Hon. William L. Dixon
Hearing Date: September 29, 2023
Hearing Time: 10:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

AMY GARCIA, ANTHONY GIBBONS, and TAYLOR RIELY-GIBBONS, individually and on behalf of all others similarly situated, Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF LICENSING, an agency of the State of Washington, Defendant.	No. 22-2-05635-5 SEA PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

Plaintiffs Amy Garcia, Anthony Gibbons, and Taylor Riely-Gibbons (together, "Plaintiffs"), submit this memorandum in support of their Motion for an Award of Award of Attorneys' Fees, Costs, and Service Awards.

I. INTRODUCTION

Following extensive arm's-length negotiations, which included an all-day mediation and continued negotiations in the weeks that followed, the Settling Parties reached an agreement to resolve the claims in this class action. The settlement is, undeniably, an outstanding result for the Class. It consists of a non-reversionary common fund of $3.6 million, in addition to enhanced and improved data security. Specifically, DOL has made, and continues to make, substantial enhancements, expenditures, and improvements to its security environment in response to the litigation.

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Class Counsel have zealously prosecuted Plaintiffs' and Class Members' claims, achieving the Settlement Agreement only after extensive investigation, negotiations, and an all-day mediation with respected mediator Bennett G. Picker. Even after the mediation, Class Counsel worked for weeks to finalize settlement terms, the settlement agreement and associated exhibits pertaining to notice, preliminary approval, and final approval.

As compensation for the significant benefit conferred on the Settlement Class, Class Counsel respectfully move the Court for an award of attorneys' fees in the amount of $1,080,000, which represents 30 percent of the non-reversionary common fund benefit earned for the Class, as well as $12,145.21 in costs. This fee is in line with the benchmark for fees regularly used by Washington Courts. *See Bowles v. Wash. Dep't of Ret. Sys*., 121 Wn.2d 52, 72 (1993) (benchmark fee of 25 percent may be increased to 30 percent). This request should be approved because it is extremely modest in comparison to the benefit negotiated for the Settlement Class, and it is reasonable and appropriate in light of the substantial risks presented in prosecuting this action in a rapidly evolving area of law, the quality and extent of work conducted, and the stakes of the case.

Class Counsel also respectfully move the Court for service awards of $6,000 each to the three named Plaintiffs and the other two Class Representatives[1] for their work on behalf of the Class.

II. STATEMENT OF ISSUES AND RELIEF REQUESTED

Plaintiffs respectfully request the Court grant Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, and enter an order that:

(1) grants Plaintiffs' request for attorneys' fees and costs in the amount of $1,080,000;

(2) grants Plaintiffs' request for $12,145.21 in litigation costs;

(3) grants Plaintiffs' request for a service award to each of the five Class Representatives

[1] Had the Parties been unsuccessful in their efforts to resolve this matter, Plaintiffs intended to name two additional class representatives in an amended pleading. Both unnamed representatives participated in informal discovery for the purposes of settlement discussions with DOL and were named as Settlement Class Representatives in the Order Granting Motion for Preliminary Approval.

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in the amount of $6,000; and

(4) grants such other, further, or different relief as the Court deems just and proper.

III. EVIDENCE RELIED UPON

This motion is based upon the Declaration of Timothy W. Emery In Support of Plaintiffs' Motion for Preliminary Approval ("Emery MPA Decl.") and the Settlement Agreement ("S.A.") attached thereto as Exhibit 1 (Dkt. 57); the Declaration of Timothy W. Emery In Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Costs, and Service Awards ("Emery Fee Decl."); the Declaration of Scott M. Fenwick of Kroll Settlement Administration LLC In Connection with Final Approval of Settlement ("Fenwick Decl."); and on the pleadings and files herein.

IV. STATEMENT OF FACTS

A. The Data Breach

In or before the week of January 24, 2022, DOL became aware of suspicious activity involving professional and occupational license information contained in its POLARIS system. Am. Compl. ¶ 16, Dkt. 7. DOL's subsequent investigation revealed that POLARIS was accessed in the Data Breach, and Personal Information for approximately 545,901 licensees was stolen, including their names, e-mail addresses, Social Security numbers, dates of birth, and/or driver's license or state identification numbers. *Id.* ¶ 18. Hackers may also have acquired additional Personal Information, including credit card account numbers, bank account numbers, routing numbers, telephone numbers, and places of employment. *Id.* ¶ 19.

