

CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

WILLIAM BOYKIN AND SALLY,  
ROBBINS, on behalf of themselves and  
all others similarly situated,

DOCKET NO.: 20-0615-BC

Plaintiffs,

v.

TENNESSEE ORTHOPAEDIC  
ALLIANCE, P.A.,

Defendant.

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION  
FOR ATTORNEYS' FEES, COSTS AND EXPENSES AND  
SERVICE AWARDS TO THE NAMED CLASS REPRESENTATIVES**

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## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION</b>	<b>5</b>
	<b>A. The Case</b>	<b>5</b>
	<b>B. The Motion for Fees, Costs and Service Awards</b>	<b>6</b>
	<b>C. The Settlement</b>	<b>8</b>
<b>II.</b>	<b>LEGAL ARGUMENT</b>	<b>9</b>
	<b>A. Tenn. R. Civ. P. Rule 23.05 Allows Agreements on Attorneys' Fees in Settlements</b>	<b>9</b>
	<b>B. An Agreed Upon Fee is Preferred and Entitled to Deference</b>	<b>10</b>
	<b>C. Tennessee Rules and Caselaw Elements Applied to the Motion <i>Sub Judice</i></b>	<b>13</b>
	<b>D. The Requested Fee Amount is Reasonable</b>	<b>29</b>
<b>III.</b>	<b>NAMED PLAINTIFFS ARE ENTITLED TO SERVICE AWARDS</b>	<b>29</b>
<b>IV.</b>	<b>CONCLUSION</b>	<b>30</b>

**TABLE OF AUTHORITIES**

**Cases**

*Anderson v. Trans Union, LLC*, Case No. 3:16-cv-00558-MHL (E.D. Va.)..... 21

*Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988)..... 25

*Brown v. Experian Information Solutions, Inc.*, No. 3:16-cv-00670-MHL (E.D. Va.)..... 21

*Calixte, Hurling et al v. Dave, Inc.*; U.S. District Court, Central District of California, Western Division, Case No. 2:20-cv-07704..... 23

*Camp v. Progressive Corp.*, No. Civ. A. 03-2507, 2004 WL 2149079, at \*8 (E.D. La. Sept. 23, 2004)..... 29

*Carrabba v. Randalls Food Markets, Inc.*, 191 F. Supp.2d 815,835 (N.D. Tex. 2002)..... 29

*Cassell v. Vanderbilt University*, Case No. 3:16-CV-02086-WDC..... 19

*Clark v. Experian Information Solutions, Inc.* No. 3:16-cv-00032-MHL (E.D. Va.)..... 21

*Clark v. Trans Union, LLC*, Case No. 2:15-cv-3:15-cv-00391-MHL (E.D. Va.)..... 21

*Cleveland v. J.H. Portfolio Recovery*, Case No. 2:19-cv-00286-B (S.D. Ala. Nov. 24, 2020)... 21, 24

*Connors v. Connors*, 594 S.W.2d 672, 676-77 (Tenn. 1980)..... 13

*Dearing v. Magellan Health, Inc.*, Superior Court of Arizona for Maricopa County, Case No. CV2020-013648..... 23

*Decker v. Transworlds Systems, Inc.*, 2009 WL 2916819 ..... 20

*Eberbach v. Eberbach*, 535 S.W.3d 467, 479 (Tenn. 2017)..... 13

*Finerman, et al. v. Marriott Ownership Resorts, Inc. and International Cruise & Excursion Gallery*, Case No. 3:14-cv-1154 (M.D. Fla. August 15, 2018)..... 20

*Fuller v. Avis/Budget Rental Car*, No. 2:15-cv-03856-KM-MAH (D. N.J. Dec. 15, 2017) ..... 21

*Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2<sup>nd</sup> Cir. 2000) ..... 11

*Griffey v. Magellan Health, Inc.*, U.S. District Court, District of Arizona, Case No. 2:20-cv-001282-SPL..... 23

*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9<sup>th</sup> Cir. 1998) ..... 12

*Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ..... 10, 11

*Heritage Bank USA, Inc. v. Johnson*, 3:15-CV-0696, 2016 WL 427833 ..... 19

*Hicks v. City of Tuscaloosa*, 2016 WL 7029827 ..... 20

*Hobson v. First State Bank*, 801 S.W.2d 807, 813 (Tenn. App. 1990)..... 14

*Huntsville Golf Dev., Inc. v. Brindley Const. Co., Inc.*, 1-08-00006, 2011 WL 4960421 ..... 19

*In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 504 (N.D. Miss. 1996) ..... 30

*In re Continental Sec. Litig.*, 962 F.2d 566 (7<sup>th</sup> Cir. 1992)..... 11

*In re First Capital Holdings Corp. Fin. Prod. Sec. Litig.*, MDL No. 901, 1992 WL 226321, at 4 (C.D. Cal. June 10, 1992)..... 12

*In re Lease Oil Antitrust Litigation* (No. II), 186 F.R.D. 403, 449 (S.D. Tex. 1999)..... 29

*In re Pacer Int'l, Inc.*, No. M2015-00356-COA-R3-CV, 2017 Tenn. App. LEXIS 442..... 10

*In re Prudential-Bache Energy Income P’ships Sec. Litig.*, No. 888, 1994 WL 202394, at \*6 (E.D. La. May 18, 1994) ..... 26

*In re Washington Public Power Supply Sec. Litig.*, 19 F.3d 1291, 1299 (9<sup>th</sup> Cir. 1994)..... 26

*In Re: Deva Concepts Products Liability Litigation*; U.S. District Court, Southern District of New York, Case No. 1:20-cv-01234..... 24

