

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

MARC BROWNE, et al.,

Plaintiffs,

v.

CIOX HEALTH LLC,

Defendant.

§
§
§
§
§
§
§
§
§
§
§
§

Civil Action No. 4:19-cv-667-ALM-KPJ

**CLASS COUNSEL’S UNOPPOSED MOTION AND BRIEF IN SUPPORT FOR
AWARD OF ATTORNEYS’ FEES AND COSTS AND CLASS
REPRESENTATIVE SERVICE AWARDS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

NATURE AND STAGE OF THE PROCEEDINGS 2

I. CLASS COUNSEL’S ATTORNEYS’ FEE REQUEST SHOULD BE APPROVED 3

A. Legal Standard for Awarding Attorneys’ Fees 3

B. 29% of the Settlement Fund is a Reasonable Percentage Within the Benchmark 25-33% Award..... 4

C. Class Counsel’s Fee is Reasonable Under the *Johnson* Factors 5

1. The Time and Labor Required Supports Approval of the Requested Fee 6

2. The Novelty and Difficulty of Issues Support Approval of the Requested Fee 8

3. The Skill Required to Perform the Legal Services Properly Supports Approval of the Requested Fee..... 9

4. The Preclusion of Other Employment by the Attorney as a Result of Taking the Case is a Neutral Factor..... 9

5. The Requested Fee is Within the Range of the Customary Fee in Common Fund Cases, Supporting the Requested Fee 10

6. The Contingent Nature of the Requested Fee Supports Its Approval 10

7. Time Limitations Imposed by the Client or Other Circumstances Factor is a Neutral Factor 11

8. The Monetary Amount and the Results Obtained Supports Approval of the Requested Fee..... 11

9. The Experience, Reputation, and Ability of Class Counsel Supports Approval of the Requested Fee 11

10. The Undesirability of this Case Due to the Risk of Non-Recovery Supports Approval of the Requested Fee..... 12

11.	The Nature and Duration of the Professional Relationship with the Clients is a Neutral Factor.....	12-13
12.	Awards in Similar Cases Supports the Requested Fee	13
D.	The Reaction of the Class Supports the Requested Fee Award.....	13
II.	CLASS COUNSEL’S REQUESTED EXPENSE REIMBURSEMENT SHOULD BE APPROVED	13
III.	THE COURT SHOULD APPROVE THE \$2,500 SERVICE FEE AWARDS.....	14
IV.	CONCLUSION.....	15

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Allen v. HealthPort Technologies, LLC, n/k/a CIOX Health, LLC</i> , Case No. 12-CA-012154-K (Fla. 13 th Cir.)	8
<i>Blondell v. Bouton, Report and Recommendation</i> . ECF No. 100, (E.D.N.Y. August 30, 2021)	7
<i>Blondell v. Bouton</i> , 2021 WL 4173066 (E.D.N.Y. Sept. 14, 2021)	7
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980).....	4
<i>Bridges v. Ridge Nat. Res., LLC</i> , 2020 WL 7496843 (W.D. Tex. June 23, 2020)	3,6,12
<i>Cunningham v. Kitchen Collection, LLC</i> , 2019 WL 2865080 (E.D. Tex. July 3, 2019)	4
<i>DeHoyos v. Allstate Corp.</i> , 240 F.R.D. 269 (W.D. Tex. 2007)	3,14
<i>Di Giacomo v. Plains All Am. Pipeline</i> , 2001 WL 34633373 (S.D. Tex. Dec. 19, 2001).....	<i>passim</i>
<i>Duncan v. JPMorgan Chase Bank, N.A.</i> , 2016 WL 4419472 (W.D. Tex. May 24, 2016), <i>report and recommendation adopted</i> , 2016 WL 4411551 (W.D. Tex. June 17, 2016)	5
<i>Erica P. John Fund, Inc. v. Halliburton Co.</i> , 2018 WL 1942227 (N.D. Tex. Apr. 25, 2018)	2,5
<i>Fairway Med. Ctr., L.L.C. v. McGowan Enterprises, Inc.</i> , 2018 WL 1479222 (E.D. La. Mar. 27, 2018)	5
<i>Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.</i> , 2018 WL 1602460 (E.D. Tex. Apr. 3, 2018).....	7
<i>In re Combustion Inc.</i> , 968 F. Supp. 1116 at 1133 (W.D. La. 1997).....	12
<i>In re Dell Inc.</i> , 2010 WL 2371834 (W.D. Tex. June 11, 2010)	6,10,11,13

