UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Village Bank, on behalf of itself and all others similarly situated, Plaintiff, v. Caribou Coffee Company, Inc., Bruegger's Enterprises, Inc., Einstein & Noah Corp., and Einstein Noah Restaurant Group, Inc. Defendants.	Case No. 0:19-cv-01640-JNE-HB **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARD**

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Settlement Class Counsel, on behalf of all counsel who provided legal services in these matters to Plaintiff Village Bank and the Settlement Class (collectively Plaintiff's Counsel), respectfully move the Court for an order (1) awarding Plaintiff's Counsel attorneys' fees and reimbursement of expenses in the aggregate amount of $1,463,515.88; and (2) approving a payment of $15,000 as a service award to Village Bank, as Settlement Class Representative, for its time, resources, and efforts devoted to the case for the benefit of the Settlement Class.

Under either the percentage of the common fund benefit approach or the lodestar approach, Plaintiff's Counsel's request for attorneys' fees and reimbursement of expenses is fair, reasonable, and supported by precedent from this and other federal courts. This Court should grant the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. History of the Litigation

On June 21, 2019, Plaintiff filed an action against Defendants Caribou Coffee Company, Inc.; Bruegger's Enterprises, Inc.; Einstein & Noah Corp.; and Einstein Noah Restaurant Group, Inc. (collectively Caribou) in this Court alleging that in 2018, third-party criminal hackers installed malware on Caribou computer systems and accessed customers' payment card information (the Data Breach). (Compl. [Dkt. No. 1] ¶¶ 1-4.) Plaintiff, like the Settlement Class of financial institutions, issued payment cards allegedly compromised in the Data Breach, was notified that its cards had been

compromised, and suffered financial loss in connection with covering customers' fraud losses and reissuing the compromised cards. (*Id.* ¶¶ 5, 12, 47, and 51.)

Plaintiff alleged that the Data Breach and Plaintiff's injury were the foreseeable result of Caribou's inadequate data security measures and refusal to implement industry-standard security measures because of the cost. (*Id*. ¶¶ 23-25, 57, 60, 76.) Plaintiff brought this action to recover its losses caused by Caribou's negligence and violations of the Minnesota Plastic Card Security Act ("MNPCSA"), Minn. Stat. § 325E.64, and for declaratory and injunctive relief, and to do the same on behalf of a nationwide class.

The Parties negotiated and electronically filed a Stipulation for Protective Order [Dkt. No. 19] and a Stipulation for Federal Rule of Evidence 502(d) Order [Dkt. No. 21]. On August 28, 2019, Caribou filed an Answer to Class Action Complaint [Dkt. No. 28]. The Parties then met and conferred and prepared a joint Rule 26(f) Report [Dkt. No. 35]

B. Following Informal and Third-Party Discovery, a Mediated Settlement Negotiations Resulted in a Settlement.

The parties agreed to engage in early informal discovery to efficiently mediate and resolve the matter. In particular, Plaintiff requested numerous documents and Caribou produced over 800 pages of documents in response, which Plaintiff reviewed. Plaintiff also obtained and reviewed documents from third parties in response to subpoenas Plaintiff served on the major payment card brands. Caribou requested documents from Plaintiff, and Plaintiff produced responsive documents that Caribou reviewed.

The proposed settlement is the result of good faith, arm's-length settlement negotiations, including a full-day mediation before the Honorable Arthur J. Boylan (Ret.)

on January 15, 2020 in Minneapolis, Minnesota. (Settlement at 2.) Prior to the mediation, the Parties provided the mediator detailed confidential mediation statements setting forth their respective positions as to liability and damages. Counsel for the Parties also participated in several direct discussions about the resolution of the litigation. The mediation was highly contested, with counsel for each side advancing their respective arguments zealously on behalf of their clients while continuing to demonstrate their willingness to litigate rather than accept a settlement not in the best interests of their clients. The negotiations were hard-fought throughout, and the settlement process, while conducted in a highly professional and respectful manner, was adversarial.

The Parties did not discuss attorneys' fees, costs, and expenses prior to agreeing to the essential terms of the Settlement. The Parties subsequently formalized the terms of their proposed settlement in the full settlement agreement. (*See* Settlement [Dkt. No. 48-1 Ex. A].)

C. The Settlement Agreement Provides Significant Benefits to the Settlement Class.

On May 14, 2020, Plaintiff, on behalf of the Settlement Class, and Caribou entered into the Settlement Agreement [*Id.*]. The Court preliminarily approved the Settlement as fair, reasonable, and adequate on July 24, 2020; and it directed notice to be provided to the Settlement Class [Dkt. No. 51]. The Settlement resolves all claims asserted by Plaintiff and the Settlement Class. The Settlement defines the Settlement Class as:

> All banks, credit unions, financial institutions, and other entities in the United States (including its Territories and the District of Columbia) that issued Visa- and/or MasterCard-branded payment cards (including debit or

> credit cards) that were affected by the Data Breach and/or part of initial and/or final alerts from Visa or MasterCard related to the Data Breach.

(Dkt. No. 48-1 Ex. A ¶ 36.) Under the proposed settlement, Caribou agrees to pay a total of $5,816,250.00 into the Settlement Fund. (*Id.* ¶¶ 34, 38.) The monetary relief will be distributed on a "claims made" basis. Each settlement class member that submits an approved claim will receive a *pro-rata* distribution of the settlement fund after settlement expenses, service awards, and attorneys' fees are deducted. (Dkt. No. 48-2 Ex. A-1.) No portion of the Settlement Fund will revert back to Caribou unless there is an event of Termination as defined in the Settlement. (Dkt. No. 48-1 Ex. A ¶ 38(b).). The Settlement's finality is not dependent on the Court awarding attorneys' fees and expenses to Settlement Class Counsel. (*Id.* ¶ 70 (providing that payment of fees is contingent upon order of the Court upon Settlement Class Counsel's separate application).)

