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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

RICHARD DANIELE, RICHARD GOSS and STEVE LANDI, individually, and on behalf of a class of similarly situated persons,

Plaintiffs,

v.

10UP, INC., a California Corporation; and DOES 1-50 inclusive,

Defendants.

Case No.: CGC-20-586506

CLASS ACTION

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, LITIGATION COSTS AND CLASS REPRESENTATIVE ENHANCEMENTS

Date: January 18, 2024
Time: 9:30 a.m.
Dept.: 302
Judge: Hon. Richard B. Ulmer

Case Filed: September 11, 2020
Trial Date: None

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs Richard Daniele, Richard Goss, and Steve Landi (together, "Plaintiffs") respectfully submit the following Memorandum in Support of their Request for Attorney Fees, Litigation Costs and Class Representative Enhancements.

I. INTRODUCTION

Plaintiffs and 10UP have reached a settlement resolving all claims on behalf of the proposed settlement class ("Class") and providing monetary benefits and data security services.[1] By this Motion, Plaintiffs seek an Order granting approval of attorney fees and costs, and an incentive award. The relevant facts and procedural history are set forth in detail within the concurrently filed Memorandum of Points and Authorities in Support of Final Approval.

Under the Settlement Agreement, Class Counsel may apply to the Court for an award of reasonable attorneys' fees and costs incurred in connection with the lawsuit, in an amount not to exceed $500,000. (Barenfeld PA Decl., Ex. 7, SAR, § V at p. 9.) Class Counsel is seeking $500,000 for their fees and costs. They are also requesting $30,000 for Incentive awards: $10,000 per named Plaintiff. The amount requested for fees, costs, and incentive awards will not diminish the $60 payment or the credit monitoring provided to Class Members.

II. COUNSEL'S FEE AWARD IS PROPERLY CALCULATED AS A PERCENTAGE OF THE FUND

Class Counsel seeks a fee and cost award for their successful prosecution and resolution of this action, calculated as 26% of the value made available to Class Members ($1,900,000.00), or alternatively 38% of the post-claim dollars to be paid by Defendant ($1,313,000.00). As stated by the California Supreme Court:

> [U]se of the percentage method to calculate a fee in a common fund case, where the award serves to spread the attorney fee among all the beneficiaries of the fund,

1 Unless otherwise noted, all exhibit references are to the two Declarations of Gabriel S. Barenfeld at a) preliminary approval ("PA"); and b) final approval (FA) ("Barenfeld Decl."). The parties' Settlement Agreement and Release ("SAR") and amendment thereto are attached as Exhibit 7 and Exhibit 14, respectively, to the Barenfeld PA Decl. filed in support of preliminary approval.

> does not in itself constitute an abuse of discretion. We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation (Citation) convince us the percentage method is a valuable tool that should not be denied our trial courts.
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> *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 503.

California decisions and federal courts have long recognized that an appropriate method for determining the award of attorneys' fees is based on a percentage of the total value of benefits afforded to class members by the settlement. *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 ("*Serrano* III"); *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; see also *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. The awarding of a fee based on a percentage of the common fund recovered is to "spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent v. Hughes Air West, Inc.*, *supra*, 557 F.2d at 769. The total settlement fund is calculated as either the value made available to Class Members ($1,900,000.00), or alternatively the post-claim dollars to be paid by Defendant ($1,313,000.00). Class Counsel is requesting a total fee award of $500,000, including litigation costs of $16,116.81.[2]

A. The Common Fund Doctrine

The Common Fund Doctrine is predicated on the principle of preventing unjust

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2 An attorney fee request in a claims-made class action settlement can be based on the potential value of the common fund available to the class, rather than just the amount claimed or paid out to class members. This is supported by various court rulings. *Lopez v. Youngblood*, 2011 WL 10483569 (E.D. California, September 02, 2011) ["Where there is a claims-made settlement, such as here, the percentage of the fund approach in the Ninth Circuit is based on the total money available to class members, plus costs (including class administrative costs) and fees. It is well established that, in claims made or class reversion cases where there is a maximum fund, and unclaimed funds revert to the defendant, it is appropriate to award class fund attorneys' fees based on the gross settlement fund."]; *Parker v. Time Warner*, 631 F.Supp.2d 242, 2009 WL 1940791 (E.D. New York, July 06, 2009).

enrichment. It provides that when a litigant's efforts create or preserve a fund from which others derive benefits, the litigant may require the passive beneficiaries to compensate those who created the fund. Both state and federal courts in California have embraced this doctrine. *Serrano v. Priest (Serrano III), supra*, at 35; *Cramptom v. Takegoshi* (1993) 17 Cal.App.4th 308, 317; *Vincent v. Hughes Air West, Inc.*, *supra*, at 769.

