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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

IN RE: Premera Blue Cross Customer Data Security Breach Litigation This Document Relates to All Actions	Case No. 3:15-md-2633-SI **PLAINTIFFS' MOTION AND SUPPORTING MEMORANDUM FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND FOR REPRESENTATIVE PLAINTIFF SERVICE AWARDS** **ORAL ARGUMENT REQUESTED**

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LR 7-1 CERTIFICATION

In compliance with Local Rule 7-1(a), the parties, through their respective counsel, have conferred. Defendant Premera Blue Cross ("Defendant" or "Premera") does not oppose this Motion.

MOTION

Plaintiffs respectfully move this Court to:

(1) award attorneys' fees of $12,872,688.80 and expenses of $1,247,389.03 as reimbursement for out-of-pocket costs, to be paid from the Settlement Fund as provided in the Settlement Agreement;[1]

(2) award service awards of $5,000 to each of the 15 Representative Plaintiffs identified in the Court's Preliminary Approval Order, to compensate them for the significant time and effort they spent on behalf of the Class, to be paid from the Settlement Fund as provided in the Settlement Agreement; and

(3) authorize Settlement Class Counsel to allocate the fees and costs among all Plaintiffs' counsel.

This motion is supported by the Supplemental Declaration of Cameron R. Azari, Esq. ("Suppl. Azari Decl.") and the Declaration of Kim D. Stephens in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Stephens Decl."), filed herewith; and the record of this case. For the reasons explained in the attached Memorandum and supporting declarations, Plaintiffs request the Court grant this Motion.

[1] The Settlement Agreement appears at Dkt. 273-1. Capitalized terms not otherwise defined have the meanings identified in the Settlement Agreement.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

As detailed in the contemporaneously filed papers in support of final approval, Class Counsel negotiated a groundbreaking Settlement that provides meaningful relief to the proposed class and an outstanding resolution of this data breach MDL class litigation.

In short, the Settlement provides the Class with over $43.8 million in direct benefits, which includes a $32 million cash fund, none of which will revert to Premera. From the cash fund, class members are eligible to choose from three forms of monetary relief. Specifically, class members may seek reimbursement for documented out-of-pocket losses, or may seek a default cash payment that requires no documentation at all. Eligible California residents may also seek an additional cash payment as compensation for statutory claims under California's Confidentiality of Medical Information Act. In addition to receiving a cash payment, *all* class members may elect to receive two years of free credit monitoring and insurance services, which each class member may defer for up to two years if they have existing credit monitoring services. Finally, the Settlement also requires Premera to spend $42 million over three years on comprehensive remedial measures and injunctive relief in the form of business practice changes related to Premera's IT security practices that will provide innumerable additional benefits to the Class. This is an outstanding result for the class; not only is this one of the largest cash funds in a data breach settlement when calculated on a per capita basis, it is unique in that a class member can receive a default cash payment *in addition to* receiving credit monitoring services.

Class Counsel and the Plaintiffs secured this exceptional relief after engaging in nearly five years of hard-fought litigation and while class certification and *Daubert* Motions were fully briefed and pending. To compensate Class Counsel and the Representative Plaintiffs for their

efforts in reaching this result, Class Counsel respectfully request that the Court award service awards to each Representative Plaintiff in the amount of $5,000, attorneys' fees in the amount of $12,752,610.97, and expenses in the amount of $1,247,389.03, in accordance with the terms of the Settlement reached between Plaintiffs and Premera.

The 15 Representative Plaintiffs deserve service awards for their efforts in this case. Each Representative Plaintiff spent numerous hours responding to extensive discovery requests (both written interrogatories and document requests), as well as preparing for and testifying at lengthy depositions, often while missing work. The efforts of these Representative Plaintiffs were essential to procuring the Settlement for the Class.

Over the past four years, Class Counsel devoted over 20,000 hours to the case, and now formally request compensation for their efforts in litigating and ultimately resolving this case on favorable terms that will provide meaningful relief to the Class. The requested attorneys' fees amount to approximately 29.07% of a conservative valuation of the total Settlement, and are commensurate with the lodestar attorneys' fees incurred in this matter, amounting to a modest 1.12 multiplier based on market rates as of December 31, 2019. They do not include any time thereafter, including time to be incurred in final approval and settlement administration. Throughout the litigation, Premera mounted a strenuous defense. Even in the settlement context, the parties needed multiple days of mediation, two experienced mediators, and several months to finalize this Settlement. Class Counsel undertook these efforts on a purely contingent basis and have yet to be compensated for their work. Class Counsel advanced over $1 million in out-of-pocket litigation costs, and seek reimbursement for expenses advanced on behalf of the Class.

The requested fees are fair and reasonable in light of the significant risks Counsel faced, and more importantly, in light of the excellent relief Counsel achieved for the Class. All

applicable factors support the requested award.

II. BACKGROUND

Litigating this case to a successful resolution required substantial commitments of time and resources from Class Counsel, Plaintiffs' Steering Committee ("PSC") firms, and other Plaintiffs' Counsel. In this brief, Class Counsel summarize their work throughout this case, their efforts to bring about the proposed settlement, the additional work they performed since the Court granted preliminary approval, and the additional time they anticipate spending throughout the process of settlement approval and claims administration.

A. The Data Breach and MDL Coordination.

On March 17, 2015, Premera publicly announced a data breach of its computer network, which began in May 2014 and went undetected for nearly a year. The breach compromised the confidential information of approximately 8.86 million[2] current and former Premera members, as well as affiliated members and employees of Premera. Following Premera's announcement, Plaintiffs across the country filed over 40 lawsuits against Premera related to the data breach. (Stephens Decl. ¶ 4.) The Judicial Panel on Multidistrict Litigation consolidated the various cases in this Court. Following a contested Rule 23(g) motion, this Court appointed Interim Lead Counsel, Liaison Counsel, and a Plaintiffs' Steering Committee ("PSC"). (Dkt. 43.)

The Court set monthly Status Conferences during which the parties discussed the progress of the case and sought guidance on various issues in the litigation. (Stephens Decl. ¶ 7.) Class Counsel met and conferred prior to each conference to streamline any pending disputes and ensure issues were ripe for presentation to the Court. (*Id.*) Class Counsel also held weekly

[2] The Class size was reduced through deduplication, from an estimated 10.6 million to 8,855,764. (*See* Azari Decl., Dkt. 280, ¶ 10).

telephone conferences with the PSC, which were crucial to streamlining litigation efforts and enabling Plaintiffs to move the case forward efficiently and diligently. (*Id.* ¶ 8.) Through these conferences, Class Counsel updated PSC members on case developments, obtained input on strategic decisions, assigned tasks, and set deadlines. (*Id.* ¶ 8.) Class counsel also updated non-PSC members about the litigation as the need arose. (*Id.* ¶ 9.)

Class Counsel set express time and expense guidelines for reporting common benefit time. (*Id.* ¶ 10.) Class Counsel strictly enforced these guidelines to ensure that any hours Plaintiffs' Counsel billed were solely for efforts spent on matters common to all claimants, and to minimize duplicative work or billing. (*Id.*) Class Counsel obtained hours reports from each Plaintiffs' Counsel every month, reviewed the bills, and submitted monthly reports of their time and expenses to the Court. (*Id.*)

Following the leadership appointment, Class Counsel spearheaded collaborative efforts to vet all prospective Plaintiffs for inclusion in the Consolidated Complaint and preserve documents. Class Counsel worked cooperatively and efficiently with other Plaintiffs' Counsel to vet well over 50 potential class representatives and select the Plaintiffs named in the Consolidated Complaint. (*Id.* ¶ 11.) This extensive process was necessary to make sure that the purported nationwide class and state subclasses were represented by devoted Class Representatives with valid claims and the appropriate commitment to pursue them. (*Id.*) Class Counsel researched, prepared, and filed a Consolidated Complaint on October 6, 2015 (Dkt. 44), and a First Amended Consolidated Complaint on September 30, 2016 (Dkt. 75).

