IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SEAN SHEFFLER, individually and on behalf of all others similarly situated, Plaintiff, vs. ACTIVATE HEALTHCARE, LLC and EVERSIDE HEALTH, LLC, Defendants.	Case No. 1:23-cv-01206-SEB-TAB

PLAINTIFF'S CORRECTED[1] UNOPPOSED MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

I. INTRODUCTION

Plaintiff Sean Sheffler ("Plaintiff") through his undersigned counsel, respectfully moves this Court for entry of an Order approving: (1) Class Counsel's requested attorneys' fees award of $152,919.33 which is one-third of the Settlement Fund after claims administration costs, expenses in the amount of $9,852.00, and service award Plaintiff of $5,000.[2]

This data breach class action arises out of the alleged negligence by Activate Healthcare, LLC ("Activate") and Everside Health, LLC ("Everside," collectively, "Defendants") in failing to safeguard and protect individuals' Sensitive Personal Information ("SPI") from unauthorized access and disclosure. As a result, Defendants experienced a security incident between April 22, 2023 and April 28, 2023 whereby unauthorized third parties may have accessed certain SPI for individuals who were patients of Defendants (the "Data

[1] Plaintiff inadvertently filed a fee petition based on a math error using a settlement fund of $555,000.00, rather than the amount negotiated and approved by the Court of $550,000.00.
[2] Unless otherwise indicated, the defined terms herein shall have the same definition as set forth in the Class Settlement Agreement and Release dated October 16, 2024 (the "Settlement Agreement" or "SA"), filed on July 5, 2024. ECF No. 45-1.

Incident"). *See* Class Settlement Agreement and Release (hereinafter, "SA"), §1 (ECF No. 45-1). Plaintiff alleges that the unauthorized third parties exfiltrated SPI which included patients' names, patient names, dates of birth, address, Social Security numbers, driver's license numbers, and clinical information, such as provider names, dates of service, and/or diagnoses. *See* Third Amended Class Action Complaint ("3AC"), ECF No. 38, at ¶3.

Following a day-long mediation session on April 11, 2024 before mediator Bruce Friedman, Esq. the Parties reached a resolution that—if accepted—resolves the litigation and provides substantive relief to the approximately 113,872 Settlement Class Members ("Class Members"). *See* Memorandum in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement, ECF No. 45 ("Mem.") at pp. 4.

The Settlement is an excellent resolution of this high-risk, complex litigation and provides substantial monetary benefit to Class Members: all Class Members who make a claim will receive a monetary award estimated at a minimum of $50, with additional amounts being available for reimbursement of out-of-pocket expenses up to $250. SA at §V.

Through Class Counsel's efforts, a nonreversionary Settlement Fund of $550,000 has been created which shall pay for: (1) all payments of valid claims from Class Members and all award payments; (2) the costs of claims administration, estimated to be $91,242.00; (3) attorneys' fees and costs to be determined by the Court; and (4) a Class Representative service award (the "Settlement"). SA at §X. All Class Members who make a claim will receive a Residual Share of the Settlement Fund estimated at $50.00, but subject to *pro rata* increase or decrease based on the number of claims. SA at §V.2(b). In additional Class Members who make a claim for valid out-of-pocket losses tied to the Data Incident may be reimbursed from the Settlement Fund for up to $250.00. SA at §V.2(a). Since the *pro rata* distribution will be

determined after all claims have been processed, no *cy pres* distribution is expected.

For their efforts in achieving these results, Class Counsel seek an award of $152,919.33 in attorneys' fees, which is one-third of the total Settlement Fund after administration expenses, which will be $458,758.00. Class Counsel also seeks expenses of $9,852.00[3]. Additionally, Class Counsel also seeks a service award of $5,000 for Plaintiff Sean Sheffler in recognition of the time and effort he incurred and the risks he undertook in pursuing claims that benefited the Settlement Class. *See* SA, §X.

As discussed below, the fee request is reasonable when considered under the applicable Seventh Circuit standards and is well within the normal range of awards in contingent-fee class actions in this Circuit. Moreover, the requested $5,000 service award for the Representative Plaintiff is reasonable, as well as standard, for this type of action, and should be approved.

