



## AlaFile E-Notice

01-CV-2024-902563.00

Judge: MONICA Y. AGEE

To: JONATHAN S. MANN  
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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JEREMY HUFSTETLER ET AL V. UPSTREAM REHABILITATION, INC. ET AL  
01-CV-2024-902563.00

The following matter was FILED on 12/17/2024 2:36:21 PM

**C001 HUFSTETLER JEREMY**

**C002 RUNK ADAM**

**C003 HATFIELD CONNIE**

**C004 JHALA YASHVANTSINH**

**C005 STARK DALE**

**C006 KENNY LISA**

**C007 MORRISSETTE A'TAVION**

**C008 SAWYER GENE**

**C009 MOFFA ROBERT**

**C010 HARNER LEAH**

**C011 YOUNG JUDY**


PLAINTIFFS' MOTION & MEMORANDUM FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND  
SERVICE AWARDS

[Filer: MANN JONATHAN STEPHEN]

Notice Date: 12/17/2024 2:36:21 PM

JACQUELINE ANDERSON SMITH  
CIRCUIT COURT CLERK  
JEFFERSON COUNTY, ALABAMA  
716 RICHARD ARRINGTON, JR BLVD  
BIRMINGHAM, AL, 35203

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<b>STATE OF ALABAMA</b> Unified Judicial System 01-JEFFERSON		Revised 3/5/08 <input type="checkbox"/> District Court <input checked="" type="checkbox"/> Circuit Court	Cas CV20	 <b>ELECTRONICALLY FILED</b> 12/17/2024 2:36 PM 01-CV-2024-902563.00 CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA JACQUELINE ANDERSON SMITH, CLERK
JEREMY HUFSTETLER ET AL V. UPSTREAM REHABILITATION, INC. ET AL		<b>CIVIL MOTION COVER SHEET</b> <i>Name of Filing Party:</i> C001 - HUFSTETLER JEREMY C002 - RUNK ADAM C003 - HATFIELD CONNIE C004 - JHALA YASHVANTSINH C005 - STARK DALE C006 - KENNY LISA C007 - MORRISSETTE A'TAVION C008 - SAWYER GENE C009 - MOFFA ROBERT C010 - HARNER LEAH C011 - YOUNG JUDY		
<i>Name, Address, and Telephone No. of Attorney or Party. If Not Represented.</i> JONATHAN S. MANN 2001 PARK PLACE N., STE. 1100 BIRMINGHAM, AL 35203 <i>Attorney Bar No.:</i> MAN057		<input type="checkbox"/> Oral Arguments Requested		
<b>TYPE OF MOTION</b>				

Motions Requiring Fee	Motions Not Requiring Fee		
<input type="checkbox"/> Default Judgment (\$50.00) Joinder in Other Party's Dispositive Motion <input type="checkbox"/> (i.e. Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00) <input type="checkbox"/> Judgment on the Pleadings (\$50.00) <input type="checkbox"/> Motion to Dismiss, or in the Alternative Summary Judgment (\$50.00) Renewed Dispositive Motion (Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00) <input type="checkbox"/> Summary Judgment pursuant to Rule 56 (\$50.00) <input type="checkbox"/> Motion to Intervene (\$297.00) <input type="checkbox"/> Other _____ pursuant to Rule _____ (\$50.00)  *Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.  <input type="checkbox"/> Local Court Costs \$ 0 _____	<input type="checkbox"/> Add Party <input type="checkbox"/> Amend <input type="checkbox"/> Change of Venue/Transfer <input type="checkbox"/> Compel <input type="checkbox"/> Consolidation <input type="checkbox"/> Continue <input type="checkbox"/> Deposition <input type="checkbox"/> Designate a Mediator <input type="checkbox"/> Judgment as a Matter of Law (during Trial) <input type="checkbox"/> Disburse Funds <input type="checkbox"/> Extension of Time <input type="checkbox"/> In Limine <input type="checkbox"/> Joinder <input type="checkbox"/> More Definite Statement <input type="checkbox"/> Motion to Dismiss pursuant to Rule 12(b) <input type="checkbox"/> New Trial <input type="checkbox"/> Objection of Exemptions Claimed <input type="checkbox"/> Pendente Lite <input type="checkbox"/> Plaintiff's Motion to Dismiss <input type="checkbox"/> Preliminary Injunction <input type="checkbox"/> Protective Order <input type="checkbox"/> Quash <input type="checkbox"/> Release from Stay of Execution <input type="checkbox"/> Sanctions <input type="checkbox"/> Sever <input type="checkbox"/> Special Practice in Alabama <input type="checkbox"/> Stay <input type="checkbox"/> Strike <input type="checkbox"/> Supplement to Pending Motion <input type="checkbox"/> Vacate or Modify <input type="checkbox"/> Withdraw <input checked="" type="checkbox"/> Other <b>PLAINTIFFS' MOTION &amp; MEMORANDUM FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS</b>		
pursuant to Rule <u>N/A</u> (Subject to Filing Fee)			
Check here if you have filed or are filing contemporaneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees) <input type="checkbox"/>	<table style="width: 100%; border: none;"> <tr> <td style="width: 50%; border: none;"> <b>Date:</b>            12/17/2024 2:34:11 PM         </td> <td style="width: 50%; border: none;"> <b>Signature of Attorney or Party</b>            /s/ JONATHAN S. MANN         </td> </tr> </table>	<b>Date:</b> 12/17/2024 2:34:11 PM	<b>Signature of Attorney or Party</b> /s/ JONATHAN S. MANN
<b>Date:</b> 12/17/2024 2:34:11 PM	<b>Signature of Attorney or Party</b> /s/ JONATHAN S. MANN		

\*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.

\*\*Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA  
BIRMINGHAM DIVISION**

**JEREMY HUFSTETLER, ADAM RUNK,  
CONNIE HATFIELD, YASHVANTSINH  
JHALA, DALE STARK, LISA KENNY,  
A'TAVION MORRISSETTE, GENE  
SAWYER, ROBERT MOFFA, LEAH  
HARNER, and JUDY YOUNG, individually  
and on behalf of all others similarly situated,**

**Plaintiffs,**

**v.**

**UPSTREAM REHABILITATION, INC.  
and UPSTREAM ROLLCO, LLC,**

**Defendants.**

**CASE NO.: 01-CV-2024-902563.00**

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**PLAINTIFFS' MOTION & MEMORANDUM FOR APPROVAL OF  
ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS**

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Plaintiffs Jeremy Hufstetler, Adam Runk, Connie Hatfield, Yashvantsinh Jhala, Dale Stark, Lisa Kenny, A'Tavion Morrisette, Gene Sawyer, Robert Moffa, Leah Harner, and Judy Young (collectively, "Plaintiffs," "Named Plaintiffs," or "Class Representatives") respectfully move this Court for approval of attorneys' fees, costs, and service awards.

