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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

JOHN DOE, on behalf of himself and all others similarly situated and for the benefit of the general public,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, et al.,

Defendants.

Case No. 20STCV32364

[Assigned to the Hon. Lawrence P. Riff in Dept. 7 of Spring Street Courthouse]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER APPROVING PAYMENT OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND PAYMENT TO THE CLASS REPRESENTATIVE

Final Approval Hearing Scheduled Per May 19, 2023 Preliminary Approval Order:

Date: August 25, 2023
Time: 10:00 a.m.

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Co-Lead Class Counsel[1] and Plaintiff John Doe[2] respectfully submit this Memorandum of Points and Authorities in Support of their Motion for Order Approving Payment of Attorneys' Fees and Reimbursement of Expenses, and Payment to the Class Representative.

I. INTRODUCTION

Since this action was commenced, Co-Lead Class Counsel have expended tremendous effort and resources investigating, understanding, and reaching a resolution to the Settlement Class Members' claims that is tailored to the underlying issues sought to be addressed through this litigation. After more than three years of extensive in-depth investigations and exhaustive settlement negotiations, Co-Lead Class Counsel and Plaintiff John Doe now present the proposed Settlement to the Court.

The Settlement Class consists of 460 individuals who were enrolled in the California Department of Public Health's ("CDPH") AIDS Drug Assistance Payment program ("ADAP") and/or Office of AIDS Health Insurance Premium Payment program ("OA-HIPP") whose confidential medical and other personal information, including their HIV status, was allegedly accessed by Defendants Evolve Healthcare, Premier Pharmacy, and Gary "Julian" Goldstein without the Settlement Class Members' authorization or consent. Another Defendant, Adherence Project, was named in the initial Class Action Complaint but later dismissed from the action by this Court after Adherence Project deleted the data in question. (See Request for Dismissal of Adherence Project, Sept. 16, 2022; Declaration of Jerry Flanagan in Support of Motion for Final Approval of Class Action Settlement, Order Approving Payment of Attorneys' Fees and Reimbursement of Expenses, and Payment to the Class Representative ("Flanagan Decl."), ¶¶ 13, 22, 49.)

This Settlement provides tremendous benefits to the Settlement Class because the relief is specifically tailored to address the significant privacy interests at issue and will be provided to the Settlement Class years before any relief they would obtain if this matter went to trial. The primary goal of this litigation was to identify which entities and individuals were in possession of Plaintiff's and Settlement Class Members' confidential data and to delete such data, or give identified members of the

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[1] Unless otherwise specified, all defined terms have the same meaning as the meaning described in the Executed Amended Settlement Agreement and Exhibits ("Settlement" or "Settlement Agreement") submitted to the Court on May 9, 2023.

[2] Due to the sensitive nature of this action, Plaintiff has chosen to file under a pseudonym. (See, e.g., *Jane Doe 8015 v. Super. Ct.* (2007) 148 Cal.App.4th 489 [patient allowed to proceed anonymously when suing a laboratory after contracting HIV].)

Settlement Class the option of deleting such data, all of which has been accomplished by the Settlement. (Settlement Agreement, § 5.)

Plaintiff's conservative estimated value of the programmatic relief detailed in Section 5 of the Settlement Agreement is $2,300,000. This estimate is based on the following calculation: 460 Settlement Class Members, multiplied by the five Defendants that have already provided and/or will be providing programmatic relief, multiplied by $1,000 in statutory damages per person, which is the minimum amount of available statutory damages under the Confidentiality of Medical Information Act ("CMIA"). The CMIA is just one of the three statutory causes of action pled in the operative complaint. (Flanagan Decl., ¶¶ 49, 51.) This calculation is a reasonable baseline for the value of the programmatic relief as it takes into account existing damages and the value of ensuring that Class Members' data is no longer at risk. Moreover, as the amounts at issue were set by the California State Legislature based on its collective judgment as to the value of various types of consumer data in terms of the impact on consumers resulting from its unauthorized disclosure, there is a relationship between the per Settlement Class Member value used in this calculation and the underlying wrong. (*Id*., ¶ 50.) The CMIA focuses on medical information concerning enrollees or subscribers of health care service plans, which, based on the description of data provided by Defendant CDPH, is most closely analogous to the data at issue here. (*Id*., ¶ 60.)

