

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

JONATHAN PHELPS, individually and on : Case No: 6:22-cv-00106
behalf of all others similarly situated, :
 :
 : Judge Claria Horn Boom
Plaintiff, : Magistrate Hanly A. Ingram
 :
 :
v. :
 :
 : PLAINTIFF'S MOTION FOR
TOYOTETSU NORTH AMERICA, : ATTORNEYS' FEES, EXPENSES
 : AND CLASS REPRESENTATIVE
Defendant. : SERVICE AWARD

Under Fed. R. Civ. P. 23(e), Plaintiff Jonathan Phelps (“Plaintiff”) and Class Counsel respectfully move this Court for an order awarding (1) \$133,333.33 for attorneys’ fees (one-third (1/3) of the \$400,000 Settlement Fund); (2) \$1,234.73 for reimbursement of costs and expenses; and (3) a Service Award of \$5,000 for the Class Representative. The grounds for the Court’s potential granting of this Motion are included in the accompanying Memorandum in Support along with the Declaration of Terence R. Coates in Support of Plaintiff’s Motion for Attorneys’ Fees, Expenses, and Class Representative Service Award (attached as **Exhibit 1**) and Declaration of Class Representative Jonathan Phelps in Support of Plaintiff’s Motion for Attorneys’ Fees, Expenses, and Class Representative Service Award and Final Approval of Class Action Settlement (attached as **Exhibit 2**). A proposed order for this Motion will be submitted as a collective proposed order with the upcoming Motion for Final Approval of Class Action Settlement. Defendant Toyotetsu North America does not oppose this Motion.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2023, I served a copy of the foregoing via electronic filing in the ECF system.

/s/ Terence R. Coates
Terence R. Coates

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I. INTRODUCTION

Pursuant to the Settlement Agreement [Doc. 37-2]¹ preliminarily approved by the Court on April 25, 2023 [Doc. 39], Class Counsel respectfully move for an order awarding (1) \$133,333.33 for attorney fees (one-third (1/3) of the \$400,000 Settlement Fund); (2) \$1,234.73 for reimbursement of Class Counsel's reasonable costs and expenses; and (3) a Service Award of \$5,000 for the Class Representative. As demonstrated herein, the fee requested by Class Counsel is reasonable under the "percentage of the fund" method, which is the preferred approach for determining a reasonable fee in a common fund case such as this one. The requested fee percentage is 33.33%, which is well within the range typically approved in the Sixth Circuit. Further, the requested fee is supported by the discretionary lodestar cross-check analysis.

II. BACKGROUND

The case arises from an October 2021 cybersecurity incident involving personally identifiable information ("PII") (the "Data Breach") experienced by Toyotetsu America, Inc.

¹ All capitalized terms not defined herein have the same meaning as in the Settlement Agreement.

(“Toyotetsu” or “Defendant”). Plaintiff initiated this nationwide class action on behalf of himself and a putative class of “All persons Toyotetsu North America identified as being among those individuals impacted by the Data Breach, including all who were sent a notice of the Data Breach.” Plaintiff’s First Amended Class Action Compl. (“CAC”) [Doc. 25], ¶ 121. Plaintiff and Class Members include current and former employees of Defendant and its acquired entities, their dependents, and other individuals affiliated with Defendant whose PII was allegedly compromised in the Data Breach. In response to the Data Breach, Defendant sent a Notice Letter (“Notice Letter”) to each potentially impacted individual providing a description of the type of PII involved, which may have potentially included: names, addresses, dates of birth, and Social Security numbers.

On May 13, 2022, Plaintiff Jonathan Phelps’ state court complaint was removed to this Court for claims arising from the Data Breach. Plaintiff filed his CAC on September 16, 2022. On April 25, 2023, the Court entered an order appointing Terence R. Coates, Jonathan T. Deters, and Dylan J. Gould of the law firm Markovits, Stock & DeMarco, LLC and Joseph B. Venters of Venters Law Office Class Counsel for the Plaintiff. In his CAC, Plaintiff alleged individually and on behalf of the Class that, as a direct result of the Data Breach, Plaintiff and Class Members suffered numerous injuries and would likely suffer additional harm in the future. Plaintiff’s claims for alleged damages and remedies included the following categories of asserted harms: (i) lost or diminished value of PII; (ii) out-of-pocket expenses associated with the prevention, detection, and recovery from identity theft, tax fraud, and/or unauthorized use of the PII; (iii) lost opportunity costs associated with attempting to mitigate the actual consequences of the Data Breach, including but not limited to lost time; (iv) the loss of time needed to take appropriate measures to avoid unauthorized and fraudulent charges; change usernames and passwords on accounts; investigate,

correct and resolve unauthorized debits; deal with spam messages and e-mails received subsequent to the Data Breach; (v) charges and fees associated with fraudulent charges on accounts to the extent fairly traceable to the Data Breach; and (vi) the continued and increased risk to Plaintiff's and class member PII, which allegedly remains in Toyotetsu's possession and is contended to be subject to further unauthorized disclosures. Plaintiff, individually and on behalf of those similarly situated, asserted claims for (i) negligence; (ii) invasion of privacy; (iii) unjust enrichment; and (iv) breach of implied contract. Plaintiff also sought injunctive relief, declaratory relief, monetary damages, and all other relief as authorized in equity or by law.

The Settlement Agreement is the product of extensive arm's-length negotiations over the course of several months with defense attorneys from Lewis, Brisbois, Bisgaard & Smith – a law firm with substantial experience handling data breach class action defenses. Before entering into this Settlement Agreement, the parties engaged in informal discovery during which Defendant produced information about the manner and mechanism of the Data Breach, the number of impacted individuals broken down by state, Defendant's notice program and incident response, and security enhancements implemented by Defendant following the Data Breach.

Under the proposed settlement, Defendant will pay \$400,000 to establish the non-reversionary Settlement Fund which shall be used to pay benefits to Class Members, settlement administration and class notice costs, attorneys' fees and expense reimbursement, and service award as approved by the Court.

III. CLASS COUNSEL ATTORNEYS' FEES REQUEST IS REASONABLE

Rule 23(h) of the Federal Rules of Civil Procedure expressly authorizes a court to award "reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Toyotetsu did not agree to pay a specific amount in attorney's fees and costs and the

Settlement Agreement does not contain a “clear sailing” provision. Under the Settlement, Toyotesu agreed not to oppose Class Counsel’s request for “an award of attorneys’ fees and costs in an amount not to exceed 1/3 of the Settlement Fund.” Settlement Agreement, ¶ 79.

