IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION
(*Electronically Filed*)

MILDRED BALDWIN and DOUGLAS DYRSSEN SR., On Behalf of Themselves and All Others Similarly Situated,	:	
Plaintiffs,	:	
v.	:	**Case No, 2:21-cv-04066-WJE**
NATIONAL WESTERN LIFE INSURANCE COMPANY,	:	
Defendant.	:	

SUGGESTIONS IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS TO CLASS REPRESENTATIVES

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INTRODUCTION

Plaintiffs, by and through undersigned counsel, hereby move this Honorable Court for an award of reasonable attorneys' fees, costs, and service awards. In support of their motion, Plaintiffs show the Court as follows:

This case arises from a ransomware attack and data breach that Plaintiffs allege compromised their private and protected health information, and the private and protected health information of the putative class. After engaging in hotly contested motion practice over the legal claims, exchanging important information, and participating in an all-day mediation with well-regarded mediator Hon. Wayne R. Andersen (Ret. United States District Court judge, N.D. Illinois), the parties consummated the proposed class action Settlement Agreement and Release (the "Settlement Agreement")[1] that the Court preliminarily approved under Federal Rule of Civil Procedure 23(e)(1) on January 19, 2022. ECF No. 62.

The Settlement Agreement, and the efforts of Class Counsel, created exceptional relief for the Settlement Class: it will make available $3,900,000 for monetary claims, attorneys' fees and costs, costs of settlement administration and Plaintiffs' service awards. *See* Lietz Decl. ¶ 58. Separate and apart from and in addition to the $3,900,000 made available, NWL will pay for Aura Financial Shield credit monitoring and identity protection services for any Settlement Class Member who redeems the activation code already sent to him/her, and will implement extensive business practices changes and substantial data security enhancements designed to safeguard the PII of Settlement Class Members. *Id.* ¶ 59.

[1] The Settlement Agreement is attached as Exhibit 1 to the Declaration of David K. Lietz ("Lietz Decl."), filed in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. ECF 61-1.

The Settlement represents an excellent result for the classes in this litigation and was obtained against a well-funded defense by the Defendant, which was represented by an international law firm that is in the top 25 of the 2021 Am Law 100. See Supporting Declaration of David Lietz, attached hereto as Exhibit A, ¶ 17. This result is even more remarkable because, although the Plaintiffs believe in the merits of their claims, this litigation was inherently risky and complex. Ex. A ¶ 18. The claims involve the intricacies of data breach litigation (a fast-developing area in the law), and the Plaintiffs faced risks as each stage of litigation. *Id.* Aside from the potential that either side will lose at trial, Plaintiffs would likely need to counter a motion for summary judgment, and both gain and maintain certification of the class. Even if successful with their class certification argument, Plaintiffs would face a near inevitable interlocutory appeal attempt. Without a certified class, no class member would likely receive any recovery. *Id.* And summary judgment, trial, and appeal present significant risks in any case. *Id*. As at least one court has found in this Circuit, because the "legal issues involved in [data breach litigation] are cutting-edge and unsettled . . . many resources would necessarily be spent litigating substantive law as well as other issues." *In re Target Corp. Customer Data Sec. Breach Litig*., 2015 WL 7253765, at *2 (D. Minn. Nov. 17, 2015).

Against these risks, it was through the skill and hard work of Class Counsel and the Class Representatives that the Settlement was achieved for the benefit of the Class members. Class Counsel maintain national class action practices and have particularly specialized skill in data breach class actions. *See* Ex A ¶¶ 3-8; *see also* Declaration of J. Gerard Stranch, IV, Ex. B ¶ 2-4. These skills have been recognized courts across the country. *Id.* In addition, the Class Representatives have actively participated in the lawsuit, communicated with counsel, and assisted

in prosecuting the case. Ex. A, ¶ 28. Without the Class Representatives investing the time and energy to pursue this litigation on behalf of the Class members, there would be no recovery at all.

This case exemplifies the public good that can be accomplished through the class action device; no class member had a large enough claim to retain counsel to pursue it individually. In counsel's experience, a settlement in this range is likely to be viewed favorably by the class members who will appreciate receiving compensation from this lawsuit without having to expend any resources of their own. Ex. A ¶ 16. Through the efforts of the Class Representatives and the zealous and diligent work of Class Counsel, the settlement provides substantial benefits that address the actual injuries Plaintiffs and Class Members have suffered in this action.

Under Rule 23(h) and Eight Circuit precedent, Class Counsel and the Class Representatives are entitled to be compensated from the Settlement for having achieved a benefit on behalf of the hundreds of thousands of other Class members. Class Counsel zealously prosecuted Plaintiffs' claims, achieving the Settlement Agreement only after an extensive investigation, motions' practice, and prolonged arms' length negotiations. Class Counsel also worked for weeks to finalize the Settlement Agreement and associated exhibits pertaining to notice, preliminary approval, and final approval.

As compensation for the substantial benefit conferred upon the settlement class, Class Counsel respectfully move the Court for a combined award of attorneys' fees and costs in the amount of $1,314,900.00. Lietz Decl. ¶ 81. This request is contemplated by the Settlement Agreement, and Class Counsel apprised the Court of this request in the Unopposed Motion for Preliminary Approval. ECF 60. The requested fees and costs represent 30% of the combined total of the Settlement Fund and the cost of the Aura Financial Shield Services (which is $483,000). *Id.* If the retail value of the Aura Financial Shield Services is used to determine the overall benefit to

the Settlement Class, the requested fees and costs represent a tiny fraction of the benefit created. Ex. A ¶¶ 21, 25. If 2% of the Settlement Class utilizes their activation codes, the requested fees and costs represent only 25% of the combined total of the Settlement Fund and the $2.2 million retail value of the Aura Financial Shield Services. *Id.*

The Eighth Circuit has expressly and repeatedly approved fees based on the potential recovery to the Class, and routinely approves fees that equal 25% to 36% of the benefit provided. Plaintiffs' motion should be granted because the request is reasonable and appropriate in light of the substantial risks presented in prosecuting this action, the quality and extent of work conducted, and the stakes of the case; the requested fees and costs were clearly delineated in notice to the class, and no class member has objected to date; and because the costs incurred were reasonable and necessary for the litigation. Class Counsel also respectfully moves the Court for an award of $3,000 to each of the two Class Representatives for their work on behalf of the Class.[2] These Service Awards were also contemplated by the Settlement Agreement.

STATEMENT OF FACTS

I. The Litigation.

This case arises from a ransomware attack and data breach at Defendant National Western Life Insurance Company ("Defendant" or "NWL") that Plaintiffs allege compromised their private and protected health information and the private and protected health information of the thousands of members of the Settlement Class. Plaintiff Mildred Baldwin filed her original Complaint against NWL in the Missouri Circuit Court for the 18th Judicial Circuit (Pettis County), while Plaintiff Douglas Dyrssen, Sr. filed his class action complaint in the United States District Court for the

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

Eastern District of California. On April 1, 2021, NWL removed Ms. Baldwin's case to this Court. Lietz Decl. ¶ 20. On April 26, 2021, NWL filed a motion to dismiss Plaintiff Baldwin's complaint, or, to transfer the action to Texas. *Id.* ¶ 21.

