

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

ALAYNA WOODS, JENNIFER NELSON,
on behalf of herself and on behalf of her minor
child, **E.N.-H., DANA BERKLEY** on behalf
of her minor child, **M.B., JAMELLA
MONTGOMERY, SUSAN HALL,**
**ARGIRO TZIAKAS, CHRISTINA
KOVALSKY,** and **ANDRE BLAKEMORE-
BELL,** on behalf of themselves and all others
similarly situated,

Plaintiffs,

-against-

**ALBANY ENT & ALLERGY SERVICES,
PC,**

Defendant.

Index No. 904730-23

**PLAINTIFFS' MEMORANDUM OF
LAW IN SUPPORT OF THEIR
MOTION FOR AWARD OF
ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES,
AND SERVICE AWARDS**

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Plaintiffs Alayna Woods, Jennifer Nelson, on behalf of herself and her minor child, E.N.-H, Dana Berkley on behalf of her minor child, M.B., Jamella Montgomery, Susan Hall, Argiro Tziakas, and Christina Kovalsky (collectively, “Plaintiffs” or “Representative Plaintiffs”) submit this Memorandum of Law in Support of their Motion for Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Awards.

I. INTRODUCTION

On July 10, 2024, this Court preliminarily approved a proposed Class Action Settlement between Plaintiffs and Defendant Albany ENT & Allergy Services (“AENT” or “Defendant”) for all claims arising out of the breach of Defendant’s computer systems and resulting compromise of Plaintiffs’ and Class Members’ personal identifying information (“PII”) and personal health information (“PHI”) (collectively the “Private Information”) stored therein (the “Data Incident”). *See* Prelim. Approval Order, Doc No. 68. The settlement negotiated on behalf of the Class (the “Settlement Agreement,” “Settlement,” or “S.A.”) provides three separate forms of relief. First, the Settlement will provide Class Members who submit timely and valid claims direct monetary relief in the form of either (1) payment for Out-of-Pocket Losses and Unreimbursed Expenses stemming from the Data Incident or (2) an Alternative Cash Payment of \$50. (Payment of monetary relief is capped at \$550,000 in aggregate (the “Aggregate Cap”).) Second, the Settlement will provide two years of three-bureau credit monitoring and identity theft protection services for Class Members who submit timely and valid claims. (The credit monitoring services will be paid for outside the Aggregate Cap on monetary relief and have an estimated retail value of \$120 per claimant per year, \$240 in total.) Third, the Settlement provides that AENT will adopt, pay for, implement, and maintain business practice changes related to information security for a period of

at least three years. (AENT estimates that it will spend approximately \$300,000 annually, \$900,000 in total, to implement and maintain these enhanced security measures.)

Class Counsel have zealously prosecuted Plaintiffs' claims, achieving the Settlement Agreement only after extensive investigation and non-collusive, arm's-length negotiations. Even after agreeing to central terms of a settlement, Class Counsel worked for weeks to finalize the Settlement Agreement and associated exhibits pertaining to Notice, Preliminary Approval, and Final Approval.

As compensation for the substantial benefit conferred upon the Settlement Class, Class Counsel respectfully move the Court for an award of attorneys' fees and costs totaling \$415,000 (less than 1% of the value of the cash and other benefits available to Settlement Class Members). New York state and federal courts have expressly and repeatedly approved similar fees based on the benefit provided to the Class in similar cases, and routinely approve fees greater than those requested here. Moreover, the \$21,461.52 in costs included within the requested award of \$415,000.00 are reasonable, were necessary to litigation, and are the types of costs usually charged to paying clients. Class Counsel also respectfully moves the Court for an award of \$1,000 to each of the seven Representative Plaintiffs for their work on behalf of the Class. The amount of the requested fees, costs, and Service Award were clearly delineated in Notice to the Class, and no Class Member has yet objected.¹ Lastly and most importantly, the payment of attorneys' fees, costs, expenses, and Service Awards will be paid *outside* of the Aggregate Cap and will in no way reduce the consideration being made available to the Settlement Class.

¹ While Plaintiffs here move for attorneys' fees, costs, and Service Awards, they will move for Final Approval of the Settlement by separate motion, which will be filed prior to the Final Fairness Hearing.

For the reasons set forth below, Class Counsel respectfully submit that the attorneys' fees and reimbursement for expenses sought are fair and reasonable under the applicable legal standards, as are Plaintiffs' requested Service Awards, and should be granted in light of the contingency risk undertaken and the significant result achieved.

