

**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION**

NOREEN PERDUE, ELIZABETH DAVIS-BERG,	)	
DUSTIN MURRAY, MELANIE SAVOIE, CHERYL	)	CASE NO. 1:19-cv-01330-MMM-JEH
ELLINGSON, ANGELA TRANG, HARLEY	)	
WILLIAMS, MARY WILLIAMS, GORDON	)	
GREWING, MELISSA WARD and PATRICIA DAVIS,	)	<b>CLASS ACTION</b>
individually and on behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	<b>JURY TRIAL DEMANDED</b>
	)	
v.	)	
	)	
HY-VEE, INC.,	)	
	)	
Defendant.	)	
	)	

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**PLAINTIFFS’ MOTION FOR AWARD OF ATTORNEYS’ FEES, COSTS, AND EXPENSES, AND REPRESENTATIVE SERVICE AWARDS**

Benjamin F. Johns  
Alex M. Kashurba  
**CHIMICLES SCHWARTZ KRINER  
& DONALDSON-SMITH LLP**  
One Haverford Centre  
361 Lancaster Avenue  
Haverford, PA 19041  
(610) 642-8500  
bfj@chimicles.com  
amk@chimicles.com

Ben Barnow  
Anthony L. Parkhill  
**BARNOW AND ASSOCIATES, P.C.**  
205 W. Randolph St., Suite 1630  
Chicago, IL 60606  
Tel: (312) 621-2000  
Fax: (312) 641-5504  
b.barnow@barnowlaw.com  
aparkhill@barnowlaw.com

*Class Counsel*  
[Additional Counsel on Signature Page]

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## INTRODUCTION

Plaintiffs and Class Counsel respectfully request the Court approve the payment of attorneys' fees of \$727,000; reimbursement of \$12,000 for costs and expenses; and service awards of \$2,000 to each of the Class Representatives. Pursuant to the Class Action Settlement Agreement, any such awards approved by the Court will not reduce the amount of payments to Class Members who submit valid claims, and will be paid separately by Defendant Hy-Vee, Inc. ("Hy-Vee") from the settlement consideration going to the Class. Class Counsel will allocate attorneys' fees, costs, and expenses to the Plaintiffs' firms that worked on the litigation. Hy-Vee does not oppose the requested awards.

The requested attorneys' fee award is reasonable, appropriate, and consistent with the market rate for legal services in complex class actions, including data breach cases. Class Counsels' firms and other Plaintiffs' firms working on the case collectively report having spent more than 2,000 hours advancing the litigation—resulting in a cumulative lodestar of in excess of \$1,158,116.84.<sup>1</sup> Approval of the requested award will result in a negative lodestar multiplier of .63<sup>2</sup>—a figure that will be further reduced by the additional work Class Counsel will perform in support of the Settlement in the future, including drafting and filing the final approval papers, appearing at the final fairness hearing, assisting with claims administration, and resolving appeals filed by any Class Member (if any).

The request also amounts to a small fraction of the value of the benefits secured on behalf of the Settlement Class. The significant risk of non-payment Plaintiffs' counsel accepted in taking

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<sup>1</sup> A summary of the time, costs, and expenses as reported by Plaintiffs' counsel is appended to the Declaration of Ben Barnow ("Barnow Decl."), attached as Exhibit A hereto.

<sup>2</sup> \$727,000 (requested award) / \$1,158,116.84 (lodestar) = .63.

on this contingency matter, the quality of counsel's performance, the difficulty, length, and expense of the litigation, and the stakes of the matter further demonstrate the requested award is reasonable and appropriate.

The request for reimbursement of \$12,000 in costs and expenses is also reasonable and appropriate. The costs and expenses were incurred in advancing the matter, were reasonable and necessary, and would generally be billed to clients in the private market. This reimbursement provides for less than half of the \$25,485.05 in costs and expenses actually incurred by Class Counsel to date. Other Plaintiffs' counsel reported an additional \$7,027.90 in costs and expenses to Class Counsel.

Class Counsel also request that the Court award payment of service awards in the amount of \$2,000 to each Representative Plaintiff. Representative Plaintiffs stepped forward to represent the interests of the Settlement Class in this complex case, were involved in the drafting and review of complaints, responded to discovery requests and other requests for information from counsel, and reviewed and approved of the terms set forth in the Settlement Agreement. The requested service awards are reasonable and consistent with awards approved in similar class action matters.

Class Counsel respectfully request that the Court grant this petition.

## **BACKGROUND**

### **I. The Data Breach**

Plaintiffs are consumers whose private and confidential financial information, including credit card and debit card numbers, expiration dates, cardholder names, internal card verification codes, and other payment card information (collectively, "Card Information") was compromised in a massive security breach of Hy-Vee's computer servers and payment card environment commencing on or around December 2018, and continuing through July 2019 (the "Data Breach").

## II. Procedural History

Plaintiffs Noreen Perdue and Dustin Murray filed their lawsuit in this Court on October 15, 2019. ECF No. 1. On November 15, 2019, a similar complaint was filed in the Western District of Wisconsin styled, *Davis v. Hy-Vee Inc.*, No. 3:19-cv-00941, and another was filed on November 18, 2019, in the Western District of Missouri styled, *Gordon Grewing v. Hy-Vee, Inc.*, No. 4:19-cv-00928. Plaintiffs filed a First Amended Class Action Complaint (“FAC”) on November 25, 2019, which added additional plaintiffs. ECF No. 8.

Plaintiffs’ operative Second Amended Complaint (“SAC”) was filed on December 30, 2019. ECF No. 21. The SAC alleges, *inter alia*, that Hy-Vee’s failure to implement adequate data security measures to protect its customers’ sensitive Card Information directly and proximately caused injuries to Plaintiffs and class members, that as a direct and proximate result of Hy-Vee’s conduct and data security negligence, a massive amount of customer information was stolen from Hy-Vee and exposed to criminals, and that victims of the Data Breach have had their sensitive Card Information compromised, had their privacy rights violated, been exposed to the increased risk of fraud and identify theft, lost control over their personal and financial information, and otherwise have been injured.

On January 31, 2020, Hy-Vee, Inc. responded to the SAC by filing a motion that sought to dismiss the case in its entirety, with prejudice, for failure to state a claim. ECF No. 30. After the motion was fully briefed, the Court issued a 34-page Order and Opinion Granting in Part and Denying in Part Defendant’s Motion to Dismiss on April 20, 2020. ECF No. 41. Per the Court’s opinion, many of Plaintiffs’ claims survived, including claims brought pursuant to various state consumer protection statutes.

