UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CRAIG PEDERSON and **DAVID BROWN** on behalf of themselves and all others similarly situated, Plaintiffs, v. **AAA COLLECTIONS, INC.**, Defendant.	No. 4:22-cv-04166-RAL Chief Judge Roberto A. Lange

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEY FEES, EXPENSES, AND SERVICE AWARDS

I. Introduction

Class Counsel[1] worked diligently on behalf of Plaintiffs Craig Pederson and David Brown ("Plaintiffs") and the Settlement Class in this data breach case against Defendant AAA Collections, Inc. ("Defendant" or "AAA"). Class Counsel's efforts culminated in an outstanding non-reversionary Settlement Fund of $865,000 to settle the claims of Plaintiffs and the roughly 66,488 members of the Settlement Class.

From the start of this case through the filing of this motion, Class Counsel invested over 373 hours pursuing the claims of Plaintiffs and the Settlement Class. The docket in this matter reflects efficient and concise pleading of claims against Defendant, Plaintiffs' Amended

[1] Preliminarily approved "Class Counsel" includes Terence R. Coates and Dylan J. Gould of Markovits, Stock & DeMarco, LLC; Joseph Lyon of the Lyon Firm, LLC; Pamela Reiter of Reiter Law Firm LLC; and Raina Borrelli of Turke & Strauss, LLP.

Complaint, briefing on Defendant's motion to dismiss, and the hard-fought mediation and settlement negotiations that ultimately resulted in the Settlement.

Therefore, Class Counsel requests attorney fees of $288,333.33—which is 33.33% of the value of the proposed Settlement. A lodestar crosscheck confirms the reasonableness and appropriateness of this request: Class Counsel incurred a combined lodestar of $213,579.34 to-date. Additionally, Class Counsel requests litigation expenses $12,889.86. And Class Counsel requests service awards for Plaintiffs Craig Pederson and David Brown of $5,000 each ($10,000 in total). As discussed below, under either (1) the percentage-of-the-fund method, or (2) the lodestar method, the requested fees, expenses, and service awards are reasonable—and well within the range of approved awards in this Circuit. Thus, this Court should grant the motion.

II. Background

A. Litigation History

Defendant AAA Collections, Inc. is a third-party collection and debt resolution services company. Doc. 1, ¶ 1. From around September 5, 2022, until September 7, 2022, AAA experienced a cyberattack (the "Data Incident"). *Id*. ¶ 3. After an investigation, AAA determined that the following types of personally identifiable information ("PII") and protected health information ("PHI") may have been impacted: full names, Social Security numbers, and potentially other information (collectively "Private Information"). *Id*. ¶ 2. AAA began notifying Plaintiffs and the Class about the Data Incident on November 16, 2022. *Id*. ¶ 4.

On December 1, 2022, Plaintiff Craig Pederson filed a class action lawsuit against AAA in the District Court for the District of South Dakota. Doc. 41-2, ¶ 7. On February 3, 2023, AAA moved to dismiss Plaintiff's Complaint. *Id.* ¶ 8. On February 24, 2023, Plaintiffs filed an Amended Complaint adding Plaintiff David Brown to this action. *Id*. On March 28, 2023, AAA moved to

dismiss Plaintiffs' Amended Complaint. *Id*. On April 14, 2023, Plaintiffs filed their Response to AAA's Motion to Dismiss. *Id.* On April 28, 2023, AAA filed a Reply Brief. *Id*. Thereafter, on June 5, 2023, this Court issued an Order setting the Motion to Dismiss for a hearing on June 20, 2023. *Id*. ¶ 9.

Recognizing the benefits of early resolution, on June 15, 2023, the Parties jointly moved the Court to stay all case deadlines to allow them to participate in private mediation. *Id*. ¶ 10. And on June 16, 2023, this Court granted the joint motion to stay all case deadlines and rescheduled the motion hearing for August 11, 2023. *Id*. ¶ 11.

B. Informal Discovery, Negotiations, and Mediation

Before mediation, the Parties engaged in intensive informal discovery, whereby AAA produced: key information about the size and composition of the Settlement Class, the types of sensitive information compromised, and other information about the Data Incident. Doc. 41-2, ¶ 14. This helped the Parties fully understand the claims, defenses, and risks of continued litigation. *Id*. Thereafter, the Parties agreed to mediate the case with the highly respected mediator Jill R. Sperber, Esq. of Sperber Dispute Resolution. *Id.* ¶16. In preparation for the mediation, both Parties prepared detailed mediation statements outlining their positions on the legal and factual claims at issue and their positions on the framework for resolution. *Id*. ¶ 15.