<i>Jane Does 1-2 v. The New Hanover County Board of Education, et al.</i> , Superior Court of New Hanover County, North Carolina, Case No. 20-CVS-1395 .....	23
<i>Jerry T. Beech Concrete Contr. V. Larry Powell Builders</i> , 2003 WL 726955, *15 (Tenn. 2003)	25
<i>John Does 1-10 v. The New Hanover County Board of Education, et al.</i> , Superior Court of New Hanover County, North Carolina, Case No. 19-CVS-2745 .....	23
<i>Johnson et al v. Lend Lease (US) Public Partnerships, LLC, et al</i> ; U.S. District Court, Eastern District of North Carolina, Case No. 7:20-cv-00174 .....	24
<i>Johnson v. Ga. Highway Express, Inc.</i> , 488 F.2d 714, 720 (5 <sup>th</sup> Cir. 1974) .....	10
<i>Jordan v. City of Birmingham</i> , 2015 WL 12830455 .....	20
<i>Liberty Leg. Found. v. Democratic Nat. Comm.</i> , 12-2143-STA, 2012 WL 6026856 .....	19, 20
<i>Lobatz v. U.S. West Cellular of Cal., Inc.</i> , 222 F.3d 1142 (9 <sup>th</sup> Cir. 2000).....	12
<i>Local 56, United Food and Commercial Workers Union v. Campbell Soup Co.</i> , 954 F. Supp. 1000, 1005 (D.N.J. 1997).....	10
<i>M. Berenson Co. v. Faneuil Hall Marketplace, Inc.</i> , 671 F.Supp. 819, 829 (D. Mass. 1987) .....	12
<i>McBean v. City of New York</i> , 233 F.R.D. 377 (S.D.N.Y. 2006).....	11, 12
<i>McCreary v. Filters Fast, LLC.</i> ; U.S. District Court, Western District of North Carolina, Case No. 3:20-cv-00595 .....	23
<i>Miller v. Deloitte Services LP</i> , 3:18-CV-00581, 2019 WL 2543526 .....	14
<i>Peticos v. Oral and Maxillofacial Surgery Associates, P.C.</i> , Court of Common Pleas, Spartanburg County, South Carolina, Case No.: 2020-CP-4203041 .....	23
<i>Pinto v. Princess Cruise Lines, Ltd.</i> , 513 F.Supp. 2d 1334, 1339 (S.D.Fla. 2007) .....	25
<i>Purdie v. Ace Cash Express, Inc.</i> , No. Civ. A 301CV1754, 2003 WL 22976611.....	30
<i>Ranson v. Magellan Health, Inc.</i> , U.S. District Court, District of Arizona, Case No. 2:20-cv-001350-SPL.....	23
<i>Renninger v. Phillips &amp; Cohen Associates, Ltd</i> , 2010 WL 3259417 (M.D. Fla. Aug. 18, 2010). 20	
<i>Rodzik Law Group, PLLC, et al. v. Hartford Casualty Insurance Group, et al</i> ; U.S. District Court, Eastern District of North Carolina, Case No. 7:20-cv-00224 .....	24
<i>Suleesky v. Bryant Lafayette &amp; Associates</i> , 2010 WL 1904968 (E.D. Wis. May 10, 2010) .....	20
<i>Swaney v. Regions Bank</i> , 2:13-CV-00544-RDP, 2020 WL 3064945, at *7-8 (N.D. Ala. June 9, 2020).....	21
<i>Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.</i> , 396 F.3d 96, 123-24 (2 <sup>nd</sup> Cir. 2005) .....	11
<i>Wrenfro v. Cano Health, LLC</i> ; Circuit Court of the Eleventh Judicial Circuit – Miami Dade County, Florida, Case No. 2020-017926-CA-01 .....	24
<i>Young v. Catherines</i> , No. 13-cv-03288-CMR (E.D. Pa. Nov. 5, 2014).....	21

**Statutes**

Rules of the Supreme Court of the State of Tennessee, Rule 8, Rule 1.5.....	13
Tenn. R. Civ. P. 23.05.....	9
Tenn. Sup. Ct. R. 8, Rule 1.5 .....	13
<i>Wright v. Wright</i> , 337 S.W.3d 166, 176-77 (Tenn. 2011).....	14

**Other Authorities**

Richard Posner, <i>Economic Analysis of Law</i> Sec. 21.9, at 534-35 (3d ed. 1986).....	25
<i>United States Consumer Law Attorney Fee Survey Report 2015-2016</i> , Sept. 9, 2019.....	20

After contentious litigation and successfully negotiating a Settlement affording Class Members Fraud Resolution Services, Credit Monitoring, and the ability to claim monetary benefits worth up to \$2,000.00 each, plus injunctive relief in the form of Business Practice Commitments to protect Class Members' personal identifying information ("PII") and protected health information ("PHI") that remain in the possession of Tennessee Orthopaedic Alliance, P.A. ("Defendant" or "TOA"), Plaintiffs request that the Court grant the Settlement Class Representatives ("Plaintiffs" or "Class Representatives") Motion for a Service Award of \$3,850.00 each, a fairly standard amount in the circumstance that fairly compensates them for their efforts, time, and dedication in this action on behalf of the Settlement Class<sup>1</sup>.

Plaintiffs also move the Court for an order approving the requested attorneys' fees, costs, and expenses in the amount of \$255,300.00. Importantly, the requested attorneys' fees, costs, expenses and service awards *are to be paid separately by Defendant*, and these payments do not in any manner affect the amount of relief available to Class Members. The requested relief is demonstrably reasonable and appropriate and amply supported by the record.<sup>2</sup>

## **I. INTRODUCTION**

### **A. The Case**

Plaintiffs William Boykin and Sally Robbins commenced this putative class action on April 6, 2020 by the filing of a complaint against Defendant. The Complaint asserts, among other things,

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<sup>1</sup> Unless otherwise noted, all capitalized terms are defined in the Settlement Agreement and Release ("Settlement"), which was previously filed with the Court.

<sup>2</sup> Plaintiffs specifically incorporate by reference in this memorandum Plaintiffs' Motion for Preliminary Approval of the Settlement and for Certification of the Settlement Class (including attachments and declarations) ("Preliminary Approval Motion"), and the Court's granting of same.

claims arising out of an alleged loss of Plaintiffs' and Class Members' personal identification information while the information was in the possession of Defendant.

The Court preliminarily approved the parties' Settlement Agreement ("Settlement Agreement") in an Order Certifying a Settlement Class, Preliminarily Approving Class Action Settlement, and Directing Notice To Settlement Class, (the "Preliminary Approval Order") dated September 29, 2020 which, among other things, conditionally certified the Class and preliminarily approved the parties' Settlement Agreement, appointed the named Plaintiffs to serve as Class Representatives, and appointed Joel R. Rhine and Martin A. Ramey of the Rhine Law Firm, P.C. and Micah S. Adkins of The Adkins Firm, P.C. as Class Counsel.

#### **B. The Motion for Fees, Costs and Service Awards**

Plaintiffs' Counsel respectfully requests that the Court award attorneys' fees, costs, and expenses in the amount of \$255,300.00, which Defendant has agreed to pay under the Settlement Agreement. The Settlement expressly reflects the parties' arms-length and separately negotiated agreement to the awards sought herein. This factor alone merits great weight and consideration by the Court in ruling on Plaintiffs' Motion. Notwithstanding, Defendant's agreement to the payments, the amount of fees, costs and expenses requested is reasonable and supported by the various Declarations of Joel R. Rhine,<sup>3</sup> Martin A. Ramey and Micah S. Adkins that have been filed in this action.

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<sup>3</sup> Joel R. Rhine's Declarations are as follows: Declaration Of Joel R. Rhine In Support Of Plaintiffs' Unopposed Motion For Attorneys' Fees, Cost And Expenses And Service Awards To The Named Class Representatives ("Rhine Attorneys' Fee Decl."); Affidavit and Declaration of Joel R. Rhine in Support of Preliminary Approval of Class Action Settlement and Certification of Settlement Class ("Rhine Preliminary Approval Decl."); Supplemental Declaration of Joel R. Rhine in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement Agreement and Entry of Final Judgment ("Rhine Final Approval Decl.").

