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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

**PLAINTIFF CLASS' OMNIBUS REPLY BRIEF IN SUPPORT OF (1) PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND (2) MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND FOR SERVICE AWARDS**

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## I. INTRODUCTION

As detailed extensively in Plaintiffs' moving papers, this proposed Settlement provides groundbreaking monetary and injunctive relief that will immensely benefit the proposed Class. The Settlement includes a $32 million cash fund, which will be used to make cash payments to participating class members and pay for expenses such as notice and administration costs, attorneys' fees and expenses, and service awards. The settlement also provides two years of free credit monitoring and insurance services to all participating class members and requires Premera to spend an additional $42 million over three years on IT security practice improvements designed to better protect class members' sensitive data. This is by numerous measures a historic settlement for a data breach lawsuit, exceeding most major data breach settlements when evaluated on a per capita basis.

Plaintiffs detailed the terms and benefits of this Settlement extensively in their opening papers. Now that the objection and opt out deadlines have passed, Plaintiffs submit this reply brief to address the one remaining factor: the reactions of Class Members to the proposed Settlement.

Response to the Settlement from the Class has been overwhelmingly positive. Class members have already submitted more than ***800,000*** claims for benefits from this Settlement. Claims rates have been higher than predicted, indicating broad class-wide support. And while the claims period remains open until March 30, 2020, the claims rate is currently ***over 9%***. This is a significant claims rate for a data breach settlement and a testament to the effectiveness of the notice program and the value of the Settlement benefits.

In sharp contrast to the high number of claims, only 823 class members elected to opt out of the settlement. Of the 8.8 million class members, this amounts to just ***0.00929%*** of the Class.

More significantly, class members submitted just ***14 objections*** to the Settlement, amounting to a mere ***0.00016%*** of the Class. While some of these objectors misunderstand the Settlement, many simply want more than even this historic settlement provides or more than could be obtained at trial by requesting, for example, credit monitoring services for life. Still others merely comment on the settlement, and do not appear to ask the Court to reject it. Notably, a group of five objectors—all named plaintiffs represented by the same non-appointed Counsel of Record in this litigation, Darrell Cochran—fit this bill. Mr. Cochran's clients raise a series of purported complaints without requesting denial of the settlement. It is not clear what he seeks. As we explain in this reply brief, these objections, along with the others filed, fail to establish the settlement is anything other than "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

Four objectors do not address the settlement terms, but simply object to the requested attorneys' fee award. As detailed in their moving papers, Class Counsel are requesting a fee award that reflects the extraordinary result Class Counsel achieved for the Class. This result was made possible only by the extensive time and resources Class Counsel devoted to prosecuting this highly complex litigation. As explained below, these objectors' contention that the fee request is excessive or disproportionate is based on a fundamental misunderstanding of the work performed, the value of the settlement, and applicable law.

Plaintiffs and Class Counsel continue to believe the proposed Settlement is in the best interest of the Class and request the Court to finally approve the settlement, grant Counsel their fees and expenses, and grant service awards.

## II. UPDATES ON NOTICE, SETTLEMENT ADMINISTRATION, AND THE CLASS MEMBERS' POSITIVE RESPONSE TO SETTLEMENT

The period during which class members may submit claims is scheduled to remain open until March 30, 2020. (Op. & Order Granting Preliminary Approval, ECF 279 at 54, ¶ 12.) To

date, the claims response indicates the Settlement is receiving extremely strong support from the Class. Plaintiffs briefly update the Court below on settlement administration developments since the filing of their opening papers.

**A. Update on Administration of the Notice Plan.**

Following Preliminary Approval, Counsel proceeded to notify class members under a comprehensive, Court-approved individual notice plan. From September 13, 2019 through October 15, 2019, Epiq sent 8,671,074 "Double-Postcard" Notices via USPS first-class mail to all records with an associated valid physical address and on November 13, 2019, Epiq sent 1,416,369 Email Notices to 1,383,858 unique Settlement Class Members with a facially valid email address. (Second Suppl. Azari Decl., ECF 301, ¶ 5.) Epiq endeavored to re-mail postcards for all individual notices returned as undeliverable. As of February 4, 2020, Epiq had received 1,890,979 undeliverable Double-Postcard Notices and re-mailed 1,280,774 Double-Postcard Notices for those addresses where a forwarding address was available. (*Id.*) Additionally, as of February 4, 2020, USPS has sent 92,633 Postal Forwards. (*Id.* ¶ 6.)

To date, Plaintiffs have satisfied the elements of the Court-approved individual notice plan. As a result, the Notice Specialist opines that the individual notice reached at least 93.3% of the Settlement Class, consistent with due process requirements. (*See id.* ¶¶ 8, 16–17.); *see also* Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* 3 (2010) (recognizing the effectiveness of notice that reaches between 70 and 95 percent of the class). Accordingly, the notice program constituted the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23.

**B. Positive Response from the Class.**

The robust Class response is a testament to the effectiveness of the Court-approved notice procedures and the ease of the claims submission process. The current claims rate is now above **9%** and rising. (Suppl. Decl. of Kim Stephens in Supp. of Pls.' Mot. for Final Approval &Mot. for Award of Attorneys' Fees and Reimbursement of Expenses ("Suppl. Stephens Decl.") ¶ 21.) This claims rate exceeds the claims rates of most other major data breach settlements by at least 300% and comes close to rivaling the "unprecedented claims rate" of the widely-publicized *Equifax* data breach settlement. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 1:17-MD-2800-TWT, 2020 WL 256132, at *4, *28 (N.D. Ga. Jan. 13, 2020) (praising claims rate, where rate exceeded 10% at final approval).

**Claims for Credit Monitoring.** The Settlement provides substantial relief to class members by providing 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*. To date, more than **471,712** class members have submitted claims for these services. (Second Suppl. Decl. of Cameron Azari, ECF 301 ¶ 13.) While Class Counsel was able to negotiate a discounted wholesale price to acquire these services for the class,[1] the benefit to class members far exceeds this discounted price. When assessed at their retail value, these services currently represent an additional claimed benefit to the Class of over **$223 million**. (Suppl. Stephens Decl. ¶ 22.) Numerous courts have taken the retail value of claimed credit monitoring services into account when assessing the total value of a settlement for purposes of granting final approval and fees.

