

**IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE**

JOSIAH AREND and BREANNA AREND,)	
individually, and on behalf of all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 23C303
)	
NEWCOURSE COMMUNICATIONS INC.)	
and FIRST UNITED BANK AND TRUST CO.,)	
)	
Defendants.)	

**PLAINTIFFS’ MOTION FOR ATTORNEYS’ FEES, EXPENSES, AND CLASS
REPRESENTATIVES’ SERVICE AWARDS**

Plaintiffs Josiah and Breanna Arend (Plaintiffs or “Class Representatives”) respectfully move the Court for an Order approving Class Counsel’s attorneys’ fees of \$250,000 and Class Representatives’ Service Awards of \$2,500 each. Because these requests are reasonable, and for the reasons set forth below, the Court should grant this motion.

I. Background

Between April 27, 2022, and May 3, 2022, Defendant Newcourse Communications experienced a data security incident on its information systems, which Plaintiffs allege caused their personally identifiable information to be unauthorizedly accessed by cybercriminals. Settlement Agreement, § 9; Class Action Compl. ¶ 1. Based on the notification letter that Defendants sent to Plaintiffs and Class Members, cybercriminals were potentially able to obtain Plaintiffs’ and Class Members’ full names, addresses, loan account numbers, the last four digits of their social security numbers, and other personal and financial information. Class Action Compl. ¶ 2. Alleging that the data breach was caused by Defendants’ failure to reasonably protect this sensitive data, Plaintiffs

filed this action asserting claims for negligence, negligence per se, invasion of privacy, breach of implied contract, third-party beneficiary, and unjust enrichment. Though Defendants continue to deny wrongdoing, the Parties ultimately reached a Class Settlement, which was signed on March 27, 2024.

II. Benefits of the Settlement

The Settlement provides for benefits that are tailored to redress the type of harm Plaintiffs alleged in their Amended Complaint. The alleged harms include identity theft and fraud because of the nature and sensitivity of the data potentially obtained by cybercriminals. *Id.* ¶¶ 5, 80. To address the harm from identity thieves that Plaintiffs must bear, the Settlement provides them with access to two additional years of credit monitoring and identity theft protection from all three credit bureaus with \$1,000,000 in identity theft insurance. Settlement Agreement, § 43. Moreover, Plaintiffs and Class Members may seek reimbursement for any time they spent responding to, and mitigating the effects of, the data breach. Plaintiffs and Class Members may be reimbursed for up to five hours of such time at twenty dollars per hour. *Id.* ¶ 39(a). Next, Plaintiffs and Class Members may seek reimbursement for their out-of-pocket expenses caused by the data breach. These expenses, which include bank fees, phone charges, postage, professional services fees, credit repair services fees, credit monitoring costs, and others, are capped at \$500 per individual. *Id.* § 39(b). Plaintiffs and Class Members who have financial losses fairly traceable to the breach may also seek reimbursement capped at \$4,000 per individual. *Id.* §39(c). To fund these benefits, Defendant Newcourse Communications agreed to a maximum total claim payout of \$600,000 in addition to the cost of credit monitoring services, settlement administration, service awards, and attorneys' fees. *Id.* § 19. Further, Newcourse has improved its cybersecurity posture and has further agreed to additional cybersecurity enhancements in both 2024 and 2025, including third-party

monitoring and logging, firewall enhancements, email security enhancements, and equipment upgrades. *Id.* § 49.

After negotiating these benefits, Defendants agreed that they would not object to Plaintiffs' motion for attorneys' fees and expenses of up to \$250,000. *Id.* § 70. Defendants furthermore agreed not to object to Class Representatives' Service Awards of up to \$2,500 each. *Id.* § 68. In exchange for these benefits, Plaintiffs and participating Class Members agree to release Defendants from all claims related to the subject data breach, as further detailed in the Settlement Agreement. *Id.* §§ 65–67. On April 26, 2024, the Court preliminarily approved the Class Settlement.

III. Plaintiffs' Request for Attorneys' Fees and Expenses is Reasonable and Should be Approved

After a class action settles, Tennessee Rule of Civil Procedure 23.05 requires that “a motion for fees must be filed and served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.” Tenn. R. Civ. P. 23.05.¹ Though not provided for in the Tennessee Rules of Civil Procedure, courts often require that Class Counsel file their motion for attorneys' fees before the deadline for Class Members to object to the Class Settlement.² William B. Rubenstein, *Newberg on Class Actions*, § 15.13 (6th ed.). The fee amount ultimately awarded is left to the discretion of the trial court. *Kline v. Eyrich*, 69 S.W.3d 197, 203 (Tenn. 2002). Pursuant to this, and the Preliminary Approval Order issued by this Court on April 26, 2024, Plaintiffs now bring their Motion for Attorneys' Fees, Costs, and Service Awards, two weeks in advance of the deadline for Settlement Class Members to opt-out of, or object to, the Settlement Agreement.

