DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Court Address: 7325 South Potomac St. Centennial, CO 80112	
Plaintiffs: Paula Henderson, Shykira Scott, Daniel Jones, Carol Goldberg, Vahram Haroutunian, Brian Kearney, Hilda Lopez, Preference Robinson, Sharon Etchieson, Radhe Banks, Jonathan Trusty, Marie Netrosio, Michaela Mujica-Steiner, Roger Loeb, Kyle Denlinger, Martin Coleman, Alyssa Halaseh, Rachel Hunter, Todd Valentine and David Moynahan, *on behalf of themselves and all others similarly situated*, v. **Defendants:** Reventics, LLC, OMH Healthedge Holdings, Inc., d/b/a Omega Healthcare	▲ **COURT USE ONLY** ▲
Attorneys for Plaintiffs: Reid Elkus (CO. BAR #32516) **ELKUS & SISSON, P.C.** 7100 E Belleview Avenue, Suite 101 Greenwood Village, CO 80111 Tel: (303) 567-7981 Scott Edward Cole (CA BAR #160744) **COLE & VAN NOTE** 555 12th Street, Suite 2100 Oakland, California 94607 Tel: (510) 891-9800	Case No.: 2025CV30456 Div.:
PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS AND SERVICE AWARDS	

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I. INTRODUCTION

On April 22, 2025, this Court preliminarily approved a proposed nationwide class action settlement. Specifically, Class Counsel's skill and efforts created an $8,150,000.00 non-reversionary settlement fund ("the Settlement Fund") that resolves all claims in what has been a risky but heavily litigated action, after vigorous negotiation, through three mediations, and against two of the nations' largest defense firms. Indeed, the underlying (federal court) litigation, which started in the Spring of 2023, presented significant risks to Class Counsel and Plaintiffs; data breach litigation is still in a relative infancy state, and the law is relatively undeveloped, especially in Colorado. And yet, despite these challenges and more, Class Counsel negotiated a Settlement Fund that provides broad relief and an efficient claims process to several million individuals residing throughout the country—including reimbursement for documented losses of up to $5,000, *pro rata* cash payments, and assured future protection of Class Member data due to Defendant's enhanced data security measures. The value of these forms of relief would not have been achieved *but for* Class Counsel's hard work in this litigation.

Given the number of class members and the complexity of the issues and procedural development of the litigation, this was not a standard consumer class action. At the time of the Settlement, eight separate class action lawsuits were pending,[1] with Class Counsel leading and pursuing this nationwide class action litigation across multiple federal and state court venues in Colorado and California, as well as in the Tenth Circuit Court of Appeals. The litigation raised

[1] Five of the class action lawsuits were consolidated in the District of Colorado and are currently on appeal in the Tenth Circuit Court of Appeals. The three additional cases were launched by Class Counsel in California and Colorado as a backup plan in light of the federal district court's dismissal of the first filed matter.

novel questions of law and fact arising from a data security attack by a sophisticated foreign threat actor, and alleged privacy harms and damages questions—thus carrying significant risk to Class Counsel who advanced all the litigation costs and resources to achieve this result. Indeed, the multi-venue approach—and Class Counsel's willingness to take the case into the Tenth Circuit Court of Appeals on questions of first impression in this Circuit—highlights Class Counsel's dedication to zealously representing the Class, and the manner in which they investigated, organized, litigated, and negotiated this complex case from its inception.

Through this Motion, Class Counsel respectfully moves this Court for an award of attorneys' fees in the amount $2,852,500 (35% of the Settlement Fund) as well as recovery of their reasonable litigation costs in the amount of $76,536.77. Class Counsel's fee request is consistent with non-reversionary common fund class action settlements where Class Counsel provided substantial and creative work and undertook the financial risk necessary to achieve the result. Thus, under the percentage of the fund analysis—the fee award method routinely adopted and applied in this jurisdiction—the requested fees are fair, reasonable and warranted. Finally, Plaintiffs' request is contemplated by the Settlement Agreement, and Class Counsel advised the Court and the Class of these requests in the Motion for Preliminary Approval, in the Short Form and Long Form Notices and on the Settlement Website.