On August 9, 2023, the Parties engaged in a full day mediation of with Jill R. Sperber, Esq. *Id*. ¶ 16. The mediation was highly contested. *Id*. ¶17–19. And counsel for both sides advanced their respective arguments zealously—while continuing to demonstrate their willingness to litigate the case further. *Id*. Moreover, the Parties did not discuss any fees, expenses, or service awards until the essential terms of the Settlement were already agreed upon. Joint Decl. in Supp. Plfs' Unopposed Mot. for Attorney Fees, Expenses, and Service Awards ("Joint Decl."), ¶ 17, 20. With

the assistance of Mediator Sperber, the Parties were able to reach an agreement on the material terms of the Settlement. Doc. 41-2, ¶ 18. And in the following weeks, the Parties continued to engage in zealous negotiations over the remaining terms. *Id*. ¶ 19. Thereafter, on October 6, 2023, the Parties filed an Unopposed Motion for Preliminary Approval. Doc. 41. And on October 16, 2023, this Court granted Preliminary Approval. Doc. 43.

C. Settlement Benefits

The Settlement provides substantial relief to the Settlement Class—defined as "individuals identified on the Class List whose certain personal information may have been involved in the Data Incident who do not timely elect to be excluded from the Class." Doc. 43, ¶ 5. In particular, the Settlement provides that AAA will establish a non-reversionary Settlement Fund of $865,000 from which Class Members are eligible to recover up to $5,000.00 per person for out-of-pocket losses, up to $25.00 per hour ($125.00 cap) for up to five hours of lost time, and a $50.00 pro rata cash payment. Doc. 42, at 2. And the fund will also provide for attorney fees, expenses, settlement administration expenses, and any service awards. *Id*. In addition, Defendant enhanced its data security and will provide a confidential declaration to Settlement Class Counsel detailing those changes. Doc. 41-1, ¶ 56(iv); Joint Decl., ¶ 22. Notably, Defendant agreed to pay for these enhancements *separate and apart* from the Settlement's other benefits. Joint Decl., ¶ 23.

Thus, the Settlement resolves and releases all claims asserted by Plaintiffs and the Settlement Class against Defendant. Doc. 41-1, ¶¶ 81–82. And in exchange for the consideration detailed above, Plaintiffs and Settlement Class Members who do not timely and validly exclude themselves from the Settlement will be deemed to have released Defendant from claims arising from the Data Incident. *Id*.

III. Legal Standard

Under Rule 23(h), district courts supervising class actions may "award reasonable attorney's fees and nontaxable costs that are authorized by law." Fed. R. Civ. P. 23(h). The Court has discretion to determine an appropriate attorneys' fee award in a class action. *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019); *Knutson v. Sprint Communs. Co. L.P.*, No. 4:11-cv-04041-KES, 2013 U.S. Dist. LEXIS 81029, at *4 (D.S.D. June 10, 2013); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999).

In the Eighth Circuit, courts either use (1) the lodestar approach, or (2) the percentage-of-the-benefit approach. *See Knutson*, 2013 U.S. Dist. LEXIS 81029, at *5 (D.S.D. June 10, 2013) (quoting *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244 (8th Cir. 1996)). First, under the lodestar approach, "the hours expended by counsel are multiplied by a reasonable hourly rate of compensation so as to produce a fee amount, and this amount may be adjusted up or down to reflect the individualized characteristics of a particular action." *Nienaber v. Citibank (South Dakota) N.A.*, 2007 U.S. Dist. LEXIS 49120, at *6 (D.S.D. July 5, 2007) (citing *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 259-60 (8th Cir.1991)). Second, the percentage-of-the-benefit approach "permits an award of attorney fees that is equal to some fraction of the common fund that counsel were successful in gathering during the course of the litigation in issue." *Id.* (citing *Walitalo v. Iacocca*, 968 F.2d 741, 747-48 (8th Cir. 1992)). And the "district court has the discretion to choose which method to apply." *Id.* (citing *Johnston*, 83 F.3d at 246).

Moreover, courts within this Circuit have explained that "a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *In re Centurylink Sales Practices & Sec. Litig.*, No. 17-2795 (MJD/KMM), 2020 U.S. Dist. LEXIS 227558, at *34 (D. Minn. Dec. 4, 2020) (quoting *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 687 (M.D.

Ala. 1988)). Thus, the "theory behind attorneys' fees awards in class actions is not merely to compensate counsel for their time, but to award counsel for the benefit they brought to the class and take into account the risk undertaken in prosecuting the action." *Id.* (quoting *In re Monosodium Glutamate Antitrust Litig*., No. CIV. 00MDL1328PAM, 2003 U.S. Dist. LEXIS 1969, at *1 (D. Minn. Feb. 6, 2003)).

IV. The Requested Attorney Fees, Expenses, and Service Awards Are Reasonable

A. Efficiency in case prosecution.

Efficiency in complex civil litigation has long been a focus of judges in this Circuit handling class action litigation:

> The first observation is a simple one and one in which litigants and their counsel in civil litigation, and especially in complex civil litigation, too often lose sight. The Federal Rules of Civil Procedure "shall be construed and administered to ensure the *just, speedy and inexpensive determination* of every action." Under Rule 1, as officers of the court, attorneys share the responsibility with the court of ensuring that cases are "resolved not only fairly, but without undue cost or delay."
>
> All counsel – both those representing plaintiffs and defendants – conducted this litigation in an exemplary manner and fulfilled their obligations under Rule 1. This is the type of complex litigation that easily could have dragged on for several more years. Instead, it had a relatively short stay of two and a half years on this court's docket because counsel litigated the case efficiently and inexpensively. The lodestar of plaintiffs' counsel could easily have been much higher had not counsel cooperated with one another through the litigation and settlement process. Instead, all plaintiffs' counsel presented a modest lodestar because they moved the case along efficiently to a just result in a remarkably short period of time.

