

STATE OF MINNESOTA
COUNTY OF ANOKA

DISTRICT COURT
TENTH JUDICIAL DISTRICT

Case Type: Personal Injury

JASON ZIMMERMAN, on behalf of
himself and all others similarly situated,

Plaintiff,

v.

RIVERPLACE COUNSELING
CENTER, INC.,

Defendant.

Civil No. 02-CV-19-6522

Judge Jonathan N. Jasper

CLASS ACTION

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED
MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF
EXPENSES, AND APPROVAL OF SERVICE AWARD TO NAMED PLAINTIFF**

INTRODUCTION

Plaintiff Jason Zimmerman (“Plaintiff”), on behalf of himself and the putative Class, through undersigned Class Counsel and pursuant to Rule 23.05 of the Minnesota Rules of Civil Procedure, hereby submits this memorandum of law in support of his motion for an award of \$150,000 in attorneys’ fees and reimbursement of expenses and approval of a service award of \$5,000 for the sole named Plaintiff.¹

The Settlement, which was preliminarily approved by the Court on September 3, 2021, *see* Doc. ID ## 92 and 93, provides for the settlement of the claims of Plaintiff and the Settlement Class against Riverplace Counseling Center, Inc. (“Riverplace” or “Defendant”). Pursuant to the Settlement Agreement, Riverplace established a Settlement Fund for all persons whose personally identifiable information and protected health information was potentially compromised in a cybersecurity incident announced by Riverplace on or about April 11, 2019. *See* Baxter-Kauf Aff., Ex. 1 (copy of Settlement Agreement). The Settlement Fund consists of \$500,000 from which up to an aggregate cap of \$300,000 will be paid out to class members on a claims-made basis, with the caveat that should notice costs exceed \$45,000, the claims-made settlement cap will be accordingly decreased to an amount not to be below \$275,000. *Id.* ¶ 3.

¹ A proposed order for the instant motion was attached as Exhibit D to the Settlement Agreement, which was attached as Exhibit 1 to the Affidavit of Kate M. Baxter-Kauf in Support of Plaintiff’s Unopposed Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of Class, and Approval of Notice (Doc ID# 90) (hereinafter “Baxter-Kauf Aff.”). Counsel will submit this Proposed Order again in conjunction with the Motion for Final Approval of Settlement consistent with the Preliminary Approval Order (Doc. ID #92) in advance of the Final Approval Hearing Date.

The parties separately negotiated attorneys' fees and an incentive award for the named Plaintiff. Specifically, the parties agreed that Riverplace would not oppose a request by Class Counsel for an award of reasonable attorneys' fees not to exceed \$150,000, inclusive of costs. Riverplace will pay the amount approved by the Court through the Settlement Fund. The parties further agreed that Riverplace would not oppose a request by the Plaintiff for an incentive award of \$5,000 to the sole named Plaintiff, Jason Zimmerman.

In conjunction with preliminary approval of the Settlement, the Court directed distribution of a notice of settlement (the "Notice") to the members of the Class informing them of the terms of the proposed Settlement, including the nature and extent of the release provided to Riverplace. The Notice also advised Class members that Class Counsel intended to apply for an incentive award for the named Plaintiff. *See* Affidavit of Jean Martin in Support of Unopposed Motion for Award of Attorneys' Fees and Reimbursement of Expenses, and Approval of Service Award to Named Plaintiff (hereinafter "Martin Aff.") ¶ 11. The Notice sent to Class members also advised them of their right to object to the proposed Settlement, or to opt out of the Settlement.

Class Counsel now respectfully request that the Court award attorneys' fees and expenses and grant the requested incentive award to Plaintiff. The fee request is within the range awarded by Courts in other complex consumer class actions. Pursuant to this Court's preliminary approval Order, Class Counsel file this application for attorneys' fees and expenses and service award at least fourteen (14) days before the Opt-Out and

Objection Deadline; as a result, any objections will be addressed at least fourteen (14) days before the Final Approval Hearing on March 11, 2022. *See* Doc ID #92 at 7.

