

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

In re: CaptureRX Data Breach Litigation

Master File No. 5:21-CV-00523-OLG

This Document Relates To:

All Actions

**PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF COSTS AND EXPENSES, AND SERVICE AWARDS**

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23 and the Court's March 3, 2022 Order Granting Preliminary Approval of Class Action Settlement Agreement and Conditionally Certifying Settlement Class for Settlement Purposes Only (the "Preliminary Approval Order") (ECF No. 42) in the above-captioned class action, Plaintiffs Daisy Trujillo, Mark Vereen, Michelle Rodgers, Echoe Camacho, on behalf of herself and her minor child, T.C., and Angelica Mendoza (collectively, "Representative Plaintiffs" or "Plaintiffs"), by and through Gary M. Klinger of Milberg Coleman Bryson Phillips Grossman PLLC ("Milberg") and M. Anderson Berry of Clayeo C. Arnold, A Professional Law Corp. ("Clayeo") (together, "Class Counsel"), respectfully submit this Motion for an Award of Attorneys' Fees, Reimbursement of Costs and Expenses, and Service Awards ("Fee Motion"). Specifically, Plaintiffs move this Court to approve (1) an award of attorneys' fees in the amount of \$1,583,333.33, which is 33 percent of the Settlement Fund; (2)

reimbursement of reasonable costs and expenses of \$18,829.79; and (3) a service award of \$2,000 to each of the five Representative Plaintiffs, for a total of \$10,000.

In common fund cases such as this one, Fifth Circuit precedent 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 sought are also reasonable. Finally, the requested service awards constitute modest compensation to acknowledge Plaintiffs' zealous prosecution of this action alongside Class Counsel.

Therefore, respectfully, this Court should grant Class Counsel's Fee Motion.

II. INCORPORATION BY REFERENCE

In the interest of judicial efficiency, for factual and procedural background on this case, Plaintiffs refer this Court to and hereby incorporate Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement and Conditionally Certifying Settlement Class for Settlement Purposes Only (ECF No. 41) filed on February 11, 2022 and the accompanying Exhibits, including the proposed Settlement Agreement, filed in conjunction therewith (ECF Nos. 41-1, 41-2, 41-3, and 41-4).

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 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970). 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.”); *see also* MANUAL FOR COMPLEX LITIGATION § 14.231 (4th ed. 2004).

IV. ARGUMENT

A. The Award Sought for Attorneys’ Fees Is Reasonable and Appropriate

To calculate attorneys’ fees in common fund cases, courts in the Fifth Circuit will typically use: (1) the percentage of the fund method, in which the court awards fees as a reasonable percentage of the common fund; cross-checked with (2) 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.*, 2018 U.S. Dist. LEXIS 82716, at *3 (E.D. Tex. Apr. 20, 2018) (awarding “40% of the gross total award”). In cross-checking the percentage fee, “courts set the lodestar multiplier by applying the *Johnson*¹ factors.” *Union Asset Mgmt. Holding A.G.*, 669 F.3d at 643 n.26. Here, the reasonableness of the fee request is demonstrated under the percentage of the fund method and is further confirmed by a loadstar cross-check.

¹ *Johnson v. Ga. Highway Exp., Inc.*, 488 F.2d 714, 718 (5th Cir. 1974), *abrogated on other grounds by* *Blanchard v. Bergeron*, 489 U.S. 87 (1989).

1. Plaintiffs' Fees Request Is Reasonable and Appropriate under the Percentage of the Fund Method

The Fifth Circuit has employed, and even favors, the percentage of the fund method when assessing whether the awards sought for attorneys' 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."); *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 attorneys' fees in common fund, or class action, cases."). In this action, CaptureRx has agreed to pay \$4,750,000 into a Settlement Fund, which will be the source of all settlement costs and award payments to Settlement Class Members, administrative costs, service awards, and attorneys' fees, costs and expenses. *See* ECF No. 41-1, Settlement Agreement, § 1.37. Class Counsel request an award of 33 percent of the Settlement Fund, or \$1,583,333.33. *Id.*, § 9.1.

This fee is reasonable and appropriate. Courts in the Fifth Circuit as a rule award fees in the 30% to 36% range. *See, e.g., Welsh v. Navy Fed. Credit Union*, 2018 U.S. Dist. LEXIS 227456, at *49 (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.*, 2018 U.S. Dist. LEXIS 69143, at *34 (N.D. Tex. Apr. 25, 2018) (awarding one-third of the Settlement Fund); *Schwartz v. TXU Corp.*, 2005 U.S. Dist. LEXIS 27077, at *87 (N.D. Tex. Nov. 8, 2005) ("Indeed, courts throughout this Circuit regularly award fees of 25% and more often 30% or more of the total recovery under the

percentage-of-the recovery method.”). Therefore, the requested attorneys’ fees of 33 percent of the Settlement Fund, or \$1,583,333.33, is reasonable.

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

Under the lodestar approach, the court first multiplies the number of hours reasonably spent on the case by each attorney’s reasonable hourly rate in order to compute the lodestar, and then adjusts 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 Plaintiffs’ 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 in order 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 v. Hotels.com, L.P.*, 2017 U.S. Dist. LEXIS 58384, at *30 (W.D. Tex. Apr. 17, 2017); *McClain v. Lufkin Indus.*, 649 F.3d 374, 381 (5th Cir. 2011).