**I. INTRODUCTION**

The Parties in this putative class action brought under Alabama law have reached a Settlement Agreement that provides significant and valuable relief for Settlement Class Members.<sup>1</sup>

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<sup>1</sup> Capitalized terms not herein defined shall have the meaning ascribed to them in Settlement Agreement ("SA"), which was previously filed as "Exhibit A" to the Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement.

The Settlement provides all persons within the Settlement Class with the ability to receive significant cash payments for the injuries they suffered, as well as meaningful injunctive relief to protect them against future misuse of their personal information. The Settlement Agreement establishes a non-reversionary Settlement Fund in the sum of \$4,304,898.50 that will be used to compensate Class Members who file valid and timely claims. SA, ¶ 40.

With this Motion, Class Counsel asks the Court to approve (1) a reasonable attorneys' fee award of \$1,434,966.17, which amounts to roughly one-third of the total Settlement Fund; (2) reimbursement of Class Counsel's expenses totaling \$10,598.48; and (3) Service Awards of \$2,500 to each of the Class Representatives. SA, ¶¶ 50, 93, 95. As explained in detail below and supported by the Declaration of Jonathan S. Mann ("Mann Decl.") attached hereto as Exhibit A, Class Counsel's requests for attorneys' fees and costs, as well as the reasonable Service Awards, are justified in light of the investment, risks, and exceptional monetary and non-monetary relief provided under the Settlement Agreement and are consistent with Alabama law and other awards in similar cases.

Both Class Counsel and the Class Representatives devoted significant money, time, and effort to the prosecution of the Settlement Class Members' claims, and their efforts have yielded an extraordinary benefit for hundreds of thousands of individuals. The requested attorneys' fees and costs and Service Awards are justified in light of the excellent results obtained for the Settlement Class Members. Thus, Plaintiffs and Class Counsel respectfully move the Court to approve the awards requested herein.

## **II. BACKGROUND**

### **A. The Data Security Incident**

Defendants Upstream Rehabilitation, Inc. and Upstream RollCo LLC d/b/a Upstream Rehabilitation ("Upstream" or "Defendants"), are outpatient physical therapy providers based in

Birmingham, Alabama. According to Upstream, an unauthorized third-party accessed Plaintiffs’ and Class Members’ PII and PHI between January 24, 2023, and January 31, 2023, as well as between February 3, 2023, and February 9, 2023 (the “Data Security Incident”). After the Data Security Incident, Defendants determined that the emails accessed by the unauthorized actor contained the personal identifiable information (“PII”) and/or protected health information (“PHI”) of Plaintiffs, including names, Social Security numbers, dates of birth, contact information, demographic information, medical information, and health insurance information. On or about September 15, 2023, Upstream began to notify its patients of the Data Security Incident. In total, Upstream directly notified approximately 546,168 individuals that their PII and PHI were potentially impacted by the Data Security Incident.

### **B. Procedural History**

After Defendants notified affected individuals, several class actions lawsuits were filed against Defendants, each seeking to redress the harms caused by the Data Security Incident. All of the actions filed focus on the same factual predicate – the Data Security Incident – and asserted nearly identical claims for relief.

On September 22, 2023, Plaintiffs Hufstetler and Runk respectively filed the first two actions in the instant litigation asserting claims for: (i) negligence; (ii) negligence per se; (iii) invasion of privacy by public disclosure of private facts; (iv) breach of express and/or implied contract; (v) breach of fiduciary duty; (vi) breach of confidence; (vii) unjust enrichment; and (viii) declaratory relief. In the ensuing weeks, three other similar cases were filed against the Defendants.

On November 17, 2023, Plaintiffs’ counsel filed a motion to consolidate, which the Court granted on January 19, 2024.<sup>2</sup> Shortly thereafter, the Parties agreed to engage in settlement talks

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<sup>2</sup> This litigation was initially commenced in federal court. The consolidated litigation was voluntarily dismissed and subsequently refiled in this Court on June 26, 2024.

in an effort to reach an early negotiated resolution of the consolidated litigation. The parties agreed to stay the cases for purposes of those negotiations.

### **C. Settlement Negotiations**

After exchanging substantial informal discovery to confirm the foundational facts of the case, and exchanging detailed mediation statements, the parties participated in mediation before experienced mediator J. Allen Schreiber, Esq. on May 13, 2024. The arms' length negotiations were hard fought on each side and lasted all day. Through the assistance of Mr. Schreiber, the parties were able to come to an agreement in principle at the conclusion of the mediation.

After reaching agreement in principle on all material terms of the settlement, the parties began drafting, exchanging, and editing the detailed Settlement Agreement, including its accompanying exhibits, notices, and claim form. The parties sought bids from numerous claims administrators, and ultimately selected a qualified and cost-effective company after an extensive bidding process. The Settlement Agreement resulted from adversarial, arms-length negotiations over a three-month period. The time and effort spent by all parties to this litigation demonstrate the rigor, intensity, and thoroughness of the mediation efforts, as well as the parties' commitment to working constructively toward a resolution.

The proposed Settlement addresses the reasonable objectives of the litigation. The exchange of information throughout the settlement process allowed the parties to sufficiently understand the relative strengths and weaknesses of their positions when fashioning the proposed settlement.

## **III. THE PROPOSED SETTLEMENT**

### **A. Settlement Benefits to the Settlement Class**

The Settlement negotiated on behalf of the Settlement Class provides for monetary relief



to be paid by Upstream to eligible claimants of Settlement Class Members whose private information was potentially compromised as a result of the Data Security Incident and who were sent written notice thereof. Defendants will fund a \$4,304,898.50 non-reversionary common fund to provide Settlement Class Members with (1) up to \$5,000 in reimbursement of documented losses fairly traceable to the Data Security Incident; (2) *pro rata* cash payments from the Settlement Fund, and (3) three years of financial account monitoring, including \$1,000,000 of fraud/identity theft insurance. SA, ¶ 58.

In addition to the monetary and monitoring benefits available to Settlement Class Members described above, Plaintiffs have also received commitments that Defendants either have undertaken or will undertake certain reasonable steps to further secure its systems and environments and Defendants will prepare a confidential declaration detailing same. The costs associated with the development and implementation of these enhanced security procedures are to be paid separately by Defendants, and no portion of the Settlement Fund is to be used for this purpose.

#### **B. Notice Has Been Sent to the Settlement Class Pursuant to the Notice Plan**

Under the Settlement's Notice Plan, which has already gone into effect, Notice has been provided to every identifiable Settlement Class Member for whom Upstream has contact information. Specifically, Notice has been provided to each Settlement Class Member by postcard via United States Mail to the postal addresses that were previously used by Upstream to provide notice to the Class Members of the Data Security Incident in or about March 2023. SA, ¶ 75.

