

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

DIANE S. JONES, and JOAN OGG,)
on behalf of themselves and all others similarly)
situated,)
)
Plaintiffs,)
)
v.)
)
P2ES HOLDINGS, LLC,)
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Defendant)
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Case No. 23-cv-00408-GPG-MEH

Judge Hon. Gordon P. Gallagher

**PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS
AND MEMORANDUM IN SUPPORT**

I. INTRODUCTION

On October 12, 2023 this Court preliminarily approved a proposed class action settlement between Plaintiffs Diane S. Jones and Joan Ogg (“Plaintiffs”) and Defendant P2ES Holdings, LLC (“Defendant”). ECF 39. Class Counsel’s efforts created a \$1,250,000 non-reversionary Settlement Fund where Settlement Class MEMBERS can easily submit a claim for a \$50 *pro rata* cash payment, reimbursement of out-of-pocket expense award of up to \$5000, lost time claims up to 4 hours at \$25 per hour, and verified fraud claims of \$250 per incident, capped at \$5000.

This Settlement represents an excellent result for the Settlement Class in this litigation and was obtained against a well-funded defense by Defendant, which was represented by an AmLaw 100 law firm, Baker Hostetler. Although Plaintiffs believe in the merits of their claims, this litigation was inherently risky and complex. Declaration of David Lietz (“Lietz Fee Decl.”), attached hereto as Exhibit 1, ¶ 32. The claims involve the intricacies of data breach litigation (a fast-developing area in the law), and the Plaintiffs would face risks at each stage of litigation. *Id.* Against these risks, it was through the hard-fought negotiations and the skill and hard work of Class Counsel and the Class Plaintiffs that the Settlement was achieved for the benefit of the Settlement Class. *Id.*

Class Counsel zealously prosecuted Plaintiffs’ claims, achieving the Settlement Agreement only after an extensive investigation and prolonged arm’s length negotiations, including a formal mediation and weeks of subsequent negotiations. Even after coming to an agreement on the central terms, Class Counsel worked for weeks to finalize the Settlement Agreement and associated exhibits pertaining to notice, preliminary approval, and final approval.

As compensation for the substantial benefit conferred upon the Settlement Class, Class Counsel respectfully move the Court for an award of attorneys’ fees of \$416,666.67 and out-of-

pocket expenses totaling \$12,309.94,¹ to be paid from the non-reversionary Settlement Fund. This fee request represents 33.33% of the total \$1.25 million common fund recovery. This request is contemplated by the Settlement Agreement, and Class Counsel apprised the Court of this request in its Motion for Preliminary Approval (filed on October 6, 2023). S.A. ¶ 7.2; ECF 37-1. This amount was also clearly delineated in the Short Form and Long Form Notice to the Settlement Class (attached to the Settlement Agreement as Exhibits B and C within ECF 37-1). As of January 10, 2024, *zero* class members have objected to the Settlement, the attorneys' fees, expenses, and service awards, and only one (1) has opted-out. Lietz Fee Decl. ¶ 6.

Federal district courts in Colorado have routinely approved attorneys' fees equaling one-third of the settlement fund as the "customary fee" for awards in common benefit settlements. Courts in the Tenth Circuit have expressly, repeatedly, and routinely approved fees that equal 20% to 50% of the settlement fund in class action settlements. Plaintiffs' request for fees here of 33.33% of the Settlement Fund puts the fee request squarely within the range of fees approved by courts in the Tenth Circuit. Plaintiffs' motion should be granted because the request is reasonable and appropriate in light of the substantial risks presented in prosecuting this action, the quality and extent of work conducted, and the stakes of the case; the requested fees and costs were clearly delineated in notice to the class, and no class member has objected; and because the costs incurred were reasonable and necessary for the litigation.

Class Counsel also respectfully moves the Court for an award of \$5,000 to each of the two proposed Class Plaintiffs for their work on behalf of the Class.² These service awards fall well

¹ The actual out-of-pocket expenses exceed \$15,000, but as set out in the motion for preliminary approval, Plaintiffs agreed to seek no more than \$15,000 in expenses.

² While Plaintiffs here move for attorneys' fees, costs, and service awards, they will move for final approval of the settlement by separate motion, which will be filed before the final fairness hearing.

within the range of service awards that have been approved by Tenth Circuit courts.

II. INCORPORATION BY REFERENCE

In the interest of judicial efficiency, for factual and procedural background on this case, Plaintiffs refer this Court to and hereby incorporate Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement filed on October 6, 2023 (ECF 37) and the accompanying exhibits, including the proposed Settlement Agreement, filed in conjunction therewith.

III. SUMMARY OF SETTLEMENT

The settlement negotiated on behalf of the Class provides for a \$1,250,000 non-reversionary Settlement Fund and a claims process through which Settlement Class Members can easily submit for substantial settlement benefits. The settlement provides for relief for the approximately 179,659 members of the Settlement Class defined as follows:

All natural persons who were impacted in the November 2021 Data Incident.

The Class specifically excludes: (i) Defendant and its officers and directors; (ii) all Persons who timely and validly request exclusion from the Class; (iii) the Judge assigned to evaluate the fairness of this settlement; and (iv) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Data Incident or who pleads *nolo contendere* to any such charge. S.A. ¶ 1.4.

