

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

In Re: Medical Informatics
Engineering, Inc., Customer Data
Security Breach Litigation
(MDL 2667)

Case No.: 3:15-MD-2667

This Document Relates to All Cases

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' LEAD COUNSEL'S FEE
AND EXPENSE APPLICATION AND REQUEST FOR APPROVAL OF
SERVICE AWARDS**

The Court should grant Plaintiffs' Lead Counsel's Fee and Expense Application and Request for Approval of Service Awards (the "Fee Application") because the requested \$1,000 per Settlement Class Representative service awards, and the \$1,000,000 in collective fees and expense reimbursements, which was negotiated after the \$2,750,000 Settlement Fund and other Class relief was agreed upon, and is in addition to the Settlement Fund, is fair, reasonable, and in line with amounts commonly awarded in, and approved by, courts in the Seventh Circuit. The requested attorneys' fee and expenses compensate counsel for the significant time, effort, risk, and expense employed in the successful resolution of this action. The service awards are similarly fair and reasonable in light of the Class Representatives' contributions to pursuing the claims in the litigation, working with their counsel, and obtaining the settlement benefits on behalf of the Class members.

FACTS

As the Court is aware, the litigation and settlement of this class action has been a long and complex process involving significant time and resources, including sophisticated lawyering, to bring together numerous parties and government regulatory bodies to achieve a final resolution. (Exhibit A, Declaration of Irwin B. Levin in Support of Fee and Expense Application (“Levin Decl.”) ¶ 3.) During the course of the litigation, the parties engaged in significant discovery and engaged in extensive, arm’s-length settlement negotiations, including three full-day mediation sessions with the Honorable Sanford M. Brook (Ret.) of Judicial Arbitrator Group, Inc., with one session involving the participation of numerous multi-state attorneys general. (Levin Decl. ¶ 4.) Lead Counsel also has performed discovery, in the form of reviewing documents and deposing two of Defendants’ senior management to confirm the financial position of Defendants and to confirm that Defendants had implemented and were continuing to implement certain data security enhancements and required injunctive relief pursuant to the Settlement, which provides a non-reversionary Settlement Fund of \$2,750,000 for the benefit of the Class members. (Levin Decl. ¶ 5; ECF No. 175-1, Stipulation and Agreement of Settlement (“Settlement Agreement”) ¶¶ 5.1.3, 5.4.1.)

After the relief to the Class was negotiated, the parties, under the auspices of Judge Brook, negotiated an agreed upon collective fee and expense amount to be paid by Defendants of \$1,000,000. (Levin Decl. ¶ 6.) The fee and expense amount is to be paid in addition to the Settlement Fund and does not diminish the relief to the

Class. (Levin Decl. ¶ 7.) In addition, the parties agreed to payment of \$1,000 to each of the Settlement Class Representatives to be paid from the Settlement Fund, in recognition of the time they spent in bringing this case and in recognition of the benefits they achieved for the rest of the Class members who did not have to pursue litigation themselves. (Settlement Agreement ¶¶ 1.30, 10.6; Levin Decl. ¶ 18.)

To date, counsel for Plaintiffs have expended over \$57,000 in expenses and over 2,745 hours in post-MDL time prosecuting this case, leading to a total lodestar exceeding \$1,000,000 and meaning that the requested fee is less than counsel's collective lodestar.¹ (Levin Decl. ¶ 8.) Similarly, if the fee and expense amount were combined with the Settlement Fund, after deducting the estimated costs of notice and settlement administration, the fee would amount to approximately one-third of the total amount paid by Defendants in the settlement of these cases. (Levin Decl. ¶ 11.) In addition, further work will be required to obtain final approval of the settlement and to oversee administration of the settlement, yet no additional fees will be paid for these services. (Levin Decl. ¶ 13.) Thus, whether measured under the lodestar-multiplier approach or the percentage-of-the-fund approach, the requested fees and expense reimbursement are reasonable and within the range regularly approved within this Circuit.

¹ This is in addition to the 1,000 hours expended by the various counsel for Plaintiffs in preparing and filing complaints and performing other work prior to the creation of the MDL. (Levin Decl. ¶ 8.)