Finally, Class Counsel hereby seeks Service Awards for each of the Representative Plaintiffs of either $2,500 or $1,000 apiece, depending on the particular contribution taken by each and the notoriety attendant to being named plaintiffs in high profile litigation. All of these contributions by the Representative Plaintiffs benefited the Settlement Class.[2]

[2] See the declarations of the Class Representatives, filed herewith.

II. PROCEDURAL HISTORY / SUMMARY OF CLASS COUNSEL'S WORK

On or about December 15, 2022, Defendants purportedly discovered that private health information of Class Members had been accessed by unauthorized parties during a data security incident. The data varied by individual, but included Class Member names, dates of birth, SSNs, patient account numbers, clinical data including diagnosis information, dates of services, treatment costs, prescription medication details and more. Starting on or about February 24, 2023, Defendants sent notice letters to potentially affected persons, ultimately seeking to inform over 4 million individuals that their data may have been compromised. Declaration of Scott Edward Cole ("Cole Decl.") ¶¶ 3-5. Indeed, Defendants likely over-notified the public.

Plaintiff Paula Henderson filed a class action lawsuit against Defendants in the United States District Court for the District of Colorado on March 6, 2023 (Case No. 1:23-cv-586-MEH). Multiple other lawsuits followed, and the respective attorneys on these cases negotiated and then obtained court approval of a leadership structure. On April 24, 2023, the federal Court ordered the various cases consolidated into the *Henderson* lawsuit and appointed Scott Edward Cole and Joseph M. Lyon (both of whom lead law firms with decades of class action experience) as Interim Co-Lead Counsel. Plaintiffs filed a Consolidated Complaint on May 19, 2023, which was subsequently amended. Cole Decl. ¶¶ 6-7. Litigation, including various case management efforts, formal and informal discovery, and pleadings challenges, etc. thereafter began and proceeded in earnest. Cole Decl. ¶¶ 8, *et al*.

During the course of the litigation, Class Counsel conducted extensive research to investigate and understand the nature of Defendants' corporate structures, both in the United States and a parallel one in India, Defendants' operations, including the collection and handling

of private information, the types of information involved in the Data Breach, whether the information was published on the Dark Web, etc. Class Counsel's pre-settlement work also included, but was not limited to, preparing and serving formal discovery and analyzing Defendants' discovery responses and document production, working with their non-designated expert/consultant, attending various court appearances, extensively briefing case management issues, scheduling orders, a motion to stay discovery, a motion to dismiss, a motion to strike, etc., preparing their appeal, significant independent research, filing the additional lawsuits against Defendants, etc. Cole Decl. ¶ 12.

Regarding settlement efforts, the Parties attended, initially, two unsuccessful mediations on September 19 and November 8, 2023. Cole Decl. ¶¶ 9-10. In December 2023, Defendants filed dispositive motions and, on September 30, 2024, the Court granted Defendants' Motion to Dismiss with prejudice. On October 29, 2024, Plaintiffs filed an appeal to the Tenth Circuit Court of Appeals, which is still pending, subject to dismissal according to the terms of this Settlement. Shortly thereafter, Class Counsel vetted additional plaintiffs and filed additional lawsuits against Defendants in different courts. Cole Decl. ¶¶ 12.[3]

On February 4, 2025, the Parties attended a mediation *for a third time*, in Miami, Florida, with Hon. Thomas E. Scott (ret.). Although the Parties did not reach a settlement at this third mediation, they engaged in significant negotiation thereafter, ultimately agreeing upon the Settlement and Notice Plan. Cole Decl. ¶¶ 13. The matter was refiled in the instant Court on

[3] Those other matters, *Coleman, et al. v. Reventics, LLC*, Case No. 1:24-cv-03187-NYW-STV (D. Colo. 2024) and *Valentine, et al. v. Reventics, LLC*, Case No. CGC-25-621920 (Sup. Ct. Cal., San Francisco Cty. 2024) have recently been dismissed as part of the terms of the present Settlement, with a tolling agreement in *Valentine*. The Settlement resolves the claims of all Plaintiffs against all Defendants connected to this Data Breach.

