

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

SAMUEL BINGAMAN, WILLIAM)	
SWIGERT, SHANE WILSON, and)	
MARIA RUSKIEWICZ, individually)	Case No. CIV-23-130-SM
and on behalf of all similarly situated)	
persons,)	Consolidated with:
)	Case No. CIV-23-134-SLP
Plaintiffs,)	
)	
and)	Magistrate Judge Suzanne Mitchell
)	
ROSALIE DUPUS, individually and)	
on behalf of all similarly situated)	
persons,)	
)	
Consolidated Plaintiff,)	
)	
v.)	
)	
AVEM HEALTH PARTNERS, INC.,)	
)	
Defendant.)	

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' UNOPPOSED MOTION FOR AWARD OF
ATTORNEY'S FEES, REIMBURSEMENT OF LITIGATION
EXPENSES, AND SERVICE AWARDS TO PLAINTIFFS**

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I. INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 23(h) and 54(d) and this Court’s January 26, 2024 Order Granting Preliminary Approval of Class Action Settlement (ECF No. 57), Plaintiffs Samuel Bingaman, William Swigert, Shane Wilson, Rosalie Dupus, and Maria Ruskiewicz (collectively, “Plaintiffs” or “Class Representatives”) respectfully submit this Memorandum of Law in support of their request for: (i) approval of an award of attorneys’ fees to Class Counsel in the amount of \$435,000.00; (ii) approval of reimbursement of expenses to Class Counsel in the amount of \$13,788.58; and (iii) approval of service awards of \$1,500.00 to each Class Representative (totaling \$7,500.00). The Settlement provides immediate and significant benefits to the Settlement Class while avoiding the delay and uncertainty of protracted litigation.¹ The Settlement represents an outstanding result for the Settlement Class, particularly in light of the complex nature of the Action and the uncertainty of success.

II. FACTUAL AND PROCEDURAL BACKGROUND²

A. The Data Security Incident.

¹ Unless otherwise stated, all capitalized terms shall have the definitions set forth in the Settlement Agreement and Release (“Settlement Agreement” or “Settlement”) attached as Exhibit A to the Declaration of William B. Federman in Support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Settlement (ECF No. 54-1). Citations to the Settlement Agreement are abbreviated herein as “SA, ¶ ____.”

² In the interest of brevity, Plaintiffs briefly recount the factual and procedural history. Please see Plaintiffs’ Memorandum of Law in Support of Plaintiffs’ Unopposed Motion for Final Approval of Class Action Settlement (filed concurrently herewith) and Plaintiffs’ Memorandum of Law in Support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement (ECF No. 53) for an in depth factual and procedural background.

On May 16, 2022, Defendant Avem Health Partners, Inc. (“Avem” or “Defendant”) learned of a data security incident that may have resulted in the unauthorized access of Plaintiffs’ and the Class’s (approximately 271,303 individuals) personally identifiable information (“PII”) and protected health information (“PHI”) (hereinafter referred to as the “Data Security Incident”). *See* Am. Consolidated Class Action Compl. (“Compl.”) ¶ 21, ECF No. 38. The types of information potentially exposed included names, dates of birth, Social Security numbers, driver’s license numbers, health insurance information, and/or diagnosis and treatment information. *Id.* ¶ 22. Defendant sent notice of the Data Security Incident³ via mail to Plaintiffs and the Settlement Class on or about December 12, 2022, informing them that their PII/PHI may be at risk. *Id.* ¶ 23.