After the ruling on Defendant’s Motion to Dismiss, the parties commenced discussions regarding the possibility of reaching a negotiated settlement on behalf of Plaintiffs and the Class. The parties agreed to enlist the aid of a private mediator to continue settlement negotiations. On October 12, 2020, the parties engaged in a full-day mediation session with private mediator Bennett G. Picker via video conference. With the assistance of the mediator, and further negotiations, the parties reached agreement. Only after reaching agreement on all substantive terms did Hy-Vee and Plaintiffs’ counsel negotiate and reach agreement as to (subject to Court approval) Plaintiffs’ attorneys’ fees, costs, and expenses, and representative service awards.

### **ARGUMENT**

#### **I. The Requested Attorneys’ Fee Award Is Reasonable and Appropriate**

“In assessing the reasonableness of an attorney fee award for a class action settlement, district courts should ‘do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.’” *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) (quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ). Relevant factors include the risk of nonpayment, the quality of the attorney’s performance, the amount of work necessary to resolve the litigation, and the stakes of the case. *Id.* at 693.

Attached in support of Plaintiffs’ motion are sworn declarations of Ben Barnow of Barnow and Associates, P.C. and Benjamin F. Johns of Chimicles Schwartz Kriner & Donaldson-Smith LLP. *See* Exhibits A and B. The declarant-attorney in each declaration attests to the total time their firm spent litigating this matter and the hourly rates of the attorneys from their firm. *See id.* The Declaration of Ben Barnow also summarizes the total hours, lodestar, and costs and expenses as reported by the firms involved in the litigation pursuant to the timekeeping



protocol circulated by Class Counsel. Class Counsel's firms incurred a total cumulative lodestar of \$988,925. Based only on the efforts of Class Counsel, the requested fee award would provide a still-negative lodestar multiplier of .74.

Combined, Class Counsels' firms and other Plaintiffs' firms working on the case collectively report having spent more than 2,000 hours advancing the litigation and a cumulative lodestar of in excess of \$1,158,116.84. Approval of the requested award will result in a negative lodestar multiplier of .63—a figure that will be further reduced by the additional work Class Counsel will perform in support of the Settlement in the future.

The quality of the work performed by Class Counsel and the quality of the result achieved would have supported the award of a lodestar multiplier. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991) (noting that “[a risk] multiplier is, within the court’s discretion, appropriate when counsel assume a risk of non-payment in taking a suit” and “[m]ultipliers anywhere between one and four have been approved”). Given the negative lodestar multiplier provided by the requested fee, this factor heavily favors approval of the requested award of attorneys’ fees. *See, e.g., Hapka v. Carecentrix, Inc.*, No. 2:16-cv-02372-KGG, 2018 U.S. Dist. LEXIS 68186, at \*5 (D. Kan. Feb. 15, 2018) (fee award implicating “a negative multiplier (0.87) on Class Counsel's lodestar—is inherently reasonable.”) (emphasis added); *Carlin v. DairyAmerica, Inc.*, No. 1:09-cv-04300AWI-EPG, 2019 U.S. Dist. LEXIS 78026, at \*44 (E.D. Cal. May 8, 2019) (citing *Schiller v. David’s Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776, at \*23 (E.D. Cal. June 11, 2012) for the proposition that “a negative lodestar multiplier strongly supports the reasonableness of the fee request).

**A. Counsel Reasonably Spent More than 2,000 Hours Prosecuting the Litigation**

Since the inception of this litigation, Class Counsel and other Plaintiffs' firms have worked diligently to advance Representative Plaintiffs' and other Settlement Class Members' interests. They successfully and informally consolidated a variety of cases filed by different counsel against Hy-Vee without judicial intervention. They also drafted the Consolidated Class Action Complaint and the Second Amended Consolidated Class Action Complaint, successfully opposed Hy-Vee's motions to dismiss, and engaged in substantial discovery. This included propounding written discovery, reviewing documents, engaging in multiple rounds of meeting and conferring with Hy-Vee's counsel regarding ESI and other discovery issues, retaining a consulting expert with expertise in the area of payment card data breaches, and taking a deposition of a Hy-Vee representative pursuant to Fed. R. Civ. P. 30(b)(6). Class counsel diligently and efficiently pursued this matter from initiation through the present, and will continue to do so until final resolution is achieved.

**B. Counsel's Hourly Rates are Reasonable**

Reasonable hourly rates are determined by "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Class Counsel are entitled to the hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Blum*, 465 U.S. at 895 n.11. Class Counsel's lodestar is calculated using rates that have been accepted in numerous other class action cases. *See, e.g.*, Barnow Decl., ¶ 36, Johns Decl., ¶ 17.

Class Counsel's rates also compare very favorably with rates approved by other trial courts in class action litigation, by what attorneys of comparable skill charge in similar areas of specialization. *See Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2015 U.S. Dist. LEXIS 67298, at \*14-15 (N.D. Cal. May 21, 2015) (finding reasonable rates in a consumer fraud

class action of between \$475–\$975 for partners, \$300–\$490 for associates, and \$150–\$430 for paralegals); *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 U.S. Dist. LEXIS 161077, at \*11 (S.D. Ill. Mar. 31, 2016) (approving hourly rates of \$460–\$998 for attorneys, \$309 for paralegals, and \$190 for legal assistants). Finally, Class Counsel have submitted sworn declarations attesting to their hourly rates and that their hourly rates charged here are the same as has been charged in their current cases.

### **C. The Risk of Non-Payment Counsel Accepted**

Courts emphasize the severity of the financial risk class counsel assumed in taking on a class action when determining the reasonableness of a fee request. *In re Dairy Farmers of Am., Inc., Cheese Antitrust Litig.*, 80 F. Supp. 3d at 847–48; *see also Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (“Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel.”); *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011) (“[I]f the market-determined fee for a sure winner were \$1 million the market-determined fee for handling a similar suit with only a 50 percent chance of a favorable outcome should be \$2 million”).