PROCEDURAL AND FACTUAL BACKGROUND

A. The Litigation

Defendant Riverplace Counseling Center, Inc., is a Minnesota corporation principally located in Anoka that operates men’s and women’s chemical dependency treatment programs. Compl. ¶ 13 (Doc. ID #2). On April 11, 2019, Riverplace notified Plaintiff, as one of 11,639 Class members, that it had discovered in January 2019 that Plaintiff’s personally identifiable information and protected health information (collectively “PII”) was the subject of a data breach involving malware installed on Riverplace’s data storing computer systems. Compl. ¶ 17; Motion to Dismiss Order at 2 (Doc. ID #66). On October 3, 2019, Plaintiff Zimmerman filed a putative class action in Minnesota federal court alleging claims of negligence, negligence per se, invasion of privacy, breach of implied contract, unjust enrichment, breach of fiduciary duty, breach of confidence, and violations of the Minnesota Consumer Fraud Act (“MCFA”), Minn. Stat. § 325F.68. *See Zimmerman v. Riverplace Counseling Center, Inc.*, Case No. 19-cv-02645-PJS-BRT, ECF No. 1 (D. Minn. Oct. 3, 2019). After Riverplace provided information indicating that nearly all of the class was located in Minnesota, the federal case was voluntarily dismissed. *See id.*, ECF No. 14 (Nov. 18, 2019). The next day, Plaintiff Zimmerman filed a substantively identical complaint in Minnesota state court. *See generally* Compl.

On January 10, 2020, Riverplace filed a motion to dismiss, asking the Court to dismiss in full Zimmerman's individual and class claims. Doc. ID #51. The Honorable Jonathan N. Jasper held a hearing on the matter on June 18, 2020. Doc. ID #64. On September 16, 2020, the Court issued an Order granting Riverplace's Motion in part and denying it in part. Doc ID #66. Specifically, the Court denied Riverplace's Motion to dismiss the Complaint based on a lack of standing, denied Riverplace's Motion as to the breach of implied contract and breach of fiduciary duty claims, but granted the Motion as to all other claims. *See id.* at 22-23. Plaintiff's breach of implied contract and breach of fiduciary duty claims proceeded to discovery. Plaintiff served written discovery and Riverplace filed and served an Answer on November 6, 2020. Doc. ID #81. The parties also held a pretrial status conference with the Court on October 5, 2020. Doc. ID #71.

Simultaneously, the parties engaged in mediation. On November 17, 2020, the parties engaged in a full day mediation with Judge Borg. At the end of that day, the parties left with a tentative way forward, but not a final agreement. After the mediation, the parties continued to negotiate a term sheet via email and telephone conferences over the course of several months. On February 17, 2021, the parties entered into a Settlement Term Sheet that set forth the material terms of the Settlement. *See See Baxter-Kauf Aff.*, Ex. 2 (copy of Term Sheet).

B. The Terms of the Settlement

Counsel for Zimmerman and counsel for Riverplace engaged in extensive fair, honest, and aggressive arm's-length negotiations with Judge Borg, and after extensive additional discussions, the Parties entered into the Term Sheet that set forth the material

terms of the Settlement. Riverplace agreed to establish a Settlement Fund of \$500,000 from which up to an aggregate cap of \$300,000 would be paid out to class members on a claims-made basis, with the caveat that should notice costs exceed \$45,000, the claims-made settlement cap will be accordingly decreased to an amount not to be below \$275,000. From the claims-made funds of \$300,000, Riverplace would pay claims as follows:

- a. Claimants may submit a claim with a choice between 2 years' credit monitoring or a \$30 cash payment for reimbursement of credit monitoring coverage purchased from April 1, 2020 (one year after Riverplace began offering 12 months of credit monitoring coverage) through February 18, 2021, with documentation of purchase of such credit monitoring coverage;
- b. Claimants may submit a claim for reimbursement of up to 2 hours' time at a rate of \$20/hour for time spent as a result of the Data Breach with no documentation but subject to signature under penalty of perjury;
- c. Claimants may submit a claim for reimbursement of out-of-pocket costs actually incurred as a result of the Data Breach, including fraud costs and other losses, and including any out-of-pocket costs paid for credit monitoring individually over the \$30 allocated in part (a) above for reimbursement of credit monitoring coverage purchased from April 1, 2020 through February 18, 2021 with documentation of purchase of such credit monitoring coverage, subject to a limit of \$950 per claimant and a requirement that documentation be provided; and
- d. Claimants may submit a claim for each of subparts (a)-(c) above. If the cost of claims exceeds \$300,000 (or between \$275,000-\$300,000 if notice costs exceed \$45,000) claims for (b) and (c) will be pro rata reduced.