B. Litigation Background, Discovery, and Settlement Negotiations

From the beginning of this case, Class Counsel expended considerable effort on behalf of Plaintiffs and the proposed Class. Class Counsel conducted their own investigations of the Data Breach, researched the legal issues implicated by the Data Breach, and drafted pleadings for the named Plaintiffs. *See* Emery Fee Decl. ¶ 22. Class Counsel researched and prepared initial liability theories, damages modeling, risk assessment, and discovery planning. *Id*. ¶¶ 22–23. Class Counsel then filed the individual complaints and ultimately worked together to plan a course of

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action without any leadership conflict. ¶ 21. Class Counsel spent numerous hours in those early stages researching and coordinating efforts among the law firms. *Id*. ¶¶ 22–23.

Shortly after the lawsuit was filed, Plaintiffs served DOL with formal written discovery seeking documents related to the merits of Plaintiffs' claims, any potential defenses thereto, and class certification. Emery MPA Decl. ¶ 20. DOL filed a Motion to Dismiss on June 24, 2023, and Plaintiffs filed their Opposition on August 1, 2023. Dkt. 27, 32.

Shortly thereafter, the Parties began to explore resolution through their counsel and filed a joint motion to stay the matter pending mediation. Emery MPA Decl. ¶ 22; Dkt. 35. The Parties agreed to engage Bennett G. Picker of Stradley Ronon as a mediator to oversee settlement negotiations in the Action. Emery MPA Decl. ¶ 22. In advance of formal mediation, DOL provided informal discovery related to the merits of Plaintiffs' claims, potential defenses thereto, and class certification, and the Parties discussed their respective positions on the merits of the claims and class certification. *Id*. ¶ 23. Plaintiffs also provided DOL informal discovery related to their experiences with the Data Breach and their capacity to serve as Class Representatives. *Id*.

The Parties participated in extensive arm's-length settlement negotiations conducted through Mr. Picker that included a day-long mediation session on February 15, 2023, followed by continued negotiations over several weeks following mediation. *Id*. ¶ 24. Plaintiff Anthony Gibbons also personally participated in the mediation session with Mr. Picker, and he approves of the settlement that the Parties reached. *Id*. These protracted settlement negotiations culminated in the Parties agreeing on the form of a CR 2A Agreement on or about March 28, 2023. *Id*. ¶ 25. The Parties thereafter finalized all the terms of the settlement and executed the Settlement Agreement on April 27, 2023. *Id*.

On May 11, 2023, this Court granted preliminary approval of the class action settlement. Dkt. 61.

C. Overseeing the Settlement Since Preliminary Approval

Class Counsel worked closely with Kroll, as the Settlement Administrator, to ensure the settlement proceeded smoothly and according to plan. Emery Fee Decl. ¶ 23. Class Counsel

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proofread, edited, and factually checked everything that Kroll posted on the settlement website. *Id*. Class Counsel responded to Class Member inquiries, and conferred with Kroll as well as DOL's Counsel on issues as they arose during the claims administration process. They also ensured deadlines were met, and they anticipate further involvement with Kroll and DOL's Counsel in the coming months to further ensure a full settlement for the Class. *Id*.

V. LEGAL AUTHORITY

A. Application of the percentage-of-the-fund is warranted.

Where attorneys have obtained a common fund settlement for the benefit of a class, Washington courts typically employ the "percentage of recovery approach" in calculating and awarding attorneys' fees. *See Bowles v. Dep't of Ret. Sys*., 121 Wn.2d 52, 72 (1993) (rejecting a lodestar critique in a common fund case and applying the percent-of-recovery approach). While the lodestar method is generally preferred when calculating *statutory* attorney fees, the percentage of recovery approach is used in calculating fees under the common fund doctrine. *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). Because this is a common fund settlement, the "percentage of recovery" approach applies. *See Ariz. Citrus*, 904 F.2d at 1311. "Under the percentage of recovery approach . . . attorneys are compensated according to the size of the benefit conferred, not the actual hours expended." *Lyzanchuk v. Yakima Ranches Owners Ass'n, Phase II, Inc*., 73 Wn. App. 1, 12 (1994). As the Washington Supreme Court has recognized, "[i]n common fund cases, the size of the recovery constitutes a suitable measure of the attorneys' performance." *Bowles*, 121 Wn.2d at 72. Public policy supports this approach: "When attorney fees are available to prevailing class action plaintiffs, plaintiffs will have less difficulty obtaining counsel and greater access to the judicial system. Little good comes from a system where justice is available only to those who can afford its price." *Id*. at 71.

