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Electronically Filed

FIRST CIRCUIT

1CCV-24-0000154

12-JUL-2024

11:49 AM

Dkt. 57 MOT

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IN THE CIRCUIT COURT FOR THE FIRST CIRCUIT

STATE OF HAWAI'I

JOSEPH SMITH AND TONY LEE,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

v.

HAWAIIUSA FEDERAL CREDIT UNION,

Defendant.

Case No.: 1CCV-24-0000154

**PLAINTIFFS' MOTION FOR AN AWARD
OF ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES, AND
SERVICE AWARDS FOR CLASS
REPRESENTATIVES; MEMORANDUM
IN SUPPORT OF MOTION;
DECLARATION OF GARY M.
KLINGER; NOTICE OF HEARING;
CERTIFICATE OF SERVICE**

(caption continued)

HEARING:

Date: September 17, 2024

Time: 2:00 p.m.

Judge: The Honorable Karin L. Holma

No Trial Date:

Judge: The Honorable Karin L. Holma

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

Plaintiffs Joseph Smith and Tony Lee, by and through their undersigned counsel, Bronster Fujichaku Robbins, Milberg Coleman Bryson, and Cafferty Clobes Meriwether & Sprengel LLP, ("collectively" Class Counsel), respectfully move this court for an award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards in accordance with the Court Order Granting Unopposed Motion for Preliminary Approval of Class Action Settlement [Dkt. 33].

This motion is brought pursuant to Rule 7, and Rule 54 of the Hawai'i Rules of Civil Procedure, and is based upon the attached Declaration Gary M. Klinger, and the records and files herein.

DATED: Honolulu, Hawai'i July 12, 2024.

Respectfully submitted,

/s/ Robert M. Hatch

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IN THE CIRCUIT COURT FOR THE FIRST CIRCUIT
STATE OF HAWAII

JOSEPH SMITH AND TONY LEE,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

v.

HAWAIIUSA FEDERAL CREDIT UNION,

Defendant.

Case No.: 1CCV-24-0000154

**MEMORANDUM IN SUPPORT OF
MOTION**

MEMORANDUM IN SUPPORT OF MOTION

Plaintiffs Joseph Smith and Tony Lee respectfully submit this Memorandum of Law in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards for Class Representatives. In support thereof, Plaintiffs state as follows:

I. INTRODUCTION

This class action lawsuit brought by Joseph Smith and Tony Lee ("Plaintiffs" or "Class Representatives") against Defendant HawaiiUSA Federal Credit Union ("HawaiiUSA" or "Defendant") (together with Plaintiffs, the "Parties"), and arises from a cyberattack perpetrated against HawaiiUSA on or about December 12, 2022 (the "Data Breach"). In total, the Settlement is valued in excess of \$16,000,000.¹ Plaintiffs strongly believe the Settlement is favorable to the

¹ As described below, each Class member is entitled to claim up to \$400 in ordinary expense reimbursements. For the Class of 21,441 members, the value of the ordinary expense reimbursement benefit alone (excluding the value of the extraordinary expense reimbursement, credit monitoring and enhanced data security practices implemented by HawaiiUSA), is \$8,576,400 (\$400 x 21,441 Members). In lieu of making a claim for ordinary expense reimbursement Settlement Class Members may claim an alternative cash payment, this benefit is capped at \$150,000 in the aggregate. The value of the 24-months of ID Total is estimated to be \$358.80 (\$14.85 per month x 24 months), which has a value of \$7,693.030.80 for the entire Class

Settlement Class.²

Pursuant to the Settlement Agreement and the Court’s inherent authority, Class Counsel respectfully submits this Motion for Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Awards for Class Representative. First, Class Counsel request that the Court award \$250,000 for payment of attorneys’ fees and expenses (“Fee Request”). This represents approximately 1.5% of the total value of the Settlement. As detailed more fully herein, the factual and legal complexity of these claims required extensive investment of labor and advancement of costs by Class Counsel. The work performed advancing the claims of Class Members—on a fully contingent basis—carried significant risk, and counsel forwent other opportunities and dedicated themselves to this case.

Further, Class Counsel request that the Court approve a service award for each Class Representative in the amount of \$1,500, for a total of \$3,000. This request is modest and is fully justified by the law and the work performed by Plaintiffs.

This Memorandum is supported by the cited and attached evidence, including: the declaration from Class Counsel attached as **Exhibit 1** (Declaration of Gary M. Klinger in support of Plaintiffs’ Motion for Approval of Attorneys’ Fees Award, Expense Reimbursement, and Service Awards to Representative Plaintiffs) (“Klinger Fee Decl.”).

II. FACTUAL BACKGROUND

A. PROCEDURAL HISTORY

On or about March 6, 2023, HawaiiUSA became aware that, on or about December 12, 2022, the sensitive personal and/or financial data of current and former employees and consumers

(\$358.80 x 21,441 Class Members). The Settlement also permits Class members to claim up to \$4,000 in documented identity theft losses that were caused by the Data Breach.

