IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

IN RE: T-MOBILE CUSTOMER DATA SECURITY BREACH LITIGATION	)	MDL No. 3019
	)	Master Case No. 4:21-md-03019-BCW

PLAINTIFFS' MOTION AND SUGGESTIONS IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES AND SERVICE AWARDS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTRODUCTION

Class Counsel have dedicated substantial time and expense on a purely contingent basis to deliver one of the largest data breach settlements of all time—one that creates a $350,000,000 non-reversionary fund and requires T-Mobile to spend an additional $150,000,000 over the next two years to improve data security. Counting those two figures alone, the settlement is worth $500,000,000. The extensive Identity Defense Services and Restoration Services, also made available to every Class Member, push the value of the benefits conferred on the Class even higher.

Class Counsel obtained this historic result in the face of numerous risks, including navigating a novel and rapidly developing legal landscape under multiple states' varying laws and T-Mobile's potential arbitration defenses, among other obstacles, all of which likely would have presented considerable litigation challenges and uncertainty. Had the case not settled when it did, there assuredly would have been protracted, tooth-and-nail litigation with sophisticated defense counsel that could have extended this case another half decade or more, with no guarantee of achieving a better (or even comparable) result. The failure to reach a settlement at this stage of the litigation would have meant fierce and extended motion practice, including many months of fact discovery and expensive expert discovery, the potential for interlocutory appeals, and lengthy stays of the litigation. At every turn, the threat of non-recovery for the Class would have been significant. Obtaining this recovery required committed and engaged counsel who could both recognize these challenges and communicate the common interest with T-Mobile in overcoming them to successfully resolve this case at this early juncture.

To compensate Class Counsel for achieving the extraordinary result that might normally only be obtained following a full and successful litigation on the merits and appeal, Class Counsel respectfully request, pursuant to Federal Rules of Civil Procedure and the negotiated Settlement

Agreement, a fee of 22.5%[1] of the $350 million cash Settlement Fund (or 15.75% of T-Mobile's total cash commitment of $500 million) and expenses in the amount of $147,982.55. Given the extraordinary results in this case, the fee request is reasonable and should be approved under well-established Eighth Circuit's precedent. A lodestar crosscheck, although not required (and disfavored by several courts), also supports the requested fee award. Furthermore, Class Counsel's expenses were reasonable and necessarily incurred on behalf of the Class. Thus, Class Counsel respectfully request that their Motion for fees and expenses be approved in full.

Class Counsel also request that the Court approve modest service awards of $2,500 to each Class Representative, as provided by the Settlement, to compensate them for their efforts on behalf of the Class. The Class Representatives were not only victims of the data breach, but also provided key support to the litigation, including helping to develop and review the factual allegations in the complaint, and providing key guidance with respect to the Settlement. The awards are both legally and factually warranted.[2]

FACTUAL BACKGROUND

On August 16, 2021, T-Mobile announced a data breach initially thought to affect the personal identifying information ("PII") of 50 million of its past, current, and prospective customers ("T-Mobile Data Breach").[3] (Doc. 128, Compl. ¶¶ 6, 98.) A November 2021 T-Mobile

[1] The Settlement Agreement allows Class Counsel to request up to 30% of the Settlement Fund. Following consultation with experts and review of the case law set forth in this Memorandum, however, Class Counsel conservatively request a reduced fee of 22.5%. (*See* Ex. 1, Class Counsel Declaration, ¶¶ 17, 29).

[2] In support of this motion, Plaintiffs rely upon a Declaration of Class Counsel (Ex. 1), as well as the Declaration of Brian Fitzpatrick (Ex. 2). Additionally, Class Counsel rely upon prior declarations, including from Class Counsel (Doc. 158-3), and from Gerald Thompson on behalf of Pango, the provider of the Identity Defense Services and Restoration Services (Doc. 158-7).

[3] Consistent with the 2018 amendments to Rule 23 calling for "frontloading" of information related to a class settlement, Plaintiffs' suggestions in support of preliminary approval and its supporting

filing with the Securities and Exchange Commission admitted that an additional 26 million individuals' PII had been compromised. (*Id.* ¶ 104.) T-Mobile's customers' PII appeared on the dark web for sale, and many customers suffered actual and attempted identity theft and fraud. (*Id.* ¶¶ 8–71, 135–48.)

Class Counsel and other attorneys filed dozens of lawsuits across the country.[4] Following motions practice before the Judicial Panel on Multidistrict Litigation ("JPML"), the litigation was centralized before this Court on December 3, 2021. (JPML Doc. 98.) After an application process, this Court appointed three Co-Lead Class Counsel and a Plaintiffs' Executive Committee (Doc. 102.) Class Counsel and the Executive Committee thoroughly vetted hundreds of potential class representatives, investigated the factual circumstances of the data breach, researched the substantive laws of every state, coordinated with other counsel representing individuals who had filed actions against T-Mobile, and subsequently filed a consolidated 336-page amended complaint on May 11, 2022. (Doc. 128.) Class Counsel then negotiated various discovery orders and exchanged numerous documents in extensive informal discovery with T-Mobile to ensure meaningful settlement discussions were possible. (Doc. 158-3, ¶ 23.) Following two full days of hard-fought negotiation overseen by a highly respected retired federal magistrate judge, Class Counsel and T-Mobile reached an agreement in principle to the terms that eventually became the final Settlement Agreement. (*Id.* ¶ 24.)

In the months since the Court granted preliminary approval of the settlement and approved notice, Class Counsel have remained hard at work. Class Counsel have spent considerable time

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documentation describe the background of this litigation and Class Counsel's work to that point in greater detail.

[4] Class Counsel's work in delivering this settlement is well documented in their declarations. (Doc. 158-3, ¶¶ 12–26; *see also* Ex. 1, ¶¶ 3–16.)

overseeing the claims and notice programs, including negotiating the terms and specifics of the notice; answering questions from Settlement Class Members; and working on necessary papers to be filed before the final approval hearing. (Ex. 1, ¶¶ 26-28.)

Importantly, Class Counsel's work will not end once the settlement is finally approved or even after any potential appeals are resolved. (*Id.* ¶¶ 41, 53-54.) Class Counsel's oversight obligations and other responsibilities will continue until the settlement is fully implemented, which will not occur until many years in the future. (*Id.*) Identity Defense Services and Restoration Services will be available to Class Members for two more years following the effective date of the Settlement. (*Id.* ¶ 22.) And the claims administration program will continue throughout this entire period. (*See id.* ¶ 28.) Once the settlement administrator begins verifying the claims that have been and will be made, Class Counsel will need to monitor the process, communicate with impacted Settlement Class Members, and participate in the dispute resolution process established by the Settlement. (*Id.* ¶ 28.) Class Counsel anticipate incurring lodestar of at least $2,200,000 in ongoing time expended to monitor and implement the Settlement after this petition is filed. (*Id.* ¶ 54.)

ARGUMENT

I. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS' FEE.

A. The Percentage-of-the-Fund Approach.

When Class Counsel have negotiated a class action settlement, they are entitled to petition the Court to award attorneys' fees and costs for their success. "Under the 'common fund' doctrine, Class Counsel is entitled to an award of reasonable attorneys' fees from the settlement proceeds." *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019) (citing Fed. R. Civ. P. 23(h); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

District courts in this Circuit typically use the "percentage-of-the-fund method" in awarding attorneys' fees in a common-fund case such as this. *See, e.g.*, *Rawa v. Monsanto Co.*,

934 F.3d 862, 870 (8th Cir. 2019). "In the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well established.'" *In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litig. ("Xcel Energy")*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999)). Indeed, some courts have suggested that using the "'percentage of the fund method may be preferable.'" *Barfield v. Sho-Me Power Elec. Co-op.*, No. 2:11-CV-4321-NKL, 2015 WL 3460346, at *3 (W.D. Mo. June 1, 2015) (quoting *West v. PSS World Med., Inc.,* No. 4:13 CV 574 CDP, 2014 U.S. Dist. LEXIS 57150, at *3, 2014 WL 1648741 (E.D. Mo. Apr. 24, 2014)); *see also Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245 (8th Cir. 1996) ("[T]he Task Force recommended that the percentage of the benefit method be employed in common fund situations." (citing *Court Awarded Attorneys Fees, Report of the Third Circuit Task Force,* 108 F.R.D. 237, 255 (3rd Cir. 1985)).[5]

"[T]he ultimate reasonableness of the award is evaluated by considering relevant factors from the twelve factors listed in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 719–20 (5th Cir. 1974)." *In re Target Corp. Customer Data Security Breach Litig. ("Target")*, 892 F.3d 968, 977 (8th Cir. 2018) (cleaned up). To be sure, "[m]any of the *Johnson* factors are related to one another and lend themselves to being analyzed in tandem." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 886 (S.D. Iowa 2020). Therefore, courts in the Eighth Circuit often focus on the

[5] In this regard, the percentage-of-the-fund method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," while "[i]n contrast, the lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (quotations omitted); *see also Health Republic Ins. Co. v. United States*, 156 Fed. Cl. 67, 76 (2021) (noting the lodestar method "'is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation,' and it creates incentives for inefficiency" (quoting *Manual for Complex Litigation* § 14.121 (4th ed. 2004))).

most relevant *Johnson* factors in evaluating fee requests. *See Xcel Energy*, 364 F. Supp. 2d at 993; *Tussey*, 2019 WL 3859763, at *2; *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010); *see also Hardman v. Bd. of Educ. of Dollarway, Arkansas Sch. Dist.*, 714 F.2d 823, 825 (8th Cir. 1983).[6] These are discussed in more detail below.

B. The Percentage of the Class Benefit Requested by Class Counsel.

The requested fee of $78.75 million represents 22.5% of the $350 million common fund. (Ex. 1, ¶ 17.) However, that percentage is not a true measure of the fee as a percentage of the benefits conferred on the Class as it fails to account for other significant settlement benefits. When considering the entirety of the settlement's benefits, the fee percentage is much lower.

For example, in addition to the $350 million fund, T-Mobile has committed to investing another $150 million in data security for 2022 and 2023 above baseline levels. (*Id.* ¶ 24.) This benefits all members of the Class by reducing the risk of another data breach and thus should be considered as a meaningful benefit to the Class. *See Equifax Inc. Customer Data Sec. Breach Litig. ("Equifax")*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *38 (N.D. Ga. Mar. 17, 2020) (explaining that courts "routinely consider" the value of "business practice changes" including the "minimum" increased expenditure on "data security and related technology"), *aff'd in part, rev'd in part and remanded*, 999 F.3d 1247 (11th Cir. 2021), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431, 211 L. Ed. 2d 254 (2021), and *cert. denied sub nom. Watkins v. Spector*, 142 S. Ct. 765, 211 L. Ed. 2d 479 (2022); *In re Anthem, Inc. Data Breach Litig.*, Case No. 15-MD-02617-LHK, 2018 WL 3960068, at *28 (N.D. Cal. Aug. 17, 2018) (finding that "minimum cybersecurity expenditures" were "properly considered in determining an appropriate attorneys' fees award").

[6] The nature of the attorney-client relationship does not apply and thus can be disregarded or treated as neutral in considering the fee.

When the larger cash expenditure by T-Mobile is considered, the requested fee falls to just 15.75% of the cash considerations in the Settlement. (Ex. 1, ¶ 44.)

Moreover, it is also appropriate to consider the retail value of the Identity Defense Services and Restoration Services the Settlement provides, which push the value of the settlement much higher. *See Equifax*, 2020 WL 256132, at *38 ("[C]ourts have often recognized the benefit of credit monitoring, use its retail cost as evidence of value, and consider that value in awarding fees."). The Identity Defense Services and Restoration Services the Settlement provides are sold at retail for $96 per year. (Ex. 1, ¶ 25; Doc. 158-7, ¶ 5.) Thus, the value of this benefit is approximately $146 million for every 1% of Settlement Class Members who elect to receive those services. (Ex. 1, ¶ 25; Doc. 158-3, ¶ 37.) In other words, if just 1% of Settlement Class Members take advantage of Identity Defense Services and Restoration Services, the requested fee would be around 12% of the Settlement's total value. (Ex. 1, ¶ 25.)

C. The Fee Is Reasonable and Supported by the *Johnson* Factors.

Whether contemplated as 22.5% of the $350 million cash fund, 15.75% of T-Mobile's $500 million cash outlay, or some lower percentage of the larger sum of the benefits conferred on the Class, the requested fee is more than reasonable under the *Johnson* factors.

(1) The benefits conferred on the Settlement Class are extraordinary.

First and foremost, the settlement represents a significant recovery for the Class. "In considering a fee award, the 'most critical factor' is 'the degree of success obtained.'" *In re UnitedHealth Group Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1104 (D. Minn. 2009) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 436 (1983)).

The $350 million settlement fund is one of the largest data breach settlements in history, second only to the $380 million fund in *Equifax*. Importantly, however, the per capita recovery is much higher here than in *Equifax*—nearly double—as there are approximately 76.6 million Class

Members here, and there were more than 147 million class members in *Equifax*. *See Equifax*, 2020 WL 256132, at *1, *34 n.50 (weighing the high per capita recovery for the class in favor of approving the fee application and comparing the *Equifax* settlement to the settlement in *In re Anthem* which "resulted in a $115 million fund for a class of 80 million individuals"); *see also In re Yahoo! Inc. Customer Data Security Breach Litig.*, Case No. 16-MD-02752-LHK, 2020 WL 4212811, at *33–34 (N.D. Cal. July 22, 2020) (considering the Yahoo! settlement fund an "unremarkable" recovery in part based upon a comparison of the $117.5 million settlement for 194 million class members there with the much larger "per-capita recovery" of the $115 million settlement for 79 million class members in *Anthem*). The settlement here is *three times larger* than the *Anthem* settlement, which involved a similar number of class members. *See Anthem*, 2018 WL 3960068, at *10 ("Whether one looks at absolute or per-capita numbers, a settlement fund of $115 million for approximately 79.15 million class members is significant.").

The larger per capita recovery here yields tangible benefits. For instance, the fund here provides cash reimbursement up to $25,000 for unreimbursed out-of-pocket payments spent to avoid or recover from fraud or identity theft that is fairly traceable to the T-Mobile Data Breach.[7] That is 25% more than the $20,000 compensation for out-of-pocket of losses in *Equifax*. *See Equifax*, 2020 WL 256132, at *34. The Settlement also allows for Class Members to obtain

[7] As set forth in Plaintiffs' Motion for Preliminary Approval, the fund covers a broad array of costs, including but not limited to: money spent to place or remove a security freeze on credit reports; money spent on credit monitoring or identity theft protection; unreimbursed costs, expenses, losses or charges paid because of identity theft or identity fraud, falsified tax returns, or other alleged misuse of personal information; professional fees incurred to address identity theft, fraud, or falsified tax returns that are fairly traceable to the data breach; and other miscellaneous expenses fairly traceable to the data breach. (Doc. 158, at 6–7; Doc 158-3, ¶ 30.)

expensive Identity Defense Services and Restoration Services.[8] As with compensation for out-of-pocket losses and lost time, these services help prevent more serious losses from occurring and will make Class Members whole if losses occur. The $350 million settlement fund also reimburses Class Members for time (up to 15 hours, depending on the circumstances) spent to avoid or recover from fraud or identity theft, or other misuse of Class Member personal information, that is fairly traceable to the T-Mobile Data Breach. It does so at the greater of $25 per hour or the Class Member's hourly wage if the Class Member took time off work.