The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (noting that the preferred

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method in common fund cases has been to award a reasonable percentage of the fund). "Stated differently, the doctrine allows an attorney 'in equity to recover fees in the absence of a contract or statute when his services confer a substantial benefit for a group of people.'" *Dolan v. King Cnty.*, 2020 WL 2395167, at *7 (Wash. Ct. App. May 12, 2020) (quoting *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 167–68 (1989)).

This is consistent with courts' acknowledgment that attorneys should normally be paid by their clients. *See Van Gemert*, 444 U.S. at 478 ("[A] litigant or a lawyer who recovers a common fund . . . is entitled to a reasonable attorney's fee from the fund as a whole."). Courts prefer a percentage-of-the-fund model over a lodestar-multiplier approach in cases where it is possible to ascertain the value of the settlement through a common fund. *See In re Bluetooth*, 654 F.3d, 935 942 (9th Cir. 2011) ("Because the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("[T]he primary basis of the fee award remains the percentage method."); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007) ("[U]se of the percentage method in common fund cases appears to be dominant.").[2]

B. Class Counsel's request for fees that total less than less than 30 percent of the value of the common fund is reasonable under a percentage-of-the-fund analysis.

Washington contingency fee percentages in individual cases are usually in the range of 33 to 40 percent. *See Forbes v. Am. Bldg. Maint. Co. W.*, 170 Wn.2d 157, 161–66 (2010) (discussing contingency fee percentages between 33 1/3 percent and 44 percent and noting trial court's order

[2] By contrast, courts rely on the lodestar method under circumstances not applicable here, i.e., when "there is no way to gauge the net value of the settlement or of any percentage thereof." *Hanlon*, 150 F.3d at 1029; *In re Bluetooth*, 654 F.3d at 941 (lodestar appropriate "where the relief sought—and obtained—is often primarily injunctive in nature and thus not easily monetized"). This limited use of the lodestar method relates in part to its potential deterrent effect: "[I]t is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *Vizcaino*, 290 F.3d at 1050 n.5; *see also In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (application of the lodestar method may encourage "abuses such as unjustified work" and therefore "does not achieve the stated purposes of proportionality, predictability and protection of the class").

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that "40 percent contingency fee based on the $5 million settlement was fair and reasonable"). The typical range for attorneys' fees awarded in common fund class action settlements is between 20 and 33 percent. *See Alba Conte et al.*, 4 Newberg on Class Actions § 14.6 (4th ed. 2002) (recognizing "fee awards in class actions average around one-third of the recovery"); *Bowles*, 121 Wn.2d at 72 (acceptable fees often range from 20 to 30 percent); *see also Ariz. Citrus Growers*, 904 F.2d at 1311.

In determining the percentage-of-fund fee award, Courts may consider the following factors: (1) whether counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether the case was handled on a contingency basis; (4) the market rate for the particular field of law; and (5) the burdens class counsel experienced while litigating the case. *In re Online DVD-Rental Antitrust Litig*., 779 F.3d at 954–55; *see also Mehlenbacher v. DeMont*, 103 Wn. App. 240, 248 (2000) (quoting *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149–50 (1993)); *Bowers v. Transamerica Title Ins. Co*., 100 Wn.2d 581, 597 (1983) (award is adjusted either upward or downward to reflect factors not already taken into consideration including the contingency of the case and the quality of the work performed).

Here, Class Counsel's request for $1,080,000 in attorneys' fees—30 percent of the common fund—is fair and reasonable under the circumstances of this case. Washington courts, including those in King County, have regularly granted fees requests at or exceeding 30 percent of the common fund. *See, e.g.*, *Hill v. Garda CL Northwest, Inc*, No. 09-2-07360-1 (King Cnty. Super. Ct. Feb. 7, 2020) (awarding 30 percent of common fund); *Mader v. Health Care Authority*, No. 98-2-30850-8 SEA (King Cnty. Super. Ct. May 14, 2004) (awarding approximately 32.7 percent of cash settlement, or 28.8 percent if including additional health benefit contributions); *Romatka v. Brinker Int'l Payroll Co*., 2014 WL 6778248 (Wash. Super. Ct. Oct. 24, 2014) (approving fees of 25 percent of the value of the common fund); *Barnett v. Wal-Mart Stores, Inc*., 2009 WL 2377907 (Wash. Super. Ct. July 10, 2009) (awarding 30 percent of the common fund); *Storti v. University of Washington*, No. 04-2-16973-9 SEA (King Cnty. Super. Ct. May 12, 2006) (awarding 30 percent of common fund).

