

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

DEMI KOSTKA, et al., individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

DICKEY'S BARBECUE
RESTAURANTS, INC., et al.,

Defendants.

No. 3:20-cv-3424-K

Hon. Ed Kinkeade

Consolidated with:

Civil Action No. 3:20-cv-3603-K

Civil Action No. 3:21-cv-0137-K

Civil Action No. 3:21-cv-0769-K

**PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF COSTS AND EXPENSES, AND SERVICE AWARDS**

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23 and the Court's December 8, 2022 Order Granting Preliminary Approval of Class Action Settlement Agreement and Conditionally Certifying Settlement Class for Settlement Purposes Only (the "Preliminary Approval Order") (ECF No. 95) in the above-captioned class action, Plaintiffs Demi Kostka and Vincent Jear (collectively, "Representative Plaintiffs" or "Plaintiffs"), by and through their counsel, Ben Barnow, of Barnow and Associates, P.C.; Benjamin F. Johns, of Shub Law Firm LLC; and John A. Yanchunis, of Morgan & Morgan Complex Litigation Group (together, "Class Counsel"), respectfully submit this Motion for an Award of Attorneys' Fees, Reimbursement of Costs and Expenses, and Service Awards ("Fee Motion"). Specifically, Plaintiffs move this Court to approve (1) an award of attorneys' fees in the amount of \$783,333.33, which is one third of the Settlement Fund; (2) reimbursement of reasonable costs and expenses not to exceed \$27,508.60; and (3) a service award of \$1,500 to each of the six Representative Plaintiffs, for a total of \$9,000.

In common fund cases such as this one, precedent in this Circuit establishes that this Court has discretion to use either the percentage or lodestar method to determine whether the requested fee award is appropriate. As demonstrated below, under either method, the requested fee award is reasonable and well within the range of fees awarded in this Circuit. The requested costs and expenses of \$27,508.60 are also reasonable. Finally, the requested service awards constitute modest compensation to acknowledge the Representative Plaintiffs' time, commitment, and zealous prosecution of this action alongside Class Counsel. These sums were reached in an arms' length negotiations with the assistance of a respected mediator, and are justified in light of the significant benefits created in the non-reversionary settlement.

Respectfully, this Court should grant Class Counsel's Fee Motion.

II. INCORPORATION BY REFERENCE

In the interest of judicial efficiency, for factual and procedural background on this case, Plaintiffs refer this Court to and hereby incorporate Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Plaintiffs' Brief in Support (ECF No. 62) filed on August 14, 2021 and the accompanying Exhibits, including the proposed Settlement Agreement, filed in conjunction therewith (ECF Nos. 62-1).¹

III. LEGAL STANDARD

Under the well-settled "common fund" doctrine, attorneys who achieve a recovery for the benefit of a class in the form of a common fund are entitled to an award of fees and expenses from that fund as compensation for their work. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970). District courts may "award reasonable

¹ This Court granted the Motion for Preliminary Approval of Class Action Settlement on December 8, 2022 (ECF No. 95).

attorney's fees that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). In class action settlements, district courts retain an "independent duty" to "ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel." *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008); *see also* Fed. R. Civ. P. 23, advisory committee's notes to the 2003 Amendments, subdivision (h) ("The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee."); *see also* Manual for Complex Litigation § 14.231 (4th ed. 2004).

IV. ARGUMENT

A. The Award Sought for Attorneys' Fees Is Reasonable and Appropriate

As noted above, to calculate attorneys' fees in common fund cases, courts in the Fifth Circuit will typically use: (1) the percentage of the fund method in which the court awards fees as a reasonable percentage of the common fund; cross-checked with (2) the lodestar method, in which the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or downward multiplier. *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012) (endorsing "the district courts' continued use of the percentage method cross-checked with the *Johnson* factors"). *See also Matthews v. Priority Energy Servs.*, 2018 U.S. Dist. LEXIS 82716, at *3 (E.D. Tex. Apr. 20, 2018) (awarding "40% of the gross total award"). In cross-checking the percentage fee, "courts set the lodestar multiplier by applying the *Johnson*² factors." *Union Asset Mgmt. Holding A.G.*, 669 F.3d at 643 n.26. Here, the reasonableness of the fee request is

² *Johnson v. Ga. Highway Exp., Inc.*, 488 F.2d 714, 718 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989).

demonstrated under the percentage of the fund method and is further confirmed by a lodestar cross-check.

1. Plaintiffs' Fee Request Is Reasonable and Appropriate Under the Percentage of the Fund Method

The Fifth Circuit has employed, and even favors, the percentage of the fund method when assessing whether the awards sought for attorneys' fees are reasonable and appropriate. *See Longden v. Sunderman*, 979 F.2d 1095, 1100 n.11 (5th Cir. 1992) (affirming district court's percentage fee award in securities class action, noting that the district court stated its preference for the percentage of recovery approach "as a matter of policy"); *Ramirez v. J.C. Penney Corp., Inc.*, No. 6:14-CV-601, 2017 WL 6462355, at *5 (E.D. Tex. Nov. 30, 2017), report and recommendation adopted, No. 6:14CV601, 2017 WL 6453012 (E.D. Tex. Dec. 18, 2017); *Cunningham v. Kitchen Collection, LLC*, No. 4:17-CV-770, 2019 WL 2865080, at *3 (E.D. Tex. July 3, 2019); *Batchelder v. Kerr-McGee Corp.*, 246 F. Supp. 2d 525, 531 (N.D. Miss. 2003) ("A percentage fee approach, as opposed to a lodestar computation, is the preferred method for determining awards of attorneys' fees in common fund, or class action, cases."). In this action, Dickey's Barbecue Restaurants, Inc. has agreed to pay \$2,350,000 into a Settlement Fund, which will be used to fund, in addition to the claims of class members, the service awards, attorneys' fees, and costs and expenses. *See* ECF No. 35-2, Settlement Agreement, § 10.2. Class Counsel request an award of one-third (33.3 percent) of the Settlement Fund, or \$783,333.33. *Id.* This amount was contained in the settlement agreement and notification provided to class members. No objections have been filed to these amounts to date.³

³ This motion is being filed in advance of the objection deadline, and will be put onto the settlement website. Plaintiffs' counsel reserve the right to respond to any objection that may be filed.

This fee is reasonable and appropriate. Courts in the Fifth Circuit as a rule award fees in the 30 percent to 36 percent range. *See, e.g., Welsh v. Navy Fed. Credit Union*, 2018 U.S. Dist. LEXIS 227456, at *49 (W.D. Tex. Aug. 20, 2018) (“When the percentage method is used, fee awards commonly fall between 20% at the low end and 50% at the upper end[.]”) (citing *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 503 (N.D. Miss. 1996) (“The petitioners present to the court citations of numerous cases wherein the presiding judge awarded fees within a range of fifteen (15) to fifty (50) percent.”); *Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 U.S. Dist. LEXIS 69143, at *34 (N.D. Tex. Apr. 25, 2018) (awarding one-third of the Settlement Fund); *Schwartz v. TXU Corp.*, 2005 U.S. Dist. LEXIS 27077, at *87 (N.D. Tex. Nov. 8, 2005) (“Indeed, courts throughout this Circuit regularly award fees of 25% and more often 30% or more of the total recovery under the percentage-of-the-recovery method.”). Therefore, the requested attorneys’ fees of one-third of the Settlement Fund is reasonable.

2. Plaintiffs’ Fee Request Is Reasonable and Appropriate Under the Lodestar Method

Under the lodestar approach, courts first multiply the number of hours reasonably spent on the case by each attorney’s reasonable hourly rate to compute the lodestar, and then adjust that figure (by applying a multiplier) depending on the respective weights of the twelve factors set forth in *Johnson. Forbush v. J.C. Penney Co.*, 98 F.3d 817, 821 (5th Cir. 1996) (citing *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir.), cert. denied, 133 L. Ed. 2d 113, 116 S. Ct. 173 (1995); *Johnson*, 488 F.2d at 717-19). To compensate Plaintiffs’ counsel for their work in prosecuting this case, it is appropriate to use current billing rates in calculating the lodestar. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (current rates, rather than historical rates, should be applied to compensate for delay in payment). Courts also determine whether the hourly rates are reasonable by comparing them to prevailing hourly rates in the community for similar services

by lawyers of comparable caliber in their skills, legal reputation, experience, and status (e.g., partner, counsel, associate). *See, e.g., City of San Antonio v. Hotels.com, L.P.*, 2017 U.S. Dist. LEXIS 58384, at *30 (W.D. Tex. Apr. 17, 2017); *McClain v. Lufkin Indus.*, 649 F.3d 374, 381 (5th Cir. 2011). “The reasonable hourly rate is the rate ‘prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.’ The relevant legal community is the community where the district court sits.” *Fessler v. Porcelana Corona de Mex., S.A. de C.V.*, No. 4:17-CV-00001, 2020 WL 1974246, at *5 (E.D. Tex. Apr. 24, 2020).

Here, as reflected in the Declarations of Plaintiffs’ Counsel in Support of Plaintiffs’ Motion for Attorneys’ Fees, Reimbursement of Costs and Expenses, and Service Awards, Plaintiffs’ counsel collectively spent 1,682.9 hours litigating this action, for a total lodestar of \$1,264,174.50. *See* Declarations of John Yanchunis ¶ 4, Bruce Steckler ¶ 4, Ben Barnow ¶ 4, Ben Johns ¶ 4, Cory Fein ¶ 4, and Brian Murray ¶ 3.

