UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JASEN BRUZEK, HOPE KOPLIN, and CHRISTOPHER PETERSON, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	Case No. 18-cv-697
v.	)	(Jury Trial Demanded)
HUSKY ENERGY INC. and SUPERIOR REFINING COMPANY LLC,	)	
Defendants.	)	

DECLARATION OF J. GORDON RUDD, JR. IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

I, J. Gordon Rudd, Jr., declare:

1. I am an attorney licensed to practice before the courts of the State of Minnesota and permitted to practice before this Court pro hac vice. I am a partner in the law firm Zimmerman Reed LLP. This Court appointed Zimmerman Reed LLP to serve as Class Counsel on behalf the certified class. Dkt. 232.

2. I submit this Declaration in support of Class Counsel's Motion for Attorneys' Fees and Reimbursement of Expenses. I have knowledge of the facts presented in this Declaration since I have been extensively involved in the prosecution of this litigation from inception to settlement and from preliminary approval through providing class notice, claims administration, and moving for final approval and for attorneys' fees and reimbursement of expenses.

3. I have supervised all Zimmerman Reed attorneys and paraprofessionals who have worked on this matter since case inception.

4. This Declaration provides the Court with information describing Plaintiffs' counsel's efforts to bring this matter to a successful conclusion. It contains: (1) a description of the factual investigation, legal research, and work to develop claims and an efficient case prosecution strategy on behalf of Plaintiffs; (2) a summary of the procedural history of the litigation, including a description of Defendants' defense of this case through the pleadings stage, discovery, expert discovery, class certification briefing and summary judgment; (3) a description of the mediation process, including our efforts to resolve this matter at an earlier stage of the litigation as well as the good-faith, arms' length and extensive settlement negotiations with the assistance of Honorable Judge Wayne R. Andersen (ret.); (4) a summary of the substantive terms of the settlement reached between the parties; and (5) information in support of the Class Counsel's request for the payment of attorneys' fees in the amount of $3,151,017.25 and reimbursement of expenses in the amount of $359,948.97.

Plaintiffs' Claims, Case Development, and Litigation Strategy

5. Shortly after the explosion and asphalt fire at the Husky Superior Refinery, Zimmerman Reed became aware of the incident and due to our experience, monitored the events surrounding it. The Firm analyzed potential claims to be asserted against the Refinery related to the evacuation. Our initial investigation spanned the course of several months. Zimmerman Reed also reviewed earlier incidents at Husky facilities including a similar explosion and fire that occurred at the Husky Refinery in Lima, Ohio in 2015. During the course of this time period, several Superior residents retained Zimmerman Reed to represent them.

6. Zimmerman Reed has represented plaintiffs in both individual and class litigation stemming from other single incident mass disasters, including the 2002 train derailment in Minot, North Dakota, and is therefore experienced in this type of litigation. *See Mehl v. Canadian Pac.*

Ry. Ltd., Court File No. 4:02-00009 (D.N.D.), and *In re Soo Line R.R. Co. Derailment of Jan. 18, 2002 in Minot, N.D.* Court File No. Court File No. 04-007726 (Hennepin Cty. Dist. Ct.).

7. During our investigation, Husky announced a reimbursement program where evacuees could be reimbursed expenses and out of pocket costs if they had receipts. Our investigation showed, however, that the displacement of people in Superior during the evacuation was widespread, and yet Husky's reimbursement program failed to adequately compensate for the nuisance and disruption it caused. Because Husky was unwilling to right the wrong it created, our Firm was retained by four named plaintiffs to represent them on behalf of all individuals affected by the evacuation for nuisance and inconvenience related damages.

8. On August 20, 2018, Plaintiffs filed a 23-page class action complaint on behalf of four named Plaintiffs and all residents of Superior who were subject to the evacuation order. The work performed to investigate and plead the case in the strongest and narrowest fashion allowed us to litigate many successful dispositive motions, including the Court's denial of Defendants' multiple motions to dismiss and granting of Plaintiffs' motion for class certification. In particular, Plaintiffs' effort to obtain ESI discovery from Defendants—which Defendants broadly resisted until the Court intervened—eventually led to a well-developed record to be trial-ready or to support a fair and reasonable settlement.

9. From the outset, Plaintiffs understood that this case, like most complex, multiparty litigation, presented challenges. By filing three motions to dismiss and refusing to engage in ESI discovery until the Court ruled on those motions, Defendants signaled that this litigation would be extremely hard fought. Husky was not only unwilling to compensate evacuees for the disruption and inconvenience they experienced from the evacuation, but Husky intended to challenge liability, that the case could proceed on a class basis and that individuals subject to the evacuation

order were in fact entitled to nuisance or inconvenience damages at all. Plaintiffs therefore faced the task of preparing the liability prosecution in a case involving scientific and engineering issues regarding the operations of a Refinery, establishing that the case could be tried on a class basis, and proving damages on either a class basis or by way of individual proof for potentially thousands of class members – all against well-funded defendants represented by Sidley Austin, one of the largest defense firms in the country.

10. Plaintiffs' counsel developed a case strategy to build the strongest liability case possible, with the goal of providing class members the opportunity to come forward to establish their individual damages if the Court declined to certify a damages class. The vast majority of Class Counsel's time and expenses was in building the liability and damages case and making the case for certification of the class, while overcoming the various discovery disputes and defensive motions brought by Husky.

Procedural History of Litigation

11. Given the extensive motion practice—generated in large measure by Defendants' aggressive strategy in the case— the Court is well aware of this case's history. This declaration will therefore concentrate on summarizing the highlights only.

12. The Court stated in its standing order relating to the discovery of electronically stored information in a complex civil lawsuit that "[d]ue to the predicted scope and complexity of discovery" related to ESI in this class action lawsuit the case is assigned to the Pilot Program initiated by the Seventh Circuit Electronic Discovery Committee Dkts. 35 and 98.

13. On October 31, 2018, Defendants brought three motions: 1) a Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim; 2) a Motion to Dismiss Defendant Husky

Energy, Inc. for Lack of Personal Jurisdiction; and 3) a Motion to Strike Plaintiffs' Class Allegations and Allegations Concerning the Chemical Safety Board's Report. Dkts. 20–27.

14. In response to Defendants' motions to dismiss, Plaintiffs filed an Amended Complaint on November 18, 2018. Dkt 29.

15. On January 4, 2019, Defendants renewed their motions to dismiss. Dkts. 41–47.

16. Plaintiffs opposed each of Defendants' motions, resulting in over 60 pages of briefing. Dkts. 49–54.

17. In the parties' Rule 26(f) Report, filed on November 27, 2018, Defendants made clear that the possibility of early settlement of the case was not for consideration, indicating that they were open only to considering settlement on an individual, non-class basis with the named plaintiffs. Defendants also stated in the Rule 26(f) Report that they "intend to bring a motion to stay discovery pending the Court's decisions on the pending motions" to dismiss. Dkt.28, ¶ ¶ 4, 7.

Defendants Blocked ESI Discovery, Causing Delay and Additional Attorneys' Fees

18. Plaintiffs proceeded to serve discovery requests on Defendants after the motion to dismiss briefing was concluded. Plaintiffs also engaged several consultants to advise on the technical aspects of Refinery operations.

19. For months, Defendants essentially refused to engage with Plaintiffs on establishing an ESI protocol or search terms, unilaterally claiming that they would not engage in ESI discovery until the Court ruled on their motions to dismiss. Husky also took the position that any discovery, outside of documents it previously produced to regulatory bodies, was disproportionate to the needs of the case because of the supposedly small damages in this case and wrongly claiming in some conversations, that Plaintiffs suffered no damages.

20. Although Husky refused to respond to Plaintiffs' discovery requests, they waited several months before moving to stay the case. Consequently, Class Counsel invested countless attorney hours on correspondence relating to the discovery dispute and discovery meet and confers that did not result in the commencement of ESI discovery, including efforts to narrow and clarify plaintiffs' discovery requests in attempts of prompting Husky's compliance.

21. On Wednesday, July 24, 2019, Plaintiffs informed Defendants that: 1) Plaintiffs believed the parties were at an impasse on their discovery dispute; and 2) Plaintiffs intended to promptly file a motion to compel discovery and for sanctions under Rule 37. Dkt. 71-5. Plaintiffs' July 24 letter invited Defendants to contact Plaintiffs if they believed the parties had any more to discuss before Plaintiffs filed their motion to compel. *Id.*

22. On Thursday, July 25, Defendants' counsel indicated that she believed Plaintiffs did not fully understand the large number of documents Defendants were willing to produce. She assured Plaintiffs that Defendants were preparing a "formal letter" to clarify this, which they would be sending shortly. Plaintiffs agreed to wait to file their motion to compel until they received Defendants' "formal letter."

23. It turns out Defendants were not preparing a formal letter to advance the meet and confer process. They were preparing their long-delayed motion to stay discovery, which they filed on August 1, 2019, thus succeeding in derailing Plaintiffs' motion to compel.

24. This Court denied Defendants' motion to stay discovery, noting that Defendants had benefited from an informal six-month discovery stay; a benefit which the Court made clear "ends today." Dkt. 74.

25. After the Court cleared Defendants' blockade of ESI discovery, the parties engaged in further extensive meet and confers regarding ESI discovery and protocols. Defendants

ultimately produced, on a rolling basis, approximately 71.80 gigabytes of electronically stored information. Zimmerman Reed engaged a vendor to establish a document database and Zimmerman Reed attorneys categorized and reviewed Defendants' ESI.

26. Part of the discovery Husky eventually produced, but had previously refused to provide, resolved its heavily litigated claim that HEI was not a property defendant. Discovery revealed that HEI was a holding company and its wholly owned subsidiary, Husky Oil Operations, Inc., was the Husky entity that operated the Superior Refinery. Had Husky produced that information earlier, Husky could have avoided filing (and requiring Plaintiffs to respond) to its Motion to Dismiss HEI as a Defendant, Motion for Reconsideration, and Motion for Interlocutory Appeal. In response to this information, Plaintiffs' counsel proposed stipulating to filing an amended complaint replacing HEI with Husky Oil.

27. Plaintiffs also served two sets of interrogatories and requests for production of documents on each of the two Defendants. In addition, Plaintiffs propounded additional jurisdictional discovery on Husky Energy, Inc. Plaintiffs' counsel took depositions of defense witnesses, Bill Demchuk, and Helmut Streblow. Plaintiffs also answered discovery directed to the Named Plaintiffs. And Defendants deposed each Named Plaintiff.

28. Apart from formal discovery in this litigation, and in part due to Defendants' unresponsiveness, Plaintiffs also sought material information about the explosion and its consequences through requests to government agencies. In all, Plaintiffs made eleven different record requests to: (1) the City of Superior, (2) the City of Superior Fire Department, (3) the City of Superior Police Department, (4) Douglas County, Wisconsin, (5) the Wisconsin Department of Health, (6) the Wisconsin Department of Natural Resources, (7) the City of Duluth, Minnesota, (8) the CSB, (9) the U.S. Department of Environmental Protection, (10) the U.S. Department of

Labor Occupational Safety and Hazard Administration, and (11) the Ohio Environmental Protection Agency.

29. On September 30, 2019, the Court denied Defendants' motions to dismiss and strike in their entirety. Dkt.78.[1]

Defendants Improperly Withheld Documents, Causing Delay and Additional Attorneys' Fees

30. Near the end of the discovery period, on April 14, 2020, Defendants provided a privilege log of withheld documents. Dkt.207, ¶ 2. The log listed 354 documents. Most of the allegedly privileged documents related directly to Defendants' investigation into the Superior Refinery explosion and fire. Hence, these allegedly privileged documents were likely to be highly relevant to the issues at the heart of the case: whether or not Defendants' negligence caused the explosion and fire.

31. Soon thereafter, Plaintiffs wrote to Defendants, challenging their claim of privilege with regard to 230 of the 354 documents on their privilege log. Thereafter the parties met and conferred numerous times to discuss Husky's expansive privilege log. *Id.*, ¶ 3. After months of

[1] Husky Energy asked the Court to reconsider its denial of Husky's motion to dismiss for lack of personal jurisdiction and also moved to certify the Court's order for interlocutory appeal. Dkts. 81 and 79. The Court granted the motion to reconsider, denied the motion to certify for interlocutory appeal as moot, and ordered additional discovery on whether the Court had personal jurisdiction over Husky Energy Inc. Dkt. 89. During negotiations over jurisdictional discovery, Husky Energy finally revealed that it believed the proper defendant was Husky Oil Operations, Inc., a wholly owned subsidiary that serves as the operating company through which Husky Energy conducts its business operations. Once that information was revealed, Defendant Husky Energy promptly stipulated that the Court had personal jurisdiction over Husky Oil Operations. That entity was then substituted for Husky Energy Inc. as a defendant. Dkt. 93, at ¶¶ 10–11. Significantly, as Husky Oil Operations is a wholly owned subsidiary of Husky Energy, the entire personal jurisdiction controversy changed nothing relating to Husky Energy's ultimate liability for damages. More to the point, this issue could have been easily resolved without any motion practice whatsoever had Husky Energy been up front with Plaintiffs about who was the proper defendant earlier in the litigation.

meet and confer negotiations, Defendants ultimately agreed to produce 200 of the 230 documents Plaintiffs challenged as improperly withheld on the grounds of privilege. *Id.*, ¶ ¶ 16, 17. In Plaintiffs' counsel's opinion, it is clear from the face of these 200 documents that they do not qualify as either attorney-client or work product privilege. This is another example of a dispute—like the dispute over whether Husky Energy, Inc. or Husky Oil Operations was the proper defendant—that should have been easily resolved.

32. With regard to the privilege log, the parties spent hours litigating the privilege log – and in the end Defendants produced 200 of the 230 documents at issue. In our opinion, Defendants' litigation strategy to oppose Plaintiffs every step of the way unnecessarily increased the costs of this litigation.

Summary of Expert Discovery

33. Expert discovery in this case was comprehensive and critical to the preparation of Plaintiffs' liability case as well as establishing the types of damages to be recovered, whether on a class or individual basis.