[1] Under Section 4.6.3 of the Settlement Agreement, the Qualified Settlement Fund will be used to provide for the wholesale purchase of 2 years of Credit Monitoring and Insurance Services for the Class. As more than 5% of the Class have already submitted claims for these services, the cost of providing these services will be $2,730,000. (Stephens Decl. in Supp. of Final Approval & Fees, ECF 285, ¶ 39.)

*See, e.g.*, *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *7; *In re Anthem, Inc. Data Breach Litig.*, 15-MD-02617-LHK, 2018 WL 3960068, at *11 (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); Order Regarding Mot. for Final Approval and Mot. for Attorney's Fees, *In re Experian Data Breach Litig.*, 8:15-cv-01592-AG-DFM, Dkt. 322 at 2 (C.D. Cal. May 10, 2019).

**Claims for Monetary Payments.** From the cash fund, class members are eligible to choose from three forms of monetary relief: (1) reimbursement for out-of-pocket losses upon providing reasonable documentation and self-attestation, (2) an alternative default payment requiring no documentation, and (3) an additional payment for California residents as compensation for their additional statutory claims in this litigation. (Settlement Agreement, ECF 273-1, § 4.3–4.5 (hereinafter "SA").). To date, more than **747,837** class members have submitted claims for the default payment, more than **46,598** class members submitted claims for the California payment, and more than **1,204** class members submitted claims for out-of-pocket losses.[2] (Second Suppl. Azari Decl., ECF 301, ¶ 13.)

As the positive response from the Class has been many times higher than is typical in these types of cases, the per-claim amount will be reduced on a pro rata basis, consistent with the terms of the Settlement Agreement. (SA ¶ 4.2.1.) Based on data from Epiq, Class Counsel currently estimates that the pro rata reduction could result in payouts on submitted claims in the range of 20-30%. Class Counsel currently estimates that Default Payments and California Payments will fall in the range of $10 to $15 per approved claim. (Suppl. Stephens Decl. ¶ 21.)

[2] Epiq's review and verification of submitted claims is ongoing. (Second Suppl. Azari Decl., ECF 301, ¶ 13.)

The fact that monetary payouts may be less than the targeted benchmark does not mean that the relief under the settlement is inadequate. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *20 ("The likelihood that alternative compensation claimants will receive substantially less than $125 does not mean that the relief afforded by the settlement is inadequate."); *see also Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." (quotation omitted)). Rather, "[t]he Court must evaluate the adequacy of the settlement in terms of the entirety of the relief afforded to the class." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *20; *see also Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009) ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). In addition to monetary payments, the Settlement provides substantial benefits, including credit monitoring services, insurance services, and injunctive relief that will better protect class members' data. Considered as a whole, the settlement is fair, adequate, and reasonable.

**C. Settlement Administration Expenses.**

After Class Counsel negotiated competing bids for notice and settlement administration from several claims administrators, Class Counsel reached an agreement with Epiq to cap costs for notice and claims administration at $4,187,290.00, contingent on notice, claims, call center minutes, email, and distribution activity falling at or below estimated volumes. (Stephens Decl. in Supp. of Final Approval & Fees, ECF 285, ¶ 37.) Because the claims rate exceeds the estimated volumes, Epiq is expected to incur additional expenses in administering the settlement benefits.

(Suppl. Stephens Decl. ¶ 21.) Plaintiffs request the Court approve and authorize the payment of all reasonable and necessary current and future settlement administration expenses from the Qualified Settlement Fund consistent with the terms of the Settlement Agreement. (*See* SA § 3.4.)

**D. Low Number of Objections.**

The number of class members who object to a proposed settlement "is a factor to be considered when approving a settlement" and the "absence of significant numbers of objectors weighs in favor of finding the settlement to be fair, reasonable and adequate." *Lane v. Brown*, 166 F. Supp. 3d 1180, 1191 (D. Or. 2016). Here, only fourteen class members objected to the settlement. Five of those objectors are represented by a Counsel of Record in this case, who appears to be using the objection process to express disappointment about his perceived lack of involvement. These objectors do not ask the court to reject the settlement, but rather, simply seek to comment on the settlement. While Plaintiffs address the merits of these objections and the other objectors below, the fact that so few class members objected strongly supports final approval.

## III. RESPONSE TO CLASS MEMBER COMMENTS AND OBJECTIONS REGARDING THE SETTLEMENT

As set forth in Plaintiffs' motion for final approval, the proposed settlement readily meets Rule 23's class certification requirements and provides fair, reasonable, and adequate relief to the class. While fourteen class members submitted objections, none of their concerns warrant rejection of the proposed Settlement. Because the class member objections sometimes overlap in substance, Plaintiffs group their responses to the objectors below by topic. Among the objectors here, five are represented by counsel of record in this litigation, Darrell Cochran, and submitted substantially the same objections ("the Cochran Clients"). (*See* ECF 290–294.)

### A. Comments Regarding the Value of the Settlement and Benefits Conferred on the Class

By many measures, the Settlement provides substantial benefits to class members, commensurate with or beyond the benefits offered in other data breach settlements. 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. (*See* Pls.' Mot. & Supp. Mem. for Fees, Expenses & Service Awards, ECF 284 at 27–30 (citing cases).) The Settlement provides substantial additional relief by providing class members with two years of Credit Monitoring and Insurance Services through Identity Guard, at a retail value of over $223 million, as well as robust and targeted injunctive relief. And yet, several objectors ask the court to reject the settlement as they apparently wish that Defendant had offered more in the Settlement. (*See* Simonsen Objection, ECF 295 ("The risk of identity theft including social security numbers is a grave risk to our secure future. The settlement is not a satisfactory offer."); Costlow Objection, ECF 287 ("In light of the potential harm that may be suffered by members of the class and the extent of the defendant's wrongdoing, the proposed settlement is not fair, reasonable, and/or adequate.").)

These objectors fail to appreciate the considerable risk and delays Plaintiffs would face were they to continue to litigate this case, including challenges to class certification, dispositive motions, trial, and likely appeals. (Op. & Order Granting Preliminary Approval, ECF 279 at 42–44 (discussing risks of further litigation and concluding "that they weigh in favor of granting approval to the Settlement.")); *see also In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 321–22 (N.D. Cal. 2018) (rejecting similar objections that failed to adequately take into account the risks and delays involved in proceeding to summary judgment or trial), *appeal dismissed sub nom. In re Anthem, Inc., Customer Data Sec. Breach Litig.*, 18-16866, 2018 WL 7890391 (9th

Cir. Oct. 15, 2018), *and appeal dismissed sub nom. In re Anthem, Inc., Customer Data Sec. Breach Litig.*, 18-16826, 2018 WL 7858371 (9th Cir. Oct. 17, 2018).

