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

TRACY MCPHERSON, on behalf of himself and all others similarly situated, Plaintiff, v. AMERICAN BANK SYSTEMS, INC. Defendant.	Civil Action No. 5:20-cv-01307-G
LARRY LYLES, on behalf of himself and all others similarly situated, Plaintiff, v. AMERICAN BANK SYSTEMS, INC. Defendant.	Civil Action No. 5:21-cv-00023-HE

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS TO CLASS REPRESENTATIVES

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Plaintiffs Tracy McPherson and Larry Lyles respectfully apply for approval of: 1) an award of attorneys' fees to Plaintiffs' counsel in the combined amount of $510,000; 2) reimbursement to Plaintiffs' counsel of litigation costs in the amount of $16,946.57; and 3) service awards of $1,500 each of the three representative plaintiffs (totaling $4,500).

I. BACKGROUND

A. Factual and Procedural Overview of the Litigation

Defendant ABS is an Oklahoma corporation that creates software products for use in the financial services industry. *McPherson*, Am. Compl., ¶¶ 1, 13. For example, ABS offers software suites known as BankManager, CreditUnionPro, CompliancePro, and CoPilot Loans and Deposits, among others. *Id*. ¶ 21. ABS has more than 350 institutional clients, primarily banks and credit unions, in 35 states. *Id*. ¶ 14. When a financial institution uses ABS's products, customer information is stored in these programs. ABS stores credentialing information for its clients that allows access to the underlying data. *Id*. ¶¶ 23–24.

In November 2020, a hacker group known as Avaddon publicly announced in a "leak warning" that they had infiltrated ABS's systems and requested a "ransom" from ABS to prevent public disclosure of the acquired data. *Id*. ¶¶ 35–37. Avaddon claimed that ABS "do not want to pay and thinks we are bluffing." *Id*. Avaddon leaked approximately 4 gigabytes of sensitive stolen files, apparently taken in or before October 2020, to support their claims. *Id*. Avaddon claimed that they had a total of 52.57 gigabytes of data taken from ABS's systems. *Id*.

Journalists reviewed the leaked files and noted that they contained financial

documents with highly sensitive personally-identifying information (PII), customer names, social security numbers, loan amounts, interest rates, and pertinent loan dates such as origination dates, maturity dates, and pay off dates. *Id*. ¶ 39. The data was stored in unencrypted plaintext files, meaning that they were fully readable by anyone who examined them. *Id*.

ABS supposedly learned of the Data Security Incident while it was occurring on October 22, 2020. *Id*. ¶ 34. ABS decided not to pay the demanded ransom and did not prevent the further dissemination of Plaintiffs' and the Class' PII. By November 14, 2020, the entire cache of stolen data was leaked by Avaddon. *Id*. ¶ 43.

Plaintiffs filed these actions after learning that their PII, previously provided to their financial institutions, had been compromised in the Data Security Incident. The McPherson action was filed on December 30, 2020. The Lyles action was filed on January 11, 2021. A third action arising from the same Data Security Incident was filed in the Western District of Pennsylvania on December 26, 2020: *Lautman v. American Bank Systems, Inc*., No. 2:20-cv-01959-RJC (W.D. Pa.).

Plaintiffs brought claims for violations of the Oklahoma Consumer Protection Act, Oklahoma Deceptive Trade Practices Act, negligence, negligence per se, unjust enrichment, and declaratory judgment. On March 11, 2021, this Court consolidated the *Lyles* and *McPherson* cases for pretrial purposes. It appointed Attorneys Gary F. Lynch and Joseph P. Guglielmo as interim co-lead counsel and Attorney William B. Federman as interim liaison counsel. The parties conducted initial Rule 26 meetings, and the Court ordered initial case management conferences in the actions and entered case management

orders. ABS moved to dismiss the McPherson action, but that motion was mooted by an amended complaint filed on February 18, 2021.