The Settlement Agreement also provides for a significant automatic Settlement Payment in the estimated amount of $1,750 to each Settlement Class Member out of a $1.6 million fund. The monetary payment exceeds that provided in other similar HIV privacy settlements, and Co-Lead Class Counsel believe it is the largest per-class member settlement payment of its kind. (*Id*., ¶¶ 7, 53.) The combined total Settlement, including the non-monetary relief ($2,300,000), the fund used to make payments to Settlement Class Members and payments to John Doe and Co-Lead Class Counsel ($1,600,000), and the cost of the Settlement Administrator's services, which will be paid by CDPH up to the Settlement Administration Cap ($40,000), is in excess of $3,900,000. (*Id*., ¶¶ 49, 52, 79.)

Defendants have also agreed not to oppose an application for attorneys' fees and reimbursement of expenses to Co-Lead Class Counsel in an amount not to exceed $763,000 as well as a Class Representative incentive payment of $10,000 to Plaintiff John Doe. These amounts were agreed upon after the other substantive terms of the settlement had been agreed upon in principle. (*Id.*, ¶¶ 67–68.)

Where, as here, injunctive and programmatic relief are the primary forms of relief obtained for Settlement Class Members, the reasonableness of the payment of fees should be assessed using the lodestar method. Indicative of the reasonableness of the requested attorneys' fees, the requested amount is significantly below Co-Lead Class Counsel's actual lodestar. As a cross-check of the reasonableness of this amount, the requested attorneys' fee payment represents approximately 19% of the overall value of the Settlement as set forth above, which is well below the range commonly approved by courts.

As reflected in the Flanagan Decl. at ¶ 68, Co-Lead Class Counsel has expended a total of 2721.4 hours litigating the action, resulting in a total lodestar of $1,500,550 and expenses of $14,630.88. Therefore, the attorneys' fees requested in the Settlement results in a *negative* multiplier. (*Id*., ¶ 70.) The attorneys' hourly rates used for this calculation are counsel's standard hourly rates and are comparable to rates (i) paid by Whatley Kallas's hourly rate paying clients, (ii) charged by similarly experienced counsel, and (iii) previously awarded to Co-Lead Class Counsel in prior actions. (Declaration of Alan M. Mansfield in Support of Motion for Order Approving Payment of Attorneys' Fees and Reimbursement of Expenses ["Mansfield Decl."], ¶¶ 3, 10–11; Declaration of Daniel L. Sternberg in Support of Motion for Order Approving Attorneys' Fees and Reimbursement of Expenses ["Sternberg Decl."], ¶¶ 37–44.) The Sternberg Decl. and Mansfield Decl. were filed concurrently.

In order to build in enough time to prepare this filing with the requisite lodestar and expense figures, due July 24, 2023, Co-Lead Class Counsel used July 16, 2023 as the cut-off date for their calculation of hours expended in the action. (Flanagan Decl., ¶ 68). Co-Lead Class Counsel anticipates expending an additional 70 hours and $39,000 in lodestar prior and subsequent to the August 25, 2023 Final Approval Hearing to ensure the settlement, if approved, is fully effectuated. (Mansfield Decl., ¶ 9; Flanagan Decl., ¶ 69, Sternberg Decl., ¶ 64.) This work will include to review materials provided by the Settlement Administrator, finalize the final approval briefs, respond to any Settlement Class Member inquiries, prepare for the Final Approval Hearing, and oversee implementation of the Settlement including the mailing of the Supplemental Notice to impacted Settlement Class Members and distribution of the automatic payment. (*Ibid*.)

For the reasons set forth more fully below and in the accompanying Flanagan Decl., Sternberg Decl., and Mansfield Decl., Co-Lead Class Counsel respectfully request that the Court approve payment

of attorneys' fees and reimbursement of expenses in the amount of $763,000 and an incentive payment of $10,000 to Class Representative John Doe.

II. HISTORY OF THE LITIGATION

A detailed description of the history of this action, the claims asserted, negotiations and terms of the Settlement, and the benefits provided to Settlement Class Members is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiff's Motion for Final Approval of Class Action Settlement (the "Final Approval Brief"), the Flanagan Decl., and the Sternberg Decl. Co-Lead Class Counsel respectfully refer the Court to those documents and incorporate the analysis provided therein by reference.