These benefits are valuable. The Settlement is designed to make Class Members whole for time spent and expenses incurred to avoid fraud or to recover from identity theft and other harm. As described below, it is difficult to litigate that aspect of a claim on a disputed class-wide basis. Moreover, the Settlement here also provides for an alternative cash payment of $25 for Class Members—and $100 for Settlement Class Members who resided in California at the time of the data breach. Not only may Settlement Class Members elect to obtain the alternative cash payment and forgo submitting documentation to obtain out-of-pocket losses and/or lost time, those who do make claims for out-of-pocket losses and/or lost time will be entitled to the *greater* of the approved claim for out-of-pocket losses and/or lost time or the amount available under the alternative cash payment provision. And no money will revert to T-Mobile. If the value of the approved claims is

[8] The suite of Identity Defense Services includes two years of credit monitoring through TransUnion, monthly credit score, real time inquiry/authentication alerts, high risk transaction monitoring, dark web monitoring, USPS address change monitoring and alerts, lost wallet protection, security freeze capability, $1,000,000 in comprehensive identity theft insurance, customer support and victim assistance. Restoration Services includes two years of access to U.S.-based fraud resolution specialists who can assist with important tasks such as placing fraud alerts with the credit bureaus, disputing inaccurate information on credit reports, scheduling calls with creditors and other service providers, and working with law enforcement and government agencies to dispute fraudulent information. (Doc. 158, at 7–8; Doc 158-3, ¶¶ 31–32.)

less than the total value of the net Settlement Fund, qualified claimants will receive additional compensation on a *pro rata* basis.

Independent of the $350 million settlement fund, T-Mobile has agreed to an incremental spending commitment of at least $150 million for data security and related technology, in the aggregate, for years 2022 and 2023 above its previously budgeted baseline. These are the kinds of "meaningful" business changes that justify a greater fee award. *See Xcel Energy*, 364 F. Supp. 2d at 1003. This is so because they will "provide[] a substantial benefit to all class members." *Equifax*, 2020 WL 256132, at *34.

(2) Class Counsel faced numerous and substantial risks.

Making the degree of success even more remarkable, Class Counsel obtained an outstanding settlement in the face of substantial risks. "'Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees.'" *Yarrington*, 697 F. Supp. 2d at 1062 (quoting *Xcel Energy*, 364 F. Supp. 2d at 994). "Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to consider pursuing a case such as this." *Tussey*, 2019 WL 3859763, at *3. Critically, "[t]he risks plaintiffs' counsel faced must be assessed as they existed in the morning of the action, not in light of the settlement ultimately achieved at the end of the day." *Xcel Energy*, 364 F. Supp. 2d at 994.

One risk in particular stands out and made this case particularly undesirable to many lawyers: unlike in other data breach cases, most Class Members are current and former T-Mobile customers and T-Mobile asserted that its Terms and Conditions of Services require customers to individually arbitrate their claims against T-Mobile. Throughout the litigation, T-Mobile contended that these arbitration provisions were ironclad—and the provisions may indeed have been enforceable for a significant number of Class Members. The combination of T-Mobile's arbitration and other defenses, along with potentially individualized damages, make this litigation

precisely the kind that is difficult or impossible to redress without a class settlement. *Cf. Carnegie v. Household, Int'l*, 376 F.3d 656, 661 (7th Cir. 2004) ("It would hardly be an improvement to have in lieu of this single class action 17 million suits each seeking damages of $15 to $30. . . . The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits . . . ." (emphasis in original)).

Apart from what would surely have been a fiercely litigated motion to compel arbitration, Class Counsel faced other daunting risks. For one, T-Mobile disputed whether the majority of Class Members had suffered any legally cognizable injuries, including with respect to risk of future identity theft, *see Hammond v. The Bank of New York Mellon Corp.*, No. 08 Civ. 6060 (RMB) (RLE), 2010 WL 2643307, at *13 (S.D.N.Y. June 25, 2010) (collecting cases), diminution in value of personal information, *see In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 806 F.3d 125, 149, 152 (3d Cir. 2015), lost time spent preventing or recovering from identity theft, *see Pruchnicki v. Envision Healthcare Corp.*, 845 F. App'x 613, 614–15 (9th Cir. 2021) (Mem.), and out-of-pocket costs (to the extent they could not be shown to be reasonable or necessary), *see Gardiner v. Walmart, Inc.*, Case No. 20-cv-04618-JSW, 2021 WL 4992539, at *4–5 (N.D. Cal. July 28, 2021). T-Mobile would also have vigorously disputed whether Class Members' damages were proximately caused by its conduct since: (1) the data breach was the result of a criminal, third-party cyberattack; and (2) the numerous other breaches of PII (including, in some cases, the personal information of hundreds of millions of individuals) in other data breaches spread across other sectors would make it difficult to trace any instance of identity theft to the T-Mobile Data Breach as opposed to another data breach.

Furthermore, T-Mobile indicated it would dispute whether it owed a duty to safeguard the confidential PII of its current, former, and prospective customers, and would have fiercely litigated

the Class's negligence, contract/quasi-contract, invasion of privacy, and statutory claims. The merits issues of various claims in data breach litigation are developing, sometimes in divergent ways in different states. This would not only have made the litigation more complex, but it also could also have exposed some of the Class's claims to challenging summary judgment motions.

In short, this litigation would have entailed serious risks for the Class and Class Counsel at every turn. To be sure, Class Counsel strongly believe they could have overcome these risks—but doing so would not have been easy, and success was far from guaranteed. Even if Plaintiffs were successful, appeals would have been inevitable. In this regard, Class Counsel took this case entirely on a contingency basis, which weighs in favor of approving the requested fee. *See Caligiuri v. Symantec Corp.*, 855 F.3d 860, 866 (8th Cir. 2017) (affirming fee award where lower court reasoned, in part, that "[p]laintiffs' counsel, in taking this case on a contingent fee basis, was exposed to significant risk"); *accord Equifax*, 2020 WL 256132, at *33 ("This action was prosecuted on a contingent basis and thus a larger fee is justified."); *see also Target*, 892 F.3d at 977 n.7 (considering "whether the fee is fixed or contingent"). If Class Counsel had not achieved a recovery, they would have received nothing and instead would have suffered a substantial out-of-pocket loss. The Class itself would have recovered nothing as well.

(3) Data breach litigation, particularly on a national scale, is novel and complex.

Data breach litigation, particularly when it involves a breach of consumer data on a nationwide scale by a company the size of T-Mobile, is difficult and presents cutting edge issues. *See Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases . . . are particularly risky, expensive, and complex."); *accord In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, MDL No. 2807, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019).

The "novelty and difficulty of the issues" here favor approving the requested fee, particularly because the novelty and difficulty "created significant risk for Class Counsel." *George v. Academy Mortgage Corporation (UT)*, 369 F. Supp. 3d 1356, 1378 (N.D. Ga. 2019). Indeed, the risks identified above illustrate the novelty and difficulty of the issues in this case. *See Equifax*, 2020 WL 256132, at *32 ("[T]his case involved many novel and difficult legal questions, such as the threshold issue of whether [the defendant] had a duty to protect plaintiffs' personal data, whether plaintiffs' alleged injuries are legally cognizable and were proximately caused by the [data] breach, . . . [and] the meaning of various state consumer protection statutes . . . .").

As was true just over two years ago, "[t]he law in data breach litigation remains uncertain and the applicable legal principles have continued to evolve . . . ." *Id.* There have been a handful of recent decisions on motions to dismiss data breach claims upholding these claims. *See, e.g.*, *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 440 F. Supp. 3d 447 (D. Md. 2020); *In re Capital One Consumer Data Sec. Breach Litig.*, 488 F. Supp. 3d 374 (E.D. Va. 2020); *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 362 F. Supp. 3d 1295 (N.D. Ga. 2019). However, other recent decisions have gone the other way. *See Pruchnicki*, 845 F. App'x at 614–15; *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 806 F.3d at 149, 152; *Gardiner*, 2021 WL 4992539, at *4–5; *Hammond*, 2010 WL 2643307, at *13. During this time, state law statutory claims have continued to evolve, creating thorny questions of whether and how the new statutes can be applied to data breach litigation.

(4) Class Counsel's efficient resolution of this litigation.

The timeliness with which Class Counsel obtained this extraordinary relief on behalf of the Class is independently valuable and weighs in favor of a substantial fee.[9] Efficiency—and providing expeditious relief—is best for the Class, the Court, and the Defendant. *See Yarrington*, 697 F. Supp. 2d at 1062 ("[T]he Settlement Class will receive settlement benefits faster than they would receive awards obtained after trial and a likely appeal."); *Xcel Energy*, 364 F. Supp. 2d at 1001 ("[C]ontinued litigation, which could have extended several years, would have delayed recovery by the Class. Instead, the settlement immediately confers benefits."). Indeed, "time limitations imposed by the client or the circumstances" (*see Target*, 892 F.3d at 977 n.7) is a factor weighing in favor of a larger fee award. *See Equifax*, 2020 WL 256132, at *33 ("Priority work done under significant time pressure is entitled to additional compensation and justifies a larger percentage of the recovery."); *accord Johnson*, 488 F.2d at 718.

Efficient resolution in data breach litigation is particularly important. First, the release of confidential data puts the Class immediately at risk, meaning the injunctive and monitoring components of the Settlement can have the most impact when delivered as near as possible to the breach. Second, Class Members can be harmed in the future,[10] which likewise can be addressed through early implementation of extended Identity Defense Services provided under the

[9] To be sure, efficient resolution is not an indication that victory was assured. *See Swinton*, 454 F. Supp. 3d at 886 ("[A]lthough the parties agreed to a settlement early on in the litigation, this was not an easy case.").

[10] The U.S. Government Accountability Office has determined that "stolen data may be held for up to a year or more before being used to commit identity theft," and that "once stolen data have been sold or posted on the Web, fraudulent use of that information may continue for years." United States Gov't Accountability Office, *Data Breaches Are Frequent, But Evidence of Resulting Identity Theft Is Limited; However, the Full Extent Is Unknown*, GAO-07-737, at 29 (June 2007), *available at*: https://www.gao.gov/assets/gao-07-737.pdf.

Settlement. Further, even Class Members that do not make a claim will have access to the Restoration Services, which will provide immediate access to help any Class Member who suffers fraud or identity theft. Lastly, achieving an early result means more Class Members will have necessary records readily available to make documented claims.

Notably, Class Counsel has already expended more than 8,225 hours on this litigation. That work involved engaging with clients, investigating the circumstances of the T-Mobile Data Breach, researching multiple states' statutory and common laws, working with several experts in the field to develop liability and damages theories, drafting and filing a complaint that set forth—in granular detail—the factual circumstances of the T-Mobile Data Breach and legal recoveries the Class pursued, working with other counsel who filed similar complaints, resolving MDL and forum issues before the JPML, working with representative Plaintiffs throughout the litigation, informal discovery, mediating the case with T-Mobile, and providing notice to Class Members. The full measure of time devoted to this effort contributed directly to the extraordinary relief the settlement provides.[11] As was true in *Xcel Energy*:

> But for the cooperation and efficiency of counsel, the lodestar of plaintiffs' counsel would have been substantially more and would have required this court to devote significant judicial resources to its management of the case. Instead, counsel moved the case along expeditiously, and the court determines that the time and labor spent to be reasonable and fully supportive of the [requested] attorney fee.

364 F. Supp. 2d at 996; *accord Equifax*, 2020 WL 256132, at *32 ("[T]he amount of work devoted to this case by class counsel likely was a principal reason that they were able to obtain such a favorable settlement at a relatively early stage.").

[11] But for this case, Class Counsel would have spent significant time on other matters. *See Target*, 892 F.3d at 977 n.7 (considering "the preclusion of employment by the attorney due to acceptance of the case"). The intensity with which the case was litigated, mediated, and settled demanded Class Counsel's full attention, and work could not be delegated to less experienced lawyers. Accordingly, a larger fee is justified.

Likewise, Class Counsel anticipates spending at least another 3,000 hours over the next several years litigating appeals, administering the settlement, managing the claims process, and responding to inquiries from Class Members. The estimate of 3,000 future hours is likely conservative. After the final approval hearing, Class Counsel reasonably expect they will spend 1,000 hours litigating any appeals. Further, if the three Class Counsel firms each spend only five hours per week on average overseeing the notice and claims processes and communicating with the various stakeholders over the next several years, that is an additional 1,500 hours. Finally, if Class Counsel must engage with 1% of the expected claims as part of the claims review process, it is likely that Class Counsel will spend more than 1,000 hours in post-final approval time on claims review alone. In Equifax, class counsel spent more than 8,000 hours at a lodestar of $6,000,000 following the submission of the fee application. (Ex. 1, ¶¶ 41, 53-54); *see Equifax*, 2020 WL 256132, at *32 (finding that "the work that class counsel . . . estimate they will do" with respect to "managing the claims process and administering the settlement" "weighs in favor of approval of the requested fee" in light of "the magnitude of the settlement and the number of claims"). As with the substantial amount of time Class Counsel expended to efficiently resolve this litigation, the significant commitment of time in the future supports Class Counsel's requested fee.

(5) Class Counsel and defense counsel are both exceptionally skilled.

Both the Class and T-Mobile have been represented by highly skilled and reputable attorneys. *See Target*, 892 F.3d at 977 n.7 (considering "the experience, reputation, and ability of the attorneys"). The Class is represented by Norman Siegel of Stueve Siegel Hanson LLP, James

Pizzirusso of Hausfeld LLP, and Cari Laufenberg of Keller Rohrback L.L.P.[12] (Ex. 1, ¶¶ 1, 6; Doc. 158-3, ¶¶ 3–11.) As was true in *Tussey*, "[o]ther courts have also recognized the skill and benefits conferred by [C]lass [C]ounsel." *Tussey*, 2019 WL 3859763, at *3; see also Ex. 1, ¶ 51 n.4. Indeed, some of the Class Counsel here represented the plaintiffs in *Equifax*, where the court emphasized:

> Plaintiffs' legal team includes lawyers from some of the most experienced and skilled class action law firms in the country who have collectively handled more than 50 data breach cases, including all of the most significant ones. Their experience and skill was needed given the scope of the case and the quality of the opposition.

2020 WL 256132, at *33. To the *Equifax* court's latter point, T-Mobile is represented by Alston & Bird. Alston & Bird has provided capable and experienced defense in numerous data breach cases. In other words, Class Counsel faced "well-funded defendants represented by highly-qualified national attorneys," which justifies a higher fee award. *Tussey*, 2019 WL 3859763, at *3. Class Counsel's achievement of outstanding relief for the Class here demonstrates that they possessed "the skill requisite to perform the legal service properly." *Target*, 892 F.3d at 977 n.7.