II. FACTUAL AND PROCEDURAL HISTORY[4]

Activate and Everside are healthcare companies that work through employers and unions to to provide employer-related services. *See* 3AC ¶ 1.

On or about June 23, 2023, Defendants began notifying individuals and state attorneys general about the Data Incident whereby hackers stole customers' SPI, including patients' names, dates of birth, addresses, Social Security numbers, driver's license numbers, and clinical information, such as provider name, date of service, and/or diagnosis. *See id.*, ¶ 2-3.

Plaintiff filed his initial complaint on July 8, 2023 (ECF No. 1), an amended complaint on

[3] Class Counsel's expenses are as follows:

Complaint filing fee:	$402.00
Service of process:	$135.00
Mediation:	$9,000.00
Travel (including estimated travel for final approval hearing):	$315.00

[4] The facts in this section are those set forth in the Amended Complaint. Defendants makes no admission as to the facts alleged in the Complaint, and Defendants reserve all right to challenge the alleged facts, if necessary

August 1, 2023 (ECF No. 10), a second amended complaint on October 12, 2023 (ECF No. 25), and (following mediation), a third amended complaint on June 3, 2024 (ECF No. 38), impleading Everside. Plaintiff alleges claims for relief for negligence, breach of implied contract, breach of third-party beneficiary contract, bailment, and (in the alternative), unjust enrichment. *See* 3AC (ECF No. 38), generally.

The Parties briefed motions to dismiss, which was not decided by this Court prior to mediation. *See* ECF Nos. 28-29, 31, and 34.

The Parties agreed to participate in mediation and, prior to doing so, informally exchanged discovery. The Parties also drafted and exchanged mediation briefs prior to mediation. At an all-day mediation with Bruce Friedman, Esq. of JAMS on April 11, 2024, the Parties agreed in principle to the terms of a Settlement, and spent the next few weeks negotiating the details of the Settlement Agreement and its exhibits.

The Parties subsequently executed the Settlement Agreement on July 3, 2024, and Plaintiff moved for preliminary approval on October 18, 2024. This Court granted preliminary approval on July 5, 2024. ECF Nos. 44-45.

The Class Notice advised Class Members that Class Counsel "will request the Court's approval of an award for attorneys' fees and costs up to one-third of the Settlement Fund after claims administration, costs, which shall be paid from the Settlement Fund. SA, §X. The objection deadline was November 29, 2024. No objections were received by the claims administrator or counsel.

III. ARGUMENT

A. The Requested Attorneys' Fee Award is Reasonable and Appropriate

Under the "common fund" or "common benefit" doctrine, "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). *See also* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or the parties' agreement."). This rule is equitable in nature and "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing Co*., 444 U.S. at 478. *See also In re Sw. Airlines Voucher Litig*., 898 F.3d 740, 745–46 (7th Cir. 2018) ("Fee awards for class counsel are part of a constructive common fund because they are a benefit to the class"); *Pearson v. NBTY, Inc*., 772 F.3d 778, 781 (7th Cir. 2014) ("value of the settlement" is "defined as the sum of the awards to the class and to its lawyers.").

"In assessing the reasonableness of an attorney fee award for a class action settlement, district courts should 'do their best to award counsel the market price for legal services, in light of the risk of non-payment and the normal rate of compensation in the market at the time.'" *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) (quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001)). Relevant factors include the risk of non-payment, the quality of the attorney's performance, the amount of work necessary to resolve the litigation, and the stakes of the case. *Id*. at 693.

The Seventh Circuit has held that "[w]hen a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund, in recognition of the fact that most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis. The typical contingent fee is between 33 and 40 percent." *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) (upholding the award of 38 percent of a $20 million