In re Xcel Energy, Inc., 364 F. Supp. 2d 980, 992 (D. Minn. 2005) (internal citations omitted). Likewise, in *In re UnitedHealth Grp. Inc. PSLRA Litig*., the court proclaimed that:

> There is no question of the quality of lead counsel. Both they and their opposite numbers are exceptionally skilled. While hard-fought, the litigation was conducted cordially and efficiently. It is evident that absent counsel's willingness to work efficiently together, this case could well have lasted many more months, if not years.

643 F. Supp. 2d 1094, 1105 (D. Minn. 2009). And in *In re Iowa Ready-Mix Concrete Antitrust Litig.*, the court declared that securing a settlement "within a year and a half of the original case filing" was a "fabulous result[] with incredible efficiency." 2011 U.S. Dist. LEXIS 130180, at *17-18 (N.D. Iowa Nov. 9, 2011).

Here, Plaintiffs and Class Counsel litigated and secured a favorable settlement in approximately thirteen months (from the filing of the initial complaint on December 1, 2022, until the date of filing of this memorandum). *See* Doc. 1. Such an expeditious result reflects the efficiency of Plaintiffs and Class Counsel's efforts. Moreover, this efficiency ensures that Plaintiffs and the Settlement Class will receive timely relief given the injuries and ongoing risks posed by the Data Incident.

B. The requested attorney fees of $288,333.33 is reasonable.

Within this Circuit, there are a variety of relevant factors when determining if the requested attorney fees are reasonable. For one, this Court has explained that "there are twelve factors that the courts and the American Bar Association have considered as being relevant" when "determining the appropriate amount of attorney fees in a given case." *Nienaber*, 2007 U.S. Dist. LEXIS 49120, at *6 (D.S.D. July 5, 2007). Those twelve 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 employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983)). These factors are often dubbed the "*Johnson* factors" as they were articulated in the 1974 case *Johnson v. Georgia Highway Express*.

See In re Xcel Energy, Inc., 364 F. Supp. 2d at 993 (citing *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719-20 (5th Cir. 1974)).

Still, "not all of the individual *Johnson* factors will apply in every case, so the court has wide discretion as to which factors to apply and the relative weight to assign to each." *In re Centurylink Sales Practices & Sec. Litig*., 2020 U.S. Dist. LEXIS 227558, at *34 (citing *Uselton v. Commercial Lovelace Motor Freight, Inc*., 9 F.3d 849, 854 (10th Cir. 1993) ("Rarely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation.") and *In re Catfish Antitrust Litig*., 939 F. Supp. 493, 502 (N.D. Miss. 1996) ("Even though the *Johnson* factors must be addressed to ensure that the resulting fee is reasonable, not every factor need be necessarily considered."). And the Eighth Circuit has explained that courts are "not required to discuss all of the factors, since rarely are all of the *Johnson* factors applicable[,] [and] this is particularly so in a common fund situation." *Keil v. Lopez*, 862 F.3d 685, 703 (8th Cir. 2017) (internal quotations omitted).

More recently, courts in the Eighth Circuit have applied a set of seven factors—which functions as a condensed version of the twelve *Johnson* factors. *See In re Xcel Energy, Inc*., 364 F. Supp. 2d at 993; *Caligiuri v. Symantec Corp*., 855 F.3d 860, 866 (8th Cir. 2017). Those seven factors are:

> (1) the benefit conferred on the class, (2) the risk to which plaintiffs' counsel was exposed, (3) the difficulty and novelty of the legal and factual issues of the case, (4) the skill of the lawyers, both plaintiffs' and defendants', (5) the time and labor involved, (6) the reaction of the class, and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

Id. (quoting *Khoday v. Symantec Corp*., No. 11-cv-180 (JRT/TNL), 2016 U.S. Dist. LEXIS 55543, at *25 (D. Minn. Apr. 4, 2016)). Moreover, "[c]ourts have recognized that the risk of receiving little or no recovery is a *major factor* in awarding attorney fees." *In re Centurylink Sales Practices*

& Sec. Litig., 2020 U.S. Dist. LEXIS 227558, at *34 (emphasis added) (quoting *In re Xcel Energy, Inc*., 364 F. Supp. 2d at 994 (D. Minn. 2005)).

i. *The benefit conferred on the Class.*

Class Counsel secured a Settlement that confers broad and substantial benefits on the Class. Notably, the Settlement establishes a non-reversionary Settlement Fund of $865,000 from which Class Members are eligible to recover compensation up to $5,000.00 per person for out-of-pocket losses, up to $25.00 per hour ($125.00 cap) for up to five hours of lost time, and a $50.00 pro rata cash payment. Doc. 42, at 1–2. In addition, Defendant has committed to enhancing its data security to protect Plaintiffs' and the Settlement Class's personal information moving forward. Doc. 41-1, ¶ 56(iv); Joint Decl., ¶ 22. Notably, Defendant agreed to pay for these enhancements *separate and apart* from the Settlement's other benefits. Joint Decl., ¶ 23.