(6) The reaction of the Class supports Class Counsel's requested fee.

Now nearly a month into the notice process, there have been limited objections to the requested fee, which assumed the request would amount to 30% of the fund. Class members wishing to object to this fee motion (reflecting the lower 22.5% of the cash fund) must notify the court by December 8, 2022, at which time Class Counsel will respond to any valid objections.

[12] Like the Co-Lead Counsel above, the other attorneys serving as Interim Leadership Counsel, as appointed by this Court, "exhibit impressive qualifications and the necessary commitment to zealous representation," (Doc. 102), and their hard work has appreciably advanced this litigation. (Ex. 1, ¶¶ 6, 50 & Ex. C.)

(7) The requested fee is less than or comparable to other awards in the Eighth Circuit and other awards in data breach cases.

The requested fee is in line with—if not substantially lower than—awards in other class actions that have resulted in similarly impressive settlements. In assessing this factor, Eighth Circuit courts look to similar fee awards in class actions within the Eighth Circuit generally, as well as to fee awards in similar litigations in other circuits. *See Xcel Energy*, 364 F. Supp. 2d at 998.

In the Eighth Circuit, courts have "frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017).[13] Here, even if the fee is based only on the cash fund, ignoring all other monetary and non-monetary benefits, the requested percentage (22.5%) is substantially less than the percentages commonly awarded in the Eighth Circuit as well as that allowed for in the Agreement itself (30%). What's more, if the additional $150 million T-Mobile is required to spend on data security over the next two years is taken into account, the resulting percentage requested by Class Counsel is even lower (15.75%)—and it is even less if the *full* value of the Settlement's benefits are considered. *See supra* part I.B.

The requested percentage is also less than or similar to awards in other data breach cases across the country. *See, e.g.*, *Anthem*, 2018 WL 3960068, *14–16 (approving a 27% fee award on a $115 million common fund in a data breach case). Indeed, Class Counsel are seeking a similar fee to the one approved in *Equifax* (and affirmed by the Eleventh Circuit on appeal), despite

[13] *E.g.*, *Caligiuri*, 855 F.3d at 865 (33.33% of $60,000,000 common fund); *Custom Hair Designs by Sandy, LLC v. Central Payment Co.*, Case No. 8:17CV310, 2022 WL 3445763, at *5 (D. Neb. Aug. 17, 2022) (33.33% of $84,000,000 common fund); *In re Airline Ticket Commission Antitrust Litig.,* 953 F. Supp. 280, 285–86 (D. Minn. 1997) (awarding 33.3% of $86,892,000 common fund); *In re Monosodium Glutamate Antitrust Litig.*, No. Civ. 00MDL1328PAM, 2003 WL 297276, at *3 (D. Minn. Feb. 6, 2003) (30% of $81,400,000); *Xcel Energy*, 364 F. Supp. 2d at 999 (awarding 25% of $80,000,000 common fund and noting "courts in this circuit and this district have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in other class actions").

delivering the Class nearly *double* the recovery on a per capita basis here. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1281 (11th Cir. 2021) ("The District Court awarded $77.5 million in attorney's fees, which it found is 20.36 percent of the $380.5 million settlement fund. . . . 20.36 percent is well within the percentages permitted in other common fund cases, and even in other megafund cases."), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431, 211 L. Ed. 2d 254 (2021), and *cert. denied sub nom. Watkins v. Spector*, 142 S. Ct. 765, 211 L. Ed. 2d 479 (2022).

Of course, these results in data breach cases align with complex consumer litigation more generally. *See* Theodore Eisenberg, Geoffrey Miller, & Roy Germano, *Attorney Fees in Class Action: 2009–2013*, 92 N.YU. L. Rev. 937, 952 (2017) (finding that the mean fee percentage in consumer class actions was 26% between 2009 and 2013); *see also Target*, 892 F.3d at 977 n.7 (considering "the customary fee"). Complex consumer litigation customarily is handled on a contingent fee basis because consumers are unwilling and unable to pay substantial hourly rates, and the potential recovery does not justify the economic investment. *See Target*, 892 F.3d at 977 n.7 (considering "whether the fee is fixed or contingent"). Contingent fees in consumer cases are typically in the range of 33.3% to 40% of the recovery. (Ex. 1, ¶ 46); *see Tussey*, 2019 WL 3859763, at *4 ("'Substantial empirical evidence indicates that a one-third fee is a common benchmark in private contingency fee cases.'" (quoting Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. of Empirical Legal Studies 27, 35 (2004))). The requested fee is substantially below that range and much lower than contingent fees charged by Class Counsel in private litigation. (*See* Ex. 1, ¶¶ 44-46).

That this case involves a fund of more than $100 million does not change the analysis. The Eighth Circuit has not adopted either the "megafund" approach or the related "sliding scale"

approach, and the only published decision within the Eighth Circuit to refer to itself as a "megafund" case awarded a fee of 25% of an $80 million common fund—greater than the percentage requested by Class Counsel here. *See Xcel Energy*, 364 F. Supp. 2d at 999; *see also In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011) ("[C]ourts nationwide have repeatedly awarded fees of 30 percent or higher in so-called 'megafund' settlements."). In any event, awarding lower percentages in megafund cases has been roundly criticized, in part because doing so undercuts the virtues of the percentage approach and fails to recognize that such cases are inherently riskier. As one court explained in awarding a fee representing 31.33% of a $1.06 billion fund:

> [D]ecreasing the percentage awarded as the gross class recovery increases . . . is antithetical to the percentage of the recovery method . . . the whole purpose of which is to align the interests of Class Counsel and the Class by rewarding counsel in proportion to the result obtained. By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little.

Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) (citation omitted).

D. The Requested Fee Is Reasonable Under a Lodestar Crosscheck.

Although a lodestar crosscheck is "not required" in the Eighth Circuit, *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017)—and, as explained below should be *disfavored*—doing so here confirms that the requested fee is reasonable and should be approved. As noted above, Class Counsel have spent over 8,225 hours through October 31, 2022, on this litigation and reasonably anticipate spending at least another 3,000 hours over the next several years. (Ex. 1, ¶¶ 40, 41, 47, 54.) *Cf. In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, MDL No. 2672 CRB, 2017 WL 1047834, at *5 (N.D. Cal. Mar 17, 2017) (calculating over 20,000 hours for future reasonably anticipated work in conducting lodestar crosscheck). These hours account for an

overall lodestar of $8,173,534 at current rates. (Ex. 1, ¶¶ 50, 54.) While the resulting multiplier here would be higher than in many cases if the requested fee is approved, it is important to note that Eighth Circuit courts have made clear that the lodestar cross-check "does not trump the court's primary reliance on the percentage of common fund method." *Xcel Energy*, 364 F. Supp. 2d at 999 (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005) and *Petrovic*, 200 F.3d at 1157). In this regard, courts have "caution[ed] against setting fees in a 'formulaic way.'" *In re Charter Commc'ns, Inc., Sec. Litig.*, No. 4:02-cv-1186-CAS, 2005 WL 4045741, at *22 (E.D. Mo. Jun. 30, 2005) (quoting *Rite Aid*, 396 F.3d at 301). "'[T]o overly emphasize the amount of hours spent on a contingency fee case would penalize counsel for obtaining an early settlement and would distort the value of the attorneys' services.'" *Rawa*, 934 F.3d 870 (quoting *Charter Commc'ns*, 2005 WL 4045741, at *18). [14]

Moreover, courts have awarded fees with similar (and larger) multipliers in many other cases. *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1252 (Del. 2012) (66 multiplier); *In re Merry-Go-Round Enters. Inc.*, 244 B.R. 327, 335 (Bankr. D. Md. 2000) (19.6 multiplier); *Health Republic Ins. Co. v. United States*, 156 Fed. Cl. 67, 82 (2021) (multiplier of 18 to 19); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. Civ. A. 03–4578, 2005 WL 1213926, at *16–18 (E.D. Pa. May 19, 2005) (15.6 multiplier); *In re Doral Fin. Corp. Sec. Litig.*, No. 05-cv-04014-RO, at ¶ 9(f) (S.D.N.Y. Jul. 20 17, 2007) (ECF 65) (10.26 multiplier); *Farrell v. Bank of Am. Corp.*, N.A., 827 F. App'x 628, 630, 636 (9th Cir. 2020) (10.15 multiplier). Considering the extraordinary relief Class Counsel expediently obtained in the face of potentially drawn-out

[14] Professor Fitzpatrick notes that "the majority of courts are wise to reject" the lodestar crosscheck because it "harms class members by creating bad incentives for class counsel. In particular, the lodestar crosscheck reintroduces the very same undesirable consequences of the lodestar method that the percentage method was designed to correct in the first place." (Ex. 2, Declaration of Brian T. Fitzpatrick, ¶ 28.)

litigation with severe risks and an uncertain outcome, the lodestar crosscheck confirms Class Counsel's requested fee is warranted.

II. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF REASONABLY INCURRED EXPENSES.

"Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement.'" *Yarrington*, 697 F. Supp. 2d at 1067 (quoting *In re Media Vision Tech. Sec. Litig.,* 913 F. Supp. 1362, 1366 (N.D. Cal. 1996)). Class Counsel have also reasonably and necessarily incurred $147,982.55 in expenses for such items as expert fees, legal research; travel for meetings and hearings; mediation fees; and other customary expenditures. (Ex. 1, ¶¶ 55, 56 & Ex. B); *see Tussey*, 2019 WL 3859763, at *5 ("Reimbursable expenses include many litigation expenses beyond those narrowly defined 'costs' recoverable from an opposing party under Rule 54(d), and includes: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research." (citing Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.))). Class Counsel kept costs at a reasonable level. (Ex. 1, ¶¶ 55, 56 & Ex. B); *see Tussey*, 2019 WL 3859763, at *5. The Court should thus approve Class Counsel's expense reimbursement request.

III. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARDS.

Courts routinely approve service awards to compensate class representatives for the services they provide and the risks they incur on behalf of the class. The factors for deciding whether the service awards are warranted are: "(1) actions the plaintiffs took to protect the class's interests, (2) the degree to which the class has benefited from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation." *Caligiuri*, 855 F.3d at 867.

Here, the Settlement Class Representatives performed important work on the case, including time-consuming gathering of facts and documents, assisting Class Counsel with the allegations in the consolidated amended complaint, and reviewing the Settlement Agreement and Benefits Plan. (Ex. 1, ¶ 57; Doc. 158-3, ¶ 43.) That work materially advanced the litigation and protected the Class's interests. (Ex. 1, ¶ 57.) Indeed, their time and effort made this historic Settlement possible. Finally, the requested service awards are significantly lower than other awards in the Eighth Circuit. *See Caligiuri*, 855 F.3d at 867 ("[C]ourts in this circuit regularly grant service awards of $10,000 or greater."); *Huyer v. Njema*, 847 F.3d 923, 941 (8th Cir. 2017) (affirming approval of settlement that included $10,000 service awards to named plaintiffs).

The Court should therefore approve the requested service awards of $2,500 for each Settlement Class Representative.

CONCLUSION

Accordingly, Class Counsel respectfully requests that the Court approve the requested fee of $78.75 million, reimbursement of current expenses in the amount of $147,982.55 (subject to being updated before the final approval hearing), and service awards of $2,500 to each of the Settlement Class Representatives.

Respectfully submitted this 17th day of November, 2022.

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Co-Lead Interim Class Counsel

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

IN RE: T-MOBILE CUSTOMER DATA SECURITY BREACH LITIGATION	)	MDL No. 3019
	)	
	)	Master Case No. 4:21-md-03019-BCW
	)	
	)	
	)	

CLASS COUNSEL'S CONSOLIDATED DECLARATION IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARDS

Norman E. Siegel, Cari Campen Laufenberg, and James J. Pizzirusso declare as follows:

1. We were appointed by this Court to serve as Plaintiffs' Co-Lead Interim Class Counsel in the above-captioned MDL. We have worked on the litigation from the announcement of the T-Mobile Data Breach (Norman Siegel and James Pizzirusso were co-counsel in several actions and Cari Laufenberg filed independent actions with other counsel) and formally led the Plaintiffs' efforts in the case since our appointment on February 25, 2022. *See* Doc. 102, Order Appointing Interim Leadership Counsel. We have personal knowledge of all the matters addressed in this Declaration.

2. This Declaration focuses on the facts that bear on the Court's determination of a reasonable fee, and, among other things, summarizes our work litigating and resolving this matter, our continued work on behalf of the Settlement Class since this Court ordered issuance of notice, and our anticipated future work administering the Settlement. This Declaration also summarizes the timekeeping protocols we developed and applied to all counsel (including ourselves), our efforts to efficiently allocate work, and the lodestar incurred in performing that work. Finally, this Declaration addresses Plaintiffs' requests for reimbursement of reasonable costs and expenses and modest service awards to the Class Representatives in the litigation.

Overview of the Litigation

3. As detailed in our Declaration submitted in support of preliminary approval of the Settlement, Class Counsel independently began working on this litigation following the August 16, 2021, announcement of the T-Mobile data breach ("Data Breach"). Class Counsel were instrumental in the process of organizing counsel and presenting argument to the Judicial Panel on Multidistrict Litigation, which consolidated and transferred the litigation to Judge Brian C. Wimes of the United States District Court for the Western District of Missouri.

4. Following consolidation, we took the lead in organizing Plaintiffs' counsel for purposes of responding to this Court's December 22, 2021 Order, which required the parties to file a joint proposed agenda by January 18, 2022, as well as a preliminary report, to be submitted confidentially by each side, detailing what each party expected to be the critical factual and legal issues in the case. Doc. 4, Order Setting Initial Pretrial Conference and General Order on Practice and Procedure.

5. On January 25, 2022, the initial pretrial conference was held, and Mr. Siegel addressed the Court on behalf of Plaintiffs and Plaintiffs' counsel. Doc. 41, Order Regarding Initial Pretrial Conference. The Court ordered that the leadership structure for the Plaintiffs should consist of three lawyers as lead counsel, an executive committee of five to seven lawyers, and a liaison counsel. The Court ordered that any motions for appointment to leadership positions were to be filed on February 1, 2022. Over 35 lawyers filed applications, some as groups of lawyers and others as individuals.

6. On February 25, 2022, the Court appointed us as Plaintiffs' Co-Lead Interim Class Counsel ("Class Counsel"), appointed Alexis Wood of the Law Offices of Ronald Marron as Liaison Counsel, and appointed to the Executive Committee the following counsel: Maureen M.

Brady of McShane & Brady LLC, Amy E. Keller of DiCello Levitt Gutzler LLC, Robert Lopez of Hagens Berman Sobol Shapiro LLP, Margaret C. MacLean of Lowey Dannenberg, P.C., Kaleigh N.B. Powell of Tousley Brain Stephens PLLC, Kenya J. Reddy of Morgan & Morgan,[1] Sabita J. Soneji of Tycko & Zavareei LLP, and Rachel K. Tack of Zimmerman Reed, LLP. Doc. 102, Order Appointing Interim Leadership Counsel.