B. Negotiation of the Proposed Settlement Agreement

This Settlement resulted from good faith, arm's-length settlement negotiations supervised by Hon. Morton Denlow (Ret.)—a retired United States Magistrate Judge and highly experienced mediator—beginning with a Zoom-facilitated mediation session on April 5, 2021. (*See* previously filed Declaration of Gary F. Lynch and Joseph P. Guglielmo in Support of Preliminary Approval, *McPherson* ECF No. 49 ¶ 8). At the conclusion of the mediation, the parties reached a tentative settlement. Over the following weeks, with Judge Denlow's continued involvement, the parties negotiated a term sheet executed on May 17, 2021. (*McPherson* ECF No. 49 ¶ 8). The parties then drafted a comprehensive Settlement Agreement ("SA")[1] and pertinent settlement attachments, including proposed notices, a proposed claim form, a distribution plan, and proposed orders. The parties also sought cost proposals from potential settlement administrators. (*McPherson* ECF No. 49 ¶ 10).

Before and during the parties' settlement negotiations, Plaintiffs sought and obtained informal discovery from ABS on several topics, including: the number of individuals whose PII was compromised during the Data Security Incident; the types of PII exposed; the mechanics of the Data Security Incident including identification of the affected systems; the communications ABS received from the hackers; the remedial actions

[1] The proposed Settlement Agreement was filed at *McPherson,* ECF No. 49-1.

ABS took after the Data Security Incident and their cost; ABS's financial condition; and the terms of any potentially applicable insurance coverage. (*McPherson* ECF No. 49 ¶ 4).

This information allowed Plaintiffs' counsel to conduct the settlement negotiations with a complete understanding of the strengths and weaknesses of Plaintiffs' claims, the size and scope of the potential class, and the financial resources available to facilitate a settlement. (*McPherson* ECF No. 49 ¶¶ 4, 12). Equipped with that knowledge and their significant experience litigating and resolving similar actions, Plaintiffs' counsel negotiated what they believe to be a fair, adequate, and reasonable settlement worthy of presentation to the Court and the putative class. (*McPherson* ECF No. 49 ¶¶ 9, 12).

C. Pertinent Terms of the Settlement

1. The Settlement Class Definition

The Court provisionally certified the following Settlement Class[2] for purposes of settlement only:

> All individuals in the United States, and its territories, whose personal-identifiable information was compromised in the Data Security Incident involving ABS which occurred between October and November 2020. Excluded from the Settlement Class are the Court, and any immediate family members of the Court; directors, officers, and employees of Defendant; parents, subsidiaries, and any entity in which Defendant has a controlling interest; and individuals who timely and validly request exclusion from the Settlement Class.

(*McPherson* ECF No. 56).

[2] ABS does not oppose certification for settlement purposes only.

2. Consideration

a. Direct Monetary Relief to Settlement Class Members

Under the Settlement, ABS will pay $1.7 million into a common fund. (SA, ¶ 4.3). The common fund will be used to: 1) pay court-approved attorneys' fees, expenses, and plaintiff service awards; 2) pay costs of administration and notice; and 3) make payments to Settlement Class Members who submit approved Documented Loss or Inconvenience Claims, as defined in the Settlement Agreement. (SA, ¶ 4.3). Eligible Settlement Class Members may make both Documented Loss Claims and Inconvenience Claims so long as such claims are not encompassed by one another. (*Id.*). For Documented Loss Claims, Settlement Class Members are eligible to receive up to $5,000. (SA, ¶¶ 4.5(b)(ii)(1)). The claims may be subject to proration, if necessary. Settlement Class Members may submit an Inconvenience Claim by returning a claim form, but no additional documentation is required. (SA, ¶¶ 4.5(b)(ii)(2)). Inconvenience Claims will be paid as equal shares of all funds remaining in the settlement fund after deduction of attorneys' fees/expenses, service awards, administration/notice costs, and payment of valid Documented Loss Claims. (*Id.*).

b. Administration Costs, Service Awards, Attorneys' Fees, and Expenses of Litigation

The Settlement Fund will also be used to pay the following:

1) The reasonable costs of notice and settlement administration (SA ¶ 4.5 (a)(ii));
2) Service awards of up to $1,500 to each of the three Plaintiffs (including Mitchell Lautman, the plaintiff in the *Lautman* action), via Class Counsel, as a service award, subject to Court approval (SA ¶ 4.5 (a)(i));

3) Attorneys' fees, in an amount not to exceed 30% of the common fund, or $510,000, subject to court approval; (SA ¶ 10.1); and

4) Reimbursement of litigation expenses. (*Id.*).