Significantly, the Settlement Fund is non-reversionary—which means that after deducting attorney fees, expenses, service awards, and costs of settlement administration, the *entirety* of the remaining fund will be distributed to Settlement Class Members who submit valid claims. Doc. 41-1, ¶ 56. And courts have noted the significance of a fund being non-reversionary. *See e.g.*, *In re Centurylink Sales Practices & Sec. Litig*., 2020 U.S. Dist. LEXIS 227558, at *33 (holding that a non-reversionary fund provided a "significant" benefit).

The benefits conferred on the Class are similar to—and arguably *better* than—the relief obtained in similar class actions within this Circuit. For one, this case mirrors the data breach case *Vill. Bank v. Caribou Coffee Co*., where the court "awarded attorneys' fees, costs and expenses in the amount of $1,464,055.88" given that the Settlement conferred "substantial" benefits via a non-reversionary settlement fund. No. 19-cv-1640 (JNE/HB), 2020 U.S. Dist. LEXIS 266929, at *12, 19 (D. Minn. Dec. 1, 2020). And in *In re Centurylink Sales Practices & Sec. Litig*., the court found

that a "minimum award of $45" was "non-nominal" and weighed towards approval. 2020 U.S. Dist. LEXIS 227558, at *34. In contrast, this Settlement predicts a pro rata cash payment of approximately $50.00 *in addition* to any other benefits. Doc. 42, at 1–2. Thus, the logic of *In re Centurylink* applies with even greater force here.

The benefits conferred on the Class are also similar to—and arguably *better* than—the benefits in other data breach cases across the country. Here, the Settlement provides a fund of $865,000 for the 66,488 members of the Settlement Class—which equates to an average per person settlement value of $13.00. Doc. 42-1, ¶ 26. In contrast, in numerous data breach cases, the average per person settlement value was far *below* $13.00. For example, in *In re Anthem, Inc. Data Breach Litig*., the court described the settlement value of $0.68 per class member as "meaningful consideration." 327 F.R.D. 299, 318 (N.D. Cal. 2018). And in *Hashemi v. Bosley, Inc*., the court noted that even $0.52 and $0.21 were both reasonable values per class member. No. CV 21-946 PSG (RAOx), 2022 U.S. Dist. LEXIS 119454, at *19 (C.D. Cal. Feb. 22, 2022) (collecting cases) (citing *In re Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 1:14-MD-02583-TWT, 2016 U.S. Dist. LEXIS 200113 (N.D. Ga. Aug. 23, 2016) and *In re Target Corp. Customer Data Sec. Breach Litig*., No. MDL 14-2522 (PAM), 2017 U.S. Dist. LEXIS 75455 (D. Minn. May 17, 2017)). Thus, the substantial benefits conferred on the Class strongly supports the requested attorney fees.

ii. *The risks to which Class Counsel was exposed.*

Class Counsel was exposed to significant risk—which strongly supports the requested attorney fees. After all, "[t]he risk of no recovery in complex cases of this sort is not merely hypothetical. Precedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite

their advocacy." *In re Xcel Energy, Inc*., 364 F. Supp. 2d at 994 (D. Minn. 2005) (citing *Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002) (reversing class certification) and *In re Milk Prods. Antitrust Litig*., 195 F.3d 430, 437-38 (8th Cir. 1999) (affirming dismissal of complaint without leave to replead)).

Moreover, the Eighth Circuit has explained that by "taking [a] case on a contingent fee basis," Class Counsel is "exposed to significant risk"—which weighs toward approval. *Caligiuri*, 855 F.3d at 866 (holding that "[w]e find no error in the [district] court's analysis"). And again, in *Keil v. Lopez*, the Eighth Circuit reiterated that working on a "contingency" basis "weighs in favor of awarding the requested fee." 862 F.3d at 703.

Here, Class Counsel took on Plaintiffs' cases on a contingent fee basis. Joint Decl., ¶¶ 28–33. Moreover, Class Counsel was exposed to numerous substantial risks. First, Class Counsel explained that "a successful outcome remains uncertain and would be achieved, if at all, only after prolonged, arduous litigation with the attendant risk of drawn-out appeals, and the potential for no recovery for the Class will remain until the time of successful verdict and appeal." Doc. 41-2, ¶ 22. And "Plaintiffs face serious risks prevailing on the merits, including proving causation, as well as risk at class certification and at trial, and surviving appeal." *Id*. ¶ 24.