“When awarding attorney’s fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved.” *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). The Sixth Circuit “require[s] only that awards of attorneys’ fees in common fund cases be reasonable under the circumstances.” *Id.* at 516.

“District courts apply a two-part analysis to assess the reasonableness of an attorney fee petition.” *O’Donnell v. Fin. Am. Life Ins. Co.*, No. 2:14-cv-1071, 2018 WL 11357092, at *5 (S.D. Ohio Aug. 24, 2018). First, the court must determine the appropriate method to calculate the fees in common fund cases, using either the percentage of fund or the lodestar approach. *Peck v. Air Evac EMS, Inc.*, CV 5:18-615-DCR, 2020 WL 354307, at *7 (E.D. Ky. Jan. 21, 2020) citing *Rawlings*, 9 F.3d 513 at 517. Second, the Court must consider six factors to assess the reasonableness of the fee. *Id.* citing *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996). The Court should provide a concise and clear explanation of the reasoning for adopting a particular method and the factors considered to arrive at the fee. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Rawlings*, 9 F.3d at 516. Here, Class Counsel’s request for attorneys’ fees is appropriately assessed using the percentage of the fund analysis.

A. Class Counsel’s Attorneys’ Fee Request is Fair and Reasonable Under a Common Fund Analysis

Courts have “the historic power of equity” to permit a party recovering a fund for the benefit of others to recover his costs, including his attorney fees, from the fund itself or from the other parties enjoying the benefit. *Alyeska Pipeline SVC Co. v. Wilderness Soc’y*, 421 U.S. 240,

257 (1975). Indeed, “a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This is known as the “common fund doctrine” and it is premised upon the principal “that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant’s expense.” *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1277 (S.D. Ohio 1996) (citing *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 164 (1939); *Boeing*, 444 U.S. at 478. “Kentucky law also recognizes the common fund doctrine.” *Appalachian Land Co. v. Eq. Prod. Co.*, 7:08-CV-139-KKC, 2018 WL 3097318, at *6 (E.D. Ky. June 22, 2018) citing *King v. City of Covington*, 160 S.W.2d 13, 14 (Ky. 1942).

“It is well established that a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.” *New Eng. Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006) citing *Boeing Co. v. Van Gemert*, 444 U.S. at 478; *see also Harsh v. Kalida Mfg., Inc.*, No. 3:18-CV-2239, 2021 WL 4145720, at *7 (N.D. Ohio Sept. 13, 2021); *Connectivity Sys. Inc. v. Nat’l City Bank*, No. 2:08-CV-1119, 2011 WL 292008, at *12 (S.D. Ohio Jan. 26, 2011) (because “counsel’s efforts create a substantial common fund for the benefit of the class, they are, therefore, entitled to payment from the fund based on a percentage of that fund”); *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 900 (S.D. Ohio 2001). Pursuant to the proposed settlement, Toyotetsu will create a \$400,000 common fund for the benefit of the Class.

In the Sixth Circuit, the “percentage of the fund has been the preferred method for common fund cases, where there is a single pool of money and each class member is entitled to a share.” *Lott v. Louisville Metro Gov’t*, No. 3:19-CV-271-RGJ, 2023 WL 2562407, at *3 n.4 (W.D. Ky. Mar. 17, 2023) (quotation omitted); *Robles v. Comtrak Logistics, Inc.*, No. 15-CV-2228, 2022 WL

17672639, at *10 (W.D. Tenn. Dec. 14, 2022) (“The percentage-of-the-fund method, however, tends to be favored over the lodestar approach by courts in this circuit.”); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 789 (N.D. Ohio 2010) (“percentage of the fund has been the preferred method for common fund cases”).

In the Sixth Circuit, attorneys’ fees awarded pursuant to the percentage of the fund method “typically range from 20 to 50 percent of the common fund created.” *Fruit of the Loom, Inc.*, 234 F.R.D. at 633; *Lott*, 2023 WL 2562407, at *3; *Connectivity Sys. Inc.*, 2011 WL 292008, at *12 (same); *Brotherton*, 141 F. Supp. 2d at 902 (same).² Here, Plaintiff requests an award of attorneys’ fees equal to one-third (1/3) of the common fund created. *See, e.g., Ware v. CKF Enterprises, Inc.*, No. CV 5:19-183-DCR, 2020 WL 2441415, at *15 (E.D. Ky. May 12, 2020) (“one-third of the common fund is a reasonable fee in this case”); *Hunter v. Booz Allen Hamilton Inc.*, No. 2:19-CV-00411, 2023 WL 3204684, at *8 (S.D. Ohio May 2, 2023) (“When using the percentage-of-the-fund method, courts in the Sixth Circuit generally approve of awards that are one-third (1/3) of the total settlement.”); *Zilinsky v. LeafFilter N., LLC*, No. 2:20-CV-6229, 2023 WL 2696554, at *6 (S.D. Ohio Mar. 29, 2023) (awarding attorneys’ fees of “one-third of the total Settlement Fund”); *Love v. Gannett Co.*, No. 3:19-cv-296, 2021 WL 4352800, at *5 (W.D. Ky. Sept. 24, 2021) (approving 33.85% of fund as reasonable attorneys’ fees); *Dillworth v. Case Farms Processing*,

² *See also In re Telectronics Pacing Systems, Inc.*, 137 F. Supp. 2d 1029, 1046 (S.D. Ohio 2001) (“the range of reasonableness ... has been designated as between twenty to fifty percent of the common fund”); *In re S. Ohio Corr. Facility*, 173 F.R.D. 205, 217 (S.D. Ohio 1997) (“[t]ypically, the percentage awarded ranges from 20 to 50 percent of the common fund”), *rev’d on other grounds*, 24 F. App’x 520 (6th Cir. 2001); *Thompson v. Seagle Pizza, Inc.*, No. 3:20-CV-16-DJH-RSE, 2022 WL 1431084, at *10 (W.D. Ky. May 5, 2022) (same); *Green v. Platinum Restaurants Mid-Am. LLC*, No. 3:14-CV-439, 2022 WL 1240432, at *3 (W.D. Ky. Apr. 27, 2022) (same).