<u>Cases</u>	<u>Page(s)</u>
<i>In re Enron Corp. Sec., Derivative & ERISA Litig.</i> , 2004 WL 1900294 (S.D. Tex. Aug. 5, 2004)	14
<i>In re Enron Corp. Sec., Derivative & ERISA Litig.</i> , 586 F. Supp. 2d 732, 747 (S.D. Tex. 2008)	6,11
<i>In re Fed. Nat’l Mortg. Ass’n Sec., Derivative, & “ERISA” Litig.</i> , 4 F. Supp. 3d 94 (D.D.C. 2013)	1
<i>In re Lease Oil Antitrust Litigation</i> (No. II), 186 F.R.D. 403 (S.D. Tex. 1999)	2
<i>Johnson v. Ga. Highway Express, Inc.</i> , 488 F.2d 714 (5th Cir. 1974)	<i>passim</i>
<i>King v. United SA Fed. Credit Union</i> , 744 F. Supp. 2d 607 (W.D. Tex. 2010)	9
<i>Klein v. O’Neal, Inc.</i> , 705 F. Supp. 2d 632 (N.D. Tex. 2010) <i>report and recommendation adopted</i> , 2016 WL 4411551 (W.D. Tex. June 17, 2016)	4-5,10
<i>La. Power & Light Co. v. Kellstrom</i> , 50 F.3d 319 (5th Cir. 1995)	11
<i>Marcus v. J.C. Penney Co.</i> , 2016 WL 8604331 (E.D. Tex. Aug. 29, 2016) <i>report and recommendation adopted in full</i> , 2017 WL 907996 (E.D. Tex. Mar. 8, 2017)	5,10
<i>Migis v. Pearle Vision, Inc.</i> , 135 F.3d 1041 (5th Cir. 1998)	6
<i>O’Donnell v. Harris Cty.</i> , 2019 WL 6219933 (S.D. Tex. Nov. 21, 2019)	8
<i>Parmelee v. Santander Consumer USA Holdings Inc.</i> , 2019 WL 2352837 (N.D. Tex. June 3, 2019)	10,15
<i>Singh v. 21Vianet Group, Inc.</i> , 2018 WL 6427721 (E.D. Tex. Dec. 7, 2018)	13
<i>Sistrunk v. TitleMax, Inc.</i> , 2018 WL 1773307 (W.D. Tex. Feb. 22, 2018)	10

<u>Cases</u>	<u>Page(s)</u>
<i>Union Asset Mgmt. Holding A.G. v. Dell, Inc.</i> , 669 F.3d 632 (5th Cir. 2012)	4,6
<i>Welsh v. Navy Fed. Credit Union</i> , 2018 WL 7283639 (W.D. Tex. Aug. 20, 2018).....	3-4
<u>Rules</u>	
Fed. R. Civ. P. 23(h)	3
<u>Treatises</u>	
Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and their Fee Awards, 7 J. Empirical Legal Stud. 811 (2010)	1
2020 National Association of Legal Fee Analysis.....	7
Newberg on Class Actions § 17:4 (5th ed.)	14

Class Counsel Roger L. Mandel, Scott R. Jeeves, Craig E. Rothburd (collectively “Class Counsel”) and Lead Plaintiffs Marc Browne and Teri Adley (collectively “Lead Plaintiffs”)¹ move for an award of attorneys’ fees, reimbursement of Class Counsel’s litigation expenses, and service awards for Lead Plaintiffs. Class Counsel seek an attorneys’ fee award of 29% of the Settlement Fund (or \$536,500.00) and reimbursement of \$10,000.00 in litigation expenses, while Lead Plaintiffs seek service awards of \$2,500.00 each (\$5,000.00 in total).

INTRODUCTION

Class Counsel have achieved a Settlement of \$1,850,000.00 in this complex medical records class overcharge action (the “Action”). It is an excellent result for the Class. Class Counsel, based on data provided by Ciox as part of informal discovery during settlement negotiations, estimated that the maximum amount of damages the Class could potentially recover in this case is approximately \$2,000,000. Declaration of Roger L. Mandel in Support of Joint Motion to Give Notice of Proposed Class Action Settlement (ECF. No. 51-2) (“Mandel Decl.”) ¶ 24. Thus, by requiring Ciox to pay up to \$1.85 million, the Settlement represents a recovery of approximately 92.5% of the potentially recoverable damages. *Id.* This is a ***significant recovery*** far higher than the percentage of potential damages typically recovered by class action settlements.² Consumer class actions typically take years to resolve, impose high costs, and result in low recoveries. Brian Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811 (2010).

The merits of the Settlement are clear when weighed against the risk that the Class might recover less than the Settlement Amount—or nothing at all—after further litigation. In the face of

¹ All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated May 26, 2022 (the “Stipulation”) (ECF No. 51-1).

² See, e.g., *In re Fed. Nat’l Mortg. Ass’n Sec., Derivative, & “ERISA” Litig.*, 4 F. Supp. 3d 94, 103 (D.D.C. 2013) (settlement value approximating “4-8% of the best-case scenario potential recovery” deemed reasonable).

these substantial risks, Class Counsel prosecuted the Action on a fully contingent basis and devoted substantial resources against highly skilled opposing counsel to achieve the Settlement. As compensation for these efforts, Class Counsel request a fee of 29% of the Settlement Fund, or \$536,500.00, which is at the lower end of common fund recoveries in the Fifth Circuit. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227, at *9 (N.D. Tex. Apr. 25, 2018).