The benefits that Settlement Class Members can claim from the non-reversionary common fund include the following:

- a) \$50 Pro-Rata Cash Payment. After the distribution of attorneys' fees, Class Counsel's litigation expenses, Administrative Fees, Service Awards, Out-of-Pocket Expense Claims, Lost-Time Claims, and Verified Fraud Claims (each of which is defined below in this Section), the Settlement Administrator will make *pro rata* settlement payments

of the remaining Settlement Fund to each Settlement Class Member who submits a claim. This may cause a *pro rata* increase or decrease the \$50 cash payment. No documentation or attestation is required.

- b) Out-of-Pocket Expense Claims. Settlement Class Members can submit claims for reimbursement of documented out-of-pocket losses reasonably traceable to the Data Incident up to \$5,000 per individual (“Out-of-Pocket-Expense Claims”). Out-of-Pocket-Expense Claims include, without limitation, unreimbursed losses relating to fraud or identity theft; professional fees including attorneys’ fees, accountants’ fees, and fees for credit repair services; the costs of freezing or unfreezing credit with any credit reporting agency; credit monitoring costs that were incurred on or after November 11, 2021, that the claimant attests under penalty of perjury were caused or otherwise incurred as a result of the Data Incident, through the date of claim submission; and miscellaneous expenses such as notary, data charges (if charged based on the amount of data used) fax, postage, copying, mileage, cell phone charges (only if charged by the minute), and long-distance telephone charges. Documentation is required for this claim.
- c) Lost-Time Claims. Settlement Class Members can submit a Claim Form for reimbursement for time spent remedying issues related to the Data Incident for up to four (4) total hours at a rate of \$25 per hour capped at \$100 (“Lost-Time Claims”). No documentation need be submitted in connection with Lost-Time Claims, but Settlement Class Members must attest that the time claimed was actually spent as a result of the Data Incident.
- d) Verified Fraud Claims: Settlement Class Members can submit a Claim Form for

documented incident of fraud for \$250 per incident capped at \$ 5,000 per individual for verified and documented incidents of fraud (“Verified Fraud Claims”). Verified Fraud Claims will include, without limitation, any verified incident regardless of reimbursement. This may include fraudulent bank or credit card charges, tax filings, opening of bank and/or credit accounts, unemployment filings, etc. Class Members with Verified Fraud Claims must submit documentation and attestation supporting their claims.

Any residual funds after payment of all class benefits, Settlement Administration fees, attorneys’ fees, costs, and Service Awards shall be used for a *pro rata* increase of the \$50 pro rata cash payment claims with no maximum payment. Any funds that remain after the distribution and reissuance of all payments from the Settlement Fund, including for settlement checks that are not cashed by the deadline to do so, will be Remainder Funds that shall be distributed to a charitable organization approved of by the Parties and subject to Court approval.

IV. PRELIMINARY APPROVAL

On October 12, 2023, this Court preliminarily approved the Settlement and ordered that notice be given to the Settlement Class. ECF 39. The Court provisionally appointed the Plaintiffs listed above as Class Representatives and Terence R. Coates, Justin C. Walker, Dylan J. Gould of Markovits, Stock & DeMarco, LLC and Gary M. Klinger and David K. Lietz of Milberg Coleman Bryson Phillips Grossman PLLC as Class Counsel. *Id.* at 5-6. The Court appointed Kroll Settlement Administration LLC as Settlement Administrator. *Id.* at 7. The Court approved the Short and Long Form Notices—which state the amount of fees that would be requested, the fact that litigation costs and expenses would be requested, and the amount of service awards that would be requested—as well as approved the plan for disseminating notice to the Settlement Class. *Id.* at

9; *see also* ECF 37-1 (Exhibits B and C to the Settlement Agreement). On November 27, 2023, Court-approved notice was sent to the Settlement Class, and Settlement Class Members have until January 26, 2024 to submit exclusion requests and to file and serve objections, if any. ECF 39. The claims period ends February 26, 2024. Plaintiffs will report on notice and claims more extensively in their Motion for Final Approval.

As of January 10, 2024, Kroll reports that, out of the approximately 169,375 individuals who were sent Notice on November 27, 2023 via first class U.S. mail, *zero* individuals have objected to the Settlement, and only one (1) has filed a request for exclusion. Lietz Fee Decl. ¶ 6. Also, as of the date of the filing, Class Counsel have received no objections to the Settlement Agreement in general or to the proposed attorneys' fees, costs, or expenses (the amount of which was made known to the Settlement Class via the Court-approved Long Form Notice) in particular. *Id.* In the Preliminary Approval Order, the Court set the Final Approval Hearing for April 15, 2024, and ordered that the instant motion be heard at that hearing. Plaintiffs will submit a declaration from Kroll detailing the notice and claims administration with their Motion for Final Approval 28 days prior to that hearing, in accordance with Paragraph 10 of the Preliminary Approval Order. ECF 39; Lietz Fee Decl. ¶ 6.