Inc., No. 5:08-CV-1694, 2010 WL 776933, at *7 (N.D. Ohio Mar. 8, 2010) (approving fee equal to 33% of settlement fund).

The Sixth Circuit has adopted the following factors (often referred to as the *Ramey* factors) to consider when determining what constitutes a reasonable fee in a common fund case:

- 1) the value of the benefit rendered to the plaintiff class (i.e. the results achieved);
- 2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;
- 3) whether the services were undertaken on a contingent fee basis;
- 4) the value of the services on an hourly basis [the lodestar cross-check];
- 5) the complexity of the litigation; and,
- 6) the professional skill and standing of counsel involved on both sides.³

Each factor supports Class Counsel's fee request here.

1. The Results Achieved in this Litigation

The first *Ramey* factor requires the Court to evaluate the benefit of the settlement to the Class and is often cited as the most important factor. *Bowling*, 922 F. Supp. at 1280. The Settlement has a total value of \$400,000, and provides a range of valuable benefits for the Class Members: Class Members are eligible for a Pro Rata Cash Payment of \$250 or can receive compensation for out-of-pocket losses up to \$5,000, upon submission of a claim and supporting documentation. Settlement Agreement, ¶ 52.

Furthermore, the recovery per Class Member in this case of roughly \$32 per person (\$400,000 for roughly 12,453 Class Members) exceeds the amount recovered in other similar data breach class action settlements. *See* Declaration of Terence R. Coates in Support of Plaintiff's

³ *Ware v. CKF Enterprises, Inc.*, No. CV 5:19-183-DCR, 2020 WL 5087766, at *6 (E.D. Ky. Aug. 26, 2020) citing *Bowling*, 102 F.3d at 780.

Motion for Attorneys’ Fees, Expenses, and Class Representative Service Award (“Coates Decl.”), ¶ 10 (**Exhibit 1**). The following chart emphasizes that the per class member recovery of over \$32 to person is substantially higher than the per person recovery in other data breach class action cases involving common fund settlements:

Case Name	Case Number	Settlement Amount	Class Size	Per Person
<i>Reynolds v. Marymount Manhattan College</i>	No. 1:22-cv-06846 (S.D.N.Y.)	\$1,300,000	191,752	\$6.78
<i>Julien v. Cash Express, LLC</i>	No. 2022-CV-221 (Putnam Cty., Tenn.)	\$850,000	106,000	\$8.02
<i>Tucker v. Marietta Area Health Care</i>	No. 2:22-CV-00184 (S.D. Ohio)	\$1,750,000	216,478	\$8.08
<i>Magliaccio v. Parker Hannifin Corp.</i>	No. 1:22-CV-00835 (N.D. Ohio)	\$1,750,000	115,843	\$15.10
<i>Lutz v. Electromed, Inc.</i>	No. 21-cv-2198-KMM-DTS (D. Minn.)	\$825,000	47,000	\$17.55
<i>Abrams v. Savannah College of Art & Design</i>	No. 1:22-cv-04297 (N.D. Ga.)	\$375,000	16,890	\$22.20
<i>Phelps v. Toyotetsu North America</i>	No. 6:22-cv-00106 (E.D. Ky.)	\$400,000	12,453	\$32.12

Id., ¶ 10.

This chart resoundingly supports that the \$400,000 Settlement Fund is a tremendous recovery for the Class in this case. The Settlement is further bolstered by the fact that Toyotetsu possessed formidable defenses to the merits of the claims at issue, both at the trial court level and on appeal. Toyotetsu has denied liability and has consistently maintained that Plaintiff’s allegations lack merit. While Plaintiff is confident in his claims, Toyotetsu could appeal a favorable judgment in the absence of settlement which would delay or even nullify any benefit to members of the Class.

Given the risk of proceeding, the value obtained from bringing, prosecuting, persevering, and settling this litigation should not be underestimated. Moreover, in addition to the inherent risk

as to the outcome, achieving a result that resolves this litigation *now* is valuable in that it avoids the certain delay of continuing litigation with the possibility of appeals. Any delay in the process could be of great detriment to the Class. *See Davis v. Omnicare, Inc.*, 5:18-CV-142-REW, 2021 WL 1214501, at *9 (E.D. Ky. Mar. 30, 2021) (“All of this signifies risk and indeterminacy, things that obviously affect the reasonableness of a brokered result. The class and collective members faced a daunting gauntlet of hurdles, and that contributes to the reasonableness of an arms’ length, risk reflective settlement”); *Connectivity Sys. Inc.*, 2011 WL 292008, at *4 (“Given the time value of money, a future recovery, even one greater than the proposed Settlement Amount, may be less valuable to the Settlement Class than receiving the benefits of the Settlement Agreement now.”). The results achieved here are substantial and timely, and support Class Counsel’s fee request.

2. The Requested Fee Provides Adequate Incentive to Undertake this Representation for the Benefit of Others

Awarding Class Counsel the requested attorneys’ fee amount provides an incentive for qualified and experienced attorneys to undertake this type of speculative and risky litigation. *Davis*, 2021 WL 1214501, at *12. Thus, “class counsel’s expenditure of time and money benefitted small claimants who lack the resources to prosecute a case of this nature.” *Hainey v. Parrott*, No. 1:02-CV-733, 2007 WL 3308027, at *3 (S.D. Ohio Nov. 6, 2007). Without counsel willing to take the risk of challenging companies like Toyotetsu, Plaintiff would have been left with no recourse since the cost to pursue his individual claims far exceeded his damages. *In re Skechers Toning Shoe Products Liab. Litig.*, 3:11-MD-2308-TBR, 2013 WL 2010702, at *9 (W.D. Ky. May 13, 2013) (“Many of the class members in this action would be financially unable to pursue the claims asserted on their own accord. Additionally, the fact that individual plaintiffs may only receive a small recovery also impedes individual efforts.”); *Myers v. Mem’l Health Sys. Marietta Mem’l Hosp.*, No. 15-CV-2956, 2022 WL 4079559, at *6 (S.D. Ohio Sept. 6, 2022) (“Society has a stake

in rewarding attorneys who achieve a result that the individual class members probably could not obtain on their own.” (quoting *Kritzer v. Safelite Sols., LLC*, No. 2:10-cv-0729, 2012 WL 1945144, at *9 (S.D. Ohio May 30, 2012)); *Karpik v. Huntington Bancshares Inc.*, No. 2:17-cv-1153, 2021 WL 757123, at *8 (S.D. Ohio Feb. 18, 2021) (“Without a class action, the individual plaintiffs would not have had a strong incentive to pursue recovery because any monetary award would have been severely outweighed by the costs to litigate their cases.”). This second factor also supports the requested attorneys’ fee award.