Again, all fees, costs and expenses that Plaintiffs' Counsel seeks will be paid by Defendant and without any reduction to the benefits available to Class Members. *Cox v. Shell Oil Co.*, CIV. A. 18,844, 1995 WL 775363, at \*3 (Tenn. Ch. Nov. 17, 1995)(“It is an important aspect of the Settlement that the plaintiffs' attorney's fees and costs are paid by the defendants in addition to the settlement fund, and are not deducted from the settlement fund”).

Moreover, this will be the only motion seeking an award of fees, costs and expenses even though Class Counsel will continue to perform services and expend funds for the Class after the filing of this Motion and even after the entry of a final judgment approving the settlement. This additional work and expense includes, but is not limited to: fielding telephone and email inquiries from Class Members; undertaking their responsibilities in connection with ensuring Class Members' claims are paid; attempts to cure deficiencies; disputes in connection with the claims process; and undertaking enforcement duties (including retaining an expert in the field to review the independent audit) to ensure TOA is properly undertaking their Business Practice Commitments. Agr.at ¶8, Rhine Attorneys' Fee Decl. ¶7, Affidavit and Declaration of Martin A. Ramey in Support of Final Approval of Class Action Settlement and Certification of Settlement Class (“Ramey Final Approval Decl.”) ¶18.

Plaintiffs' Counsel also requests Court approval of a service award in the amount of \$3,850.00 to the named Plaintiffs, William Robbins and Sally Boykin, appointed by the Court as the Class Representatives, for their initiative and effort in pursuing this litigation to a favorable outcome for the Class. Defendant has agreed to pay this service award separately from the benefits Class Members will receive under the Settlement Agreement. As such, this amount is also reasonable and should be awarded for their respective efforts.

### **C. The Settlement**

Before and after filing the Class Action Complaint and continuing throughout settlement negotiations, Plaintiffs' Counsel conducted a thorough examination and evaluation of the relevant law and facts to assess the merits of Plaintiffs' claims and potential claims and to determine how best to serve the interests of Plaintiffs and the Class Members. (Rhine Preliminary Approval Decl. ¶¶14-15). Informal and formal discovery was conducted in this case. Plaintiffs' Counsel and their expert reviewed targeted information provided by Defendant and Class Members and made an educated analysis of the subject data breach and implications of the same. *Id.*

On July 29, 2020, counsel for the parties met for a formal mediation conducted by Rodney Max, Esq., and based upon this arm's-length and lengthy negotiation through mediation, Plaintiffs and Defendant reached an agreement to settle this action (the "Litigation") pursuant to the provisions of the Settlement Agreement filed previously with the Court. *Id.*, at ¶18. The Settlement Agreement was reached after considering such factors as: (1) the data that was compromised in the Phishing Attack; (2) settlement benefits to Plaintiffs and the Class including Fraud Resolution Services, Credit Monitoring, monetary compensation for out-of-pocket expenses and lost time, and the business commitments that TOA has agreed to implement to secure PII and PHI in the future and their willingness to perform an audit and provide Class Counsel and their experts with the same; (3) the strength of Plaintiffs' case weighed against the settlement offer; (4) the attendant risks and uncertainty of litigation, especially in complex actions such as this, which involve allegations relating to privacy; (5) the attendant risks and uncertainty of establishing liability and/or damages; (6) Defendant's vigorous defense of the litigation and continued denial of the claims and facts contained in the Class Action Complaint; (7) the paucity of caselaw on certification of a class for damages in data breach cases such as the one at issue here; and, (8) the

desirability of consummating this Settlement Agreement promptly, in order to safeguard the privacy and security of Plaintiffs' and Class Members' personal information.

Only after reaching an agreement in principle on the merits of the settlement did the parties turn to the issue of a service award to the class representatives and attorneys' fees and costs. Initially, no agreement was reached on attorneys' fees and costs and the parties agreed to submit the same to the Court. *Id.*, at ¶30. However, negotiations continued in the coming weeks and eventually, on September 4, 2020, the parties came to an agreement on fees, costs, and service award payments.

## **II. LEGAL ARGUMENT**

As set forth below, Class Counsel is entitled to its reasonable attorneys' fees, expenses and costs.

As explained by the United States Supreme Court:

While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery. A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.

*Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-392 (1970).

### **A. Rule 23.05 of the Tennessee Rules of Civil Procedure Allows Agreements on Attorneys' Fees in Settlements.**

It is common for parties to a class action settlement to agree that a defendant will pay attorneys' fees, costs and expenses to plaintiffs' counsel. Such an arrangement poses no particular problem for court approval, so long as the amount of the fee is reasonable under the circumstances.

Here, as a part of the Settlement, Defendant agreed to pay Class Counsel up to \$255,300.00 for attorneys' fees, costs and expenses. (Agr. at 19 ¶33). Further, Defendant "waived [its] right to object to or oppose Class Counsel's request for a Fee and Expense Award so long as such request does not exceed Two Hundred Fifty-Five Thousand Three Hundred Dollars and No/100 dollars \$255,300.00." *Id.* Importantly, the agreement reached to pay fees, costs and expenses in the instant case was reached only after the parties had reached a resolution of the benefits to be provided to Class Members, and such payment was not dependent upon reaching an agreement on the class relief. Accordingly, Defendant does not oppose the relief sought herein.

**B. An Agreed-Upon Fee is Preferred and Entitled to Deference.**

Courts at all levels encourage litigants to resolve fee issues by agreement whenever possible. As the United States Supreme Court<sup>4</sup> explained, "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *See also Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974)("In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees."). Accordingly, courts are permitted to award attorneys' fees and expenses where all parties have agreed to the amount, subject to court approval, especially where the amount is in addition to and separate from the Defendant's settlement with the Class. *See, e.g., Local 56, United Food and Commercial Workers Union v. Campbell Soup Co.*, 954 F. Supp. 1000, 1005 (D.N.J. 1997)(granting class counsel the maximum amount of fees agreed to by defendant under the settlement agreement, where "class members...retain all that the settlement provides

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<sup>4</sup> *See In re Pacer Int'l, Inc.*, No. M2015-00356-COA-R3-CV, 2017 Tenn. App. LEXIS 442, at \*15-16 (Tenn. Ct. App. Jun. 30, 2017)(discussing Tennessee Court's use of federal authorities when considering approving a class action).

[and] do not lose any of the negotiated benefits on account of an attorneys' fee and costs award that equals the 'cap' on such an award set forth in the settlement."'). Indeed, the Supreme Court has suggested that such agreements be encouraged as a matter of public policy. *Hensley, supra*, at 720.