Here, as reflected in the Declaration of Gary Klinger (“Klinger Decl.”), Plaintiffs’ counsel collectively spent 1,020 hours litigating this or related actions, for a total lodestar of \$716,850.25. The time reflected in Plaintiffs’ counsel’s lodestar calculations are reasonable, and were necessary for the effective and efficient prosecution and resolution of this litigation. 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 Klinger Decl.*, ¶ 34. Plaintiffs’ 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* Klinger Decl., ¶ 28. Other courts have found Plaintiffs’ counsel’s rates to be reasonable and have approved them. *Id. See also, e.g., Legere-Gordon v. Firstcredit Inc.*, 2021 U.S. Dist. LEXIS 104612, at *13 (D. Idaho June 2, 2021). Further, Plaintiffs’ requested fee award represents only a 2.2 multiplier of Plaintiffs’ counsel’s collective lodestar. Klinger Decl., ¶ 33. Because there is additional work required to obtain final approval, monitor the settlement, and assist Class Members, this multiplier will ultimately decrease. *Id.* Therefore, the 33 percent fee request under the lodestar/multiplier method here verifies its reasonableness.

1) The *Johnson* Factors Support that the Requested Fee Is Fair and Reasonable under the Lodestar Method

Application of the *Johnson* factors confirms that the requested fee is fair and reasonable under the lodestar method. 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, 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. Surles*, 804 F.2d 321, 325-26 (5th Cir. 1986). Courts should pay special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience,

reputation and ability of counsel. *Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir. 1990). Here, however, all the Johnson factors support the requested fees award.

(a) The time and labor required for the litigation

In particular, the first *Johnson* factor (the time and labor required) supports a finding that the requested award of fees is appropriate because this case consumed the attention of many 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 declarations submitted herewith, Plaintiffs' counsel dedicated a total of 1,020 hours on this matter as of May 1, 2022, for a total collective lodestar of \$716,850.25. Klinger Decl. ¶ 32. Class Counsel, among other things, have:

- a. before filing their respective complaints, investigated the potential claims against Defendant, interviewed potential plaintiffs, and gathered information about the Data Incident and its potential impact on consumers;
- b. conducted a pre-suit factual investigation including interviewing the Plaintiffs and reviewing their documents, background and damages, and continued their 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 website, developing information from third-parties, and scouring internet websites for information about the Data Incident and Defendant's business operations in general and specifically pertinent to the Data Incident;

- c. drafted and filed Plaintiffs' Consolidated Class Action Complaint (ECF No. 17), which included material exhibits;
- d. Engaged in motion practice before the Judicial Panel on Multidistrict Litigation;
- e. Discussed with Defendant the potential for early resolution, and exchanged confidential information in advance of the mediation, which information provided by Defendant aided Plaintiffs' counsel in developing an understanding the Data Incident, the breadth of the Data Incident, the size and composition of the Class and the potential damages to Class Members;
- f. reviewed and analyzed documents produced by Defendant and solicited bids from claims administrators in order to select one;
- g. conducted extensive direct negotiations with Defendant through its counsel, and when all issues could not be resolved, drafted a lengthy mediation brief and prepared for and participated in a global mediation session with Defendant and the Hon. Wayne Andersen (Ret.) of JAMS on November 3, 2021, as well engaged in numerous follow-up telephonic efforts after the mediation in order to resolve this matter, which proved successful in resolving the claims and resulted in the terms that would become the present Settlement;
- h. prepared and submitted the Stipulation of Settlement and supporting documents, including the Notice, Summary Notice, claim form, proposed preliminary and proposed final approval orders;

- i. prepared and submitted Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification, and Approval of Notice Plan (ECF No. 41) which was ultimately granted when the Court preliminarily approved the Settlement (ECF No. 42); and
- j. regularly conferred with the Plaintiffs about the status, strategy, and direction of the case and settlement negotiations. Klinger Decl., ¶ 27.

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 fee requested because data breach class actions are still new and can present novel and complex issues, making a successful outcome difficult to predict. *Id.*, ¶ 19. Also, a successful outcome would ensue, if at all, only after prolonged and arduous litigation with an attendant risk of drawn-out appeals. *Id.* Among national consumer protection class action litigation, data breach cases are some of the most complex and involve a rapidly evolving area of law. *Id.*, ¶ 22. As such, these cases are particularly risky for plaintiffs’ attorneys. *Id.* Consequently, the requested fee award appropriately compensates for the risk undertaken by Plaintiffs’ counsel here.

(c) The skill requisite to perform the legal service properly

Counsel exemplifies this factor where 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) (citing *Di Giacomo v. Plains All Am. Pipeline*, 2001 U.S. Dist. LEXIS 25532, at *36 (S.D. Tex. Dec. 18, 2001)). Here, 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 discovery disputes. *Id.*, ¶ 18. Class Counsel worked on behalf of the Settlement Class to obtain information from Defendant regarding the Data Incident and used that information (along with their experience and the knowledge gained from other data breach class actions) to negotiate the Settlement. *Id.* The Settlement reached here is notable for the simplicity of the claims process; the speed with which counsel was able to secure a favorable settlement; and the cooperation of Plaintiffs' counsel which aided in the ability to resolve this matter efficiently. *Id.*, ¶ 20. Therefore, this factor also weighs in favor of approval of the Fee Motion.

