

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

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

Plaintiffs,

v.

ELEKTA, INC. and  
NORTHWESTERN MEMORIAL  
HEALTHCARE,

Defendants.

Case No. 1:21-cv-02851-SDG

**PLAINTIFFS' MOTION FOR ATTORNEYS' FEES  
AND LITIGATION EXPENSES**

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## **MOTION FOR ATTORNEYS' FEES AND EXPENSES**

Under Fed. R. Civ. P. 23(h) and Fed. R. Civ. P. 54(d)(2), as well as this Court's Order Granting Preliminary Approval of Class Action Settlement and Notice Plan (ECF No. 85), Plaintiffs Carla Tracy, Darryl Bowsky, and Deborah Harrington (collectively "Plaintiffs"), on behalf of themselves and all others similarly situated, respectfully move the Court for an award of attorneys' fees in the amount of \$2,966,666.66, and for reimbursement of litigation expenses in the amount of \$23,688.19.

Unless otherwise stated, all definitions herein are the same as in the Settlement Agreement. (ECF No. 84-1).

### **MEMORANDUM IN SUPPORT**

#### **I. BACKGROUND**

##### **A. History of Litigation**

In May of 2021, Elekta worked with its healthcare customers, including Northwestern, (collectively, "Elekta's Customers") to send notice of the Data Security Incident to Plaintiffs and Settlement Class Members informing them that their information may have been compromised in the Data Security Incident. The Data Security Incident was understood to have impacted approximately 497,000 individuals. S.A. § 1.42. On February 2, 2022, Plaintiffs filed a Consolidated Amended Class Action Complaint (ECF No. 33) alleging that Defendants failed to

implement and maintain reasonable data security measures. Plaintiffs asserted claims for negligence, negligence *per se*, breach of implied contract, breach of contract—third-party beneficiaries, violation of the Illinois Genetic Information Privacy Act (“GIPA”), and for declaratory and injunctive relief, as well as statutory claims under Ga. Code Ann. § 13-6-11. In March of 2022, Defendants filed a motion seeking to dismiss Plaintiffs’ claims, along with accompanying documents, which was subsequently briefed by both parties. *See* 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 as to Defendant Northwestern, and violations of GIPA as to one Plaintiff. Order, March 31, 2023. ECF No. 61. The Court granted Defendants’ motion as to the other causes of action. *Id.* On April 21, 2023, Defendants filed their Answer and Defenses, denying Plaintiffs’ claims in their entirety. (ECF No. 62). Thereafter, the Parties engaged in litigation, including exchanging written discovery. Declaration of Terence R. Coates in Support of Preliminary Approval of Class Action Settlement (“Coates Preliminary Approval Decl.”) (ECF No. 84-2) ¶ 6.

### **B. Negotiations and Settlement**

The Settlement is the result of arm’s-length negotiations and hard bargaining over many months of discussions and two all-day mediation sessions. *Id.* ¶ 10. The Parties had settlement discussions during the course of the litigation and jointly



decided to engage in the mediation process. *Id.* ¶ 7. On May 10, 2024, the Parties engaged in their second mediation attempt—an arm’s-length, full-day mediation session with mediator Jill R. Sperber at which they reached an agreement in principle. *Id.* ¶ 8. The Parties were able to resolve the matter for a non-reversionary common fund settlement of \$8,900,000.00. S.A. § 2.2. This Settlement, if approved, will resolve all claims related to the Data Security Incident on behalf of the Settlement Class. *Id.* § 9.1. The Settlement in principle was then negotiated in detail in the form of the thorough Settlement Agreement. Coates Preliminary Approval Decl. ¶ 10.

On August 26, 2024, Plaintiffs moved for preliminary approval. The Court granted the unopposed motion on August 29, 2024. ECF No. 85. Pursuant to the terms of the Settlement Agreement and the Preliminary Approval Order, notice was sent to the Class beginning on September 28, 2024. The amount of the attorneys’ fees to be sought was included in the Short Form (postcard) Notice mailed to Settlement Class Members, and in the Long Form Notice posted on the Settlement Website. To date, there have been no objections to the Settlement, or specifically to the attorneys’ fees and expenses requested.

### **C. Summary of Settlement Terms**

Under the terms of this Settlement, Elekta will pay \$8,900,000.00 to establish the Settlement Fund to be distributed to Settlement Class Members under the Settlement Agreement. The Settlement defines the Settlement Class as follows:

All persons residing in the United States who had their Sensitive Information hosted by Elekta compromised as a result of the Data Security Incident.