Steckler Wayne & Love, PLLC				
Billor	Title	Hourly Rate	Time Spent	Lodestar
Bruce W. Steckler	Partner	\$950	41.7	\$39,615.00
Paul D. Stickney	Of Counsel	\$1,000	20.9	\$20,900.00
Austin P. Smith	Associate	\$715	12.1	\$8,651.50
Jamie M. Baciak	Paralegal	\$175	15.4	\$2,695.00
Subtotal			90.1	\$71,861.50
Cory Fein Law Firm				
Cory Fein	Partner	\$750	8.7	\$6,525.00
Subtotal			8.7	\$6,525.00
Glancy Prongay & Murray LLP				
Brian P. Murray	Partner	\$975	12.3	\$11,992.50
Gregory B. Linkh	Partner	\$900	3.8	\$3,420.00
Thomas Kennedy	Associate	\$650	16.6	\$10,790.00
Subtotal			32.7	\$26,202.50
Morgan and Morgan Complex Litigation Group				
John A. Yanchunis	Partner	\$1,300	79.8	\$103,740.00
Jean Sutton Martin	Partner	\$1,150	0.4	\$460.00
Francesca Kester	Associate	\$650	9.0	\$5,850.00

Patrick A. Barthle	Associate	\$800	0.2	\$160.00
Ryan D. Maxey	Associate	\$800	0.8	\$640.00
Ryan J. McGee	Associate	\$800	3.7	\$2,960.00
Jennifer Cabezas	Paralegal	\$225	4.0	\$900.00
Subtotal			97.9	\$114,710.00
Shub Law Firm / Chimicles Schwartz Kriner & Donaldson-Smith LLP				
Benjamin F. Johns	Former Partner	\$800.00	329.50	\$263,600.00
Beena M. McDonald	Partner	\$750.00	1.80	\$1,350.00
Samantha E. Holbrook	Former Associate	\$715.00	273.90	\$195,838.50
Alex M. Kashurba	Associate	\$550.00	203.50	\$111,925.00
Andrew W. Ferich	Former Associate	\$525.00	49.20	\$25,830.00
David W. Birch	Former Info. Tech.	\$400.00	3.80	\$1,520.00
Justin P. Boyer	Paralegal	\$325.00	41.50	\$13,487.50
Sydney B. Spott	Paralegal	\$325.00	16.50	\$5,362.50
Kiera A. Wadsworth	Paralegal	\$300.00	23.60	\$7,080.00
Carlynn A. Wagner	Former Associate	\$260.00	9.70	\$2,522.00
Corneliu P. Mastraghin	Former Paralegal	\$250.00	0.40	\$100.00
Subtotal			953.40	\$628,615.50
Barnow and Associates, P.C.				
Ben Barnow	Partner	\$1,050	194.9	\$204,645.00
Anthony L. Parkhill	Associate	\$725	229.4	\$166,315.00
Riley W. Prince	Associate	\$475	38.5	\$18,287.50
Nicholas W. Blue	Associate	\$425	0.1	\$42.50
Erich P. Schork	Former Associate	\$725	37.2	\$26,970.00
Subtotal			500.1	\$416,260.00

The time reflected in Plaintiffs' counsel's lodestar calculations are reasonable and were necessary for the effective and efficient prosecution and resolution of this litigation. *See* Yanchunis Decl., ¶ 7. In addition, the fees and expenses incurred in this litigation are all of a type that would normally be charged to a fee-paying client in the private legal marketplace. *See* Yanchunis Decl., ¶ 7. Plaintiffs' counsel's current rates are also appropriate in light of prevailing rates for similar legal services provided by lawyers of reasonably comparable skill, experience, and reputation. *See* Yanchunis Decl., ¶ 8. Other courts have found Plaintiffs' counsel's rates to be reasonable and have approved them. *Id.*; *see also, e.g., Legere-Gordon v. Firstcredit Inc.*, 2021 U.S. Dist. LEXIS

104612, at *13 (D. Idaho June 2, 2021). Further, Plaintiffs’ requested fee award represents a negative multiplier of Plaintiffs’ counsel’s collective lodestar . In other words , the fees sought are substantially less than counsel’s lodestar. See declarations of John Yanchunis Bruce Steckler, Ben Barnow ,Ben Johns , Cory Fein, and Brian Murray . Numerous courts have recognized that such a “negative” lodestar multiplier indicates that the requested attorneys’ fee is reasonable. *See, e.g., In re Valeant Pharm. Int’l Third-Party Payor Litig.*, No. 16-3087 (MAS) (LHG), 2022 U.S. Dist. LEXIS 31090, at *23 (D.N.J. Feb. 22, 2022) (“Lead Counsel’s lodestar results in a *negative* multiplier, thereby furnishing strong evidence that the requested fees are reasonable.”) (collecting cases); *Taha v. Bucks Cnty. Pa.*, No. 12-6867, 2020 U.S. Dist. LEXIS 222655, at *24 (E.D. Pa. Nov. 30, 2020) (same); *McDonough*, 80 F. Supp. 3d at 657 (negative lodestar multiplier “provides strong support for approving the fee request”). And because there is still additional work required to obtain final approval, monitor the settlement, and assist Class Members, this multiplier will ultimately decrease. *Id.* Therefore, the one-third (33.3 percent) fee request under the lodestar/multiplier method here verifies its reasonableness.

1) The *Johnson* Factors Support that the Requested Fee Is Fair and Reasonable under the Lodestar Method

Application of the *Johnson* factors confirms that the requested fee is fair and reasonable under the lodestar method. The twelve *Johnson* factors are:

- (1) The time and labor required. . . .
- (2) The novelty and difficulty of the questions. . . .
- (3) The skill requisite to perform the legal service properly. . . .
- (4) The preclusion of other employment by the attorney due to acceptance of the case. . . .
- (5) The customary fee [for similar work in the community]. . . .
- (6) Whether the fee is fixed or contingent. . . .
- (7) Time limitations imposed by the client or the circumstances. . . .
- (8) The amount involved and the results obtained. . . .
- (9) The experience, reputation, and ability of the attorneys. . . .
- (10) The “undesirability” of the case. . . .
- (11) The nature and length of the professional relationship with the client. . . .
- [and] (12) Awards in similar cases.

Johnson, 488 F.2d at 717-19. Each of the *Johnson* factors will vary, depending on the case, and, rather than imposing a rigid application of each factor, the Fifth Circuit has entrusted the lower courts to apply those factors in view of the circumstances of a particular case. *See Brantley v. Surles*, 804 F.2d 321, 325-26 (5th Cir. 1986). Courts should pay special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience, reputation, and ability of counsel. *See Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir. 1990). Here, however, all of the *Johnson* factors support the requested fees award.

(a) The time and labor required for the litigation

The first *Johnson* factor (the time and labor required) supports a finding that the requested award of fees is appropriate because this case consumed the attention of many reputable law firms and partners, associates, and paralegals, who devoted a substantial amount of hours focused on the issues, and flexibility and cooperation to meet the deadlines required. In particular, pursuant to the declarations of Class Counsel submitted herewith, Plaintiffs' counsel dedicated a total of 1,682.9 hours on this matter for a total collective lodestar of \$1,264,174.50 . See declarations oof John Yanchunis Bruce Steckler , Ben Barnow , Ben Johns , Cory Fein , and Brian Murray . Class Counsel, among other things, have:

- a. before filing the complaint, investigated the potential claims against Defendants, interviewed potential plaintiffs, and gathered information about the Data Incident and its potential impact on consumers;
- b. conducted a pre-suit factual investigation including interviewing the Plaintiffs and reviewing their documents, background and damages, and continued the investigation during the pendency of this case, by attempting to locate and interview potential witnesses and reviewing hundreds of pages of public documents,

including Defendants' public statements, letters to consumers, and websites, developing information from third-parties, and scouring internet websites for information about the Data Incident and Defendants' business operations in general and specifically pertinent to the Data Incident;

- c. Assisted in drafting and filing Plaintiffs' complaint, amended complaint and other filings;
- d. Successfully opposed the creation of an MDL before the Judicial Panel on Multidistrict Litigation;
- e. Discussed with Defendants the potential for early resolution, and exchanged confidential information in advance of the mediation, which information provided by Defendants aided Plaintiffs' counsel in developing an understanding of the Data Incident, the breadth of the Data Incident, the size and composition of the Class and the potential damages to Class Members;
- f. reviewed and analyzed documents produced by Defendants and solicited bids from claims administrators and Identity-Theft Protection services providers;
- g. conducted direct negotiations with Defendants through their counsel, then drafted a lengthy mediation brief and prepared for and participated in a global mediation session with Defendants and mediator the Honorable United States District Judge Wayne Andersen (Ret.) on June 30, 2021, as well as engaged in follow-up communications after the mediation to resolve this matter, which proved successful in resolving the claims and resulted in the terms that would become the present Settlement;

- h. prepared the Settlement Agreement and supporting documents, including the Notice, Summary Notice, claim form, proposed preliminary and proposed final approval orders;
- i. prepared and submitted Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Plaintiffs' Brief in Support (ECF No. 62) which was ultimately granted when the Court preliminarily approved the Settlement (ECF No. 95);
- j. filed a written response to the Court's order raising standing issues, and argued those issues before Magistrate Judge Rutherford on August 5, 2022; and
- k. when necessary, conferred with one another about the status, strategy, and direction of the case and settlement negotiations. See declaration of John Yanchunis, Bruce Steckler , Ben Barnow, Ben Johns, Corey Fein , and Brian Murray

Therefore, the time and labor required supports the requested fee.