B. Overview of the Litigation.

From the very inception of this case, the Parties fiercely contested every phase of litigation. Plaintiffs brought various claims alleging Premera breached its duties by, *inter alia*:

(a) failing to implement and maintain adequate data security practices; (b) failing to detect the Data Breach in a timely manner; and (c) failing to disclose that its data security practices were inadequate to safeguard Class Members' PII and PHI. Plaintiffs asserted a number of state law claims, including violation of Washington's Consumer Protection Act; negligence; breach of contract; and violation of California's Confidential Medical Information Act. (*See* Dkt. 75.)

Premera consistently denied Plaintiffs' core allegations and challenged Plaintiffs' legal theories. Early on, Premera moved twice to dismiss Plaintiffs' Consolidated Complaint. After extensive briefing and oral argument, on August 1, 2016, the Court granted in part and denied in part Premera's first motion to dismiss. *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 198 F. Supp. 3d 1183 (D. Or. 2016). The Court dismissed Plaintiffs' fraud-based claims and contract claims and gave Plaintiffs leave to replead. Premera then moved to dismiss Plaintiffs' First Amended Consolidated Complaint. Following further briefing and oral argument, the Court granted in part and denied in part the motion. *In re: Premera Blue Cross Customer Data Sec. Breach Litig.*, 3:15-MD-2633-SI, 2017 WL 539578, at *22 (D. Or. Feb. 9, 2017).

Premera hotly disputed whether any data had been exfiltrated in the breach and made it a key issue in this case. Even before Plaintiffs filed this case, Premera claimed no evidence existed proving that the hackers removed or "exfiltrated" any of Plaintiffs' data from Premera's systems. (*See, e.g.*, Dkt. 60 at 54:20–56:2.) Plaintiffs spent significant time and effort to uncover evidence of exfiltration through various discovery methods, including depositions, document discovery, and a forensic review of Premera's network servers aided by experts. (Stephens Decl. ¶¶ 13–14.) With this deep technical understanding of Premera's systems, Class Counsel was also able to identify missing evidence, and with that, filed a motion for sanctions against Premera for the destruction of a key computer and specific log data that could have documented further evidence

of exfiltration. (Dkt. 182.) The Court granted the motion in part and awarded evidentiary sanctions which, *inter alia*, precluded any expert working for Premera from testifying that the destroyed computer and logs did not contain evidence of exfiltration. (Dkt. 224.)

Class Counsel worked diligently to master highly technical details about data security and industry best practices and retained and worked extensively with several consulting and testifying experts, including an IT security expert. (Stephens Decl. ¶¶ 14–15.) Class Counsel's depth of understanding in this area enabled Counsel to identify Premera's failures and deficiencies that made its systems vulnerable and led to the breach. (*Id.*) These facts were essential to showing commonality and predominance for class certification. (*See* Dkt. 156, at 18–53.) Finally, Counsel's fulsome understanding of Premera's IT security system structure and its deficiencies allowed Counsel to negotiate intelligently for comprehensive and effective injunctive relief as a part of this settlement. (Stephens Decl. ¶ 15.)

Throughout the litigation, Premera also contested Plaintiffs' damages theories. Plaintiffs worked with several experts to support their "benefit of the bargain" and "lost value of PII" theories of damages. (*Id.* ¶¶ 16, 45.) Premera filed a partial summary judgment motion challenging one of these damages theories. (Dkt. 175.) This motion remains pending.

Before reaching this Settlement, the Parties also fully briefed and argued Plaintiffs' Motion for Class Certification, in which Plaintiffs sought to certify a nationwide class under Washington law, and a California subclass. (Dkt. 156–174, 190–197, 218–220.) Plaintiffs also filed, and the Parties fully briefed, motions to exclude expert testimony from Premera's three experts. (Dkt. 211–217.) All four of these motions remain pending.

C. Discovery.

During the course of the litigation, the Parties engaged in significant discovery. Obtaining

discovery, however, was a hard-fought battle. Premera vigorously contested the scope of discovery served on it, requiring Plaintiffs to brief and argue several disputes before the Court. Premera disputed the proposed list of custodians and search terms that would be searched and produced. (Stephens Decl. ¶¶ 18–19.) This dispute reached an impasse and required Court intervention in April 2017. (*Id.*) At the Court's direction, the Parties implemented a technology-assisted review ("TAR") process to identify a set of relevant and responsive documents for production. (*Id.*) This TAR process shifted the bulk of the workload from Premera to Plaintiffs, who were required to expend significant time and effort to train the TAR software. Premera provided Plaintiffs with access to the database of its documents in August 2017. (*Id.*) Over the following three months, Plaintiffs devoted hundreds of hours of attorney time to training the TAR software, reviewing over 7,000 documents. (*Id.*) Following the TAR process, and further guidance from the Court to resolve disputes arising after the TAR process was complete, Premera produced over 1.5 million pages of documents. (*Id.*) Due to the delay in obtaining these documents from Premera, and the looming deadlines in the case, Class Counsel enlisted help from other Plaintiffs' firms to assist in the document review efforts. (*Id.* ¶ 20.) These firms proceeded under strict billing protocols set by Class Counsel and were subject to oversight from the PSC to ensure that document review progressed efficiently and promptly. (*Id.* ¶¶ 20–21.)

Class Counsel expended significant time and resources reviewing and analyzing Premera's document production and privilege logs. Overall, counsel for Plaintiffs spent over 5,000 hours reviewing and analyzing tens of thousands of documents. (*Id.* ¶ 22.) In addition to seeking informal resolution of discovery disputes from the Court, Plaintiffs were forced to file two discovery motions: regarding Premera's privilege logs and whether a third-party forensic report regarding Premera's breached servers constituted attorney-work product. (Dkt. 110, 231.)

These motions resulted in the appointment of a Special Master, several hearings, and two published decisions compelling production that are now being cited by other Courts. *See In re: Dominion Dental Servs. USA, Inc. Data Breach Litig.*, No. 1:19-cv-1050-LMB-MSN, Dkt. 113 (Order) at *5, 8 (Dec. 19, 2019) (order compelling production and citing *In re Premera Blue Cross Customer Data Security Breach Litig.*, 296 F. Supp. 3d 1230, 1245–46 (D. Or. 2017)).

In late 2018, Premera moved to compel production of personal computers and tablets from specific Plaintiffs. (Dkt. 240.) Plaintiffs successfully defeated the motion, arguing the request presented privacy concerns and did not meet Rule 34's proportionality requirements. *See In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 329 F.R.D. 656, 668 (D. Or. 2019).

Plaintiffs continued their discovery efforts through extensive deposition testimony. Collectively, the Parties took more than 50 depositions. Plaintiffs' took over fifteen depositions of Premera's employees (some multiple times)—including Premera's EVP of Operations and IT, Senior Manager of Information Security, VP of IT Infrastructure, Manager of Security Operations, and Chief Information Security Officer—and three 30(b)(6) depositions. (Stephens Decl. ¶24.) Many of these deponents were no longer employed by Premera and they had to be deposed where they relocated. Plaintiffs also took depositions of Premera's four expert witnesses. (*Id.*) In addition, Plaintiffs prepared for and defended 24 depositions of the named Plaintiffs and Plaintiffs' experts. (*Id.* ¶ 25.) Plaintiffs subpoenaed a number of third parties seeking documents and testimony from entities such as Coalfire Systems, Inc. and FireEye, Inc., cyber security consulting firms hired by Premera, and Accuvant and Verizon, third party firms Premera hired to perform IT security audits. (*Id.* ¶ 26.) The information Class Counsel obtained through these party and non-party depositions was critical to obtaining a comprehensive understanding of how and why the data breach occurred and to preparing for their class certification motion, discovery

motions, anticipated future motions practice and trial. (*Id.* ¶ 27.)