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1. Class Counsel obtained exceptional results.

In determining the amount of attorneys' fees to award, a court should examine "the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *Omnivision*, 559 F. Supp. 2d at 1046 ("The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award."); Federal Judicial Center, *Manual for Complex Litigation*, § 27.71, p.336 (4th ed. 2004) ("MCL") (the "fundamental focus is on the result actually achieved for class members"). The settlement is a significant result for the Class, comprising both core prospective and monetary relief. As further described in the accompanying declarations, the litigation was hard-fought, difficult, contentious, and posed a series of case-dispositive risks for Class Counsel. *See* Emery Fee Decl. ¶ 3.

The settlement achieved reflects the high quality of work by skilled and experienced Class Counsel throughout the litigation, including several rounds of settlement negotiation. Class Counsel's fee request is commensurate with their extensive experience, which they were able to leverage to procure the settlement. The skill demonstrated by Class Counsel in developing the Complaints, consolidating multiple cases, and negotiating and settling the action early further supports the fees requested. *See Vizcaino*, 290 F.3d at 1050 n.5; (class counsel's consumer class action expertise allowed for a result that "would have been unlikely if entrusted to counsel of lesser experience or capability" given the "substantive and procedural complexities" and the "contentious nature" of the settlement).

As explained in Plaintiffs' Motion for Preliminary Approval, Plaintiffs believe that they would succeed in litigation and be able to recover damages on behalf of the Class. However, Class Counsel recognizes that the range of potential litigation outcomes is large. The scope of damages would depend in large part on the scope of class certification, whether various theories of damages would be accepted by the Court (*i.e.*, loss of value of PII theory), and which causes of action survived to trial. Whether the case would be litigated to a favorable outcome and the amount

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obtained through continued litigation are not certain, and the case is subject to numerous risks. By settling and paying Class Members now, practical remedies that have been absent become imminently available. Even if Plaintiffs achieved a successful judgment, relief to Class Members would likely be forestalled for years following the exhaustion of appeals. Based on the size of the breach and the substantial litigation risks, the settlement presents a robust relief package and valuable outcome for the Class compared to other recent data breach class action settlements.

Monetary Relief: Class Counsel obtained a $3.6 million non-reversionary common fund—the "Settlement Fund." This fund will be used to fund (a) settlement payments, (b) identity theft protection and credit monitoring services, (c) settlement administration costs, (d) service awards to the Class Representatives, and (e) attorneys' fees, costs, and expenses. S.A. ¶ 45. The retail value of the identity theft protection and credit monitoring services offered to Settlement Class Members is $19.99 per month ($239.88 per year). *See* Emery Fee Decl. ¶ 7.

Equitable Relief: Class Counsel also achieved substantial non-monetary benefits for the Class. *See* S.A. ¶¶ 63–66. The Ninth Circuit and other courts have repeatedly held that where, as here, class counsel achieves significant non-monetary benefits, the court "should consider the value of [such] relief . . . as a relevant circumstance" in determining what percentage of the settlement benefits should be awarded as reasonable fees. *Staton*, 327 F.3d at 974 (internal quotation marks omitted); *see also Vizcaino*, 290 F.3d at 1049 (affirming enhanced fee award where "the court found that counsel's performance generated benefits beyond the cash settlement fund"); *Linney v. Cellular Alaska P'ship*, 1997 WL 450064, at *7 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234 (9th Cir. 1998) (granting fee award of 33 percent of common fund where settlement provided additional non-monetary relief).

The settlement promises significant remedial measures that DOL has agreed to implement as a result of this litigation, all of which will benefit all Class Members, whether or not they submit a Claim Form for monetary relief. The results achieved here are substantial, and support Class Counsel's fee request.

