IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARK S. HOLDEN, RICHARD ANDISIO, EDWARD MARSHALL, ANN MARIE MARSHALL, ARTHUR CHRISTIANI, JOHNIELLE DWYER, PAWEL KRZYKOWSKI, MARIOLA KRZYNOWEK, JAMES HOWE, and CINDY A. PEREIRA, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

GUARDIAN ANALYTICS, INC., ACTIMIZE INC., and WEBSTER BANK, N.A.,

Defendants.

Case No. 2:23-cv-02115-WJM-LDW

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARDS

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

III. PLAINTIFFS' APPLICATION FOR AWARD OF REQUESTED ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS WARRANTS APPROVAL 4

A. The Class Has Received Reasonable Notice of the Requested Attorneys' Fees, Costs, and Expenses, and Has Been Given a Reasonable Opportunity to Object 4

1. Summary of the Notice 4

2. Timing of Motion for Attorneys' Fees and Costs and Opportunity to Object 5

B. The Attorneys' Fees Requested by Plaintiffs Are Fair and Reasonable 5

1. Percentage of Recovery Method 6

i. The size of the fund created and the number of persons benefitted 8

ii. The presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel 9

iii. The skill and efficiency of the attorneys involved 9

iv. The complexity and duration of the litigation 10

v. The risk of nonpayment 11

vi. The amount of time devoted to the case by Plaintiffs' counsel 13

vii. The awards in similar cases 13

viii. The value of benefits attributable to the efforts of Plaintiffs' counsel relative to the efforts of other groups, such as government agencies conducting investigations 14

ix. The percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained 14

x. Any innovative terms of settlement 15

2. Lodestar Cross-Check 15

i. Plaintiffs' Counsel's Hourly Rates Are Reasonable 16

ii. The Number of Hours Plaintiffs' Counsel Worked Is Reasonable 17

iii. Plaintiffs' Counsel's Requested Fee Results in a Negative Multiplier 18

IV. THE REQUEST FOR REIMBURSEMENT OF COSTS AND EXPENSES INCURRED IS REASONABLE AND SHOULD BE APPROVED........................... 18

V. SERVICE AWARDS FOR CLASS REPRESENTATIVES....................................... 19

VI. CONCLUSION.. 20

TABLE OF AUTHORITIES

Cases

Abrams v. Lightolier Inc.,
50 F.3d 1204 (3d Cir. 1995) 19

Brady v. Air Line Pilots Ass'n,
627 Fed. Appx. 142 (3d Cir. 2015) 20

Brightview Landscapes, LLC,
2017 WL 4354809 (M.D. Pa. Oct. 2, 2017) 19

Bryan v. Pittsburgh Plate Glass Co.,
494 F.2d 799 (3d Cir. 1974) 10

Brytus v. Spang & Co.,
203 F.3d 238 (3d Cir. 2000) 5

Castro v. Sanofi Pasteur Inc.,
2017 WL 4776626 (D.N.J. Oct. 23, 2017) 13

Dickerson v. York Intl. Corp.,
2017 WL 3601948 (M.D. Pa. Aug. 22, 2017) 18

Erby v. Allstate Fire and Cas. Ins. Co.,
2022 WL 14103669 (E.D. Pa. Oct. 24, 2022) 18

Esslinger v. HSBC Bank Nevada, N.A.,
2012 WL 5866074 (E.D. Pa. Nov. 20, 2012) 14

Fulton-Green v. Accolade, Inc.,
2019 WL 4677954 (E.D. Pa. Sept. 24, 2019) 12

Good v. Nationwide Credit, Inc.,
314 F.R.D. 141 (E.D. Pa. 2016) 20

Gunter v. Ridgewood Energy Corp.,
223 F.3d 190 (3d Cir. 2000) 6, 7, 15

Hall v. Accolade, Inc.,
2020 WL 1477688 (E.D. Pa. Mar. 25, 2020) 14

Hensley v. Eckerhart,
461 U.S. 424 (1983) 8

263 F.R.D. 226 (E.D. Pa. 2009) 19

In re Anthem, Inc. Data Breach Litig.,
327 F.R.D. 299 (N.D. Cal. 2018) 9

In re AremisSoft Corp. Sec. Litig.,
210 F.R.D. 109 (D.N.J. 2002) 10

In re AT & T Corp.,
455 F.3d 160 (3d Cir. 2006) 9, 15

In re Cendant Corp. Prides Litig.,
243 F.3d 722 (3d Cir. 2001) 6

In re CertainTeed Fiber Cement Siding Litig.,
303 F.R.D. 199 (E.D. Pa. 2014) 11

In re Comcast Corp. Set-Top Cable TV Box Antitrust Litig.,
333 F.R.D. 364 (E.D. Pa. 2019) 20

In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.,
553 F. Supp. 2d 442 (E.D. Pa. 2008) 12

In re Diet Drugs,
582 F.3d 524 (3d Cir. 2009) 9

In re Ductile Iron Pipe Fittings ("DIPF") Direct Purchaser Antitrust Litig.,
2018 WL 2722458 (D.N.J. May 10, 2018) 14

In re Fasteners Antitrust Litig.,
08-MD-1912, 2014 WL 296954 (E.D. Pa. Jan. 27, 2014) 12

In re Flonase Antitrust Litig.,
951 F. Supp. 2d 739 (E.D. Pa. 2013) 6

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig. ("GM Truck,
55 F.3d 768 (3d Cir. 1995) 10, 13

In re Ins. Brokerage Antitrust Litig.,
579 F.3d 241 (3d Cir. 2009) 6, 18

In re Ins. Brokerage Antitrust Litig.,
297 F.R.D. 136 (D.N.J. 2013) 14

In re Liquid Aluminum Sulfate Antitrust Litig.,
2018 WL 7108059 (D.N.J. Dec. 3, 2018) 14

In re Mercedes Benz Tele Aid Contract Litig.,
2011 WL 4020862 (D.N.J. Sept. 9, 2011) 17