V. ARGUMENT

A. **The Percentage-of-the-Benefit Method is the Appropriate Method Used to Calculate Attorneys' Fees in this Case.**

Tenth Circuit and Colorado courts utilize two main approaches to analyzing a request for attorneys' fees: the lodestar method and the percentage-of-fund (or percent-of-the-benefit or percent-of-the-recovery) method. *Brown v. Phillips*, 838 F.2d 451, 454 (10th Cir. 1988); *Uselton v. Com. Lovelace Motor Freight, Inc.*, 9 F.3d 849, 853 (10th Cir. 1993); *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994); *Brody v. Hellman*, 167 P.3d 192, 200 (Colo. App. 2007). Under the

lodestar method, the number of hours reasonably expended by an attorney are multiplied by a reasonable rate, which is adjusted given the characteristics of a particular action. *Blum v. Stenson*, 465 U.S. 886, 888 (1984). Under the percentage-of-the-fund method, an award of fees is equal to some percentage of the common fund that the attorneys were successful in procuring during the litigation. *Brown*, 838 F.2d at 454; *Uselton*, 9 F.3d at 853; *Gottlieb*, 43 F.3d at 482.

The Tenth Circuit has recognized a “preference for the percentage of the fund method.” *Gottlieb*, 43 F.3d at 483; *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995); *Uselton*, 9 F.3d at 853 *see also Anderson v. Merit*, Nos. 07–cv–00916–LTB–BNB, 07–cv–01025–REB–MJW, 2009 WL 3378526, at *2 (D. Colo. Oct. 20, 2009) (“Under Tenth Circuit law, attorneys’ fees in common fund cases are generally awarded on a reasonable percentage of the fund created.”); *Manual For Complex Litigation (Fourth)*, § 14.121 (the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases).³ In calculating the percentage, it is appropriate to compare the fee to the total amount recovered for the benefit of the class, even if some of the fund ultimately reverts to the defendant because some class members choose not to claim their share. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481 (1980) (attorneys’ fees must be based on the value of the entire common fund, even if some beneficiaries make no claim); *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291, 1298–98 (11th Cir. 1999); *Williams v. MGM-Pathe Commc’ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). It is also appropriate to include the amount of the attorneys’ fees in the common fund when

³ A lodestar crosscheck is not required in the Tenth Circuit. *See Peace Officers’ Annuity & Benefit Fund of Georgia v. DaVita Inc.*, No. 17-cv-0304-WJM-NRN, 2021 WL 2981970, at *3 (D. Colo. July 15, 2021) (slip copy) (stating lodestar crosscheck is not required in Tenth Circuit); *Chieftain Royalty Co. v. XTO Energy Inc.*, No. CIV-11-29-KEW, 2018 WL 2296588, at *3 (E.D. Okla. Mar. 27, 2018) (same); *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS, WL 7758915, at *3 (E.D. Okla. Mar. 8, 2019) (slip copy) (holding “neither a lodestar nor a lodestar cross check is required”).

calculating the proper percentage. *Manual For Complex Litigation, supra*, § 21.7 (proper calculation of settlement benefits includes all fee amounts paid by defendant in addition to class relief).

B. Plaintiffs' Request for Attorneys' Fees Should be Approved.

1. Plaintiffs' Request for 33.33% Attorneys' Fees is in Line with the One-Third Customary Fee in Common Benefit Settlements.

Plaintiffs seek \$416,666.67 in attorneys' fees. Plaintiffs also seek \$12,309.94 in actual out-of-pocket costs and expenses, and there will be additional necessary case expenses (such as travel to Denver for the final approval hearing). Plaintiffs' fee request amounts to 33.33% of the total benefit created on behalf of the Settlement Class—the \$1,250,000 non-reversionary common fund (as outlined above). Federal district courts sitting in Colorado have regularly held that the “customary fee” for a fee award in a common fund settlement is “approximately one-third of the economic benefit bestowed upon the class.” *Anderson v. Merit Energy Co.*, No. 07-cv-00916-LTB-BNB, 2009 WL 3378526, at *3 (D. Colo. Oct. 20, 2009) (stating that the customary fee in a common fund settlement is approximately one-third of the economic benefit bestowed upon the class); *Rothe v. Battelle Mem'l Inst.*, No. 1:18-cv-03179-RBJ, 2021 WL 2588873, at *8 (D. Colo. June 24, 2021) (same); *Johnson v. Camino Nat'l Res., LLC*, No. 19-cv-02742-CMA-SKC, 2021 WL 2550165, at *2 (D. Colo. June 22, 2021) (slip copy) (awarding 40% of gross settlement value); *Vaszlavik v. Storage Corp.*, No. 95-B-2525, 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000) (“A 30% common fund fee award ... [was] in the middle of the ordinary 20%-50% range [for class actions] and ... [was considered] presumptively reasonable.”).⁴ Here, Plaintiffs' request equals the

⁴ *Shaw v. Interthinx*, No. 13-cv-01229-REB-NYW, 2015 WL 1867861, at *6 (D. Colo. Apr. 22, 2015 (citing cases holding that fees within the 20%-50% range are “presumptively reasonable”); *Robertson v. Whitman Consulting Org., Inc.*, No. 19-cv-2508-RM-KLM, 2021 WL 4947349, at *5 (D. Colo. Oct. 22, 2021) (slip copy (awarding 40% of gross settlement amount plus costs);

“customary fee” for a fee award in a common fund settlement. Plaintiffs’ fee request should be granted.

