

# Exhibit D

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

JOHN DOE ONE; JOHN DOE TWO;  
JOHN DOE THREE; and JOHN DOE FOUR,  
on behalf of themselves and all similarly  
situated individuals,

*Plaintiffs,*

v.

CAREMARK, L.L.C.;  
FISERV, INC.,  
FISERV SOLUTIONS, LLC; and  
DEFENDANTS DOES 1–10,

*Defendants.*

No. 2:18-cv-00238-EAS-CMV

No. 2:18-cv-00488-EAS-CMV

(Consolidated for all purposes)

CLASS ACTION

**DECLARATION OF TERRY L. KILGORE IN SUPPORT OF MOTION FOR  
ATTORNEYS' FEES AND COSTS AND PLAINTIFFS' SERVICE AWARDS**

I, TERRY L. KILGORE, declare as follows:

I am an attorney with a solo practice in Brooklyn, Ohio, which is a suburb of Cleveland. I am one of the counsel of record for Plaintiffs in this case. I am a member in good standing of the bar of Ohio. I respectfully submit this declaration in support of Plaintiffs' Motion for Attorneys' Fees and Costs and Service Awards to the Named Plaintiffs, and in support of Final Approval of the Settlement. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration, and could testify competently to them if called upon to do so.

**Background and Experience**

1. I graduated cum laude from Wittenberg University with a B.A. in Political Science in 1970. I graduated cum laude from the Moritz College of Law at The Ohio State University with a J.D. in 1973.

2. I have been practicing law in Ohio since 1973. I am admitted to practice in the State of Ohio, the U.S. District Courts for the Southern and Northern Districts of Ohio, and the U.S. Court of Appeals for the Sixth Circuit.

3. I was diagnosed as HIV+ in 1991, and I learned first-hand the stigma that accompanies that diagnosis. Shortly thereafter, I began to provide free legal services to HIV+ individuals, both on my own and through organizations such as the Ohio AIDS Coalition and the Columbus AIDS Task Force.

4. Since 1994, I have devoted the vast majority of my practice to representing HIV+ individuals pro bono or at a reduced cost.

5. In this case, I have been assisted by my paralegal Edward Hamilton.

**Pre-Filing Investigation**

6. In August 2017, I became aware that CVS Health Corporation or one of its subsidiaries sent a mailing to participants in the Ohio Drug Assistance Program (OhDAP), which referred on its face to prescription medications and included the letters “HIV” directly above the recipient’s name.

7. On September 4, 2017, I sent a letter to the Ohio Department of Health and the CVS Health Privacy Office informing them of this breach of confidential information and demanding that they take corrective action.

8. On September 7, 2017, Neal Baker, who listed his title as Chief Privacy Officer of “CVS Health,” replied by email, acknowledging receipt of the letter and stating that CVS was investigating the claim.

9. With the help of my paralegal Edward Hamilton, I undertook an investigation into CVS’s breach. Through investigation of the postal permit number on the mailing, we were able

to determine that Fiserv, Inc. or one of its subsidiaries had sent the mailing. This was a significant discovery because the forms required for enrollment in OhDAP do not list Fiserv as an entity with which information will be shared, and ultimately this discovery led to Fiserv's inclusion as a defendant in a suit I filed, *John Doe One et al. v. Caremark, LLC et al.*, No. 18-cv-238 (N.D. Ohio) (the "First-Filed Action").

10. My work on this case has brought significant public attention to CVS's breach of confidentiality, including television and newspaper coverage.

11. In response to the breach, my office also filed a complaint with the Office of Civil Rights of the U.S. Department of Health and Human Services.

12. To determine the circumstances under which CVS obtained information relating to the HIV status of OhDAP participants, my office filed a Public Records Request with the Ohio Department of Health (ODH). When ODH was not forthcoming, my office filed a Public Records Request Complaint in the Ohio Court of Claims to compel ODH to produce the information. *Hamilton v. Ohio Dep't of Health*, No. 2017-00918PQ (Ohio Ct. Cl.). My office then negotiated a resolution with ODH, which led to the production of hundreds of pages of documents concerning CVS's bid for its contract with ODH, and other useful information. We made use of these materials in the complaints and the oppositions to the motions to dismiss in the First-Filed Action.

13. I consulted with numerous individuals and determined that claims against CVS and Fiserv should be pursued on a class-wide basis. I associated with Whatley Kallas LLP and Consumer Watchdog, based on their record in complex litigation relating to healthcare, including their representation of HIV+ individuals in suits against pharmacies.