¹ Pursuant to Rule 23.05, Class Counsel notified Class Members of the fees it intended to request. This was included in the notice provided to Class Members and in the Settlement. All such documents are publicly available on the Settlement Website. <https://www.newcoursedatabreachsettlement.com>.

² Here, the deadline for Class Members to object to the settlement or request exclusion is July 10, 2024. <https://www.newcoursedatabreachsettlement.com> (noting the “Important Dates”).

Although the Tennessee Rules of Civil Procedure do not specify a method of determining an appropriate award of attorneys' fees, relying on a percentage of the benefit made available to the Class is the ideal approach because the lodestar method of calculating time and a reasonable hourly rate is disfavored in Tennessee. *See Wright ex. Rel. Wright v. Wright*, 337 S.W.3d 166, 180 (Tenn. 2011) (calling the lodestar approach "problematic" in part because of the potential to reward "inexperience, inefficiency, and incompetence" over "skillful and expeditious disposition of litigation") (quoting *Adams v. Unterkircher*, 714 P.2d 193, 197 (Okla. 1985)).

Ultimately, reasonableness is the standard for determining the appropriate fee award. The award of attorneys' fees in common fund cases need only "be reasonable under the circumstances." *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Moulton v. US. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009). When awarding fees, a court must make sure that counsel is fairly compensated for the results achieved. *Rawlings*, 9 F.3d at 516. The Tennessee Supreme Court has illuminated several factors that may be relevant in determining the reasonableness of a fee award: (1) the time and labor required, the novelty and difficult of the litigation, and the skill required; (2) whether taking the case would reasonably appear to preclude other employment; (3) fees customarily charged in similar cases; (4) the amount involved and the results obtained; (5) any time limitations imposed by client or the circumstances; (6) the nature and length of the professional relationship; (7) the experience, reputation, and ability of counsel; (8) whether the fee is contingent or fixed; (9) prior advertisements, if any, by the counsel with respect to the fees the attorney charges; and (10) whether the fee agreement is in writing. *Smith v. All Nations Church of God*, No. W2019-02184-COA-R3-CV, 2020 WL 6940703, at *5 (Tenn. Ct. App. Nov. 25, 2020) (quoting Tenn. Sup. Ct. R. 8; Rules of Prof. Cond. 1.5(a)).

Credit monitoring and identity theft protection services are offered at a range of prices, but

the likely minimum a Class Member could expect to pay is \$8.95 per month, which is \$107.40 per year, or \$214.80 over two years. Decl. of J. Gerard Stranch, IV, ¶ 6. Given the class size of 53,786 individuals, that is a value provided to the Class of \$11,553,232.80. *Id.* Moreover, Defendants have agreed to a \$600,000 aggregate cap for claimed out-of-pocket expenses and reimbursement for lost time. Settlement Agreement, § 19, 39. The requested Service Awards add another \$5,000. *Id.* §§ 29, 68. The costs to administer the Class Settlement add at least another \$76,054. Decl. of J. Gerard Stranch, IV, ¶ 9. And the requested attorneys’ fees and expenses are \$250,000. All are included in the calculation of the benefit to the Class. *Rikos v. Proctor & Gamble Co.*, No. 1:11-cv-226, 2018 WL 2009681, at *9 (S.D. Ohio April 30, 2018) (including all such fees and costs in the total benefit to the class); *Dick v. Sprint Comms. Co., L.P.*, 297 F.R.D. 283, 299–300 (W.D. Ky. 2014) (noting the same because such costs and fees “do not diminish class recovery”). Moreover, when calculating the reasonableness of a fee award, the Court can include the value of the benefits that Class Counsel’s efforts have made available, regardless of whether Class Members ultimately exercise the rights created under the Agreement. *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 285–85 (6th Cir. 2016) (noting the value of the work by class counsel to provide a fund from which Class Members could claim their benefits, work that is not undone by individual decisions to not file claims forms).