2. *Other Factors Weigh in Favor of Approving the Fee Request.*

Whether the Court uses the percentage-of-fund method or the lodestar method, the fee must be reasonable. *Brown*, 838 F.3d at 454 (quoting *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983)). To determine the reasonableness of the fee, Tenth Circuit courts consider the factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).⁵ *Brown*, 838 F.3d at 454; *Gottlieb*, 43 F.3d at 482.

i. *The amount involved and the results obtained support approval of Class Counsel’s fee request.*

As stated *supra*, the Settlement provides remarkable benefits to Settlement Class Members. Each and every Settlement Class Member, without exception, can easily submit a claim for the \$50 *pro rata* cash award. Settlement Class Members who have documented out-of-pocket harm can claim up to \$5,000 in reimbursements. Settlement Class Members can claim 4 hours of lost time (reimbursed at \$25 per hour) spent remedying the effects of the Data Security Incident by

Whittington v. Taco Bell of Am., Inc., No. 10-cv-01884-KMT-MEH, 2013 WL 6022972, at *6 (D. Colo. Nov. 13, 2013 (awarding fees and costs amounting to approximately 39% of the fund as a whole as “within the normal range” in a common fund case); *Davis v. Crilly*, 292 F. Supp. 3d 1167, 1174 (D. Colo. 2018) (awarding 37% of the gross settlement award).

⁵ A court does not need to specifically address each *Johnson* factor in a case. *Blanco v. Xtreme Drilling & Coil Servs., Inc.*, No. 16-cv-00249-PAB-SKC, 2020 WL 4041456, at *4 (D. Colo. July 7, 2020) (citing *Gudenkauf v. Stauffer Commc’ns, Inc.*, 158 F.3d 1074, 1083 (10th Cir. 1998)). Furthermore, “a court may assign different relative weights to the factors—that is, none of the factors is inherently equiponderant, preponderant, or dispositive.” *Stalcup v. Schlage Lock Co.*, 505 F. Supp. 2d 704, 705-06 (D. Colo. 2007). The factors also need not be exhausted in every case. *Jenkins v. Pech*, No. 8:14CV41, 2016 WL 715780, at *1 (D. Ne. Feb. 22, 2016). In a common fund case, the greatest weight is to be given to the monetary results achieved. In fact, the monetary results may be considered “decisive.” *Brown*, 838 F.2d at 456. Although the time and labor involved is a “relevant” factor, it should be assigned a lesser weight than the monetary results achieved, risks undertaken, and other factors that “predominate.” *Id*

merely attesting that they spent the time. Settlement Class Members can submit a Claim Form for documented incidents of fraud for \$250 per incident capped at \$ 5,000 per individual for verified and documented incidents of fraud. These are real, significant benefits that without the efforts of Plaintiffs and Class Counsel, and their willingness to take on the attendant risks of litigation, would not have been made available to Settlement Class Members. Thus, this factor weighs heavily in favor of granting this fee request.

ii. The contingent nature of the case, the risks of litigation, preclusion of other employment by Class Counsel, and undesirability of the case all weigh in favor of Class Counsel's fee request.

Class Counsel took this case on a purely contingent basis. Lietz Fee Decl. ¶ 7. The retainer agreements Class Counsel have with Plaintiffs do not provide for fees apart from those earned on a contingent basis, and, in the case of a class settlement, attorneys' fees would only be awarded to Class Counsel if approved by the Court. *Id.* ¶ 12. As such, attorneys' fees were not guaranteed in this case. *Id.* Class Counsel assumed significant risk of nonpayment or underpayment of attorneys' fees. *Id.* ¶ 7. Thus, Class Counsel took on these significant risks knowing full well their efforts may not bear fruit. *Id.* ¶ 9.

This case involved complexities of data breach cases that are novel and evolving. *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.”). Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data breach cases like this one face substantial hurdles—even just to make it past the pleading stage. *See, e.g., Hammond v. The Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060(RMB)(RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Plaintiffs faced the risk of obtaining class certification. *See, e.g., In re*

Hannaford Bros. Co. Customer Data Sec. Breach Litig., 293 F.R.D. 21 (D. Me. 2013) (denying class certification in data breach class action). Plaintiffs also would have had difficulties in demonstrating causation and damages. *See, e.g., S. Indep. Bank v. Fred's, Inc.*, No. 2:15-CV-799-WKW, 2019 WL 1179396, at *8 (M.D. Ala. Mar. 13, 2019) (holding under *Daubert* motion that causation was not met for class certification purposes in data security breach case); *Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686 (N.D. Cal. 2019) (denying motion to certify data breach damages class under Rule 23(b)(3)); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 318 (N.D. Cal. 2018) (“While there is no obvious reason to treat certification in a data-breach case differently than certification in other types of cases, the dearth of precedent makes continued litigation more risky.”).

Continued litigation would have required formal discovery, depositions, expert reports, maintaining class certification throughout trial, and summary judgment, as well as possible appeals (interlocutory and/or after the merits), which would require additional rounds of briefing and the possibility of no recovery at all.