After conferring, on May 21, 2021, the Parties filed a joint motion for leave to file an amended complaint, which added Plaintiff Dyrssen as a co-plaintiff in this case, and which the Court granted on May 23, 2021. *Id.* ¶ 22. On June 1, 2021, pursuant to the scheduling order, Plaintiffs Baldwin and Dyrssen ("Plaintiffs") filed their Amended Class Action Complaint ("Complaint"), the operative complaint in this matter. In their Complaint they allege nine causes of action: (1) negligence; (2) negligence *per se*; (3) invasion of privacy; (4) breach of express/implied contractual duty; (5) unjust enrichment; (6) violation of California Unfair Competition Law; (7) violation of California Consumer Privacy Act; (8) violation of California Consumer Legal Remedies Act; and (9) violation of California Consumer Records Act. Lietz Decl. ¶ 24; Compl. at Doc. 31. Plaintiffs sought equitable relief enjoining NWL from engaging in the wrongful conduct complained of and compelling NWL to utilize appropriate methods and policies with respect to consumer data collection, storage, and safety. *Id.* ¶ 26. Plaintiffs further sought an order requiring Defendant to provide credit monitoring services to themselves and the rest of the class. *Id.* ¶ 27. Finally, Plaintiffs sought an award of actual, compensatory, and statutory damages as well as attorneys' fees and costs, and any such further relief as may be deemed just and proper. *Id.* ¶ 28.

NWL moved to dismiss Plaintiffs' Amended Complaint on July 16, 2021, arguing that Plaintiffs had failed to allege injuries sufficient to sustain any claim against NWL, and that the Complaint contained additional fatal flaws. *Id.* at ¶ 29. On August 27, 2021, Plaintiffs filed their Suggestions in Opposition to Defendant's Motion to Dismiss. *Id.* ¶ 31. On September 3, 2021,

Plaintiffs and Defendants each served their initial disclosures. *Id.* ¶ 32. On September 10, 2021 NWL filed its reply in support of its motion to dismiss. *Id.* ¶ 33. On September 15, 2021 this Court issued its Order denying NWL's motion to dismiss in its near entirety, granting the motion only with regards to Plaintiffs' claims for emotional distress. *Id.* ¶ 34.

II. Mediation and Settlement.

After meeting and conferring on multiple occasions regarding the potential for early settlement, the Parties agreed to mediate the case before the Hon. Wayne Andersen (Ret.). *Id.* ¶ 37. Judge Andersen (Ret.) is a retired federal judge and respected JAMS mediator with extensive experience in class action mediation generally and data breach mediations in particular. *Id.* ¶ 38. The mediation proceeded via ZOOM Video Conference on October 12, 2021. *Id.* ¶ 39. After a full day of arms-length negotiations, and significant exchange of information through Judge Andersen, the Parties agreed to a memorandum of understanding describing the key terms of the settlement agreement. *Id.* ¶ 40.

Over the next several weeks, the Parties diligently negotiated, drafted, and finalized the settlement agreement, notice forms, and came to an agreement on a claims process and administrator. *Id.* ¶ 41. The Settlement Agreement was finalized and signed by the Parties in January 2022. *Id.* ¶ 41, Ex. 1.

III. Settlement Benefits.

The settlement negotiated on behalf of the Class provides for three separate forms of relief: (1) a settlement payment; (2) credit monitoring and identity theft restoration services; and (3) equitable relief in the form of information security enhancements. *See generally* Settlement Agreement at Lietz Decl. Ex. 1 ("Agr."). The Settlement provides exceptional relief for the Settlement Class: it will make available $3,900,000 for monetary claims, attorneys' fees and costs, costs of settlement administration and Plaintiffs' service awards. *See* Lietz Decl. ¶ 58. Separate

and apart from and in addition to the $3,900,000, NWL will pay for Aura Financial Shield credit monitoring and identity protection services for any Settlement Class Member who redeems this automatic benefit, and will implement extensive business practices changes and data security enhancements designed to safeguard the PII of Settlement Class Members. *Id.* ¶ 59.

More specifically, the Settlement Benefits include the following:

1. Monetary Relief

The monetary relief provided for by the Settlement Agreement consists of (a) compensation for lost time; (b) reimbursement for the cost of credit monitoring and/or identity theft protection services; (c) ordinary expense reimbursements; and (d) extraordinary expense reimbursement. *Id.* ¶ 49. Each Settlement Class Member can submit a claim for up to four hours of lost time with a simple attestation, and up to eight hours of lost time with supporting documentation. Lost time is paid out at a rate of $20 per hour. *Id.* Class Members can also submit a claim for reimbursement of up to $120 per person for credit monitoring services and/or identity theft protection services purchased prior to August 7, 2020 and February 11, 2022. *Id.* Settlement Class members can also submit a claim for up to an additional $120 of documented, ordinary out-of-pocket losses. *Id.* ¶ 52.

In addition to the ordinary expense reimbursements, each Settlement Class Member may submit a claim for a reimbursement of extraordinary expenses—expenses not included in ordinary expenses or other categories of reimbursement—in the amount of up to $5,000. *Id.* ¶ 53. Members of the California Subclass can submit a claim for an award of statutory damages of $50. *Id.* ¶ 54. The total amount of the Settlement Fund that can be claimed as California Statutory Benefits is capped at $500,000, and each claim may be subject to *pro rata* reduction should the claims exceed the $500,000 cap. *Id.*

2. *Credit Monitoring and Identity Theft Protections*

All Settlement Class Members will be automatically eligible to activate one year of Aura Financial Shield credit monitoring and identity theft protection services whether or not they are eligible for a cash recovery. *Id.* ¶ 55. This is an automatic benefit, which all Settlement Class Members will receive without having to file a formal claim for this benefit.[3] The retail value of the Aura Financial Shield Product offered to Settlement Class Members is approximately $135 per year to each Settlement Class Member. *Id.* ¶ 56. Thus, the potential value of this automatic benefit to the Settlement Class is astronomical – over $110 million dollars (because that is what it would cost for each Class Member to go out and purchase these services on the open market). Even if only 2% of this class activated this benefit, this still provides over $2.2 million in real benefits to Class Members.

3. *Equitable and Prospective Relief*

In addition to the monetary relief and credit monitoring services provided, NWL has also committed to providing equitable relief in the form of data security enhancements and changes to business practices that will be maintained for at least two years, subject to certain exceptions. *Id.* ¶ 57. This equitable relief is laid out in more detail in the Suggestions in Support of the Unopposed Motion for Preliminary Approval. ECF 61 at 7; see also Settlement Agreement ¶ 47.

The Settlement Fund and retail cost of the credit monitoring and identity protection services is $4,383,000. ECF 61 at 4-7, 11. This amount does not include the costs of the agreed upon business practice changes and data security enhancements, which is an added benefit to the Class that has substantial value.

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[3] In the notice process that has already commenced, Settlement Class Members who were sent notice received a code for this service, which they may use to activate the service without having to file a Claim Form..

4. *Settlement Administration Costs*

The Settlement also calls for the Defendant to pay the costs of settlement administration, estimated at $450,613. Ex. A, ¶ 35. This amount is included in the $3,900,000 Settlement Fund, and is also a benefit to the Class.

IV. Preliminary Approval and Notice.

On January 19, 2022, this Court entered an Order granting preliminary approval to the Settlement. Doc. 62. The Court found, upon a preliminary review, that "the proposed Settlement is fair, reasonable, and adequate" and that "[t]he Settlement confers substantial benefits upon the Settlement Class, particularly in light of the damages that Settlement Class Representatives and Settlement Class Counsel believe are potentially recoverable or provable at trial, and does so without the costs, uncertainties, delays, and other risks associated with continued litigation." *Id.* at 4–5. The Court appointed Plaintiffs Baldwin and Dyrssen as Settlement Class Representatives and appointed David Lietz and J. Gerard Stranch IV as Class Counsel. *Id.* at 4. The Court also approved the forms of notice, which state the amount of fees and service awards that will be requested, and approved the plan for disseminating notice to the Settlement Class. *Id.* On February 21, 2022, Court-approved notice was sent to the Settlement Class, and Class Members have until April 22, 2022, to file objections, if any. *See generally* natwestdatasettlement.com. As of March 15, 2022, the Settlement Administrator has received 19 requests for exclusion (out of a class of over 800,000), and *zero* objections. Ex. A, ¶ 36.

