IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN CHACON and LEONARD BRADLEY, individually and on behalf of all others similarly situated, Plaintiffs, v. NEBRASKA MEDICINE, Defendant.	CASE NO. 8:21-cv-00070-RFR-CRZ

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS AND MEMORANDUM IN SUPPORT

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I. INTRODUCTION

On June 4, 2015 this Court preliminarily approved a proposed class action settlement between Plaintiffs John Chacon and Leonard Bradley ("Plaintiffs") and Defendant Nebraska Medicine ("Defendant"). Dkt. 19. Class Counsel's efforts created three distinct benefits for two separate classes: (1) up to $3,300 in cash reimbursements for ordinary out-of-pocket expenses, lost time, and extraordinary expenses for all Settlement Class Members; (2) one-year of credit monitoring and identity theft restoration services automatically provided to Credit Monitoring Subclass Members; and (3) equitable relief in the form of information security enhancements designed to ensure Settlement Class Members' Personal Identifying Information and Private Health Information is better protected in the future.

Class Counsel have zealously prosecuted Plaintiffs' claims, achieving the Settlement Agreement only after an extensive investigation and prolonged arms' length negotiations. Even after coming to an agreement on the central terms, Class Counsel worked for weeks to finalize the settlement agreement and associated exhibits pertaining to notice, preliminary approval, and final approval.

As compensation for the substantial benefit conferred upon the settlement class, Class Counsel respectfully move the Court for a combined award of attorneys' fees and costs totaling $195,000, to be paid by Nebraska Medicine separate and apart from the Settlement Fund. The Eighth Circuit has expressly and repeatedly approved fees based on the potential recovery to the Class, and routinely approves fees that equal 25% to 36% of the benefit provided. Plaintiffs' request here for fees and costs *combined* represents less than 1% of the total benefit to the class. Plaintiffs' motion should be granted because the request is reasonable and appropriate in light of the substantial risks presented in prosecuting this action, the quality and extent of work conducted,

and the stakes of the case; the requested fees and costs were clearly delineated in notice to the class, and no class member has objected; and because the costs incurred were reasonable and necessary for the litigation. Class Counsel also respectfully moves the Court for an award of $2,000 to each of the two Plaintiffs for their work on behalf of the Class.[1]

II. CASE SUMMARY[2]

a. The Data Breach

Defendant Nebraska Medicine ("Nebraska Medicine" or "Defendant") is a comprehensive health network in the Omaha, Nebraska region, with two major hospitals, more than 1,000 doctors and 40 clinics in the Omaha area. *See* Dec. of David K. Lietz in Support of Plaintiffs' Mot. for Prelim. App. at Dkt. 17-1 ("Lietz MPA Dec.") ¶ 9.a. In the ordinary course of receiving treatment and healthcare services from Nebraska Medicine, patients are required to provide Defendant with sensitive, personal and private information such as: name, address, phone number, and mail address; date of birth; demographic information; information related to medical history; insurance information and coverage; information concerning an individual's doctor, nurse, or other medical providers; photo identification; employer information; and other information that may be deemed necessary to provide care. *Id.* ¶ 9.c. Nebraska Medicine publicly recognizes and affirms its duties and responsibilities to keep its patients' personal information private and confidential. *Id.* ¶ 9.d.

Plaintiffs allege that between August 27, 2020 and September 20, 2020, Nebraska medicine experienced a targeted cybersecurity incident where cyberthieves had unauthorized access to Nebraska Medicine's network for approximately 24-days (the "Data Incident"). *Id.* at ¶ 9.e. Nebraska Medicine hired forensic experts to perform an investigation into the full nature and scope

[1] While Plaintiffs here move for attorneys' fees, costs, and service awards, they will move for final approval of the settlement by separate motion, which will be filed prior to the final fairness hearing.
[2] This section has been largely adopted from the Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, filed May 25, 2021 at Dkt. 17.

of the cyber-attack. *Id.* ¶ 9.e. Plaintiffs allege that investigators found that cyber-criminals had been able to access patient data that included names, addresses, dates of birth, health insurance information, medical record numbers, and/or clinical information (including physician notes, laboratory results, imaging, diagnosis information, treatment information, and/or prescription information) and Social Security numbers. *Id.*