Caribou has also agreed to injunctive relief for a period of two years from the Effective Date. (*Id.* ¶¶ 39-40.) Consistent with its obligations to comply with the Payment Card Industry Data Security Standards (PCI-DSS), Caribou will continue to design and implement reasonable safeguards to manage and protect the security and confidentiality of payment cardholder data and the payment cardholder data environment. (*Id.* ¶ 39(a)-(b).) These measures will be materially maintained for at least two years following the Effective Date of the Settlement, subject to reasonable exceptions. (*Id.* ¶ 40.)

In exchange for the consideration above, Plaintiff and the Class members who do not timely and validly exclude themselves from the Settlement will be deemed to have

released Caribou from claims arising from or related to the Data Breach. (*Id.* ¶ 62.) In turn, Caribou will also release any potential claims or counterclaims against Plaintiff and Settlement Class Members relating to the initiation, prosecution, or settlement of the Litigation. (*Id.* ¶ 63.).

II. AWARDING ATTORNEYS' FEES TO CLASS COUNSEL IS FAIR AND REASONABLE UNDER GOVERNING LAW

A. Applicable Legal Standards

The Court has discretion to determine an appropriate attorneys' fee award in a class action. *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019); *In re Monosodium Glutamate Antitrust Litig.*, No. 00-md-1328 (PAM), 2003 WL 297276, at *1 (D. Minn. Feb. 6, 2003) ("*MSG*") (citing *Blum v. Stetson*, 465 U.S. 886, 896-97 (1984)); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999). In considering a fee request, courts owe a fiduciary duty to absent class members. *In re Xcel Energy, Inc., Sec., Derivatives & "ERISA" Litig*., 364 F. Supp. 2d 980, 992 (D. Minn. 2005); *MSG*, 2003 WL 297296, at *1.

As this Court has observed, "[t]he theory behind attorneys' fee awards in class actions is not merely to compensate counsel for their time, but to award counsel for the benefit they brought to the class and take into account the risk undertaken in prosecuting the action." *MSG*, 2003 WL 297276, at *1; s*ee also In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958, 2013 WL 716460, at *4 (D. Minn. Feb. 27, 2013) ("[A] financial incentive is necessary to entice capable attorneys . . . to devote their time to complex, time-consuming cases for which they may never be paid. To make certain that

the public interest is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.") (citations omitted).

In exercising their discretion, courts within the Eighth Circuit may base an award of attorneys' fees either under the lodestar method or a percentage of the common benefit recovered. *Rawa*, 934 F.3d at 870. "Under the 'lodestar' methodology, the hours expended by an attorney are multiplied by a reasonable hourly rate of compensation so as to produce a fee amount which can be adjusted, up or down, to reflect the individualized characteristics of a given action." *Johnson v. Comerica Mortg. Corp.*, 83 F.3d 241, 244 (8th Cir. 1996). "[T]he 'percentage of the benefit' approach, permits an award of fees that is equal to some fraction of the common fund that the attorneys were successful in gathering during the course of the litigation." *Id.* at 244-45.

B. Efficiency in Case Prosecution

Efficiency in complex civil litigation has long been a focus of judges in this District handling class action litigation:

> The first observation is a simple one and one in which litigants and their counsel in civil litigation, and especially in complex civil litigation, too often lose sight. The Federal Rules of Civil Procedure "shall be construed and administered to ensure the *just, speedy and inexpensive determination* of every action." Under Rule 1, as officers of the court, attorneys share the responsibility with the court of ensuring that cases are "resolved not only fairly, but without undue cost or delay."
>
> All counsel – both those representing plaintiffs and defendants – conducted this litigation in an exemplary manner and fulfilled their obligations under Rule 1. This is the type of complex litigation that easily could have dragged on for several more years. Instead, it had a relatively short stay of two and a half years on this court's docket because counsel litigated the case efficiently and inexpensively. The lodestar of plaintiffs'

> counsel could easily have been much higher had not counsel cooperated with one another through the litigation and settlement process. Instead, all plaintiffs' counsel presented a modest lodestar because they moved the case along efficiently to a just result in a remarkably short period of time.

Xcel Energy, 364 F. Supp. 2d at 992 (emphasis in original) (citations omitted).[1] In awarding fees, this Court has time and again struck the efficiency chord:

> There is no question of the quality of lead counsel. Both they and their opposite numbers are exceptionally skilled. While hard-fought, the litigation was conducted cordially and efficiently. It is evident that absent counsel's willingness to work efficiently together, this case could well have lasted many more months, if not years.

In re UnitedHealth Group Inc. PSLRA Litig., 643 F. Supp. 2d 1094, 1105 (D. Minn. 2009). This theme of efficient case prosecution is a common thread running through other fee precedent in this District. *See, e.g.*, *Zurn Pex*, 2013 WL 716460, at *3 ("To a large degree, the settlement and resolution of the complex issues present in this MDL litigation are the result of the diligence and focus of class counsel."); *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1063 (D. Minn. 2010) (noting that "Plaintiffs' counsel moved the case along expeditiously, and made every effort to limit duplicative efforts and to minimize the use of judicial resources in the management of the case" and "[c]ounsel exhibited diligence and efficiency throughout the litigation, resulting in a favorable result for the Class").

[1] Fed. R. Civ. P. 1 was amended effective December 1, 2015, and now reads that the civil rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

Indeed, Plaintiff's Counsel litigated and settled this case **in approximately 11 months** following their filing of the initial complaint on June 21, 2019 to the signed Settlement Agreement on May 24, 2020 with a Settlement providing significant benefits to the Class; and it settled **within 17 months** from December 20, 2018 when Caribou publicly announced the Data Breach. The services provided by Plaintiff's Counsel are found in detail in the Declaration of Bryan L. Bleichner. The highlights are summarized below:

- The law firm of Chestnut Cambronne PA served as Settlement Class Counsel and actively participated in the litigation from the outset to ensure the matter was prosecuted in an efficient and non-duplicative fashion. (Decl. ¶ 4.)