D. Settlement Negotiations.

Over the course of several months, and while Plaintiff's Motion for Class certification was fully briefed and pending, the Parties engaged in extensive, arm's-length settlement negotiations. These negotiations included not only Plaintiffs and Premera, but several of Premera's insurers and its coverage counsel as well. (*Id.* ¶ 32.) These negotiations included ***three*** all-day sessions of mediation with the Honorable Jay C. Gandhi (Ret.) of JAMS; two of which included the additional assistance of Peter K. Rosen, Esq. of JAMS, an excellent mediator with an extensive background in insurance coverage.[3] (*Id.*) The negotiations continued over emails and in telephone conferences with Judge Gandhi and Mr. Rosen. (*Id.* ¶ 33.) In the evening of February 14, 2019, the Parties reached a preliminary agreement on the terms of a nationwide settlement. Numerous additional negotiations occurred relating to finalizing the Settlement Agreement in the following months. ((*Id.* ¶ 34) The Parties exchanged numerous drafts of the Settlement Agreement and its exhibits to negotiate details of the settlement structure and notice plan in order to maximize the benefits to the class. The parties had to again consult Judge Gandhi to resolve disputes arising out of documentation of the settlement. The parties executed the final proposed Settlement Agreement on May 29, 2019. (*Id.* ¶ 36; *see also* Dkt. 273-1.)

After executing the Settlement, Class Counsel obtained and negotiated competing bids from numerous third-party claims administrators to obtain the best notice plan and cost for the class. (Stephens Decl. ¶ 37.) Class Counsel negotiated an agreement with Epiq under which certain costs are capped based on estimated class size and claims rates. (*Id.*) Class Counsel also negotiated a competitive bid with Identify Guard to provide Credit Monitoring and Insurance

[3] Two of these mediation sessions began at 10 a.m. and went well past midnight.

Services for the class at a capped wholesale cost, and including price break points depending on the Class's take rate. (*Id.* ¶ 39.) Finally, Class Counsel prepared and filed the Settlement Agreement along with the Motion for Preliminary Approval (Dkt. 273) which this Court granted on July 29, 2019 (Dkt. 279).

E. Material Terms of the Settlement

As explained in more detail in the contemporaneously filed Motion for Final Approval, the proposed Settlement includes a $32 million cash fund that will be used to make cash payments and provide robust Credit Monitoring and Insurance services to class members who submit valid claims. No less than $10 million of the cash fund will be used to provide direct monetary compensation to those class members submitting claims. (SA, ¶ 4.2.) If the approved claims exceed the value of the available funds, then all claims will be reduced pro rata. (SA, ¶ 4.2.1.) The cash fund is non-reversionary, ensuring that all of the monetary benefits will go to the proposed Settlement Class. (SA ¶ 3.1.) Additionally, $2.73 million of the fund will be allocated to provide all class members with the option to enroll for two free years of Credit Monitoring and Insurance provided by Identity Guard. Identify Guard will provide robust credit monitoring and insurance services, worth hundreds of dollars to each class member who enrolls. The cash fund also will be used to pay any class representative Service Awards, attorneys' fees and expenses to Class Counsel, and notice and claims administration costs, as approved by the Court. (SA, §§ III, IV, V, IX.) Finally, the Settlement requires Premera to spend $42 million over three years on comprehensive remedial measures and injunctive relief in the form of business practice changes and future commitments related to Premera's IT security practices.

F. Settlement Administration.

Since this Court granted Preliminary Approval of the Settlement, Class Counsel has

worked with the Settlement Administrator, Epiq, to ensure that notice and claims processes proceeds smoothly. Class Counsel regularly conferred with Epiq regarding the progress of the notice plan and claims response and responded to inquiries from Class Members about the claims process. (Stephens Decl. ¶ 38.) In response to common inquiries from class members, Class Counsel worked with Epiq to make updates to the settlement website. (*Id.*) Class Counsel will continue to expend time and effort to ensure that Class Members are able to file claims and receive benefits from the Settlement. The lodestar presented to the Court in this Motion does not include the significant amount of time that will be expended on future efforts to respond to Class Member inquiries and administer the settlement. (*Id.* ¶ 81.)

III. THE REQUESTED ATTORNEY'S FEES ARE REASONABLE

It is well established that where counsel's work results in substantial benefit to a class of individuals, counsel is entitled to an award of their attorney's fees under the common fund doctrine. Under this doctrine, "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). The purpose of this doctrine is "to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of the litigants and their counsel." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008).

Rule 23 permits a court to award "reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). But "[c]ourts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). In common fund cases in the Ninth Circuit, district courts have discretion to

"employ either the lodestar method or the percentage of recovery method." *Id.* at 942; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). "Under either method, the court must exercise its discretion to achieve a reasonable result." *Demmings v. KKW Trucking, Inc.*, 3:14-CV-0494-SI, 2018 WL 4495461, at *13 (D. Or. Sept. 19, 2018).

Because this class action is based on Washington law, Washington law governs the award of fees. *Vizcaino*, 290 F.3d at 1047; *see also Dennings v. Clearwire Corp.*, No. C10–1859JLR, 2013 WL 1858797, at *4 (W.D. Wash. May 3, 2013) ("The jurisdiction in this case . . . is based on diversity of citizenship under the Class Action Fairness Act, 28 U.S.C. § 1332(d). The availability and amount of a fee award are considered substantive issues of state law for *Erie* purposes."). But like the Ninth Circuit, "Washington law recognizes both the lodestar method and the percentage of the fund methods for determining appropriate attorneys' fees." *Dennings*, 2013 WL 1858797, at *5 (alterations and quotations omitted). And because the "Washington practice" is to "look[] to federal law for guidance in this area," the Ninth Circuit has authorized federal courts to exercise their discretion to use the percentage of the fund or lodestar method in class cases governed by Washington law. *Vizcaino*, 290 F.3d at 1047 (affirming district court's application of percentage method to case brought under Washington law); *see also Clark v. Payless Shoesource, Inc.*, 2012 WL 3064288, at *1 (W.D. Wash. July 27, 2012) (applying lodestar method in case brought under Washington law).

Although courts may use either method, "the percentage method in common fund cases appears to be dominant" in the Ninth Circuit. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1046; *see also Demmings*, 2018 WL 4495461, at *13 ("Courts typically use the percentage approach when awarding attorney's fees with the lodestar serving as a 'cross check' on the reasonableness of the percentage."). That method "better aligns the incentives of plaintiffs'

counsel with those of the class members because it bases the attorneys' fees on the results they achieve for their clients, . . ." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014).

The Ninth Circuit recognizes 25% of the common fund as a "benchmark rate" in common fund cases. *Vizcaino*, 290 F.3d at 1048. But as the Ninth Circuit cautioned, the 25% benchmark rate is "a starting point for analysis" and it "may be inappropriate in some cases." *Id.* Accordingly, this percentage can be adjusted upward or downward based on the circumstances of the case. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *In re Bluetooth*, 654 F.3d at 942; *Demmings*, 2018 WL 4495461, at *13 (noting the percentage "may be adjusted . . . when special circumstances warrant a departure" (quotation omitted)).

Plaintiffs' Counsel is requesting fees of $12,752,610.97 or their work in this case. As explained below, this requested fee amounts to 17.4%–29.34% of the overall settlement value—even when excluding the retail value of credit monitoring services—and is reasonable under both the percentage method and lodestar methods.

A. The percentage of the settlement value requested by class counsel is reasonable.

The first step when using the percentage method is to assess the appropriate size of the fund to "determine what portion of the common fund is for the benefit of the entire class." *In re Anthem, Inc. Data Breach Litig.*, 15-MD-02617-LHK, 2018 WL 3960068, at *7 (N.D. Cal. Aug. 17, 2018), *appeal dismissed sub nom. In re Anthem, Inc., Customer Data Sec. Breach Litig.*, 18-16826, 2018 WL 7858371 (9th Cir. Oct. 17, 2018). The Settlement provides relief to the Class in three primary ways: (1) a cash fund that will provide cash payments to class members who submit a claim; (2) valuable credit monitoring and insurance services that will protect class members from future harm, purchased at wholesale from the cash fund; and (3) substantial

injunctive relief that will cost Premera $42 million to implement and maintain for at least three years, and which will benefit the class by ensuring their data is protected from future attacks. Here, the settlement value should include both the value of $32 million cash fund, as well as the value of the injunctive relief, as both provide substantial, measurable benefits to the class.