LEGAL STANDARDS

I. Courts in the Eighth Circuit commonly award attorneys' fees of one-third of the total value of a settlement.

Courts historically utilize two main approaches to analyzing a request for attorneys' fees: the lodestar approach and the percent-of-benefit approach. *Johnston v. Comerica Mortg. Corp.,* 83

F. 3d 241, 244 (8th Cir. 1996). Under the lodestar approach, the hours expended by an attorney are multiplied by a reasonable rate, which is adjusted given the characteristics of a particular action. *Id.* The percent-of-benefit (or percent-of-fund) approach permits an award of fees that is equal to some fraction of the common fund the attorneys were successful in procuring during the course of litigation. *Id.*

Under Rule 23(h) and "the 'common fund' doctrine, Class Counsel is entitled to an award of reasonable attorneys' fees from the settlement proceeds" in a class action. *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019) (citing Fed. R. Civ. P. 23(h); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole")). The common fund doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Boeing*, 444 U.S. at 478.

It is within the discretion of the District Court to determine what approach to use and if a requested fee is reasonable in a given case. *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 622 (8th Cir. 2017). However, whereas the lodestar approach is viewed as appropriate in statutory fee shifting cases, the percent-of-benefit method is widely endorsed in common fund cases. *Johnston,* 83 F. 3d at 245; *see also Report of the Third Circuit Task Force,* 108 F.R.D. 237, 246–49 (1985) (concluding that the percent-of-recovery fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 736 F. Supp. 1007, 1009 (E.D. Mo. 1990) (adopting what the court called the "healthy trend" of applying the percent-of-fund

approach over the lodestar analysis); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F. 3d 768, 821 (3d Cir.1995).

"In the Eighth Circuit, use of the percentage of the fund method when awarding attorneys' fees in a common fund case is not only approved, but also 'well established.'" *In re NuvaRing Prod. Liab. Litig.*, 2014 WL 7271959, *2 (E.D. Mo. Dec. 18, 2014). Indeed, in common fund cases, the percentage of the benefit approach is "recommended." *Tussey*, 2019 WL 3859763, at *2; *see also Johnston*, 83 F.3d at 246 (approving percentage method of awarding fees); *Petrovic v. Amoco Oil Co*., 200 F.3d 1140, 1157 (8th Cir. 1999)(same); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002)(same).[4] The percentage of the benefit approach aids litigants and the courts because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 120 (2d. Cir. 2005); *see also Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (percentage of fund is "a method of more closely aligning the lawyer's interests with those of his client by giving him a stake in a successful outcome"). The percentage-of-the-benefit method better aligns counsel and the class and encourages the most efficient resolution of the litigation. *In re NuvaRing Prod. Liab. Litig*., No. 4:08 MDL 1964 RWS, 2014 WL 7271959, at *4 (E.D. Mo. Dec. 18, 2014). "[U]nder the percentage approach, the class members and the class counsel have the same interest—maximizing the recovery of the class." Silber and Goodrich, *Common Funds*

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[4] While the use of the lodestar approach is sometimes used to crosscheck the result of the percent-of-benefit method, it is not required. *Caligiuri v. Symantec Corp*., 855 F.3d 860, 865–66 (8th Cir. 2017); *citing Petrovic*, 200 F.3d at 1157 (finding no reason to examine the lodestar crosscheck carried out by the district court where the percent-of-fund approach yielded a reasonable result); *see also In re U.S. Bancorp Litig.*, 291 F.3d at 1038. Even when a lodestar cross-check is done, it "need entail neither mathematical precision nor bean counting" and a court "need not scrutinize each time entry" and can rely on "representation[s] by class counsel as to total hours." *In re NuvaRing*, 2014 WL 7271959, at *4.

and Common Problems: Fee Objections and Class Counsel's Response, 17 Rev. Litig. 525, 534 (Summer 1998).

Courts determine the total benefit to the class "based on both the monetary and the non-monetary value of the settlement." *Tussey*, 2019 WL 3859763, at *2; *see also* Principles of the Law of Aggregate Litigation, A.L.I., § 3.13(b) (May 20, 2009) ("a percent-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and the nonmonetary value of the settlement."). Thus, consideration of injunctive or declaratory relief, as well as savings to class members is appropriately considered as part of the total value of a settlement. *Tussey*, 2019 WL 3859763, at *2 (including tax avoidance and injunctive relief in addition to monetary relief as being the basis for the total value of the settlement for determining an appropriate common-fund fee); *Barfield v. Sho-Me Power Elec. Co-op.*, No. 2:11-CV-4321NKL, 2015 WL 3460346, at *4 (W.D. Mo. June 1, 2015) (including administrative costs paid separately by defendant as being part of the total value of the settlement). The value of the settlement for purposes of determining the fee is the value that is made available to class members, regardless of whether the full amount is claimed through the claims process. *See Keil v. Lopez*, 862 F.3d 685, 697 (8th Cir. 2017) (approving requested fees and noting that "even if 97 percent of the class did not exercise their right to share in the fund, their opportunity to do so was a benefit to them") (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) ("Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.")).

As to the appropriate percentage to award to Class Counsel, the amount is within the discretion of the court, but "courts have frequently awarded attorney fees between 25 and 36

percent of a common fund in class actions." *Caligiuri*, 855 F.3d at 866 (affirming 33% fee) (quoting *Khoday v. Symantec Corp.*, No. 11-cv-180, 2016 WL 1637039, at *9 (D. Minn. Apr. 5, 2016)); *In re U.S. Bancorp. Litig.*, 291 F.3d at 1038 (affirming 36% fee); *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017). Within this range, the most common fee awarded is one-third of the value of the settlement. *See, e.g., Caligiuri*, 855 F.3d at 865–66 (affirming one-third fee); *Huyer*, 849 F.3d at 399–400 (same); *Barfield*, 2015 WL 3460346, at *4 (awarding one-third fee and collecting cases awarding one-third fees).

Finally, although the Eighth Circuit has not formally established fee-evaluation factors, it has approved consideration of several, none of which is determinative. Specifically, in *Caligiuri*, the Eighth Circuit held that it was appropriate in evaluating the fee to look at various factors, including: (1) the benefit conferred on the class; (2) the risk to which plaintiffs' counsel was exposed (i.e., whether their fee was fixed or contingent); (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 reaction of the class; and (6) the comparison between the requested attorney fee percentage and percentages awarded in similar cases. *Caligiuri*, 855 F.3d at 866. Evaluation of these factors assists a court in determining a reasonable fee. *Id.*

II. Courts in the Eighth Circuit award reimbursement of reasonable costs and expenses advanced by Class Counsel.

In addition to fees, "[a]n attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved." *Tussey*, 2019 WL 3859763, at *5 (quoting Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.); *see also Sprague v. Ticonic*, 307 U.S. 161, 166–67 (1939) (recognizing a federal court's equity power to award costs from a common fund)). "Counsel in common fund cases may recover those expenses that would normally be charged to a fee-paying client." *Tussey*, 2019 WL

3859763, at *5 (quoting *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, No. MDL 05-1708, 2008 WL 682174, at *4 (D. Minn. Mar. 7, 2008)). "Reimbursable expenses include many litigation expenses beyond those narrowly defined 'costs' recoverable from an opposing party under Rule 54(d), and includes: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research." *Id.* (collecting cases).

As to amount, "reducing litigation expenses because the district judge thinks costs too high in general is not permissible." *Id.* (internal quotations omitted). And, in general, courts approve requested expense reimbursements because class counsel bring the case on a contingent basis, "so they had a strong incentive to keep costs to a reasonable level." *Id.* Courts in this district have noted that expenses equal to or slightly greater than 4% of the relief obtained for the class "should be viewed as generally reasonable." *Id.* (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: an Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUDIES 27, 70 (2004)); *see also Keslar v. Bartu*, 201 F.3d 1016, 1017 (8th Cir. 2000) (per curiam) (finding no abuse of discretion in $17,000 cost award when case settled for only $70,000).