(d) Preclusion of other employment by the attorney due to acceptance of the case

Furthermore, the application of *Johnson* factor 4 (preclusion of other employment by the attorney due to acceptance of the case) further supports the requested fees because the pursuit of this litigation was an economic risk for the firms and diverted their resources from other less risky cases. *Id.*, ¶ 41. Plaintiffs' 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. Plaintiffs' counsel seek reimbursement of their lodestar already incurred and for time to be spent wrapping up the litigation. *Id.* Moreover, Plaintiffs' counsel also undertook a risk that any judgment would become uncollectable due to Defendant's financial condition. *Id.* Therefore, this factor also favors Plaintiffs' fee request.

(e) Customary fee for similar work in the community

As discussed previously, the requested the customary billing rates reflect the particular legal expertise of Plaintiffs' counsel, and are also based on established competitive market rates for national cases involving complex and class action litigation. As such, the application of the *Johnson* factor 5 supports the requested attorneys' fees.

(f) Whether the fee is fixed or contingent

Plaintiffs' counsel undertook this litigation on a purely contingent basis, with no assurance of recovery of expenses or attorneys' fees. *Id.*, ¶ 35. 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, and the fee percentage is generally one third of the total recovery and can be higher where risk and likely case expenses are expected to be relatively high. *Id.*

(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 Mex., S.A.*, 2022 U.S. App. LEXIS 804, at *15 (5th Cir. Jan. 10, 2022) (citing *Farrar v. Hobby*, 506 U.S. 103 (1992)). The result achieved in this Settlement weighs in favor of the requested attorneys' fees. This most critical factor supports the requested fee because the Settlement Agreement provides significant monetary and remedial relief. Klinger Decl., ¶ 14. Specifically, CaptureRx will establish a Settlement Fund of \$4,750,000, 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.* Each Settlement Class Member who files a valid claim will be eligible to receive twenty-five dollars (\$25.00), and California Settlement Subclass Members will also be eligible for an additional benefit of seventy-five dollars (\$75.00). *Id.* The Settlement Agreement provides for a

pro rata increase or a *pro rata* reduction if the total dollar value of all Approved Claims is less than or exceeds the amount remaining in the Settlement Fund after the Claims Deadline has passed and after the Attorneys' Fees and Expenses Award, the Service Award, and Claims Administration costs have been paid in full out of the Settlement Fund. Klinger Decl., ¶ 15. Moreover, CaptureRx will also develop, implement, and maintain a comprehensive information security program that is reasonably designed to protect the security, integrity, and confidentiality of Personal Information that CaptureRx collects or obtains from Patients (collectively, the "ISP"). *Id.*, ¶ 16. CaptureRx may satisfy the requirement to implement and maintain the ISP through: (1) review, maintenance and, as necessary, updating of existing information security program or existing safeguards to ensure that the ISP is operating in a manner reasonably calculated to prevent unauthorized access to or unauthorized use of PII; and (2) upgrading information safeguards as necessary to limit risks. *Id.* Therefore, this factor also weighs in favor of approval because Class Counsel achieved an excellent Settlement on behalf of the Class.

(i) The experience, reputation, and ability of the attorneys

This factor has been addressed under factors 1 and 3 above. Overall, throughout this litigation, Plaintiffs' counsel have demonstrated to the Court that they have competently handled this litigation. 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. *Id.*, ¶ 24. As such, the prompt resolution of the case further demonstrates that Plaintiffs' counsel managed this action skillfully, always mindful of Plaintiffs' and Class Members' best interests, while facing challenging opponents, which further attests to the experience, reputation, and the ability of the attorneys involved.

(j) The undesirability of the case

Given that data breach cases pose unique challenges, with areas of law not settled and making outcomes of cases more uncertain and hard to predict, these cases may be less desirable. That is particularly true where, as here, the data compromised did not include Social Security Numbers, financial account numbers, etc.; rather, only prescription information was the subject of the Data Incident. Moreover, class action litigation is more involved and more lengthy, and requires more discovery and more investigation than other types of litigation. Finally, Plaintiffs' counsel here undertook this litigation on a contingency fee basis, which in itself carries more risk. All these factors contribute to the undesirability of the case.

(k) The nature and length of the professional relationship with the client

Plaintiffs' counsel spent a time building relationships with Plaintiffs, discussing Plaintiffs' claims, and addressing Plaintiffs' questions and concerns. As addressed under factor 1, before filing Plaintiffs' respective Complaints, Plaintiffs' counsel investigated the potential claims against Defendant, interviewed potential plaintiffs, and gathered information about the Data Incident and its potential impact on consumers. *Id.*, ¶ 27. Plaintiffs' counsel also regularly conferred with the Plaintiffs about the status, strategy, and direction of the case and settlement negotiations. *Id.*

(l) Awards in similar cases

Finally, *Johnson* factor 12 (awards in similar cases) also supports the requested fee award. The Settlement is similar to results obtained in other data breach cases, and which include, for instance: *Principe v. Ukropina (In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (“We cannot conclude, on this record, that the district court’s award of fees [in the amount of \$4 million (thirty-three percent)] was an abuse of discretion.”); *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.”). For these reasons, Class counsel should be reasonably compensated for its successful efforts in representing the Class and achieving a beneficial settlement in just four months.