In re Merck & Co., Inc. Securities, Derivative & "Erisa" Litig.,
2016 WL 11686450 (D.N.J. June 3, 2016)..8

In re Merck & Co., Inc. Vytorin Erisa Litig.,
2010 WL 547613 (D.N.J. Feb. 9, 2010)..14, 17

In re Nat'l Football League Players' Concussion Injury Litig.,
2018 WL 1635648 (E.D. Pa. Apr. 5, 2018)..10

In re Nat'l Football League Players' Concussion Inj. Litig.,
814 F. App'x 678 (3d Cir. 2020)..6

In re Nutella Mktg. & Sales Pracs. Litig.,
589 F. App'x 53 (3d Cir. 2014)..5

In re Ocean Power Techs., Inc.,
2016 WL 6778218 (D.N.J. Nov. 15, 2016)..19

In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions,
148 F.3d 283 (3d Cir. 1998)..7, 15, 18

In re Remeron Direct Purchaser Antitrust Litig.,
2005 WL 3008808 (D.N.J. Nov. 9, 2005)..15

In re Remeron End-Payor Antitrust Litig.,
2005 WL 2230314 (D.N.J. Sept. 13, 2005)..18

In re Remicade Antitrust Litig.,
2023 WL 2530418 (E.D. Pa. Mar. 15, 2023)..17

In re Rent-Way Sec. Litig.,
305 F. Supp. 2d 491 (W.D. Pa. 2003)..12

In re Rite Aid Corp. Sec. Litig.,
396 F.3d 294 (3d Cir. 2005)..5, 6, 10, 12, 15, 16, 18

In re Safety Components, Inc. Sec. Litig.,
166 F. Supp. 2d 72 (D.N.J. 2001)..14, 19

In re Valeant Pharm. Int'l, Inc. Sec. Litig.,
2020 WL 3166456 (D.N.J. June 15, 2020)..15

In re Viropharma Inc. Sec. Litig.,
2016 WL 312108 (E.D. Pa. Jan. 25, 2016)..11, 17

In re Warfarin Sodium Antitrust Litig.,
391 F.3d 516 (3d Cir. 2004)..10

Kanefsky v. Honeywell Intl. Inc.,
2022 WL 1320827 (D.N.J. May 3, 2022) ... 11, 14

Kapolka v. Anchor Drilling Fluids USA, LLC,
2019 WL 5394751 (W.D. Pa. Oct. 22, 2019) ... 11

Karcich v. Stuart (In re Ikon Office Sols., Inc., Sec. Litig.),
194 F.R.D. 166 (E.D. Pa. 2000) ... 15

Khanna v. Sokoloff,
2017 WL 825215 (D.N.J. Mar. 2, 2017) ... 16

Landsman & Funk, P.C. v. Skinder-Strauss Assocs.,
2015 WL 2383358 (D.N.J. May 18, 2015) ... 5

Lanni v. New Jersey,
259 F.3d 146 (3d Cir. 2001) ... 16

Lazy Oil Co. v. Wotco Corp.,
95 F. Supp. 2d 290 (W.D. Pa. 1997) ... 20

Lupian v. Joseph Cory Holdings,
2019 WL 3283044 (D.N.J. July 22, 2019) ... 14

Maddy v. General Electric Co.,
2017 WL 2780741 (D.N.J. June 26, 2017) ... 9

Maldonado v. Houstoun,
256 F.3d 181 (3d Cir. 2001) ... 16

Milliron v. T–Mobile USA, Inc.,
2009 WL 3345762 (D.N.J. Sept. 10, 2009) ... 14

Moore v. Comcast Corp.,
2011 WL 238821 (E.D. Pa. Jan. 24, 2011) ... 7

Moore v. GMAC Mortg.,
2014 WL 12538188 (E.D. Pa. Sept. 19, 2014) ... 16

O'Keefe v. Mercedes-Benz USA, LLC,
214 F.R.D. 266 (E.D. Pa. 2003) ... 11

Oliver v. BMW of N.A., LLC,
2021 WL 870662 (D.N.J. Mar. 8, 2021) ... 10

Schneider v. Chipotle Mexican Grill, Inc.,
336 F.R.D. 588 (N.D. Cal. 2020) ... 9

Serrano v. Sterling Testing Sys., Inc.,
711 F. Supp. 2d 402 (E.D. Pa. 2010) 20

Whiteley v. Zynerba Pharm., Inc.,
2021 WL 4206696 (E.D. Pa. Sept. 16, 2021) 17

Statutes

Manual for Complex Litigation, Fourth, § 14.121 8

Rules

Fed. R. Civ. P. 23 .... 1, 3-5

Fed. R. Civ. P. 54 1

Other Authorities

5 *Newberg on Class Actions* § 15:98 (5th ed. 2021) 6

Third Circuit 2001 Task Force Report on Selection of Class Counsel,
74 Temp. L. Rev. 689 (2001) 7, 13

Pursuant to Rules 23(h) and 54(d) of the Federal Rules of Civil Procedure, Plaintiffs Mark S. Holden, Richard Andisio, Edward Marshall, Ann Marie Marshall, Arthur Christiani, Johnielle Dwyer, Pawel Krzykowski, Mariola Krzynowek, James Howe, and Cindy A. Pereira (collectively, "Plaintiffs"), individually and on behalf of others similarly situated, respectfully submit this memorandum in support of their motion to approve an award of attorneys' fees in the amount of $476,735.83, costs in the amount of $9,101.19, and service awards in the amount of $1,000 per Class Representative ($10,000 total), in accordance with the Settlement Agreement (ECF No. 43-2) entered into by Plaintiffs and Defendants Guardian Analytics, Inc. ("Guardian"), Actimize Inc. ("Actimize"), and Webster Bank, N.A. ("Webster Bank") (collectively, "Defendants").[1]