- Intensive factual and legal research was undertaken to plead narrow and strong claims in the Complaint based on the chronology and mechanism of the events leading to the data breach, including negligence, PCSA, and negligence per se, and to ensure proper financial institutions were included as plaintiffs. (*Id.* ¶ 5.) Counsel worked to ensure that this case was properly distinguished from negative precedent regarding other data breach cases. (*Id.*)

- The parties engaged in early informal discovery in conjunction with early mediation discussions in an effort to efficiently resolve the case. (*Id.*)

- Plaintiff's Counsel issued third party subpoenas and reviewed third party discovery. (*Id.*)

- The parties negotiated and submitted a joint Rule 26(f) Report, proposing an aggressive schedule for formal discovery, motion practice, and trial in order to efficiently and effectively prosecute the litigation. (*Id.*)

- Village Bank, the Settlement Class Representative, through its counsel, vigorously advocated for the best settlement possible through a weeks-long negotiations process with the assistance of the Honorable United States Magistrate Judge Arthur J. Boylan (Ret.). (*Id.* ¶ 6.) The settlement provides significant relief and benefit to the Settlement Class.

Plaintiff's Counsel's focus and efficiency in achieving resolution in eleven months bears favorably on the quality of services provided by Plaintiff's Counsel and the efficient efforts should be rewarded.

C. The Fee Requested Is Reasonable under the Percentage-of-the-Fund Method.

The Supreme Court has "recognized consistently that . . . a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Eighth Circuit has upheld the use of a percentage of the fund approach. *Petrovic*, 200 F.3d at 1157. "In the Eighth Circuit, use of a percentage method of awarding attorney's fees in a common-fund case is not only approved, but also well established." *Yarrington,* 697 F. Supp. 2d at 1061 (citations and internal quotation marks omitted). Under the percentage-of-the-benefit method, courts award attorneys' fees equal to a reasonable percentage of the fund obtained for the class. *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017). "The key issue is whether the desired percentage is reasonable." *Khoday v. Symantec Corp.*, No. 11-cv-180, 2016 WL 1637039, at *9 (D. Minn. Apr. 5, 2016) (citing *Petrovic*, 200 F.3d at 1157), *aff'd sub nom. Caligiuri v. Symantec Corp.*, 855 F.3d 860 (8th Cir. 2017).

The Eighth Circuit has recently reiterated that the district court has discretion to use either the lodestar or percentage-of-the-fund method in determining an appropriate recovery, "and the ultimate reasonableness of the award is evaluated by considering relevant factors from the twelve factors listed in *Johnson v. Georgia Highway Express*,

Inc., 488 F.2d 714, 717-20 (5th Cir. 1974)." *Rawa*, 934 F.3d at 870 (quoting *In re Target Corp. Customer Data Sec. Breach Litig.*, 892 F.3d 968, 977 (8th Cir. 2018)). In several recent cases, the Court has most often applied the following *Johnson* factors in determining a reasonable attorneys' fee award:

> (1) the benefit conferred on the class, (2) the risk to which plaintiffs' counsel were exposed, (3) the difficulty and novelty of the legal and factual issues in the case, including whether plaintiffs were assisted by a relevant governmental investigation, (4) the skill of the lawyers, both plaintiffs and defendants, (5) the time and labor involved, including the efficiency in handling the case, (6) the reaction of the class and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

Xcel Energy, 364 F. Supp. 2d at 993 ("[N]ot all of the individual *Johnson* factors will apply in every case, so the court as wide discretion as to which factors to apply and relative weight to assign to each."); *Yarrington*, 697 F. Supp. 2d at 1062.

Here, the total value of the monetary benefits secured by Plaintiff's Counsel for the Settlement Class is $5,816,250.00. Settlement Class Counsel's attorneys' fee request of 25% of the total value of the Settlement is $1,454,062.50, a request fully supported by the *Johnson* factors. This fee represents a 3.2 multiplier on lodestar, which is also fully supported by case law. *See, e.g.*, *Rawa*, 934 F.3d at 870 (awarding 28% of the common fund, which represented a multiplier of 5.3, which while admittedly high, "it does not exceed the bounds of reasonableness" as fees in the Eighth Circuit have ranged up to 36% in class actions). The Court should therefore award the requested fee.

1. The Benefit Conferred on the Class.

The benefit conferred on the Class is afforded great weight in assessing the reasonableness of a request of attorneys' fee and expenses. *Beaver Cnty. Emps. Ret. Fund v. Tile Shop Holdings*, No. 0:14-cv-786-ADM-TNL, 2017 WL 2588950, at *2 (D. Minn. June 14, 2017) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). Here, Plaintiffs' Counsel's significant litigation efforts pushed this case towards an early, positive resolution that benefits a nationwide class of financial institutions and credit unions impacted by the Data Breach. Through this Settlement, Plaintiff's Counsel obtained over $5.8 million in monetary relief and significant non-monetary relief related to Caribou's data security that requires Caribou to implement or continue security measures designed to prevent future data breaches.

The Settlement Fund is non-reversionary, meaning that after deducting attorneys' fees and expenses, the class representative service award, and costs related to the Notice Plan, the entirety of the remaining fund will be distributed to Settlement Class Members who submit Claim Forms. Even if the total value of all timely and valid claims is less than the remaining fund, the value of the payments will be increased on a pro rata basis.

