

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

In re BJC Healthcare)
Data Breach Litigation) Civil Action No. 2022-CC09492
_____)

**MOTION FOR APPROVAL OF MISSOURI CLASS COUNSEL’S
ATTORNEYS’ FEES, COSTS, AND EXPENSES, AND FOR AWARD OF CLASS
REPRESENTATIVE INCENTIVE AWARDS**

I. INTRODUCTION

Pursuant to Paragraph 58 of the Settlement Agreement that was preliminarily approved by the Court on April 29, 2022, and in conjunction with the final approval hearing set for September 6, 2022, Plaintiffs Brian Lee Bauer, Tiffany Jew, and Jessica Simpson (the “Missouri Class Representatives”) respectfully move the Court to approve the agreed payment of attorneys’ fees, costs, and expenses in the amount of \$790,000 to Ben Barnow, J. Gerard Stranch IV, and John F. Garvey (“Missouri Class Counsel”) and award incentive awards of \$2,000 to the Class Representatives. Defendant has agreed to pay this amount in addition to all of the benefits provided to the Settlement Class, and this payment does not reduce any of those benefits. The requested payments are fair and reasonable under Missouri law and should be approved by the Court.

II. STATEMENT OF FACTS

A. Class Counsel vigorously advocated for the Class and invested significant time and resources into the representation.

Missouri Class Counsel have diligently worked to advance the interests of the Class in this litigation and settlement since July 2020 when Plaintiffs originally filed their complaint

against Defendant BJC Health System (“BJC”). Declaration of Ben Barnow (“Barnow Decl.”) ¶ 3; Declaration of J. Gerard Stranch IV (“Stranch Decl.”) ¶ 2; Declaration of Lynn A. Toops (“Toops Decl.”) ¶ 2. Before initiating this action, Missouri Class Counsel investigated the facts of the BJC Data Breach, the impact of the breach on BJC patients, and the potential legal claims and defenses that may be raised in the case. Barnow Decl. ¶ 4.

The information gleaned from investigation and research into the facts of the case and potential legal claims enabled Missouri Class Counsel to assess the strengths and weaknesses of this case, analyze potential damages models that could be utilized at trial, and informed the decision to engage in negotiation with BJC’s Counsel about attending mediation and later settling the matter. *Id.* ¶ 5. Missouri Class Counsel’s diligence in preparing for mediation, including obtaining information necessary to analyze all claims and defenses, allowed them to negotiate a robust relief package and valuable outcome for the Settlement Class, and to determine a fair and efficient structure and distribution plan. *Id.*

Missouri Class Counsel has performed significant work during the pendency of this matter, including significant time researching the issues raised in BJC’s motion to dismiss. After this, Plaintiffs’ case was consolidated with another case pending before the Court, *Brian Lee Bauer v. BJC*, Case No. 2022-CC09492 (Circuit Court of the City of St. Louis, Missouri). *Id.* ¶ 7. This consolidation was the result of Missouri Class Counsel organizing to ensure the most efficient litigation of the case. *Id.* In connection with the consolidation, Missouri Class Counsel prepared a consolidated complaint. *Id.* BJC then moved to dismiss the consolidated complaint. Missouri Class Counsel again spent significant time researching and drafting a response in opposition to BJC’s motion to dismiss. *Id.* That work culminated in BJC’s motion to dismiss being denied in its entirety. *Id.*

Missouri Class Counsel also served discovery requests on BJC and received certain documents from BJC in response. *Id.* ¶ 8. These documents helped counsel to better understand their position in the litigation and informed their settlement strategy. *Id.* Missouri Class Counsel also completed other work relating to the litigation, including meetings, emails, and phone calls between co-counsel and with counsel for BJC, and calls with numerous consumers who reached out to Missouri Class Counsel about this litigation. *Id.* ¶ 9. Missouri Class Counsel will continue to diligently and efficiently litigate this matter through the Final Approval Hearing and processing of the settlement. *Id.*

Prior to the mediation session with the mediator Friedman, the Parties exchanged information to prepare for and facilitate a productive mediation session, communicating their respective positions regarding this litigation with each other and with the mediator. *Id.* ¶ 11. Missouri Class Counsel also zealously advocated for the Class throughout the settlement negotiation process, including a day-long mediation with mediator Bruce A. Friedman, Esq. of JAMS on September 1, 2021. *Id.* ¶ 10. Missouri Class Counsel and counsel for BJC aggressively advocated for their side's position during the mediation. *Id.* The Parties did not reach an agreement during the mediation, but continued to negotiate. *Id.*