III. Courts in the Eighth Circuit commonly award class representative service awards of $10,000 or more.

Apart from Class Counsel, "[a]t the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class." 5 *Newberg on Class Actions* § 17:1 (5th ed. 2015). "Courts often grant service awards to named plaintiffs in class action suits to 'promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits.'" *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (quoting *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1086 (D. Minn. 2010)). Otherwise, most people could not afford to spend the time and effort to pursue what would provide only a modest individual recovery for the effort involved but would also benefit thousands of other people who

do not have to expend any time or resources. *See id.* Relevant considerations in determining whether to grant an incentive award include actions plaintiffs took to protect the interests of the class; the degree to which the class has benefitted from those actions; and the amount of time and effort plaintiffs expended in pursuing the litigation. *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002).

As to amount, "courts in this circuit regularly grant service awards of $10,000 or greater." *Caligiuri*, 855 F.3d at 867 (8th Cir. 2017) (approving $10,000 service award) (citing *Huyer v. Njema*, 847 F.3d 934, 941 (8th Cir. 2017) (affirming approval of settlement that included $10,000 service awards to named plaintiffs); *Jones v. Casey's Gen. Stores, Inc.*, 266 F.R.D. 222, 231 (S.D. Iowa 2009) (approving $10,000 service awards to each of nine plaintiffs). And much higher service awards are not uncommon. *See, e.g.*, *Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009) (approving $15,000 service awards to two representatives)); *Tussey*, 2019 WL 3859763, at *6 (approving $25,000 service awards to each of three representatives); *In re Charter Commc'ns, Inc., Sec. Litig.*, No. MDL 1506, 2005 WL 4045741, at *25 (E.D. Mo. June 30, 2005) (approving $26,625 service award).

DISCUSSION

Under these standards, the Court should grant the requested payments from the Settlement fund of attorneys' fees, expenses, and service awards. All of the requested amounts are reasonable, in line with amounts routinely approved in the Eighth Circuit, and well within the Court's discretion.

I. The Court should award Class Counsel attorneys' fees from the Settlement Fund in the amount of one-third of the value of the settlement.

The Court should award Class Counsel 30% of the conservative value of the settlement, which is the fee amount the Settlement Agreement contemplates. Not only is this amount common

in the Eighth Circuit, but all the *Caligiuri* factors support approving the requested fee. *Caligiuri*, 855 F.3d at 866 (listing factors).

First, the benefit conferred by the Settlement is substantial and conservatively valued at over $4.3 million. Settlement Class Members who submit valid claims are eligible to receive reimbursement at the rate of $20 per hour for up to twelve (12) hours (4 attested hours, and 8 additional documented hours) spent addressing issues pertaining to the Security Incident; reimbursement of up to $120 for credit monitoring and/or identity theft protection services purchased due to the Security Incident; up to $120 in documented ordinary losses; and up to $5,000 in documented extraordinary losses. Lietz Dec. ¶¶ 49-53. California Subclass Members can make a claim for up to an additional $50 in statutory payments. *Id.* ¶¶ 54.

Moreover, members of the Settlement Class will receive up to one-year of Aura Financial Shield credit monitoring and identity theft protection services. *Id.* ¶ 55. Additionally, NWL will be implementing extensive security enhancement protocols that will guarantee that Settlement Class Members' PII will be better safeguarded in the future. *Id.* ¶ 57.

This Settlement terms are consistent with agreements approved by Courts in other, similar data breach cases. *Rutledge et al v. Saint Francis Healthcare System*, No. 1:20-cv-00013-SPC (E.D. Mo.) (data breach settlement providing up to $280 in value to Settlement Class Members in the form of: reimbursement up to $180 of out of pocket expenses and time spent dealing with the data breach; credit monitoring services valued at $100; and equitable relief in the form of data security enhancements); *Chacon et al, v. Nebraska Medicine,* No. 8:21-cv-00070 (Dist. Nebr.) (data breach settlement providing up to $300 in ordinary expense reimbursements; up to $3,000 in extraordinary expense reimbursements; credit monitoring services; and equitable relief in the form

of data security enhancements). This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

Second, the risks of the litigation for Class Counsel were high. Class Counsel took this case on a purely contingent basis. Ex. A ¶ 30. As such, they assumed significant risk of nonpayment or underpayment. *Id.* This risk of non-payment was quite real, as evidenced by the motion to dismiss filed by Defendant and ruled upon by this Court prior to reaching the Settlement. Class Counsel took on these risks knowing full well their efforts may not bear fruit. Fees were not guaranteed—the retainer agreements Counsel have with Plaintiffs did not provide for fees apart from those earned on a contingent basis, and in the case of class settlement, approved by the court. *Id.* ¶ 33.

Class Counsel labored and advanced their own funds to prosecute the case all at the risk of never being paid for their work or reimbursed for their expenses. Class Counsel devoted their time and energy to this matter, instead of pursuing other income, all at the risk of never getting paid and, at best, being paid at some point potentially many years down the road. Had Defendant prevailed on the merits, on class certification, or on appeal, Class Counsel might have recovered nothing for the time and expense they invested in representing the Class. *Id.* ¶ 31. "Unquestionably, with high-risk and high-cost cases such as this, contingency fee arrangements are the "key to the courthouse" for individuals taking on a large corporation." *Tussey*, 2019 WL 3859763, at *4. This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866; s*ee e.g. Huyer,* 849 F.3d at 399 (approving requested fees of 33% of the settlement fund where all attorneys worked on a contingent basis).

Third, this case involved complexities of data breach that are novel and evolving. *See* Ex. A ¶ 18. To even be able to identify the issues of Article III standing, relatively new statutes like the

California Consumer Protection Act, the highly technical aspects of the data breach mechanism (i.e. the means by which Defendant's systems were breached), not to mention the specialized knowledge of class action procedure required to achieve certification, let alone settlement. While Plaintiffs were confident that their claims would prevail, they faced several strong legal defenses and difficulties in demonstrating causation and injury. Such defenses, if successful, could drastically decrease or eliminate any recovery for Plaintiffs and putative class members. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on either certification or merits. The general risks of litigation are further heightened in the data breach arena. Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data breach cases like this one are particularly complex and face substantial hurdles—even just to make it past the pleading stage. As one federal district court recently observed in finally approving a data breach settlement with similar class relief and similar attorneys' fees:

> Data breach litigation is evolving; there is no guarantee of the ultimate result. *See Gordon v. Chipotle Mexican Grill, Inc.,* No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases ... are particularly risky, expensive, and complex."). Plaintiffs also faced the risk that [defendant] would successfully oppose class certification, obtain summary judgment on one or more of their claims, or win at trial or on appeal. Also, the cost for [defendant] and Plaintiffs to maintain the lawsuit would be high, given the amount of documentary evidence as well as the expert costs both parties would incur in the context of class certification, summary judgment, and trial. As such, the current Settlement strikes an appropriate balance between Plaintiffs' "likelihood of success on the merits" and "the amount and form of the relief offered in the settlement." *See Carson v. Am. Brands, Inc*., 450 U.S. 79, 88 n.14 (1981).

Fox v. Iowa Health Sys., No. 3:18-CV-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021) (also approving attorneys' fees and costs in the amount of $1,575,000); *see also Hammond v. The Bank of N.Y. Mellon Corp*., 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another

hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013).