I. INTRODUCTION

Plaintiffs initiated this class action litigation against Defendants, alleging that they failed to secure and safeguard Plaintiffs' and Settlement Class Members' personally identifiable information ("PII"), including names, Social Security numbers, and financial account numbers. Plaintiffs allege that between November 27, 2022, and January 22, 2023, unauthorized individuals

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[1] Defendant Webster Bank previously informed Class Counsel that its records demonstrate that there are 197,270 class members. Webster Bank recently confirmed its belief in the accuracy of this number in response to Class Counsel's inquiry. Based upon Webster Bank's initial representation, Class Counsel informed the Court in their Preliminary Approval Motion that the Class consisted of 197,270 class members. *See* Memorandum of Law in Support of Motion for Preliminary Approval, ECF No. 43-1 at 14. However, the Settlement Administrator, Epiq, recently informed Class Counsel that it issued class notice to 218,919 unique class members. The Parties are currently investigating this discrepancy. In addition, it is our understanding that Webster Bank is re-verifying that its records support the 197,270 class size. To the extent the actual class size is larger than 197,270, Class Counsel intend to discuss with Defendants an increase to the Settlement Fund. If the Settlement Fund is raised, Class Counsel will not seek additional compensation as attorneys' fees based upon any such increase. The Parties intend to provide the Court with a further update on this issue on or before March 15, 2024.

gained access to Guardian's network systems and acquired or had access to the PII of Plaintiffs and other class members (the "Data Incident").[2]

After months of contested, arms' length negotiations, which included mediation before the Honorable Stephen Orlofsky (Ret.), the parties reached a proposed class Settlement. The Settlement requires Defendants to establish a non-reversionary cash common fund of $1,430,207.50, which will be utilized to fund: (1) approved claims of all eligible and participating Settlement Class Members; (2) notice and administration costs; (3) Court-approved attorneys' fees, costs, and expenses; and (4) Court-approved service awards.

Plaintiffs' counsel's fee and expense request is fair and reasonable under both a percentage of the benefit approach and a lodestar approach. For these reasons, the Court should grant the Motion, award Plaintiffs' counsel the requested fees and expenses, and approve service awards to the Class Representatives.

II. BACKGROUND

Plaintiffs incorporate by reference the factual and procedural background summarized in Plaintiffs' Motion for Preliminary Approval. *See* ECF No. 43.

Plaintiffs' counsel are experienced data breach litigators. *See* Declaration of Co-Lead Counsel Ben Barnow, attached hereto as Exhibit 1 ("Barnow Decl."), ¶¶ 11-12; Declaration of Charles E. Schaffer, attached hereto as Exhibit 2 ("Schaffer Decl."), ¶¶ 11-13. Collectively, they have successfully litigated dozens of data breach class actions. *Id*. Following initial discussions outlining the general parameters of a potential settlement, the parties agreed to mediate and engaged the Honorable Stephen Orlofsky (Ret.) as their mediator. Barnow Decl., ¶ 3; Schaffer Decl., ¶ 3. Prior to the mediation, Plaintiffs' counsel analyzed the legal landscape thoroughly—

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[2] Unless otherwise indicated, capitalized terms shall have the same meaning as they do in the Settlement Agreement.

including issues related to tort remedies, contract remedies, and class certification—to fully evaluate the risks and benefits to potential early resolution. Barnow Decl., ¶ 4; Schaffer Decl., ¶ 4. Topics analyzed included the value of personal identifying information; hacking; consequences of data breaches, including exposure of private financial account information and social security numbers; industry standards for data security; and Defendants' representations regarding its security features to protect PII. *Id*. Plaintiffs' counsel also requested and received informal discovery from Defendants, including information regarding how the Data Incident occurred, Defendants' response to the Data Incident, and information relating to the PII impacted in the Data Incident. Barnow Decl., ¶ 5; Schaffer Decl., ¶ 5.

The full-day mediation took place on September 19, 2023. Barnow Decl., ¶ 6; Schaffer Decl., ¶ 6. The negotiations, while professional, were adversarial and conducted at arm's length. While the parties made substantial progress during the mediation, no settlement was reached at the mediation. *Id*. The parties continued to communicate in the weeks that followed the mediation, and eventually were able to reach an agreement in principle on October 2, 2023. Barnow Decl., ¶ 7; Schaffer Decl., ¶ 7. These settlement negotiations required substantial preparation and research so that Plaintiffs' counsel could obtain the best possible results for the Class. This settlement is the product of hard-fought, arm's length negotiations. *Id.*

After the Settlement was reached, Plaintiffs' counsel spent, and continues to spend, significant time and resources developing settlement administration and Notice Program that comports with both the requirements of Rule 23 and the Due Process Clause. Barnow Decl., ¶ 9; Schaffer Decl., ¶ 9. Among other tasks, Plaintiffs' counsel sought proposals from different claims administrators, selected and worked with the Claims Administrator to prepare Notice and Claims documents, helped develop a Settlement website, and continued to monitor for potential opt-outs

and objections to the Settlement. *Id.* To the extent final approval is granted, Plaintiffs' counsel will continue to expend time and resources for a considerable length of time to ensure that the Settlement administration follows the Court-approved claims process. Barnow Decl., ¶ 10; Schaffer Decl., ¶ 10.

III. PLAINTIFFS' APPLICATION FOR AWARD OF REQUESTED ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS WARRANTS APPROVAL

Plaintiffs seek the Court's approval of an award of $476,735.83 (representing 33.33% of the common fund), as well as reimbursement of costs and expenses of $9,101.19 in connection with their counsel's work on behalf of Plaintiffs and Settlement Class Members. Plaintiffs' counsel have provided Settlement Class Members with reasonable notice of their intention to make this request, and Class Members will have an adequate opportunity to object to this Motion after its filing. For the reasons set forth below, this fee request is reasonable and should be granted.