III. THE COURT SHOULD APPROVE THE PAYMENT OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES OF $763,000 AS REASONABLE

A. The Lodestar Method Is the Appropriate Standard for Determining a Reasonable Fee

The lodestar method is the appropriate method for assessing the reasonableness of attorneys' fee requests in settlements like this one "brought under fee-shifting statutes (such as federal civil rights, securities, antitrust, copyright, and patent acts), where the relief sought—and obtained—is often primarily injunctive in nature and thus not easily monetized, but where the legislature has authorized the award of fees to ensure compensation for counsel undertaking socially beneficial litigation."[3] (*In re Bluetooth Headset Products Liability Litig.* (9th Cir. 2011) 654 F.3d 935, 941; see also *Laffitte v. Robert Half Internat. Inc*. (2016) 1 Cal.5th 480, 493 (the lodestar method is appropriate "in statutory fee cases in which no common economic benefit, or only a fund insufficient to yield a reasonable fee, has been or is likely to be produced."); *In re HP Laser Printer Litig*. (C.D. Cal. Aug. 31, 2011) 2011 WL 3861703, *5 ["[B]ecause the primary benefit to the class is injunctive relief, the Court finds it appropriate to base the attorney fees on a lodestar calculation rather than any sort of common fund calculation."].)

Similarly, the lodestar method is the correct method for determining attorneys' fees in cases like this one that seek to "vindicate important public interests whose value transcends the ultimate dollar amounts awarded . . . ." (*Harman v. City & Cty. of San Francisco* (2007) 158 Cal.App.4th 407, 427, *cert*

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[3] Several of the causes of action in the operative First Amended Class Action Complaint either include fee-shifting statutes—Information Practices Act, Civ. Code § 1798.53; AIDS Public Health Practices Act, Health and Saf. Code § 121025(e)(1)–(3); Confidentiality of Medical Information Act, Civ. Code § 56.36(e)(1)—or invoke Code of Civ. Proc. section 1021.5 through claims under the Unfair Competition Law, Bus. and Prof. Code section 17200 et seq.

denied (June 23, 2008) 128 S.Ct. 2973; see also *Campbell v. Facebook, Inc.* (9th Cir. 2020) 951 F.3d 1106, 1125 ["although 'it is difficult to put a dollar figure on' the value of the non-monetary relief obtained by the class, 'the privacy interests of the class vindicated by the settlement' were significant . . . ."].) In such cases, "a trial court does not under California law abuse its discretion simply by awarding fees in an amount higher, even very much higher, than the damages awarded." (*Harman*, *supra*, 158 Cal.App.4th at 427, internal citations omitted.) It is not "relevant that plaintiffs obtained the relief they sought through settlement rather than a judgment in their favor." (*Friend v. Kolodzieczak* (9th Cir. 1995) 72 F.3d 1386, 1390.) This is because "the lodestar [method] assures counsel undertaking socially beneficial litigation . . . an adequate fee irrespective of the monetary value of the final relief achieved for the class." (*Lealao v. Beneficial California, Inc*. (2000) 82 Cal.App.4th 19, 33, internal citations omitted.) "[A] rule of proportionality would make it difficult, if not impossible" for plaintiffs "to obtain redress from the courts." (*Graciano v. Robinson Ford Sales, Inc*. (2006) 144 Cal.App.4th 140, 164, quoting *Riverside v. Rivera* (1986) 477 U.S. 561, 578) (basing award solely on percentage of monetary recovery to Plaintiff was error when would result in low attorneys' fee award for successful litigation efforts.)

B. Calculating Attorneys' Fees Under the Lodestar Method

The lodestar-multiplier method "calculates the fee 'by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.'" (*Laffitte*, *supra*, 1 Cal.5th at 489; see also *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1086 [similar].)

California courts have consistently held that "a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award." (*Margolin v. Reg'l Planning Comm'n* (1982) 134 Cal.App.3d 999, 1004.) "'The trial court could make its own evaluation of the reasonable worth of the work done in light of the nature of the case, and of the credibility of counsel's declaration unsubstantiated by time records and billing statements.'" (*Bernardi v. Cty. of Monterey* (2008) 167 Cal.App.4th 1379, 1398, citing *Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1587.)