Importantly, these objectors put forward no explanation as to how the Settlement, in their opinion, falls short. "[T]he very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Linney*, 151 F.3d at 1242. "Objections that the settlement fund is too small for the class size, or that [Defendant] should be required to pay more, do not take into account the risks and realities of litigation, and are not a basis for rejecting the settlement." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *15.

Just one objector raised a specific objection to the monetary claims allowed under the Settlement. Specifically, Mr. Costantinou takes objection to the limitation that a class member may not submit a claim seeking to recover both their out-of-pocket losses *and* a default payment as applied to class members who already have credit monitoring. (*See* Costantinou Objection, ECF 288.) This objection appears to rest largely on a misunderstanding of the settlement's structure, as the default payment is *not an alternative* to credit monitoring, as Mr. Costantinou suggests. Any class member who files a claim for the default payment is also entitled to credit monitoring. While most other data breach settlements have offered modest cash payments in lieu of claiming credit monitoring, this settlement provides for a monetary payment to class members without either requiring documented losses or limiting the compensation as an alternative to credit monitoring.

The default payment is intended to provide class members with a streamlined alternative to seeking an out-of-pocket claim and providing reasonable documentation. It is also meant to ensure all class members are eligible to claim some relief for the harms they have suffered due to the breach, consistent with the "loss of value" and "benefit of the bargain" damages theories

Plaintiffs' advanced in the case. While Mr. Costantinou may desire *additional* monetary compensation, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Linney*, 151 F.3d at 1242 (internal quotation marks and citation omitted); *see also Hendricks v. Starkist Co.*, No. 13-cv-00729-HSG, 2016 WL 5462423, at *6 (N.D. Cal. Sept. 29, 2016) ("That a more favorable result for some Class Members could potentially have been reached is not a sufficient reason to reject an otherwise fair and reasonable settlement." (quotation omitted)); *Browning v. Yahoo! Inc*., 2007 WL 4105971, at *5 (N.D. Cal. 2007) (characterizing objections as "tantamount to complaining that the settlement should be 'better,' which is not a valid objection. [*Hanlon*, 150 F.3d at 1027.] It also fails to recognize that settlement, as a product of compromise, typically offers less than a full recovery.").

Notably, Courts have approved other data breach settlements that provided no monetary compensation other than reimbursement for out-of-pocket losses. *See, e.g.*, *In re the Home Depot, Inc., Customer Data Sec. Breach Litig.*, 1:14-MD-02583-TWT, 2016 WL 6902351, at *5 (N.D. Ga. Aug. 23, 2016). In addition, the availability of loss of value or benefit of the bargain damages at trial or otherwise is far from certain. The Court should overrule Mr. Costantinou's objection.

**B. Comments Regarding Credit Monitoring Services**

A number of objectors take issue with the credit monitoring services available under the Settlement. Some objectors contend the credit monitoring is very valuable and the settlement should provide more; others object that the credit monitoring is valueless.

Recognizing the significant value that credit monitoring services provide, some objectors express their request that the settlement offer them credit monitoring for the rest of their lives. (J. Hickey Objection, ECF 296 at 2; A. Hickey Objection, ECF 297; I. Hickey Objection, ECF 298;

*see also* L. Webster Objection, ECF 291 at 5.) Essentially, these "objectors also ask the Court to rewrite the settlement, but that is beyond the Court's power." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *16 (overruling objectors' demand that the settlement include "lifetime credit and identity protection"); *see also In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. at 322 (rejecting objections seeking lifetime credit monitoring, and noting they "ignore that the Settlement provides the class with a timely, certain, and meaningful recovery, while further litigation and any subsequent appeal are uncertain, would entail significant additional costs, and in any event would substantially delay any recovery achieved.").

No objector explains how this type of relief could be achieved at trial, nor provides proof that any company offers such a product. "These suggestions constitute little more than a 'wish list' which would be impossible to grant and [are] hardly in the best interests of the class." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *16 (quotation marks omitted) (rejecting objection seeking credit monitoring for life).

Other objectors comment that the relief is not worth anything because credit monitoring has been made available to a large portion of the U.S. population as a result of the *Equifax* settlement or via other data breach settlements. (*See* Silverfish Objection, ECF 286; G. Webster Objection, ECF 290 at 6; L. Webster Objection, ECF 291 at 6; Ailey Objection, ECF 292 at 6; Imbler Objection, ECF 293 at 6; Allred Objection, ECF 294 at 6.) Notably, some of these objectors simultaneously appear to complain that the credit monitoring has little value and that they should get credit monitoring for life. (*See* L. Webster Objection, ECF 291 (complaining credit monitoring is duplicative of *Equifax* settlement, while also complaining that she will require coverage for life).)

These objections fail to note that the credit monitoring benefits can be delayed for up to two years, and that the settlement does not prohibit class members from layering their coverage with other credit monitoring programs. The objectors also overlook the fact that the credit monitoring and insurance services offered in this Settlement include different features that may not be offered with other credit monitoring programs. (*See* Thompson Decl., ECF 275 at ¶ 6 (noting that Identity Guard is "the only company currently offering identity protection services that used advanced machine learning and a massively greater array of data providers to give consumer far better protection").) While some objectors claim that many class members will likely already qualify for credit monitoring from the *Equifax* settlement, they fail to note that the proposed credit monitoring in this case includes advanced features such as "anti-phishing and safe Apps" for devices and "safe browsing software" which do not appear to be included in the services offered in *Equifax*. *Compare id.* ¶ 7 *with Equifax Inc. Customer Data Sec. Breach Litig.*, 1:17-md-02800-TWT, Dkt. No. 900-6 at ¶ 12("Declaration of Experian").

Courts have repeatedly lauded high-quality credit monitoring services for providing valuable class member relief that would likely not otherwise be recoverable at trial and have repeatedly overruled objections that contend otherwise. *See Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *7; *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. at 323 (noting "[o]bviously, the credit monitoring services themselves confer an economic benefit," and overruling objections contending the credit monitoring services were of little value); *see also* Order Regarding Mot. for Final Approval and Mot. for Attorney's Fees, *In re Experian Data Breach Litig.*, 8:15-cv-01592-AG-DFM, Dkt. 322 at 2 (C.D. Cal. May 10, 2019) (including retail value of credit monitoring in calculation of settlement value for percentage fee request).