DISCUSSION

I. THE COURT SHOULD APPROVE THE DEFENDANTS' PAYMENT OF ATTORNEYS' FEES AND EXPENSES AS MEDIATED BY JUDGE BROOK.

“In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). “Negotiated and agreed-upon attorneys’ fees as part of a class-action settlement are encouraged as an ‘ideal’ toward which the parties should strive.” *In re Ford Motor Co. Spark Plug and Three Valve Engine Prod. Liab. Litig*, No 1:12 MD-2319, 2016 WL 6909078 at *9 (N.D. Ohio Jan. 26, 2016). Courts recognize that analysis of agreed upon fee awards paid separately from the class benefits “is greatly reduced because there is no conflict of interest between attorneys and class members.” *McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006). Indeed, “fees negotiated and paid separate and apart from the class recovery are entitled to a ‘presumption of reasonableness.’” *Bairly v. AK Steel Corp*, 2008 WL 553764, at *1 (S.D. Ohio Feb. 28, 2008). Stated another way, because a reduction in the amount of the attorneys’ fees that Defendants agreed to pay “would not confer a benefit upon the class, but would only benefit [defendants]”, *Dehoyos v. Allstate Corporation*, 240 F.R.D. 269, 322 (S.D. Tex. 2007), courts “can generally assume that the defendants have closely examined the plaintiffs fee request and agreed to pay only a reasonable amount.” *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.* 671 F. Supp. 819, 829 (D. Mass. 1987).

In the Seventh Circuit, a court has discretion to evaluate a proposed fee and expense award under either the percentage-of-the-fund method or the lodestar-multiplier method. *See Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014) (noting that the Seventh Circuit allows a district court to apply either the lodestar or percentage method); *Florin v. Nationsbank of Georgia N.A.*, 34 F.3d 560, 566 (7th Cir. 1994) (“[W]e are of the opinion that both the lodestar approach and the percentage approach may be appropriate in determining attorney’s fee awards, depending on the circumstances.”); *Michael v. Indiana Packers Corp.*, No. 4:08-CV-13 JD, 2010 WL 11681242, at *4 (N.D. Ind. Aug. 23, 2010) (same). Here, under either method, the requested fee and expense award is reasonable.

A. The requested fee and expense reimbursement is reasonable when evaluated under the lodestar-multiplier method.

If evaluated under the lodestar-multiplier method the requested fee and expense reimbursement is reasonable. The general starting point of the lodestar analysis “multiplies the attorneys’ reasonable hourly rates by the number of hours reasonably expended.” *See Design Ideas, Ltd. v. Yankee Candle Co.*, No. 10–CV–3217, 2013 WL 143379, at *8 (C.D. Ill. Jan. 11, 2013) (quotations & citations omitted). “A reasonable hourly rate should reflect the attorney’s market rate, defined as ‘the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question.’” *Id.* (quoting *Small v. Richard Wolf Med. Instruments Corp.*, 264 F.3d 702, 707 (7th Cir. 2001));

see generally In re Synthroid Marketing Litig., 264 F.3d 712, 718 (7th Cir. 2001) (“We have held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award 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.”); *In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) (describing the court’s function in fee litigation “to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order”). “The best indicator of the market rate is the amount actually billed by the attorney for similar work.” *Norton v. City of Springfield*, 281 F. Supp. 3d 743, 747 (C.D. Ill. 2017).

In class action litigation of this type, hourly rates ranging from \$400 to over \$900 are common and have been accepted by courts. *See, e.g., Spano*, 2016 WL 3791123, at *3 (recognizing \$998 per hour for attorneys with at least 25 years of experience; \$850 per hour for attorneys with 15–24 years of experience; \$612 per hour for attorneys with 5–14 years of experience; \$460 per hour for attorneys with 2–4 years of experience; \$309 per hour for Paralegals and Law Clerks and \$190 per hour for Legal Assistants). *See, e.g., Martin*, 2010 WL 11614985, at *4 (utilizing a blended rate based on the Class Counsel’s hourly rate scale that ranged from “\$800.00 per hour for an attorney with over 25 years of experience to \$125.00 per hour for legal professionals,” resulting in a blended hourly rate between \$514.60 and \$408.80 per hour). These rates are consistent with Counsel’s experience and

knowledge of the rates typically recorded by class action lawyers in contingent fee litigation. (Levin Decl. ¶ 9.)

The lodestar recorded by counsel for Plaintiffs exceeds \$1,000,000. (Levin Decl. ¶ 10.) Thus, counsel will be receiving *less* than their hourly billed time and will not receive a multiplier. (Levin Decl. ¶ 10.) Given the financial realities of Defendants' ability to pay, counsel will receive less than what they would have received had they taken this litigation on an hourly, rather than a contingent, basis. (Levin Decl. ¶ 10.)² Thus, counsel will actually receive a multiplier of less than 1.0 (a reduction in fees) rather than the 2.0 to 5.0 multipliers routinely approved by courts. (Levin Decl. ¶ 10.)