Tenth Circuit courts “have consistently found that [contingency fee arrangements], under which counsel runs a significant risk of nonpayment, weighs in favor of the reasonableness of a requested fee award.” *Blanco*, No. 16-cv-00249-PAB-SKC, 2020 WL 4041456, at *5-6 (approving requested 38% of settlement amount where attorneys worked on a contingent basis) (internal citations omitted); *see Shaw v. Interthinx*, No. 13-cv-01229-REB-NYW, 2015 WL 1867861, at *8 (D. Colo. Apr. 22, 2015) (awarding \$2 million in attorneys’ fees, representing 33⅓% of the maximum value of the common fund). Accordingly, these factors weigh in favor of approval of the attorneys’ fees request here.

- iii. *The skill required to litigate this matter and Class Counsel's extensive experience in class action data breach litigation support the request for attorneys' fees.*

As set forth *supra*, the skill required to litigate data breach cases is great, in part due to the quickly evolving nature of data breach and privacy law. Here, the lawyers representing Plaintiffs are some of the most experienced in this area of the practice. *See* ECF 37-2. Class Counsel worked hard on behalf of the Settlement Class to obtain information from Defendant P2 regarding the Data Incident and analyzed that information (along with their experience and the knowledge gained from other data breach class actions) to negotiate a favorable Settlement. Lietz Fee Decl. ¶ 3. The Settlement addresses the type of injury and repercussions sustained by Settlement Class Members in the wake of the Data Incident. *Id.* ¶ 53. Thus, this factor weighs in favor of Plaintiffs' fee request.

- iv. *The requested fee falls well within the range of attorneys' fees granted in similar cases.*

Class Counsel's request for 33.33% in attorneys' fees is reasonable compared to similar cases in this District. *See, e.g., Droegemueller v. Petroleum Dev. Corp.*, Nos. 07-cv-1362-JLK-CBS, 07-cv-2508, 2009 WL 961539 (D. Colo. April 7, 2009) (awarding 33 $\frac{1}{3}$ % without a lodestar cross-check); *Robertson*, 2021 WL 4947349, at *5 (awarding 40% of gross settlement amount plus costs without a lodestar crosscheck); *Johnson*, 2021 WL 2550165, at *2 (awarding 40% of gross settlement value without lodestar crosscheck); *Farley v. Fam. Dollar Stores, Inc.*, No. 12-cv-00325, 2014 WL 5488897 (D. Colo. Oct. 30, 2014) (awarding 33% attorneys' fees and costs without performing lodestar crosscheck). This fee request falls well within the range of attorneys' fee awards found "presumptively reasonable" in Colorado. *See, e.g., Brody*, 167 P.3d at 203. Awards of more than 30% of a common fund are commonplace in similar privacy cases in the Tenth Circuit and other circuits. *See, e.g., Braver v. Northstar Alarm Servs., LLC*, No. CIV-17-0383-F, 2020 WL 6468227, at *6 (W.D. Okla. Nov. 3, 2020) (slip op) (awarding one-third of the

common fund in attorneys' fees); *Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 795 (7th Cir. 2018) (affirming "the sum of 36% of the first \$10 million" for attorneys' fees).

v. *A Summary Lodestar Crosscheck Confirms the Reasonableness of the Fees Requested.*

Although no lodestar crosscheck is required, a summary lodestar crosscheck confirms the reasonableness of the fees requested here. Class Counsel have expended 319.9 hours of work on this matter to date. Lietz Fee Decl. ¶ 22. At the normal billing rates of participating counsel, that have been approved by courts across the country, this equates to a lodestar of \$257,716.50, and the fees requested represent a current lodestar multiplier of 1.6 (\$416,666.67 divided by \$257,716.50). Colorado courts have found that lodestar multipliers of 2.3 are "well within the range of fees customarily awarded in complex litigation." *Brody*, 167 P.3d at 203. Class Counsel expect to expend another 50-100 hours of time consummating this Settlement, including preparing and filing a motion for final approval, participating in the final fairness hearing, assisting Settlement Class Members with their claims and answering their questions, and working with the Settlement Administrator on claims administrator and distribution of benefits to the Settlement Class. Lietz Fee Decl. ¶ 23. Meaning, by the time this case is brought to final approval, the lodestar "multiplier" will likely be 1.3 or below, once these additional attorney hours are expended. Accordingly, the lodestar fully supports the fees requested.

C. Plaintiffs' Requested Costs are Reasonable and Should be Granted.

"[A]n attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred." *Vaszlavik v. Storage Corp.*, No. 95-B-2525, 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000) (internal citation omitted); *Peace Officers' Annuity & Benefit Fund of Georgia*, No. 17-cv-0304-WJM-NRN, 2021 WL 2981970, at *4. Due to Class Counsel's ability to reach an early and excellent settlement for Settlement Class Members,

costs and expenses are very modest and total \$12,309.94, which is less than the \$15,000 cap on expenses contemplated by the Settlement Agreement. Lietz Fee Decl. ¶ 29. These reimbursable costs and expenses are related to: (a) filing and service fees; (b) mediation fees; and (c) travel expenses. *Id.* ¶¶ 27-28 These costs and expenses were necessary to prosecute this case and are modest in comparison to the enormous costs that likely would have been incurred if litigation had continued. *Id.* at ¶ 29. The Court should grant Class Counsel’s request for \$12,309.94 in costs and expenses, in addition to the \$416,666.67 in attorneys’ fees sought.