34. Plaintiffs obtained testimony and reports from three experts: Dr. John A. Williams, Ph.D., a licensed professional engineer who reported on the causes and risks of the explosion; Dr. Charles Baum, Ph.D., a professor of economics and finance, who opined on a method to measure the value of economic losses due to nuisance, annoyance, inconvenience, and discomfort; and Dr. John A. Kilpatrick, a Ph.D. in Finance and the Managing Director of Greenfield Advisors, Inc., who opined on damages due to loss of use of enjoyment by residential property owners during the period of evacuation. Class Representatives later withdrew Dr. Kilpatrick's opinion (and did not include the costs of that work in their fee submission).

35. Dr. Williams would serve as Plaintiffs' primary witness at trial to assist Plaintiffs in establishing liability and causation. Dr. Williams' opinions were critical to the preparation of Plaintiffs' liability case for trial and to demonstrate that the liability case could be established on a class basis.

36. Dr. Williams extensively examined documents produced by Defendants. He intended to testify at trial that the explosion and fire was a near catastrophic event which was caused by Defendants' multiple failures to ensure safe and adequate operations, including violating their own standard operating procedures, industry standards, and industry regulations. In his expert report, Dr. Williams opined that the explosion and fire at Superior Refinery was foreseeable and could have been prevented had standard industry practices and procedures been followed. Dkt. 113, 113-1. Based upon his expertise and knowledge surrounding this incident, Plaintiffs' counsel understand that Dr. Williams is also serving as an expert in other cases stemming from this incident that are currently pending before this Court.

37. Defendants deposed all three of Plaintiffs' experts and submitted expert reports by three of their own experts: Ennio Mastracci, P.Eng., who opined on the Refinery's practices and safety systems, including the hydrogen fluoride safety systems; Erin M. Johnson, Ph.D., Senior Economist at Data for Decisions, LLC, who responded to Dr. Baum' report; and Trevor E. Phillips, a Managing Director with Alvarez & Marshal Disputes and Investigations, LLC, who responded to Dr. Kilpatrick's report.

Plaintiffs' Motion for Class Certification and Defendants' Motion for Partial Summary Judgment

38. Toward the end of discovery, the parties briefed another series of motions: First, Plaintiffs moved to certify Rule 23(b)(3) and 23(b)(2) classes for three of their claims: negligence, nuisance, and strict liability. Dkt.108.

39. Defendants opposed the motion for class certification and, at the same time, moved to exclude both of Plaintiffs' damages experts—Dr. Baum and Dr. Kilpatrick. Dkts.141, 134, 130.

40. Plaintiffs withdrew Dr. Kilpatrick's report and opposed Defendants' motion to exclude Dr. Baum's opinions. Dkts. 149, 151.

41. Separately, Defendants moved for partial summary judgment on Plaintiffs' request for injunctive relief, on the ground that Class Representatives lacked standing to pursue an injunction because they did not face an imminent risk of future harm from the operation of the Superior Refinery. Dkt. 137, at 1–3.

42. On February 19, 2021, the Court certified a Rule 23(b)(3) class for purposes of determining Defendants' alleged liability as to Plaintiffs' negligence, nuisance, and strict liability claims. Dkt. 232. at 20–33. The Court defined the certified class as: "All persons over the age of 18 subject to the Evacuation Order declared on April 26, 2018 as a result of the Superior Refinery explosion and fire who seek compensation for economic loss or loss of use and enjoyment of their property, excluding personal injury damages." *Id.* at 36. The Court granted Defendants' motion for partial summary judgment and, therefore, denied Plaintiffs' request to certify a 23(b)(2) injunctive relief class. *Id.*

43. The Court also denied Defendants' motion to exclude Dr. Baum's testimony regarding a model for calculating classwide damages. *Id.* at 34, 36. However, given the Court's decision to bifurcate the case, the Court held that it would allow Defendants to re-raise this issue in a motion *in limine*. *Id.* at 29, 34.

Defendants' Defense Strategy was Broad and Greatly Increased the Costs and Attorneys' Fees Incurred by Plaintiffs

44. Like all complex cases, Plaintiffs were prepared at the outset of this case to litigate the case to trial. Plaintiffs' counsel knew that this litigation would be costly, complex, and difficult,

and would require the use of technical experts to opine on both liability and damages. Moreover, counsel knew that Defendants would conduct a vigorous defense, as summarized above. However, Defendants' litigation strategy was aggressive. Thus, the risk Class Counsel shouldered at the outset of this case not only remained, but in fact increased throughout the litigation. And while Defendants always have the right to elect a litigation strategy, no matter how broad or adversarial it might be to the claims in the underlying case, it would be improper for a defendant, after having chosen a broad, contentious, and adversarial strategy, to then challenge Plaintiffs for the work they had to incur in responding to that strategy.

45. Defendants declared almost immediately in this case that, as far as the possibility of early settlement, they were uninterested in considering a classwide settlement. Dkt. 28.

46. In early meet and confers, Defendants' counsel aggressively questioned Plaintiffs' counsel about the damages at issue in the case. Defendants' counsel repeatedly stated Defendants' belief that the putative class members had in fact suffered no damages because of Defendants' Reimbursement Program. Consequently, Defendants argued that the discovery Plaintiffs sought did not meet the proportionality requirement of Rule 26.

47. In response, Plaintiffs described the type of damages sought, acknowledging that due to the size of class members' individual damages, Plaintiffs' counsel was pursuing the case on a class basis. Plaintiffs candidly recognized that even if every putative class member subject to the evacuation order were entitled to nuisance damages, the aggregate damages at issue in this case was in the modest range by complex class action case standards. But Defendants made it clear during the early meet and confers that they would litigate the case aggressively. When Class Counsel brought the case, it knew this was possible and was of course prepared to litigate to trial, and to represent the clients and the class capably and professionally.

48. Based upon Class Counsel's experience, Defendants' litigation approach was disproportionate to the claims and damages at issue and greatly increased the costs to litigate this case. Defendants were unwilling to right the wrong that they caused by the explosion in their Superior, Wisconsin refinery. Rather than establish a fair process to compensate individuals for the disruption that the evacuation caused, they instead elected to limit recoveries, expand the litigation, increase the burden, and contest every issue in the case. They did this knowing that they were greatly expanding the burden on Plaintiffs and their counsel, in time and expense.

Settlement Negotiations

49. By early March 2020, a significant amount of pretrial discovery had been completed, allowing the parties to adequately analyze the strength and weaknesses of their respective claims and defenses. At that time however, the parties were about to embark on what was likely to be the most expensive and time-consuming period of pretrial litigation. Over the next several months, the parties would take and defend numerous depositions; finalize their expert reports; take and defend expert depositions and brief the class certification motion as well as Defendants' expected summary judgment motion.

50. Accordingly, Plaintiffs approached Defendants' counsel to determine whether Defendants were interested in exploring resolution of the case before the parties incurred these costs and expenses. The parties had several productive discussions but were far apart in terms of reaching resolution. Defendants refused Plaintiffs' proposal to engage a qualified neutral to help mediate the case. As a result, settlement discussions ceased in the Spring of 2020.

51. As expected, a significant amount of attorney and expert time was invested from the Spring of 2020 through the Fall 2020 when the parties completed expert discovery, and class certification, summary judgment, and *Daubert* briefing.

52. After the Court issued its order on class certification and summary judgment in February 2021 and while the Parties were preparing the class notice plan, Plaintiffs once again raised the issue of settlement—before incurring the expense of class notice, and both the time and expense of further pretrial work as well as a class trial. At this juncture, Defendants agreed to engage a mediator to explore resolution on a class basis. The parties ultimately mediated the case before the Honorable Wayne R. Andersen (ret.) via Zoom on April 15, 2021.

53. The settlement negotiations were conducted in good faith and at arms' length. While the negotiations were adversarial, they were also civil, with both parties firmly advancing their clients' positions and consistently expressing their willingness to continue through the litigation process to advance their respective client's position on the merits. The mediation ended April 15 with substantial progress toward a class settlement and establishment of a class damages structure, but without a binding term sheet.

54. With the assistance of Judge Andersen over the next several weeks, the parties reached an agreement, evidenced by a signed term sheet on May 6, 2021.

55. The parties then worked over the next several weeks negotiating the details of the settlement, drafting a comprehensive agreement, and developing a notice and settlement administration plan.

56. On June 25, 2021, Plaintiffs filed their motion for preliminary approval of the class action settlement Dkt. 244.

57. On August 6, 2021, the Court preliminarily approved the proposed settlement as fair, reasonable, and adequate and ordered notice to be given to the Class. Dkt. 250.

58. As set forth in Plaintiffs' Motion for Final Approval of Class Action Settlement (Dkt. 244), the proposed settlement resolves the claims of Plaintiffs and the certified class

consisting of approximately 20,000 class members. In the settlement agreement, Defendants agreed to pay $1,050,000 into a Claimant and Notice Fund ("the Fund") and agreed to pay any Fee Award from the Fund, or, separately funded by Defendants, or both. Dkt. 246-1, at §§ 2.35, 3.1, 7.1. The Settlement Administrator's Report dated December 15, 2021 (Dkt. 257) states that the entire Fund will be used to pay claims, notice and administration costs, and Class Representative Awards as approved by the Court. Therefore, the entire amount awarded by the Court for attorneys' fees and expenses will be paid separately from the Fund.

59. Importantly, the class will not be burdened with compensating Class Counsel's attorneys' fees and expenses awarded by the Court, which is an additional, significant benefit to the Class.

Post-Settlement Work

60. Since the Settlement was executed, Class Counsel worked extensively with the Settlement Administrator, JND, to implement the settlement. This work has included assisting with review and finalizing class notices; creating the design and content of the dedicated website, www.superiorrefinerysettlement.com, which became active on August 18, 2021; scripting responses to frequently asked questions about the settlement; ensuring the Notice Plan was implemented in accordance with the preliminary approval order and Notice Plan; fielding and responding to inquiries from members of the class who contacted our office or asked to speak with class counsel; and monitoring opt outs and claim submissions. This work has and will continue on an ongoing basis until the settlement has been fully implemented, all claims processed, and distribution is made pursuant to the final judgment.

61. Class members have reacted favorably to the proposed Settlement. Of the estimated 20,782 Class members, 5390, or more than one quarter of the Class, submitted valid claims. No

Class member objected to the settlement and 16 Class members opted out. Dkt. 258. Class members who submitted valid claims will receive a pro rata increase in the value of their claims from $150 to an estimated $167.23, not including deductions for previous payments from the Reimbursement Program. The valid Claims will, therefore, exhaust the Fund, meaning no amount will be used to pay a Cy Pres beneficiary or any amount of the awarded attorneys' fees and expenses.

62. Based on Class Counsel's experience, the claim rate in this settlement is high. A variety of factors contributed to strong participation by the Class. First, the Settlement provides fair relief to the Class. Second, the notice program was robust. Third, the claim form was simple and easy to complete online and claimants were not required to provide additional documentation of their damages.

63. One of the persistent criticisms of class action settlements is the low rate at which class members participate in settlements. The ease with which class members were able to make a Claim is a significant benefit to the class and one that Class Counsel worked hard to achieve.

Litigation Risk and Uncertainties

64. Zimmerman Reed undertook this litigation on a wholly contingent basis. From the outset, Plaintiffs' counsel fully understood the possibility that it was embarking on extensive, costly, complex, and risky litigation where counsel would have to establish liability, causation, and damages in a case involving a large amount of technical data and relatively modest claims, all the while confronting highly skilled lawyers who would advocate Defendants' case. The commitment of time, staff, and financial resources made by Zimmerman Reed has been substantial. Plaintiffs' counsel assumed these financial burdens regardless of whether a recovery

would ever occur to reimburse us for out-of-pocket expenses or compensate us for any of the time and effort dedicated to this case on behalf of the Class.

65. Husky fully understood that Plaintiffs' counsel was committed to this case at every step. Plaintiffs' counsel never wavered in its belief that the record evidence amassed, and would continue to marshal for trial, would establish Husky's liability, causation, and damages.

The Attorneys' Fees and Expenses should be Awarded

66. This case required a significant investment of time and resources by Zimmerman Reed. At the inception of the case and as is a sound management practice, Zimmerman Reed maintained contemporaneous time and expense records.

67. Zimmerman Reed's lodestar from inception through November 3, 2021, is $3,151,017.25, representing 6,250.91 total hours expended. Defendants have been aware of the general range of Plaintiffs' counsel's lodestar and expenses since at least the Spring of 2020.

68. Attached as Exhibit A, filed under seal, is a true and correct copy of the spreadsheet containing Zimmerman Reed's detailed time and billing records pursuant to the Court's request in Paragraph 17 of its order granting preliminary approval, Dkt. 250. Class Counsel does not waive any attorney client privilege or work product protection concerning the information described in Exhibit A.

69. Zimmerman Reed maintained the following published billing rates for work performed by its attorneys and paralegals during this litigation. These are the Firm's published rates typically charged per hour by each individual performing work on this matter and for whom reimbursement is being sought.

Attorney	Title	Rate	Hours	Lodestar
Abdi, Alia M.	Associate	$395 - $495	442.85	$196,528.25
Bloodgood, Patricia A.	Partner	$350	46.00	$16,100.00
Bloodgood, Patricia A.	Partner	$805 - $845	913.40	$737,793.00

Cialkowski, David M.	Partner	$695 - $800	46.65	$35,145.50
Cuneo, Tessa G.	Associate	$350	2,216.56	$775,796.00
Fernandez, Hannah B.	Associate	$350 - $505	186.3	$78,096.50
Hoidal, June P.	Partner	$695 - $775	216.05	$150,938.75
Laird, Michael J.	Associate	$545	106.3	$57,933.50
Leary, Alyssa J.	Associate	$505 - $545	29.5	$15,027.50
Lindquist, Daniel T.	Associate	$425	129.95	$55,228.75
Ridout, Christopher P.	Partner	$795 - $845	90.4	$72,371.00
Rudd, Gordon J.	Partner	$795 - $845	679.4	$551,160.00
Toomajian, Charles R.	Associate	$425 - $545	538.2	$236,267.00
Paraprofessional	**Title**	**Rate**	**Hours**	**Lodestar**
Colt, Karen M.	Paralegal	$275 - $315	17.9	$4,938.50
Cuppy, Heidi S.	Paralegal	$200 - $315	482.05	$140,662.00
Lu, Josephine	Paralegal	$200 - $315	42.1	$8,523.50
VanNorman, Julianne	Paralegal	$275	67.3	$18,507.50
TOTALS			**6,250.91**	**$3,151,017.25**

70. Plaintiffs' counsel made every effort to work efficiently by assigning tasks to timekeepers commensurate with their level of experience and to avoid duplication of effort. Therefore, assignments were made with an effort to ensure that associates handled a majority of initial briefing, document review, and early discovery work, while more senior attorneys handled issues regarding expert witnesses, depositions, settlement, and drafting more complex motions as well as revising and editing motions.