B. The Litigation, Mediation, and Settlement.

After announcement of the Data Security Incident, multiple lawsuits were filed, which were removed and consolidated before this Court. *See* ECF Nos. 1, 34. William B. Federman of Federman & Sherwood was appointed as Interim Class Counsel and Interim Liaison Class Counsel (hereinafter referred to as “Class Counsel” or “Settlement Class Counsel”) for Plaintiffs and the Class. *See* ECF No. 37. On March 31, 2023, Plaintiffs filed their Amended Consolidated Class Action Complaint (ECF No. 38), asserting claims of (i) negligence; (ii) negligence *per se*; (iii) invasion of privacy; (iv) breach of implied contract; (v) unjust enrichment; and (vi) breach of fiduciary duty. The Amended Consolidated Complaint was the result of considerable work from Class Counsel, including: (i) detailed

conversations with and reviews of documents from Plaintiffs; (ii) research into publicly available information about the Data Security Incident; and (iii) research into industry-standard data security practices and standards. *See* Decl. of William B. Federman in Support of Plaintiffs’ Plaintiffs’ Unopposed Motion for Award of Attorneys’ Fees, Reimbursement Of Litigation Expenses, and Service Awards to Plaintiffs (“Federman Decl.”), ¶ 5.⁴

Following service of the Amended Consolidated Complaint, the Parties communicated concerning the allegations and case schedule. *Id.* ¶ 6. Rather than engage in protracted litigation, counsel for the Parties opened a dialogue and began considering possible options for reaching an early resolution of the case. *Id.* In furtherance of this objective, the Parties exchanged informal discovery, exchanged detailed pre-mediation materials, and scheduled a mediation session with experienced mediator, Bennett G. Picker of Stradley Ronon (the “Mediator”). *Id.*

Although the Parties did not resolve the case during the mediation session, significant progress was made. *Id.* ¶ 7. After the conclusion of the mediation session, the Mediator provided a mediator’s proposal to the Parties, which was considered by Plaintiffs and Defendant for approximately one week. *Id.* After further discussions with the Mediator, the Parties accepted the mediator’s proposal to settle the Action for a non-reversionary common fund of \$1,450,000.00, subject to executing formal settlement documents and the Court’s approval of the Settlement. *Id.* Thereafter, Class Counsel spent extensive time

⁴ Filed concurrently herewith.

negotiating the specific settlement terms, soliciting bids and selecting a proposed settlement administrator, establishing a detailed notice program, drafting a settlement agreement (including exhibits, proposed notices, a claim form, and proposed order), and drafting a motion for preliminary approval of the Settlement. *Id.* On August 18, 2023, the Settlement Agreement was finalized and submitted to the Court, along with Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. *Id.* ¶ 8; ECF Nos. 52–54.

On January 26, 2024, the Court entered an Order preliminarily approving the Settlement. ECF No. 57. The Court found, subject to the Final Approval Hearing, that the Settlement reached is fair, reasonable, and adequate. *Id.*

C. The Settlement Benefits

Defendant has made a generous non-reversionary Settlement Fund of \$1,450,000.00 available to pay for the costs and expenses of this settlement including the following substantial benefits for Settlement Class Members: (i) reimbursement up to \$7,000.00 for Documented Out-Of-Pocket Losses; (ii) reimbursement of Lost Time at a rate of \$25.00 per hour (a maximum of 5 hours); and (iii) 3 years of credit monitoring and identity theft protection services. *See* SA, ¶¶ 52, 54, 57. A claim for Lost Time may be combined with a claim for reimbursement for Documented Out-of-Pocket Losses, but a Settlement Class Member will not be eligible to receive more than the \$7,000.00—the individual cap. *Id.* ¶ 54. Additionally, and in lieu of receiving a reimbursement for Documented Out-Of-Pocket Losses, reimbursement for Lost Time, and/or Credit Monitoring and Identity Theft Protection Services, all Settlement Class Members may elect to submit a claim for a one-

time Alternative Cash Payment of up to \$100.00. *Id.* ¶ 58. This is in addition to the meaningful remediation measures Defendant is undertaking at its own expense, completely separate and apart from the \$1,450,000.00 made available to the Class. *See id.* ¶ 69.