(b) The novelty and difficulty of the questions

The second *Johnson* factor also weighs in favor of awarding the fee requested because data breach class actions are still new and can present novel and complex issues, making a successful outcome difficult to predict. *Id.*, ¶ 8. Also, a successful outcome would ensue, if at all, only after prolonged and arduous litigation with an attendant risk of drawn-out appeals. *Id.* At present, courts have certified only a handful of classes in this area. Moreover, the theories of damages remains untested at trial and appeal. As one federal district court recently observed:

Data breach litigation is evolving; there is no guarantee of the ultimate result. *See Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) (“Data breach cases ... are particularly risky, expensive, and complex.”).

Fox v. Iowa Health Sys., No. 3:18-CV-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021). These cases are particularly risky for plaintiffs' attorneys. *Id.* Consequently, the requested fee award appropriately compensates for the risk undertaken by Plaintiffs' counsel here.

(c) The skill requisite to perform the legal service properly

The next *Johnson* factor is the skill requisite to perform the legal service properly. Counsel exemplifies this factor where they “performed diligently and skillfully, achieving a speedy and fair settlement, distinguished by the use of informal discovery and cooperative investigation to provide the information necessary to analyze the case and reach a resolution.” *King v. United SA Fed. Credit Union*, 744 F. Supp. 2d 607, 614 (W.D. Tex. 2010) (citing *Di Giacomo v. Plains All Am. Pipeline*, 2001 U.S. Dist. LEXIS 25532, at *36 (S.D. Tex. Dec. 18, 2001)). Here, the lawyers representing Plaintiffs are some of the most experienced in this area of the practice and have successfully litigated the largest data breaches in this country to date. In addition, one of the members of Plaintiffs' team is a frequent speaker nationally and internationally in the area of privacy and data misuse and data breach litigation. Yanchunis Decl., ¶ 1. Finally, the result achieved in this Settlement is notable because the parties were able, through capable and experienced counsel, to reach a negotiated Settlement without involvement of the Court in discovery disputes. Yanchunis Decl., ¶ 14. Class Counsel worked on behalf of the Settlement Class to obtain information from Defendant regarding the Data Incident and used that information (along with their experience and the knowledge gained from other data breach class actions) to negotiate the Settlement. *Id.* The Settlement reached here is notable for the simplicity of the claims process; the relief which addresses the type of injury and repercussions sustained by consumers in the wake of a Data Incident of the type here; the speed with which counsel was able to secure a favorable settlement; and the cooperation of Plaintiffs' counsel which aided in the ability to resolve this

matter efficiently. *Id.*, ¶ 15. Therefore, this factor also weighs in favor of approval of the requested fee.

(d) Preclusion of other employment by the attorney due to acceptance of the case

Furthermore, the application of the fourth *Johnson* factor (preclusion of other employment by the attorney due to acceptance of the case) provides some level of support for the requested fees because the pursuit of this litigation required a certain concentration of effort which prohibited counsel from engaging in other litigation. Yanchunis Decl., ¶ 18. Plaintiffs' counsel invested substantial time, effort, and resources into the litigation of this risky and uncertain case with no guarantee or promise of return on their investment. *Id.* Plaintiffs' counsel seek reimbursement of their lodestar already incurred and for time to be spent wrapping up the litigation. *Id.*, ¶¶ 29-30.

(e) Customary fee for similar work in the community

As discussed previously, the requested customary billing rates reflect the particular legal expertise of Plaintiffs' counsel and are also based on established competitive market rates for national cases involving complex and class action litigation. Reasonable hourly rates are determined by "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Class Counsel are entitled to the hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Id.*, at 895 n.11. Here, the relevant community is that of attorneys practicing multi-state class action litigation.

Class Counsel's lodestar is calculated using rates that have been accepted in numerous other data breach and consumer class action cases. Class Counsel's rates also compare very favorably with rates approved by other trial courts in data breach and other class action litigation, by what attorneys of comparable skill and experience charge in similar areas of specialization. Yanchunis Decl., ¶ 26; *see Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123,

at *3 (S.D. Ill. Mar. 31, 2016) (approving these hourly rates: attorneys with at least 25 years of experience, \$998 per hour; for attorneys with 15–24 years of experience, \$850 per hour; for attorneys with 5–14 years of experience, \$612 per hour; for attorneys with 2–4 years of experience, \$460 per hour; for paralegals and law clerks, \$309 per hour; for legal assistants, \$190 per hour).

The hourly rates charged by Class Counsel are commensurate with hourly rates charged by their contemporaries around the country, including those rates charged by lawyers with similar experience who practice in the area of data breach class litigation. Yanchunis Decl., ¶ 26; *see, e.g., Fox*, 2021 WL 826741, at *6 (awarding \$1,575,000 in attorneys’ fees and costs, at hourly rates from \$815-\$865 per hour for partners, \$550-\$625 for senior associates, \$415-\$500 for associates, and \$215-\$350 for paralegals).

Class Counsel’s hourly rates are also on par with market rates usually charged by other plaintiffs’ firms handling multistate data-breach class actions. *See Perdue v. Hy-Vee, Inc.*, No. 19-1330, 2021 WL 3081051, at *5 (C.D. Ill. July 21, 2021) (approving reasonable hourly rates requested by Class Counsel of \$700-\$815 for partners, \$325-\$700 for associates, \$200-\$275 for paralegals, and \$150-\$225 for law clerks); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *39 (N.D. Ga. Mar. 17, 2020) (finding reasonable hourly rates charged by partners who billed \$1050, \$1000, \$750, and \$935 per hour); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at *26 (N.D. Cal. July 22, 2020) (finding reasonable rates from \$450 to \$900 for partners, \$160 to \$850 for non-partner attorneys, and \$50 to \$380 for paralegals); *Fulton-Green v. Accolade, Inc.*, No. CV 18-274, 2019 WL 4677954, at *12 (E.D. Pa. Sept. 24, 2019) (finding reasonable hourly rates ranging from \$202 to \$975 per hour); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *16 (N.D. Cal. Aug. 17, 2018) (finding reasonable hourly rates of partners

from \$400 to \$970, non-partner attorneys from \$185 to \$850, and non-attorneys from \$95 to \$440). *See* Yanchunis Decl. ¶ 12. These rates are reasonable in light of Class Counsel’s significant experience and the relatively specialized nature of this data breach class actions. These rates have been approved by other courts. As such, the application of the *Johnson* factor 5 supports the requested attorneys’ fees.

(f) Whether the fee is fixed or contingent

Plaintiffs’ counsel undertook this litigation on a purely contingent basis, with no assurance of recovery of expenses or compensation for their time. Yanchunis Decl., ¶ 8. The nature of contingency fees is that they are inherently uncertain and require counsel to assume more risk than in cases where compensation is based on billable hours. *Id.* Accordingly, the sixth *Johnson* factor tips the scales in favor of the requested award because the percentage of fee applied to the total recovery obtained for the client reflects the uncertain nature of contingency fee agreements, and the fee percentage is generally one third of the total recovery and can be higher where risk and likely case expenses are expected to be relatively high. *Id.*

(g) Time limitations imposed by the client or the circumstances

The time constraints here were typical of like-litigation; this factor is therefore neutral.

(h) The amount involved and the results obtained

The most critical factor in determining the reasonableness of a fee award is the “degree of the success obtained.” *Fessler v. Porcelana Corona De Mex., S.A.*, 2022 U.S. App. LEXIS 804, at *15 (5th Cir. Jan. 10, 2022) (citing *Farrar v. Hobby*, 506 U.S. 103 (1992)). The result achieved in this Settlement weighs in favor of the requested attorneys’ fees. This most critical factor supports the requested fee because the Settlement Agreement provides significant monetary and mitigative relief. Yanchunis Decl., ¶ 16. Specifically, Defendant will establish a Settlement Fund of

\$2,350,000, which will be the source of all settlement costs and awards payments to Settlement Class Members, administrative costs, service awards, and attorneys' fees, and costs and expenses.

Id. Settlement Class Members may select one of three forms of relief: (1) expense reimbursement; (2) cash payment; or (3) credit services. Settlement Class Members who select the expense reimbursement will be eligible to receive reimbursement for out-of-pocket losses incurred in connection with the breach, up to a maximum amount of \$5,000, upon submission of a Claim Form with supporting documentation to show proof of expenses.

Settlement Class Members who select the cash option will be eligible to receive a cash payment, estimated in the amount of \$100 for California Class Members and \$50 for non-California Class Members. The difference in payment amounts accounts for enhanced statutory damages potentially available to California Class Members under the California Consumer Privacy Act. Residency will be determined by the Class Member's primary residence during the time of the Security Incident.

Settlement Class Members who select the credit services option will receive a 24-month plan providing (i) three-bureau credit monitoring; (ii) identity restoration services that provide professional fraud resolution assistance to Settlement Class Members who experience identity theft or fraud, helping them with identity recovery and restoration; and (iii) \$1,000,000 of identity theft insurance coverage. Credit services are valid to be activated within twelve months from the mailing or emailing of the activation code. Yanchunis Decl., ¶ 16.

(i) The experience, reputation, and ability of the attorneys

This factor has been addressed under the first and third factors above. Overall, throughout this litigation, Plaintiffs' counsel have demonstrated to the Court that they have competently handled this litigation. In the process of reaching this Settlement, this case was defended by highly

qualified and nationally recognized counsel with a great deal of experience in data breach cases. *Id.*, ¶ 17. As such, the prompt resolution of the case further demonstrates that Plaintiffs' counsel managed this action skillfully, always mindful of Plaintiffs' and Class Members' best interests, while facing challenging opponents, which further attests to the experience, reputation, and the ability of the attorneys involved.