The Common Fund Doctrine is the oldest exception to the American rule, which prohibits fee shifting, that is, awarding attorneys' fees to the winning party from the losing party without statutory or contractual authorization.

> The Common Fund exception is grounded in the historic power of equity to permit the trustee of a fund or property (or a party preserving or recovering a fund for the benefit of others, as well as himself or herself) to recover costs, including attorney's fees. Those costs and fees are paid out of the fund or property itself, or directly from the other parties enjoying the benefit.
> R. Pearle, *California Attorney Fee Awards* (CEB) § 7.4, at 7-5.

In the present case, a common fund has been created and the requisites supporting payment of fees by the beneficiaries of that fund are satisfied. Under this doctrine, courts have recognized that class litigation is necessary to protect the rights of individuals whose injuries are too small to economically justify individual representation. In *Paul, Johnson, Alston & Hunt v. Gaulty* (9th Cir. 1989) 886 F.2d 268, 271, the Ninth Circuit embraced this principle when it stated:

> Since the Supreme Court's 1885 decision in *Central Railroad & Banking Co. of Ga. v. Pettus*, 113 U.S. 116 (1885), it is well settled that the lawyer who creates a common fund is allowed an extra reward, beyond that which he has arranged with his client, so that he might share the wealth of those upon whom he has conferred a benefit. The amount of such a reward is that which is deemed 'reasonable' under the circumstances.
> (*Id*.)

Accordingly, in determining a reasonable common fund fee award, courts should properly consider the fact that fees serve as an economic incentive for lawyers to bring class action litigation in order to achieve increased access to the judicial system for meritorious claims and to enhance deterrents to wrongdoing. *See*, A. Conte, *Attorney Fee Awards*, 2nd. Ed., § 104, at 6. Without prosecution on a contingent basis and use of the class action mechanism, the

courthouse door would effectively be closed to all class members due to the relatively small amount of their individual claims in relation to the enormous time and cost associated with class action litigation. When the Ninth Circuit held that the Common Fund Doctrine was available in ERISA cases, the court echoed the foregoing sentiment:

> Having determined that risk multipliers remain available in common fund cases after *Dague*, we further note that we have held, in a pre-*Dague* case, that a risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel 'had no sure source of compensation for their services . . . Moreover, we have observed that the need for such an adjustment is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent.'
>
> *Florin v. Nations Bank of Georgia* (9th Cir. 1994) 34 F.3d 560, 564.

When this case was originally filed it was "inescapably contingent." Further, the result was by no means guaranteed. Effective prosecution of this case was founded upon the risky contingent investment of time and expense.

B. All of The Factors Regarding Fee Requests Support The Requested Award

Fee determinations in both common fund and statutory fee situations are incapable of mathematical precision because of the intangible factors that must be resolved in the court's discretion based on the circumstances of each particular case. See, A. Conte, *Attorney Fee Awards*, 2nd Ed., § 207, at 44. In determining an appropriate fee in a common fund case, a court must decide, based on the unique posture of each case, what percentage of the common fund would most reasonably compensate class counsel given the nature of the litigation and the performance of counsel. *Paul, Johnson, Alston & Hunt v. Gaulty* (9th Cir. 1989) 886 F.2d 268, 272 (the benchmark percentage fee may be adjusted to account for the circumstances involved in this case.)

Courts apply a five-part test in calculating a reasonable percentage fee in common fund cases.

> (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases.
>
> *In re Omnivision Technologies, Inc*. (N.D. Cal. 2007) 2007 WL 4293467 at *9.

Here, each of these five factors strongly supports an award of the percentage fee requested in this case.