D. The Court Granted Preliminary Approval and the Parties Implemented the Notice Program

Plaintiffs filed an unopposed motion for preliminary approval of the settlement on July 1, 2021. (*Lyles*, ECF No. 43; *McPherson*, ECF No. 48). The Court held a hearing on the motion on March 4, 2022, and granted preliminary approval and authorization of notice on March 8, 2022. (*Lyles*, ECF Nos. 48–49; *McPherson*, ECF Nos. 55–56).

Since that time, the parties have worked with the approved settlement administrator, Analytics Consulting, LLC, to implement the notice program, including issuance of mail and electronic notices and the establishment of a settlement website and toll-free hotline. (Joint Declaration of Gary F. Lynch and Joseph P. Guglielmo, ¶ 5) ("Jt. Decl.").[3] Although the deadline to file claims is not until September 6, 2022, to date, the response from the Settlement Class has been uniformly positive: 1,885 Claim Forms have been submitted, zero Class Members have exercised their ability to object to the Settlement and only five Class Members have sought to exclude themselves from the Settlement. Declaration of Caroline Barazesh, ¶¶ 11–12.

[3] For more details on the implementation of the notice program, see Plaintiffs' contemporaneously filed memorandum in support of their motion for final approval, at page 3, and the Declaration of Caroline Barazesh.

II. ARGUMENT

A. The percentage-of-the-fund approach is permitted by Oklahoma law and preferred by the Tenth Circuit.

In diversity cases within the Tenth Circuit, state substantive law governs the permissible methods of calculation of reasonable attorneys' fees. *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 463 (10th Cir. 2017) ("*Enervest*"). Under Oklahoma law, a reasonable attorney fee in class actions may be determined using either the percentage-of-the-fund method or the lodestar method. *Strack v. Cont'l Res., Inc.*, 507 P.3d 609, 615 (Okla. 2021).[4] Whichever method is used in the first instance, it should also be cross-referenced using the other method, to ensure a reasonable fee. *Id.* at 617 ("We conclude that both the lodestar method and the percentage method are valuable to determine attorney's fees under Oklahoma's class action statute. A court's goal in deciding attorney fee awards is to award a reasonable fee, and a court should compare the results of both methods to ensure it is awarding a reasonable fee in a common fund class action").

The percentage-of-the-fund approach is preferred by the Tenth Circuit when state law so permits. *See Gottlieb v. Barry*, 43 F.3d 474, 482–83 (10th Cir. 1994); *Anderson v. Merit Energy Co.*, 2009 WL 3378526 at *2 (D. Colo. Oct. 20, 2009). This approach results

[4] The *Enervest* court predicted that Oklahoma law would require the use of the lodestar method in common fund cases, *Enervest* at 463–64, but the Supreme Court of Oklahoma in *Strack* subsequently held otherwise. As an intervening decision of Oklahoma's highest court resolving the relevant state law issues, *Strack* is binding on this Court and other federal courts applying Oklahoma law. *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 2022 WL 566790 at *2 (W.D. Okla. Feb. 24, 2022) (citing *Kokins v Teleflex, Inc.*, 621 F.3d 1290, 1295 (10th Cir. 2010)).

in "proportionately spreading payment of attorney fees among the class members." *Lucken Family Ltd. Partnership, LLP v. Ultra Res., Inc*., 2010 WL 5387559, at *2–3 (D. Colo. Dec. 22, 2010).

Oklahoma's class action statute also includes a list of factors to be considered in arriving at a fair and reasonable fee for class counsel, which are as follows:

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

Okla. Stat. tit. 12, § 2023(G)(4)(e). Not all the factors apply in every case, and some deserve more weight than others, depending on the facts at issue. *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW, 2018 WL 2296588, at *3 (E.D. Okla. Mar. 27, 2018).

As explained below, Class Counsel's request for payment of 30% of the common fund as attorneys' fees is reasonable when analyzed under these factors, a lodestar cross-check, and similar cases.

B. The requested fee is within the customary percentage range and reasonable under Oklahoma's statutory factors.

Class Counsel's request for a fee award of $510,000, equivalent to 30% of the settlement fund, is within the standard range as recognized by the Oklahoma Supreme Court. "[T]he attorney's fees awarded in complex class actions are normally 20% to 30% of the recovered fund, with deviations from that range when the fund is extraordinarily large or small relative to the hours of work expended by the attorneys." *Strack*, 507 P.3d at 617.