II. CASE SUMMARY

On or around March 27, 2023, AENT became aware of suspicious activity on its computer network. *See* Corrected Consolidated Amended Class Action Complaint ("Compl.") ¶ 4, Doc. No. 22. After an investigation, AENT determined that between March 23, 2023 and April 4, 2023, unauthorized actor(s) gained access to AENT's computer systems that stored Private Information belonging to AENT's current and former patients. *Id.* The types of Private Information potentially compromised in the Data Incident included full names, dates of birth, addresses, Social Security numbers, and medical histories and treatment information. *Id.* ¶ 1. On or around May 25, 2023, AENT sent Notice of Security Incident Letters to affected individuals, which prompted the current litigation. *Id.* ¶ 3.

Several class action lawsuits were filed against AENT following the Security Incident.² On July 10, 2023, the actions were consolidated into the present action. *See* Doc. No. 20. On August 29, 2023, Plaintiffs filed their operative Complaint, asserting claims for: (i) negligence, (ii)

² On June 1, 2023, *Woods v. Albany ENT & Allergy Services, P.C.*, No. 904730-23 was filed in the New York Supreme Court for Albany County. On June 8, 2023, *Berkley ex rel. M.B. v. Albany ENT & Allergy Services, P.C.*, No. 904919-23 was filed in the New York Supreme Court for Albany County. On June 13, 2023, *Montgomery v. Albany ENT & Allergy Services, P.C.*, No. 905088-23 was filed in the New York Supreme Court for Albany County, and on June 14, 2023, *Hall v. Albany ENT & Allergy Services, P.C.*, No. 905162-23 was filed in the New York Supreme Court for Albany County. There were also several cases filed against AENT in the United States District Court for the Northern District of New York. Those cases were all voluntarily dismissed.

negligence *per se*, (iii) breach of contract, (iv) breach of implied contract, (v) violations of New York General Business Law § 349, and (vi) unjust enrichment. *See* Doc. No. 22.

On September 29, 2023, AENT filed its Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint and its Motion to Strike Plaintiffs' Consolidated Class Action Complaint. Doc. Nos. 25, 30, 31, 36. Shortly thereafter, counsel for Plaintiffs and counsel for AENT began discussing the potential for early resolution. As part of this process, Plaintiffs requested, and AENT provided, information concerning the details of the Security Incident and the scope of the Class. *See* Declaration of Daniel O. Herrera ("Herrera Decl."), Doc. No. 64 at ¶ 10.

On February 8, 2024, Plaintiffs and AENT engaged in an arm's-length full-day mediation before the Honorable Wayne Andersen (Ret.) and reached an agreement in principle. The discussions, though collegial, involved vigorous negotiation and considerable back-and-forth. *Id.* ¶¶ 11–12. The Settlement Agreement and the exhibits thereto³ represent the terms reached between Plaintiffs and AENT. As further discussed below, the Settlement provides significant relief to Class Members.

III. SUMMARY OF THE SETTLEMENT

A. Settlement Class Definition

The Settlement Class is defined as "all individuals whose Personal Information was compromised in the Security Incident." *See* S.A. ¶ 1.22. The Settlement Class consists of approximately 224,486 individuals (each, a "Settlement Class Member"). *See id.* at p. 1; Herrera Decl. ¶ 6. Excluded from the Settlement Class definition are: (i) AENT, and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the presiding judge, and his or her staff and family; and (iv) any other Person

³ The Settlement Agreement is attached to the Herrera Decl. as Ex. A.

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. S.A. ¶ 1.22.

B. Settlement Benefits

1. Monetary Benefits

The Settlement will provide Class Members who submit timely and valid claims direct monetary relief up to \$550,000 in the form of either (1) payment for Out-of-Pocket Losses and Unreimbursed Expenses stemming from the Data Incident or (2) an Alternative Cash Payment of \$50.⁴ *Id.* ¶ 2.1.4.