### C. Mr. Cochran intended to object regardless of the terms of the settlement.

Five Objectors—Sharif Ailey, April Allred, Ross Imbler, Gabriel Webster, and Laura Webster—are named plaintiffs in this litigation and are represented by attorney Darrell Cochran, one of the attorneys who filed a complaint in this matter prior to MDL consolidation. "[W]hen assessing the merits of an objection to a class action settlement, courts consider the background and intent of objectors and their counsel, particularly when indicative of a motive other than putting the interest of the class members first." *Chambers v. Whirlpool Corp.*, SACV111733FMOJCGX, 2016 WL 9451360, at *2 (C.D. Cal. Aug. 12, 2016) (quoting *Dennis v. Kellogg Co.*, 2013 WL 6055326, *4 n. 2). Mr. Cochran's motives are best reflected in his actions, summarized below.

#### 1. As demonstrated by his public statements, Mr. Cochran believed he should have had a leadership role in this case.

Although the Court did not appoint Mr. Cochran to a leadership position in this matter, Mr. Cochran falsely represented it had, on his website and elsewhere. Class Counsel believe this is part of the source of confusion for his clients who have objected, as they are likely unaware he had a very limited role in this case.

As the Court is aware, many attorneys applied to the Court for leadership positions in this MDL. This Court rejected all leadership slate proposals, and instead appointed Mr. Stephens and his partners as interim lead counsel and Mr. Dubanevich as liaison counsel on August 7, 2015 (Pretrial Order No. 2, ECF 35). On October 6, 2015, the Court appointed a Plaintiffs' Executive Leadership Committee consisting of Mr. Scharg,[3] Ms. Wolfson, and Mr. Pizzirusso (Order re: Leadership Structure & Responsibilities of Pls.' Counsel, ECF 43). Mr. Cochran's name

[3] After Mr. Scharg withdrew from the leadership in this case, the Court appointed Karen Hanson Reibel in place of Mr. Scharg on October 5, 2017 (Pretrial Order No. 13, ECF 128).

appeared in a joint slate application where he was discussed as someone who could assist on a "trial committee" should the case make it to trial. (Joint Appl. for Appointment, ECF 18 (July 28, 2015).) The Court *rejected* that application, however, and Mr. Cochran received no such appointment along with numerous other lawyers who sought leadership.

Nonetheless, Mr. Cochran's firm website described Mr. Cochran's class action experience as "one of the ***lead counsel*** on the Premera Insurance class action lawsuit." (*See* Declaration of Jason T. Dennett ("Dennett Decl."), Ex. 1 (emphasis added).) Similarly, a June 8, 2017 Washington Super Lawyers magazine profile on Mr. Cochran stated: "He has also been ***named trial counsel*** on the Premera Blue Cross data breach case, in which 11 million people may have been exposed to identity theft." (Dennett Decl., Ex. 2 (emphasis added).)[4] Mr. Cochran was not a lead counsel in this case, was not named as "trial counsel," In contrast, Mr. Cochran's true role in this case has been limited.

Following the Court's appointment of leadership, Mr. Cochran reached out several times to Lead Counsel to offer his assistance. For example, he recommended an expert witness in 2015 with whom Lead Counsel met but did not engage. (Dennett Decl. ¶ 5.) In September 2015, he suggested a potential source of discovery. (*Id.* ¶ 6.) In February 2016, Mr. Cochran identified a group of former Premera employees that he wished to attempt to interview. Lead Counsel agreed he could try, as long as he operated consistently within Lead Counsel's guidelines. As described below, that effort was not successful and caused Lead Counsel conflict not only with Mr. Cochran, but also with Premera's counsel. (*Id.* ¶¶ 7, 15.)

[4] *Also available at* https://www.superlawyers.com/washington/article/righting-wrongs-and-keeping-things-simple/7e2a6b9c-b02a-4985-a834-3699a0dab949.html (last accessed Feb. 11, 2020).

In 2017, Mr. Cochran assisted leadership with vetting of his individual clients who served as named plaintiffs and their depositions. (*Id.* ¶ 8.) Even that did not pass without conflict, with Mr. Cochran overstating the number of clients who had retained him and showing his frustration with his limited role in the case. (Dennett Decl., Ex. 3.) In an email to PSC counsel Tina Wolfson concerning arrangements for upcoming class representative depositions, Mr. Cochran wrote:

> [D]o me a favor to avoid any appearance of subtly demeaning our firm in front of our clients . . . . Brushing us out as local yokels is exactly the type of tactic I don't want to hear about . . . . I have two thousand clients concerned that that [sic] "national counsel" is sandbagging on deps of Premera, hoping for a quick settlement. We can work together, or work against each other and I've been awfully patient so far.

(*Id.*) Mr. Cochran's frustration on behalf of his "two thousand clients" (only five of whom "objected")[5] continued and ultimately led to his purported objections.

Mr. Cochran and his firm undertook no other substantial, authorized work in this matter. (Dennett Decl. ¶ 10.) Moreover, this firm submitted no time records to Lead Counsel despite repeated requests that it do so. (*Id.* ¶ 11.) Mr. Cochran periodically reached out to Lead Counsel for updates on the case, and Lead Counsel provided him answers whenever requested. (*Id.* ¶ 12; Suppl. Stephens Decl. ¶ 18.)

**2. Mr. Cochran twice stated that he would object to *any* future settlement if Class Counsel did not involve him in this case to the degree he felt was adequate.**

On January 24, 2016, Mr. Cochran contacted Lead Counsel and requested an update on case progress saying he had clients who had been "hounding him." (Dennett Decl. ¶ 13.) He did not identify the names of those individuals. Mr. Cochran spoke to Jason Dennett on January 28,

[5] Mr. Cochran has never explained or provided proof of his alleged 2,000 to 2,500 clients. (Suppl. Stephens Decl. ¶ 19.) At plaintiff vetting, Mr. Cochran provided approximately 400 anonymized intake forms, and it was unclear which individuals, if any, had been retained. (*Id.*) Mr. Cochran refused to let Class Counsel perform any interviews directly. (*Id.*)

2016 to provide an update on the status of the litigation. Mr. Cochran said that he wanted to review the discovery served in the case, that he did not have enough information about what was happening in the case, and that if his clients felt ill-informed, they would object to any future settlement. (*See* Dennett Decl., Ex. 4 (email confirming conversation).) In response Class Counsel provided Mr. Cochran with the requested discovery. (*Id.*)