### **IV. ARGUMENT**

#### **A. The Court Should Award Class Counsel's Requested Attorneys' Fees**

Pursuant to the Settlement Agreement, Class Counsel seeks attorneys' fees in the amount of \$1,434,966.17, which constitutes approximately one-third of the Settlement Fund, and

\$10,598.48 in reimbursement of the litigation costs and expenses that were advanced and paid by Class Counsel. The requested fee is well within the range of approved fees in other class actions, pursuant to Alabama law, and is fair and reasonable in light of the significant recovery secured on behalf of the Settlement Class Members by Class Counsel's efforts.

It is well established under Alabama law that attorneys who, by their efforts, create a common fund for the benefit of a class are entitled to reasonable fees and costs based on the common benefit achieved. *Edelman & Combs v. Law*, 663 So.2d 957, 959 (Ala. 1995) (citing *Ex parte Brown*, 562 So. 2d 485, 495 (Ala. 1990); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.”)).

In cases where, as here, a class action settlement results in the creation of a settlement fund, “[the Alabama Supreme] Court, like the federal courts, has long recognized that a lawyer who recovers an award for the benefit of a class of clients is entitled to a reasonable fee from the amount recovered.” *Edelman*, 663 So. 2d at 959 (citing *Ex parte Brown*, 562 So. 2d at 495). This rule is “an equitable principle designed to compensate the attorney whose services on behalf of his client created a fund to which others may have a claim.” *City of Ozark Trawick*, 604 So. 2d 360, 364 (Ala. 1992) (citing *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469 (Ala. 1988)).

State and federal courts throughout Alabama consistently apply the “percentage-of-the-fund” approach for cases, such as this one, where a common monetary fund is established for the benefit of a class of individuals. *See Union Fid. Life Ins. Co. v. McCurdy*, 781 So. 2d 186, 189 (Ala. 2000) (“the common-fund approach is the preferred method for calculating attorney fees in class actions”); *see also Blum v. Stenson*, 465 U.S. 886, 900 (1984) (“under the ‘common fund doctrine’ . . . a reasonable fee is based on a percentage of the fund bestowed on the class”). Further,

the United States Supreme Court has held that negotiated, agreed-upon attorneys' fee provisions are ideal outcomes toward which parties should strive. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount for a fee.").

Although fee awards based on the percentage of the fund may vary, awards of 33 ⅓% are referred to as generally reasonable. *See, e.g., City of Ozark*, 604 So. 2d at 364–65 (Ala. 1992) (finding reasonable a fee award of one-third of the class action common fund); *McWhorter v. Ocwen Loan Servicing, LLC*, No. 2:15-CV-01831-MHH, 2019 WL 9171207, at \*14 (N.D. Ala. Aug. 1, 2019) ("The Court of Appeals and numerous district courts in this circuit have held that one-third of the fund represents a reasonable attorneys' fee, especially in contingency fee cases, such as this one.") (collecting cases)<sup>3</sup>; *see also Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295 (11th Cir. 1999) (affirming attorneys' fees representing "33 ⅓%" of the common fund); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991) ("The majority of common fund fee awards fall between 20% and 30% of the fund . . . an upper limit of 50% may be stated as a general rule, although even larger percentages have been awarded"); *Waters v. Cook's Pest Control, Inc.*, No. 2:07-CV-00394, 2012 WL 2923542, \*18 (N.D. Ala. July 17, 2012) ("[A]n award of 35% of the Settlement Fund is well within the range of 20% to 50%, which has been generally established in this circuit."). As a result, there is a presumption of reasonableness to the requested 33 ⅓% fee award here, which is fully supported based on the consideration of the relevant factors discussed below.

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<sup>3</sup> Alabama courts routinely rely on federal court case law when analyzing issues in class action cases. *See Union Fid.*, 781 So. 2d at 189 ("As we have said before, Alabama will look to federal law in interpreting this most complex area of litigation.") (citing *Adams v. Robertson*, 676 So. 2d 1265, 1268 (Ala. 1995)).

**B. Class Counsel’s Requested Attorneys’ Fee is Reasonable and Supported by the *Peebles* Factors**

The Supreme Court of Alabama established general guidelines for trial courts to consider in determining a reasonable attorney fee award in *Peebles v. Miley*, 439 So.2d 137 (Ala.1983). In *Edelman*, the Court confirmed that the *Peebles* factors should be considered by the trial court when determining fees for counsel in a class action case. The *Peebles* factors are: (1) the nature and value of the subject matter of the employment; (2) the learning, skill, and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of his responsibilities; (6) the measure of success achieved; (7) the reasonable expenses incurred by the attorney; (8) whether the fee is fixed or contingent; (9) the nature and length of a professional relationship; (10) the fee customarily charged in the locality for similar legal services; (11) the likelihood that a particular employment may preclude other employment; and, (12) the time limitations imposed by the client or by the circumstances. *Edelman*, 663 So. 2d at 960.

Importantly, “not all of these criteria are applicable in every case” and “a trial court may consider those that are [applicable], along with other pertinent facts, in approving attorney fees.” *Edelman*, 663 So. 2d at 960. In addition, other factors may also be pertinent, including, for example, “whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action.” *Camden I*, 946 F.2d at 775. Here, the analysis of the factors below demonstrates that the requested fee award is amply justified.

## **1. The nature and value of the subject matter of employment**

Plaintiffs brought this class action against Upstream for its failure to properly secure and safeguard patient PII and PHI in its possession, and for failing to provide timely, accurate, and adequate notice to Plaintiffs and Settlement Class Members that the integrity of their PII/PHI had been compromised. Now that their PII and PHI have been made accessible to cybercriminals, Plaintiffs and Class Members are at imminent and impending risk of identity theft. Additionally, Plaintiffs and Class Members have already lost time and money responding to and mitigating the impact of the Data Security Incident.

For these reasons, Plaintiffs and Class Counsel believe the prosecution of this case has been incredibly valuable not only to Plaintiffs but also to the public at large, both by getting Upstream to make meaning business practices changes, and by seeking and securing monetary relief for victims across the country. *See Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 287 (6th Cir. 2016) (holding that class actions such as this action “have value to society[—]particularly when the individual injuries are too small to justify the time and expense of litigation—and as private law enforcement regimes that free public sector resources”).

## **2. The learning, skill, and labor requisite to its proper discharge**

It is well recognized that class actions are complex actions to prosecute due to their inherently complicated legal and factual issues. Courts consistently suggest that cases that are “more complex, involve the lives and fortunes of larger numbers of people, and have a greater public value,” such as “class action cases,” warrant higher fees. *See Edelman*, 663 So. 2d at 960–61 (“Class actions are designed to provide a vehicle for redress where wrongful conduct has resulted in harm to a great number of people . . . in such cases, fee awards of as high as 50% of the recovery may be justified . . . taking into account the management responsibilities inherent in a

class action”). Upstream has denied Plaintiffs’ material allegations and have raised several legal defenses, any of which, if successful, would result in the Plaintiffs and the proposed Settlement Class Members receiving no payment whatsoever. Specifically, Upstream is prepared to argue that Plaintiffs have not suffered any actual injury, that no negligence or violation of other state law occurred, and that Plaintiffs would not be able to adversely certify any proposed class for litigation purposes.