The virtue of a fee negotiated by parties at arm's length is essentially a market-set price resulting from opposing interests. Defendant has an interest in minimizing the fee; Plaintiffs have an interest in maximizing it; and the negotiations are informed by the parties' knowledge of the work done and result achieved and their views on what the Court may award if the matter were litigated. In *In re Continental Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992), Judge Posner of the Seventh Circuit endorsed a market-based approach to evaluating fee requests. According to Judge Posner, "it is not the function of judges in litigation to determine the equivalent of the medieval just price." *Id.* "It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order." *Id.* at 570. "The object in awarding a reasonable attorney's fee is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible." *Id.* at 572.

Additionally, as explained in *McBean v. City of New York*, 233 F.R.D. 377 (S.D.N.Y. 2006), a court need not review an application for attorneys' fees with a heightened level of scrutiny where, as here, the parties have contracted for an award of fees that will not be paid from a common fund. "If money paid to the attorneys comes from a common fund, and is therefore money taken from the class," the court reasoned, "then the Court must carefully review the award to protect the interests of the absent class members." *Id.* at 392 (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123-4 (2d Cir. 2005) and *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000)). "[I]f however, money paid to attorneys is entirely independent of money awarded to

the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *Id.* The *McBean* court concluded that the parties' agreement for attorneys' fees was objectively reasonable because it was the product of arm's length negotiations. *Id.*

The court in *In re First Capital Holdings Corp. Fin. Prod. Sec. Litig.*, MDL No. 901, 1992 WL 226321, at 4 (C.D. Cal. June 10, 1992), appeal dismissed, 33 F.3d 29 (9th Cir. 1994), echoed Judge Posner's reasoning in awarding a negotiated fee of \$8 million. As the *First Capital* court noted, the fee was negotiated at arm's length with sophisticated defendants and by attorneys who were intimately familiar with the case, risks, amount and value of their time, and the nature of the result obtained for the class. Where there is such arm's length negotiation and no evidence of self-dealing or disabling conflict of interest, the court is reluctant to interpose its judgment as to the amount of attorneys' fees in the place of the amount negotiated by the adversarial parties in the litigation. *Id.*

The rationale espoused by Judge Posner, the court in *First Capital* and other courts equally applies here.<sup>5</sup> Defendant sought to minimize the fees that it must pay in addition to the benefits it will provide to the Class, and therefore its counsel had a keen interest in negotiating the smallest amount its client would have to pay. Class Counsel, on the other hand, after negotiating the best settlement that they could obtain for the Class, wished to receive full compensation, as the law

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<sup>5</sup> See also *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142 (9th Cir. 2000)(affirming award of fees and expenses, where defendant had agreed not to oppose request for fees and expenses up to a negotiated ceiling and to be paid separately from class settlement benefits; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)(upholding the district court's award of attorney fees, citing lack of abuse of discretion, where the court has approved attorneys' fees and costs of \$5.2 million that were negotiated after the final settlement was achieved); *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F.Supp. 819, 829 (D. Mass. 1987)("Whether a defendant is required by statute or agrees as part of the settlement of a class action to pay the plaintiffs' attorneys' fees, ideally the parties will settle the amount of the fee between themselves.")

encourages, for undertaking this litigation and devoting the resources and skill necessary to bring this case to a successful conclusion.

### **C. Tennessee Rules and Caselaw Elements Applied to the Motion *Sub Judice***

The Rules of the Supreme Court of the State of Tennessee, Rule 8, Rule 1.5 set forth the following factors to be used as guides in determining a reasonable fee:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;<sup>6</sup>
- (6) The nature and length of the professional relationship with the client;<sup>7</sup>
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) Whether the fee is fixed or contingent;
- (9) Prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) Whether the fee agreement is in writing.

Tenn. Sup. Ct. R. 8, Rule 1.5. *See also Eberbach v. Eberbach*, 535 S.W.3d 467, 479 (Tenn. 2017) (citing *Connors v. Connors*, 594 S.W.2d 672, 676-77 (Tenn. 1980) (summarizing “[t]he appropriate factors to be used as guides in fixing reasonable attorney’s fees . . . .”). The lawful

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<sup>6</sup> As there were no time limitations imposed by the case or the client other than what would normally occur, factor 5 should not be evaluated in connection with this motion.

<sup>7</sup> As this was the first representation of the Class Representatives by Class Counsel, factor 6 should not be evaluated in connection with this motion.

allowance of attorney fees by a Trial Court is a matter of discretion with that Court. *Hobson v. First State Bank*, 801 S.W.2d 807, 813 (Tenn. App. 1990). The factors to be considered by the Court when determining the reasonableness of attorneys' fees "are not exclusive and each factor may not be relevant in every case." *Miller v. Deloitte Services LP*, 3:18-CV-00581, 2019 WL 2543526, at \*3 (M.D. Tenn. June 19, 2019) (citing *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176-77 (Tenn. 2011) (quoting Tenn. Sup. Ct. R. 8, RPC 1.5(a)). "Tennessee has 'no fixed mathematical rule' for determining what a reasonable fee is." *Wright ex rel.*, at 176 (Tenn. 2011). "[U]ltimately the reasonableness of the fee must depend upon the particular circumstances of the individual case." *Id.* at 177.

Here, the above factors support a finding that the requested fee amount is reasonable. The Settlement presented here presents a tremendous value for the Class. It is difficult to understate the value of the agreed non-monetary relief, which includes business changes as a part of the Settlement. Defendant agreed to undertake substantial improvements to its information security systems. Defendant also agreed to implement robust Business Practice Commitments for two years. The Settlement also affords Class Members with credit monitoring services and fraud resolution services and the means to recover for damages without the time, expense and risk associated with protracted litigation and up to \$2,000.00 per Class Member for unreimbursed out-of-pocket expenses and losses traceable to the underlying Phishing Attack.

**(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly supports Plaintiff's fee petition.**

This factor supports Plaintiffs' petition because of Class Counsel's time expended and the requisite novelty, difficulty of the questions at issue and the skill needed to resolve Plaintiffs' claims on a class-wide basis. First, Plaintiff's counsel expended more than 391 hours during the

prosecution of this matter. See Rhine Attorneys' Fee Decl. ¶8. Further, as detailed in Joel Rhine and Martin Ramey's Declaration, Class Counsel has not completed their tasks and will continue to expend funds on the Class Members' behalf. See Rhine Attorneys' Fee Decl. ¶7, Ramey Final Approval Decl. ¶18.

