19th DISTRICT COURT, **CITY OF GREELEY,** **COUNTY OF WELD,** **STATE OF COLORADO** Court Address: 901 9th Avenue, Greeley, Colorado 80631 _____ **Karen Alexander and Jared Gabelman, on behalf of themselves and all others similarly situated,** **Plaintiffs,** **v.** **Salud Family Health, Inc.,** **Defendant.**	DATE FILED: October 30, 2023 5:32 PM FILING ID: F4D928752434D CASE NUMBER: 2023CV30580 ▲ **COURT USE ONLY** ▲
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PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS, AND MEMORANDUM IN SUPPORT	

C.R.C.P. 121 § 1-15(8) CONFERRAL

Pursuant to C.R.C.P. 121 § 1-15(8), the undersigned certifies that Plaintiffs' counsel Benjamin F. Johns conferred with Defendant's counsel Christopher Dodrill and was informed that the Defendant does not oppose this Motion.

I. INTRODUCTION

Pursuant to Colo. R. Civ. P. 23 and this Court's order granting preliminary approval of the proposed settlement (Dkt. 234 at ¶ 18), Plaintiffs Karen Alexander and Jared Gabelman ("Plaintiffs") respectfully seek an Order approving Defendant Salud Family Health, Inc.'s ("Salud" or "Defendant") unopposed payment of the following: (i) $550,000 for Class Counsel's attorneys' fees and litigation costs and expenses; and (ii) $2,000 Service Awards to each of the two Class Representatives, totaling $4,000. The payments made by Salud for the aforementioned fees and expenses will be separate and apart from the settlement consideration going to the class and will not reduce the amounts of any of those benefits.

These payments, which are set forth in the settlement agreement, were agreed to only after the Parties reached agreement on all other material terms of the Settlement. *See* Declaration of Benjamin F. Johns ("Johns Decl.") at ¶ 7; Declaration of Danielle L. Perry ("Perry Decl.") at ¶ 7. As discussed therein, the fee amount was determined with the assistance of experienced mediator (and retired federal judge) Hon. Wayne Andersen.

Plaintiffs seek $550,000 in fees and expenses: as they have incurred $21,769 in expenses, they seek the remaining $528,231 in fees. The proposed $528,231 for attorney's fee is reasonable under the lodestar method, the percentage-of-the-benefit method, and the *Johnson* factors used in Colorado. The $21,769 reimbursement request is reasonable in amount and consistent in type with expense awards commonly approved in the state of Colorado and the Tenth Circuit. The expenses were necessary for the effective prosecution of this matter, as discussed below.

The proposed Service Awards are reasonable in light of the time and effort contributed by the Class Representatives to pursue this case on behalf of the Class. The $2,000 per Class Representative amount of the Service Awards is conservative relative to service awards commonly approved in other data breach cases nationwide.

In light of these factors, among others discussed below, Class Counsel respectfully request that the Court approve the agreed upon $550,000 payment for attorneys' fees and litigation expenses, as well as a total of $4,000 in Service Awards.

A. Summary of the Settlement Benefits

As the Court is aware, this proposed class action settlement relates to a data breach that Salud discovered on or around September 5, 2022. The relevant terms of the Parties' Settlement Agreement are summarized below.

1. Compensation for Losses

The Settlement provides for monetary relief to Class Members via a three-tier system totaling up to $1 million in payments, *plus* the value of two years of three-bureau identity theft monitoring for any valid claimant. The relief consists of: (1) out-of-pocket, unreimbursed expenses, not to exceed $7,500 per Class Member, that were incurred more likely than not as a result of the Security Incident; (2) reimbursement for up to four hours of lost time, at a rate of $20

per hour, spent dealing with the Security Incident; and (3) two years of identity theft protection services, which includes dark web scanning and identity theft insurance of $1 million. SA §§ 2.1-2.2. Settlement Class Members who previously enrolled in the Kroll identity theft protection services offered by Salud will automatically be provided with two additional years of those services. *Id.* at § 2.2. The identity theft protection services provided under the settlement are not subject to the $1 million cap on cash benefits. *Id.* at § 2.1.4.

This package of benefits is reasonable relative to the defenses Plaintiffs anticipated Salud would raise if litigation continued. Johns Decl. ¶ 16; Perry Decl. ¶ 17.

2. Injunctive Relief

The Settlement also includes Injunctive Relief designed to minimize the likelihood of an intrusion into Salud's systems in the future. Specifically, for a period of three years, Salud agrees to:

- Maintain a written information security program;
- Conduct employee training on data security policies and detecting/handling suspicious emails;
- Implement appropriate firewall and segregation protocols;
- Develop appropriate protocol for deletion of records; and
- Maintain a policy for responding to data security events.

SA § 2.4.

Salud also made data security enhancements prior to the Settlement that were due in part to this litigation. SA § 2.4. The Parties estimate that the enhancements listed above, along with other enhancements made prior to the Settlement and due in part to the litigation, are valued at no less than $600,000. Johns Decl. ¶ 18. Class Members do not need to submit a claim to benefit from this aspect of the Settlement.

3. Salud's Separate Payment of Attorneys' Fees, Expenses, Service Awards, and Settlement Administration Fees

Separate and apart from the monetary and injunctive benefits discussed above, Defendant also agreed to pay for $550,000 in attorneys' fees and litigation costs and expenses, and a $2,000 Service Award to each of the two named plaintiffs.

4. Reaction of the Class to the Settlement

As of the filing of this motion, the notice period has not yet expired, but the reaction to the Settlement is already positive. Johns Decl. ¶ 18; Perry Decl. ¶ 19. To date, there have been no objections to the Settlement, only two requests to be excluded, and class members have filed hundreds of claims. Johns Decl. ¶ 18; Perry Decl. ¶ 19. Class Members have until November 12, 2023, to opt-out or object to the Settlement. *See* Order Granting Preliminary Approval of Class Action Settlement and Approving Notice Program, dated and entered on August 14, 2023. Any objections and the final number of opt-outs will be reported to the Court in conjunction with the final approval motion and before the Court considers this motion at the final approval hearing.

i. Class Counsel's Efforts

Class Counsel have expended significant time investigating, litigating, and settling, this complex data breach matter. Johns Decl. ¶¶ 5, 11; Perry Decl. ¶¶ 5, 11-12; Declaration of Rick Bailey, ("Bailey Decl."), ¶ 5. This work includes investigating and drafting the Complaint, negotiating a resolution and ultimately securing the Settlement, drafting and negotiating settlement documents with Defendant, conference calls, attending an all-day mediation with Judge Andersen, preparing and filing the requisite preliminary approval papers, assisting with the administration of the Settlement after selecting the Settlement Administrator, and conducting a confirmatory interview of Salud IT personnel on August 24, 2023. Class Counsel will continue to expend time

and effort on this litigation in preparation for final approval, working with the Settlement Administrator to implement the Settlement, and continuing to field calls and questions from Class Members over the many months of Settlement implementation. Johns Decl. ¶ 5; Perry Decl. ¶ 14; Bailey Decl. ¶ 6.

In addition to the time worked, Class Counsel have incurred $21,769 in expenses to date, including for research costs and filing fees, all of which were advanced on a contingent basis and without any guarantee they would be reimbursed absent a positive outcome in the case. Johns Decl. ¶ 17; Perry Decl. ¶ 13; Bailey Decl. ¶ 8.