1. The Results Achieved

"The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award." *Omnivision*, 2007 WL 4293467 at *9; See also, *In re Heritage Bond Litig*. (C.D. Cal. June 10, 2005) U.S. Dist. LEXIS 13627, at *27-28.

Class Counsel obtained a fair and just result in this case for the Class Members considering the risk factors described below and in the Motion for Final Approval of Class Action Settlement. The Settlement is particularly advantageous to the Class Members because the proceeds will be distributed shortly as opposed to waiting additional years for a similar, or possibly, less favorable result. The absence of any objection to either the Settlement or the attorneys' fee request from any of the Class Members supports this finding.

Subject to the terms discussed below, 10UP will pay a $60 cash payment to Class Members who submitted a claim, as well as attorneys' fees, expenses, incentive awards, and administration costs. 10UP is also providing an opportunity for Class Members to enroll, for no cost to the Class, to receive twelve months of Credit Monitoring. (Barenfeld PA Decl., Ex. 7, SAR § III, pp. 7-8.) Those who enroll will receive one year of identity protection services offered by IDX™, which includes the following services: Triple Bureau Credit Monitoring & Alerts, Cyberscan Dark Web Monitoring, $1 Million Reimbursement Insurance, and Fully-Managed Identity Restoration. (*Ibid.*)[3] Also, each Class Member who allegedly was the victim of actual identity theft could submit an Extraordinary Loss Claim.

10UP's payment obligation is subject to an aggregate cap (or maximum amount) and various floors (or minimum amount). The payment obligation includes the cost of administration,

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[3] IDX's cost is $32.90 per month for an individual and $64.99 for families. Lower-level plans don't include enough to be considered comprehensive protection. IDX has several stand-out features with exceptional monitoring capabilities. IDX has extensive reviews showing it to be a top-rated and legitimate company providing protection services since 2003. IDX has over 40 million customers and has an A+ rating from the Better Business Bureau. The value of the identity protection services is equal to approximately $32.90 for 4,878 enrolled Class Members, or $160,486.

credit monitoring, Class Member Claims, service awards, fees, and costs. (Barenfeld PA Decl., Ex. 7, SAR, § VI-VII, pp. 10-11.) In essence, it is the all-in Settlement cost to 10UP.

The cap on 10UP's aggregate payment obligation is $1.9 million. If 10UP's obligations exceed the $1.9 million cap, costs of administration and credit monitoring are paid as a first and second priority, and all other claims, awards, fees, and costs are "summed and reduced on a pro rata basis" so that the aggregate cost amounts to $1.9 million. (*Id.* at p. 11.)

The aggregate floors depend on the number of claims made:

Number of Claims	**Floor**
Less than 2,200	$700,000
Between 2200 and 3700	$800,000
More than 3,700	$1,000,000

As shown in the concurrently filed Motion for Final Approval, the number of claims easily exceeds 3,700, which triggers the $1 million cash floor. But the total Settlement Benefits will not exceed the $1.9 million cash cap, so there will be ***no*** need to apply a pro rata reduction of the benefits to the Class Members. The credit protection service settlement agreement feature had a *projected* value in excess of the $1.9M cap (66,586 Class Members x $32.90) whereas the actual cost will be closer to $160,486 based on the claims received. The IDX credit monitoring cost to Defendant is in addition to the cash benefits. As noted in the Motion for Final Approval, the value of the settlement is as follows:

- Claim payments: $339,720 at $60 per claimant.
- Credit Monitoring: *projected* value exceeds the $1.9M cap; actual value $160,486.
- Admin. Costs: $165,082.36.
- Actual Damage Claims: $133,000.
- Attorney fees and Costs: $500,000.
- Enhancements: $30,000.

The Class Members also received a substantial benefit as the result of the settlement of this action both in terms of receiving the settlement proceeds much sooner and avoiding the risk of receiving nothing at all. See *Glass v. UBS Fin. Servs.* (N.D. Cal. Jan. 27 2007) 2007 U.S. Dist. LEXIS 8476 at *48 ("The early settlement of the instant action resulted in significant benefit to the class…. Class counsel achieved an excellent result for the class members by settling the instant action promptly.")

2. Risks of Litigation

"The risk that further litigation might result in Plaintiff not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees." *Omnivision*, 2007 WL 4293467 at *9. At the time this case was brought, the result was far from certain.