In July 2016, Premera's counsel at BakerHostetler contacted Mr. Dennett and said that Mr. Cochran's firm had been calling *current* Premera employees and that such contact was inappropriate. (*Id.* ¶ 15.) Since Lead Counsel authorized Mr. Cochran to only contact an agreed list of *former* Premera employees, Mr. Dennett reached out to Mr. Cochran thinking there must be some misunderstanding, but there was not. (Dennett Decl., Ex. 5.) Mr. Cochran was acting outside of the scope of what Lead Counsel authorized him to do and he reacted defiantly, and concluded his email with the following:

> We've got 2500 clients emailing us non-stop about what is happening in this case and we've shielded your firm from criticism out of great respect for Kim and what I assume your firm must be doing; but make no mistake about it, the communication gap lies with your firm and the other lead counsel. With 2500 votes on the resolution you are going to propose someday, I highly recommend you exert greater effort to let us know what activity is taking place.[6]

(*Id.*)

Mr. Cochran's two 2016 statements about the fate of a future settlement occurred years before the parties first sat down to mediate this case and well before any terms of a potential settlement were discussed. Moreover, as Counsel of Record, Mr. Cochran received all ECF pleadings and was well-informed about the proceedings in the case. Whenever he asked Lead

[6] Mr. Cochran never provided the results of his interviews with former Premera employees to lead counsel. (*Id.* at ¶ 16.)

Counsel for additional information, Lead Counsel provided it promptly and without hesitation. (Suppl. Stephens Decl. ¶ 18.)

**3. Class Counsel repeatedly and unsuccessfully tried to engage Mr. Cochran's clients in discussion of the terms of the Settlement Agreement before the parties signed.**

After months of protracted and difficult negotiations, and with the general terms outlined but before the Parties signed an agreement, Class Counsel reached out to all individual lawyers representing named plaintiffs to inform them of the proposed settlement and its terms and seek feedback. (Dennett Decl. ¶ 18.) On May 9, Mr. Cochran responded expressing concern that he represented five named plaintiffs but was not included in the mediation. (Dennett Decl., Ex. 6.) These Cochran Clients are the same ones who submitted objections protesting their lack of individual involvement in the settlement negotiations. (*See* ECF 290–294.)

The Court expressly authorized Lead Counsel to "[n]egotiate settlements on behalf of Plaintiffs." (Order re: Leadership Structure & Responsibilities of Pls.' Counsel, ECF 43 at 3.) And while Lead Counsel was authorized to delegate work to specific Plaintiffs' firms with "specialized expertise" when necessary, Counsel heeded the Court's instructions to prosecute this case efficiently and to not duplicate work. (*See id.* at 3–4; Suppl. Stephens Decl. ¶ 18.) It simply was not efficient or reasonable to have at least nine additional attorneys who represented individual named plaintiffs (but who were not on in a leadership position) present at each of the three in-person mediations, or intimately involved throughout several months of negotiations. Such involvement would have resulted in a significantly higher lodestar and would likely have bogged down negotiations.

On May 9, Lead Counsel provided Mr. Cochran with the draft settlement agreement and asked for his input before the agreement was finalized. (Suppl. Stephens Decl. ¶ 13; Dennett

Decl. ¶ 20.) On May 10, Mr. Cochran responded, raising largely the same complaints his clients raise in their written objections, such as the lack of Mr. Cochran's involvement even though he could offer no proposals for addressing his concerns and even though Lead Counsel indicated a willingness to listen to any of his ideas. (Dennett Decl., Ex. 7.) Mr. Stephens replied on May 16 addressing Mr. Cochran's concerns in the context of comparable data breach cases, explaining why Mr. Cochran could not have been involved in more aspects of the case, and correcting Mr. Cochran's public assertions that he had been appointed to a leadership position. (Dennett Decl., Ex. 8.) Taking Mr. Cochran at his word that he was not completely up to speed about the in-depth intricacies of the case, Mr. Stephens offered to discuss the Settlement jointly and directly with the Cochran Clients. But Mr. Cochran refused to allow Lead Counsel to talk with his clients about their professed concerns. (Dennett Decl. ¶ 23; Suppl. Stephens Decl. ¶ 14.).

Instead, Mr. Cochran and Mr. Stephens met for lunch on May 18, 2019, to discuss the proposed settlement, any specific revisions to the agreement Mr. Cochran might desire and any other concerns about it. (*Id.* at ¶ 24.) On May 22, Mr. Cochran replied in writing to Mr. Stephens's last letter, stating that he was not able to approve the settlement, again focusing on his lack of involvement in the mediation.[7] (*Id.* Ex. 9.) Believing the Settlement to be in the best interests of the class and receiving overwhelming positive support from the other proposed class representatives, Lead Counsel moved for preliminary approval without Mr. Cochran's clients' express approval.

[7] Mr. Cochran also defended his right to publicly claim himself as part of appointed leadership in this case based on (1) the original, unsuccessful petition for appointment and emails negotiating the content of that petition and (2) Mr. Stephens failing to correct a forwarded email from 2017 in which Mr. Cochran told a client he was "one of the trial counsel of the case nationally."

Despite the numerous attempts by Lead Counsel to reach out to Mr. Cochran and his clients, including attempts to seek their input *before* the settlement agreement was finalized, the Cochran Clients failed to raise any substantive concerns regarding the terms of the proposed settlement to Lead Counsel. Far from being "deprived of a meaningful opportunity" to give "fully informed input," Mr. Cochran and his clients refused any such opportunity when offered. Even now, it is unclear what relief the Cochran Clients seek with their objections. They neither contend the settlement is unfair, unreasonable or inadequate, nor do they ask the Court to reject the settlement. (*See, e.g.*, ECF 290 (asking only that the Court "fully explore these concerns when deciding *whether* to approve this settlement" (emphasis added)). The Cochran Clients' purported concerns over their lack of involvement ignore this factual record and should be overruled.