See Baxter-Kauf Aff., Ex. 1 ¶ 3.

The parties also negotiated injunctive relief. Riverplace agreed to implement improvements and plan for future implementation to improve its cybersecurity practices, including the implementation of multifactor authentication. *See id.* ¶ 6. Separate and apart

from agreeing to the remedy for Settlement Class, the parties negotiated attorneys' fees and a service award for the named Plaintiff. Pursuant to the Settlement Agreement, within 45 days of the Effective Date, Riverplace will pay \$300,000 into an interest-bearing escrow account. *Id.* ¶ 5. The funds in the escrow account will be utilized by Class Counsel for the payments addressed in the Settlement Agreement, to include attorneys' fees and the service award. *See id.* ¶ 4.

The Settlement Agreement provides that Class Counsel shall petition the Court for attorneys' fees in an amount not to exceed \$150,000, inclusive of costs. *Id.* The Settlement Agreement also includes a provision for Class Counsel to request an incentive award for the named Plaintiff in the amount of \$5,000. *Id.*

C. Preliminary Approval

On September 3, 2021, this Court preliminarily approved the Settlement. Preliminary Approval Order (Doc. ID 92). The Court appointed the Plaintiff Jason Zimmerman as Class Representative for the Settlement Class, and appointed Plaintiff's counsel as Class Counsel. *Id.* at 3-4. The Court also approved the direct mailing of Class Notice to the Settlement Class and scheduled a final approval hearing for March 11, 2022. *Id.* at 6.

The Court ordered that any applications for attorneys' fees and expenses and service awards be filed at least fourteen (14) days before the opt out and objection deadline. *Id.* at 7.

ARGUMENT

I. THE REQUESTED PAYMENT OF ATTORNEYS' FEES AND EXPENSES IS FAIR AND REASONABLE UNDER APPLICABLE LEGAL STANDARDS

Plaintiff's counsel conducted a thorough investigation into the facts and law relating to the Lawsuit, fully analyzing and evaluating the merits of all the Parties' claims and defenses and of the proposed Settlement as it impacts each of the Parties, including the members of the Class. Plaintiff's counsel have evaluated the risks, delay and difficulties in establishing liability, the potential relief that might be available, and the likely expense and time of further litigation and believe they have negotiated an excellent result. Martin Aff. ¶ 9. For their successful efforts on behalf of the Class, Class Counsel requests an award of legal fees and reimbursement of expenses of \$150,000, inclusive of both fees and costs.

A. The Fee Request Is Appropriate Under the Lodestar Method

The Minnesota Supreme Court has "approved the use of the lodestar method for determining reasonable attorney fees." *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 620 (Minn. 2008); *see also Green v. BMW of N. Am., LLC*, 826 N.W.2d 530, 535 (Minn. 2013) ("Generally, Minnesota courts have used the lodestar method for determining the reasonableness of statutory attorney fees."). Under that method of analysis, lawyers' hours are multiplied by hourly rates and then multiplied by a factor to account for the risk involved and result achieved. In determining the reasonableness of the hours expended and hourly rates, the court considers "all relevant circumstances," which typically includes "the time and labor required; the nature and difficulty of the responsibility

assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client.” *Id.* at 621 (quoting *State v. Paulson*, 188 N.W.2d 424, 426 (Minn. 1971) (quotation marks omitted)). “There is a ‘strong presumption’ that the lodestar figure represents the reasonable fee to be awarded.” *Hixon v. City of Golden Valley*, 2007 WL 4373111, *2 (D. Minn. Dec. 13, 2007), quoting *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).