(j) The undesirability of the case

Given that data breach cases pose unique challenges, with areas of law not settled and making outcomes of cases more uncertain and hard to predict, these cases may be less desirable. Indeed, Judge Rutherford recognized as much in her Report and Recommendation:

However, the risks inherent to this litigation are readily apparent. Dickey's has filed motions to dismiss in several of the related cases. Additionally, in the Fifth Circuit, there is little case law on the subject of data breaches. Moreover, the out-of-circuit authority is not universally favorable to the proposed claims. In a different procedural context—such as on summary judgment—the class members may have trouble proving standing or establishing the elements of a breach of an implied contract. The fact that the case is now only at the pleading stage indicates that the greatest costs of potential litigation are still ahead, to say nothing of potential appeals. Given the risk inherent at this stage of the litigation, the proposed settlement is more than adequate.

Kostka v. Dickey's Barbecue Restaurants, Inc., No. 3:20-CV-03424-K, 2022 WL 16821685, at *11 (N.D. Tex. Oct. 14, 2022), *report and recommendation adopted*, No. 3:20-CV-03424-K, 2022 WL 16821665 (N.D. Tex. Nov. 8, 2022). Finally, Plaintiffs' counsel here undertook this litigation on a contingency fee basis, which in itself carries more risk. All these factors contribute to the undesirability of the case.

(k) The nature and length of the professional relationship with the client

Plaintiffs' counsel spent time building relationships with each of the Representative Plaintiffs, discussing Plaintiffs' claims, and addressing their questions and concerns. As addressed

under the first *Johnson* factor, before filing the Complaint, Plaintiffs' counsel investigated the potential claims against Defendant, interviewed potential plaintiffs, and gathered information about the Data Incident and its potential impact on consumers. *Id.*, ¶3. Plaintiffs' counsel also regularly conferred with Plaintiffs about the status, strategy, and direction of the case and settlement negotiations. *Id.*

(I) Awards in similar cases

Finally, the twelfth *Johnson* factor (awards in similar cases) also supports the requested fee award. The Settlement is similar to results obtained in other data breach cases, which include, for instance: *Culbertson, et al v. Deloitte Consulting LLP*, Case No. 1:20-cv-3962-LJL (S.D.N.Y. 2022); *Carrera Aguallo v. Kemper Corp.*, Case No. 1:21-cv-01883 (N.D. Ill. Oct. 27, 2021), ECF 33 (finally approving \$2,500,000 in attorneys' fees in data breach class action involving 6 million class members); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, 2019 U.S. Dist. LEXIS 135573, at *24 (N.D. Ohio Aug. 12, 2019) ("Considering the above factors, the Court finds that 30 percent [request for attorneys' fees] of the \$4,325,000 aggregate amount is appropriate."); *Henderson V. Kalispell Regional Healthcare*, No. CDV 19-0761 (Montana Eighth Judicial District Court, Cascade County) (court awarded attorneys fee of 33% of the common fund of \$4.2 million). For these reasons, Class counsel should be reasonably compensated for its successful efforts in representing the Class and achieving a beneficial settlement in just four months.

In sum, Class Counsel's requested fee of \$783,333.33, or one-third percent of the Settlement Fund, is facially reasonable under the percentage method. Application of the *Johnson* factors confirms the appropriateness of the requested fee award, which, respectfully, should be granted.

B. Plaintiffs' Expense Reimbursement Request is Reasonable

District courts allow costs and expenses, the sort that lawyers ordinarily include in their bills to clients, to be recovered from the common fund. *See City of San Antonio*, 2017 U.S. Dist. LEXIS 58384, at *54; *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1089 (S.D. Tex. 2012); Fed. R. Civ. P. 23(h) (authorizing the recovery of “nontaxable costs”); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 334 (W.D. Tex. 2007) (“The appropriate analysis to apply in determining which expenses are compensable in a class action case is whether such costs are of the variety typically billed by attorneys to clients.”). The declarations filed herewith demonstrate that the expenses sought to be reimbursed were all advanced by Plaintiffs’ counsel, were necessarily incurred in the prosecution of this case, and were also properly documented and prepared using contemporaneous time records. *See Yanchunis Decl.*, ¶ 6 and Ex. A thereto. Such costs and expenses included research, court fees, mediation fees, and other services that are necessary and reasonable to prosecuting a class action. *Id.* The requested reimbursement of \$27,508.60 in costs and expenses are therefore appropriately reimbursable to Plaintiffs’ counsel.

C. The Requested Service Awards Are Warranted

Class Counsel move this Court to approve a service award of \$1,500 to each Representative Plaintiff for their service as Class representatives. Courts approve reasonable service awards to compensate the named plaintiffs for their services. *Guadalupe v. Am. Campus Cmty. Servs.*, 2020 U.S. Dist. LEXIS 259660, at *7 (W.D. Tex. Oct. 23, 2020); *see also Matson v. NIBCO Inc.*, 2021 U.S. Dist. LEXIS 201909, at *36 (W.D. Tex. Oct. 20, 2021) (finding that an award of \$10,000 to each plaintiff was appropriate under the circumstances of the case and would adequately compensate plaintiffs for the service they provided and the burdens they shouldered); *Blackburn v. Conduent Commer. Sols. LLC*, 2020 U.S. Dist. LEXIS 255284, at *8 (W.D. Tex. Dec. 22, 2020)

(approving an award of \$2,500 where plaintiff was instrumental in identifying the alleged violation and building the case). Likewise, the Plaintiffs here have been instrumental in assisting Plaintiffs' counsel throughout this proceeding. Yanchunis Decl., ¶ 3. Their involvement was not merely nominal. *Id.* They initiated and remained in contact with Plaintiffs' counsel; considered and questioned various pleadings in this case, including the Complaint, amended complaint and settlement papers; monitored and periodically visited with Plaintiffs' counsel; provided background documents and followed the progress of this litigation; and have been actively involved in the prosecution of the case, to ensure that Class Members received the best recovery possible given the particular circumstances and risks of the case. *Id.* Balancing the services that Plaintiffs rendered against the modest amount of the \$1,500 for each of the six Representative Plaintiffs (i.e., \$9,000), the Court should find such amount is reasonable.

V. CONCLUSION

For these aforementioned reasons, the Court should grant Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Costs and Expenses, and Service e Awards.

Dated: March 23, 2023

Respectfully submitted,

/s/ John A. Yanchunis

John A. Yanchunis

Texas Bar No. 22121300

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Interim Co-Lead Class Counsel

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cory@corfeinlaw.com

Interim Liaison Counsel

Paul D. Stickney (Of Counsel)
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**Steckler Wayne Cochran Cherry,
PLLC**
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Dallas, TX 75230
Tel: 972-387-4040
judgestick@gmail.com

Additional Interim Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on counsel of record through the Court's CM/ECF system March 23, 2023.

/s/ John A. Yanchunis

John A. Yanchunis

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

DEMI KOSTKA, et al., individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

DICKEY'S BARBECUE
RESTAURANTS, INC., et al.

Defendants.

No. 3:20-cv-3424-K

Hon. Ed Kinkeade

Consolidated with:

Civil Action No. 3:20-cv-3603-K

Civil Action No. 3:21-cv-0137-K

Civil Action No. 3:21-cv-0769-K

**DECLARATION OF JOHN A. YANCHUNIS IN FURTHER SUPPORT OF THE
KOSTKA PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF COSTS AND EXPENSES, AND SERVICE AWARDS**

I, John A. Yanchunis, hereby declare as follows:

1. I am a partner at the Morgan and Morgan Complex Litigation Group ("Morgan Firm") in Tampa, Florida. I have personal knowledge of the information contained herein and, if called as a witness, could and would testify competently thereto.

2. I am admitted to practice before the Supreme Courts of Florida and Texas. I am among the Court appointed Interim Co-Lead Counsel for Plaintiffs and the settlement class.

3. Over the course of this case, the Morgan firm and its attorneys have performed the following work:

- Interviewed a consumer who was interested in filing a complaint, vetted the consumer for possible consideration as a class representative and then filing a complaint in this Court, which was later consolidated with other litigation

- Prepared for and participated in a full-day mediation session with private mediator the Honorable United States District Judge Wayne Andersen (Ret.) on June 30, 2021.
- Assisted in the preparation of the settlement agreement, and related exhibits, memorializing the terms of the settlement, and the motion seeking preliminary approval of the settlement.
- Assisting in the preparation of a response to the Court’s order dated March 3, 2022 seeking additional briefing in connection with Plaintiffs’ motion for preliminary approval of the settlement.
- Assisted co-counsel in arguing before Magistrate Judge Rutherford on August 5, 2022, Plaintiffs’ motion for preliminary approval of the settlement, which was ultimately granted and approved by the Court on November 8, 2022.
- Participated in the settlement and claims administration process with co-counsel, counsel for Dickey’s, and Epiq (the claims administrator).

4. From the inception of the case until February 28, 2023, timekeepers at the Morgan firm billed the following on this matter:

LODESTAR REPORT				
FIRM NAME: MORGAN AND MORGAN COMPLEX LITIGATION GROUP				
REPORTING PERIOD: INCEPTION TO FEBRUARY 28, 2023				
NAME	STATUS*	HOURLY RATE	HOURS	LODESTAR
John A. Yanchunis	P	\$1,300	77.2	\$100,360.00
Jean Sutton Martin	P	\$1,150	0.4	\$460.00
Francesca Kester	A	\$650	9.0	\$5,850.00
Patrick A. Barthle	A	\$800	0.2	\$160.00
Ryan D. Maxey	A	\$800	0.8	\$640.00
Ryan J. McGee	A	\$800	3.7	\$2,960.00
Jennifer Cabezas	PL	\$225	2.5	\$562.50

TOTALS			93.8	\$110,992.50
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P = Partner
 A = Associate
 PL = Paralegal

5. From inception to February 28, 2023, the Morgan firm recorded the following expenses on this matter:

Category Name	Total Expenses per Category
Computer Research (e.g Westlaw)	\$71.90
Court/Filing Fees	\$305.00
Internal Reproduction/Copies	\$124.25
Travel expenses related to attend the hearing before Judge Rutherford	\$1,825.26
Total	\$2,326.41

6. The foregoing data and information was obtained from the records and accounts kept in the ordinary course of business at the Morgan firm, respectively.