71. By way of explanation of the various rates for Attorney Patricia Bloodgood, Ms. Bloodgood played a substantial role in the litigation as evidenced by her lodestar. Ms. Bloodgood is a former Zimmerman Reed partner who is now of counsel to the Firm. Ms. Bloodgood handled numerous responsibilities in this case, including developing case theories, working closely with experts, developing Plaintiffs' liability case, and preparing Plaintiffs' motion for class certification. She also was involved in some document review; with regard to her work reviewing documents, Plaintiffs' counsel applied a standard document review rate of $350 per hour rather

than her published rate. The above chart reflects Ms. Bloodgood's two hourly rates and the number of hours attributable to document review as opposed to more complex tasks at her published rate.

72. Generally, an attorneys' hourly rate at the time of case resolution is applied throughout the tenure of the case. For example, an attorney's 2021 hourly rate would be applied to all time worked on a case since inception even though that attorney might have had a lower hourly rate in the preceding years. Zimmerman Reed did not follow this practice of applying current rates historically in this matter. Instead, the published rate for each year has been utilized.

73. In addition, hours billed by Zimmerman Reed attributable to work to prepare Dr. Kilpatrick's report, which Plaintiffs later withdrew, or related to his deposition have been removed. The Firm seeks no compensation for its time or expense related to Dr. Kilpatrick.

74. Total expenses incurred to date in this matter as reported to the Court through November 3, 2021 are $359,948.97. The costs are broken down as follows:

Expense Category	Amount
Airfare	$2,213.20
Business meals	$380.10
Conference Calls	$289.62
Courier	$385.41
Court Fee	$831.00
CTEQ	$17,548.33
Deposition	$8,674.65
Expert/Consultant - Damage Guide	$9,050.00
Expert/Consultant - EnviroConsultants	$1,400.00
Expert/Consultant – EPS, Inc.	$287,229.93
Expert/Consultant – Stone Lions	$19,278.60
Ground transportation	$840.87
Lodging	$611.19
Mediation	$10,720.00
Parking	$80.00
Postage	$36.29
Subpoena Fee	$379.78
Grand Total	**$359,948.97**

75. The majority of costs and expenses are for expert work – and the expert costs predominantly for the work of Dr. John Williams of EPS, Inc. As set forth above, Dr. Williams' work in this case was extremely important. Had the case gone to trial, Dr. Williams would have served as Plaintiffs' primary witness to establish liability and to explain to the jury the refinery process and what Plaintiffs believe to be the multiple failures of the Defendants, which caused this incident.

76. Dr. Williams Report in the case was more than 245 hundred pages. Defendants offered two experts to counter Dr. Williams' opinions.

77. Zimmerman Reed compensated all experts and non-testifying consultants, including consultants Stone Lions Environmental Corporation and EnviroConsultants, Inc. and paid these invoices in full without any assurance during the litigation that these expenses would be reimbursed.

78. Plaintiffs' counsel also does not seek reimbursement of Westlaw or Bloomberg charges incurred in this case.

79. Attached as Exhibit B, filed under seal, is a true and correct copy of the contingency agreement in this case pursuant to the Court's request in its preliminary approval order at Paragraph 17, where the Court instructed Class Counsel to provide "typical contingency payments and a copy of any written fee agreement applicable in this case."

80. As to the Court's request to provide a copy of any written fee agreement applicable in this case, Plaintiffs' counsel references the Class Action Settlement Agreement. The Parties' Settlement Agreement states at Paragraph 7.1 that "Defendants agree that Class Counsel is entitled to reasonable attorneys' fees and expenses separate and apart from the Claimant and Notice Fund,

and shall not oppose Class Counsel's entitlement to attorneys' fees and expenses in their entirety." Dkt. 246-1, at §7.1.

81. Attached as Exhibit C is a true and correct copy of Orders approving Zimmerman Reed's published rates as discussed below. Those orders are described further below.

82. In 2020, the United States District Court for the Eastern District of Pennsylvania granted plaintiffs' counsel attorneys' fee motion. Zimmerman Reed submitted its lodestar to the court where partner rates from $525-$795 per hour and associate rates from $350-$395. *Carr v. Flowers Foods, Inc.*, Court File No. 15-CV-06391 (E.D. Pa.).

83. In *Soular v. Northern Tier Energy, LP et al.*, Court File No. 15-CV-556, the United States District Court for the District of Minnesota granted Zimmerman Reed's attorneys' fee and expense motion awarding a 1.27 multiplier where partner rates ranged from $695-$795 and associate rates ranged from $225-$450 during the years 2015-2017.

84. Lastly, in *First Choice Federal Credit Union v. The Wendy's Company et al.*, Court File No. 16-CV-00506, the United States District Court for the Western District of Pennsylvania granted plaintiffs' attorneys' fee motion where Zimmerman Reed partner rates ranged from $695-$900 and associate rates ranged from $350-$425 in 2019.

85. Attached as Exhibit D is a true and correct copy of the Declaration of Daniel E. Gustafson in Support of Plaintiffs' Motion for Final Approval, filed in *Yarrington v. Solvay Pharmaceuticals, Inc.,* Court File No. 0:09-cv-02261 (D. Minn.). There, the United States District Court for the District of Minnesota granted plaintiffs' attorneys' fee motion that included partner rates ranging from $500–$750 per hour, as listed in Exhibit D.

86. Attached as Exhibit E is a true and correct copy of the Declaration of Brian C. Gudmundson in Support of Plaintiffs' Motion for Attorneys' Fees, filed in *In re: CenturyLink*

Sales Practices & Securities Litig., Court File No. 17-md-2795, 2020 WL 7133805 (D. Minn.). There, the United States District Court for the District of Minnesota granted plaintiffs' attorneys' fee motion that included partner rates ranging from $450–$895 per hour, as listed in Exhibit E.

87. Attached as Exhibit F is a true and correct copy of the Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses and Service Awards, filed in *VillageBank v. Caribou Coffee Co. Inc.*, Court File No. 19-cv-1640, Dkt. 68 (D. Minn.). There, the United States District Court for the District of Minnesota granted plaintiffs' attorneys' fee motion that included partner rates ranging from $375 to $1,150 per hour, as described in Exhibit F.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: December 21, 2021 */s/ J. Gordon Rudd, Jr.*
J. Gordon Rudd, Jr.

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MATTHEW CARR, TERRY CARR, DAVID TUMBLIN AND GREGORY BROWN, on behalf of themselves and others similarly situated, **Plaintiffs,** **v.** **FLOWERS FOODS, INC. AND FLOWERS BAKING CO. OF OXFORD, INC.,** **Defendants.**	**CIVIL ACTION** **NO. 15-6391**

O R D E R

WHEREAS Plaintiffs Matthew Carr, Terry Carr, David Tumblin, Gregory Brown, and Luke Boulange, by and through their counsel, have filed an Unopposed Motion for Approval of Attorneys' Fees, Costs, and Service Awards; and **WHEREAS** the Court having heard and considered all submissions in connection with the Unopposed Motion for Approval of Attorneys' Fees, Costs, and Service Awards and the files and records herein, as well as the arguments of counsel; The Court hereby finds and concludes:

1. Plaintiffs' Unopposed Motion for Approval of Attorneys' Fees, Costs, and Service Award **(ECF#325**) is **GRANTED**.

2. Pursuant to Rule 23(h) and 29 U.S.C. § 216(b), Class Counsel is awarded attorneys' fees equal to 33% of the $13.25 million common-fund settlement in this case for a total attorneys' fee award of $4,372,500.00.

3. Pursuant to Rule 23(h) and 29 U.S.C. § 216(b), Class Counsel is awarded $180,101 in expenses necessarily and reasonably incurred in connection with the prosecution and settlement of this litigation, to be paid out of the $13.25 million common-fund settlement in this case.

4. In recognition of their service as class representatives, Plaintiffs Matthew Carr, Terry Carr, David Tumblin, Gregory Brown, and Luke Boulange shall be paid service awards in the amount of $10,000 each, to be paid out of the $13.25 million common-fund settlement in this case.

Dated: August 19, 2020

IT IS SO ORDERED.

/s/Wendy Beetlestone, J.

_____

The Honorable Wendy Beetlestone United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Alex Soular, Jonathan Diamond, and Sterling Molby, on behalf of themselves and all others similarly situated, Plaintiffs, vs. Northern Tier Energy, LP; Northern Tier Energy LLC; Northern Tier Retail Holdings, LLC; Northern Tier Retail, LLC d/b/a SuperAmerica, Defendants.	Case No. 15-cv-556 (SRN/KMM) **Final Order Approving Class Action Settlement**

This matter came before the Court on July 28, 2017, on the Plaintiffs' Motion for Final Approval of Class Action Settlement and Class Counsel's Motion for Award of Attorneys' Fees and Costs, and Payment of Service Awards. (ECF Nos. 77 and 79). Based on the files, records, and proceedings herein, IT IS HEREBY ORDERED:

1. The Motion for Final Approval of Settlement (ECF No. 77) is GRANTED.

2. This Order incorporates by reference the definitions in the Settlement Agreement, and all terms used herein shall have the same meanings as set forth in the Settlement Agreement unless set forth differently in this Order. The terms of this Court's Order Preliminarily Approving Class Action Settlement are also incorporated by reference in this Order.

3. This putative class action commenced February 20, 2015, when Plaintiff Soular filed against Defendants. Plaintiffs assert a claim on behalf of themselves and a

similarly situated class that SuperAmerica violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA), by sending Plaintiffs and members of the class unsolicited text messages.

4. The Settlement Class was conditionally certified for settlement purposes in this Court's Order Preliminarily Approving Class Action Settlement:

> All persons and entities within the United States who received a text message from or sent on behalf of SuperAmerica to a cellular telephone through the use of an automatic telephone dialing system from January 1, 2012 through April 1, 2015.

5. The Court has jurisdiction over the subject matter of this Action and all Parties to the Action, including all Settlement Class Members, including, without limitation, jurisdiction to approve the proposed Settlement, grant final certification of the Settlement Class, and dismiss this Action with prejudice.

6. The Court finds that, for purposes of approving and effectuating the Settlement embodied in the Settlement Agreement, and only for such purposes, the prerequisites for certifying this Action as a class action under Federal Rule of Civil Procedure 23(a) and (b)(3) have been met, in that: (a) the Members of the Settlement Class are so numerous that joinder of all individual Settlement Members is impracticable; (b) there are questions of law and fact common to the Settlement Class, which questions predominate over individual questions; (c) the claims of the Class Representatives are typical of the Settlement Class Members; (d) the Class Representatives and Class Counsel have fairly and adequately represented the interests of the Settlement Class and

will continue to do so; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the issues relating to the Settlement.

7. A total of six (6) Settlement Class Members submitted timely and proper Requests for Exclusion. (*See* Declaration of Cameron Azari ¶ 18.) The Court hereby orders that each of those individuals is excluded from the Settlement Class. Those individuals will not be bound by the Agreement, and neither will they be entitled to any of its benefits. Those individuals will not be bound by this Order and final judgment or the releases herein.

8. The Class Representatives appointed in this Court's Order Preliminarily Approving Class Action Settlement have fairly and adequately represented the Settlement Class throughout the proceedings and are hereby finally confirmed and appointed as Class Representatives.

9. Having considered the factors set forth in Federal Rule of Civil Procedure 23(g)(1), the Court finds that Class Counsel have fairly and adequately represented the Settlement Class throughout the proceedings and for purposes of entering into and implementing the Settlement, and thus hereby reiterates the appointment of Class Counsel as Class Counsel to represent the Settlement Class.

10. Pursuant to Federal Rule of Civil Procedure 23(c)(2) and (e), the Settlement Class Notice provided to the Settlement Class constitutes the best and most practicable notice under the circumstances. The Notice Program was designed to provide notice in the manner most likely to be received and read by Settlement Class Members. Defendants have filed with the Court proof of compliance with the Notice Program in accordance

with this Court's Preliminary Approval Order. The Settlement Class received valid, due, and sufficient notice that complied fully with Federal Rule of Civil Procedure 23 and the constitutional requirements of due process.

11. The Court hereby finds and concludes that the notice provided by the Claims Administrator to the appropriate state and federal officials pursuant to 28 U.S.C. § 1715 fully satisfied the requirements of that statute.

12. Pursuant to Federal Rule of Civil Procedure 23(e)(2), the Court finds, after a hearing and based upon all submissions of the Parties and interested Persons, that the Settlement proposed by the Parties is fair, reasonable, and adequate. The terms and provisions of the Agreement are the product of lengthy, arm's-length negotiations. Approval of the Settlement will result in substantial savings of time, money, and effort to the Court and the Parties, and will further the interests of justice. The Court hereby finally approves the Agreement, the exhibits, and the Settlement contemplated thereby, and directs its consummation pursuant to its terms and conditions.