In addition to the Settlement Fund, the non-monetary relief negotiated by Plaintiff's Counsel offers significant benefits to the Settlement Class. The non-monetary relief agreed upon in the Settlement will require Caribou to continue to maintain certain data security measures, upgrade its systems to point-to-point encryption, implement security training for active directory employees, and perform annual external audits for Payment Card Industry Data Security Standards by a Qualified Security Assessor.

Through Plaintiff's Counsel's vigorous litigation of the claims against Caribou and extensive settlement negotiations, Plaintiff's Counsel achieved significant monetary and non-monetary relief for Settlement Class Members. The substantial benefits to thousands of Settlement Class Members supports the attorneys' fee request.

2. The Risks to Which Plaintiff's Counsel Were Exposed.

"Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorneys' fees." *Xcel*, 364 F. Supp. 2d at 994 (citation omitted). Risks "must be assessed as they existed in the morning of the action, not in light of the settlement ultimately achieved at the end of the day." *Id.* (citation omitted). From commencement of this litigation through its eventual Settlement, Plaintiff's Counsel faced numerous risks.

In agreeing to the Settlement, Plaintiff's Counsel carefully considered a range of additional risks, including:

> (1) numerous merits issues remained uncertain, such as establishing negligence causation or injury and causation under the Minnesota Plastic Card Security Act; (2) the challenges associated with proving damages on a class-wide basis; (3) obtaining 100% of the data for and establishing a damage model and expert testimony that would ultimately be persuasive to a jury; (4) further developments in the law or the factual record of the case that could undermine Village Bank's claims; (5) the risk that a jury might award lower damages than what is provided by the Settlement Agreement or no damages at all; (6) the risk both sides faced that a jury could react unfavorably to the evidence presented; and (7) the uncertainties, risks, expense, and significant delays associated with any appeal that would inevitably be pursued following trial and entry of final judgment.

(Decl. ¶ 7.)

Such risks in complex class action litigation are very real. *See, e.g., Xcel Energy*, 364 F. Supp. 2d at 994 (stating that "[t]he risk of no recovery in complex cases of this sort is not merely hypothetical" and that "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy"). As one court aptly remarked, "[i]t is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971).

Despite these risks, Plaintiff's Counsel undertook this litigation on a wholly contingent basis at a time that the application of negligence law to data breach cases is still a developing area of law and recent precedents in similar cases have had mixed outcomes for bank and credit unit plaintiffs. Some similar cases have ended in settlements, such as *Target, Home Depot,* and *Eddie Bauer*,[2] but others have been dismissed in whole or substantial part, *e.g.*, *Community Bank of Trenton v. Schnuck Mkts., Inc*., 887 F.3d 803, 817-18 (7th Cir. 2018); *SELCO Community Credit Union v. Noodles & Co.*, 267 F. Supp. 3d 1288, 1297 (D. Colo. 2017), and class certification has been denied in others, *e.g.*, *In re TJX Cos. Retail Securities Breach Litig.*, 246 F.R.D.

[2] *See In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 14-2522 (PAM), 2016 WL 2757692 (D. Minn. May 12, 2016); *In re The Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 1:14-md-02583-TWT, 2016 WL 6902351 (N.D. Ga. Aug. 23, 2016); *Veridian Credit Union v. Eddie Bauer LLC*, No. 2:17-cv-00356-JLR, 2019 WL 5536824 (W.D. Wash. Oct. 25, 2019).

389, 395-396 (D. Mass. 2007) (denying class certification because necessity of individualized inquiries regarding causation, comparative negligence, and damages precluded a finding of predominance).

In sum, the contingent nature of the case and the substantial risks involved in this complex litigation strongly support Settlement Class Counsel's fee request. *See Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J. concurring) ("[T]he risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee."); *Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1083 (D. Minn. 2009) ("In the Eighth Circuit, courts must take 'into account any contingency factor' where plaintiffs' counsel assumes a 'high risk of loss.' Plaintiffs' counsel assumed the risk this case would 'produce no fee,' and courts see fit to reward such gambles.") (citations omitted).

3. The Difficulty and Novelty of the Legal and Factual Issues

Courts also consider the difficulty and novelty of the legal and factual issues. *See Target Corp.*, 892 F.3d at 977 ("[T]he award was justified by the time and labor required, the difficulty of the matter, the skills necessary to prevail (or to reach the current settlement agreement), and the length of the representation."). This case is no exception. The pursuit of nationwide claims and relief presented complex issues of law and fact.

Additionally, the substantial benefits achieved in the Settlement are attributable solely to the efforts of Plaintiff's Counsel, and the complexity of the factual and legal issues presented by this litigation supports Settlement Class Counsel's request for attorneys' fees. *See In re AT&T Corp., Sec. Litig.*, 455 F.3d 160, 173 (3d Cir. 2006)

(absence of assistance from any government group supported district court's conclusion that the fee award to class counsel was fair and reasonable); *Dryer v. Nat'l Football League*, Civ. No. 09-2182 (PAM/AJB), 2013 WL 5888231, at *3 (D. Minn. Nov. 1, 2013) (approving settlement where "[t]here is no doubt that further litigation in this matter would be both complex and extraordinarily expensive").

4. The Skill of the Attorneys.

The skill of the attorneys litigating the case is another factor courts evaluate in determining an appropriate attorneys' fee. *See MSG*, 2003 WL 297276, at *2 (awarding attorneys' fees where "[t]he attorneys prosecuted [the] case very skillfully, often under difficult circumstances"). Plaintiff's Counsel brought the highest quality skills and efficiency to this litigation. Each firm and attorney has significant complex and class action litigation experience, including in the area of data breach, both in this District and nationally. Plaintiff's Counsel's experience in prosecuting data breach cases proved critical to the efficient prosecution and ultimate resolution of this case. This experience allowed Plaintiff's Counsel to tightly tailor informal discovery requests and third-party subpoenas to avoid an unnecessary expenditure of time and resources. (Decl. ¶ 5.)