Further, this specific class action involved complex issues in the evolving field of data breach law. Although nearly all class actions involve a high level of risk, expense, and complexity, data breach cases are especially so. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800, 2020 WL 256132, at \*32-33 (N.D. Ga. Mar. 17, 2020) (recognizing the complexity and novelty of issues in data breach class actions); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at \*12 (N.D. Cal. Aug. 17, 2018) (“[C]lass certification was not guaranteed, in part because Plaintiffs had a scarcity of precedent to draw on.”); *see, e.g., Hammond v. The Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060(RMB)(RLE), 15 2010 WL 2643307, at \*1 (S.D.N.Y. June 25, 2010) (collecting cases).

### **3. The time consumed**

The *Edelman* Court emphasized that “the ‘expended time’ factor has limited significance in a common fund case” and quoted an analogy stating that “[a] surgeon who skillfully performs an appendectomy in seven minutes is entitled to no smaller fee than one who takes an hour; many a patient would think he is entitled to more.” *Edelman*, 663 So. 2d at 960. Here, Class Counsel investigated and litigated this case rigorously and thoroughly, which included pre-suit investigations, extensive legal researching, drafting pleadings, reviewing documents, successfully negotiating the class-wide Settlement with meaningful relief, seeking approval of the Settlement,

and now overseeing the administration of the Settlement. Indeed, Class Counsel spent many hours prosecuting this matter. Mann Decl. ¶¶ 29-31.

Further, the Settlement Agreement was negotiated at arms-length, which required counsel to expend a considerable amount of time and effort in coordinating various litigation and settlement strategies. Had this case not settled when it did, it is certain that substantial expense, duration, and complexity would result from the additional litigation, including trial and, likely, lengthy appeals. Furthermore, the Class Members would likely not have achieved any result for several years, while also running the risk of obtaining a less favorable result than the Settlement achieved here or obtaining no result whatsoever. Given the quality and quantity of work expended by Class Counsel, the risk of substantially more time and money having to be expended had the litigation not settled, and the results achieved as a direct result of those efforts, the requested fee award is justified.

#### **4. The professional experience and reputation of the attorney[s]**

“[P]rosecution and management of a complex national class action requires unique legal skills and abilities.” *Edmonds v. U.S.*, 658 F. Supp. 1126, 1137 (D.S.C. 1987) Here, Class Counsel have decades of experience in class action litigation and have extensive experience in data breach and privacy litigation, in particular. *See* Declaration of Jonathan Mann, attached as Exhibit B to Plaintiffs’ Unopposed Motion & Memorandum In Support Of Preliminary Approval Of Class Action Settlement, at ¶ 7. Class Counsel’s experience here is indisputable, and in this case, they were able to use that extensive experience to inform negotiations and drive this case to an excellent resolution. Accordingly, the requested fee award is reasonable in light of the quality of representation and the type of complex consumer class action at issue here, where such a fee is

necessary to continue to attract competent and dedicated counsel given the time, costs, and significant risk of nonpayment involved.

### **5. The weight of [the attorneys'] responsibilities**

From the inception of this matter, Class Counsel has shouldered the immense weight of the multitude of responsibilities that come with litigating a nationwide data breach class action. *See In re Toyota Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10-ML-2151, 2013 WL 12327929, at \*31 (C.D. Cal. July 24, 2012) (“Courts have recognized that the ‘prosecution and management of a complex national class action requires unique legal skills and abilities.’”) (citation omitted). As discussed *supra*, data breach class actions are an emerging area of law that require detailed investigations into the cause and scope of the Data Security Incident, extensive plaintiff vetting, time-intensive legal and factual research, and careful pleadings just to get past the pleading stage. Here, Class Counsel has tackled these responsibilities by, among other things, self-organizing and drafting a thorough 105-page consolidated complaint that positioned Plaintiffs to quickly engage in meaningful settlement negotiations. Class Counsel then participated in hard-fought settlement discussions, conducted pre-mediation written discovery and document review, prepared a convincing mediation statement, negotiated a meaningful settlement, crafted a comprehensive notice program, sought preliminary approval of the Settlement, and is now overseeing the administration of the Settlement. Mann Decl. ¶¶ 29-31.

Were it not for Class Counsel taking on this complex action and successfully litigating it from the start, the highly favorable Settlement could not have been achieved.

### **6. The measure of success achieved**

As explained in detail in Plaintiffs’ motion for preliminary approval of the Settlement, the Settlement obtained by Class Counsel requires Upstream to establish a non-reversionary



Settlement Fund of \$4,304,898.50 for Settlement Class Members to make claims against. Indeed, the Settlement allows all Class Members to claim up to \$5,000 in reimbursement of expenses, *pro rata* cash payments from the Settlement Fund, and three years of credit monitoring and identity protection services that include a \$1,000,000 insurance policy to cover Settlement Class Members in the event they experience future harms from the Data Security Incident. SA, ¶ 58. Class Counsel believe the Settlement Fund will be adequate to reimburse each Class Member for the full amount of his/her claim and to fund significant *pro rata* cash payments to such Class Members. The Settlement also provides meaningful business practice changes to Upstream's systems to protect Class Members and the general public from future data security incidents. *Id.* These important benefits were negotiated to provide Plaintiffs and the Settlement Class relief that is responsive to the damages they sustained.

Despite the difficulties in prosecuting data breach class action cases, especially ones such as this in which both legal liability and damages are difficult to prove, a result such as this is outstanding and weighs in favor of the requested fee.

**7. The reasonable expenses incurred by the attorney[s] and whether the fee is fixed or contingent**

Class Counsel invested \$10,598.48 out of their own pocket to prosecute this case, all of which were reasonable and necessary to fully prosecute this matter and incurred for the benefit of the Class Members. Mann Decl. ¶¶ 29-31. As such, Class Counsel's willingness to invest such a substantial amount of money in the case with no guarantee of reimbursement supports the requested fee award. *Id.*

Further, Class Counsel took on this case on a purely contingent basis. Mann Decl. ¶ 14. As such, Class Counsel, again, assumed a significant risk of nonpayment or underpayment. *Id.* The case required Class Counsel to spend time and resources on this litigation that could have been

spent on other matters. *Id.* ¶ 15. Because Class Counsel undertook representation of this matter on a contingency-fee basis, they shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment. *Id.* ¶ 16.

That risk should be taken into consideration when determining an appropriate fee. *See In re Continental Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent basis, plaintiffs' counsel must be compensated adequately for the risk of non-payment); *York v. Alabama Senate Bd. of Ed.*, 631 F. Supp. 78, 86 (M.D. Ala. 1986); *see also In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) ("Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.").