13. No Settlement Class Member submitted a timely and proper Objection to the terms of the settlement.

14. Having considered the submissions by Class Counsel and all other relevant factors, the Court finds that Class Counsel have expended substantial time and effort in their able prosecution of claims on behalf of the Settlement Class. The Class Representatives initiated and prosecuted the Action, acted to protect the Settlement Class, and assisted Class Counsel. The efforts of Class Representatives and Class Counsel have produced a Settlement Agreement entered into in good faith that provides a fair,

reasonable, adequate and certain result for the Settlement Class. Class Counsel is entitled to reasonable attorneys' fees for their work, which the Court finds to be $800,000.00, and reimbursement of reasonable expenses incurred in the litigation in the amount of $11,312.00. The Class Representatives are entitled to service awards in the amount of $2,500.00 to Alex Soular, $500.00 to Sterling Molby, and $500.00 to Jonathan Diamond. Payments to the Class Representatives and attorneys' fees awarded shall be paid by Defendants within 14 days after the Effective Date, in accordance with the Settlement Agreement.

15. All Settlement Class Members who have not been excluded above are bound by this Order, the accompanying Final Judgment, and by the terms and provisions of the Settlement Agreement incorporated herein.

16. The Court hereby dismisses the Action, as defined in the Agreement, with prejudice, without costs to any party, except as awarded above.

17. The Plaintiffs and each and every one of the Settlement Class Members unconditionally, fully, and finally release and forever discharge the Released Parties from the Released Claims.

18. Each and every Settlement Class Member, and any person actually or purportedly acting on behalf of any Settlement Class Member(s), is hereby permanently barred and enjoined from commencing, instituting, continuing, pursuing, maintaining, prosecuting, or enforcing any Released Claims (including, without limitation, in any individual, class or putative class, representative or other action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum, against the Released

Parties as set forth in Sections 13.01 and 13.02, and the covenant not to sue in Section 13.03 to the Settlement Agreement. This permanent bar and injunction is necessary to protect and effectuate the Agreement, this Order and this Court's authority to effectuate the Agreement, and is ordered in aid of this Court's jurisdiction and to protect its judgments. Nothing contained in this Order is intended to restrict any Settlement Class Member from contacting, assisting or cooperating with any government agency regarding any Released Claim.

19. The Agreement (including, without limitation, its exhibits), and any and all negotiations, documents, and discussions associated with it, this Order and the final judgment, or the fact of the Settlement shall not in any event be construed as, offered in evidence as, received in evidence as, and/or deemed to be, evidence of a presumption, concession or an admission of liability, fault or wrongdoing, or in any way referred to for any other reason, by any Class Representative, Settlement Class Member, Defendants, or Released Party in the Action or in any other civil, criminal, or administrative action or proceeding, except for purposes of enforcing the provisions of the Agreement, this Order and the final judgment. Without affecting the finality of the judgment, the Court, under the Court's contempt power, retains exclusive jurisdiction over this Action and thus all Defendants, Plaintiffs, and Settlement Class Members in this Action regarding the Settlement including without limitation the Settlement Agreement and this Order. Defendants, Plaintiffs, and Settlement Class Members in this Action are hereby deemed to have submitted irrevocably to the exclusive jurisdiction of this Court for any suit, action, proceeding, or dispute arising out of or relating to the Released Claims, this

Order, or the Settlement Agreement, including but not limited to the applicability of the Released Claims, the Settlement Agreement, or this Order.

20. No opinions concerning the tax consequences of the Settlement to Settlement Class Members have been given, and no representations or warranties regarding such tax consequences are made in the Agreement. The Parties and their respective counsel shall not be liable to any party or person for any tax consequences that result from the implementation of this Settlement. Settlement Class Members must consult their own tax advisors regarding the tax consequences of the Settlement, including any payments or credits provided or relief awarded under the Settlement and any tax reporting obligations with respect to it.

21. The Court reserves jurisdiction over the interpretations, administration, implementation, effectuation, and enforcement of this Order, the final judgment, the Agreement, and all other matters that the Court may deem ancillary thereto. Nothing in this Order or the final judgment shall preclude any action to enforce the terms of the Agreement; nor shall anything in this Order or the final judgment preclude Plaintiffs or Settlement Class Members from participating in the claims process described in the Settlement Agreement if they are entitled to do so under the terms of the Settlement Agreement.

22. The Parties and their counsel are hereby directed to implement the Settlement Agreement according to its terms and provisions.

23. As of the date of this Order, a total of 11,004 Settlement Class Members submitted valid claims. The Court hereby orders that these claims, and any other claims

subsequently determined to be timely and valid by the Claims Administrator pursuant to the terms set forth in the Settlement Agreement, be treated as Approved Claims for purposes of distributing Cash Awards and In-Store Awards.

24. By incorporating the Agreement's terms herein, the Court determines that this Order complies in all respects with Federal Rule of Civil Procedure 65(d)(1).

25. The Court will separately enter a final judgment in accordance with Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

Dated: July 28, 2017

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

Leslie Harms

From: ecf_intake_pawd@pawd.uscourts.gov
Sent: Thursday, November 7, 2019 6:13 AM
To: pawd_ecf@pawd.uscourts.gov
Subject: Activity in Case 2:16-cv-00506-MPK FIRST CHOICE FEDERAL CREDIT UNION v. THE WENDY'S COMPANY et al Order on Motion for Attorney Fees

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

Western District of Pennsylvania

Notice of Electronic Filing

The following transaction was entered on 11/7/2019 at 7:13 AM EST and filed on 11/7/2019

Case Name: FIRST CHOICE FEDERAL CREDIT UNION v. THE WENDY'S COMPANY et al
Case Number: 2:16-cv-00506-MPK
Filer:
Document Number: 192(No document attached)

Docket Text:

ORDER granting [187] Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Expenses. The award of attorneys' fees and expenses requested in the motion filed at ECF No. 187 is addressed in the Final Approval Order and Judgment filed at ECF No. 191. Signed by Magistrate Judge Maureen P. Kelly on 11/7/19. Text-only entry; no PDF document will issue. This text-only entry constitutes the Order of the Court or Notice on the matter. (Kelly, Maureen)

2:16-cv-00506-MPK Notice has been electronically mailed to:

Kristine McAlister Brown kristy.brown@alston.com, Doug.Cunningham@alston.com, d.sharp@alston.com, gavin.reinke@alston.com, mike.barry@alston.com

Donald M. Houser donald.houser@alston.com, Liz.Brown@alston.com, rachel.smith@alston.com

Joseph P. Guglielmo jguglielmo@scott-scott.com, aslaughter@scott-scott.com, efile@scott-scott.com, ksteinberger@scott-scott.com

Dominique R. Shelton dshelton@perkinscoie.com, michellejackson@perkinscoie.com

James Pizzirusso jpizzirusso@hausfeld.com

Swathi Bojedla sbojedla@hausfeld.com

Bryan L. Bleichner bbleichner@chestnutcambronne.com, dproulx@chestnutcambronne.com

Arthur M. Murray amurray@murray-lawfirm.com, cdimaggio@murray-lawfirm.com, cfitzgerald@murray-lawfirm.com, cthomas@murray-lawfirm.com

Brian C. Gudmundson brian.gudmundson@zimmreed.com, leslie.harms@zimmreed.com

Karen H. Riebel khriebel@locklaw.com, amraak@locklaw.com, crjohnson@locklaw.com, dmstanek@locklaw.com, lgn-khriebel@ecf.courtdrive.com

Jonathan S. Mann jonm@pittmandutton.com

Karen Sharp Halbert halbert.karen@gmail.com, aprilburton@robertslawfirm.us, emilyneal@robertslawfirm.us, karenhalbert@robertslawfirm.us

Charles H. Van Horn cvanhorn@bfvlaw.com, kkramer@bfvlaw.com, notices@bfvlaw.com

Steven M. Nathan snathan@hausfeld.com

Kate M. Baxter-Kauf kmbaxter-kauf@locklaw.com, dmstanek@locklaw.com, lgn-kmbaxter-kauf@ecf.courtdrive.com

Gavin Reinke gavin.reinke@alston.com, ashley.miller@alston.com

Cassandra Kerkhoff Johnson cassie.johnson@alston.com

Jonathan D. Parente jonathan.parente@alston.com

Carey Alexander calexander@scott-scott.com

Marguerite Ashley Miller ashley.miller@alston.com

Gary F. Lynch glynch@carlsonlynch.com, dhart@carlsonlynch.com, eavery@carlsonlynch.com, ecf@carlsonlynch.com, emcfarland@carlsonlynch.com, jetzel@carlsonlynch.com, ktucker@carlsonlynch.com, mbrady@carlsonlynch.com

Erin G. Comite ecomite@scott-scott.com, aslaughter@scott-scott.com, efile@scott-scott.com, ksteinberger@scott-scott.com

Stephen S. Stallings attorney@stevestallingslaw.com, gstaley@stevestallingslaw.com, kmallon@stevestallingslaw.com

Edward A. Infante schan@jamsadr.com

2:16-cv-00506-MPK Filer must deliver notice by other means to:

Diane M. Welsh
Suite 4010
Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FIRST CHOICE FEDERAL CREDIT UNION, AOD FEDERAL CREDIT UNION, TECH CREDIT UNION, VERIDIAN CREDIT UNION, SOUTH FLORIDA EDUCATIONAL FEDERAL CREDIT UNION, PREFERRED CREDIT UNION, ALCOA COMMUNITY FEDERAL CREDIT UNION, ASSOCIATED CREDIT UNION, CENTRUE BANK, ENVISTA CREDIT UNION, FIRST NBC BANK, NAVIGATOR CREDIT UNION, THE SEYMOUR BANK, FINANCIAL HORIZONS CREDIT UNION, NUSENDA CREDIT UNION, GREATER CINCINNATI CREDIT UNION, KEMBA FINANCIAL CREDIT UNION, WRIGHT-PATT CREDIT UNION, and MEMBERS CHOICE CREDIT UNION, on Behalf of Themselves and All Others Similarly Situated,

and

CREDIT UNION NATIONAL ASSOCIATION, GEORGIA CREDIT UNION AFFILIATES, INDIANA CREDIT UNION LEAGUE, MICHIGAN CREDIT UNION LEAGUE, and OHIO CREDIT UNION LEAGUE,

Plaintiffs,

v.

THE WENDY'S COMPANY, WENDY'S RESTAURANTS, LLC, and WENDY'S INTERNATIONAL, LLC,

Defendants.

Civil No. 2:16-cv-00506-MPK

FINAL APPROVAL ORDER AND JUDGMENT

FINAL APPROVAL ORDER AND JUDGMENT

On February 26, 2019, this Court entered an order granting preliminary approval (the "Preliminary Approval Order") (Doc. 183) of the Settlement between the Financial Institution Plaintiffs, on their own behalf and on behalf of the Settlement Class, and the Association Plaintiffs (collectively, "Plaintiffs"), and Defendants The Wendy's Company, Wendy's Restaurants, LLC, and Wendy's International, LLC (collectively, "Wendy's"), as memorialized in Exhibit 1 (Doc. 176) to Plaintiffs' Motion for Preliminary Approval of Class Action Settlement;[1]

On March 28, 2019, pursuant to the notice requirements set forth in the Settlement and in the Preliminary Approval Order, the Settlement Class was apprised of the nature and pendency of the Litigation, the terms of the Settlement, and their rights to request exclusion, object, and/or appear at the final approval hearing;

On October 7, 2019, Plaintiffs filed their Motion for Final Approval of the Class Action Settlement ("Final Approval Motion") and accompanying Memorandum of Law and supporting exhibits, and Class Counsel filed their Application for Attorneys' Fees, Expenses and Service Awards and accompanying Memorandum of Law and supporting exhibits ("Fee Application");

On November 6, 2019, the Court held a final approval hearing to determine, inter alia: (1) whether the Settlement is fair, reasonable, and adequate; and (2) whether judgment should be entered dismissing all claims in the Complaint with prejudice. Prior to the final approval hearing, Class Counsel filed a declaration from the Settlement Administrator confirming that the Notice Program was completed in accordance with the Parties' instructions and the Preliminary Approval Order. Therefore, the Court is satisfied that Settlement Class Members were properly notified of

[1] The capitalized terms used in this Final Approval Order and Judgment shall have the same meaning as defined in the Settlement except as may otherwise be indicated.

their right to appear at the final approval hearing in support of or in opposition to the proposed Settlement, the award of attorneys' fees, costs, and expenses, and the payment of Service Awards.

Having given an opportunity to be heard to all requesting persons in accordance with the Preliminary Approval Order, having heard the presentation of Class Counsel and counsel for Wendy's, having reviewed all of the submissions presented with respect to the proposed Settlement, having determined that the Settlement is fair, adequate, and reasonable, having considered the application made by Class Counsel for attorneys' fees, costs, and expenses, and the application for Service Awards, and having reviewed the materials in support thereof, and good cause appearing in the record and Plaintiffs' Final Approval Motion is **GRANTED**, and Class Counsel's Fee Application is **GRANTED**, and:

IT IS HEREBY ORDERED THAT:

1. The Court has jurisdiction over the subject matter of this action and over all claims raised therein and all Parties thereto, including the Settlement Class. The Court also has personal jurisdiction over the Parties and the Settlement Class Members.

2. The Settlement was entered into in good faith following arm's length negotiations and is non-collusive.

3. The Settlement is, in all respects, fair, reasonable, and adequate, is in the best interests of the Settlement Class, and is therefore approved. The Court finds that the Parties faced significant risks, expenses, delays and uncertainties, including as to the outcome, of continued litigation of this complex matter, which further supports the Court's finding that the Settlement is fair, reasonable, adequate and in the best interests of the Settlement Class Members. The Court finds that the uncertainties of continued litigation in both the trial and appellate courts, as well as the expense associated with it, weigh in favor of approval of the Settlement.

4. This Court grants final approval of the Settlement, including but not limited to the releases in the Settlement and the plans for distribution of the settlement relief. The Court finds that the Settlement is in all respects fair, reasonable, and in the best interest of the Settlement Class. Therefore, all Settlement Class Members who have not opted out are bound by the Settlement and this Final Approval Order and Judgment.

5. The Settlement and every term and provision thereof shall be deemed incorporated herein as if explicitly set forth herein and shall have the full force of an Order of this Court.