² See Plaintiffs’ Memorandum of Law in Support of Their Unopposed Motion for Preliminary Approval of Class Action Settlement. Doc. #20.

was compromised when unauthorized actors were able to breach an employee’s email account on Defendant’s network and access certain files (the “Data Incident”). Defendant notified Plaintiffs and the Settlement Class about the Data Incident on or about April 7, 2023.

Plaintiffs allege they spent hours responding to the Data Incident, including by monitoring their accounts, reviewing their credit reports, and researching credit monitoring options. As a result of these losses, on April 28, 2023, Plaintiff Tony Lee (“Lee”) filed a putative class action complaint against HawaiiUSA in the Circuit Court of the First Circuit, State of Hawaii, asserting claims allegedly arising out of the Data Incident. On May 2, 2023, Plaintiff Joseph Smith (“Smith”) filed a putative class action complaint against Hawaii USA in the United States District Court for the District of Hawaii. On June 2, 2023, HawaiiUSA timely removed the Lee Action to the United States District Court for the District of Hawaii. On June 26, 2023, the Parties filed a Joint Motion to Consolidate the Lee and Smith Actions into a single, consolidated action. The Court granted that Joint Motion on June 28, 2023.

On July 26, 2023, Plaintiffs Smith and Lee filed their amended consolidated class action complaint in the United States District Court for the District of Hawaii. Following meet-and-confer discussions between counsel for HawaiiUSA and counsel for Plaintiffs, including discussions about Article III standing, the parties agreed, as a condition of settlement, that Plaintiffs would dismiss their action filed in the United States District Court for the District of Hawaii, and would refile their complaint in the Circuit Court of the First Circuit, State of Hawaii. On January 30, 2024, Plaintiffs Smith and Lee refiled their complaint in the Circuit Court of the First Circuit, State of Hawaii. That case is titled *Smith, et al. v. Hawaii USA Federal Credit Union*, Case No. 1CCV-24-0000154 (Haw. Cir. Ct., 1st Cir.) (the “Litigation”).

Shortly thereafter, the Parties determined that discussions regarding early resolution of this case were warranted and could be beneficial to both Plaintiffs and Defendant. The Parties began arm's-length discussions regarding the same.

This Settlement came about as the result of protracted, arms'-length negotiations, including a full day mediation with Jill Sperber of Judicate West on December 1, 2023. *See* Klinger Fee Decl., ¶ 2. Although the Parties were not able to reach a resolution at the mediation, the Parties continued to negotiate following the mediation. Eventually, Ms. Sperber made a mediator's proposal, which each side accepted. Both Parties negotiated in good faith and zealously defended their respective positions as they negotiated the Settlement Agreement. *Id.* The Settlement Agreement and the various exhibits thereto ("S.A.") were ultimately finalized and signed in March 2024. *See id.*

Since reaching the Settlement, Class Counsel has, and will continue throughout the claims period and through distribution of funds to Settlement Class Members who make Valid Claims, to work on behalf of the Settlement Class. This work has included drafting the Settlement Agreement and corresponding exhibits, drafting the motion for preliminary approval of the Settlement, working with the Settlement Administration to ensure Notice was adequately distributed to the Settlement Class, answering questions of Settlement Class Members, and drafting the instant motion for fees, costs, and Service Awards. Based on experience, Class Counsel will spend 50-100 additional hours seeking final approval, defending the Settlement from potential objections (of which there are none to date), and supervising claims administration and the distribution of proceeds. Klinger Fee Decl., ¶ 5.

This Court granted preliminary approval of the Settlement in its May 3, 2024 Preliminary Approval Order. Doc. # 33. Plaintiffs now submit this Motion for Attorneys' Fees, Costs, and Service Awards pursuant to that Order.

B. SUMMARY OF SETTLEMENT

The Settlement Class is defined as:

All persons in the United States to whom HawaiiUSA mailed a notification that their information may have been impacted in the Data Incident. *See* S.A. ¶ 1.25 The Settlement Class is comprised of approximately 21,441 individuals (each, a "Settlement Class Member").

1. Settlement Benefits

Settlement Class Members have the opportunity to submit a Claim for Settlement benefits on or before the Claims Deadline, which is August 27, 2024. All Settlement Class Members are eligible to claim Extraordinary Losses and Identity Theft Protection. In addition to Extraordinary Losses and Identity Theft Protection, Settlement Class Members may also make a claim for *either* Ordinary Losses and Lost Time *or* an Alternative Cash Payment. The details are outlined below;

Ordinary Expense Reimbursement: Settlement Class Members may submit a Claim for reimbursement of documented out-of-pocket losses incurred as a result of the Data Incident, up to a maximum of \$400 per person. Ordinary Expense Reimbursement Claims include reimbursement for:

- i) (i) unreimbursed bank fees; (ii) unreimbursed card reissuance fees; (iii) unreimbursed overdraft fees; (iv) unreimbursed charges related to unavailability of funds; (v) unreimbursed late fees; (vi) unreimbursed over-limit fees; (vii) long distance telephone charges; (viii) cell minutes (if charged by minute), Internet usage charges (if charged by the minute or by the amount of data usage and incurred solely as a result of the Data Incident), and text messages (if charged by the message and incurred solely as a result of the Data Incident); (ix) unreimbursed charges from banks or credit card companies; (x) interest on payday

loans due to card cancellation or due to over-limit situation incurred solely as a result of the Data Incident; (xi) costs of credit report(s), credit monitoring, and/or other identity theft insurance products purchased by members of the Settlement Class between December 12, 2022 and the date of the Claims Deadline; and (xii) other losses incurred by Settlement Class Members determined by the Settlement Administrator to be fairly traceable to the Data Incident, including, but not limited to, the cost of postage and gas for local travel.