**D. Other Comments on the Settlement.**

**1. Class Counsel negotiated the settlement at arms-length and with the utmost integrity.**

Any objection based on the lack of class member involvement in the settlement negotiations[8] ignores both the factual record and the practical realities of litigating in the MDL context. Class Counsel engaged in good-faith, arms-length negotiations. The Settlement was reached after over approximately five months of intense discussions and hard-fought negotiations, and with the assistance of two experienced, neutral mediators. (*See* Suppl. Stephens Decl. ¶¶ 2–11.) Numerous attorneys were present for Plaintiffs and involved throughout the three formal mediation sessions and the ongoing negotiations thereafter, as were numerous attorneys for the Defendant. (*Id.* ¶¶ 7–8.) The mediators remained extensively involved throughout the months of negotiations necessary to bring about the settlement. (*Id.* ¶ 11 and Ex. 1.) The

[8] (*See generally* Cochran Client Objections ECF 290–294; *see also* J. Hickey Objection, ECF 296 at 1, A. Hickey Objection, ECF 297; I. Hickey Objection, ECF 298.)

representative plaintiffs, other than the Cochran Clients, executed the settlement agreement evidencing their understanding and approval of it.

"A settlement agreement in a class action lawsuit is like a settlement agreement in any other lawsuit with one major exception—the clients who are the primary beneficiaries of the settlement agreement are generally not involved in negotiating it." 4 William B. Rubenstein, *Newberg on Class Actions* § 13:2 (5th ed.). The Court granted Class Counsel authorization and authority to engage in settlement negotiations on behalf of the Class. (*See* Order re: Leadership Structure & Responsibilities of Pls.' Counsel, ECF 43 at 3.) While it was not possible to involve all 20 named plaintiffs throughout the negotiations, the relief Class Counsel sought during those negotiations was informed by Counsel's significant experience with data breach litigation and understanding of the damages that named plaintiffs and class members suffered as a result of the Premera data breach. Counsel sought to inform named plaintiffs of the proposed deal before either party signed an agreement. (Suppl. Stephens Decl. ¶¶ 12–14, 18.) Class Counsel offered to discuss the proposed settlement with the Cochran Clients further before signing, but Mr. Cochran would neither explain the Cochran Clients' substantive concerns with the deal nor authorize Class Counsel to speak with them. (*Id.* ¶¶ 13–15.)

"As a general principle, the courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered." *Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 621 (S.D. Cal. 2005) (internal quotation omitted). No objector has provided any evidence to rebut this presumption. *See In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 583 (N.D. Cal. 2015) ("An objector to a proposed settlement agreement bears the burden of proving any assertions they raise challenging

the reasonableness of a class action settlement.").The Cochran Clients' general allegations regarding Counsel's management of the "settlement process" are without support.

**2. Class Counsel has not sought to "suppress" objectors.**

The Cochran Clients also raise various allegations that Class Counsel is attempting to suppress objectors to the Settlement. These allegations lack merit.

First, the Cochran Clients allege that Section 8.4 of the Settlement Agreement, which authorizes the Parties to take discovery of objectors, is nothing more than an attempt to suppress and scare away potential objectors. (G. Webster Objection, ECF 290 at 5; L. Webster Objection, ECF 291 at 5; Ailey Objection, ECF 292 at 5; Imbler Objection, ECF 293 at 5; Allred Objection, ECF 294 at 5.) However, it's well-established that "class counsel may seek discovery *from* objectors on issues such as the objectors' proof of their membership in the class, the factual basis of their objections, any past objections they have made, and their relationships with the professional objector counsel." 4 William B. Rubenstein, *Newberg on Class Actions* § 13:33 (5th ed.) (emphasis in original); *see also In re Netflix Privacy Litig.*, 5:11-CV-00379-EJD, 2013 WL 6173772, at *2 (N.D. Cal. Nov. 25, 2013) ("[A]n objector who voluntarily appears in litigation is properly subject to discovery. . . . Discovery regarding objections to a settlement agreement may be used to seek information regarding the objector's standing, the bases for the objections, his role in objecting to this and other class settlements, and his relationships with the counsel that may affect the merits of the objection.").

The authority to take discovery of objectors is both authorized under the civil rules and subject to the court's oversight. Courts have authorized targeted discovery of objectors, generally in response to "professional objectors" whom the parties "suspect of filing objections solely to extract money from the parties to withdraw their objections." 4 Rubenstein, *supra*, § 13:33 (5th

ed.); *see also In re Netflix Privacy Litig.*, 2013 WL 6173772, at *5 (N.D. Cal. Nov. 25, 2013) (authorizing additional discovery of objectors as "proper as it will be used to pursue information regarding Objectors' standing in regards to their appeals and the bases for Objectors' current contentions"). Moreover, the provision in the Settlement Agreement warning that *the Court* may tax the costs of discovery to objectors applies only to objections the Court determines are "frivolous or made for an improper purpose"; they have no bearing on class members ability to raise legitimate concerns about the Settlement. Nothing about this provision undermines the fairness or adequacy of the objection process or the Settlement. And importantly, Class Counsel have not sought to invoke this provision against Mr. Cochran's clients or any other objectors to this settlement.

Second, Counsel's failure to post its fee application and final approval motions on the Settlement website was both inadvertent and did not affect due process. As addressed in a separate filing (*see* Class Counsel's Resp. to Feb. 3, 2020 Court Order, ECF 302), this briefing was filed publicly on the court's docket and class members were notified as to several methods through which they could seek more information about the fee request. The Postcard Notice, Long Form Notice and settlement website all explicitly informed Class Members that Class Counsel intended to apply for fees and costs of up to $14 million and told Class Members they could object. The Long Form Notice and website provided Class Members information regarding several places where they could obtain more information, including by accessing the Court's publicly available docket, by calling or writing to the Settlement Administrator, by contacting Class Counsel.

With respect to the fee motion, the Long Form notice expressly stated that class members could "request a copy of the application by contacting the Settlement Administrator, at [1-877-

202-7335].” (ECF 273-1 at 61.) No one requested this filing. (Stephens Decl. in Supp. of Resp. to Court Order, ECF 303 ¶ 5, McCown Decl., ECF 304 ¶ 5.) Finally, Class Counsel served individual counsel for the Cochran Clients with copies of all documents submitted in support of their final approval motion and fee motion concurrently upon filing these documents with the Court on January 10, 2020 via the ECF filing system. (*See* Stephens Decl. in Supp. of Resp. to Court Order, ECF 303 ¶ 10.). This notice, combined with the opportunity to inquire and review the fee briefing before the deadline to object expired, is all that *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d988, 994 (9th Cir. 2010) and Rule 23(h) require. Class Counsel also mailed these same documents to the other fee objectors and indicated they would not object to further comments from them to the court on this. (*Id.*¶ 11.) The Court should overrule the Cochran Clients’ objection.