As a result of the discovery of the Data Incident, notification was mailed to approximately 125,902 individuals that their personally identifiable information ("PII") may have been impacted. *Id.* at ¶ 10. Of those approximately 125,902 individuals, approximately 13,497 individuals were mailed notification indicating that their Social Security and/or driver's license numbers may have been potentially accessed. *Id.*

Subsequently, this lawsuit was filed asserting claims against Nebraska Medicine relating to the Data Incident.

b. Plaintiffs' Complaint

Plaintiffs filed their Complaint in this Court on February 24, 2021. They allege seven causes of action: (1) Negligence; (2) Invasion of Privacy by Trespass or Intrusion; (3) Breach of Implied Contract; (4) Breach of Fiduciary Duty; (5) Violation of Nebraska Consumer Protection Act; and (6) Violation of Nebraska Uniform Deceptive Trade Practices Act. Lietz Dec. ¶ 12. Plaintiffs sought equitable relief enjoining Nebraska Medicine from engaging in the wrongful conduct complained of and compelling Nebraska Medicine to utilize appropriate methods and policies with respect to consumer data collection, storage, and safety. *Id.* ¶ 13. Plaintiffs further sought an order requiring Defendant to provide credit monitoring services to themselves and the rest of the class. *Id.* ¶ 14. Finally, Plaintiffs sought an award of actual, compensatory, and statutory

damages as well as attorneys' fees and costs, and any such further relief as may be deemed just and proper. *Id.* ¶ 15.

c. History of Negotiations

From approximately March to May 2021, Plaintiffs and Defendant, through their respective counsel, engaged in arms' length negotiations on behalf of the Settlement Class. Lietz MPA Dec. ¶ 17. Counsel for Plaintiff brought extensive experience in hospital data breach class actions to the table, which, along with their internal investigation and informal discovery produced by Nebraska Medicine, allowed proposed Class Counsel to effectively negotiate settlement terms that are fair, adequate and reasonable. *Id.* ¶ 18; *see also* Dec. of David Lietz in Support or Pls.' Mot. for Attorneys' Fees, Costs, and Service Awards ("Lietz Fee Dec.") ¶¶ 5-10, filed herewith. After extensive negotiations and an informal exchange of relevant information, in late March 2021, the Parties reached an agreement on the material terms of the Settlement. *Id.* ¶ 19.

On March 29, 2021, the Parties filed a Joint Notice of Settlement and Request to Set Deadline to File Motion for Preliminary Approval of Class Action Settlement. *Id.* at ¶ 20. The Court approved the Parties' Motion, and set May 25, 2021 as the deadline by which the preliminary approval motion was required to be filed. *Id.* at ¶ 21. Over the following weeks, the Parties diligently negotiated final terms, drafted and finalized the Settlement Agreement along with the corresponding exhibits. *Id.* at ¶ 22. The Settlement Agreement was finalized by the Parties in late-May 2021. *Id*. at ¶ 23, Ex. 1 ("Agr.").

III. SUMMARY OF SETTLEMENT

a. Settlement Benefits

The Settlement negotiated on behalf of the Class provides for three separate forms of relief: (1) cash reimbursements for time and expenses; (2) credit monitoring and identity theft restoration

services; and (3) equitable relief in the form of information security enhancements. *See generally* Lietz MPA Dec., Ex. 1 ("Agr."). The Settlement Agreement calls for certification of both (a) a Settlement Class, members of which can make a claim for cash reimbursements, and (b) a smaller subset referred to as the Credit Monitoring Subclass who will automatically receive one-year of credit monitoring and identity theft restoration services at Defendant's cost:

> **Settlement Class:**
> The approximately 125,902 persons who were mailed notification that their PII was potentially impacted as a result of the Data Incident that occurred between August 27, 2020 and September 20, 2020;
>
> **Credit Monitoring Subclass:**
> The approximately 13,497 persons who were mailed notification that their Social Security and/or driver's license numbers were potentially accessed as a result of the Data Incident that occurred between August 27, 2020 and September 20, 2020.

Agr. ¶¶ 1.7, 1.25. Specific exclusions are detailed in the Settlement Agreement. The Settlement Class is comprised of 125,902 individuals. Agr. ¶ 1.25. The Credit Monitoring Subclass is comprised of 13,497 individuals. Agr. ¶ 1.7.

i. Expense Reimbursements

Under the terms of the Settlement Agreement, Settlement Class Members can submit a claim for both ordinary and extraordinary expense reimbursements. Agr. ¶¶ 2.1-2.3.