- ii) Compensation for lost time of up to four (4) hours at \$20 per hour, for a maximum of up to \$80 per person. Class members may submit claims for up to four (4) hours of lost time with an attestation that they spent the claimed time responding to issues raised by the Data Security Incident. This payment shall be included in the per person cap for Compensation for Ordinary Losses.

S.A. ¶ 2.2(a).

Alternative Cash Payment: In lieu of making a claim for Ordinary Expense Reimbursement, members of the Settlement Class may submit a Valid Claim using the Claim Form to receive a \$50 cash payment. Total Valid Claims for Alternative Cash Payments shall not exceed \$150,000. To the extent that the total Valid Claims for Alternative Cash Payments do exceed \$150,000, each Valid Claim for Alternative Cash Payment shall be reduced, on a *pro rata* basis, until the total Valid Claims for Alternative Cash Payments equals or is less than \$150,000. S.A. ¶ 2.2(b).

Extraordinary Expense Reimbursement: Settlement Class Members who were the actual victim of identity theft may also make a claim for up to \$4,000 in proven monetary loss if:

- (i) The loss is an actual, documented, and unreimbursed monetary loss;
- (ii) The loss was more likely than not caused by the Data Incident;
- (iii) The loss occurred between December 12, 2022 and the Claims Deadline;
- (iv) The loss is not already covered by one or more of the normal reimbursement categories in SA ¶ 2.2; and
- (v) The Settlement Class Member made reasonable efforts to avoid, or seek reimbursement for, the loss, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance.

S.A. ¶ 2.1(b).

Identity Theft Protection: All members of the Settlement Class who submit a Valid Claim using the Claim Form are eligible for 24 months of free identity-theft protection, called “Identity Defense Total 3-Bureau Service” (“ID Total”). For members of the Settlement Class who opted to receive the credit monitoring initially offered by HawaiiUSA, “ID Total” shall be in addition to that year. S.A. ¶ 2.1(a).

2. Fees, Costs and Service Awards

For their work in obtaining an excellent result for the Class, the Settlement Agreement provides that Class Counsel may seek an award of Attorneys’ Fees and Costs and Expenses of two hundred and fifty thousand dollars (\$250,000). S.A. ¶ 7.2. HawaiiUSA agreed not to oppose Class Counsel’s request for an award of attorneys’ fees and reimbursement of litigation costs and expenses not to exceed \$250,000. *Id.* Additionally, for their role in bringing this action and securing the significant relief for the Settlement Class discussed above, the Settlement Agreement provides for the payment of a court-ordered service award for each Class Representative. S.A. ¶ 7.3. HawaiiUSA agreed to not oppose Class Counsel’s request for a service award not to exceed \$1,500 for each Class Representative. *Id.*

III. ARGUMENT

A. LEGAL STANDARDS GOVERNING THE AWARD OF ATTORNEYS’ FEES IN CLASS ACTIONS

Both the Ninth Circuit and Hawaii courts routinely approve attorney fee award requests for twenty-five percent (25%) or more of the total value of the settlement. Hawaii law is consistent with federal law, awarding expense reimbursements in class actions and is “even more discretion[ary] (relative to federal law) in determining reasonable fee awards: Trial courts are ‘not require[d] . . . to apply specific factors in determining fee awards.’” *Aquilina v. Certain Underwriters at Lloyd’s London*, 2022 WL 21309735, at *9–10 (D. Haw. Sept. 19, 2022) (quoting

Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Haw., 106 P.3d 339, 361 (Haw. 2005) (“*Chun I*”).

Hawaii courts should “identify the fee award that most equitably compensates plaintiffs’ counsel, while at the same time protecting the interests of the class members for whose benefit the common fund was created.” *Chun v. Bd. of Trs. of Employees Ret. Sys. of State of Haw.*, 992 P.2d 127, 140 (Haw. 2000) (“*Chun I*”). The Supreme Court of Hawaii has “given a general nod to the persuasiveness of federal case law on attorneys’ fee awards in class-action cases,” especially “in the face of [the Court’s] jurisprudential silence as to the appropriate [standards].” *Aquilina*, 2022 WL 21309735, at *10; *see also Chun II*, 106 P.3d at 360. Accordingly, both state and federal authorities are cited in support of this motion.