S.A. § 1.42. There is an Illinois GIPA Subclass defined as:

All persons residing in the State of Illinois who had Genetic Information hosted by Elekta compromised as a result of the Data Security Incident.

*Id.* § 1.20. The Settlement Class consists of approximately 497,000 individuals nationwide. *Id.* § 1.42. The Settlement Fund will be used to make payments to Settlement Class Members and to pay the costs of Notice and Administrative Expenses, and attorneys' fees and expenses. *Id.* § 2.3.

#### **1. Settlement Benefits**

##### **a. Reimbursement of Out-of-Pocket Losses up to \$5,000**

Settlement Class Members may receive monetary payments by submitting a claim form selecting the option for reimbursement of documented Out-of-Pocket Losses up to \$5,000 per individual. *Id.* § 3.2.

**b. *Pro Rata* GIPA Payments**

Settlement Class Members who were residents of Illinois who had Genetic Information hosted by Elekta and compromised in the Data Security Incident may submit a claim for the GIPA Cash payment, which will be made on a *pro rata* payment of 50% of the Settlement Fund after distribution of attorneys’ fees, litigation expenses, settlement administration, and out-of-pocket losses. *Id.* § 3.1(a). The GIPA Cash payments will be capped at \$1,000.00. *Id.*

**c. *Pro Rata* Cash Payments**

Settlement Class Members not electing and/or eligible to receive a GIPA Cash Payment may submit a claim for a *Pro Rata* Cash Payment. The amount of the payment will be determined *pro rata* based on 50% of the amount remaining in the Settlement Fund following distribution of attorneys’ fees, litigation expenses, settlement administration, and out-of-pocket losses (plus any amounts remaining from the GIPA *Pro Rata* Cash Payment to the extent the \$1,000 cap per GIPA Cash Payment is reached). *Id.* § 3.1(b).

**II. LEGAL STANDARD**

Federal Rule of Civil Procedure 23(h) allows a district court supervising a class action to “award reasonable attorney’s fees and nontaxable costs that are authorized by law.” Fed. R. Civ. P. 23(h). The United States Supreme Court noted that attorneys who represent a class and whose efforts achieve a benefit for the class

are “entitled to a reasonable attorney’s fee from the fund as a whole,” as appropriate compensation for their services to the class. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). “[D]istrict courts have great latitude in setting fee awards in class action cases.” *In re Home Depot Inc. Customer Data Sec. Breach Litig.*, 931 F.3d 1065, 1078 (11th Cir. 2019) (Internal quotation and citation omitted).

In common fund cases, such as this case, “a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys’ fee from the fund as a whole.” *Home Depot*, 931 F.3d at 1079 (citing *Boeing*, 444 U.S. at 478). The Eleventh Circuit has held that the “percentage of the fund approach” should be used to determine a reasonable fee award when the settlement established a common fund. *Camden I Condo. Ass’n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

### **III. ARGUMENT**

Class Counsel’s efforts created a \$8,900,000.00 non-reversionary Settlement Fund where Settlement Class Members can easily submit a claim for significant cash benefits. This Settlement represents an excellent result for the Settlement Class in this litigation and was obtained against a well-funded defense by Defendants, which were represented by an AmLaw 100 law firm, Morgan Lewis. Although Plaintiffs believe in the merits of their claims, this litigation was inherently risky and complex. The claims involve a challenging fact pattern for a data breach case and also the

intricacies of data breach litigation, a fast-developing area in the law. The Plaintiffs would face risks at each stage of litigation. Against these risks, it was through the hard-fought negotiations and the skill and hard work of Class Counsel and the Class Plaintiffs that the Settlement was achieved for the benefit of the Settlement Class.

Class Counsel zealously prosecuted Plaintiffs' claims, achieving the Settlement Agreement only after years of hard-fought litigation and prolonged arm's length negotiations. Even after coming to an agreement on the central terms, Class Counsel worked for weeks to finalize the Settlement Agreement and associated exhibits pertaining to notice, preliminary approval, and final approval. Coates Preliminary Approval Decl. ¶ 10.