14. My office interviewed many potential class representatives. Ultimately, we were retained by twenty individuals, three of whom we selected as class representatives.

15. With Whatley Kallas and Consumer Watchdog, I filed the First-Filed Action on March 21, 2018.

### **The Litigation of the Case**

16. After filing the First-Filed Action, my office continued to investigate factual and legal theories in support of the case. For example, Mr. Hamilton found the original minutes of the Senate Committee hearings on the bill that became Ohio Rev. Code § 3701.243, which is the basis of one of the Plaintiffs' claims in the First-Filed Action. Based on the appearance of the staples holding this document together, no one had ever copied it before.

17. Based on what I learned from my investigation, I also filed a suit against ODH in the Ohio Court of Claims relating to its unauthorized disclosure of OhDAP participants' HIV status to CVS. John Doe One et al. v. Ohio Dep't of Health, No. 2018-01004JD (Ohio Ct. Cl.). This case was ultimately dismissed voluntarily, but I believe that the pendency of an action against ODH strengthened the Plaintiffs' negotiating position with Caremark.

18. I participated in all aspects of the litigation, including discovery, client communications, and drafting of filings. I attended the Rule 26 conference in Columbus in September 2018, as well as the mediation sessions in Philadelphia in October 2018 and in Chicago in May 2019.

19. Once a settlement in principle was reached, I was closely involved in the preparation of the settlement agreement, especially as it related to issues that could affect the privacy of class members and their rights going forward. I communicated with my clients about the settlement agreement and solicited their input.

### **Contingent Nature of the Action**

20. Work on this matter required me to spend time that could have been spent on

other matters. I shouldered the risk of expending costs and time in litigating this action without any monetary gain in the event of an adverse judgment.

**My Lodestar and Billing Rates**

21. Mr. Hamilton and I both kept contemporaneous records of the time we spent preparing for and litigating this case. In addition, before the complaint was filed, we spent substantial hours for which we did not keep records. We have not included those additional hours in the totals below.

22. For the last twenty-five years, I have handled matters on a contingency basis. Therefore, I have no customary hourly billing rate with which to calculate my lodestar. I am aware that this Court often uses the Rubin Committee rates to measure the reasonableness of a fee request. *Linneman v. Vita-Mix Corp.*, 394 F. Supp. 3d 771, 788 (S.D. Ohio 2019). Those rates, which were established in 1983, are \$128.34 per hour for partners with 21 or more years of experience (like myself) and \$37.91 per hour for paralegals (like Mr. Hamilton), with an annual 4% cost-of-living adjustment. *Id.* In 2018, these rates were \$506.44 and \$149.60, respectively. I have calculated my lodestar on that basis.

23. I and Mr. Hamilton worked a total of 916.0 hours in this action, for a total lodestar of \$313,276.88.

24. The following chart details the time Mr. Hamilton and I worked on this case and our contribution to the total lodestar:

<b>Attorney/Paralegal</b>	<b>Total Hours</b>	<b>Billing Rate</b>	<b>Lodestar</b>
Terry Kilgore	493.9	\$506.44	\$250,130.72
Edward Hamilton	422.1	\$149.60	\$63,146.16
	916.0		\$313,276.88

24. I have personally reviewed the time reported for myself and Mr. Hamilton. I reduced or eliminated time reported where necessary to ensure that there was no unnecessary duplication of efforts. For example, I deleted time spent on routine, housekeeping matters. I can confidently assert that the lodestar reported in this declaration is reasonable, particularly in light

of our efforts and accomplishments in this litigation.

**My Costs**

25. I have maintained records of my expenses relating to this case. I have reviewed those records, and my expenses are \$4,104.80, categorized as follows:

- Travel to Rule 26 conference and two mediations: \$2,541.05
- Mileage (using IRS rates): \$668.45
- Parking: \$33.00
- Postage: \$92.00
- Copies: \$105.30
- Legal research database charges: \$665.00

**Plaintiff Does' Request for Service Awards**

27. The Plaintiffs in this case were all willing to come forward at the risk of publicizing their HIV status and potentially subjecting them to vigorous scrutiny of their personal health and other private matters, about which Caremark propounded discovery. The Plaintiffs were willing to testify in deposition and at trial, if necessary, and each one strongly supports the Settlement. My view is that the reasonable service awards requested here are easily warranted based on these facts.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct, and that this declaration was executed at Columbus, Ohio on December 6, 2019.

/s/ Terry L. Kilgore  
Terry L. Kilgore (0014692)