Through the end of October 31, 2022, Class Counsel' lodestar is \$502,806.00. Declaration of Roger L. Mandel in Support of Class Counsel's Unopposed Motion for Award of Attorneys' Fees and Costs and Class Representative Service Awards ("Mandel Fee Decl.") ¶¶ 6-7, Exhibit A hereto. That represents a current multiplier of only 1.06, barely a multiplier at all. *Id.*³ Further, Class Counsel expect to spend significantly more time to bring this case to its conclusion, including dealing with settlement administration issues, drafting the pleadings necessary to obtain final approval of the settlement and litigation and conducting the final approval hearing. Mandel Fee Decl. ¶ 8. Accordingly, Class Counsel expect that by the end of the case, they may recover **less than** their lodestar. *Id.* The 29% fee, \$10,000.00 in litigation expenses, and \$2,5000.00 service awards were all maximum amounts negotiated by Ciox at arms' length only after all the other terms had been agreed upon. Mandel Decl. ¶ 14. To date, only a single class member has filed a request for exclusion, and there have been no objections to the Settlement or the requested fees.⁴ Mandel Fee Decl. ¶ 10.

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs' previous Joint Motion to Give Notice of Proposed Class Action Settlement and

³ *In re Lease Oil Antitrust Litigation (No. II)*, 186 F.R.D. 403 (S.D.Tex.1999) (holding that a 1.35 lodestar was "certainly on the low end of the range of multipliers usually used").

⁴ The deadline for Settlement Class Members to file objections and/or requests for exclusion is November 23, 2022. If any objections are filed to the settlement after the filing of this motion, Class Counsel will address them in their motion for final approval of the settlement and/or their reply brief in support of this motion to be filed no later than January 7, 2023.

Brief in Support (ECF No. 51) and the supporting Mandel Declaration (ECF No. 51-2) fully describe the factual and procedural history of this case (pp. 1-2); the nature of the claims asserted (pp. 3-4); the settlement terms (pp. 4-6), the settlement negotiations (pp. 12-14); the risks inherent in continued litigation (pp. 15-17); and the services that Class Counsel and Lead Plaintiffs rendered for the benefit of the Settlement Class (pp. 17-20). Class Counsel incorporates those descriptions by reference here to avoid repetition.

CLASS COUNSEL’S ATTORNEYS’ FEE REQUEST SHOULD BE APPROVED

A. Legal Standard for Awarding Attorneys’ Fees

Federal Rule of Civil Procedure 23(h) provides that “[i]n a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized . . . by the parties’ agreement.” The Fifth Circuit has “encourage[d] counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney’s fees.” *Bridges v. Ridge Nat. Res., LLC*, 2020 WL 7496843, at *1 (W.D. Tex. June 23, 2020) (quoting *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974)). “An agreed upon award of attorneys’ fees and expenses is proper in a class action settlement, so long as the amount of the fee is reasonable under the circumstances In fact, courts have encouraged litigants to resolve fee issues by agreement, if possible.” *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322 (W.D. Tex. 2007) (citing Fed. R. Civ. P. 23(h) and collecting cases). “Accordingly, courts are authorized to award attorney fees and expenses where all parties have agreed to the amount, subject to court approval.” *Id.* Here, Ciox has agreed that it will not oppose a request by Class Counsel not exceeding 29% of the Settlement Fund. ECF 51-1, Agreement, ¶ 8.1.

Moreover, where, as here, Class Counsel obtains a common fund for the Settlement Class, the common fund doctrine entitles Class Counsel to a reasonable attorneys’ fee award from the

Settlement Fund. See *Welsh v. Navy Fed. Credit Union*, 2018 WL 7283639, at *15 (W.D. Tex. Aug. 20, 2018) (“[T]he Supreme Court has consistently recognized the common fund doctrine to permit attorneys who obtain a recovery for a class to be compensated from the benefits achieved as a result of their efforts.”) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478–79 (1980)). Thus, although courts may alternatively apply the lodestar method to calculating attorneys’ fees, “[c]ourts have recognized the best approach, in a common fund or variant case, is to use the percentage method with the *Johnson* factors as a cross-check.” *Cunningham v. Kitchen Collection, LLC*, 2019 WL 2865080, at *3 (E.D. Tex. July 3, 2019) (Mazzant, J.). The *Johnson* factors are:

(1) the time and labor required; (2) the novelty and difficulty of the legal issues; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney as a result of taking the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or other circumstances; (8) the monetary amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) whether the case is undesirable; (11) the nature and duration of the professional relationship with the client; and (12) awards in similar cases

Welsh, 2018 WL 7283639, at *16 (citing *Johnson*, 488 F.2d at 717–19).