Given the reported nature of the Data Breach, Class Counsel knew the expenditure of significant time, effort, and money would likely be needed to achieve a successful resolve litigating this matter to conclusion. They understood Hy-Vee would likely argue that Class Members suffered no damages as a result of the Data Breach and that damages incurred were not traceable to the Data Breach, as opposed to another data breach. Class Counsel also knew that to litigate this matter to conclusion they would need to prevail at the motion to dismiss and class certification stages, at trial, and likely on appeal. Class Counsel briefed the dismissal issues comprehensively,

and obtained a sufficient degree of success to carry forward with the litigation. Even after this victory, significant hurdles remained. It is difficult to obtain certification of a class in a data breach case and prevailing at trial and on appeal is never guaranteed. *Yvonne Mart Fox v. Iowa Health Sys.*, No. 3:18-cv-00327-JDP, 2021 U.S. Dist. LEXIS 40640, at \*13-14 (W.D. Wis. Mar. 4, 2021) (“breach cases . . . are particularly risky, expensive, and complex.”) (quoting *Gordon*, 2019 U.S. Dist. LEXIS 215430, 2019 WL 6972701, at \*1). Accordingly, the significant risk counsel accepted in taking on this matter on a contingency basis weighs strongly in favor of approving the requested award.

#### **D. The Quality of Counsel’s Performance**

The valuable and easy-to-claim benefits made available to Settlement Class Members under the Settlement evidences that Class Counsel’s performance was excellent in this litigation. Class Counsel achieved a fair, reasonable, and adequate remedy for Settlement Class Members when compared to the facts and law at issue in this litigation. Class Counsel: (1) negotiated informal consolidation of all related cases before the Court; (2) prepared and filed Plaintiffs’ Consolidated Class Action Complaint and Plaintiffs’ Second Amended Consolidated Complaint; (2) briefed and successfully defeated a motion to dismiss; (3) engaged in discovery, including propounding and responding to written discovery, producing and reviewing documents, and deposing a corporate representative of Hy-Vee; and (4) engaged in comprehensive arm’s length settlement negotiations with Hy-Vee, including an all-day mediation with an experienced mediator. Barnow Decl. ¶¶ 9–27.

Class Counsel’s efforts resulted in an excellent Settlement pursuant to which Class Members are eligible to receive reimbursement of up to \$225 for out-of-pocket expenses incurred because of the Data Breach including, *inter alia*, bank fees, card reissuance fees, overdraft fees,

late fees, over-limit fees, costs of credit monitoring and identity theft protection, reimbursement of up to three hours of documented time (at \$20 per hour) spent dealing with replacement card issues or in reversing fraudulent charges. Class Members who had other extraordinary unreimbursed monetary losses because of information compromised as part of the Data Breach are eligible to make a claim for reimbursement of up to \$5,000 for actual, documented, and unreimbursed monetary loss caused by the Data Breach. ECF No. 57-1, ¶¶ 2.1–2.2.

Significantly, the Settlement also requires Hy-Vee to implement and maintain specific security measures estimated to cost \$20 million. These security enhancements include: appointment of a Group Vice President, IT Security, maintenance of a written information security program, employee training on data security policies, maintenance of a policy for responding to information security events, compliance with PCI-DSS standards, and requiring the use of multi-factor authentication to access Hy-Vee’s payment card environment by third-party vendors. ECF No. 57-1, ¶¶ 2.4.1–2.4.6.

These benefits were negotiated and obtained against Hy-Vee’s strong defense mounted by experienced data breach attorneys. The Settlement provides real benefits that will be available to Settlement Class Members in the near future, as opposed to years from now, further enhancing the value of the Settlement to Class Members. *See Donovan v. Estate of Frank E. Fitzsimmons*, 778 F.2d 298, 309 n.3 (7th Cir. 1985) (recognizing that at a prime interest rate of 12.5% a \$2 million settlement sum today is worth the same as a \$3.6 million recovery five years from now). This factor favors approval of the requested award.

#### **E. The Complexity, Length, and Expense of the Litigation**

By nature, data breach class actions are complex, risky, and expensive to litigate. This case was no exception. At the initiation of this case, Class Counsel knew that prosecuting this matter

would likely involve lengthy discovery, briefing, argument, trial, and potential appeals, requiring hundreds, if not thousands, of hours of attorney time to complete, and the advancement of significant out-of-pocket costs and expenses. Class Counsel's firms and other Plaintiffs' counsels' firms working on the matter avoided duplication of effort and collectively report having already spent in excess of 2,000 hours advancing the matter for a collective lodestar of more than \$1,158,116.84. Based on their experience in similar cases, that number could have easily tripled or more with further discovery and motion practice through class certification. Class Counsel will also spend additional time drafting and filing Plaintiffs' Motion for Final Approval of the Settlement, preparing for and appearing at the final fairness hearing, overseeing claims administration, and resolving any appeals. This factor favors approval of the requested awards.

#### **F. The Stakes of the Litigation**

Settlement Class Members' claims were potentially subject to a number of defenses, and the possibility existed that the Court would dismiss certain of Plaintiffs' claims, decline to certify any class, or that Plaintiffs would not prevail at trial. The uncertain result of this litigation at its outset supports approval of the requested award.

#### **II. The Requested Costs and Expenses Award Is Reasonable and Appropriate**

Pursuant to a market-based approach, attorneys who generate a benefit for the class are entitled to recover reasonable litigation expenses incurred to advance the matter. *See Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 412 (E.D. Wis. 2002). Plaintiffs seek reimbursement of \$12,000 for costs and expenses incurred in furtherance of this litigation. These costs and expenses were incurred in furtherance of the litigation for filing fees, mediation fees, deposition costs, electronic legal research costs, vendor costs for storing ESI, postage and messenger delivery charges, payments to a consulting expert,

and conference call charges. *See* Barnow Decl. ¶¶ 38–39 and Johns Decl. ¶ 18. The requested costs and expenses are significantly less than the amounts actually incurred and are certainly reasonable and consistent with what the market would award in a private setting.

### **III. The Requested Service Awards Are Reasonable and Appropriate**

Representative plaintiff service awards encourage members of a class to become class representatives and to reward individual efforts taken on behalf of a class. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (awarding incentive award of \$25,000). “In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.” *Id.*

The requested award of \$2,000 to each Plaintiff is reasonable, justified, and accords with common practice. Each Plaintiff stepped forward and volunteered to undertake the responsibilities, risks, and scrutiny attendant with bringing this class action. They were also actively involved throughout the litigation. Among other things, Plaintiffs provided information and approved of complaints, provided counsel with information for initial disclosures and discovery responses, and reviewed and approved of the Settlement. They were also willing to sit for depositions and perform their duties as counsel and the Court required. Moreover, often plaintiffs in data breach cases risk further losses of privacy just by stepping forward—all of which justifies a reasonable service award.