2. The risk involved with the litigation supports the fee request.

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"The risk that further litigation might result in Plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees." *Omnivision*, 559 F. Supp. 2d at 1046–47; *see also Vizcaino*, 290 F.3d at 1048 (risk of dismissal or loss on class certification is relevant to evaluation of a requested fee). Class Counsel confronted significant hurdles to obtaining any recovery.

While almost all class actions involve a high level of risk, expense, and complexity, numerous courts have recognized that data breach cases are especially risky, expensive, and complex given the unsettled and evolving nature of the law. *See, e.g.*, *In re Sonic Corp. Customer Data Sec. Breach Litig.*, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) ("Data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts. And of course, juries are always unpredictable."); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (noting that "many of the legal issues presented in [] data-breach case[s] are novel"). This risk is highlighted by the fact that data breach cases have faced substantial hurdles in making it past the pleading stage—and more in obtaining and maintaining certification. *See Hammond v. Bank of N.Y. Mellon Corp.*, 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage); *see also In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying certification on the basis that plaintiffs in a data breach case could not show that common issues predominated). Such cases underscore the risk faced by Class Counsel on behalf of the Class.

Another significant risk faced by Plaintiffs here are the risks of maintaining class action status through trial. The class has not yet been certified, and DOL will certainly oppose certification if the case proceeds. Thus, Plaintiffs "necessarily risk losing class action status." *Grimm v. Am. Eagle Airlines, Inc.*, 2014 WL 12746376, at *10 (C.D. Cal. Sept. 24, 2014). Class certification in contested consumer data breach cases is not common—first occurring in *Smith v. Triad of Ala., LLC*, 2017 U.S. Dist. LEXIS 38574, at *45–46 (M.D. Ala. Mar. 17, 2017). In one of the few significant data breach class actions that have been certified, this risk is very real. This

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over-arching risk simply puts a point on what is true in all class actions: class certification through trial is never a settled issue and is always a risk for the Plaintiffs and their Counsel.

Moreover, the theories of damages in data breach class actions remain untested at trial and appeal. As another court recently observed: "Data breach litigation is evolving; there is no guarantee of the ultimate result." *Fox v. Iowa Health Sys*., 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021) (citation omitted). These cases are particularly risky for plaintiffs' attorneys. Consequently, the requested fee award appropriately compensates for the risk undertaken by Class Counsel here.

3. Class Counsel faced substantial risk of non-payment.

The requested fee is also justified by the financial risks undertaken by Class Counsel in representing the Class on a contingency basis. *See Vizcaino*, 290 F.3d at 1050 (finding that class counsel's representation of the class on a contingency basis is relevant to the assessment of the fee). "Most important, 'the contingency adjustment is designed solely to compensate for the possibility . . . that the litigation would be unsuccessful and that no fee would be obtained.'" *Bowers*, 100 Wn.2d at 598–99 (quoting *Copeland v. Marshall*, 641 F.2d 880, 893 (1980)). Such adjustments are "based on the notion that attorneys generally will not take high risk contingency cases, for which they risk no recovery at all for their services, unless they can receive a premium for taking that risk." *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 541 (2007). The public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk they might be paid nothing at all for their work. *WPPSS*, 19 F.3d at 1299.

Class Counsel have devoted substantial resources to the prosecution of this case with no guarantee that they would be compensated for their time or reimbursed for their expenses. *See* Emery Fee Decl. ¶ 9. In spite of the substantial risk of nonpayment, Class Counsel zealously represented the interests of the Class. "Attorneys are entitled to a larger fee award when their compensation is contingent in nature." *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig*., 2013 WL 12327929, at *32 (C.D. Cal. July 24, 2013) (citing

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Vizcaino, 290 F.3d at 1048–50); *see also Kissel v. Code 42 Software Inc*., 2018 WL 6113078, at *5 (C.D. Cal. 2018). "[W]hen counsel takes cases on a contingency fee basis, and litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award." *Bellinghausen v. Tractor Supply Co*., 306 F.R.D. 245, 261 (N.D. Cal. 2015). The potential of receiving little or no recovery in the face of increasing risk weighs in favor of the requested fee. *See WPPSS*, 19 F.3d at 1299; *Ching v. Siemens Indus*., 2014 WL 2926210, at *8 (N.D. Cal. June 27, 2014) ("Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work."); *Brown v. 22nd Dist. Agric. Ass'n*, 2017 WL 3131557, at *8 (S.D. Cal. July 24, 2017) (recognizing that "class counsel was forced to forego other employment in order to devote necessary time to this litigation" and the substantial risk associated with taking the matter on a contingent basis warranted "an upward adjustment to the fee award").