1. The fund provides valuable relief to class members.

The $32 million cash fund constitutes one of the largest data breach settlements when measured on a per capita basis, even without taking into account Premera's required $42 million spend on increased IT security. The monetary portion of this Settlement directly benefits the class by providing class members with valuable credit monitoring and insurance services and cash payments. The types of cash payments offered under the Settlement allow class members to seek relief directly tailored to the harms they have incurred as a result of the Data Breach. Those class members who incurred out-of-pocket losses can recoup those losses—such as unreimbursed fraud, costs associated with freezing or unfreezing credit, credit monitoring costs, or for their time spent remedying fraud—upon submitting a claim and providing reasonable documentation of those losses. (SA ¶ 4.3.) Those who have not suffered such losses, may still claim a default cash payment requiring no documentation or specific proof of loss. (SA ¶ 4.4.)

The cash fund will also be used to pay for expenses of notice and claim administration, attorney's fees and expenses, and service awards, all of which benefit the class. *See In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *8 ("[T]he Court concludes that litigation expenses and administrative costs should be included. As to the former, the litigation expenses were necessary to litigate this case and 'make the entire action possible.' As to the latter, investing in a comprehensive notice and claims processing effort was critical to inform . . . Settlement Class Members about the Settlement and their ability to seek reimbursement for their losses."

(quoting *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015))). Thus, at a minimum, the settlement value includes the full amount of the $32 million cash fund.

2. Premera's business practice commitments provide substantial, and measurable, benefit to the class.

In addition to the $32 million cash fund, the Settlement contains extensive business practice commitments that Premera must undertake for period of no less than three years. Premera is obligated to spend no less than $42 million on improved data security between 2019 and 2022. (SA ¶ 4.8.2 & Exhibit A.) With this increased spend on security, Premera has agreed to implement enhanced security measures specifically designed to protect class members' sensitive information that only came about because of this Settlement. (SA at Exhibit A.)

Because Class Counsel took extensive discovery of Premera's IT security system, Counsel was able to specifically negotiate enhanced security measures that target and remediate the deficiencies in Premera's IT security systems that existed at the time of the breach. (Stephens Decl. ¶ 15.) Because Premera still retains databases containing all of the same sensitive class member data that it did at the time of the breach, ensuring Premera adequately protects this data going forward was a principal part of the negotiated relief for the class. These measures are designed to prevent another breach from happening and thereby directly benefit the class.

In determining the total settlement value for the percentage-of-recovery method, the district court may consider the value of the injunctive relief offered by the settlement agreement where it can quantify the value of that relief. *Stanton v. Boeing Co.*, 327 F.3d 938, 973–74 (9th Cir. 2003); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (upholding use of the common fund doctrine in fee analysis where settlement relief was injunctive in nature). "When the non-cash relief can be reliably valued, courts often include the value of this relief in the common fund and award class counsel a percentage of the total fund." *In re Checking Account*

Overdraft Litig., No. 1:09-MD-02036-JLK, 2013 WL 11319243, at *11 (S.D. Fl. Aug. 2, 2013) (awarding attorney fees of 30% of common fund after adding expected value to class members from defendant's business practice changes to the value of the common fund); *Guschausky v. Am. Family Life Assur. Co. of Columbus*, No. CV 10–59–H–DWM, 2012 WL 4849688 at *2 (D. Mont. Oct. 11, 2012) (awarding attorney fees based on percentage of $1.5 million settlement fund combined with the $1.2 million in savings to the class from defendant's policy change).

Here, the benefits to the Class Members from Premera's business practice commitments can be accurately ascertained and therefore added to the common fund for purposes of calculating attorney's fees. *See In re: Checking Account Overdraft Litig.*, 2013 WL 11319243, at *13; *Staton*, 327 F.3d at 974 (emphasis added) (noting courts may include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees if the benefits can be accurately ascertained). Since Premera has committed to spending no less than $42 million in security benefits as part of this Settlement, the Court can quantify the value of the injunctive relief as the amount Premera has agreed to spend. *See, e.g.*, *In re: Equifax Inc. Customer Data Sec'y Breach Litig.*, No. 1:17-md-02800-TWT (N.D. Ga.), Final Approval Hr'g Tr. (Dec. 19, 2019) at 120:17–21 ("I reject the idea that the non-monetary benefits can't be considered in determining the percentage in this case, which makes the percentage that I'm awarding even less when you consider the $1 billion that Equifax is committing to improve its cybersecurity."). If the Court considers the $42 million injunctive relief value in addition to the $32 million cash fund, the total fee amounts to just 17.23% of the Settlement value, well below the Ninth Circuit's 25% benchmark.

Plaintiffs also sought to value the injunctive relief with expert analysis. An expert economist, Dr. Robert Vigil, isolated the benefit to settlement class members from the injunctive

relief and calculated that benefit as having a measurable value of *at least* $11,872,000.00. Specifically, Dr. Vigil calculated the benefit to the class members using the Cost Approach, a conservative and commonly used method to value an intangible asset like data security. (Vigil Decl., Dkt. 274, ¶¶ 18–20; 10–17.) Economists and finance professionals commonly use the Cost Approach to value many different types of assets, including intangible assets. (*Id.* ¶ 11.) "[T]his approach is most applicable in situations, similar to this case, where cost information is known, the intangible asset being valued is new (*i.e.*, the improvement in data security), and the type of value being estimated is the value in continued use by the current owner . . . ." (*Id.* ¶ 14.)

The premise of the Cost Approach is that "the cost to purchase or develop [an asset] is commensurate with the economic value of the service that the [asset] can provide during its life." (*Id.* ¶ 16 (citing Smith, Gordon V., and Russell L. Parr, *Valuation of Intellectual Property and Intangible Assets* 197–98 (3d ed. 2000)).) Inherent in Premera's decision to spend money on data security is a belief that its customers will benefit by an amount *at least as much* as it spends. Premera may believe that its customers will benefit by more than what it spends, but not less. If Premera did not believe its customers would benefit by the amount it has already spent and has agreed to spend, it would not be rational for Premera to spend this money. (*Id.* ¶ 17.) Courts have found the Cost Approach to be an acceptable valuation methodology in a wide variety of cases. *See, e.g.*, *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No.: 12–CV–00630–LHK, 2014 WL 794328 at *4–5, 11 (N.D. Cal. Feb. 25, 2014) (valuing patents related to various smartphone features); (*see also* Vigil Decl., Dkt. 274, ¶ 15 (compiling additional cases)).

Dr. Vigil applied the Cost Approach to the IT security spend Premera is obligated to incur under the Settlement. Premera has agreed that its cost to obtain and maintain the components of the injunctive relief is equal to the difference between (1) the $14 million per year Premera is

obligated to spend on data security under the Settlement Agreement and (2) Premera's pre-breach IT security budget.[4] (SA ¶ 4.8.2.) Using these figures, Dr. Vigil calculated the cost of providing the injunctive relief over the three-year period.

This improved data security flowing from the injunctive relief will benefit all settlement class members because a new data breach would cause harm to all of the class. (Vigil Decl., Dkt. 274, ¶¶ 9–10 (citing Decl. of Dr. Coleman Bazelon, ECF 164 at ¶ 19)). However, the improved data security benefits more than just the class members because Premera has continuously added personal information to its database since the breach. While those newly added persons are not class members (as their data was not exposed in the breach), they will also benefit from Premera's data security improvements. Accordingly, Dr. Vigil adjusted for this consideration by examining the number of people added to Premera's database between the data breach and the present and estimating any further increase during the three-year injunctive period. (*Id.* at ¶¶ 21–24.) Based on that calculation, Dr. Vigil was able to carve out the benefit to the non-class members and isolate the value of the injunctive relief to the class member's alone.[5] Assuming the Court

[4] To protect Premera's confidentiality, Premera's historical IT budgets and patient population data are detailed only in Dr. Vigil's report, which is filed under seal. (Dkt. 274.)