The hourly rates of the attorneys for whom time is submitted range from \$468 to \$950, and the hourly rate for non-lawyer billing staff range from \$208 to \$325. Martin Aff. ¶ 14. These hourly rates have been accepted and approved in other contingent litigation and are comparable to rates charged by class action counsel in similar cases in Minnesota. *Id.*

Collectively, prior to the filing of this motion, Class Counsel have expended 395 hours of attorney and paralegal time for a total lodestar of \$290,447.55. As a result, the proposed fees represent a negative multiplier of nearly half for the work performed in this case. Martin Aff. ¶ 13. The relevant circumstances support awarding this request.

1. The Time and Labor Required

Here, Class Counsel diligently monitored time expended throughout the litigation to ensure that the time spent on the case was necessary. Martin Aff. ¶ 15. Class Counsel have made good-faith efforts to use good billing judgment in their fee request. The vast majority of time expended in this case was by three attorneys, who worked diligently to avoid duplication while actively prosecuting the case. *Id.* Class Counsel researched and

successfully briefed and argued Plaintiff's opposition to Riverplace's Motion to dismiss, served written discovery, and otherwise litigated this case for over one year before reaching a partial agreement. *Id.* ¶ 8. Even then, Class Counsel continued to negotiate a term sheet via email and telephone conferences over the course of several months. *Id.* ¶ 7. Class Counsel will continue to expend time implementing the Settlement and in connection with the Final Approval Hearing. Plaintiff's counsel will provide detailed time records for *in camera* review upon the Court's request. However, because Class Counsel are requesting a fee award that is almost half of the lodestar, and because the Court has been intimately involved in this case and is well aware of the litigation efforts involved, Plaintiff's counsel have provided an affidavit supporting the fee request but not detailed time records at this time.

2. The Nature and Difficulty of the Case

The instant action involves a statewide class under state law with 11,639 Settlement Class Members. Class Counsel encountered and dealt with complex issues at various stages of this litigation. At the onset, Plaintiff filed this action in federal court and only voluntarily dismissed his lawsuit after he was provided information that nearly all of the class was located in Minnesota. Class Counsel continued to navigate hurdles while briefing Plaintiff's opposition to Riverplace's motion to dismiss and throughout discovery, including overcoming Riverplace's argument regarding Plaintiff's standing. In addition, Plaintiff's claims were both complex and novel. Data breach litigation such as this is relatively new to Minnesota courts. Because caselaw generally favors defendants with respect to a number of the issues in this case, Class Counsel spent

significant time developing strong, supported, and persuasive arguments. These efforts required extensive legal research.

3. The Amount Involved and the Results Achieved

Courts have consistently recognized that the result achieved is an important factor to be considered in making a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Here, a settlement fund of \$500,000.00 has been obtained solely through the efforts of Class Counsel without the assistance of any regulatory agency or the necessity of trial. This result is substantial for the 11,639 affected Class members, especially in light of Riverplace's vigorous defense and the likelihood of success at trial; generally unfavorable precedent in this district; the Court's ruling dismissing Plaintiff's negligence, negligence per se, invasion of privacy, unjust enrichment, breach of confidence, and MCFA claims; the risks of trial; and the further risks of appeal. *Martin Aff.* ¶ 9. In sum, Plaintiff's case faced substantial legal, factual and practical obstacles. This factor favors an award of the amount sought.

4. The Fees Customarily Charged for Similar Legal Services

Reasonableness of hourly rates are determined by reference to those rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stemsom*, 465 US 886, 896, n.11 (1984); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 741 (Minn. 1997). Here, as noted above, the hourly rates charged by Class Counsel and staff are comparable to rates charged by class action counsel in similar cases and have been accepted and approved in

other contingent litigation. Martin Aff. ¶ 14. As a result, this factor also favors an award of the amount sought.

5. The Experience, Reputation, and Ability of Counsel

The skill, experience and quality of work of counsel are also important factors in setting a fair fee. As demonstrated by the history of the case, Class Counsel are skilled and experienced class action litigators, and they have devoted the effort and time necessitated by the circumstances of the case, including the complexity of the issues, the class certification issues, and the significant amount of discovery. Class Counsel have prosecuted this case efficiently and have achieved an excellent result. This Court has already found that Class Counsel has adequate experience handling class actions, other complex litigation, and the types of claims at issue here, and has demonstrated knowledge of the applicable law. *See* Preliminary Approval Order, Doc ID #92 at 5; Martin Aff. ¶ 17.