6. The Parties shall effectuate the Settlement in accordance with its terms.

OBJECTIONS AND OPT-OUTS

7. No objections were filed by Settlement Class Members.

8. All persons and entities who have not objected to the Settlement in the manner provided in the Settlement are deemed to have waived any objections to the Settlement, including but not limited to by appeal, collateral attack, or otherwise.

9. A list of those putative Settlement Class Members who have timely and validly elected to opt out of the Settlement and the Settlement Class in accordance with the requirements in the Settlement (the "Opt-Out Members") has been submitted to the Court in the Declaration of Christopher D. Amundson, filed in advance of the final approval hearing. That list is attached as Exhibit A to this Order. The persons and/or entities listed in Exhibit A are not bound by the Settlement, this Final Approval Order and Judgment, and are not entitled to any of the benefits under the Settlement. Opt-Out Members listed in Exhibit A shall be deemed not to be Releasing Parties.

CLASS CERTIFICATION

10. For purposes of the Settlement and this Final Approval Order and Judgment, the Court hereby finally certifies for settlement purposes only the following Settlement Class:

> All banks, credit unions, financial institutions, and other entities in the United States (including its Territories and the District of Columbia) that issued Alerted on Payment Cards. Excluded from the Settlement Class is the judge presiding over this matter and any members of her judicial staff, Wendy's, and persons who timely and validly request exclusion from the Settlement Class.

11. The Court determines that for settlement purposes the Settlement Class meets all the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3), namely that the class is so numerous that joinder of all members is impractical; that there are common issues of law and fact; that the claims of the class representatives are typical of absent class members; that the class representatives will fairly and adequately protect the interests of the class as they have no interests antagonistic to or in conflict with the class and have retained experienced and competent counsel to prosecute this matter; that common issues predominate over any individual issues; and that a class action is the superior means of adjudicating the controversy

12. The Court grants final approval to the appointment of the Financial Institution Plaintiffs as the Settlement Class Representatives. The Court concludes that the Settlement Class Representatives have fairly and adequately represented the Settlement Class and will continue to do so.

13. The Court grants final approval to the appointment, pursuant to Rule 23(g), of Erin Green Comite of Scott+Scott Attorneys at Law, LLP and Gary F. Lynch of Carson Lynch, LLP as Class Counsel. The Court concludes that Class Counsel have adequately represented the Settlement Class and will continue to do so.

NOTICE TO THE SETTLEMENT CLASS

14. The Court finds that the Notice Program, set forth in the Settlement and effectuated pursuant to the Preliminary Approval Order, satisfied Rule 23(c)(2), was the best notice practicable under the circumstances, was reasonably calculated to provide and did provide due and sufficient notice to the Settlement Class of the pendency of the Litigation, certification of the Settlement Class for settlement purposes only, the existence and terms of the Settlement, their right to exclude themselves, their right to object to the Settlement and to appear at the Final Approval Hearing, and satisfied the other requirements of the Federal Rules of Civil Procedure, the United States Constitution, and all other applicable laws.

15. The Court finds that Wendy's has fully complied with the notice requirements of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715.

AWARD OF ATTORNEYS' FEES AND SERVICE AWARDS

16. The Court has considered Class Counsel's Motion for attorneys' fees, costs, and expenses, and for Service Awards.

17. Pursuant to Rule 23(h) and relevant Third Circuit authority, the Court awards Class Counsel 30% of the gross Settlement Fund, which includes any interest earned thereon, as an award of reasonable attorneys' fees and $347,284.15 as an award of costs and expenses to be paid in accordance with the Settlement, and the Court finds this amount of fees, costs, and expenses to be fair and reasonable. This award of attorneys' fees, costs, and expenses, and any interest earned thereon, shall be paid from the Settlement Fund in accordance with the Settlement. This award of attorneys' fees, costs, and expenses is independent of the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement.

18. The Court grants Class Counsel's request for Service Awards and awards $7,500 to each Financial Institution Plaintiff that was deposed: First Choice Federal Credit Union, AOD

Federal Credit Union, Tech Credit Union, Veridian Credit Union, South Florida Educational Federal Credit Union, Preferred Credit Union, Alcoa Community Federal Credit Union, Associated Credit Union, Envista Credit Union, First NBC Bank, Navigator Credit Union, The Seymour Bank, Financial Horizons Credit Union, Nusenda Credit Union, and Members Choice Credit Union. The Court awards $2,500 to each Financial Institution Plaintiff that was not deposed: Greater Cincinnati Credit Union, Kemba Financial Credit Union, and Wright-Patt Credit Union. The Court finds that this payment is justified by their service to the Settlement Class. These Service Awards shall be paid from the Settlement Fund in accordance with the Settlement.

OTHER PROVISIONS

19. The Parties to the Settlement shall carry out their respective obligations thereunder.

20. Within the time period set forth in the Settlement, the relief provided for in the Settlement shall be made available to the Settlement Class Members submitting valid Claim Forms, pursuant to the terms and conditions of the Settlement.

21. As of the Effective Date, the Releasing Parties, each on behalf of itself and any predecessors, successors, or assigns, shall automatically be deemed to have fully, completely, finally, irrevocably, and forever released and discharged Defendants' Released Persons of and from any and all liabilities, rights, claims, actions, causes of action, demands, damages, penalties, costs, attorneys' fees, losses, and remedies, whether known or unknown (including Unknown Claims), existing or potential, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, that result from, arise out of, are based upon, or relate to the Data Breach, including, without limitation, any claims, actions, causes of action, demands, damages, penalties, losses, or remedies relating to, based upon, resulting from, or arising out of (1) Wendy's information security policies and practices; (2) the allegations, facts, and/or circumstances described in the Litigation and/or Complaint; (3) Wendy's response to and notices about the Data

Breach; (4) the fraudulent use of any Compromised Cards or Alerted on Payment Cards; (5) the cancellation and reissuance of any Compromised Cards or Alerted on Payment Cards; and (6) any expenses incurred investigating, responding to, or mitigating potential damage from the theft or illegal use of Compromised Cards or Alerted on Payment Cards or information relating to such cards (the "Released Claims").

22. For the avoidance of doubt, the Released Claims include, without limitation, any claims, causes of actions, remedies, or damages that were or could have been asserted in the Litigation, and also include, without limitation, any claims that a Releasing Party may have under the law of any jurisdiction, including, without limitation, those arising under state or federal law of the United States (including, without limitation, any causes of action under the California Business & Professions Code § 17200 *et seq*., California Civil Code § 1750 *et seq*., California Civil Code § 1798.80 *et seq*., California Civil Code § 56.10 *et seq*., and any similar statutes or data breach notification statutes in effect in the United States or in any states in the United States); causes of action under the common or civil laws of any state in the United States, including but not limited to: unjust enrichment, negligence, bailment, conversion, negligence *per se*, breach of contract, breach of implied contract, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, misrepresentation (whether fraudulent, negligent, or innocent), fraudulent concealment or nondisclosure, invasion of privacy, public disclosure of private facts, and misappropriation of likeness and identity; any causes of action based on privacy rights provided for under the constitutions of the United States or of any states in the United States; any statutory claims under state or federal law; and also including, but not limited to, any and all claims in any state or federal court of the United States, for damages, injunctive relief, restitution, disgorgement, declaratory relief, equitable relief, attorneys' fees and expenses, pre-judgment interest, credit or financial account monitoring services, identity theft insurance, the creation of a fund for future

damages, statutory penalties, restitution, the appointment of a receiver, and any other form of relief.

23. As of the Effective Date, Defendants' Released Persons will be deemed to have completely released and forever discharged the Releasing Parties and Plaintiffs' Released Persons from and for any and all liabilities, claims, cross-claims, causes of action, rights, actions, suits, debts, liens, contracts, agreements, damages, costs, attorneys' fees, losses, expenses, obligations, or demands, of any kind whatsoever, whether known or unknown, existing or potential, or suspected or unsuspected, whether raised by claim, counterclaim, setoff, or otherwise, including any known or unknown claims, which they have or may claim now or in the future to have, relating to the institution, prosecution, or settlement of the Litigation. For the avoidance of doubt, Defendants' Released Persons' release as set forth in this Paragraph 23 does not include entities that do not meet the definition of either Releasing Parties or Plaintiffs' Released Persons. For the further avoidance of doubt, Defendants' Released Persons' release as set forth in this Paragraph 23 does not include WAND Corporation, Trustwave, Trustwave Holdings, Inc., NCR, or DUMAC Business Systems, Inc.

24. The Settlement Class Representatives and Settlement Class Members are enjoined from prosecuting any Released Claims in any proceeding against any of the Defendants' Released Persons or prosecuting any claim based on any actions taken by any of the Defendants' Released Persons that are authorized or required by this Settlement or by the Final Approval Order and Judgment. It is further agreed that the Settlement and/or this Final Approval Order and Judgment may be pleaded as a complete defense to any proceeding subject to this section.

25. "Unknown Claims" means any of the Released Claims that any Settlement Class Member, including any of the Settlement Class Representatives, does not know or suspect to exist in its favor at the time of the release of the Defendants' Released Persons that, if known by it,

might have affected its settlement with, and release of, the Defendants' Released Persons, or might have affected its decision not to object to and/or to participate in this Settlement. With respect to any and all Released Claims, the Parties stipulate and agree that upon the Effective Date, the Settlement Class Representatives expressly shall have, and each of the other Settlement Class Members shall be deemed to have, and by operation of the Final Approval Order and Judgment shall have, waived the provisions, rights, and benefits conferred by California Civil Code § 1542 to the extent applicable, and also any and all provisions, rights, and benefits conferred by any law of any state, province, or territory of the United States (including, without limitation, Montana Code Ann. § 28-1-1602; North Dakota Cent. Code § 9-13-02; and South Dakota Codified Laws § 20-7-11), which is similar, comparable, or equivalent to California Civil Code §1542, which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Settlement Class Members, including the Settlement Class Representatives, and any of them, may hereafter discover facts in addition to, or different from, those that they now know or believe to be true with respect to the subject matter of the Released Claims, but the Settlement Class Representatives expressly shall have, and each other Settlement Class Member shall be deemed to have, and by operation of the Final Approval Order and Judgment shall have, upon the Effective Date, fully, finally, and forever settled and released any and all Released Claims, including Unknown Claims. The Parties acknowledge, and Settlement Class Members shall be deemed by operation of the Final Approval Order and Judgment to have acknowledged, that the foregoing waiver is a material element of the Settlement Agreement of which this release is a part.

26. This Final Approval Order and Judgment and the Settlement, and all acts, statements, documents, and proceedings relating to the Settlement are not, and shall not be

construed as, used as, or deemed to be evidence of, an admission by or against Wendy's of any claim, any fact alleged in the Litigation, any fault, any wrongdoing, any violation of law, or any liability of any kind on the part of Wendy's or of the validity or certifiability for litigation of any claims that have been, or could have been, asserted in the Litigation.

27. This Final Approval Order and Judgment, the Settlement, and all acts, statements, documents, and proceedings relating to the Settlement shall not be offered, received, or admissible in evidence in any action or proceeding, or be used in any way as an admission, concession or evidence of any liability or wrongdoing of any nature or that Plaintiffs, any Settlement Class Member, or any other person has suffered any damage; ***provided, however***, that nothing in the foregoing, the Settlement, or this Final Approval Order and Judgment shall be interpreted to prohibit the use of the Settlement or this Final Approval Order and Judgment in a proceeding to consummate or enforce the Settlement or this Final Approval Order and Judgment (including all releases in the Settlement and Final Approval Order and Judgment), or to defend against the assertion of any Released Claims in any other proceeding, or as otherwise required by law.

28. The Settlement's terms shall be forever binding on, and shall have res judicata and preclusive effect in, all pending and future lawsuits or other proceedings as to Released Claims (and other prohibitions set forth in this Final Approval Order and Judgment) that are brought, initiated, or maintained by, or on behalf of, any Settlement Class Member who is not an Opt-Out Member or any other person subject to the provisions of this Final Approval Order and Judgment.

29. The Court hereby dismisses the Litigation and Complaint and all claims therein on the merits and with prejudice, without fees or costs to any Party except as provided in this Final Approval Order and Judgment.

30. Consistent with the Settlement, if the Effective Date, as defined in the Settlement Agreement, does not occur for any reason, this Final Approval Order and Judgment and the

Preliminary Approval Order shall be deemed vacated and shall have no force and effect whatsoever; the Settlement shall be considered null and void; all of the Parties' obligations under the Settlement, the Preliminary Approval Order, and this Final Approval Order and Judgment shall cease to be of any force and effect, and the Parties shall return to the status quo ante in the Litigation as if the Parties had not entered into the Settlement. In such an event, the Parties shall be restored to their respective positions in the Litigation as if the Settlement Agreement had never been entered into (and without prejudice to any of the Parties' respective positions on the issue of class certification or any other issue).

31. Pursuant to the All Writs Act, 28 U.S.C. § 1651, this Court shall retain the authority to issue any order necessary to protect its jurisdiction from any action, whether in state or federal court.

32. Without affecting the finality of this Final Approval Order and Judgment, the Court will retain jurisdiction over the subject matter and the Parties with respect to the interpretation and implementation of the Settlement for all purposes, including enforcement of its terms at the request of any party and resolution of any disputes that may arise relating in any way to, arising from, the implementation of the Settlement or the implementation of this Final Order and Judgment.

SO ORDERED:

DATED: November 6, 2019

BY: Maureen P. Kelly
MAUREEN P. KELLY
UNITED STATES MAGISTRATE JUDGE

Exhibit A

The following class member submitted a timely request for exclusion:

Stride Bank, N.A. formerly Central National Bank & Trust Co. of Enid AKA CNB Enid

324 W Broadway Ave
Enid OK 73701

Exhibit D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JUDITH YARRINGTON, ELIZABETH CRAGAN, JULIA CRAIGHEAD and CAROLYN GREEN, individually, and on behalf of all others similarly situated, Plaintiffs, v. SOLVAY PHARMACEUTICALS, INC., Defendant.	**No. 09-CV-2261 (RHK/RLE)** **DECLARATION OF DANIEL E. GUSTAFSON IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR PAYMENT OF ATTORNEYS' FEES AND COSTS, AND PAYMENT OF SERVICE AWARDS TO THE NAMED PLAINTIFFS**

I, Daniel E. Gustafson, declare and state:

1. I am licensed to practice law in the State of Minnesota, and am a Member of Gustafson Gluek PLLC ("Gustafson Gluek").

2. Gustafson Gluek is a Minneapolis law firm with a national practice, with emphasis in antitrust, consumer protection and class action litigation. The five partners of the firm have over fifty years of experience in these areas. Gustafson Gluek was formed in May 2003. A copy of the firm's resume is attached as Exhibit A to my September 15, 2009 Declaration in Support of Motion for Preliminary Approval of Class Action Settlement.