Settlement Class Members can claim reimbursement for ordinary out-of-pocket expenses, up to $300 per Settlement Class Member, that were incurred as a result of the Data Incident: (i) unreimbursed bank fees; (ii) long distance phone charges; (iii) cell phone charges (if charged by the minute); (iv) data charges (if charged based on the amount of data used); (v) postage; (vi) gasoline for local travel; and (vii) fees for credit reports, credit monitoring, or other identity theft insurance products purchased by Settlement Class Members between August 27,, 2020 and the Claims Deadline. Agr. ¶ 2.1.1. Claims for ordinary expense reimbursements may also include

reimbursement for up to six (6) hours of lost time spent dealing with the Data Incident (calculated at the rate of $20 per hour), but only if at least one full hour was spent. Agr. ¶ 2.1.3. Settlement Class Members may receive up to three (3) hours of lost time if the Settlement Class Member (i) attests that any claimed lost time was spent related to the Data Incident; and (ii) provides a written description of how the claimed lost time was spent related to the Data Incident. *Id.* Settlement Class Members may claim up to an additional three (3) hours of lost time if the claimant submits reasonable supporting documentation of the time spent (e.g. employment records showing time off of work to deal with effects of the Data Incident). *Id.*

Settlement Class Members are also eligible to receive reimbursement for documented extraordinary losses, up to $3,000 per Settlement Class Member for documented monetary loss that: (i) is actual, documented, and unreimbursed; (ii) was more likely than not caused by the Data Incident; (iii) occurred between August 27, 2020 to the Claims Deadline; and (iv) is not already covered by one or more of the above-referenced reimbursed expenses. Agr. ¶ 2.1.4. Settlement Class Members must also provide documentation that he or she made reasonable efforts to avoid, or seek reimbursement for, such extraordinary losses, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance. *Id.*

Importantly, while both ordinary and extraordinary expense reimbursements are capped at an individual level, *because there is no aggregate cap there will be no pro rata reductions of the valid amounts claimed by Settlement Class Members.* Lietz MPA Dec. ¶ 30.

ii. Credit Monitoring and Identity Theft Restoration

Additionally, Members of the Credit Monitoring Subclass will be automatically provided one-year of additional credit monitoring services, *without* the need to make any affirmative claim. Agr. ¶ 2.3. This one year of credit monitoring is in addition to any credit monitoring previously

offered by Nebraska Medicine and/or UNMC following the Data Incident. *Id.* This service is valued at least $100.00 per person. Lietz Fees Dec. ¶ 13.

iii. Equitable and Prospective Relief

In addition to the monetary relief and credit monitoring services provided, the Parties have also agreed that Nebraska Medicine will implement and keep in place, through December 31, 2022, specific security-related measures and enhancements. Agr. ¶ 2.4, *see also* Appx. A. These measures are detailed in a confidential Appendix A that the Settling Parties have filed under seal with the Court. Lietz MPA Dec. ¶ 32; Mot. to File Under Seal at Dkt. 14; Order Granting Mot. to File Under Seal at Dkt. 18. Generally, Nebraska Medicine will implement and enhance password and user-identity protocols and email and user-browsing protocols. Lietz MPA Dec. ¶ 32; *see also* Appx. A. Nebraska Medicine will also enhance and limit its remote access capabilities. *Id.* Further, Nebraska medicine will update, strengthen, and enhance its network security and system security measures including additional endpoint, vulnerability, and firewall measures. *Id.* Nebraska Medicine will also implement, update, and enhance its security operations center and conduct periodic, enhanced risk assessments. *Id.*

iv. Release

The release in this case is tailored to the claims that have been plead or could have been plead in this case, arising out of the events and circumstances of the Data Incident. Agr. ¶ 1.22. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release claims against Defendant and Related Entities related to the Data Incident and/or the recordkeeping or data security practices in place at the time of the Data Incident. *See* Agr. ¶¶ 1.21.

b. The Notice and Claim Process

i. Notice

In its Order granting preliminary approval, the Court appointed Heffler Claims Group[3] as the Notice Specialist and Claims Administrator in this case. Prelim. App. Order, Dkt. 19. Nebraska Medicine will pay for the cost of providing notice and claims administration separate and apart from the Settlement Payments available to Settlement Class Members. Agr. ¶ 2.6.