[5] Because Dr. Vigil identified the benefit to the class, rather than the cost of implementation, the injunctive value satisfies *Stanton* and is distinguishable from cases where courts have rejected requests to add injunctive value. *E.g. Anthem*, 2018 WL 3960068, at *8; *Mason v. Heel, Inc.*, 2014 WL 1664271, at *9 n.3 (S.D. Cal. Mar. 13, 2014); *Johnson v. MGM Holdings, Inc.*, __F. App'x __, 2019 WL 6464270, at *2 (9th Cir. Dec. 2, 2019). Moreover, because Dr. Vigil excluded the benefit to the public as a whole, and calculated the benefit to the class alone, this further distinguishes from cases where the courts have rejected requests to add injunctive value. *E.g.*, *Johnson v. Metro-Goldwyn-Mayer Studios, Inc.*, 2018 WL 5013764, at *11 (W.D. Wash. Oct. 16, 2018) *aff'd sub nom. Johnson v. MGM Holdings, Inc*, 943 F.3d 1239 (9th Cir. 2019), *and aff'd sub nom. Johnson v. MGM Holdings, Inc*, 18-35967, 2019 WL 6464270 (9th Cir. Dec. 2, 2019) (refusing to add injunctive relief regarding labeling on DVD box set to value of settlement where it was unlikely to benefit class members as class members were unlikely to purchase the same DVD box set again).

declines to consider the full-value of the of the amount Premera has committed to spend as part of the Settlement, according to Dr. Vigil's analysis, the injunctive relief presents a benefit to class members of at least **$11,872,000**. (*Id.* ¶¶ 3; 23–25.)

Dr. Vigil's calculation is an ascertainable and supported, yet, conservative measure of the benefit to class members from the injunctive relief. As Dr. Vigil notes, because the data security measures implemented under Premera's incremental spending are substantially non-rivalrous, meaning, the consumption of these benefits by one customer does not decrease the availability or consumption of the benefits by other customers, an argument can be made that all of Premera's incremental spending will directly benefit the class. (*Id.* at ¶ 23.) Notably, the injunctive relief runs to the benefit of *all* class members, regardless of whether the class member files a claim.

Here, consistent with the Ninth Circuit's standard in *Stanton*, the settlement value should include *at least* this additional $11.87 million measurable benefit to the class for purposes of evaluating whether the requested fee is reasonable (if not the full value of the $42 million commitment). Accordingly, the total value of the settlement from the cash fund and injunctive relief is between $43,872,000 and $74,000,000.

B. The *Vizcaino* factors justify the requested fee award.

The requested fee amounts to 29.07% of the $43,872,000 Settlement value (or just 17.23% of the $74,000,000 Settlement value). While the 25% is the Ninth Circuit "benchmark," it is well established that this percentage can be adjusted upward based on the circumstances of the case. *See Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d at 272; *In re Bluetooth*, 654 F.3d at 942; *Demmings*, 2018 WL 4495461, at *13. Indeed, courts regularly grant fee awards between 20% and 30% of the settlement value. *Bowles v. Washington Dep't of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440, 450 (1993) (noting that a reasonable percentage of that recovery is "often in

the range of 20 to 30 percent"); 5 Newberg on Class Actions § 15:83 (5th ed.) (noting "recent empirical data on fee awards demonstrate that percentage awards in class actions are generally between 20–30%"); *see also, e.g.*, *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1023 (E.D. Cal. 2019) (awarding 33.3% of common fund in attorney's fees under percentage method); *Vizcaino*, 290 F.3d at 1050 (affirming fee award of 28% of the common fund); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 448, 451 (E.D. Cal. 2013) (noting "[t]he typical range of acceptable attorneys' fees in the Ninth Circuit is 20 percent to 33.3 percent of the total settlement value," and approving fee award of 33% of fund).

Factors that a court may consider in making such a departure include: (1) the results obtained; (2) the risks involved in the litigation; (3) counsel's skill and the complexity of the issues; (4) the effort expended by counsel; (5) the reaction of the class; (6) non-monetary or incidental benefits, including helping similarly situated persons nationwide by clarifying certain laws; (7) awards in similar cases; and (8) comparison with counsel's lodestar. *See Vizcaino*, 290 F.3d at 1048–50; *Demmings*, 2018 WL 4495461, at *13. These factors should not be used as a rigid checklist or weighed individually, but, rather, should be evaluated in light of the totality of the circumstances. *See Vizcaino*, 290 F.3d at 1048–50.

1. Counsel received exceptional results for the class.

"The most critical factor in granting attorney's fees is the overall result and benefit to the class." *Demmings*, 2018 WL 4495461, at *14. As extensively detailed *supra*, and in the concurrently file Motion for Final Approval, both the monetary and injunctive relief in this Settlement provide substantial benefits to the class. This relief compares highly favorably with similar data breach settlements. *Cf., e.g.*, *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *10 (cash settlement fund of $115 million for class of 79.15 million individuals); *In*

re Yahoo! Inc., Customer Data Breach Sec'y Breach Litig., No. 16-md-02752-LHK (N.D. Cal.), Dkt. 369 (cash settlement fund of $117.5 million for class of 194 million individuals); *In re: Equifax Inc. Customer Data Sec'y Breach Litig.*, No. 1:17-md-02800-TWT (N.D. Ga.), Dkt. 858 at 11 (cash settlement fund of $380.5 million for class of 147 million members); *In re: The Home Depot Inc. Customer Data Sec'y Breach Litig.*, No. 1:14-md-02583, Dkt. 261 at *2–4 (cash fund of $29 million for 52 million consumers); *In re Target Corp. Customer Data Sec'y Breach Litig.*, No. 1:14-md-02522-PAM (D. Minn. Nov. 17, 2015), Dkt. 645 (settlement including cash fund of $10 million for an estimated 97 million consumers), *finally affirmed by* 892 F.3d 968 (8th Cir. 2018). The cash relief obtained here ($32 million in cash for a class of 8.86 million) substantially exceeds each of these approved data breach settlements when scaled on a per capita basis.

The response to the Settlement from the class has been overwhelmingly positive. Claims rates have been higher than expected, indicating class-wide support for the relief this Settlement provides. At present, Epiq has received 691,870 total claims. (Supplemental Declaration of Cameron Azari ("Suppl. Azari Decl.") ¶ 12.) This amounts to a current claims rate of approximately 7.81%, which we expect to rise before the claims period ends. This rate far exceeds the claim rates seen in several other major data breach settlements: 0.2% (*Target* and *Home Depot*[6]) and nearly 2% (*Anthem*[7]). To date, the Parties have received just *one* objection, and 560 requests to opt out. (Stephens Decl., ¶ 49; Suppl. Azari Decl. ¶ 11.) The low rate of

[6] *See In re The Home Depot, Inc. Customer Data Sec. Breach Litig.*, No. 1:14-md-02583-TWT (N.D. Ga.), Dkt. 245-1 at 2; Dkt. 261; *In re Target Corp. Customer Data Sec. Breach Litig.*, No. 14-md-02522-PAM (D. Minn.), Dkt. 783 at 2.

[7] *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 329 (N.D. Cal. 2018), *appeal dismissed sub nom. In re Anthem, Inc., Customer Data Sec. Breach Litig.*, 18-16866, 2018 WL 7890391 (9th Cir. Oct. 15, 2018), *appeal dismissed sub nom. In re Anthem, Inc., Customer Data Sec. Breach Litig.*, 18-16826, 2018 WL 7858371 (9th Cir. Oct. 17, 2018) (noting claims rate of 1.8% at final approval).

objections and requests for exclusions indicates class approval of the settlement. *See Hughes v. Microsoft Corp.*, No. C98–1646C, C93–0178C, 2001 WL 34089697, at *8 (W.D. Wash. Mar. 26, 2001). Here, the exceptional relief obtained for the class supports the requested fee award.