This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

Fourth, the complexity of the case is further shown by the skill of the lawyers involved on both sides of the case. Class Counsel have national class action practices involving many areas of complex litigation, but particularly data breach cases of this very type. *See Baksh v. Ivy Rehab Network, Inc*., Case No. 7:20-cv-01845-CS (S.D. N.Y.) (class counsel in a data breach class action settlement involving 125,000 individuals with a settlement value of $12.8 million; final approval granted); *Mowery et al. v. Saint Francis Healthcare System*, Case No. 1:20-cv-00013-SRC (E.D. Mo.) (appointed class counsel; final approval granted with settlement value of over $13 million); *Chatelain et al. v. C, L and W PLLC d/b/a Affordacare Urgent Care Clinics*, Case No. 50742-A (42nd Dist. Ct. for Taylor Cnty., Tex.) (appointed class counsel; settlement valued at over $7 million, final approval granted); *Jackson-Battle v. Navicent Health, Inc.,* Civil Action No. 2020-CV-072287 (Super. Crt. of Bibb Cnty., Ga.) (appointed class counsel in data breach case involving 360,000 patients; settlement valued at over $72 million, final approval granted); *Bailey v. Grays Harbor County Public Hospital District et al.*, Case No. 20-2-00217-14 (Grays Harbor Cnty. Super. Crt., Wash.) (appointed class counsel in hospital data breach class action involving approximately 88,000 people; final approval granted); *Richardson v. Overlake Hospital Medical Center et al*., Case No. 20-2-07460-8 SEA (King Cnty. Super. Crt., Wash. (Mr. Lietz appointed class counsel in data breach case; final approval granted September 2021); *Kenney et al. v. Centerstone of America, Inc. et al*., Case No. 3:20-cv-01007-EJR (M.D. Tenn.) (Mr. Lietz appointed co-lead class counsel; final approval granted August 9, 2021); *Chacon v. Nebraska Medicine*, Case No. 8:21-cv-00070-RFR-CRZ (D. Neb) (Mr. Lietz appointed co-class counsel in

data breach settlement, final approval granted September 2021); *Klemm et al. v. Maryland Health Enterprises, Inc. D/B/A Lorien Health Services*, C-03-CV-20-002899 (Cir. Crt. for Baltimore Cnty., Md.) (appointed Settlement Class Counsel, final approval granted November 2021); *Carr et al. v. Beaumont Health et al*., Case No. 2020-181002-NZ (Cir. Crt. for Cnty. of Oakland, Mich.) (Mr. Lietz appointed co-class counsel in data breach case involving 112,000 people; final approval granted October 2021); *Martinez et al. v. NCH Healthcare System, Inc*., Case No. 2020-CA-000996 (Cir. Crt. of the Twentieth Jud. Cir. in and for Collier Cnty., Fla.) (Mr. Lietz appointed Settlement Class Counsel; final approval granted). Ex. A. ¶ 5 ; *see also* Declaration of Gerard Stranch, attached hereto as Exhibit B; see also ECF 61-1, Exhibit 3. Class Counsel has been recognized by courts across the country for their skill. *Id.* On the other side of the case, Defendant is represented by an international law firm that is one of the largest in the country and is a formidable opponent. This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

Fifth, the requested fee is commensurate with the amount that Class Counsel has been awarded in similar data breach litigation and in class action litigation in general in courts across the country. Ex. A, ¶ 24; *see also Fox*, 2021 WL 826741, at *6 (approving attorneys' fees and costs in the amount of $1,575,000 in data breach settlement with similar class relief). The fee requested here is 30% of the $4,383,000 in settlement benefit (representing the Settlement Fund plus the cost of the credit monitoring and identity protection services). This amount is exclusive of the equitable relief, which also provides substantial benefits to the Class.

Moreover, Financial Shield Services from Aura, like those provided for by the Settlement Agreement, retail for approximately $135 per year.[5] Ex. A ¶ 20. If the retail value of the Aura Financial Shield Services is used to determine the overall benefit to the Settlement Class, the

[5] See https://www.aura.com/pricing

requested fees and costs represent a tiny fraction of the benefit created. If even 2% of the Settlement Class utilizes their activation codes for Aura Financial Shield, the requested fees and costs represent only 25% of the combined total of the Settlement Fund and the $2.2 million retail value of the Aura Financial Shield Services *Id.* ¶ 21. The fee requested here also falls well within the 25% to 36% of common fund fees regularly approved by Eighth Circuit Courts. *Del Toro, v. Centene Mgmt. Co., LLC*., No. 4:19-CV-02635-JAR, 2021 WL 1784368, at *3 (E.D. Mo. May 5, 2021) (35% fee sought by Plaintiffs' counsel approved as "in line with other awards in the Eighth Circuit"); *Tussey*, 2019 WL 3859763, at *4 (33% fee awarded where there was no objection to the fee request by the Class); *Caligiuri*, 855 F.3d at 865–66; *see also In re Xcel Energy, Inc., Sec. Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005) (collecting cases); *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (awarding 36% of a common fund of $3.5 million); *West v. PSS World Med., Inc.,* No. 4:13-cv-574, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014) (approving attorneys' fees of 33%); *Harris v. Republic Airlines, Inc.,* No. 4-88-1076, 1991 WL 238992 at *2 (D. Minn. Nov. 12, 1991) (awarding "a sum slightly in excess of 30% of the common fund"). This factor supports granting the requested fee. *Caligiuri*, 855 F.3d at 866.

Thus, all of these factors support the Court's discretion in approving the requested attorneys' fee amount of one-third of the value of the settlement, which is an amount routinely awarded in the Eighth Circuit. *See id.*; *Barfield*, 2015 WL 3460346, at *4 (collecting cases awarding one-third fees).

II. The Court should award Class Counsel reimbursement from the Settlement Fund of expenses incurred in litigating this case to settlement.

The Court should likewise award Class Counsel reimbursement of the expenses they advanced in litigation this case, which are reasonable. Due to the early stage of litigation at which Plaintiffs were able to reach settlement, costs incurred by Plaintiffs are low. Here, Class Counsel

has advanced $11,556.74 in expenses for necessary litigation expenses such as filing fees and the costs of mediation. *See* Ex. A, ¶ 34, Ex. B ¶ 24. As repayment of these expenses was contingent on judgment or settlement, Class Counsel's incentive was to incur only those expenses necessary to resolve the case. The requested expenses are far less than 1% of the value of the settlement and therefore are reasonable and should be approved. *See Tussey*, 2019 WL 3859763, at *5 (holding that expenses of even 4% of the settlement value are generally reasonable).

III. The Court should award the Class Representatives payment from the Settlement Fund for service awards of $3,000 each.

Finally, the Court should grant the Class Representatives a service award of $3,000 each in recognition of the time and effort they spent and the results they obtained on behalf of the absent Class members who will receive compensation without ever having to do anything. The Class Representatives have regularly consulted with Class Counsel, provided documents and information, reviewed pleadings, and participated in the settlement process. Ex. A ¶¶ 27-28. Without the Class Representative's efforts, the over $4 million in benefits for the Class would never have been achieved. These factors support granting a service award. *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002). Now that the case has achieved a significant recovery the Class Representative should be rewarded for having obtained this benefit for the thousands of other Class members who will receive essentially "free money" when the settlement funds are deposited to their accounts or mailed to them as a check. The Court is well within its discretion to award the requested $3,000 service awards, which is less than the amount "regularly" awarded in the Eighth Circuit. *Caligiuri*, 855 F.3d at 867 ("courts in this circuit regularly grant service awards of $10,000 or greater").

CONCLUSION

Upon granting final approval to the settlement, the Court should enter an order awarding from the Settlement Fund the payments of: (1) combined attorneys' fees and expenses to Class Counsel in the amount of $1,314,900; and (2) service awards to the two Class Representatives in the amount of $3,000 each.

Dated March 23, 2022

Respectfully submitted,

/s/David K. Lietz

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing by electronic mail to the attorneys and parties of record.

/s/David K. Lietz
David K. Lietz

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION
(*Electronically Filed*)

MILDRED BALDWIN and DOUGLAS DYRSSEN SR., On Behalf of Themselves and All Others Similarly Situated,	:	
Plaintiffs,	:	
v.	:	**Case No, 2:21-cv-04066-WJE**
NATIONAL WESTERN LIFE INSURANCE COMPANY,	:	
Defendant.	:	

DECLARATION OF DAVID LIETZ IN SUPPORT OF
PLAINTIFFS' MOTION FOR FEES, EXPENSES, AND SERVICE AWARDS

I, David K. Lietz, being competent to testify, make the following declaration:

1. I am currently a partner of the law firm Milberg Coleman Bryson Phillips Grossman PLLC ("Milberg"). I am one of the lead attorneys for Plaintiffs and have been appointed Class Counsel for the Settlement Class. I submit this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration, and could testify competently to them if called upon to do so.