Out of Pocket Losses and Unreimbursed Expenses. All Settlement Class Members are eligible to receive a reimbursement for documented and attested-to out-of-pocket expenses directly associated with dealing with the Security Incident not to exceed \$7,500 per Settlement Class Member, that were incurred more likely than not as a result of the Security Incident, including but not limited to (i) unreimbursed expenses, charges and/or losses relating to fraud or identity theft; (ii) other fees for credit repair or similar services; (iii) and costs associated with freezing or unfreezing credit. *Id.* ¶ 2.1.1. To receive reimbursement for extraordinary out-of-pocket losses, Settlement Class Members must submit a Valid Claim, including necessary supporting documentation, to the Claims Administrator. *Id.* Reimbursement for out-of-pocket expenses is subject to the following terms: (1) the loss is an actual, documented, and unreimbursed monetary loss; (2) the loss was more likely than not caused by the Security Incident; and (3) the loss occurred between March 27, 2023, and the Claims Deadline. *Id.*

⁴ If the total of valid claims for monetary relief exceeds \$550,000.00, each claim will be reduced *pro rata*.

Alternative Cash Payment. In lieu of the benefits described above, Settlement Class Members can elect to receive a one-time cash payment of \$50.00. *Id.* ¶ 2.1.2.

2. Credit Monitoring

In addition to monetary relief, all Settlement Class Members may elect to receive two (2) years of three-bureau Credit Monitoring and identity theft protection services provided through Administrator, Postlethwaite & Netterville, APAC (“P&N”)⁵, including identity theft insurance of at least \$1 million (no deductible). *Id.* ¶ 2.2. The credit monitoring services provided have an estimated retail value of \$120 per claimant per year. Declaration of Danielle L. Perry (“Perry Decl.”) ¶ 18, attached as **Exhibit A**.

3. Business Practice Changes

As part of the Settlement consideration, AENT, has adopted, paid for, implemented, and will maintain the following business practices changes related to information security to safeguard personal information on its systems for a period of at least three years from the time when the applicable business practices change is initiated: (i) implementation of enhanced multi-factor authentication; (ii) engagement with recognized third-party vendors for managed detection and response; (iii) adoption of additional encryption technologies; (iv) implementation of improved log retention and monitoring policies; and (v) creation of an incident response plan. AENT estimates that it, in total, it will spend approximately \$300,000.00 annually, \$900,000 in total, to implement and maintain the enhanced security measures provided for herein. S.A. ¶ 2.3.

⁵ As of May 21, 2023, the directors & employees of Postlethwaite & Netterville (P&N), APAC joined EisnerAmper as EAG Gulf Coast, LLC. Where P&N is named or contracted, EAG Gulf Coast, LLC employees will service the work under those agreements. P&N’s obligations to service work may be assigned by P&N to Eisner Advisory Group, LLC or EAG Gulf Coast, LLC, or one of Eisner Advisory Group, LLC’s or EAG Gulf Coast, LLC’s subsidiaries or affiliates.

4. Release

In exchange for the relief provided by this Settlement, Settlement Class Members who do not exclude themselves (including Plaintiffs) and AENT will mutually release each other from all claims arising out of the Security Incident, including its litigation. *Id.* ¶ 6.1.

C. Notice Program

The Parties agreed to a robust notice program to be administered by a well-respected third-party class administrator, P&N—a company that specializes in class action notice plans and claims administration—which will use all reasonable efforts to provide direct and individual notice to each potential Settlement Class Member via direct U.S. mail and perform claims administration. *Id.* ¶ 1.3. The notices and Claim Form are plain and easily understood. *Id.* at Exs. 1–3. P&N will establish a dedicated Settlement Website and will maintain and update the website throughout the Claims Period with copies of the Settlement Agreement, as well as the Short Notice, Long Notice, and Claim Form. *Id.* ¶ 3.2. Further, P&N will create a toll-free help line staffed with live operators who can address Settlement Class Members’ inquiries. *Id.* The costs of the notice program and claims administration will be paid by AENT outside of the Aggregate Cap and will in no way reduce the consideration being made available to the Settlement Class. *Id.* ¶¶ 3.2, 7.4–7.5.

D. Fees, Costs, and Service Awards

The Settlement provides for an award of attorneys’ fees, costs, and expenses not to exceed four-hundred and fifteen-thousand dollars and zero cents (\$415,000.00). *Id.* ¶ 7.2. Additionally, the Settlement provides for Service Awards of \$1,000.00 for each Plaintiff. *Id.* ¶ 7.3. These amounts were negotiated after the primary terms of the Settlement were negotiated and will be paid by AENT outside of the Aggregate Cap in no way reducing the consideration being made available to the Settlement Class. *Id.* ¶¶ 3.2, 7.1, 7.4–7.5.

AENT will not oppose these requests. *Id.* ¶¶ 7.2–7.3.