In sum, Class Counsel’s requested fee of \$1,583,333.33, or 33 percent of the Settlement Fund is facially reasonable under the percentage method, and Plaintiffs’ lodestar is entitled to a presumption of reasonableness under the lodestar method. Application of the *Johnson* factors confirms the appropriateness of the requested fee award, which, respectfully, should be granted.

B. Plaintiffs’ Expense Reimbursement Request is Reasonable

District courts allow costs and expenses, the sort that lawyers ordinarily include in their bills to clients, to be recovered from the common fund. *See City of San Antonio*, 2017 U.S. Dist. LEXIS 58384, at *54; *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 declarations filed herewith demonstrate that the expenses sought to be reimbursed were all advanced by Plaintiffs’ counsel, were necessarily incurred in the prosecution of this case, and were also properly documented and prepared using contemporaneous time records. *See* Klinger Decl., ¶ 46 and Plaintiffs’ counsel’s declarations. Such costs and expenses included research, court fees, mediation fees, and other services that are necessary and reasonable to prosecuting a class action.

Id. The requested reimbursement of \$18,829.79 in costs and expenses are therefore appropriately reimbursable to Plaintiffs' counsel. *See* EFC No. 41-1, § 9.1.

C. The Requested Service Awards Are Warranted

Class Counsel move this Court to approve a service award of \$2,000 to each Plaintiff for their service as Class representatives. Courts approve reasonable service awards to compensate the named plaintiffs for their services. *Guadalupe v. Am. Campus Cmty. Servs.*, 2020 U.S. Dist. LEXIS 259660, at *7 (W.D. Tex. Oct. 23, 2020); *see also Matson v. NIBCO Inc.*, 2021 U.S. Dist. LEXIS 201909, at *36 (W.D. Tex. Oct. 20, 2021) (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.); *Blackburn v. Conduent Commer. Sols. LLC*, 2020 U.S. Dist. LEXIS 255284, at *8 (W.D. Tex. Dec. 22, 2020) (approving an award of \$2,500 where plaintiff was instrumental in identifying the alleged violation and building the case). Likewise, the Plaintiffs here have been instrumental in assisting Plaintiffs' counsel throughout this proceeding. Klinger Decl., ¶ 54. Their involvement was not merely nominal. *Id.* They initiated and remained in contact with Plaintiffs' counsel; considered and questioned various pleadings in this case, including the Consolidated Complaint and settlement papers; supervised, monitored and periodically visited with Plaintiffs' counsel; provided background documents and followed the progress of this litigation; 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 \$2,000 each requested, the Court should find such amount is reasonable.

V. CONCLUSION

For these aforementioned reasons, the Court should grant Plaintiffs' Fee Motion.

DATED: May 3, 2022

Respectfully submitted,

/s/ Joe Kendall

Joe Kendall
Texas Bar No. 11260700
KENDALL LAW GROUP, PLLC
3811 Turtle Creek Blvd., Suite 1450
Dallas, Texas 75219
Telephone: (214) 744-3000
Facsimile: (214) 744-3015
jkendall@kendalllawgroup.com

Local Counsel for Plaintiffs

CLAYEO C. ARNOLD,
A PROFESSIONAL LAW CORP.
M. Anderson Berry*
865 Howe Avenue
Sacramento, CA 95825
Telephone: (916) 777-7777
Facsimile: (916) 924-1829
aberry@justice4you.com

MILBERG COLEMAN BRYSON
PHILLIPS GROSSMAN PLLC
Gary M. Klinger*
227 West Monroe Street, Suite 2100
Chicago, IL 60630
Telephone: (312) 283-3814
gklinger@milberg.com

Interim Class Counsel

* Admitted *Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2022, I caused a true and correct copy of the foregoing document to be filed with the Clerk of the Court for the Western District of Texas via the Court's CM/ECF system, which will send notification of such filing to the counsel of record in the above-captioned matters.

Date: May 3, 2022

/s/ Gary M. Klinger

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

In re: CaptureRX Data Breach Litigation

Master File No. 5:21-CV-00523-OLG

This Document Relates To:

All Actions

**DECLARATION OF GARY M. KLINGER IN SUPPORT OF
PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF
COSTS AND EXPENSES, AND SERVICE AWARDS**

I, Gary M. Klinger, declare and state, under penalty of perjury, as follows:

1. I am currently a partner of the law firm of Milberg Coleman Bryson Phillips Grossman PLLC ("Milberg"). I became licensed to practice law in the State of Illinois in 2010, and am a member of the Trial Bar for the Northern District of Illinois as well as the U.S. Bankruptcy Court for the Northern District of Illinois. Additionally, I am admitted to practice in federal courts across the country, including, but not limited to, the U.S. District Courts for the District of Colorado, Central District of Illinois, Northern District of Illinois, Southern District of Illinois, Northern District of Indiana, Southern District of Indiana, Eastern District of Michigan, District of Nebraska and the Eastern District of Texas.