The fact that Class Counsel secured a favorable settlement in the end is not relevant to assessing the risks attendant to the case which Class Counsel assumed at the case's inception. *See Skelton v. General Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988) ("The point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them"); *Lindsey Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3rd Cir. 1976).

Despite Class Counsel's effort in litigating this case, Class Counsel remains uncompensated for the time invested, in addition to the expenses advanced, to date. Mann Decl. ¶ 14. Class Counsel have devoted significant attorney time and incurred litigation costs without the assurance that they would recover those expenses. *Id.* The fact that Class Counsel took such a

substantial risk with both litigation costs and contingency fees favors approval of the requested fees.

#### **8. The nature and length of a professional relationship**

As previously stated, Class Counsel have represented each of the Plaintiffs for almost a year now on a purely contingency-fee basis with no guarantee of success. Further, this case is a single action representation, and there is no “repeat business” from the Plaintiffs to be gained from such representation. For these reasons, this factor supports approving the requested fee.

#### **9. The fee customarily charged in the locality for similar legal services**

As set forth above, attorneys’ fees awarded in common fund cases in Alabama have ranged from 20% to 50%, with 33 ⅓% considered fair and reasonable by the Alabama Supreme Court. *See Edelman*, 663 So.2d at 960 (“Several factors, including the number of lawyers who were actively engaged for over four years in the handling of the claims, the complexity of the litigation, as well as the management responsibilities inherent in a class action, and the result obtained, would justify an award of an amount between 20% and 33 ⅓% of the amount of the settlement.”); *see also City of Bessemer v. McClain*, 957 So. 2d 1061, 1078 (Ala. 2006) (upholding a fee award of one-third of the common fund); *City of Ozark*, 604 So. 2d at 364–65 (Ala. 1992) (finding reasonable a fee award of one-third of the class action common fund). In the Eleventh Circuit, percentage-based fee awards have averaged around 33% of the class benefit. *See, e.g., Wolff v. Cash 4 Titles*, 2012 WL 5290155, at \*5-6 (S.D. Fla. Sept. 26, 2012) (noting that fees in this Circuit are “roughly one-third”); T. Eisenberg, et al., *Attorneys’ Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Rev. 937, 951 (2017) (median fee from 2009-2013 was 33%); *cf. Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (“When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the market rate.”) (internal

quotations omitted, emphasis in original). The requested fee award here is well-within the range of attorneys' fee awards routinely found reasonable in similar cases by courts in this state and by federal courts in the Eleventh Circuit.

#### **10. The likelihood that [this] employment [precluded] other employment**

“This guideline involves the dual consideration of other available business which is foreclosed because of conflicts of interest which occur from the representation, and the fact that once the employment is undertaken the attorney is not free to use the time spent on the client's behalf for other purposes.” *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 718 (5th Cir. 1974). There is no question that the hours Class Counsel and their staff spent prosecuting this case precluded them from securing and profiting from other employment over the past year. Additionally, Class Counsel spent \$10,598.48 in litigation expenses to prosecute this case, where such money could have instead been used for other employment opportunities or otherwise invested into their law firms.

#### **11. “The time limitations imposed by the client or by the circumstances”**

While Counsel does not feel this factor to have much relevance to this case, there were practical time limitations that favored settlement, as opposed to conducting a trial on the matter. Namely, Upstream had only a limited and wasting insurance policy available to fund a possible recovery for the Settlement Class. Mann Decl., ¶ 20. Protracted litigation would have further depleted the available insurance funds, thereby potentially decreasing the recovery for the Class. *Id.* Accordingly, the prompt Settlement secured by Class Counsel not only provides immediate benefits to the Settlement Class, but it also provides a recovery amount that was unlikely to increase through further litigation.

Each of the *Peebles* factors discussed herein support Class Counsels' requested fee award.

### **C. The Court Should Approve Class Counsel's Requested Reimbursable Litigation Expenses**

Class Counsel expended \$10,598.48 in reimbursable costs and expenses related to legal research fees (Westlaw, LexisNexis, Pacer), mediation fees, filing and *pro hac vice* fees, photocopies, postage and delivery charges, travel and parking fees, and service of process fees. Mann Decl. ¶¶ 29-31. Courts regularly award reimbursement of the expenses counsel incurred in prosecuting the litigation. *See Edelman*, 663 So.2d at 961 (“[O]ur reversal of that portion in no way affects that portion of the judgment that requires [the defendant] to reimburse the plaintiffs’ counsel for all reasonable expenses incurred in the management of the class action[.]”); *Waters v. Int’l Precious Metals Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999) (“plaintiffs’ attorney are entitled to reimbursement of those reasonable and necessary out-of-pocket expenses incurred in the course of activities that benefitted the class”) (citing *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1296, 1314 (E.D.N.Y. 1985)); *Waters v. Cook’s Pest Control, Inc.*, No. 2:07-CV-00394-LSC, 2012 WL 2923542 (N.D. Ala. 2012) (approving plaintiffs’ class counsel’s fee request for 35% of the \$2,500,000 settlement fund, as well as reimbursement of their costs in the amount of \$53,831.55). Therefore, Class Counsel request the Court approve as reasonable the incurred expenses, a request which Defendants do not oppose.

### **D. The Agreed-Upon Service Award Amount for Plaintiffs Is Reasonable and Should Be Approved**

The requested \$2,500.00 Service Award for each of the Class Representatives is reasonable and modest compared to other incentive awards granted to class representatives in similar class actions. “Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.” *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001); *see also Parsons v. Brighthouse*

*Networks, LLC*, No. 09-cv-267, 2015 WL 13629647, at \*16 (N.D. Ala. Feb. 5, 2015) (approving \$5,000 incentive award for class representative); *Martin v. Dun & Bradstreet, Inc.*, No. 12-cv-215, 2014 WL 9913504, at \*3 (N.D. Ill. Jan. 16, 2014) (awarding incentive award of \$20,000 in TCPA class action); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218–19 (S.D. Fla. 2006) (noting that “incentive awards are not uncommon in class action litigation where, as here, a common fund has been created for the benefit of the class”).

Here, Plaintiffs’ efforts and participation in prosecuting this case justify the Service Award sought for each Plaintiff. Even though no award of any sort or special treatment was promised to Plaintiffs prior to the commencement of the litigation or at any time thereafter, Plaintiffs nonetheless contributed significant time and effort in pursuing their own claims, as well as in serving as the representatives on behalf of the Settlement Class Members—exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. Mann Decl. ¶¶ 33-34.