**3. Notice was accurate and not misleading.**

The Cochran Clients suggest that the Court-approved notice was misleading because it clarified only in “fine print” that the class member may receive less than $50 for the default payment depending on the number of participating class members. (G. Webster Objection, ECF 290 at 5–6; L. Webster Objection, ECF 291 at 5–6; Ailey Objection, ECF 292 at 5; Imbler Objection, ECF 293 at 5–6; Allred Objection, ECF 294 at 5.) But all forms of notice provided to the class disclosed that monetary compensation could be reduced depending on how many valid claims class members submitted. The Court-approved Postcard Notice that was sent to class members clearly disclosed that “[a]ll cash payments may be adjusted pro rata depending on the number of Class Members that participate in the settlement.” (ECF 273-1, at 53.) The font was the same size and did not consist of “fine print.” The Settlement website and Court-approved Long Form Notice also informed class members the default payment could be “up to” $50 and

that "[i]ndividual cash payments may be adjusted *pro rata* depending on the number of Class Members that participate in the Settlement."[9]

Notably, the district court overruled similar objections when approving the *Equifax* settlement. In so doing, the district court noted that the court-approved notice explained "that the amount available to pay alternative compensation claims was capped and that individual class members might receive less than" the estimated claim amount. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *17–18. Similarly, the website and long form informed class members that if claims for the alternative compensation exceeded the amount available for distribution, all payments would "be lowered and distributed on a proportional basis." *Id.* Here, the notice explicitly informed class members that their recovery may be capped and reduced based on the number of class members participating in the Settlement and was not hidden in small or hard to find print.

**E. The Settlement Provides Timely Relief to Objectors and the Class.**

Several objectors appear to ask the Court to consider the stress and frustration[10] they have felt as data breach victims as part of the basis for their objections. (*See generally* J. Hickey Objection, ECF 296; A. Hickey Objection, ECF 297; I. Hickey Objection, ECF 298.) But these grievances are precisely why the court should approve the Settlement. Objectors John, Anita, and Ian Hickey detail the unfortunate lengths their family had to go through to remediate financial fraud occurring after the Premera Data Breach. These losses are precisely the type of harms the

[9] *Premera Settlement Website*, https://www.premerasettlement.com/Home/FAQ#faq11 (last updated Feb. 2, 2020); *see also* ECF 273-1 at 58.

[10] Ms. Silverfish objects to the settlement apparently based on difficulties with accessing her online Lifewise account. (*See* Silverfish Objection, ECF 286.) This account bears no relation to the proposed settlement terms.

Settlement seeks to address through providing compensation for out-of-pocket losses.[11] The process for claiming out of pocket losses was designed to be non-onerous and to enable compensation under relaxed causation standards. *See In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. at 325 (noting that the supporting documentation requirement for out-of-pocket costs "eliminat[ed] the need to prove causation" and was "significantly less than what Class Members would have had to produce at trial"). Moreover, the Settlement provides credit monitoring, insurance services, improved security measures, and financial relief to class members now, not years after litigating through class certification, summary judgment, and potentially trial and appeal.

## IV. RESPONSE TO CLASS MEMBER COMMENTS AND OBJECTIONS REGARDING ATTORNEY'S FEES, EXPENSES, AND SERVICE AWARDS

### A. Response to Comments on Attorneys' Fees and Expenses

Plaintiffs previously submitted materials to the court demonstrating that their request for an award of $12,752,610.97 in fees, $1,247,389.03 in expenses, and $5,000 in Service Awards to each authorized recipient, are well-justified and supported. (*See* ECF 284–285.) Class members were notified in the various forms of postcard, long form, and web notice that Counsel's request for fees and expenses amounted to a combined total of $14 million. The notices further alerted class members of their right to object to or seek out more information regarding the attorneys' fees and expenses.

While there are 8.8 million class members, only *four* class members submitted any objections to Class Counsel's requested fees and expenses. *See, e.g.*, *In re the Home Depot, Inc.,*

[11] As of this filing, Epiq has not received a claim from either John Hickey, Anita Hickey, or Ian Hickey. (Suppl. Stephens Decl. ¶ 20.) Class Counsel attempted to contact these three objectors to ensure they understand their ability to claim benefits in this settlement, but have not received a response. (*Id.*)

*Customer Data Sec. Breach Litig.*, 2016 WL 6902351, at *4 (objections from an "infinitesimal percentage" of the class "indicates strong support"). While one objector asks the Court to reject the fee request for unspecified reasons,[12] the remaining three all object on the basis that requested fees and expenses are too high. These objections fail to appreciate the volume of work and risk endured over nearly five years of litigation.

It is this Court's responsibility to determine what constitutes a reasonable fee. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) ("Courts 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."). Class Counsel submitted detailed information in their opening papers explaining the significant volume of work necessary to bring this case to resolution. This work included extensive discovery and substantial motion practice, including briefing on two motions to dismiss, multiple discovery disputes, *Daubert* motions, and class certification. *See In re Anthem, Inc. Data Breach Litig*., 2018 WL 3960068, at *13 (noting extensive briefing weighed in favor of fee). This was a complex case, requiring mastery of complicated and technical subject matters. (Stephens Decl. in Supp. of Final Approval & Fees, ECF 285 ¶¶ 14–15.) And, as detailed in its Preliminary Approval Order, Counsel faced substantial risks of non-recovery. (Op. & Order Granting Preliminary Approval, ECF 279 at 42–44.) All of these factors weigh in favor of granting the requested fee award as reasonable. *See Demmings v. KKW Trucking, Inc.*, 3:14-CV-0494-SI, 2018 WL 4495461, at *13 (D. Or. Sept. 19, 2018) (noting factors relevant to assessing fee award).

[12] Objector Costlow does not think the fees and expenses should be approved but provides no explanation or support for this position. (*See* Costlow Objection, ECF 287.) The Court should overrule her conclusory objection. *See Nwabueze v. AT & T Inc.*, C 09-01529 SI, 2013 WL 6199596, at *7 (N.D. Cal. Nov. 27, 2013) (overruling certain objections on the basis that the objectors "do not state why they are objecting").