B. THE FEES REQUESTED BY CLASS COUNSEL ARE ROUTINELY GRANTED AND ARE FAIR AND REASONABLE

In the Settlement Agreement, the parties agreed that the Court may award Plaintiffs’ Counsel up to \$250,000 in attorneys’ fees and litigation costs and expenses. S.A. ¶ 7.2. Although the Parties’ Settlement standing alone is a sufficient basis for the Court to award attorney’s fees, the Court maintains an “independent obligation to ensure the award, like the settlement itself, is reasonable” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011); *Lara v. Renaissance Hotel Operating Co.*, 2011 WL 6002521, at *3 (D. Haw. Nov. 29, 2011). Courts routinely recognize that in the settlement context, attorneys’ fees are the result of compromise and that courts “need not inquire into the reasonableness of the fees at even the high end with precisely the same level of scrutiny as when the fee amount is litigated.” *Staton v. Boeing Co.*, 327 F.3d 938, 966 (9th Cir. 2003). Courts retain discretion to determine the reasonableness of attorneys’ fees by conducting either the “percentage of the fund” method or “lodestar” method.

Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002); *Donkerbrook v. Title Guar. Escrow Services, Inc.*, 2011 WL 3649539, at *10 (D. Haw. Aug. 18, 2011).

Here, Plaintiffs' attorneys' fee and expenses are reasonable under either the percentage of the fund or lodestar method. Class Counsel seek an award of just 1.5% of the total value of the Settlement.³ Courts routinely award significantly more than the amount Plaintiffs request here. *See Smith v. Bank of Hawaii*, No. 1:16-cv-00513-JMS-WRP, ECF No. 233, ¶14 (D. Haw. Dec. 22, 2020) (awarding 30% attorneys' fee award in action under unfair and deceptive acts and practices statutes); *see also Howerton v. Cargill, Inc.*, 2014 WL 6976041, at *6 (D. Haw. Dec. 8, 2014) (awarding 30% attorneys' fee award); *Martin v. Marriott Intl., Inc.*, 2021 WL 4888973, at *6 (D. Haw. Oct. 19, 2021) (awarding 30% of the original settlement fund); *Paul, Jonson, Alston & Hunt v. Graulity*, 886 F.2d 268, 272 (9th Cir. 1989) (holding that an award of attorneys' fees up to 33 1/3% of the fund can be reasonable).

When assessing the reasonableness of an attorneys' fee award under the percentage of the fund theory, courts consider: (1) the extent to which class counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether counsel's performance generated benefits beyond the cash settlement fund; (4) the market rate for the particular field of law; (5) the burdens class counsel experienced while litigating the case; and (6) whether the case was handled on a contingency basis. *Vizcaino* 290 F.3d at 1048-50; *Martin*, 2021 WL 4888973, at

³ Class Counsel calculates the total value of the settlement to be in excess of \$16,000,000 (excluding the value of the Extraordinary Loss Reimbursement benefit). Accordingly, Class Counsel's Fee Request constitutes less than 1.5% of the total value of the Settlement. Class Counsel calculates the value of the credit monitoring benefit to be \$7,693,030.80. Class Counsel's Fee Request constitutes 3.2% of the total value of the credit monitoring alone. Even using only the value of the compensation for lost time that each Settlement Class member is entitled to receive without any documentation (a value of \$1,715,280 to the Settlement Class), the requested attorneys' fees represent a mere 14.5% of the value.

*6. As demonstrated *infra*, the relevant factors further support Class Counsel's Fee Request and should be approved.

1. Class Counsel Achieved an Exceptional Result

Class Counsel achieved an exceptional result for the class. The Settlement affords significant benefits to Settlement Class Members including the ability to make a claim for compensation for ordinary losses resulting from the Data Breach, which includes the ability to claim compensation for up to 4 hours of lost time. The Settlement Agreement also provides Settlement Class Members the opportunity to claim up to \$4,000.00 in compensation for extraordinary losses. S.A. ¶ 2.1(b). The Settlement also secures significant identify theft protection for all Class Members, allowing Settlement Class Members to claim 24 months of identity theft protection and three bureau credit monitoring, and obtains assurances that Defendant has and/or will implement certain business practice changes to better protect the information of Settlement Class Members in the future. *See* S.A. ¶ 2.1(a). Courts routinely grant similar claims made settlements. *See Harris v. Vector Mktg. Corp.*, 2012 WL 381202 (N.D. Cal. Feb. 6, 2012) (granting final approval of claims-made settlement); *Lemus v. H & R Block Enters. LLC*, 2012 WL 3638550 (N.D. Cal. Aug. 22, 2012) (approving claims-made settlement); *Shames v. Hertz Corp.*, 2012 WL 5392159, at *9 (S.D. Cal. Nov. 5, 2012) ("courts routinely approve claim made settlements."). This factor weights in favor of Class Counsels' Fee Request.

2. The Risks of the Litigation

Class Counsel faced substantial risks and uncertainties in the litigation that made it far from certain that any recovery would be obtained for the Class. "Data breach class actions are among the riskiest and uncertain of all class action litigation due to the absence of direct precedent certifying data breach cases as class actions." *Gaston v. FabFitFun, Inc.*, 2021 WL 6496734, at *3

(C.D. Cal. Dec. 9, 2021); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, 2019 U.S. Dist. LEXIS 135573, at *14 (N.D. Ohio Aug. 12, 2019) (“Data breach litigation is complex and risky.”). Even cases of wide-spread notoriety that involved data far more sensitive than at issue here have been found wanting by courts throughout the country. *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 266 F. Supp. 3d 1, 19 (D.D.C. 2017) (“The Court is not persuaded that the factual allegations in the complaints are sufficient to establish . . . standing.”), *reversed in part*, 928 F.3d 42 (D.C. Cir. June 21, 2019) (holding that plaintiff had standing to bring a data breach lawsuit).