3. By its "Order Granting Preliminary Approval of Settlement Agreement and Release, and Approval of Forms and Methods of Notice," dated September 18, 2009, this Court designated Gustafson Gluek and Lieff, Cabraser, Heimann & Bernstein LLP as

Settlement Class Counsel. By its "Order Appointing Escrow Agent and Escrow Counsel," dated September 22, 2009, I was also co-appointed Escrow Counsel.

4. I submit this Declaration in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for Payment of Attorneys' Fees and Costs, and Payment of Service Awards to the Named Plaintiffs.

5. Gustafson Gluek has spent time on this litigation ("Litigation") that could have been spent on other matters. At various times during the Litigation, the active prosecution of the claims consumed a substantial percentage of my billable time that could otherwise have been spent on other fee-generating work. In addition to my time, this case has also required work by other lawyers in Gustafson Gluek, as well as by the firm's paralegals and administrative personnel.

6. The time my firm has spent on this Litigation has been completely contingent on the outcome of the action. Gustafson Gluek has not been paid for any of the time spent on the action.

7. In connection with the Litigation, the attorney and staff timekeepers at Gustafson Gluek have billed a total of 1,691.50 hours from inception to January 29, 2010 for a total lodestar of $880,936.25.

8. Attached hereto as Exhibit A is a summary listing each lawyer, paralegal and administrative assistant for which Gustafson Gluek is seeking compensation for legal services in connection with the Litigation and Settlement, the hours each individual expended, and the hourly rate at which compensation is sought for each individual. For

individuals who have left the employ of Gustafson Gluek, the hourly rate at the time when employment concluded is used.

9. Based upon my experience with other class action matters, I believe that the time expended by Gustafson Gluek in connection with the Litigation, when compared to the result achieved for the Class, is reasonable in amount and was necessary to ensure the successful monetary relief obtained on behalf of the Class.

10. Gustafson Gluek sets its hourly rates according to prevailing market rates for complex class litigation of this type, and is routinely awarded fees according to those rates. Gustafson Gluek primarily represents clients on a contingent fee basis, both in class and individual cases.

11. As also detailed in the attached Exhibit A, Gustafson Gluek necessarily incurred a total of $17,100.05 in unreimbursed expenses in connection with the prosecution of the Litigation.

12. The foregoing expenses were incurred solely in connection with this Litigation and are reflected on Gustafson Gluek's books and records as maintained in the ordinary course of business. These books and records are prepared from invoices, receipts, expense vouchers, check records and other records, and are an accurate record of the expenses incurred in this case. The rates charged for all internal expenses incurred by my firm (*e.g.*, photocopying) are the same irrespective of whether the case is billable or contingent. As a result, the rates charged are necessarily market-sensitive and market-competitive since they are subject to and controlled by an overriding "check" imposed by the firm's cost paying clients.

13. Additional information about the history of the Litigation, the Settlement, the effort and expense of Settlement Class Counsel, and the participation of the Named Plaintiffs is set forth in the January 29, 2010 Declaration of Michael W. Sobol in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for Payment of Attorneys' Fees and Costs, and Payment of Service Awards to the Named Plaintiffs, filed herewith.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of January, 2010, Minneapolis, Minnesota.

Daniel E. Gustafson

Yarrington, et al. v. Solvay Pharmaceuticals, Inc.
Case No. 09-2261 (RHK/RLE)

DISBURSEMENT REPORT

Firm: **Gustafson Gluek PLLC**
Reporting Period: **Inception through 12/31/2009**

Disbursement	**Total Amount to Date**	
Internal Copies	$	10,044.50
Outside Copies	$	1,352.86
Long Distance	$	49.39
Fax	$	31.00
Postage	$	1.17
Federal Express	$	211.32
Courier	$	682.65
Court Cost	$	3,012.44
Westlaw	$	1,658.29
PACER	$	40.72
Mediation	$	1.71
Transportation	$	14.00
TOTAL	**$**	**17,100.05**

Yarrington, et al. v. Solvay Pharmaceuticals, Inc.
Case No. 09-2261 (RHK/RLE)

LODESTAR REPORT

Firm: **Gustafson Gluek PLLC**
Reporting Period: **Inception through 01/29/10**

Professional	Status	Hourly Rate	Total Hours to Date	Total Lodestar to Date
Daniel E. Gustafson	P	$ 750.00	186.25	$ 139,687.50
Karla M. Gluek	P	$ 600.00	100.00	$ 60,000.00
Renae D. Steiner	P	$ 500.00	50.50	$ 25,250.00
Jason S. Kilene	P	$ 525.00	285.75	$ 150,018.75
Daniel C. Hedlund	P	$ 525.00	32.75	$ 17,193.75
Brian L. Williams	P	$ 575.00	579.75	$ 333,356.25
Stacey L. Mitchell	A	$ 325.00	17.00	$ 5,525.00
Amanda M. Williams (Martin)	A	$ 405.00	292.25	$ 118,361.25
Diana Kazakeviciute	PL	$ 225.00	122.50	$ 27,562.50
Melanie L. Morgan	PL	$ 210.00	1.50	$ 315.00
Sarah A. Densmore	PL	$ 175.00	10.75	$ 1,881.25
Shawn M. Kaasa	PL	$ 160.00	3.50	$ 560.00
Tracey D. Grill	Admin.	$ 180.00	1.25	$ 225.00
Rebecca A. Houle	PL	$ 150.00	1.25	$ 187.50
Hilary G. Lamers	PL	$ 125.00	6.50	$ 812.50
TOTALS			**1,691.50**	**$ 880,936.25**

Partner (P)
Associate (A)
Paralegal (PL)
Administrative (Admin.)

Exhibit E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: CENTURYLINK SALES PRACTICES AND SECURITIES LITIGATION This Document Relates to: 17-2832, 17-4613, 17-4614, 17-4615, 17-4616, 17-4617, 17-4618, 17-4619, 17-4622, 17-4943, 17-4944, 17-4945, 17-4947, 17-5001, 17-5046, 18-1573, 18-1572, 18-1565, 18-1562	**MDL No. 17-2795 (MJD/KMM)** **DECLARATION OF BRIAN C. GUDMUNDSON IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF COSTS AND EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARDS**

1. I, Brian C. Gudmundson, am a partner at the law firm of Zimmerman Reed, LLP and am a member in good standing of the state Bar of Minnesota. I am duly licensed to practice law before this Court and am one of the attorneys of record representing Settlement Class Representatives in this matter. This Court appointed Zimmerman Reed as Co-Lead Class Counsel and Liaison Counsel to the Court.

2. I submit this Declaration in support of Settlement Class Representative's Motion for Attorneys' Fees, Reimbursement of Costs and Expenses, and Service Payments for Settlement Class Representatives. I have knowledge of the facts presented in this Declaration because I have been extensively involved in the prosecution of this litigation from inception to settlement and from preliminary approval through providing class notice, claims administration, and moving for final approval and an award of attorneys' fees and expense reimburse and service payments to Settlement Class Representatives.

3. On January 4, 2018, the Court appointed Zimmerman Reed LLP as Plaintiffs' Interim Lead Counsel and Liaison to the Court, and additionally, appointed Geragos &

Geragos, APC and O'Mara Law Group as Plaintiffs' Interim Co-Lead Counsel. The Court further appointed Gustafson Gluek PLLC, Henninger Garrison LLC, Hellmuth & Johnson, PPLC, and Roxanne Conlin & Associates, LLC, as members to the Plaintiffs' Interim Executive Committee (collectively, "Plaintiffs' Counsel") (ECF No. 25).

4. In addition to these law firms, which the Court appointed to formal leadership positions, several other law firms contributed to the prosecution of this matter. These firms include, Hodge & Langley Law Firm; Gardy & Notis, LLP; Attorney Alfred M. Sanchez; Walsh PLLC; Olsen Daines PC; and Fernald Law Group.

5. Plaintiffs' Counsel worked cooperatively and efficiently in litigating what was a complex class action case. Through the Settlement Agreement, Plaintiffs' Counsel obtained significant monetary and non-monetary relief for a nationwide Class of current and former CenturyLink customers that included approximately 17.2 million individuals and small businesses. This Declaration provides the Court with information describing our efforts to bring this matter to a successful conclusion.

Plaintiffs' Consolidated Class Action Complaint

6. On February 15, 2018, thirty-eight current or former CenturyLink customers, five of whom were later voluntarily dismissed without prejudice, filed a consolidated complaint against CenturyLink alleging systematic sales and billing practices that resulted in customers being charged amounts higher than promised during the sales process and imposing a variety of improper charges and fees. Consolidated Class Action Complaint ("CCAC"), ¶ 5 (ECF No. 38).

7. In the CCAC, Plaintiffs alleged that CenturyLink purposefully created a sales system designed to quote prices it would not honor. *Id.* at ¶¶ 71-72, 74, 77. According to the CCAC, CenturyLink relied on a labyrinth of customer databases that lacked sufficient capacity to track quoted prices, a sales methodology designed to encourage hyperaggressive sales tactics, including promising undeliverable prices to secure customers, and a myriad of exceptions, conditions, exclusions, and hidden fees undisclosed to customers. *Id.* at ¶¶ 68, 70, 81-84, 87, 92-95, 99-100, 108.

8. Those tactics led to meaningless quoted costs of services and customers being billed for services at a higher rate than what CenturyLink had quoted. *Id.* at ¶¶ 80, 83, 88, 100. As a result, Plaintiffs asserted CenturyLink increased its customer base but many were charged and paid more than the amount they were promised. *Id.* at ¶¶ 80, 83. When customers called to validly cancel their services due to their overpayments, CenturyLink often charged them early termination fees. *Id.* at ¶¶ 84, 102, 116.

9. Plaintiffs brought eight claims against CenturyLink: (1) violation of 47 U.S.C. §§ 201, et seq. and 47 C.F.R. § 64.2401, the Truth in Billing requirements, (2) Breach of Contract, (3) Breach of Duty of Good Faith and Fair Dealing, (4) Violation of State Consumer Protection Statutes in Colorado, Minnesota, Florida, Washington, Oregon, Missouri, New Mexico, Iowa, Nevada and Idaho, (5) Violations of the Louisiana Unfair Trade Practices and Consumer Protection Law, (6) Negligent Misrepresentation, (7) Fraudulent Inducement, and (8) Unjust Enrichment. *Id.* at ¶¶ 422-544.

10. All of these claims, except for the state-specific consumer protection statutes and breach of duty of good faith and fair dealing, were asserted on behalf of a proposed

nationwide Class of current and former CenturyLink customers. Id. at ¶¶ 415, 422-445, 483-544. Plaintiffs' brought a breach of duty of good faith and fair dealing claim on behalf of five subclasses made up of CenturyLink customers residing in Arizona, Minnesota, North Carolina, Oregon, and Wisconsin. Finally, Plaintiffs' brought ten consumer protection claims on behalf of their respective state subclasses.

Management of Time and Expenses

11. After the Court appointed them, Co-Lead Counsel established measures to ensure the matter was litigated efficiently and advanced the best interests of the Plaintiffs and proposed Class.

12. Co-Lead Counsel required all Plaintiffs' counsel to submit monthly time reports to Co-Lead Counsel and to provide guidelines and directives for case staffing, time keeping , cost reimbursement, and common benefit attorney time and expenses.

13. Co-Lead Counsel mandated that only reasonable time and expenses expressly authorized by Co-Lead Counsel and performed for the common benefit of the Plaintiffs and Class would be included in any application for an award of attorneys' fees and expenses. Co-Lead Counsel detailed the type of authorized and unauthorized work that would appropriately be included or excluded on the monthly time submissions, and described the types of information and level of detail required for time entries, including the firm name, attorney name, attorney's title and years of experience, a description of the task performed, the amount of time performed on the task, the authorizing attorney, the billing rate of the timekeeper, and a code describing the purpose of the task.

14. Co-Lead Counsel also established harmonized hourly rates approved in the District of Minnesota. The hourly rates were capped according to the years of experience of the timekeeper in the following manner:

Years of Practice	**Hourly Rate**
For Partners:	
1-2 years	Up to $450
3-5 years	Up to $495
6-10 years	Up to $625
11-20 years	Up to $725
21-30 years	Up to $795
30+ years	Up to $895
For Associates:	
1-6 years	Up to $495
6+ years	Up to $625
For Paralegals and Law Clerks	
Any amount	Up to $300

15. Co-Lead Counsel also provided guidelines on the types of expenses that would be appropriately included in a request for reasonable expense upon successful completion of this litigation. These included reasonable limitations on expenses expected to be incurred during the court of litigation.

16. Co-Lead Counsel closely reviewed the submitted time and expense reports.

Case Development and Litigation Strategy

17. Plaintiffs' Counsel undertook extensive research into the facts and conduct giving rise to the claims, and developed a strategy to pursue claims on a nationwide basis that would include all current and former purported Class Members who were injured because of CenturyLink's alleged misconduct. Plaintiffs' Counsel believed the broad scope of individual complaints consolidated in the MDL, actions from two Attorneys

General in Minnesota and Arizona, and a Whistleblower Complaint discussing CenturyLink's billing and sales practices suggested CenturyLink's misconduct occurred on a largescale, nationwide basis. Plaintiffs' Counsel devoted significant time and effort to analyzing the legal and factual issues of seeking and obtaining relief for a nationwide class.