To date, Class Counsel have not received any compensation for their work or any reimbursement for expenses. Johns Decl. ¶ 13; Perry Decl. ¶ 18; Bailey Decl. ¶ 11.

Defendant does not object to the requested fee and expense award. For the reasons that follow, Plaintiffs respectfully request that their motion be granted.

II. ANALYSIS

A. The Court Should Approve the Attorneys' Fee Award Agreed to By the Parties.

The Supreme Court has held that, due to similarities between state and federal civil procedure concerning class actions, Colorado state courts may look to federal cases interpreting federal rule to inform court's interpretation of Rule 23 of the Colorado Rules of Civil Procedure. *Jahn ex rel. Jahn v. ORCR, Inc.*, 92 P.3d 984, 987 (Colo. 2004) (comparing Colo. R. Civ. P. 23 and Fed. R. Civ. P. 23); *see also Toothman v. Freeborn & Peters*, 80 P.3d 804, 809 (Colo. App. 2002) ("C.R.C.P. 23 is virtually identical to Fed. R. Civ. P. 23"). Although Colorado's Rule 23 acknowledges that payment of attorney's fees is customarily accounted for in a class action settlement, the rule is silent regarding the procedure for awarding them. *See generally* Colo. R. Civ. P. 23. As such, the Court should look to the Rule 23 of the Federal Rules of Civil Procedure,

which provides, "[i]n a certified class action, the court may award reasonable attorney's fees and . . . costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, the Parties agreed that Salud will pay $550,000 for attorney's fees and expenses, as well as $4,000 in Service Awards, subject to Court approval. SA § 7.5.

Courts generally prefer that litigants agree to a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("Ideally, of course, litigants will settle the amount of the fee."); *In re Ford Motor Co. Spark Plug Engine Prod. Liab. Litig*, No. 12-MD-2319, 2016 WL 6909078, at *9 (N.D. Ohio Jan. 26, 2016) ("Negotiated and agreed-upon attorneys' fees as part of a class action settlement are encouraged as an 'ideal' toward which the parties should strive.").

Where, as here, the fee award is to be paid separately by the defendant rather than as a reduction to a common fund, the "[c]ourt's fiduciary role in overseeing the award is greatly reduced, because there is no potential conflict of interest between attorneys and class members." *McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006); *see also Granillo v. FCA US LLC*, No. 16-cv-00153, 2019 WL 4052432, at *2 (D.N.J. Aug. 27, 2019) ("[O]ne important consideration in this Court's analysis is the . . . provision that any award of attorneys' fees and costs is wholly separate and apart from the relief provided for the Settlement Class; thus relief will not be reduced by an award of the fees."); *Haas v. Burlington Cty*., No. 08-cv-01102, 2019 WL 413530, at *9 (D.N.J. Jan. 31, 2019) ("[T]he amount of attorneys' fees was negotiated as a separate aspect of the settlement agreement, which further supports reasonableness.").

1. The Lodestar Method Should Be the Primary Method Used Because This is Not a Traditional Common Fund Case.

"'Attorneys' fees are properly calculated by determining the 'lodestar' – the number of hours reasonably expended multiplied by reasonable hourly rates – and then adjusting the lodestar figure, if appropriate, by considering one or more of the factors in *Johnson v. Georgia Highway*

Express, Inc., 488 F.2d 714 (5th Cir. 1974)' (the "*Johnson* factors")." *Peterman Invs. LLC v. Auto-Owners Ins. Co.*, No. 17-CV-02475-RM-NRN, 2018 WL 11246696, at *2 (D. Colo. Nov. 16, 2018); *see also Tisch v. Tisch*, 84, 439 P.3d 89, 108 (Colo. App. 2019); *Brody v. Hellman*, 167 P.3d 192, 201 (Colo. App. 2007) (applying the *Johnson* factors to a case brought under Colorado state law).

Where, as here, the fee is not part of a traditional common fund, the fee is best evaluated under the lodestar method because it reflects the "amount of time reasonably expended on the litigation." *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (distinguishing common fund and non-common fund fee determinations). The lodestar method should also be the primary method used for calculating fees because courts have recognized that it produces a presumptively reasonable fee. *Anchondo v. Anderson, Crenshaw & Assocs.*, L.L.C., 616 F.3d 1098, 1102 (10th Cir. 2010) (citing *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010)). The two factors that went into generating the lodestar in this case—amount of time billed and hourly rates—are discussed below.

i. The Number of Hours Incurred by Class Counsel Was Reasonable.

The number of hours incurred by Class Counsel was reasonable for a case of this type and size. Bringing this case to a swift and successful conclusion demanded a significant commitment of time and resources by a team of experienced lawyers. Johns Decl. ¶ 11; Perry Decl. ¶ 11; Bailey Decl. ¶ 7. Class Counsel expended 313.95 hours on this case from inception to the end of October 2023, which correlates to a lodestar amount of $238,865.

The following chart summarizes the adjusted hours and lodestar incurred by each firm, recorded at historical hourly rates, respectively:

Law Firm	Hours	Lodestar
Class Counsel		
Shub & Johns LLP	159.55	$140,168.05
Mason LLP	133.40	$88,197.50
Law Office of Rick D. Bailey	21.00	$10,500.00
Total	**313.95**	**$238,865.55**

Johns Decl. ¶ 12; Perry Decl. ¶ 12; Bailey Decl. ¶ 7. Charts and descriptions specifying the hours incurred by each individual biller and each biller's hourly rates are set forth in the Johns Decl. ¶ 12; Perry Decl. ¶ 12; Bailey Decl. ¶ 7.

The aggregate hours were spent on tasks that were necessary to the overall litigation and settlement of this case. Plaintiffs' counsel's efforts included, among other things:

- Investigated the circumstances surrounding the Data Breach;
- Coordinated between the counsel in the *Alexander* case (which was initially filed in state court and then removed) and counsel in the *Gabelman* case (which was filed in federal court);
- Stayed abreast of and analyzed reports, articles, and other public materials discussing the Data Breach and describing Salud's challenged conduct;
- Reviewed public statements from Salud concerning the Data Breach, including the contents of the breach notification letter sent to impacted class members;
- Researched Salud's corporate structure;
- Fielded numerous contacts from potential class members inquiring about this matter;
- Investigated the nature of the challenged conduct at issue here by interviewing multiple potential clients who contacted us;
- Investigated the adequacy of the named Plaintiffs to represent the putative class;
- Drafted and filed initial complaints against Salud in state and federal court, and a consolidated complaint in this Court, and served those complaints on Salud;
- Communicated internally amongst plaintiffs' counsel regarding the most efficient manner to organize this litigation, successfully engaging in private ordering and self-organizing leadership in this litigation;
- Analyzed information provided by Salud in pre-mediation discovery;

- Engaged in a full-day mediation session under the direction of the Honorable Wayne Andersen (ret.) and reached an agreement in principle to resolve the litigation;

- Prepared for and conducted a confirmatory discovery interview with the head of Salud's IT security department to, among other things, verify Salud's compliance with the Business Practice changes set forth in section 2.4 of the Settlement Agreement.

See Johns Decl. ¶¶ 5, 11; Perry Decl. ¶ 5; Bailey Decl. ¶ 5.