As compensation for the substantial benefit conferred upon the Settlement Class, Class Counsel respectfully move the Court for an award of attorneys' fees of \$2,966,666.66 and out-of-pocket expenses totaling \$23,688.19, to be paid from the non-reversionary Settlement Fund. This fee request represents one-third (33.33%) of the total \$8,900,000.00 common fund recovery. This request is contemplated by the Settlement Agreement, and Class Counsel apprised the Court of this request in its Motion for Preliminary Approval (filed on August 26, 2024). S.A. ¶ 10.1 (ECF No. 84-1). This amount was also clearly delineated in the Short Form and Long Form Notice to the Settlement Class (attached to the Settlement Agreement as Exhibits B and D within ECF No. 84-1). As of November 6, 2024, zero class members have

objected to the Settlement, the attorneys' fees and expenses, and only seven (7) have opted-out. Declaration of Terence R. Coates in Support of Plaintiffs' Motion for Attorneys' Fees and Litigation Expenses ("Coates Fee Decl.") ¶ 4.

**A. The Requested Fee Should be Approved Because it is Reasonable and Supported by the Relevant Factors**

Federal district courts in Georgia and in the Eleventh Circuit have routinely approved attorneys' fees equaling one-third of the settlement in common fund settlements. Plaintiffs' request for fees here of one-third (1/3) of the Settlement Fund puts the fee request squarely within the range of fees approved by courts in the Eleventh Circuit. Plaintiffs' motion should be granted because the request is reasonable and appropriate in light of the substantial risks presented in prosecuting this action, the quality and extent of work conducted, and the stakes of the case; the requested fees and costs were clearly delineated in notice to the Settlement Class and no class member has objected; and because the expenses incurred were reasonable and necessary for the litigation.

As Class Counsel will also show this Court, the fee request is also fully supported by the relevant "*Johnson*" factors that district courts in the Eleventh Circuit employ when determining the reasonableness of an attorneys' fee request.

**B. The Settlement Establishes a Non-Reversionary Common Fund**

Data breach class action settlements typically fall under one of two structures: (1) a common fund or (2) claims made. The Settlement here is a non-reversionary

common fund from which Settlement Class Members may claim reimbursement for documented out-of-pocket expenses, a *pro rata* GIPA payment (if the Class Member is a qualifying Illinois resident), and a *pro rata* Cash Payment for those not eligible for the GIPA payment. Courts prefer this structure over claims made settlements. *See, e.g., Hart v. Movement Mortg., LLC*, No. 814CV1168JLSPLAX, 2016 WL 11756826, at \*7 (C.D. Cal. Nov. 30, 2016) (“The non-reversionary nature of these amounts counsels in favor of final approval.”). Class Counsel have negotiated many *pro rata* cash payments under non-reversionary common fund settlement structures with the understanding that *pro rata* payments increase direct benefits to Settlement Class Members, by “sweeping” all remaining funds in the non-reversionary Settlement Fund to Settlement Class Members making valid claim. Coates Fee Decl. ¶ 7.

### **C. The Requested Fee is Within the Range Typically Approved**

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

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 in a data breach class action settlement); *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’s attorneys’ fee request of one-third (1/3, or \$2,966,666.66) of the \$8,900,000.00 non-reversionary common fund in this case is reasonable in that it is within the range typically approved by courts within the Eleventh Circuit, including within District and by this Court.

#### **D. The Relevant *Johnson* Factors Support Approval of the Fee Request**

“In the Eleventh Circuit, the percentage method requires a district court to consider a number of relevant factors called ‘the *Johnson* factors’ in order to determine if the requested percentage is reasonable.” *In re Ethicon Physiomesh Flexible Composite Hernia Mesh Prods. Liab. Litig.*, No. 1:17-md-02782, 2022 WL 17687425, at \*6 (N.D. Ga. Nov. 22, 2022). Courts within this District have noted that not all twelve *Johnson* factors need to be reviewed and have determined the reasonableness of a fee request based on the following six *Johnson* factors: (1) the results obtained and fees in similar cases; (2) the novelty and difficulty of the questions involved; (3) the preclusion of other employment by the attorneys due to the acceptance of this case; (4) whether the fee is fixed or contingent; (5) the experience, reputation, and ability of the attorneys; and, (6) the time and labor required. *In re S. Co. S’holder Derivative Litig.*, No. 1:15-CV-725-MHC, 2022 WL

4545614, at \*10 (N.D. Ga. June 9, 2022); *see also Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (listing all 12 *Johnson* factors).