As compensation for the substantial benefit conferred upon the Settlement Class, Settlement Class Counsel request this Court award attorneys' fees in the amount of \$435,000.00. This request represents a mere 30.00% of the monetary benefits the Settlement provides to the Settlement Class, and an even lesser percentage of the total benefits, once Defendant's remedial measures are accounted for. Class Counsel also seek \$13,788.58 in reasonable litigation expenses as well as Service Awards of \$1,500.00 for each of the Class Representatives (\$7,500.00 in total). SA, ¶¶ 91, 93. These requests are contemplated by the Settlement Agreement and Class Counsel apprised the Court of these requests in their Motion for Preliminary Approval filed August 18, 2023. *Id.*; ECF No. 53. This was also clearly delineated in the notice materials sent to the Settlement Class. *See* ECF Nos. 54-2, 54-4, 54-5.

The relief requested herein should be granted by the Court at the scheduled Final Approval Hearing on May 10, 2024, in conjunction with Plaintiffs' Motion for Final Approval of the Settlement.

III. ARGUMENT

A. Legal Standard.

"When state law governs whether to award attorney fees...state law also governs how to calculate the amount." *Chieftan Royalty Co. v. Enervest Energy Inst. Fund XIII-A, L.P.*, 888 F.3d 455, 461 (10th Cir. 2017). Oklahoma Statute 12 O.S. § 2023(G) governs the

award of attorneys' fees in a class action lawsuit such as this. In determining whether the requested fee is reasonable, the Court must consider the following factors:

(1) time and labor required, (2) the novelty and difficulty of the questions presented by the litigation, (3) the skill required to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount in controversy and the results obtained, (9) the experience, reputation and ability of the attorney, (10) whether or not the case is an undesirable case, (11) the nature and length of the professional relationship with the client, (12) awards in similar causes, and (13) the risk of recovery in the litigation.”

12 O.S. § 2023(G).⁵

This Court has noted that “[t]he preferred method of determining a reasonable attorney fee award in common fund cases is the percentage of fund analysis.” *McNeely v. Nat'l Mobile Health Care, LLC*, No. CIV-07-933-M, 2008 WL 4816510, at *14 (W.D. Okla. Oct. 27, 2008); *In re Anadarko Basin Oil & Gas Lease Antitrust Litig.*, 2019 WL 1867446, at *1 (“The percentage-of-recovery method of calculating attorneys' fee awards

⁵ In an unpublished decision—*In re Anadarko Basin Oil & Gas Lease Antitrust Litig.*, No. CIV-16-209-HE, 2019 WL 1867446 (W.D. Okla. Apr. 25, 2019)—the Court utilized the “Johnson Factors” to determine the reasonableness of the requested attorney’s fees award in a class action lawsuit. *See also McNeely v. Nat'l Mobile Health Care, LLC*, No. CIV-07-933-M, 2008 WL 4816510, at *14–16 (W.D. Okla. Oct. 27, 2008). The *Johnson* Factors are: “(1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee ...; (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.* at *1. The *Johnson* Factors are nearly identical to 12 O.S. § 2023(G). Thus, case law discussing the *Johnson* Factors should be considered instructive.

is appropriate in this action.”); *In re Sandridge Energy, Inc.*, 2015 WL 11921422, at *2 (W.D. Okla. Dec. 22, 2015), *aff’d sub nom. In re SandRidge Energy, Inc.*, 875 F.3d 1297 (10th Cir. 2017).