Courts regularly award service fees in excess of \$2,000. *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-CV-4462, 2015 WL 1399367, at \*6 (N.D. Ill. Mar. 23, 2015) (approving \$25,000 incentive award); *Am. Int’l Grp., Inc. v. ACE INA Holdings, Inc.*, Nos. 07–CV–2898, 09–CV–2026, 2012 WL 651727, at \*16 (N.D. Ill. Feb. 28, 2012) (awarding a \$25,000

incentive awards to each of seven plaintiffs); *Cook*, 142 F.3d at 1016 (awarding incentive award of \$25,000); *see also Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 503 (N.D. Ill. 2015) (awarding \$5,000 incentive awards where the case did not proceed past the earliest stages of discovery). Plaintiffs' participation and willingness to undertake the responsibilities and risks attendant with bringing this class action warrant that each Plaintiff is awarded a service award of \$2,000.

**CONCLUSION**

As the above analysis shows, the requested award of attorneys' fees, costs, and expenses, and requested service awards, are reasonable, appropriate, and should be approved. Plaintiffs, individually and on behalf of the Settlement Class, by and through Class Counsel, pray that this Honorable Court enter an order:

- (a) granting Plaintiffs' request for attorneys' fees in the amount of \$727,000; costs and expenses in the amount of \$12,000; and service awards for Representative Plaintiffs in the amount of \$2,000 each; and
- (b) granting such other and additional relief as the Court may deem just and appropriate.

Dated: April 23, 2021

Respectfully submitted,

/s/ Ben Barnow  
Ben Barnow  
Anthony L. Parkhill  
**BARNOW AND ASSOCIATES, P.C.**  
205 W. Randolph St., Suite 1630  
Chicago, IL 60606  
Tel: (312) 621-2000  
Fax: (312) 641-5504  
b.barnow@barnowlaw.com  
aparkhill@barnowlaw.com

Benjamin F. Johns  
Alex M. Kashurba  
**CHIMICLES SCHWARTZ KRINER  
& DONALDSON-SMITH LLP**  
One Haverford Centre  
361 Lancaster Avenue  
Haverford, PA 19041



(610) 642-8500  
bfj@chimicles.com  
amk@chimicles.com

*Class Counsel*

William B. Federman  
**FEDERMAN & SHERWOOD**  
10205 North Pennsylvania Avenue  
Oklahoma City, Oklahoma 73120  
Tel: (405) 235-1560  
Fax: (405) 239-2112  
WBF@federmanlaw.com

Cornelius P. Dukelow  
Oklahoma Bar No. 19086  
**ABINGTON COLE + ELLERY**  
320 South Boston Avenue, Suite 1130  
Tulsa, Oklahoma 74103  
918.588.3400 (*telephone & facsimile*)  
cdukelow@abingtonlaw.com  
www.abingtonlaw.com

Shpetim Ademi  
**ADEMI & O'REILLY, LLP**  
3620 East Layton Avenue  
Cudahy, WI 53110  
(414) 482-8000  
(414) 482-8001 (fax)  
sademi@ademilaw.com

*Plaintiffs' Steering Committee*

Kyle Alan Shamberg  
**CARLSON LYNCH LLP**  
Suite 1240  
111 W Washington Street  
Chicago, IL 60602  
312-750-1265  
kshamberg@carlsonlynch.com

*Plaintiffs' Liaison Counsel*

Matthew M. Guiney  
**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**  
270 Madison Avenue  
New York, New York 10016

(212) 545-4600  
Fax: (212) 686-0114  
guiney@whafh.com

Carl Malmstrom  
**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLC**  
111 West Jackson Blvd.  
Suite 1700  
Chicago, IL 60604  
(312) 984-0000  
malmstrom@whafh.com

*Additional Counsel for Plaintiffs  
and the Putative Class*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on April 23, 2021, I electronically filed the foregoing with the Clerk of the District Court via the CM/ECF system, which serves notice of the same on all counsel of record. Service by mail was provided to the individual listed below:

Kimber Lee Ingle  
1604 SE Silkwood Lane  
Lees Summit, MO 64063

/s/ Ben Barnow  
Ben Barnow

# Exhibit A

**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION**

NOREEN PERDUE, ELIZABETH DAVIS-BERG,	)	
DUSTIN MURRAY, MELANIE SAVOIE, CHERYL	)	CASE NO. 1:19-cv-01330-MMM-JEH
ELLINGSON, ANGELA TRANG, HARLEY	)	
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GREWING, MELISSA WARD and PATRICIA DAVIS,	)	<b>CLASS ACTION</b>
individually and on behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	<b>JURY TRIAL DEMANDED</b>
	)	
v.	)	
	)	
HY-VEE, INC.,	)	
	)	
Defendant.	)	
	)	

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**DECLARATION OF BEN BARNOW IN SUPPORT OF PLAINTIFFS’ MOTION FOR  
AWARD OF ATTORNEYS’ FEES, COSTS, AND EXPENSES, AND  
REPRESENTATIVE SERVICE AWARDS**

I, BEN BARNOW, declare as follows:

**I. INTRODUCTION**

1. I am an attorney licensed to practice law in the State of Illinois and the State of New York.
2. I am one of the Court-appointed Class Counsel in the above-captioned matter.
3. I have been practicing law in a number of areas for approximately 50 years. During the last twenty-plus years, I have successfully resolved some of the nation’s largest class action lawsuits, including a number of high-profile data breach class actions.
4. I submit this declaration in support of Plaintiffs’ Motion for Award of Attorneys’ Fees, Costs, and Expenses, and Representative Service Awards. I have personal knowledge of the matters stated herein and, if called upon, I could and would testify competently thereto.

**II. THE REQUESTED ATTORNEYS' FEE AWARD IS REASONABLE AND APPROPRIATE**

5. This declaration describes the background of the litigation, including its procedural history, motion practice, settlement negotiations, and other activities relevant to this motion.