A. The Class Has Received Reasonable Notice of the Requested Attorneys' Fees, Costs, and Expenses, and Has Been Given a Reasonable Opportunity to Object

1. Summary of the Notice

Fed. R. Civ. P. 23(h)(1) provides that "[n]otice of the motion [for an award of attorneys' fees and costs] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." Plaintiffs' counsel has provided reasonable notice of this motion, through direct notice efforts and has afforded Class Members an opportunity to object to this motion. *See* Declaration of Cameron R. Azari, attached hereto as Exhibit 3 ("Azari Decl.").

The Notice Program individual notice efforts reached approximately 97% of the identified Settlement Class. The reach was further enhanced by a Settlement Website. Azari Decl., ¶ 7. As of February 28, 2024, a Postcard Notice or an SSN Postcard Notice was delivered to 213,786 of the 218,919 unique, identified Settlement Class Members. Azari Decl., ¶ 16. As of March 8, 2024,

there have been 10,144 unique visitor sessions to the Settlement Website, and 46,703 web pages have been presented. Azari Decl., ¶ 18. As of March 8, 2024, there have been 852 calls to the toll-free telephone number representing 2,232 minutes of use. Azari Decl., ¶ 19.

2. Timing of Motion for Attorneys' Fees and Costs and Opportunity to Object

The schedule approved by the Court requires Plaintiffs' counsel to file their Motion for an Award of Attorneys' Fees and Reimbursement of Costs at least 14 days in advance of the deadline for Settlement Class Members to object or exclude themselves from the Settlement Agreement. ECF No. 44 ¶ 26. As such, Class Members have two weeks after the filing of this motion to lodge any objections to the requested fees, costs, and expense award. Class members will be able to view this motion for fees, costs, and expenses and supporting papers on the Settlement website.

B. The Attorneys' Fees Requested by Plaintiffs Are Fair and Reasonable

"In a certified class action, the court may award reasonable attorney's fees and . . . costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "The Supreme Court has recognized that '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 re Nutella Mktg. & Sales Pracs. Litig.*, 589 F. App'x 53, 58 (3d Cir. 2014) (quoting *Brytus v. Spang & Co.*, 203 F.3d 238, 242 (3d Cir. 2000)). "The awarding of attorneys' fees in a class action settlement is within the Court's discretion, provided that the Court thoroughly analyzes and reviews an application for such fees." *Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, No. 08-3610 (CLW), 2015 WL 2383358, at *7 (D.N.J. May 18, 2015), *aff'd*, 639 F. App'x 880 (3d Cir. 2016) (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 299 (3d Cir. 2005), *as amended* (Feb. 25, 2005)); *In re Nat'l Football League Players' Concussion Inj. Litig.*, 814 F. App'x 678, 683 n.6 (3d Cir. 2020) ("we give district courts considerable deference in fee decisions").

Here, in the Settlement Agreement, the Parties agreed that Plaintiffs' counsel will move the Court for an Order awarding attorneys' fees, costs, and expenses (collectively, "Fee Award") expressed as a percentage of the Settlement Fund not to exceed one-third of the fund (33.33%). ECF No. 43-2 ¶ 74.

Courts in the Third Circuit have discretion to select between the lodestar method and percentage-of-the-benefit method when approving a class action fee award. *See, e.g.*, William B. Rubenstein, 5 *Newberg on Class Actions* § 15:98 (5th ed. 2021) ("The Third Circuit gives its district courts discretion as to whether to use a percentage or lodestar method."). The Third Circuit has explained that the goal of the percentage fee or lodestar awards is to ensure "that competent counsel continue to undertake risky, complex, and novel litigation." *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 747 (E.D. Pa. 2013) (quoting *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000)).

1. Percentage of Recovery Method

"The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *In re Ins. Brokerage Antitrust Litig*., 579 F.3d 241, 280 (3d Cir. 2009) (quoting *In re Rite Aid*, 396 F.3d at 300).

The Third Circuit has rejected benchmark percentages, preferring more qualitative standards. *See In re Rite Aid*, 396 F.3d at 303 ("We have generally cautioned against overly formulaic approaches in assessing and determining the amounts and reasonableness of attorneys' fees.") (citation omitted); *In re Cendant Corp. Prides Litig*., 243 F.3d 722, 736-37 (3d Cir. 2001) (district court may not rely on formulaic application of appropriate range in awarding attorney fees under percentage-of-fund method in a class action, but must consider relevant circumstances of

particular case, including size of settlement). Indeed, the Third Circuit 2001 Task Force on Selection of Class Counsel recommended that courts "avoid rigid adherence to a 'benchmark'" and concluded that "a percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel." Edward R. Becker, C.J., *Third Circuit 2001 Task Force Report on Selection of Class Counsel*, 74 Temp. L. Rev. 689, 707 (2001).

The Third Circuit utilizes the ten factors identified in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000), and *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) (the "*Gunter/Prudential* factors"), in determining whether a fee is reasonable:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiff's counsel; (7) the awards in similar cases; (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations; (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained; and (10) any innovative terms of settlement.

Gunter, 223 F.3d at 195 n.1; *see also Prudential*, 148 F.3d at 336-40. The *Gunter/Prudential* factors should not "be applied in a rigid, formulaic manner, but rather a court must weigh them in light of the facts and circumstances of each case." *Moore v. Comcast Corp.*, No. 08-cv-773, 2011 WL 238821, at *4 (E.D. Pa. Jan. 24, 2011). This Court should approve Plaintiffs' counsel's request based on these factors.

i. The size of the fund created and the number of persons benefitted

"The size of the fund is indicative of the success obtained through a settlement, and, accordingly, a significant consideration in evaluating the reasonableness of an award for attorneys' fees." *In re Merck & Co., Inc. Securities, Derivative & "Erisa" Litig.*, No. CV 05-02367 (SRC), 2016 WL 11686450, at *8 (D.N.J. June 3, 2016); *see also* Manual for Complex Litigation, Fourth, § 14.121 ("The greatest emphasis is the size of the fund created, because a common fund is itself a measure of success and represents the benchmark from which a reasonable fee will be awarded.") (citations and internal quotation marks omitted); *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("the most critical factor is the degree of success obtained"). Here, counsel obtained a significant amount for the class, negotiating a settlement fund of $1,430,207.50. The common fund will be used to pay approved claims which fall into a variety of categories.