2. Credit monitoring provides additional value to the class.

The Settlement provides substantial additional relief beyond the $43.78–$74 million settlement value by providing class members with two years of Credit Monitoring and Insurance Services through Identity Guard, with an option to delay the start date if a Class Member already has similar services. These additional benefits to class members that are relevant to assessing a reasonable percentage fee. *See Staton*, 327 F.3d at 974 (noting additional relief that is difficult to quantify is a "'relevant circumstance' in determining what percentage of the common fund class counsel should receive as attorneys' fees"). These services have a retail value of $19.99 per month per individual. (*See* Thompson Decl., Dkt. 275, ¶ 7.) Over the two-year period that the Settlement provides this service, this amounts to a value of $479.76 for each participating class member. Given a class size of approximately 8.86 million individuals, this is an enormous benefit, potentially amounting to over $4 billion of benefit to class members at the retail value.[8]

Looking at the take rate alone, a higher response rate means more claimants will receive the Credit Monitoring and Insurance Services, resulting in an increase in the value attributable to that component of the Settlement. Every 1% of class members that enroll generates an additional value to the class of approximately $42.5 million, before excluding the cost of the services. Epiq is in the process of reviewing submitted claims; of the 551,597 reviewed claims, 315,853 class

[8] *See Williams v. MGM-Pathe Communs. Co.*, 129 F.3d 1026, 27 (9th Cir. 1997); *Ellsworth v. U.S. Bank, N.A.*, No. 3:12-cv-02506-LB, 2015 WL 12952698, at *4 (N.D. Cal. Sept. 24, 2015) ("Ninth Circuit precedent requires courts to award class counsel fees based on the total benefits being made available to class members rather than the actual amount that is ultimately claimed.").

members have submitted a claim for credit monitoring. (Suppl. Azari Decl. ¶ 12.) This is equivalent to over $148 million in additional value to the participating class members, after subtracting the cost of providing the services. (*See* Stephens Decl. ¶ 41.) Class counsel project this number to rise as class members continue to file claims before the March 30, 2020 claims deadline, and as Epiq continues to review the claims already submitted.

Several courts have suggested the retail value of credit monitoring relief is relevant settlement value, given that this represents the value of the benefit Class Members will actually receive.[9] *See, e.g.*, *In re Experian Data Breach Litig*., No. 8:15-cv-01592-AG-DFM (C.D. Cal. May 10, 2019), Dkt. 322 at 2 (including retail value of credit monitoring in calculation of settlement value for percentage fee request); *Johansson-Dohrmann v. Cbr Sys., Inc.*, No. 12-cv-1115-MMA (BGS), 2013 WL 3864341, at *9 (S.D. Cal. July 24, 2013) (analyzing value of credit monitoring services for fee analysis); *In re The Home Depot, Inc. Customer Data Sec. Breach Litig.*, No. 1:14-md-02583-TWT, 2016 WL 6902351, at *4 (N.D. Ga. Aug. 23, 2016) (granting final approval of settlement and reasoning that "[t]hese services have a retail value of approximately $180 per enrollee"). When the retail value benefit of current Credit Monitoring claims is added to the settlement value, Counsel's fee request amounts to just ***9%*** of the total value to the class. This further supports the reasonableness of the fees requested.

3. The risks of litigation support the requested fee award

The risk of further litigation is also an important factor in determining a fair fee award. *See Vizcaino*, 290 F.3d at 1048. "When considering the risks posed in litigation, 'the risk of loss

[9] Indeed, it is the "value to individual class members" that determines the true value of the settlement. *See Staton*, 327 F.3d at 974. The retail value of the credit monitoring services reflects of the true value class members receive from provision of these services in the Settlement.

in a particular case . . . is a product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits.'" *Demmings*, 2018 WL 4495461, at *15 (quoting *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992)). A high level of risk supports an upward adjustment to the percentage fee. "In cases where recovery is uncertain, an award of one third of the common fund as attorneys' fees has been found to be appropriate." *Id.* (quoting *Franco v. Ruiz Food Prods.*, No. 1:10–cv–02354–SKO, 2012 WL 5941801, at *16 (E.D. Cal. Nov. 27, 2012).).

As set forth herein and in the supporting declarations, Plaintiffs faced numerous defenses to liability and damages. Although Plaintiffs largely prevailed at the motion to dismiss phase, Premera continues to deny liability. Through settlement, Premera also continued to dispute exfiltration and challenged Plaintiffs' damages theories by arguing that no plaintiffs were injured since no data appeared on the dark web. (*See* Dkt. 190 at 17, 48.) After extensive discovery efforts, including forensic examination of Premera's servers, Plaintiffs uncovered evidence supporting exfiltration. (*See* Dkt. 156 at 37–46.) However, each party presented expert testimony disputing key issues regarding exfiltration and whether there was harm to Plaintiffs. Plaintiffs faced a substantial risk of non-recovery from adverse findings on these issues.

As Judge Koh noted in *Anthem*, "data-breach litigation is an actively developing field of the law where much of the legal landscape is still shifting and unsettled." *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *11. The risks inherent in litigating issues in this field are "substantial." *See id.* Class Counsel litigated novel and unsettled issues on topics such as causation and damages. And at the time of settlement, Premera had already filed a motion for partial summary judgment attacking one of Plaintiffs' primary damages theories. (Dkt. 175.) Were litigation to continue, Plaintiffs would have had a long road ahead of them. Even if

Plaintiffs prevailed on the pending summary judgment motion, Premera likely would have continued to challenge Plaintiffs' ability to prove causation, damages, and the scope of Premera's promise to protect customers' sensitive data through additional summary judgment motions and at trial. Due to the novelty of Plaintiffs' damages theories, there was a risk that Plaintiffs would prevail on liability but establish only a small figure in damages. *See In re Omnivision*, 559 F. Supp. 2d at 1047 (acknowledging risk of small recovery where estimates of damages varied).

Moreover, the Court has yet to rule on Plaintiff's pending motion for class certification. While Counsel believes they put forward a strong class certification motion, certification was not guaranteed. *See In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *12 (noting scarcity of precedent favoring class certification in data breach litigation). Plaintiffs sought to certify a nationwide class under Washington's CPA based on a well-supported yet untested legal position. (*See* Dkt. 156, at 61–66 and Dkt. 218, at 23–29 (discussing precedent favoring nationwide class for Washington CPA claim).) Plaintiffs had to contend with the significant risk that class certification could have been denied in whole or in part. While a settlement class must still be certified as part of the settlement process, the Court is not required to examine manageability, an issue which Premera contested. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The substantial risks in further litigating this case support Counsel's requested fee award.

4. This was a complex lawsuit, requiring substantial time and skill

Other factors warranting an upward adjustment include the efforts of counsel and the complexity of the issues in the case. *See Vizcaino*, 290 F.3d at 1048–50; *Demmings*, 2018 WL 4495461, at *15 ("The complexity of issues and skills required may weigh in favor of a departure from the benchmark fee award." (quotation omitted)). Counsel has spent more than 20,000 hours in the massive efforts detailed above. (Stephens Decl. ¶79.) Class Counsel performed significant

factual investigation and extensive, detailed discovery and engaged in substantial motion practice, including opposing two motions to dismiss, successfully briefing multiple discovery disputes, and fully briefing a motion for class certification and reply. *See In re Anthem, Inc. Data Breach Litig*., 2018 WL 3960068, at *13 (noting extensive briefing weighed in favor of fee). Moreover, Class Counsel participated in protracted negotiations with Premera to reach the settlement, and Counsel estimates they will spend significant further hours over the next few years in managing the claims process and administration of the Settlement.

Not only did this litigation require substantial efforts from Class Counsel, it required significant skill to competently address complex and unsettled issues of fact and law. Here, the factual issues required mastery of complex, technical subject matter on issues of data security, industry best practices, and the mechanisms of the data breach. (Stephens Decl. ¶¶ 14–15.) Obtaining an in-depth understanding of such complicated factual issues was critical to drafting targeted discovery requests, conducting effective depositions, developing expert testimony to support class certification, and, ultimately, requiring meaningful business practice changes during the settlement process. Moreover, Plaintiffs presented damages models and a nationwide class certification theory that were relatively untested in the legal landscape. "[L]itigating complicated matters, especially unprecedented issues, is a circumstance that points in favor of a larger percentage." *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *13. The skill required to competently navigate these issues was substantial and justifies the fee request.