Missouri Class Counsel worked diligently after the mediation to reach a settlement. *Id.* ¶ 12. This process involved the review of confirmatory discovery. *Id.* Once the parties reached a settlement in principle, they went through many more rounds of negotiations to finalize the details of each aspect of the Settlement Agreement and exchanged numerous drafts of the Settlement Agreement. *Id.*

Missouri Class Counsel has also worked with the Settlement Administrator to implement the robust Notice Plan and remains in close touch with the Settlement Administrator to ensure

the smooth implementation of the Notice Plan. *Id.* ¶ 14. This included reviewing and drafting of the Settlement Website’s language and format, the script for the automated response of the toll-free number, and the language and format of the Notice forms, monitoring exclusion requests, and ensuring prompt responses to each and every Settlement Class Member inquiry regarding the Settlement. *Id.* All told, Missouri Class Counsel advanced no less than \$12,693.94 in expenses in litigating this matter (the majority of which were mediation expenses), and accrued a total lodestar, at their normal hourly rates, of \$718,090. Barnow Decl. ¶¶ 30–34, Stranch Decl. ¶¶ 3–4; Toops Decl. ¶¶ 3–4.

B. Class Counsel achieved significant and valuable benefits for the Class through their efforts in achieving the settlement.

The Settlement achieved by Class Counsel provides Settlement Class members with timely benefits targeted at remediating the specific harms they have suffered as a result of the Security Incident involved in this litigation. The benefits of the Settlement are not subject to an aggregate cap and are available to all Settlement Class members. Given that the Class is comprised of 287,874 persons, the benefits made available by the Settlement easily total in the millions of dollars in value. The Settlement provides the following benefits to all Settlement Class members who submit a valid claim:

1. Ordinary Expense Reimbursement

Settlement Class members are eligible to receive compensation for up to \$250 of their ordinary out-of-pocket expenses that were incurred between March 6, 2020 and the Claims Deadline as a result of the Incident through submission of a valid claim. SA ¶ 18. These ordinary out-of-pocket expenses include: (i) cost to obtain credit reports; (ii) fees related to a credit freeze; (iii) card replacement fees; (iv) late fees; (v) overlimit fees; (vi) interest on payday loans taken as a result of the Incident; (vii) other bank or credit card fees; (viii) postage, mileage, and other

incidental expenses resulting from lack of access to an existing account; and (ix) costs associated with credit monitoring or identity theft insurance if purchased primarily as a result of the Incident; (x) compensation for attested-to lost time spent monitoring accounts, reversing fraudulent charges, or otherwise dealing with the aftermath/clean-up of the Incident, at the rate of \$20 per hour for up to three (3) hours of lost time (attestation requires a narrative description of the activities performed during the time claimed and their connection to the Incident). *Id.*

2. Extraordinary Expense Reimbursement

Settlement Class members who submit a valid claim are also eligible to recover compensation for up to \$5,000 of their documented extraordinary out-of-pocket losses, incurred on or after March 6, 2020, as a result of the Incident. SA ¶ 19. Settlement Class members need to submit supporting documentation with these claims to show that the Settlement Class member was not reimbursed from other sources, their losses were caused in material part by the Incident, and that they attempted to avoid, or seek reimbursement for, the loss, including but not limited to exhaustion of all credit monitoring insurance and identity theft insurance. *Id.* If a Settlement Class member has suffered documented fraud, attempted fraud, or publication or actual misuse associated with the sensitive information compromised as a result of the Incident, that Settlement Class member can claim up to an additional three hours of lost time, at \$20 per hour, for time spent remedying the fraud or attempted misuse, subject to the \$5,000 extraordinary expense cap. *Id.*

3. Credit Monitoring Protections

BJC will provide two (2) years of one-bureau credit monitoring and identity theft insurance through IDX to Settlement Class members who request credit monitoring by indicating such request on the claim form. SA ¶ 20.

4. Equitable Relief

BJC will improve the security of its current and former patients' information through four different means: (1) BJC will maintain a written information security policy that will be made available to all of its employees (SA ¶ 21(a)); (2) BJC will conduct annual mandatory cybersecurity training classes, new hire orientation, and periodic training updates as new information security issues arise (SA ¶ 21(b)); (3) BJC will maintain a written password policy, requiring appropriate password complexity (SA ¶ 21(c)); and (4) BJC will implement Multi-Factor Authentication for remote access to e-mail (SA ¶ 21(d)). BJC has estimated that the equitable relief will cost the company approximately \$2,688,000, including \$1,223,000 in initial implementation costs and \$1,465,000 in annual maintenance costs. SA ¶ 21(e). These figures are reasonable estimates only, and while BJC must comply with such equitable relief, BJC is not required to spend a particular dollar amount towards these measures but is required to materially comply.