Settlement Class Members may elect to file a claim for either 1) reimbursement of certain losses and Credit Monitoring services; or 2) a cash payment. ECF No. 43-2 ¶ 26. Settlement Class Members who submit a Claim for Reimbursement/Credit Monitoring can seek reimbursement for each of 1) certain ordinary losses; 2) lost time; and 3) two years of three-bureau credit monitoring. ECF No. 43-2 ¶ 27. Settlement Class Members who submit a Claim for a cash payment are eligible to receive a Tier 1 cash payment if their Social Security Number was compromised, or a Tier 2 cash payment (equal to half of the Tier 1 payment) if their Social Security number was not compromised. ECF No. 43-2 ¶ 27.

Epiq has identified 218,919 unique Settlement Class Members. Azari Decl., ¶ 11. The deadline for Settlement Class Members to file a Claim Form is April 24, 2024. As of March 8, 2024, Epiq has received 6,782 Claim Forms (6,692 online and 90 paper), which is expected to increase as the claims deadline approaches. Azari Decl., ¶ 23. This claims rate of 3.1% is consistent

with other similar class action settlements. *See, e.g.*, *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 599 (N.D. Cal. 2020) ("Here, the 0.83% claims rate . . . is on par with other consumer cases, and does not otherwise weigh against approval."); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 321 (N.D. Cal. 2018) (approving 1.8% claims rate).

In light of the complexity, likely duration and expense of continued litigation, and the risk of establishing liability and damages at trial, this is an excellent result. *See Maddy v. General Electric Co.*, CV-14-490-JBS-KMW, 2017 WL 2780741, at *7 (D.N.J. June 26, 2017) ("[T]here is tremendous benefit to the Class Members in light of the stage of the litigation, the remaining hurdles prior to even arriving at a trial date, and the risks associated with continued litigation"). Given the size of the fund, as well as the number of class members entitled to benefits, this first factor therefore strongly supports Plaintiffs' counsel's fee request.

ii. The presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel

As of March 8, 2024, no Class Members have submitted an objection to the Settlement or proposed Fee Award. Azari Decl., ¶ 21. The deadline for submitting objections is March 25, 2024. ECF No. 44 ¶ 26. The lack of objections weighs in favor of Plaintiffs' counsel's request. *See In re Diet Drugs*, 582 F.3d 524, 541–42 (3d Cir. 2009) ("few objections to the settlement terms and to the fees requested by counsel" weigh in favor of approval); *In re AT & T Corp.*, 455 F.3d 160, 170 (3d Cir. 2006) ("the absence of substantial objections by class members to the fees requested by counsel strongly supports approval"); *In re Rite Aid*, 396 F.3d at 305 ("[t]he class's reaction to the fee request supports approval of the requested fees").

iii. The skill and efficiency of the attorneys involved

The substantial recovery obtained demonstrates that Plaintiffs' counsel zealously pursued the interests of Plaintiffs and the Class. *See*, *e.g.*, *Oliver v. BMW of N.A., LLC*, No. CV 17-12979

(CCC), 2021 WL 870662, at *10 (D.N.J. Mar. 8, 2021) (citing *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002) ("the single clearest factor reflecting the quality of the class counsels' services to the class are the results obtained")). Plaintiffs' counsel have extensive experience in complex litigation and class action proceedings throughout the United States. The Settlement was reached after arm's length negotiations with the assistance of a neutral third-party mediator, the Honorable Stephen Orlofsky (Ret.), and following vigorous pursuit by Counsel. Plaintiffs' counsel are therefore more than adequate for purposes of certification herein. *See generally In re AremisSoft*, 210 F.R.D. at 132 ("[T]he single clearest factor reflecting the quality of class counsels' services to the class are the results obtained.") (citation omitted). Notably, "[n]o one has taken issue with the skill or efficiency of Class Counsel in securing this Settlement Agreement, nor could they. This factor weighs heavily in Class Counsel's favor." *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-MD-02323-AB, 2018 WL 1635648, at *5 (E.D. Pa. Apr. 5, 2018)). Accordingly, this factor supports the proposed fee award.

iv. The complexity and duration of the litigation

The fourth *Gunter* factor is intended to capture "the probable costs, in both time and money, of continued litigation." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig. ("GM Truck")*, 55 F.3d 768, 812 (3d Cir. 1995) (quoting *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir. 1974)); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 536 (3d Cir. 2004) ("[T]his factor favors settlement because continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial."); *Kapolka v. Anchor Drilling Fluids USA, LLC*, C.A. No. 2:18-01007-NR, 2019 WL 5394751, at *9 (W.D. Pa. Oct. 22, 2019) (counsel's work saved "[c]onsiderable judicial time and resources").