3. Class Counsel Undertook this Representation on a Contingent Basis

The third *Ramey* factor “stands as a proxy for the risk that attorneys will not recover compensation for the work they put into a case.” *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 765 (S.D. Ohio 2007) (citing *Bowling*, 922 F. Supp. at 1282); *see also Ware v. CKF Enterprises, Inc.*, CV 5:19-183-DCR, 2020 WL 5087766, at *6 (E.D. Ky. Aug. 26, 2020). Some courts consider the risk of non-recovery to be the most important factor in the fee determination. *Id.* (citing cases). “[C]ontingency fee arrangements indicate that there is a certain degree of risk in obtaining a recovery.” *Whitlock v. FSL Mgmt., LLC*, No. 3:10cv-00562, 2015 WL 9413142, at * 9 (W.D. Ky. Dec. 22, 2015) (quoting *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d at 1043).

Class Counsel agreed to undertake this litigation on a contingent basis. Coates Decl., ¶¶ 2, 6. Class Counsel took risk in advancing all costs (which presently total \$1,234.73),⁴ while receiving no compensation for the work they have performed over the past two years. Moreover, had there been no recovery, Class Counsel would not have been paid a fee or reimbursement for their expenses. Therefore, this factor weighs in support of Class Counsel’s fee request.

4 *Id.*, ¶ 8.

4. The Value of the Services Supports the Fee Requested

Although performing a cross-check on the percentage method using Class Counsel's lodestar is optional and solely within the Court's discretion, *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 Fed. App'x 496, 500 (6th Cir. 2011), courts may perform a lodestar cross-check to ensure counsel does not receive a windfall. *Love*, 2021 WL 4352800, at *6; *see also In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d at 764. The purpose of the exercise is "not to supplant the court's detailed inquiry into the attorney's skill and efficiency in recovering the settlement" using the percentage of the fund and *Ramey* factors, but instead merely to ensure that the fee award is still "roughly aligned with the amount of work the attorneys contributed." *Id.*

"The Court performs a lodestar cross-check by comparing the lodestar multiplier used in this case to lodestar multipliers used in similar cases." *Id.* at 767. "In contrast to employing the lodestar method in full, when using a lodestar cross-check, 'the hours documented by counsel need not be exhaustively scrutinized by the district court.'" *Id.* (quoting *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005)). This is because "the lodestar cross-check is 'not a full-blown lodestar inquiry' and a court 'should be satisfied with a summary of the hours expended by all counsel at various stages with less detailed breakdown than would be required in a lodestar jurisdiction.'" *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 n.16 (3d Cir. 2005) (quoting Report of the Third Circuit Task Force, Selection of Class Counsel, 208 F.R.D. 340, 423 (2002)).⁵

⁵ *Accord* The Manual For Complex Litigation (Fourth) § 14.122 (2004) ("the lodestar is at least useful as a cross-check . . . using affidavits and other information provided by the fee applicant"); *Milliron v. T-Mobile United States*, 423 F. App'x 131, 136 (3d Cir. 2011) ("the crosscheck is not the primary analysis in this type of case and does not entail 'mathematical precision []or bean-counting,'); *In re Cincinnati Gas & Elec. Co. Sec. Litig.*, 643 F. Supp. 148, 150 (S.D. Ohio 1986) ("Counsel have provided the Court with helpful charts summarizing the hours logged and the rate requested by each of the attorneys involved in this case.").

From May 2022 through July 7, 2023, Class Counsel and their co-counsel have spent more than 130 hours prosecuting this litigation for a lodestar total of approximately \$85,000.00. Coates Decl., ¶ 8. Notably, Class Counsel will necessarily spend substantial additional time from this point to conclusion of the case including drafting the motion for final approval, attending the final approval hearing, working with the Settlement Administrator to administer the Settlement - time that will not be reflected in this fee application. The hourly rates that form the basis of the lodestar calculation reflect the experience of Class Counsel and co-counsel and are their customary hourly rates. *Id.*, ¶ 8.

The requested \$133,333.33 fee is one-third (1/3) of the value of the \$400,000 Settlement Fund. Thus, when cross-checked, the requested fee is equivalent to the application of a modest multiplier to the lodestar of roughly 1.5. Courts within the Sixth Circuit have noted that “a multiplier of approximately 1.5” is “well within an acceptable range.” *Midland, Funding, LLC v. Brent*, No. 3:08-cv-1434, 2011 WL 3557020, at *19 (N.D. Ohio Aug. 12, 2011); *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 746-747 (6th Cir. 2005) (approving 1.75 multiplier). Furthermore, the multiplier will continue to decrease as Class Counsel remains pursuing Plaintiff’s and the Class’s interests through the distribution of Settlement benefits.

In sum, Class Counsel’s fee request is reasonable based on a percentage of the common fund, and on the discretionary lodestar cross-check.

5. The Complexity of the Litigation Supports the Requested Fee

The fifth *Ramey* factor requires the Court to consider the complexity of the case. Although nearly all class actions involve a high level of risk, expense, and complexity, this is a particularly complex class action in an especially risky area, that has very little precedent in this federal district. Data breach cases have faced substantial hurdles in making it past the pleading stage. *See, e.g., In*

re Countrywide Fin. Corp. Customer Data Sec. Breach Litig., No. 3:08-MD-01998, 2010 WL 3341200, at *6 (W.D. Ky. Aug. 23, 2010) (approving a data breach settlement in part because “proceeding through the litigation process in this case is unlikely to produce the plaintiffs’ desired results”); *Hashemi v. Bosley, Inc.*, No. CV 21-946 PSG (RAOX), 2022 WL 18278431, at *4 (C.D. Cal. Nov. 21, 2022) (noting the challenges in litigating data breach cases meant that “Plaintiffs would have faced prolonged litigation and significant obstacles as trial approached”); *Antman v. Uber Techs., Inc.*, No. 3:15-cv-01175, 2015 WL 6123054, at *11 (N.D. Cal. Oct. 19, 2015) (holding that the risk that plaintiff’s identity could be stolen was insufficient to confer standing based on a data breach exposing plaintiff’s name and driver’s license number); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 966 (S.D. Cal. 2012) (loss of personal information and allegations of a heightened risk of identity theft, without more, calls standing into question); *Hammond v. Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060 (RMB), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting cases and noting that “every court to [analyze data breach cases] has ultimately dismissed under Rule 12(b)(6) . . . or under Rule 56 following the submission of a motion for summary judgment”).