Plaintiffs participated in the initial investigation of their claims and provided their sensitive personal information and records—such as full credit reports and other financial documents—to Class Counsel to aid in preparing the initial pleadings and issuing discovery, reviewed the pleadings prior to filing, consulted with Class Counsel on numerous occasions, stayed abreast of the litigation for about a year, and provided feedback and input on the settlement negotiations and a number of other filings including, most importantly, the Settlement Agreement. *Id.*

Further, agreeing to serve as the Class Representatives meant that Plaintiffs publicly placed their names on this suit and opened themselves to significant risks which, in and of itself, is certainly worthy of some type of remuneration. *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 04-cv-3066, 2008 WL 11319972, at \*2 (N.D. Ga. Mar. 4, 2008) (citing *Ingram*, 200

F.R.D. at 685). Were it not for Plaintiffs' willingness to bring this action on a class-wide basis, their efforts and contributions to the litigation by assisting Class Counsel with their investigation and filing of this suit, and their continued participation and monitoring of the case through settlement, the substantial benefit to the Settlement Class Members afforded under the Settlement Agreement would not exist.

The Service Award requested for each Plaintiff amounts to roughly 0.058% of the total Settlement Fund, which is well in line with the average service award granted in class actions. *See, e.g., Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, U.S. Dist. LEXIS 35421, at \*19 (N.D. Ill. Mar. 23, 2015) ("a study on incentive awards for class action plaintiffs (also conducted by Eisenberg and Miller) . . . found that the mean incentive fee granted in class actions overall is .161% [of the total recovery]") (citing *Eisenberg & Miller, Incentive Award to Class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A. L. Rev. 1303, 1339 (2006)). Indeed, numerous courts that have granted final approval in similar settlements have awarded significantly larger incentive awards than the one sought here. *See, e.g., Markos v. Wells Fargo Bank, N.A.*, No. 15-cv-01156, 2017 WL 416425, at \*3 (N.D. Ga. Jan. 30, 2017) (approving service awards of \$20,000 to each class representative in a class action).

Compensating Plaintiffs for the risks and steadfast efforts they undertook to benefit the Settlement Class Members is reasonable under the circumstances of this case, especially in light of the exceptional results obtained. As shown above, courts have regularly approved service awards in similar class action litigation consistent with and greater than the Service Award sought here. Moreover, no opposition or objection to the Service Award has been raised to date. A Service Award of \$2,500.00 to each Plaintiff is reasonable, justified, and should be approved.

### **E. The Positive Reaction of the Settlement Class Supports the Requests**

Notice of the Settlement was directly provided to Class Members by direct mail with Notice further disseminated via the Settlement Website. Class Members were informed in the Notice that Class Counsel would apply for attorneys' fees in an amount up to 33 <sup>1</sup>/<sub>3</sub>% of the Settlement Fund, reimbursement of litigation expenses up to \$50,000.00, and Service Awards of \$2,500. *See* SA, ¶ 95; *see also* SA at Exhibits B and D, thereto. The Notice plainly advises Class Members of their right to object to Class Counsel's fee and expense request. *Id.* To date, more than 17,000 Settlement Class Members have already submitted claims to receive their benefits under the Settlement. Mann Decl. ¶ 25. In stark contrast, there have been no objections to any of the terms of the Settlement, including the terms regarding the attorneys' fees, expenses, and service awards being requested here. *Id.* The lack of objections received to date supports approval of the requested award for attorneys' fees. *See Anderson v. Merit Energy Co.*, No. 07-CV-00916-LTB, 2009 WL 3378526, at \*3 (D. Colo. Oct. 20, 2009) ("The absence of any Class members' objection is an additional factor that supports this Court's approval of the requested attorneys' fees."); *see, e.g., Howard v. Liquidity Servs. Inc.*, No. CV 14-1183 (BAH), 2018 WL 4853898, at \*7 (D.D.C. Oct. 5, 2018) (finding support for attorneys' fees in the absence of objections to the request).

### **V. CONCLUSION**

For the foregoing reasons, Plaintiffs and Class Counsel respectfully request that the Court enter an Order: (i) approving an award of attorneys' fees of \$1,434,966.17; (ii) reimbursement of litigation expenses in the amount of \$10,598.48; and (ii) Service Awards in the amount of \$2,500.00 to each Plaintiff in recognition of their significant efforts on behalf of the Settlement Class Members.<sup>4</sup>

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<sup>4</sup> Class Counsel intend to include the relief requested herein in a proposed order in support of final approval of the Settlement.



Dated: December 17, 2024

Respectfully Submitted,

/s/ Jonathan S. Mann

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*Class Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 17, 2024, I filed the foregoing with the Clerk of the Court using the Court's filing system, which will send notice to all counsel of record.

/s/ Jonathan S. Mann

Jonathan S. Mann

# **EXHIBIT A**

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA  
BIRMINGHAM DIVISION**

**JEREMY HUFSTETLER, ADAM RUNK,  
CONNIE HATFIELD, YASHVANTSINH  
JHALA, DALE STARK, LISA KENNY,  
A'TAVION MORRISSETTE, GENE  
SAWYER, ROBERT MOFFA, LEAH  
HARNER, and JUDY YOUNG, individually  
and on behalf of all others similarly situated,**

**CASE NO.: 01-CV-2024-902563.00**

**Plaintiffs,**

**v.**

**UPSTREAM REHABILITATION, INC.  
and UPSTREAM ROLLCO, LLC,**

**Defendants.**

**DECLARATION OF JONATHAN S. MANN IN SUPPORT OF PLAINTIFFS'  
MOTION FOR ATTORNEYS' FEES, EXPENSES AND SERVICE AWARDS**

I, Jonathan S. Mann, being competent to testify, make the following declaration based on my personal knowledge and, where stated, upon information and belief. I declare:

1. I am one of the lead attorneys for the Plaintiffs in this action and have personal knowledge of the facts and matters stated herein. I, along with my co-counsel, are Class Counsel on behalf of Plaintiffs and the Settlement Class. I submit this Declaration in support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards. Except as otherwise noted, I have personal knowledge of the facts stated below. If called on to do so, I could and would competently testify thereto.

**Counsel Qualifications**

2. I am a shareholder with the law firm of Pittman, Dutton, Hellums, Bradley & Mann, P.C. ("PDHBM"). My practice involves complex civil litigation, including class actions, mass

torts, personal injury, and products liability matters. I have litigated complex actions since 2011, with an emphasis on consumer claims and defective products.

3. I am admitted to practice before courts of the State of Alabama. I have also been admitted to practice before the United States Court of Appeals for the Eleventh Circuit, the United States District Court for the Northern District of Alabama, the United States District Court for the Middle District of Alabama, the United States District Court for the Southern District of Alabama, the United States District Court for the Northern District of Florida, the United States District Court for the Northern District of Georgia, the United States District Court for the Northern District of Indiana, the United States District Court for the Southern District of Indiana, the United States District Court for the Eastern District of Louisiana, the United States District Court for the District of Maryland, the United States District Court for District of Massachusetts, the United States District Court for the District of Minnesota, the United States District Court for the District of Montana, the United States District Court for the District of New Jersey, the United States District Court for the Eastern District of New York, the United States District Court for the Southern District of New York, the United States District Court for the Western District of Pennsylvania, and the Los Angeles County Superior Court.