D. Plaintiffs’ Service Awards are Reasonable and Should be Granted.

The Tenth Circuit has held that courts “regularly give incentive awards to compensate plaintiffs for the work they perform—their time and effort invested in the case.” *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, LP*, 888 F.3d 455, 468 (10th Cir. 2017). Service Awards are an “efficient and productive way to encourage members of a class to become class representatives, and to reward the efforts they make on behalf of the class.” *Luken Fam. Ltd. P’ship, LLP v. Ultra Res., Inc.*, No. 09-cv-01543-REB-KMT, 2010 WL 5387559, at *8 (D. Colo. Dec. 22, 2010). For their efforts on the case, Plaintiffs seek Service Awards in the amount of \$5,000 each. S.A. ¶ 9.2. Plaintiffs were actively engaged in this action, which included, assisting in the investigation of the case, producing relevant documents, reviewing and approving pleadings, reviewing the Settlement documents, and answering counsel’s many questions. Lietz Fee Decl. ¶ 30. Moreover, their modest Service Award requests fall well below the range of service awards that have been approved by courts in this District. *See, e.g., Luken Fam. Ltd. P’ship*, 2010 WL 5387559, at *8 (awarding \$10,000 service award); *Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1010 (D. Colo. 2014) (awarding \$15,000 service award). Thus, this Court should grant the requested Service Awards.

VI. CONCLUSION

Class Counsel, with Plaintiffs' assistance, have made significant benefits available to Settlement Class Members. In return, Plaintiffs seek attorneys' fees, costs, and service awards commensurate with those regularly approved by courts sitting in the Tenth Circuit. The attorneys' fees, expenses, and service awards are reasonable.

Dated: January 11, 2024

Respectfully submitted,

/s/ David K. Lietz

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Class Counsel and Attorneys for Plaintiffs

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

DIANE S. JONES, and JOAN OGG,)	
<i>on behalf of themselves and all others similarly</i>)	
<i>situated,</i>)	
)	
Plaintiffs,)	Case No. 23-cv-00408-GPG-MEH
)	
v.)	Judge Hon. Gordon P. Gallagher
)	
P2ES HOLDINGS, LLC,)	
)	
Defendant)	
)	
)	

**DECLARATION OF DAVID K. LIET IN SUPPORT OF
PLAINTIFFS’ MOTION FOR ATTORNEYS’ FEES, EXPENSES, AND
SERVICE AWARDS**

I, David K. Lietz, being competent to testify, make the following declaration:

1. I am currently a senior partner of the law firm Milberg Coleman Bryson Phillips Grossman, PLLC (“Milberg”). My credentials, those of my law partner Gary M. Klinger, and those of my co-counsel at Markovits, Stock & DeMarco, LLC were previously outlined for this Court in joint declaration of Plaintiffs’ Counsel submitted in connection with the Unopposed Motion for Preliminary Approval. I have been appointed co-class counsel for Plaintiffs in this matter. I submit this declaration in support of Plaintiffs’ Motion for Attorneys’ Fees, Costs, and Service Awards. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them if called upon to do so.

2. My experience and qualifications are outlined in the joint declaration in support of Plaintiffs’ Unopposed Motion for Preliminary Approval. ECF 37-2.

3. My work in this matter, the work of others in my law firm, and the work of my co-counsel involved investigating the cause and effects of the P2ES Holdings, LLC (“P2”) Data Incident, interviewing potential clients, evaluating the potential class representatives, contributing to the evaluation of the merits of the case before filing the two Complaints; conducting legal research; conducting extensive research into data security incidents and their causes and effects, conducting further extensive research into data security practices and standards across e-Commerce platforms and industries; researching the corporate and financial structure, and the financial health, of the Defendant P2, drafting and filing the two Complaints; drafting and filing consolidation and leadership papers, drafting and filing a consolidated amended complaint; obtained information from P2 regarding the Data Incident and the makeup of this Class and analyzed that information; engaging in extensive settlement negotiations with Defendant over the course of weeks; prepared for and participated in a formal mediation presided over by Bruce Friedman, Esq., engaged in substantial and substantive additional negotiations and settlement discussions with Mr. Friedman and defense counsel, drafting the settlement term sheet, the settlement agreement, the relevant notices of settlement, the Unopposed Motion for Preliminary Approval, and this instant motion for attorneys’ fees; communicated with defense counsel; updating and handling questions from our class representatives; overseeing the launching of the notice program with substantial interaction between me and the Settlement Administrator; and overseeing the claims process. I conferred with my colleagues about strategy and case status while being mindful to avoid duplicative efforts within my firm and with co-counsel.

4. Continuing through to today co-counsel and I have continued to work with Defendant and the Claims Administrator regarding claims administration and processing as well as answering class members questions about the settlement and the process.

5. Based on my past experience I and my law firm expect to spend another 50-100 hours seeking final approval, defending the Settlement from and potential objections, and supervising claims administration and the distribution of proceeds.