2. I was appointed Interim Lead Counsel and also Class Counsel for Plaintiffs Daisy Trujillo, Mark Vereen, Michelle Rodgers, Mark Biddle, Donald Woodrome, Echoe Camacho, on behalf of herself and her minor child, T.C., and Angelica Mendoza ("Plaintiffs") and the Class in this litigation against NEC Networks, LLC d/b/a CaptureRx ("Defendant" or "CaptureRx"). *See* ECF Nos. 14, 42.¹ I submit this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Costs and Expenses, and Service Awards (the "Fee Motion") incurred in

¹ This Court also appointed M. Anderson Berry of Clayco C. Arnold, A Professional Law Corp. ("Arnold Law Firm"), as Interim Lead Counsel and Class Counsel. *See id.*

connection with the prosecution of the above-captioned action.² Unless otherwise stated, I have personal knowledge of the following facts and could and would competently testify thereto.

Procedural Background

3. The Plaintiffs, individually and on behalf of a proposed class of consumers, asserted claims against CaptureRx in various actions that were consolidated, stemming from a third-party cyberattack (the “Data Incident”) that occurred on or about February 6, 2021, where unauthorized actors gained access to CaptureRx’s computer systems and accessed and acquired certain files containing the personally identifiable information (“PII”) and personal health information (“PHI”) of CaptureRx’s patients and/or customers, including the PII and PHI of the Plaintiffs.

4. In particular, in February 2021, Plaintiff Daisy Trujillo filed a Class Action Complaint against Defendants CaptureRx and Rite Aid in this Court as a result of a Data Incident (the “Trujillo Complaint”).³ See ECF No. 1. On June 4, 2021, Plaintiff Mark Vereen filed a Class Action Complaint against Defendants CaptureRx and Midtown Health Center, Inc. (“Midtown”), also in this Court, alleging the same causes of action as the Trujillo Complaint. See Compl., ECF No. 1, *Vereen v. NEC Networks, LLC, et al.*, No. 5:21-CV-00536-OLG (W.D. Tex.). On June 30, 2021, Plaintiffs Trujillo and Vereen moved to consolidate their two actions, as well as any subsequently filed or transferred related actions, before this Court. See ECF No. 11.

5. On July 21, 2021, Plaintiff Michelle Rodgers filed a Class Action Complaint against CaptureRx. See Compl., ECF No. 1, *Rodgers v. NEC Networks LLC*, No. 5:21-cv-00692-OLG-HJB (W.D. Tex.). This Court thereafter ordered that the *Rodgers* case be consolidated with *In Re: CaptureRx Data Breach Litigation*, Case No. 5:21-cv-00523-OLG (W.D. Tex.). See ECF No. 24.

² Class Counsel will allocate the fees among themselves and other Plaintiffs’ counsel (“Plaintiffs’ counsel”) who participated in prosecuting this and related litigation.

³ The Trujillo Complaint named Rite Aid Corporation as a defendant; however, on July 20, 2021, the Court granted the parties’ stipulation to substitute Defendant Rite Aid Hdqtrs. Corp. for Rite Aid Corporation. See ECF No. 16.

6. On October 20, 2021, Plaintiff Esther Burch filed a Class Action Complaint against Rite Aid in the Los Angeles Superior Court. *See* Compl., ECF No. 1-2, *Burch v. Rite Aid Corp.*, No. 5:21-cv-01102-OLG (W.D. Tex.). After Rite Aid removed the action to federal court, the parties stipulated to a transfer of the action to the Western District of Texas, which occurred on November 10, 2021. *Id.* This Court thereafter ordered that the *Burch* case consolidated with *In Re: CaptureRx Data Breach Litigation*, Case No. 5:21-cv-00523-OLG (W.D. Tex.). *See* ECF No. 29.

7. On June 4, 2021, Plaintiff Echoe Camacho, on behalf of herself and her minor child, T.C., filed a Class Action Complaint in the Eastern District of California. *See* Compl., ECF No. 1, *Camacho, et al. v. NEC Networks, LLC, et al.*, No. 5:21-cv-00979-OLG (W.D. Tex.). The parties stipulated to a transfer of the action to the Western District of Texas, which occurred on October 13, 2021. *Id.* This Court thereafter ordered that the *Camacho* case be consolidated with *In Re: CaptureRx Data Breach Litigation*, Case No. 5:21-cv-00523-OLG (W.D. Tex.). *See* ECF No. 31.

8. On August 10, 2021, Plaintiff Angelica Mendoza brought a Class Action Complaint against CaptureRx, Rite Aid, and CHCC in the Northern District of California. *See* Compl., ECF No. 1, *Mendoza v. NEC Networks, LLC, et al.*, No. 5:21-cv-01232-OLG (W.D. Tex.). The parties stipulated to a transfer of the action to the Western District of Texas, which occurred on December 14, 2021. *Id.* This Court thereafter ordered that the *Mendoza* case be consolidated with *In Re: CaptureRx Data Breach Litigation*, Case No. 5:21-cv-00523-OLG (W.D. Tex.). *See* ECF No. 34.

9. Plaintiff D.W. brought a Class Action Complaint against CaptureRx and Walmart, Inc. on May 25, 2021 in the Western District of Missouri. *See* Compl., ECF No. 1, *D.W., et al. v. NEC Networks, LLC, et al.*, No. 4:21-cv-00363-SRB (W.D. Mo.). The case filed in the Western District of Missouri is stayed pending resolution of the claims from the Texas Court.