Ms. Adidas objects to the fees as too high based on her own calculations of attorneys' rates and hours worked. But her calculations rest, first, on a misunderstanding of the basis for the fee award Class Counsel seeks. Consistent with both Ninth Circuit and Washington law, Class Counsel seeks fees based on the percentage method, not lodestar method. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008); *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."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (affirming district court's application of percentage method to case brought under Washington law). Here, Class Counsel's attorneys' fee request of $12,752,610.97 amounts to 29.07% of the common fund based on the most conservative valuation of the Settlement. This percentage falls within the Ninth Circuit standard range for fees and is consistent with fee awards granted in other data breach litigation. *See, e.g.*, *Barbosa v. Cargill Meat Solutions 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); *see also In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *9 (awarding just over 27% of the fund); *In re the Home Depot, Inc., Customer Data Sec. Breach Litig.*, 1:14-MD-02583-TWT, 2020 WL 415923, at *7 (N.D. Ga. Jan. 23, 2020) (awarding fees to Financial Institution Plaintiffs of one-third of common fund).

Second, the fee request is in fact commensurate with a lodestar cross check. Ms. Adidas' calculation of her estimated fee award per attorney is based on a misconception that only five attorneys worked on this case. Instead, attorneys at 31 law firms contributed to the over 20,000 hours that Counsel reasonably worked in this case. (*See* Stephens Decl. in Supp. of Final

Approval & Fees, ECF 285 ¶¶ 78–79 & Exs. C1–C30.) Moreover, Ms. Adidas based her calculations on an attorney rate of $20 per hour. The proper comparison, however, is to the prevailing rates in the legal community, and $20 per hour is patently unreasonable. As detailed in their opening papers, Class Counsel's rates are reasonable. (*Id.* ¶¶ 62–63 & Exs. C1–C30.) Ms. Adidas requests a detailed itemization of Class Counsel's work in this case. But the Court need not look at detailed itemizations when conducting a lodestar analysis as a cross-check, and may appropriately rely on summaries submitted by attorneys.[13] *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015). When calculated based on actual hours and reasonable rates, the lodestar cross check confirms that Class Counsel do not seek windfall profits. Class Counsel's effective multiplier amounts to a modest 1.12 and is consistent with or below fee awards in similar cases. (*See* Pls.' Mot. & Supp. Mem. for Fees, Expenses & Service Awards, ECF 284 at 37); *see also, e.g.*, Order Regarding Mot. for Final Approval and Mot. for Attorney's Fees, *In re Experian Data Breach Litig.*, 8:15-cv-01592-AG-DFM, Dkt. 322 at 8 (May 10, 2019) (approving fee award with 1.65 lodestar multiplier).

Mr. Costantinou objects that the attorneys' fee and expenses take up too much of the settlement fund and suggests 33% would be a reasonable percentage of the fund for fees. (Costantinou Objection, ECF 288.) But Mr. Costantinou bases his percentages solely on the cash portion of the Settlement. His objection fails to consider the substantial value of the non-monetary benefits available to the Class as part of this Settlement, including Premera's enhanced business practice commitments and agreement to spend more than $42 million on enhanced data security or the value of credit monitoring and identity theft insurance. In determining the total

[13] Class Counsel have submitted such materials to the Court on a regular basis and are prepared to provide more detail should the Court so desire.

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); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 WL 11319243, at *11 (S.D. Fl. Aug. 2, 2013).

Here, the benefits to the Class from Premera's business practice commitments can be accurately ascertained and added to the common fund for purposes of calculating attorney's fees. As discussed in Class Counsel's moving papers, the total value of the settlement from the cash fund and injunctive relief is between $43,872,000 and $74,000,000. (*See* Pls.' Mot. & Supp. Mem. for Fees, Expenses & Service Awards, ECF 284 at 22–26.) On top of this, the credit monitoring and insurance services represent an additional claimed benefit to the Class of at least $223 million. (Suppl. Stephens Decl. ¶ 22.) Thus, Class Counsel's fee request of $12,752,610.97, is just 29.07% to 17.23% of the settlement value, if the Court considers the value of the injunctive relief. Adding in the retail value of credit monitoring, the fee equates to as low as 3.85%–4.77% of the value of the overall benefits to the Class.

Accordingly, Class Counsel request the Court overrule all objections to their fees and expenses and grant Class Counsel's motion.

**B. Response to Comments on Service Awards**

In its order granting preliminary approval, the Court appointed certain named plaintiffs as Representative Plaintiffs, and authorized Class Counsel to apply to the Court for Service Awards on behalf of the "Representative Plaintiffs." (Op. & Order Granting Preliminary Approval, ECF 279 at 51 n.9, 55.). The Cochran Clients were not appointed as Representative Plaintiffs because Lead Counsel were unable to speak with those clients to secure their support for settlement or the motion for preliminary approval.

Service Awards, though common in complex class actions, are entirely a matter of court discretion. *Bellinghausen*, 306 F.R.D. at 266 ("[T]he decision to approve such an award is a matter within the Court's discretion."). Class Counsel agrees with the Cochran Clients that their involvement in this litigation as named plaintiffs was material; each one participated in discovery and provided deposition testimony. Through their participation, the Cochran Clients aided in the development of Plaintiffs' case and as a result, their efforts throughout this litigation helped to bring about the Settlement. Class Counsel agrees the Cochran Clients' are deserving of a Service Award for their contributions during this litigation, and submit it is within the Court's discretion to award Service Awards to not just the Representative Plaintiffs, but all named plaintiffs, including the Cochran Clients. *See* Settlement Agreement § 9.1 (authorizing counsel to seek and court to award service awards to named plaintiffs).

Any contention that the Service Awards are contingent on support for the Settlement is without merit. The Settlement does not condition service awards on support for the settlement, as was the case in *Radcliffe v. Experian Information Solutions Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013). And the Settlement Agreement provides no guarantee that any individual will receive service awards. *Cf. In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (holding district court did not abuse discretion in certifying settlement class and noting the class settlement agreement provided no guarantee that the class representatives would receive incentive payments, leaving that decision to later discretion of the district court). The Service Awards of $5,000 each are reasonable, consistent with circuit precedent, and should be granted.

## V. CONCLUSION

For the reasons set forth herein and in Plaintiffs' motion for final approval and Motion for Attorneys' Fees, Expenses, and Service Awards, and after full consideration of the submitted

class member objections, the Court should finally approve the settlement, certify the settlement class, and enter final judgment.

Dated: February 19, 2020

Respectfully Submitted,

**TOUSLEY BRAIN STEPHENS PLLC**

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