February 24, 2025. This Court granted Plaintiffs' Motion for Preliminary Class Action Settlement Approval on April 22, 2025. Cole Decl. ¶ 15.

III. SUMMARY OF THE SETTLEMENT

Class Counsel briefly summarizes the terms of the Settlement for the Court's reference. The settlement negotiated on behalf of the Class provides for a $8,150,000 non-reversionary Settlement Fund[4] with a simple claims process, and provides significant non-monetary relief by virtue of Defendants' agreement to engage in remedial measures that will benefit Class Members for years into the future. The preliminarily approved Settlement Agreement ("SA") provides relief for the approximately 4.2 million members of the Settlement Class defined as follows:

> "All United States residents whose Private Information was potentially exposed to unauthorized third parties as a result of the data breach allegedly discovered by Defendant on or before December 15, 2022."
>
> SA ¶ 56 (also lists excluded certain individuals and entities).

Class Members may submit a claim for a Cash Payment for (a) up to $5,000.00 for documented losses related to the Data Breach or (b) a cash payment in the amount of $100.00 (subject to *pro rata* adjustment based upon the total number of claims submitted).[5] SA ¶ 68. In

[4] While the amount of money changing hands is $8,150,000, the genuine value of the settlement is far higher. Class Member data remains in the hands of Defendants and the security enhancements promoted by this litigation provides an additional substantial benefit (e.g., if the value of jeopardizing that disclosed data is well over $8 million here, the value of avoiding another breach in the future can be *presumed* to be substantial). *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002) ("Incidental or non-monetary benefits conferred by the litigation are relevant circumstances….").

[5] Since claims rates in data breach cases tend to be very low (e.g., since the data sets accessed often contain information going back decades, class members may be unfamiliar with the Defendants and/or may have long since relocated, or be litigation adverse), it is conceivable that participating claimants may receive substantially more than the $100 targeted cash out

addition to the monetary settlement benefits, Defendants agreed to implement and/or maintain certain reasonable steps to adequately secure its systems and environments. SA ¶ 69.

Per the terms of the Agreement, Class Counsel now seeks an award of attorneys' fees not to exceed 35 percent of the Settlement Fund as well as recovery of their litigation costs. SA ¶ 101; Cole Decl. ¶ 19.[6] Class Counsel also requests Service Awards of $1,000 or $2,500 for each of the Representative Plaintiffs. SA ¶ 100. As discussed at length below, Class Counsel's fee request is within the range of reasonableness for Settlements of this nature and size, as well as the substantial and creative work they provided, and the excellent result achieved in the face of the daunting challenges highlighted herein.

IV. LEGAL ANALYSIS

A. The Common Fund Doctrine Applies.

Colorado state law is in accord with Tenth Circuit federal authority and U.S. Supreme Court precedent that common fund fee awards are to be computed as a percentage of the fund basis. *See Brown v. Phillips,* 838 F.2d 451, 456 (10th Cir. 1988); *Uselton v Com. Lovelace Motor Freight, Inc.,* 9 F.3d 849, 853 (10th Cir. 1994); *Blum v. Stenson,* 465 U.S. 886, 900

amount. But, whatever the precise *pro rata* result may ultimately be, any recovery per class member in that range would represent a **remarkable award for claims otherwise sitting on appeal at the Tenth Circuit.**

[6] *See Manual for Complex Litigation*, § 27.71, 336 (4th ed. 2004) ("[The] fundamental focus is on the result actually achieved for class members."); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81, 100 S.Ct. 745 (1980) (attorneys' fees are awarded based on the value of the common benefit made available to the class). While this is regardless of a reversion provision, here, there is no reversion; *See also, Herbert Newberg & Alba Conte, Newberg on Class Actions ("Newberg")* § 15.53 (5th ed.) at 183 (the common fund is, itself, the measure of success and represents the benchmark from which a fee will be awarded).