To the extent the law has gradually accepted this relatively new type of litigation, the path to a class-wide judgment remains unforged, particularly in the area of damages. For now, data breach cases are among the riskiest and uncertain of all class action litigation, making settlement the more prudent course when it provides adequate and reasonable compensation to the Settlement Class, as is the case here. The damages methodologies, while theoretically sound in Plaintiffs’ view, remain untested in a disputed class certification setting and unproven in front of a jury. And, as in any data breach case, establishing causation on a class-wide basis is rife with uncertainty. Consequently, Class Counsel incurred significant risk by taking and litigating this case. Despite these risks, Class Counsel invested substantial time and resources in the case to ensure zealous representation of the Settlement Class and obtained an excellent result. Class Counsel’s willingness to take on such risks supports approval of Class Counsel’s Fee Request.

3. The Settlement Provides Substantial Non-Monetary Relief

The Settlement provides the Settlement Class with substantial non-monetary relief that further supports the Fee Request. The Settlement requires HawaiiUSA to implement additional data security procedures to adequately secure its systems and IT environments, and that the

costs associated with those measures be paid by HawaiiUSA separate and apart from the other settlement benefits. *See* S.A. ¶ 2.4. The Settlement Agreement also provides the opportunity to claim the identity theft protection services. *See Pfeiffer v. RadNet, Inc.*, 2022 WL 2189533, at *3 (C.D. Cal Feb. 15, 2022) (benefits negotiated on behalf of the settlement class that “are protective measures geared towards preventing future harm to Class Members’ and other customers [] weigh in favor of the fee award.”). Consequently, this factor further weights in favor of the Fee Request.

4. The Requested Fee is Consistent with the Market Rate

As discussed *supra*, courts routinely grant much higher attorneys’ fees than requested here. In this case, Plaintiffs’ request a Fee Award of \$250,000, inclusive of costs and expenses, which is less than 1.5% of the total value of the Settlement. The Ninth Circuit established a benchmark of 20%-30% of the common fund as a benchmark award for attorneys’ fees and “20% to 30% is the usual range.” *Martin*, 2021 WL 4888973, at *6 (internal citations omitted). The amount of attorneys’ fees requested by Class Counsel here is in line with awards regularly approved by federal courts in the 9th circuit and nationwide. *See e.g., Martin*, 2021 WL 4888973, at *6 (awarding 30% fee); *Howerton*, 2014 WL 6976041, at *6; *Pfeiffer*, 2022 WL 2189533, at *3 (25% of the common fund was reasonable in data breach class action settlement); *Gaston v. FabFitFun, Inc.*, 2021 WL 6496734 (C.D. Cal., Dec. 9, 2021) (same). Accordingly, this factor supports Class Counsels’ Fee Request.

5. The Burdens Class Counsel Experienced While Litigating the Case Weigh in Favor of the Requested Fee

Class Counsel’s activities included, but were not limited to, conducting an extensive pre-filing investigation of Plaintiffs’ and Class Members’ claims and damages and vigorously

prosecuting those claims. Class Counsel engaged in protracted settlement negotiations and ultimately negotiated a comprehensive Settlement for the Settlement Class.

Since reaching the Settlement, Class Counsel has drafted a motion for preliminary approval of the Settlement, assisted with the drafting and preparation of the Settlement Agreement, short and long form notice, and claim forms, drafted the instant motion for a Fee Award, and worked with the Settlement Administrator to ensure the successful implementation of the Notice Program and to answer any questions from Settlement Class Members. Class Counsel anticipates expending approximately 50-100 hours of additional time administering the Settlement, including drafting a Motion for Final Approval of the Settlement and preparing for and attending the final fairness hearing. Thus, the work performed by Class Counsel to date has been comprehensive, complex, and wide ranging, and this factor supports the Fee Request.

6. Class Counsel Handled the Case on a Contingency Basis

Class Counsel undertook this case on an entirely contingent basis, assuming the significant risk that the litigation would yield no recovery, or very little recovery, and leave them uncompensated for their time and out of pocket expenses. In pursuing this matter, Class Counsel forwent the ability to devote time to other, fee generating, matters. Klinger Decl., ¶¶ 9-12. Class Counsel undertook a substantial risk of nonpayment and the fee award should reflect Class Counsel's risk in prosecuting the case to a successful settlement. Accordingly, this factor weighs in favor of approving Class Counsel's Fee Request. *See Pfeiffer*, 2022 WL 2189533, at *6-7 (“Historically, data breach cases have had great difficulty in moving past the pleadings stage and receiving class certification. . . . Because Class Counsel took this case on a contingency basis in a risky and still-developing area of law, this factor weighs in favor of the proposed attorneys’ fee award.”).