IV. THE TOTAL VALUE OF THE SETTLEMENT

Although the Settlement Agreement does not create a traditional “common fund,” the total maximum value provided by the Settlement for Settlement Class Members is in excess of \$50,000,000: (1) the \$550,000 Aggregate Cap in monetary relief claims; (2) credit monitoring services worth \$53,876,640⁶ and made available to all claimants; (3) AENT’s business practice changes worth \$900,000⁷; (4) the \$415,000 requested for attorneys’ fees and expenses; (5) the \$7,000 in total requested as Service Awards for Plaintiffs; and (6) the estimated \$114,000 cost of notice to the Settlement Class and administration of the Settlement⁸.

In calculating the \$55,862,640 settlement value, the entire \$550,000 in monetary relief and \$53,876,640 in credit monitoring services made available to Class Member should be considered. *See, e.g., Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (holding the “entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class” and therefore fees should be allocated based on “total funds made available, *whether claimed or not*”) (emphasis added); *see also Park v. FDM Grp., Inc.*, No. 16-CV-1520 (LTS)(SN), 2021 WL 227339, at *1 (S.D.N.Y. Jan. 22, 2021) (same); *see also Zink v.*

⁶ The value of two years of credit monitoring is \$240 for each of the 224,486 Class Members. Even if only 1% of the Settlement Class Members claim credit monitoring services, the value would total \$538,766.40.

⁷ The value of this injunctive relief should be taken into account in considering the total settlement value and the fee request. *See Fleisher v. Phx. Life Ins. Co.*, No. 11-cv-8405 (CM), 2015 WL 10847814, at *17 (S.D.N.Y. Sept. 9, 2015) (“The substantial injunctive relief is a major factor in favor of the fee request”); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 49 (E.D.N.Y. 2019) (“the value of . . . injunctive relief cannot be ignored in assessing the range of reasonableness of this settlement.”).

⁸ The value of the notice and settlement administration should also be taken into account in considering the settlement value and the fee request. *See, e.g., Hart v. BHH, LLC*, No. 15CV4804, 2020 WL 5645984, at *8 (S.D.N.Y. Sept. 22, 2020) (including “the costs of administration” in calculating “the Total Benefit to the class”).

First Niagara Bank, N.A., No. 13-CV-01076-JJM, 2016 WL 7473278, at *8–9 (W.D.N.Y. Dec. 29, 2016) (in “claims-made” settlement, fees are based on percentage of total fees made available to class, even if not claimed); *Behzadi v. Int’l Creative Mgmt. Partners, LLC*, No. 14-cv-4382 (LGS), 2015 WL 4210906, at *2 (S.D.N.Y. July 9, 2015) (“This is a claims made settlement, meaning the amount paid to the class will depend on the number of claims submitted by class members. Nevertheless, awarding attorneys’ fees based on a percentage of the settlement amount rather than the amount paid is proper.”) (citing *Masters*, 473 F.3d at 437). Moreover, despite the fact that Defendant has agreed to pay attorneys’ fees and expenses awarded by this Court directly, and separate from the Aggregate Cap, this amount must be considered as part of the settlement value as these sums would normally be paid by Class Members, from a common fund, or otherwise. *See, e.g., Bitzko v. Weltman, Weinberg & Reis Co., LPA*, No. 1:17-cv-00458 (BKS/DJS), 2021 WL 3514663, at *8 n.6 (N.D.N.Y. Aug. 10, 2021) (“Because attorneys’ fees are part of the recovery in a typical common fund case, in cases where, as here, the award of attorneys’ fees is separate from, and does not deplete, the common settlement fund, courts have found it appropriate to use the separate attorneys’ fees as part of the denominator in the calculation of the percentage.”) (internal quotation marks omitted). As such, Class Counsel’s request for \$415,000 in attorneys’ fees and expenses amounts to less than one percent of the total funds made available by the Settlement.⁹

⁹ Even if this Court includes only the value of credit monitoring services claimed by 1% of the class, the total Settlement value is still well over \$2,500,000. In such a calculation, the \$415,000 sought here by counsel as attorneys’ fees and costs would still amount to 16% of the value provided by the Settlement.

V. CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES AND EXPENSES IS REASONABLE.

New York Civil Practice Law and Rules state that “the court in its discretion may award attorneys’ fees to the representatives of the class . . . based on the reasonable value of legal services rendered.” N.Y. C.P.L.R. 909. Similarly, the Supreme Court and federal courts sitting in the State of New York have consistently 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.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also City of New York v. Maul*, 14 N.Y.3d 499, 510 (2010) (Court of Appeals held that “federal jurisprudence is helpful” in analyzing CPLR article 9 as it “has much in common with Federal Rule 23.”) (citing *Colt Indus. S’holder Litig. v. Colt Indus. Inc.*, 77 N.Y.2d 185, 194 (1991)). Payment of fees from funds made available in a class action settlement is also supported by public policy, as “[c]ompensating plaintiffs’ counsel for their risks is crucial, because such actions could not be sustained if plaintiffs’ counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class.” *In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728-CM-SDA, 2020 WL 4196468, at *45 (S.D.N.Y. July 21, 2020) (internal quotation marks and brackets omitted).

In making the determination of the proper amount of attorneys’ fees, courts “should consider the following well-established factors: the time and labor required; the difficulty of the questions involved; the skill required to handle the issues presented; the experience, ability and reputation of counsel; the proposed amount of fees; the benefit resulting to the putative class from the services; the customary fee charged for similar services; the contingency or certainty of

compensation; the results obtained; and the responsibility involved.”¹⁰ *Gordon v. Verizon Commc'ns, Inc.*, 46 N.Y.S.3d 557, 572 (2017).

VI. THE DIFFICULTY AND MAGNITUDE OF THE LITIGATION

“Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them.” *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000). This case is no different, where successfully litigating the case to a judgment providing class-wide relief would require that Plaintiffs, *inter alia*, succeed in defeating the pending motion to dismiss, the pending motion to strike, and any future motions for summary judgment, prevail in their motion for class certification, and ultimately obtain a class judgment following trial. Perry Decl. ¶¶ 14, 17; Declaration of William B. Federman ¶¶ 14, 17, attached as **Exhibit B**; Declaration of Daniel O. Herrera ¶¶ 14, 17, attached as **Exhibit C** (collectively, “Plaintiffs’ Counsel’s Decls.”). This process, as with any class action litigation, will be fraught with risks at every stage. And at the end of the day, while Plaintiffs believe that they would be able to vindicate their claims at trial, Defendant takes the opposite view, and a jury might agree with either Plaintiffs or Defendant.

An additional challenge is the calculation of class-wide damages stemming from the Security Incident, which would be a complicated and costly process. *See, e.g., Ebbert v. Nassau Cnty.*, No. CV 05-5445(AKT), 2011 WL 6826121, at *12 (E.D.N.Y. Dec. 22, 2011) (“On liability and damages, this case likely would have ended up in a classic ‘battle of the experts.’ With that comes the inherent risk that a jury could be swayed by an expert for the Defendants who could minimize the amount of the Plaintiffs’ losses.”). While Plaintiffs are confident that they could establish the damages incurred by the Settlement Class to the Court’s satisfaction, the Settlement

¹⁰ Many of these factors overlap and will thus be analyzed jointly.

eliminates this complexity and risk. Perry Decl. ¶ 23; Herrera Decl. ¶¶ 14, 33. And even if Plaintiffs were successful in obtaining certification of a litigation class, the certification would not be set in stone. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (“Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.”).

According to Class Counsel’s research, no data breach class action has reached trial, further demonstrating the unpredictable outcome if this Action were to be tried. *See Rosenfeld v. Lenich*, No. 18-CV-6720 (NGG) (PK), 2021 WL 508339, at *5 (E.D.N.Y. Feb. 11, 2021) (Class action suits “have a well-deserved reputation as being most complex.”) (internal quotation marks omitted); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2807, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) (“Data breach litigation is complex and risky.”).

This case’s complexity is not diminished by the fact that Plaintiffs’ Counsel was able to reach a prompt and efficient settlement. In order to do so on terms that provide significant monetary and injunctive relief to Plaintiffs and the Settlement Class Members, Plaintiffs’ Counsel were required to conduct significant amounts of work including prolonged settlement negotiations. Plaintiffs’ Counsel’s Decls. ¶ 4. At a minimum, absent settlement, litigation (and potential appellate review) of these issues would likely continue for years before Plaintiffs or the Settlement Class would obtain any recovery, which might then be diminished by immense costs and expenses. By reaching a favorable settlement prior to dispositive motions or trial, Plaintiffs and the Settlement Class Members avoid significant expense and delay, and instead ensure a fair recovery for the Settlement Class and the immediate implementation of crucial measures to protect sensitive data stored and collected by Defendant. *See Babcock v. C. Tech Collections, Inc.*, No. 1:14-CV-3124 (MDG), 2017 WL 1155767, at *6 (E.D.N.Y. Mar. 27, 2017) (“the settlement provides certain

compensation to the class members now, rather than awaiting an eventual resolution that would result in further expense without any definite benefit to class members.”); *Castagna v. Madison Square Garden, L.P.*, No. 09-cv-10211 (LTS)(HP), 2011 WL 2208614, at *10 (S.D.N.Y. June 7, 2011) (commending parties for negotiating early settlement). Accordingly, this factor supports the requested fee award.