In addition to time spent to prepare for and attend the upcoming Final Approval Hearing and the defense of any appeals taken from the final judgment approving the Settlement, Class Counsel will perform post-final approval duties, including:

a. The Settlement Agreement allows Class Counsel to participate in the claims administration process to ensure our clients receive a fair, just and appropriate recovery. Among other things, we likely will be involved whenever Heffler Group determines a claim for out-of-pocket losses or lost time is deficient in whole or part and the Participating Class Member is having difficulty curing the same. (Agr. ¶15(a) and (b)).

b. The Settlement Agreement sets forth an appeal process, should a Participating Class Member dispute Heffler Group's determinations. Once a Participating Settlement Class Member disputes a determination in writing and requests an appeal, the Settlement Administrator shall provide a copy of the Participating Settlement Class Member's dispute and Claim Form along with all documentation or other information submitted to Counsel for the Parties. The Parties will confer regarding the claim submission and attempt to reach a decision as to whether the claim, in whole or in part, is approved or rejected, which will be final. If the Parties cannot agree on approval or denial of the member's claim, in

whole or part, the dispute will be submitted to a claims referee agreed upon by the Parties. (Agr. ¶15(c)).

c. Further, as the Court is aware, TOA has committed to certain business commitments that will help ensure that Class Members' PII and PHI that remains in TOA's possession remains secure. The Settlement Agreement sets forth an independent audit process. Class Counsel and a cybersecurity expert that Class counsel will retain will review the same and will alert TOA's counsel of any possible deficiencies. Class Counsel and TOA's counsel will meet and confer about these deficiencies and hopefully reach a resolution on how TOA's practices and policies should be altered. If, however, counsel are unable to agree, Class Counsel shall seek judicial intervention. (Agr. ¶ 8(b)).

Second, this case was undoubtedly novel, which in turn made it risky and difficult, and the results achieved by the Settlement all the more significant. Moreover, the case involved litigating a claim with little precedent on such key issues as damages. By any reasonable view, this case was unattractive to many litigators because of the substantial risks and uncertainties present from the outset of this case.

It was far from certain that any relief could be obtained for the Class. Notably, in reaching a settlement, Class Counsel overcame numerous Defense arguments, including:

- TOA's contention that neither Plaintiff suffered any "cognizable injury," because, among other reasons, neither has alleged they suffered actual identity theft or fraud.
- TOA characterizes Plaintiffs' alleged injuries as future risk related, which TOA contends is not a legally recognized injury.

- TOA claims that Plaintiffs' invasion of privacy claim fails under Tennessee law because the data allegedly was not disclosed to an adequately large group of persons.

- As for the unjust enrichment claim, TOA asserts that an element of the claim (namely that it would be inequitable for TOA to retain the benefit without payment for the value) cannot be satisfied.

- With respect to Plaintiffs' negligent misrepresentation and constructive fraud claims, TOA is defending under a variety of theories including its belief that no false statements were ever issued to the Plaintiffs and that TOA never "disclosed" the PHI and PII.

- TOA contests many factual issues, including contesting Plaintiff Boykin's claims that he receives spam email and telephone calls by reason of the data breach because it claims that Boykin's email and phone number were not included in the exposed data.

- TOA emphasizes the causation, damages and other alleged individualized issues that could hamper contested certification of the class.

Rhine Preliminary Approval Decl. at ¶10

Continued litigation through trial inevitably would have delayed any recovery to Class Members. Plaintiffs' Counsel carefully considered the threat of protracted proceedings and because Plaintiffs' Counsel believed the whereabouts of Class Members' PII remained undetermined and their information might have been subject to compromise, potentially exposing Class Members to identity theft the longer this litigation lasted. The heightened security measures negotiated by Plaintiffs' Counsel ensure that the personal identification information of Plaintiffs and the Class will be protected.

Third, Class Counsel's skill is based on experience prosecuting other complex litigation matters. The quality of Class Counsel's work on this case was excellent and is ultimately reflected

in the result, which was obtained in the face of stiff opposition. Moreover, this litigation required specialized experience and expertise in privacy law, remedies, and information technology that few firms may have been willing to master to prosecute the litigation successfully. Uncertainty of result and the likelihood of appeal were omnipresent in the case. As such, Class Counsel undertook significant risk in accepting Plaintiffs' case, but nevertheless achieved meaningful relief sought by Plaintiffs for their privacy claims.

This is the type of litigation that most other firms would shy away from because the subject matter is too esoteric or "technical." Many of the issues and legal territory at issue are still being charted. The issues were complex, and the legal hurdles were many and substantial. Also, although Plaintiffs' Counsel had a good faith basis to believe that they would develop a convincing case, Counsel was also aware of practical difficulties associated with the prosecution of privacy cases which, as in the present case, often do not readily demonstrate actual monetary damages.

**(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer supports Plaintiff's fee petition.<sup>8</sup>**

This factor supports the reasonableness of Plaintiffs' fee petition because Class Counsel devoted hundreds of attorney and non-attorney hours to the prosecution of Plaintiffs' claims. As outlined by Class Counsel's declarations, collectively, counsel expended 454.15 hours in attorney and 25.4 hours in non-attorney time. As a result, Class Counsel was prevented from or limited in the pursuit of other matters on a class-wide or individual basis. Class Counsel's devotion to this

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<sup>8</sup> "The client himself would have had no awareness that the acceptance of this particular employment would have precluded other employment by the lawyer, but the court considers this factor anyway, in the interest of a complete record." *Miller v. Deloitte Services LP*, 3:18-CV-00581, 2019 WL 2543526, at \*4 (M.D. Tenn. Jun. 19, 2019).

matter was performed without any guarantee of the recovery for the time or expenses incurred in the prosecution of Plaintiffs' claims at bar.

**(3) The fee customarily charged in this locality for similar legal services supports Plaintiffs' fee petition.**

The customary hourly rate charged in this geographic location supports the reasonableness of Plaintiffs' fee petition. In order to calculate attorneys' fees, the Court often considers a lodestar analysis, which is calculated by multiplying the reasonable time expended by the reasonable hourly rate. "A trial court, in calculating the 'reasonable hourly rate' component of the lodestar computation, should initially assess the 'prevailing market rate in the relevant community.'" *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 350 (6th Cir. 2000). "The 'prevailing market rate' is that rate which lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Id.*

A survey of hourly rates approved by Courts in the Nashville area range from between \$195 and \$1,060 per hour. *Huntsville Golf Dev., Inc. v. Brindley Const. Co., Inc.*, 1-08-00006, 2011 WL 4960421, at \*12 (M.D. Tenn. Oct. 18, 2011)(finding hourly rates of \$195 and \$225 reasonable); *Heritage Bank USA, Inc. v. Johnson*, 3:15-CV-0696, 2016 WL 427833, at \*3 (M.D. Tenn. Feb. 4, 2016)(awarding hourly rates of \$195 and \$470 in a breach of contract case); *Cassell v. Vanderbilt University*, Case No. 3:16-CV-02086-WDC, at 3 (M.D. Tenn. Oct. 22, 2019)(approving hourly rate of \$1,060 for attorneys with at least 25 years of experience, \$900 per hour for attorneys with 15-24 years of experience, \$650 per hour for attorneys with 5-14 years of experience, \$490 per hour for attorneys with 2-4 years of experience and \$330 per hour for paralegals and law clerks in an ERISA class action). *See also Liberty Leg. Found. v. Democratic Nat. Comm.*, 12-2143-STA, 2012 WL 6026856, at \*6-7 (W.D. Tenn. Dec. 4, 2012), *aff'd sub*

*nom. Liberty Leg. Found. v. Natl. Democratic Party*, 575 Fed. Appx. 662 (6th Cir. 2014)(unpublished)(awarding \$225 for associate and \$500 for senior level partner).