2. I have extensive experience prosecuting complex class actions, especially in the area of data breach litigation. I have been licensed to practice law in the District of Columbia since 1991, am a member of the bars of numerous federal district and appellate courts, and have decades of litigation and class action experience.

3. I have represented and are currently representing plaintiffs in more than 100 class action lawsuits in state and federal courts throughout the United States. Both I and my firm carry on a

4. With respect to data privacy cases, I am currently litigating more than seventy-five cases across the country involving violations of the privacy violations, data breaches, and ransomware attacks.

5. While Milberg partners (including me) have decades of class action experience, it is noteworthy that in the past two years since March 14, 2020, I have been appointed class counsel in a number of data breach or data privacy cases, including:

a. *Kenney et al. v. Centerstone of America, Inc*., Case No. 3:20-cv-01007 (M.D. Tenn.) (appointed co-class counsel in data breach class action settlement involving over 63,000 class members; final approval granted August 2021);

b. *Baksh v. Ivy Rehab Network, Inc*., Case No. 7:20-cv-01845-CS (S.D. N.Y.) (class counsel in a data breach class action settlement; final approval granted Feb. 2021);

c. *Mowery et al. v. Saint Francis Healthcare System*, Case No. 1:20-cv-00013-SRC (E.D. Mo.) (appointed class counsel; final approval granted Dec. 2020);

d. *Chatelain et al. v. C, L and W PLLC d/b/a Affordacare Urgent Care Clinics*, Case No. 50742-A (42nd District Court for Taylor County, Texas) (appointed class counsel; settlement valued at over $7 million; final approval granted Feb. 2021);

e. *Jackson-Battle v. Navicent Health, Inc.,* Civil Action No. 2020-CV-072287 (Superior Court of Bibb County, Georgia) (appointed class counsel in data breach case involving 360,000 patients; final approval granted Aug. 2021);

f. *Bailey v. Grays Harbor County Public Hospital District et al*., Case No. 20-2-00217-14 (Grays Harbor County Superior Court, State of Washington) (appointed class counsel in hospital data breach class action involving approximately 88,000 people; final approval granted Sept. 2020);

g. *Chacon v. Nebraska Medicine*, Case No. 8:21-cv-00070-RFR-CRZ (D. Neb.) (appointed class counsel in data breach settlement, final approval granted September 2021);

h. *Richardson v. Overlake Hospital Medical Center et al*., Case No. 20-2-07460-8 SEA (King County Superior Court, State of Washington (appointed class counsel in data breach case, final approval granted September 2021);

i. *Martinez et al. v. NCH Healthcare System, Inc.*, Case No. 2020-CA-000996 (Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida) (Mr. Lietz appointed Settlement Class Counsel; final approval granted);

j. *Carr et al. v. Beaumont Health et al*., Case No. 2020-181002-NZ (Circuit Court for the County of Oakland, Michigan) (Mr. Lietz appointed co-class counsel in data breach case involving 112,000 people; final approval granted October 2021);

k. *Klemm et al. v. Maryland Health Enterprises Inc*., Case No. C-03-CV-20-022899 (Circuit Court for Baltimore County, Maryland) (appointed class counsel; final approval granted November 2021);

l. *Cece et al. v. St. Mary's Health Care System, Inc. et al*., Civil Action No. SU20CV0500 (Superior Court of Athens-Clarke County, Georgia) (appointed Settlement Class Counsel in data breach case involving 55,652 people; preliminary approval granted December 2021);

m. *Powers, Sanger et al v. Filters Fast LLC*, Case 3:20-cv-00982-jdp (appointed co-lead Settlement Class Counsel; preliminary approval granted November 2021);

n. *Garcia v. Home Medical Equipment Specialists, LLC*, Case No. D-202-cv-2021-06846 (appointed class counsel; preliminary approval granted January 2022);

o. *Baldwin et al. v. National Western life Insurance Company*, Case No. 2:21-cv-04066 (W.D. Mo.) (appointed co-class counsel; preliminary approval granted January 2022);

p. *Hashemi, et. al. v. Bosley, Inc*., Case No. 21-cv-00946-PSG (RAOx) (C.D. CA) (appointed co-class counsel; preliminary approval granted February 2022).

6. I am lead counsel on the following cases that are on the cutting edge of Article III federal court jurisdiction in data breach litigation -- *Purvis v. Aveanna Healthcare, LLC*, No. 1:20-

CV-02277-LMM, 2021 WL 5230753 (N.D. Ga. Sept. 27, 2021) and *McCreary v. Filters Fast LLC*, No. 3:20-CV-595-FDW-DCK, 2021 WL 3044228 (W.D.N.C. July 19, 2021).

7. I have been appointed as class counsel in other consumer class action cases, and have tried consumer class action cases to verdict before a jury, most recently in *Baez v. LTD Financial Services*, Case No: 6:15–cv–1043–Orl–40TBS (MD Fla.).

8. My experience with class actions also includes a leadership role in a Massachusetts WalMart wage abuse class action, national HMO litigation, the Buspirone MDL, and Louisiana Norplant litigation.

9. In addition to my class action experience, I have substantial appellate experience, successfully briefing and arguing multiple cases before a number of federal appellate courts, including *Home Depot v. Jackson* at the U.S. Court of Appeals for the Fourth Circuit, and served as part of the successful brief-writing and oral advocacy team for *Home Depot v. Jackson*, 139 S. Ct. 1743, 1744, 204 L. Ed. 2d 34 (2019) at the United States Supreme Court.

10. Prior to concentrating my practice on consumer class action litigation, I litigated critical injury and wrongful death actions arising from commercial incidents, such as tractor trailer incidents, industrial explosions, a subway collision, and commercial airplane crashes.

11. A representative list of my critical injury and wrongful death cases include:

- Represented the family of the deceased conductor of the Washington Metropolitan Area Transit Authority subway train that collided with another Metro train in 2009.
- Represented the family of a fatality victim of the 2006 Greyhound bus crash near Elizabethtown, New York.
- Represented six victims (four deceased, two injured) of a massive fog related pileup on the Pennsylvania Turnpike in 2003.
- Represented three victims (two deceased, one injured) of the 2002 Interstate 40 Bridge Collapse, where a tugboat and barge hit an interstate highway bridge near

Webbers Falls, Oklahoma and caused several vehicles to plunge into the Arkansas River.

- Represented the family of one victim of the 2000 Alaska Airlines Flight 261 crash, where an MD-83 with a cracked jackscrew nosedived into the water off Point Mugu, California.
- Represented the victims (one deceased, one critically injured) of a 2000 incident where a tractor trailer rear ended a line of stopped traffic near Hopkinsville, Kentucky.
- Represented a critically burned victim of the 1998 explosion at the State Line Energy plant in Hammond, Indiana, where a massive coal dust explosion ripped through the power plant, causing power shortages all over the city of Chicago, Illinois.
- Represented the families of four victims of the 1996 Valujet Flight 592 crash, where a DC-9 developed a cargo hold fire and crashed into the Everglades near Miami, Florida.
- Represented the family of a victim of a 1994 crane collapse in Laughlin, Nevada, when a mobile truck crane toppled across the parking lot of a casino.

12. I negotiated several million+ dollar settlements, served as lead counsel in multiple civil actions, tried a number of cases to verdict in both jury and bench trials, and argued cases before federal district and appeals courts, and numerous state courts.

13. I have lifetime verdicts and settlements in excess of $100 million, and consistently achieved settlements in the highest quartile of tort and mass tort cases.

14. I have litigated against some of the largest transportation-related companies in the US, including Greyhound, Goodyear, Cessna, Textron, and the Washington Metropolitan Area Transit Authority (WMATA).