4. Class Counsel worked on a contingency fee basis.

The contingency fee agreements between Plaintiffs' counsel and the named Plaintiffs further support the requested attorney fee award. Common fund fee awards essentially function as "an equitable substitute for private fee agreements where a class benefits from an attorney's work." *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003). Plaintiffs' Counsel have standard fee agreements with the named Plaintiffs calling for 33–40 percent of the recovery to be paid as attorneys' fees, plus costs, in the event that this action settled or taken to judgment on an individual basis. Emery Fee Decl. ¶ 8. *See Vizcaino*, 290 F.3d at 1049–50 (what the named plaintiffs agreed to as percentage for fees may be relevant to common fund percentage); *In re Washington Public Power Supply System Securities Litig.*, 779 F.Supp. 1063, 1086 (D.Ariz. 1990) (citing *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989) and *Kirkorian v. Borelli*, 695 F.Supp. 446, 456 (N.D. Cal. 1988)).

5. Fees in similar actions.

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Courts may refer to awards made in other settlements of comparable size when determining whether an award is reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. Washington courts and courts in the Ninth Circuit routinely award percentage recoveries in excess of the 25 percent benchmark. *See, e.g.*, *Lyzanchuk v. Yakima Ranches Owners Ass'n, Phase II, Inc*., 73 Wn. App. 1, 9 (1994) (33 percent fee); *In re Pac. Enters. Secs. Litig*., 47 F.3d 373, 379 (9th Cir. 1995) (affirming 33 percent award); *Williams v. MGM-Pathe Comms. Co*., 129 F.3d 1026, 1027 (9th Cir. 1997) (same); *Syed v. M-I, L.L.C*., 2017 WL 3190341, at *8 (E.D. Cal. July 27, 2017) (awarding 33 percent of $7 million common fund); *Dearaujo v. Regis Corp*., 2017 WL 3116626, at *13 (E.D. Cal. July 21, 2017) (awarding 33 percent of common fund); *Bennett v. SimplexGrinnell LP*, No. 11-cv-1854-JST, ECF No. 278, at 11 (N.D. Cal. Sept. 3, 2015) (awarding 38.8 percent of common fund); *Lee v. JPMorgan Chase & Co*., 2015 WL 12711659, at *8–9 (C.D. Cal. Apr. 28, 2015) (awarding 33 percent of common fund); *Boyd v. Bank of Am. Corp*., 2014 WL 6473804, at *10–11 (C.D. Cal. Nov. 18, 2014) (same); *Burden v. Select Quote Ins. Servs*., 2013 WL 3988771, at *5 (N.D. Cal. Aug. 2, 2013) (same); *Barbosa v. Cargill Meat Sols. Corp*., 297 F.R.D. 431, 454 (E.D. Cal. 2013) (same); *Franco v. Ruiz Food Prods., Inc*., 2012 WL 5941801, at *25 (E.D. Cal. Nov. 27, 2012) (same); *Garcia v. Gordon Trucking, Inc*., 2012 WL 5364575, at *11 (E.D. Cal. Oct. 31, 2012) (same); *Singer v. Becton Dickinson & Co*., 2010 WL 2196104, at *8 (S.D. Cal. June 1, 2010) (awarding 33 percent); *Stuart v. RadioShack Corp*., 2010 WL 3155645, at *8 (N.D. Cal. Aug. 9, 2010) (awarding 33 percent of common fund); *Fernandez v. Victoria's Secret Stores, LLC*, 2008 WL 8150856, at *16 (C.D. Cal. July 21, 2008) (awarding 34 percent of common fund); *Aguilar v. Wawona Frozen Foods*, 2017 WL 2214936, at *9 (E.D. Cal. May 19, 2017) (awarding 33 percent of fund); *Emmons v. Quest Diagnostics Clinical Labs, Inc*., 2017 WL 749018, at *9 (E.D. Cal. Feb. 24, 2017) (awarding 33 percent of common fund); *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at *27–28 (N.D. Cal. Apr. 1, 2011) (awarding 42 percent of $27 million fund). The requested fee is consistent with the fees and costs awarded in similar cases. In short, Class Counsel's fee request is reasonable under the "percentage of the fund" method.