5. The contingent nature of the fee and financial burden carried by Class Counsel supports the requested fee.

A determination of a fair fee should include consideration of the contingent nature of the fee. *See Vizcaino*, 290 F.3d at 1050. "It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal

hourly rates for winning contingency cases." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (quoting Richard Posner, Economic Analysis of Law §21.9 (5th ed. 1998)). "Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose." *Id.* Without this incentive, few lawyers would invest years of their time and money representing a class in light of the risk of recovering nothing. *Id.* "Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work.").

> It is axiomatic that attorneys who work on a contingent-fee must charge a higher fee than those who work on a noncontingent-fee basis. . . . This "higher" fee . . . is not a bonus . . . . From a pure dollars-and-cents economic view, this higher fee is the appropriate measure of a reasonable fee that is required in the marketplace of services: (1) to induce an attorney to agree to assume the risk that no compensation will be received unless she or he successfully achieves a benefit for the client; and (2) if ultimately successful, to compensate for the costs suffered and investment income forgone by delay in payment.

H. Newberg and A. Conte, 1 Attorney Fee Awards § 1.8 (3d ed.).

Plaintiffs' Counsel received no compensation for their efforts during the course of this litigation, which has gone on for nearly five years. (Stephens Decl. ¶ 71, 85.) On top of this, Counsel advanced payment of nearly $1.1 million in out-of-pocket expenses, knowing that if their efforts were unsuccessful, they would not receive payment or reimbursement for either their work or expenses. The financial risk was substantial; Class Counsel should be compensated for enduring the risks of this time-consuming and expensive contingent case.

6. The Requested Fee is Comparable to attorneys' fees awarded in other cases

Courts look to fee awards in similar cases when assessing a reasonable fee. *Demmings*, 2018 WL 4495461, at *13. Courts in the Ninth Circuit regularly award between 20% and 33% in common fund cases. *See Barbosa*, 297 F.R.D. at 448 (holding "[t]he typical range of acceptable attorneys' fees in the Ninth Circuit is 20 percent to 33.3 percent of the total settlement value," and approving fee award of 33% of fund).

Here, a 29.07% fee request—based on the most conservative valuation of the Settlement—falls within that Ninth Circuit standard range and is consistent with fee awards granted in other data breach litigation. Given the risks inherent in litigating data breach cases, several courts have awarded an upward adjustment on fees in data breach cases. *See, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *9 (awarding just over 27% of the fund to counsel for their efforts in that case and noting "the Court believes that, particularly in light of the substantial results achieved in this case and the risks associated with the litigation, the factors set forth in *Vizcaino* weigh in favor of granting Class Counsel an upward adjustment."); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, 1:17-MD-2807, 2019 WL 3773737, at *5 (N.D. Ohio Aug. 12, 2019) (awarding fees of 30% of common fund); *In re: The Home Depot, Inc., Customer Data Security Breach Litig.*, 1:14-md-02583-TWT, Dkt. 385 (N.D. Ga. Dec., 12, 2019) (awarding fees to Financial Institution Plaintiffs of 1/3 of common fund); *In re: Target Corp. Customer Data Security Breach Litig.*, 0:14-md-02522-PAM, Dkt. 645 at 6 (D. Minn. Nov. 17, 2015) (awarding fees of 29% of the common fund); *In re Home Depot, Inc., Customer Data Sec'y Breach Litig.*, 1:14-MD-02583-TWT, 2016 WL 11299474, at *2 (N.D. Ga. Aug. 23, 2016) (awarding fees of about 28% of the common fund in consumer track).

C. A cross-check of the requested fees under the lodestar method also demonstrates the fee request is reasonable.

To determine the reasonableness of a fee award, courts may compare the percentage of

the common fund with counsel's lodestar calculations. *See Vizcaino*, 290 F.3d at 1050–51; *Demmings*, 2018 WL 4495461, at *13 (noting a "comparison with counsel's lodestar" is a factor to consider in assessing a reasonable percentage fee award). While courts have discretion to choose the percentage or lodestar approach, the Ninth Circuit expressly "encourage[s] district courts to cross-check their attorneys' fee awards using a second method of fee calculation." *Johnson v. MGM Holdings, Inc.*, 943 F.3d 1239, 1242 (9th Cir. 2019).

"Under the lodestar method, the Court multiplies a reasonable number of hours by a reasonable hourly rate." *Demmings*, 2018 WL 4495461, at *13 (quoting *Fischel*, 307 F.3d at 1006). "Once the lodestar has been calculated, 'the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.'" *Id.* at 740 (quoting *In re Bluetooth*, 654 F.3d at 941–42). The lodestar method is typically utilized in cases brought under fee shifting statutes and "where the relief sought—and obtained—is often primarily injunctive in nature and thus not easily monetized." *In re Bluetooth*, 654 F.3d at 941; *see also Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 922 (9th Cir. 2014) *vacated as moot*, 772 F.3d 608 (9th Cir. 2014).

When conducting a cross-check using the lodestar, "[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean counting . . . [courts] may rely on summaries submitted by the attorneys and need not review actual billing records." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015) (alternations in original). Where the Court uses the lodestar "as a cross-check to the percentage-of-the-fund amount sought," it may accept class counsel's explanation of fees as reasonable when supported by "sworn declarations" describing Counsel's work in the case. *Id.*

Counsel's fee request of $12,752,610.97 is reasonable when compared to Counsel's lodestar. At present, Plaintiffs' Counsel's combined lodestar at historic rates is $10,499,392.25. However, the Supreme Court and other courts have held that the use of current rates to assess lodestar is proper since such rates compensate for inflation and the loss of use of funds. *See Mo. v. Jenkins by Agyei*, 491 U.S. 274, 283–84 (1989); *Rutti v. Lojack Corp., Inc.*, No. SACV 06-350 DOC (JCx), 2012 WL 3151077, at *11 (C.D. Cal. July 31, 2012) ("[I]t is well-established that counsel is entitled to current, not historic, hourly rates") (citing *Jenkins*, 491 U.S. at 284). Based on current rates, Counsel's combined lodestar is $11,378,705.90. (Stephens Decl. ¶ 80.) The fee request amounts to a modest lodestar multiplier of 1.21 and 1.12, respectively. Moreover, by the end of this litigation, it is likely to amount to much closer to 1.0 multiplier.

1. The number of hours counsel worked is reasonable.

Counsel's lodestar represents 20,615.30 hours of work in this litigation. (*Id.*) Counsel submitted summaries of the number of hours expended by attorneys and staff and descriptions of the type of work each firm performed to Lead Counsel on a monthly basis throughout the litigation. These summaries were in turn provided to the Court. (*Id.* ¶ 73.) As detailed in the supporting declarations, Counsel spent hours drafting pleadings and briefs, litigating discovery disputes, taking and defending depositions, responding to discovery requests and producing documents, reviewing document productions, working with experts, and negotiating the Settlement. (*See id.* ¶ 51, Exs. C-1 to C-30.) These tasks are typical in litigation and were necessary to the successful prosecution and resolution of the claims.[10] (*Id.* ¶ 51, 85–86.)

Class Counsel took measures to litigate this case efficiently, as described in more detail

[10] If requested, Counsel will make time and expense records available to the court for *in camera* review.

in the accompanying Stephens Declaration. (*Id.* ¶¶ 73–76.) For example, Lead and Liaison Counsel assigned the majority of the work in this case to firms appointed to the PSC in order to streamline work and maximize efficiency. (*Id.* ¶9.) Class Counsel instructed all firms that they would not be compensated for work they did that was not explicitly assigned by leadership. (*See id.* ¶ 10.) Class Counsel assigned work to other Plaintiffs' firms as needed, such as during the massive document review phase of the litigation. (*Id.* ¶ 20.)

