IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
CIVIL ACTIONS BRANCH

RORY LAWLESS, individually and on behalf of all others similarly situated,

Plaintiff,

v.

DISTRICT OF COLUMBIA HEALTH EXCHANGE AUTHORITY, d/b/a DC Health Link,

Defendant.

CASE NO. 2023 CAB 001569

Hon. Yvonne Williams

PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND SERVICE AWARDS

Plaintiff Rory Lawless, individually and on behalf of the putative Class, submits this Memorandum of Points and Authorities in Support of Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to Representative Plaintiffs.

I. INTRODUCTION

On November 13, 2024, this Court preliminarily approved a Settlement between Plaintiff, on the one hand, and Defendant District of Columbia Health Benefit Exchange Authority d/b/a DC Health Link ("DCHBX" or "Defendant"), on the other hand. The Settlement provides immediate and significant benefits to the Settlement Class while avoiding the delay and uncertainty of protracted litigation.[1] The Settlement represents an outstanding result for the Settlement Class, particularly in light of the complex nature of the Action and the uncertainty of success.

First, pursuant to the Settlement Agreement, all Settlement Class Members who have not previously enrolled in the credit monitoring services offered by DCHBX are eligible to receive (i) one year of three-bureau credit monitoring with Equifax, Experian, and Transunion and (ii) at least $1,000,000 of fraud/identity theft insurance. SA ¶ 75.

Second, the Settlement provides Settlement Class Members with direct monetary relief. Group 1 Settlement Class Members—those whose information is known to have been compromised during the Data Incident—may submit claims for *all* of the following benefits: (i) documented ordinary losses and expenses fairly traceable to the Data Incident, up to $2,500 per individual and (ii) documented extraordinary losses resulting from the Data Incident, up to a maximum of $10,000 in combination with any claimed documented ordinary losses. SA ¶ 75. Alternatively, Group 1 Settlement Class Members may opt for a pro-rata cash payment from the

[1] Unless otherwise stated, all capitalized terms shall have the definitions set forth in the Settlement Agreement and Release ("Settlement Agreement," "SA," or "Settlement").

Net Settlement Fund. Group 2 Settlement Class Members—those whose information was not known to be compromised but was potentially accessed during the Data Incident—may submit claims for (i) documented ordinary losses and expenses fairly traceable to the Data Incident, up to $2,500 per individual, or (ii) a pro-rata cash payment from the Net Settlement Fund. SA ¶ 75.

Class Counsel fought hard to secure these benefits for the Settlement Class, all on a risky contingency basis. As compensation for Class Counsel's work, Class Counsel's investment in this litigation, and in recognition of the risks Class Counsel faced, Class Counsel request an award of attorneys' fees of 33.33% of the Settlement Fund, or $483,285.00. *See* Declaration of Gary E. Mason in Support of Plaintiff's Consent Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses, and Service Awards to Plaintiffs ¶ 8 ("Mason Fee Decl."), attached hereto as Exhibit 1. This request is contemplated by the Settlement Agreement, and Class Counsel apprised the Court of this request in its Motion for Preliminary Approval filed on November 11, 2024. This amount was also clearly delineated in the Short Form and Long Form Notice to the Settlement Class (attached to the Settlement Agreement as Exhibits A and B). As of December 23, 2024, zero Class Members have objected to the Settlement, the attorneys' fees, expenses, and service awards, and zero have opted out. *Id.* ¶ 9. Class Counsel have not received any compensation for their successful prosecution of this case, which required hundreds of hours of billable time. *Id.* ¶ 19. As discussed below, the requested fee is supported by each of the factors applied by the D.C. Circuit in assessing the reasonableness of a requested fee from a common fund.

Additionally, Class Counsel seek collective reimbursement of out-of-pocket litigation expenses incurred in connection with the prosecution of this Action in the amount of $11,554.43. *See Id.* ¶ 20. These expenses, including court filings fees, legal research fees, and mediation fees, were reasonable and necessary for the successful prosecution of the Action. *Id.* Pursuant to the

Notices disseminated to the potential Settlement Class, Class Counsel were authorized to request up to $25,000 in reimbursement of expenses. SA, Exhibits A and B.

Lastly, Class Counsel request service awards of $2,500 for each of the Class Representatives for their considerable efforts and time spent securing the Settlement on behalf of the Class. The requested service awards are reasonable and fall in line with service awards granted in similar matters. Indeed, the service awards are warranted, especially when considering the amount of time the Class Representatives spent in furtherance of this Action, without which there would be no Settlement. *See* Mason Fee Decl. ¶ 25.