Federal courts within the Tenth Circuit also routinely approve fee requests in that range or even higher. *See CompSource Okla. v. BNY Mellon, N.A.*, 2012 WL 6864701 (E.D. Okla. Oct. 25, 2012) ("25% is on the low end of the range of acceptable fee awards in common fund cases, which ranges between 22% and 37%, and more in some cases"); *Lucken*, 2010 WL 5387559, at *6 ("The customary fee awarded to class counsel in a common fund settlement is approximately one third of the total economic benefit bestowed on the class. *Vaszlavik v. Storage Tech. Corp.*, No. 95–B–2525, 2000 WL 1268824 (D. Colo. Mar. 9, 2000) ("A 30% common fund fee award is in the middle of the ordinary 20%–50% range and is presumptively reasonable."); *Cimarron Pipeline Construction, Inc. v. National Council on Compensation Insurance*, 1993 WL 355466, at *2 (W.D. Okla. June 8, 1993) ("Fees in the range of 30–40% of any amount recovered are common in complex and other cases taken on a contingent fee basis.").

An analysis of the fee request under Oklahoma's statutory factors confirms the reasonableness of the request.

1. The amount involved and the results obtained – § 2023(G)(4)(e)(8).

In "contingent fee representations, the most important factor is the result obtained." *Fitzgerald Farms, L.L.C. v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008, at *2 (Okla. Dist. Ct. Beaver Cty. July 2, 2015); *Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc*., 77 P.3d 1042, 1046, 1049 (Okla. 2003). Here, the substantial recovery obtained, $1,700,000, plus injunctive relief, and the fact that the recovery will distributed after less than two years of litigation, weigh in favor of the requested fee. Class Counsel estimates that even after subtracting the requested fees, expenses, and administration costs, approximately $1 million of the settlement fund will be directly distributed to class members who submit claims. Jt. Decl. at ¶ 7. Thus, the ratio of direct payments to the class compared to the fee request is close to 2:1, which compares very favorably to *Hess v. Volkswagen of Am*., 398 P.3d 27, 32–34 (Okla. Ct. Civ. App. 2017), in which an Oklahoma appellate court affirmed a fee award of $983,616.75, despite an ultimate distribution to the class of only $45,780.

2. Time and labor required –§ 2023(G)(4)(e)(1).

Here, Class Counsel devoted substantial time, labor, and resources to achieve the Settlement. Since the start of this case in 2021, Class Counsel has documented 713.6 hours spent litigating this case, at a value of $555,881.50 when multiplied by counsel's customary rates. Jt. Decl. ¶ 11; *see also* Section II.C (describing the time and rates in more detail).

Although Class Counsel consistently sought to keep costs and fees to a minimum, the Litigation required a significant amount of work and time. These efforts included: fully

investigating the facts and legal claims; preparing the complaints; requesting, obtaining, and reviewing numerous documents from ABS regarding the incident and how it affected class members, ABS's remediation efforts, insurance coverage, and financial condition; drafting a comprehensive mediation statement assessing the legal and factual strengths and weaknesses of the case; participating in the mediation and a multi-week negotiation process to develop the proposed settlement agreement; developing the notice program and distribution plans, including soliciting bids from settlement administrators; obtaining preliminary approval; and working with Analytics to implement the notice plan. *See* Jt. Decl. at ¶ 5.

For these reasons, and as shown further below in the discussion regarding the lodestar cross-check, the time and labor required strongly support a finding that the requested fee is reasonable.

3. Novelty and difficulty of the questions presented – § 2023(G)(4)(e)(2).

"One of the basic considerations in establishing the reasonable value of legal services is the type, extent, and difficulty of the services rendered." *Robert L. Wheeler, Inc. v. Scott*, 777 P.2d 394, 396 (Okla. 1989). Class actions are notoriously complex and vigorously contested. *See Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS, 2019 WL 7758915, at *5 (E.D. Okla. Mar. 8, 2019). As are data breach cases. *In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2807, 2019 WL 3773737, at *6–7 (N.D. Ohio Aug. 12, 2019) ("The realm of data breach litigation is complex and largely undeveloped. It would present the parties and the Court with novel questions of

law."); *Bahnmaier v. Wichita State Univ.,* No. 220CV02246JARTJJ, 2021 WL 3662875, at *3 (D. Kan. Aug. 18, 2021) ("Data-breach litigation is a technical, emerging area of the law."). In addition to the merits regarding liability, this case presented a potentially difficult fight over class certification had the case not settled, and certification has been denied in several data breach cases. *See, e.g., Dolmage v. Combined Ins. Co. of Am.*, No. 14 C3809, 2017 WL 1754772, at *10 (N.D. Ill. May 3, 2017) (class certification denied); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21, 33 (D. Me. 2013) (same); *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389, 397-98 (D. Mass. 2007) (same).