settlement). District Courts within the Seventh Circuit "regularly award percentages of 33.33% or higher to counsel in class action litigation." *Hale v. State Farm Mut. Auto. Ins. Co*., No. No. 12-0660-DRH, 2018 U.S. Dist. LEXIS 210368 at *35 (S.D. Ill. Dec. 13, 2018). *See also, Behrens v. Landmark Credit Union*, No. 17-cv-101-jdp, 2018 U.S. Dist. LEXIS 106358 at *16 (W.D. Wis. June 26, 2018) ("And generally, a 33 to 40 percent contingency fee is considered consistent with the market rate and reasonable."); *Martin v. Caterpillar Inc*., No. 07-CV- 1009, 2010 U.S. Dist. LEXIS 145111, 2010 WL 11614985, at *2 (C.D. Ill. Sept. 10, 2010) ("[C]ourts in the Seventh Circuit award attorney fees 'equal to approximately one-third or more of the recovery.' . . . The Seventh Circuit itself has specifically noted that 'the typical contingent fee is between 33 and 40 percent.'") (citation omitted)[5].

Class Counsel's requested attorneys' fee award of $152,919.33 represents one-third of the total Settlement Fund after administration costs (or $458,758.00). Class Counsel's request is within the range of 33 to 40 percent commonly awarded by courts in the Seventh Circuit in common fund cases and is therefore reasonable.

1. Counsel Assumed the Risk of Non-Payment

Courts emphasize the severity of the financial risk class counsel assumed in taking on a class action when determining the reasonableness of a fee request. *In re Dairy Farmers of Am., Inc.,* 80 F.Supp.3d 838, 847 (N.D. Ill. 2015); *see also Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) ("Contingent fees compensate lawyers for the risk of non-payment. The greater risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel."); *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011) ("[I]f the market-determined fee for a sure winner were $1 million the

[5] Plaintiff notes that the use of a lodestar cross-check in the Seventh Circuit "is no longer recommended." *See Bell v. Pension Comm. of Ath Holding Co. LLC*, 2019 U.S. Dist. LEXIS 150302 at *14 (S.D. Ind. Sep. 4, 2019) (citing *In re Synthroid Marketing Litig*., 325 F.3d 974, 979-80 (7th Cir. 2003))

market determined fee for handling a similar suit with only a 50% chance of a favorable outcome should be $2 million.").

Class Counsel initiated the lawsuit knowing that it would require expenditure of significant time, effort, and money in order to achieve a successful resolution to the matter. There was uncertainty in the outcome of the case as Class Counsel had already responded to two motions to dismiss and discovery was underway. Class Counsel would have to prevail over a motion for class certification, a motion for summary judgment, trial, and potentially an appeal. Class certification in a data breach case is never guaranteed and could have presented a significant hurdle for Plaintiff in this matter. *Yvonne Mart Fox v. Iowa Health Sys.*, No. 3:18-cv-00327-JDP, 2021 U.S. Dist. LEXIS 40640, at *13-14 (W.D. Wis. Mar. 4, 2021) ("breach cases . . . are particularly risky, expensive, and complex.") (quoting *Gordon v. Chipotle Mexican Grill, Inc.,* No. 17-CV-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019)). As such, the significant risk that Class Counsel accepted by taking on this matter on a contingency basis weighs in favor of approval of this motion.

2. The Quality of Counsel's Performance

Class Counsel achieved an automatic benefit for every class member who files a claim and an easy to claim benefit available to those class members who experienced out-of-pocket losses as a result of the Data Incident. The Settlement is a fair, reasonable, and adequate remedy for Class Members when compared to the facts and law at issue in this matter. Class Counsel represented the Class at various stages of litigation including: (1) drafted the initial complaint and the amended complaints; (2) engaged in discovery and investigation of the Data Incident; (3) briefed responses to two separate motions to dismiss; and (4) engaged in comprehensive arm's-length settlement negotiations with Defendant at an all-day mediation with a mediator.

These efforts resulted in a Settlement with benefits to the Class that they would not otherwise have. The benefits an estimated payment of $50 available to every class member and options to claim out-of-pocket reimbursements that will allow eligible Class Members to claim up to $250 for costs related to the Data Incident, such as (1) unreimbursed or unauthorized charges, (2) credit monitoring purchased following the Data Incident, and (3) out of pocket expenses.

