**COMMONWEALTH OF MASSACHUSETTS**
**HAMPDEN SUPERIOR COURT**

BONITA JOYNER,

Plaintiff,

v.

BEHAVIORAL HEALTH NETWORK, INC.,

Defendant.

Case No. 2079CV00629

11/15/2021

**MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARD**

In conjunction with final approval of the Stipulation and Agreement of Settlement (the "Settlement"), which is scheduled for hearing on December 14, 2021, the Court should approve the requested attorneys' fees, expenses, and service award payments from the $1,200,000 Settlement Fund created by the Settlement. The requested fees, expenses, and service award are reasonable and are in line with amounts regularly approved in similar litigation.

## FACTS

### I. Plaintiff brings claims relating to a data breach that compromised the confidential information of 130,000 of Defendant's patients.

On November 19, 2020, Plaintiff filed a Class Action Complaint against Defendant Behavioral Health Network, Inc. relating to a data breach that occurred between May 26 and May 28, 2020, in which an unauthorized person gained access to the confidential and protected personally identifiable information of nearly 130,000 of Defendant's patients. Compl. ¶ 2. Plaintiff alleged that she and other patients faced a significant risk of identity theft as a result of the data breach. Compl. ¶¶ 19–25. Plaintiff brought class action claims for negligence, invasion



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of privacy, and breach of implied contract. Compl. ¶¶ 44–72. On February 10, 2021, Plaintiff filed a First Amended Class Action Complaint, which added an additional claim under Massachusetts's Consumer Protection Act, Massachusetts General Laws Chapter 93A & H, and Massachusetts Code of Regulations § 17.00 *et seq.* Am. Compl. ¶¶ 73–83.

## II. The parties engage in a mediation and in arm's-length negotiations over several months to reach a compromise and settlement.

On May 12, 2021, the parties agreed to attempt to resolve this action through mediation. Joint Declaration of Lynn A. Toops and J. Gerard Stranch IV, attached as Exhibit 1 to the Motion ("Joint Decl.") ¶ 3. The Court entered an order granting the parties' motion to stay proceedings pending the outcome of the mediation.

On June 28, 2021, the parties participated in an arm's-length mediation facilitated by the Honorable Morton Denlow (ret.) of JAMS Resolution Center. Joint Decl. ¶ 4. Throughout the mediation session, and for several weeks thereafter, the parties continued to engage in extensive evaluation of the strengths and weaknesses of each party's claims and defenses. *Id.* Taking into account that evaluation, as well as the risks, uncertainties, costs, and delays of continued litigation, the parties eventually reached a proposed compromise and executed a term sheet on July 20, 2021. *Id.* The parties then negotiated the detailed terms of the Settlement over several months and executed the final Settlement Agreement on September 16, 2021. *Id.* The Settlement was filed on September 23, 2021, as Exhibit 1 to the Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement.

## III. The terms of the Settlement address both the potential for future identity theft caused by the data breach and economic losses that have already been incurred.

The terms of the Settlement are designed to address the harms caused by the data breach, both by providing for credit monitoring and identity theft restoration services (including

$1,000,000 in identity theft insurance coverage for each participating member of the Settlement Class) and by providing a fund for members of the Settlement Class to receive compensation for Economic Losses, including lost time, related to the data breach. Settlement § 5. Specifically, the Settlement provides for the following:

- Defendant to pay $1,200,000 into a Settlement Fund to be used to provide credit monitoring and identity theft restoration services; payments for Economic Losses, including lost time, relating to the data breach; costs of notice and administration; attorneys' fees; and a service award to the Class Representative. Settlement § 1.34.

- No reversion of the Settlement Fund to Defendant; instead, any amounts remaining uncollected in the Settlement Fund will be disbursed as a *cy pres* award to a charity approved by the Court. Settlement § 5.5.11.

- Additional actions taken by Defendant to better protect and safeguard the personal information of the members of the Settlement Class. Settlement § 5.5.10.