Fee surveys may also assist the Court when determining the reasonableness of the requested rates. *See Hicks v. City of Tuscaloosa*, 2016 WL 7029827 (N.D. Ala. May 24, 2016); *Jordan v. City of Birmingham*, 2015 WL 12830455 (N.D. Ala. Jun. 22, 2015); *Decker v. Transworlds Systems, Inc.*, 2009 WL 2916819 (N.D. Ill. Sept. 1, 2009); *Renninger v. Phillips & Cohen Associates, Ltd*, 2010 WL 3259417 (M.D. Fla. Aug. 18, 2010); *Suleesky v. Bryant Lafayette & Associates*, 2010 WL 1904968 (E.D. Wis. May 10, 2010).

According to the United States Consumer Law Attorney Fee Survey Report (the “Fee Survey”), the median hourly rate for attorneys handling class actions in Tennessee is \$450. Ronald L. Burge, *United States Consumer Law Attorney Fee Survey Report 2015-2016*, Sept. 9, 2019, at 163.<sup>9</sup> The median rate for the lowest quartile in the same category is \$400. *Id.* The median for the 95<sup>th</sup> percentile of attorneys handling class actions in Tennessee is \$625. *Id.* And, the average paralegal rate is \$117. *Id.* at 162.

Here, the hours Class Counsel expended are consistent, and quite modest, especially when considering the size of the Class. Further, the lower number of hours expended in this case further bolster Class Counsel’s skill in resolving this matter on a class wide basis.

Class Counsel’s hourly rates have been approved by Courts in other matters. For example, in *Finerman, et al. v. Marriott Ownership Resorts, Inc. and International Cruise & Excursion Gallery*, Case No. 3:14-cv-1154 (M.D. Fla. August 15, 2018), the Court’s lodestar analysis applied a \$750 hourly rate for Mr. Rhine’s work.

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<sup>9</sup> <https://burdgelaw.com/wp-content/uploads/2019/10/US-Consumer-Law-Attorney-Fee-Survey-Report-2017-2018.pdf> Last visited November 29, 2020.

For The Adkins Firm, the firm's rates have been approved by Courts in various geographic areas. *See Young v. Catherines*, No. 13-cv-03288-CMR (E.D. Pa. Nov. 5, 2014) (approving fee petition in full and awarding hourly rate of \$325 for Adkins, plus a 2.4 multiplier); *Fuller v. Avis/Budget Rental Car*, No. 2:15-cv-03856-KM-MAH (D. N.J. Dec. 15, 2017) (approving fee petition in full and awarding hourly rate of \$375 for Adkins, plus a 2.59 multiplier); *Clark v. Trans Union, LLC*, Case No. 2:15-cv-3:15-cv-00391-MHL (E.D. Va.) and *Anderson v. Trans Union, LLC*, Case No. 3:16-cv-00558-MHL (E.D. Va.) (approving fee petition in full and awarding hourly rate of \$450 for Adkins); *Clark v. Experian Information Solutions, Inc.* No. 3:16-cv-00032-MHL (E.D. Va.), *Brown v. Experian Information Solutions, Inc.*, No. 3:16-cv-00670-MHL (E.D. Va.) (approving fee petition in full and awarding hourly rate of \$450 for Adkins); and, *Thomas v. Equifax Information Services, LLC*, No. 3:18-cv-00684-MHL (E.D. Va., Sept. 13, 2019) (approving fee petition in full and awarding hourly rate of \$475 for Adkins, \$375 for associate, \$150 for paralegal and \$75 for law clerk); *Swaney v. Regions Bank*, 2:13-CV-00544-RDP, 2020 WL 3064945, at \*7-8 (N.D. Ala. June 9, 2020) (approving fee petition for \$791 for senior level partner and \$548 for an eight-year lawyer); *Cleveland v. J.H. Portfolio Recovery*, Case No. 2:19-cv-00286-B (S.D. Ala. Nov. 24, 2020) (Magistrate's Report and Recommendation recommending approval of Plaintiff's fee petition in full and awarding hourly rate for Adkins \$275, \$225 for associate attorney with less than ten years of experience and \$75 for paralegal on motion for default judgment).

**(4) The amount involved and the results obtained support the reasonableness of Plaintiffs' fee petition.**

The results of the Settlement weigh in favor of the reasonableness of Plaintiffs' fee petition. First, the Settlement produces significant non-monetary and monetary value for the class. The Settlement allows Class Members to receive cash payments up to \$2,000.00 for out-of-pocket

losses, including up to \$90 for lost time. Class Members who made claims will also receive one year of credit monitoring and all Class Members receive three years of fraud resolution benefits as a result of the Settlement.

Second, as a part of the Settlement, Defendant agreed to injunctive relief. It is difficult to overstate the significance of the value of the injunctive relief obtained by Defendant's change in business practices that are to be adopted as a result of the Settlement and in order to protect the Class Members' and Defendant's future patient's PII and PHI. Defendant's business practice changes agreed to in the Settlement include cyber security training for its personnel. Defendant also agreed to employ new cyber security protocols designed to protect patients' PII and PHI.

Third, no Class Member has objected to the amount of the requested attorneys' fees, expenses or costs. The lone objection was made concerning the settlement amount – not the amount of attorneys' fees, expenses or costs.

**(5) The time limitations imposed by the client or by the circumstances is not applicable in this case.**

The fifth factor is not relevant to the determination of the reasonableness of Plaintiffs' attorneys' fees request in this case because there were no time limitations imposed by the case or the clients other than what would normally occur.

**(6) The nature and length of the professional relationship with the client is not applicable in this case.**

The sixth factor is not relevant to the determination of the reasonableness of Plaintiffs' attorneys' fees request in this case because this was the first representation of the Class Representatives by Class Counsel.

**(7) The experience, reputation, and ability of the lawyer or lawyers performing the services supports Plaintiff's fee petition.**

Class Counsel's experience, reputation and ability support the reasonableness of Plaintiffs' fee petition. Consumer cases, especially data breach cases, require a high level of skill. Mr. Rhine's experience, reputation and ability is nationally recognized. See Rhine Preliminary Approval Decl. at ¶¶ 2-3 and Rhine Attorneys' Fee Decl. at ¶2. Simply put, for 32 years Mr. Rhine has been at the forefront of some of the most contentious complex litigation matters ranging from nuclear powerplant construction litigation, bridge collapses, cutting edge data breach litigation, product liability including defective building construction materials litigation, representing the State of North Carolina in PFAS litigation against a labyrinth of DuPont and Chemours entities and much more.