(1984); *Brody v. Hellman*, 167 P.3d 192, 198 (Colo. App. 2007).[7] Indeed, "[t]he doctrine is an equitable remedy that affords fees to attorneys for their advocacy for the benefit of others. It is grounded in equitable principles of *quantum meruit* and unjust enrichment. Therefore, a court needs no legislative support to award fees under the common fund doctrine." *Brody*, 167 P.3d at 198 (internal citations omitted). "The [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.*

As *Brody* further explains,

> "Colorado recognizes the common fund doctrine. In class action lawsuits where a fund is created for the benefit of the class, either through settlement or judgment on the merits, the doctrine is widely adhered to as a method for proportionately spreading attorney fees among the class members. Because a class action lawsuit benefits all class members, and because at least one class member contracts with an attorney to pursue this benefit, the remaining class members should pay what the court determines to be the reasonable value of the services benefitting them. An award of attorney fees from a common fund also serves to reward counsel for creativity and skill in enlarging a settlement fund beyond what was thought possible or likely at the inception of the case." *Id.* at 198 (cleaned up) (citing *Kuhn v. State*, 924 P.2d 1053, 1060 (Colo. 1996)).

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[7] In common fund cases, fees are not assessed against the unsuccessful litigant (a.k.a., "**fee shifting**") but, rather, taken from the fund or damage recovery (a.k.a. "**fee spreading**"). In fact, the United States Supreme Court has always computed common fund fee awards on a percentage of the fund basis. *Van Gemert*, 444 U.S. 472; *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 59 S.Ct. 777 (1939); *Central Railroad & Banking Co. of Georgia v. Pettus*, 113 U.S. 116, 5 S.Ct. 387 (1885); *contrast*, *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1050 & n.5 (9th Cir. 2002) ("[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.").

And, finally, as to the policies underpinning this rule,

> "the size of the contingent fee is designed to be greater than the reasonable value of the services, or the hours worked multiplied by the hourly rate, to reflect the fact that attorneys will realize no return for their investment of time and expenses in cases they lose. Thus, because payment is contingent upon receiving a favorable result for the class, attorneys should be compensated both for services rendered and for the risk of loss or nonpayment assumed by following through with the case." *Id.* at 201.

Prosecuting these claims in a jurisdiction with little on-point jurisprudence posed great risk to Class Counsel, as further detailed below. Unlike their defense counterparts, Class Counsel's clients (i.e., the Plaintiffs) could not help fund the prosecution, and Class Counsel knew from the outset that they could be on the hook for millions of dollars of defense fees if they lost. Those risks are meaningful. For these reasons, and given that a non-reversionary common fund was established through this settlement—the benefits of which will be made available to all Class Members with no need for documentation or enduring any onerous procedures to collect those benefits—proportionately spreading attorneys' fees among the Class Members though a percentage-of-the-fund approach is the most rational approach.

B. The *Johnson* Factors Support a Finding that the Fees Are Reasonable.

Colorado courts further rely on the factors articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) in calculating and reviewing the reasonableness of attorneys' fee awards under the common fund doctrine. *Brody*, 167 P.3d at 200. "The *Johnson* factors are substantially similar to those found in Rule 1.5 of the Colorado Rules of Professional Conduct, which provide a basis for a court's evaluation of whether attorney fees are reasonable and may also be considered when determining the reasonable value of an attorney's services for recovery based on quantum meruit." *Id.*

Specifically, the *Johnson* factors examine:

> (1) The time and labor involved, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) any prearranged fee, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case (11) the nature and length of the professional relationship with the client and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