VII. THE EXPERIENCE, ABILITY, AND REPUTATION OF COUNSEL

Courts “have consistently recognized that the result achieved is a major factor to be considered in making a fee award and in assessing the quality of the representation.” *Fleisher*, 2015 WL 10847814, at *21. Courts also account for the quality of opposing counsel. *See, e.g., In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010).

Here the high quality of Plaintiffs’ Counsel’s representation comes into focus when considering the results Plaintiffs’ Counsel have attained: a settlement worth \$55,748,640. The primary goals of the litigation were to provide monetary compensation for the Settlement Class members for losses stemming from the Security Incident, and to require Defendant to take measures to better protect sensitive data in their possession. Plaintiffs’ Counsel’s efforts in the litigation achieved those goals. Plaintiffs’ Counsel’s substantial prior experience in prosecuting complex class action cases on behalf of consumers, including numerous data breach class actions, was an important factor in achieving those goals. Plaintiffs’ Counsel’s Decls. ¶ 19; Herrera Decl. ¶¶ 34–43. And Class Counsel obtained these results while facing opposing counsel of significant skill and reputation. *See Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ. 214 (CM), 2012 WL 2505644, at *11 (S.D.N.Y. June 27, 2012) (“Class Counsel achieved a positive result in this case while facing well-resourced and experienced defense counsel.”). Accordingly, this factor weighs strongly in favor of the reasonableness of the requested fee award.

VIII. THE PROPOSED AMOUNT OF FEES

There are two methods for determining the appropriate award of attorneys' fees from a common fund: the "percentage of the benefit" method and the "lodestar" method. *See, e.g., Cox v. Microsoft Corp.*, 907 N.Y.S.2d 436 (N.Y. Sup. Ct. 2007). Under the percentage method, the court calculates the fee award as some percentage of the funds made available to the Settlement Class. *See Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007). Under the lodestar method, the court assesses the number of hours reasonably billed and then multiplies them by an appropriate hourly rate. *See Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290, 309 (E.D.N.Y. 2015).

In this case, as is common practice in state and federal courts in New York, the percentage method with a lodestar cross-check is the appropriate tool for determining the propriety of the requested fee award. *See Gordon*, 46 N.Y.S.3d at 573 (courts should "award attorney's fees in an amount commensurate with the degree of benefit obtained by the class as a result of the litigation"); *see, e.g., Cox*, 907 N.Y.S.2d 436 ("The court prefers the percentage of recovery method to determine an award of attorneys' fees in a class action. The lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours."); *Guevoura Fund Ltd. v. Sillerman*, No. 1:15-cv-07192-CM, 2019 WL 6889901, at *15 (S.D.N.Y. Dec. 18, 2019) ("The trend among district courts in the Second Circuit is to award fees using the percentage method.") (internal quotation marks and brackets omitted). The percentage method also provides a strong incentive for attorneys to resolve litigation as expeditiously as possible. *See, e.g., Henry v. Little Mint, Inc.*, No. 12 Civ. 3996(CM), 2014 WL 2199427, at *12 (S.D.N.Y. May 23, 2014) (the percentage method "removes disincentives to prompt settlement, because plaintiffs' counsel, whose fee does not increase with

delay, have no reason to drag their feet.”) (citing *Savoie v. Merchs. Bank*, 166 F.3d 456, 461 (2d Cir. 1999)). The lodestar method, on the other hand, “has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours. Nevertheless, the lodestar method can serve as a cross-check on the reasonableness of fees a court awards under a percentage of recovery approach.” *Cox*, 907 N.Y.S.2d 436 (internal citations omitted).