Success at class certification has also been mostly nonexistent in these cases.⁶ Even if this Court were to certify a contested class, the inherent risks attendant to trying a data breach class

⁶ See *Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686, 691 (N.D. Cal. Nov. 26, 2019) (granting motion to certify injunctive-only class, but denying motion to certify damages and issues classes in data breach class action); *Cheryl Gaston v. FabFitFun, Inc.*, No. 2:20-CV-09534-RGK-E, 2021 WL 6496734, at *3 (C.D. Cal. Dec. 9, 2021) (“data breach cases have experienced minimal success in moving for class certification”); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying class certification in data breach action); *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389 (D. Mass. 2007) (same). Cf. *In re Brinker Data Incident Litig.*, No. 3:18-cv-686-TJC-MCR, 2021 WL 1405508, at *14 (M.D. Fla. Apr. 14, 2021) (“The Court acknowledges it may be the first to certify a Rule 23(b)(3) class involving individual consumers complaining of a data breach involving payment cards....”).

action would only magnify the difficult legal questions at issue here. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *12 (N.D. Cal. Aug. 17, 2018) (“class certification was not guaranteed, in part because Plaintiffs had a scarcity of precedent to draw on”). Although Plaintiff believes he would ultimately prevail in such a trial, a verdict for the defense would be entirely possible.

To the extent the law has gradually accepted this relatively new type of litigation, the path to a class-wide monetary judgment remains unforged, particularly in the area of damages. Data breach cases are among the riskiest and uncertain of all class action litigation, making settlement the more prudent course when a reasonable deal is available.

Here, the litigation was fraught with numerous risks. While Class Counsel remain confident in Plaintiff’s claims, there is a recognized element of risk in any litigation, particularly complex and expensive data breach class litigation. *See In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (C.D. Cal. 2008) (“The risk that further litigation might result in plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees”).

6. The Professional Skill of Counsel on both sides Supports the Requested Fee

The last *Ramey* factor addresses the professional skill of counsel. Here, Class Counsel has substantial experience representing plaintiffs in data breach class actions. Indeed, Mr. Coates is a national leader in data privacy litigation. He is frequently appointed as lead counsel for plaintiffs in data breach and data privacy class action cases across the country and is a frequent speaker at national conferences for the plaintiffs. Coates Decl., ¶¶ 3-4. Toyotetsu has likewise been represented by counsel who specialize in defending data breach cases from Lewis, Brisbois,

Bisgaard & Smith, a well-respected defense law firm. Class Counsel's professionalism, experience, and skill support the requested fee.

7. The Fee Request is Supported by the Class Representative

The utilization of the common fund doctrine as a basis for the payment of attorneys' fees and expenses is employed in addition to, and independent of, the contingent fee contract between lawyer and client. Bolstering the foregoing common fund considerations, the Plaintiff supports the payment of fees and expenses as requested in the instant motion.⁷

Based upon the foregoing, a fee of \$133,333.33 representing one-third (1/3) of a \$400,000 common fund is fair and reasonable, is within the range established in the Sixth and other Circuits, and is within the range established by federal courts in Kentucky.

III. CLASS COUNSEL'S EXPENSES ARE REASONABLE

"Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket expenses and costs in the prosecution of claims, and in obtaining settlement, including but not limited to expenses incurred in connection with document productions, consulting with and deposing experts, travel and other litigation-related expenses." *In re Flint Water Cases*, 583 F. Supp. 3d 911, 932 (E.D. Mich. 2022), dismissed, 22-1187, 2022 WL 18960956 (6th Cir. Sept. 14, 2022), citing *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 534-535 (E.D. Mich. 2003). "[T]he categories of expenses for which Plaintiffs' counsel seek reimbursement are the type routinely charged to hourly fee-paying clients and thus should be reimbursed out of the settlement fund ... [including] the cost of experts and consultants ... computerized research; travel and lodging expenses; photocopying cost; filing and witness fees;

⁷ Declaration of Class Representative Jonathan Phelps in Support of Plaintiffs' Motion for Attorneys' Fees and Expenses and Final Approval of Class Action Settlement ("Phelps Decl."), ¶ 9 (**Exhibit 2**).

postage and overnight delivery; and the cost of court reporters and depositions.” *Fruit of the Loom*, 234 F.R.D. at 635 (approving expenses submitted pursuant to these categories).

The Settlement Agreement states that Class Counsel’s expenses will be capped at \$15,000.00. Class Counsel incurred \$1,234.73 in costs and expenses. Coates Decl., ¶ 8. As set forth in the Coates Declaration, each expense for which Class Counsel seeks reimbursement was necessary and directly related to this litigation. *Id.* Accordingly, Class Counsel is entitled to this expense reimbursement.

IV. THE \$5,000 SERVICE AWARD IS REASONABLE

The Settlement Agreement also provides that Class Counsel will apply to the Court for Service Award in the amount of \$5,000.00 to Plaintiff. *See* Settlement Agreement, ¶ 82. Class Counsel moves for the approval of the Service Award under principles of equity; the amount is consistent with awards granted by courts within this District. *See, e.g., Fox v. Team Goliath, Inc.*, 5:19-CV-195-JMH, 2021 WL 9748516, at *7 (E.D. Ky. Dec. 29, 2021) (service award of \$10,000 considered reasonable); *Ware*, 2020 WL 5087766, at *7 (approving a similar class representative service award of \$5,000); *Ditsworth v. P&Z Carolina Pizza*, No. 1:20-CV-00084-GNS, 2021 WL 2941985, at *6 (W.D. Ky. July 13, 2021) (granting \$5,000 service award); *Davis*, 2021 WL 4188053, at *8 (same). Plaintiff indicated his desire and willingness to undertake the responsibilities and fiduciary duties on behalf of the class. This is a voluntary obligation that goes well beyond the pursuit of his individual claims. Plaintiff remained in close contact with Class Counsel, prior to the case filing and throughout the litigation; he also reviewed the Complaint and other court filings, and approved the Settlement. *see also* Phelps Decl., ¶¶ 5-6. Without their willingness to undertake these obligations on behalf of the Class Members, the recovery in this case would not have occurred.