For the reasons set forth herein, Class Counsel respectfully request this Court award $483,285.00 in attorneys' fees, $11,244.43 in expenses and costs, and the requested service awards of $2,500 for each of the twelve Class Representatives.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. History of Litigation

In March of 2023, DCHBX became aware of a breach to its system, and that some DCHBX customers' PII had been exposed on a public forum. Declaration of Gary E. Mason in Support of Plaintiff's Consent Motion for Preliminary Approval of Class Action Settlement ¶ 10 ("Mason Decl."). Exfiltrated files included certain Plaintiff and Class Member names, dependents' names, addresses, Social Security numbers, email addresses, phone numbers, employer names and information, work emails, health care plans, race, and other highly sensitive information. *Id.* DCHBX's investigation identified 56,415 individuals whose PII was found publicly posted (referred to herein as "Group 1"). *Id.* ¶ 11. The investigation also identified another 197,973 individuals (referred to herein as "Group 2") whose PII was stored in this manner and may have

been breached at the same time but was not found publicly posted. *Id.* In total, DCBHX sent data incident notice letters to approximately 254,388 individuals ("Class Members"). *Id.*

After receiving notice that his PII had been implicated in the Data Incident, Plaintiff Rory Lawless filed this class action on March 14, 2023, asserting claims on behalf of himself and all similarly situated individuals. *Id.* ¶ 12. Plaintiff alleged four causes of action against DCHBX: negligence, breach of implied contract, unjust enrichment, and declaratory judgment. *See* Complaint, filed March 14, 2023. Plaintiff sought equitable relief enjoining DCHBX from engaging in the wrongful conduct alleged and to compel DCHBX to utilize appropriate methods and policies with respect to consumer data collection, storage, and safety. *Id*. Plaintiff further sought an order requiring DCHBX to provide credit monitoring services to him and the rest of the Class. *Id*. Finally, Plaintiff sought an award of actual, compensatory, and statutory damages as well as attorneys' fees and costs, and any such further relief as may be deemed just and proper. *Id*.

Four additional cases pertaining to the same Data Incident were later filed in the District Court for the District of Columbia: *Suhr v. District of Columbia Health Benefit Exchange Authority d/b/a DC Health Link*, No. 1:23-cv-00694 (D.D.C); *Meranda v. District of Columbia Health Benefit Exchange Authority d/b/a DC Health Link*, No. 1:23-cv-00737 (D.D.C.); *McAteer v. District of Columbia Health Benefit Exchange Authority d/b/a DC Health Link*, No. 1:23-cv-01043; and *Caston v. District of Columbia Health Benefit Exchange Authority d/b/a DC Health Link*, No. 1:23-cv-01065 (collectively, the "Related Matters"). *Id*. ¶ 13.

Plaintiffs in the Related Matters coordinated in federal court, consolidating their cases and filing a Consolidated Amended Complaint on August 9, 2023. *Id.* ¶ 14. In October 2023, Defendant filed a motion to dismiss the *Lawless* Matter, as well as a motion to dismiss the Related Matters.

Id. ¶ 15. The motion to dismiss the *Lawless* Matter was granted on November 17, 2023, and Plaintiff Lawless appealed the decision to the District of Columbia Court of Appeals. *Id.* ¶ 16.

While the appeal was pending in state court and the motion to dismiss remained pending in federal court, the Parties agreed to attempt to negotiate a resolution with the assistance of mediator Jill Sperber, Esq., of Judicate West. *Id.* ¶ 17. In preparation for negotiations, the Parties engaged in significant pre-mediation discovery that allowed them to adequately evaluate the claims, defenses, and value of the case. *Id.* ¶ 18. On May 24, 2024 the Parties attended a full-day virtual mediation with Ms. Sperber. *Id.* ¶ 19. After extensive arm's-length negotiations, and with Ms. Sperber's assistance, the Parties reached an agreement on the central terms of a Settlement. *Id.* ¶ 20. Since then, the Parties notified the Court of Appeals of the Settlement, had the matter remanded back to the Superior Court, and negotiated and drafted the finer points of the Settlement Agreement, notice forms, and came to an agreement on a claims process and administrator. *Id.* ¶ 21. The Settlement Agreement was finalized by the Parties in September 2024. *Id.* ¶ 22.

