IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

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| SUZANNE RESTIVO-CONLEY, individually and on behalf of all others similarly situated,<br><br>Plaintiff,<br>vs.<br><br>SOUTHERN ORTHOPEDIC ASSOCIATES, S.C. D/B/A ORTHOPAEDIC INSTITUTE OF WESTERN KENTUCKY AND SOUTHERN ORTHOPEDIC ASSOCIATES, L.L.C. D/B/A ORTHOPAEDIC INSTITUTE OF WESTERN KENTUCKY,<br><br>Defendant. | ) | Case No.: 2022LA77 |

**MOTION AND MEMORANDUM IN SUPPORT OF APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARD FROM SETTLEMENT FUND**

In conjunction with the final approval hearing scheduled for February 13, 2024, Plaintiffs respectfully move the Court to approve the attorneys' fees, expenses, and service awards contemplated by the proposed class action Settlement Agreement (the "Settlement") that the parties reached with the help of a neutral third-party mediator and that the Court previously granted preliminary approval to.[1] The Settlement provides for Defendants to pay $660,000.00 into a non-reversionary Settlement Fund to be used to provide Class Members with identity theft protection services and to pay claims for actual losses caused by the Data Incident at the heart of this litigation, as well as to pay attorneys' fees, expenses, and service awards. In conjunction with final approval, the Court should approve the requested fees (one-third of the Fund), litigation expenses ($13,022.69), and service awards ($2,500 to each of three plaintiffs) because those amounts are reasonable and in line with amounts awarded in similar litigation.

[1] Plaintiff is filing this motion at this time so that it can be posted to the Settlement Website in advance of the January 29, 2024, deadline for Class Members to file any objections, but it should be heard in conjunction with the final approval hearing scheduled for February 13.

## FACTS

### I. Plaintiffs sue Defendants over the compromise of personal health information and personally identifiable information resulting from the Data Incident.

On June 23, 2022, Plaintiff Suzanne Restivo-Conley filed a Class Action Complaint in this Court against SOA on behalf of a class of Illinois patients. The Complaint alleged that on December 20, 2021, SOA began to provide notice that between June 24, 2021, and July 8, 2021, cybercriminals had accessed SOA's patients' personal health information ("PHI") and personally identifiable information ("PII"), including names and Social Security numbers of 106,910 patients (the "Data Incident"). The Complaint alleged that SOA's action with respect to the Data Breach gave rise to claims by patients for negligence, breach of contract, unjust enrichment, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1 et seq., breach of fiduciary duty, and invasion of privacy.

On October 5, 2022, SOA filed an Answer and Affirmative Defenses to the Complaint in which it denied all liability and requested entry of judgment in its favor, as well as asserted affirmative defenses that Plaintiff Restive-Conley lacked standing and was barred by the economic loss doctrine as to the claim for negligence.

On October 26, 2022, Plaintiff Restive-Conley filed her reply to SOA's Affirmative Defenses.

Meanwhile, on August 16, 2022, Plaintiff Melinda Fleet filed a Class Action Complaint in the United States District Court for the Western District of Kentucky against Southern Orthopedic Associates, P.S.C. d/b/a Orthopaedic Institute of Western Kentucky on behalf of a nationwide class and Kentucky subclass relating to the same Data Incident negligence and alleging claims for breach of implied contract, breach of fiduciary duty, violation of the Kentucky Consumer Protection Act, KRS 367.110 et seq., and invasion of privacy.

On October 12, 2022, Southern Orthopedic Associates, P.S.C. filed a motion to dismiss Plaintiff Fleet's Class Action Complaint.

On December 2, 2022, Plaintiff Fleet and Plaintiff Christiansen filed a First Amended Class Action Complaint that added an additional Plaintiff, Sally Christiansen and brought claims on behalf of a nationwide class and Kentucky and Illinois subclasses relating to the same Data Incident and bringing the same claims with an additional claim under the Illinois Consumer Fraud Act, 815 ILCS § 505/1 et seq.

On January 13, 2023, Southern Orthopedic Associates, P.S.C. filed a partial motion to dismiss the First Amended Class Action Complaint ("FAC"), on February 22, 2023, Plaintiff Fleet and Plaintiff Christiansen filed a response, and on March 7, 2023, Southern Orthopedic Associates, P.S.C. filed a reply.