7. The time reflected in Plaintiffs’ counsel’s lodestar calculations are reasonable and were necessary for the effective and efficient prosecution and resolution of this litigation. Furthermore, the fees and expenses incurred in this litigation are all of a type that would normally be charged to a fee-paying client in the private legal marketplace.

8. Plaintiffs’ counsel’s current rates are also appropriate in light of prevailing rates for similar legal services provided by lawyers of reasonably comparable skill, experience, and reputation. Data breach class actions are still new and can present novel and complex issues, making a successful outcome difficult to predict. Among national consumer protection class action litigation, data breach cases are some of the most complex and involve a rapidly evolving area of law.

9. The pursuit of this litigation required a certain concentration of effort which prohibited counsel from engaging in other litigation.

10. Plaintiffs' requested fee award represents only a negative multiplier of Plaintiffs' counsel's collective lodestar.

11. Plaintiffs' counsel dedicated a cumulative total of 1,682.9 hours on this matter for a total collective lodestar of \$1,264,174.50.

12. Class Counsel's hourly rates are also on par with market rates usually charged by other plaintiffs' firms handling multistate data-breach class actions.

13. The work performed in this case was reasonable and necessary to the prosecution and settlement of this case. Class Counsel conducted a significant factual investigation before commencing this action, and litigated this action diligently and vigorously after it was filed. Because of our comprehensive evaluation of the facts and law, Class Counsel was able to settle this case for a substantial sum. Class Counsel provided Class Members with substantive and certain relief much sooner than would have otherwise been obtained if litigation of this matter had continued.

14. The result achieved in this Settlement is notable because the parties were able, through capable and experienced counsel, to reach a negotiated Settlement without involvement of the Court in discovery disputes.

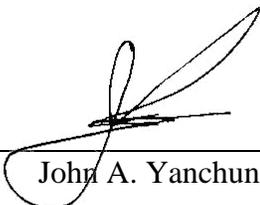
15. The Settlement reached here is further notable for the simplicity of the claims process; the relief which addresses the type of injury and repercussions sustained by consumers in the wake of a Data Incident of the type here; the speed with which counsel was able to secure a favorable settlement; and the cooperation of Plaintiffs' counsel which aided in the ability to resolve this matter efficiently.

16. The Settlement Agreement provides significant monetary and mitigative relief. Settlement Class Members who select the credit services option will receive a 24-month plan providing (i) three-bureau credit monitoring; (ii) identity restoration services that provide professional fraud resolution assistance to Settlement Class Members who experience identity theft or fraud, helping them with identity recovery and restoration; and (iii) \$1,000,000 of identity theft insurance coverage. Credit services are valid to be activated within twelve months from the mailing or emailing of the activation code.

17. Plaintiffs' counsel have demonstrated to the Court that they have competently handled this litigation. In the process of reaching this Settlement, this case was defended by highly qualified and nationally recognized counsel with a great deal of experience in data breach cases.

18. Class Counsel prosecuted this case on a contingent-fee basis with no guarantee of recovery. Each firm was forced to forgo other employment in order to devote the time necessary to pursue this litigation. Class Counsel advanced expenses with the understanding that we would be paid a fee and receive reimbursement for expenses only if successful and only if approved by the Court. Class Counsel have not been paid for any of their time in this litigation or reimbursed for any of the expenses incurred in this matter.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of March, 2023 in Tampa, Florida.



John A. Yanchunis

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

DEMI KOSTKA, et al., individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

DICKEY'S BARBECUE
RESTAURANTS, INC., et al.

Defendants.

No. 3:20-cv-3424-K

Hon. Ed Kinkeade

Consolidated with:

Civil Action No. 3:20-cv-3603-K

Civil Action No. 3:21-cv-0137-K

Civil Action No. 3:21-cv-0769-K

**DECLARATION OF BENJAMIN F. JOHNS IN FURTHER SUPPORT OF THE
KOSTKA PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL**

I, Benjamin F. Johns, hereby declare as follows:

1. I am a partner at the Shub Law Firm ("Shub Firm") in Haddonfield, New Jersey. Prior to November 23, 2022, I was a partner at the law firm of Chimicles Schwartz Kriner & Donaldson-Smith LLP ("Chimicles Firm") in Haverford, Pennsylvania. This declaration accounts for the time and expenses of both of these firms on this matter. I have personal knowledge of the information contained herein and, if called as a witness, could and would testify competently thereto.

2. I am admitted to practice before the Supreme Courts of Pennsylvania and New Jersey and was admitted *pro hac vice* on behalf of Plaintiffs in this matter on November 21, 2022. I am among the Court appointed Interim Co-Lead Counsel for Plaintiffs and the settlement class.

3. Over the course of this case, the Chimicles firm and its attorneys have performed the following work:

- Along with co-counsel, filed the initial complaint in this Court on November 16, 2020 on behalf of Plaintiff Demi Kostka. Thereafter, an amended complaint was filed on December 4, 2020.
- Opposed a motion, filed on November 20, 2020 with the Judicial Panel on Multidistrict Litigation (“JPML”) by other plaintiffs’ counsel, which had sought to transfer all of the cases related to the Dickey’s data breach to the Southern District of California pursuant to 28 U.S.C. § 1407.
- Argued against the creation of an MDL at a hearing before the JPML On January 28, 2021. On February 4, 2021, the JPML issued an order denying the motion filed by the California plaintiffs’ lawyers. *See In re Dickey's Barbecue Rests., Inc., Customer Data Sec. Breach Litig.*, No. MDL No. 2983, 2021 U.S. Dist. LEXIS 21952 (J.P.M.L. Feb. 4, 2021).
- Prepared for and participated in a full-day mediation session with private mediator the Honorable United States District Judge Wayne Andersen (Ret.) on June 30, 2021.
- Briefed and filed a motion to consolidate cases and appoint interim co-lead counsel.
- Performed legal research, including assessing a motion to dismiss that had been filed by Dickey’s in another case, reading numerous cases on Article III standing, and helped prepare the preliminary approval motion and related materials.
- Drafted a written response to the Court’s order dated March 3, 2022 seeking additional briefing in connection with Plaintiffs’ motion for preliminary approval of the settlement.

- Argued, before Magistrate Judge Rutherford on August 5, 2022, Plaintiffs’ motion for preliminary approval of the settlement, which was ultimately granted and approved by the Court on November 8, 2022.
- Participated in the settlement and claims administration process with co-counsel, counsel for Dickey’s, and Epiq (the claims administrator).

4. From the inception of the case until February 28, 2023, timekeepers at the Chimicles firm billed the following on this matter:

LODESTAR REPORT				
FIRM NAME: CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH LLP				
REPORTING PERIOD: INCEPTION TO FEBRUARY 28, 2023				
NAME	STATUS*	HOURLY RATE	HOURS	LODESTAR
Benjamin F. Johns	FP	\$800.00	329.50	\$263,600.00
Beena M. McDonald	P	\$750.00	1.80	\$1,350.00
Samantha E. Holbrook	FA	\$715.00	273.90	\$195,838.50
Alex M. Kashurba	A	\$550.00	203.50	\$111,925.00
Andrew W. Ferich	FA	\$525.00	49.20	\$25,830.00
David W. Birch	FIT	\$400.00	3.80	\$1,520.00
Justin P. Boyer	PL	\$325.00	41.50	\$13,487.50
Sydney B. Spott	PL	\$325.00	16.50	\$5,362.50
Kiera A. Wadsworth	PL	\$300.00	23.60	\$7,080.00
Carlynnne A. Wagner	FA	\$260.00	9.70	\$2,522.00
Corneliu P. Mastraghin	FPL	\$250.00	0.40	\$100.00
TOTALS			953.40	\$628,615.50

P = Partner
 FP = Former Partner
 A = Associate
 FA = Former Associate
 FIT = Former Info. Tech.
 PL = Paralegal
 FPL = Former Paralegal

5. From inception to February 28, 2023, the Chimicles firm recorded the following expenses on this matter:

Category Name	Total Expenses per Category
Mediation	\$3,883.00
Expert Witnesses	\$2,523.00
Computer Research (e.g Westlaw)	\$1,799.38
Court/Filing Fees	\$850.00
Internal Reproduction/Copies	\$776.50
Air Transportation	\$506.94
Lodging	\$353.25
Meals	\$324.59
Ground Transportation	\$226.52
Courier/Subpoena Service	\$85.00
Postage/Express Delivery/Messenger	\$42.18
Court Reports/Transcripts	\$13.20
Total	\$11,383.56

6. I was the partner primarily responsible for this matter while I was at Chimicles, and took it with me when I left to join Shub Law. Accordingly, I oversaw and approved all of the billable time spent on this case at both of these firms. Shub Law has a total lodestar of \$10,357.82 (and no expenses) as of the date of this declaration that has been billed to this case. This billable work has primarily been devoted to overseeing the settlement claims administration process.

7. The foregoing data and information was obtained from the records and accounts kept in the ordinary course of business at the Chimicles and Shub firms, respectively.

8. The work performed by each of these firms in this case was reasonable and necessary to the prosecution and settlement of this case. Class Counsel conducted a significant factual investigation before commencing this action, and litigated this action diligently and vigorously after it was filed. Because of our comprehensive evaluation of the facts and law, Class

Counsel was able to settle this case for a very substantial sum. Class Counsel provided Class Members with substantive and certain relief much sooner than would have otherwise been obtained if litigation of this matter had continued.