Plaintiffs assert they had a strong case at certification and on the merits. Plaintiffs' theory of liability under the CCPA presents predominant common questions, the answers to which are equally applicable to all Class Members. Specifically, Plaintiffs assert the facts are not in dispute as to whether Class Members PII was stored on Defendant's systems. Plaintiffs submit that the only question reasonably in dispute are a) the extent/categories of PII on Defendant's servers which was subject to the Data Breach, and b) whether Defendant's security policies and practices were reasonable. During litigation, Plaintiffs conducted and extensive investigation and discovery into the facts, including the relationship and contracts between SFERS and Defendant, and believe they would be able to make a strong showing that Defendant's security policies and practices were not reasonable and therefore Defendant is liable under the CCPA.

Defendant, on the other hand, both had filed a motion for summary judgment pending and would likely have contest class certification arguing that the effects of the breach were different for each Class Member, thus, requiring individual inquires which are not susceptible to class-wide resolution. Defendant would argue that while some Class Members may not have suffered consequences/damages, and may never, others have suffered losses the extent of which may have varied greatly between Class Members. Similarly, Defendant would argue that just because some Class Members suffered losses because of identity theft, it would be difficult to

conclude that the proximate cause of those losses traced back to Defendant's breach. Thus, notwithstanding Plaintiff's disclaiming a claim for actual damages in favor of statutory damagers, these factors would be relevant to the assessment of the amount of statutory damages which would make the determination of statutory damages unmanageable.

Defendant also had potential defenses on liability. Specifically, Defendant would argue its security procedures and practices were reasonable and appropriate. In discovery, Defendant pointed to security procedures that it had in place to protect its customers' PII. Defendant intended to argue that it is ultimately a question of reasonableness – not whether the security procedures were somehow impenetrable -- which is a standard no business could possibly attain. Defendant would also argue that the CCPA is a new statute, enacted effective January 1, 2020. Therefore, it would be unfair, unjust, confiscatory and possibly unconstitutional to impose statutory damages on it when there are no reported cases defining what the term "reasonable security procedures and practices" means in practice. In light of the security procedures in place in conjunction with the relative newness of the statutory damages aspect of the CCPA, Defendant would argue that if any statutory damages were awarded, they should be at the low end of the statutory range. Defendant also intended to argue that its investigation supported a conclusion that PII, as defined in the CCPA, may not have been downloaded/copied during the incident. Thus, it is Counsel's informed opinion that benefits of this Settlement outweigh the risk and that settlement at this juncture is in the best interests of the Class.[4]

3. The Skill Required and the Quality of Work

As set forth in the Declarations of Gabe Barenfeld and Matthew Righetti, Class Counsel consistently demonstrated high standards of professionalism, skill and ability. (Decl. of Barenfeld, ¶¶ 2; Declaration of Matthew Righetti ("Decl. of Righetti"), ¶¶ 20-24.).

Class Counsel Matthew Righetti has 36 years of experience prosecuting class actions. (Decl. of Righetti, ¶¶ 20-24.) Class Counsel Righetti has served as class counsel in numerous

[4] Plaintiffs refer to and incorporate the *Dunk/Kirk* Analysis in their Preliminary Approval Motion, which discusses the extensive risks of litigation the Plaintiffs and Plaintiffs' counsel confronted. (See Plaintiffs' PA Mot., Section II.D, at pp. 6-12.)

class actions in federal and state courts. (*Ibid*.) Class Counsel Righetti is recognized as an expert by his peers having been awarded the 2017 California Lawyer of the Year by the Daily Journal for his work on suitable seating litigation. (Righetti Decl., ¶ 5.) Class Counsel Righetti also has been regularly asked to speak on panels involving class action and employment issues for organizations such as the American Conference Institute, California Employment Lawyers Association, Bridgeport CEB, Industrial Relations Association and a wide range of Bar associations. (*Ibid*.)

Additionally, as set forth in the Barenfeld Declaration, Class Counsel with Nelson & Fraenkel LLP, similarly have extensive experience in prosecuting class action and data breach cases. (Decl. of Barenfeld, Ex. 1.)