- Class Counsel to be paid up to one-third of the Settlement Fund as fees, along with reasonable litigation expenses, and a service award to the Plaintiff not to exceed $5,000.

## IV. The Court grants preliminary approval to the Settlement finding that it falls within the range of a fair, reasonable, and adequate compromise.

On September 28, 2021, the Court entered the Preliminary Approval Order, which granted preliminary approval to the Settlement. The Court found that the Settlement "falls within the range of possible approval as fair, reasonable, adequate, and in the best interests of the Settlement Class as to their claims against [Defendant]." Preliminary Approval Order ¶ 8. The Preliminary Approval Order certified the Settlement Class for purposes of settlement; directed that notice be given to the Class informing Class Members of their rights to object to the settlement or any part of it, including the requested attorneys' fee and service award; ordered Class Counsel to file any motion for fees, expenses, and a service award no later than 14 days before the objection deadline; and set a final approval hearing for December 14, 2021, at 2 p.m.

to decide final approval and whether to approve the requested attorneys' fees, expenses, and service award.

## DISCUSSION

The Court should approve the requested payments from the $1,200,000 Settlement Fund of $400,000 in attorneys' fees to Class Counsel, reimbursement of $11,312.93 in litigation expenses to Class Counsel, and $5,000 as a service award to the Class Representative. Under the relevant factors, these requests are all reasonable and are in line with fee, expense, and service awards in similar cases.

### I. The Court should approve the requested attorneys' fees to be paid from the Settlement Fund.

It is well established that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (citations omitted); *In re Fid./Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999); *Coggins v. New England Patriots Football Club, Inc.*, 406 Mass. 666, 669, 550 N.E.2d 141, 143 (1990) ("Where a party has, at his or her own expense, been successful in creating, preserving or enlarging a fund in which other parties have a rightful share, a court may order the payment of attorneys fees and expenses out of the fund as part of a damages award.") (internal quotation 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." *Boeing*, 444 U.S. at 478 (citation omitted). "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.* (citation omitted).

In determining the amount of the fee to award, courts sometimes use the "percentage-of-the-recovery method" and sometimes use the "lodestar method," or a combination of the two. Under the "percentage-of-the-recovery method," the Court awards Class Counsel a percentage of the common fund, often 33 1/3 %. *See, e.g.*, *In re Solodyn Antitrust Litig.*, No. 1:14-md-2503 (DJC), 2018 WL 7075881, at *2 (D. Mass. July 18, 2018) (reasonable to award attorneys' fees totaling one-third of settlement fund); *Gordan v. Massachusetts Mut. Life Ins. Co.*, No. 13-CV-30184-MAP, 2016 WL 11272044, at *2 (D. Mass. Nov. 3, 2016) (same). The "percentage-of-the-recovery method" has the advantage that it aligns counsel's incentives with the Class, meaning Class Counsel has an incentive to achieve the highest dollar settlement possible without wasting resources because Class Counsel gets paid more if they recover more for the Class and do not need to run up a large lodestar before settling. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 78–79 (D. Mass. 2005) ("From a public policy standpoint, the [percentage of fund] method of calculating fees 'more appropriately aligns the interests of the class with the interests of class counsel–the larger the value of the settlement, the larger the value of the fee award.' Furthermore, the [percentage of fund] method encourages efficiency and avoids the disincentive to settle cases early created by the lodestar method.") (citing *Bussie v. Allamerica Financial Corp.*, No. Civ.A. 97–40204–NMG, 1999 WL 342042, at *2 (D. Mass. May 19, 1999)).