### **1. The Results Obtained and Fees in Similar Cases**

The non-reversionary common fund of \$8,900,000.00 is a strong recovery for the Settlement Class of roughly 497,000 individuals. The “per person” amount of this settlement far outstrips comparable settlements. *See* ECF No. 84-2 at ¶ 23 (chart of comparable settlements with the “per person” amounts included). The Settlement provides every Settlement Class Member who submits a valid claim with a monetary award that is fair and reasonable, especially considering the risks at class certification and trial. Settlement Class Members have the ability to claim reimbursement for documented Monetary Losses up to \$5,000 and the ability to receive a cash payment. S.A. § 3.2. Settlement Class Members who were residents of Illinois and had Genetic Information, as defined by GIPA, hosted by Elekta that was compromised in the Data Security Incident can submit a claim for a GIPA Cash Payment, capped at \$1,000.00 per valid GIPA Cash Payment claim. S.A. § 3.1. All other Settlement Class Members may submit a claim for the *Pro Rata* Cash Payment, consisting of an equal share of the net Settlement Fund after payment of the documented Monetary Losses and the GIPA Cash Payments. S.A. § 3.1(b).

The Settlement is eminently reasonable, especially considering that it avoids the potential contingencies of continued litigation. As pointed out in connection with

the preliminary approval motion, this case remained particularly risky considering that an ancillary case based on the same data security incident 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.). Also, as Judge Thrash noted when approving the Equifax settlement, “[Defendant] would likely renew its arguments under Georgia law that it has no legal duty to safeguard personal information, arguments that were strengthened following the Supreme Court of Georgia’s decisions in *Georgia Dep’t of Labor v. McConnell*, 305 Ga. 812, 828 S.E.2d 352 (Ga. 2019).” *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132 at \*7 (N.D. Ga. Mar. 17, 2020).

Comparable fee awards were recently made in other data privacy cases in this District. For example, in *Sherwood v. Horizon Actuarial Services, LLC*, No. 1:22-cv-01495-ELR (N.D. Ga.) (Doc. No. 94; April 2, 2024), Judge Ross granted a motion for attorneys’ fees of 1/3 (\$2,911,148.79) of a comparable \$8.73 million non-reversionary common fund plus reasonable litigation expenses. Where the fees in similar cases recently approved by this Court are in line with the requested fee here, this factor weighs in favor of the requested fee award.

## **2. The Novelty and Difficulty of the Questions Involved**

Courts also consider the difficulty and novelty of the legal and factual issues. *See Cotter v. Checkers Drive-In Rests., Inc.*, No. 8:19-cv-1386, 2021 WL 3773414,

at \*12 (M.D. Fla. Aug. 25, 2021) (noting data breach class actions present “serious risks” due, in part, to “the ever-developing law surrounding data breach cases”); *In re Citrix Data Breach Litig.*, No. 19-61350-CIV, 2021 WL 2410651, at \*3 (S.D. Fla. Jun 11, 2021) (“Data breach cases in particular present unique challenges with respect to issues like causation, certification, and damages.”); *In re Arby’s Rest. Grp., Inc. Data Sec. Litig.*, No. 1:17-cv-1035-WMR, 2019 WL 2720818, at \*3 (N.D. Ga. June 3, 2019) (“Further, data breach litigation involves the application of unsettled law with disparate outcomes across states and circuits. Georgia law, in particular, presents challenges.”). This case is no exception. The pursuit of nationwide claims and relief presented complex issues of law and fact. Plaintiffs survived a stiff challenge from Defendants’ motion to dismiss. And in a very real way, the issues here were more novel and complex than in the typical data privacy case, due to the largely untested GIPA claims that have not been widely pursued in data breach actions. The substantial benefits achieved in the Settlement are attributable to the efforts of Class Counsel, and the complexity of the factual and legal issues presented by this litigation supports Class Counsel’s request for attorneys’ fees. *In re Citrix Data Breach Litig.*, 2021 WL 2410651, at \*9 (noting that “by resolving the case early in the litigation, Class Counsel avoided these

difficult questions and ensured a successful result for Class Members” in a data breach class action).

### **3. The Preclusion of Employment by the Attorneys Due to the Acceptance of this Case**

Class Counsel’s pursuit of this case precluded them from working on other matters. Coates Fee Decl. ¶ 9. Courts within this District have weighed this factor in favor of Class Counsel’s requested fee when the work on the case precluded Class Counsel’s ability to pursue other matters. *See In re S. Co. S’holder Derivative Litig.*, 2022 WL 4545614, at \*12 (noting that class counsel’s pursuit of the class action case “necessarily precluded them from devoting resources to other litigation and the prosecution of additional cases.”). Accordingly, this factor supports Class Counsel’s fee request.