Accordingly, a Service Award of \$5,000.00 to Plaintiff Phelps for his time and work on this case on behalf of all Class Members is appropriate.

V. CONCLUSION

Based upon the foregoing, Class Counsel respectfully requests this Court approve the payment from the \$400,000 common fund of (1) \$133,333.33 as fair and reasonable for attorneys' fees; (2) \$1,234.73 for reimbursement of the expenses necessarily incurred in prosecution of this Class Action; (3) \$5,000 to Plaintiff Phelps as a Service Award, and any further relief that this Court deems just and equitable.

Respectfully submitted:

/s/ Terence R. Coates

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Attorneys for Plaintiff and the Class

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2023, I served a copy of the foregoing via electronic filing in the ECF system.

/s/ Terence R. Coates
Terence R. Coates

EXHIBIT 1

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

JONATHAN PHELPS, individually and on behalf of all others similarly situated,	:	Case No: 6:22-cv-00106
	:	
Plaintiff,	:	Judge Claria Horn Boom
	:	Magistrate Hanly A. Ingram
	:	
v.	:	<u>DECLARATION OF TERENCE R.</u>
	:	<u>COATES IN SUPPORT OF</u>
TOYOTETSU NORTH AMERICA	:	<u>PLAINTIFFS' MOTION FOR</u>
	:	<u>ATTORNEYS' FEES, EXPENSES,</u>
Defendant.	:	<u>AND CLASS REPRESENTATIVE</u>
	:	<u>SERVICE AWARD</u>

I, Terence R. Coates, hereby state that the following is true and accurate and based on my personal knowledge:

1. I am the managing partner of the law firm Markovits, Stock & DeMarco, LLC (“MSD”). I am one of the Co-Lead Class Counsel for Plaintiff in this matter along with Joseph B. Venters from the Venters Law Office, representing Plaintiff and the putative Class and have monitored my firm’s participation in this matter from 2022 to the present. The contents of this Declaration are based upon my own personal knowledge, my experience in handling many class action cases, and the events of this litigation.

2. As a member of Class Counsel, my firm has been centrally involved in all aspects of this litigation from the initial investigation to the present. My co-counsel, Joseph Venters, and I have been the primary points of contact for Plaintiff and Class Counsel with counsel for Toyotetsu America, Inc. (“Toyotetsu” or “Defendant”). Class Counsel and Toyotetsu’s counsel are experienced in class action litigation. Class Counsel undertook this matter on a contingency fee basis with the risk of achieving no recovery at all. Additionally, Class Counsel have incurred reasonable litigation expenses that remain unreimbursed.

3. I have been practicing law since 2009 and have extensive experience handling complex class action cases. I am currently the Secretary of the Cincinnati Bar Association's Board of Trustees and the Executive Director of the Potter Stewart Inn of Court. I am a frequent speaker for the plaintiffs' perspective on recent trends in data privacy class action cases having recently spoken at the Trial Lawyers of Mass Tort's conference in Big Sky, Montana in March 2023, the NetDiligence cybersecurity summit in Ft. Lauderdale, Florida in February 2023, and the Beazley Insurance national conference in Ft. Lauderdale, Florida in March 2023. Furthermore, I am participating as a member of plaintiffs' counsel in over 70 data breach and data privacy cases pending around the country, including serving as co-lead counsel or a member of plaintiffs' counsel in: *Phillips v. Bay Bridge Administrators, LLC*, No. 1:23-CV-022 (W.D. Tex.) (court-appointed interim class counsel in data breach class action); *Federman v. Cerebral, Inc.*, No. 2:23-cv-01803 (C.D. Cal.) (court-appointed interim co-lead class counsel for plaintiffs in pixel tracking privacy class action); *Abrams v. Savannah College of Art & Design*, No. 1:22-CV-04297 (N.D. Ga.) (court-appointed class counsel for preliminarily-approved data breach class action settlement); *John v. Advocate Aurora Health, Inc.*, No. 22-CV-1253-JPS (E.D. Wis.) (court-appointed interim co-lead class counsel for plaintiffs in pixel tracking privacy class action that has resulted in a claw-wide settlement in principle); *In re U.S. Vision Data Breach Litigation*, No. 22-cv-06558 (D. N.J.) (court-appointed interim co-lead class counsel for plaintiffs); *Tucker v. Marietta Area Health Care, Inc.*, No. 2:22-cv-00185 (S.D. Ohio) (court-appointed interim co-lead class counsel for plaintiffs for \$1,750,000 data breach class action settlement for roughly 216,000 class members); *Vansickle v. C.R. England*, No. 22-cv-00374 (D. Utah; Doc. 22, August 16, 2022) (court-appointed interim co-lead counsel in consolidated data breach class action); *Sherwood v. Horizon Actuarial Services, LLC*, No. 1:22-cv-1495 (N.D. Ga.; Doc. 16, May 12, 2022) (court-

appointed interim class counsel in a data breach class action); *Rodriquez v. Professional Finance Company, Inc.*, No. 1:22-cv-01679-RMR-STV, ECF No. 23 (D. Colo.) (court-appointed interim class counsel); *Lutz v. Electromed, Inc.*, No. 0:21-cv-02198 (D. Minn.) (court-appointed co-lead counsel \$825,000 common fund data breach class action settlement for roughly 47,000 class members); *Tracy v. Elekta, Inc.*, No. 1:21-cv-02851-SDG (N.D. Ga.) (court-appointed interim class counsel in a data breach class action); *In re Luxottica of America, Inc. Data Security Breach Litigation*, No. 1:20-cv-00908-MRB (S.D. Ohio) (court-approved interim co-liaison counsel); *Tate v. EyeMed Vision Care, LLC*, No. 1:21-cv-00036 (S.D. Ohio) (court-approved liaison counsel); *In re 20/20 Eye Care Network Inc. Data Breach Litigation*, No. 21-cv-61275 RAR (S.D. Fla.) (Plaintiffs' Executive Committee); *Baker v. ParkMobile, LLC*, No. 1:21-cv-02182 (N.D. Ga.) (Plaintiffs' Steering Committee); *In re Herff Jones Data Security Breach Litigation*, No. 1:21-cv-01329-TWP-DLP (S.D. Ind.) (plaintiffs' counsel in approved \$4.35 million common fund settlement); *In re CaptureRx Data Breach Litigation*, No. SA-21-CV-00523 (W.D. Tex.) (plaintiffs' counsel in a \$4.75 million common fund settlement); *In re Gallagher Data Breach Litigation*, No. 1:21-cv-04056, (N.D. Ill.); *In re NetGain Technology, LLC, Consumer Data Breach Litigation*, No. 21-cv-1210, (D. Minn.; Plaintiffs' Executive Committee); *Medina v. PracticeMax Inc.*, No. CV-22-01261 (D. Ariz.) (court-appointed Executive Leadership Committee); *Devine v. Health Aid of Ohio, Inc.*, No. CV-21-948117 (Cuyahoga County Court of Common Pleas, Ohio) (co-lead counsel for plaintiffs); *Engle v. Talbert House*, No. A 2103650 (Hamilton County Court of Common Pleas, Ohio) (co-lead counsel for plaintiffs for a data breach class action settlement valued at over \$50,000,000); *Bae v. Pacific City Bank*, No. 21STCV45922 (Los Angeles County Superior Court) (proposed class counsel in \$700,000 common fund data