Despite the legal and factual hurdles, Plaintiff's Counsel were able to obtain a settlement affording class-wide relief. *See Xcel Energy,* 364 F. Supp. 3d at 995-96 ("Thus, the effort of counsel in efficiently bringing this case to fair, reasonable and adequate resolution is the best indicator of the experience and ability of the attorneys involved, and this factor supports the court's award . . . ."); *see also Jenkins ex rel. Jenkins v. Missouri*, 127 F.3d 709, 716 (8th Cir. 1997) ("The most important factor in determining

what is a reasonable fee is the magnitude of the plaintiff's success in the case as a whole."); *Pentel v. Shepard*, No. 18-CV-1447 (NEB/TNL), 2019 WL 6975448, at *2 (D. Minn. Dec. 20, 2019) ("Indeed, 'the degree of success obtained' is 'the most critical factor' courts consider when awarding attorneys' fees." (internal citations omitted)); *Roth v. Life Time Fitness, Inc*., Civ. No. 16-2476 (JRT), 2019 WL 3283172, at *2 (D. Minn. July 22, 2019) ("The most critical factor in assessing fees is the degree of success obtained." (internal citation omitted)). In preliminarily approving the Settlement, the Court designated Settlement Class Counsel, finding, that they are "experienced counsel." (ECF No. 51 ¶ 6.)

The result achieved here is particularly noteworthy considering that the nature of every data breach is different, and some cases have failed at the dismissal or class certification stages. *See, e.g.*, *SELCO Cmty. Credit Union*, 267 F. Supp. 3d at 1292 (dismissing a nationwide class action for a data breach at Noodles & Co, holding Colorado's economic loss rule prohibited tort damages caused by the data breach); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, MDL No. 09-2046, 2012 WL 896256 (S.D. Tex. Mar. 14, 2012) (after three rounds of dismissal motions, dismissing among other claims, breach of fiduciary duty, breach of contract, and negligence), *rev'd Lone Star Nat'l Bank N.A. v. Heartland Payment Sys., Inc*., 729 F.3d 421, 424 (5th Cir. 2013) (concluding that New Jersey's economic loss doctrine could not be applied at dismissal stage); *In re TJX Cos. Retail Sec. Breach Litig.*, 524 F. Supp. 2d 83 (D. Mass. 2007) (dismissing contract, negligence, negligence per se claims but sustaining negligent misrepresentation and deceptive trade practices claims), *aff'd*, 564

F.3d 489 (1st Cir. 2009); *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389, 400 (D. Mass. 2007) (denying class certification because individual issues of reliance, causation, and damages predominated).

The Court should also consider the applicability here of Judge Doty's observation that "[c]ounsel – both the lawyers representing lead plaintiffs and defendants – conducted themselves in an exemplary manner." *Xcel Energy*, 364 F. Supp. 2d at 995. The significant benefits conferred on the Settlement Class appropriately reflect Plaintiff's Counsel's skill, dedication and efficiency:

> All counsel consistently demonstrated considerable skill and cooperation to bring this matter to an amicable conclusion. Thus, the effort of counsel in efficiently bringing this case to fair, reasonable and adequate resolution is the best indicator of the experience and ability of the attorneys involved, and this factor supports the court's award of 25%.

Id., *see also Yarrington*, 697 F. Supp. 2d at 1063 (noting that "Plaintiffs' counsel have advanced and fully protected the common interests of all Members of the Settlement Class and have successfully navigated the complex legal and factual issues presented," and that defendants' "attorneys consist of multiple well-respected and capable defense firms," and concluding that "[c]ounsel for all parties exhibited a great deal of skill in advocating on behalf of their clients and in bringing this case to a fair and reasonable resolution"). This factor further supports Settlement Class Counsel's request for attorneys' fees.

5. The Time and Labor Involved, Including the Efficiency in Handling The Case.

Plaintiff's Counsel should be rewarded for moving the litigation along with diligence and extraordinary efficiency. As previously discussed, this case was resolved

after a remarkably short eleven-month period of active litigation, providing a significant Settlement less than two years after the data breach. In awarding attorneys' fees, Courts have consistently recognized and rewarded class counsel for moving the litigation to conclusion with diligence and efficiency. *See Yarrington*, 697 F. Supp. 2d at 1063. As Judge Doty reasoned:

> [P]laintiffs' counsel presented a reasonable lodestar in a case that was not yet ancient, but easily could have become so. But for the cooperation and efficiency of counsel, the lodestar plaintiffs' counsel would have been substantially more and would have required this court to devote significant judicial resources to its management of the case. Instead, counsel moved the case along expeditiously, and the court determines that the time and labor spent to be reasonable and fully supportive of the 25% attorney fee.

Xcel Energy, 364 F. Supp. 2d at 996. This factor, like the others, weighs in favor of approving Settlement Class Counsel's fee request.

6. The Reaction of the Class.

The reaction of the Class also supports the award. *See Beaver Cnty. Emps. Ret. Fund*, 2017 WL 2588950, at *3 (noting that the lack of a single class member objection is "strong evidence that the requested amount of fees and expenses is reasonable"). The deadline for Class Members to file objections to the Settlement or request for exclusions from the Settlement Class is October 22, 2020. Following completion of notice to the Class pursuant to the Notice Plan approved by the Court in its preliminary approval order and out of 3,802 mailed notices sent, only one Class Member has opted out, and no bank or credit union has objected to the fairness, reasonableness, or adequacy of the settlement

or award of attorneys' fees, expense reimbursement, or service award to the Settlement Class Representatives.[3] (Decl. ¶ 9.)