6. The Contingent Nature of the Representation

It has been a long-recognized rule that an attorney is entitled to a larger fee when the compensation is contingent than when it is fixed on a time or contractual basis. *See, e.g., In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.*, 724 F. Supp. 160, 164 (S.D.N.Y. 1989) (“Th[e] contingent fee risk is the single most important factor in awarding a multiplier.”). These considerations support the fee award sought for Class Counsel, who have litigated on a contingent-fee basis against determined opposition and achieved an excellent result for the Class. Plaintiff is of modest means and would not have been able to obtain counsel to pursue his claims on a fixed-fee basis. Martin Aff. ¶

18. Class Counsel bore the time costs and out-of-pocket costs of litigation for over two years without any compensation and with the risk of no compensation. *Id.* Thus, the contingent nature of the representation also supports the requested fee award.

B. The Request Properly Includes the Costs Incurred by Class Counsel

Plaintiffs vigorously litigated this case for over two years. During that time, Class Counsel incurred unreimbursed costs and expenses totaling \$6,133.71. Martin Aff. ¶ 16. Pursuant to the Settlement Agreement, costs and expenses are included in Class Counsel's request for \$150,000. These expenses include costs for filing fees, mediation, document management, photocopying, overnight mail, process service fees, copies, and electronic research. *Id.* The expenses for which Class Counsel now seek reimbursement were incurred in the normal course of the litigation and Class Counsel made every effort to keep expenses contained. *Id.* Reimbursement of the expenses of counsel whose efforts produced the recovery is appropriate and customary. *See, e.g., Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1315 (8th Cir. 1981); *In re Xcel Energy, Inc. Sec. Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (awarding expenses for costs related to photocopying, postage, messenger services, document depository, telephone and facsimile charges, filing and witness fees, computer assisted legal research, and expert fees).

II. THE REQUESTED INCENTIVE AWARD TO THE NAMED PLAINTIFF IS APPROPRIATE GIVEN PLAINTIFF'S INVOLVEMENT IN THIS LITIGATION

Courts may make awards to class representatives in recognition of their risks, time expended, and benefits to the class. *See In re US Bancorp Litig.*, 291 F.3d 1035, 1037 (8th Cir. 2002), *cert. denied* 537 U.S. 823 (2002). The Settlement here includes an incentive award request for the named Plaintiff. Incentive or service payments are commonly awarded to class representatives. *Employee Benefits Plans Sec. Litig.*, 1993 WL 330595 at *23; *see also White v. National Football League*, 822 F. Supp. 1389, 1406 (D. Minn. 1993), *aff'd* 41 F.3d 402 (8th Cir. 1994), *cert. denied* 515 U.S. 1137 (1995) (citing cases). In determining whether the awards is appropriate, the courts consider what actions the plaintiff took to protect the class's interests, the degree the class benefited from those actions and the amount of time and effort the plaintiff expended in pursuing the litigation. *In re U.S. Bancorp Litig.*, 291 F.3d at 1038.

In this case, Plaintiff performed a public service by seeking to enforce the rights of the class and conferred a benefit on the class. "Small incentive awards, which serve as premiums to any claims-based recovery from the Settlement, promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits." *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1068 (D. Minn. 2010). The incentive award reflects the efforts of the Plaintiff in gathering and communicating information to counsel and acting as the public face of the litigation. Here, Plaintiff assisted with the prosecution of the suit by gathering documents for production, responding to discovery responses, working with counsel on motion practice, and

preparing for a deposition should one have been taken. Martin Aff. ¶ 19. Mr. Zimmerman put his name and reputation on the line for the sake of the Class by bringing this case. The payment of \$5,000 to the named Plaintiff is well-deserved and should be awarded.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that the requested attorneys' fees and expenses for which reimbursement is sought are fair and reasonable under the applicable legal standards and should be awarded by the Court. Plaintiff also requests that the Court grant the requested service award to the sole named Plaintiff.

Dated: November 30, 2021

Respectfully submitted,

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