4. PDHBM has represented individuals, consumers, and small businesses in complex civil litigation, including class actions, in federal and state courts across the country, for over 35 years. While the firm is in Birmingham, Alabama, PDHBM attorneys routinely litigate cases nationwide and are frequently appointed to serve in leadership positions.

5. I and other PDHBM lawyers (including those in the instant case) have been appointed to leadership positions in the following complex class actions and multidistrict litigations (MDLs) over the past ten years, including MDL 2406, *In re Blue Cross Blue Shield*

*Antitrust Litigation* (Local Facilitating Counsel and Plaintiffs' Steering Committee for Subscriber Plaintiffs); MDL 2441, *In re Stryker Rejuvenate and ABG II Hip Implant Products Liability Litigation* (Plaintiffs' Steering Committee); MDL 2595, *In re Community Health Systems, Inc., Customer Data Security Breach Litigation* (Local Liaison Counsel); MDL 2734, *In re Abilify (Aripiprazole) Products Liability Litigation* (Plaintiffs' Steering Committee); *In re: Arby's Restaurant Group, Inc. Data Security Litigation* (Financial Institution Plaintiffs' Steering Committee); MDL 2846, *In re Davol, Inc./C.R. Bard, Inc. Polypropylene Hernia Mesh Products Liability Litigation* (Plaintiffs' Steering Committee); MDL 2875, *In re Valsartan Products Liability Litigation* (Plaintiffs' Steering Committee); MDL 2885, *In re 3M Combat Arms Earplug Products Liability Litigation* (Common Benefit Fund Committee), MDL 2974, *In re Paragard IUD Products Liability Litigation* (Plaintiffs' Steering Committee), *Pirani v. Medical Properties Trust, Inc.*, 2:23-cv-00486 (N.D. Ala.) (Liaison Counsel), and MDL 2885, *In re 3M Combat Arms Earplug Products Liability Litigation* (Settlement Implementation and Administration Committee).

6. I and other PDHBM attorneys have also recently been appointed as Co-Lead Counsel/Settlement Class Counsel in consumer class action cases involving health care data breaches, such as *Limbaugh, et al. v. Norwood Clinic, Inc.*, Circuit Court, Jefferson Cty., Alabama, Case No. 01-cv-2022-900851, *Kemp, et al. v. NorthStar Emergency Medical Services, Inc.*, Circuit Court, Tuscaloosa Cty., Alabama, Case No. 63-cv-2023-900249, *Sides, et al. v. Sheffield Group, Inc., et al.*, Circuit Court, Jefferson Cty., Alabama, Case No. 01-cv-2024-900745.00, and *Williams v. Gulf Coast Pain Consultants, LLC d/b/a Clearway Pain Solutions Institute*, 3:19-cv-01659 (N.D. Fla.).

7. PDHBM lawyers have been involved in other class actions in the past several years which have resolved favorably to their clients, including *In re Blue Cross Blue Shield Antitrust Litigation*, MDL 2406, 2:13-cv-20000-RDP (N.D. Ala.), *Sullen, et al. v. Vivint, Inc.*, Circuit Court, Jefferson Cty., Ala., Case No. 01-cv-2023-903893, *Winsouth Credit Union v. MAPCO Express, Inc. and Delek US Holdings, Inc.*, 3:14-cv-1753 (M.D. Tn.), *Bach Enterprises, Inc. v. Advanced Disposal Services South, Inc.*, Circuit Court, Barbour Cty., Ala., Case No. 69-cv-2013-9000090, and *In re Arby's Restaurant Group, Inc. Data Security Litigation*, 1:17-cv-514 (N.D. Ga.).

8. Each of the attorneys named as Class Counsel in this Settlement—PITTMAN, DUTTON, HELLUMS, BRADLEY, & MANN, P.C., CORY WATSON, P.C., MIGLIACCO & RATHOD LLP, SROURIAN LAW FIRM, P.C., MURPHY LAW FIRM, SIRI & GLIMSTAD LLP, MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN PLLC, DEGARIS LAW, LLC—have extensive experience in class action litigation generally and data breach class action litigation in particular. *See* Plaintiffs' Unopposed Motion & Memorandum in Support of Preliminary Approval of Class Action Settlement, filed on September 18, 2024, at Exhibit B.A (resumes of Class Counsel).

### **Initial Investigation and Communications**

9. According to Defendant, an unauthorized third-party accessed Plaintiffs' and Class Members' Personal Identifiable Information ("PII") and Protected Health Information ("PHI") (collectively, "Personal Information") between January 24, 2023, and January 31, 2023, as well as between February 3, 2023, and February 9, 2024 (the "Data Security Incident"). After the Data Security Incident, the Defendant determined that the emails accessed by the unauthorized actor contained the PII and PHI of Plaintiffs, including names, Social Security numbers, dates of birth, contact information, demographic information, medical information, and health insurance



information. In or about September 15, 2023, Upstream began to notify its patients of the Data Security Incident. In the weeks following, several class action lawsuits were filed against Defendant, each seeking to redress the harms caused by the Data Security Incident. All the actions filed focus on the same factual predicate—the Data Security Incident—and assert nearly identical claims for relief.

10. After the named Plaintiffs received notice on or around September 22, 2023 that their Personal Information may have been impacted by the Data Breach, they retained the various firms who are proposed Class Counsel.

11. I and my team, and proposed class counsel, vigorously and aggressively gathered all information available regarding Upstream and the alleged Data Breach, including publicly available documents concerning announcements of the Data Breach and Notice of the Data Security Incident that were sent to Upstream’s current and former patients.

12. Class Counsel swiftly gathered all the information regarding the Data Security Incident and extensively researched the potential legal claims and theories that were available.

13. Our initial investigation into the facts and circumstances of the alleged Data Security Incident revealed that the attack against Upstream likely involved highly sensitive Personal Information belonging to its current and former patients, which information was stored in Upstream’s computer network.

14. After Plaintiffs were counseled on their duties and responsibilities to serve as class representatives, Plaintiffs agreed to serve as class representatives and retained Class Counsel on a purely contingency fee basis, with Class Counsel advancing all litigation costs and expenses, without assurance of recovering said expenses.

15. This matter has required Class Counsel to spend time on this litigation that could have been spent on other matters. At various times during the litigation of this class action, this lawsuit has consumed significant amounts of my time and Class Counsel's time.

16. Such time could otherwise have been spent on other fee-generating work. Because our Firm undertook representation of this matter on a contingency-fee basis, we shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment.

17. If not devoted to litigating this action, from which any remuneration is wholly contingent on a successful outcome, the time our firms spent working on this case could and would have been spent pursuing other potentially fee-generating matters.