The Fifth Circuit endorses “the district courts’ use of the percentage method cross-checked with the *Johnson* factors,” and “has never reversed a district court judge’s decision to use the percentage method.” *Union Asset Mgmt.*, 669 F.3d at 644 (footnotes omitted). “Indeed, district courts in this Circuit regularly use the percentage method blended with a *Johnson* reasonableness check.” *Id.* at 643.

B. 29% of the Settlement Fund is a Reasonable Percentage Within the Benchmark 25-33% Award

Many Fifth Circuit courts have found 25-30% to be a reasonable benchmark in common fund cases. See, e.g., *Klein v. O’Neal, Inc.*, 705 F. Supp. 2d 632, 675–76 (N.D. Tex. 2010) (“Attorney fees awarded under the percentage method are often between 25% and 30% of the

fund”; granting class counsel’s attorney fee request for 30% of a \$90,000,000 common fund in part because “[a] review of other cases reveals that a fee request of 30% of a common fund, although on the high end, is within the range of reasonableness for settlements of this size.”), *report and recommendation adopted*, 2016 WL 4411551 (W.D. Tex. June 17, 2016); *Duncan v. JPMorgan Chase Bank, N.A.*, 2016 WL 4419472, at *13 (W.D. Tex. May 24, 2016) (“typical benchmark” in Fifth Circuit is “25-30%”), *report and recommendation adopted*, 2016 WL 4411551 (W.D. Tex. June 17, 2016). Other Fifth Circuit cases have found the benchmark percentage to be 30% to 33% or even 36%. *Erica P. John Fund, Inc.*, 2018 WL 1942227, at *9 (N.D. Tex. Apr. 25, 2018) (“Numerous courts in this Circuit have awarded fees in the 30% to 36% range.”); *Fairway Med. Ctr., L.L.C. v. McGowan Enterprises, Inc.*, 2018 WL 1479222, at *2 (E.D. La. Mar. 27, 2018) (finding that “the appropriate benchmark in this case is one-third”).

The Settlement generates a common fund of \$1,850,000.00 for the Class, and Class Counsel move for a collective award of \$536,500.00, which is 29% of the common fund. This fee is well within the range of fees commonly awarded within the Fifth and, therefore, is “not excessive.” *Marcus v. J.C. Penney Co., Inc.*, 2017 WL 6590976, at *6 (E.D. Tex. Dec. 18, 2017), *report and recommendation adopted*, 2018 WL 307024 (E.D. Tex. Jan. 4, 2018) (“Lead Counsel’s request for a fee of 30% is not excessive. It is not unusual for attorneys’ fees awarded under the percentage method to range between 25% to 30% of the fund or more.”).

C. Class Counsel’s Fee is Reasonable Under the *Johnson* Factors

The purpose of a cross-check under the *Johnson* factors is to ensure that a fee is reasonable and thereby ensures “fairness to the class and to the class attorneys.” *Welsh*, 2018 WL 7283639, at *16 (citing *Erica P. John Fund*, 2018 WL 1942227, at *8). “While the *Johnson* factors must be addressed ‘rarely are all the *Johnson* factors applicable; this is particularly so in a common fund

situation.” *In re Dell Inc.*, 2010 WL 2371834, at *15 (W.D. Tex. June 11, 2010) (quoting *Di Giacomo v. Plains All Am. Pipeline*, 2001 WL 34633373, at *9 (S.D. Tex. Dec. 19, 2001)), *aff’d*, *appeal dismissed sub nom.*, *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632 (5th Cir. 2012). “In evaluating these factors, the Fifth Circuit has explained that courts should ‘give special heed to the time and labor involved, the customary fee, the amount involved, and the result obtained, and the experience reputation and ability of counsel.’” *Welsh*, 2018 WL 7283639, at *16 (quoting *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998)). As explained below, a *Johnson* factors cross-check demonstrates that Class Counsel’s request for 29% of the Settlement Fund is reasonable and will ensure fairness to the Settlement Class and Class Counsel.

1. The Time and Labor Required Supports Approval of the Requested Fee.

Under the first *Johnson* factor, courts examine whether “the time and labor expended was reasonably required for the results achieved” in the case. *See Bridges*, 2020 WL 7496843, at *4. Class Counsel has invested substantial time and resources into pursuing the Class’s claims. From the inception of the case through October 31, 2022, Class Counsel and the attorneys and staff at their law firms have spent a combined 770 hours prosecuting this case, all of which were reasonably required to achieve the significant cash relief the Settlement will confer on the Settlement Class Members.⁵ Mandel Fee Decl. ¶ 6. Their total lodestar amounts to \$502,806.00, as set forth in the following chart:

<u>NAME</u>	<u>FIRM</u>	<u>POSITION</u>	<u>HOURLY RATE</u>	<u>HOURS</u>	<u>LODESTAR</u>
-------------	-------------	-----------------	--------------------	--------------	-----------------