Moreover, Class Counsel undertook this contingent fee litigation while the application of negligence law to data breach cases is a developing area of law—and recent precedents in similar cases have had mixed outcomes. Some cases secured settlements. *See e.g., In re Target Corp. Customer Data Sec. Breach Litig*., MDL No. 14-2522 (PAM), 2016 WL 2757692 (D. Minn. May 12, 2016); *In re The Home Depot, Inc., Customer Data Sec. Breach Litig*., No. 1:14-md-02583-TWT, 2016 WL 6902351 (N.D. Ga. Aug. 23, 2016); *Veridian Credit Union v. Eddie Bauer LLC*, No. 2:17-cv-00356-JLR, 2019 WL 5536824 (W.D. Wash. Oct. 25, 2019). But other similar cases

were dismissed in whole or in substantial part. *See e.g.*, *Community Bank of Trenton v. Schnuck Mkts*., Inc., 887 F.3d 803, 817-18 (7th Cir. 2018); *SELCO Community Credit Union v. Noodles & Co*., 267 F. Supp. 3d 1288, 1297 (D. Colo. 2017). And in others, class certification was denied. *See e.g., In re TJX Cos. Retail Securities Breach Litig*., 246 F.R.D. 389, 395-396 (D. Mass. 2007) (denying class certification because necessity of individualized inquiries regarding causation, comparative negligence, and damages precluded a finding of predominance).

iii. *The difficulty and novelty of the legal and factual issues.*

The legal and factual issues were both difficult and novel—which strongly supports the requested attorney fees. In *Keil v. Lopez* the Eighth Circuit explained that "the novelty and difficulty of the questions" is a relevant factor in determining the fee award. 862 F.3d at 703. There, the Eighth Circuit noted that a requested fee was reasonable when "further litigation would be complex and expensive." *Id.* Likewise, Class Counsel has already explained that further litigation would "become more expensive and complex as the Parties engage in formal discovery, commission expert reports, further pursue third-party vendor information, and move towards class certification and dispositive motions." Doc. 42, at 20-21.

As a data breach class action, this case poses substantially difficult and novel legal and factual issues. For one, in the analogous data breach case, *Reynolds v. Marymount Manhattan Coll*., the court noted that the "novel, evolving and complex nature of data breach" class actions justified the requested award. No. 1:22-CV-06846-LGS, 2023 U.S. Dist. LEXIS 191993, at *5 (S.D.N.Y. Oct. 23, 2023). And in the data breach case *Hapka v. Carecentrix, Inc*., the court found that, *inter alia*, the issues of "Article III standing for data breach victims," "what type of damages are available at trial," and "whether Plaintiff [] could obtain class certification of a class of data breach victims" were all difficult and novel issues which "support[ed] Class Counsel's application

for attorneys' fees." No. 2:16-cv-02372-KGG, 2018 U.S. Dist. LEXIS 68186, at *6 (D. Kan. Feb. 15, 2018). Here, the factual and legal issues of this data breach case mirror the novelty and complexity of those in *Reynolds* and *Hapka*. *See* Doc. 42, at 20-21. After all, the Parties' motion to dismiss briefing reveal that such complex issues are also central to this case (e.g., Article III standing for data breach victims). *See e.g.,* Docs. 24, 25, 27, 32, 33. Thus, the difficulty and novelty of the legal and factual issues in this case strongly support the requested attorney fees.

iv. *The skill of the attorneys.*

The attorneys litigating this case are highly skilled and experienced in such complex class actions—which strongly supports the requested attorney fees. For example, the Eighth Circuit has reasoned that "class counsel hav[ing] significant experience in class actions and complex litigation" weighs in favor of awarding a requested fee. *Keil*, 862 F.3d at 703. Here, Class Counsel has decades of combined experience litigating complex class actions in state and federal courts across the country. *See* Doc. 41-2, ¶¶ 29–40. More particularly, Class Counsel has significant experience in litigating *data breach* class actions. *Id*.

Here, Class Counsel fully briefed its Opposition to Defendant's Motion to Dismiss the First Amended Complaint. Doc. 32. Notably, Defendant's motion attacked critical elements of Plaintiffs' Amended Complaint, including Article III standing based on seven discrete theories, traceability, negligence, negligence *per se*, breach of implied contract, breach of third-party beneficiary contract, unjust enrichment, invasion of privacy, and declaratory relief. *Id*. And as demonstrated by the briefing on this motion, these are complex and hotly litigated issues, which courts across the country have concluded differently. *See id*.

Ultimately, Class Counsel successfully obtained a substantial settlement that provides broad and timely relief to the nationwide class. *See* Docs. 41-43. After all, the Eighth Circuit is

clear that the "most important factor in determining what is a reasonable fee is the magnitude of the plaintiff's success in the case as a whole." *Lash v. Hollis*, 525 F.3d 636, 642 (8th Cir. 2008) (quoting *Jenkins v. Missouri*, 127 F.3d 709, 716 (8th Cir. 1997) (*en banc*)). Here, Class Counsel's success in securing a Settlement Fund of $865,000 is especially noteworthy given that data breach class actions routinely result in dismissal (in full or part). *See e.g., Kuhns v. Scottrade, Inc*., 868 F.3d 711, 713, 719 (8th Cir. 2017) (affirming the district court's dismissal with prejudice of a data breach class action); *George D. v. NCS Pearson, Inc*., No. 19-2814 (JRT/KMM), 2020 U.S. Dist. LEXIS 117916, at *2 (D. Minn. July 6, 2020) (dismissing for lack of standing); *Wilson v. J.B. Hunt Transp., Inc*., No. 5:21-CV-5194, 2022 U.S. Dist. LEXIS 243393, at *22 (W.D. Ark. Oct. 6, 2022) (dismissing such that "the Court considers the dismissal to be final and immediately appealable").