B. The 12 O.S. § 2023(G) Factors Support Approval of Class Counsel’s Request for Attorney’s Fees.

1. Factor 1: The Time and Labor Expended Merits Approval of the Requested Fee.

Class Counsel devoted substantial time, labor, and resources to achieve the Settlement. Since inception of the case, Class Counsel have documented 465.11 hours spent to date litigating this case, at a value of \$288,294.55. when multiplied by counsel’s customary rates. Federman Decl., ¶ 19. This time does not include the time spent preparing for the final fairness hearing, supervising the claims process, or responding to Class Member inquiries about their awards, all of which will require Class Counsel to accrue additional time and fees. *Id.* Although Class Counsel have consistently sought to keep costs and fees to a minimum, the Action required a significant amount of work and time and was levied against a company with a deep pool of resources and which was represented by a national law firm with extensive data breach litigation experience. *Id.* ¶ 14. Class Counsels’ efforts in this matter included: fully investigating the facts and legal claims; preparing the complaints; requesting, obtaining, and reviewing numerous documents from Avem regarding the Data Security Incident, Avem’s remediation efforts in response to the Incident, and Avem’s insurance coverage, drafting a comprehensive mediation statement assessing the legal and factual strengths and weaknesses of the case; participating in mediation and weeks long negotiations to reach and finalize the Settlement Agreement,

developing the notice program and distribution plans, including soliciting bids from settlement administrators; obtaining preliminary approval; and working with the Settlement Administrator to implement the notice program. *Id.* ¶ 23. For these reasons, the time and labor required strongly support a finding that the requested fee is reasonable.

2. Factors 5 and 12: The Requested Fee Falls Within the Range of Attorneys' Fees Granted in Similar Cases.

Class Counsel seek \$435,00.00 in attorneys' fees and \$13,788.58 in expenses. As mentioned above, Class counsel will incur additional time and necessary expenses through the conclusion of this lawsuit. Plaintiffs' request of \$435,00.00 in attorneys' fees only amounts to approximately 30.00% of the Settlement Fund (not including the remedial measures Defendant has implemented). Federal District courts sitting in the Tenth Circuit regularly hold that the customary fee award in a common fund settlement is approximately one-third (1/3) of the economic benefit bestowed upon the class. *See Cimarron Pipeline Const., Inc. v. Nat'l Council On Comp. Ins.*, 1993 U.S. Dist. LEXIS 19969 at *2 (W.D. Okla. June 8, 1993) ("Fees in the range of 30–40% of any amount recovered are common in complex and other cases taken on a contingent fee basis."); *In re Anadarko Basin Oil & Gas Lease Antitrust Litig.*, 2019 WL 1867446, at *2 (awarding one-third of the settlement fund); *Lewis v. Wal-Mart Stores, Inc.*, No. 02-CV-0944 CVE FHM, 2006 WL 3505851, at *1 (N.D. Okla. Dec. 4, 2006) (A "contingency fee of one-third is relatively standard in lawsuits that settle before trial."); *CompSource Okla. v. BNY Mellon, N.A.*, 2012 WL 6864701 (E.D. Okla. Oct. 25, 2012) ("25% is on the low end of the range of acceptable fee awards in common fund cases, which ranges between 22% and 37%, and more in some

cases”); *Vaszlavik v. Storage Tech. Corp.*, No. 95–B–2525, 2000 WL 1268824 (D. Colo. Mar. 9, 2000) (“A 30% common fund fee award is in the middle of the ordinary 20%–50% range and is presumptively reasonable.”).

Here, Plaintiffs’ request of \$435,000.00 is well below the “customary fee” of one-third (1/3) of the settlement and should therefore be viewed by this Court as presumptively reasonable. Accordingly, Plaintiffs’ fee request should be granted.

3. Factor 8: The Amount in Controversy and the Results Obtained Support Approval of Class Counsel’s Requested Fee.

As stated in Section II(C) *supra*, the Settlement provides substantial benefits to Settlement Class Members. Each Settlement Class Member is eligible to submit a claim for: (i) reimbursement up to \$7,000.00 for Documented Out-Of-Pocket Losses; (ii) reimbursement of Lost Time at a rate of \$25.00 per hour (a maximum of 5 hours); and (iii) 3 years of credit monitoring and identity theft protection services. *See* SA, ¶¶ 52, 54, 57. A claim for Lost Time may be combined with a claim for reimbursement for Documented Out-of-Pocket Losses, but a Settlement Class Member will not be eligible to receive more than the Seven Thousand Dollars and Zero Cents (\$7,000.00)—the individual cap. *Id.* ¶ 54. Additionally, in lieu of receiving a reimbursement for Documented Out-Of-Pocket Losses, reimbursement for Lost Time, and/or Credit Monitoring and Identity Theft Protection Services, all Settlement Class Members may elect to submit a claim for a one-time Alternative Cash Payment of up to \$100.00. *Id.* ¶ 58. This is in addition to the meaningful remediation measures Defendant is undertaking at its own expense, completely separate and apart from the \$1,450,000.00 made available to the Class. *See id.* ¶ 69.