Notwithstanding the foregoing, this Court need not specifically address each *Johnson* factor. *Blanco v. Xtreme Drilling & Coil Services, Inc.*, No. 16-cv-00249-PAB-SKC, 2020 WL 4041456, at *4 (D. Colo. July 7, 2020) (citing *Gudenkauf v. Stauffer Commc'ns, Inc.*, 158 F.3d 1074, 1083 (10th Cir. 1998)). In fact, "a court may assign different relative weights to the factors—that is, none of the factors is inherently equiponderant, preponderant, or dispositive." *Stalcup v. Schlage Lock Co.*, 505 F.Supp.2d 704, 705-06 (D. Colo. 2007). And the factors also need not be exhausted in every case. *Jenkins v. Pech*, No. 8:14CV41**,** 2016 WL 715780, at *1 (D. Ne. Feb. 22, 2016). In a common fund case, the greatest weight is to be given to the monetary results achieved. In fact, the monetary results may be considered "decisive." *Brown v. Phillips*, 838 F.2d 451, 456 (10th Cir. 1988). Here, the monetary results speak for themselves: Class Counsel achieved an $8,150,000 Settlement through multi-venue litigation, a commitment to vigorously arguing Plaintiffs' appeal to the Tenth Circuit, and by otherwise zealously litigating and negotiating the matter to resolution.

In any event, although not necessarily dispositive—since its underlying policy is already clear—we review the relevant *Johnson* factors below, a review which confirms that Class Counsel's fee request is reasonable and well warranted.

1. Plaintiffs' Request for an Attorneys' Fees Award of 35% of the Settlement Fund is in Line with the Customary Fee in Common Fund Settlements.

Plaintiffs seek attorneys' fees of 35% of the Settlement Fund, or $2,852,500. The Court should approve the requested fee award because the fee is in line with, and lower than, other similar awards. *See Johnson v. Camino Nat'l Resources, LLC*, No. 19-cv-02742-CMA-SKC, 2021 WL2550165, at *2 (D. Colo. June 22, 2021) (awarding 40% of gross settlement value without lodestar crosscheck); *Vaszlavik v. Storage Corp.*, No. 95-B-2525, 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000) ("A 30% common fund fee award … [was] in the middle of the ordinary 20%-50% range [for class actions] and … [was considered] presumptively reasonable."); *Shaw v. Interthinx*, No. 13-cv-01229-REB-NYW, 2015 WL 1867861, at *6 (D. Colo. Apr. 22, 2015) (citing cases holding that fees within the 20%-50% range are "presumptively reasonable"); *Robertson v. Whitman Consulting Org., Inc.*, No. 19-cv-2508-RM-KLM, 2021 WL 4947349, at *5 (D. Colo. Oct. 22, 2021) (slip copy) (awarding 40% of gross settlement amount plus costs); *Whittington v. Taco Bell of America, Inc.*, No. 10–cv–01884–KMT–MEH, 2013 WL 6022972, at *6 (D. Colo. Nov. 13, 2013) (awarding fees and costs amounting to approximately 39% of the fund as a whole as "within the normal range" in a common fund case); *Davis v. Crilly*, 292 F.Supp.3d 1167, 1174 (D. Colo. 2018) (awarding 37% of the gross settlement award). Cole Decl. ¶ 26.[8]

[8] Even on a lodestar *plus* multiplier basis, not applicable in *common fund* settlements, these fees would be reasonable. *See In re Miniscribe Corp.*, 309 F.3d 1234, 1245 (10th Cir. 2002) (2.57 multiplier); *Mishkin v. Zynex, Inc.*, 2012 WL 4069295 at *2 (D. Colo. Sep. 14, 2012) (collecting District of Colorado cases approving multipliers ranging from 2.5 to 4.6); *Prim v. Ensign United States Drilling, Inc.*, No. 15-cv-02156-PAB-KMT, 2019 WL 4751788, at *7 (D. Colo. Sept. 30, 2019) (approving fees reflecting a 2.34 multiplier); *Aguilar v. Pepper Asian Inc.*, No. 21-CV-02740-RM-NYW, 2022 WL 408237, at *6-7 (D. Colo. Feb. 10, 2022) (approving 2.49 multiplier); *In re Davita Healthcare Partners, Inc.*, No. 12-CV-2074-WJM-CBS, 2015 WL

2. The Amount Involved and the Results Obtained Support Approval of Class Counsel's Fee Request.

This $8,150,000 non-reversionary Settlement Fund (plus the remedial benefits) provides remarkable benefits to Class Members. Each and every Settlement Class Member, without exception, can easily submit a claim for up to $5,000 in Documented Losses or a *pro rata* cash payment. Additionally, Class Members can rest assured that their private information is safely protected as a result of the data security enhancements implemented by Defendants. SA ¶ 69; Cole Decl. ¶ 17. These are real, significant benefits that, without the efforts of Plaintiffs and Class Counsel, and their willingness to take on the attendant risks of litigation, would not have been made available to Class Members. As discussed above, this decisive factor weighs heavily in favor of granting this fee request.