Throughout the litigation, Class Counsel conscientiously coordinated and collaborated with each other on an as-needed basis to ensure the efficiency and non-duplication of effort in this litigation. Johns Decl. ¶ 11; Perry Decl. ¶ 11.

In performing the tasks outlined above, Class Counsel took measures to ensure that the work was necessary in light of the needs of the case, carried out efficiently, and non-duplicative. For example, the three firms allocated specific tasks amongst themselves prior to undertaking any assignments, such as drafting the mediation statement, writing the settlement papers and conducting the confirmatory discovery interview, to ensure that no two attorneys performed the same work. Johns Decl. ¶¶ 11, 14; Perry Decl. ¶¶ 11, 14.

Notably, the number of hours incurred in this case, 313.95 hours, is modest relative to the hours incurred in similar data breach class actions that settled in the early stages of the proceedings. *See In re: Home Depot, Inc. Customer Security Breach Litig.*, No. 14-md-02583 (N.D. Ga.) (consumer track counsel devoted 10,186 hours in reaching settlement before motion to dismiss was decided);[1] *In re: Target Corp. Customer Data Security Breach Litig*., No. 14-md-02522 (D. Minn.) (consumer track counsel devoted 20,482 hours in reaching settlement three months after motion to dismiss was decided);[2] *In re TJX Cos. Retail Security Breach Litig*., No. 07-cv-10162 (D. Mass.) (consumer track counsel devoted 7,400 hours in reaching settlement before motion to

[1] *See Home Depot*, Dkt. 227-1 at pg. 19 (motion for attorneys' fees).
[2] *See Target*, Dkt. 483 at pg. 23 (Decl. in support of motion for attorneys' fees).

dismiss was decided).[3] Data breach cases are inherently time consuming because, *e.g.*, many underlying complaints are typically filed prior to consolidation; significant coordination is needed among counsel in the underlying cases; lengthy consolidated complaints are generally filed asserting both common law and state statutory claims from many different states; and settlements are multi-faceted involving several types of relief. Each of those circumstances existed here.

In sum, the number of hours incurred was reasonable given the tasks at hand and the overall needs of the case.

ii. Class Counsel's Hourly Rates are Reasonable.

In conducting a lodestar analysis, "current rates, rather than historical rates, should be applied in order to compensate for the delay in payment." *Konits v. Valley Stream Cent. High Sch. Dist.*, 350 Fed. Appx. 501, 505 n.2 (2d Cir. 2009). A "reasonable rate" is defined as the prevailing market rate in the relevant community for an attorney of similar experience. *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1078 (10th Cir. 2002). "Because of the significant resources and skill required, as well the risks entailed, to litigate large-scale actions . . . very few attorneys handle such cases." *Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK-CBS, 2006 WL 2729260, at *4 (D. Colo. July 27, 2006). "Thus the relevant community for purposes of determining a reasonable billing rate for Class Counsel likely consists of attorneys who litigate nationwide, complex class actions." *Id.* Class Counsel's current rates are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984), i.e., in the nationwide class action practice.

Class Counsel's hourly rates are their standard billing rates. Johns Decl. ¶ 14; Perry Decl.

[3] *See TJX*, Dkt. 353 at pg. 4-5 (motion for attorneys' fees).

¶ 15; Bailey Decl. ¶ 7. The hourly rates range from $425 to $1,050 for attorneys, and $150 to $300 for paralegals and administrative staff. Johns Decl. ¶ 12; Perry Decl. ¶ 12; Bailey Decl. ¶ 7. Class Counsel's rates are in line with those recognized across the country (including in the Tenth Circuit) as acceptable in data breach and large complex class action cases. *See, e.g.*, *Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-CV-01415-CMA-SKC, 2019 WL 6972701, at *2 (D. Colo. 2019) (Tenth Circuit data breach settlement; finding reasonable partner rates of $675-950 per hour, associate rates of $325-500 per hour, and professional staff rates of $165-260 per hour);[4] *Hapka v. Carecentrix, Inc.*, No. 2:16-cv-02372-KGG, 2018 WL 1871449, at *4 (D. Kan. Feb. 15, 2018) (Tenth Circuit data breach settlement; finding reasonable partner rates of $645-865 per hour, associate rates of $375-475 per hour, and professional staff rates of $225-275 per hour);[5] *In re Imprelis Herbicide Mktg., Sales Practices & Prod. Liab. Litig.*, 296 F.R.D. 351, 370 (E.D. Pa. 2013) (approving fee request where hourly rates peaked at $1,200 and several attorneys' rates were at or above $900);[6] *In re Processed Egg Prod. Antitrust Litig.*, No. 08-MD-2002, 2012 WL 5467530, at *6 (E.D. Pa. Nov. 9, 2012) (approving fee request where hourly rates peaked at $1,100 and several attorneys' rates were at or above $900; "the Court finds that the stated hourly rates of these attorneys and staff . . . are reasonable"); *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1087-88 (S.D. Tex. 2012) (finding rates reasonable where class action attorney rates ranged from

[4] The Order cited class counsel's total lodestar amount but not the underlying hourly rates. The hourly rates were set forth in various Declarations filed by class counsel (Dkt. 114-1, 115-1, 118).

[5] The Order cited class counsel's total lodestar amount but not the underlying hourly rates. The hourly rates were set forth in various Declarations filed by class counsel (Dkt. 95, p. 10).

[6] The Order cited class counsel's total lodestar amount but not the underlying hourly rates. The hourly rates were set forth in various Declarations filed by class counsel (Dkt. 189-2 to 189-4). Hourly rates greater than $900 are located at Dkt. 189-2 at ECF pg. 15, Dkt. 189-3 at ECF pg. 30, 216, and Dkt. 189-4 at ECF pg. 32.

$825 per hour for one the co-lead class counsel to as low as $90 per hour for a paralegal, and where the mean hourly rate for all lawyers was $400.81). Class Counsel's rates fall squarely within the national average rates for attorneys of comparable skill and experience who charge by the hour for their work.

Class Counsel's rates are also reasonable as compared to hourly rates for attorneys in the regional legal market. *See, e.g.*, *Biax Corp. v. NVIDIA Corp.*, No. 09-cv-01257-PAB-MEH, 2013 WL 4051908, at *6 (D. Colo. Aug. 12, 2013) (considering 2010 National Law Journal ("NLJ") billing survey showing Denver firms billed between $285 and $810 per hour for partners; approving rates of over $700 per hour for partners with comparable experience prior to inflation that has occurred between 2010 and 2023); *Watson v. Dillon Cos., Inc.*, No. 08-cv- 00091-WYD-CBS, 2013 WL 4547521, at *2 (D. Colo. Aug. 28, 2013) (approving rate of $550 per hour for lead attorney).

Furthermore, the rates of each firm comprising Co-Lead Counsel have previously been approved by other district courts. *See e.g.*, *Chapman v. Insight Global, Inc.*, 1:21-cv-000824 (M.D. Pa. Apr. 6, 2023), ECF No. 65 (approving Shub & Johns LLC's rates); *In re Deva Concepts Products Liability* Litigation, Case No. 1:20-cv-01234 (S.D.N.Y. Jan. 3, 2022), ECF No. 131 (approving Mason LLP's rates); Appalachian *Land Company v. Equitable Production Company*, Case No. 7:08-CV-00139 (E.D. Ky. July 7, 2020), ECF No. 160 (approving Mason LLP's rates); *Norman v. Nissan North America, Inc., et al.*, 3:18-CV-00588 (M.D. Tenn. Mar. 10, 2020) (same).