10. Plaintiff Mark Biddle brought a Class Action Complaint against CaptureRx, the University of Pittsburgh Medical Center, and Charles J. Hilton, P.C. Attorney at Law on June 23, 2021 in the Western District of Pennsylvania. *See* Compl., ECF No. 2, *Biddle v. The University*

of *Pittsburgh Medical Center, et al.*, No. 2:21-cv-00815-RJC (W.D. Pa.). On December 9, 2021, Plaintiff Biddle filed a notice of settlement. *See id.*, ECF No. 29.

11. Finally, during the pendency of the above-identified actions, a plaintiff in a related case in the Western District of Missouri filed a motion under 28 U.S.C. § 1407 to centralize all litigation in the Western District of Missouri. *See* Order Den. Transfer, ECF No. 73, *In Re: NEC Networks, LLC d/b/a CaptureRx Customer Data Security Breach Litig.*, MDL No. 3018 (JPML Dec. 8, 2021). The Judicial Panel on Multidistrict Litigation denied the motion to centralize the litigation, holding that “[c]entralization at this time is premature and could delay a class-wide settlement with little or no benefit to the parties and putative class members.” *Id.* at 2.

The Settlement

12. Through the efforts of Plaintiffs and Class Counsel, and with the assistance of Hon. Wayne Andersen, a retired federal judge and experienced class action mediator of JAMS, the Released Parties⁴ reached a Settlement (“Settlement”) that was preliminarily approved by the Court on March 3, 2022 (the “Preliminary Approval Order”) that created a Nationwide Settlement Class and California Settlement Subclass (collectively, the “Settlement Class”) of, respectively, “All natural persons residing in the United States whose Personal Information was exposed to an unauthorized party as a result of the Data Incident[,]” and “All natural persons residing in the State of California at the time of the Data Incident whose Personal Information (a) Defendant stored and/or shared in its electronic files and (b) was exposed to an unauthorized party as a result of the data breach announced between March 30 and April 7, 2021 and that occurred on February 6, 2021.” *See* ECF No. 42.

13. As part of the Settlement, the Released Parties drafted and executed, through their respective counsel, a Settlement Agreement (the “Settlement Agreement”).

⁴ The Released Parties include, on the one hand, (i) Plaintiffs, and, on the other hand, (ii) CaptureRx.

14. The Settlement Agreement provides significant monetary and remedial relief. Specifically, CaptureRx will establish a Settlement Fund of \$4,750,000, which shall be the source of all settlement costs and awards payments to Settlement Class Members, administrative costs, service awards, and attorneys' fees, costs and expenses. *See* Settlement Agreement, § 1.37. Each Settlement Class Member who files a valid claim will be eligible for one cash payment. *Id.*, § 2.3. Every Settlement Class Member who attests that he or she was impacted by the Data Incident is eligible to receive Twenty-Five Dollars (\$25.00). *Id.*, § 2.4. In addition, California Settlement Subclass Members will also be eligible for an additional benefit of Seventy-Five Dollars (\$75.00) where they similarly attest that they were impacted by the Data Breach. *Id.*, § 2.5.

15. The Settlement Agreement provides for a *pro rata* increase or a *pro rata* reduction if the total dollar value of all Approved Claims is less than or exceeds the amount remaining in the Settlement Fund after the Claims Deadline has passed and after the Attorneys' Fees and Expenses Award, the Service Award, and Claims Administration costs have been paid in full out of the Settlement Fund.

16. Moreover, CaptureRx will also develop, implement, and maintain a comprehensive information security program that is reasonably designed to protect the security, integrity, and confidentiality of Personal Information that CaptureRx collects or obtains from Patients (collectively, the "ISP"). *Id.*, § 2.7. The CaptureRx ISP shall be written and shall contain administrative, technical, and physical safeguards appropriate to: (i) the size and complexity of CaptureRx's operations; (ii) the nature and scope of CaptureRx's activities; and (iii) the sensitivity of the Personal Information that CaptureRx maintains. *Id.* CaptureRx may satisfy the requirement to implement and maintain the ISP through: (1) review, maintenance and, as necessary, updating of existing information security program or existing safeguards to ensure that the ISP is operating in a manner reasonably calculated to prevent unauthorized access to or unauthorized use of PII; and (2) upgrading information safeguards as necessary to limit risks. *Id.*

17. Based on my years of practice litigating class and other complex actions, I endorse the Settlement and believe it benefits and provides 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: remedial relief *plus* cash compensation.

18. 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 discovery disputes. Class Counsel worked on behalf of the Settlement Class to obtain information from Defendant regarding the Data Incident and used that information (along with their experience and the knowledge gained from other data breach class actions) to negotiate the Settlement.

19. My years of experience representing individuals in complex class actions—including data breach actions—contributed to an awareness of Plaintiffs’ and the Class’ settlement leverage, as well as their needs. Although I 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 prolonged and arduous litigation with an attendant risk of drawn-out appeals.

20. Moreover, the Settlement reached here is notable for the simplicity of the claims process; the speed with which counsel was able to secure a favorable settlement; and the cooperation of Plaintiffs’ counsel which aided in the ability to resolve this matter efficiently.

21. As a result of this litigation, Defendant has agreed to use and employ certain data security practices moving forward, which provide a benefit to Settlement Class Members, many of whom may continue to interact with Defendant.

22. 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.