### **4. Whether the Fee is Fixed or Contingent**

“Courts have routinely recognized that another important factor in evaluating an application for fees is the contingent nature of the fee.” *Id.* at \*11. Class Counsel pursued this matter on a wholly contingent basis without any guarantee of recovery while advancing litigation expenses on behalf of Plaintiff and the Settlement Class. Coates Preliminary Approval Decl. ¶ 2. To the extent there was no recovery for the Class by way of the non-reversionary common fund, Class Counsel would not have been compensated at all for their work on this case and would have lost all litigation expenses incurred in pursuing this matter. *See In re Arby’s*, 2019 WL 2720818, at \*4

(“The risk of non-payment based on the contingent nature of recovery in this case supports the requested award of attorneys’ fees.”). Accordingly, this factor also weighs in favor of granting Class Counsel’s requested fee.

### **5. The Experience, Reputation, and Ability of the Attorneys**

The experience, reputation, and ability of class counsel is another factor courts evaluate in determining an appropriate attorneys’ fee. As detailed in the attached Declaration, Class Counsel (Terence R. Coates of Markovits, Stock & Demarco, LLC and Bryan L. Bleichner of Chestnut Cambronne PA), in conjunction and cooperation with the other Plaintiffs’ firms involved in this matter, relied upon their vast experience handling data privacy class actions across the country to negotiate a non-reversionary common fund settlement with experienced data breach defense counsel. Coates Preliminary Approval Decl. ¶¶ 10, 13, 26; Coates Fee Decl. ¶¶ 2, 6-7. Class Counsel utilized their experience to reach a uniform, class-wide settlement even considering the risks of class certification or potentially losing at summary judgment or trial. *Id.* ¶ 7. Class Counsel’s experience in handling many other data privacy class action cases permitted Class Counsel to recover the \$8,900,000.00 non-reversionary common fund. Class Counsel’s experience in prosecuting data breach cases has proven to be critical to the efficient prosecution and ultimate resolution of this case. Furthermore, Class Counsel have a national reputation for handling

complex class action cases. *See* Coates Fee Decl. ¶ 2; Coates Preliminary Approval Decl. ¶¶ 3-4.

The result achieved here is particularly noteworthy considering that the nature of every data breach is different, and that some cases have failed at the dismissal or class certification stages. *See, e.g., SELCO Cmty. Credit Union v. Noodles & Co.*, 267 F. Supp. 3d 1288, 1292 (D. Colo. 2017) (dismissing a nationwide class action for a data breach at Noodles & Co, holding Colorado’s economic loss rule prohibited tort damages caused by the data breach); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, MDL No. 09-2046, 2012 WL 896256 (S.D. Tex. Mar. 14, 2012) (after three rounds of dismissal motions, dismissing among other claims, negligence), *rev’d sub nom., Lone Star Nat’l Bank NA v. Heartland Payment Sys., Inc.*, 729 F.3d 421, 424 (5th Cir. 2013) (concluding that New Jersey’s economic loss doctrine could not be applied at dismissal stage); *In re TJX Cos. Retail Sec. Breach Litig.*, 524 F. Supp. 2d 83 (D. Mass. 2007) (dismissing claims for negligence and negligence per se), *aff’d*, 564 F.3d 489 (1st Cir. 2009).

This factor further supports Class Counsel’s request for attorneys’ fees.

## **6. The Time and Labor Required**

As discussed above, Class Counsel litigated and negotiated this case both vigorously and efficiently. As of November 11, 2024, Class Counsel have expended approximately 1,371.50 hours pursuing this matter on behalf of the Settlement Class.

Coates Fee Decl. ¶ 14. Class Counsel will certainly expend additional time and efforts pursuing this matter through the Final Approval Hearing and in overseeing the administration of settlement benefits to Settlement Class Members thereafter. *Id.* ¶ 15. The amount of time invested by Class Counsel demonstrates both vigorous advocacy and the efficient use of time by a highly experienced and effective group of advocates.