Here, this class action data breach Litigation involved numerous complex questions of law and fact, which support the reasonableness of the requested fee.

4. The skill required to litigate the case and the experience, reputation and ability of those who did – § 2023(G)(4)(e)(3) & (9):

This Litigation called for considerable skill and experience, requiring investigation and mastery of complex factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. As explained in the preceding section, data breach litigation is a cutting-edge area of the law that presents numerous developing issues, evolving precedents, and unpredictable outcomes. With over 30 and 25 years of experience respectively, Mr. Lynch and. Mr. Guglielmo, co-lead Class Counsel, have litigated complex class action litigations in courts across the country and obtained leadership positions in numerous large, national class action cases. *See* Jt. Decl., ¶ 2; *See also* Ex. 1 to Declaration of Gary F. Lynch; Ex. 1 to Declaration of Daryl F. Scott. Further,

Class Counsel has received many favorable results in data breach and privacy cases throughout the nation, including some of the earliest and largest actions on record. *Id*. Without the experience and skill displayed by all counsel, the Settlement would not have been obtained.

5. Limitations on counsel's time and opportunity – § 2023(G)(4)(e)(4) & (7).

This litigation began in late 2020 and has required the devotion of substantial time from Class Counsel. A case of this size and complexity requires the commitment of a large percentage of the time and resources of Class Counsel. Thus, Class Counsel was necessarily precluded to some degree from working on other cases and pursuing available opportunities due to their dedication of time and effort to prosecuting this Litigation. *See* Jt. Decl. ¶ 5. Accordingly, these factors support the fee request.

6. Customary fee and awards in similar cases – § 2023(G)(4)(e)(5) & (12).

Class Counsel have consistently recovered attorneys' fees in percentage and rate terms commensurate with those requested in this case, in both their home markets and in federal courts around the country. *See* Final Approval Order, *Dittman et al v. UPMC d/b/a The University of Pittsburgh Medical Center and UPMC McKeesport*, No. GD-14-003285 (Pa. Ct. Comn. Pls. Alleg. Cty. Dec. 29, 2021) (approving fee of 28.3% of constructive common fund of $2.65 million, with Lynch Carpenter LLP's approved rates ranging from $350 for associates to $950 for senior partners); Final Approval Order, *First Choice Federal Credit Union v. The Wendy's Company et al*, 2:16-cv-0506 (ECF No. 191) (W.D. Pa. Nov. 6, 2019) (in case with Lynch Carpenter (formerly Carlson Lynch) and Scott+Scott

attorneys serving as co-lead counsel, approving fee award of 30% of common fund, with hourly attorney rates ranging from $300 to $950); *Arkansas Fed. Credit Union v. Hudson's Bay Co.*, No. 18-CV-8472 (PKC), 2021 WL 8445929 (S.D.N.Y. July 22, 2021) (approved fees ranging from $500–$950); *Veridian Credit Union v. Eddie Bauer LLC*, No. 2:17-cv-00356 (ECF No. 182) (W.D. Wash. Oct. 25, 2019); *see also* Jt. Decl. ¶ 14.

Further, courts routinely award similar fee percentages in similar cases. *See Cimarron Pipeline Const.*, 1993 WL 355466, at *2 ("Fees in the range of 30–40% of any amount recovered are common in complex and other cases taken on a contingent fee basis."); 4 Robert Newberg, Newberg on Class Actions, § 14:6 at 551 (4th ed. 2002) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery")); *Vaszlavik*, 2000 WL 1268824, at *10 (noting that "requested fee of 30% of the settlement is well within the ordinary range of common fund awards," and that "[a] 30% common fund award is in the middle of the ordinary 20%–50% range and is presumptively reasonable"). Therefore, these factors support Class Counsel's request.