Class Counsel reviewed all time and expense submissions on a monthly basis. Messrs. Dennett, Dubanevich, and Stephens reviewed all billing entries to ensure compliance with strict common benefit billing guidelines set at the outset of this litigation. (*Id.* ¶ 10.) During review, Class Counsel reduced time where appropriate, and disallowed time that appeared duplicative, excessive, unnecessary, or not in compliance with the billing guidelines. (*Id.* ¶¶ 10, 76–77.) After reviewing time submissions, Counsel submitted these time records to the Court for review on a monthly basis. (*Id.* ¶ 10.) In total, Counsel trimmed over 1,100 hours of time from their lodestar during the monthly review process. (*Id.* ¶ 76.) In advance of this filing, Class Counsel undertook an additional review of time submitted prior to the appointment of interim lead counsel and liaison counsel and trimmed an additional 1,870 hours of pre-appointment time from the lodestar, further supporting the reasonableness of the hours claimed. (*Id.* ¶ 77.)

Counsels' time is also reasonable when compared to other similar data breach litigation. *Anthem* is an apt comparison, as the litigation spanned a similar length of time (three years), and counsel briefed two motions to dismiss, fully briefed class certification, and took significant discovery. *See In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *13. Counsel here expended fewer hours than in *Anthem* (20,000 here vs. 78,000 in *Anthem*) and utilized fewer law firms (31 firms here vs. 53 law firms in *Anthem*).

Moreover, additional work will be required before this litigation is complete. Class Counsel must still: (1) prepare for and attend the final approval hearing, including drafting of the reply papers and responses to objections (if any); (2) continue to respond to the many inquiries from Class Members; (3) oversee the Settlement through final approval of distribution of the common fund; (4) oversee the claims administration process, including addressing any claim review issues; and (5) handle any appeals. (*Id.* ¶ 81.) None of this is reflected in the current lodestar figures submitted with this Motion.

2. Class Counsel's hourly rates are reasonable.

Class Counsel are entitled to the hourly rates charged by attorneys of comparable experience, reputation, and ability for similar complex federal litigation. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). Here, Class Counsel's hourly rates are reasonable in light of their significant experience, work, and the complex and relatively specialized nature of this litigation. (*See* Stephens Decl. ¶ 85–86.) Plaintiffs' Counsel's rates have been approved by other federal and state courts. (*See id.* ¶ 62–63, Ex. C-1 ¶ 4; Ex C-2 ¶4, Ex. C-3 ¶ 4, Ex. C-4 ¶ 4.) Moreover, Class Counsel capped rates for certain tasks, such as document review, to ensure rates for these tasks were reasonable. (Stephens Decl. ¶ 21.)

3. A modest positive multiplier is warranted.

The Ninth Circuit has recognized that attorneys in common fund cases are frequently awarded a multiple of their lodestar, rewarding them "for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases." *Vizcaino*, 290 F.3d at 1051; *Demmings*, 2018 WL 4495461, at *13 ("Once the lodestar has been calculated, 'the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors, including the quality of representation, the benefit

obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.'"). For example, the district court in *Vizcaino* approved a fee that reflected a multiplier of 3.65 times counsel's lodestar. *Vizcaino*, 290 F.3d at 1051. The Ninth Circuit affirmed this award, holding that the district court correctly considered the range of multipliers applied in common fund cases and noting that a range of multipliers from 1.0 to 4.0 are frequently awarded. *Id.* at 1051 n.6.

Class Counsel's modest effective multiplier of 1.12 is below that typically awarded in contingent litigation and justified based on the substantial time and risk that counsel faced in this litigation and the excellent results obtained in this complex case. The risks of the litigation and the skill required to achieve the outstanding relief for the class support the modest multiplier requested. *See supra* Part III.B. Moreover, the effective multiplier is consistent with *or below* effective multipliers awarded in other data breach litigation. *See, e.g.*, *Equifax* (granting fee award that amounted to an effective 2.62 lodestar multiplier); *In re Experian Data Breach Litig.*, SACV 15-01592 AG (DMFx) (Doc. 322) (May 10, 2019) (approving fee award with 1.65 lodestar multiplier); *Anthem*, 2018 WL 3960068, at *28 (granting fee award that amounted to an effective multiplier of "slightly over 1.0").

IV. THE REQUESTED EXPENSES ARE SUPPORTED AND REASONABLE

Class Counsel incurred substantial out-of-pocket costs and expenses in prosecuting this litigation on behalf of the Class. Attorneys who create a common fund are entitled to reimbursement of expenses advanced for the benefit of the class." *Vincent*, 2013 WL 621865, at *5. "Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters." *In re Omnivision*, 559 F. Supp. 2d at 1048 (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)). Class Counsel seek reimbursement of $1,247,389.03

for the reasonable expenses incurred to advance this litigation. (Stephens Decl. ¶ 82.) These expenses were detailed in the monthly reports submitted to Lead Counsel throughout the litigation and are the same costs Counsel would normally charge a fee-paying client. (*Id.* ¶ 86.).

V. THE COURT SHOULD AWARD FEES AND EXPENSES AS LUMP SUMS.

As part of the Settlement, the parties separately negotiated a maximum amount of $14 million to cover both attorney fees and expenses. (SA ¶ 9.2.) Counsel's request for $1,247,389.03 in expenses advanced during the course of this litigation, combined with their fee request of $12,752,610.97, equate to the $14 million maximum and are therefore consistent with the terms of the Settlement. The Court should grant the requested fees and expenses as lump sums and authorize Class Counsel with the discretion to distribute and apportion the fees and expenses among all Plaintiffs' counsel. *See, e.g.*, *Carlin*, 380 F. Supp. 3d at 1023 ("The Court grants this award as a lump sum, to be divided among class counsel as managed by [lead counsel]").

VI. THE SERVICE AWARDS ARE SUPPORTED AND REASONABLE

In addition to any payments the proposed Representative Plaintiffs are entitled to receive for submitting valid claims for Settlement Benefits, Plaintiffs request the Court award $5,000 to each Representative Plaintiff for his or her time, effort, and risk in connection with the Action. Each of the 15 Representative Plaintiffs appointed by the Court in its Order Granting Preliminary Approval stepped forward to put their name and reputation on the line for the sake of the Class, and their efforts throughout this litigation were essential to bringing about the Settlement.

"Incentive awards that are intended to compensate class representatives for work undertaken on behalf of a class are fairly typical in class action cases." *Online DVD-Rental*, 779 F.3d at 943. Though fairly typical, such awards are discretionary and "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational

risk undertaken in bringing the action." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009); *see also Demmings*, 2018 WL 4495461, at *12. "Incentive awards are generally approved so long as the awards are reasonable and do not undermine the adequacy of the class representatives." *Zamora Jordan v. Nationstar Mortg., LLC*, 2:14-CV-0175-TOR, 2019 WL 1966112, at *9 (E.D. Wash. May 2, 2019); *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1164 (9th Cir. 2013). "In assessing the reasonableness of an incentive award, courts look to the number of plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment." *Zamora Jordan*, 2019 WL 1966112, at *9; *Online DVD-Rental*, 779 F.3d at 947.

The Representative Plaintiffs materially contributed to this case, including by searching for and producing data, and preparing for and sitting for their depositions. The requested Service Awards are not conditioned on the Representative Plaintiffs' support of the proposed Settlement. (SA, ¶ 9.1.) Class Counsel negotiated the amount of Service Awards to be applied for independently from the other terms of the proposed Settlement. (Stephens Decl. ¶ 34.) Plaintiffs in other data breach cases have received similar or higher awards in other data breach settlements. *See, e.g.*, *Anthem*, 218 WL 3960068 at *30 (awarding service awards to 29 class representatives of $7500 each, and to 76 class representatives, $5000 each). Moreover, the requested service awards are consistent with other incentive awards in this district for protracted, complex litigation. *See, e.g.*, *Demmings*, 2018 WL 4495461, at *12 (granting $7,500 inventive award and noting it was "similar in size to incentive awards granted to class representatives in this circuit").

VII. CONCLUSION

Class Counsel respectfully submit that the fees, expenses and service awards they request are fair and reasonable. Class Counsel are proud of the results they obtained for the Class in this

case, and ask this Court to award the relief they request.

Dated: January 10, 2020

Respectfully Submitted,

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