B. Summary of Settlement Terms

Under the terms of this Settlement, DCBHX will pay $1,450,000 to establish a non-reversionary Settlement Fund to cover all benefits, costs of notice and administration, and any attorneys' fees, costs, and service awards approved by the Court. While the exact benefits available to Class Members vary based on whether the Settlement Class Member is a part of Group 1 or Group 2 (determined based on whether the Settlement Class Member's PII was exposed on a public forum), all Class Members are eligible to claim either: (1) reimbursement of certain documented

expenses OR (2) an alternative cash payment, AND (3) credit monitoring and identity restoration services.[2]

1. Settlement Benefits

a. Reimbursement of Documented Monetary Losses

Group 1 and Group 2 Settlement Class Members may submit a claim for reimbursement of ordinary out-of-pocket expenses fairly traceable to the Data Incident, up to $2,500 per individual. Such Documented Ordinary Losses may include various types of out-of-pocket losses: credit monitoring costs that were incurred on or after March 5, 2023 through the date of claim submission, unreimbursed bank fees, long distance phone charges, postage, or gasoline for local travel.

In addition to the $2,500 available to every Settlement Class Member, Group 1 Settlement Class Members are also eligible for compensation for Extraordinary Losses resulting from the Data Incident, up to a maximum of $10,000 in combination with any claimed ordinary loss. To be reimbursable, an extraordinary loss must be an actual, documented, and unreimbursed monetary loss more likely than not caused by the Data Incident. Further, the loss must have occurred between March 5, 2023, and the date of claim submission and must not be covered by one or more of the normal reimbursement categories. Additionally, the claimant must have made reasonable efforts to avoid the loss or seek reimbursement for the loss, including, but not limited to, exhaustion of all available credit monitoring insurance and identity theft insurance. Extraordinary Losses may include, without limitation, unreimbursed costs, expenses, losses or charges incurred as a result of

[2] The Parties are aware of Settlement Class Members who may be minor children. The Settlement Agreement provides that a parent and/or legal guardian may submit a claim on a minor child's behalf and stipulates that the requirements of D.C. Code § 21-120 (Settlement of Actions Involving Minor Children . . .) will apply to those claims. *See* SA ¶ 112.

any identity theft or identity fraud, falsified tax returns, or other possible misuse of private information.

b. Alternative Cash Payments

In lieu of claiming reimbursement of Documented Monetary Losses, Group 1 and Group 2 Settlement Class Members may make a claim for an Alternative Cash Payment that will be calculated *pro rata* according to whether the claimant is a Group 1 or Group 2 Settlement Class Member. Group 1 Alternative Cash Payments shall be three times the amount of Group 2 Alternative Cash Payments. The payments shall be calculated by dividing remaining funds in the Settlement Fund, after payment of Settlement Administration Fees, Attorneys' Fees Costs and Expenses, Credit Monitoring and Identity Restoration Services, and Documented Monetary Losses, by the number of eligible claims. In making this calculation, each Group 1 Alternative Cash Payment claim will be counted as three claims, while each Group 2 Alternative Cash Payment claim will be counted as one claim.

c. Credit Monitoring and Identity Restoration Services

Group 1 and Group 2 Settlement Class Members may also claim one-year of three-bureau credit monitoring services and at least $1 million of fraud/identity theft insurance, if they have not enrolled in the credit monitoring services previously offered by DCHBX.

d. Plaintiff Service Awards

Class Counsel also seek a service award for each of named Plaintiffs and Class Representatives—Rory Lawless, Jenni Suhr, Pretial Caston, Austin Dressman, John Eborall, Keven Hammond, Taylor Heath, Shirley Huang, Kathleen McAteer, Angelo Merenda, Matthew Oginsky, and Catherine Sanders—in the amount of $2,500 each, in recognition of their willingness

to step forward, participate in an investigation, file suit, and otherwise commit time and effort as a Class Representative. *See* SA ¶ 99.

III. LEGAL STANDARD

"[W]hen a federal rule and a local rule contain the same language, 'we will look to federal court decisions interpreting the federal rule as persuasive authority in interpreting the local rule.'" *Oparaugo v. Watts*, 884 A.2d 63, 69 n.1 (D.C. 2005) (quoting *Peddlers Square, Inc. v. Scheuermann*, 766 A.2d 551, 556 n.4 (D.C. 2001)). "[Superior Court] Rule 23 is identical to Federal Rule of Civil Procedure 23 except for certain changes in subsections (c)(1) and (c)(2) . . ." Comments to Super. Ct. R. Civ. P. 23.

Superior Court Rule 23(h) allows a court supervising a class action to "award reasonable attorney's fees and nontaxable costs that are authorized by law." Super. Ct. R. 23(h). The United States Supreme Court noted that attorneys who represent a class and whose efforts achieve a benefit for the class are "entitled to a reasonable attorney's fee from the fund as a whole," as appropriate compensation for their services to the class. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d 14, 16 (D.D.C. 2003) (quoting *Boeing Co.*, 444 U.S. at 478).