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6. The burdens faced by Class Counsel support the fee request.

The Ninth Circuit instructs district courts to consider the burdens class counsel experienced while litigating the case (e.g., cost, duration, and foregoing other work). This litigation has been pending for more than 15 months. Class Counsel has advanced time and out-of-pocket costs, and they have foregone other work while litigating this case. *See In re Infospace, Inc. Secs. Litig*., 330 F. Supp. 2d 1203, 1212 (W.D. Wash. 2004) (noting that "preclusion of other employment by the attorney due to acceptance of the case" is a factor to consider when determining an appropriate fee award).

B. A lodestar-multiplier cross-check confirms the requested fee.

Although Washington State law, and not federal law, is controlling here, the Ninth Circuit has encouraged, but not required, courts to conduct a lodestar crosscheck when assessing the reasonableness of a percentage fee award. *See In re Bluetooth*, 654 F.3d at 944 (stating "we have also encouraged courts to guard against an unreasonable result by crosschecking their calculations against a second method" of determining fees). The first step in the lodestar method is to multiply the number of hours counsel reasonably expended on the litigation by a reasonable hourly rate. *Hanlon*, 150 F.3d at 1029. At that point, "the resulting figure may be adjusted upward or downward to account for several factors including the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Id*. (citing *Kerr v. Screen Extras Guild, Inc*., 526 F.2d 67, 70 (9th Cir. 1975)); *see also In re Bluetooth*, 654 F.3d at 942. The lodestar-multiplier method confirms the propriety of the requested fee here.

1. Class Counsel's lodestar is reasonable.

Through July 26, 2023, Class Counsel devoted more than 668 hours to the investigation, litigation, and resolution of this complex case, thereby incurring $398,530.00 in lodestar.[3] Emery Fee Decl. ¶ 19. As detailed in the Emery Fee Declaration, Class Counsel's time was spent

[3] Class Counsel will spend additional hours seeing this case through its final resolution, including by overseeing the claims process and attending the final approval hearing.

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investigating the claims of the Settlement Class Members, drafting complaints, conducting informal discovery, engaging in significant motion practice, researching and analyzing legal issues, and engaging in settlement negotiations.[4] *Id*. ¶¶ 22–23.

The time Class Counsel devoted to this case is reasonable. Class Counsel prosecuted the claims at issue efficiently and effectively, making every effort to prevent the duplication of work that might have resulted from having multiple firms working on this case. Emery Fee Decl. ¶ 24. Throughout the litigation and mediation process, Class Counsel faced defense counsel at the top of their profession from one of the most prominent data privacy defense firms. *See DeStefano v. Zynga, Inc*., 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016) ("The quality of opposing counsel is also relevant to the quality and skill that class counsel provided").

Class Counsel's hourly rates are reasonable and have been approved by this Court and by other courts in the Ninth Circuit and throughout the country. In assessing the reasonableness of an attorney's hourly rate, courts consider whether the claimed rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1994). Class Counsel are experienced, highly-regarded members of the bar with extensive expertise in complex class actions involving consumer claims like those at issue here. *See* Emery Fee Decl. ¶ 2.

2. A multiplier is warranted.

The fee requested by Class Counsel reflects a multiplier of 2.7. In *Vizcaino*, the Ninth Circuit noted that multipliers have ranged from 0.6 to 19.6, and it upheld an award with a 3.65 multiplier in that case. *Vizcaino*, 290 F.3d at 1050–51 & n.6; *accord In re Infospace*, 330 F. Supp. 2d at 1216 (Zilly, J.) (finding that a lodestar multiplier of 3.5 adequately compensates counsel's

[4] Class Counsel's efforts to secure a settlement before accruing even more lodestar further support the fee, as Class Counsel obtained a reasonable resolution prior to the filing of summary judgment motions that could have significantly weakened or eliminated Plaintiffs' claims. *See, e.g.*, *Pelletz v. Weyerhaeuser Co*., 255 F.R.D. 537, 539 (W.D. Wash. 2009) (approving prompt settlement after thorough pre-filing negotiations). Awarding Class Counsel a reasonable percentage of the common fund promotes the public policy of encouraging timely settlements. *Vizcaino*, 290 F.3d at 1050 n.5 (noting "it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief"). In providing this general overview, Class Counsel do not waive and, in fact, specifically reserve all protections afforded by the attorney-client privilege and work product doctrine.