7. Pursuant to the Court's Order Appointing Co-Lead Interim Class Counsel, we have been responsible for coordinating and managing the activities of Plaintiffs during pretrial proceedings, including formulating the proposed litigation schedule and discovery plan; determining how to present to the Court and opposing parties the position of Plaintiffs on all matters arising during pretrial proceedings; determining and coordinating how discovery is to be conducted on behalf of Plaintiffs, including written discovery, subpoenas, and depositions; conducting settlement negotiations on behalf of Plaintiffs and entering into settlement agreements; ensuring scheduling requirements are met; delegating tasks as needed to non-leadership counsel in order to maximize efficiency; consulting with and employing experts; entering into stipulations with opposing counsel as necessary for the conduct of the litigation; encouraging full cooperation and efficiency among Plaintiffs' counsel; preparing and distributing periodic status reports to the parties; and maintaining adequate time and disbursement records. Doc. 102 at ¶ 1.

8. Immediately upon our appointment, we worked to prepare a detailed proposed discovery plan and proposed schedule pursuant to the Court's Order (Doc. 102), about which Plaintiffs and T-Mobile met and conferred on multiple occasions. On March 18, 2022, the Parties submitted a Joint Agenda and Report of the Parties' Rule 26(f) Conference, which detailed competing proposed schedules and several preliminary disputes regarding discovery. Doc. 107.

[1] Ms. Reddy subsequently withdrew from her position.

The Court then held a status conference with the Parties on March 23, 2022 (Doc. 110), and issued a Scheduling Order on April 18, 2022 (Doc. 117).

9. During the end of March and early April, Plaintiffs met and conferred on numerous occasions with T-Mobile to negotiate the provisions of a Protective Order and ESI Protocol. On April 6, 2022, the Parties jointly submitted a Protective Order and ESI Protocol, which contained both agreed-to and disputed sections, along with position letters detailing the Parties' disagreements to the Court. *See* Docs. 111 and 112. On May 12, 2022, the Court heard oral argument from Plaintiffs and T-Mobile on the disputed sections of the Protective Order and ESI Protocol, after which it ruled on many of the disputes and ordered the Parties to continue to meet and confer with respect to others. After further conferral, the Parties submitted a Joint Motion for Protective Order and ESI Protocol on June 1, 2022 (Doc. 135), which the Court entered on June 8, 2022 (Docs. 142, 143).

10. During this same time, we were working on the major task of preparing and filing the Consolidated Consumer Class Action Complaint ("Complaint"). Preparation of the Complaint was a massive undertaking, involving investigating the underlying facts, consulting with experts, and thoroughly researching many legal theories under the laws of 50 states, the District of Columbia, the U.S. Virgin Islands, and Puerto Rico. We also worked to select appropriate, dedicated named plaintiffs from across the United States by analyzing all of the complaints filed in the MDL, answering many inquiries from affected victims of the data breach, and conducting numerous, extensive telephone interviews including examining detailed questionnaires. Through this process, we selected 64 Plaintiffs to be named in the Complaint. Class Counsel also undertook providing pre-suit notice of consumer claims to attorneys general for numerous states.

11. On May 11, 2022, Plaintiffs filed the 338-page Complaint, with Named Plaintiffs from 39 states including: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. The Complaint asserted representative common law claims on behalf of a nationwide class against T-Mobile for negligence, negligence *per se*, breach of confidence, intrusion upon seclusion, breach of implied contract, unjust enrichment, and declaratory judgment. The Complaint also asserted 86 state statutory claims under state data breach notification laws as well as consumer protection and privacy statutes on behalf of state subclasses. Doc. 128.

12. Promptly after filing the Complaint, on May 16, 2022, Plaintiffs served document requests and interrogatories on T-Mobile. Plaintiffs also served preservation letters on a number of third parties involved in the response to, and investigation of, the data breach, including FireEye Mandiant, McAfee, KPMG, and Orrick. On June 1, 2022, the Parties exchanged initial Rule 26 disclosures. Additionally, after filing the Complaint, Plaintiffs substantively briefed an opposition to a motion to remand, which made standing arguments adverse to the Class. *See* Doc. 133 (Plaintiff Achermann's Motion to Remand); Doc. 141 (Plaintiffs' Suggestions in Opposition to Motion to Remand).

Overview of Settlement Discussions

13. At various times before and after filing the Complaint, the Parties engaged in discussions regarding a potential mediation of this case. As part of this process, the Parties exchanged extensive confidential discovery documents and information related to the Data Breach

and the named Plaintiffs in the Complaint, which allowed the Parties to assess the risks of the case as well as potential damages and meaningfully engage in arm's-length settlement negotiations.

14. Following several telephonic conferences and an in-person meeting in Kansas City, the Parties decided to mediate the case with the Honorable Diane M. Welsh (Ret.) of JAMS in Philadelphia, Pennsylvania, a mediator with a proven track record of resolving complex data breach class actions. Judge Welsh conducted pre-mediation calls with each Party, and the Parties exchanged detailed mediation statements in advance of mediation. After vigorous and hard-fought negotiations occurring over two full days on June 7 and June 8, 2022, the Parties reached an agreement in principle and executed a binding Term Sheet, which reflects the essential terms of the Settlement.

15. Over the course of the following several weeks after the execution of the Term Sheet, the Parties engaged in ongoing negotiations regarding the various terms set forth in the Settlement Agreement. These were also lengthy and often difficult negotiations. The time expended to work out significant details and vigorous disagreements between the Parties demonstrates that this proposed resolution was the product of heavily contested and arm's-length negotiations.

16. While the negotiations were professional throughout, they were marked by significant factual and legal disputes pertaining to the value of the case. At all times the negotiations were made at arm's length and free of collusion of any kind. Attorneys' fees were not discussed in any manner until the Parties had reached agreement on the material terms of the Settlement, including the payment of the Settlement Fund. At the conclusion of the negotiations, the Parties agreed that Class Counsel could seek up to 30% of the Settlement Fund as attorneys'

fees. No agreements exist other than those outlined herein and reflected in the Settlement Agreement.

17. Although we believe the case law in the Eighth Circuit supports a fee of 30%, we determined that given the relatively early settlement in this case that we would discount the fee by 25%, resulting in the requested award of 22.5% of the cash fund. If approved, this would reallocate $26.25 million from the maximum fee Class Counsel could have requested pursuant to the Settlement Agreement to additional cash available to the Settlement Class.

The Settlement Benefits Conferred on the Settlement Class

18. Under the proposed Settlement, T-Mobile will pay $350 million into a non-reversionary fund for Class benefits, notice and administration costs, attorneys' fees and expenses, and service awards for the Settlement Class Representatives.

19. The Settlement, as implemented through the Consumer Settlement Benefits Plan ("Benefits Plan") drafted by Class Counsel and approved by the Court as Exhibit 2 to Plaintiffs' Motion for Preliminary Approval (Doc. 158-2), establishes that the Settlement Fund will provide specific benefits to Settlement Class Members, including:

- **Out-of-Pocket Losses.** The Settlement Fund will be used to pay valid claims for Out-of-Pocket Losses incurred on or after August 1, 2021, that are fairly traceable to the Data Breach. Out-of-Pocket Losses include, but are not limited to: (i) unreimbursed costs, expenses, losses or charges incurred as a result of identity theft or identity fraud, falsified tax returns, or other alleged misuse of a Settlement Class Member's personal information; (ii) costs incurred on or after August 1, 2021, associated with placing or removing a credit freeze on a Settlement Class Member's credit file with any credit reporting agency; (iii) other miscellaneous expenses incurred on or after August 1, 2021, related to any Out-of-Pocket Losses such as notary, fax, postage, copying, mileage, and long-distance telephone charges; and (iv) costs of credit reports, credit monitoring, or other products related to detection or remediation of identity theft incurred on or after August 1, 2021, through the date of the Settlement Class Member's claim submission.

- **Lost Time.** The Settlement Fund will also be used to pay claims for Lost Time. Lost Time that is not related to a qualifying claim for Out-of-Pocket Losses may be made in 15-minute increments and supported by a certification for up to 5 hours. In the alternative, Lost Time

related to a qualifying claim for Out-of-Pocket Losses may be made in 15-minute increments and supported by a certification for up to 15 hours. Settlement Class Members can claim $25 per hour, or, if the Settlement Class Member took time off work, their current hourly rate if higher and supported by documentation.

- **Alternative Cash Payments.** As an alternative to making a claim for Out-of-Pocket Losses or Lost Time, Settlement Class Members may request an Alternative Cash Payment of $25, or $100 for California Settlement Subclass Members.

20. Settlement Class benefits also include Identity Defense Services provided by Pango to help detect and remediate actual or attempted identity theft and fraud. The services Pango will provide to participating Settlement Class Members include:

- Credit Monitoring from TransUnion
- Monthly Credit Score from TransUnion
- Real time Inquiry / Authentication Alerts
- Dark Web Monitoring
- High Risk Transaction Monitoring
- USPS Address Change Monitoring & Alerts
- Lost Wallet Protection
- Security Freeze Capabilities
- Customer Support & Victim Assistance
- $1 million identity theft insurance

21. As a separate Class benefit, all Settlement Class Members, *even those who do not enroll in Identity Defense Services or do not submit a claim*, will be entitled to utilize Restoration Services offered through Pango. This coverage is a separate benefit and enables all Settlement Class Members access to U.S.-based fraud resolution specialists who can assist with important tasks such as placing fraud alerts with the credit bureaus, disputing inaccurate information on credit

reports, scheduling calls with creditors and other service providers, and working with law enforcement and government agencies to dispute fraudulent information.

22. If a claim is rejected for any reason, there is also a consumer-friendly appeals process whereby claimants will have the opportunity to cure any deficiencies in their submission or request an automatic appeal if the Settlement Administrator determines a claim is deficient in whole or part. Settlement Class Members will have 90 days to file a claim for benefits, but are not required to file a claim to access Restoration Services which will remain available for 2 years after the Settlement is finalized.

23. To the extent total valid claims are greater than the available Settlement Fund, all valid claims (including Alternative Cash Payments) will be reduced on a *pro rata* basis. To the extent total valid claims are less than the available Settlement Fund, all valid claims will be increased on a *pro rata* basis (including Alternative Cash Payments) until the Net Settlement Fund is exhausted.

24. Additionally, as part of this Settlement, T-Mobile has agreed to maintain an incremental spend commitment of at least $150 million for data security and related technology, in the aggregate, for years 2022 and 2023 above its previously budgeted baseline.

25. The non-cash benefits conferred upon the Class exceeds the $500 million cash components provided in the Settlement. Consideration of the value of the Identity Defense Services and Restoration Services offered to every Class Member push the value of the Settlement significantly higher. The Identity Defense Services and Restoration Services provided in the Settlement are sold at retail for $96 per year. Accordingly, the value of this benefit to the Settlement Class is approximately $146 million for every 1% of Settlement Class Members that elect to receive this benefit. Given a Settlement Class of more than 76.6 million individuals, this

is an enormous benefit to Settlement Class Members that materially increases the value of the Settlement.

The Notice and Claims Process

26. As part of the Court's July 26, 2022, Preliminary Approval Order, the Court appointed Kroll Settlement Administration LLC ("Kroll") as Settlement Administrator to provide notice to Class Members, process claims, and otherwise administer the Settlement. Doc. 162, Order Granting Preliminary Approval at ¶ 6. Kroll subsequently began the process of providing notice to the Class through first-class U.S. mail, electronic mail, and/or SMS Text, as well as additional notice by publication.

27. Over the last several months, Class Counsel has had near daily contact with Kroll and T-Mobile's counsel to ensure that the notice program was on schedule and met the requirements of the Court's Preliminary Approval Order. This included substantial work in ensuring that the SMS Text program was implemented as planned, which required significant unanticipated work due to technical changes in the ability to use mass-text messaging.

28. Class Counsel has also been closely monitoring the claims in the case, which are at a current pace of approximately 20,000 per day, and we are responding to Class Member inquiries regarding the Settlement on a daily basis. As explained below, Class Counsel expects it will spend substantial time working with Class Members through the claims period and beyond.

Factors Supporting Plaintiffs' Motion for Attorneys' Fees

29. Class Counsel's fee application seeks a percentage of the $350 million cash fund negotiated in this case, which is consistent with the law in this and other circuits. As explained below, we believe consideration of the factors set forth by the Eighth Circuit demonstrates the reasonableness of Class Counsel's requested fee of 22.5% of the cash fund. *See In re Target Corp.*

Customer Data Security Breach Litig. ("Target"), 892 F.3d 968, 977 (8th Cir. 2018) (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 719–20 (5th Cir. 1974)). This requested percentage is even more reasonable given that Plaintiffs could have asked for up to 30% of the fund.

Factor 1: The benefits conferred on the Settlement Class are extraordinary.

30. The Settlement represents a significant recovery for the Class. The $350 million Settlement Fund is one of the largest data breach settlements in history, second only to the $380 million fund in *Equifax*. However, the per capita recovery is much higher here than in *Equifax*—nearly double—as there are approximately 76.6 million Class Members here, whereas there were more than 147 million class members in *Equifax*. This recovery also compares favorably to other large data breach settlements including *In re Anthem* ($115 million fund for a class of 80 million individuals); and *In re Yahoo!* ($117.5 million settlement for 194 million class members).

31. The larger recovery here yields tangible benefits. For instance, the fund here provides cash reimbursement up to $25,000 for unreimbursed out-of-pocket payments spent to avoid or recover from fraud or identity theft that is fairly traceable to the T-Mobile Data Breach. The Settlement also allows for Class Members to obtain valuable Identity Defense Services and Restoration Services. As with compensation for out-of-pocket losses and lost time, these services help prevent more serious losses from occurring and will make Class Members whole, if losses occur. The $350 million Settlement Fund also reimburses Class Members for time spent (up to 15 hours, depending on the circumstances) to avoid or recover from fraud, identity theft, or other misuse of Class Member personal information, which is fairly traceable to the T-Mobile Data Breach. The hourly rate for time is the greater of $25 per hour or the Class Member's hourly wage if the Class Member took time off work.

32. The Settlement is designed to make Class Members whole for time spent and expenses incurred to avoid fraud or to recover from identity theft or other harm. As described below, it is difficult to litigate that aspect of a claim on a disputed class-wide basis. Moreover, the Settlement here also provides for an alternative cash payment of $25 for Class Members—and $100 for Settlement Class Members who resided in California at the time of the T-Mobile Data Breach. Not only may Settlement Class Members elect to obtain the alternative cash payment and forgo submitting documentation to obtain out-of-pocket losses and/or lost time, those who do make claims for out-of-pocket losses and/or lost time will be entitled to the *greater* of the approved claim for out-of-pocket losses and/or lost time or the amount available under the alternative cash payment provision. Independent of the $350 million Settlement Fund, T-Mobile has agreed to an incremental spending commitment of at least $150 million for data security and related technology, in the aggregate, for years 2022 and 2023 above its previously budgeted baseline.