5. Costs of Notice and Settlement Administration, Attorneys' Fees, Costs, and Expenses, and Incentive Awards

BJC will pay the costs of notice and settlement administration, Plaintiffs' attorneys' fees, costs, and expenses, and incentive awards to Plaintiffs. BJC will separately pay the attorneys' fees, costs, and expenses, as approved by the Court, up to \$790,000 to Missouri Class Counsel and up to \$415,000 to Illinois Class Counsel. SA ¶ 53. BJC will also not contest a request for incentive awards of up to \$2,000 per named plaintiff (up to \$10,000 in the aggregate). SA ¶ 55. The Parties did not discuss or agree upon payment of incentive awards until after they agreed on all material terms of relief to the Settlement Class. *Id.*

III. LEGAL STANDARD

A trial court has discretion in determining the appropriate amount of reasonable attorneys' fees to approve in a class action. *Berry v. Volkswagen Grp. Of Am., Inc.*, 397 S.W.3d 425, 431 (Mo. 2013) (en banc). "The trial court is deemed an expert at fashioning an award of attorneys' fees," and the court's determination will be affirmed unless it is "so arbitrary and unreasonable as to shock one's sense of justice." *Id.* at 430–31 (citations omitted).

As to the amount of a reasonable fee, courts employ one of two methods, or a combination of them: (1) the percentage-of-the-benefit approach; or (2) the lodestar multiplier approach. *See id.* (using lodestar multiplier approach and approving 2.0 multiplier); *Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 267 (Mo. Ct. App. 2011) (using percentage-of-the-benefit approach and noting that a "one-third contingent fee award is not unreasonable").

The most common method of awarding attorneys' fees is as a percentage of the benefit. *See Paulson v. Dynamic Pet Prod., LLC*, 560 S.W.3d 583, 593 (Mo. Ct. App. 2018) (affirming award of attorneys' fees and expenses and a service award from a fund created by a class action settlement); *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019) (holding that "Class Counsel is entitled to an award of reasonable attorneys' fees from the settlement proceeds" in a class action.).¹ The percentage-of-the-benefit method of calculating fees encourages counsel to obtain the largest possible settlement for the class, and "use of the percentage of the fund method when awarding attorneys' fees . . . is not only approved, but also 'well established.'" *In re NuvaRing Prod. Liab. Litig.*, 2014 WL 7271959, *2 (E.D. Mo. Dec. 18, 2014) (citation omitted). *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir.

¹ Cases on Federal Rule of Civil Procedure 23 are persuasive in interpreting Missouri Rule of Civil Procedure 52.08. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 166 (Mo. Ct. App. 2006).

1998) (percentage of fund is “a method of more closely aligning the lawyer’s interests with those of his client by giving him a stake in a successful outcome”). As to the appropriate percentage to award, “courts have frequently awarded attorney fees between 25 and 36 percent.” *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 866 (8th Cir. 2017) (affirming one-third fee) (quoting *Khoday v. Symantec Corp.*, No. 11-cv-180, 2016 WL 1637039, at *9 (D. Minn. Apr. 5, 2016)); *In re U.S. Bancorp. Litig.*, 291 F.3d at 1038 (affirming 36% fee); *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017). Within this range, the most common fee awarded is one-third of the value of the settlement. *See, e.g., Caligiuri*, 855 F.3d at 865–66 (affirming one-third fee); *Huyer*, 849 F.3d at 399–400 (same); *Barfield*, 2015 WL 3460346, at *4 (awarding one-third fee and collecting cases awarding one-third fees).

Under the lodestar approach, the trial court may award a fee equal to the lodestar incurred by class counsel times a multiplier that takes into account the fact that class counsel took the matter on a contingent basis and thus assumed a risk of non-payment. *Berry*, 397 S.W.3d at 433 (affirming award of \$6,174,640, which represented a lodestar multiplier of 2.0). Multipliers between two and five are common. *See Caligiuri*, 855 F.3d at 866. For example, in *Caligiuri*, the court noted that a multiplier of less than 2 is “below the range of multipliers commonly accepted” and It cited cases approving multipliers between 2.5 and 5.6. *Id.* (citing *Nelson v. Wal-Mart Stores, Inc.*, No. 05-cv-000134, 2009 WL 2486888, at *2 (E.D. Ark. Aug. 12, 2009) (approving multiplier of 2.5 and citing cases within the Eighth Circuit approving multipliers of up to 5.6)).

Regardless of the method employed, relevant factors in determining the appropriate fee include:

- 1) the rates customarily charged by the attorneys involved in the case and by other attorneys in the community for similar services; 2) the number of hours reasonably

expended on the litigation; 3) the nature and character of the services rendered; 4) the degree of professional ability required; 5) the nature and importance of the subject matter; 6) the amount involved or the result obtained; and 7) the vigor of the opposition.