In support of their Motion, Plaintiff's Co-Lead Class Counsel have submitted summaries of the attorney time expended in this action. (See, e.g., Sternberg Decl., Mansfield Decl.) Each attorney and paralegal who worked on this matter has provided their lodestar from inception of the case to July 16, 2023 indicating how much time was spent on this action.[4]

In determining that the hours expended are reasonable, courts review the information submitted by counsel to determine that the overall work performed was reasonable under all the circumstances, including "the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case." (*PLCM Group, Inc.*, *supra*, 22 Cal.4th at 1096, citing *Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623–624.) As set forth in greater detail in the Flanagan Decl., Sternberg Decl., and Mansfield Decl., the hours expended by counsel to achieve this result were reasonable under the circumstances, especially given the high level of success achieved in the Settlement. As the Sternberg Decl. and Mansfield Decl. show, Co-Lead Class Counsel have spent substantial time litigating this highly complex action (collectively 2721.4 hours) and advanced all costs, without payment or reimbursement to date. (See Flanagan Decl., ¶¶ 66, 68.) As set forth in detail in the Sternberg Decl.:

- After John Doe received notification of an unauthorized access to his data, Co-Lead Class Counsel performed an extensive investigation of the underlying facts alleged in the action prior to the filing of the action, including making two Public Records Act requests and reviewing hundreds of pages of documents regarding this alleged unauthorized access of confidential personal and medical information;
- We later demanded, obtained, and reviewed information from Defendants in response to informal discovery requests;
- We conducted extensive interviews with several individuals with first-hand knowledge of the incident;
- We drafted the initial 31-page Class Action Complaint with very detailed allegations and later

[4] California case law permits fee awards in the absence of detailed time sheets. (See, e.g., *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260 ["California case law permits fee awards in the absence of detailed time sheets"]; *Steiny & Co. v. Ca. Elec. Supply Co.* (2000) 79 Cal.App.4th 285, 293 [same]; *Weber*, *supra*, 39 Cal.App.4th at 1587 [fees awarded on the declaration of counsel].)

greatly expanded those allegations in the 41-page First Amended Class Action Complaint;

- We prepared and filed a California Tort Claims Act claim with the State of California on behalf of Plaintiff John Doe;
- After engaging in extensive negotiations with counsel for Defendants over a forensic computer review to, as counsel described it, "contain the spill" of data, we negotiated and assisted in the implementation of CDPH's forensic review of Premier's prescription drug database, which resulted in CDPH identifying 125 Settlement Class Members whose names were contained in its DocuTrak system, including John Doe's name, even though John Doe and the other Class Members had not obtained prescriptions through Premier Pharmacy;
- We prepared for and participated in two full-day mediations with separate mediators that ultimately resulted in an agreement on the monetary aspects of the Settlement but left the details of the programmatic relief to be negotiated;
- We participated in seven Case Management Conferences ("CMC") with the Court and prepared 13 joint CMC statements and worked with counsel for Defendants to get approval for those statements;
- We participated in hard fought and long-running settlement negotiations with counsel for Defendants for more than two years over the programmatic aspects of the Settlement in order to protect and vindicate the privacy rights of people living with HIV;
- As part of the dismissal of Adherence Project, we negotiated that agents for Adherence Project would confirm in a Declaration filed with the Court on or about September 16, 2022 that the data at issue was deleted from an Airtable cloud server at the request of Co-Lead Class Counsel. (See Declaration of Joel Anderson, Sept. 15, 2022, filed with the Court in support of Plaintiff's Request for Dismissal of Adherence Project, Sept. 16, 2022; Flanagan Decl., ¶¶ 13, 22, 49);
- We drafted and negotiated the detailed 31-page Settlement Agreement and 75 pages of Exhibits, including a very detailed notice program to ensure the protection of Settlement Class Member data as well as (at the Court's direction) an Amended Settlement Agreement;
- We drafted the Preliminary Approval motion papers and declarations, participated in two Preliminary Approval motion hearings, and prepared the motion for Final Approval and supporting briefs and declarations; and

- We have also overseen the settlement notification and computer system review process, which has required significant additional time.

(Sternberg Decl., ¶¶ 6–7, 9, 12–21, 23–33; see also Flanagan Decl., ¶ 13, Mansfield Decl., ¶ 6.) Over three years of investigation, litigation and resolution of this action, Co-Lead Class Counsel's lodestar equates to approximately 75 hours per month, which should be facially reasonable. The key to the success and timely resolution of this action was the extensive investigation conducted by Co-Lead Class Counsel to establish key facts of the alleged unauthorized access to Settlement Class Members' private and confidential information. (Sternberg Decl., ¶ 3.)