Factor 2: Class Counsel faced numerous and substantial risks.

33. Class Counsel obtained an outstanding settlement in the face of several substantial risks. Unlike other data breach cases, most Class Members are current and former T-Mobile customers, and T-Mobile asserted that its Terms and Conditions of Services require customers to individually arbitrate their claims against T-Mobile. Throughout the litigation, T-Mobile contended that these arbitration provisions were ironclad—and the provisions may indeed have been enforceable for a significant number of Class Members. In our assessment, the combination of T-Mobile's arbitration and other defenses, along with potentially individualized damages, make this precisely the kind of litigation that is difficult if not impossible to redress without a class settlement.

34. In addition to what would surely have been a fiercely litigated motion to compel arbitration, Class Counsel faced other daunting risks. For one, T-Mobile disputed whether the

majority of Class Members had suffered any legally cognizable injuries, including with respect to risk of future identity theft, lost time spent preventing or recovering from identity theft, and out-of-pocket costs (to the extent they could not be shown to be reasonable or necessary). T-Mobile would also have vigorously disputed whether Class Members' damages were proximately caused by its conduct since: (1) the T-Mobile Data Breach was the result of a criminal, third-party cyberattack; and (2) the numerous other breaches of PII (including, in some cases, the personal information of hundreds of millions of individuals) in other data breaches spread across other sectors would make it difficult to trace any instance of identity theft to the T-Mobile Data Breach as opposed to another data breach.

35. T-Mobile also indicated it would dispute whether it owed a duty to safeguard the confidential PII of its current, former, and prospective customers, and would have fiercely litigated the Class's negligence, contract/quasi-contract, invasion of privacy, and statutory claims. The merits issues of various claims in data breach litigation are developing, sometimes in divergent ways in different states. This would not only have made the litigation more complex, but it also could also have exposed some of the Class's claims to challenging dismissal and summary judgment motions.

36. In short, this litigation would have entailed serious risks for the Class and Class Counsel at every turn. Although we strongly believe the Class could have overcome these risks—doing so would not have been easy, and success was far from guaranteed.

Factor 3: Data breach litigation, particularly on a national scale, is novel and complex.

37. Our experience in litigating most of the largest data breach cases confirms that this type of litigation, particularly when it involves a breach of consumer data on a nationwide scale by a company the size of T-Mobile, is difficult and presents cutting edge issues. As discussed elsewhere, this case involved many novel and difficult legal questions, such as the threshold issue

of whether T-Mobile had a duty to protect Plaintiffs' personal data, whether Plaintiffs' alleged injuries are legally cognizable and were proximately caused by the T-Mobile Data Breach, and the application of various state consumer protection statutes. The law in data breach litigation remains uncertain and the applicable legal principles have continued to evolve.

38. Recent decisions demonstrate the legal challenges in data breach litigation. In some cases, the plaintiffs have prevailed on motions challenging the pleadings, including *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 440 F. Supp. 3d 447 (D. Md. 2020); *In re Capital One Consumer Data Sec. Breach Litig.*, 488 F. Supp. 3d 374 (E.D. Va. 2020); *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 362 F. Supp. 3d 1295 (N.D. Ga. 2019). However, other recent decisions have gone against the plaintiffs. *See Pruchnickias v. Envision Healthcare Corp.*, 845 F. App'x 613 (9th Cir. 2021); *Gardiner v. Walmart, Inc.*, 2021 WL 4992539 (N.D. Cal. 2021); *Hammond v. The Bank of New York Mellon Corp.*, 2010 WL 2643307 (S.D.N.Y. 2010). During this time, state law statutory claims have continued to evolve, creating thorny questions of whether and how the new statutes can be applied to data breach litigation.

Factor 4: Class Counsel's efficient resolution of this litigation.

39. The efficiency with which Class Counsel obtained this extraordinary relief on behalf of the Class is independently valuable for the Class and the Court, as efficient resolution in data breach litigation is particularly important. First, the release of confidential data puts the Class immediately at risk, meaning the injunctive and monitoring components of the Settlement can have the most impact when delivered as near as possible to the breach. Second, Class Members can be harmed in the future,[2] which likewise can be addressed through early implementation of extended

[2] The U.S. Government Accountability Office has determined that "stolen data may be held for up to a year or more before being used to commit identity theft," and that "once stolen data have been

Identity Defense Services provided under the Settlement. Further, even Class Members that do not make a claim will have access to the Restoration Services, which will provide immediate access to help any Class Member who suffers fraud or identity theft.

40. Through October 31, 2022, Class Counsel has expended more than 8,225 hours on this litigation. That work involved engaging with clients, investigating the circumstances of the T-Mobile Data Breach, researching multiple states' statutory and common laws, working with several experts in the field to develop liability and damages theories, drafting and filing a complaint that set forth—in granular detail—the factual circumstances of the T-Mobile Data Breach and legal recoveries the Class pursued, working with other counsel who filed similar complaints, resolving MDL and forum issues before the Judicial Panel on Multidistrict Litigation, working with representative Plaintiffs throughout the litigation, informal discovery, mediating the case with T-Mobile, and providing notice to Class Members. And, but for this case, Class Counsel would have spent significant time on other matters. The intensity with which the case was litigated, mediated, and settled demanded Class Counsel's full attention, and work could not be delegated to less experienced lawyers.

41. In addition to the time spent to date, we anticipate spending at least another 3,000 hours over the next several years litigating appeals, administering the Settlement, managing the claims process, and responding to inquiries from Class Members. This estimate is likely conservative. After the final approval hearing, we reasonably expect to expend at least 1,000 hours litigating any appeals and thirty to forty hours per week on average over the next 1-2 years

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sold or posted on the Web, fraudulent use of that information may continue for years." United States Gov't Accountability Office, *Data Breaches Are Frequent, But Evidence of Resulting Identity Theft is Limited; However, the Full Extent is Unknown*, GAO-07-737, at 29 (June 2007), *available at*: https://www.gao.gov/assets/gao-07-737.pdf.

overseeing the notice and claims processes and communicating with the various stakeholders, which would collectively total over 1,500 hours per year. Finally, Class Counsel reasonably anticipates engaging with approximately 1% of the expected claims as part of the claims review process and believes that it is likely that Class Counsel will spend more than 1,000 hours in post-final approval time on claims review alone. For reference, in *Equifax* class counsel spent more than 8,000 hours at a lodestar of $6,000,000 following the submission of the fee application.

Factor 5: Class Counsel and defense counsel are both exceptionally skilled.

42. Both the Class and T-Mobile are represented by highly skilled and reputable attorneys. We have previously provided our detailed resumes demonstrating our experience in consumer litigation and data breach litigation in particular. Similarly, T-Mobile is represented by Alston & Bird, which has provided capable and experienced defense in numerous data breach cases. T-Mobile is well-funded and represented by highly-qualified national attorneys.

Factor 6: The reaction of the Class supports Class Counsel's requested fee.

43. Now nearly a month into the notice process, there have been a handful of objections to the requested fee, which the notice indicated would be up to 30% of the Settlement Fund. This motion, seeking only 22.5% of the Settlement Fund, will be posted on the Settlement website and available to all Class Members before the December 8, 2022, objection deadline. Class Counsel will therefore address any valid objections raised to this motion in advance of final approval.

Factor 7: The requested fee is less than or comparable to other awards in the Eighth Circuit and other awards in data breach cases.

44. The requested fee is in line with—if not substantially lower than—awards in other class actions that have resulted in similar settlements. In the Eighth Circuit, courts have "frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017). Here, even if the fee is based only on the cash fund, ignoring all other monetary

and non-monetary benefits, the requested percentage (22.5%) is substantially lower than the percentages commonly awarded in the Eighth Circuit as well as that allowed for in the Agreement itself (30%). What's more, if the additional $150 million T-Mobile is required to spend on data security over the next two years is taken into account, the resulting percentage requested by Class Counsel is even lower (15.75%)—and it is even lower than that if the *full* value of the Settlement's benefits are considered.

45. The requested percentage is also less than or similar to awards in other data breach cases across the country. *See, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *14-16 (N.D. Cal. Aug. 17, 2018) (approving a 27% fee award on a $115 million common fund in a data breach case). In applying for a fee of 22.5%, we are seeking a similar fee to the one approved in *Equifax* (and affirmed by the Eleventh Circuit on appeal), despite delivering the Class nearly double the recovery on a per capita basis.

46. The fee we are seeking here is also well below the percentages that were included in the fee agreements signed by many of the named plaintiffs in this case. *See In re Remeron Direct Purchaser Antitrust Litig.*, No. CIV.03-0085 FSH, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) ("[t]he percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee which would be negotiated if the lawyer were offering his or her services in the private marketplace."). Class Counsel regularly negotiates contingency fee arrangements with both individuals and sophisticated businesses with fees that amount to 33.3% to 40% of the expected recovery. Thus, consideration of real-world contingency arrangements and the actual contingency fee arrangements used by Class Counsel supports the requested award of 22.5% of the Settlement Fund.

Consideration of the Lodestar Supports the Requested Fee

47. Some courts supplement their analysis of the percentage-of-fund method with the lodestar cross-check to determine whether a proposed fee award is excessive relative to the hours worked by counsel, or whether the fee is within a reasonable multiplier of the lodestar. While the lodestar cross-check is not necessary in the Eighth Circuit, we respectfully submit that a lodestar cross-check in this case supports the requested fee. Despite the risks, complexities, and challenges posed by this litigation, Class Counsel and other lawyers working at the direction of Class Counsel invested over 8,225 hours of attorney and other professional time on behalf of the Class from case inception through October 31, 2022.

48. At the outset of the case, Class Counsel implemented a rigorous timekeeping process. All law firms that filed complaints that were consolidated in the MDL were directed to submit contemporaneously recorded time and expenses incurred in the case to Class Counsel on a monthly basis. A copy of the billing protocol established by Class Counsel and sent to all firms is attached to this Declaration as Exhibit A. Class Counsel received and reviewed all contemporaneous time submitted from all Plaintiffs' counsel. Inadequate or incomplete time entries, time that was not performed at the direction of Co-Lead Counsel, or reports that did not meet the billing protocol were eliminated or returned for correction. The complete time records are available for the Court's review upon request.

49. In preparation for Plaintiffs' fee request, Class Counsel spent a full day in Seattle in October 2022 reviewing all time entries submitted in the case, including time and expenses submitted by Co-Lead firms. Each Plaintiffs' firm's time and expense submission was reviewed by at least two attorneys from two different Co-Lead firms. All time and expenses submitted by the Co-Lead firms were reviewed by at least one lawyer from a different Co-Lead firm. In

evaluating the time entries submitted by other law firms, Class Counsel looked to ensure that the time was non-duplicative and performed at the direction of Plaintiffs' Co-Lead Counsel, who also audited and confirmed the validity of all law firms' expense submissions and removed unapproved expenses where appropriate. Time and expenses that were excessive or were not consistent with the billing protocol were disallowed, and not considered in this submission.

50. After reviewing and vetting all time records and ensuring that the work recorded was not duplicative, unnecessary, or not performed at the direction of Co-Lead Counsel, the total recorded lodestar for all firms is $5,973,534. Of this amount, $5,285,610 (approximately 88%) was reported by Class Counsel and the Executive Committee. With respect to the lodestar submitted by non-lead firms, the time reflects work performed at the direction of Co-Lead Counsel (or, in some instances, work performed before appointment of Co-Lead Counsel but which was determined to have advanced the litigation) including document review and communications with Plaintiffs. A chart reflecting the lodestar for each firm is attached as Exhibit B.[3]

51. Each Co-Lead Counsel attests that the rates charged by the lawyers and staff in their firm are reasonable, based on each person's position, and experience level. Each Co-Lead Counsel further affirms that (1) the rates submitted with this declaration are based on rate scales each Co-Lead Counsel has submitted and Courts have approved in other contingency cases,[4] and (2) the

[3] Co-Lead Counsel will distribute any fee awarded by the Court based on the overall contribution to the result achieved. The lodestar reported by each firm will be a material, but not the exclusive consideration in distributing any fee award.

[4] *See, e.g., Johnson v. Lifebridge Health Care, Inc.*, Case No. 24-C-18-006801, Order Granting Final Approval at 11 (Cir. Court Baltimore City, MD., October 26, 2022) (finding Stueve Siegel Hanson's 2022 rates reasonable); *Hays v. Nissan North America, Inc.* Case No. 4:17-CV-0353-BCW, Doc. 138, Order Granting Final Approval at 3 (W.D. Mo. September 30, 2022) (same); *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litig.*, No. 15-md-02672-CRB, Doc. 8088 (N.D. Cal. Nov. 9, 2022) (awarding attorneys' fees based on Keller

rates reported here are the rates charged to hourly-paying clients of the Co-Lead firms that undertake hourly work.

52. Based on our collective experience and knowledge of the legal market, including the market for hiring lawyers engaged in complex litigation, the rates reflected in Exhibit B are comparable to or lower than the rates charged by other law firms with similar experience, expertise, and reputation, for similar services in the nation's leading legal markets.

Additional Anticipated Time

53. The lodestar figure above does not include the substantial amount of time that Class Counsel will be required to devote to achieving final approval, responding to any objections, overseeing the claims administration process and the distribution of settlement funds to the Class, and litigating any appeals. For example, class counsel in the Equifax data breach litigation have expended over $6 million in time addressing similar tasks *after* the submission of the fee application in that case.

54. These additional hours, for which Class Counsel will not receive any additional compensation from the Settlement Fund, effectively reduce the multiplier, and should be considered in evaluating the reasonableness of the fee request. Given the size of the settlement, the number of Class Members, and the range of relief offered, we expect that we will incur at least 3,000 hours of additional time finalizing this Settlement, or approximately $2,200,000 in additional lodestar.

Rohrback's current rates); *Southern California Gas Leak Cases*, No. BC601844 (Cal. Super. Ct. Apr. 29, 2022) (finding Keller Rohrback rates reasonable); *In re: Blue Cross Blue Shield*, No. 2:13-CV-20000-RDP, Doc. 2932 (N.D. Ala. August 9, 2022) (finding Hausfeld's rates reasonable on a lodestar crosscheck). Class Counsel can provide copies of these orders upon request.

Plaintiffs' Motion for Reimbursement of Expenses

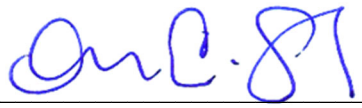
55. Class Counsel also request reimbursement of reasonable and necessary litigation costs and expenses in the amount of $147,982.55. As with the time submission process discussed above, all expenses were reviewed by Class Counsel to ensure conformity with the billing protocol, and all expenses incurred were reasonable, necessary, and expended in furtherance of the litigation.

56. Class Counsel's costs and expenses are summarized in Exhibit B and are the same costs that Counsel would normally charge a monthly-paying client. Accordingly, Class Counsel's request for reimbursement of $147,982.55 in expenses from the Settlement Fund (as supplemented by any additional expenses incurred before final approval) is reasonable and should be approved.