In awarding attorneys' fees, courts have consistently recognized and rewarded class counsel for moving the litigation to conclusion with diligence and efficiency. *Ressler v. Jacobson*, 149 F.R.D. 651 (M.D. Fla. 1992) (noting class counsel's efficiency in resolving the case as a factor supporting the requested fee award); *see also Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1063 (D. Minn. 2010) (noting that "Plaintiffs' counsel moved the case along expeditiously, and made every effort to limit duplicative efforts and to minimize the use of judicial resources in the management of the case" and "[c]ounsel exhibited diligence and efficiency throughout the litigation, resulting in a favorable result for the Class"). This factor, like the others, weighs in favor of approving Class Counsel's fee request.

**E. The Requested Expenses are Reasonable in that They Were Necessary to Prosecute this Litigation**

Class Counsel have been prudent in monitoring their litigation expenses in this case to date. As of November 11, 2024, Class Counsel have \$23,688.19 in expenses including \$18,750.00 in mediation costs. Coates Fee Decl. ¶ 16. The rest



of the reasonable expenses are for *pro hac vice* application and other filing fees, service of process expenses, legal research and copying expenses, and in travel costs for attending the hearing on Defendants' Motion to Dismiss and the upcoming Final Approval hearing. *Id.* These expenses were incurred for the benefit of the Settlement Class.

#### IV. CONCLUSION

For these reasons, Plaintiffs and Class Counsel respectfully ask the Court to enter an Order Granting Plaintiffs' Motion for Attorneys' Fees in the amount of \$2,966,666.66 and Litigation Expenses in the amount of \$23,688.19 (subject to being updated before the Final Approval hearing).

Dated: November 12, 2024

/s/ Terence R. Coates

Terence R. Coates\*

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**CERTIFICATE OF SERVICE AND  
LOCAL RULE 7.1(D) CERTIFICATION**

I hereby certify that on November 12, 2024, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will send notification of such filing and effectuate service to all counsel of record in this matter, pursuant to Local Rule 5.1.

I further certify that this Motion for Attorneys' Fees and Litigation Expenses has been prepared with one of the fonts and point selections approved by the Court in Local Rule 5.1(C).

/s/ Terence R. Coates

Terence R. Coates

*Class Counsel*

/s/ MaryBeth V. Gibson

MaryBeth V. Gibson

*Plaintiffs' Liaison Counsel*

# **EXHIBIT 1**

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

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

Plaintiffs,

v.

ELEKTA, INC. and  
NORTHWESTERN MEMORIAL  
HEALTHCARE,

Defendants.

Case No. 1:21-cv-02851-SDG

**DECLARATION OF TERENCE R. COATES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND LITIGATION  
EXPENSES**

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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, along with Bryan L. Bleichner, am Class Counsel for Plaintiffs in this matter and have monitored my firm’s and my co-counsel’s participation in this matter from 2021 to the present. I reviewed my firm’s billing and expense records before drafting this Declaration. These billing and expense records are held in the ordinary course of business and audited to ensure they relate

to this matter and are not duplicative. I have also collected the billing and expense records of the other attorneys and law firms for the Plaintiffs, and have reviewed the same. 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.

### **SIMILAR SETTLEMENTS**

2. Class Counsel frequently represents individuals impacted in data breach class action cases and is very familiar with the settlement terms of many recent data breach class actions. For example, members of Class Counsel have participated as class counsel for several finally approved data breach class actions such as *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); *Durgan v. U-Haul Int'l Inc.*, No. 2:22-cv-01565 (D. Ariz.) (sole 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); *In re U.S. Vision Data Breach Litig.*, No. 1:22-cv-6558 (D.N.J) (class counsel for Nationwide Sightcare for a \$3.45 million data breach class action settlement); *Phillips v. Bay Bridge Administrators, LLC*, No. 23-cv-00022 (W.D. Tex.) (sole class counsel for a \$2,516,890 data breach class action settlement).

**THE SETTLEMENT AND THE SETTLEMENT CLASS'S  
RESPONSE TO IT SO FAR**

3. Through my experience with handling similar data breach class action cases, the Settlement in this case of \$8,900,000 for roughly 497,000 class members is a strong recovery for the Settlement Class especially considering that any remainder funds in the common fund will be used to increase *pro rata* the cash payment made available under the Settlement.

4. I have overseen the settlement administration process to date in this case and receive weekly update reports from EisnerAmper, the Settlement Administrator. As of November 6, 2024, there have been seven (7) opt out requests and no objections. Furthermore, the Settlement Class has responded favorably to the Settlement so far with 9,662 claims having been submitted to date (roughly 2% of Settlement Class Members). Notably, no Settlement Class Members have objected specifically to the requested attorneys' fees, despite being apprised (by way of the Short Form (postcard) Notice that was mailed to all Settlement Class Members) of the amount of fees to be sought.