Class Counsel brought their extensive and unique experience to this case and were able to employ it for the benefit of the class. Class Counsel demonstrated superior skill in focusing discovery and maneuvering the case toward relatively early settlement while avoiding substantial law and motion practice for the benefit of the Class.

4. The Contingent Nature of the Fee and the Financial Burden

This case was litigated on a contingent basis with all of the concomitant risk factors inherent in such an uncertain undertaking. (Decl. of Righetti) There is a substantial difference between the risk assumed by attorneys being paid by the hour and attorneys working on a contingent fee basis. The attorney being paid by the hour can go to the bank with his fee. *Powers v. Eichen* (9th Cir. 2000) 229 F.3d 1249, 1256. The attorney working on a contingent basis can only log hours while working without pay towards a result that will hopefully entitle him or her to a market place contingent fee taking into account the risk and other factors of the undertaking. *Id.* at 1257. Otherwise, the contingent fee attorney receives nothing. *Id*. In this case, Class Counsel subjected themselves to this contingent fee market risk in this all-or-nothing contingent fee case wherein the necessity and financial burden of private enforcement makes the requested award appropriate.

Counsel retained on a contingency fee basis, whether in private matters or in class action litigation, is entitled to a premium beyond his or her standard, hourly, non-contingent fee

schedule in order to compensate for both the risks and the delay in payment. The simple fact is that despite the most vigorous and competent of efforts, success is never guaranteed. *McKittrick v. Gardner* (4th Cir. 1967) 378 F.2d 872, 875. Indeed, if counsel is not adequately compensated for the risks inherent in difficult class actions, competent attorneys will be discouraged from prosecuting similar cases. *Steiner v. BOC Financial Corp*. (S.D.N.Y. October 10, 1980) 1980 U.S. Dist. LEXIS 14561 at *6-7.

Here, the contingent nature of the fee award, both from the point of view of eventual settlement and the point of view of establishing eligibility for an award, also warrant the requested fee award. A number of difficult issues, the adverse resolution of any one of which could have doomed the successful prosecution of the action, were present here. Attorneys' fees in this case were not only contingent but extremely risky, with a very real chance that Class Counsel would receive nothing at all for his efforts after having devoted significant time and advancing costs. (Decl. of Righetti.) In addition to Counsels' time, Counsel also advanced all costs. Especially in this type of litigation where the corporate defendants and their attorneys are well-funded, this can prove to be very expensive and risky. Because the risk of advancing costs in this type of litigation can be significant, it is therefore cost prohibitive to many attorneys. (Decl. of Righetti, ¶ 10.) Here, the financial burden undertaken by Class Counsel was not insubstantial by the time settlement was reached. Of course, the costs would have increased exponentially as the action progressed if no settlement had been reached.

5. Awards in Similar Cases

The attorneys' fees requested by Class Counsel are within the range of fees awarded in comparable cases. A review of class action settlements shows that the courts have historically awarded fees in the range of 20% to 50% depending upon the circumstances of the case. Class Counsel's requested fees are 26% of the value made available to Class Members ($1,900,000.00), or alternatively 38% of the post-claim dollars to be paid by Defendant ($1,313,000.00). These percentages are within the range of reasonableness given the results obtained for the Class, the risks undertaken, and the skill of the prosecution. In *In re Warner Communications Sec. Lit.* (S.D. N.Y. 1985) 618 F.Supp. 735, 749-50, the court concluded that

percentage fees in common fund cases range from 20% to 50%. Professor Newberg is in accord:

> No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.
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> Newberg, *Newberg on Class Actions*, 3rd Ed., § 14.03, at 14-13.

C. Plaintiff's Request for Attorneys' Fees is Reasonable By A Lodestar Cross-Check

Plaintiff's fee request is also reasonable based on the lodestar analysis as a final "cross-check on the percentage method." *In re Washington Pub.Power Supply Sys. Sec. Litig*. (1994) 19 F.3d 1291, 1296-1298. Where the lodestar method is used as a cross-check, it can be performed with a less exhaustive cataloguing and review of counsel's hours. *See In re Rite Aid Corp. Secs. Litig*. (3d Cir. 2005) 396 F.3d 294, 306 ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting."); *In re Immune Response Sec. Litig*. (S.D. Cal. 2007) 497 F.Supp.2d 1166 ("Although counsel have not provided a detailed cataloging of hours spent, the Court finds the information provided to be sufficient for purposes of lodestar cross-check."). The lodestar method is calculated by multiplying "the number of hours reasonably expended on the litigation … by a reasonable hourly rate." *In re Bluetooth* (9th Cir. 2011) 654 F.3d 935, 941.