## II. The parties mediate and thereafter reach an agreement to resolve the litigation, subject to Court approval.

Plaintiff Restivo-Conley, Plaintiff Fleet, and Plaintiff Christiansen agreed to coordinate to discuss potential resolution of their cases relating to the Data Incident, and on May 25, 2023, Plaintiffs and SOA engaged in a full-day mediation with retired judge and mediator, the Honorable Wayne R. Andersen, of JAMS. Despite the parties' efforts, no agreement was reached at the mediation, but the next day Judge Andersen made a mediator's proposal to resolve the case, to be accepted or rejected by June 16, 2023. Both parties accepted the mediator's proposal, subject to negotiating a final detailed settlement agreement and receiving Court approval of the settlement. Following acceptance of the mediator's proposal, counsel for the parties in the federal court action in Kentucky jointly moved to stay the federal court action pending the approval of the Settlement in this Court. On July 7, 2023, the federal court granted the joint motion to stay the case.

## III. The proposed Settlement provides substantial relief to the Settlement Class.

Under the terms of the Settlement, in exchange for a release of claims relating to the Data Incident, Defendants will pay $660,000.00 into a non-reversionary Settlement Fund. Settlement § 1.35. The Settlement contemplates that one-third will be paid as attorneys' fees to Class Counsel, plus reasonable expenses, and that each of the three Plaintiff will receive a $2,500 service award. The Net Settlement Fund will then be used to provide Class Members who submit valid claims with: (1) one year of single-bureau credit monitoring services with $1,000,000.00 in identity theft protection services; (2) reimbursement of up to $350.00 per Class Member for ordinary losses resulting from the Data Incident, such as bank fees, fees for credit monitoring, and up to 4 hours of lost time (at $20/hour) attributable to dealing with the Data Incident; (3) reimbursement of up to $5,000.00 for extraordinary losses resulting from the Data Incident, such as unreimbursed fraud or misuse. *Id.* §§ 3.1–3.2. If money remains in the Settlement Fund, it will be used to increase the benefits to the Class, such as by extending the period for credit monitoring, or it will be paid on a *cy pres* basis to a charity recommended by Class Counsel and approved by the Court. *Id.* § 3.6. In addition, Defendants will, at their own cost, implement security measures designed to protect against future data breaches. *Id.* § 3.3. As part of the Settlement, Defendants also agreed to certification of the Settlement Class, defined as: All persons whose Private Information was compromised in the Data Breach. Settlement §§ 1.32, 2.

## IV. The Court grants preliminary approval to the Settlement.

On October 31, 2023, the Court entered the Preliminary Approval Order granting preliminary approval to the Settlement. In that order, the Court certified the Settlement Class and found that "the terms of the Settlement are within the range of a fair, reasonable, and adequate settlement between the Settlement Class and Defendant under the circumstances of this case." Preliminary Approval Order ¶¶ 3–4. The Court approved the form and method of providing

notice to the Class Members, set deadlines for Class Members to object or opt out, and scheduled a final approval hearing. *Id.* ¶¶ 5–8.

## LEGAL STANDARD

In conjunction with final approval of the Settlement, and in recognition of the efforts and benefits achieved by Class Counsel and the Class Representatives on behalf of the Settlement Class, the Court should award the requested payments from the Settlement Fund of reasonable attorneys' fees, expenses, and service awards.

### I. Courts commonly award attorneys' fees of one-third of the value of a class-action settlement.

"[L]awyer[s] who recover[ ] a common fund . . . [are] entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)[2]; *see also Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 243–44, 659 N.E.2d 909, 914 (1995); *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007). "[T]he circuit court is vested with the discretionary authority to choose the percentage-of-the-award method or the lodestar method to determine the amount of fees to be granted plaintiffs' counsel in common fund class action litigation." *Brundidge*, 168 Ill. 2d at 243–44, 659 N.E.2d at 914.