The quality of opposing counsel is also relevant in determining whether the lodestar that was incurred is reasonable. (See, e.g., *In re Warner Commc'ns Sec. Litig*. (S.D.N.Y. 1985) 618 F.Supp. 735, 749 ["The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."].) Here, the Defendants were vigorously represented by experienced and able counsel who fought over every major aspect of this litigation and settlement. (See Flanagan Decl., ¶ 62.) The fact that Co-Lead Class Counsel negotiated a favorable settlement with multiple Defendants represented by effective private counsel supports the reasonableness of attorneys' fees in this action:

> Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior.

(*Lealao*, *supra*, 82 Cal.App.4th at 47.)

Next, to ascertain the reasonable hourly rate to use in calculating the lodestar, "the court engage[s] in [a] relevant objective analysis: to determine the prevailing rate in the community for *comparable* professional legal services, that is, services rendered by counsel on consumer fraud issues." (*Graciano*, *supra*, 144 Cal.App.4th at 156, emphasis in original.) Here, the hourly rates utilized by Co-Lead Class Counsel are rates charged by counsel performing similar work on similar types of cases, and similar rates have been approved by California courts, and are the same as rates charged to Whatley Kallas's hourly rate–paying clients. (Sternberg Decl., ¶¶ 37–46; Mansfield Decl., ¶¶ 3, 10–11.) As Co-Lead Class Counsel's hourly rates are reasonable when compared to the legal community for similar work, they are appropriately used for the lodestar calculation. (*PLCM Group, Inc.*, *supra*, 22 Cal.4th at 1095; *Shaffer v. Super. Ct.* (1995) 33 Cal.App.4th 993, 1002.) Finally, use of current hourly rates to calculate lodestar is

appropriate to compensate counsel for the fact that court-awarded fees come long after the work was completed. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal. 4th 553, 583–584, *as modified* (Jan. 12, 2005).)

Thus, where, as here, the parties agree on a fee after all other terms benefitting the Settlement Class Members have been agreed to in principle, which fee is reasonable under a lodestar calculation, they have "mimic[ked] the market" by setting a fee at a level that the market would set. (*Lealao*, *supra*, 82 Cal.App.4th at 47, internal citations omitted.) This agreement should be given significant weight in determining that the requested fee is reasonable.

C. Co-Lead Class Counsel Have Agreed to Less than Their Lodestar Amounts and Have Not Requested a Multiplier

Co-Lead Class Counsel have not requested a multiplier. In fact, the $750,000 in requested attorneys' fees is significantly *less* than Co-Lead Class Counsel's total lodestar ($1,500,550) and constitutes a *negative* multiplier.

Under the lodestar method, the lodestar calculated based on the reasonable hours and reasonable customary hourly rate is then adjusted, commonly using a multiplier, by considering the following factors: (1) "the novelty and difficulty of the questions involved"; (2) "the skill displayed in presenting them"; (3) "the contingent nature of the fee award" (see *Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 49); and (4) the "public service element, and motivation to represent consumers and enforce laws." (*State of California v. Meyer* (1985) 174 Cal.App.3d 1061, 1073.)

In determining the appropriate multiplier, the ultimate goal is "to encourage suits effectuating a *strong* [*public*] *policy* by awarding substantial attorney's fees . . . to those who successfully bring such suits . . . ." (*Woodland Hills Residents Ass'n, Inc. v. City Council* (1979) 23 Cal.3d 917, 933, emphasis added, internal citations omitted; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132–33 [similar].) To accomplish that purpose, the fee award must be large enough "to entice competent counsel to undertake difficult public interest cases." (*San Bernardino Valley Audubon Soc., Inc. v. Cty. of San Bernardino* (1984) 155 Cal.App.3d 738, 755.) Thus, an agreed-to fee award that results in a payment where counsel forego a multiplier (though one would be warranted)—should be presumptively reasonable.