⁵ Several courts have suggested that the analysis of this factor should not be so detailed that it defeats the purpose of using the percentage method rather than the lodestar method. *See Di Giacomo v. Plains All Am. Pipeline*, 2001 WL 34633373, at *10 (S.D. Tex. Dec. 19, 2001) (“This court will not conduct a detailed analysis of charged hours and hourly rates. To do so would undermine the utility of the percentage fee method.”). This is especially so in common fund contingency cases. *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 747 (S.D. Tex. 2008) (“One treatise writer has observed, ‘A lodestar figure cannot fully compensate counsel’ in a contingency common fund case ‘because the resulting amount does not reflect the risk of nonpayment. . . Furthermore, risk must be assessed ex ante, from the outset of the case, not in hindsight.”).

Roger L. Mandel	Jeeves Mandel Law Group P.C.	Partner	\$950.00	198.5	\$188,575.00
Scott R. Jeeves	Jeeves Law Group, P.A.	Partner	\$850.00	158.2	\$134,470.00
Kyle W. Woodford	Jeeves Law Group, P.A.	Associate	\$395.00	366.8	\$144,886.00
Craig Rothburd	Craig E. Rothburd, P.A.	Partner	\$750.00	46.50	\$34,8750.00
				770.00	\$502,806.00

Id.

These rates are consistent both with Fifth Circuit case law and Texas Lawyer Survey's on the market rate for attorneys' fees. *See, e.g., Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.*, No. 4:14-CV-00371, 2018 WL 1602460, at *7 (E.D. Tex. Apr. 3, 2018) (Mazzant, J.) (approving rates as great as \$1,100 per hour in complex commercial litigation); 2020 National Association of Legal Fee Analysis ("NALFA") (showing 2020 Average Hourly Partner Rates between \$801-\$900 and Associate rates between \$300-\$500).

Mr. Mandel has been practicing complex commercial litigation for 35 years, including 30 years bringing class actions on behalf of injured individuals and companies. Mandel Decl. ¶¶ 19-21 & Exhibit A thereto. He has worked on approximately 35 class action cases which he and co-counsel settled or tried to verdict. *Id.* In 2021, in a class action in the Southern District of New York, in awarding fees on a lodestar basis, the court approved a rate of \$850 per hour for Mr. Mandel. *Blondell v. Bouton, Report and Recommendation*. ECF No. 100, (E.D.N.Y. August 30, 2021); *Blondell v. Bouton*, 2021 WL 4173066, at *1 (E.D.N.Y. Sept. 14, 2021). Craig E. Rothburd is also a very experienced class action attorney who has successfully prosecuted class action for over 24 years. Mandel Decl. at ¶ 22 & Exhibit B thereto. Likewise, Mr. Jeeves has been practicing complex class litigation and personal injury law for 31 years. Declaration of Scott R. Jeeves in Support of Joint Motion to Give Notice of Proposed Class Action Settlement ("Jeeves Decl.") (ECF No. 56-3) Jeeves Decl. ¶ 4 & Exhibit A thereto. He has worked on approximately over 100

class actions cases which he either settled or tried to verdict. *Id.* In 2022, Mr. Jeeves was awarded \$750 per hour in the State of Florida against BACTES Imaging Solutions.⁶

Mr. Mandel testifies that as lead counsel he has personal knowledge of all the work performed in the case, and in his opinion the number of hours included in the lodestar analysis were reasonably and necessarily incurred in the successful prosecution of the case. Mandel Fee Decl. ¶ 6. He also testifies that in his opinion these rates are reasonable rates based on the market and the skill and experience of the attorneys. *Id.*

2. The Novelty and Difficulty of Issues Support Approval of the Requested Fee.

“The second factor examines the novelty and difficulty of the issues.” *O’Donnell v. Harris Cty.*, 2019 WL 6219933, at *25 (S.D. Tex. Nov. 21, 2019). at *26. “Cases of first impression generally require more time and effort on the attorney’s part.” *Johnson*, 488 F.2d at 718. In the State of Texas, this was a case of first impression. Class Counsel are unaware of any other medical records billing overcharge cases having been brought in Texas.

And no better example of the complexity and difficulty of issues faced by Class Counsel can be shown to this Court than Mr. Jeeves’ litigation against Ciox in the State of Florida.⁷ Brought under similar legal theories at this Action, that medical records overcharging case took over eight years to conclude, required two trips to the court of appeals, and required the expenditure of a lodestar exceeding \$1 million and out of pocket expenses of approximately \$130,000 by plaintiffs’ counsel. Jeeves Decl. ¶ 7. Before HealthPort (Ciox) finally settled, Mr. Jeeves had to obtain the following from the court: granting of class certification, granting of plaintiffs’ motion for partial summary judgment, denial of HealthPort’s (Ciox’s) motion for summary judgment, and granting

⁶ *Webber v. Bactes Imaging Sols., Inc.*, 295 So. 3d 841 (Fla. Dist. Ct. App. 2020), review denied, No. SC20-825, 2020 WL 6375593 (Fla. Oct. 30, 2020).