7. Whether the fee is fixed or contingent, and risk of recovery – § 2023(G)(4)(e)(6) & (13).

The receipt of a fee in this litigation was entirely contingent on the success of the litigation. Jt. Decl. at ¶ 4. As a result, there was a significant risk that Class Counsel would recover no fee if Plaintiffs would have lost on the merits, either through dispositive motion practice or at trial. In addition to the time spent on this case, Class Counsel advanced costs, which they would not be entitled to have reimbursed without a successful outcome in this

litigation. *Id.* This is likely the only way this case could have been undertaken, as it is highly unlikely any Class Member would have paid Class Counsel on an hourly basis to the extent necessary to litigate this case properly and achieve a recovery comparable to the outstanding result Counsel obtained here.

Independent of the merits, the action also posed a risk of recovery because, in the opinion of Class Counsel—developed after reviewing financial statements and insurance coverage— it is not likely that Defendant ABS could have accessed the financial resources necessary to sustain the amount of litigation and discovery typical in these cases, while still preserving sufficient funds to pay a judgment equivalent to what was obtained in the settlement. Jt Decl. ¶ 6. Therefore, absent a settlement, Class Counsel faced significant risk that even successful litigation on the merits would have resulted in an ultimate loss of some or all of the invested costs and billed time.

These factors support the reasonableness of the requested fee.

8. The 'undesirability' of the case – § 2023(G)(4)(e)(10).

This case was neither particularly desirable or undesirable, but the limited number of plaintiffs' firms involved indicates that it did not attract significant interest. On the one hand, data breach litigation has increased significantly in recent years, and several notably large settlements demonstrate the general viability of these cases and their potential to be worthwhile for plaintiffs' counsel. *E.g.*, *In re Equifax Inc. Customer Data Security Breach Litig.*, 999 F.3d 1247 (11th Cir. 2021); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299 (N.D. Cal. 2018). Further, the plaintiffs and classes in these cases are generally made

up of employees or consumers from the average general American population, rather than any traditionally unpopular or underrepresented group.

On the other hand, the class size here of approximately 554,000 is smaller than the tens or hundreds of millions as in cases like *Equifax* and *Anthem*, and Defendant ABS is not as widely-known, or equipped with comparably deep pockets, and in fact likely could not have financed full-blown litigation and a judgment equivalent to the value of the settlement. Jt. Decl. ¶ 6. As a result, the potential financial incentives for plaintiffs' counsel were modest. It is likely for these reasons that this data incident did not attract much attention from the plaintiffs' bar, and the only actions filed were the three filed by Class Counsel. This factor therefore weighs somewhat in favor of the requested fee.

9. Counsel's relationship with the client – § 2023(G)(4)(e)(11).

The most likely purpose of this factor is to assess whether any special circumstances related to the lawyer's engagement weigh in favor or enhancing or reducing the fee request. *See Stalcup v. Schlage Lock Co.*, 505 F. Supp. 2d 704, 709 (D. Colo. 2007); *but see also Peterson v. Mortg. Sources, Corp.*, No. 08-2660-KHV, 2011 WL 3793963, at *12 (D. Kan, Aug. 25, 2011) (stating that the meaning of this factor is generally unclear). For example, a lawyer may bring a class action at the urging of a long-term client for whom the lawyer charges a lower-than-customary rate. In that circumstance, it may not be appropriate to award the lawyer fees from a class settlement based on the lawyer's customary rate, because the lawyer had already agreed with the class representative to do the work at a lower rate. This factor is neutral here because Class Counsel entered into their standard contingent fee agreements with the Class Representatives and did not agree to any special

rates. Jt. Decl. ¶ 4. For the reasons described above, Class Counsel's request for an attorney fee award of 30% of the settlement fund is within the standard percentage range in similar cases, consistent with Oklahoma law, and supported by the Oklahoma statutory factors.

C. Class Counsel's fee request is reasonable under a lodestar crosscheck.

To determine the lodestar amount, counsel's hours reasonably expended on the litigation are multiplied by counsel's hourly rates (if reasonable). *Enervest*, 888 F.3d at 458; *Strack*, 507 P.3d at 614. In calculating the lodestar amount, the movant "bears the burden of ... documenting the appropriate hours expended and hourly rates." *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1201 (10th Cir.1986) (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983)).