The hourly rates of each attorney and paralegal are appropriately tailored to the individual's level of seniority and experience. The highest hourly rates are limited to only those attorneys with the greatest expertise, and vice versa. Johns Decl. ¶¶ 3, 12, and exhibits thereto; Perry Decl. ¶¶ 3, 12, and exhibits thereto; Bailey Decl. ¶ 7. *See Moore v. GMAC Mortg.*, No. 07-cv-04296, 2014

WL 12538188, at *2 (E.D. Pa. Sept. 19, 2014) ("A reasonable hourly rate reflects an attorney's experience and expertise, [thus] the rates for individual attorneys vary."). Each plaintiffs' counsel firm is highly specialized with abundant experience in complex class actions, which further supports the reasonableness of the hourly rates. Johns Decl. ¶ 3, and exhibits thereto; Perry Decl. ¶ 3, and exhibits thereto; *see also* Declaration of Danielle L. Perry in Support of Plaintiffs' Motion for Preliminary Approval, filed Aug. 28, 2023.

For the aforementioned reasons, this court should find that Class Counsel's rates are reasonable.

iii. The Modest 2.21 Multiplier is Reasonable

The $528,231 fee request relative to Class Counsel's $238,865 lodestar results in a 2.21 multiplier. This multiplier is much lower than multipliers commonly awarded in the Tenth Circuit. *See In re Miniscribe Corp.,* 309 F.3d 1234, 1245 (10th Cir. 2002) (finding no error in awarding a 2.57 multiplier); *Mishkin v. Zynex, Inc.*, 2012 WL 4069295 at *2 (D. Colo. Sep. 14, 2012) (collecting District of Colorado cases approving multipliers ranging from 2.5 to 4.6); *Prim v. Ensign United States Drilling, Inc.,* No. 15-cv-02156-PAB-KMT, 2019 WL 4751788, at *7 (D. Colo. Sept. 30, 2019) (approving fees reflecting a 2.34 multiplier); *Aguilar v. Pepper Asian Inc.*, No. 21-CV-02740-RM-NYW, 2022 WL 408237, at *6-7 (D. Colo. Feb. 10, 2022) (approving 2.49 multiplier); *In re Davita Healthcare Partners, Inc.*, No. 12-CV-2074-WJM-CBS, 2015 WL 3582265, at *5 (D. Colo. June 5, 2015) (approving a multiplier of 3.00 where "Plaintiff has established that the significant risk it assumed by taking this case on contingency warrants compensation").

The 2.21 multiplier is also lower than multipliers awarded nationwide, which typically range from 1 to 3. *See Newberg* § 15:89 ("[T]he basic range of multipliers [nationwide] . . . run[s] from a floor around counsel's lodestar to a ceiling around three times lodestar, as the mean."); *see,*

e.g., In re AT&T Corp. Secs. Litig., 455 F.3d 160, 173 (3d Cir. 2006) ("[W]e approved of a lodestar multiplier of 2.99 in *Cendant PRIDES*, in a case we stated 'was neither legally nor factually complex.' The case lasted only four months, 'discovery was virtually nonexistent,' and counsel spent an estimated total of 5,600 hours on the case."). For these reasons, the 2.21 multiplier, here, is reasonable.

iv. The Multiplier Will Decrease Further as Class Counsel Conducts Additional Work Following the Filing of this Brief.

The multiplier will decrease further going forward as Class Counsel incurs future lodestar. Class Counsel will at a minimum spend time drafting the motion for final settlement approval, preparing for and attending the Final Approval Hearing, overseeing the claims administration and distribution process, and responding to inquiries from Class Members. Class Counsel will also monitor the Injunctive Relief for three years, including analyzing periodic compliance reports from Salud. SA § 2.4.

Courts in data breach class actions have held that it is appropriate to consider future anticipated lodestar when evaluating the reasonableness of a fee award. *See In re: Yahoo! Inc. Customer Data Security Breach Litig.*, No. 16-MD-02752, 2020 WL 4212811, at *30 (N.D. Cal. July 22, 2020) ("[T]he Court acknowledges that certain tasks will continue to occupy Class Counsel following final approval. Indeed, . . . Class Counsel must work with a Third-Party Assessor to review annual audits of Yahoo's information security program for four years. Accordingly, for purposes of the lodestar calculation, the Court will [adopt] the anticipated future lodestar requested by Plaintiffs . . . ."); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 17-MD-2800, 2020 WL 256132, at *40 (N.D. Ga. Mar. 17, 2020) ("[C]ourts have included future time in lodestar calculations . . . . Excluding such time would misapply the lodestar methodology

and needlessly penalize class counsel.").

Thus, Class Counsel's anticipated future lodestar (and the resulting decrease in the multiplier) further supports the reasonableness of the fee request.

2. The Fee Request is Reasonable Under the Percentage of the Benefit Cross Check.

Typically, courts use the percentage-of-the-benefit method and then crosscheck the adequacy of the resulting fee by applying the lodestar method. *Brody v. Hellman*, 167 P.3d 192, 201 (Colo. App. 2007) (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir.2005) and *In re Bristol–Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 233 (S.D.N.Y. 2005)).

i. The Attorneys' Fees, Expenses, and Settlement Administration Costs Should Be Added to the Settlement Value for Purposes of the Percentage of the Benefit Analysis.

"The first step under the [percentage] method requires determining the actual monetary value conferred to the class members by the settlement." *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig*., 851 F. Supp. 2d 1040, 1075 (S.D. Tex. 2012) (citing *Bussie v. Allamerica Fin. Corp.*, No. Civ. A. 97–40204–NMG, 1999 WL 342042, at *2 (D. Mass. May 19, 1999)). Where, as here, attorneys' fees, expenses, and settlement administration costs are paid directly by the defendant as opposed to from a common fund, courts have held that those costs may be added to the settlement value when applying the percentage of the benefit method. *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245-46 (8th Cir. 1996*); In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011). For example, in *Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 706, 718-19 (W.D. Pa. 2015), the court stated:

> [T]he $2.8 million to be paid directly to Settlement Class members represents less than half of the total value of the settlement. Under the Settlement Agreement,

> defendants also will pay $1.5 million for attorneys' fees and expenses and what is estimated to be at least $1.5 million for the costs of administering the settlement. **These are costs for which the class would otherwise be responsible, and therefore properly are considered in valuing the settlement**. [Emphasis added.] These amounts bring the total value of the settlement to, at minimum, $5,859,452.50.
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> . . . .
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> [T]he value of the settlement fund is $5,859,452.50 . . . . At $1.5 million, the requested fee award equates to 25.6% of this value. . . .
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> . . . .
>
> [C]lass counsel has met its burden of showing that its requested fee award is reasonable.