6. A significant amount of work went into the successful resolution of this matter. Plaintiffs' counsel collectively report having expended over 2,000 hours working on the litigation, and have accumulated a lodestar of in excess of \$1,158,116.84. Plaintiffs' counsel also report having incurred costs and expenses in excess of \$32,512.95 in furtherance of the litigation. Class Counsel and other Plaintiffs' counsel will incur additional time, costs, and expenses preparing and completing and filing Representative Plaintiffs' Motion for Final Approval of Class Action Settlement Agreement, appearing (in person or through Zoom and the like, as required) at the Final Fairness Hearing, addressing appeals (if any), responding to Settlement Class Member inquiries regarding the Settlement, and overseeing administration of the Settlement.

7. Plaintiffs request an award of attorneys' fees in the amount of \$727,000, reimbursement of \$12,000 for costs and expenses incurred in furtherance of the litigation, and a \$2,000 award for each Representative Plaintiff for their service on behalf of the Settlement Class. Hy-Vee does not oppose these requested awards, which are to be paid by Hy-Vee separately from the relief paid to the Class. These payments will not reduce the settlement benefits being afforded to the class. In accordance with best practices, the Parties did not negotiate the amounts of attorneys' fees, costs, and expenses, or service awards until after agreement was reached on all other substantive terms of the Settlement.

8. Based upon the reported time to date, the requested attorneys' fee award equates to a lodestar negative multiplier of approximately 0.63. As noted above, this negative multiplier will necessarily be further reduced by future work of Class Counsel and other Plaintiffs' Counsel,

including preparing and filing Plaintiffs' motion for final approval of the Settlement, appearing at the final fairness hearing, overseeing settlement administration, and resolving appeals, if any. The requested fee award represents compensation for the significant work undertaken, costs and expenses incurred, and risks accepted by Plaintiffs' counsel in this actively litigated matter, as well as the activity of the Representative Plaintiffs. As set forth in the memorandum filed herewith, the requested awards in my view are reasonable and justified.

**A. Case Initiation, Pleadings, and Discovery**

9. As the Court is aware, this is a data breach class action. Plaintiffs are consumers whose private and confidential financial information, including credit card and debit card numbers, expiration dates, cardholder names, internal card verification codes, and other payment card information (collectively, "Card Information") was compromised in a massive security breach of Hy-Vee's computer servers and payment card environment (the "Data Breach") commencing on or around December 2018 and continuing through July 2019 (the "Data Breach").

10. The following class action complaints were filed asserting claims against Hy-Vee relating to the Data Breach: *Purdue v. Hy-Vee, Inc.*, Case No. 1:19-cv-01330 (C.D. Ill.); *Davis v. Hy-Vee, Inc.*, Case No. 0:19-cv-00941 (W.D. Wis.); *Grewing v. Hy-Vee, Inc.*, Case No. 0:18-cv-61836-CMA (W.D. Mo.).

11. On November 27, 2019, plaintiffs' counsel in the *Grewing* case petitioned the Judicial Panel on Multidistrict Litigation for transfer of all related actions concerning the Data Breach to the United States District Court for the District of Kansas for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407.

12. During the last twenty-plus years, I have led and resolved a number of MDL matters, including data breach cases, and argued before the Judicial Panel on Multidistrict

Litigation (the “Panel”) on several occasions. In recent years, the Panel has stressed that counsel should attempt to reach agreement on informal consolidation whenever possible and has been hesitant to create MDLs for matters involving only a half-dozen or less cases, such as this matter.

13. Following the Panel’s guidance, I reached out to Plaintiffs’ counsel in all related cases and Hy-Vee’s counsel to discuss informal consolidation of all cases related to the Data Breach. After several discussions, an agreement was reached providing that (1) all plaintiffs from the related cases pending in federal court would be added to a consolidated class action complaint in the *Perdue* case; and (2) the MDL petition would be withdrawn. Pursuant to that agreement, on December 6, 2019, Plaintiffs’ counsel from the *Grewing* case moved to withdraw their MDL petition. The Panel granted that request on December 12, 2019.

14. On December 30, 2019, the Second Consolidated Class Action Complaint (“SAC”) was filed in this Court, alleging 15 causes of action on behalf of 11 plaintiffs and a nationwide putative class. ECF No. 21. Hy-Vee responded by moving to dismiss the SAC. ECF Nos. 36.

15. On February 28, 2020, Plaintiffs filed their opposition to Hy-Vee’s motion to dismiss the SAC. ECF No. 36. Hy-Vee’s reply brief in support of their motion was filed on March 18, 2020.

16. Hy-Vee answered the SAC on May 13, 2020.

17. After substantial negotiation, the Parties reached a stipulated protective order and a stipulation governing the production of electronically stored information, which were filed with the Court on April 29, and June 30, respectively.

18. The discovery process was hotly contested. Many disputes resulted in meet and confer conferences, and some discovery disputes required multiple conferences. The Parties disagreed about proportionality, privilege, preservation, and other issues.



19. During discovery, Hy-Vee produced several important documents to Class Counsel regarding the Data Breach, including documents providing information regarding Hy-Vee's security measures in place prior to the Data Breach, explaining how Hy-Vee discovered the Data Breach, describing Hy-Vee's investigation into the cause and scope of the Data Breach, and detailing a third-party forensic expert's analysis of the Data Breach.

20. On September 23, 2020, Plaintiffs took a deposition of a Hy-Vee representative pursuant to Fed. R. Civ. P. 30(b)(6).

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

21. The Settlement is the product of extensive, arm's length negotiations conducted by experienced counsel.

22. On October 12, 2020, the parties engaged in a full-day mediation session with private mediator Bennett G. Picker via video conference. With the assistance of the mediator, and further negotiations, the parties reached agreement. Only after reaching agreement on all substantive terms did Hy-Vee and Plaintiffs' counsel reach agreement that Defendant would pay (subject to Court approval) the requested Plaintiffs' attorneys' fees, costs, and expenses, and service awards.

23. After the terms of the Settlement were finalized, Class Counsel worked with counsel for Hy-Vee to finalize the language of the Settlement Agreement and with the claims administrator to finalize the notice documents and claim form. The Settlement Agreement was executed on January 12, 2021. ECF No. 57-1. Plaintiffs filed a motion for preliminary approval of the Settlement that same day. ECF No. 57.