1. Novelty and Difficulty of Questions Involved

The issues asserted in this action were novel and complex. The Settlement was negotiated by Co-Lead Class Counsel, comprised of attorneys with significant experience in litigating healthcare and HIV

privacy class actions. (Sternberg Decl., ¶¶ 49–63, Ex. 1.) The extensive experience of Co-Lead Class Counsel in litigating complex consumer protection cases merits deference when considering the appropriateness of the overall hours they spent in connection with this litigation, especially in light of the magnitude of the success of their efforts and the benefits provided to Settlement Class Members. Such a settlement required significant time of counsel experienced in handling complex litigation, including issues related to the privacy interests of individuals living with HIV to appropriately address the legitimate concerns of Settlement Class Members. (See *Ketchum*, *supra*, 24 Cal. 4th at 1138 ["[a] more difficult legal question typically requires more attorney hours . . . ."].) This required extensive knowledge of the underlying issues and the best way to negotiate and agree to effectuate relief that would benefit the Settlement Class. In short, the result achieved—in many respects better than what could have been achieved at trial—is the best reflection of Co-Lead Class Counsel's skill and expertise. (Flanagan Decl., ¶¶ 7–8, 56–57, 60, 62–65.)

2. Skill of Counsel and Results Obtained

Co-Lead Class Counsel presented and resolved the Settlement Class Members' claims with skill and ingenuity as reflected in the detailed and thorough programmatic relief achieved in this Settlement. In *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, the Court noted that "[t]he California cases appear to incorporate the 'results obtained' factor into the 'quality' factor: *i.e.*, high-quality work may produce greater results in less time than would work of average quality, thus justifying a multiplier." (*Id.* at 838, internal citations omitted; see *In re Lugo* (2008) 164 Cal.App.4th 1522, 1546 [affirming multiplier based in part on finding that "the statewide results achieved by pursuing the matter as a class action resulted from class counsel's legal skills and persistence"]; *Graham*, *supra*, 34 Cal.4th at 582 ["The 'results obtained' factor can properly be used to enhance a lodestar calculation where an exceptional effort produced an exceptional benefit" (internal citations omitted)].)

3. The Contingent Nature of the Fee Award

Co-Lead Class Counsel undertook this action on an entirely contingent basis, assuming a substantial risk that they would devote a significant amount of time and incur substantial expenses in prosecuting this action without any assurance of being compensated for their efforts. (Flanagan Decl.,

¶ 71.)[5] Courts in California have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees and determining that the resulting multiplier is reasonable. (See, e.g., *Ketchum*, *supra*, 24 Cal.4th at 1128; *In re Warner Communications*, *supra*, 618 F.Supp. at 747–49 (citing cases); *Cazares v. Saenz* (1988) 208 Cal.App.3d 279, 287–288.)

In *Ketchum*, the California Supreme Court emphasized that attorneys who accept cases on a contingent basis need to be additionally compensated for the risk involved and the clients they represent. The Court stated: "[a] contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable." (*Ketchum*, *supra*, 24 Cal.4th at 1132, quoting *Rader v. Thrasher* (1962) 57 Cal.2d 244, 253.) The court emphasized that attorneys should be paid for the risk they take in accepting contingency fee cases, as it is a just and fair way to compensate them for taking such risk. (*Ketchum*, *supra*, 24 Cal.4th at 1138.)

Here, the contingent nature of this representation was important to obtain qualified representation since Plaintiff John Doe did not have the funds to litigate this type of case in terms of up-front expenses, let alone pay for the attorneys' fees incurred. (Flanagan Decl., ¶ 71.) Thus, if the case had been lost, Co-Lead Class Counsel would have gone unpaid.

Accordingly, the risks of non-payment in this case demonstrates that a fee and expense award of $763,000 is reasonable. In fact, a multiplier would have been reasonable under the circumstances.

4. Public Policy Effectuated by This Settlement

The "public service element, and motivation to represent consumers and enforce laws" has been a factor considered by courts in setting a reasonable fee award. (*State of California v. Meyer*, *supra*, 174 Cal.App.3d at 1073; *Lealao*, *supra*, 82 Cal.App.4th 19 at 53 [trial courts should consider the need for private enforcement necessary to vindicate legal rights, as well as the role representative actions play in relieving the courts of the need to separately adjudicate numerous claims].)

The public interest at stake in the *Doe Action* is significant. Recent studies demonstrate that even if people living with HIV do not know and cannot demonstrate who may have been made aware of their

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[5] Under *Serrano III*, *supra*, 20 Cal.3d at 49, a multiplier may be applied to the lodestar figure to take into account the fact that the litigation precluded attorneys from accepting other employment. Here, because of the magnitude of the action and the Settlement, Co-Lead Class Counsel were required to devote many hours of their time, preventing them from working on other cases. (See Flanagan Decl., ¶ 71.)