B. The requested fee and expense reimbursement is reasonable when evaluated under the percentage-of-the-fund method.

Although unnecessary to consider given that the fee is reasonable under the lodestar method, if the Court were to consider the fee under the percentage-of-the-fund method, the fee is likewise reasonable. Under the percentage-of-the-fund method, “[t]he ratio that is relevant to assessing the reasonableness of the attorneys’ fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received,” so costs of notice and administration are

² If the \$1,000,000 fee is approved, this would result in a blended average hourly rate for counsel of less than \$370/hr for post-MDL work. (Levin Decl. ¶ 11.) Taking into account the attorneys working on this case and their experience, in Counsel’s opinion, this blended rate is well below the hourly rates usually commanded by counsel working on this matter. (Levin Decl. ¶ 11.)

deducted first. *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014).

After that deduction, a one-third fee is common in this District for attorneys' fees in a class action. *See, e.g., Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990, 997 (N.D. Ind. 2010) (approving one-third fee); *Michael v. Indiana Packers Corp.*, No. 4:08-CV-13 JD, 2010 WL 11681242, at *4 (N.D. Ind. Aug. 23, 2010) (approving one-third fee). A one-third fee is also common throughout district courts in the Seventh Circuit. *See, e.g., Gaskill v. Gordon*, 160 F.3d 361, 362–63 (7th Cir. 1998) (noting that typical contingency fees are between 33% and 40%); *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”); *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); *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 “33.3% of the fund plus expenses is well within the generally accepted range of the attorneys fee 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”). Consistent with that, Lead Counsel has regularly been awarded a one-third or higher fee in class litigation. (Levin Decl. ¶¶ 14–17.)

Here, although the fee and expense award is being paid in addition to the Settlement Fund, were the Court to evaluate the fee and expense request under the percentage-of-the-fund method, the fees and expenses would amount to approximately one-third of the total funds being paid by Defendants. (Levin Decl. ¶ 17.) Combining the \$1,000,000 in fees and expenses with the \$2,750,000 Settlement Fund yields a total payment by Defendants of \$3,750,000. (Levin Decl. ¶ 17.) The Settlement Administrator estimates that the costs of notice and administration will be approximately \$750,000. (Levin Decl. ¶ 17.) Thus, the net benefit would be \$3,000,000, and the requested fee of \$1,000,000 would be equal to one-third, well within the range of the percentages routinely approved by courts in this Circuit and received by counsel in this case. (Levin Decl. ¶ 17.) Under either the percentage-of-the-fund method or the lodestar-multiplier method, the requested fee is reasonable.

II. THE COURT SHOULD APPROVE A SERVICE AWARD OF \$1,000 TO EACH OF THE NAMED PLAINTIFFS.

The Court should also award the Class Representatives incentive fees of \$1,000 each for their time and effort in representing the Class Members and for the results achieved for them. When deciding whether a class representative incentive award is reasonable, courts consider the actions the plaintiff has taken to protect the interests of the class and the degree to which the class has benefited from those actions. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 2009).

In this case, from the very outset the Plaintiffs resolved to benefit the entire class, and not only themselves. (Levin Decl. ¶ 18.) They consulted with counsel, and without them there would be no recovery at all for hundreds of thousands of absent Class members. (Levin Decl. ¶ 18.) Now that a substantial recovery has been made on behalf of the Class, the Plaintiffs' efforts in bringing and litigating this case should be recognized and should be rewarded.

Service awards of over \$10,000 are common in class actions. For example, in *In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, 251 F. Supp. 3d 1225, 1244 (N.D. Ind. 2017) (Miller, J.), this Court approved service awards of \$15,000 each to seven named representatives. The Court cited to authority approving service awards as high as \$25,000 per representative. *Id.* (citing *Cook v. Niedert*, 142 F.3d at 1016 (\$25,000); *In re Southwest Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, at *11 (N.D. Ill., Aug. 26, 2013) (\$15,000 to 2 plaintiffs); *Heekin v. Anthem, Inc.*, No. 05-cv-1908, 2012 WL 5878032 at *1 (S.D. Ind. Nov. 20, 2012) (\$25,000); *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07 C 2898, 2012 WL 651727, at *17 (N.D. Ill. Feb. 28, 2012); (\$25,000 to each of 7 plaintiffs); *Will v. Gen. Dynamics Corp.*, Civ. No. 06-698, 2010 WL 4818174, at *4 (S.D. Ill. Nov. 22, 2010) (\$25,000 to 3 plaintiffs)). Thus, here the requested amount of \$1,000 per representative is highly reasonable.

CONCLUSION

The Court should approve the payment of attorneys' fees and expenses by Defendants in the amount of \$1,000,000, and should approve the payment of service awards of \$1,000 to each of the 22 named plaintiffs.

Dated: December 10, 2019

Respectfully submitted,

/s/ Irwin B. Levin

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CERTIFICATE OF SERVICE

I certify that on December 10, 2019, a copy of this document was served on all counsel of record by operation of the Court's electronic filing system.

/s/ Irwin B. Levin

Plaintiffs' Lead Counsel