1. Class Counsels' Hourly Rates.

In terms of the hourly rate, Class Counsels' hourly rates have been approved and are reasonable rates for the qualifications and experience of the attorneys. These rates are supported by the extensive and specialized experience brought by Class Counsel. It is consistent with hourly rates for other plaintiff's counsel approved by courts in numerous class action settlements. Having reviewed the hourly rates of dozens of law firms in California and elsewhere, the requested rate is consistent with market rates for comparably qualified and experienced counsel handling similar civil litigation. (Righetti Decl., ¶¶ 7-19; Decl. of Barenfeld FA.)

Class Counsel has worked on this case for several years. During this time, Class

Counsel's respective offices invested nearly 500 hours in prosecuting this case on behalf of the Class. (Decl. of Barenfeld, ¶ 5; Decl. of Righetti, Ex. 1). Class Counsel reasonably expects to incur an additional many more hours in order to carry out all the terms of the settlement for which they will not seek additional compensation for. Class Counsel will be spending this time on such activities as: Preparing for and attending the hearing on final approval; conferring with the Settlement Administrator and reviewing its reports; communicating with Plaintiffs; communicating with Class Members prior to and after final approval on a variety of issues including, but not limited to, the status of the Settlement, status of claims, explaining the Settlement, handling lost checks, and address updates; communicating with defense counsel; handling cy pres issues, resolving disputes; and, generally carrying out the terms and conditions of the Settlement.

Accordingly, Class Counsel's combined lodestar is currently $434,451.25 in fees, or $450,000.00 including costs. (Decl. of Barenfeld, ¶ 5; Decl. of Righetti, Ex. 1.) The time spent and the fees incurred were reasonable and necessary for the successful prosecution of this case. Counsel's detailed time records were kept contemporaneously. (*Ibid*.) Due to the length of time this case has been pending and the amount and type of activities that were needed to be performed, not all time was captured in Counsel's time records. Class Counsel estimates that up to 5% of the firm's time was not recorded. (*Ibid*.)

A summary of Class Counsels' lodestars are set forth in the Decl. of Barenfeld FA, ¶ 5 and Decl. of Righetti, Ex. 1.

2. Multiplier Is Appropriate

In common fund cases, courts frequently apply multipliers to the lodestar taking into account a variety of factors, including quality of the representation, the novelty and complexity of the issues, the results obtained and the contingent risk presented. *Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 489. "Courts [] routinely enhance[] the lodestar to reflect the risk of non-payment in common fund cases. Such an enhancement mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency

cases." *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d, 1043, 1051. Multipliers can range from 2 to 4 or even higher. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255; *see also, In re Ret. Cases* (Cal. Ct. App. Nov. 4, 2003) 2003 WL 22506555, at *8 (affirming 4.0 multiplier in determining statutory fees); *Steiner v. American Broad. Co.* (9th Cir. 2007) 248 Fed.Appx. 780, 783 (affirming fee award where the lodestar multiplier was 3.65).

Here, Plaintiff is requesting a modest multiplier of 1.1. This was a novel and complex class action under the relatively new CCPA. Class Counsel, having dedicated much of their careers prosecuting class actions, had the requisite skill to pivot and litigate a privacy action under the CCPA involving theft of California residents' PII. Leveraging their experience, skill and reputation as litigators, Class Counsel were able to efficiently litigate this action and resolve it at mediation prior to certification. To the extent early settlement suppressed their lodestar, Class Counsel should not be punished for litigating efficiently and effectively to achieve the instant result. Indeed, throughout the litigation, Class Counsel bore a high contingent risk where they could possibly obtain no compensation in the event Defendant was to prevail. Lastly, there has been no objection by the Class regarding Class Counsel's requested attorneys' fees. Thus, the 1.1 multiplier is warranted, and the lodestar cross-check demonstrates that the requested $500,000.00 combined fee and cost request is fair and reasonable.