Plaintiffs' Service Awards

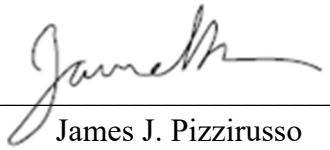
57. Consistent with the law in this Circuit, Plaintiffs also request approval for a $2,500 service award for each of the Settlement Class Representatives. These individuals performed important work on the case, including time-consuming gathering of facts and documents, assisting Class Counsel with the allegations in the consolidated complaint, and reviewing the Settlement Agreement and Benefits Plan. That work materially advanced the litigation and protected the Class's interests. Further, the requested service awards are significantly lower than other awards in the Eighth Circuit.

DATED this 17th day of November 2022 in the United States of America.



Norman E. Siegel

Cari Campen Laufenberg



James J. Pizzirusso

EXHIBIT A

STUEVE SIEGEL HANSON KELLER ROHRBACK LAW OFFICES L.L.P. HAUSFELD

March 3, 2022

All Plaintiff's Counsel

Re: ***In re T-Mobile Customer Data Security Breach Litigation***
Case No. 4:21-md-03019

Dear Counsel:

As you know, the Court recently appointed the undersigned as interim Co-Lead Counsel in this litigation. Our responsibilities include monitoring time and expenses accrued by all Plaintiffs' counsel in this case.

In keeping with other cases before Judge Wimes, and consistent with our communications with the Court leading up to the Initial Status Conference, all time spent and expenses incurred in connection with this litigation must be recorded on a contemporaneous basis. As provided in the appointment order, **all work undertaken in this litigation must be expressly authorized by Co-Lead Counsel**.

To facilitate the monitoring of time and expenses, each firm must submit detailed monthly time and expenses. All time should be reported at your regular billing rates in effect at your firm during the particular month(s) for which you are reporting. However, review of time and costs for reporting purposes and review of documents and coding must be capped at the lesser of the timekeeper's regular rate or $425.00 per hour.

Reports for the preceding month will be due on the 15th day of the next month (or next business day if the 15th day is a weekend or holiday) and should be sent via email to tmobiletime@stuevesiegel.com.

Your first report is due April 15, 2022, and should include all time and expenses from inception of the case through March 31, 2022. Please note that we cannot and do not represent that pre-leadership appointment time, or any time for that matter, will be allowed by the Court or even submitted to the Court. All firms must use the standard form in the attached Excel spreadsheet for time and expense reporting. The template includes a time tab and an expense tab. **With your first report, please advise us as to who at your firm is the appropriate contact person for time and expense reporting purposes.**

Please note the following:

First, please submit your time in the proper format and on time. Time sent in the wrong format will be sent back. Time that is not timely submitted will not be considered.

Second, Co-Lead Counsel reserves the right to not assign work to firms that are not current in their monthly time and expense reports.

Third, work performed in this case without the express, specific authorization of Co-Lead Counsel will not be compensable. This includes reading and reviewing of correspondence and pleadings, or appearances at hearings or depositions and travel time and expenses related to such appearances, unless assigned to do so by Co-Lead Counsel. If in doubt, please confirm before incurring the time or expense.

Fourth, all billings may be audited periodically and billings that we do not believe are appropriate may be disallowed before our time is submitted to the Court, or at any time thereafter. It will make our job in this regard much easier if we all exercise restraint in our time keeping by only reporting time that is reasonably expended in prosecution of our clients' and the class's claims. We recognize that, given the number of reports to be submitted, it may not be realistic for Co-Lead Counsel to provide immediate feedback regarding time submission and that such decisions may evolve as the case progresses, or based on feedback from the Court. Accordingly, please note that even if billing reports are "accepted" at the time submitted, this does not mean that the time is "approved," or that the submissions will ultimately be deemed compensable and submitted to the court in support of a fee application. We will examine—and re-examine—all of our time in a comprehensive way before any fee application is submitted to determine, based upon a complete picture of how the case was prosecuted, how each firm's time should be treated.

Fifth, we are not using task codes; therefore your time entries will require fulsome, clear descriptions of each and every time entry you make, and separate tasks should have separate time indicated. Individuals identified in time entries must be described by at least their first initial and last name, not by initials. "John Doe" is preferred; "J. Doe" is acceptable; and "JD" is unacceptable.

Sixth, we ask that you not staff committee calls with more than one lawyer from your firm. Exceptions to this policy will require advance approval from Co-Lead Counsel. Absent express authorization, time for multiple attendees will not be compensable.

Seventh, we intend to be particularly mindful about the use of contract lawyers, in particular for document review purposes. Any use of contract lawyers for document review or any other work must be expressly approved in writing by Co-Lead Counsel in advance. Work performed by contract attorneys, for any purpose, may be subjected to a cap on the hourly rate charged for those lawyers' time.

Eighth, Co-Lead Counsel have established an account from which common expenses will be paid. Common expenses include such matters as filing and service costs related to the MDL consolidated action; deposition and court reporter fees; the cost of creating and operating a document depository; administrative expenses, such as the expenses associated with EC meetings and conference calls; expert and consultant fees and expenses; fees for e-discovery, copying, and coding (done outside of a particular firm); witness expenses; fees for independent investigators;

bank charges; and such other common expenses approved by Co-Lead Counsel. No one other than Co-Lead may incur common expenses without approval. Bills for approved common expenses should be sent for payment to James Pizzirusso, whose firm maintains the litigation fund. Any common expense will require advance approval from Co-Lead Counsel before the expense is paid.

Ninth, you should report on a monthly basis all non-common expenses (*e.g.*, Westlaw, in-house copies) for which you may seek reimbursement at the conclusion of the case. Non-common expenses should be reported at cost without any markups.

If we are fortunate enough to earn a fee in this case, the allocation of the fee between the participating firms will be made by Co-Lead Counsel when the fee has been earned. In allocating any fee, Co-Lead Counsel will be guided by the concept that each firm will be rewarded for the value it has contributed to the results obtained for our clients. Each firm's lodestar will be a factor in determining value, but it will not be the only factor. Among other things, how efficiently a firm has handled its responsibilities will be given significant weight.

We look forward to working with all of you on this case.

Sincerely,

Norman E. Siegel

Cari Campen Laufenberg

James J. Pizzirusso

EXHIBIT B

Firm	Biller	Hours	Hourly Rate	Lodestar
Hausfeld LLP	Dorsey, Angel	1.30	$325.00	$422.50
	Engdahl, Ian	85.60	$520.00	$44,512.00
	Hansson, Katherine	5.30	$520.00	$2,756.00
	Kenney, Jeannine	0.40	$760.00	$304.00
	Lewis, Richard S.	1.00	$1,275.00	$1,275.00
	Martin, Scott	2.70	$1,150.00	$3,105.00
	McCune, Kenya	0.50	$325.00	$162.50
	Mitchell, James	38.60	$325.00	$12,545.00
	Nathan, Steven	393.90	$725.00	$285,577.50
	Pizzirusso, Jamie J.	487.20	$960.00	$467,712.00
	Ratner, Brian A.	1.50	$975.00	$1,462.50
	Ringeling, Camila	40.00	$430.00	$17,200.00
	Smith, Gary	1.70	$960.00	$1,632.00
	Walker, Renner	120.10	$675.00	$81,067.50
		1179.80		$919,733.50

Firm	Biller	Hours	Hourly Rate	Lodestar
Keller Rohrback LLP	Cappio, Gretchen	5.00	$1,045.00	$5,225.00
	Chan, Alex	5.10	$350.00	$1,785.00
	Farris, Juli E.	100.50	$1,065.00	$107,032.50
	Fierro, Eric	7.70	$795.00	$6,121.50
	Garrido, Joel M.	7.50	$350.00	$2,625.00
	Gotto, Maxwell	146.80	$295.00	$43,306.00
	Graver, Devon	0.30	$285.00	$85.50
	Green, Kellyn A.	50.20	$375.00	$18,825.00
	Hill, Jennifer	2.00	$365.00	$730.00
	Kolcun, Jason T.	0.50	$410.00	$205.00
	LaPorte, Kait B.	5.60	$280.00	$1,568.00
	Laufenberg, Cari Campen	302.30	$1,010.00	$305,323.00
	Loeser, Derek W.	10.50	$1,000.00	$10,500.00
	McKinlay-Mench, Rosie	6.50	$300.00	$1,950.00
	Mersing, Jacob T.	5.50	$405.00	$2,227.50
	Montgomery, Mary K.	77.80	$340.00	$26,452.00
	Nanfelt, Nathan L.	5.30	$585.00	$3,100.50
	Oldach, John E.	1.60	$270.00	$432.00
	Rodgers, Aubrey A.	13.50	$350.00	$4,725.00
	Sarko, Lynn Lincoln	2.70	$1,200.00	$3,240.00
	Schafer, David H.	23.50	$320.00	$7,520.00
	Springer, Christopher	288.10	$650.00	$187,265.00
	Tiezazu, Y. Tizzy	0.30	$295.00	$88.50
	Wilcher, Debra Lynn	0.20	$270.00	$54.00
	Wilson, Kiana R.	29.00	$315.00	$9,135.00
	Wright, Emma M.	98.80	$550.00	$54,340.00
		1196.80		$803,861.00

Firm	Biller	Hours	Hourly Rate	Lodestar
Stueve Siegel Hanson LLP	Brulez, Margaret	1.30	$300.00	$390.00
	Cervantes, Katrina	114.00	$300.00	$34,200.00
	Davis, Bria	197.30	$500.00	$98,650.00
	Dent, Jillian	242.10	$650.00	$157,365.00
	Edwards, Tanner	2.00	$575.00	$1,150.00
	Marquart, Mary Rose	59.40	$340.00	$20,196.00
	Moore, Austin	400.40	$825.00	$330,330.00
	Perez, Cheri	12.70	$300.00	$3,810.00
	Perkins, Lindsay	2.10	$825.00	$1,732.50
	Reyes, Erika	81.00	$300.00	$24,300.00
	Siegel, Norman	722.50	$1,125.00	$812,812.50
	Six, Stephen	1.60	$1,025.00	$1,640.00
	Spates, Brandi	20.80	$475.00	$9,880.00
	Stueve, Benjamin	4.60	$575.00	$2,645.00
	Vahle, Barrett	407.90	$950.00	$387,505.00
	Walters, Stephanie	30.20	$750.00	$22,650.00
	Weiner, Adrian	4.20	$325.00	$1,365.00
	Wilders, Bradley	0.20	$950.00	$190.00
	Williams, Sheri	38.40	$300.00	$11,520.00
	Youngentob, Kasey	1.00	$475.00	$475.00
		2343.70		$1,922,806.00

Non-Lead Firms	Hours	Lodestar
Abington Cole + Ellery	111.00	$105,450.00
Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C.	36.90	$22,105.00
Chestnut Cambronne PA	12.80	$9,150.00
DiCello Levitt	201.70	$168,124.50
Emerson Firm, PLLC	85.70	$68,131.50
Finkelstein, Blankinship, Frei-Pearson & Garber, LLP	84.90	$35,667.00
Hagens Berman Sobol Shapiro LLP	170.50	$123,482.50
Held & Hines LLP	48.80	$20,740.00
Herman Jones LLP	235.90	$169,127.00
Kershaw Talley Barlow, PC	35.70	$22,790.00
Law Offices of Ronald A. Marron	203.90	$111,676.50
Lite DePalma Greenberg & Afanador, LLC	169.10	$105,195.00
Lowey Dannenberg	539.90	$358,816.00
McShane & Brady	436.20	$332,095.00
MoginRubin LLP	318.60	$151,219.50
Nussbaum Law Group	33.10	$27,904.50
Seeger Weiss LLP	147.90	$68,085.00
Tousley Brain Stephens PLLC	248.40	$172,669.50
Tycko & Zavareei LLP	185.50	$137,410.10
Wolf Haldenstein Adler Freeman & Herz LLP	57.90	$33,578.00
Zimmerman Reed LLP	142.90	$83,717.00
TOTAL	3507.30	$2,327,133.60

Category	Expenses
Copies/Printing	$2,198.65
ESI Processing & Hosting	$1,363.26
Experts	$26,125.00
Filing Fee	$15,696.39
Hearing Transcript	$388.25
Mediation	$14,815.31
Miscellaneous	$31,022.90
Postage	$1,086.75
Research (Pacer/Westlaw)	$23,649.47
Service/Courier	$1,801.64
Telephone	$183.22
Travel (Transportation/Meals/Hotel)	$29,651.71
TOTAL	$147,982.55

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

In re: T-Mobile Customer Data Security Breach Litig.

MDL No. 3019

DECLARATION OF BRIAN T. FITZPATRICK

I. Background and qualifications

1. I am the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from the University of Notre Dame in 1997 and Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1. I speak only for myself and not for Vanderbilt.

2. My teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the Fordham Law Review, the NYU Journal of Law & Business, and the University of Arizona Law Review. My work has been cited by numerous courts, scholars, and media outlets such as the New York Times, USA Today, and Wall Street Journal. I have also been invited to speak at symposia and other events about class action litigation, such as the ABA National Institutes on

Class Actions in 2011, 2015, 2016, 2017, and 2019; and the ABA Annual Meeting in 2012. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to the membership of the American Law Institute. Last year, I became the co-editor of THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (with Randall Thomas).

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is still what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to one subject matter or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period (2006-2007). *See id*. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is also several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements, including 21 from the Eighth Circuit alone. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools

in 2009 and 2010. Since then, this study has been relied upon regularly by a number of courts, scholars, and testifying experts.[1] This study is attached as Exhibit 2.

[1] *See, e.g.*, *In re Stericycle Sec. Litig.*, 35 F.4th 555, 561 (7th Cir. 2022) (relying on article to assess fees); *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (same); *In re Ranbaxy Generic Drug Application Antitrust Litig*., 2022 WL 4329646, at *5 (D. Mass., Sep. 19, 2022) (same); *de la Cruz v. Manhattan Parking Group*, 2022 WL 3155399, at *4 (S.D.N.Y., Aug. 8, 2022) (same); *Kukorinis v. Walmart*, 2021 WL 8892812, at *4 (S.D.Fla., Sep. 21, 2021) (same); *Kuhn v. Mayo Clinic Jacksonville*, No. 3:19-cv-453-MMH-MCR, 2021 WL 1207878, at *12-13 (M.D. Fla. Mar. 30, 2021) (same); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2020 WL 6891417, at *3 (S.D.N.Y. Nov. 24, 2020) (same); *Shah v. Zimmer Biomet Holdings, Inc.*, No. 3:16-cv-815-PPS-MGG, 2020 WL 5627171, at *10 (N.D. Ind. Sept. 18, 2020) (same); *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) (same); *In re Wells Fargo & Co. S'holder Derivative Litig.*, No. 16-cv-05541-JST, 2020 WL 1786159, at *11 (N.D. Cal. Apr. 7, 2020) (same); *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, No. CV 11-10230-MLW, 2020 WL 949885, 2020 WL 949885, at *52 (D. Mass. Feb. 27, 2020), *appeal dismissed sub nom. Arkansas Tchr. Ret. Sys. v. State St. Corp.*, No. 20-1365, 2020 WL 5793216 (1st Cir. Sept. 3, 2020) (same); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *34 (N.D. Ga. Jan. 13, 2020) (same); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 3:07-cv-05634-CRB, 2019 WL 6327363, at *4-5 (N.D. Cal. Nov. 26, 2019) (same); *Espinal v. Victor's Cafe 52nd St., Inc.*, No. 16-CV-8057 (VEC), 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) (same); *James v. China Grill Mgmt., Inc.*, No. 18 Civ. 455 (LGS), 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018) (same); *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 38 (D.D.C. 2018) (same); *Hillson v. Kelly Servs. Inc.*, No. 2:15-cv-10803, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, No. 14-1374, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *Brown v. Rita's Water Ice Franchise Co. LLC*, No. 15–3509, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 (DLC), 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. 3:07-cv-5944 JST, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, No. MDL 2328, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 797 (N.D. Ill. 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 58 F.Supp.3d 167, 172 (D. Mass. 2014) (same); *Tennille v. W. Union Co.*, No. 09–cv–00938–JLK–KMT, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp.