The Plan requires direct notice be provided via mail to the last postal provided to Nebraska Medicine and/or the Released Entities by the Settlement Class Members, and for the establishment of a Settlement Website, and toll-free help line. Agr. ¶ 3.2(d)-(f). Notice in this case has been provided pursuant to the Court's Preliminary Approval Order and will be reported on more extensively in Plaintiffs' Motion for Final Approval of Class Action Settlement. Lietz Fees Dec. ¶ 21. Overall, the Settlement Administration is projected to cost approximately $145,000, all of which is to be borne by Defendant separate and apart from the funds available to claimants. *Id.*

Plaintiffs will submit a declaration from Heffler Claims Group (or Kroll) detailing the notice and claims administration with their Motion for Final Approval of Class Action Settlement.

c. Fees, Costs, and Service Awards

The Settlement Agreement calls for a reasonable service award to be sought for Plaintiffs in the amount of $2,000 per Plaintiff. Agr. ¶ 7.3. The Service Award is meant to compensate Plaintiffs for their efforts on behalf of the Settlement Class, including maintaining contact with counsel, assisting in the investigation of the case, producing relevant documents, reviewing the

[3] During the pendency of the settlement, Heffler Claims Group was acquired by Kroll, and thus the Settlement Administrator's declarations may likely come from Kroll.

Complaint, remaining available for consultation throughout mediation, for answering counsel's many questions, and for reviewing the Settlement Agreement. Lietz Fees Dec. ¶ 15.

After agreeing to the terms of the settlement on behalf of the Class, counsel for Plaintiffs negotiated their fees and costs separate from the benefit to Class Members, in the amount of $195,000 for fees and costs combined, subject to Court approval. Lietz MPA Dec. ¶ 55; *see also* Agr. ¶ 7.1.

Class Counsels' fees were not guaranteed—the retainer agreement counsel had with Plaintiffs did not provide for fees apart from those earned on a contingent basis, and, in the case of class settlement, approved by the court. Lietz Fees Dec. ¶ 19. The purely contingent basis upon which Class Counsel took the case meant that Class Counsel assumed significant risk. *Id.* ¶ 17. Class Counsel spent time on this matter that could have otherwise been spent on other, fee-generating matters, and shouldered the risk of expending substantial costs and time without any monetary gain in the case of adverse judgment. *Id.*

Due to the early stage of litigation at which Plaintiffs were able to reach settlement, costs incurred by Plaintiffs are low. *Id.* at ¶ 20. Plaintiffs' current costs are $690, and include filing fees. *Id.* These costs are reasonable and were necessary for the litigation. *Id.* These costs do not include the projected expense of claims and settlement administration, which is to be covered by Nebraska Medicine separate and apart from the Settlement benefits available to class members. Notice and claims administration is projected to cost approximately $145,000. *Id.* at ¶ 21.

IV. LEGAL STANDARD

Courts historically utilize two main approaches to analyzing a request for attorneys' fees: the lodestar approach and the percent-of-benefit approach. *Johnston v. Comerica Mortg. Corp.,* 83 F. 3d 241, 244 (8th Cir. 1996). Under the lodestar approach, the hours expended by an attorney

are multiplied by a reasonable rate, which is adjusted given the characteristics of a particular action. *Id.* The percent-of-benefit (or percent-of-fund) approach permits an award of fees that is equal to some fraction of the common fund the attorneys were successful in procuring during the course of litigation. *Id.* In this Circuit, courts regularly award fees between 25% and 36% of the total combined benefit to the class. *Caligiuri v. Symantec Corp*., 855 F.3d 860, 865–66 (8th Cir. 2017).

It is within the discretion of the District Court to determine what approach to use and if a requested fee is reasonable in a given case. *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 622 (8th Cir. 2017). However, whereas the lodestar approach is viewed as appropriate in statutory fee shifting cases, the percent-of-benefit method is widely endorsed in common fund cases. *Johnston v. Comerica Mortg. Corp.,* 83 F. 3d at 245; *see also Report of the Third Circuit Task Force,* 108 F.R.D. 237, 246–49 (1985) (concluding that the percent-of-recovery fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 736 F. Supp. 1007, 1009 (E.D. Mo. 1990) (adopting what the court called the "healthy trend" of applying the percent-of-fund approach over the lodestar analysis); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F. 3d 768, 821 (3d Cir.1995).