IX. PERCENTAGE OF THE BENEFIT

In light of the over \$55 million obtained in total settlement value, Class Counsel’s request for \$415,000 in attorneys’ fees and expenses—less than one percent of the benefit—is more than appropriate. State and federal courts in New York have frequently approved of percentages well above this number. *See, e.g., Cox*, 907 N.Y.S.2d 436 (awarding 9% of the settlement value in a \$183 million, megafund case); *Fiala v. Metro. Life Ins. Co.*, 899 N.Y.S.2d 531, 541 (N.Y. Sup. Ct. 2010) (finding a fee award of 21% of settlement “reasonable and justified”); *Torres v. Gristede’s Operating Corp.*, 519 F. App’x 1, 5–6 (2d Cir. 2013) (noting one-third of common fund is benchmark in Second Circuit and affirming higher percentage—52.2%—of settlement value for attorneys’ fees and expenses); *Rapoport-Hecht v. Seventh Generation, Inc.*, No. 14-CV-9087 (KMK), 2017 WL 5508915, at *3 (S.D.N.Y. Apr. 28, 2017), ECF No. 60 at 1–2 (awarding 33.3% of \$4.5 million settlement fund). Further, the fact that attorneys’ fees are paid separate from the relief available to Class Members militates in favor of approval. *See, e.g., Cox*, 907 N.Y.S.2d 436 (award supported by fact that defendant “agreed to pay attorneys’ fees separate from the settlement, [such that fee] award in no way diminishes the amount of benefits to the class.”).

X. LODESTAR CROSSCHECK/THE CUSTOMARY FEE CHARGED FOR SIMILAR SERVICES

Here, Plaintiffs' Counsel have spent 453.5 hours investigating, litigating, and settling this matter to date. Plaintiffs' Counsel's Decls. ¶¶ 2–5; Perry Decl. ¶ 21. The hours worked by Plaintiffs' Counsel, when billed at Plaintiffs' Counsel's current hourly rates, results in a lodestar of \$315,945.32. Plaintiffs' Counsel's Decls. ¶ 5; Perry Decl. ¶ 21. Plaintiffs' Counsel's hourly rates are appropriate considering the prevailing rates for similar legal services provided by lawyers of reasonably comparable skill, experience, and reputation, and other courts have found Plaintiffs' Counsel's current rates to be reasonable in the settlement context. *Id.* ¶¶ 8–10. Class Counsel's fee request thus equates to a multiplier of 1.31. This fee is reasonable particularly in light of the risk and complexity involved in litigating data breach class actions and the excellent and expeditious result achieved for the Settlement Class. *Id.* ¶ 2–13, 19; *see, e.g., Cox*, 907 N.Y.S.2d 436 (awarding a multiplier of 1.53); *see also Guevoura Fund Ltd.*, 2019 WL 6889901, at *18 (“multipliers of between three and four times a successful plaintiff's counsel's lodestar have been routinely awarded in [the Second] Circuit”) (collecting cases).

Furthermore, because Plaintiffs' Counsel will be required to spend significant additional time on this litigation in connection with implementing and monitoring the settlement, the multiplier will be even smaller because the award includes not only time spent prior to the award, but after, in enforcing the settlement. Plaintiffs' Counsel's Decls. ¶ 7. In light of this fact, Class Counsel's request is “even more reasonable than it appears at first glance.” *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 482 (S.D.N.Y. 2013).

XI. THE CONTINGENCY AND RISK OF COMPENSATION

Plaintiffs' Counsel took the substantial risk of prosecuting this litigation on a full contingency basis, without charging Plaintiffs or any Settlement Class Members for fees or

expenses. Plaintiffs' Counsel's Decls. ¶¶ 12, 15–18; *see Fleisher*, 2015 WL 10847814, at *21 n.16 (“Contingency risk is the principal, though not exclusive factor, courts should consider in their determination of attorneys’ fees.”) (internal quotation marks omitted).

In pursuing the investigation and litigation against Defendant, Plaintiffs' Counsel were aware that resolution of the case in Plaintiffs' favor might take years, with the possibility that Plaintiffs' claims would never be vindicated. Plaintiffs' Counsel's Decls. ¶¶ 12, 15–18. Despite this, Plaintiffs' Counsel vigorously investigated, negotiated and litigated this case without any assurance that they would ever be compensated. *Id.* All of these risks were apparent when Plaintiffs' Counsel began this action further justifying the requested fee award.

IV. PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE AND SHOULD BE REIMBURSED.

“Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation of those clients.” *In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (internal quotation marks omitted); *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775, 2015 WL 5918273, at *7 (E.D.N.Y. Oct. 9, 2015) (“Lawyers are generally entitled to reimbursement for reasonable out-of-pocket expenses.”).