These are real, significant benefits that without the efforts of Plaintiffs and Class Counsel, and their willingness to take on the attendant risks of litigation, would not have been made available to Settlement Class Members. As such, this factors weighs in favor of approval of the requested fee.

4. Factors 3 and 9: The skill required to perform the legal services properly and the experience, reputation, and ability of Class Counsel Support the Requested Fee.

The skill required to litigate data breach cases is great, in part due to the quickly evolving nature of data breach and privacy law. Class Counsel highly experienced in this area of practice and have a well-respected reputation in the data privacy litigation sector. *See* Federman Decl., ¶ 16, Ex. 1. Settlement Class Counsel worked hard on behalf of the Settlement Class to obtain information from Avem regarding the Data Security Incident and utilized their experience and the knowledge gained from other data breach class actions to negotiate a favorable Settlement. *Id.* ¶ 16. The Settlement addresses the type of injury and repercussions sustained by Settlement Class Members in the wake of the Data Security Incident and offers significant compensation to make each Settlement Class Member “whole.” Thus, this factor weighs in favor of Class Counsel’s fee request.

5. Factor 7: The Time Limitations Imposed by the Circumstances.

Plaintiffs alleged that due to the Data Security Incident they were at a certainly impending risk of identity theft and fraud. Time was of the essence when securing relief and benefits for the Settlement Class. Class Counsel's efficient work has allowed Settlement Class members to take expeditiously advantage of reimbursements and credit monitoring that otherwise may not be available to Settlement Class Members until years

after the litigation is resolved (assuming the litigation is successful). These benefits will help mitigate future harms. Thus, this factor supports the fee request.

6. Factor 11: The Nature and Length of the Professional Relationship with the Clients Supports Approval.

This factor also weighs in favor of the fee award. Class Counsel have been in communication with their clients since before this action was commenced and remain in close contact with them regarding details of this settlement and its progression. *See id.* ¶ 27. Plaintiffs have been actively involved in this litigation and have approved of and support the Settlement. *Id.* Accordingly this factor weighs in favor of the agreed upon fee.

7. Factors 2, 4, 6, 10, 13: The Novelty and Difficulty of the Questions Presented by the Case, the Undesirability of the Case, the Contingent Nature of the Case, the Risks of Recovery in the Litigation, and the Preclusion of Other Employment by Settlement Class Counsel All Weigh in Favor of the Requested Fee.

This case involved complex issues of the novel and evolving area of data breach litigation. *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.”). Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data breach cases like this one face substantial hurdles—even just to make it past the pleading stage. *See, e.g., Hammond v. The Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060(RMB)(RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Plaintiffs faced the risk of obtaining class certification. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying class

certification in data breach class action). Though Plaintiffs strongly believe in the merits of their claims, Plaintiffs and Class Counsel acknowledge that proving causation and damages in the emerging area of data breach cases can be difficult, and is by no means guaranteed. *See, e.g., Southern Independent Bank v. Fred's, Inc.*, No. 2:15-CV-799-WKW, 2019 WL 1179396, at *8 (M.D. Ala. Mar. 13, 2019) (holding under *Daubert* motion that causation was not met for class certification purposes in data security breach case); *In re TJX Cos. Sec. Breach Litig.*, 246 F.R.D. 389, 398 (D. Mass. Nov. 29, 2007) (“[T]he need for individualized damages decisions does not ordinarily defeat predominance where there are ... disputed common issues as to liability.”) (quoting *Tardiff v. Knox Co.*, 365 F.3d 1, 6 (1st Cir. 2004)). Continued litigation further would have required formal discovery, depositions, expert reports, maintaining class certification throughout trial, and summary judgment, as well as possible appeals (interlocutory and/or after the merits), which would require additional rounds of briefing and the possibility of no recovery at all. The Settlement guarantees relief to the Settlement Class whereas further protracted litigation would not.