"Although courts . . . have the discretion to use either a percentage of the fund or lodestar methodology, . . . the percentage method is employed by the vast majority of courts" both federally and state-by-state throughout the country. *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *7 (S.D. Ill. Dec. 16, 2018) (citation omitted); *c.f. Beesley v. Int'l Paper Co.*, No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014)

[2] "It is settled that [Illinois courts] may consider federal case law for guidance on class action issues because the Illinois class action statute is patterned on Rule 23 of the Federal Rules of Civil Procedure." *Ballard RN Ctr., Inc. v. Kohll's Pharmacy & Homecare, Inc.*, 2015 IL 118644, ¶ 40, 48 N.E.3d 1060, 1068 (citations omitted).

("When determining a reasonable fee, the Seventh Circuit Court of Appeals uses the percentage basis rather than a lodestar or other basis."). Courts have expressed a preference for the "percentage of the recovery" method "because of its relative simplicity of administration." *Florin*, 34 F.3d at 566. The "percentage of the recovery" approach also has the advantage that it "award[s] counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton*, 504 F.3d at 692 (citing *In re Synthroid Mktg. Litig. ("Synthroid I")*, 264 F.3d 712, 718 (7th Cir. 2001)); *accord Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011) ("[T]he district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys.").[3]

The percentage method makes sense because "it is essentially unheard of for sophisticated lawyers to take on a case of this magnitude and type on any basis other than a contingency fee, expressed as a percentage of the relief obtained." *Hale* 2018 WL 6606079, at*7 (quotation omitted). "Thus, where, as here, the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the market rate." *Id.* (internal quotations omitted) (quoting *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (emphasis in original)).

[3] In addition, "[t]he use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive." *Will v. Gen. Dynamics Corp.*, No. 06-698-GPM, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) (citing *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979–980 (7th Cir. 2003) ("The client cares about the outcome alone" and class counsel's efficiency should not be used "to reduce class counsel's percentage of the fund that their work produced."); *In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 948 n. 10 (N.D.Ill.2001) ("To view the matter through the lens of free market principles, [lodestar analysis] (with or without a multiplier) is truly unjustified as a matter of logical analysis."); *Gehrich v. Chase Bank USA*., 2016 WL 806549 *13 (N.D. Ill. March 2, 2016) ("The central consideration is what class counsel achieved for the class rather than how much effort class counsel invested in the litigation"); *Silverman v. Motorola*, No. 07 C 4507, 2012 WL 1597388 *4 (N.D. Ill. 2012), *aff'd* 739 F.3d 956 (7th Cir. 2013) (declining to consider lodestar).

"'The normal rate of compensation in the market [is] 33.33% of the common fund recovered' because the class action market commands contingency fee agreements and the class counsel accepts a substantial risk of nonpayment." *George v. Kraft Foods Global, Inc.*, No. 1:08-cv-3799, 2012 WL 13089487, at *2 (N.D. Ill. Jun. 26, 2012). And a one-third fee is common across the country. *See, e.g.*, *Hale*, 2018 WL 6606079, at *10 ("Courts within the Seventh Circuit, and elsewhere, regularly award percentages of 33.33% or higher to counsel in class action litigation."); *Gaskill v. Gordon*, 160 F.3d 361, 362–63 (7th Cir. 1998) (noting that typical contingency fees are between 33% and 40%) (citation omitted); *Kolinek v. Walgreen Co*., 311 F.R.D. 483, 500 (N.D. Ill. 2015) (recognizing that "courts in this circuit regularly allow attorneys to recoup one-third of the first $10 million of the class action settlement fund" and rejecting request by objecting class members to utilize the lodestar approach); *Pavlik v. FDIC*, No. 10-816, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *Coleman v. Sentry Ins. A Mut. Co.*, No. 15-CV-1411-SMY-SCW, 2016 WL 6277593, at *3 (S.D. Ill. Oct. 27, 2016) (awarding one-third of the common fund and noting that "Class Counsel has shown the Court that they have routinely been awarded a contingent 33 1/3% (and in some cases more) of a Settlement Fund").[4] This