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risk of nonpayment); *Steiner v. Am. Broad. Co, Inc*., 248 F. App'x 780, 783 (9th Cir. 2007) (finding a multiplier of approximately 6.85 to be "well within the range of multipliers that courts have allowed"); *Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d 1113, 1123 (C.D. Cal. 2008) (approving multiplier of 5.2).

When conducting a lodestar-multiplier cross check, courts in the Ninth Circuit use similar factors in determining the reasonableness of a percentage-of-the-fund-award as they do in determining an adjustment of lodestar, namely: results achieved, risks stemming from the complexity of the case, and the risk of nonpayment. *See Hanlon*, 150 F.3d at 1029; *see* MCL § 14.122, at 261. Class Counsel refer the Court to the above discussion of those factors.[5] The multiplier of 2.7 is therefore comfortably within the spectrum of multipliers identified in *Vizcaino* and is in line with the multipliers awarded in other courts within the Ninth Circuit. The lodestar-multiplier cross check thus supports the fee request here.

C. The costs sought are appropriate, fair, and reasonable.

It is well-established that recovery of costs, in addition to fees, is appropriate in its own right. "Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit [from] the settlement." *In re Media Vision Tech. Sec. Litig*., 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). Class Counsel incurred out-of-pocket costs totaling $12,145.21, primarily to cover expenses related to mediation fees, court filing fees, service fees, fees for use of research databases, and administrative costs such as copying, mailing, and messenger expenses. Emery Fee Decl. ¶ 26. These out-of-pocket costs were necessary to secure the resolution of this litigation and may be recouped. *See In re Immune Response Sec. Litig*., 497 F. Supp. 2d 1166, 1177-78 (S.D. Cal. 2007) (finding that costs such as filing fees, photocopy costs, travel expenses, postage telephone and fax costs,

[5] By way of summary, the multiplier here is reasonable given the outstanding result of $3.6 million and practice changes that Class Counsel have achieved for the Class through their skill, experience, and effort; the risks involved in this litigation, and the fact that counsel agreed to represent the Class on a contingent basis, thereby risking their own resources with no guarantee of recovery. *See Hanlon*, 150 F.3d at 1029.

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computerized legal research fees, and mediation expenses are relevant and necessary expenses in a class action litigation).

D. The service awards requested are reasonable.

Service awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Peterson v. Kitsap Cmty. Fed. Credit Union*, 171 Wn. App. 404, 430 (2012) (citing *Rodriguez v. West Publ'g Corp*., 563 F.3d 948, 958–59 (9th Cir. 2009)); *see also Hartless v. Clorox Co*., 273 F.R.D. 630, 646–47 (S.D. Cal. 2011) ("Incentive awards are fairly typical in class actions."), *aff'd*, 473 F. App'x 716 (9th Cir. 2012). The settlement is not contingent on the Court's granting of such an award. S.A. ¶ 86.

The requested service awards of $6,000 are modest under the circumstances and well in line with awards approved by state and federal courts in Washington and elsewhere. *See, e.g.*, *In re Online DVD-Rental Antitrust Litig*., 779 F.3d at 934, 947–48 (approving service payments to plaintiffs in the amount of $5,000 each); *Pelletz v. Weyerhaeuser Co*., 592 F. Supp. 2d 1322, 1329–30 & n.9 (W.D. Wash. 2009) (approving $7,500 service awards and collecting decisions approving awards ranging from $5,000 to $40,000). These awards will compensate Plaintiffs for their time and effort in stepping forward to serve as proposed class representatives, assisting in the investigation, keeping abreast of the litigation, providing informal discovery as part of settlement negotiations, and reviewing and approving the proposed settlement terms after consulting with Class Counsel. Indeed, without Plaintiffs litigating this matter, the Class would not have been able to recover anything.

VI. CONCLUSION

Class Counsel respectfully request that this Court grant their motion and award the requested attorneys' fees and expenses, and Plaintiffs' service awards in full.

Dated: July 26, 2023

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I certify that this memorandum contains 5720 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I, Jennifer Chong, under penalty of perjury of the laws of the state of Washington, certify and declare that I caused a true and correct copy of the foregoing document to be served on the following parties on July 26, 2023 as indicated below:

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Dated this 26th day of July, 2023, at Seattle, Washington.

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