### **Procedural Posture**

18. On September 22, 2023, Plaintiffs Hufstetler and Runk respectively filed the first two actions in the instant litigation asserting claims for: (i) negligence; (ii) negligence per se; (iii) invasion of privacy by public disclosure of private facts; (iv) breach of express and/or implied contract; (v) breach of fiduciary duty; (vi) breach of confidence; (vii) unjust enrichment; and (viii) declaratory relief. In the ensuing weeks, three other similar cases were filed against the Defendant. Plaintiffs' counsel filed a motion to consolidate on November 17, 2023, which the Court granted on January 19, 2024. Shortly thereafter, the Parties agreed to participate in mediation before experienced mediator J. Allen Schreiber, Esq., in an effort to reach an early negotiated resolution of the consolidated litigation. Ultimately, the parties agreed to stay the cases for purposes of those negotiations.

19. After exchanging substantial informal discovery to confirm the foundational facts of the case, the parties worked at arms' length to negotiate a settlement over the course of numerous

phone calls, emails, and mediation. The negotiations were hard fought on each side, but the parties were eventually able to come to an agreement in principle.

20. It is my opinion, and the opinion of my co-counsel, that the Settlement represents an excellent result considering the significant benefits to the Settlement Class as well as the risks and delays attendant to further protracted litigation. Under the Settlement, Defendant will fund a \$4,304,898.50 non-reversionary common fund to provide Settlement Class Members with (1) up to \$5,000 in reimbursement of documented losses fairly traceable to the Data Security Incident; (2) *pro rata* cash payments from the Settlement Fund, and (3) three years of financial account monitoring, including \$1,000,000 of fraud/identity theft insurance. SA, ¶ 58. This is a very favorable Settlement when compared to similar data breach recoveries. Moreover, by settling the matter when they did, Class Counsel avoided the risks and delays associated with protracted litigation. This was particularly important here because there was only a limited, wasting insurance policy available to fund the defense and/or judgment on behalf of Upstream. Thus, there was a very real risk that there would be a smaller recovery for the Class were the litigation to proceed. Thus, a timely Settlement was crucial to obtaining a recovery for the Class.

21. The issue of attorneys' fees, costs, and class representative service awards was only discussed after the parties reached agreement in principle on all material terms of substantive relief for the settlement class. Like the other negotiations, these discussions were conducted at arm's length.

22. Following negotiations, the parties ultimately reached an agreement in principle on all issues related to the settlement and began drafting, exchanging, and editing the detailed Settlement Agreement, including its accompanying exhibits, notices, and claim form. The parties

sought bids from numerous claims administrators, and ultimately selected a qualified and cost-effective company after an extensive bidding process.

23. The time and effort spent by all parties to this litigation demonstrate the rigor, intensity, and thoroughness of the mediation efforts, as well as the parties' commitment to working constructively toward a resolution. Eventually, these discussions culminated in the Settlement Agreement that this Court preliminarily approved on October 3, 2024.

24. The Court has preliminarily approved the terms of the settlement as being fair and adequate, and the notice plan has now been partially completed by the Settlement Administrator. Class members are now in the process of filing claims. Specifically, Direct Notice was mailed to 546,168 individuals by postcard via United States Postal Service and was initiated on November 1, 2024.

25. The Settlement Administrator recently informed Class Counsel that, as of the date of this filing, more than 17,000 individuals have already submitted claims to receive benefits under the Settlement. I expect additional claims will be submitted prior to the Claims Deadline. To date, there have been no objections submitted as to any of the terms of the Settlement, including the requests for fees, expenses, and service awards.

#### **Fees, Costs, and Service Awards**

26. The Settlement allows Counsel to make an application to the Court for an award of reasonable attorneys' fees, costs, and expenses to be paid by Upstream out of the Settlement Fund.

27. The Parties did not discuss payment of attorneys' fees, costs, expenses, and service awards until after the substantive terms of the settlement had been agreed upon. All negotiations were conducted at arm's length and mediated by a respected neutral party, J. Allen Schreiber, Esq.

28. We, as Counsel, now apply for a reasonable attorneys' fee award of \$1,434,966.17 for our extensive work in achieving this substantial settlement for the Settlement Class Members.

29. Class Counsel spent many hours prosecuting this matter for the benefit of Plaintiffs and the Settlement Class Members. Specifically, we investigated and litigated this case rigorously and thoroughly, which included pre-suit investigations, extensive legal research, drafting pleadings, plaintiff vetting, organizing the various related actions, drafting pleadings, engaging in hard-fought settlement discussions, conducting pre-mediation written discovery and document review, negotiating a meaningful settlement, seeking approval of the Settlement, and now overseeing the administration of the Settlement.

30. We are also now applying for reimbursement of our reasonable and necessary costs and expenses of the Litigation totaling \$10,598.48, which is the total amount of money that Class Counsel advanced to prosecute this case with no guarantee of recoupment. The following is a general breakdown of the expenses for which we are requesting reimbursement:

<b>CATEGORIES</b>	<b>AMOUNT</b>
Westlaw, LexisNexis, Pacer, Secretary of State Fees	\$ 196.70
Mediation Fees	\$ 5,220.00
Photocopies	\$ 183.45
Postal, FedEx, Service Fees	\$ 316.28
Filing Fees, Pro hac vice fees	\$ 4,532.74
Travel/Parking	\$ 149.31
<b>TOTAL</b>	<b>\$ 10,598.48</b>

31. Detailed documentation and receipts supporting these costs and expense amounts are available for inspection at the Court's request.

32. All the costs and expenses for which we are seeking reimbursement were reasonable and necessary to fully prosecute this matter and incurred for the benefit of the Class Members.

33. Upstream also agreed to pay each Class Representative a Service Award in the amount of \$2,500.00 for their services rendered on behalf of the Settlement Classes, subject to Court approval. I believe this is a reasonable amount to award based on the time, energy, and efforts of the Class Representatives and is in line with awards granted in similar cases.

34. The Service Awards requested are meant to recognize the Class Representatives for their efforts on behalf of the Settlement Class. Plaintiffs participated in the initial investigation of their claims and provided their information and records to Class Counsel to aid in preparing the initial pleadings and issuing discovery, reviewed the pleadings prior to filing, consulted with Class Counsel on numerous occasions, and provided feedback on the settlement negotiations and a number of other filings including, most importantly, the Settlement Agreement.

35. Plaintiffs' support for the Settlement as fair, reasonable, and adequate is not conditioned upon the Court's award of the requested Service Award. The parties did not discuss or agree upon the amount of Service Awards for which Plaintiffs as Class Representatives could apply until after the substantive terms of the Settlement had been agreed upon.

36. In my opinion, the attorneys' fees, costs and expense reimbursement, and Service Awards that Class Counsel are requesting are reasonable, appropriate, and warranted based on the significant benefits that have been recovered by Class Counsel and Plaintiffs for the benefit of the Settlement Class Members.

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

Executed this 17<sup>th</sup> day of December 2024 in Birmingham, Alabama.



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