5. Class Counsel expects that the claims rate will continue to increase with the claims deadline still two weeks away. Class Counsel will update the Court in the Motion for Final Approval as to the total number of claims submitted in this Settlement.



6. Class Counsel has spent significant time over the past two years focusing on implementing different notice methods in data breach class actions with the focus on increasing class member participation in data privacy settlements. This experience has resulted in the Notice program utilized in this case including the postcard notice with tear-off claim form and generally simplified notice language.

7. Class Counsel's experience handling many data breach class actions was instrumental to achieving the \$8,900,000 non-reversionary common fund settlement. Class Counsel have negotiated many *pro rata* cash payments under non-reversionary common fund settlement structures with the understanding that *pro rata* payments increase direct benefits to Settlement Class Members, by "sweeping" all remaining funds in the non-reversionary Settlement Fund to Settlement Class Members making valid claim. Class Counsel utilized their experience to reach a uniform, class-wide settlement even considering the risks of class certification or potentially losing at summary judgment or trial.

**THE REQUESTED FEE AWARD IS REASONABLE**

8. Under the Settlement, Class Counsel may seek up to 1/3 of the Settlement Fund (\$2,966,66.66) as attorneys' fees plus reasonable litigation expenses, which shall be paid from the Settlement Fund.

9. 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. Furthermore, due to accepting representation of Plaintiffs in this matter and pursuing the case on behalf of the Settlement Class, Class Counsel and Plaintiffs' Counsel were precluded from working on certain other class action cases including certain other data breach class action cases.

10. 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.<sup>1</sup> *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 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).

11. 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

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<sup>1</sup> 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).

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.

12. The fee request of 1/3 (\$2,966,666.66) of the \$8,900,000 common fund is reasonable in that it is supported by fee awards in other recent data breach class action settlements and Class Counsel and Plaintiffs’ Counsel’s lodestar.

13. Other data breach class action cases, such as *Savannah College of Art & Design, Inc.*, and *Sherwood v. Horizon Actuarial Services, LLC*, No. 1:22-cv-01495-ELR (N.D. Ga.) (Doc. No. 94; April 2, 2024) each include fee awards of 1/3 of the common fund. This case survived a motion to dismiss where *Savannah College of Art & Design* and *Horizon Actuarial* were resolved before a motion to dismiss decision was rendered. Class Counsel's fee request of 1/3 of the common fund is reasonable and generally consistent with other data breach class action cases from this District.

14. Class Counsel's lodestar to date also supports the fee request of \$2,966,666.66. Through November 1, 2024, Class Counsel and Plaintiffs' Counsel have expended roughly 1,371.50 hours for a lodestar total of approximately \$1,081,864.50. This equates to a modest current multiplier of 2.74, which is well within the range of reasonable multipliers in this District. *See Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-CV-3066-JEC, 2008 WL 11234103, at \*3 (N.D. Ga. Mar. 4, 2008) (approving attorneys' fees and noting that "[m]ultipliers of three and higher appear to be common[.]"); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 696 (N.D. Ga. 2001) (finding multipliers between 2.5 and 4 "reasonable[.]").

15. Class Counsel will undoubtedly accrue additional lodestar pursuing this matter through final approval, attending the Final Approval Hearing, and overseeing

the administration of Settlement benefits. In Class Counsel's experience, they will expend additional time and effort exceeding 150 hours in continuing to represent Plaintiffs and the Settlement Class in this matter.

**CLASS COUNSEL'S LITIGATION EXPENSES ARE MINIMAL AND REASONABLE**

16. Under the Settlement Agreement, Class Counsel may also request reimbursement of reasonable litigation expenses. Class Counsel have endeavored to limit expenses wherever possible. Class Counsel's litigation expenses to date are minimal and imminently reasonable in that they total \$23,688.19 including \$18,750.00 in mediation fees. The rest of the reasonable expenses are for filing fees, service of process fees, travel for the motion to dismiss hearing and the upcoming final approval hearing, and copying and research costs. \$23,688.19 of litigation expenses in a class action case that includes travel expenses and substantial mediation fees are reasonable and should be approved.

I declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct. Executed on November 12, 2024, at Cincinnati, Ohio.

/s/ Terence R. Coates  
Terence R. Coates