⁷ *Allen v. HealthPort Technologies, LLC, n/k/a CIOX Health, LLC*, Case No. 12-CA-012154-K (Fla. 13th Cir.).

of a permanent injunction prohibiting HealthPort (Ciox) from charging patients more for medical records than allowed under Florida law. *Id.* ¶ 8. Given Ciox’s track record for vigorously defending claims of first impression, this factor strongly supports the requested fee.

3. The Skill Required to Perform the Legal Services Properly Supports Approval of the Requested Fee.

“This factor is evidenced where ‘counsel performed diligently and skillfully, achieving a speedy and fair settlement, distinguished by the use of informal discovery and cooperative investigation to provide the information necessary to analyze the case and reach a resolution.’” *In re Heartland*, 851 F. Supp. 2d at 1083 (quoting *King v. United SA Fed. Credit Union*, 744 F. Supp. 2d 607, 614 (W.D. Tex. 2010)). This case exemplifies this definition of the skill required to perform the legal services. After legal briefing on Ciox’s motion to dismiss and Class Counsel obtaining interrogatory answers and document discovery, the parties stayed the case to conduct informal, cooperative discovery and settlement negotiations. Mandel Decl. ¶¶ 7-12. Following the stay, the parties engaged in over a year of voluminous and vigorous informal discovery and negotiations, culminating in the Settlement Agreement. *Id.* ¶ 13.

This Settlement, reached largely through informal discovery and negotiation, could not have been achieved without the high level of skill and experience of Class counsel. Nor would Ciox have gone down this road of forgoing active formal discovery and litigation if it did not believe the skill and experience of Class Counsel gave them a high probability of success had the case been fully litigated. This factor strongly supports the requested fee.

4. The Preclusion of Other Employment by the Attorney as a Result of Taking the Case Is a Neutral Factor.

Class counsel do not contend that this case precluded them from taking other employment, so this factor is inapplicable/neutral.

5. The Requested Fee is Within the Range of the Customary Fee in Common Fund Cases, Supporting the Requested Fee.

“This Court has previously approved fee awards consistent with the Fifth Circuit’s benchmark of 30 percent in common-fund cases.” *Sistrunk v. TitleMax, Inc.*, 2018 WL 1773307, at *3 (W.D. Tex. Feb. 22, 2018). In the Fifth Circuit, fee awards of 30%–33% are customary in common fund cases. *See Parmelee v. Santander Consumer USA Holdings Inc.*, 2019 WL 2352837, at *1 (N.D. Tex. June 3, 2019) (33%); *Marcus v. J.C. Penney Co., Inc.*, 2018 WL 11275437, at *1 (E.D. Tex. Jan. 5, 2018) (30%). The factor therefore strongly supports the requested fee.

6. The Contingent Nature of the Requested Fee Supports Its Approval.

“Consideration of this factor is designed to ‘demonstrat[e] the attorney’s fee expectations when he accepted the case.’” *In re Dell*, 2010 WL 2371834, at *17 (quoting *Johnson*, 488 F.2d at 718). “District courts within this circuit have found upward adjustments appropriate if counsel took the case on a contingency basis . . . But merely taking a case on a contingency basis does not merit an upward adjustment if the benchmark reflects the market rate.” *In re Heartland*, 851 F. Supp. 2d at 1084 (citing *Klein*, 705 F. Supp. 2d at 678). “The contingent nature of the fee favors an increase in the typical benchmark percentage.”⁸ Here, Class Counsel took this case on a contingency basis and the risk of non-recovery was very real, as set forth in the Mandel Decl. ¶¶ 8-10. At the onset of the litigation, Class Counsel could reasonably have expected to incur over \$1 million in lodestar and over \$130,000 in expenses. Jeeves Decl. ¶ 7. Thanks to their skill, experience and reputation, Class Counsel were able to settle the case with less work and expense, but still performed over a half-million worth of work on a purely contingent basis, and they expended slightly more than \$10,000 in expenses, as set forth below, also on a purely contingent

⁸ *OCA*, 2009 WL 512081, at *22 (“the risk plaintiffs’ counsel undertook in litigating this case on a contingency basis must be considered in its award of attorneys’ fees, and thus an upward adjustment is warranted[]”).

basis. Thus, the contingent nature of the litigation strongly supports the requested percentage.

7. Time Limitations Imposed by the Client or Other Circumstances Is a Neutral Factor

The seventh *Johnson* factor is whether the clients or the circumstances imposed “any time limitations” *DiGiacomo*, 2001 WL 34633373, at *12. Here, Lead Plaintiffs and Class Counsel did not experience any such circumstances that would impose a restriction on the time. However, the Court does not need to “meticulously” evaluate every *Johnson* factor in its determination of whether Class Counsel’s fee request is reasonable, *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 331 (5th Cir. 1995), because the “*Johnson* factors will vary in any particular case”. The seventh *Johnson* factor should not impact the Court’s approval of the fee request.