Other courts have reached similar conclusions. *See Rose v. Travelers Home & Marine Ins. Co.*, No. 19-cv-00977, 2020 WL 4059613, at *9 (E.D. Pa. July 20, 2020) ("This case does not involve a true common fund because Defendants are not paying the attorneys' fees and costs through the reimbursement fund. 'However, where the reality is that the fund and the [attorneys'] fee are paid from the same source – in this case, [Defendants] – the arrangement 'is, for practical purposes, a constructive common fund,' and courts may still apply the percent-of-fund analysis in calculating attorney's fees.'"); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig*., 851 F. Supp. 2d at 1075 ("[T]he court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, the fee awards should be based only on the benefits actually delivered."); Manual for Complex Litig. § 21.7 (4th ed. 2017) ("If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees and expenses, . . . the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class . . . . The total fund could be used to measure whether the portion allocated to the class and to attorney fees is reasonable.").

Indeed, courts in data breach cases frequently analyze fee requests by adding the value of

the attorneys' fees and settlement administration costs to the overall settlement value. *See, e.g., In re: Citrix Data Breach Litig.*, No. 19-cv-61350, 2021 WL 2410651, at *4 (S.D. Fla. June 11, 2021) (adding attorneys' fees and settlement administration costs to settlement value and approving 32.9% fee award); *In re Arby's Rest. Grp., Inc. Data Sec. Litig.*, No. 17-cv-01035, 2019 WL 2720818, at *2 (N.D. Ga. June 6, 2019) ("In this case, when adding the requested [attorneys'] fee, litigation expenses, and costs of administration to the $2 million aggregate cap for claims, Arby's will provide a total potential benefit to the class of up to $3,306,000. . . . Attorneys' fees therefore represent approximately 29.6% of that recovery. This percentage falls within the range [of reasonableness]."); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617, 2018 WL 3960068, at *8-9, 16 (N.D. Cal. Aug. 17, 2018) (approving 27% fee award as percent of total settlement value, which included settlement benefits plus payment of attorneys' fees and settlement administration and notice costs); *In re Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 14-MD-02583, 2016 WL 11299474, at *2 (N.D. Ga. Aug. 23, 2016) (approving 28% fee award as percent of total monetary payout defendant was required to make, which included settlement benefits plus defendant's separate payment of attorneys' fees); *In re Target Corp. Data Sec. Breach Litig.*, No. 14-MD-02522, 2015 WL 7253765, at *2-3 (D. Minn. Nov. 17, 2015) (approving 29% fee award as percent of the "total monetary payout Target is required to make," which included the common fund amount plus defendant's separate payment of attorneys' fees and settlement administration and notice costs); *In re LinkedIn User Priv. Litig.*, 309 F.R.D. 573, 581-82, 590-91 (N.D. Cal. 2015) (approving 25% fee award as percent of total monetary payout defendant was required to make, which included settlement benefits plus payment of attorneys' fees and settlement administration costs).

Thus, the Court should add the $550,000 in attorneys' fees and litigation expenses, and the

approximately $309,332 in settlement administration costs to the $1 million in available cash to arrive at a settlement value for purposes of the percent-of-the-benefit cross check. Additionally, Class Counsel has negotiated two-years of three-bureau credit monitoring and identity protections to be provided (1) automatically to every Settlement Class Member who previously enrolled in identity protection services provided by Salud as part of their initial response to the Data Incident; and (2) to any other Settlement Class Member who claims them. These services will be provided to any valid claimant, without cap, and are regularly valued at over $150 per year.[7] Even if provided automatically to and/or claimed by just .5% of the class, the value of this benefit is over $600,000.[8]

The Court should also consider the value of the Injunctive Relief estimated at $600,000 when performing this cross-check. As discussed more fully below, the Injunctive Relief provided by way of Business Practice Changes such as the enhanced security measures are routinely considered by courts assessing fee applications. *See, e.g., Hall v. Best Buy*, 274 F.R.D. 154, 172 n.107 (in approving the fee award, the court considered "relief that . . . goes beyond pure monetary relief and protects Best Buy's hourly workers going forward").

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[7] *See* pricing models for three-bureau monitoring provided by Experian at https://www.experian.com/protection/compare-identity-theft-products/ (last accessed Oct. 27, 2023) (offering 3-bureau protection at $24.99 per month); *see* pricing models provided by Identity Guard at https://buy.identityguard.com/save?clickid=1g7UHbyj8xyPWyjUQrxNwwehUkFQUh2JuyiRQg0&irgwc=1&c1=102401&camp=8563&utm_source=redventures&utm_medium=ir_affiliate&mktp=IR_Affiliates&utm_campaign=ir_affiliate&sharedid=42154 (last accessed Oct. 27, 2023) (offering 3-bureau protection at $17.99 per month, when billed annually, $29.99 per month otherwise); *see* https://secure.identityforce.com/sales_landing/step2?offer=forbesfebusc&cjevent=bede9cc274f811ee805601090a82b82a&utm_source=CJ&utm_medium=referral (last accessed Oct. 27, 2023) (offering 3-bureau protection at $179.90 per year)

[8] 1% of the Settlement Class is approximately 4,275 individuals. At $150 per year, two years of three bureau credit monitoring services would be valued at approximately $1,282,500.

ii. The 21.4% Ratio is Consistent with Fee Awards Commonly Approved in the Tenth Circuit

When adding the $1 million in direct monetary benefits to $550,000 in attorneys' fees and litigation costs and expenses, $4,000 in service awards, approximately $309,332 in settlement administration costs, and $600,000 in credit monitoring services, the resulting value of the negotiated settlement is $2,463,332. The $528,231 fee request equals 21.4% of the conservatively estimated $2.5 million settlement value, *excluding* the value of injunctive relief.

The 21.4% ratio is consistent with fee awards commonly granted in the Tenth Circuit. *See, e.g.*, *Brown*, 838 F.2d at 455 n.2 (collecting cases finding awards from 22.0% to 37.3% reasonable); *Uselton v. Com. Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993) (affirming a 29% fee); *Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1264 (10th Cir. 2023) ("To date, we have not adopted a benchmark percentage for attorneys' fees from common fund settlements. And we decline to pronounce a bright-line benchmark today," affirming a 33% fee).

Studies have found that, on a national scale, "empirical data on fee awards demonstrate that percentage awards in class actions are generally between 20-30%, with the average award hovering around 25%." *Newberg* § 153.

Notably, fee awards in data breach settlements commonly exceed 25% of the settlement value. *See, e.g.*, *Citrix*, 2021 WL 2410651, at *4 (32.9% fee award); *Arby's*, 2019 WL 2720818, at *2 (29.6% fee award); *Anthem*, 2018 WL 3960068, at *9 (27% fee award); *Home Depot*, 2016 WL 11299474, at *2 (28% fee award); *Target*, 2015 WL 7253765, at *2-3 (29% fee award); *LinkedIn*, 309 F.R.D. at 590-91 (25% fee award).