Mr. Ramey's experience, reputation and ability is detailed in his Declaration. See Ramey Attorney Fees Decl. at ¶¶ 2-8. Along with Mr. Rhine, Mr. Ramey's practice is engulfed by Class Actions, including *Griffey v. Magellan Health, Inc.*, U.S. District Court, District of Arizona, Case No. 2:20-cv-001282-SPL; *Ranson v. Magellan Health, Inc.*, U.S. District Court, District of Arizona, Case No. 2:20-cv-001350-SPL; *Dearing v. Magellan Health, Inc.*, Superior Court of Arizona for Maricopa County, Case No. CV2020-013648; *Peticos v. Oral and Maxillofacial Surgery Associates, P.C.*, Court of Common Pleas, Spartanburg County, South Carolina, Case No.: 2020-CP-4203041; *John Does 1-10 v. The New Hanover County Board of Education, et al.*, Superior Court of New Hanover County, North Carolina, Case No. 19-CVS-2745; *Jane Does 1-2 v. The New Hanover County Board of Education, et al.*, Superior Court of New Hanover County, North Carolina, Case No. 20-CVS-1395; *McCreary v. Filters Fast, LLC.*; U.S. District Court, Western District of North Carolina, Case No. 3:20-cv-00595 (Data Breach); *Calixte, Hurling et al v. Dave, Inc.*; U.S. District Court, Central District of California, Western Division, Case No. 2:20-cv-07704 (Data Breach); *Wrenfro v. Cano Health, LLC*; Circuit Court of the Eleventh Judicial

Circuit – Miami Dade County, Florida, Case No. 2020-017926-CA-01 (Data Breach); *In Re: Deva Concepts Products Liability Litigation*; U.S. District Court, Southern District of New York, Case No. 1:20-cv-01234 (Product Liability); *Johnson et al v. Lend Lease (US) Public Partnerships, LLC, et al*; U.S. District Court, Eastern District of North Carolina, Case No. 7:20-cv-00174 (Military Member housing); and *Rodzik Law Group, PLLC, et al. v. Hartford Casualty Insurance Group, et al*; U.S. District Court, Eastern District of North Carolina, Case No. 7:20-cv-00224 (Breach of Insurance Contract).

Likewise, Mr. Adkins’ experience, reputation and ability to prosecute consumer protection matters has been recognized by Courts across the United States. *See* Ex. C, Decl. of Adkins, ¶¶14, 15. Most recently, one Court found, “[t]he record clearly reflects that Adkins is a highly experienced and qualified attorney in the field of consumer protection law.” *Cleveland, supra*.

Mr. Adkins’s reputation and ability has been recognized by the legal community. His consumer protection experience has been recognized by Super Lawyers six times in the last seven years. *See* Adkins Decl. at ¶9. Mr. Adkins’ experience also includes the prosecution of no less than two-hundred cases in federal Court related to consumer protection issues. *Id.* at ¶7. Mr. Adkins is also regularly invited to lecture on consumer protection issues across the country. *Id.* at ¶8.

Janet Coleman and Christopher Barbour of the Rhine Law Firm also worked on this case. Their experience is detailed in Rhine Attorneys’ Fee Decl. ¶¶3-4. Notably, Ms. Coleman has been practicing for 36 years and has handled over 250 jury trials.

Clearly, Class Counsel’s experience, reputation and ability weighs in favor of approval of the fee petition.

**(8) The contingent nature of Class Counsel’s representation supports the reasonableness of Plaintiffs’ fee petition.**

Here, Class Counsel represented Plaintiffs on a contingent-fee basis. Contingency fee arrangements have become widely used because they serve important functions in the marketplace. Contingency agreements provide access to legal services to many individuals who could not otherwise pay for them. Contingency agreements also assure that the economic interests of the attorney are aligned with those of their clients. In addition, they foster efficient use of resources by attorneys.

It is an established practice to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See*, Richard Posner, *Economic Analysis of Law*, Sec. 21.9, at 534-35 (3d ed. 1986). Courts have recognized that “[a] contingency fee arrangement often justifies an increase in the award of attorneys’ fees.” *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988) (citations omitted); *see also Jerry T. Beech Concrete Contr. V. Larry Powell Builders*, 2003 WL 726955, \*15 (Tenn. 2003). “This rule helps assure that the contingency fee arrangement endures. If this ‘bonus’ methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.” *Id.*

Indeed, “[a] determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee, the wholly contingent outlay of out-of-pocket sums by Class Counsel, and the fact that the risks of failure and nonpayment in a class action are extremely high.” *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007). Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award

of attorneys' fees. For example, in awarding attorneys' fees in a contingent fee case, a district court noted the risks that plaintiff's counsel had taken:

Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

*In re Prudential-Bache Energy Income P'ships Sec. Litig.*, No. 888, 1994 WL 202394, at \*6 (E.D. La. May 18, 1994). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose. *In re Washington Public Power Supply Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994). Plaintiffs' counsel "accept[s] a substantial risk of non-payment for legal work and reimbursement of out-of-pocket expenses advanced" in contingency matters. *In re Se. Milk Antitrust Litig.*, No. 2:07-CV-208, 2013 WL 2155387, at \*5 (E.D. Tenn. May 17, 2013). Risk taken by class counsel "is a very substantial factor" and the "fee awarded should fully reflect" this risk. *Id.* at \*5.

The same is true of the risk taken by Class Counsel here. From the outset, Class Counsel understood that they were embarking on complex and expensive litigation in an area of the law which continues to develop. This was not a case where any recovery was assured. This case presented a number of legal issues and challenges in the area of privacy law, which has been the subject of minimal previous jurisprudence, and many of these challenges were raised by Defendant over the course of the litigation.

Nonetheless, Class Counsel accepted this project on a wholly contingent basis. No client or Class Member was asked to pay fees or advance costs. Unlike Defendant's counsel, Class Counsel has received no compensation for the legal services provided to Plaintiffs and the Class Members. Further, absent this Settlement, there was no guarantee that the Class Members would receive any relief from Defendant, which would have resulted in Class Counsel receiving nothing for the hours expended on behalf of Plaintiffs and Class Members.

Class Counsel bore these risks and was prepared to litigate the case to trial and on further appeal, if necessary. Despite these risks and the fact that few cases had been successfully litigated for the type of claims raised in this litigation, Class Counsel accepted this case in an attempt to address Defendant's conduct and provide remedies to Plaintiffs and the Class Members. Based on the contingent recovery of any attorneys' fees, Class Counsel's requested attorneys' fees are justified and reasonable.