So, the value of the Settlement to Class Members is \$12,484,286.80.³ Additionally, of the \$250,000 in fees and expenses Class Counsel requests, Class Counsel incurred \$6,918.91 in expenses that were not charged back to Plaintiffs. Decl. of J. Gerard Stranch, IV, ¶ 10. Thus, of the \$250,000 Class Counsel requests, \$243,081.09 are for attorneys’ fees, which is only 1.95% of the benefit made available to the Class. The percentage is reasonable under the factors outlined by

³ \$11,553,232.80 + \$600,000 + \$5,000 + \$76,054 + \$250,000 = \$12,484,286.80.

the Supreme Court, as discussed in more detail below.

As to the first factor, the time, labor, and skill required to litigate data breach class actions is significant because of the novelty and skill required. *Corra v. ACTS Ret. Servs., Inc.*, No. 22-2917, 2024 WL 22075, at *14 (E.D. Pa. Jan. 2, 2024) (noting that “[d]ata breach litigation is inherently complex”); *Hashemi v. Bosley, Inc.*, No. 21-cv-946, 2022 WL 18278431, at *4 (C.D. Cal. 2022) (noting that standing issues have magnified uncertainty in data breach litigation); *Cotter v. Checker’s Drive-In Rests., Inc.*, No. 8:19-cv-1386, 2021 WL 3773414, at *9 (M.D. Fla. 2021) (explaining that the issues raised “were complex, and the law surrounding data-breach cases is new and evolving”). Here, rather than wait for the end to prolonged litigation which could ultimately result in no recovery whatsoever for the Settlement Class, Class Counsel negotiated an early resolution of this case so that Class Members could obtain credit monitoring and identity theft protections now and make claims for out-of-pocket expenses now, when their information is highly susceptible to being utilized for nefarious purposes in the wake of being allegedly compromised by the data breach. As discussed in more detail below, and in the Declaration of J. Gerard Stranch, IV, ¶ 4, Class Counsel in this matter is highly skilled and experienced in data breach litigation. It is only by using their unique skill set that Class Counsel was able to obtain this result for the Settlement Class early in the litigation process against prominent defense counsel.

As to the second and third factors, Class Counsel has expended significant labor and effort in prosecuting this action, which otherwise could have been dedicated to other, fee generating matters. Decl. of J. Gerard Stranch, IV, ¶ 13. Before filing a complaint in this matter, Class Counsel spent significant time and effort investigating the potential claims and causes of action arising from the data breach, including reviewing pertinent documentation such as Defendants’ notifications regarding the data breach. *Id.* ¶ 2. Class Counsel’s fee request here is commensurate with and is in

fact much lower than amounts awarded in other data breach cases in the Sixth Circuit and around the country. *In re Se. Milk Antitrust Litig.*, No. 2:08-md-208, 2013 WL 2155387, at *3 (E.D. Tenn. May 17, 2013) (awarding one-third of common fund); *see also Bessey v. Packerland Plainwell, Inc.*, No. 4:06-cv-95, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) (awarding one-third of common fund and noting that “[e]mpirical studies show that . . . fee awards in class actions average around one-third of recovery”); *In Re Prandin Direct Purchaser Antitrust Litig.*, No. 10-cv-12141, 2015 WL 1396473, at *4 (E.D. Mich. Jan. 20, 2015) (awarding one-third of the common fund); *see also Denver Area Meat Cutters & Emps. Pension Plan v. Clayton*, 209 S.W.3d 584, 592–93 (Tenn. Ct. App. 2006) (affirming trial court award of one-third of settlement fund in common fund case).

Next, consideration of the amount involved and the results obtained warrants approval of Class Counsel’s fee request. Indeed, the fee request, at just 1.95%, pales in comparison to the benefit obtained for the Class and the typical fees sought by class counsel, who would have been justified in seeking significantly higher fees here, up to 33% of the benefit conferred upon the class. *See Robles v. Comtrak Logistics, Inc.*, No. 15-cv-22228, 2022 WL 17672639, at *10 (W.D. Tenn. Dec. 14, 2022) (“Courts in this Circuit have held that a one-third contingency fee is within the range of fees often award in common fund cases, both nationwide and in the Sixth Circuit.”).

Moreover, the experience and reputation of Class Counsel weighs in favor of the reasonableness of the fee request. Decl. of J. Gerard Stranch, IV, ¶ 4. Class Counsel have a wealth of experience and knowledge in data breach matters and have litigated numerous such cases across the country. *Id.* In addition, Class Counsel litigated this case on a contingent basis, facing the risk of receiving no recovery whatsoever for their considerable efforts in this matter. *Id.* ¶ 2. This fact weighs further in favor of the reasonableness of Class Counsel’s fee request. *DeHoyos v. Allstate*

Corp., 240 F.R.D. 269, 329–30 (W.D. Tex. 2007).