While the use of the lodestar approach is sometimes used to crosscheck the result of the percent-of-benefit method, it is not required. *Caligiuri v. Symantec Corp*., 855 F.3d 860, 865–66 (8th Cir. 2017); *citing Petrovic v. Amoco Oil Co*., 200 F.3d 1140, 1157 (8th Cir. 1999) (finding no reason to examine the lodestar crosscheck carried out by the district court where the percent-of-fund approach yielded a reasonable result); *see also In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002).

V. LEGAL ARGUMENT

a. Plaintiffs' Request for Combined Fees and Costs in the Amount of less than 1% of the Total Settlement Fund is Reasonable and Should be Approved.

i. This Court should apply the percent-of-fund method for determining fees.

The advantages to using the percentage method in common fund cases are many. As one New York court stated:

> The percentage method is bereft of the largely judgmental and time-wasting computations of lodestars and multipliers. These latter computations, no matter how conscientious, often seem to take on the character of so much Mumbo Jumbo. They do not guarantee a more fair result or a more expeditious litigation.

In re Union Carbide Corp., Consumer Prods. Bus. Sec. Litig., 724 F. Supp. 160, 170 (S.D.N.Y. 1989). The increasing use of the percent-of-fund approach in common fund cases likely flows from the fact that the lodestar method has been roundly criticized as "increase[ing] the workload of an already overtaxed judicial system, . . . [being] insufficiently objective and produc[ing] results that are far from homogenous, . . . creat[ing] a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law, . . . le[ading] to abuses such as lawyers billing excessive hours, . . . creat[ing] a disincentive for the early settlement of cases, . . . not provid[ing] the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered, . . [and being] confusing and unpredictable in its administration. *Ryan v. City of Chicago*, 274 Ill.App.3d 913, 923 (1995) (summarizing findings of the Third Circuit task force appointed to compare the respective merits of the percent-of-recovery and lodestar methods).

The percent-of-fund approach on the other hand, allows attorneys who have brought about a benefit to a class to recover fees commensurate with that benefit. *See Elliott v. Sperry Rand Corp.,* 680 F.2d 1225, 1227 (8th Cir.1982) (*per curiam*). The doctrine stems from the Court's inherent equitable powers; by awarding fees and costs payable (or measured) from the fund created

for the benefit of the class the court can spread the cost of litigation proportionately among those who will benefit from the fund. *See Sprague v. Ticonic National Bank*, 307 U.S. 161, 167 (1939); *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980).

The suitability of the percent-of-fund or percent-of-benefit approach in common fund cases is broadly accepted. Eighth Circuit Courts regularly endorse the "percent of the fund" or "percent-of-benefit" method of determining attorneys' fees in class action settlements. *Johnston v. Comerica Mortg. Corp.,* 83 F. 3d at 244; *see also In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002); *Petrovic v. Amoco Oil Co*., 200 F.3d at 1156; *West v. PSS World Med., Inc.,* No. 4:13-cv-574, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014); *Ramsey v. Sprint Commc'ns Co.,* No. 4:11-cv-3211, 2012 WL 6018154, at *4 (D. Neb. Dec. 3, 2012). Accordingly, this Court should utilize the percent-of-benefit approach in assessing the fee request submitted by Plaintiffs.

ii. Settlement Class Counsel's request for less than 1% of the benefit negotiated for the class is reasonable and well below the range of fees accepted by Eighth Circuit Courts.

Settlement Class Counsel here seeks $195,000 in combined fees and costs. It is well established that counsel who create a common benefit are entitled to reimbursement of litigation costs and expenses. Fed. R. Civ. P. 23; *Boeing v. Van Gemert*, 444 U.S. at 478.

In applying the percent-of-fund or percent-of-benefit approach, Eighth Circuit Courts look at the entirety of the settlement package to determine the value of the "fund" or "benefit"—including such items as potential compensation to Settlement Class Members, attorneys' fees and costs, and costs of settlement administration—even where the fund created for class members exists independently from the fees agreed to be paid by a defendant. *Johnston v. Comerica Mortg. Corp.,* 83 F. 3d at 246; *see also Caligiuri v. Symantec Corp*., 855 F.3d at 865-66; *Life Time Fitness,*

Inc., Tel. Consumer Prot. Act (TCPA) Litig., 847 F.3d 619, 622 (8th Cir. 2017); *Huyer v. Buckley,* 849 F.3d 395, 399 (8th Cir. 2017).