Accordingly, the 21.4% fee requested here is well within the bounds of a reasonable fee

request and in line with fee award trends in the Tenth Circuit and across the country.

iii. The Business Practices Changes Component of the Settlement Further Supports the Reasonableness of the Fee Request

The Business Practices Changes component of the settlement (§ 2.4) further supports the reasonableness of the 21.4% fee request. Courts generally treat the existence of injunctive relief as a factor in determining the size of the percentage fee to approve, as opposed to adding the costs of the injunctive relief to the settlement value. This is because injunctive relief is often difficult to value. *See, e.g., In re LivingSocial Mktg. & Sales Prac. Litig.*, 298 F.R.D. 1, 17 (D.D.C. 2013) ("'[C]ourts should consider the value of the injunctive relief obtained as a relevant circumstance in determining what percentage of the common fund class counsel should receive as attorneys' fees, rather than as a part of the fund itself.'") (citation omitted); *Bodnar v. Bank of Am., N.A.*, No. 14-cv-03224, 2016 WL 4582084, at *5 (E.D. Pa. Aug. 4, 2016) ("The value of the settlement is actually greater in light of the meaningful injunctive relief to which Bank of America has agreed, but which has not been quantified monetarily. . . . [T]his factor weighs in favor of the requested fee award."); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 478 (D.N.J. 2008) ("The value of the injunctive relief here is a highly relevant circumstance in determining what percentage of the common fund class counsel should receive as attorneys' fees.").

The existence of the Business Practices Changes here serves as a factor supporting approval of the 21.4% fee award. If the estimated $600,000 value of the Injunctive Relief were instead added to the approximate $2.5 million monetary value of the settlement, the overall settlement would be valued at over $3,063,332 million. The $528,231 fee request would represent just 17.0% of the approximate $3.0 million settlement value. This low percentage further supports the reasonableness of the fee request.

3. An Analysis of the *Johnson* Factors Makes Clear that the Requested Attorneys' Fees are Reasonable.

To determine reasonableness, Colorado state courts and federal courts, including those in the Tenth Circuit, have also relied heavily on the *Johnson* factors to review the reasonableness of attorney's fee awards. *See Brody*, 167 P.3d at 200; *see also Brown*, 838 F.2d at 454. The *Johnson* Factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *In re Davita Healthcare Partners, Inc.*, 2015 WL 3582265, at *4, n.1 (citing *Johnson*, 488 F.2d at 717-19). As demonstrated below, an analysis of the Johnson Factors demonstrates the reasonableness of the fee request.

iv. The Time and Labor Required

The first *Johnson* factor supports the fee request. As previously stated, bringing this case to a successful conclusion demanded a significant commitment of time and resources by a team of experienced lawyers. *See* Johns Decl. ¶ 11; Perry Decl. ¶ 11; Bailey Decl. ¶ 7. From inception to late October 2023, Class Counsel have collectively expended 313.95 hours of time in prosecuting this case on a contingency fee basis. *See* Johns Decl. ¶ 12; Perry Decl. ¶ 12; Bailey Decl. ¶ 7. As set forth above and in these declarations, this time included *inter alia*, counsels' pre-suit investigation of the relevant facts and potential claims, communications with potential plaintiffs and class members, drafting complaints, conducting a confirmatory interview, performing legal

research regarding myriad issues pertinent to the case, engaging in pre-mediation discovery and participating in a mediation with Judge Andersen. *See* Johns Decl. ¶¶ 5, 14; Perry Decl. ¶ 12; Bailey Decl. ¶ 5.

As set forth *supra*, Class Counsel's rates are reasonable. Using current, reasonable billable rates, this equates to a lodestar of $238,865. Johns Decl. ¶¶ 12, 14; Perry Decl. ¶ 12; Bailey Decl. ¶ 7. Class Counsel has expended and will continue to expend significant hours and resources beyond the point at which the parties reached a settlement in seeing this litigation to its conclusion.[9]

v. The Substantial Novelty and Difficulty of the Questions; Undesirability of the Case.

The second and tenth *Johnson* factors also support the fee request. This case presented complex and uncertain questions of fact and law. Indeed, other courts have concluded that data breach litigation presents difficult and novel issues for the parties and the courts. *See, e.g., In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) ("Data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts. And of course, juries are always unpredictable."); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (". . . many of the legal issues presented in this data-breach case are novel . . . ."); *Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.*, No. JKB-16-3025, 2019 WL 3183651, at *7 (D. Md. July 15, 2019) (finding fee

[9] As noted in the declarations, Mason LLP's and Shub & Johns' reported time does not include any of the billable time after October 27, 2023, and the time for the Law Offices of Rick Bailey does not include any of the billable time after October 30, 2023; thus, the above lodestar figures do not account for the work performed subsequent to those dates, such as future work that will be associated with the final approval hearing and claims and settlement administration. *See In re Philips/Magnavox TV Litig.*, No. 09-3072, 2012 WL 1677244, at *17 (D.N.J. May 14, 2012) (observing, in analyzing a fee request, that the submitted figures did not include time and expenses incurred by counsel subsequent to the submission of that motion)

in data breach case reasonable in light of, inter alia, "the complex and novel nature of the case"). This case is no different in that it presented novel and difficult issues.

Moreover, the path to class certification was far from certain. Notably, "[a]s of May 2018, nationwide only one data breach consumer class had been certified." *Linnins v. HAECO Ams., Inc.*, No. 1:16CV486, 2018 WL 5312193, at *2 (M.D.N.C. Oct. 26, 2018) (referring to *Smith v. Triad of Ala., LLC*, No. 1:14-CV-324-WKW, 2017 WL 1044692, at *16 (M.D. Ala. Mar. 17, 2017)). Numerous courts that consider class certification motions in data breach cases have denied certification. *See, e.g.*, *Dolmage v. Combined Ins. Co. of Am.*, No. 14 C 3809, 2017 WL 1754772, at *10 (N.D. Ill. May 3, 2017) (class certification denied); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21, 33 (D. Me. 2013) (same); *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389, 397-98 (D. Mass. 2007) (same); *see also Hammond v. Bank of N.Y. Mellon Corp.*, 08 Civ. 6060, 2010 WL 2643307, at *9 (S.D.N.Y. June 25, 2010) (granting summary judgment for defendant due to lack of standing in data security/theft action). This uncertainty and the novelty of this case, as well as the possibility of no recovery, equally supports the "undesirability" Johnson factor. *Hapka v. Carecentrix, Inc.*, No. 2:16-cv-02372-KGG (D. Kan. Feb. 15, 2018), ECF 103 (finding "undesirability" Johnson factor to be satisfied by uncertainty of success and novelty of the case). Accordingly, these factors militate strongly in favor of approval of Plaintiffs' fee request.

vi. The Skill Required, the Experience, Reputation, and Ability of the Attorneys.

The third and ninth *Johnson* factors also support the fee request. As discussed above, this litigation raised complex and novel questions relating to data breaches, consumer protection laws, class certification and constitutional standing. The three firms comprising Class Counsel are well-experienced in complex civil litigation, including in consumer and data breach actions. *See, e.g.,*

Meyers v. Onix Grp., LLC, No. 23-cv-2288, 2023 WL 4630674, at *2 (E.D. Pa. July 19, 2023) ("Mr. Johns, specifically, has almost 20 years of experience with complex class action cases and has been appointed Lead Counsel in data breach cases over a dozen times in various jurisdictions across the country; he has been appointed Lead Counsel in the Eastern District of Pennsylvania no less than three times.") (collecting cases); *Gordon v. Chipotle Mexican Grill, Inc.*, *supra* (appointing Mr. Johns as co-lead counsel in a data breach class action); *Rasmussen et al. v. Uintah Basin Healthcare*, Case No. 2:23-cv-00322 (D. Utah) (appointing Ms. Perry Interim Co-Lead Counsel June 2023); *In re NCB Mgmt. Serv., Inc. Data Breach Litig.*, Case No. 23-cv-1236 (E.D. Pa.) (appointing Ms. Perry to Plaintiffs' Steering Committee and Mr. Johns as Co-Lead Counsel). Each is of the opinion that the settlement reached here is in the best interest of the Class. Class Counsel's specialized knowledge "facilitated and promoted the settlement of this action," *Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1008-09 (D. Colo. 2014), and thus supports the fee request.

vii. Preclusion of Other Employment; Customary Fee; Contingent Fee; Awards in Similar Cases.