breach class action settlement for roughly 15,000 class members); and *In re Pawn America Consumer Data Breach Litigation*, No. 0:21-cv-02554 (D. Minn.) (plaintiffs' counsel).

4. Federal courts have recognized me and my firm as experienced in handling complex cases including class actions. *Shy v. Navistar Int'l Corp.*, No. 3:92-CV-00333, 2022 WL 2125574, at *4 (S.D. Ohio June 13, 2022) ("Class Counsel, the law firm Markovits, Stock & DeMarco, LLC, are qualified and are known within this District for handling complex cases including class action cases such as this one."); *Bechtel v. Fitness Equip. Servs., LLC*, 339 F.R.D. 462, 480 (S.D. Ohio 2021) ("plaintiffs' attorneys have appeared in this Court many times and have substantial experience litigating class actions and other complex matters."); *Schellhorn v. Timios, Inc.*, No. 2:221-cv-08661, 2022 WL 4596582, at *4 (C.D. Cal. May 10, 2022) (noting that Class Counsel, including "Terence R. Coates of Markovits, Stock & DeMarco, LLC, have extensive experience litigating consumer protection class actions ..."); *Bedont v. Horizon Actuarial Services, LLC*, No. 1:22-CV-01565, 2022 WL 3702117, at *2 (N.D. Ga. May 12, 2022) (noting that class counsel, including Mr. Coates, "are well qualified to serve as Interim Co-Lead Class Counsel and that they will fairly, adequately, responsibly, and efficiently represent all Plaintiffs in the Cases in that role.").

CLASS COUNSEL'S ATTORNEYS' FEES & EXPENSES ARE REASONABLE

5. Under the Settlement, Class Counsel may seek up to 1/3 of the Settlement Fund (\$400,000) as attorneys' fees and up to \$15,000.00 in expenses.

6. Class Counsel have undertaken this case on a contingency fee basis and have not received any payment for their work in this case to date and have not been reimbursed for any of their litigation expenses.

7. Courts within the Sixth Circuit routinely award attorneys' fees up to 1/3 of the common fund amount in class action settlements. *See e.g. Davis v. Omnicare, Inc.*, No. 5-18-CV-

142-REW, 2021 WL 1214501, at *11 (E.D. Ky. Mar. 30, 2021) (preliminarily approving attorneys' fees of 1/3 of the class action settlement fund); *In re Automotive Parts Antitrust Litigation*, No. 12-md-02311, 2022 WL 4385345, at *2 (E.D. Mich. Sept. 22, 2022) (noting that a fee request of 1/3 of the class action settlement fund "is within the range of fee awards made by courts in this Circuit."); *Walker v. Nautilus, Inc.*, No. 2:20-cv-3414-EAS (S.D. Ohio) (awarding attorneys' fees of 1/3 of the \$4.25 million common fund); *Bechtel v. Fitness Equipment Services, LLC*, No. 1:19-cv-726-KLL (S.D. Ohio) (awarding attorneys' fees of 1/3 of the \$3.65 million common fund); *Fields v. KTH Parts Industries, Inc.*, No. 3:19-cv-8, 2022 WL 3223379, at * 7-8 (S.D. Ohio Aug. 9, 2022) (finding that attorneys' fees that are 1/3 of the class action settlement fund are "normal").

8. Class Counsel have spent significant time and expenses pursuing this matter on behalf of the Class. From May 3, 2022, to roughly the present, Class Counsel have spent more than 131.7 hours for a lodestar of over \$85,000.00, and incurred expenses of \$1,234.73 directly related to this litigation. The hourly rates that form the basis of the lodestar calculation reflect the experience of Class Counsel and co-counsel and are their customary hourly rates. A chart including MSD's current lodestar chart is attached as Exhibit A. The reasonable expenses incurred all relate to this litigation and were necessary for the quality of result achieved. For example, my firm incurred \$714.73 in filings fees for complaints and three pro hac admission applications, \$316.95 in copying costs, and in \$203.05 estimated mileage reimbursement for travel to the Final Approval Hearing at the federal mileage reimbursement rate (\$.655 per mile x 310 miles). Class Counsel's expenses of \$1,234.73 are entirely reasonable and warrant reimbursement.

9. Class Counsel will continue to expend substantial additional time and other minimal expenses continuing to protect the Class's interest through the Final Approval Hearing

and throughout settlement administration. Class Counsel hold the informed opinion that the fee request of \$133,333.33 and expenses of \$1,234.73 are reasonable and justified in this case.