6. As of the date of filing, I have received no objections to the Settlement Agreement in general, and no objections to the proposed attorneys' fees, expenses, and service awards (the amounts of which was made known to the Class via the Court-approved notice program) in particular. There has also been only one (1) requested opt-out to date. It is my understanding that Kroll, the Settlement Administrator, also has received no opt-outs and no objections. Plaintiffs will submit a declaration from Kroll detailing the notice and claims administration with their Motion for Final Approval.

The Contingent Nature of the Case

7. My Firm and my co-counsel prosecuted these consolidated cases on a purely contingent basis. As such, the firm assumed a significant risk of nonpayment or underpayment.

8. This matter has required me, other attorneys at my Firm, and my co-counsel to spend time on this litigation that could have been spent on other matters. At various times during the litigation of this class action, this lawsuit has consumed significant amounts of my time, my Firm's time, and the time of my co-counsel and their firm.

9. Such time could otherwise have been spent on other fee-generating work. Because our respective law firms undertook representation of this matter on a contingency-fee basis, we shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment.

10. If not devoted to litigating this action, from which any remuneration is wholly contingent on a successful outcome, the time our respective law firms spent working on this case could and would have been spent pursuing other potentially fee generating matters.

11. Litigation is inherently unpredictable and therefore risky. Here, that risk was very real, due to the rapidly evolving nature of case law pertaining to data breach litigation, and the state of data privacy law. Therefore, despite the devotion of Class Counsel and their law firms to the case and our confidence in the claims alleged against Defendant, there have been many factors beyond our control that posed significant risks.

12. The fees contemplated under Class Counsel's representation agreements for cases in this District and elsewhere generally fall within the one-third to 40% range. Class Counsel's fees were not guaranteed—the retainer agreement counsel had with Plaintiffs did not provide for fees apart from those earned on a contingent basis, and, in the case of class settlement, approved by the court.

The Costs and Fees Incurred

13. Due to the early stage of litigation and efficiency by which Class Counsel was able to obtain this significant settlement, expenses and fees incurred by Plaintiffs are low.

14. My law firm has currently accrued \$131,850.50 in reasonable attorneys' fees through January 9, 2024. My co-counsel has accrued an additional \$125,866.00 through January 10, 2024.

15. My hourly rate has increased over time based on my experience and my accomplishments in my practice. I have been practicing law continuously since November 1991 (32 years), and the rate for my time is commensurate with senior partners of that level of experience.

16. My current hourly rate and the hourly rate for my law partner Mr. Klinger were set in March 2022 by my law firm Milberg, which made that determination based its own surveys of hourly rates, and upon an internal comparison of hourly rates awarded to the senior partners in the firm by courts across the country.

17. The rate of \$997 per hour that I charge for my time is also commensurate with (or below) hourly rates charged by my contemporaries around the country, including those rates charged by lawyers with my level of experience who practice in the area of data breach class litigation across the nation.

18. The rate of \$997 per hour that I currently charge for my time is commensurate with or less than hourly rates charged by my contemporaries around the country, including those rates charged by lawyers with my level of experience who practice in the area of data breach class litigation across the nation. *See In re Capital One Consumer Data Breach Litigation*, MDL No. 1:19-md-02915-AJT-JFA (Doc. 2231-1 – detailing rates for senior partners in data breach litigation).

19. Prior to submitting the Motion for Attorneys' Fees, Costs, and Service Awards, I compared and confirmed our hourly rate with lawyers at other law firms whose practice is focused on data breach class litigation. Moreover, I routinely survey hourly rates charged by lawyers around the country in published surveys, and review continuously as part of my continuing education opinions rendered by courts on attorneys' fee requests. Again, based upon my research, our rates are well within the range of lawyers with our levels of experience, practicing in this area of law.

20. Our hourly rates have been routinely approved by federal courts around the country. Most recently, my hourly rate was approved in *In re GE/CBPS Data Breach Litigation*, Case No.

1:20-cv-02903 (KPF) (S.D.N.Y. 3/28/2023) (Judge Failla); *Pagan v. Faneuil, Inc.*, Case No. 3:22-cv-297 (ED VA February 17, 2023); *Powers, Sanger et al v. Filters Fast LLC*, Case 3:20-cv-00982-jdp (WD WI, July 22, 2022), ECF 84) where the fee application was submitted on a lodestar basis; (SD NY September 20, 2022) (fee application submitted on both percentage of benefit and lodestar calculation); *In re Deva Concepts Product Liability Litigation*, Case 1:20-cv-01234-GHW, Order Granting Motion for Attorneys' Fees, Document 129 (January 3, 2022); see also Document 121-1 (filed 10/01/21).

21. In addition, our hourly rates were approved by at least two federal courts using that hourly rate as a lodestar cross-check, which is what my hourly rate is submitted for in this case. *See Baldwin et al. v. National Western life Insurance Company*, Case No. 2:21-cv-04066 (W.D. Mo.) ECF 76; *Purvis, et al v. Aveanna Healthcare, LLC*, Case No. 1:20-cv-02277-LMM (N.D. Ga.) (appointed class counsel; final approval granted October 2022), ECF 79.