8. The Monetary Amount and the Results Obtained Supports Approval of the Requested Fee

“The United States Supreme Court and the Fifth Circuit have held ‘the most critical factor in determining the reasonableness of a fee award is the degree of success obtained.’” *In re Dell*, 2010 WL 2371834, at *18 (quoting *In re Enron*, 586 F. Supp. 2d at 796). Here, Class Counsel, based on data provided by Ciox as part of informal discovery during settlement negotiations, estimate that the maximum amount of damages the Class could potentially recover in this case is approximately \$2,000,000. Mandel Decl. ¶ 24. Thus, by requiring Ciox to pay up to \$1.85 million, the Settlement represents a recovery of approximately 92.5% of the potentially recoverable damages. *Id.* This is a **significant recovery** far higher than the percentage of potential damages typically recovered by class action settlements. Thus, the Settlement provides an excellent recovery under any standard and supports Class Counsel’s fee request.

9. The Experience, Reputation, and Ability of Class Counsel Supports Approval of the Requested Fee.

The ninth *Johnson* factor guides the Court to evaluate Lead Counsel’s “experience, reputation, and ability . . .” *Johnson*, 488 F.2d at 718–19. As addressed above, Class Counsel are highly experienced in litigating complex class actions. In addition to other active cases, Class Counsel have also been appointed and served as class counsel in several other complex class actions across the country. Mandel Decl., ¶ 19, 22 & Exhibits A & B A; Jeeves Decl., ¶ 4 & Exhibit A. Thus, this factor strongly supports approval of the requested 29% of the Settlement Fund.

10. The Undesirability of this Case Due to the Risk of Non-Recovery Supports Approval of the Requested Fee

The tenth *Johnson* factor is the “‘undesirability’ of the case.” *Johnson*, 488 F.2d at 719. This case was undesirable in two respects. *First*, the risk of non-recovery was high, as set forth in the Mandel Decl. ECF No. 51-2 at ¶¶ 9-10. Thus, in taking the case, Class Counsel accepted a high risk of not being compensated for their efforts, supporting approval of the fee award here. *See In re Combustion*, 968 F. Supp. 1116, 1132 (W.D. La. 1997) (“The rationale behind awarding a percentage of the fund to counsel in common fund cases is . . . The underlying premise is the existence of risk—the contingent risk of nonpayment.”). *Second*, in bringing this lawsuit on behalf of Plaintiff and the Settlement Class against Ciox, Class Counsel undertook expensive litigation against a well-financed corporate defendant on a contingency fee basis. Where a “case carried risks that required in-depth investigation and considerable . . . discovery to analyze the merits of” the class’s claims, that “justifies the benchmark percentage” Class Counsel requests. *Bridges*, 2020 WL 7496843, at *4. Here, as recited above, the eight years and huge investment of time and expenses required to litigate the Florida, made it likely the same would be true in Texas. Jeeves Decl. ¶ 7. That coupled with the high risk of not prevailing made this a quite undesirable case, which strongly supports the requested award.

11. The Nature and Duration of the Professional Relationship with the Clients

Is a Neutral Factor.

The eleventh *Johnson* factor considers the “the nature and length of the professional relationship with the client[.]” *In re Dell*, 669 F.3d at 642 n.25. This factor is not relevant.

12. Awards in Similar Cases Supports the Requested Fee.

The final *Johnson* factor considers awards in similar cases. As discussed above, Class Counsel’s fee request of 29% of the Settlement Fund at the lower end of the range of awards in similar cases. This factor thus strongly supports the requested award.

D. The Reaction of the Class Supports the Requested Fee Award.

Although not one of the *Johnson* factors, many courts consider the reaction of the Class (whether there are any objections, and the number of opt-outs) relevant to deciding class action fee requests. *Di Giacomo*, 2001 WL 34633373, at *9 (S.D. Tex. Dec. 19, 2001) (requested attorneys' fees supported by fact that there were “no objections and virtually no requests for exclusion from the settlement class.”). As set forth above, there has thus far not been any objection to the fee award or the proposed settlement. That is particularly significant given that the vast majority of notices were sent to law firms and insurance companies well able to evaluate the merits of the Settlement. Mandel Decl. ¶¶ 15 & 16. The absence of any objections strongly supports the requested fees. *Singh v. 21Vianet Group, Inc.*, 2018 WL 6427721, at *1 (E.D. Tex. Dec. 7, 2018) (citing the absence as supporting an award of attorneys' fees of 33.3% of \$9 million settlement fund and full reimbursement of litigation expenses).