SIMILAR DATA BREACH SETTLEMENTS

10. Class Counsel’s opinion that this \$400,000 Settlement is fair and reasonable for the 12,453 Class Members is informed by other data breach class action settlements based on the per class member recovery amount. For example, the following chart identifies the per class member value based on the common fund settlement amount for certain recent cases that also involved sensitive, private information such as Social Security Numbers:

Case Name	Case Number	Settlement Amount	Class Size	Per Person
<i>Reynolds v. Marymount Manhattan College</i>	No. 1:22-cv-06846 (S.D.N.Y.)	\$1,300,000	191,752	\$6.78
<i>Julien v. Cash Express, LLC</i>	No. 2022-CV-221 (Putnam Cty., Tenn.)	\$850,000	106,000	\$8.02
<i>Tucker v. Marietta Area Health Care</i>	No. 2:22-CV-00184 (S.D. Ohio)	\$1,750,000	216,478	\$8.08
<i>Magliaccio v. Parker Hannifin Corp.</i>	No. 1:22-CV-00835 (N.D. Ohio)	\$1,750,000	115,843	\$15.10
<i>Lutz v. Electromed, Inc.</i>	No. 21-cv-2198-KMM-DTS (D. Minn.)	\$825,000	47,000	\$17.55
<i>Abrams v. Savannah College of Art & Design</i>	No. 1:22-cv-04297 (N.D. Ga.)	\$375,000	16,890	\$22.20
<i>Phelps v. Toyotetsu North America</i>	No. 6:22-cv-00106 (E.D. Ky.)	\$400,000	12,453	\$32.12

Class Counsel and Plaintiff believe that the Settlement in this case is fair and reasonable in that it exceeds the settlement amount recovered per class member in other recent data breach class action settlements.

**THE CLASS REPRESENTATIVE SERVICE AWARD OF \$5,000.00
IS REASONABLE AND JUSTIFIED**

11. Plaintiff has stayed informed about this litigation, reviewed, and approved the settlement demand and final settlement amount and Settlement Agreement, and spent substantial time and effort protecting the Class's interests. Accordingly, the \$5,000.00 Service Award to the Class Representative is reasonable given his efforts on behalf of the Class in this matter. Furthermore, the Class Representative Service Award here is less than what has been approved in other common fund data breach class action settlements. *See Lutz v. Electromed, Inc.*, No. 0:21-cv-02198 (D. Minn.; Doc. 73) (service award of \$9,900 in a data breach class action).

12. Plaintiff was informed about the status of settlement negotiations and remained engaged as the Class Representative at all times during the pendency of this matter. He has no conflicts with the Class he represents. Plaintiff fully supports the \$5,000 Service Award and Class Counsel's attorneys' fees request of \$133,333.33 and request for litigation expenses of \$1,234.73.

**THE SETTLEMENT IS FAIR, REASONABLE AND A SUBSTANTIAL RECOVERY
FOR THE CLASS**

13. Class Counsel believe the Settlement is fair, reasonable, and adequate.

14. Furthermore, in my experience in handling over 70 data breach class action cases for plaintiffs, I can confirm that the \$400,000 non-reversionary common fund settlement is fair and reasonable for 12,453 Class Members and is one of the higher per class member recoveries I've seen in recent data breach class action settlements.

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

Executed on July 10, 2023, at Cincinnati, Ohio.

/s/ Terence R. Coates
Terence R. Coates

EXHIBIT A

Markovits, Stock & DeMarco, LLC – Lodestar Chart

<u>Individual</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Lodestar</u>
Terence R. Coates (Managing Partner)	64.1	\$795	\$50,959.50
Dylan Gould (Attorney)	31	\$530	\$16,430.00
Jonathan T. Deters (Attorney)	33.2	\$530	\$17,596.00
Spencer D. Campbell (Attorney)	1.3	\$375	\$487.50
Ashley S. Paver (Law Clerk)	1.2	\$190	\$228.00
<u>Total</u>	<u>131.7</u>		<u>\$85,701.00</u>

EXHIBIT 2

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

JONATHAN PHELPS, individually and on behalf of all others similarly situated,	:	Case No: 6:22-cv-00106
	:	
Plaintiff,	:	Judge Claria Horn Boom
	:	Magistrate Hanly A. Ingram
	:	
v.	:	
	:	
TOYOTETSU NORTH AMERICA,	:	
	:	
Defendant.	:	
	:	

**DECLARATION OF JONATHAN PHELPS IN SUPPORT OF PLAINTIFF’S MOTION
FOR ATTORNEYS’ FEES, EXPENSES, AND CLASS REPRESENTATIVE SERVICE
AWARD AND FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

I, Jonathan Phelps, state that the following is true and accurate:

1. I am the named Plaintiff in the above-captioned class action lawsuit. I submit this declaration in support of Plaintiff’s Motion for Attorneys’ Fees, Expenses, and Class Representative Service Award, as well as Plaintiff’s forthcoming Motion for Final Approval of Class Action Settlement.

2. I make this declaration based on my personal knowledge, and could and would testify to the truthfulness of the facts herein.

3. I am a former employee of Toyotetsu, the Defendant in this action. I have not worked there since approximately 2013. However, I received a notice from Toyotetsu in late 2021 stating that certain files containing my information may have been accessed and acquired by unauthorized actors during a data security incident, including my name, address, date of birth, and Social Security number. I later initiated this action through my attorneys.

4. I have been in consistent contact with my attorneys in this matter, especially the attorneys at Markovits, Stock & DeMarco, LLC, and have stayed apprised of this case's progress. My attorneys have been available to answer any questions I've had as this case has progressed.

5. I remained engaged with my attorneys as this case progressed, including as we explored settlement with Toyotetsu. During this process, Toyotetsu requested—and I agreed—to share personal information and documentation supporting the allegations in the amended complaint.

6. I have committed many hours to pursuing this matter on my own behalf and on behalf of the class without any promise or guarantee of compensation. This includes time spent researching the data breach, communicating with my counsel, reviewing and approving the allegations in the complaint, reviewing initial disclosures, providing information to my attorneys in response to requests by Toyotetsu, reviewing and approving the terms of the proposed settlement, and reviewing the preliminary approval order.

7. I understand that the Settlement benefits afforded to me and the approximately 12,500 other similarly-situated individuals includes a \$400,000 settlement fund that will be used to make cash payments to me and other class members submitting valid claims after the reduction of my counsel's attorneys' fees and expenses, any settlement administration costs and expenses, and the potential class representative service award. I also understand that Toyotetsu has implemented and maintained important business practice changes that will decrease the likelihood of a future data incident.

8. I believe that the Settlement benefits are a great result for me and my fellow Class Members. I strongly support this Settlement and the benefits recovered and believe they are more than reasonable.

9. I have reviewed Class Counsel's request for attorneys' fees of 1/3 the \$400,000 common fund (\$133,333.33) and expenses totaling \$1,234.73 and believe such fees and expenses are fair and adequate under the circumstances of this case.

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

Dated: July 9, 2023


Jonathan Phelps (Jul 9, 2023 13:15 EDT)

Jonathan Phelps