9. Class Counsel prosecuted this case on a contingent-fee basis with no guarantee of recovery. Each firm was forced to forgo other employment in order to devote the time necessary to pursue this litigation. Class Counsel advanced expenses with the understanding that we would be paid a fee and receive reimbursement for expenses only if successful and only if approved by the Court. Class Counsel have not been paid for any of their time in this litigation or reimbursed for any of the expenses incurred in this matter.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of March, 2023 in Drexel Hill, Pennsylvania.

A handwritten signature in black ink, appearing to read "B. Johns", written in a cursive style.

BENJAMIN F. JOHNS

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

DEMI KOSTKA, et al., individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

DICKEY'S BARBECUE
RESTAURANTS, INC., et al.

Defendants.

No. 3:20-cv-3424-K

Hon. Ed Kinkeade

Consolidated with:

Civil Action No. 3:20-cv-3603-K

Civil Action No. 3:21-cv-0137-K

Civil Action No. 3:21-cv-0769-K

**DECLARATION OF BEN BARNOW IN FURTHER SUPPORT OF THE
KOSTKA PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF COSTS AND EXPENSES, AND SERVICE AWARDS**

I, Ben Barnow, hereby declare as follows:

1. I am President of Barnow and Associates, P.C. ("Barnow and Associates") and one of counsel for Plaintiffs. I have personal knowledge of the information contained herein and, if called as a witness, could and would testify competently thereto.

2. I am admitted to practice before the Supreme Courts of Illinois and New York. I am among the Court appointed Interim Co-Lead Counsel for Plaintiffs and the settlement class.

3. Over the course of this case, Barnow and Associates and its attorneys have performed the following work:

- Along with co-counsel, filed a complaint on November 16, 2020, on behalf of Plaintiff Demi Kostka. Thereafter, an amended complaint was filed on December 4, 2020.
- Opposed a motion, filed on November 20, 2020, with the Judicial Panel on Multidistrict Litigation ("JPML") by other plaintiffs' counsel, which had sought to transfer all of the

cases related to the Dickey’s data breach to the Southern District of California pursuant to 28 U.S.C. § 1407.

- Prepared for and participated in a full-day mediation session with a private mediator, the Honorable United States District Judge Wayne Andersen (Ret.), on June 30, 2021.
- Briefed and filed a motion to consolidate cases and appoint interim co-lead counsel.
- Drafted and finalized the Settlement Agreement and preliminary approval package.
- Drafted an opposition to the objection to preliminary approval filed by Diczhazy Plaintiffs.
- Participated in the settlement and claims administration process with co-counsel, counsel for Dickey’s, and Epiq (the claims administrator).

4. From the inception of the case until March 20, 2023, timekeepers at Barnow and

Associates billed the following on this matter:

LODESTAR REPORT				
FIRM NAME: BARNOW AND ASSOCIATES, P.C.				
REPORTING PERIOD: INCEPTION TO MARCH 20, 2023				
NAME	STATUS*	HOURLY RATE	HOURS	LODESTAR
Ben Barnow	Principal	\$1,050	194.9	\$204,645.00
Anthony L. Parkhill	Associate	\$725	229.4	\$166,315.00
Riley W. Prince	Associate	\$475	38.5	\$18,287.50
Nicholas Blue	Associate	\$425	0.1	\$42.50
Erich P. Schork	Former Associate	\$725	37.2	\$26,970.00
TOTALS			500.1	\$416,260

5. From inception to March 20, 2023, Barnow and Associates recorded the following expenses on this matter:

Category Name	Total Expenses per Category
Expert Witness Fee	\$2,500
Court/Filing Fees	\$200
Mediation Fees	\$4,181
Travel	\$1,198.37
PACER/Electronic Legal Research	\$603.14
Conference Calls	\$34.29
Transcript Preparation Costs	\$145.50
Total	\$8,862.30

6. The foregoing data and information was obtained from the records and accounts kept in the ordinary course of business at Barnow and Associates.

7. The work performed in this case was reasonable and necessary to the prosecution and settlement of this case. Class Counsel conducted a significant factual investigation before commencing this action and litigated this action diligently and vigorously after it was filed. Because of our comprehensive evaluation of the facts and law, Class Counsel was able to settle this case for a very substantial sum. Class Counsel provided Class Members with substantive and certain relief much sooner than would have otherwise been obtained if litigation of this matter had continued.

8. Class Counsel prosecuted this case on a contingent-fee basis with no guarantee of recovery. Each firm was forced to forgo other employment in order to devote the time necessary to pursue this litigation. Class Counsel advanced expenses with the understanding that we would be paid a fee and receive reimbursement for expenses only if successful and only if approved by the Court. Class Counsel have not been paid for any of their time in this litigation or reimbursed for any of the expenses incurred in this matter.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of March, 2023, in Chicago, Illinois.



Ben Barnow

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

DEMI KOSTKA and VINCENT JEAR,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

DICKEY'S BARBECUE RESTAURANTS,
INC.

Defendant.

No. 3:20-cv-3424-K

Hon. Ed Kinkeade

Consolidated with:

Civil Action No. 3:20-cv-3603-K

Civil Action No. 3:21-cv-0137-K

Civil Action No. 3:21-cv-0769-K

**DECLARATION OF BRIAN P. MURRAY IN FURTHER SUPPORT OF THE
KOSTKA PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF COSTS AND EXPENSES, AND SERVICE AWARDS**

I, Brian P. Murray, declare and state as follows:

1. I am a partner at the law firm Glancy Prongay & Murray LLP. I submit this Declaration in support of motion for an award of attorneys' fees and reimbursement of costs and expenses in connection with services rendered and expenses incurred by my firm in connection with this litigation.

2. During the period from inception through March 13, 2023 my firm has been involved in the following activities: Investigating the facts underlying this action and drafting a complaint; communication involving the consolidation and organization of these actions; editing the memorandum of understanding for the settlement of this action.

3. The total number of hours expended on this litigation by my firm from inception through March 13, 2023 is 32.7 hours. The total lodestar for my firm is \$26,202.50. The hourly rates for the partners, attorneys, and professional support staff in my firm are the same as the usual and customary hourly rates charged for their services in contingent billable matters. The total hours

were determined by the examination of contemporaneous, daily time records regularly prepared and maintained by my firm.

NAME	HOURS	HOURLY RATE	TOTAL
Brian P. Murray (Partner)	12.3	\$975	\$11,992.50
Gregory B. Linkh (Partner)	3.8	\$900	\$3,420
Thomas Kennedy (Associate)	16.6	\$650	\$10,790
TOTAL	32.7		\$26,202.50

4. My firm has incurred a total of \$278.48 in unreimbursed expenses during the period from inception through March 13, 2023.

EXPENSE	AMOUNT
Filing Fees	\$255.88
Online Research	\$22.60
TOTAL	\$278.48

5. The unreimbursed expenses incurred in this action are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records, and other source materials and represent an accurate recordation of the expenses incurred.

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

Executed on March 13, 2023 in Wilton, CT.

/s/Brian P. Murray
Brian P. Murray

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

DEMI KOSTKA, et al., individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

DICKEY'S BARBECUE
RESTAURANTS, INC., et al.

Defendants.

No. 3:20-cv-3424-K

Hon. Ed Kinkeade

Consolidated with:

Civil Action No. 3:20-cv-3603-K

Civil Action No. 3:21-cv-0137-K

Civil Action No. 3:21-cv-0769-K

**DECLARATION OF BRUCE W. STECKLER IN FURTHER SUPPORT OF THE
KOSTKA PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF COSTS AND EXPENSES, AND SERVICE AWARDS**

I, Bruce W. Steckler, hereby declare as follows:

1. I am a partner at Steckler, Wayne, Cherry & Love PLLC ("SWCL") in Dallas, Texas. This declaration accounts for the time and expenses of SWCL. I have personal knowledge of the information contained herein and, if called as a witness, could and would testify competently thereto.

2. I am admitted to practice before the Supreme Courts of Texas, Pennsylvania, New York, Missouri, and Louisiana, and was among the Court appointed Interim Liaison Counsel behalf of Plaintiffs and settlement class in this matter.

3. Over the course of this case, SWCL firm and its attorneys have performed the following work:

- Along with co-counsel, filed the petition in Dallas County, Texas on December 3, 2020 on behalf of Plaintiff Latorsha Adams.

- Opposed a motion, filed on November 20, 2020 with the Judicial Panel on Multidistrict Litigation (“JPML”) by other plaintiffs’ counsel, which had sought to transfer all of the cases related to the Dickey’s data breach to the Southern District of California pursuant to 28 U.S.C. § 1407.
- Briefed and filed a motion to consolidate cases and appoint interim co-lead counsel.
- Performed legal research regarding settlement issues and case law on Article III standing and helped prepare the preliminary approval motion and related materials.
- Drafted a written response to the Court’s order dated March 3, 2022
- Participated in preparation and argument on the prove-up of the settlement.

4. From the inception of the case until February 28, 2023, timekeepers at SWCL billed the following on this matter:

LODESTAR REPORT				
FIRM NAME: STECKLER WAYNE & LOVE PLLC				
REPORTING PERIOD: INCEPTION TO FEBRUARY 28, 2023				
NAME	STATUS	HOURLY RATE	HOURS	LODESTAR
Bruce W. Steckler	Partner	\$950.00	41.7	\$39,615.00
Paul D. Stickney	Of Counsel	\$1,000.00	20.9	\$20,900.00
Austin P. Smith	Associate	\$715.00	12.1	\$8,651.50
Jamie M. Baciak	Paralegal	\$175.00	15.4	\$2,695.00
TOTALS			90.1	\$71,861.50

5. From inception to February 28, 2023, SWCL recorded the following expenses on this matter:

Category Name	Total Expenses per Category
Computer Research (e.g Westlaw)	\$2.40
Court/Filing Fees	\$334.39
Printing/Copies	\$196.80
Meals	\$72.62

Courier/Subpoena Service	\$301.64
Of Counsel Fees	\$3,750.00
Total	\$4,657.85

6. I was the partner primarily responsible for this matter. Accordingly, I oversaw and approved all of the billable time spent on this case. The foregoing data and information was obtained from the records and accounts kept in the ordinary course of business at SWCL.