If the Parties did not reach a settlement, this dispute would likely require years of continued litigation, discovery, motion practice, and eventually, trial, with no guarantee of a recovery for the Settlement Class. *See In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 223 (E.D. Pa. 2014) ("Class counsel have also participated in mediation sessions and submitted filings to the Court. Absent Settlement, litigation would likely continue for some time and would require both Plaintiffs and Defendants to incur considerable expert witness fees and other expenses. I find that the complexity and duration of the litigation weigh in favor of the requested award of fees."). Ultimately, additional litigation efforts could still result in a recovery less than that achieved by the Settlement, or even nothing at all. Even if Plaintiffs would have recovered a larger judgment at trial on behalf of the Settlement Class Members, their actual recovery would likely be postponed for years. There is also the possibility that Plaintiffs would recover nothing. The Settlement ensures that Settlement Class members recover now, rather than the "speculative promise of a larger payment years from now." *In re Viropharma Inc. Sec. Litig.*, 2016 WL 312108, at *16 (E.D. Pa. Jan. 25, 2016). Thus, the fourth *Gunter* factor weighs in favor of approval.

v. The risk of nonpayment

"Any contingency fee includes a risk of non-payment." *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 309 (E.D. Pa. 2003); *see also Kanefsky v. Honeywell Intl. Inc.*, No. 18-CV-15536 (WJM), 2022 WL 1320827, at *10 (D.N.J. May 3, 2022) ("[T]he Court has already analyzed the risk of nonpayment (factor 5) by noting the various risks, including the risk of an unsuccessful trial or appeal, that would render Plaintiffs, and their contingency-fee based counsel unable to recover anything at all."). "Class Counsel invested considerable resources into this case with no guarantee that they would recover those costs given that they were retained on a contingency fee basis. This factor again weighs in favor of determining that the fee is reasonable." *Fulton-Green*

v. Accolade, Inc., No. CV 18-274, 2019 WL 4677954, at *13 (E.D. Pa. Sept. 24, 2019); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) ("Aside from investing their time, counsel had to front copious sums of money . . . . Thus, the risks that counsel incurred in prosecuting this case were substantial and further support the requested fee award."). Plaintiffs' counsel took this case on a contingency basis, with no guarantee that they would be paid for their services. *See* Barnow Decl., ¶ 10; Schaffer Decl., ¶ 11.

"[T]he risks associated with establishing liability if litigation were to continue were substantial, and thus weighed in favor of approving the settlement. The Third Circuit has found that this risk of establishing liability is relevant to the analysis of whether there is a risk of nonpayment." *In re Fasteners Antitrust Litig.*, No. CIV.A. 08-MD-1912, 2014 WL 296954, at *6 (E.D. Pa. Jan. 27, 2014) (citing *In re Rite Aid,* 396 F.3d at 304; *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.*, 553 F. Supp. 2d 442, 478 (E.D. Pa. 2008), *aff'd*, 582 F.3d 524 (3d Cir. 2009) (counsel "risked being unable to establish liability and causation or to achieve class certification under Rule 23").

From the outset, Plaintiffs' counsel undertook this complex and potentially lengthy litigation knowing that there was significant and real risk as to whether they would be compensated. Despite the serious litigation risks, Plaintiffs' counsel were able to forge a resolution that provides significant present relief to the Class, including substantial monetary benefits. Thus, there is little doubt that Plaintiffs' counsel undertook a significant risk here and the fee award, respectfully, should reflect that risk. The complexity and duration of this litigation therefore also support the requested fee.

vi. The amount of time devoted to the case by Plaintiffs' counsel

Plaintiffs' counsel devoted 686.65 hours, through March 5, 2024, to this litigation. The time expended by Plaintiffs' counsel has been necessary to obtain this recovery, and to effectively prosecute this action to a point where Defendants were willing to entertain a settlement. The time expended was reasonable based on the needs of the case and ultimately resulted in a highly favorable Settlement for the benefit of the Class. This factor therefore weighs in favor of the requested fee. *See also infra*. at III(B)(2).

vii. The awards in similar cases

Reasonable fee awards generally range from 19% to 45% of the common fund. *GM Truck*, 55 F.3d at 822. Courts in the Third Circuit consider a one-third fee to be reasonable. *See Castro v. Sanofi Pasteur Inc*., No. CV117178JMVMAH, 2017 WL 4776626, at *9 (D.N.J. Oct. 23, 2017) ("The one-third fee is within the range of fees typically awarded within the Third Circuit through the percentage-of-recovery method; the Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund.") (citing *GM Truck*, 55 F.3d at 822); dward R. Becker, C.J., *Third Circuit 2001 Task Force Report on Selection of Class Counsel*, 74 Temp. L. Rev. 689, 707 (2001) ("A percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel. In setting a percentage fee, the court should avoid rigid adherence to a 'benchmark.'").[3] Here, the total requested award of Attorneys'

[3] *See also Lupian v. Joseph Cory Holdings*, No. 16-CV-5172, 2019 WL 3283044, at *6 (D.N.J. July 22, 2019) (one-third); *In re Merck & Co., Inc. Vytorin Erisa Litig.*, No. CIV.A. 08-CV-285DMC, 2010 WL 547613, at *9 (D.N.J. Feb. 9, 2010) (one-third); *In re Ductile Iron Pipe Fittings ("DIPF") Direct Purchaser Antitrust Litig*., No. CV 12-711 (AET)(LHG), 2018 WL 2722458, at *2 (D.N.J. May 10, 2018) (one-third); *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) (33%); *In re Liquid Aluminum Sulfate Antitrust Litig.*, No. 16-md-2687 (JLL)(JAD), 2018 WL 7108059, at *1 (D.N.J. Dec. 3, 2018) (one-third); *Milliron v. T–Mobile USA, Inc.*, No. 08–4149, 2009 WL 3345762, at *14 (D.N.J. Sept. 10, 2009) (one-third); *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 101-02 (D.N.J. 2001) (collecting cases).