4. In addition to my empirical works, I have also published many law-and-economics papers on the incentives of attorneys and others in class action litigation. *See*, *e.g.*, Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151 (2021) (hereinafter "A Fiduciary Judge"); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043 (2010) (hereinafter "Class Action Lawyers"); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). Much of this work was discussed in a book I published with the University of Chicago Press entitled THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019). The thesis of the book is that the so-called "private attorney general" is superior to the public attorney general in the enforcement of the rules that free markets need in order to operate effectively and that courts should provide proper incentives to encourage such private attorney general behavior. This work, too, has been relied upon by courts and scholars.[2]

5. I have been asked by class counsel to opine on whether the attorneys' fees they have requested here are reasonable in light of the empirical studies and research on economic incentives in class action litigation. In order to formulate my opinion, I reviewed a number of

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2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Fed. Nat'l Mortg. Association Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Prod. Liab. Litig.*, No. 11–1546, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Se. Milk Antitrust Litig.*, No. 2:07–CV 208, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, No. 10 C 816, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

[2] *See, e.g.*, *Briseno v. Henderson*, 998 F.3d 1014, 1025, 1029 (9th Cir. 2021); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 960 (11th Cir. 2020) (Jordan, J., dissenting); *Neese et al. v. Becerra*, 2022 WL 9497214, at *2 n.1 (N.D.Tex., Oct. 14, 2022); *Tershakovec v. Ford Motor Co.*, 2021 WL 2700347, at *18 (S.D. Fla. July 1, 2021); *Vita Nuova, Inc. v. Azar*, 2020 WL 8271942, at *3 n.5 (N.D. Tex. Dec. 2, 2020).

documents provided to me by class counsel; I have attached a list of these documents in Exhibit 3. As I explain, based on my study of settlements across the country and in the Eighth Circuit in particular, I believe the request here is within the range of reason in light of the empirical and economic research on class actions.

II. Case background

6. Beginning in August 2021, consumers filed dozens of lawsuits against T-Mobile under various state law theories for permitting cybercriminals to gain access to their personally identifiable information. These lawsuits were eventually transferred to this court by the Judicial Panel on Multidistrict Litigation. During the early stages of the litigation, the parties reached a class-wide settlement. The court certified the settlement class (and a California subclass) and preliminarily approved the settlement on July 26, 2022. The parties are now seeking final approval of the settlement and class counsel are seeking a fee award.

7. Under the settlement, T-Mobile will pay $350 million to class members. *See* Settlement Agreement ¶ 3.1. After deducting costs for notice and settlement administration, service awards to the class representatives, and any attorneys' fees and expenses awarded by the court, the monies will used to 1) buy identity protection services for any class member who choose to enroll and 2) to pay class members who file claims either $25-$100 each or, if they prefer, an amount equal to their actual out-of-pocket losses (including lost time) incurred as a result of the data breach. *See id*. at ¶ 3.2; Benefits Plan ¶¶ 3-5. None of this money can revert to T-Mobile; if the claims exceed or undershoot the cash fund, class members will receive more or less than these amounts on a pro rata basis. *See* Benefits Plan ¶ 8. In addition, T-Mobile has agreed to spend $150 million above previously budgeted amounts this year and next to improve its data security.

See Settlement Agreement ¶ 5.1. In exchange for these benefits, class members agree to release T-Mobile from any and all claims that "in any way concern, arise out of, or relate to the Data Breach, the facts alleged in the Actions, or any theories of recovery that were, or could have been, raised at any point in the Actions." *Id*. at ¶ 2.30

8. Class counsel have now moved the court for an award of fees of $78.75 million, which comes to 22.5% of the cash-fund portion of the settlement or 15.75% of the total monies that the defendant will pay under the settlement. In my opinion, this request is reasonable in light of the empirical studies on class action fee awards and the research on economic incentives in class action litigation.

III. Assessment of the reasonableness of the request for attorneys' fees

9. This settlement is a so-called "common fund" settlement where attorneys for the plaintiffs have created a settlement fund for the benefit of class members. When a fee-shifting statute is inapplicable in such cases (as it is here), courts award fees from class members' proceeds pursuant to the common law of unjust enrichment. This is sometimes called the "common fund" or "common benefit" doctrine.

10. At one time, courts that awarded fees in common fund class actions did so using the familiar lodestar approach. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043, 2051 (2010) (hereinafter "Class Action Lawyers"). Under this approach, courts awarded class counsel a fee equal to the number of hours they worked on the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors. *See id.; Johnson v. Comerica Mort. Corp.*, 83 F.3d 241, 244 (8th Cir. 1996). Over time, however, the

lodestar approach fell out of favor in common fund class actions because it was difficult to calculate the lodestar (courts had to review voluminous time records and the like) and the method did not align the interests of class counsel with the interests of the class (because class counsel's recovery did not depend on how much the class recovered). *See id.* at 2051-52; *Comerica*, 83 F.3d at 245 n.8 (recounting "the deficiencies of the lodestar process particularly as it applies to a [common] fund case"). According to my empirical study, the lodestar method is now used to award fees in only a small percentage of class action cases. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of settlements). The other large-scale academic studies of fees agree. *See, e.g.,* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Review 937, 945 (2017) (hereinafter "Eisenberg-Miller 2017") (finding the lodestar method used only 6.29% of the time from 2009-2013, down from 13.6% from 1993-2002 and 9.6% from 2003-2008).

11. The more popular method of calculating attorneys' fees is known as the "percentage-of-the-fund" method. Under this approach, courts select a percentage that they believe is fair to class counsel, multiply the common fund amount (in mathematical terms, the "multiplicand") by that percentage, and then award class counsel the resulting product. *See id.; Comerica*, 83 F.3d at 244-45. The percentage-of-the-fund approach has the advantages of being easy to calculate (because courts need not review voluminous time records and the like) and of aligning the interests of class counsel with the interests of the class (because the more the class recovers, the more class counsel receives). *See* Fitzpatrick, *Class Action Lawyers, supra,* at 2052; *In re Xcel Energy, Inc. Sec., Derivative, & ERISA Litig.*, 364 F.Supp.2d 980, 992 (D. Minn. 2005) (explaining the "strong policy reasons behind the . . . preference for the percentage of recovery method").

12. In the Eighth Circuit, district courts have the discretion to use either the lodestar method or the percentage-of-the-fund method in common fund cases. *See Comerica*, 83 F.3d at 246 ("It is within the discretion of the district court to choose which method to apply."). In light of the well-recognized disadvantages of the lodestar method and the well-recognized advantages of the percentage method, it is my opinion that courts should generally use the percentage method whenever enough of the value of the settlement can be reliably calculated. It is my opinion that courts should use the lodestar method only where enough value of the settlement cannot be reliably calculated (and the percentage method is therefore not feasible) or a fee-shifting statute requiring the lodestar method is applicable. *See id.* (affirming lodestar method where "the value of the settlements remained too speculative to calculate an appropriate percentage of the benefit"). This is not just my opinion. It is the consensus opinion of class action scholars. *See* American Law Institute, Principles of the Law of Aggregate Litigation § 3.13(b) (2010) ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases."). In this case, the settlement consists of cash payments and therefore it can be easily valued. Thus, in my opinion, the court should use the percentage method and I will proceed under that method here.

13. Under the percentage method, courts must 1) calculate the value of the benefits conferred by the litigation and then 2) select a percentage of that value to award to counsel. When selecting the percentage, courts in the Eighth Circuit, *see, e.g., Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019), use the familiar factors from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974): (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 for similar work in the community; (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.

14. When calculating the value of the benefits, most courts include any benefits conferred by the litigation, whether cash relief, non-cash relief, attorneys' fees and expenses, or administrative expenses. Although some of these things do not go directly to the class, they facilitate compensation to the class (e.g., notice and administration expenses), provide future savings to the class, or deter defendants from future misconduct by making defendants pay more when they cause harm. Thus, in my opinion, it is appropriate to include them all in the denominator of the percentage method. *See also* Principles of the Law of Aggregate Litigation, *supra*, § 3.13(b) ("[A] percentage of the fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement.").

15. As I explain below, the fee request here is only 22.5% of the cash-fund portion of the settlement and 15.75% of the total monies T-Mobile will pay under the settlement. It is my opinion that this request is reasonable under the *Johnson* factors in light of the empirical studies of class action fees and in light of the research on the economic incentives in class action litigation.

Valuation of the settlement

16. Let me begin with the valuation of the settlement. The $350 million cash fund portion of the settlement can be quantified at face value because none of it can revert to T-Mobile. It is true that the fund will not only distribute cash payments to class members, but will also buy identity protection services for any who want it. Although these services have a retail value of $96 per person and it is possible that, if enough people sign up for the services, the benefits conferred on the class could far exceed the face value of the fund, because it is unclear how many people

will sign up, in order to be as conservative as possible, I will not consider that potential additional value. I will therefore value the cash fund at its face value: $350 million. In addition, T-Mobile has agreed to pay $150 million to improve its data security. If the court included these expenditures, the settlement value would increase to $500 million. As I explain below, it does not matter in my opinion whether the court values the settlement at $350 million or $500 million; the fee request is reasonable either way.

Selecting the percentage

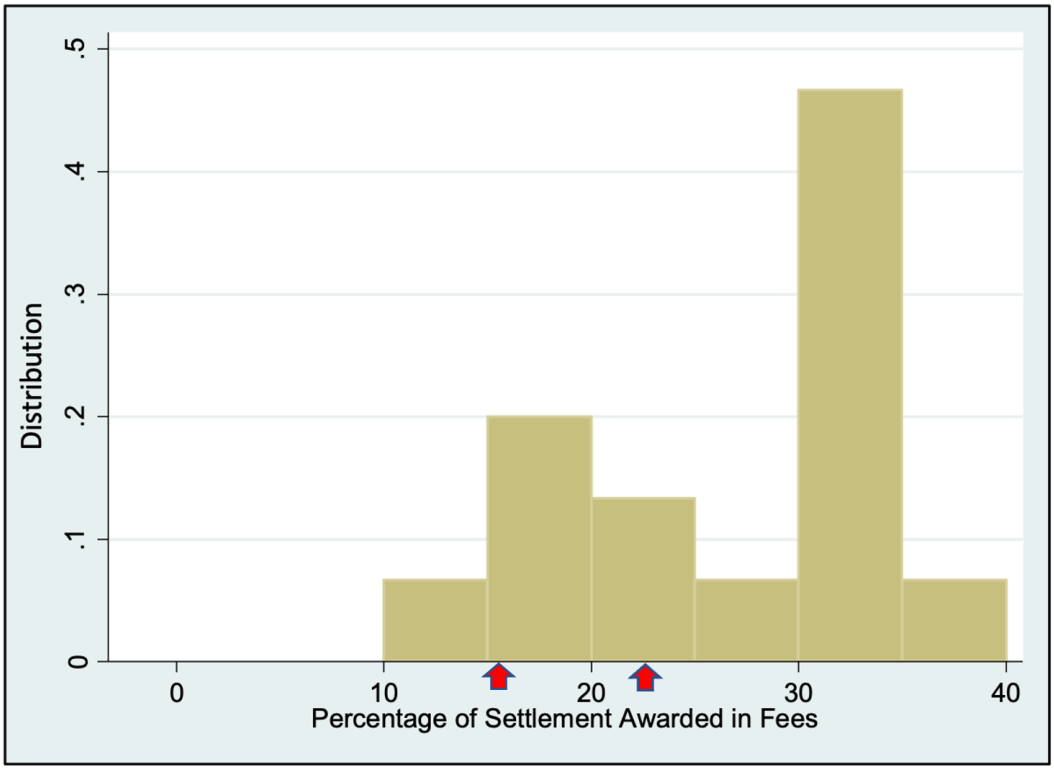
17. Class counsel have requested $78.75 million in fees, which comes to 22.5% if the court uses a $350 million valuation or 15.75% if the court uses a $500 million valuation. In my opinion, either percentage would be reasonable in light of the empirical studies and research on economic incentives.

18. Consider first the factors that go to the fee awards in other cases: (5) the customary fee for similar work in the community and (12) awards in similar cases. According to my empirical study, the most common percentages awarded by all federal courts in 2006 and 2007 using the percentage method were 25%, 30%, and 33%, with nearly two-thirds of awards between 25% and 35%, and with a mean award of 25.4% and a median award of 25%. *See* Fitzpatrick, *Empirical Study, supra,* at 833-34, 838. The numbers in the Eighth Circuit were even higher: there were 15 class action settlements in my study in which district courts in the Eighth Circuit used the percentage-of-the-fund method to award attorneys' fees and the average was 26.1% with the median at 30%. *See id*. My numbers agree with the other large-scale academic studies of class action fee awards. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 260 (2010) (hereinafter "Eisenberg-Miller 2010") (finding mean and median of 24% and 25% nationwide, and 25% and 30% in the Eighth Circuit); *Eisenberg-Miller 2017*, *supra*, at 951 (finding mean and median of

27% and 29% nationwide, and 29% and 32% in the Eighth Circuit). The fee request here—whether 22.5% or 15.75%—is obviously well below any of these numbers.

19. In order to visualize how low the fee request here is, I graphed the distribution of the Eighth Circuit's percentage awards from my study in Figure 1, below. The figure shows what fraction of settlements (y-axis) had fee awards within each five-point range of fee percentages (x-axis). The figure includes red arrows where the fee request here would fall under both of the aforementioned settlement valuations. As the figure shows, a fee award of 22.5% or 15.75% would be lower than the vast majority awarded in this Circuit. Indeed, the bar containing 22.5% is lower than some *three-fifths* of awards in this Circuit and the bar containing 15.75% is lower than some *three-fourths* of such awards.