Additionally, the skill of Class Counsel is evidenced by its efficiency in litigating Plaintiffs' claims. As explained *supra*, courts within the Circuit recognize the importance of the "the *just, speedy and inexpensive determination* of every action." *In re Xcel Energy, Inc*., 364 F. Supp. 2d at 992; *see also In re UnitedHealth Grp. Inc. PSLRA Litig*., 643 F. Supp. 2d 1094, 1105 (D. Minn. 2009) ("While hard-fought, the litigation was conducted cordially and efficiently."); *In re Iowa Ready-Mix Concrete Antitrust Litig*., 2011 U.S. Dist. LEXIS 130180, at *17-18 (N.D. Iowa Nov. 9, 2011) (declaring that securing a settlement "within a year and a half of the original case filing" was a "fabulous result[] with incredible efficiency"). And here, Class Counsel secured a favorable settlement in approximately thirteen months—thereby providing the Class with relief approximately one year and four months after the Data Incident occurred. Doc. 42, at 3. Thus, the skill demonstrated by Class Counsel strongly supports the requested attorney fees.

v. *The time and labor involved.*

Litigating this case involved a substantial investment of time and labor—which strongly supports the requested attorney fees. *See e.g., Vill. Bank*, 2020 U.S. Dist. LEXIS 266929, at *19 (awarding $1,464,055.88 in attorney fees, costs, and expenses after noting that "Class Counsel [] reasonably expended over 885.5 hours and incurred substantial out-of-pocket expenses"). Here, Class Counsel's work totaled 373.6 hours. Joint Decl., ¶ 35. This constitutes a significant investment of time and labor into this case. Thus, this factor strongly supports the requested attorney fees.

vi. *The reaction of the Class.*

Thus far, the reaction of the Class to the Settlement was overwhelmingly positive. Here, the exclusion and objection deadlines are both January 14, 2024. Doc. 43. And the claims deadline is February 13, 2024. *Id*. Thus, Class Counsel will provide the Court with updated information regarding objections, exclusions, and claims when they file pleadings regarding the motion for final approval. But so far, the reaction of the Class strongly supports the requested attorney fees, with no objections or opt-outs filed.

In conclusion, all relevant factors strongly support the requested attorney fees. Thus, the Court should award the requested fee percentage of 33.33%.

C. The requested fee is reasonable under the percentage-of-the-fund method.

Here, Class Counsel's requested fee equates to 33.33% of the fund—which is reasonable under the percentage-of-the-fund method. The Eighth Circuit has consistently declared that "courts have frequently awarded attorneys' fees ranging up to 36% in class actions." *Sciaroni v. Target Corp*., 892 F.3d 968, 977 (8th Cir. 2018) (quoting *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017)). Similarly, in *Huyer v. Buckley*, the Eighth Circuit held that even "38% of the net settlement fund" was reasonable. 849 F.3d 395, 399 (2017). And while case law is thin, courts in this district

have approved percentages of 26 and 28 percent. *See In re IBP, Inc. Sec. Litig*., 328 F. Supp. 2d 1056, 1065 (D.S.D. 2004) (awarding 28%); *Knutson*, 2013 U.S. Dist. LEXIS 81029, at *7 (D.S.D. June 10, 2013) (awarding 26%).

Importantly, the Eighth Circuit is clear that "the rule in this circuit is that a district court may include 'fund administration costs as part of the benefit when calculating the percentage-of-the-benefit fee amount.'" *Caligiuri*, 855 F.3d at 865 (quoting *Thut v. Life Time Fitness, Inc*., 847 F.3d 619, 623 (8th Cir. 2017)). Likewise, this Court has explained that "it is appropriate to [include] . . . the additional benefits conferred on the class by [defendant's] separate payment of attorneys' fees and expenses, and the expenses of administration." *Knutson*, 2013 U.S. Dist. LEXIS 81029, at *6 (D.S.D. June 10, 2013). Thus, the Settlement Fund value of $865,000 properly includes attorneys' fees, expenses, settlement administration expenses, and any service awards. *See* Doc. 42, at 2.

D. The requested fee is reasonable under the lodestar method.

Under the lodestar method, "the hours expended by counsel are multiplied by a reasonable hourly rate of compensation so as to produce a fee amount, and this amount may be adjusted up or down to reflect the individualized characteristics of a particular action." *Nienaber v. Citibank (South Dakota) N.A*., 2007 U.S. Dist. LEXIS 49120, at *7 (D.S.D. July 5, 2007) (citing *H.J. Inc. v. Flygt Corp*., 925 F.2d 257, 259-60 (8th Cir.1991)). Adjusting the fee amount is done by applying a "lodestar multiplier"—whereby the court multiplies the attorney fees amount by a number (e.g., a lodestar multiplier of "2.0" would double the fee amount). *See Huyer v. Buckley*, 849 F.3d 395, 399-400 (8th Cir. 2017).