7. The work performed by my firm in this case was reasonable and necessary to the prosecution and settlement of this case. Class Counsel conducted a significant factual investigation before commencing this action, and litigated this action diligently and vigorously after it was filed. Because of our comprehensive evaluation of the facts and law, Class Counsel was able to settle this case for a very substantial sum. Class Counsel provided Class Members with substantive and certain relief much sooner than would have otherwise been obtained if litigation of this matter had continued.

8. Class Counsel prosecuted this case on a contingent-fee basis with no guarantee of recovery. Each firm was forced to forgo other employment in order to devote the time necessary to pursue this litigation. Class Counsel advanced expenses with the understanding that we would be paid a fee and receive reimbursement for expenses only if successful and only if approved by the Court. Class Counsel have not been paid for any of their time in this litigation or reimbursed for any of the expenses incurred in this matter.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of March, 2023 in Dallas, Texas.

/s/ Bruce W. Steckler

 Bruce W. Steckler

II. BACKGROUND

5. I am a litigation attorney with more than twenty-five years of experience. I am a 1991 graduate of the University of Texas Law School, with honors, and a 1988 graduate of the University of Texas with high honors. I am licensed to practice law in all state and federal courts in Texas and California, and am admitted to practice in multiple additional federal district and appellate courts, as well as the United States Supreme Court.

6. Thomson Reuters named me as a Super Lawyer in 2015-2023, and as a Rising Star in 2004, 2005 and 2007 as published in Texas Monthly magazine. H Texas Magazine named me as one of Houston's Top Lawyers in multiple years from 2014 through the present.

7. In 2017, after being nominated by a Harris County judge, I was elected as a Fellow of the Texas Bar Foundation, in recognition of outstanding professional service and notable contributions to the system of justice and the people of Texas (an invitation limited to the top 1/3 of 1% of Texas lawyers each year.)

8. I founded Cory S. Fein, PC in 2013, which does business under the name "Cory Fein Law Firm." My firm offices in downtown Houston, at 712 Main Street, Suite 800.

9. Before founding my own law firm, I practiced law with Caddell & Chapman in Houston, Texas. During more than 13 years with Caddell & Chapman, most recently as a partner, I established an outstanding record representing primarily plaintiffs in complex litigation across the United States Caddell & Chapman has an outstanding record representing primarily plaintiffs in complex litigation across the United States.

A. Class Action Experience

10. I am currently lead counsel for plaintiffs and a putative class of insureds in Arizona in a case alleging improper depreciation of labor costs when paying property insurance claims. In 2021, the Arizona District Court certified two questions of law to the Arizona Supreme Court.

Walker v. Auto-Owners Ins. Co., Civ. 20-449-TUC-CKJ (D. Ariz. Sep. 30, 2021). In 2022, the Arizona Supreme Court answered the questions in favor of plaintiffs. *Walker v. Auto-Owners Ins. Co.*, 517 P.3d 617 (Ariz. 2022).

11. I served as lead counsel for Plaintiff and a certified class of individuals in Texas asserting claims under the federal Driver's Privacy Protection Act. I successfully obtained class certification, over the defendant's objection. I obtained a \$12.362 million judgment in favor of certified Plaintiff class. *Sistrunk v. TitleMax, Inc.*, 5:14-CV-628-RP, at *24 (W.D. Tex. Aug. 17, 2017), and I obtained final approval of a post-judgment class action settlement. *Sistrunk v. TitleMax, Inc.*, 5:14-CV-628-RP (W.D. Tex. Feb. 22, 2018).

12. During my tenure at Caddell & Chapman, I assumed primary responsibility for multiple cases, primarily class actions, which resolved successfully. Even while representing my clients zealously, I have maintained an excellent reputation as an ethical attorney. In May 2013, in conjunction with his analysis of the work done by my partners and me in the *In re Navistar Diesel Engine Products Liability Litigation MDL No. 2223* pending in Chicago (where Michael Caddell served as Lead Counsel, and I chaired the Discovery Committee), prominent class-action expert Professor Geoffrey Miller attested: "I am familiar with the Lead Counsel, Caddell & Chapman, and consider the attorneys at that firm to be among the finest class action attorneys I have encountered in more than a quarter century of work in this area," "I know Counsel to be highly ethical attorneys," and "Lead Counsel, with the assistance of the Court, performed admirably."¹ In that same case, Harvard Professor William Rubenstein (frequent class-action commentator and

¹ Miller Declaration, filed in *In re: Navistar 6.0 L Diesel Engine Products Liability Litigation*, No. 1:11-cv-02496 (N.D. Ill.), ECF Dkt. No. 278-10, May 15, 2013.

sole author of *Newberg on Class Actions*) described the settlement my firm negotiated with Ford as “a terrific settlement providing significant value to the class easily warrant[ing] . . . final approval.”²

13. While at Caddell & Chapman, my typical role in class action litigation was as the primary attorney in charge of litigation on cases in which Caddell & Chapman was designated as lead or co-lead counsel (or in another leadership position).

14. In the last several years I served as Class Counsel (in conjunction with Caddell & Chapman, before I started my own law firm) and I represented classes in about a dozen cases, including:

a) *In re Navistar Diesel Engine Products Liability Litigation*, an MDL class action proceeding, referenced above, I was the primary attorney at Caddell & Chapman tasked with representing the Plaintiff class. The MDL consolidated about 35 cases from around the country (Michael Caddell was Lead Counsel and I was chair of the Discovery Committee). A settlement was approved on July 2, 2013, by Federal District Judge Matthew J. Kennelly (“the settlement can be viewed as paying roughly 50% of the full value of the class members’ claims, were they to succeed” and is “clearly fair”) in Chicago, Illinois. It provided partial reimbursement for post-warranty engine repair costs incurred by a class of over 1 million current and former owners of Ford vehicles equipped with 6.0-liter PowerStroke diesel engines, and attorneys’ fees of \$12.8 million were awarded on August 11, 2013 (approving the “relatively modest” lodestar multiplier of 1.25);

² Rubenstein Declaration, filed in *In re: Navistar 6.0 L Diesel Engine Products Liability Litigation*, No. 1:11-cv-02496 (N.D. Ill.), ECF Dkt. No. 278-7 at 2, May 15, 2013

b) *Bank Overdraft MDL*. In conjunction with co-counsel, I represented a class of bank account holders in a case involving improper overdraft charges. On August 10, 2012, my co-counsel and I prevailed in certifying a class, were successful in defeating a subsequent Rule 23(f) interlocutory appeal to the Eleventh Circuit, and reached a settlement which was approved in Florida federal court in 2014;

c) *Polybutylene insurance class action*. I took the lead role in a class action on behalf of a class of insureds in a case involving underpayment of insurance benefits to Arizona homeowners with leaking polybutylene pipe systems. I successfully obtained class certification in the District Court of Arizona and withstood an interlocutory challenge of class certification to the Ninth Circuit Court of Appeals. After prevailing on summary judgment motions, I successfully resolved the case for the class members in April 2015;

d) *Webhosting class action*. I took the lead role in representing a class of website owners in a class action against a web hosting company involving improper price increases, which resulted in a court-approved settlement for a nationwide class in 2016;

e) *Vehicle brake wear class action*. I worked with my partners at Caddell Chapman and our co-counsel in representing a class in a class action in California federal court against a vehicle manufacturer involving a defect leading to premature wear of brake pads and other braking components, which resulted in a court-approved class action settlement in 2015;

f) *Online car rental class action*. I served as sole lead counsel for a class of persons who rented vehicles through an online website for use outside of the United States and alleged that insurance fees and taxes were improperly disclosed. I successfully obtained a class action settlement for a nationwide class, which settlement was approved by a Northern District of California federal court in July 2014;

g) *Vehicle tire wear class action.* I was the responsible attorney for Caddell & Chapman, co-counsel for a class of vehicle owners who alleged their tires wore prematurely and irregularly as a result of improperly designed rear suspension. We successfully obtained class certification, defended it against interlocutory appeal, after which we negotiated a settlement which obtained final approval in a Central District of California federal court in January 2014;

h) *Property insurance underpayment class action.* I served as lead counsel for a nationwide class of insureds alleging that they were underpaid on their property loss claims due to improper calculation of payment amounts. The settlement provided repayment of 100% of the alleged underpayment, plus interest, and obtained final approval by a Central District of California federal court in March 2014;

i) *Beverage class action.* I was primary counsel at Caddell & Chapman, serving as co-lead counsel in a case against two major beverage manufacturers, which resulted in a settlement for a nationwide class of consumers. The settlement obtained final approval on August 31, 2012, in Los Angeles Superior Court;

j) *Ambulance engine class action.* I was the primary attorney at Caddell & Chapman in *Williams Ambulance et al. v. Ford Motor Co.*, a settlement that obtained final approval from Federal District Judge Marcia Crone on July 2, 2009 in the Eastern District of Texas, in which the owners of some 20,000 defective ambulances—utilizing the same diesel engine at issue in the *In re Navistar* case—were eligible to obtain substantial compensation from Ford in the form of extended warranties, reimbursements for repairs, and enhanced service.

k) *Marketing list class action.* I was the primary attorney at Caddell & Chapman representing the Plaintiff class in *In re Trans Union Corp. Privacy Litigation*, Case 1:00-cv-04729, MDL Docket No. 1350, N.D. Illinois, one of the largest class actions in history including

more than 190 million class members, where the settlement was approved by Judge Robert Gettleman on September 17, 2008, and prominent class action expert Professor Geoffrey Miller stated “[h]aving worked closely with [Caddell & Chapman], I can also attest that they are among the finest class action attorneys I have been privileged to know during my two decades of experience in this field of law. They not only possess excellent analytical and rhetorical skills, but—more importantly—displayed remarkable qualities of judgment, imagination and persistence.”