3. The Contingent Nature of the Case, Risks of Litigation, Preclusion of Other Employment by Class Counsel and Undesirability of the Case All Weigh in Favor of Class Counsel's Fee Request.

Class Counsel undertook this matter solely on a contingent basis, with no guarantee regarding the potential duration of the litigation or the ultimate recovery of fees or costs. Cole Decl. ¶ 28. While attorneys who represent corporations are routinely paid (often quite handsomely) on an hourly basis, plaintiffs wanting to pursue data breach cases can rarely afford

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3582265, at *5 (D. Colo. June 5, 2015) (multiplier of 3.0); multipliers awarded nationwide typically range from 1 to 3. *See*, *Newberg* § 15:89.

Finally, the Court should note that the work detailed in this brief does not include that prospective time (i.e., work after submission of this motion)--work associated with the final approval hearing, the claims process and settlement administration. *See, In re Philips/Magnavox TV Litig.*, No. 09-3072, 2012 WL 1677244, at *17 (D.N.J. May 14, 2012) (observing, in analyzing a fee request, that the submitted figures did not include time and expenses incurred by counsel subsequent to the submission of that motion). With millions of class members, Class Counsel's future work will unquestionably be substantial.

to pay their attorneys by the hour, especially if they expect to be represented by a law firm well known for achieving good results. As attorneys committed to data breach class actions, including the one at hand, Class Counsel must accept them on a wholly contingent basis, with no guarantee of recovery of fees, or even the reimbursement of litigation costs. *Id.* As such, Class Counsel assumed significant risk of nonpayment or at least underpayment of their attorneys' fees, and incurred serious opportunity costs. Class Counsel took on these significant risks knowing full well their efforts may not bear fruit. *Id.*

This Settlement Fund is the result of over two thousand hours of hard work of Class Counsel. Cole & Van Note alone invested well over 1,760 hours litigating this case, hours that could and would have been allocated to the many other cases it prosecutes and potential cases it may otherwise have investigated and launched. Cole Decl. ¶ 24. And yet, each of those hours was spent *here*, meaning that this time was/is unbillable to other matters.[9] The Lyon Firm likewise dedicated substantial time with over 525 hours committed to this litigation at the time of this Motion. Lyon Decl. ¶ 8. With a class of this magnitude, both Firms anticipate spending far more time through the claims process and Final Approval. Again, all this work was done on a no-promises, contingent basis.

Tenth Circuit Courts "have consistently found that [contingency fee arrangements], under which counsel runs a significant risk of nonpayment, weighs in favor of the

[9] Although the time and labor involved can be evaluated as a "relevant" factor, it should be assigned a lesser weight than the monetary results achieved, risks undertaken, and other factors that "predominate." *Brown v. Phillips*, 838 F.2d 451, 456 (10th Cir. 1988). Additionally, although the Parties vigorously litigated this case and zealously advocated for their respective clients, the Parties also cooperated with each other to resolve disputes and reduce litigation costs. Cole Decl. ¶ 27.

reasonableness of a requested fee award." *Blanco*, No. 16-cv-00249-PAB-SKC, 2020 WL 4041456, at *5-6 (approving requested 38% of settlement amount where attorneys worked on a contingent basis) (internal citations omitted); *Shaw v. Interthinx*, No. 13-cv-01229-REB-NYW, 2015 WL 1867861, at *8 (D. Colo. Apr. 22, 2015) (awarding $2 million in attorneys' fees, representing 33⅓% of the maximum value of the common fund). Accordingly, these factors weigh in favor of approval of the attorneys' fees request here.