15. The Settlement Agreement, and the efforts of Class Counsel, created exceptional relief for the Settlement Class: it will make available $3,900,000 for monetary claims, attorneys' fees and costs, costs of settlement administration and Plaintiffs' service awards. Separate and apart from and in addition to the $3,900,000 made available, Defendant will pay for Aura Financial Shield credit monitoring and identity protection services for any Settlement Class Member who

redeems the activation code already sent to him/her, and will implement extensive business practices changes and substantial data security enhancements designed to safeguard the PII of Settlement Class Members.

16. In my experience, a settlement in this range is likely to be viewed favorably by the class members who will appreciate receiving compensation from this lawsuit without having to expend any resources of their own.

17. It is my belief, based upon my knowledge and experience that the Settlement represents an excellent result for the classes in this litigation and was obtained against a well-funded defense by the Defendant, which was represented by an international law firm that is in the top 25 of the 2021 Am Law 100.

18. This result is even more remarkable because, although the Class Counsel and Plaintiffs believe in the merits of their claims, this litigation was inherently risky and complex. The claims involve the intricacies of data breach litigation (a fast-developing area in the law), and the Plaintiffs faced risks as each stage of litigation. Aside from the potential that either side will lose at trial, Plaintiffs would likely need to counter a motion for summary judgment, and both gain and maintain certification of the class. Even if successful with their class certification argument, Plaintiffs would face a near inevitable interlocutory appeal attempt. Without a certified class, no class member would likely receive any recovery. Summary judgment, trial, and appeal present significant risks in any case.

19. In this case, all Settlement Class Members will be automatically eligible to activate one year of Aura Financial Shield credit monitoring and identity theft protection services whether or not they are eligible for a cash recovery. This is an automatic benefit, which all Settlement Class Members will receive without having to file a formal claim for this benefit.

20. The credit monitoring product offered here is also offered to persons on a retail basis. See https://www.aura.com/pricing. The retail value of the Aura Financial Shield Product offered to Settlement Class Members is approximately $135 per year ($12 per month, with the first 2 weeks free) to each Settlement Class Member.

21. Thus, the potential value of this automatic benefit to the Settlement Class is astronomical – over $110 million dollars (because that is what it would cost for each Class Member to go out and purchase these services on the open market - $135 times 818,558). Even if only 2% of this class activated this benefit, this still provides over $2.2 million (16,371 times $135) in real benefits to Class Members.

22. Courts recognize the economic benefit of the retail value of credit monitoring. *See In re Anthem, Inc. Data Breach Litig*., 327 F.R.D. 299, 323 (N.D. Cal. 2018) ("Obviously, the credit monitoring services themselves confer an economic benefit, as they can retail for $9 to $20 a month.").

23. While Class Counsel calculates the value of the settlement as a conservative $4,383,000 (i.e. the $3.9 million settlement fund, plus the $483,000 cost of the credit monitoring), the settlement could also be valued at $6.100,000, if the credit monitoring was valued at $2.2 million as shown above.

24. The Settlement Agreement provides for combined attorneys' fees and costs in the amount of $1,314,0900. The requested fee is commensurate with or substantially less than the amount Class Counsel have been awarded in similar data breach litigation. *See, e.g*. *Aguallo et al. v. Kemper Corporation et al.,* Case No. 1:21-cv-01883-MMP (ND Ill.), ECF #53, March 18, 2022 (final approval order awarding $2,500,000 in combined attorneys' fees and costs for a data breach settlement with similar settlement metrics).

25. The combined attorneys' fees and costs requested represents 30 percent of the value of the Settlement Fund plus the cost of the credit monitoring ($4,383,000). If the retail value of the Aura Financial Shield Services is used to determine the overall benefit to the Settlement Class, the requested fees and costs represent a tiny fraction of the benefit created. If the retail value of the credit monitoring is considered based upon a modest 2% take rate for the credit monitoring, the combined fees and costs represents only 25% of the settlement value.

26. While Class Counsel also obtained significant equitable relief (in the form of data security improvements) for the Class, no value is being assigned to that class benefit when calculating the percentage of the benefit obtained for the attorneys' fee application.

27. The Settlement Agreement provides for a reasonable service award to Plaintiffs in the amount of $3,000 each.

28. The Class Representatives have actively participated in the lawsuit, communicated with counsel, and assisted in prosecuting the case.

29. The service awards are meant to compensate Plaintiffs for their efforts which include maintaining contact with counsel, assisting in the investigation of the case, producing relevant documents, reviewing the Complaint, remaining available for consultation throughout mediation, for answering counsel's many questions, and for reviewing the Settlement Agreement.

30. My Firm took on this case on a purely contingent basis. As such, the firm assumed a significant risk or nonpayment or underpayment.

31. This matter has required me, and other attorneys at my Firm, to spend time on this litigation that could have been spent on other matters. At various times during the litigation of this class action, this lawsuit has consumed significant amounts of my time. Such time could otherwise have been spent on other fee-generating work. Because I undertook representation of this matter

on a contingency-fee basis, I shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment.

32. Litigation is inherently unpredictable and therefore risky. Here, that risk was very real, due to the rapidly evolving nature of case law pertaining to data breach litigation.

33. Class Counsels' fees were not guaranteed in this matter—the retainer agreement counsel had with Plaintiffs did not provide for fees apart from those earned on a contingent basis, and, in the case of class settlement, approved by the court.

34. Due to the early stage of litigation, costs incurred by Plaintiffs are low. My current reimbursable costs incurred are $5,386.03, and include filing fees of $502.00, a charge of $1.03 for research, and $4,883.00 in mediation expenses. These costs are extremely reasonable, and were necessary for the litigation.

35. Upon information and belief, notice in this case has been provided pursuant to the Court's Preliminary Approval Order and will be reported on more extensively in Plaintiffs' Motion for Final Approval of Class Action Settlement. Overall, the Settlement Administration is projected to cost an amount not to exceed $, all of which is to be borne by Defendant as part of the Settlement fund.

36. As of March 15, 2022, the Settlement Administrator reports having received nineteen (19) requests for exclusion, and zero (0) objections.

37. As of the date of filing, Class Counsel has not received any objections to the Settlement or to the request for fees, costs, and service awards.

38. In the opinion of the undersigned and other Class Counsel, the attorneys' fees, costs, and service awards requested are fair and reasonable, under the facts and circumstances of this case.

*   *   *   *   *   *   *   *   *   *   *   *   *

I declare under penalty of perjury of the laws of the State of Missouri and the United States that the foregoing is true and correct, and that this declaration was executed in Washington, D.C. on this 23rd day of March, 2021.

s/David K. Lietz
David K. Lietz (*admitted pro hac vice*)
MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC
5335 Wisconsin Avenue NW
Suite 440
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Attorney for Plaintiffs and the Class

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION
(*Electronically Filed*)

MILDRED BALDWIN and DOUGLAS DYRSSEN SR., On Behalf of Themselves and All Others Similarly Situated,	:	
Plaintiffs,	:	
v.	:	**Case No. 2:21-cv-04066-WJE**
NATIONAL WESTERN LIFE INSURANCE COMPANY,	:	
Defendant.	:	

DECLARATION OF J. GERARD STRANCH, IV IN SUPPORT OF PLAINTIFFS' MOTION FOR FEES, EXPENSES, AND SERVICE AWARDS

I, J. Gerard Stranch, IV, being competent to testify, make the following declaration:

1. I am currently managing partner of the law firm Branstetter, Stranch & Jennings, PLLC ("Branstetter"). I am one of the lead attorneys for Plaintiffs and have been appointed Class Counsel for the Settlement Class. I submit this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration, and could testify competently to them if called upon to do so.