The favorable reaction of the Class provides further support for the attorneys' fee request and is in accord with past cases from this District. *See, e.g., Caligiuri*, 855 F.3d at 866 (affirming district court award of attorneys' fees and noting the favorable reaction of the class as only five objections in a class of fourteen million were filed); *Beaver Cnty. Emps. Ret. Fund*, 2017 WL 2588950, at *3 (observing that "not a single Class Member has objected" to the attorney fee is "strong evidence" of reasonableness); *Xcel Energy*, 364 F. Supp. 2d at 998 (noting notices were mailed to over 265,000 potential class members and concluding that "careful consideration of the merits of the seven [fee] objections and the minuscule number of total objections received in light of the size of the class" supports the fee award); *Yarrington*, 697 F. Supp. 2d at 1064 (concluding "the Settlement Class strongly supports Settlement Class Counsel's request for attorneys' fees of 33% of the Settlement Fund, based on the fact that only one untimely objection was made").

7. The Comparison Between the Requested Attorney Fee Percentage And Percentages Awarded in Similar Cases.

The requested attorney fee is within the range of fees previously approved by courts in similar cases. Settlement Class Counsel's request of 25% in attorneys' fees, in

[3] Settlement Class Counsel will provide the Court with updated information on any objections and requests for exclusion deadline when they file pleadings regarding the motion for final approval of the Settlement by November 1, 2020.

addition to expense reimbursement, and a service award falls squarely within the range of percentages deemed reasonable in other cases.

Courts in the Eighth Circuit and this District "have frequently awarded attorney fees between [25%] and [36%] of a common fund in other class actions." *Xcel Energy*, 364 F. Supp. 2d at 998 (collecting cases); *see also Rawa*, 934 F.3d at 870 (noting that fees in the Eighth Circuit have ranged up to 36% in class actions). In *MSG*, this Court noted that "[m]ost courts applying the percentage-of-the-fund approach award fees in the 25% to 30% range, adjusting up or down for the circumstances of the case." *MSG*, 2003 WL 297276, at **1-3 (noting that "the Court is convinced that Plaintiffs' counsel is entitled to a substantial award" and concluding that "an award of 30% of the settlement fund is reasonable in this matter"); *see also In re US Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (36% of $3.5 million settlement fund awarded); *In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 14-2522 (PAM), 2016 WL 2757692, at *2 (D. Minn. May 12, 2016) (awarding attorneys' fees in a data breach class action of slightly less than 30% of the total benefit); 9-*M Corp. Inc. v. Sprint Commc'ns Co.*, No. 11-3401 (DWF/SJM), 2012 WL 5495905, at *3 (D. Minn. Nov. 12, 2012) ("At 26 percent of the value of the fund as a whole, the fee-and-expense award would be well within the range of reasonable percentage-fee awards in this Circuit.") (citations omitted); *Carlson v. C.H. Robinson Worldwide, Inc.*, No. CIV 02-3780 JNE/JJG, 2006 WL 2671105, at *8 (D. Minn. Sept. 18, 2006) (approving fee of $5,325,000, amounting to 35.5% of the settlement fund of $15 million and finding the fee "is within the range established by other cases"); *Yarrington*, 697 F. Supp. 2d at 1064-65 (approving fee award of 33% of $16.5 million

common fund as "certainly within the range established by other cases in this District," after noting that "this Court has recently approved attorney fee awards in other cases amounting to between 30-36% of a common settlement fund") (citations omitted). This factor, too, supports Settlement Class Counsel's request.

In conclusion, all relevant *Johnson* factors strongly support the requested attorneys' fee. Under the percentage-of-the-benefit method, the Court should award the requested attorneys' fee of 25% of the common fund.

D. The Fee Requested Is Reasonable Under the Lodestar Method.

The requested attorney's fee is also reasonable under the lodestar method. The lodestar approach may be used as an independent basis for a fee award, *see Zurn Pex*, 2013 WL 716460, at **3-4; as a cross-check in evaluating a fee request under the common fund approach, *see Petrovic*, 200 F.3d at 1157; *Xcel Energy*, 364 F. Supp. 2d at 999; or as a side-by-side analysis alongside the common fund approach, *see MSG*, 2003 WL 297276, at **2-3. Under the lodestar approach, district courts within this Circuit apply four factors in determining whether requested attorneys' fees are reasonable: "(1) the number of hours counsel expended; (2) counsel's 'reasonable hourly rate'; (3) the contingent nature of success, and (4) the quality of the attorneys' work." *In re UnitedHealth Group Inc. PSLRA Litig.*, 643 F. Supp. 2d at 1106 (citation omitted); *see also In re Life Time Fitness, Inc., Tel. Consumer Protection Act (TCPA) Litig.*, 847 F.3d 619, 622 (8th Cir. 2017) (noting the lodestar method multiplies the hours expended by a reasonable hourly rate and any adjustment "to reflect the individualized characteristics of a given action") (citation omitted). Application of these factors is straightforward and

supports the reasonableness of Settlement Class Counsel's requested fee given the substantial time and resources Plaintiff's Counsel devoted to litigating this case. (*See, supra* § II.B (describing significant efforts of counsel in securing an efficient resolution of this matter).)

Courts recognize that "[i]n cases where fees are calculated using the lodestar method, counsel may be entitled to a multiplier to reward them for taking on risk and high-quality work." *In re UnitedHealth Group Inc. PSLRA Litig.*, 643 F. Supp. 2d at 1106 (using lodestar cross-check and finding appropriate a multiplier of nearly 6.5); *see Rawa*, 934 F.3d at 870 (noting a 5.3 multiplier, while high compared to similar cases in the Eighth Circuit, nevertheless was "not unreasonable in light of the results obtained"); *MSG*, 2003 WL 297276, at *3 (finding "a multiplier of slightly less than 2" is "within the range of multipliers that courts typically use"); *Dworsky v. Bank Shares Inc.*, Civ. No. 3-93-13, 1993 WL 331012, at *2 (D. Minn. May 3, 1993) (finding a 2.75 multiplier appropriate); *Yarrington*, 697 F. Supp. 2d at 1067 (determining that multiplier of 2.26 times lodestar to be "modest" and reasonable "given the risk of continued litigation, the high-quality work performed, and the substantial benefit to the Class"); *Xcel Energy*, 364 F. Supp. 2d at 999 (finding lodestar multiplier of 4.7 reasonable); *In re St. Paul Travelers Sec. Litig.*, Civ. No. 04-3801 JRT-FLN, 2006 WL 1116118, at *1 (D. Minn. Apr. 25, 2006) (approving multiplier of 3.9).