D. Class Counsel's Costs Were Reasonably Incurred.

Class Counsel has incurred $16,116.81 in combined costs to date. (Decl. of Barenfeld; Decl. of Righetti.) Class Counsels' expenses include the amounts paid for service of process, legal research charges, travel expenses, mediation fees, court fees and delivery charges, all of which are costs normally billed to and paid by the client. These costs were reasonably incurred in the prosecution of this matter and could not have been recovered if this case had been lost. (Decl. of Barenfeld; Decl. of Righetti.). These costs are inclusive of the $500,000 attorney fee request (i.e., not on top of the $500,000).

E. The Class Representative Should Receive the Requested Service Award

Class Counsel respectfully submits that for their service as the Class Representatives, Plaintiffs should be awarded $10,000 each. Defendant does not oppose this service award and

the Court has preliminarily approved this amount. The requested award was disclosed to the Class Members and not one Class Member objected. Here, Plaintiffs placed the interests of the Class before their own. Plaintiffs also retained experienced counsel and actively participated in the litigation throughout its pendency. (*Ibid*.) Plaintiffs are retired San Francisco police officers who assisted Class Counsel throughout the course of the litigation and who subordinated their own personal interests to the interests of the Class.

Plaintiffs assisted in the prosecution of this action by educating Class Counsel about the data breach and conducting necessary and important investigation work. Plaintiffs further assisted by providing documents regarding the data breach which were instrumental in Class Counsels' understanding of the case. Plaintiffs also participated in the action throughout its pendency, including the mediation and settlement processes.

In addition to Plaintiffs' active participation and assistance in the prosecution of this action, Plaintiffs knowingly gave up their right to prosecute his own individual potential claims against Defendant to represent the interests of the putative class without any conflict. Pursuant to the Settlement, Plaintiffs have agreed to execute a general release of all claims with a Civil Code section 1542 waiver. The representatives also exposed themselves to the risk of a cost and/or fee award in the event the case was unsuccessful. In doing so, Plaintiffs demonstrate their commitment to putting the interests of the Class above their own individual interests, including the associated sacrifice of viable individual claims. Thus, Class Counsel recommends that the requested and modest enhancement payment to Plaintiffs is fair, adequate and reasonable under these circumstances.

The payment of service awards to successful class representatives is appropriate and the amount of $10,000 is well within the currently accepted range. *See, e.g., Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 299-300 (incentive award of $50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig*. (S.D. Ohio 1990) 130 F.R.D. 366 (two incentive awards of $55,000, and three incentive awards of $35,000); *Brotherton v. Cleveland* (S.D. Ohio 2001) 141 F.Supp.2d 907, 913-14 (granting a $50,000 service award); *Enter Energy Corp. v. Columbia Gas Transmission Corp.* (S.D. Ohio 1991) 137 F.R.D. 240 ($50,000 awarded to each

class representative). *Glass v. UBS Fin. Servs.*, (N.D. Cal. Jan. 27 2007) 2007 U.S. Dist. LEXIS 8476 at *51-*52 (awarding $25,000 service award in FLSA overtime wages class action); *Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, 1016 (affirming $25,000 service award to class representative in ERISA case).

Plaintiffs' efforts in bringing the lawsuit have conferred a substantial benefit on all Class Members. As such, Class Counsel respectfully requests that the Court approve the requested service award.

III. CONCLUSION

The representation of the Class provided by Class Counsel has been wholly contingent. The fee request is well within the realm of reasonableness for fee requests approved by California and federal courts given the efforts expended in this case and the stage of proceedings at the time of the Settlement. Moreover, Class Counsel undertook great risks on a contingent fee basis and achieved an outstanding result for the benefit of Class Members. Based on the foregoing, Class Counsel respectfully requests approval of the application for award of attorneys' fees and costs. It should be noted that Class Counsel will finish the prosecution of this action including the disbursement of funds, final accounting and defense of an appeal, if any, without a subsequent attorney's fee request. As well, for the reasons set forth herein an enhancement for the Plaintiffs is appropriate and reasonable.

Respectfully submitted,

Dated: November 20, 2023

RIGHETTI GLUGOSKI, P.C.
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