Under the "lodestar method," the Court multiplies the amount billed by Class Counsel by a number, typically between 1 and 9 (or more), to adjust the billed amount upwards to take into consideration a number of factors, including the risk that Class Counsel bore by prosecuting the case on a contingent basis and with no guarantee of recovering any fee at all. *See, e.g.*, *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 182 (D. Mass. 1998) (approving $7.5 million fee, which represented an 8.9 lodestar multiplier). "A multiplier recognizes that the lawyer who does not

charge for his services until and unless he recovers for his client has essentially made a loan of his time: where there is a high risk that loan will "default" (i.e. there will be no recovery), the interest rate must be high enough to compensate the lawyer accordingly." *Commonwealth Care All. v. Astrazeneca Pharms. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236, at *2 (Mass. Super. Aug. 5, 2013). Under either the "percentage-of-the-recovery method" or the "lodestar method," the requested fee of $400,000 is reasonable in this case.

Under the "percentage-of-the-recovery method," the requested fee is one-third of the $1,200,000 Settlement Fund. A one-third fee is common in courts across the country. *See, e.g.*, *Chambers v. Together Credit Union*, No. 19-CV-00842-SPM, 2021 WL 1948452, at *2 (S.D. Ill. May 14, 2021) (noting that "[a]s numerous courts have recognized, [t]he normal rate of compensation in the market [is] 33.33% of the common fund recovered.") (internal quotations omitted) (collecting cases); *Briggs v. PNC Fin. Servs. Grp., Inc.*, No. 1:15-CV-10447, 2016 WL 7018566, at *4 (N.D. Ill. Nov. 29, 2016) (noting that "[c]ourts routinely hold that one-third of a common fund is an appropriate attorneys' fees award in a class action settlement."); *Cates v. Trs. of Columbia Univ. in City of New York*, No. 1:16-CV-06524-GBD, 2021 WL 4847890, at *7 (S.D.N.Y. Oct. 18, 2021) (noting that courts "routinely approve fee awards of one-third of the common fund or more"). *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, 75 Cal. Rptr. 3d 413, 433 n.11 (2008) ("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.") (quoting *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000)). Indeed, the Massachusetts Court of Appeals has affirmed a fee award that exceeded one-third of a common fund. In *Salvas v. Walmart Stores Inc.*, 81 Mass. App. Ct. 1103, 958 N.E.2d 535 (2011), the Court of Appeals affirmed an attorney fee award of $15.2 million, which

represented 38% of the common fund. A one-third fee (or more) is also the standard fee that Class Counsel is awarded in common fund cases. Joint Decl. ¶¶ 7, 9. Thus, the requested one-third fee here is standard and reasonable.

The requested fee is also reasonable under the "lodestar method." Class Counsel's current lodestar is $145,579 comprised of 221 hours of billed time. Joint Decl. ¶ 7. The lodestar incurred so far (and not including the fees motion) by firm is Branstetter, Stranch & Jennings, PLLC ($79,895.50); Cohen & Malad, LLP ($47,964.00); Turke & Strauss LLP ($14,170); and Sugarman, Rogers, Barshak & Cohen, P.C. ($3,549.50). *Id.* This time includes pre-suit investigation, research and drafting of the complaint and amended complaint, preparation and participation in the mediation and subsequent settlement discussions, drafting of the final detailed Stipulation and Agreement of Settlement, including the class notices, reimbursement forms, and proposed orders, working with the Settlement Administrator, and moving for preliminary approval. *Id.* This figure does not include the significant additional work that will be involved in final approval of the Settlement, the final approval hearing, and administration of the Settlement, including handling correspondence and calls from Class Members throughout the claims period. *Id.* The requested lodestar multiplier is only 2.75 currently and will decrease as Class Counsel continue to work on this matter. *Id.* This is well below the 8.9 times multiplier approved in *Conley*, 222 B.R. at 182, and the 5 times multiplier awarded in *In re AMICAS, Inc. Shareholder Litigation*, No. 10-174-BLS2, 2010 WL 5557444, at *4 (Mass. Super. Dec. 6, 2010).