In this case, the combined benefit negotiated for the class is immense, easily totaling over $400,000,000. This benefit available includes: (1) up to $3,300 per Settlement Class Member in ordinary expense reimbursements, lost time, and extraordinary expense reimbursements; (2) credit monitoring and identity theft protection *automatically* provided to the Credit Monitoring Subclass, valued at $1,349,700; (3) an estimated $145,000 in settlement notice and administration costs; and (4) $195,000 in attorneys' fees and costs. This is a substantial benefit, and does *not* include the *additional value* of the equitable relief provided by Nebraska Medicine in the form of data security enhancements to its systems that will ensure the Settlement Class Members' private information and personal health information is better safeguarded in the future.

Even ignoring the funds Defendant will be expending in order to implement the data security enhancements provided for by the Settlement Agreement, the requested $195,000 for attorneys' fees and costs combined represents less than 1% of the total settlement fund or benefit. In fact, the requested fees and costs combined represent ***only 14% of the value of the credit monitoring services alone***. This sum is well below the 25% to 36% of common fund fees regularly approved by Eighth Circuit Courts. *Caligiuri v. Symantec Corp*., 855 F.3d at 865–66; *see also In re Xcel Energy, Inc., Sec. Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005) (collecting cases); *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (awarding 36% of a common fund of $3.5 million); *West v. PSS World Med., Inc.,* No. 4:13-cv-574, 2014 WL 1648741, at *1 (approving attorneys' fees of 33%); *Harris v. Republic Airlines, Inc.,* No. 4-88-1076, 1991 WL 238992 at *2 (D. Minn. Nov. 12, 1991) (awarding "a sum slightly in excess of 30% of the common fund").

iii. The Johnson Factors Weigh in Favor of Approving the Modest Requested Fee.

In determining the reasonableness of a requested fee, Courts look to the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-719 (5th Cir. 1974), though they need not exhaustively address every factor. *See Jenkins v. Pech*, No. 2016 WL 715780 (D. Ne. Feb. 22, 2016), citing *Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001); see also *Huyer v. Buckley,* 849 F.3d 395, 399 (8th Cir. 2017) (addressing only the *Johnson* factors the Court found relevant). Plaintiffs address the relevant *Johnson* factors below.

1. The amount involved and the results obtained support approval of Class Counsel's fee request.

The most important inquiry pertains to the results obtained for the class. *Hensley v. Eckerhart,* 461 U.S. 422, 436 ("the most critical factor is the degree of success obtained"). Class Counsel here have delivered a significant benefit to Settlement Class Members. Not only is each Settlement Class Member eligible for up to $3,300 in expense reimbursements and compensation for lost time, but each member of the Credit Monitoring Subclass will *automatically* be provided with 12-months of credit monitoring and identity theft restoration services, without having to make an affirmative claim. Further, the Settlement Agreement provides for Nebraska Medicine to implement specific increased data security safeguards that ensure that all Settlement Class Members' personal identifying information and private health information will be better protected in the future. These are real tangible benefits—that without the efforts of Plaintiffs and Class Counsel, and their willingness to take on the attendant risks, would not have been available. Thus, this factor weighs in favor of granting the fee request.

2. The contingent nature of the case, preclusion of other employment by Class Counsel, risks of litigation, and desirability of the case all weigh in favor of approval of Class Counsel's fee request.

Class Counsel took this case on a purely contingent basis. Lietz Fees Dec. ¶ 16. As such, they assumed significant risk of nonpayment or underpayment. *Id.* Class Counsel took on these risks knowing full well their efforts may not bear fruit. Fees were not guaranteed—the retainer agreement Counsel has with Plaintiffs did not provide for fees apart from those earned on a contingent basis, and in the case of class settlement, approved by the court. *Id.* ¶ 17.

Here Settlement Class Counsel took on significant risk. While Plaintiffs believed they could prevail on their claims against Defendants, they were also aware that they would likely face several strong legal defenses and difficulties in demonstrating causation and injury. Such defenses, if successful, could drastically decrease or eliminate any recovery for Plaintiffs and putative class members. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on either certification or merits. The general risks of litigation are further heightened in the data breach arena. Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data breach cases like this one are particularly complex and face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp*., 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013).

"Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (citing *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986)). Accordingly, these factors weigh in favor of approval of

the attorneys' fees request. *See e.g. Huyer v. Buckley,* 849 F.3d 395, 399 (8th Cir. 2017) (approving requested fees of 33% of the settlement fund where all attorneys worked on a contingent basis).

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

As discussed above, the skill required to litigate data breach cases is great, in part due to the quickly evolving nature of data breach and privacy law. While Mason Lietz & Klinger LLP attorneys have decades of experience in class actions generally, it is noteworthy that just in the time since the firm's inception on March 14, 2020, the firm's partners have been appointed class counsel in a number of data breach and privacy class actions, including: *Baksh v. Ivy Rehab Network, Inc*., No. 7:20-cv-01845-CS (S.D.N.Y. Jan. 27, 2021) (class counsel in a data breach class action settlement involving 125,000 individuals with a settlement value of $12.8 million; final approval granted); *In re GE/CBPS Data Breach Litig.*, 1:2020-cv-02903, Doc. 35 (S.D.N.Y. June 11, 2020) (appointed lead counsel in nationwide class action); *Mowery et al. v. Saint Francis Healthcare System*, No. 1:20-cv-00013-SRC (E.D. Mo.) (appointed class counsel; settlement value of over $13 million); *Chatelain et al. v. C, L and W PLLC*, No. 50742-A (Tex. 42d Dist. Ct. Taylor Cnty. Nov. 6, 2020) (appointed class counsel; settlement valued at over $7 million); *Jackson-Battle v. Navicent Health, Inc.,* No. 2020-CV-072287 (Ga. Super. Ct. Bibb Cnty. Apr. 21, 2021) (appointed class counsel in data breach case involving 360,000 patients; settlement valued at over $72 million); *Bailey v. Grays Harbor Cnty. Pub. Hosp. Dist.,* No. 20-2-00217-14 (Wash. Super. Ct. Grays Harbor Cnty. May 27, 2020) (appointed class counsel in hospital data breach class action involving approximately 88,000 people; final approval granted); *In re Canon U.S.A. Data Breach Litig.*, Master File No. 1:20-cv-06239-AMD-SJB (E.D.N.Y.) (appointed co-lead counsel); *Carrera Aguallo v. Kemper Corporation*, 1:21-cv-01883-MMP (YBK) (N.D. Ill. Apr. 30, 2021) (appointed

co-lead interim class counsel); *Richardson v. Overlake Hospital Medical Center et al*., No. 20-2-07460-8 SEA (Wa. Sup. Ct, King County) (Mr. Lietz, Mr. Klinger, and Ms. Perry appointed class counsel in data breach case; preliminary approval granted); *Kenney et al. v. Centerstone of America, Inc.,* No. 3:20-cv-01007-EJR (M.D. Tenn.) (Mr. Lietz and Mr. Klinger appointed co-lead class counsel; final approval granted August 9, 2021); *Klemm et al. v. Maryland Health Enterprises, Inc.*, C-03-CV-20-002899 (Md. Cir. Ct. Baltimore Cnty.) (appointed Settlement Class Counsel, preliminary approval granted); *Martinez v. NCH Healthcare System, Inc*., No. 2020-CA-000996 (Fl. 20th Cir. Ct. Collier Cnty.) (Mr. Lietz appointed Settlement Class Counsel; preliminary approval granted).. Lietz Fees Dec. ¶¶ 5-11; *see also,* Firm Resume at Lietz MPA Dec., Ex. 2.

Class Counsel brought this established track record and experience to work in litigating Plaintiffs' and Class Members' claims. The significant experience and qualifications of counsel easily justify the modest requested fee of less than 1% of the settlement fund.

4. The requested fee falls well below fees granted in similar cases.

And finally, as discussed at length above, the fee sought here is well within the range of customary, market rate fees requested by attorneys in data breach class action settlements in the State of Nebraska and granted by courts. Most notably, the fee requested here is a small fraction of the $925,000 fee approved by a Nebraska state district court in *Coleman. v. Boys Town Nat'l Rsch. Hosp.*, No. D01CI18008162, (Neb. 4th Dist. Ct. Douglas Cnty), a data breach class action case where the relief obtained is strikingly similar to that obtained here.[4] Indeed, in some key aspects (namely the ability to claim up to six (6) hours of lost time spent dealing with the Data Incident (as opposed to 4 hours in the *Boys Town* settlement), the settlement terms here eclipse those negotiated in *Boys Town*. Yet Plaintiffs' Counsel here requests only 21% of the fees awarded

[4] https://www.boystownclass.com/ (last visited August 18, 2021)

in *Boys Town*, demonstrating the fee request here is well within the range of reasonable and customary fees awarded in this state.