Even in light of these risks, Settlement Class Counsel took this case on a purely contingent basis with the understanding that they would only be compensated if there was a recovery for Plaintiffs, and court approval of the requested fees. *See* Federman Decl., ¶ 25. As such, neither compensation for their time or reimbursement of their costs were guaranteed to Counsel in this case. *Id.* Settlement Class Counsel assumed significant risk of nonpayment or underpayment of attorneys’ fees. *Id.* This litigation began in 2022 and has required the devotion of substantial time, totaling 465.11 hours from Class Counsel to

date. *Id.* ¶ 19. A case of this size and complexity required a significant commitment of time and resources from Class Counsel. *See id.* ¶¶ 19–25. This time could have been devoted to other matters. Tenth Circuit courts “have consistently found that this type of fee arrangement, under which counsel runs a significant risk of nonpayment, weighs in favor of the reasonableness of a requested fee award. *Blanco v. Xtreme Drilling & Coil Servs., Inc.*, No. 16-CV-00249-PAB-SKC, 2020 WL 4041456, at *5–6 (D. Colo. July 17, 2020) (approving requested 38% of settlement amount where attorneys worked on a contingent basis) (internal citations omitted); *see Shaw v. Interthinx*, No. 13-cv-01229-REB-NYW, 2015 WL 1867861, at *8 (D. Colo. Apr. 22, 2015) (awarding \$2 million in attorneys’ fees, representing 33.33% of the maximum value of the common fund). This weighs in favor of approval of this motion.

C. Class Counsel’s Lodestar Confirms the Reasonableness of the Fees Requested.

A lodestar cross check of the amount of attorneys’ fees and expenses requested in this matter under the lodestar method supports the requested award.

1. Class Counsel’s Lodestar.

In total, Class Counsel spent 465.11 hours on the litigation to date. Federman Decl., ¶ 19. Multiplied by counsel’s customary and usual rates, these hours are worth \$288,294.55 in lodestar. *Id.* A summary of this information, broken down by law firm, is as follows:

LODESTAR

Firm	Hours	Hourly Rate Range	Lodestar
Federman & Sherwood	325.10	\$300.00–\$900.00	\$180,870.00

Milberg Coleman Bryson Phillips Grossman, PLLC	62.00	\$208.00–\$1,057.00	\$53,814.00
Turke & Strauss, LLP	30.60	\$150.00–\$700.00	\$15,665.00
Lowey Dannenberg, P.C.	40.70	\$395.00–\$1,175.00	\$32,972.50
Shub & Johns LLC	6.71	\$295.00–\$800.00	\$4,973.05
	TOTAL: 465.11		TOTAL: \$288,294.55

Measured against the fee and expense reimbursement request of \$435,000.00, the lodestar represents a “positive” multiplier of approximately 1.51, which is extremely modest when compared with multipliers approved in other complex cases. *See, e.g., Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 1995) (upholding an award of 25% of the fund that resulted in a multiplier of approximately 5.2, citing precedent for awards “in this range or higher”); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 & Appendix (9th Cir. 2002) (approving a multiplier of 3.65 and citing multipliers up to 19.6); *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (“In recent years multipliers of between 3 and 4.5 have become common.”) (internal citations omitted); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (finding that “a modest multiplier of 4.65 is fair and reasonable”).