Fees of $476,735.83 equals 33.33% of the Common Fund. Thus, the requested award is well within the reasonable range of awards approved by the Third Circuit and is consistent with similar class action settlements.

viii. The value of benefits attributable to the efforts of Plaintiffs' counsel relative to the efforts of other groups, such as government agencies conducting investigations

The Settlement Agreement was obtained by Plaintiffs' counsel without the benefit of findings from any government investigation. "There is no contention, by objectors or otherwise, that the settlement could be attributed to work done by other groups, such as government agencies." *Esslinger v. HSBC Bank Nevada, N.A.*, No. CIV.A. 10-3213, 2012 WL 5866074, at *14 (E.D. Pa. Nov. 20, 2012). This factor therefore weighs in favor of the requested fee.

ix. The percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained

Plaintiffs' counsel's requested fee is reasonable relative to contingent fee percentages commonly entered into in private fee agreements. *See, e.g.*, *Hall v. Accolade, Inc.*, No. 17-cv-03423, 2020 WL 1477688, at *11 (E.D. Pa. Mar. 25, 2020) ("Contingency fees generally range between 30% to 40%."); *Kanefsky*, 2022 WL 1320827, at *11 ("The requested award of fees and expenses relative to the size of the recovery and constructive common fund is also in line with contingent fees that are routinely negotiated in the private marketplace."); *In re Remeron Direct Purchaser Antitrust Litig.*, No. CIV.03-0085 FSH, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); *Karcich v. Stuart (In re Ikon Office Sols., Inc., Sec. Litig.)*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("[I]n private contingency fee cases . . . plaintiffs' counsel

routinely negotiate agreements providing for between thirty and forty percent of any recovery."). This factor therefore weighs in favor of the requested fee.

x. Any innovative terms of settlement

The Settlement Agreement provides for a two-tiered claims system whereby Class members may obtain a recovery based on the severity of harm caused by the Data Breach. ECF No. 43-2 ¶ 32. This approach is tailored to individual Settlement Class Members' claims while being administratively efficient. This factor therefore weighs in favor of the requested fee. *See In re Prudential*, 148 F.3d at 339 ("multi-tiered review process" is an innovative term that weighs in favor of a fee award).

2. Lodestar Cross-Check

The Third Circuit suggests that courts "cross-check the percentage award counsel asks for against the lodestar method." *See Gunter*, 223 F.3d at 199; *In re Rite Aid*, 396 F.3d at 305 ("Here, it was proper for the District Court to apply the percentage-of-recovery method, with an abridged lodestar analysis serving as a cross-check."); *In re Valeant Pharm. Int'l, Inc. Sec. Litig.*, No. 3:15-CV-07658-MAS-LHG, 2020 WL 3166456, at *14 (D.N.J. June 15, 2020) ("[T]he lodestar cross-check does not trump the primary reliance on the percentage of common fund method."). "The lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." *In re AT & T Corp.*, 455 F.3d at 164. In a lodestar analysis, courts "may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite Aid*, 396 F.3d at 307. "The lodestar award is calculated by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of

the attorneys." *Id.* at 305. As outlined below, Plaintiffs' counsel's hourly rates and total number of hours worked are reasonable, and the lodestar thus supports the requested fee award.

i. Plaintiffs' Counsel's Hourly Rates Are Reasonable

"Reasonable rates are determined by 'assessing the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Khanna v. Sokoloff*, No. CV 15-6814 (JAD), 2017 WL 825215, at *3 (D.N.J. Mar. 2, 2017) (quoting *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001)). "The court has broad discretion in determining an appropriate hourly rate." *Id.*

"A reasonable hourly rate reflects an attorney's experience and expertise, [thus] the rates for individual attorneys vary." *Moore v. GMAC Mortg*., No. 07-cv-04296, 2014 WL 12538188, at *2 (E.D. Pa. Sept. 19, 2014). Plaintiffs' counsel's hourly rates[4] are consistent with the rates courts have found reasonable in other class actions. *See, e.g.*, *Potter v. Valeant Pharmaceuticals International, Inc.*, No. 3:15-cv-07658, ECF No. 575 (D.N.J. June 15, 2020) (Special Master's report (adopted at ECF No. 657) recommends approval of plaintiffs' counsels fees with hourly rates as high as $1,325 per hour, stating "the Special Master finds the rates submitted by Lead Counsel are reasonable and appropriate"); *In re Eros International PLC Securities Litigation*, No. 2:19-cv-14125, ECF No. 93 (D.N.J. Nov. 28, 2023) (approving fee award which included hourly rates of $1,100 for partners); *In re Remicade Antitrust Litig.*, No. 17-CV-04326, 2023 WL 2530418, at *28 (E.D. Pa. Mar. 15, 2023) ("hourly rates, which range from $115 to $1,325, fall well within the range of rates charged by other attorneys in this market"); *Whiteley v. Zynerba*

[4] In calculating the lodestar, Plaintiffs' counsel used their current billing rates. *See Lanni v. New Jersey*, 259 F.3d 146, 149-50 (3d Cir. 2001) ("When attorney's fees are awarded, the current market rate must be used. The current market rate is the rate at the time of the fee petition, not the rate at the time the services were performed.").

Pharm., Inc., No. CV 19-4959, 2021 WL 4206696, at *14 (E.D. Pa. Sept. 16, 2021) (approving "hourly rates ranging from $110 to $1,100"); *In re Viropharma*, 2016 WL 312108, at *18 (approving hourly rates ranging from $610 to $925 for partners, $475 to $750 for of counsel, and $350 to $700 for other attorneys); *In re Mercedes Benz Tele Aid Contract Litig*., No. 07-2720, 2011 WL 4020862, at *7 (D.N.J. Sept. 9, 2011) ($500 to $855 for partners and $370 to $475 for associates); *In re Merck*, 2010 WL 547613, at *13 ($320 to $835).