24. On January 21, 2021, Class Counsel appeared telephonically before the Court to present Plaintiffs' motion for preliminary approval of the Settlement. Pursuant to the Court's

guidance at the hearing, on January 22, 2021, Plaintiffs filed amended settlement exhibits. ECF No. 61.

25. The Court's Order granting preliminary approval of the Settlement was entered on January 25, 2021. ECF No. 62.

26. Pursuant to that preliminary approval order, Plaintiffs' motion for final approval of the Settlement and supporting memorandum must be filed on or before June 28, 2021.

27. Class Counsel will continue to represent the interests of the Settlement Class in the future. Based on my experience, inquiries from Class Members seeking information about the settlement are likely to continue until long after the final fairness hearing. Additionally, in the event any appeal relating to the Settlement is filed, we will represent the Settlement Class in such proceedings.

### **C. The Settlement Agreement**

28. Under the terms of the Settlement, the Settling Parties agreed to certification of the following Settlement Class for settlement purposes only:

All persons residing in the United States who used a payment card to make a purchase at an affected Hy-Vee point-of-sale device during the Security Incident, which as described in the definition of Security Incident occurred during the time frames and at the locations set forth in Exhibit C to the Settlement Agreement and Appendix A to the Publication Notice.

SA ¶¶ 4.<sup>1</sup> The following Persons are specifically excluded from the Settlement Class: (i) Hy-Vee and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge assigned to evaluate the fairness of this settlement; (iv) the attorneys representing the parties in the Litigation; (v) banks and other entities that issued payment cards which were utilized at Hy-Vee during the Security Incident; and (vi)

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<sup>1</sup> References to particular paragraphs of the Settlement are prefixed by "SA ¶¶."

any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Security Incident or who pleads nolo contendere to any such charge. SA ¶ 4.

29. Pursuant to the Settlement Class Members are eligible to receive reimbursement of up to \$225 (in total) for out-of-pocket expenses incurred because of the Data Breach including, *inter alia*, bank fees, card reissuance fees, overdraft fees, late fees, over-limit fees, costs of credit monitoring and identity theft protection, reimbursement of up to three hours of documented time (at \$20 per hour) spent dealing with replacement card issues or in reversing fraudulent charges. SA ¶ 2.1. Class Members who had other extraordinary unreimbursed monetary losses because of information compromised as part of the Data Breach are eligible to make a claim for reimbursement of up to \$5,000 for actual, documented, and unreimbursed monetary loss caused by the Data Breach. SA ¶ 2.2.

30. The Settlement also requires Hy-Vee to implement and maintain specific security measures estimated to cost \$20 million. SA ¶ 2.4.

### **III. TIME, COSTS, AND EXPENSES**

31. Class Counsel from my firm and Chimicles Schwartz Kriner & Donaldson-Smith LLP oversaw the prosecution of this litigation. Attorneys from my firm actively participated in all aspects of the litigation, including pre-filing research and investigation, drafting complaints, negotiating coordination of the related cases, responding to Hy-Vee's motion to dismiss, serving and responding to written discovery, reviewing documents, taking the deposition of Hy-Vee's corporate representative, settlement negotiations, preparing settlement documentation, and assisting with claims administration. I believe the time expended by my firm and all Plaintiffs'

counsel firms working on the litigation was reasonable and necessary in light of the complex nature of the litigation and Hy-Vee's defense of the claims against it.

32. My firm prosecuted this case on a contingent-fee basis with no guarantee of recovery. Plaintiffs' counsel incurred 100% of the risk in litigating this Action. My firm was necessarily forced to forgo other employment in order to devote the time necessary to pursue this litigation. My firm advanced expenses with the understanding that we would be paid a fee and receive reimbursement for expenses only if successful.

33. The information in this declaration regarding my firm's time and out-of-pocket expenses is taken from time and expense records prepared and maintained by the firm in the ordinary course of business using timekeeping software. The time records were prepared shortly thereafter by each attorney working on the litigation. The expense records are prepared from receipts, expense vouchers, check records, and other documents and are an accurate record of the expenses. I reviewed the printouts and also reviewed the backup documentation where necessary. The purpose of these reviews was to confirm the accuracy of the entries on the printouts as well as the necessity for, and reasonableness of, the time and expenses committed to the litigation.

34. The summary below includes the name of each person from my firm who worked on the case, years of experience, hourly billing rates, and the total number of hours expended.

35. From inception to March 31, 2021, attorneys at my firm spent over 657 hours working on this litigation. My firm's lodestar is \$423,460 calculated at historical rates.

<b>Attorney</b>	<b>Year Admitted to Practice</b>	<b>Hours</b>	<b>Rate</b>	<b>Lodestar</b>
Ben Barnow (Shareholder)	1969	107	\$875	\$93,625
Erich P. Schork (Former Associate)	2006	299.2	\$700	\$209,440

Anthony L. Parkhill (Associate)	2014	236.5	\$500	\$118,250
Riley Prince (Law Clerk)	(graduation expected 2021)	14.3	\$150	\$2,145
<b>Total</b>		<b>657</b>		<b>\$423,460</b>

36. The hourly rates shown above are the current usual and customary rates set by my firm for each individual. *See e.g., Gann v. Nissan North America*, 18-cv-966, ECF No. 130 (M.D. Tenn. March 10, 2020) (awarding, \$5,900,000 of reasonable attorneys' fees, costs and expenses on the basis of evidence submitted, including time records for Ben Barnow (\$875/hr), Erich P. Schork (\$700/hr), and Anthony Parkhill (then \$425/hr)). *See also, Warner v. Toyota Motor Sales, U.S.A., Inc.*, No. CV 15-2171 FMO (FFMx), 2017 U.S. Dist. LEXIS 77576, at \*42–43 (C.D. Cal. May 21, 2017) (approving Barnow and Associates, P.C.'s rates as reasonable given "the prevailing rates in the community for lawyers of comparable skill, experience, and reputation"). The rates reflect what would be charged to a fee-paying client in the private legal marketplace for complex litigation. The rates are also in line with the rates charged by other firms that handle complex cases and class actions.

37. The costs and expenses for which reimbursement is sought are reasonable in amount and were necessary for the effective and efficient litigation of the case. The expenses are all of a type that, in my view, would normally be charged to a fee-paying client in the private legal marketplace. My firm has received reimbursement for similar costs and expenses in numerous cases.