The lodestar method can be used in multiple ways. First, the lodestar method can be used as a standalone method for determining an appropriate award. *See Rawa v. Monsanto Co*., 934

F.3d 862, 870 (8th Cir. 2019) (explaining that the court can "use either a lodestar *or* percentage-of-the-fund method"). And second, the lodestar method can be used as a "crosscheck" to verify the reasonableness of an award (that was calculated under the percentage-of-the-fund method). *Knutson*, 2013 U.S. Dist. LEXIS 81029, at *8 (D.S.D. June 10, 2013). But regardless of how the lodestar method is used—either as a standalone basis *or* as a crosscheck—the requested fee is reasonable as explained *infra*.

Within the Eighth Circuit, courts have approved hourly rates for attorneys up to $950.00 per hour. *See Fath v. Am. Honda Motor Co*., No. 18-CV-1549 (NEB/LIB), 2020 U.S. Dist. LEXIS 252264, at *11 (D. Minn. Sep. 11, 2020) (holding that $850,000.00 in attorneys' fees and expenses "is reasonable" when attorneys' hourly rates were up to $950.00 per hour); *see also PHT Holding II LLC v. N. Am. Co. for Life*, No. 4:18-cv-00368-SMR-HCA, 2023 U.S. Dist. LEXIS 222028, at *22 (S.D. Iowa Nov. 30, 2023) (holding that that an "hourly rate of $800 per hour" was reasonable given that "the median standard billing rate for equity partners" in top law firms nationwide was "$1,463 per hour"). In 2007—approximately sixteen years ago—this Court approved hourly rates of $365 for attorneys and $125 for paralegals. *See Nienaber*, 2007 U.S. Dist. LEXIS 49120, at *10 (D.S.D. July 5, 2007). And according to the U.S. Bureau of Labor Statistics' Inflation Calculator, such rates would equate to approximately $553.68 (for attorneys) and $189.62 (for paralegals) as of November 2023.[2]

Here, Class Counsel's hourly rates range from $275 to $875 for attorneys, and from $135 to $225 for legal support staff. Joint Decl., ¶¶ 41–56. Thus, these rates are well within the range of hourly rates approved by courts in the Eighth Circuit.

[2] *CPI Inflation Calculator*, U.S. BUREAU LABOR STATS., https://www.bls.gov/data/inflation_calculator.htm (last visited Dec. 27, 2023).

Considering Class Counsel's hourly rates, and total hours worked (373.6), Class Counsel's thirteen months of work equates to a total lodestar value of $213,579.34. *Id.* ¶ 35. Moreover, Class Counsel's lodestar will increase during the final approval and benefit distribution stages of this case. *Id.* ¶ 37.

Within the Eighth Circuit, lodestar multipliers up to 5.6 have been approved as reasonable. *See Huyer v. Buckley*, 849 F.3d 395, 400 (8th Cir. 2017) (noting that lodestar multipliers up to 5.6 were approved and thus finding a lodestar multiplier of 1.82 as "well within the range of multipliers awarded in this and other circuits"). Indeed, several federal courts have explained that "a multiplier ranging from 1.0 to 4.0 is considered 'presumptively acceptable.'" *Gutierrez v. Amplify Energy Corp.*, No. 8:21-CV-01628-DOC(JDEx), 2023 U.S. Dist. LEXIS 72861, at *30 (C.D. Cal. Apr. 24, 2023) (citing *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014)). And in *Rawa v. Monsanto Co.*, the Eighth Circuit explained that "while the 5.3 lodestar multiplier is high, it does not exceed the bounds of reasonableness." 934 F.3d 862, 870 (8th Cir. 2019); *see also Yarrington*, 697 F. Supp. 2d at 1067 (determining that a multiplier of 2.26 to be "modest" and reasonable "given the risk of continued litigation, the high-quality work performed, and the substantial benefit to the Class"); *Xcel Energy*, 364 F. Supp. 2d at 999 (finding a lodestar multiplier of 4.7 reasonable); *In re St. Paul Travelers Sec. Litig.*, Civ. No. 04-3801 JRT-FLN, 2006 WL 1116118, at *1 (D. Minn. Apr. 25, 2006) (approving multiplier of 3.9).

Here, Class Counsel's request for $288,333.33 equates to a lodestar multiplier of 1.35—which is well within the range accepted by courts in this Circuit. Joint Decl., ¶ 36.

In sum, after applying the lodestar method—either as a standalone method *or* as a crosscheck—Class Counsel's requested fee is reasonable.