CLASS COUNSEL’S REQUESTED EXPENSE REIMBURSEMENT SHOULD BE APPROVED

Attorneys who create a common fund for the benefit of a class are entitled to payment from the fund of reasonable litigation expenses and charges.⁹ Here, Class Counsel request \$10,000.00

⁹ *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 2004 WL 1900294, at *3 (S.D. Tex. Aug. 5, 2004).

for litigation expenses, the maximum agreed to by Ciox. Thus far, they have reasonably and necessarily incurred \$10,275.49 in expenses to achieve the Settlement as set forth in this chart:

<u>Description</u>	<u>Amount</u>
File Set-Up Fee	\$1,000.00
Filing Fee – Texas	\$600.00
Service of Process – Texas (2)	\$260.00
CS Disco – Records/Storage/Organization	\$7,702.89
Expert Fee	\$540.00
Pacer – Court Fees	\$172.60
TOTAL	\$10,275.49

Mandel Fee Decl. ¶ 11. Mr. Mandel testifies that as lead counsel he has personal knowledge of all these expenditures and that they were all reasonably and necessarily incurred to successfully prosecute this litigation. *Id.* Because all these expenses were reasonably and necessarily incurred in the prosecution of the Litigation, the Court should order \$10,000.00 of them paid from the Settlement Fund.

THE COURT SHOULD APPROVE THE \$2,500 SERVICE FEE AWARDS

“Service awards are used in class action lawsuits to compensate named plaintiffs for the services they provide.” *DeHoyos*, 24 F.R.D. at 339) (“Federal courts consistently approve incentive awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they shoulder during litigation.”). Service awards are supported by the text of Rule 23(e)(2)(D), which requires a court reviewing a proposed settlement to consider whether “the proposal treats class members equitably relative to each other.” While this “equitable treatment requirement most obviously protects absent class members from being subjected to excessive incentive awards,” the requirement “also protects class representatives from having absent class members free ride on their efforts.” *Newberg on Class Actions* § 17:4 (5th ed.).

Pursuant to the Settlement, Lead Plaintiffs and Class Counsel move the Court to award \$2,500 each to each Lead Plaintiff. Relevant considerations in granting incentive awards include

the steps taken to protect the interests of the Class, the extent in which the Class benefited from such actions, and the time and labor that Plaintiffs have rendered in their capacities as Lead Plaintiffs. *Parmelee*, 2019 WL 2352837, at *2 (granting the incentive award of \$14,500 to be distributed between two class representatives prior to class certification discovery). Lead Plaintiffs actively supported Class Counsel throughout the litigation by providing the documents and information necessary to draft the lawsuit, make initial disclosures, and by consulting on the settlement negotiations. Mandel Decl. ¶¶ 12-13. These modest awards are consistent with the amounts of service awards commonly awarded by Fifth Circuits.¹⁰ In connection with this motion, Lead Plaintiffs now respectfully request an incentive fee of \$2,500 each (or \$5,000 in total).

CONCLUSION

Class Counsel's request for 29% of the Settlement Fund, a fee award of \$536,500.00, should be approved as a reasonable percentage of the fund created for the Settlement Class, which is further supported by the *Johnson* factors cross-check. In addition, Class Counsel's request for expense reimbursement of \$10,000.00 should be approved because expenses more than that amount were reasonably incurred. Finally, Service Awards of \$2,500.00 for Teri Adley and Marc Browne should be approved in recognition of their important contributions to this litigation.

Dated: November 17, 2022.

Respectfully submitted,

/s/Roger L. Mandel

Roger L. Mandel (admitted *pro hac vice*)

rmandel@jeevesmandellawgroup.com

JEEVES MANDEL LAW GROUP, P.C.

2833 Crockett St

Suite 135

Fort Worth, TX 76107

¹⁰ *Slipchenko*, 2015 WL 338358, at *15 (granting the incentive award of \$12,000 to be distributed among three class representatives).

T: 214-253-8300

Scott R. Jeeves (admitted *pro hac vice*)

JEEVES LAW GROUP, P.A.

2132 Central Avenue

St. Petersburg, Florida 33712

T. (727) 894-2929

sjeeves@jeeveslawgroup.com

khill@jeeveslawgroup.com

kwoodford@jeeveslawgroup.com

Craig E. Rothburd (admitted *pro hac vice*)

CRAIG E. ROTHBURD, P.A.

320 W. Kennedy Blvd., Suite 700

Tampa, Florida 33606

T. (813) 251-8800

craig@rothburdpa.com

maria@rothburdpa.com

Counsel for Plaintiffs and the Class

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(h), counsel for the undersigned confirms they have complied with the meet and confer requirement and Ciox does not oppose this motion.

/s/Roger L. Mandel

Roger L. Mandel

CERTIFICATE OF SERVICE

This document was filed November 17, 2022, on the Court's ECF System, through which it will be served on all counsel of record.

/s/Roger L. Mandel _____
Roger L. Mandel