22. My firm's lodestar of 163.5 hours as of January 9, 2024, amounts to \$131,850.50. My co-counsel's lodestar of 156.4 hours as of January 10, 2024 amounts to \$125,866.00. The currently combined lodestar is thus \$257,716.50. Given the \$416,666.67 in fees request, the current lodestar multiplier is 1.6, which is under lodestar multipliers awarded by the U.S. District Court in Colorado. While Class Counsel seeks fees based upon a percentage of the fund and no lodestar cross-check is required, this lodestar multiplier is appropriate given the excellent results obtained for the class here. The lodestar thus confirms the reasonableness of the attorneys' fee request.

23. Additional time will be spent drafting the final approval motion, preparing for and attending the Final Approval Hearing, defending any appeals taken from the final judgment approving Settlement, and ensuring that the claims process and distribution of Settlement proceeds to Class Members is done in a timely manner in accordance with the terms of the Settlement. Based

upon my past experience, I estimate that another 50-100 hours of attorney time will be reasonably expended on this matter. I assert that the attorneys’ fees sought in the Motion for Attorneys’ Fees, Costs, and Service Awards are reasonable and seek fair and reasonable compensation for undertaking this case on a contingency basis, and for obtaining the relief for Plaintiffs and the Class. As set forth in the Settlement Agreement, the attorneys’ fees and expenses sought in this Motion will not reduce the benefits payable to the Class.

24. Where possible, Class Counsel made efforts to carefully assign work so as to avoid duplication of efforts and have the work completed by the appropriate level of attorney.

25. Upon request, I can provide detailed contemporaneous time records to the Court for review.

26. All books and records in this case regarding costs expended were maintained in the ordinary course of business, from expense vouchers and check records. I have reviewed the records of costs expended in this matter.

27. My firm has also accrued \$6,639.50 in out-of-pocket expenses pertaining to this litigation; including:

E pense	Amount
Filing Fees	\$ 402.00
JAMS (mediation fees)	\$ 4,639.50
Travel Expenses for Final Approval Hearing*	\$ 2,000.00
TOTAL	\$ 6,639.50

*This is an extremely conservative estimate based upon the current prices for roundtrip coach airfare for two persons (Mr. Lietz and Mr. Klinger) to Grand Junction, current hotel prices for the Spring Hill Suites by Marriott in Grand Junction, ground transportation, and modest meals. Should the actual amount of the final approval travel expenses be less than this amount, Class Counsel shall advise the Court at the Final Fairness Hearing.

28. My co-counsel, Markovits, Stock, & DeMarco, LLC, has accrued \$5,670.44 in out-of-pocket expenses pertaining to this litigation, including:

Expense	Amount
Filing Fees	\$ 402.00
JAMS (mediation fees)	\$ 4,237.50
Travel Expenses for Final Approval Hearing*	\$ 1,030.94
TOTAL	\$ 5,670.44

29. The total costs sought are thus \$12,309.94. These costs are reasonable, and necessary for the litigation, and are modest in comparison to the enormous costs that likely would have been incurred if litigation had continued. Reimbursement of these costs is sought in addition to the \$416,666.67 in attorney fees requested. Based upon my past experience, the amount of out-of-pocket case expenses will increase prior to Final Approval, and will include additional travel expenses to appear at the Final Approval Hearing.

30. The Settlement Agreement calls for reasonable service awards to Plaintiffs in the amount of \$5,000.00 each, subject to approval of the Court, in addition to any benefits provided to Settlement Class Members and the costs of notice and settlement administration and separate from any award of attorneys' fees and costs. The Service Awards are meant to recognize Plaintiffs for their efforts on behalf of the Class, including assisting in the investigation of the case, maintaining contact with counsel, reviewing the pleadings, answering counsel's many questions, communicating with counsel during the settlement negotiations, and reviewing the terms of the Settlement Agreement. Plaintiffs also put their reputations at risk, and put themselves forward for

public scrutiny. Plaintiffs were not promised an service award, nor did they condition their representation on the expectation of an incentive award.

31. I strongly believe that the Settlement Agreement is favorable for the Settlement Class. The Settlement addresses the type of injury and repercussions sustained by Settlement Class Members in the wake of the Data Incident. In the opinion of the undersigned and other Class Counsel, the settlement is fair, reasonable, adequate, as are the attorneys’ fees, expenses, and service awards requested here.

32. Although Plaintiffs believe in the merits of their claims, this litigation was inherently risky and complex. The claims involve the intricacies of data breach litigation (a fast-developing area in the law), and the Plaintiffs would face risks at each stage of litigation. Against these risks, it was through the hard-fought negotiations and the skill and hard work of Settlement Class Counsel and the Class Representatives that the Settlement was achieved for the benefit of the Settlement Class.

* * * * *

I declare under penalty of perjury under the laws of the State of Colorado that that foregoing is true and correct. Executed this 11th day of January, 2023, at Washington, D.C.



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As the requested attorneys' fees, expenses, and Service Awards are reasonable, and there being no objection to them, the Motion is hereby GRANTED. Plaintiffs' counsel are awarded \$416,666.67 in attorneys' fees and \$12,309.94 in reasonable case expenses, and the Class Representatives are awarded \$5,000 each as a Service Award.

ORDERED this ____ day of _____, 2024.

HON. GORDON P. GALLAGHER
UNITED STATES DISTRICT JUDGE