**(9) Prior advertisements or statements by the lawyer with respect to the fees the lawyer charges supports the reasonableness of Plaintiff's fee petition.**

While Class counsel issued no advertisements about their fees, Class Counsel's declarations support the reasonableness of the fee petition. As stated above, Mr. Rhine's lodestar has been based upon the rate referenced in the chart below. Further, Mr. Ramey's rates are far commensurate or below his experience level when working on risky contingency fee cases. Finally, several other lawyers in the Rhine Law Firm provided legal assistance. Janet Coleman has over 36 years of litigation experience and has handled in excess of 250 jury trials. Christopher Barbour, who is no longer with the firm, has 10 years of litigation experience. See Rhine Attorneys' Fee Decl. at ¶¶ 3-4

<b>Firm Member:</b>	<b>Role:</b>	<b>Hourly Rate:</b>	<b>Total Time Spent:</b>	<b>Total Billed:</b>
Joel Rhine	Attorney / Partner	\$750.00	160.50	\$120,037.50
Martin Ramey	Attorney	\$400.00	49.80	\$19,920.00
Janet Coleman	Attorney	\$400.00	107.30	\$42,920.00
Christopher Barbour	Associate Attorney	\$300.00	28.75	\$8,625.00
Stephanie Chase	Paralegal	\$100.00	14.75	\$1,475.00

Mr. Adkins' declaration supports the requested hourly rates. Mr. Adkins' firm has received approval from other Courts for the attorney and non-attorney rates requested herein. See Adkins Decl. ¶13. The Adkins Firm's lodestar is \$37,405.00.

<b>Name</b>	<b>Title</b>	<b>Total Hours</b>	<b>Hourly Rate</b>	<b>Total</b>
Micah S. Adkins	Attorney	75.55	\$475	\$35,886.25
Brian Dixon	Staff Attorney	5.75	\$175	\$1,006.25
Whitney Matthews	Paralegal	3.5	\$100	\$350.00
Kayla Redmon	Law Clerk	3.15	\$50	\$162.50
<b>Total</b>		<b>87.95</b>		<b>\$37,405.00</b>

The above rates are reasonable. By way of example, in 2014, the Court approved an hourly rate of \$325 for Adkins, plus a 2.4 multiplier. Adkins Decl. ¶13. In 2017, Courts approved an hourly rate for Adkins for \$325 and \$375, plus a 2.59 multiplier. *Id.* at ¶13. In 2018, the Court approved an hourly rate of \$450 for Adkins. *Id.* at ¶13. In 2019, Courts approved \$450 and \$475 hourly rates for Adkins and \$375 for an associate of the firm). *Id.* at ¶13. In 2020, Courts have approved Adkins for \$275 on an uncontested motion for default judgment in an individual case and \$400 per hour in a class case that spanned 2013 to 2020). *Id.* ¶13.

- (10) **Whether the fee agreement is in writing does not have any bearing on the reasonableness of Plaintiffs' fee petition.**

Whether Plaintiffs' retainer is in writing or verbal offers no guidance to this Court concerning the reasonableness of Plaintiffs' fee petition because Plaintiffs' retainer agreement is contingent on recovery – not an agreed hourly rate. Thus, this factor is neutral.

**D. The Requested Fee is Reasonable.**

As stated in Class Counsel's declarations, the current lodestar is in excess of \$243,832.50 and out-of-pocket expenses in the amount of \$8,178.80. Rhine Attorneys' Fee Decl, ¶8. The requested fees also contemplate the substantial post-approval work that Class Counsel will undertake to ensure Defendant's compliance with the Settlement Agreement for at least two years. *Id.* ¶7.

**(11) Whether the fee agreement is in writing does not have any bearing on the reasonableness of Plaintiffs' fee petition.**

Whether Plaintiffs' retainer is in writing or verbal offers no guidance to this Court concerning the reasonableness of Plaintiffs' fee petition because Plaintiffs' retainer agreement is contingent on recovery – not an agreed hourly rate. Thus, this factor is neutral.

**IV. NAMED PLAINTIFFS ARE ENTITLED TO SERVICE AWARDS**

Class Counsel requests approval of a modest incentive award to the Named Plaintiffs in the amount of \$3,850.00 each. Named Plaintiffs have served as the Class Representatives in this case from inception to the present. Defendant does not oppose these awards and agreed to pay them, if approved by the Court, and as provided by the Settlement Agreement.

“[C]ourts consistently approve incentive awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they shoulder during litigation.” *Camp v. Progressive Corp.*, No. Civ. A. 03-2507, 2004 WL 2149079, at \*8 (E.D. La. Sept. 23, 2004)(internal citations omitted); *see also Carrabba v. Randalls Food Markets, Inc.*, 191 F.

Supp.2d 815,835 (N.D. Tex. 2002)(recognizing practice of awarding incentive awards). Based on Class Counsel's experience, the amount requested is consistent with or below the amounts typically awarded in similar litigation. *See, e.g., Camp*, 2004 WL 2149079, at \*7 (awarding up to \$10,000 to each named plaintiff as incentive awards, for a total payment of \$102,000); *In re Lease Oil Antitrust Litigation* (No. II), 186 F.R.D. 403, 449 (S.D. Tex. 1999)(awarding named plaintiffs up to \$10,000 each for participating in lawsuit); *Purdie v. Ace Cash Express, Inc.*, No. Civ. A 301CV1754, 2003 WL 22976611, at \*7 (N.D. Tex. Dec. 1, 2003)(awarding the three named plaintiffs a combined incentive award of \$16,665); *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 504 (N.D. Miss. 1996)(awarding each of four named plaintiffs a \$10,000 incentive award); *Cassell, supra.* (awarding class representatives \$25,000 each).

Plaintiffs have actively followed this litigation from the inception and have participated in the mediation and negotiation phase of the case. Rhine Attorneys' Fee Decl. at ¶13. Plaintiffs demonstrated a keen interest in the enforcement of their privacy rights and of those of the class they represent. They have remained in communication with their Counsel and have reviewed documents in the case. The service award requested is justified in light of the named Plaintiffs' willingness to devote their time and energy to prosecuting a representative action and is reasonable in consideration of the overall benefit conferred on the Settlement Class and should be approved.

## **V. CONCLUSION**

For the foregoing reasons, Plaintiffs' Motion for Attorneys' Fees, Costs and Expenses and Service Awards for the Named Plaintiffs should be granted.

This the 2<sup>nd</sup> day of December, 2020.

Respectfully submitted,

/s/ Micah S. Adkins

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**CERTIFICATE OF SERVICE**

I certify that on December 2, 2020, I caused the foregoing paper to be filed electronically using the Davidson County Chancery Court E-Filing System, which will electronically serve notification of same on the following counsel of record:

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*/s/ Micah S. Adkins*  
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