Here, Class Counsel requests reimbursement of \$21,461.52 in out-of-pocket expenses incurred by Plaintiffs' Counsel, which will be paid separate and apart from the relief made available to Class Members. Plaintiffs' Counsel's Decls. ¶ 11; Perry Decl. ¶ 22. These expenses, which primarily filing and mediation costs, were typical and integral to the prosecution of this case, including the settlement obtained. Accordingly, these expenses should be reimbursed. *Id.* ¶¶ 11, 18, 21; *see, e.g., Fiala*, 899 N.Y.S.2d at 542 (granting reimbursement of counsel's reasonable and necessary expenses).

V. PLAINTIFFS' REQUESTED SERVICE AWARDS ARE REASONABLE AND APPROPRIATE.

“New York’s statutory scheme for class actions does not provide for incentive fees. Nor does it prohibit such awards.” *Fiala*, 899 N.Y.S.2d at 541. Still, New York courts frequently grant plaintiffs incentive awards to “reimburse[] them for any expenses they incurred to participate in the action [and] encourage class representatives to bring needed class actions without worry that their expenses will not be covered.” *See, e.g., id.; Cox*, 26 Misc.3d 1220(A). Moreover, a “modest” fee, “ranging from \$1,000 to \$1,500,” furthers public policy and “cannot be argued to be a temptation to settle [] years-long litigation for a suboptimal amount or to bring frivolous litigation. Rather, it merely puts these class representatives on a par with the federal class representatives” *Fiala*, 899 N.Y.S.2d at 541; *see also Times v. Target Corp.*, No. 18 Civ. 02993, 2019 WL 5616867, at *5 (S.D.N.Y. Oct. 29, 2019) (“Service awards are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a named plaintiff, and any other burdens sustained by the plaintiffs.”). To the contrary, disallowing incentive awards except where litigation lasts for some untold number of years would create a perverse incentive where class representatives would be tempted to extend litigation when an early settlement might be more efficient. *See Cox*, 907 N.Y.S.2d 436 (Reimbursement methods based on actual time spent, such as the lodestar method, have “the potential to lead to inefficiency and resistance to expeditious settlement because it gives [litigants] an incentive to raise their [awards] by [logging] more hours.”); *Henry*, 2014 WL 2199427, at *12 (same).

Plaintiffs here request that the Court grant them “modest” Service Awards of \$1,000 each

(totaling \$7,000).¹¹ The Service Award is meant to reimburse Plaintiffs for their effort on behalf of the Class, including assisting in the investigation of the case, reviewing the pleadings, answering counsel's many questions, and reviewing the terms of the Settlement Agreement. Herrera Decl. ¶ 30. Indeed, without Plaintiffs' efforts, the Class would have no access to the over \$55 million in relief achieved here. The \$1,000 sought for each Plaintiff represents only a fraction of the funds available for any Class Member to claim. Given these facts and that Service Awards will be paid separate and apart from the relief made available to Class Members, Plaintiffs' requested Service Awards are more than reasonable. *See, e.g., Fiala*, 899 N.Y.S.2d at 541 (service award granted where class representatives rendered services to class and awards were paid separate from relief available to class); *Mark Fabrics, Inc. v. GMAC Comm. Cred. LLC*, No. 604631/02, 2005 WL 6216029, at *5 (N.Y. Sup. Ct. Dec. 22, 2005) (granting "incentive award of \$25,000") (unpublished opinion); *Esposito v. Deatrick & Spies, P.S.C.*, No. 7:13-CV-1416 (GLS/TWD), 2015 WL 390392, at *4 (N.D.N.Y. Jan. 28, 2015) (granting service award of \$1,000 paid separate from relief available to class).

VI. CONCLUSION

For the above reasons, the Settlement Agreement clearly falls within the range of possible approval, and Plaintiffs respectfully request this Court grant their Unopposed Motion for Preliminary Approval of Class Action Settlement.

¹¹ There are, in fact, eight named Plaintiffs. However, one Plaintiff (Jennifer Nelson) filed on behalf of herself and her minor child. As such, Plaintiffs seek only seven Service Awards.

Dated: September 9, 2024

Respectfully Submitted,

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, **Gary E. Mason**, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in 22 NYCRR § 202.8-b of the Uniform Rules for the Supreme Court and the County Court because it contains 5,896 words excluding the caption, table of contents, table of authorities, signature block, and this certification. In preparing this certification, I relied on the word-count function of the word-processing system used to prepare the document.

Dated: September 9, 2024

/s/ Gary E. Mason

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