Here, Plaintiffs' counsel's hourly rates ranged from $450 for associates to $1,125 for partners, which are reasonable and comparable to hourly rates approved in this circuit and in other cases. *See* Barnow Decl., ¶¶ 14-15; Schaffer Decl., ¶¶ 26-29; Declaration of Mason A. Barney, attached hereto as Exhibit 4 ("Barney Decl."), ¶ 5; Declaration of Bryan L. Bleichner, attached hereto as Exhibit 5 ("Bleichner Decl."), ¶ 5; Declaration of Jeffrey S. Goldenberg, attached hereto as Exhibit 6 ("Goldenberg Decl."), ¶ 5; Declaration of Joseph M. Lyon, attached hereto as Exhibit 7 ("Lyon Decl."), ¶¶ 1, 5; Declaration of Carl V. Malmstrom, attached hereto as Exhibit 8 ("Malstrom Decl."), ¶ 5; and Declaration of Adam Pollock, attached hereto as Exhibit 9 ("Pollock Decl."), ¶ 5.

ii. The Number of Hours Plaintiffs' Counsel Worked Is Reasonable

Plaintiffs' counsel collectively spent 686.65 hours litigating this matter to achieve a favorable result for the Class. *See* Schaffer Decl., ¶ 17. The number of hours incurred was reasonable for a case of this type and size. Schaffer Decl., ¶ 22. As discussed *supra*, Plaintiffs' counsel vigorously litigated this case, and these hours were necessary to the overall litigation and settlement of this case.

iii. Plaintiffs' Counsel's Requested Fee Results in a Negative Multiplier

Multiplying the hourly rates by the number of hours worked yields a lodestar of $512,195.50 and a negative multiplier of 0.93 compared to the requested fee.

"The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Rite Aid*, 396 F.3d at 305–06 (footnote omitted). "Multipliers may reflect the risks of nonrecovery facing counsel, may serve as an incentive for counsel to undertake socially beneficial litigation, or may reward counsel for an extraordinary result." *In re Prudential*, 148 F.3d at 340; *see, e.g.*, *In re Remeron End-Payor Antitrust Litig.*, No. CIV. 02-2007 FSH, 2005 WL 2230314, at *31 (D.N.J. Sept. 13, 2005) ("in a multiplier of 1.73 . . . is on the low end of the spectrum").

Here, Plaintiffs' counsel have requested a negative multiplier of 0.93, which weighs in favor of the requested fee. *See Erby v. Allstate Fire and Cas. Ins. Co.*, No. CV 18-4944-KSM, 2022 WL 14103669, at *17 (E.D. Pa. Oct. 24, 2022) ("lodestar multiplier of 0.93 . . . falls well within the range of lodestar multipliers courts within the Third Circuit have accepted"); *Dickerson v. York Intl. Corp.*, No. 1:15-CV-1105, 2017 WL 3601948, at *11 (M.D. Pa. Aug. 22, 2017) ("A negative multiplier reflects that counsel is requesting only a fraction of the billed fee; negative multipliers thus favor approval.") (quotations and alterations omitted); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d at 284 ("The lodestar multiplier that the District Court calculated was less than one and thus reveals that Plaintiffs' counsel's fee request constitutes only a fraction of the work that they billed.").

IV. THE REQUEST FOR REIMBURSEMENT OF COSTS AND EXPENSES INCURRED IS REASONABLE AND SHOULD BE APPROVED

Plaintiffs' counsel requests reimbursement of $9,101.19 in out-of-pocket litigation costs and expenses that were necessarily incurred to prosecute this case. *See* Schaffer Decl., ¶ 35.

"Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Safety Components*, 166 F. Supp. 2d at 108 (citing *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)). The expense categories are consistent with the types of expenses commonly approved by courts in the Third Circuit. *See, e.g.*, *In re Ocean Power Techs., Inc.*, No. 3:14-CV-3799, 2016 WL 6778218, at *29 (D.N.J. Nov. 15, 2016) (approving costs for "private investigator, photocopying, postage, messengers, filing fees, travel, long distance telephone, telecopier, mediation fees, and the fees and expenses of Plaintiff's damages expert"); *Acevedo v. Brightview Landscapes, LLC*, No. CV 3:13-2529, 2017 WL 4354809, at *20 (M.D. Pa. Oct. 2, 2017) ("travel, photocopying, filing fees, research, postage, and mediation fees"); *In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Pracs. Litig.*, 263 F.R.D. 226, 245 (E.D. Pa. 2009) ("expert witness fees; mediation fees; . . . legal research; . . . and service of process"). Further, Plaintiffs' counsel will likely incur additional expenses on this case going forward, including working with Epiq (the Claims Administrator), communicating with Settlement Class Members, and attending the Final Approval Hearing.

V. SERVICE AWARDS FOR CLASS REPRESENTATIVES

Plaintiffs' counsel request the approval of a $1,000 Service Award for each Class Representative for their time and effort pursuing the litigation on behalf of the Class ($10,000 total). This amount is provided for in the Settlement Agreement, and Defendant does not object to this request. The Class Representatives' efforts included, among other things, staying in communication with Plaintiffs' counsel about the progress of the litigation and filings, and conducting searches for relevant documents in their possession, custody, or control. Additionally,

while their depositions were not ultimately conducted, the Class Representatives were ready and willing to sit for their depositions had a settlement not been reached.

Service awards compensate class representatives for their "willingness to undertake the risks of this litigation and shoulder the burden of such litigation. . . . [T]here would be no benefit to Class members if the Class representative had not stepped forward." *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 424 (E.D. Pa. 2010). "[T]here are no set factors that a District Court must employ in determining the amount of class representative incentive awards." *Brady v. Air Line Pilots Ass'n*, 627 Fed. Appx. 142, 146 (3d Cir. 2015). "[C]ourts in this circuit have typically approved awards to class representatives in the range of $1,000 to $5,000." *Lazy Oil Co. v. Wotco Corp.*, 95 F. Supp. 2d 290, 345 (W.D. Pa. 1997), *aff'd*, 166 F.3d 581 (3d Cir. 1999). The service awards requested are comparable to others approved in the Third Circuit based on the investment of time by the class representatives. *See, e.g.*, *In re Comcast Corp. Set-Top Cable TV Box Antitrust Litig.*, 333 F.R.D. 364, 390 (E.D. Pa. 2019) (approving $1,000 incentive award); *Good v. Nationwide Credit, Inc.*, 314 F.R.D. 141, 161 (E.D. Pa. 2016) (same).

VI. CONCLUSION

For the reasons set herein, Plaintiffs' counsel respectfully request that the Court grant the request for an award of attorneys' fees, reimbursement of costs and expenses, and for an award of service payments to the Class Representatives.

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Respectfully submitted,

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