1. Class Counsel's report of hours expended and lodestar incurred.

In total, Plaintiffs' counsel spent 713.6 hours on the litigation to date, excluding some deleted entries. Multiplied by counsel's customary and usual rates, these hours are worth $555,881.50 in lodestar. A summary of this information, broken down by firm, is as follows:

Firm	**Attorney Rate Range**	**Hours**	**Lodestar**
Scott+Scott	$575–$1,150	289.2	$240,076.50
Lynch Carpenter	$400–$950	296.1	$231,260.00
Federman & Sherwood	$350–$900	75.7	$42,635.00
Wood Law Firm	$450–$850	52.6	$41,910.00
	Totals:	**713.6**	**$555,881.50**

More detailed summaries, including listings of each individual biller's hours and rates, are provided in counsel's attached declarations. *See* Declaration of Gary F. Lynch ¶ 6; Declaration of Daryl F. Scott ¶ 6; Declaration of William Federman ¶ 6; Declaration of E. Kirk Wood ¶ III & Ex. 2. [5]

Measured against the requested fee of $510,000, the lodestar represents a "negative" multiplier of 0.917. In other words, even if Class Counsel's fee request is granted in full, counsel ultimately will not receive compensation equivalent to 100% of their customary rates. Instead, counsel's payment will be paid at no more than 91.7% of their usual rates.

2. Counsel's recorded hours and rates are reasonable.

Class Counsel utilized their firms' standard billing practices and contemporary recordkeeping to track and record their reasonable hours. Jt. Decl. ¶¶ 9–10. Prior to submitting Class Counsel's hour summaries to the Court, Class Counsel reviewed all the time entries billed to this matter and exercised billing judgment to exclude hours that, in Class Counsel's professional judgment, were excessive, duplicative, or otherwise could not be billed to a fee-paying client. *Id.*

The hours reflected in the summaries are all attributable to the following broader tasks, all of which were necessary to initiate, prosecute, and resolve the litigation: fully investigating the facts and legal claims; preparing the complaints; requesting, obtaining, and reviewing numerous documents from ABS regarding the incident and how it affected class members, ABS's remediation efforts, insurance coverage, and financial condition;

[5] Counsel can produce task-level billing records to the Court or a class member if so requested. Jt. Decl. ¶ 12.

drafting a comprehensive mediation statement assessing the legal and factual strengths and weaknesses of the case; participating in the mediation and a multi-week negotiation process to develop the proposed settlement agreement; developing the notice program and distribution plans, including soliciting bids from settlement administrators; obtaining preliminary approval; and working with Analytics to implement the notice plan. *See* Jt. Decl. at ¶ 7.

The rates utilized by counsel in calculating their lodestar (which are their customary rates) are also reasonable in the context of this litigation. When assessing the reasonableness of an attorney's rate, "the district court should base its hourly rate award on what the evidence shows the market commands for ... analogous litigation." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (describing relevant comparison as the rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation") (quoting *Blum*, 465 U.S. at 896 n.11); *Malloy v. Monahan,* 73 F.3d 1012, 1018 (10th Cir. 1996) (Court is to refer to the "the prevailing market rate in the relevant community.").

When a case involves a specialized, complex practice or out-of-state attorneys whose involvement is appropriate or necessary due to their specialty, the national character of the litigation, or plaintiffs' difficulty in locating local counsel, the out-of-state attorneys' rates may be compared to the national market or their own markets in the reasonableness determination. *See, e.g, Oklahoma Intrastate Transmission, LLC v. 25 Foot Wide Easement*, 908 F.3d 1241, 1245 (10th Cir. 2018) (out-of-state rates may be utilized when appropriate); *Reirdon v. XTO Energy Inc*., No. 6:16-cv-00087-KEW (E.D. Okla. Jan. 29,

2018) (Dkt. No. 124); *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW (E.D. Okla. Mar. 27, 2018) (Dkt. No. 231); *Nat'l Lab. Rels. Bd. v. Cobalt Coal Ltd.*, No. 1:17MC00018, 2018 WL 5292052, at *2 (W.D. Va. Oct. 25, 2018).