Data breach litigation is complex, risky, and evolving and there is no guarantee of the ultimate result. *Gordon v. Chipotle Mexican Grill, Inc*., No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases ... are particularly risky, expensive, and complex."). Such risk was especially present in this case where the federal District Court ultimately granted Defendants' Motion to Dismiss without leave to amend, and where no on-point law[10] existed at the Tenth Circuit to guide the parties as to the likely outcome of that appeal. Plaintiffs could, thus, receive nothing and/or, even worse, be on the hook for Defendants' attorneys' fees. Colo. Rev. Stat. § 13-17-201.[11]

Notably, these risks augment those challenges present in all data breach cases, which generally face substantial legal hurdles given the novelty of the factual and legal issues presented. Due, at least in part, to the cutting-edge nature of data protection technology and the

[10] The Tenth Circuit has not specifically addressed the issue of Article III standing in data breach cases, and its District Courts have addressed the issue with mixed and sometimes unexpected results. *Owens-Brooks, et al. v. DISH Network Corp.*, Case No. 1:23-cv-01168-RMR-SBP (D. Colo. Aug. 23, 2024) (Doc 61). This lack of specific Tenth Circuit authority added another layer of uncertainty to this already risky case.

[11] Under Colorado law, defendants may be entitled to attorney's fees in any tort action that is dismissed in its entirety prior to trial under Rule 12(b). Colo. Rev. Stat. § 13-17-201(1). This provision applies to tort actions dismissed by federal courts. *Torres v. American Family Mut. Ins. Co.*, 606 F.Supp.2d 1286, 1287 (D. Colo. 2009).

rapidly evolving law throughout the country, data breach cases like this one face substantial hurdles—even just to make it past the pleading stage. *See also, e.g., Hammond v. The Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060(RMB)(RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Next, Plaintiffs faced the risk of failing to obtain class certification. *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying class certification in data breach class action). Further, Plaintiffs would certainly have faced challenges demonstrating causation and damages. *See, e.g. Southern Independent Bank v. Fred's, Inc.*, No. 2:15-CV-799-WKW, 2019 WL 1179396, at *8 (M.D. Ala. Mar. 13, 2019) (holding under *Daubert* motion that causation was not met for class certification purposes in data security breach case); *Adkins v. Facebook, Inc.*, 424 F.Supp.3d 686 (N.D. Cal. 2019) (denying motion to certify data breach damages class under Rule 23(b)(3)); *In re Anthem, Inc. Data Breach Litig*., 327 F.R.D. 299, 318 (N.D. Cal. 2018) ("While there is no obvious reason to treat certification in a data-breach case differently than certification in other types of cases, the dearth of precedent makes continued litigation more risky."). Here, Class Counsel consulted an expert to formulate a damages model—but there was certainly no guarantee the model would have held water at class certification or that the Court might not have certified the class and then *decertified* it later after massive claims administration costs were borne by Class Counsel, if it turned out that individual issues predominated.

Further, continued litigation would have required substantial additional formal discovery, depositions, payment for expert reports, achievement and then maintenance of class certification through trial, a summary judgment attack, *Daubert* challenges, and possible

writs/appeals—each of which would require extensive briefing and each of which would add to the possibility of no recovery at all. Cole Decl. ¶¶ 26-32. In sum, this high-stakes, risky case justifies a commensurate attorneys' fees award.

4. The skill required to litigate this matter and Class Counsel's extensive experience in class action data breach litigation support the request for attorneys' fees.

While many firms would simply have given up after having their case dismissed, Class Counsel did not, and they made that choice well aware of the risks of continued litigation. Class Counsel are well known data breach litigators, undoubtedly among the most experienced privacy lawyers in the country. As such, Class Counsel were well aware of the risks they and Plaintiffs faced in in advocating issues of first impression in the Tenth Circuit Court of Appeals and pursing discovery in multi-venue litigation in California and Colorado. Cole Decl. ¶¶ 37-43, Exhibit A. Nonetheless, Class Counsel's willingness to accept the risk resulted in an $8,150,000 common fund for past harms and significant business practice changes to benefit the Class into the future. Cole Decl. ¶¶ 8-13, 22.