The relevant factors also support a 2.75 (or more) multiplier. Under the lodestar method, factors to consider when determining whether a requested multiplier is reasonable include (1) the nature of the case and the issues presented, (2) the time and labor required, (3) the amount of damages involved, (4) the result obtained, (5) the experience, reputation, and ability of the

attorneys, (6) the usual price charged for similar services by other attorneys in the same area, and (7) the amount of awards in similar cases. *See Berman v. Linnane*, 434 Mass. 301, 303 (2001); *Linthicum v. Archambault*, 379 Mass. 381, 388–89 (1970); *Cummings v. Nat'l Shawmut Bank*, 284 Mass. 563 (1934); *Howe v. Tarvezian*, 73 Mass. App. Ct. 10, 13 n. 5 (2008) (the lodestar value may encompass a number of practical factors).

Here, the nature of the case was a complex class action involving a data breach, which presents complicated issues of standing, causation, class certification, and damages. *See, e.g.*, *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (noting that "[m]ost class actions are inherently complex"), *aff'd*, 236 F.3d 78 (2d Cir. 2001). Indeed, data breach cases are sometimes dismissed for lack of standing or damages and class certification has been denied. Joint Decl. ¶ 6 (citing *Reetz v. Advocate Aurora Health, Inc.*, No. 20CV2361 (Wisc. Cir. Ct. Feb. 18, 2021) (dismissing data breach class action); *Turner v. Mid Michigan College*, No. 20-10503-CK (Mich. Cir. Ct. Oct. 13, 2021) (same); *Keach v. BST & Co. CPAs, LLP*, No. 903580-20 (N.Y. Comm'l Ct. Mar. 30, 2021) (same); *Fero v. Excellus Health Plan, Inc.*, 502 F. Supp. 3d 724 (W.D.N.Y. 2020) (denying class certification for damages claims in data breach).

Class Counsel devoted significant resources to the case and was able to leverage their experience in complex data breach litigation to negotiate an early settlement that provides for data security measures that are important to obtain sooner rather than later to protect class members' data that is still in the hands of Defendant. Joint Decl. ¶¶ 7, 9. While it is difficult to estimate the total potential damages involved, the result of a $1,200,000 non-reversionary Settlement Fund represents a significant and timely recovery. Joint Decl. ¶ 6, 9. Further, the Settlement provides data security measures that the Class could only obtain in the settlement context. Class Counsel are experienced, able, and well-respected attorneys who have a national

practice involving complex class action litigation, including data breach litigation in particular. Joint Decl. ¶ 9. The usual price charged in this type of litigation is a one-third fee, which is equal to what Class Counsel is requesting in this case and is similar (or less than) fees that have been awarded in similar cases. Joint Decl. ¶¶ 7, 9.

Thus, under either the "percentage-of-the-recovery method" or the "lodestar method," the requested $400,000 fee is reasonable. In connection with final approval of the Settlement, the Court should approve payment of this fee from the Settlement Fund.

## II. The Court should approve reimbursement from the Settlement Fund of litigation expenses advanced by Class Counsel.

"[L]awyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax." *In re Fid./Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999); *Coggins v. New England Patriots Football Club, Inc.*, 406 Mass. 666, 669, 550 N.E.2d 141, 143 (1990) ("Where a party has, at his or her own expense, been successful in creating, preserving or enlarging a fund in which other parties have a rightful share, a court may order the payment of attorneys' fees *and expenses* out of the fund as part of a damages award.") (internal quotation omitted and emphasis added); Alba Conte, 1 *Attorney Fee Awards* § 2:19 (3d ed.) ("An attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved."); *see also Sprague v. Ticonic*, 307 U.S. 161, 166–67 (1939) (recognizing court's equity power to award expenses from a common fund); *Commonwealth Care Alliance v. Astrazeneca Pharms. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236, at *1 (Mass. Super. Aug. 5, 2013) (approving reimbursement to class counsel of $1,043,903.48 in litigation expenses). In general, courts approve the amount requested for an

expense reimbursement as reasonable because class counsel bring the case on a contingent basis, "so they had a strong incentive to keep costs to a reasonable level." *Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.*, 504 F. Supp. 3d 265, 271 (S.D.N.Y. 2020) (approving request for over $40,000 in expenses comprised of normal litigation expenses, such as "experts' fees, travel, mediation fees, and photocopying costs").