1) *Property insurance class action.* I was the primary attorney in *Hardy v. Hartford*, a settlement providing injunctive and monetary relief to a nationwide class of Hartford insureds with respect to the payment of General Contractor’s overhead and profit on property damage claims, approved by Judge Bury of the Federal District Court of Arizona on June 18, 2008.

B. Additional Experience

15. Michael Caddell and I also served as Lead Counsel in *In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litigation*, an MDL proceeding (Case No. MDL-1718) pending in the Eastern District of Michigan, where I took the lead role in facilitating a double-tracked, multi-party mediation that resulted in more than 100 settlements of cases involving vehicle fires.

16. In addition to class actions, I also focus my practice on *qui tam*, False Claims Act cases and retaliation cases.

17. In August 2017, in conjunction with the United States, I settled a lawsuit I brought in 2014 on behalf of a whistleblower client, a former employee of a chain of nursing homes. As a result of the settlement, the defendants reimbursed the Government more than \$600,000. I filed the suit, Case No. 4:14-cv-02948, in the U.S. District Court for the Southern District of Texas, Houston Division, and it was pursued by the United States Department of Justice on behalf of the

United States Department of Health and Human Services' Office of Inspector General (OIG-HHS) and the Texas Office of the Attorney General and Texas Health and Human Services Commission. The suit alleged that the defendants knowingly submitted false and fraudulent claims for payment to Medicare, Medicaid and other government-funded programs relating to rehab services. The alleged conduct included rounding up the amount of rehab therapy provided to nursing facility residents, in order to qualify for the highest RUG level (which required at least 720 minutes of therapy per week), which resulted in higher Medicare, TRICARE, and Medicaid reimbursement to the facility.

18. In January 2017, in conjunction with the United States, I settled a lawsuit I brought in 2013 on behalf of a whistleblower client, a former employee of the defendant, Advanced Containment Systems, Inc. As a result of the settlement, the defendants, Advanced Containment Systems, Inc., and Boh Environmental, LLC, paid more than \$2.48 million. The case is No. 4:13-cv-02330, in the U.S. District Court for the Southern District of Texas, Houston Division, and was pursued by the United States Department of Justice on behalf of the United States Department of Defense (DoD), and the Defense Logistics Agency (DLA), which handles purchasing for the DOD. The lawsuit included allegations that the defendants were contractually obligated to obtain ISO Quality Management System certifications and that they represented to DLA that they had obtained such certifications when they had not.

19. In July of 2016, along with my co-counsel, I successfully recovered a \$9.5 million settlement for false Medicare claims submitted by the largest health care provider in Reno, Nevada. The case, filed in 2012 in the U.S. District Court for Nevada, is styled *United States ex rel. Cecilia Guardiola v. Renown Health, et al*; No. 3:12-cv-00295. We represented Cecilia Guardiola, a registered nurse who discovered that Renown had a systematic problem billing Medicare for

inpatient claims that should have been categorized as outpatient claims. After the United States decided not to intervene in the case, my co-counsel and I continued to pursue the case without the Government, as allowed by the False Claims Act, resulting in the successful recovery.

20. In 2016, I settled a lawsuit against the Florida Department of Transportation brought in 2014 on behalf of a Florida truck driver and a putative class of others who were overcharged as a result of drivers having the number of axles on their vehicles miscounted and being charged for vehicles that did not belong to them. The settlement included a refund of overcharges for my client and an agreement to better inform all drivers about errors that occur in toll charges and how to dispute them.

21. While a partner at Caddell Chapman, I worked on a qui tam case filed in the Eastern District of Texas against dialysis provider DaVita. The firm represented a whistleblower, Ivey Woodard, who accused DaVita of over-administering the drug Epogen to exploit Medicare reimbursements. The case settled for \$55 million in July 2012. The claim was that DaVita was administering so-called overfill — an extra quantity of a drug in each vial, required by law to ensure full doses are given — of Epogen to patients and fraudulently seeking reimbursement from Medicare for the overfill. The whistleblower was awarded the maximum relator's share of 30%. The case was *USA ex rel. v. DaVita Inc.*, Case number 1:05-cv-00227, in the U.S. District Court for the Eastern District of Texas.

22. I served as a guest lecturer on class actions and qui tam litigation in Adj. Professor Charles Brown's class at the University of Houston Law School during the Spring 2015 and Spring 2017 semesters.

23. For further information concerning my experience and expertise, the Court is referred to my website (www.coryfeinlaw.com).

III. LODESTAR

A. Reported Lodestar Amount

24. As stated above, I spent 8.7 hours working on this case. At my rate of \$750 per hour, my total lodestar is \$6,525.00.

B. The hours expended were actually expended on the topics and activities stated.

25. I hereby verify that the 8.7 hours expended as reported in my billing spreadsheet (available upon request) were actually expended on the activities and topics stated therein. I contemporaneously recorded my time electronically which was used to generate my billing spreadsheet.

C. The hours expended were reasonable.

26. The number of hours devoted to this litigation was reasonable. Plaintiff's counsel avoided duplication of efforts. Courts have been critical of multiple attorneys doing overlapping work on a case, billing for conferences among multiple attorneys, and multiple attorneys working on the same projects, reviewing the same documents, and attending the same hearings.

27. I exercised billing judgment in determining the number of hours used to calculate the lodestar.

D. Billing Rates Used to Calculate Lodestar Are Reasonable

28. The rate I used in calculating my lodestar was \$750 per hour, a rate that is far below the major national firms' rates and is in line with, or even slightly lower than, the rates charged by other class action attorneys with comparable legal experience.

29. My current billing rate, used for purposes of calculating the lodestar, is based on prevailing fees for national complex litigation. The use of national rates is appropriate in light of the fact that this action required specialized expertise in complex class action litigation.

30. The 2014 NLJ survey, which contained information for 159 of the largest law firms in the U.S., found a median rate for the highest partner billing category of \$775, meaning that at half of the firms, the highest-charging partner billed at a rate above \$775 while at the other half the highest-charging partner charged that amount or less. For all firms surveyed, partners charged an average of \$604. *See* National Law Journal, Billing Rates Across the Country (Jan. 13, 2014).³

31. Additionally, the Laffey Matrix for lawyers 20+ years out of law school (like myself) is \$826 per hour, significantly higher than the rate I used to calculate my lodestar. *See* www.laffeymatrix.com.

32. The Court may also wish to examine Defendants' counsel's billable rates to help judge whether Relator's counsel's rates are fair. *Ruiz v. Estelle*, 553 F. Supp. 567, 589 (S.D. Tex. 1982) ("In an action for which no adequate parallel can be found, the best example of a fee paid for similar work is that paid by opposing counsel in the same action.") *See Christus Health Care Sys. v. Am. Consultants RX, Inc.*, No. SA:12-CV-1221-DAE, 2014 U.S. Dist. LEXIS 34874, at *19 (W.D. Tex. Mar. 18, 2014) (relying on National Law Journal's billing survey as evidence of billing rates). Although Defendants were represented by megafirms, and my firm is small, successful small firm lawyers can be entitled to megafirm rates. *Miller v. Holzmann*, 575 F.Supp. 2d 2, 22 (D.D.C. 2008) ("Defendants balk at the 'mega-law firm rates' relator seeks. But these rates reflect counsel's 'mega-law firm'-quality representation.")

33. In *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 556 (2010), the Supreme Court held that the delay in receiving fees in a federal fee-shifting statute case justifies awarding

³ <http://www.nationallawjournal.com/id=1202636785489/Billing-Rates-Across-the-Country>.

attorneys' fees using the attorneys' current rates rather than the rates at the time the services were rendered.

34. My current rate of \$750 per hour is only \$100 more than a rate that was approved nine years ago.

a) On January 21, 2014, District Court Judge Margaret M. Morrow specifically approved my rate of: "\$650 per hour for senior partner Cory S. Fein (honors graduate of the University of Texas Law School with 18 years of experience)." *See* Order Granting Plaintiffs' Motion for Final Approval of Class Action Settlement and Request for Attorneys' Fees, Expenses, and Incentive awards. *Keegan v. Am. Honda Motor Co*, No. CV 10-09508 MMM (AJWx), 2014 U.S. Dist. LEXIS 197404, at **64-69 (C.D. Cal. Jan. 21, 2014). Judge Morrow analyzed the rate based on my experience and rates approved in other decisions. Based on this analysis, "the court determines that the hourly rates requested for both the partners and associates in this case are reasonable." *Id.* at *68.

b) In December 2012, after resolving a high profile and complicated *qui tam* action (*United States of America, ex. rel. Ivey Woodard v. DaVita Inc.*, United States District Court for the Eastern District of Texas, Civil Case No. 1:05-CV-00227-MAC-ZJH), the Department of Justice approved attorneys' fees that were based on Cory Fein's current rates. In *DaVita*, the Department of Justice approved the entire requested fee, which included a \$650 rate for Cory Fein.

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

DATED: March 19, 2023, Houston, Texas.

/s/ Cory S. Fein
Cory S. Fein