

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**CARLA TRACY, DARRYL
BOWSKY, and DEBORAH
HARRINGTON** *on behalf of
themselves and those similarly situated,*

Plaintiffs,

v.

**ELEKTA, INC. and
NORTHWESTERN MEMORIAL
HEALTHCARE,**

Defendants.

Judge Steven D. Grimberg

Case No. 1:21-cv-02851

**DECLARATION OF TERENCE R. COATES IN SUPPORT OF
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

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 Interim Class Counsel along with Bryan L. Bleichner for Plaintiffs in this matter and have monitored my firm’s and my co-counsel’s participation in this matter from 2023 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. My firm has been centrally involved in all aspects of this litigation from the initial investigation to the present. I have been the primary point of contact for Plaintiffs and Plaintiffs' Counsel with counsel for Defendants Elekta, Inc. and Northwestern Memorial Healthcare (collectively "Defendants"). Class Counsel and Defendants' counsel are experienced in class action litigation. Class Counsel and Plaintiffs' Counsel undertook this matter on a contingency fee basis with the risk of achieving no recovery at all. Additionally, Class Counsel and Plaintiffs' 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 Vice President 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 participated as a panel speaker The Sedona Conference Working Group 11 Midyear Meeting 2022 "Emerging issues in privacy and cybersecurity class action litigation" in Cleveland, Ohio on November 3, 2022; 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; the Beazley Insurance national conference in Ft. Lauderdale, Florida in March 2023; the JAMS roundtable for selecting mediators in September 2023; Trial Lawyers of Mass Tort's conference in Cabo, Mexico in

December 2023; and Class Action Money & Ethics Conference in New York, New York in May 2024. 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 plaintiffs' counsel in *In re Advocate Aurora Health Pixel Litigation*, No. 22-CV-1253-JPS (E.D. Wis.) (class counsel for a \$12.225 million data privacy class action settlement); *Sherwood v. Horizon Actuarial Services, LLC*, No. 1:22-cv-1495 (N.D. Ga) (class counsel for an \$8,733,446.36 data breach class action settlement); *In re Novant Health, Inc.*, No. 1:22-CV-00697 (M.D.N.C.) (plaintiffs' counsel for a \$6.66 million data privacy class action settlement); *Durgan v. U-Haul Int'l Inc.*, No. 2:22-cv-01565 (D. Ariz.) (class counsel for \$5,085,000 data breach class action settlement); *Owens v. U.S. Radiology Specialist, Inc.*, No. 22 CVS 17797 (Mecklenburg County Superior Court, North Carolina) (class counsel for \$5,050,000 data breach class action settlement); *Phillips v. Bay Bridge Administrators, LLC*, No. 23-cv-00022 (W.D. Tex.) (class counsel for a \$2,516,890 data breach class action settlement).

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.”).

THE DATA BREACH

5. Plaintiffs’ Counsel thoroughly investigated this case resulting in the filing of the consolidated class action complaint on February 2, 2022, in this case resulting from their Sensitive Information being included in Defendant’s May 2021 Security Incident. Thereafter, Defendant moved to dismiss Plaintiffs’ consolidated class action complaint in March 2022, which was subsequently briefed by both Parties. ECF Nos. 43, 43-1, 44, 47. The Court denied Defendants’ motion as to the causes of action for negligence, negligence per se, breach of implied contract relating to Defendant Northwestern, and violations of the Illinois Genetic Information

Privacy Act (“GIPA”); and granted Defendants’ motion as to the other causes of action. ECF No. 61.

6. The Parties exchanged initial disclosures and Plaintiffs commenced formal discovery, serving interrogatories and document requests. Defendant provided responses to Plaintiffs’ discovery requests. The Parties also met and conferred regarding the scope of Defendants’ document production in this case and the potentially significant expense that was affiliated with such document production.

7. The Parties then began exploring the possibility of settlement and mediation. Plaintiffs sent Defendant informal discovery requests for settlement purposes. Defendant responded to Plaintiffs’ informal discovery requests for settlement purposes.

8. The Parties agreed to mediate this case with Jill Sperber – a respected mediator with substantial experience with data privacy class actions. The Parties exchanged detailed mediation statements before the April 24, 2024 all-day mediation. The Parties’ negotiations were arm’s-length in that each side were strident in their mediation positions while remaining professional. Through these settlement negotiations and the settlement information requests Plaintiffs received from Defendant before the mediation, Plaintiffs were able to confirm the class size of roughly 497,000 individuals, determine the data sets potentially compromised in

the Security Incident, number of impacted individuals with Social Security numbers, and available insurance coverage. The mediation did not result in a settlement in principle.