Figure 1: Percentage-method fee awards in the Eighth Circuit, 2006-2007



20. With all of that said, it should be noted that the settlement here is unusually large; few settlements each year reach $350 or $500 million. This is notable because some courts analyze the "other cases" factor in reference to the size of the settlement. For this reason, my empirical study and the other large-scale academic studies show that settlement size has a statistically significant but inverse relationship with fee percentages—*i.e.*, that some courts awarded lower percentages in cases where settlements were larger. *See* Fitzpatrick, *Empirical Study, supra,* at 838, 842-44; *Eisenberg-Miller 2010*, *supra*, at 263-65; *Eisenberg-Miller 2017, supra*, at 947-48. Thus, for example, the mean and median fee percentages awarded in settlements in my dataset between $250 million and $500 million were only 17.8% and 19.5%, respectively. *See id.* at 839. (The Eisenberg-Miller studies do not break settlements down as granularly.) Although the 15.75% number is below these numbers, the 22.5% number is above them. Nonetheless, for several reasons, this does not change my opinion that these factors support the fee request.

21. First, "some courts" in the above paragraph does not mean "all courts." The data from my study is nationwide data—the data points are too few to break them down by Circuit—and different Circuits have different answers to the question of whether fees should be lowered in bigger settlements. For example, there is nothing in Eighth Circuit law that requires the Court to assess the "other cases" factor in reference only to similarly-sized settlements. *See, e.g., In re Xcel*, 364 F.Supp.2d at 997 ("To the extent that the [objectors] imply that courts 'traditionally accounted for economies of scale by awarding lower fees as the size of the fund increases' . . . the court reads the precedent otherwise.").

22. Second, when, as here, courts are not required to assess the "other cases" factor in reference to similarly-sized settlements, it is my opinion that courts should not exercise their discretion to do so anyway. The reason is the one I intimated above when discussing the

percentage versus lodestar methods: it creates poor incentives for class counsel. *See, e.g.*, *In re Cendant Corp. Litigation*, 264 F.3d 201, 284 n. 55 (3d Cir. 2001) ("Th[e] position [that the percentage of a recovery devoted to attorneys' fees should decrease as the size of the overall settlement or recovery increases] . . . has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply." (alteration in original)); *Allapattah Servs. Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1213 (S.D.Fla. 2006) ("By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011) (quoting *Allapattah*); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, No. 10-ml-02151, at 17 n.16 (C.D. Cal., Jun. 17, 2013)) ("The Court . . . agrees with . . . other courts . . . which have found that decreasing a fee percentage based only on the size of the fund would provide a perverse disincentive to counsel to maximize recovery for the class.") Consider the following example: if courts award attorneys 25% of settlements if they are under $100 million but only 18% of settlements if they are over $100 million (e.g., the average percentage I found in my study for settlements between $100 and $500 million), then rational attorneys will prefer to settle cases for $90 million (*i.e.*, an $22.5 million fee award) rather than $120 million (*i.e.*, a $21.6 million fee award)! Such incentives are obviously perverse. Indeed, cutting fee percentages when lawyers recover more money has been deemed so irrational—at least when not done only on the margin (e.g., for the *portion* above $100 million)—that it has been banned in at least one Circuit on the ground that "[p]rivate parties would never contract for such an arrangement . . . ." *See Synthroid I*, 264 F.3d 712, 718 (7th Cir. 2001). This is why studies of sophisticated corporate clients do not

report any such practice among them when they hire lawyers on contingency, even in the biggest cases like patent litigation. *See, e.g.,* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012) (finding that corporations either agree to flat rates of, on average, 38.6% or graduated rates that start, on average, at 28% and accelerate, on average, to 40.2%); Fitzpatrick, *A Fiduciary Judge*, *supra*, at 1159-63. But if class members would never contract for such an arrangement on their own, why should courts force it upon them in class actions? Given that courts are supposed to act as "fiduciaries" for absent class members, the answer is clear to me: they should not. *See, e.g.*, Fitzpatrick, *Fiduciary Judge*, *supra*, at 1154-55.

23. Third, it bears noting that there is a large range around average fee percentages in class action litigation. For example, the standard deviation in my study was 7.9% in the $250 to $500 million range.[3] This means that fee awards can be found that are much higher (and lower) than average in big settlements like this one. In other words, the fee request here would land well within the range of fee awards in comparably large settlements. *See, e.g.*, *In re: Syngenta AG MIR 162 Corn Litigation*, 357 F.Supp.3d 1094, 1110 (D. Kan. 2018) (33.33% of $1.5 billion); *In re Urethane Antitrust Litig.*, No. 04 Civ. 1616, 2016 WL 4060156, at *6 (D. Kan. July 29, 2016) (33.33% of $835 million); *Dahl v. Bain Capital Partners, LLC*, No. 07-cv-12388, Dkt. 1095 (D. Mass. Feb. 2, 2015) (33% of $590.5 million); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (33% of $510 million); *In re Vitamins Antitrust Litig.*, No. Misc. 99-197 (TFH), 2001 WL 34312839, at *10, 14 (D.D.C. July 16, 2001) (34% of $359 million); *Hale*

[3] Professors Eisenberg and Miller have taken the view that, the greater the number of standard deviations fee requests are from the mean, the greater justification is needed to approve them. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical L. Studies 27, 74 (2004). Because even the higher percentage here—22.5% of $350 million—would be within one standard deviation of the mean, they would say it should be presumed reasonable. *See id.*

v. State Farm, No. 12-00660-DRH-SCW (S.D. Ill. Dec. 16, 2018) (33.33% of $250 million); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340-SLR, ECF No. 543 (D. Del. 2009) (33% of $250 million); *In re Buspirone Antitrust Litig.*, No. 01-md-1413 (S.D.N.Y. Apr. 11, 2003) (33% of $220 million); *In re Relafen Antitrust Litig.*, No. 01-12239, at 8 (D. Mass. Apr. 9, 2004) (33% of $175 million); *In re Apollo Group Inc. Securities Litigation*, 2012 WL 1378677, at *9 (D. Ariz. April 20, 2012) (33% of $145 million); *In re Combustion Inc*., 968 F. Supp. 1116, 1142 (W.D. La. 1997) (36% of $127 million); *City of Greenville v. Syngenta Crop Protection*, 904 F. Supp. 2d 902, 908-09 (S.D. Ill. 2012) (33% of $105 million).

24. Consider next the factors that go to the results obtained by class counsel in light of the risks class counsel faced: (2) the novelty and difficulty of the questions; (6) whether the fee is fixed or contingent; (8) the amount involved and the results obtained; and (10) the undesirability of the case. The best way to assess these factors is to compare the class's best-case damages estimate to the settlement and then to analyze whether any discount was justified by the risks the class faced. Because many class members have not suffered any out-of-pocket losses here, however, it is difficult to estimate a best-case damages estimate. Perhaps the most likely theory of recovery was that each class member could at least obtain nominal damages. Given the size of the class, that would have been roughly $75 million. The other theories—that class members paid more for T-Mobile's services thinking they came with privacy protections than they would have if they had known the services did not; that T-Mobile profited from their consumer's data and this profit could be disgorged; that the class could recover from T-Mobile for the value commanded on the black market of their private information; that T-Mobile breached implied contractual provisions with the class—are so uncertain it is difficult to gauge what more, if anything, the class might have recovered. A theory with a bit more legs is the new California Consumer Privacy

Act—it provides for statutory damages irrespective of out-of-pocket loses and might have totaled a billion dollars or more for the California class members here—but even this law is untested and subject to several defenses. Nonetheless, we might assume that the class could have obtained a billion dollars or more here. But that is if everything went right. Not only was recovery uncertain on any of these substantive theories of liability—even with nominal damages, it would be contested whether it should be $1 for the class or $1 for each class member—but, even more significantly in my view, T-Mobile has individual arbitration provisions in its contracts. Thus, it is difficult to see how this case could have survived a motion to compel arbitration, at least with respect to the significant portion of the class that had agreements with T-Mobile. Even if the class somehow survived that, it is not clear that a litigation class would be certified here given the variety of state laws at issue. If you add all these risks up, $350-500 million not only looks good; it looks incredible. Indeed, class counsel recovered more per class member here than other data breach class actions pursuing similar theories. As such, these factors support the fee request, too.

25. Consider next the factors that go to the skills of class counsel and their relationship with the plaintiffs: (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; (7) time limitations imposed by the client or the circumstances; (9) the experience, reputation, and ability of the attorneys; and (11) the nature and length of the professional relationship with the client. Although I was not privy to the attorney-client relationships here, I can say that class counsel count among their number some of the deans of the national class action bar, especially the data breach class action bar. These are not average lawyers; they are exceptional ones. These factors, too, therefore support the fee request.

26. Consider finally factor (1): the time and labor required. There are two ways that courts consider this factor: qualitatively or quantitatively. The qualitative approach assesses what class counsel did during the litigation; i.e., whether class counsel have dug deeply enough into a case to know what it is worth. *See, e.g.*, *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988) ("[I]n awarding attorneys' fees in a common fund case, the 'time and labor involved' factor need not be evaluated using the lodestar formulation . . . ."). The quantitative approach is to calculate class counsel's lodestar and to "crosscheck" the fee percentage requested against the lodestar to ensure that the ensuing multiplier is not in some sense "too much." *See, e.g.*, *In re Cendant Corp. Litig.*, 264 F.3d at 285. Courts in this Circuit are not required to take the quantitative approach, *see, e.g., Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) ("Having found that the district court's approval of the fee under the 'percentage of the fund' approach was proper . . . we need not address these criticisms [of the data used to calculate the lodestar crosscheck]."); *In re Xcel*, 364 F.Supp.2d at 999 ("Although not required, the court will exercise its discretion . . . by cross-checking . . . against lodestar."), and, indeed, the quantitative approach tends to be the minority approach nationwide. *See* Fitzpatrick, *supra*, at 833 (finding that only 49% of courts consider lodestar when awarding fees with the percentage method); *Eisenberg-Miller 2017*, *supra*, at 945 (finding percent method with lodestar crosscheck used 38% of the time versus 54% for percent method without lodestar crosscheck).

27. In this case, the qualitative approach supports the requested fee. Class counsel were able to secure all the information necessary to fairly evaluate the claims and potential damages in order to secure one of the largest data breach settlements on record. Class counsel obtained the key forensic report, understood the scope of the data compromised, and were well informed regarding the existing and potential harms to the class. Thus, class counsel dug deep enough to know what

this case was worth. The qualitative approach would not punish class counsel for doing so efficiently.

28. The quantitative approach, by contrast, would punish class counsel for doing so efficiently. In my opinion, the majority of courts are wise to reject it. I say this because the lodestar crosscheck harms class members by creating bad incentives for class counsel. In particular, the lodestar crosscheck reintroduces the very same undesirable consequences of the lodestar method that the percentage method was designed to correct in the first place. For example, if counsel believe that courts will cap the percentage awarded at some multiple of their lodestar, then they will have precisely the same incentives they would if courts used the lodestar method alone: to be inefficient, perform unnecessary projects, delay results, and overbill and overstaff work in order to run up their lodestar. Moreover, by capping the amount of compensation counsel can receive from a settlement, the lodestar crosscheck misaligns their incentives from those of their clients and blunts their incentives to achieve the largest possible award. *See* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2065-66. For these reasons, to my knowledge, real clients have never reported using lodestar crosschecks when they hire lawyers on contingency, *see* Fitzpatrick, *A Fiduciary Judge, supra*, at 1167, and, for that reason, the Seventh Circuit has all but banned it in awarding class action fees, *see Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) ("The . . . argument . . . that any percentage fee award exceeding a certain lodestar multiplier is excessive . . . echoes the 'megafund' cap we rejected in *Synthroid*."). Again, if class members would never contract for such an arrangement on their own, why should courts force it upon them in class actions? Given that courts are supposed to act as "fiduciaries" for absent class members, the answer is again clear to me: they should not. *See, e.g.*, Fitzpatrick, *Fiduciary Judge*, *supra*, at 1154-55.

29. In the event the court nonetheless wishes to follow a strictly quantitative approach here, I will comment on class counsel's lodestar. The lodestar multiplier that would result if the court grants class counsel's fee request would be higher than usual. According to class counsel, their lodestar thus far is $6,000,000 through October 31, 2022, with another $2,200,000 in anticipated time. If we add those numbers together, it means the requested fee award would result in a multiplier of 9.6. Of the 204 cases in my study where the district court used the percentage-of-the-fund method with a lodestar crosscheck and the lodestar multiplier was ascertainable, the multipliers ranged from .07 to 10.3, with a mean and median of 1.65 and 1.34, respectively. *See* Fitzpatrick, *Empirical Study, supra*, at 834. Larger settlements tend to result in larger multipliers, but, even factoring that in, the multiplier here would still be higher than usual. *See Eisenberg-Miller 2010*, *supra*, at 274 (finding mean and median multipliers of 3.18 and 2.60, respectively, for recoveries above $175.5 million). But it is also true that the multiplier here would fall within the range of multipliers found in previous settlements. As I noted, in just the two years of my empirical study, I found multipliers up to 10.3. There are many in other years that are even higher. *See, e.g.*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1252 (Del. 2012) (awarding fee with a 66 multiplier); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 (9th Cir. 2002) (noting multipliers of up to 19.6); *Health Republic Ins. Co. v. United States*, 156 Fed. Cl. 67, 82 (2021) ("[E]ven if the Court applied the lodestar cross-check, a multiplier of 18–19 would, at least, not be outside the realm of reasonableness."); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. Civ.A. 03–4578, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (awarding fee with 15.6 multiplier); *Lloyd v. Navy Fed. Credit Union*, 2019 WL 2269958, at *13 (S.D. Cal. May 28, 2019) (awarding fee even though "[t]he Court is aware that a lodestar cross-check would likely result in a multiplier of around 10.96"); *In re Doral Financial Corp. Securities Litigation*, No. 05-

cv-04014-RO (S.D.N.Y. Jul. 17, 2007) (awarding fee with 10.26 multiplier); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, No. 11-cv-00011 (D.N.J. Jan. 26, 2015) (awarding fee with 8.91 multiplier); *Raetsch v. Lucent Tech., Inc.*, No. 05-cv-05134 (D.N.J., Nov. 8., 2010) (awarding fee with 8.77 multiplier); *Thacker v. Chesapeake Appalachia, L.L.C.*, No. 07-cv-00026 (E.D.Ky. Mar. 3, 2010) (awarding fee with 8.47 multiplier); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (awarding fee with 8.3 multiplier).

30. Given that all of the other *Johnson* factors support the fee request and the time and labor expended here is within the range of previous cases, it is my opinion that it would be a mistake to reject the fee request simply because class counsel did not bill more hours before achieving what is a highwater mark in data breach settlements—especially when, as I noted above, billing more hours here probably would have resulted in a worse outcome for the class, not a better one.

31. For all these reasons, I believe the fee award requested here falls within the range of reason in light of the empirical studies and research on economic incentives.

32. My compensation in this matter was a flat fee in no way dependent on the outcome of class counsel's fee petition.

Nashville, TN

November 16, 2022

Brian T. Fitzpatrick