C. A LODESTAR CROSS-CHECK SUPPORTS THE FEE AWARD

Although Class Counsel is not requesting an award of attorneys' fees based on a lodestar analysis, this Court "uses the fees that it could have awarded Plaintiffs under the lodestar analysis as a gauge of the reasonableness of the attorneys' fees provided for in the Settlement Agreement." *See, e.g., Almodova v. City & Cnty. of Honolulu*, 2011 WL 4625692, at *5 (D. Haw. Sept. 30, 2011) (using the lodestar method to review the agreed upon attorneys' fees reasonableness); *Shea v. Kahuku Hous. Found., Inc.*, 2011 WL 1261150, at *6 (D. Haw. Mar. 31, 2011) (citation omitted) (using the lodestar analysis to evaluate the reasonableness of the agreed upon attorneys' fees in a class action settlement). *See also Zyda v. Four Seasons Hotels and Resorts*, 2020 WL 9762910, at *2 (D. Haw. Apr. 1, 2020) ("Courts also sometimes engage in a streamlined lodestar 'cross-check' to analyze the reasonableness of fees."). "[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award." *Vizcaino*, 290 F.3d at 1050. "The aim is to do rough justice, not to achieve auditing perfection." *In re Apple Inc. Device Performance Litig.*, 2021 WL 1022866, at *7 (N.D. Cal. Mar. 17 2021) (citation omitted).

Here, Class Counsel's Fee Request results in a multiplier of 1.1, which verifies the reasonableness of the requested fee. *See Hopkins v. Stryker Sales Corp.*, 2013 WL 496358, *4 (N.D. Cal. Feb. 6, 2013) ("Multipliers of 1 to 4 are commonly found to be appropriate in complex class action cases."). Settlement Class Counsel has spent 308.6 hours litigating this case and anticipates that they will spend an additional 50-100 hours through final approval and the completion of settlement administration. Klinger Decl., ¶¶ 15. The rates charged by Class Counsel are well within the acceptable range for class action litigators in general and under hourly rates

that were approved in other Hawaii complex data breach class action litigation.⁴ *Id.* Class Counsel’s lodestar is \$225,208.52. *Id.* This lodestar results in a multiplier of 1.1 and will likely be less than 1 by the conclusion of this matter. A multiplier of less than one demonstrates that Class Counsel’s fee is reasonable. *See, e.g., Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 265 (N.D. Cal. 2015) (finding that the proposed 1.49 multiplier was reasonable and fair); *Howerton*, 2014 WL 6976041, at *4 (awarding 30% attorneys’ fee award where lodestar multiplier was between 0.62 and 1.39). Here, the lodestar cross-check confirms the reasonableness of Class Counsel’s request.

D. CLASS COUNSEL’S REQUESTED LITIGATION COSTS ARE REASONABLE

Class Counsel seeks reimbursement of costs and expenses totaling \$13,106.28. Klinger Fee Decl., ¶ 19. These expenses are of the type of expenses routinely charged to hourly clients, are appropriately documented, and were necessary and reasonable to prosecute the litigation. Pursuant to the Settlement Agreement, the full requested amount should be awarded as part of the combined \$250,000 attorneys’ fee and expense request. The submitted expenses are reasonable, necessary, and directly related to the prosecution of the action. *See In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1048 (“Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters.”). Therefore, Class Counsel requests that the Court award expenses.

E. PLAINTIFFS’ REQUESTED SERVICE AWARDS ARE JUSTIFIED AND SHOULD BE APPROVED

The Court also has discretion to award a reasonable and equitable “incentive award,” or “service award,” to class-representing plaintiffs. *See Adams v. City & Cnty. of Honolulu*, 2017 WL

⁴ *See Martin v. Marriot Int’l, Inc.*, ECF No. 169-8.

3880651, at *1 (D. Haw. Sept. 5, 2017) (“Incentive awards are discretionary and fairly typical in class action cases.”) (citation and internal quotation marks omitted)); *Benedict v. Diamond Resorts Corp.*, 2013 WL 12149277, at *2 (D. Haw. June 6, 2013) (granting final approval of settlement which awarded incentive awards to each of the named Plaintiffs).

Here, Plaintiffs have been vital in litigating this matter. Plaintiffs have been personally involved in the case. For their commitment to this case, Plaintiffs Joseph Smith and Tony Lee each seek \$1,500 as a service award for their important work in this case. Plaintiffs were subjected to extensive interviews, submitted documentation to prove that they were impacted by the Data Breach, and were prepared to take on the responsibilities of class representatives, including being deposed and testifying at trial. Klinger Fee Decl., ¶¶ 22-23. The amount requested is presumptively reasonable and commonly awarded in settled class action cases. *See, e.g., In re Pauley*, 2020 WL 5809953, at *4 (Granting “class representative enhancement fees in the amount of \$5,000 each to Plaintiffs,” and finding that amount to be “presumptively reasonable”); *Yahoo Mail Litig.*, 2016 WL 4474612, at *11 (N.D. Cal. Aug. 25, 2016) (“The Ninth Circuit has established \$5,000.00 as a reasonable benchmark [for service awards.]”); *Aquilina*, 2022 WL 21309735, at *12 (awarding \$2,500 to each named plaintiff).

IV. CONCLUSION

For the foregoing reasons, Class Counsel requests that the Court grant this motion and (1) award \$250,000 as attorneys’ fees and expenses and (2) approve a service award of \$1,500 to each

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Plaintiff.