9. The Parties continued to engage with Mediator Jill Sperber and rescheduled a follow-up mediation on May 10, 2024. Through the second mediation, Ms. Sperber was able to guide the Parties to a settlement in principle for an \$8,900,000 non-reversionary common fund. Furthermore, Defendant implemented business practice changes to improve Defendant's information security following the Security Incident.

10. This Settlement is the result of extensive arm's-length negotiations and hard bargaining. After reaching an agreement in principle and throughout the course of the Parties' negotiations of the terms of the Settlement Agreement, Class Counsel and Defendant's counsel participated in several phone calls and email exchanges to reach the final terms of the comprehensive Settlement Agreement on August 20, 2024. Through these protracted settlement discussions, the Parties were able to evaluate the strengths and weaknesses of their case and evaluate damages on a potential classwide basis. Furthermore, Class Counsel and Defendant's counsel are experienced in handling data breach class actions such as this one and understand the complexities of these cases. As a result of these negotiations, I can confirm that

the Parties and their counsel support this Settlement, and believe it is fair and reasonable.

THE SETTLEMENT & ITS BENEFITS

11. The Settlement in this matter will provide tangible cash benefits to Class Members who submit valid claims under the \$8,900,000 non-reversionary Settlement Fund.

12. From the Settlement Fund, Class Members will receive either a Pro Rata GIPA Payment or a Pro Rata Cash Payment and the ability to receive up to \$5,000 for documented out-of-pocket losses, after the deduction of the payment to the Settlement Administrator for Costs of Settlement Administration, and for attorneys' fees and expenses.

13. In my experience of handling many data breach class actions around the country including many other common fund cases, the payment of \$8,900,000 for a common fund settlement for roughly 497,000 class members (equivalent to roughly \$17.90 per Class Member) is a strong recovery for the Settlement Class, including the Illinois GIPA Subclass.

14. This case remained particularly risky considering that an ancillary case was filed against Northwestern in Illinois based on the same data security incident and that case was dismissed in its entirety at the motion to dismiss stage of the case. *Fenske v. Nw. Mem. Healthcare*, No. 21 CH 3759 (Cir. Ct. Cook Cty. Ill.).

**EISNERAMPER IS QUALIFIED TO ACT AS THE SETTLEMENT
ADMINISTRATOR**

15. Understanding that settlement administration costs and expenses will be deducted from the Settlement Fund, Class Counsel sought to engage the service of a settlement administrator with experience handling data privacy class actions and providing cost-effective services. Notably, Eisner Advisory Group, LLC ("EisnerAmper") bid included comprehensive settlement administration services and a price that is favorable to the Class. I have received and reviewed hundreds of settlement administration bids during my career and am very familiar with what a reasonable settlement administration bid is per class member while factoring in the size of the class and the primary notice method.

16. EisnerAmper is a qualified class action settlement administration company, as evidenced in the documentation supporting its declaration in support of the notice program.

17. EisnerAmper projects to complete settlement administration for approximately \$360,000 in this case.

THE NOTICE PROGRAM IS ADEQUATE

18. The Notice plan in this case consists of sending each Class Member the Short Form Notice with tear off claim form included via Regular U.S. Mail to all Settlement Class for whom Defendant has contact information, and the Long Form Notice and full Claim Form will be posted on the Settlement Website. Additional

case information including important documents from this case will also be posted on the Settlement Website. Through my experience of handling many other class action settlements and working with many other settlement administrators, the reach of the Notice Plan meets that of other court-approved notice programs, and has been designed to meet due process requirements, including the “desire to actually inform” requirement.

CLASS COUNSEL’S ATTORNEYS’ FEES & EXPENSES ARE REASONABLE

19. Under the Settlement, Class Counsel may seek up to 1/3 of the Settlement Fund (\$2,966,66.67) as attorneys’ fees plus reasonable litigation expenses, which shall be paid from the Settlement Fund.

20. 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.

21. The Eleventh Circuit’s controlling authority is *Camden I*, which holds attorneys’ fees in common fund cases must be calculated using the percentage rather than the lodestar approach.¹ *Camden I Condo. Ass’n, Inc. v. Dunkle*, 946 F.2d at 774-75. In *Camden I*, although the court noted that awards typically range from 20% to 30%, it stated: “There is no hard and fast rule . . . because the amount of any fee

¹ A lodestar cross-check is not required in this Circuit. *In re Equifax Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1280 (11th Cir. 2021).

must be determined upon the facts of each case.” *Id.* at 774; *see also, e.g., Waters v. Int’l. Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999).