In addition to the factors discussed above, which were outlined in *Smith v. All Nations Church of God*, because the negotiations were hard fought and at arms’ length, *id.* ¶ 12, the Court should presume the reasonableness of the Parties’ agreement regarding attorneys’ fees and expenses. *Senne*, 2023 WL 2699972, at *7 (“Class Settlements are presumed fair when they are reached following sufficient discovery and genuine arms-length negotiation.”) (quoting *Foster v. Adams & Assocs., Inc.*, No 18-cv-02723, 2022 WL 425559, at *6 (N.D. Cal. Feb. 11, 2022)).

Because all relevant factors weigh in favor of the reasonableness of the fee request, the Court should grant Plaintiffs’ motion and award Class Counsel \$250,000 inclusive of attorneys’ fees and expenses.

IV. The Court Should Approve Class Representatives’ Service Awards

In the Class Settlement Agreement, Defendants agreed not to challenge a request for Class Representatives’ Service Awards up to \$2,500 each, which was not conditioned on or tied to the Court’s final approval of the Class Settlement. Settlement Agreement, § 68. Service Awards, which are sometimes referred to as Incentive Awards, “aim to compensate class representatives for their service to the class,” “are paid in most class suits,” and “average between \$10,000 to \$15,000 per class representative.” William B. Rubenstein, *Newberg on Class Action*, § 17.1 (6th ed.); *see also In re Family Dollar Stores, Inc. Pest Infestation Litig.*, No. 2:22-cv-3032, 2024 WL 2000059, at *6 (W.D. Tenn. May 6, 2024) (awarding \$5,000 for each class representative); *Fusion Elite All Stars v. Varsity Brands, LLC*, No. 2:20-cv-02600, 2023 WL 6466398, at *8 (W.D. Tenn. Oct. 4, 2023) (awarding between \$5,000 and \$20,000 in Service Awards); *O’Bryant v. ABC Phones of North Carolina, Inc.*, No. 19-cv-02378, 2021 WL 5016872, at *7 (W.D. Tenn. Oct. 28, 2021). “Such awards ‘encourage individuals to undertake the responsibilities and risks of

representing the class and recognize the time and effort spent in the case.” *Carter v. Vivendi Ticketing US LLC*, No. 22-cv-01981, 2023 WL 8153712, at *11 (C.D. Cal. Oct. 30, 2023) (quoting *In re Anthem, Inc. Data Breach Litig.*, No. 15-md-02617, 2018 WL 3960068, at *30 (N.D. Cal. Aug. 17, 2018)).

The Court should award Class Representatives the requested \$2,500 each in Service Awards. These awards are reasonable given the average amount of such awards in class actions and are in line with service awards in other data breach class actions. Decl. of J. Gerard Stranch, IV, ¶¶ 7–8; *see also, e.g., Morrison v. Entrust Corp.*, No. 23-cv-415, 2024 WL 2207563, at *7 (D. Minn. May 14, 2024) (approving a \$3,000 Service Award); *Jackson v. Nationwide Ret. Sols., Inc.*, No. 2:22-cv-3499, 2024 WL 958726, at *7 (S.D. Ohio Mar. 5, 2024) (approving Service Awards of \$5,000); *Beasley v. TTEC Servs. Corp.*, No. 22-cv-00347, 2024 WL 710411, at *7 (D. Colo. Feb. 21, 2024) (approving Service Awards of \$2,500); *Carter*, 2023 WL 8153712, at *11 (same).

Here, Class Representatives have actively engaged in this litigation, including assisting in Class Counsel’s investigation, providing documents and other information, and answering questions. Decl. of J. Gerard Stranch, IV, ¶¶ 7–8. Because Plaintiffs have served the Class well and have been willing participants in this action, and because the requested Service Awards are imminently reasonable in comparison to similar cases, the Court should grant Plaintiffs’ motion for Service Awards of \$2,500 for each Class Representative for a total of \$5,000—such amount will not reduce the benefit to the Class in any manner.

V. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court approve Class Counsel’s fees of \$250,000 and Plaintiffs’ Service Awards of \$2,500 each.

Dated: June 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June 2024, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system, email, and/or U.S. Mail to:

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