23. Furthermore, data privacy and the security of one's PII and PHI are of utmost importance. Perpetrators of data breaches exploit lost or stolen PII and PHI and use it to commit a multitude of crimes, wreaking havoc on consumers. It follows that holding companies like CaptureRx accountable for failing to adequately secure PII and PHI in their possession is vital not only to help patients and consumers recover the damages they suffer as a result of such data breaches, but also to incentivize companies to prioritize data security.

24. 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 nationally recognized mediator in data breach cases.

25. Finally, Notice of the Settlement has been given in accordance with the terms of the Settlement Agreement. Settlement Agreement, § 4. As of this date, no Settlement Class Members have objected to the Settlement, including the requested attorney fees, reimbursement of expenses or the service award/incentive payment to Plaintiffs, or opted out of the Settlement.

Milberg / Mason Lietz & Klinger Time and Expenses

26. As Class Counsel, I oversaw or conducted the day-to-day activities in this litigation, and reviewed these materials (and backup documentation where necessary or appropriate) in connection with the preparation of this Declaration. The purpose of these reviews was to confirm the accuracy of the entries as well as the necessity for, and reasonableness of, the time and expenses committed to the litigation.

27. In prosecuting this case while at Milberg and Mason Lietz & Klinger LLP⁵, I performed a wide range of work on this case, including, in particular:

⁵ Prior to joining Milberg, I was a Partner at Mason Lietz & Klinger LLP ("MLK"). I initially filed this case while working at MLK and then it transferred with me to Milberg.

- a. before filing a complaint, investigated the potential claims against Defendant, interviewed potential plaintiffs, and gathered information about the Data Incident and its potential impact on consumers;
- b. conducted a pre-suit factual investigation including interviewing the Plaintiffs and reviewing their documents, background and damages, and continued their 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 website, developing information from third-parties, and scouring internet websites for information about the Data Incident and Defendant's business operations in general and specifically pertinent to the Data Incident;
- c. Assisted in drafting and filing Plaintiffs' Consolidated Class Action Complaint (ECF No. 17), which included material exhibits;
- d. Engaged in motion practice before the Judicial Panel on Multidistrict Litigation and appeared for argument;
- e. Discussed with Defendant the potential for early resolution, and exchanged confidential information in advance of the mediation, which information provided by Defendant aided Plaintiffs' counsel in developing an understanding the Data Incident, the breadth of the Data Incident, the size and composition of the Class and the potential damages to Class Members;
- f. reviewed and analyzed documents produced by Defendant and solicited bids from claims administrators in order to select one;

- g. conducted extensive direct negotiations with Defendant through its counsel, and when all issues could not be resolved, drafted a lengthy mediation brief and prepared for and participated in a global mediation session with Defendant and the Hon. Wayne Andersen (Ret.) of JAMS on November 3, 2021, as well engaged in numerous follow-up telephonic efforts after the mediation in order to resolve this matter, which proved successful in resolving the claims and resulted in the terms that would become the present Settlement;
- h. coordinated with other Plaintiffs' counsel to earn nearly unanimous support of the Settlement;
- i. prepared and submitted the Stipulation of Settlement and supporting documents, including the Notice, Summary Notice, claim form, proposed preliminary and proposed final approval orders;
- j. prepared and submitted Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification, and Approval of Notice Plan (ECF No. 41) which was ultimately granted when the Court preliminarily approved the Settlement (ECF No. 42); and
- k. regularly conferred with the Plaintiffs about the status, strategy, and direction of the case and settlement negotiations.

28. Records kept of the aforementioned work reflect that attorneys and paralegals at Milberg and MLK worked a combined 180.7 hours, through May 2, 2022, on this litigation, which, multiplied by the current hourly rates (\$800 at MLK; \$900 at Milberg), amounts to \$147,337.00 in lodestar. Milberg'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. Other courts have found Milberg's current rates to be reasonable in a settlement context.

29. The 180.7 hours does not include time Milberg and I will spend on continuing services to the Class, including attending the final settlement hearing, responding to Class Members' inquiries, supervising the claims administration in the review and processing of claims, overseeing the distribution of payments to Class Members, and confirming that the CaptureRx ISP is implemented and remains in effect.

30. Separately, the time described above does not include charges for expense items. With respect to the unreimbursed expenses, Milberg/MLK has spent a total of \$5,061.43 for this litigation, including necessary costs associated with research, filing fees, and mediation.

Plaintiffs' Counsel's Aggregate Time and Expenses

31. I requested Plaintiffs' counsel in this action and in the related actions identified above to submit to me itemizations of their time, lodestar and expenses.