22. Following *Camden I*, percentage-based fee awards in the Eleventh Circuit have averaged around 33% of the common fund. *See, e.g., Wolff v. Cash 4 Titles*, No. 03-22778-CIV, 2012 WL 5290155, at *5-6 (S.D. Fla. Sept. 26, 2012) (“The average percentage award in the Eleventh Circuit mirrors that of awards nationwide -roughly one-third”); *Abrams v. Savannah College of Art & Design, Inc.*, No. 1:22-cv-4297 (N.D. Ga. Sept. 22, 2023) (Doc. 29) (approving fee request of 1/3 of the common fund plus expenses); *Alghadeer Bakery & Marker, Inc. v. Worldpay US, Inc.*, No. 1:18-cv-02688-MLB, 2020 WL 10935986, at *4 (N.D. Ga. June 3, 2020) (“The fee represents one-third of the \$15 million cash settlement fund, which the Court finds to be reasonable and consistent with awards in similar cases in this Circuit.”); *Waters v. Int’l Precious Metals, Corp.*, 190 F.3d 1291, 1292-98 (11th Cir. 1999) (affirming attorneys’ fees of 1/3 of the \$40 million common fund); *Morefield v. NoteWorld, LLC*, Nos. 1:10-CV-00117; 1:11-CV-0029, 2012 WL 135573, at *5 (S.D. Ga. Apr. 18, 2012) (1/3 of \$1,040,000 common fund); *Lunsford v. Woodforest Nat’l Bank*, No. 1:12-cv-103, 2014 WL 12740375, at *15 (N.D. Ga. May 19, 2014) (fee award of 1/3 of the common fund); *Cabot E. Broward 2 LLC v. Cabot*, No. 16-61217-CIV, 2018 WL 5905415, at *7-8 (S.D. Fla. Nov. 9, 2018) (awarding fee of \$33,333,333 of the \$100 million common fund); *Morgan v. Pub. Storage*, 301 F.

Supp. 3d 1237, 1257 (S.D. Fla. 2016) (noting that “a fee award of 33% ... is consistent with attorneys’ fees in federal class actions in this Circuit.”). Class Counsel and Plaintiffs’ Counsel have invested considerable time and resources into the prosecution of this action and will file a motion for attorneys’ fees and expenses at least 14 days before the objection and opt-out deadline.

SIMILAR DATA BREACH SETTLEMENTS

23. Class Counsel opines that this \$8,900,000 Settlement is fair and reasonable for the roughly 497,000 Class Members. Class Counsel’s opinion 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:

Case Name	Case Number	Settlement Amount	Class Size	Per Person
<i>In re C.R. England, Inc. Data Breach Litigation</i>	No. 2:22-cv-374 (D. Utah)	\$1,400,000	224,572	\$6.23
<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>Phillips v. Bay Bridge Administrators, LLC</i>	No. 23-cv-00022 (W.D. Tex.)	\$2,516,890	251,890	\$10.00
<i>Tiller v. Hilb Group Operating, LLC</i>	No. 3:23-cv-00759 (JAG) (E.D. Va.)	\$1,600,000	108,954	\$14.68
<i>Migliaccio v. Parker Hannifin Corp.</i>	No. 1:22-CV-00835 (N.D. Ohio)	\$1,750,000	115,843	\$15.10
<i>Tracy v. Elekta, Inc.</i>	No. 1:21-cv-2851 (N.D. Ga.)	\$8,900,000	497,000	\$17.90

Class Counsel and Plaintiffs 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 and is in the range of reasonableness.

THE CLASS REPRESENTATIVES ARE ADEQUATE REPRESENTATIVES OF THE SETTLEMENT CLASS

24. The proposed Class Representatives have been active participants in this case, generally stayed informed about this litigation, reviewed, and approved the settlement and final settlement amount and Settlement Agreement, and spent substantial time and effort protecting the Class's interests. Class Representatives have no conflicts of interest with other Settlement Class Members, are subject to no unique defenses, and they have and continue to vigorously prosecute this case on behalf of the Settlement Class. Each Class Representative received notice from Defendants that their Sensitive information was included in the Data Incident.

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

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

26. Furthermore, in my and my co-counsel's experience in handling over 100 data breach class action cases for plaintiffs, we hold the informed opinion that the \$8,900,000 non-reversionary common fund settlement is fair and reasonable for roughly 497,000 Class Members. The settlement afforded here, as compared to the uncertainty of damages even following a successful finding of liability, weighs in favor of preliminary approval.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on August 23, 2024, at Cincinnati, Ohio.

/s/ Terence R. Coates
Terence R. Coates