18. Seeking certification of a nationwide class required significant legal and factual research. CenturyLink's alleged violation of the Truth in Billing Act was important to that strategy because it provided a federal claim that applied uniformly to all class members. Indeed, a previous class action against CenturyTel was certified for a nationwide class claiming a violation of Truth in Billing Laws. *Beattie v. CenturyTel, Inc.*, 511 F.3d 554 (2007). While that case considered just a single alleged misconduct, Class Counsel here pursued numerous types of overbilling and sales misconduct that stemmed from what Class Counsel alleged was a deliberate pattern of misconduct designed to obtain illicit financial benefits at its customers' expense.

19. Class Counsel also brought a claim under the Louisiana Unfair Trade Practices Act which could apply to a nationwide class under a choice-of-law analysis because CenturyLink was headquartered in Louisiana and its primary billing and sales decisions occurred there. Finally, Plaintiffs brought several other state law claims which, due to similar state laws, would apply on a nationwide basis because no conflict of interest. In analyzing these claims, Class Counsel performed surveys of each relevant state's laws concerning breach of contract, unjust enrichment, breach of the duty of good faith and fair dealing, negligent misrepresentation and fraudulent inducement.

20. In addition to a nationwide class, Class Counsel sought ten state subclasses pursuing claims under their respective state consumer protection statutes and, in some instances, a claim of breach of the duty of good faith and fair dealing. The states chosen – Arizona, Colorado, Florida, Idaho, Iowa, Minnesota, Missouri, Montana, Nevada, New Mexico, North Carolina, Oregon, Washington, and Wisconsin – represented a significant portion of CenturyLink's customers.

21. Plaintiffs' Counsel also committed substantial time to vetting the named Plaintiffs, their factual circumstances and potential claims, and their commitment to the litigation and representing the interests of the Class.

Litigation History

22. On April 2, 2018, soon after Plaintiffs filed the CCAC, ten entities, which CenturyLink termed the "Operating Companies," filed a Motion to Intervene for the Limited Purpose of Moving to Compel Arbitration and Enforce Class-Action Waivers and to Join in Defendant CenturyLink Inc.'s Motion for Temporary Stay of Discovery ("Motion to Intervene"). Mot. to Intervene, Apr. 2, 2018 (ECF No. 80).

23. CenturyLink, Inc. and the Operating Companies asserted CenturyLink, Inc. was not the proper defendant in this action and that the Operating Companies, who supposedly contracted with the Plaintiffs and provided their services, were the proper defendants. *See* Mem. In Supp. of Mot. to Intervene, Apr. 2, 2018 (ECF No. 82). The Operating Companies sought to intervene to enforce certain arbitration and class-action waiver provisions that CenturyLink argued governed Plaintiffs' service agreements. *Id.*

24. Also, on April 2, 2018, CenturyLink filed a Motion to Temporarily Stay Discovery Pending Resolution of Forthcoming Motion to Compel Arbitration and Enforce Class Action Waivers. CenturyLink asserted that because, in its view, it had "substantial grounds" to assert certain arbitration provisions and class action waivers applied to Plaintiffs, the Court should stay all discovery related to Plaintiffs' claims. *See* Mem. of L. In Supp. of Mot. to Temporarily Stay Discovery, Apr. 2, 2018 (ECF No. 89).

25. On April 23, 2018, Plaintiffs' submitted their Opposition to the Motion to Temporarily Stay Discovery, Apr. 23, 2018 (ECF No. 119). Plaintiffs' asserted CenturyLink's position on the arbitration provisions and class action waivers was unfounded and that the provisions at issue were invalid and unenforceable. Additionally, Plaintiffs asserted CenturyLink's delay of discovery was a tactical decision to undermine the consolidated proceedings in the MDL and that, regardless of whether CenturyLink succeeded in enforcing arbitration provisions and class action waivers, Plaintiffs would ultimately take discovery concerning its sales and billing practices.

26. On April 28, 2018, CenturyLink additionally moved to Compel Arbitration and Enforce Class Action Waivers ("Mot. to Compel Arb."). (ECF No. 122). CenturyLink asserted the named Plaintiffs agreed to arbitrate claims against CenturyLink and the Operating Companies and waived their rights to bring a class action. Mem. in Supp. of Mot. to Compel Arb. 7-8 (ECF No. 124).

27. CenturyLink claimed that 37 of the 38 Named Plaintiffs assented to the arbitration and class action waiver provisions multiple times, including by: (1) "clicking" to accept contract terms when installing internet services; (2) "clicking" to accept contract

terms in order to use online payment features; (3) receiving mail and email confirmation of the terms; (4) "clicking" to accept contract terms prior to activating television services; (5) "clicking" to accept contract terms prior to completing an online purchase; and, (6) continuing services after a 2017 contract amendment. *Id.* at 2-3, 7-8.

28. Also, on April 28, 2018, CenturyLink filed an Alternative Motion to Dismiss under Rules 12(b)(2) and 12(b)(6) ("Mot. to Dismiss"). (ECF No. 132). CenturyLink asserted because CenturyLink, Inc. was merely a holding company that had no interaction with the Plaintiffs, the Court had no personal jurisdiction over it. Mem in Supp. of Mot. to Dismiss 10-22 (ECF No. 134). CenturyLink also argued Plaintiffs' federal Truth in Billing claim should be dismissed because the harms supposedly did not fall within the proscriptions of the law. *Id.* at 23-24.

29. On May 8, 2018, the Court permitted Plaintiffs to conduct reasonable discovery related to CenturyLink's Motion to Compel Arbitration and Motion to Dismiss, but stayed all other discovery. (ECF No. 145).

30. The Parties proceeded through extensive discovery on these issues. Plaintiffs responded to 730 written discovery requests and CenturyLink deposed 25 Plaintiffs. Plaintiffs served CenturyLink with requests for production of documents and interrogatories and reviewed tens of thousands of pages of documents. Plaintiffs took seven depositions of CenturyLink, including both Rule 30(b)(1) and 30(b)(6) depositions. The Parties also briefed and argued several discovery disputes.

31. On August 23, 2018, after completing discovery related to CenturyLink's motions, Plaintiffs filed their memoranda in opposition to the Motion to Intervene (ECF

No. 216), Motion to Compel Arbitration (ECF No. 253), and Motion to Dismiss (ECF No. 229). In their oppositions to the Motion to Intervene and the Motion to Dismiss, Plaintiffs contended that CenturyLink, Inc. was the appropriate Defendant because, among other things, it controlled and centralized the billing practices, policies, and systems for all of the Operating Companies through the use of Affiliated Interests Services Agreements ("AISAs"). *See* Opp. to Mot. to Intervene 8-9 (ECF No. 216).

32. Plaintiffs asserted CenturyLink used a three-tiered system where: (1) CenturyLink, Inc.'s directors and officers oversaw the Service Companies, (2) the Service Companies fulfilled all functions related to management, sales, billing, customer service, and collections on behalf of the Operating Companies, and (3) the Operating Companies contracted with and provided customers with access to CenturyLink's networks. Opp. to Mot. to Dismiss 6-11 (ECF No. 229). CenturyLink, Inc. owned 100% of the Operating Companies and was the sole member of each of the Service Companies. *Id.* at 12. Plaintiffs asserted this system enabled CenturyLink to retain control over all aspects of the CenturyLink enterprise while attempting to insulate itself from liability. *Id.* at 6. Therefore, Plaintiffs asserted, CenturyLink, Inc. was the proper defendant.

33. Plaintiffs also opposed CenturyLink's Motion to Compel Arbitration. *See* Mem. In Opp. to Mot. to Compel Arb. (ECF No. 253). Among other things, Plaintiffs argued the discovery showed CenturyLink's asserted arbitration provisions were invalid for a number of reasons, including but not limited to: (1) they were never presented to certain Plaintiffs at all; (2) they were presented after an agreement was reached, were hidden, or otherwise inconspicuous in violation of the law; and (3) they contained

conflicting directives, including requiring disputes be brought "in court" while simultaneously requiring arbitration. *Id.* at 11-14, 20-23, 46-48, 50-62. Plaintiffs asserted these infirmities undermined fundamentally all the arbitration provisions CenturyLink asserted applied to Plaintiffs.

34. On November 21, 2018, the Operating Companies filed a Reply to Plaintiffs' Opposition to their Motion to Intervene (ECF No. 296), and CenturyLink, Inc. filed Replies to Plaintiffs' Opposition to its Motions to Dismiss (ECF No. 305) and to Compel Arbitration (ECF No. 295).

35. The Parties submitted additional briefing on the Motion to Intervene, with Plaintiffs filing a Sur-Reply on January 18, 2019 (ECF No. 360) and the Operating Companies filing a response on March 22, 2019 (ECF No. 396).

36. All three motions are still pending before this Court.

Settlement Negotiations and the Settlement Agreement

37. Following the extensive discovery and briefing on Defendant's initial motions, the Parties agreed to mediate. They met on May 20, 2019 before the Hon. Layn R. Phillips in New York City.

38. Prior to mediation, the parties drafted extensive mediation statements summarizing Plaintiffs' claims, CenturyLink's defenses, the procedural posture of the case, information about similar cases against CenturyLink, and analyses of CenturyLink's billing systems and business operations. Additionally, the Parties provided all briefing on CenturyLink's pending motions.

39. Despite extensive, arms-length negotiations, the Parties did not come to an agreement during mediation but continued to negotiate in consultation with Judge Phillips' office.

40. On May 24, 2019, the Parties agreed to the terms of a potential settlement and signed an initial term sheet.

41. Acceptance of the terms of the agreement was made contingent upon confirmatory discovery that would test CenturyLink's representations and warranties given during the mediation process and the signing of a final, master Settlement Agreement.

42. Plaintiffs pursued extensive and iterative confirmatory discovery of CenturyLink, focused largely on the scope of class damages. Plaintiffs served a total of 39 interrogatories, eight requests for admission, and took CenturyLink's Rule 30(b)(6) deposition. CenturyLink responded to all requests.

43. Additionally, on October 3, 2019, Plaintiffs' Counsel observed the deposition of CenturyLink's expert, David Hall, which was conducted by the Office of the Minnesota Attorney General. *Id*.

44. Among other things, confirmatory discovery indicated that:

(a) CenturyLink had approximately 17.2 million customers from January 1, 2014 to the present date ("Relevant Time Period");

(b) Of the 17.2 million customers, approximately 6.6 million were current customers and 10.6 million were former customers;

(c) CenturyLink had not performed any analyses or audits to determine the total number of customers overbilled or the amount overbilled on a Classwide basis;

(d) To determine the number of overbilled customers or the amount overbilled on a Classwide basis would require CenturyLink to review the individual records of each of its customers;

(e) CenturyLink has a Customer Advocacy Group ("CAG") that responds to escalated and unresolved complaints;

(f) During the Relevant Time Period, the CAG received complaints from less than 1% of CenturyLink's customers;

(g) Less than half of the complaints received by the CAG were related to overbilling or overpayment;

(h) The CAG provided less than $2.5 million in adjustments during the Relevant Time Period to resolve the complaints, including some related to overbilling;

(i) The average adjustment amount made by the CAG over the Relevant Time Period was $68;

(j) Apart from the CAG, CenturyLink's customer care agents issued tens of millions of dollars annually to resolve customer complaints; and,

(k) CenturyLink had reimbursed, or was in the process of reimbursing, all customers affected by systematic billing issues, including certain specific issues identified by the Minnesota AG and others.

45. Based on confirmatory discovery and the litigation of this case, Co-Lead Counsel believe the Settlement to be fair, adequate, and reasonable.

Terms of the Settlement Agreement

46. Under the Settlement, the Settlement Class is defined as:

> All persons or entities in the United States who are identified by CenturyLink as a residential or small business customer and who, during the Class Period, had an account for local or long distance telephone, internet, or television services with one or more of the Operating Companies.

47. The Settlement Class excludes the Court, the officers and directors of CenturyLink, Inc. or any of the Operating Companies, and persons who timely and validly request exclusion from the Settlement Class.

48. Of the approximately 17.2 million Class Members, approximately 6.6 million are current customers and 10.6 million are former customers.

49. CenturyLink agreed to pay $15.5 million to create a non-revisionary, capped Primary Fund, plus $3 million to pay for a Notice and Settlement Administration Fund; and, if those costs exceed $3 million, CenturyLink will pay half of any additional costs for the next million. Settlement Agreement and Release ("SAR") §§ 1.25, 1.30, 2.2.1., Oct. 16, 2019 (ECF No. 469-1).

50. The Net Primary Fund – the amount of the Primary Fund remaining after deducting the costs of proposed Service Payments to Settlement Class Representatives and the Fee, Cost, and Expense Award – will be distributed by the Settlement Administrator, Rust Consulting Co., to Settlement Class Members who make valid Claims pursuant to the Distribution Plan. *See id*. at § 3.

51. Pursuant to the Distribution Plan, Settlement Class Members may submit a claim to be payed from the Net Settlement Fund by submitting either: (1) a Flat Payment Claim or (2) a Supported Document Claim. *Id*. at §§ 3.2.1, 3.2.2. For both types of Claims Claimants must submit a timely Claim Form to the Settlement Administrator. *Id*. at §§ 1.6, 5.2, Ex. 7.

52. When submitting a Claim Form, Settlement Class Members must assert they paid CenturyLink for unauthorized, undisclosed, or otherwise improper charges, and were

not previously compensated for their overpayment. The types of compensable overpayments include: (1) promised one rate during the sales process but paid a higher rate; (2) paid for services or equipment not ordered; (3) paid for nonexistent or duplicate accounts; (4) paid for services ordered but never delivered or not delivered as promised; (5) paid for services that were previously and appropriately cancelled; (6) paid for equipment that was previously returned; (7) paid for an unwarranted early termination fee; (8) incurred costs resulting from an account being improperly sent to collections. *Id.* at Ex. 7 (Claim Form).

53. The Claim Form requires all Claimants to provide: (a) their name and basic contact information, including current address, email, and phone number; (b) either their Claimant Identification Number as indicated on the Claimant's notice, or their CenturyLink account number, (d) the types of services received from CenturyLink, (e) the state in which services were received, (e) the timeframe during which the Claimant received services, and (f) preferred manner of payment. *Id*. at Ex. 7.