38. My firm has incurred \$10,388.43 in out-of-pocket litigation costs and expenses as summarized below:

<b>Expense Category</b>	<b>Total</b>
Westlaw/PACER	\$7,746.46
Conference Calls	\$2.97
Pro Hac Vice Fees	\$693
Mediation Fees	\$1,946
<b>Total</b>	<b>\$10,388.43</b>

39. The following is additional information regarding these expenses:

a. Westlaw/PACER: \$7,746.46. The amount of \$7,559.26 was paid to Westlaw for legal research, and the amount of \$187.20 was paid to PACER for research in federal court filings. Westlaw is used to obtain access to legal research, factual databases, and for cite-checking of briefs. The expense amount detailed herein represents the out-of-pocket costs incurred by my firm in connection with the use of these services in connection with this litigation. My firm has a flat-rate contract with Westlaw for use of its services. When my firm utilizes Westlaw services, the case name is entered for the specific case being researched. At the end of each billing period in which a service is used, my firm's costs for such services are allocated to specific cases based on the percentage of use in connection with that specific case in the billing period. As a result of the contract negotiated by my firm, the Class enjoys substantial savings in comparison with the "market-rate" for *a la carte* use of online legal research services.

b. Conference Calls: \$2.97. This conference call charge was incurred to host a conference call with other Plaintiffs' counsel. At my firm, each conference call is allocated to the relevant case shortly before or after the call occurs, and the conference call charges for each case are entered into our billing system.

c. Mediator Fees: \$1,946. My firm paid \$1,946 for Bennett G. Picker's work as mediator in this matter.



# Exhibit B





## I. THE LITIGATION

2. This is a consumer class action against Hy-Vee. Plaintiffs are among consumers whose personal and non-public information was compromised in a cyberattack on Hy-Vee's point-of-sale system that accepts payment cards. Through the operation of a type of malware, the criminal hacker had the ability to capture and steal payment card numbers when a card was swiped at an affected point-of-sale device at Hy-Vee's fuel pumps, drive-thru coffee shops, and restaurants (which included Hy-Vee Market Grille Expresses and the Wahlburgers locations that Hy-Vee owns and operates, as well as the cafeteria at Hy-Vee's West Des Moines corporate office) beginning on or around December 14, 2018 (the "Security Incident").

3. Plaintiffs alleged that Hy-Vee failed to implement adequate data security measures to protect the confidential payment card data entrusted to it by its customers, and that it failed to promptly inform customers that their information was compromised. Plaintiffs further alleged that, *inter alia*, victims of the Security Incident have had their payment card information compromised, were exposed to fraud and identity theft, lost control over their personal information, and have spent many hours attempting to address and mitigate the resulting fraud, all without timely notification or meaningful assistance from Hy-Vee, such as fraud insurance or credit monitoring.

4. This lawsuit was initially filed on October 15, 2019. Dkt. No. 1. On December 30, 2019, Plaintiffs filed the Consolidated Second Amended Class Action Complaint ("SACC") asserting fifteen claims on behalf of a nationwide class and several state classes. Dkt. No. 21.

5. On January 31, 2020, Hy-Vee responded to the SACC by filing a motion to dismiss for failure to state a claim. Dkt. Nos. 30-31. Plaintiffs opposed the motion (Dkt. No. 36) and Defendant replied (Dkt. No. 38). On April 20, 2020, Judge Mihm issued an Order and Opinion on

the motion to dismiss (Dkt. No. 41). Judge Mihm dismissed Plaintiffs' claims for negligence, negligence *per se* as they relate to Illinois, Missouri, Kansas and Iowa plaintiffs, Plaintiffs' breach of contract and unjust enrichment claims, violations of DTPA claims for Wisconsin, Illinois, and Minnesota plaintiffs, but permitted Plaintiffs to replead the Illinois CFA claim. *Id.* Defendant filed an Answer and Affirmative Defenses on May 13, 2020. Dkt. No. 46.

6. During the course of discovery, Plaintiffs' counsel reviewed and analyzed over 6,500 pages of documents from Hy-Vee. Plaintiffs' counsel also communicated frequently with the Plaintiffs in this matter, including in preparation of discovery responses on their behalf.

7. On September 3, 2020, Plaintiffs' counsel took the FED. R. CIV. P. 30(b)(6) deposition of a Hy-Vee witness. Over the course of this case, counsel for the parties engaged in numerous telephonic meet-and-confers to discuss discovery disputes.

## **II. THE SETTLEMENT NEGOTIATIONS**

8. After the Court's ruling on the motion to dismiss, the parties commenced settlement discussions, which were conducted at arm's length at all times. After having preliminary discussions among themselves, the parties agreed to seek the aid of a private mediator to continue settlement negotiations.

9. On October 12, 2020, the parties engaged in a full-day mediation session, held over Zoom, with Bennett G. Picker of the law firm Stradley Ronon Stevens & Young, LLP. At the end of the day, and with Mr. Picker's assistance, the parties reached agreement on all material, substantive terms of the class-wide settlement. Only after the material terms were agreed upon did the parties begin discussing payment of attorneys' fees and expenses. The parties were unable to reach agreement only on the amount of Plaintiffs' attorneys' fees and expenses at the October 12 mediation session. As a result, Mr. Picker submitted a mediator's proposal, which was

subsequently accepted by both parties. The parties also reached an agreement on service awards for Plaintiffs.

10. After several months of negotiating and documenting the settlement, the parties executed the Settlement Agreement on January 12, 2021.

### **III. PRELIMINARY APPROVAL**

11. On January 12, 2021, the Plaintiffs filed their Unopposed Motion for Preliminary Approval of the Class Action Settlement and Direction of Notice under FED. R. CIV. P. 23(e). *See* Dkt. Nos. 57–58.

12. On January 25, 2021, following a hearing held on January 21, the Court granted Plaintiffs’ Motion for Preliminary Approval and, among other things, determined that the requirements of FED. R. CIV. P. 23(g) to be satisfied; appointed Heffler Claims Group as the Claims Administrator; appointed Bennett G. Picker as the Claims Referee; and scheduled a final fairness hearing for July 19, 2021. *See* Dkt. No. 62.

### **IV. TIME AND EFFORT UNDERTAKEN TO REACH THIS SUCCESSFUL RESULT**

13. My law firm was unequivocally committed to this action and the time-consuming task of prosecuting this litigation to conclusion, and even to trial, as were my co-counsel. Our resources combined with our substantial privacy and data-breach litigation experience (as well as the resources and experience of other the Class Counsel firms), allowed us to achieve a favorable result for the class of consumers who were affected by the Cyberattack.