[4] *See also Martin v. Caterpillar, Inc.*, No. 07-1009, 2010 WL 11614985 (C.D. Ill. Sept. 10, 2010) (one-third fee); *Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990, 997 (N.D. Ind. 2010) (one-third fee); *Heekin v. Anthem, Inc.*, No. 1:05-CV-01908-TWP, 2012 WL 5878032, at *3 (S.D. Ind. Nov. 20, 2012) (awarding 33.3% of the common fund of $90 million); *In re Guidant Corp. ERISA Litig.,* No. 05-cv-1009, slip op. at 2 (S.D. Ind. Sept. 10, 2010) (38% of the common fund); *Campbell v. Advantage Sales & Mktg. LLC,* No. 09–01430, 2012 WL 1424417, at *2 (S.D. Ind. Apr. 24, 2012) (awarding one-third of recovery as attorneys' fees); *Williams v. Rohm & Haas Pension Plan*, No. 4:04-cv-0078-SEB-WGH, 2010 WL 4723725 (S.D. Ind. Nov. 12, 2010) (awarding one-third of recovery ($43.5 million) as attorneys' fees); *Retsky Family Ltd. P'ship*, No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered."); *In re Lithotripsy Antitrust Litig.*, No. 98-8394, 2000 WL 765086, at *2 (N.D. Ill. June 12, 2000) (noting that "[m]any courts in this district have utilized" the percentage method to set fees in class actions; 33.3% of the fund plus expenses is well within the generally accepted range of the attorneys fee

percentage is applied to the total value of the settlement. *Hash v. First Fin. Bancorp*, No. 1:20-cv-01321-RLM-MJD, slip op. at 7 (S.D. Ind. Nov. 22, 2021), ECF No. 91 (collecting cases); *Coleman v. Alaska USA Fed. Credit Union*, No. 3:19-cv-00229-HRH, slip op. at 17–18 (D. Alaska Nov. 17, 2021), ECF No. 93 ("The Court considers both cash and cash equivalents, such as debt forgiveness of the Uncollected Retry Fees, when determining the [settlement value]").

The award of a reasonable fee also "is informed by a number of factors," including: (1) the risk of non-payment at the outset of the case; (2) the caliber of Class Counsel's performance; and (3) information from other cases, including fees awarded in comparable cases. *Hale*, 2018 WL 6606079, at *8 (citing *Synthroid I*, 264 F.3d at 719).

## II. Courts award reimbursement of reasonable litigation expenses from a common fund.

In addition to fees, "[i]t is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses." *Hale*, 2018 WL 6606079, at *17 (citing *Beesley*, 2014 WL 375432, at *3 (citing *Boeing*, 444 U.S. at 478)). These expenses "include[] such things as expert witness costs; computerized research; court reports; travel expense; copy, phone and facsimile expenses and mediation." *Id.* (citation omitted).

## III. Courts commonly approve class representative service awards of $10,000 to $25,000 or more.

Finally, in recognition that a class representative has taken his or her own time and has achieved a settlement that benefits the many other absent class members, courts often approve payment of a class representative service award. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 2009). These awards serve to incentivize persons to seek vindication of rights through a class

awards"); *Goldsmith v. Tech. Solutions Co.*, No. 92-4374, 1995 WL 17009594, at *8 (N.D. Ill. Oct. 10, 1995) (noting that courts in the Seventh Circuit award attorneys' fees "equal to approximately one-third or more of the recovery").

action and consider the actions the class representative has taken to protect the interests of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiffs expended in pursuing the litigation. *Id.* Class representative service awards of $10,000 to $25,000 or more are common. *See, e.g.*, *id.* (affirming $25,000 service award); *Hale*, 2018 WL 660679, at *15 ($25,000 service award); *Spano v. Boeing Co.*, No. 06-cv-743-NJR-DGW, 2016 WL 3791123, at *4 (Mar. 31, 2016) (awarding $25,000 to two representatives and $10,000 to a third representative); *Abbott v. Lockheed Martin Corp.*, No. 06-CV-701-MJR-DGW, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (awarding $25,000); *Beesley*, 2014 WL 375432, at* 4 (awarding $15,000 and $25,000); *Will v. Gen. Dynamics Corp.*, No. CIV. 06-698-GPM, 2010 WL 4818174, at *4 (S.D. Ill. Nov. 22, 2010) ("Awards of $25,000 for each Plaintiff are well within the ranges that are typically awarded in comparable cases."); *Lively v. Dynegy, Inc.*, No. 05-CV-0063-MJR, 2008 WL 4657792 (S.D. Ill. Sept. 30, 2008) (awarding $10,000 to each of three representatives); *Morlan v. Universal Guar. Life Ins.*, No. Civ. 99-274-GPM, 2003 WL 22764868 (S.D. Ill. Nov. 20, 2003) (awarding $25,000, $20,000, $20,000 and $5,000 respectively to class representatives); *Spicer v. Chicago Board Options Ex., Inc.*, 844 F. Supp. 1226 (N.D. Ill. 1993) (collecting cases awarding incentive fees ranging from $5,000 to $100,000; awarding $10,000 each to named plaintiffs).