Berry, 397 S.W.3d at 431 (quoting *Hill v. City of St. Louis*, 371 S.W.3d 66, 81 (Mo.Ct. App. 2012)).

IV. DISCUSSION

A. The Court should approve payment of the requested fee, cost, and expense award as reasonable.

Here, the requested attorneys' fee, cost, and expense payment is reasonable whether considered under the percentage-of-the-benefit approach or the lodestar approach.

Under the percentage-of-the-benefit approach, the requested fees are well below the usual one-third of the value of the settlement. Ignoring all of the other meaningful benefits made available by the Settlement, the requested fee is less than 1/3 the value of the injunctive relief. Taking account for the other valuable benefits of the Settlement (reimbursement for ordinary expenses including lost time, reimbursement for extraordinary expenses, credit monitoring), the requested fees and expenses are clearly justified under a percentage-of-the-benefit analysis.

Under the lodestar approach, the multiplier is just 1.1, well below the much higher multipliers that are routinely approved in similar cases. *See Bachman*, 344 S.W.3d at 267 (noting that a one-third contingent fee award is common and not unreasonable). *Berry*, 397 S.W.3d at 431 (approving multiplier of 2.0); *Caligiuri*, 855 F.3d at 866 (noting that a multiplier of less than 2.0 is "below the range of multipliers commonly accepted" and citing cases approving multipliers between 2.5 and 5.6).

Moreover, each of the relevant factors favors approval of the fee. First, Missouri Class Counsel utilized the rates they customarily charge in class action litigation when calculating their lodestar amount. Second, the total lodestar is nearly equal to the requested fee payment, meaning

Missouri Class Counsel's fee provides them with no compensation for the risk they took on in accepting this complex matter on a contingent basis with no guarantee of being paid at all. Third, Missouri Class Counsel served the Class in a professional and zealous manner, all at Missouri Class Counsel's own expense and risk. Fourth, class action data breach litigation is inherently complex and specialized, requiring skills peculiar to Missouri Class Counsel and only a handful of other practitioners across the country. Fifth, the nature and importance of the litigation is significant as it involves the safety, security, and privacy of important personal information. Sixth, the uncapped and highly valuable benefits achieved by the settlement support the fee, particularly in the face of vigorous opposition from highly skilled defense counsel. Finally, the fee is even more reasonable here because, unlike in a common fund case, here the fee is being paid by the Defendant on top of the benefits to the Class, and therefore approving the requested fee has no negative effect on the benefits that the Class will receive. In short, the requested fee is reasonable under both the percentage-of-the-benefit method and the lodestar method, and all of the relevant factors support approving the requested fee.

B. The Court should award incentive awards to the Class Representatives.

The Court should grant the Incentive Awards of \$2,000 requested per Plaintiff to compensate the Class Representatives for the effort and risk entailed in pursuing this litigation, which has triggered important and positive changes in BJC's business practices and has secured significant compensation for Class Members. Service awards, which are discretionary, "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *see also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995).

The requested Incentive Awards are squarely in line with incentive awards that are approved by courts in class actions. *See Fellows v. Am. Campus Cmtys. Servs.*, No. 4:16-cv-01611-JAR, 2018 WL 3056046, at *5–6 (E.D. Mo. June 20, 2018) (approving service award of \$5,000); *Martin v. Safe Haven Sec. Servs.*, No. 19-CV-00063-ODS, 2020 WL 4816418, at *6 (W.D. Mo. Aug. 19, 2020) (approving service awards of \$10,000 and \$5,000). Plaintiffs have been actively engaged in this Action and were essential to the success achieved. Among other things, they provided information to Class Counsel, gathered documents, reviewed pleadings, stayed updated about the litigation, and reviewed and approved the Settlement. Barnow Decl. ¶¶ 37. The Settlement would not have been possible without the effort and commitment of the Plaintiffs, who sacrificed their time and put their name on the line for the sake of the Class. *Id.* ¶¶ 38. Their commitment is notable given the modest size of their personal financial stakes in the matter. *See Van Vranken*, 901 F. Supp. at 299 (“In exchange for his participation, [named plaintiff] will not receive great personal benefit. He owns a moderately sized truck stop and his claim makes up only a tiny fraction of the common fund.”).

V. CONCLUSION

The Court should approve the payment of attorneys’ fees, costs, and expenses to Missouri Class Counsel and award incentive awards to Class Representatives.

Dated: August 1, 2022

Respectfully submitted,

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Missouri Class Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 1st day of August, 2022, via the Court's Electronic Filing System upon all counsel of record herein.

/s/ John F. Garvey
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