Here, in addition to accounting for the requested expenses of $9,453.38, $15,000 in a service award, and $50,000 for the Notice Plan, Settlement Class Counsel's fee request—if all time is considered—amounts to attorneys' fees of $1,454,062.50, or a

positive multiplier of 3.2. This multiplier will continue to shrink as time spent implementing the settlement in 2020 and 2021 is incurred. Considering the skill and efficiency of Plaintiff's Counsel in bringing this case to a relatively speedy resolution, this multiplier is within the range of multipliers awarded by courts in this District.

Settlement Class Counsel will take on the process of distributing the awarded fees to the counsel that have provided valuable services in this matter and intend to continue to exercise responsibility for ensuring that unnecessary expenditures of time and of funds are avoided. This District appropriately expects sound billing judgment and has recognized in other cases that "[o]nly time and expenses authorized and incurred on matters that advance the litigation on behalf of all class members will be considered as compensable." *Dryer v. Nat'l Football League*, Civ. No. 09-2182 (PAM/AJB), 2013 WL 1408351, at *6 (D. Minn. Apr. 8, 2013). Settlement Class Counsel will carefully evaluate and scrutinize Plaintiff's Counsels' time and expense reports in allocating any fee and expense award and anticipate appropriate reductions which could involve substantially discounting such time based on established criteria centered on class benefit.[4] Just as the

[4] Courts recognize that "submission of a combined fee application with actual allocation to be made by lead counsel has generally been adopted by the courts." *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *17 (E.D. Pa. June 2, 2004). "[F]rom the standpoint of judicial economy, leaving allocation to such counsel makes sense because it relieves the Court of the 'difficult task of assessing counsel's relative contributions.'" *Id.* at *18 (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 329 n.96 (3d Cir. 1998)). Courts afford broad discretion to lead counsel in initially allocating attorneys' fee awards. *See In re Indigo Sec. Litig.*, 995 F. Supp. 233, 235 (D. Mass. 1998) (directing that "[a]ny and all allocations of attorneys' fees and expenses among counsel for all class representatives shall be made by lead counsel for the class, who shall apportion the fees and expenses based upon their assessment of the respective contribution to the litigation made by each counsel").

Supreme Court has held that the standard for evaluating fee awards is reasonableness, *see Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), Settlement Class Counsel's allocation must be fair and reasonable. The Supreme Court has also cautioned that "[a] request for attorney's fees should not result in a second major litigation." *Id.* at 437. Should the Court award attorneys' fees and expenses in this matter, Settlement Class Counsel will award on a fair and reasonable basis applying factors courts consider in awarding fees in class litigation, including each firm's contribution to the litigation for the benefit of the Settlement Class, the risks borne by counsel in litigating this complex case on a contingency fee basis, leadership and other roles assumed, lodestars, the quality of work performed, contributions made, the magnitude and complexity of assignments executed, and the time and effort expended by counsel.

Rates for Plaintiff's Counsel ranged from $375/hour (Louisiana-based associate attorney) to $1,150/hour (New York-based partner). (Decl. Ex. A.) These rates are consistent with the rates typically approved in complex litigation in Minnesota and the Eighth Circuit. *See, e.g.*, *Tussey v. ABB, Inc.*, 746 F.3d 327, 340-41 (8th Cir. 2014) (approving, in 2014, a "blended rate" of $514 per hour as reasonable in an ERISA class action); *Yarrington*, 697 F. Supp. 2d at 1066 (recognizing, as of 2010, partner rates ranging from $500-$800 "are based on prevailing fees for complex class actions of this type that have been approved by other courts"); *Zurn Pex*, 2013 WL 716460, at *5 (approving $8.5 million fee award based on rates shown in supporting declaration and noting "[t]hese hourly rates are market rates similar to those charged by firms with expertise in class action and other complex litigation"); *Austin v. Metro. Council*, No. 11-

cv-03621-DWF-SER, slip op. ¶ 57 (D. Minn. Mar. 27, 2012) (ECF No. 27) (noting that attorney rate of $500 per hour was "at the lower end of complex class action rates approved in this District"); *Xcel Energy*, 364 F. Supp. 2d at 989-90, 1004 (implicitly approving attorney rates ranging from $225-$650 in 2005).[5]

Multiplying the total reasonable hours by the various rates, Plaintiff's Counsel's lodestar totals $449,567.00. (Decl. Ex. A.)

The third and fourth lodestar factors—"the contingent nature of the success" and "the quality of the attorneys' work"—discussed more fully above, further support Settlement Class Counsel's attorneys' fee request under a lodestar analysis.

In sum, the requested attorneys' fee is fair and reasonable under the lodestar method and should be awarded. Therefore, under either the percentage-of-the-common benefit or lodestar methods, the Court should approve the requested attorneys' fee as fair and reasonable.