HIV status, acts such as alleged in the operative First Amended Class Action Complaint increase stress and anxiety due to the very real risks of the loss of housing, relationships, and employment. (Flanagan Decl., ¶¶ 2, 73–76.) The programmatic relief requires Thrive Tribe to delete certain data pertaining to the Settlement Class and gives certain members of the Settlement Class the right to direct Defendants Premier, Goldstein, and Evolve Healthcare to delete data from their computer systems and laptops.

IV. THE REQUESTED FEE AND EXPENSE PAYMENT IS ALSO REASONABLE WHEN CROSS-CHECKED AGAINST THE OVERALL VALUE OF THE BENEFITS PROVIDED TO MEMBERS OF THE SETTLEMENT CLASS

Because the primary benefit to Settlement Class Members is the programmatic relief negotiated with Defendants, even though there is a fund for payment of significant amounts to Settlement Class Members the reasonableness of the requested fees cannot be solely determined using a percentage of the common fund benchmark. (*In re HP Laser Printer Litig.*, *supra*, 2011 WL 3861703 at *6.) However, as a cross-check to the reasonableness of this request the Court can compare the requested attorneys' fees and expenses ($763,000) to the overall value of the settlement (in excess of $3,900,000.) The requested payment of attorneys' fees and expenses represents approximately 19% of the overall value of the Settlement, which is well below the range commonly approved by courts.

Under a percentage-of-the-fund approach, the attorneys' fees are awarded as a percentage of the "common fund" available, including payments to class members. (*Laffitte*, 1 Cal.5th at 493; see also *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 726, *as modified on denial of reh'g* (Mar. 9, 2004).) However, when cross-checking attorneys' fees awarded based on the lodestar approach against the value of the settlement, the value of injunctive relief achieved under the settlement must also be included in calculating the overall value of the settlement. (*In re Wells Fargo & Co. S'holder Derivative Litig*. (N.D. Cal. 2020) 445 F.Supp.3d 508, 520, *aff'd*, (9th Cir. 2021) 845 F. App'x 563; *Roes, 1-2 v. SFBSC Mgmt., LLC* (9th Cir. 2019) 944 F.3d 1035, 1056; see also *Newberg and Rubenstein on Class Actions* § 15:92 (6th ed. 2022) [If the primary relief "is non-monetary or difficult to monetize, the percentage cross-check may be meaningless and may fail to consider 'the importance of underlying rights separate and apart from their monetary value.'"].) It is thus appropriate to take into account the value of the programmatic relief when crosschecking the lodestar method to the percentage-of-the-fund method.

Courts have consistently found that attorneys' fees of more than 25% of the common fund are reasonable. For example, the California Supreme Court in *Laffitte* approved using a percentage fund

approach with 33% as the presumptively standard percentage fee. (*Lafitte*, *supra*, 1 Cal.5th at 487, 674.) The Court in *Sanders v. City of Los Angeles* previously held that a lower court properly awarded attorneys' fees 25% of the common fund. (*Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 261.) The court in *Bell v. Farmers Ins. Exch*. awarded to plaintiffs' counsel attorneys' fees in the amount of 25% of the total damages fund recovered for the class, consisting of back pay and interest, plus expenses. (*Bell*, *supra*, 115 Cal.App.4th at 726; see also *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048–1049 [holding that 28% of the common fund was a reasonable award for attorneys' fees due to the complexity and risk of the case and the performance and results achieved by the attorneys]; *In re Pac. Enterprises Sec. Litig.* (9th Cir. 1995) 47 F.3d 373, 379 [holding 33% of common fund was reasonable]. Here, as the requested attorneys' fees represent approximately 19% of the overall value of the benefits provided to Settlement Class Members, this cross check establishes the reasonableness of the fees requested as it is below the percentage range commonly approved by courts.