Johnson factors four, five, six, and twelve all strongly weigh in favor of the requested fee. As previously noted, Class Counsel has spent 313.95 hours litigating this class action. Johns Decl. at ¶ 12; Perry Decl. ¶ 12; Bailey Decl. ¶ 7. This is time that counsel could have devoted to other matters. *See, e.g., Tuten*, 41 F. Supp. 3d at 1009 ("Moreover, the time expended by Class Counsel on this case prevented them from working on other matters."); *Burford v. Cargill, Inc.*, No. 05-0283, 2012 WL 5471985, at *3 (W.D. La. Nov. 8, 2012) ("The affidavits of Class Counsel prove that while this case did not preclude them from accepting other work, they were often times precluded from working on other cases due to the demands of the instant matter. . . . This factor weighs in favor of a substantial fee award.").

Additionally, Class Counsel accepted this case on a contingent fee basis and, therefore, accepted a significant risk of non-payment. *See Tuten*, 41 F. Supp. 3d at 1009 ("Class Counsel took the case on a contingent basis, which permits a higher recovery to compensate for the risk of recovering nothing for their work. . . . This is notable, particularly because this case involved novel legal issues for which recovery was uncertain.").

The requested fee amount is also consistent with those approved in other data breach settlements and is in line with fee awards in this Court. Class Counsel have amassed a collective lodestar of $238,865 through late October 2023, thus representing a 2.21 multiplier.

The lodestar multiple is well below the upper limit of the acceptable range of multipliers that have been approved by courts in the Tenth Circuit. *See, e.g., In re Davita Healthcare Partners, Inc.*, 2015 WL 3582265, at *5 (approving a multiplier of three where "Plaintiff has established that the significant risk it assumed by taking this case on contingency warrants compensation"); *Connolly v. Harris Trust Co. of Ca. (In re Miniscribe Corp.)*, 309 F.3d 1234, 1245 (10th Cir. 2002) (affirming fee award based on a lodestar multiplier of 2.57 in class action); *Tuten*, 41 F. Supp. 3d at 1009 (approving fees with lodestar multiplier estimated to be at or below two).

Moreover, a review of similar data breach settlements also demonstrates that the fee request here is reasonable and appropriate. *See, e.g., In re Ashley Madison Customer Data Security Breach*, Case No. 4:15-MD-02669-JAR (E.D. Mo. Nov. 20, 2017), ECF. No. 383 ($3,733,333.33 in fees plus $78,032.38 in approved expenses in a website breach); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, 2019 WL 3773737, at *3, *11-12 (granting preliminary approval of data breach settlement, including fee request of $1,297,500 and expenses of $209,536.76 with an estimated 1.5 million settlement class members). Plaintiffs' requested award of $550,000 in fees and expenses is less than the amounts approved in many similar cases and is appropriate here.

viii. The Time Limitations Imposed by the Client or the Circumstances.

Counsel's efficient work has allowed Settlement Class members to take advantage of reimbursements out-of-pocket losses for up to $7,500. SA § 2.1.1. Additionally, Class Members may also elect to receive a reimbursement for up to four (4) hours of lost time actually spent remedying issues related to the Security Incident (calculated at the rate of $20 per each hour spent). SA § 2.1.2. And finally, the Settlement also allows Class Members to enroll in two-years of three-bureau credit monitoring and other similar services (provided automatically to any Class Member who previously requested monitoring from Salud), which will help mitigate future harm. SA § 2.2. "Given the nature of [data breach] case[s], it was important for Class Counsel to litigate this case on an expedited schedule, which Class Counsel successfully did." *Hapka*, No. 2:16-cv-02372-KGG, ECF 103 (finding fee request appropriate where settlement provided $200 payment for fraud). Given that Class Counsel successfully reached a highly favorable settlement within six (6) months of initiating litigation, the seventh *Johnson* factor thus supports the fee request.

ix. The Amount Involved and the Results Obtained.

The eighth *Johnson* factor also supports the fee request. "[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *O'Dowd v. Anthem, Inc.*, No. 14-cv-02787-KLM-NYW, 2019 WL 4279123, at *18 (D. Colo. Sep. 9, 2019). In negotiating the amounts to be paid under the Settlement, Class Counsel relied upon materials received by Salud as well as published reports documenting data breach and identity theft costs, actual costs incurred by Class Members (as relayed in conversations with Class Counsel), information uncovered in discovery, their own experience in other data breach litigation, and reported settlements in other data breach class actions. The monetary benefits offered to Settlement

Class Members are more than fair and reasonable in light of reported average out-of-pocket expenses due to a data breach.[10]

The benefits available here compare favorably to what Class Members could recover if successful at trial. In the experience of Class Counsel, the relief provided by this Settlement should be considered an outstanding result and benefit to the Class. *See, e.g.*, *Hapka*, No. 2:16-cv-02372-KGG, ECF. No. 103 ("By any measure, Class Counsel obtained a robust result in this data breach class action. The Settlement addresses past harms through reimbursement of Out-of-Pocket Losses or the alternative minimum $200 payment for tax fraud and also helps Settlement Class Members protect against future harm through the Credit Monitoring Services."). The equitable, forward-looking relief obtained with respect to Salud's data security practices also provides substantial non-monetary benefits to the class members. SA § 2.4; *see also O'Dowd*, 2019 WL 4279123, at *18 (injunctive relief provides "substantial non-monetary benefits" to the class).

x. Nature and Length of the Relationship with the Clients.

Finally, the eleventh *Johnson* factor weighs in favor of the fee award. Class Counsel have been in communication with their clients since before this action was commenced in January 2023, and remain in close contact with them regarding details of this settlement and its progression. Johns Decl. ¶ 10; Perry Decl. ¶ 10. The Plaintiffs have been actively involved in this litigation and have approved of and support the Settlement. Johns Decl. ¶ 10; Perry Decl. ¶ 10; s*ee* SA § 10.6. Accordingly, this factor weighs in favor of the agreed upon fee.

B. No Objections to the Fee Request Have Been Received to Date.

[10] For individuals who experienced actual identity theft, a 2014 Congressional Report stated that these victims incurred an average of $365.00 in expenses in dealing with the fraud. See Kristin Finklea, Congressional Research Service, *Identity Theft: Trends and Issues* (January 16, 2014), p. 2, available at https://fas.org/sgp/crs/misc/R40599.pdf (last visited Oct. 25, 2023).

The deadline for Class Members to submit objections to the Settlement or requested fee award is November 12, 2023. *See* Preliminary Approval Order, at 13-14 (Aug. 14, 2023).

The amount of the proposed $1 million lump sum payment was disclosed in the Settlement Notice. Thus far, no Class Members have objected to the Settlement or fee request. Class Counsel will update the Court regarding any subsequent objections to the fee request when Plaintiffs file their motion for final approval of the Settlement on November 13, 2021.