E. The Expenses Incurred in this Litigation Are Reasonable and should Be Reimbursed.

Settlement Class Counsel respectfully request that the Court reimburse expenses of $9,453.38 representing out-of-pocket expenses from inception through August 2020. (Decl. Ex. B.) The expenses were incurred in this litigation and were necessary for its efficient but effective prosecution. Because counsel had no guarantee that these expenses

[5] In more recent data breach class action cases in other federal jurisdictions, higher hourly rates have been approved. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LKH, 2018 WL 3960068, at *17 (N.D. Cal. Aug. 17, 2018) (approving partner rates of $400-$970/hour; and non-partners, senior attorneys, and associates of $185-$850/hour).

would ever be reimbursed, Plaintiff's Counsel had the incentive to keep them reasonable. All expenses have been carefully scrutinized to ensure that they were reasonable and necessarily incurred to benefit the Class. (*Id.* ¶ 13.) Certain categories of expenses, such as photocopies, internet, and other office-related expenses, have been eliminated entirely. (*Id.*) These reductions appropriately cut reported expenses to those included in the requested expense award.

"The common fund doctrine provides that a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of his litigation . . . ." *Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1084-85 (D. Minn. 2009) (citation omitted). Courts routinely approve expenses incurred in the prosecution of complex cases. *See, e.g.*, *Zurn Pex*, 2013 WL 716460, at *5 ("[T]he requested costs and expenses are appropriate and reasonable, Such expenses are related and necessary to the prosecution of this type of litigation and are properly recovered by counsel who prosecute cases on a contingent basis."); *Yarrington*, 697 F. Supp. 2d at 1067-68 (approving reimbursement of $245,720.31 in out-of-pocket expenses, including filing fees, expenses associated with research, preparation, filing and responding to pleadings, costs associated with copying, uploading and analyzing documents, fees and expenses for experts and mediation fees, as well as computer-based legal research, and noting that "[a]ll of these costs and expenses were advanced by Settlement Class Counsel with no guarantee they would ultimately be recovered, and most were 'hard' costs paid out of pocket to third-party vendors, court reporters, and experts"); *Zilhaver*, 646 F. Supp. 2d at 1085 (noting

that "Plaintiffs' counsel has detailed its expenses. The Court finds them reasonable and necessary" and therefore allowed reimbursement of counsel's expenses of $212,629.01).

For these reasons, the Court should approve that expenses of $9,453.38 be reimbursed from the Settlement Fund.

F. Awarding a $15,000 Service Award to the Settlement Class Representative Is Reasonable and Appropriate Given Its Service to the Settlement Class.

The district court has discretion to award service awards. *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002). Settlement Class Counsel have requested that the Court award $15,000 to the Settlement Class Representative, Village Bank, who ably represented various types of financial institutions, from large multi-state banks to credit unions and to small and community banks, in this litigation.

Courts routinely approve such service awards to recognize individuals' service to the class and to reward them for contributing to the enforcement of laws through the class action mechanism. *See, e.g., China Agritech, Inc. v. Resh,* 138 S. Ct. 1800, 1811 n.7 (2018) (noting a "class representative may receive a share of the class recovery above and beyond her individual claim" and citing a circuit case awarding a $25,000 incentive award); *Caligiuri*, 855 F.3d at 867 (quoting *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1068 (D. Minn. 2010) and noting service awards to named plaintiffs "promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits"); *Garcia v. Target Corp.*, No. 16-CV-2574-MJD-BRT, 2020 WL 416402, at *2 (D. Minn. Jan. 27, 2020) (approving $10,000 service award as "reasonable in light of the services performed . . . including taking on the risks of litigation, helping to

achieve the compensation being made available to the Settlement class, and providing discovery"); *Bhatia v. 3M Co.*, Civ. No. 16-1340 (DWF/DTS), 2019 WL 4298061, at *3 (D. Minn. Sept. 11, 2019) (awarding $25,000 service awards to two plaintiffs and $10,000 each to sixteen other class representatives); *In re Target Corp. Customer Data Sec. Breach Litig.*, MDL 14-2522 (PAM), 2016 WL 2757692, at *2 (D. Minn. May 12, 2016) (awarding $20,000 to each of the five financial institution class representatives); *Yarrington,* 697 F. Supp. 2d at 1068 (approving $5,000 service awards to each class representative, which was "merited for time spent meeting with class members, monitoring cases, or responding to discovery") (citation and internal quotation marks omitted); *White v. Nat'l Football League*, 822 F. Supp. 1389, 1406 (D. Minn. 1993) ("Courts . . . routinely approve such awards for class representatives who expend special efforts that redound to the benefit of absent class members.").

Courts have awarded higher service payments to large-entity plaintiffs who, by virtue of their size, face a much heavier burden in discovery than individual consumer representatives. *See*, *e.g.*, *Bhatia*, 2019 WL 4298061, at *3; *City of Farmington Hills Emp. Ret. Sys. v. Wells Fargo Bank, N.A.*, No. 10-cv-4372-DWF-HB, ECF No. 686 at 7 (D. Minn. Aug. 18, 2014) (awarding $50,000 to each of two class representatives—one city employee retirement system and one state pension fund).

In this case, Village Bank, as Settlement Class Representative, stepped up to lead this litigation on behalf of all financial institutions nationally and to provide valuable services for the benefit of the Settlement Class. Caribou provided over 800 pages of potentially responsive documents that Settlement Class Counsel reviewed for relevancy

and privilege. It also worked extensively with Settlement Class Counsel to respond to numerous inquiries regarding its individual facts and circumstances as the litigation proceeded. It actively monitored the litigation through continuous communication with Settlement Class Counsel and was available for mediation and subsequent settlement discussions. (Decl. ¶ 15.)

Because Village Bank devoted time and resources in service to the class, a service award in the amount of $15,000 to recognize the time, expense, and valuable contributions to this litigation should be awarded as fair and reasonable.

CONCLUSION

Settlement Class Counsel, on behalf Plaintiff and the Settlement Class, respectfully request that the Court award (1) reasonable attorneys' fees in the amount of $1,454,062.50; (2) a reimbursement of expenses in the amount of $9,453.38; and (3) a service award to the Settlement Class Representative of $15,000. The requests are fair and reasonable under all applicable law.

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