2. Branstettter has more than sixty-five years of experience in complex and class action litigation in state and federal courts and has served as lead and class counsel on behalf of numerous certified statewide and nationwide plaintiff classes in courts across the country. Branstetter enjoys a national reputation of prominence in the complex litigation arena for its work in class actions, shareholder derivative claims, securities, ERISA, labor and employment, and other

complex cases, both at the trial and appellate levels. In the data breach context, Branstetter is currently involved in numerous lawsuits nationwide regarding phishing and data breach claims.

3. A few examples of our recent successes in a data breach context are below:

a. *McKenzie et al. v. Allconnect, Inc.,* U.S. District Court, Eastern District of Kentucky: lawsuit brought on behalf of consumers whose highly sensitive personally identifiable information was compromised as a result of a data breach. Achieved a settlement for, among other things, five (5) years of credit monitoring services, monetary payments of $100 to each settlement class member, and funds for claims of identity theft.

b. Slos et al. v. Select Health Network, Inc., St. Joseph Circuit/Superior Court, State of Indiana: lawsuit brought on behalf of consumers whose personal health information was compromised because of a data breach. Achieved a settlement for, among other things, three (3) years of credit monitoring and funds for claims of identity theft.

c. Jones et al. v. The Methodist Hospitals, Inc., Lake Circuit Court, State of Indiana: lawsuit brought on behalf of consumers whose personal information was compromised in a phishing attack.

4. In addition, Brantstetter has extensive experience in complex class action litigation in general. For example, I was appointed to the Plaintiffs' Steering Committee in the *In re: Volkswagen "Clean Diesel" Multi-District Litigation*, in which the district court recently approved settlements obligating *Volkswagen* to pay a minimum of $17 billion (including a buyback fund of over $10 billion to eligible class members). This settlement was reported as the largest auto scandal payout in U.S. history. Similarly, in *In re Wellbutrin XL Antitrust Litigation*, in its role as co-lead

counsel, Branstetter successfully petitioned for certification of a class of indirect purchasers for a brand and generic version of a pharmaceutical antidepressant, achieved a $12 million settlement for the that class, and received praise from the presiding district court judge for its work. The Firm served on the Plaintiffs' Executive Committee in *Dahl v. Bain Capital Partners, LLC*, a federal antitrust case challenging bid rigging and market allocation in the private equity/leveraged-buyout industry, which reached a $590.5 million settlement approximately two months before trial and was finally approved in 2015. I also currently serve on the Plaintiffs' Steering Committee in the *In re New England Compounding Pharmacy, Inc. Products Liability Litigation*, a mass-tort MDL proceeding stemming from the 2012 fungal meningitis catastrophe caused by tainted pharmaceuticals that resulted in the deaths of over 100 people and 700 fungal infections across the country. Although the compounding pharmacy ultimately filed for Chapter 11 bankruptcy protection, Branstetter (along with the rest of the Plaintiffs' Steering Committee) secured over $230 million for victims in settlements with the compounding pharmacy, its vendors, and its health-care facility customers. Branstetter also recently obtained final approval of a $1.6 million class settlement in a TCPA "junk fax" class action in *Davis Neurology, P.A. v. Dental Equities, LLC, et al.* (E.D. Ark.). Since the inception of this case, Branstetter has maintained, on a periodic basis, time and expenses. The information in this declaration regarding the time devoted to this lawsuit by Branstetter is taken from time billing entries prepared and maintained by Branstetter in the ordinary course of business. I reviewed these billing entries in connection with the preparation of this declaration to confirm both the accuracy of the entries as well as the necessity for, and reasonableness of, the time committed to the lawsuit. I believe that the time reflected in Branstetter's lodestar calculation was reasonable and necessary for the effective and efficient

prosecution and resolution of this lawsuit for the benefit of the Representative Plaintiff and the Class.

5. The Settlement Agreement, and the efforts of Class Counsel, created exceptional relief for the Settlement Class: it will make available $3,900,000 for monetary claims, attorneys' fees and costs, costs of settlement administration and Plaintiffs' service awards. Separate and apart from and in addition to the $3,900,000 made available, Defendant will pay for Aura Financial Shield credit monitoring and identity protection services for any Settlement Class Member who redeems the activation code already sent to him/her, and will implement extensive business practices changes and substantial data security enhancements designed to safeguard the PII of Settlement Class Members.

6. In my experience, a settlement in this range is likely to be viewed favorably by the class members who will appreciate receiving compensation from this lawsuit without having to expend any resources of their own.

7. It is my belief, based upon my knowledge and experience that the Settlement represents an excellent result for the classes in this litigation and was obtained against a well-funded defense by the Defendant, which was represented by an international law firm that is in the top 25 of the 2021 Am Law 100.

8. This result is even more remarkable because, although the Class Counsel and Plaintiffs believe in the merits of their claims, this litigation was inherently risky and complex. The claims involve the intricacies of data breach litigation (a fast-developing area in the law), and the Plaintiffs faced risks as each stage of litigation. Aside from the potential that either side will lose at trial, Plaintiffs would likely need to counter a motion for summary judgment, and both gain and maintain certification of the class. Even if successful with their class certification argument,

Plaintiffs would face a near inevitable interlocutory appeal attempt. Without a certified class, no class member would likely receive any recovery. Summary judgment, trial, and appeal present significant risks in any case.

9. In this case, all Settlement Class Members will be automatically eligible to activate one year of Aura Financial Shield credit monitoring and identity theft protection services whether or not they are eligible for a cash recovery. This is an automatic benefit, which all Settlement Class Members will receive without having to file a formal claim for this benefit.

10. The credit monitoring product offered here is also offered to persons on a retail basis. See https://www.aura.com/pricing. The retail value of the Aura Financial Shield Product offered to Settlement Class Members is approximately $135 per year ($12 per month, with the first 2 weeks free) to each Settlement Class Member.

11. Thus, the potential value of this automatic benefit to the Settlement Class is astronomical – over $110 million dollars (because that is what it would cost for each Class Member to go out and purchase these services on the open market - $135 times 818,558). Even if only 2% of this class activated this benefit, this still provides over $2.2 million (16,371 times $135) in real benefits to Class Members.

12. Courts recognize the economic benefit of the retail value of credit monitoring. *See In re Anthem, Inc. Data Breach Litig*., 327 F.R.D. 299, 323 (N.D. Cal. 2018) ("Obviously, the credit monitoring services themselves confer an economic benefit, as they can retail for $9 to $20 a month.").

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the settlement could also be valued at $6.100,000, if the credit monitoring was valued at $2.2 million as shown above.

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19. The service awards are meant to compensate Plaintiffs for their efforts which include maintaining contact with counsel, assisting in the investigation of the case, producing relevant documents, reviewing the Complaint, remaining available for consultation throughout mediation, for answering counsel's many questions, and for reviewing the Settlement Agreement.

20. My Firm took on this case on a purely contingent basis. As such, the firm assumed a significant risk or nonpayment or underpayment.

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

22. Litigation is inherently unpredictable and therefore risky. Here, that risk was very real, due to the rapidly evolving nature of case law pertaining to data breach litigation.

23. Class Counsels' fees were not guaranteed in this matter—the retainer agreement counsel had with Plaintiffs did not provide for fees apart from those earned on a contingent basis, and, in the case of class settlement, approved by the court.

24. Due to the early stage of litigation, costs incurred by Plaintiffs are low. My current reimbursable costs incurred are $6,170.71, and include fees incurred for filing and pro hac vice admission fees and mediation costs. These costs are extremely reasonable, and were necessary for the litigation.

25. In the opinion of the undersigned and other Class Counsel, the attorneys' fees, costs, and service awards requested are fair and reasonable, under the facts and circumstances of this case.

* * * * * * * * * * * * *

I declare under penalty of perjury of the laws of the State of Missouri and the United States that the foregoing is true and correct, and that this declaration was executed in Nashville, TN, on this 22nd day of March, 2021.

/s/ J. Gerard Stranch, IV
J. Gerard Stranch, IV (BPR: 23045)
**BRANSTETTER, STRANCH
& JENNINGS, PLLC**
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