2. Class Counsel's Hours and Rates are Reasonable.

Class Counsel utilized their firms' standard billing practices and contemporary recordkeeping to track and record their reasonable hours. Federman Decl., ¶ 21. Prior to submitting Class Counsel's hour summary to the Court, Class Counsel reviewed all the time entries billed to this matter and exercised billing judgment to exclude hours that, in Class Counsel's professional judgment, were excessive, duplicative, or otherwise could not be billed to a fee-paying client. *Id.* ¶ 22.

The hours reflected in the summary are attributable to the following broader tasks, all of which were necessary to initiate, prosecute, and resolve the litigation: interviewing plaintiffs, fully investigating the facts and legal claims; preparing the complaints; requesting, obtaining, and reviewing numerous documents from Avem regarding the Data Security Incident and how it affected Class Members, Avem's remediation efforts, and Avem's insurance coverage; drafting a comprehensive mediation statement assessing the legal and factual strengths and weaknesses of the case; participating in the mediation and a weeks-long negotiation process to develop the proposed settlement agreement; developing and negotiating the notice program and distribution plans, including soliciting bids from multiple settlement administrators; obtaining preliminary approval; and working with the Settlement Administrator to implement the notice plan and claims process; and advising Class Members throughout this Action. *Id.* ¶ 23.

The rates utilized by Class Counsel in calculating their lodestar (which are their customary and usual rates for this type of litigation) are also reasonable in the context of this litigation. When assessing the reasonableness of an attorney's rate, "the district court

should base its hourly rate award on what the evidence shows the market commands for ... analogous litigation.” *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (describing relevant comparison as the rates “prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation”) (quoting *Blum*, 465 U.S. at 896 n.11); *Malloy v. Monahan*, 73 F.3d 1012, 1018 (10th Cir. 1996) (Court is to refer to the “the prevailing market rate in the relevant community.”).

Here, Class Counsel are skilled class action attorneys with extensive prior experience in data breach matters. Federman Decl., ¶ 16, Ex. 1. Their rates are reasonable whether measured against the Tenth Circuit and national markets for complex class actions or the national market for complex class actions in federal court. *See, e.g., In re SandRidge Energy, Inc.*, 875 F.3d 1297 (10th Cir. 2017) (approving rates for partners in national complex litigation firms, ranging from \$850/hour to \$1,150/hour); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *16 (N.D. Cal. Aug. 17, 2018) (approving \$970 billing rates for partners in data breach class action); *see also In re Samsung*, No. 17-ml-2792-D (W.D. Okla., Jun. 11, 2020) (Dkt. No. 256), slip op. at 15 (finding that Federman & Sherwood’s billing rates “are reasonable” for the “geographic area[] in comparable cases, and Class Counsel’s affidavits support the request’s reasonableness”) *aff’d*, 2021 WL 1825685, at *12 (10th Cir. May 7, 2021); *McPherson v. American Bank Systems*, No. 5:20-cv-01307 (W.D. Okla.) (approving Federman & Sherwood’s billing rates); *Doughty v. Centralsquare Technologies, LLC, et al.*, No. CIV-20-500 (W.D. Okla.) (ECF No. 137) (same); *Dennis, et al. v. Good Deal*

Charlie, Inc., et al., No. 4:20-cv-00295) (N.D. Okla.) (ECF No. 263) (same); *In re: GE/CBPS Data Breach Litigation*, No. 1:20-cv-02903 (KPF) (S.D.N.Y. 3/28/2023) (Milberg partners Klinger and Lietz's hourly rates approved in data breach case); *Pagan v. Faneuil, Inc.*, Case No. 3:22-cv-297 (E.D. Virg., Feb. 17, 2023) (Milberg hourly rates approved after lengthy oral argument concerning reasonable hourly rates for national data breach practice).

In sum, the hourly rates submitted by Class Counsel are reasonable and fit well within the customary rates charged by comparable firms for similar services. As a result, the lodestar method strongly supports the reasonableness of the requested fee.