DATED: Honolulu, Hawai‘i, July 12, 2024.

Respectfully submitted,

/s/ Robert M. Hatch

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IN THE CIRCUIT COURT FOR THE FIRST CIRCUIT

STATE OF HAWAII

JOSEPH SMITH AND TONY LEE,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

v.

HAWAIIUSA FEDERAL CREDIT UNION,

Defendant.

Case No.: 1CCV-24-0000154

DECLARATION OF GARY M. KLINGER

DECLARATION OF GARY M. KLINGER

I, GARY M. KLINGER, being competent to testify, make the following declaration:

1. I am currently a partner of the law firm of Milberg Coleman Bryson Phillips Grossman, PLLC (“Milberg”). I am one of the lead attorneys for Plaintiffs. I submit this declaration in support of Plaintiffs’ Motion for an Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Award to Class Representatives.

2. This Settlement came about as the result of protracted, arms’-length negotiations and mediation. On December 1, 2023, the Parties participated in a full-day mediation before Jill Sperber of Judicate West. Although the Parties were not able to reach a resolution at the mediation, the Parties continued to negotiate following the mediation. Eventually, Ms. Sperber made a mediator’s proposal, which each side accepted. Throughout the entire process, Defendant was ably represented by a well-regarded defense firm with experience in cyber-security investigation and litigation. After reaching an agreement on the relief for Settlement Class Members, the Parties continued to negotiate in good faith and at arms’ length regarding the finer points of the settlement, and drafted the Settlement Agreement and accompanying Notice documents and other exhibits.

While negotiations were always collegial and professional between the Parties, there is no doubt that the negotiations were also adversarial in nature, with both Parties strongly advocating their respective client's positions. The Settlement Agreement and the various exhibits thereto ("S.A.") were ultimately finalized and signed in March 2024.

3. Class Counsel's work on this matter involved investigating the cause and effects of the HawaiiUSA Data Incident, evaluating potential class representatives, contributing to the evaluation of the merits of the case before filing the Complaint; conducting legal research; conducting extensive research into data security incidents and their causes and effects; drafting and filing the Complaint; obtaining information from Defendant regarding the Data Incident and analyzing that information; preparing for mediation and drafting a confidential mediation summary; participating in an all-day mediation; engaging in extensive settlement negotiations with Defendant over the course of several weeks following; drafting the settlement agreement, the relevant notices of settlement, the Motion for Preliminary Approval, and this instant motion for attorneys' fees; communicating with defense counsel; updating and handling questions from class representatives; overseeing the launching of the notice program with substantial interaction between the Settlement Administrator and Class Counsel; and overseeing the claims process.

4. Class Counsel will continue to work throughout the claims period for this case. This work will include drafting a motion for final approval of the settlement and attending the final fairness hearing, monitoring for and defending against potential objections (there are none to date), and the supervision of the claims administration process and the distribution of the settlement proceeds.

5. Based on my past experience Class Counsel expect to spend another 50-100 hours seeking final approval, defending the Settlement from any potential objections, and supervising claims administration and the distribution of proceeds.

6. In my opinion, and the option of Class Counsel, the Settlement is fair, reasonable, and adequate and provides significant benefits for Plaintiffs and approximately 21,441 Settlement Class Members, and I strongly support the Settlement. Plaintiffs also strongly support this Settlement.

7. As of the date of filing, neither Class Counsel have received any objections to the Settlement Agreement, and no objections to the proposed attorneys' fees and costs (the amount of which was made known to the Class via the Court-approved notice program) in particular.

The Contingent Nature of the Case

8. Class Counsel were retained to represent Plaintiffs on a contingent basis. Class Counsel's fees were not guaranteed—Class Counsel have not received any hourly fees for their work on this case, and had Plaintiffs' case been dismissed or if they lose at trial, Class Counsel would be paid nothing. As such, Class Counsel assumed a significant risk of nonpayment or underpayment.

9. This matter has required me, other attorneys at my firm, and my co-counsel to spend time on this litigation that could have been spent on other matters. At various times during the litigation of this class action, this lawsuit has consumed significant amounts of my time and my firm's time.

10. Such time could otherwise have been spent on other fee-generating work. Because Class Counsel undertook representation of this matter on a contingency-fee basis, we shouldered

the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment.

11. If not devoted to litigating this action, from which any remuneration is wholly contingent on a successful outcome, the time our firms spent working on this case could and would have been spent pursuing other potentially fee generating matters.

12. Litigation is inherently unpredictable and therefore risky. Here, that risk was very real, due to the rapidly evolving nature of case law pertaining to data breach litigation, and the state of data privacy law. Therefore, despite my firm's devotion to the case, the equal devotion of my co-counsel to the cases, and our confidence in the claims alleged against Defendant, there have been many factors beyond our control that posed significant risks.

Costs and Fees Incurred

13. Due to the early stage of litigation and efficiency by which Class Counsel was able to obtain this significant settlement, expenses and fees incurred by Plaintiffs are low.