V. THE COURT SHOULD ALSO APPROVE REIMBURSEMENT OF CO-LEAD CLASS COUNSEL'S EXPENSES INCURRED FOR THE BENEFIT OF THE SETTLEMENT CLASS

While Co-Lead Class Counsel have incurred direct litigation related expenses totaling $14,630.88, they have agreed to cap their expense reimbursement request at $13,000. Such litigation-related expenses are typically awarded in addition to the payment of attorney fees in contingency fee cases. (*Natural Gas Anti-Trust Cases I, II, III & IV* (Cal. Super. Ct. Dec. 11, 2006) No. 4221, 4228, 4224, 4226, 2006 WL 5377849 at *4, quoting Conte, *Attorney Fee Awards*, § 2.08 at 50–51 (2d ed. 1977).) Co-Lead Class Counsel expenses include filing fees, e-service and court reporter transcription fees, telephonic conferences with counsel, and research materials. These expenses were necessarily incurred as part of Co-Lead Class Counsel's efforts in achieving this Settlement and were reasonable and appropriately incurred. (Sternberg Decl., ¶¶ 65–66; Mansfield Decl., ¶ 12.)

VI. PLAINTIFF JOHN DOE SHOULD RECEIVE ADDITIONAL COMPENSATION FOR HIS SERVICES AS THE CLASS REPRESENTATIVE

Finally, the Court should approve a service award of $10,000 to Plaintiff John Doe for his services as representative of the Settlement Class in this action, which would be in addition to the Settlement Payment John Doe will receive as a member of the Settlement Class. Without Plaintiff bringing this issue to the attention of counsel, none of this relief would have been made available to members of the Settlement Class. This payment reflects the time Plaintiff put into prosecuting the case, which he

estimates at approximately 75 hours, and the risks to his privacy, including his HIV status, that he faced in doing so. (Declaration of John Doe, ¶¶ 8, 12–13, attached as Exhibit 2 to the Declaration of Daniel L. Sternberg in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Settlement; Certification of Settlement Class; and Qualified Protective Order, Feb. 7, 2023 [Decl. of John Doe].) (See also *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 806–807 (approving payment of such amounts to class representatives, and holding that specificity of the time and efforts expended by a class representative is a factor in setting a touchstone of the reasonableness of class representative enhancements); *In re Cellphone Termination Cases* (2010) 186 Cal.App.4th 1380, 1394–95 (evidence showing how each class representative "actively participated" in litigation justified payment of class representative awards).) The requested amount was not conditioned on whether Plaintiff supported the Settlement and was not agreed to until after all material settlement terms benefitting the Settlement Class Members had been agreed to in principle. (*Radcliffe v. Experian Information Solutions Inc*. (9th Cir. 2013) 715 F.3d 1157, 1165; Flanagan Decl., ¶¶ 68, 78; Decl. of John Doe, ¶ 12.)

Finally, the amount requested is comparable to amounts awarded in analogous settlements. (See, e.g., *In re Cellphone Termination Fee Cases*, *supra*, 186 Cal.App.4th at 1393–95 (affirming award of $10,000 to each of the class representatives); *Natural Gas Anti-Trust Cases*, *supra*, 2006 WL 5377849, at *4 (approving payments totaling $45,000); *Barel v. Bank of America* (E.D. Pa. 2009) 255 F.R.D. 393, 402–03 (same); *In re Ins. Brokerage Antitrust Litig.* (D.N.J., Feb. 17, 2009, No. CIV. 04-5184 (GEB)) WL 411856, at *10 (same).)

VII. CONCLUSION

Based on the significant effort they expended for the successful benefit of the Settlement Class, Plaintiff's Co-Lead Class Counsel respectfully request the Court approve the payment of $763,000 for attorneys' fees and reimbursement of expenses, as well as an incentive payment of $10,000 to Plaintiff John Doe.

DATED: July 20, 2023

Respectfully Submitted,

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PROOF OF SERVICE
State of California, County of Los Angeles

I am employed in the City and County of Los Angeles in the State of California. I am over the age of 18 years and not a party to the within action. My business address is 6330 San Vicente Boulevard, Suite #250, Los Angeles, California 90048, and I am employed in the city and county where this service is occurring.

On July 20, 2023, I caused service of true and correct copies of the document entitled

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER APPROVING PAYMENT OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND PAYMENT TO THE CLASS REPRESENTATIVE

upon the persons named in the attached service list, in the following manner:

SEE ATTACHED LIST

☒ (**BY EMAIL OR ELECTRONIC SERVICE**) Per the Court's Order dated October 22, 2020 authorizing electronic service, I caused the above-entitled document to be served through Case Anywhere addressed to all parties appearing on the Case Anywhere electronic service list for the above-entitled case.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 20, 2023, at Los Angeles, California.

Kaitlyn Gentile

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