Here, Class Counsel are skilled class action attorneys with prior experience in data breach matters. Jt. Decl. ¶ 2. Their rates are reasonable whether measured against the Oklahoma market for complex class actions, counsel's local markets, or the national market for complex class actions in federal court. *See, e.g.*, *In re Sandridge Energy, Inc.*, No. CIV-13-102-W, 2015 WL 11921422 (W.D. Okla. Dec. 22, 2015), *aff'd sub nom. In re SandRidge Energy, Inc.*, 875 F.3d 1297 (10th Cir. 2017) (approving rates for partners in national complex litigation firms, like Counsel here, ranging from $850/hour to $1,150/hour); *Strack*, 507 P.3d at 617 n.10 (finding rates of $875/hour reasonable for Oklahoma class action involving oil and gas royalties); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *16 (N.D. Cal. Aug. 17, 2018) (approving $970 billing rates for partners in data breach class action); *see also* cases cited *supra* pp. 13–14 (data breach cases involving Class Counsel).

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

D. Class Counsel's expenses should be reimbursed from the fund because they are reasonable, were necessary, and are a small fraction of the fund amount.

"As with attorney fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs

incurred...in addition to the attorney fee percentage." *Cecil v. BP Am. Prod. Co.*, No. 16-CV-00410-KEW, 2018 WL 8367957, at *9 (E.D. Okla. Nov. 19, 2018) (quotation marks and citation omitted).

Class Counsel requests reimbursement of litigation expenses in the total amount of $16,946.57. As explained in counsel's supporting declarations, these expenses were unavoidable expenses such as filing fees, courtesy copy costs, the mediator fee, travel to the preliminary approval hearing, and an estimated $1,500 required for travel to the final approval hearing. Declaration of Gary F. Lynch ¶ 7; Declaration of Daryl F. Scott ¶ 7; Declaration of William Federman ¶ 7; Declaration of E. Kirk Wood ¶¶ V–VI & Ex. 3. The total expenses are less than 1% of the total settlement fund. These expenses are typical of litigation, reasonable in amount, and necessary for advancement of the action to the benefit of the settlement class. For these reasons, they should be approved.

E. The requested service awards for the class representatives are reasonable.

Incentive awards are typically given where a common fund has been created for the benefit of the entire class to recognize named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation. *Enervest*, 888 F.3d at 464–66. The requested service awards of $1,500 per representative plaintiff are well within the range found reasonable by courts in similar cases. *See* Theodore Eisenberg & Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303 (2006). The Eisenberg and Miller study found that the average incentive award was .16% of the class recovery, with a median of .02%. *Id.* at 1303. The

average award per class representative was $15,992, and the median award was $4,357. *Id.* at 1348.). *See also Key v. Butch's Rat Hole & Anchor Serv., Inc.*, No. CIV 17-1171 RB/KRS, 2022 WL 457915, at *1 (D.N.M. Feb. 15, 2022) (the incentive award of $7,500 per named plaintiff is fair, reasonable, and adequate); *Nieberding v. Barrette Outdoor Living, Inc.*, 129 F. Supp. 3d 1236, 1252 (D. Kan. 2015) (approval of $3,500 to the representative plaintiff as an incentive award); *In re Universal Serv. Fund Tel. Billing Pracs. Litig.*, No. 02-MD-1468-JWL, 2011 WL 1808038 (D. Kan. May 12, 2011) (granting $10,000 incentive award to subclass representative); *Lucken*, 2010 WL 5387559 (D. Colo. Dec. 22, 2010) (approving $10,000 award).

Here, the excellent result in this Litigation could not have been achieved without the substantial efforts of the Plaintiffs. Plaintiffs assisted Class Counsel with the prosecution of their claims and those claims of the Settlement Class by retaining counsel, agreeing to serve as representative plaintiffs and verifying the complaints, communicating with Class Counsel when required regarding various steps during Litigation, and reviewing and signing the proposed Settlement. Jt. Decl. at ¶ 16. They devoted time and effort to the Action, and because of their efforts, a substantial benefit was conferred to the Settlement Class.

Accordingly, and in recognition of the substantial benefit they conferred on the Settlement Class and their efforts generally, modest Service Awards of $1,500 to Representative Plaintiffs are reasonable and should be approved.

CONCLUSION

For the reasons above, Plaintiffs respectfully request that this Court grant their motion (in conjunction with final approval of the Settlement) and enter Plaintiffs' proposed order awarding $510,000 towards attorneys' fees, reimbursement of $16,946.57 in litigation expenses, and approving Service Awards of $1,500 to each representative plaintiff.

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Respectfully submitted,

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