Thus, the *Johnson* factors weigh in favor of the fee request in its entirety.

C. Class Counsel's Requested Costs are Reasonable and Should be Granted.

Class Counsel's litigation costs "are compensable in a common fund case if the particular costs are the type typically billed by attorneys to paying clients in the marketplace." *Brody v. Hellman*, 167 P.3d 192, 205 (Colo. App. 2007). The requested costs are related to: (a) filing and service fees, (b) reproduction/copy expenses, (c) legal research, (d) postage, (e) expert consultation fees and (f) mediation and travel fees. Cole & Van Note's Cost Journal is attached as Exhibit B to the Cole Decl. Lyon Firm costs are attached as Exhibit A to the Lyon Decl. These costs and expenses were necessary to prosecute and negotiate this case and are modest in

comparison to the enormous costs that likely would have been incurred if litigation had continued through additional discovery and expert disclosures. *Id*. at ¶ 34. At present, Class Counsel has incurred $76,536.77 in such costs. Because these costs are reasonable and were necessarily incurred in litigating this action, the Court should grant Plaintiffs' request for reimbursement.

D. Plaintiffs' Requests for Service Awards Are Reasonable and Should be Granted.

The Tenth Circuit has held that courts "regularly give incentive awards to compensate plaintiffs for the work they perform[]—their time and effort invested in the case." *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 468 (10th Cir. 2017). Service Awards are, thus, commonplace and represent an "efficient and productive way to encourage members of a class to become class representatives, and to reward the efforts they make on behalf of the class." *Luken Family Ltd. P'ship, LLP v. Ultra Resources, Inc.*, No. 09-cv-01543-REB-KMT, 2010 WL 5387559, at *8 (D. Colo. Dec. 22, 2010).

Here, Plaintiffs request service awards in the amount of $2,500 apiece for Plaintiffs Paula Henderson, Shykira Scott, Daniel Jones, Carol Goldberg, Vahram Haroutunian, Brian Kearney, Hilda Lopez, Preference Robinson, Sharon Etchieson, Radhe Banks, Jonathan Trusty, Marie Netrosio, Michaela Mujica-Steiner, Roger Loeb and Kyle Denlinger. These are the original *Henderson* (federal court) Plaintiffs who incurred the greatest risk. Plaintiffs also request Service Awards of $1,000 apiece for Plaintiffs Martin Coleman, Alyssa Halaseh, Rachel Hunter, Todd Valentine and David Moynahan, the contributions of whom began later, but were instrumental in achieving this resolution. Cole Decl. ¶ 35.

All Plaintiffs were actively engaged in this action, which included assisting in the

ongoing investigation of the case and damages flowing therefrom, producing relevant documents, reviewing and approving pleadings, reviewing the Settlement documents and, *inter alia*, answering Class Counsel's many questions. Class Counsel vetted all these litigants and, as such has no reason to believe any of them have any conflicts between each other or vis-a-vis the remaining Class Members. Cole Decl. ¶¶ 35-36. Moreover, these modest service award requests fall well within the range of service awards approved by Colorado federal and state courts. *See Tuten v. United Airlines, Inc.*, 41 F.Supp.3d 1003 (D. Colo. May 19, 2014) (awarding $15,000 service award). *Patterson v. BP Am. Prod. Co.*, 2013 Colo. Dist. LEXIS 145 at *14-15 (Denver County, Oct. 28, 2013) ("Numerous courts have recognized that incentive awards are an efficient and productive way of encouraging members of a class to become class representatives, and awarding individual efforts taken on behalf of the class."). Thus, the Court should grant the requested Service Awards.

V. CONCLUSION

For all the above reasons, Plaintiffs respectfully request this Court grant Plaintiffs' Motion for Attorneys' Fees, Costs and Service Awards.

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**Pro hac vice forthcoming*