32. Pursuant to the information I received, Plaintiffs' counsel dedicated a total of 1,020 hours on this matter as of May 2, 2022, for a total collective lodestar of \$716,850.25. The hours, lodestar and expense information I received from the various firms representing Plaintiffs and plaintiffs in related litigation are as follows:

	Hours	Lodestar	Expenses
Arnold Law Firm	148.4	\$87,187.00	\$3,371.08
Milberg Coleman Bryson Phillips Grossman PLLC	180.7	\$147,337.00	\$5,06.43
Wolf Haldenstein Adler Freeman & Herz LLP	83.6	\$44,984.50	\$2,825.06
Joe Kendall Law Group, PLLC	18.5	\$15,725.00	\$1,204.00
Kopelowitz Ostrow PA	86.4	\$65,734.60	\$0.00
Tycko & Zavareei LLP	30.1	\$10,101.00	\$957.80
Markovits Stock & DeMarco LLC	41.2	\$25,403.50	\$536.40
Chestnut Cambronne PA	8.3	\$5,917.50	\$100.00
Ellzey & Associates, PLLC	12.8	\$5,671.25	\$0.00
Pearson, Simon & Warshaw, LLP	72.4	\$51,278.50	\$945.01

Cole & Van Note Law Firm	159.4	\$99,137.50	\$2,210.30
Morgan & Morgan	39.8	\$41,162.40	\$129.05
Glancy Prongay & Murray	133.2	\$114,922.50	\$1,489.66
Total	1020.0	\$716,850.25	\$18,829.79

33. Plaintiffs' requested fee award represents a 2.2 multiplier of Plaintiffs' counsel's collective lodestar. Because there is additional work required to obtain final approval, monitor the Settlement, and assist Class Members, this multiplier will ultimately decrease.

34. The weighted average hourly rate for work performed by Plaintiffs' counsel and their paraprofessionals/staff, calculated by dividing the total amount of fees by the total amount of hours worked, is \$702.79 per hour.

35. Plaintiffs' counsel undertook this litigation on a purely contingent basis, with no assurance of recovery 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. Accordingly, the percentage of fee applied to the total recovery obtained for the client reflects the uncertain nature of contingency fee agreements, and the fee percentage is generally one third of the total recovery and can be higher where risk and likely case expenses are expected to be relatively high. The fee percentage is always in addition to case expenses incurred in furtherance of the clients' cases.

36. The Fee Motion comports with the terms of the Settlement Agreement. The Settlement Agreement reflects Plaintiffs' counsel would apply for and Defendant would not object to a fee request of an amount not to exceed 33 percent (or \$1,583,333.33) of the Settlement Fund. Settlement Agreement, § 9.1. This provision was negotiated only after all of the other settlement terms had been finalized.

37. The time described above does not include charges for expense items. The table above further reflects that, with respect to unreimbursed costs and expenses (which have been advanced and not yet reimbursed), Plaintiffs' counsel incurred, in the aggregate, approximately \$18,829.79, through May 2, 2022, including necessary costs associated with research, filing fees,

mail, and travel, in line with the terms of the Settlement Agreement, pursuant to which Plaintiffs' counsel may seek their reasonable costs and expenses from the Settlement Fund (not to exceed \$30,000). *Id.*, § 9.1.

38. Upon information and belief, the expenses pertaining to this case are reflected in the books and records of Plaintiffs' counsel. The total of the expenses for which Plaintiffs' counsel seek reimbursement, and which Defendant has agreed to pay, was calculated from receipts, expense vouchers, check records and other documents maintained by the respective law firms.

39. Plaintiffs' counsel incurred costs conducting online research, court fees, mediation fees and travel expenses. These costs also reflect typical expenses of the type ordinarily passed on to a 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.

40. Generally, Plaintiffs' counsel should be awarded a fair and reasonable attorneys' fee and reimbursed for the expenses they incurred in the investigation, prosecution, negotiation and Settlement of this action, and which Defendant may be paid out of the Settlement Fund.

41. Plaintiffs' 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. Plaintiffs' counsel seek reimbursement of their lodestar already incurred and for time to be spent wrapping up the litigation. The pursuit of this litigation was an economic risk for the Plaintiffs' counsel firms and diverted their resources from other less risky cases. Moreover, Plaintiffs' counsel also bore the risk that any judgment would become uncollectable due to Defendant's financial condition.

42. 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 is justified. The Settlement makes available an immediate cash payment to Settlement Class Members and provides for ongoing remedial measures—a benefit to the Settlement Class by requiring Defendant

to undertake certain measures, upgrades, and monitoring to protect against another similar security breach and to properly protect PII and PHI.

43. Based on my years of practice litigating complex class actions, Plaintiffs' requested attorneys' fees, costs and expenses sought here are reasonable and have been agreed to by Defendant.

Service Awards

44. Pursuant to the Settlement Agreement, Plaintiffs will each be awarded, subject to Court approval, \$2,000 for their services as the Class Representatives, for a total of Ten Thousand Dollars (\$10,000.00). *See* Settlement Agreement, § 9.2.

45. The Plaintiffs here have been instrumental in assisting Plaintiffs' counsel throughout this proceeding. Their involvement was not merely nominal. Upon information and belief, they initiated and remained in contact with Plaintiffs' counsel; considered and questioned various pleadings in this case, including the Consolidated Complaint and settlement papers; supervised, monitored and periodically visited with Plaintiffs' counsel; provided background documents and followed the progress of this litigation; and have been actively involved in the prosecution of the case, including some participating in the mediation, to ensure that Class Members received the best recovery possible given the particular circumstances and risks of the case. Accordingly, I support the Court's approval of service awards to the Plaintiffs for their investment of time and energy in this class action.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of May, at Chicago, Illinois.



GARY M. KLINGER

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2022, I caused a true and correct copy of the foregoing document to be filed with the Clerk of the Court for the Western District of Texas via the Court's CM/ECF system, which will send notification of such filing to the counsel of record in the above-captioned matters.

Date: May 3, 2022

/s/ Gary M. Klinger