "awarded to class representatives in recognition of their time, expense, and risk undertaken to secure a benefit for the Class they represent" and such awards are "within the discretion of the Court." *Carl v. State*, No. 06CVS13617, 2009 WL 8561911 at ¶ 97 (N.C. Super. Dec. 15, 2009). The amount of the award is ultimately within the discretion of the Court, though the size of the award itself is typically commensurate with the level of activity performed and the size of the case. *See Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05CV00187, 2007 WL 119157, at *4 (M.D.N.C. Jan. 10, 2007) (awarding a service award of $15,000).

Factors courts consider when awarding incentive awards include: the risk to the plaintiff in commencing suit, both financially and otherwise; the notoriety and/or personal difficulties encountered by the representative plaintiff; the extent of the plaintiff's personal involvement in the lawsuit in terms of discovery responsibilities and/or testimony at depositions and trial; the duration of the litigation; and the plaintiff's personal benefit, or lack thereof, purely in his capacity as a class member. *Perry v. Fleetboston*, 229 F.R.D. at 118. The degree to which the Class has benefited

from the Class Representatives' actions is also taken into account. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

Plaintiff seeks a service award of $2,500 in recognition of the time and effort he has personally invested in this case. Plaintiff was prepared to litigate this action through trial to properly represent the class and fight for significant relief. Absent his efforts, the class would have received no compensation. Plaintiff also assisted in Counsel's investigation of the case, reviewing pleadings, maintaining contact with counsel, remained available for consultation during settlement negotiations, answering counsel's many questions, and reviewing the Settlement Agreement. The Class Representative amply fulfilled his duties, making the Service Award requested appropriate.

The requested service award is reasonable and commensurate with Plaintiff's efforts in the litigation. It is modest compared to other, recent service awards in data breach cases before this Court. *See McManus v. Dry, P.A.*, No. 22-CVS-1776, 2023 WL 2785559, at *3 (N.C. Super. Mar. 29, 2023) (final approval granted by Bledsoe, C.J., March 29, 2023, and awarding $5000 service awards).

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant the instant motion as part of final approval of this class action settlement, award Settlement Class Counsel attorneys' fees and costs in the amount of $115,000, and make a service award in the amount of $2,500 to Plaintiff for his service to the Class.

Dated: January 14, 2025

Respectfully submitted,

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