Here, the requested fees of $11,312.93 are comprised of normal litigation expenses (mediation fees ($9,000), filing and pro hac vice fees ($2,160), and FedEx, copying, and conference call expenses ($152.93)). Joint Decl. ¶ 8. Class Counsel was incentivized to only incur expenses that were reasonable and necessary because repayment of those expenses was not guaranteed and was contingent on the outcome of the case. *Id.* The Court should therefore approve the reimbursement of these expenses.

## III. The Court should approve a service award to the Plaintiff for her efforts in bringing suit and achieving a benefit for tens of thousands of other people.

Finally, courts recognize that a Class Representative who litigates and settles a lawsuit that benefits many other people is entitled to a service award (also known as an incentive award) for their efforts in achieving a recovery for others. For example, in *Commonwealth Care Alliance v. Astrazeneca Pharmaceuticals L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236, at *1 (Mass. Super. Aug. 5, 2013), the Court granted a service award of $15,000 each to two class representatives.

Here, the Class Representative consulted with counsel and was involved in the settlement process. Joint Decl. ¶ 10. Without the Class Representative there would be no recovery for any Class Member and the Defendant would not be paying $1,200,000 to the Class. *Id.* The requested service award of $5,000 for the Class Representative's efforts and the results achieved is equal to, or lower than, service awards approved in other cases. *See Commonwealth Care Alliance,*

2013 WL 6268236, at *1 ($15,000 service awards); *Eldridge v. Provident Companies, Inc.*, No. 971294, 2005 WL 503701, at *3 (Mass. Super. Jan. 20, 2005) ($12,500 service award); *Buston v. Zoll Med. Corp.*, No. CIV.A. 12-1190, 2013 WL 5612566, at *9 (Mass. Super. Mar. 15, 2013) ($5,000 service award); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1308 (2006) (finding that the average incentive award was $15,992). The Court should therefore approve the requested $5,000 service award as reasonable.

## CONCLUSION

For the foregoing reasons, in conjunction with final approval of the Settlement, the Court should approve payments from the Settlement Fund of $400,000 in attorneys' fees to Class Counsel, reimbursement of expenses of $11,312.93 to Class Counsel, and a service award of $5,000 to the Class Representative.

Dated: November 15, 2021

Respectfully submitted,

*/s/ Michael S. Appel*

Michael S. Appel, BBO #543898
SUGARMAN, ROGERS, BARSHAK
& COHEN, P.C.
101 Merrimac Street, 9th Floor
Boston, MA 02114
Telephone: (617) 227-3030
appel@sugarmanrogers.com

Lynn A. Toops, pro hac vice
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
Telephone: (317) 636-6481
ltoops@cohenandmalad.com

J. Gerard Stranch, IV, pro hac vice
Peter J. Jannace, pro hac vice
BRANSTETTER, STRANCH
& JENNINGS, PLLC
223 Rosa L. Parks Avenue, Suite 200
Nashville, TN 37203
Tel: (615) 254-8801
gerards@bsjfirm.com
peterj@bsjfirm.com

Samuel J. Strauss, pro hac vice
TURKE & STRAUSS LLP
613 Williamson Street Suite 201
Madison, WI 53703
Telephone: (608) 237-1775
Facsimile: (608) 509-4423
Sam@tukerstrauss.com

CERTIFICATE OF SERVICE

I, Michael S. Appel, hereby certify that I have on the above date served the foregoing by email and first-class mail, postage prepaid, to the following counsel of record:

James Monagle, Esquire
Mullen Coughlin, LLC
178 East Hanover Avenue, #103-373
Cedar Knolls, NJ 07927-2013

Lynda R. Jensen, Esquire
Mullen Coughlin, LLC
430 Franklin Village Drive, No. 184
Franklin, MA 02038

*/s/ Michael S. Appel*
Michael S. Appel, BBO #543898