## DISCUSSION

### I. The Court should award Class Counsel attorneys' fees of one-third of the Settlement Fund.

The Court should grant Class Counsel an award of attorneys' fee from the Settlement Fund in the amount of $220,000. This amount represents one-third of the Settlement Fund, not taking into account the added value of Defendant improving its data security to protect Class Members. The requested fee is the one-third percentage routinely awarded by courts across the

country. *See supra*, at pp. 7–7 (collecting cases awarding one-third fees). In addition, the relevant factors all support the requested fee: (1) the risk of non-payment at the outset of the case was substantial as the matter was entirely contingent-fee based and there were significant risks and uncertainties of prevailing on the claims to achieve a recovery; (2) Class Counsel performed in a diligent and efficient manner to achieve a settlement that provides for substantial relief; and (3) one-third of the settlement is the amount of fees that have been awarded in comparable cases. Exhibit 1, Joint Declaration of Class Counsel ("Joint Decl.") ¶¶ 6–7.

## II. The Court should grant Class Counsel reimbursement of litigation expenses in the amount of $13,022.69.

The Court should likewise grant Class Counsel reimbursement of $13,022.69 in litigation expenses. The majority of the expenses consist of the costs of mediation ($9,258.89), Westlaw charges ($2,257.70), and filing and pro hac vice fees ($1,214.50), with the remainder being for copying, postage, and similar ancillary expenses. Joint Decl. ¶ 8. These are routine litigation costs, and Class Counsel had every incentive to only incur reasonable expenses and to keep these costs low because repayment of them was contingent on the outcome of the lawsuit. *Hale*, 2018 WL 6606079, at *17.

## III. The Court should approve service awards to the Class Representatives.

The Court should also award the Class Representatives the service awards of $2,500 each. Before and during the litigation and settlement, the Class Representatives regularly consulted with Class Counsel in prosecuting the lawsuits, provided documents and information for the suits, and participated in the decision to accept the proposed Settlement, overall taking their own valuable time to represent the interests of the Class, which ultimately resulted in the Settlement that will benefit all Class Members. Joint Decl. ¶ 9. The result achieved by the lawsuit and Settlement has been substantial and justifies the requested service awards, which are well within the range of

awards often granted. *See supra,* at pp. 13–14 (listing cases awarding upwards of $25,000–$100,000 service awards).

## CONCLUSION

For the foregoing reasons, the Court should grant the Motion for Approval of Attorneys' Fees, Expenses, and Service Awards from Class Action Settlement.

Dated: January 12, 2024

/s/ *David Cates*
David Cates (#6289198)
THE CATES LAW FIRM, LLC
216 West Pointe Drive, Suite A
Swansea, IL 62226
Tel: (618) 277-3644
dcates@cateslaw.com

J. Gerard Stranch, IV*
Peter J. Jannace*
BRANSTETTER, STRANCH & JENNINGS PLLC
223 Rosa L. Parks Avenue, Suite 200
Nashville, TN 37203
Tel: (615) 254-8801
gerards@bsjfirm.com
peterj@bsjfirm.com

Lynn A. Toops, *pro hac vice* (#6333743)
Lisa M. La Fornara*
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
Tel: (317) 636-6481
ltoops@cohenandmalad.com
llafornara@cohenandmalad.com

William B. Federman
FEDERMAN & SHERWOOD
10205 North Pennsylvania Avenue
Oklahoma City, OK 73120
Tel: (405) 235-1560
WBF@federmanlaw.com

Lori G. Feldman
GEORGE FELDMAN MCDONALD, PLLC
745 5th Avenue, Suite 500
Tel: (646) 354-6534
lfeldman@4-justice.com