Class Counsel negotiated these terms with, and obtained the results for the Class from, Defendants who mounted a strong defense with experienced data breach attorneys. The Settlement provides real benefits that will be available to Settlement Class Members in the very near future, rather than years from now, because of the efficient settlement of the case. This is a further enhancement to the value of the Settlement to the Class Members. *See Donovan v. Estate of Frank E. Fitzsimmons*, 778 F.2d 298, 309 n.3 (7th Cir. 1985) (recognizing that at a prime interest rate of 12.5 percent of a $2 million settlement sum today is worth the same as a $3.6 million recovery five years from now). As such, this factor weighs in favor of approval of this motion.

3. The Complexity, Length, and Expense of the Litigation

Data breach class action lawsuits are complex, risky, and expensive to litigate. Class Counsel were aware that pursuing this case beyond settlement would be lengthy and expensive – it would require discovery, briefing, argument, trial, and potential appeals. All of this would require hundreds, or perhaps thousands, of hours, which would result in significant costs. Interim Class Counsel coordinated to avoid duplicating hours. There is still work to be done in the case as well. For example, Class Counsel will spend additional time drafting and filing Plaintiff's motion for final approval of the Settlement, preparing for and appearing at the final

fairness hearing, overseeing claims administration, and resolving any appeals. As such, this factor weighs in favor of approval of Plaintiff's attorneys' fees request.

4. The Stakes of the Litigation

Class action lawsuits are high stakes litigation and data breach class action lawsuits come with their own set of uncertainties. The Class Members' claims could have faced a number of defenses such as the possibility that the court would dismiss some or all of the claims, decline to certify the Class, or that Plaintiff would not prevail at trial. This factor weighs in favor of granting this motion because there was an uncertain nature of the lawsuit at the beginning of the case, yet Class Members are receiving the benefits of the Settlement.

VI. THE REQUESTED SERVICE AWARDS ARE REASONABLE AND APPROPRIATE

Representative plaintiff service awards encourage members of a class to become class representatives and reward individual efforts taken on behalf of a class. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (awarding $25,000). "In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Id*.

The requested award of $5,000 to Plaintiff is reasonable, justified, and accords with common practice. Plaintiff stepped up and volunteered to take on the responsibilities, risks, and scrutiny of bringing a class action lawsuit. Plaintiff engaged in discovery and was involved in the mediation process, authorizing the settlement for the entire Class. This benefited the entire Class as without the Plaintiff there would not have been a class action lawsuit. Plaintiff was

willing to sit for depositions and to perform duties as the Court may have required if the case continued. Further, plaintiffs in data breach cases risk further losses of privacy by stepping forward and being named, which justifies a reasonable service award.

Courts regularly award service awards in excess of $5,000. *See, e.g., Crawford Lumber Co. v. Interline Brands, Inc.*, No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) (approving an award of $25,000); *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, Nos. 07-CV-2898, 09-CV-2026, 2012 WL 651727 at 16 (N.D. Ill. Feb. 28, 2012) (awarding a $25,000 award to each of seven plaintiffs); *Cook*, 142 F.3d at 1016 (awarding award of $25,000); *see also Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 503 (N.D. Ill. 2015) (awarding $5,000 where the case did not proceed past the earliest stages of discovery).

Furthermore, the proposed award of $5,000 represents merely 0.9% of the entire settlement fund of $550,000. As such, the requested service award is reasonable and warranted considering Plaintiff's participation and willingness to undertake the responsibilities and risks attendant with bringing this class action lawsuit.

VII. CONCLUSION

The requested attorneys' fees, costs and expenses, and service award are reasonable and appropriate and should be approved by this Court. Plaintiff, individually and on behalf of the Class Members, by and through Interim Class Counsel, pray that this Court enter an order: (a) granting Plaintiff's request for attorneys' fees in the amount of $152,919.33; attorneys' expenses of $9,852.00, and a service award for Plaintiff in the amount of $5,000; and (b) granting such other and additional relief that this Court may deem just and appropriate.

Dated: January 10, 2025

Respectfully Submitted,

/s/ Carl V. Malmstrom
Carl Malmstrom
WOLF HALDENSTEIN ADLER

FREEMAN & HERZ LLC
111 West Jackson Boulevard, Suite 1700
Chicago, IL 60604-3597
Email: malmstrom@whafh.com

Interim Class Counsel for Plaintiff and the Class