14. The total lodestar of all Settlement Class Counsel to date is \$225,208.52.

15. To date, Class Counsel has worked a total of 308.6 hours on this case. The time spent by each of the timekeepers that performed work for this case, along with their respective billable rates was kept contemporaneously as the work was performed. At the request of the Court, Class Counsel can and will produce detailed times records supporting the time set out above. The firms' rates are fair and reasonable and reflect the market rate for class action contingency litigation.

16. Additional time will be spent to prepare for and attend the Final Approval Hearing, defend any appeals taken from the final judgment approving Settlement, and ensure that the claims process and distribution of Settlement proceeds to Class Members is done in a timely manner in

accordance with the terms of the Settlement. I assert that the attorneys' fees sought in the Motion for Attorneys' Fees, Costs, and Service Awards are reasonable and seek fair and reasonable compensation for undertaking this case on a contingency basis, and for obtaining the relief for Plaintiffs and the Class. As set forth in the Settlement Agreement, the attorneys' fees and expenses sought in this Motion will not reduce the benefits payable to the Class.

17. Where possible, Class Counsel made efforts to carefully assign work so as to avoid duplication of efforts and have the work completed by the appropriate level of attorney.

18. All books and records in this case regarding costs expended were maintained in the ordinary course of business, from expense vouchers and check records. I have reviewed the records of costs expended in this matter.

19. Class Counsel advanced costs in connection with this case in the amount of \$13,106.28. These expenses include mediator fees, filing fees, and fees associated with *pro hac vice* admissions.

20. These costs are reasonable, and necessary for the litigation, and are modest in comparison to the enormous costs that likely would have been incurred if litigation had continued. Reimbursement of these costs is sought as part of (and not in addition to) the \$250,000 in combined attorney fees and expenses requested. Based upon my past experience, the amount of out-of-pocket case expenses will increase prior to Final Approval.

21. The Settlement Agreement calls for a reasonable service award to Plaintiffs in the amount of \$1,500, subject to approval of the Court, in addition to any benefits provided to Settlement Class Members and the costs of notice and settlement administration and separate from any award of attorneys' fees and expenses. The Service Awards are meant to recognize Plaintiffs for their efforts on behalf of the Class, including assisting in the investigation of the case,

maintaining contact with counsel, reviewing the pleadings, answering counsel's many questions, communicating with counsel during the settlement negotiations, and reviewing the terms of the Settlement Agreement. Plaintiffs also put their personal reputations at risk and put themselves forward for public scrutiny. Plaintiffs were not promised a service award, nor did they condition their representation on the expectation of an incentive award. The Service Award will diminish the recovery to the Settlement Class Members in any way

22. I strongly believe that the Settlement Agreement is favorable for the Settlement Class. The Settlement addresses the type of injury and repercussions sustained by Settlement Class Members in the wake of the Data Incident. In the opinion of the undersigned and other Class Counsel, the settlement is fair, reasonable, adequate, as are the attorneys' fees, expenses, and service awards requested here.

23. Although Plaintiffs believe in the merits of his claims, this litigation was inherently risky and complex. The claims involve the intricacies of data breach litigation (a fast-developing area in the law), and the Plaintiffs would face risks at each stage of litigation. Against these risks, it was through the hard-fought negotiations and the skill and hard work of Settlement Class Counsel and the Class Representatives that the Settlement was achieved for the benefit of the Settlement Class.

24. In contrast to the risks, the Settlement provides certain and substantial compensation to the Settlement Class Members. The benefits for ordinary and extraordinary losses are uncapped in the aggregate, meaning there will be no pro rata reduction of any Settlement Class Members' recovery. Due to the Settlement's uncapped structure, the Settlement makes available to the Class in excess of \$16 million in relief.

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

Executed this 11th day of July, 2024 at Chicago, Illinois.

/s/ Gary M. Klinger
GARY M. KLINGER

**IN THE CIRCUIT COURT FOR THE FIRST CIRCUIT
STATE OF HAWAI'I**

JOSEPH SMITH AND TONY LEE,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

v.

HAWAIIUSA FEDERAL CREDIT UNION,

Defendant.

Case No.: 1CCV-24-0000154

NOTICE OF HEARING

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the **PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS FOR CLASS REPRESENTATIVES** shall come on for hearing before the Honorable Karin L. Holma, Judge of the Above-Entitled court, on **September 17, 2024, at 2:00 p.m.**, or as soon thereafter as the matter can be heard.

If you fail to appear at the hearing, the relief requested may be granted without further notice to you.

DATED: Honolulu, Hawai'i, July 12, 2024.

Respectfully submitted,

/s/ Robert M. Hatch

Margery S. Bronster

Robert M. Hatch

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Attorneys for Plaintiffs and the Proposed Class

**IN THE CIRCUIT COURT FOR THE FIRST CIRCUIT
STATE OF HAWAI'I**

JOSEPH SMITH AND TONY LEE,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

v.

HAWAIIUSA FEDERAL CREDIT UNION,

Defendant.

Case No.: 1CCV-24-0000154

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certified that a filed marked copy of the foregoing document was duly served upon the parties listed below at the email below VIA JEFS:

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DATED: Honolulu, Hawai'i, July 12, 2024.

Respectfully submitted,

/s/ Robert M. Hatch

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