14. The work performed in this case was reasonable and necessary to the prosecution and settlement of this case. As set forth in Plaintiffs’ Motion for Preliminary Approval and the accompanying declarations, Class Counsel conducted a significant factual investigation before commencing this action, and litigated this action diligently and vigorously after it was filed.

Because of our comprehensive evaluation of the facts and law, Class Counsel was able to settle this case for a very substantial sum. Class Counsel provided Class Members with substantive and certain relief much sooner than would have otherwise been obtained if litigation of this matter had continued.

15. Class Counsel prosecuted this case on a contingent-fee basis with no guarantee of recovery. Each firm was forced to forgo other employment in order to devote the time necessary to pursue this litigation. Class Counsel advanced expenses with the understanding that we would be paid a fee and receive reimbursement for expenses only if successful and only if approved by the Court. Class Counsel have not been paid for any of their time in this litigation or reimbursed for any of the expenses incurred in this matter.

16. From inception until the end of March 2021, my firm has billed 1,107.30 hours on this matter for a total lodestar of \$565,465.00. I have personally reviewed my firm's time entries before submitting them to the Court, and have eliminated certain entries based on my billing discretion. These figures do not account for any time that will be billed after this date, such as for that which will be necessary to seek final approval and to oversee the claims administration and distribution process. My firm's billable time through March 31 is summarized in the attached Exhibit A. All of this billable time was necessary to advance this case on behalf of Plaintiffs and the class.

17. The hourly rates shown in Exhibit A are the current usual and customary rates set by my firm for each individual. Many courts across the country have approved the hourly rates of CSKD attorneys and paralegals, even in cases where the rates were contested. *See, e.g., In re Philips/Magnavox TV Litig.*, 2012 U.S. Dist. LEXIS 67287, at \*47 ("The Court finds the billing rates [of the Chimicles Firm] to be appropriate and the billable time to have been reasonably

expended.”); *In re Elk Cross Timbers Decking Marketing, Sales Practices and Prods. Liab. Litig.*, No. 15-0018 (JLL) (JAD) (D.N.J. Feb 27, 2017), Dkt. No. 126 at 2 (reviewed Class Counsel’s “time summaries and hourly rates,” and found that “the hourly rates of each of Plaintiffs’ Steering Committee firm are . . . reasonable and appropriate in a case of this complexity.”); *Alessandro Demarco v. Avalon Bay Communities, Inc.*, No. 2:15-628-JLL-JAD (D.N.J. July 11, 2017), Dkt. No. 223 at ¶18 (“The Court, after careful review of the time entries and rates requested by Class Counsel [including C&T] and after applying the appropriate standards required by relevant case law, hereby grants Class Counsel’s application for attorneys’ fees . . .”).

18. From inception until the end of March 2021, my firm has incurred \$15,096.62 in expenses. Among other items, these costs were to pay for mediation fees, deposition transcripts and expert work. As with our billable time, I reviewed our firm’s expenses before finalizing this submission, and eliminated from it any entries that appeared unnecessary based upon my billing judgment. Also like the billable hours, this does not account for any expenses incurred after March 31. A summary of these expenses is attached as Exhibit B.

19. The service awards are reasonable and are intended to compensate the class representatives for their services as named Plaintiffs, including assisting counsel in preparing the complaints, gathering documents and information for Class Counsel, monitoring the litigation, consulting with Class Counsel on settlement alternatives, and coming forward to represent the interests of the Settlement Class Members.

I declare pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed this 23rd day of April, 2021 at Drexel Hill, Pennsylvania.

/s/ Benjamin F. Johns  
Benjamin F. Johns

# Exhibit A

**PERDUE, et al. v. HY-VEE, INC.****FIRM NAME: CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH LLP****LODESTAR REPORT****INCEPTION - MARCH 31, 2021**

<b>NAME</b>	<b>STATUS*</b>	<b>HOURLY RATE</b>	<b>CUMULATIVE HOURS</b>	<b>CUMULATIVE ODESTAR</b>
Benjamin F. Johns	P	\$ 700.00	281.40	\$196,980.00
Tiffany J. Cramer	OC	\$ 575.00	5.90	\$3,392.50
Andrew W. Ferich	FA	\$ 525.00	358.90	\$188,422.50
Samantha E. Holbrook	A	\$ 525.00	39.50	\$20,737.50
Alex M. Kashurba	A	\$ 450.00	237.50	\$106,875.00
Zachary P. Beatty	A	\$ 400.00	0.50	\$200.00
Emily L. Skaug	A	\$ 325.00	5.40	\$1,755.00
David W. Birch	IT	\$ 300.00	20.60	\$6,180.00
Justin P. Boyer	PL	\$ 275.00	116.10	\$31,927.50
Sydney B. Spotts	PL	\$ 275.00	1.50	\$412.50
Corneliu P. Mastraghin	FPL	\$ 250.00	5.30	\$1,325.00
Carlyne A. Wagner	LC	\$ 225.00	12.70	\$2,857.50
Madeline C. Landry	FPL	\$ 200.00	22.00	\$4,400.00
<b>TOTALS</b>			<b>1,107.30</b>	<b>\$565,465.00</b>

P = Partner

A = Associate

FA = Former Associate

OC = Of Counsel

LC = Law Clerk

PL = Paralegal

FPL = Former Paralegal

IT = Information Tech



# Exhibit B

<b><i>PERDUE, et. al v. HY-VEE, INC.</i></b> <b>EXPENSE CHART</b> <b>FIRM NAME: CHIMICLES SCHWARTZ KRINER</b> <b>&amp; DONALDSON-SMITH LLP</b> <b>REPORTING PERIOD: INCEPTION TO MARCH 31, 2021</b>	
DESCRIPTION	TOTAL EXPENSES
Mediation Fees	\$4,500.00
Deposition Transcripts	\$3,260.05
Consultant/Expert	\$3,087.12
Computer Research	\$1,384.37
Case/Pro Hac Related Filing Fees	\$1,187.00
Professional/Consultant	\$762.98
Subpoena Service	\$690.00
Travel/Food/Lodging	\$194.55
Postage	\$30.55
<b>TOTAL</b>	<b>\$15,096.62</b>