As discussed at length above, the fee requested here also falls well below the 25% to 36% of common fund fees regularly approved by Eighth Circuit Courts. *Caligiuri v. Symantec Corp*., 855 F.3d at 865–66; *see also In re Xcel Energy, Inc., Sec. Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005) (collecting cases); *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (awarding 36% of a common fund of $3.5 million); *West v. PSS World Med., Inc.,* No. 4:13-cv-574, 2014 WL 1648741, at *1 (approving attorneys' fees of 33%); *Harris v. Republic Airlines, Inc.,* No. 4-88-1076, 1991 WL 238992 at *2 (D. Minn. Nov. 12, 1991) (awarding "a sum slightly in excess of 30% of the common fund"). Again, if the Court only considers the value of the additional credit monitoring (which is a guaranteed benefit to the subclass), the fee request here is only 14% of that benefit. If one considers all the class relief obtained, the fee request is less than 1% of the total value of the settlement. As such, Class Counsel's request should be granted.

b. Plaintiffs' Requested Costs are Reasonable and Necessary to Litigation.

"In addition to attorney fees, expenses and costs necessarily incurred in prosecution of a case may be recovered from defendants as part of the attorney-fee award to the extent the expenses constitute out-of-pocket expenses normally incurred by attorneys and charged to fee-paying clients." *Powers v. Credit Management Services, Inc.,* No. 8:11cv436, 2016 WL 6994080 (D. Nebr. Nov. 29, 2016), *citing West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 395-396 (8th Cir. 2003). Due to Counsel's ability reach an early and excellent settlement, costs are very modest and include only filing fees totaling $690, all of which is included in Plaintiffs' request for fees and costs in the amount of $195,000. Lietz Fees Dec., ¶ 16. Such costs are necessary and reasonable to litigation, and are typically charged to fee-paying clients. Thus, they should be approved.

c. Plaintiffs' Request for Service Awards is Reasonable and Should be Granted.

For their efforts on the case, Plaintiffs seek an award of $2,000 each, or $4,000 total, to be paid by Defendant separate and apart from the fund made available to Settlement Class Members. Lietz Fees Dec. ¶ 14. The service award is meant to compensate Plaintiffs for their efforts on behalf of the Settlement Class. *Id*. ¶ 15. Here, in addition to lending their names to this matter, and thus subjecting themselves to public attention, Plaintiffs were actively engaged in this Action. Among other things, Plaintiffs maintained contact with counsel, assisted in the investigation of the case, produced relevant documents, reviewed the Complaint, remained available for consultation throughout the mediation, answered counsel's many questions, and reviewed the Settlement Agreement. *Id*.

Service awards to class representatives are appropriate and regularly awarded by Courts in class action litigation. The awards, provided in addition to any individual claims-based recovery, promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits, and reward the class representatives for working to bring a benefit to a larger group of people. The requested reward is reasonable and falls well below the range of service awards that have been approved by courts in this Circuit. *See, e.g., Powers v. Credit Management Services, Inc.,* No. 8:11cv436, 2016 WL 6994080 (D. Nebr. Nov. 29, 2016) (approving $7,000 to each of the lead plaintiffs as service awards); *In re Charter Commc'ns, Inc., Sec. Litig.*, 2005 WL 4045741, at *25 (awarding $26,625 compensatory award to lead plaintiff); *In re Aquila ERISA Litig.*, 2007 WL 4244994, at *3 (W.D. Mo. Nov. 29, 2007) (awarding $25,000 incentive award); *Wineland v. Casey's Gen. Store s, Inc.*, 267 F.R.D. 669, 677 (S.D. Iowa 2009) (awarding $10,000).

VI. CONCLUSION

Settlement Class Counsel, with the help of Plaintiffs, have made significant benefits available to class members. In return, they seek fees, costs, and service awards well below those regularly approved by courts sitting in the Eighth Circuit. The fees, costs, and service awards are inherently reasonable, and as such, Plaintiffs respectfully request their approval.

Dated: August 19, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 19, 2021, the foregoing document was filed via the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record.

/s/ Gary M. Klinger
Gary M. Klinger

Counsel for Plaintiffs and the Class