IV. CLASS COUNSEL'S EXPENSES MERIT REIMBURSEMENT

"As with attorney fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred...in addition to the attorney fee percentage." *Cecil v. BP Am. Prod. Co.*, No. 16- CV-00410-KEW, 2018 WL 8367957, at *9 (E.D. Okla. Nov. 19, 2018) (quotation marks and citation omitted); *Vaszlavik*, 2000 WL 1268824, at *4 (internal citation omitted).

Class Counsel's costs and litigation expenses total \$13,788.58. Federman Decl., ¶ 19. As explained in Class Counsel's supporting declaration, the reimbursement requested is for unavoidable expenses such as filing fees, copy costs, the mediator fee, and research fees, which all inured to the benefit of the Class. *Id.* ¶ 20. The total costs and expenses are less than 1.0% of the total Settlement Fund. These expenses are typical of litigation, reasonable in amount, and necessary for advancement of the action to the benefit of the settlement class. For these reasons, they should be approved.

V. THE REQUESTED SERVICE AWARDS ARE REASONABLE

Incentive awards are typically given where a common fund has been created for the benefit of the entire class to recognize named plaintiffs for the services they provided during the course of the class action litigation. *Chieftain Royalty Co.*, 888 F.3d at 464–66. The requested Service Award in the amount of \$1,500.00 to each Plaintiff, for a total of \$7,500.00, is well within the range found reasonable by courts in similar cases. *See In re Anadarko Basin Oil & Gas Lease Antitrust Litig.*, 2019 WL 1867446, at *3 (awarding incentive awards of \$10,000 per plaintiff); *Fankhouser v. XTO Energy, Inc.*, 2012 WL 4867715, at *3 (W.D. Okla. Oct. 12, 2012) (granting incentive awards up to \$40,000); *McNeely*, 2008 WL 4816510, at *16 (preliminarily approving \$15,000 incentive award); *Childs v. Unified Life Ins. Co.*, No. 10-CV-23-PJC, 2011 WL 6016486, at *16 (N.D. Okla. Dec. 2, 2011) (preliminarily approving incentive award of \$10,000); *Key v. Butch's Rat Hole & Anchor Serv., Inc.*, No. CIV 17- 1171 RB/KRS, 2022 WL 457915, at *1 (D.N.M. Feb. 15, 2022) (the incentive award of \$7,500 per named plaintiff is fair, reasonable, and adequate); *Nieberding v. Barrette Outdoor Living, Inc.*, 129 F. Supp. 3d 1236, 1252 (D. Kan. 2015) (approval of \$3,500 to the representative plaintiff as an incentive award).

Here, the excellent result in this Action could not have been achieved without the substantial efforts of Plaintiffs. Among other things, the Class Representatives answered detailed questionnaires and provided essential information to Class Counsel; collected documents and other evidence that supported the claims alleged in this complaints; agreed to face invasive and time consuming discovery, including depositions, if necessary; reviewed pleadings and coordinated with Class Counsel as to the status of, and strategy for,

the Action; conferred multiple times with Class Counsel about the settlement negotiations and provided meaningful input about what potential benefits were most important to them; and considered and approved the settlement terms on behalf of the Settlement Class. Federman Decl., ¶ 27. Plaintiffs devoted significant time and effort to the Action, and because of their efforts, a substantial benefit was conferred to the Settlement Class. *Id.*

Accordingly, and in recognition of the substantial benefit they conferred on the Settlement Class and their efforts generally, modest Service Awards of \$1,500.00 to each Plaintiff are reasonable and should be approved.

VI. CONCLUSION

For the reasons above, Plaintiffs respectfully request that this Court grant their motion (in conjunction with final approval of the Settlement) and enter Plaintiffs' proposed order awarding \$435,000 in attorney's fees, reimbursement of expenses in the amount of \$13,788.58 and approving Service Awards of \$1,500.00 to each Class Representative.

Date: April 25, 2024

Respectfully submitted,

/s/: William B. Federman

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2024, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using CM/ECF. Copies of the foregoing document will be served upon interested counsel via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ William B. Federman
William B. Federman