E. The expenses incurred are reasonable.

Courts in the Eighth Circuit routinely award reasonable expenses in class action settlements. *See Thut v. Life Time Fitness, Inc*., 847 F.3d 619, 621 (8th Cir. 2017) (affirming an award of "$2.8 million in attorney's fees and expenses"); *see also Sciaroni v. Target Corp. (In re Target Corp. Customer Data Sec. Breach Litig.)*, 892 F.3d 968, 977 (8th Cir. 2018) (affirming an award of "attorney's fees and expenses of $6.75 million). For example, in *Yarrington*, the court awarded expenses for "filing fees; expenses associated with the research, preparation, filing, and responding to the pleadings in this matter; costs associated with copying, uploading, and analyzing documents; fees and expenses for experts; and mediation fees." 697 F. Supp. 2d 1057, 1067 (D. Minn. 2010). The court reasoned that "[a]ll of these costs and expenses were advanced by Settlement Class Counsel with no guarantee they would ultimately be recovered, and most were 'hard' costs paid out of pocket to third-party vendors, court reporters, and experts." *Id*.

Moreover, courts within this district have often awarded reasonable expenses. In *Nienaber*, this Court approved $818.35, $8,804.81, and $6,230.91 in "unreimbursed expenses" for three different firms. 2007 U.S. Dist. LEXIS 49120, at *13 (D.S.D. July 5, 2007). Similarly, in *Bird Hotel Corp. v. Super 8 Motels*, this Court "awarded reimbursement of litigation expenses in the amount of $59,413.73." No. 4:06-cv-04073-LLP, 2010 U.S. Dist. LEXIS 156288, at *6 (D.S.D. Oct. 26, 2010).

Here, Class Counsel has incurred $12,889.86 in expenses to date and estimates that they will incur an additional $2,000.00 in expenses associated with travel for the final approval hearing. As a result, Class Counsel requests expenses of up to $14,889.86. This request is well within the range approved within this Circuit and District (as detailed *supra*). These expenses were necessarily incurred during the litigation process. Joint Decl., ¶ 40. These expenses include, *inter*

alia, filing fees, research expenses, and mediation costs. *Id*. For these reasons, the Court should approve expenses of up to $14,889.86 to be reimbursed to Class Counsel.[3]

F. The service awards are reasonable and appropriate.

The Eighth Circuit has explained that service awards are appropriate "to promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits." *Caligiuri*, 855 F.3d at 867 (quoting *Yarrington v. Solvay Pharms., Inc*., 697 F. Supp. 2d 1057, 1068 (D. Minn. 2010)). And the district court has the discretion to award service awards to class representatives. *In re U.S. Bancorp Litig*., 291 F.3d 1035, 1038 (8th Cir. 2002). Still, the Eighth Circuit is clear that "courts in this circuit regularly grant service awards of $10,000 or greater." *Caligiuri*, 855 F.3d at 867 (8th Cir. 2017) (citing *Huyer v. Njema*, 847 F.3d 934, 941 (8th Cir. 2017)). Thus, in *Caligiuri*, the Eighth Circuit reasoned that "service awards of $10,000 are warranted." *Id*. at 868. And again, in *Huyer*, the Eighth Circuit affirmed service awards of $10,000 per class representative. 847 F.3d at 941 (8th Cir. 2017).

Here, Class Counsel requests modest service awards of $5,000 for both Craig Pederson and David Brown (thus, $10,000 in total for the two Class Representatives). After all, Craig Pederson and David Brown stepped up and led this litigation on behalf of all Class Members nationally. Pederson Decl., ¶ 4; Brown Decl., ¶ 4. They provided valuable services for the benefit of the Class. Pederson Decl., ¶ 6; Brown Decl., ¶ 6. And they worked extensively with Class Counsel to respond to numerous inquiries regarding their individual facts and circumstances as the litigation proceeded. *Id*. Moreover, they actively monitored the litigation through continuous communication with Class Counsel and made themselves available for discussions regarding mediation and settlement. *Id*.

[3] Class Counsel will submit their final estimated expenses when they file their motion for final approval.

As evidenced by *Caligiuri* and *Huyer*, such modest service awards are well within the acceptable range in the Eighth Circuit. Moreover, Class Counsel's requested service awards align with service awards in analogous data breach cases. For example, in *Vill. Bank v. Caribou Coffee Co*., the court approved a service award of $15,000.00 for a *single* class representative. 2020 U.S. Dist. LEXIS 266929, at *21. And in *In re Target Corp. Customer Data Sec. Breach Litig.,* the court approved service awards of $20,000 to each class representative. No. 14-2522 (PAM), 2016 U.S. Dist. LEXIS 63125, at *23 (D. Minn. May 12, 2016). Thus, the service awards for Craig Pederson and David Brown are both reasonable and appropriate.

V. Conclusion

For the foregoing reasons, Plaintiffs Craig Pederson and David Brown respectfully request that this Court enter an order (1) granting Class Counsel's request for attorney fees of $288,333.33 and expenses of $14,889.86; (2) awarding Craig Pederson and David Brown service awards of $5,000 each; and (3) providing such other and further relief as the Court deems reasonable and just.

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Respectfully submitted,

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