54. For a Flat Payment Claim, a Class Member submitting a Flat Payment Claim need not provide any documentation supporting the fact or amount of the overpayment beyond the information required in the Claim Form. *Id*. The Claimant must instead indicate on the Claim Form that they were injured by selecting the type of compensable overcharge they assert. The Claimant must also confirm under penalty of perjury that the statements provided are truthful and that neither the Claimant, nor anyone on his or her behalf, previously accepted reimbursement or other compensation for the overcharges asserted. *Id.*

55. A Class Member submitting a Supported Document Claim must submit a completed Claim Form and provide a narrative of their injury and documents evidencing the amount the Claimant overpaid to CenturyLink. *Id*. Supporting documents may include chat transcripts, correspondence, or other communications with CenturyLink, contemporaneous notes, and copies of billing statements or payment receipts. *Id*. The Settlement Administrator will review all submitted Claims for completeness, validity, accuracy, and timeliness, and will implement reasonable measures designed to prevent fraudulent claims. *Id*. at §§ 5.1-5.4.

56. Any Claim determined by the Settlement Administrator to be timely and valid will receive a payment from the Net Settlement Fund. *Id*. at §§ 5.2, 3.2.1, 3.2.3.

57. A Flat Payment Claim will result in an award of $30 multiplied by the Pro Rata Multiplier, which may increase or decrease the award based upon how many valid claims are made. *Id*. at §§ 3.2.1, 3.3.2.

58. A successful Supported Document Claim will permit the Claimant to receive the amount of his or her overpayment multiplied by a Litigation Risk Factor of 40% and by the Pro Rata Multiplier. *Id*. at §§ 3.2.2, 3.3.3. If the amount of the Supported Document Claim is less than the amount of a Flat Payment Claim, the Claimant will receive the amount of the Flat Payment Claim instead. *Id*. at § 3.2.3.

59. The Settlement also provides non-monetary relief, under which CenturyLink must certify its compliance for three years with several business practices in all states where it does business. *Id*. at § 2.1. These business practice requirements are designed to

prevent instances of future systematic, intentional overbilling and misleading sales practices, and include prohibitions on false statements and omissions during sales. *Id*.

60. In consideration of the monetary and non-monetary relief, the Settlement Class includes a release of claims. *Id*. at § 2.3

61. The Settlement also sets forth a Notice Plan that contains substantial direct and indirect notice to proposed Settlement Class Members. *Id*. at § 4.

62. The Settlement Agreement provides direct notice to current CenturyLink customers through Bill Notice. *Id.* at §§ 4.3.1., 4.3.2, 4.3.3. For Settlement Class Members who receive their billing statements from CenturyLink by U.S. Mail, CenturyLink will issue the Bill Notice in billing statements mailed to Settlement Class Members. *Id*. at § 4.3.1. For those who receive their billing statements electronically, CenturyLink will include a link to the Bill Notice in the email sent to Settlement Class Members that lets them know their billing statement is ready to be viewed. *Id*. at § 4.3.2. Additionally, CenturyLink's website will include a link to the Bill Notice. *Id*. at § 4.3.3.

63. For Settlement Class Members who are former CenturyLink customers, the Settlement Agreement provides direct notice through either Email Notice or Postcard Notice. *Id*. at § 4.4. The Settlement Administrator will send an Email Notice to those for whom CenturyLink possesses an email address and to those for whom an email address was identified through the email appends process. *Id*. at §§ 4.4.1, 4.4.2. Former customers who do not receive an Email Notice or for whom the Settlement Administrator receives a notification that the Email Notice was undeliverable will receive a Postcard Notice sent to

the U.S. postal address provided by CenturyLink, subject to any corrected addresses identified through the National Change of Address Database. *Id*. at §4.4.3.

64. In addition to direct notice, the Settlement Administrator will issue indirect notice through four weeks of ads using the Google Display Network, which reaches millions of websites, news pages, blogs, and Google sites, and creating "keyword searches" that display ads when users search specific keywords in common search engines.

65. The Court-approved notices contain information about the reason for the notice, the subject matter of the litigation, the criteria to be a Settlement Class Member, the relief provided by the Settlement, rights and requirements to object or opt out of the Settlement, and deadlines for all actions. *Id.* at § 4.5.

66. The Long-Form Notice posted on the Settlement Website also provided additional information on the legal rights and options available to the Settlement Class, including how to submit a claim, how to opt out, how to object, the date, location, and time of the Fairness Hearing, how to contact Settlement Class Counsel, and attorneys' fees, costs, and expenses and Service Payments. *Id.* at § 1.24, Ex. 2.

67. The Settlement allows Settlement Class Counsel to make a reasonable request for fees up to 33 1/3 percent of the total value of the Settlement Funds plus reasonable costs and expenses to the Court. *Id*. at §§ 1.15, 2.2.4. It also allows CenturyLink to respond as it deems appropriate. *Id*.

68. Any attorneys' fees, costs and expenses awarded by the Court will be paid by the Settlement Administrator from the Primary Fund. *Id*. at § 2.2.4. The finality or

effectiveness of the Settlement will not be dependent on the Court awarding Plaintiffs' Counsel any particular amount on their petition. *Id*.

69. The Settlement also permits Settlement Class Counsel to apply to the Court for an award of Service Payments to the Settlement Class Representatives not to exceed two thousand five hundred dollars ($2,500.00) each, to reward the Settlement Class Representatives for their substantial effort to respond to discovery, provide personal documents, be deposed, and otherwise assist in the prosecution of the action.

70. The Court Preliminarily Approved the Settlement on January 24, 2020, conditionally certifying the Settlement Class and appointing Settlement Class Counsel and Settlement Class Representatives and ordering notice to be issued to the Settlement Class. (ECF No. 528).

Post Settlement Work

71. In addition to usual work to effect the approval process, this case has included substantial post-Settlement work due to efforts by the law firm Keller Lenkner, LLC ("Keller Lenkner"), to undo parts or all of the Preliminarily Approval Order.

72. Specifically, Keller Lenkner appealed the Preliminary Approval Order to the Eighth Circuit asserting that it prevented Class Members from immediately arbitrating their Claims against CenturyLink. (ECF No. 534) (notice of appeal). Keller Lenkner filed a Motion to Stay Preliminary Approval Order Pending Appeal in this Court, which Settlement Class Counsel opposed, and which the Court denied. Pls.' Opp. to Movants Mot. for Stay Pending Appeal (ECF No. 563); Mem. of L. & Ord. (ECF No. 569).

73. Subsequently, Keller Lenkner filed a Motion to Intervene and Compel Arbitration (ECF No. 598) and has sought to opt out 1,978 of its purported 22,000 clients through a letter to the Court. (ECF No. 631). The validity of that "mass" opt out is the subject of motion practice and has not been resolved. *See* CenturyLink, Inc.'s Mot. to Enforce Prelim. Approval Order (ECF No. 655); Arbitration Claimants' Opp. to Mot. to Enforce Prelim. Approval Order (ECF No. 690); MDL Consumer Pls.' Resp. to Mot. to Enforce Prelim. Approval Order (ECF No. 675).

74. CenturyLink, Inc. and the Operating Companies have also filed a Mot. to Disqualify Counsel and Require Corrective Notice related to Keller Lenkner's conduct. (ECF No. 634). Both Keller Lenkner (ECF No. 714) and Plaintiffs (ECF No. 726) have responded to this motion. Keller Lenkner's Motion to Intervene and Compel Arbitration and CenturyLink's Motion to Disqualify Counsel and Require Corrective Notice are ongoing.

Settlement Administration

75. Following preliminary approval, CenturyLink and the Settlement Administrator, Rust, endeavored to provide notice to the Settlement Class as set forth in the Notice Plan.

76. On May 27, 2020, CenturyLink informed Settlement Class Counsel that a query CenturyLink ran to identify all customers in the Class did not execute properly. Due to this error, information for approximately 6% of Settlement Class Members was inadvertently not provided to the Settlement Administrator, and therefore, those former customers have not yet received notice of the Settlement. CenturyLink is currently

undertaking research to confirm the exact scope of the issue, and the Administrator will promptly issue Notice to these Settlement Class Members, who will be provided 60 days to submit a claim, object, or opt out.

77. As of the date of this Declaration, the Settlement Administrator has received four objections and 206 requests for exclusion.

78. Based on current claim rates, the Parties expect the Pro Rata Multiplier to increase the value of the Flat Payment Claims and Supported Document Claims.

Services of Settlement Class Representatives Benefiting the Class

79. The Settlement allows Settlement Class counsel to seek up to $2,500 for Class Representative service awards to Settlement Class Representatives for work performed in advancing the litigation. The Primary Fund will fund any service awards the Court orders.

80. Settlement Class Counsel seek awards for thirty-four individuals, comprised of the thirty-three Settlement Class Representatives, and plaintiff Frank Carrillo, who served as a class representative in the underlying Florida action, *Carrillo, et al. v. CenturyLink, Inc., et al.*, 17-cv-1309 (M.D. Fla.). While Mr. Carrillo was not named as a Plaintiff in the CCAC, he participated in providing information and assisting in the investigation of this matter, which provided significant assistance to Plaintiffs' Counsel and their assessment of the case. His effort, like the Settlement Class Representatives, merits inclusion in Settlement Class Counsel's request for service awards.

81. The Settlement Class Representatives spent considerable time and effort assisting Plaintiffs' Counsel by: (1) signing their names to publicly filed lawsuits and

documents; (2) searching their records and providing relevant documents and information responsive to CenturyLink's 730 written discovery requests to the CCAC's named Plaintiffs; (3) consulting with and advising Plaintiffs' Counsel throughout the litigation; (4) preparing for and sitting for depositions (in the case of 25 Plaintiffs); (5) advocating on behalf of the class members; and/or (6) assisting Plaintiffs' Counsel with securing a favorable settlement by providing factual information and reviewing and approving the Settlement's terms.

The Request for Attorneys' Fees and Expenses is Reasonable

82. Plaintiffs' Counsel invested significant time and effort advancing this heavily litigated and complex case. From its inception to present, Plaintiffs' Counsel incurred $9,239,660.75 in lodestar after harmonizing the timekeeper rates of Plaintiffs' counsel's attorneys and staff. In all, Plaintiffs' Counsel expended 17,877.58 hours on behalf of the Plaintiffs and Class.

83. Although the total lodestar exceeds $9 million, which continues to rise through post-Settlement efforts, including to address motions involving Keller Lenkner, Settlement Class Counsel seek only $6,166,667 in attorneys' fees. If awarded in full, the requested attorneys' fees will represent a substantial negative multiplier.

84. Total expenses incurred by Plaintiffs' Counsel to date in this matter are $325,608.54.

85. Co-Lead Counsel mandated and collected monthly time submissions from Plaintiffs' Counsel, conducted a multi-layered review of those time submissions, and excluded time and expenses deemed non-compensable. Should the Court desire to review

any of time or expense records, Settlement Class Counsel will provide them in any form the Court deems appropriate.

86. Should the Court award attorneys' fees and expense reimbursement, Co-Lead Counsel will distribute any such award on a fair and reasonable basis applying factors courts typically consider in awarding fees in class action litigation. These factors include 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 the work performed, contributions made, the magnitude and complexity of the assignments executed, and the time and effort expended by counsel.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: June 2, 2020

/s/ Brian C. Gudmundson
Brian C. Gudmundson

Exhibit F

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Page

Page

Statutes and Rules:

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.

Dated: October 1, 2020

CHESTNUT CAMBRONNE PA

By */s/ Bryan L. Bleichner*

Karl L. Cambronne (#14321)
Bryan L. Bleichner (#0326689)
Jeffrey D. Bores (#227699)
100 Washington Avenue South, Suite 1700
Minneapolis, MN 55401
Telephone: (612) 339-7300
kcambronne@chestnutcambronne.com
bbleichner@chestnutcambronne.com
jbores@chestnutcambronne.com

Karen Hanson Riebel
Kate M. Baxter-Kauf
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Ave. S., Suite 2200
Minneapolis, MN 55401
Telephone: (612) 339-6900
khriebel@locklaw.com
kmbaxter-kauf@locklaw.com

Brian C. Gudmundson, (#336695)
Michael J. Laird (#0398436)
ZIMMERMAN REED LLP
1100 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 341-0400
brian.gudmundson@zimmreed.com
michael.laird@zimmreed.com

Gary F. Lynch
CARLSON LYNCH LLP
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
Direct: 412.253.6307
Office: 412.322.9243
glynch@carlsonlynch.com

Arthur M. Murray
Caroline T. White
MURRAY LAW FIRM
650 Poydras Street, Suite 2150
New Orleans, Louisiana 70130
Telephone: (504) 593-6473
amurray@murray-lawfirm.com
cthomas@murray-lawfirm.com

Joseph P. Guglielmo
Erin G. Comite
SCOTT+SCOTT ATTORNEYS AT LAW LLP
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
jguglielmo@scott-scott.com
ecomite@scott-scott.com

ATTORNEYS FOR PLAINTIFF

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 **LR 7.1(c) WORD COUNT COMPLIANCE CERTIFICATE**

I, Bryan L. Bleichner, certify that Plaintiff's Motion for Attorneys' Fees, Reimbursement of Expenses, and Service Award complies with Local Rule 7.1(c).

I further certify that, in preparation of this memorandum, I used Microsoft Office Professional Plus 2010, Word version 14.0.7106.5003, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 8,076 words.

Dated: October 1, 2020

CHESTNUT CAMBRONNE PA

By */s/ Bryan L. Bleichner*_____
Bryan L. Bleichner (#0326689)
Karl L. Cambronne (#14321)
Jeffrey D. Bores (#227699)
100 Washington Avenue South
Suite 1700
Minneapolis, MN 55401
Phone: 612-339-7300
bbleichner@chestnutcambronne.com
kcambronne@chestnutcambronne.com
jbores@chestnutcambronne.com

ATTORNEYS FOR PLAINTIFF