To the extent any Class Members submit generic, boilerplate, or undeveloped assertions that the fee request is too high, without providing a substantive or meaningful analysis, those objections should not be credited. *See* Newberg § 13:21 ("[C]lass members are most apt to focus on the fact that they, individually, are getting little compared to what the attorneys are getting—and they typically lack the sophistication to appreciate that the attorney's fee is generally an acceptable portion of the class's aggregate award."); *In re Royal Dutch/Shell*, 2008 WL 9447623, at *30 (rejecting "boilerplate objections" to fee request).

C. The Expense Reimbursement Request is Reasonable

Class Counsel request reimbursement of $21,769 in out-of-pocket litigation expenses in addition to the fees request. In the interests of billing judgment and conservatism, Class Counsel are seeking recovery of only their filing fees, service of process fees, expert and professional services fees, mediation fees, Westlaw/LEXIS fees, and PACER fees. Class Counsel will forgo reimbursements of all in-house administrative expenses such as printing, photocopies, and similar items. Johns Decl. ¶ 13; Perry Decl. ¶ 13. Reimbursement of these expenses will not detract from any settlement benefits made available to the Class.

A chart summarizing the expense categories and amounts incurred by each firm is set forth in the declarations attached. Johns Decl. ¶ 13; Perry Decl. ¶ 13. The expense categories are consistent with the types of expenses commonly approved by federal courts, including the Tenth

Circuit. *See Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-CV-01415-CMA-SKC, 2019 WL 6972701, at *2 (D. Colo. Dec. 16, 2019) (granting approving class counsel's request for reimbursement of, *e.g.*, "filing fees, service of process fees, . . . mediation fees, Westlaw/LEXIS fees, and PACER"); *Cunningham v. Salud, Inc.*, No. 18-cv-03355, 2021 WL 1626482, at *8 (E.D. Pa. Apr. 21, 2021) (approving class counsel's request for reimbursement of, *e.g.*, "filing fees, . . . mediation fees, and other similar, ordinary litigation expenses"); *Acevedo v. Brightview Landscapes, LLC*, No. 13-cv-02529, 2017 WL 4354809, at *20 (M.D. Pa. Oct. 2, 2017) (approving class counsel's request for reimbursement of, *e.g.*, filing fees, mediation fees, and legal research costs).

The $21,769 expense total is modest for a case of this size and type. *See, e.g.*, *Home Depot*, 2016 WL 11299474, at *2 (approving $166,925 expense reimbursement in case involving theft of 40 million payment cards settled before motion to dismiss decided). Since the expense categories here are typical of those usually approved by courts and the amounts incurred by each firm are relatively modest, the expenses requested here are reasonable.

D. The Service Award Request is Reasonable

Plaintiffs request the court's approval of a $2,000 Service Award to each Class Representative for their time and effort pursuing the litigation on behalf of the Class. Defendant consents to funding these payments separately from the settlement amount. *See* SA §§ 7.1, 7.3.

The Class Representatives' efforts included, among other things, undergoing lengthy initial and follow-up interviews by Class Counsel to gather their facts; searching for, culling, and producing documents regarding their transactions with Salud, fraudulent activity on their accounts, out of pocket losses, and history with other data breaches; agreeing to burdensome evidence preservation obligations regarding hardcopy documents, emails, financial records, and other ESI; reviewing major case filings; monitoring the overall progress of the litigation; engaging in frequent

communications with Class Counsel; and approving the Settlement Agreement. Johns Decl. ¶ 10; Perry Decl. ¶ 10.

"A class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class." *O'Dowd*, 2019 WL 4279123, at *19 (citing *Tuten*, 41 F. Supp. 3d at 1010). "The reasonableness of a service award to a named Plaintiff is not generally listed as a factor to consider when deciding whether to approve a settlement." *Id*. (quoting *Thompson v. Qwest Corporation*, No. 17-cv-01745-WJM-KMT, 2018 WL 2183988, at *9 (D. Colo. May 11, 2018)). However, "reasonable incentive payments have become common for class representatives . . . ." *Id*. (citation omitted) (internal quotation marks and citations omitted). Factors to be considered when determining whether to approve an incentive award include: "(1) the actions that the class representative took to protect the interests of the class; (2) the degree to which the class has benefited from those actions; and (3) the amount of time and effort the class representative expended in pursuing the litigation." *Thompson*, 2018 WL 2183988, at *9.

The service provided by the Class Representatives in this action should not go without financial recognition. The Class Representatives were the principal catalysts to achieving the significant benefits to the class under the proposed Settlement. They participated in numerous meetings with their attorneys and stayed abreast of significant developments in the case. *See* Johns Decl. ¶ 10; Perry Decl. ¶ 10. And like Plaintiffs' expense request, the $4,000 in collective incentive awards – or $2,000 per Class Representative – will be paid separately from the consideration in the settlement agreement, and, therefore, will not detract from any settlement benefits made available to the Class. *See In re LG/Zenith Rear Projection TV Class Action Litig.*, No. 06- 5609 (JLL 2009 WL 455513, at *9 (D.N.J. Feb. 18, 2009) (approving incentive award that "will not

decrease the recovery of other class members."); *Edelen v. Am. Residential Servs., LLC*, No. DKC 11-2744, 2013 WL 3816986, at *16 (D. Md. July 22, 2013) (incentive award found reasonable, *inter alia*, where it "does not decrease the recovery available to other class members.").

A $2,000 incentive award is lower than those approved in numerous other data breach settlements. *See, e.g., Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-CV-01415-CMA-SKC, 2019 WL 6972701, at *2 (D. Colo. Dec. 16, 2019) (approving $2,500 incentive awards); *In re Ashley Madison Customer Data Security Breach*, No. 4:15-md-02669 (E.D. Mo.) (approving $5,000 incentive awards); *In re Arby's Rest. Grp., Inc. Data Sec. Litig*., No. 17-cv-01035, 2019 WL 2720818, at *1 (N.D. Ga. June 6, 2019) (approving $4,500 service awards for each of five plaintiffs in case that settled prior to depositions); *In re LinkedIn User Priv. Litig*., 309 F.R.D. 573, 592 (N.D. Cal. 2015) ($5,000 service awards where plaintiff "did not need to respond to any discovery" and "was not deposed"). Furthermore, the requested incentive awards of $2,000 is also below the amounts deemed reasonable by this Court in other class action settlements. *Thompson*, 2018 WL 2183988, at *3 ("A $5,000 incentive award is comparatively on the lower end of awards deemed reasonable."). Accordingly, the requested Service Awards are reasonable and should be granted.

III. CONCLUSION

Plaintiffs respectfully request that the Court approve Defendant's agreed upon payments of $550,000 in attorneys' fees and litigation costs and expenses, and $4,000 in Service Awards. A Proposed Final Order and Judgment approving both this request and the overall Settlement will be submitted to the Court with Plaintiffs' motion for final approval of the Settlement to be filed on November 13, 2023.

Dated: October 30, 2023

Respectfully submitted,

/s/Rick D. Bailey
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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2023, a true and correct copy of the accompanying document was filed via the Court's e-filing system for electronic service on all counsel of record and is available for viewing and downloading from the e-filing system.

By: */s/ Rick D. Bailey*
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