Indeed, in common fund cases, such as this case, an "attorney whose efforts created, increased or preserved a fund [may] 'recover from the fund the costs of his litigation, including attorneys' fees.'" *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d at 16 (quoting *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977)). There are two primary methods of calculating attorneys' fees: (1) the "percentage of fund"; and (2) the "lodestar" method. In class action cases in which the plaintiff class recovers benefits from a common fund, courts in the District of Columbia favor the percentage of the fund method. *See, e.g.*, *Doe v. Georgetown Synagogue - Kesher Isr.*

Congregation, 2018 D.C. Super. LEXIS 16, *22-23, No. 2014 CA 007644 B (D.C. Super. Ct. Oct. 24, 2018) ("[P]ercentage-of-the-fund method is the appropriate mechanism for determining the attorneys['] fees award in common fund cases[, and may] range from fifteen to forty-five percent."); *see also In re Fed. Nat'l Mortg. Ass'n Sec. Derivative, & "ERISA" Litig.*, 4 F. Supp. 3d 94, 110 (D.D.C. 2013) ("[O]ur Circuit has joined other circuits in concluding that 'a percentage-of-the-fund method is the appropriate'" method for awarding attorneys' fees in common fund cases) (quoting *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265, 1271 (D.C. Cir. 1993)); *In re Vitamins Antitrust Litig.*, Nos. 99-197 (TFH), 1285, 2001 U.S. Dist. LEXIS 25067, at *33 (D.D.C. July 13, 2001) (awarding attorneys' fees of one-third of the common fund). Further, courts in the District of Columbia are not required to undertake a lodestar cross-check. *See In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 101 (D.D.C. 2013) ("In this circuit, such a lodestar crosscheck is not required"); *Nat'l Veterans Legal Servs. Program v. U.S.*, 724 F. Supp. 3d 1, 23 (D.D.C. Mar. 20, 2024) ("Class Counsel points out, rightly, that a lodestar cross-check is not required").

Compensating counsel in common fund cases on a percentage-of-the-fund basis closely aligns the interests of the lawyers in receiving a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. *See In re Lorazepam & Clorazepate Antitrust Litig.*, MDL No. 1290 (TFH), 2003 WL 22037741, at *7 (D.D.C. Jun. 16, 2003) (holding that the benefit of applying a percentage of the fund is that it "directly aligns the interests of the Class and its counsel . . . for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system").

Thus, Class Counsel's request for a percentage of the common fund is appropriate and is the preferred method for compensating Class Counsel.

IV. ARGUMENT

Class Counsel's efforts created a $1,450,000 non-reversionary Settlement Fund where Settlement Class Members can easily submit a claim for significant cash benefits. This Settlement represents an excellent result for the Settlement Class in this litigation and was obtained against a well-funded defense by Defendant, which was represented by an AmLaw 100 law firm, Norton Rose Fulbright. Although Plaintiff believes in the merits of his claims, this litigation was inherently risky and complex. The claims involve a challenging fact pattern for a data breach case and the intricacies of data breach litigation, a fast-developing area in the law. Plaintiff would face risks at each stage of litigation. Against these risks, it was through the hard-fought negotiations and the skill and hard work of Class Counsel and Plaintiff that the Settlement was achieved for the benefit of the Settlement Class.

Class Counsel zealously prosecuted Plaintiff's claims, achieving the Settlement Agreement only after months of hard-fought litigation and prolonged arm's-length negotiations. Even after coming to an agreement on the central terms, 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 of $483,285.00 and out-of-pocket costs and expenses totaling $11,554.43, to be paid from the non-reversionary Settlement Fund. This fee request represents one-third (33.33%) of the total $1,450,000 common fund recovery. Class Counsel apprised the Court of this request in its Motion for Preliminary Approval, filed on November 11, 2024. This amount was also clearly delineated in the Short Form and Long Form Notice to the Settlement Class (attached to the Settlement Agreement as Exhibits A and B).

As of December 23, 2024, zero Class Members have objected to the Settlement, and none have opted out. Mason Fee Decl. ¶ 9.

A. The Requested Fee Should be Approved Because it is Reasonable and Supported by the Relevant Factors

Courts in the District of Columbia have routinely approved attorneys' fees equaling one-third of the settlement in common fund settlements. Plaintiff's request for fees of one-third of the Settlement Fund puts the fee request squarely within the range of fees approved by both federal and superior courts in the District of Columbia. Plaintiff's Motion should be granted because the request is reasonable and appropriate in light of the substantial risks presented in prosecuting this Action, the quality and extent of work conducted, and the stakes of the case; the requested fees and costs were clearly delineated in notice to the Settlement Class and no Class Member has objected; and because the expenses incurred were reasonable and necessary for the litigation.

As Class Counsel will also show this Court, the fee request is fully supported by the relevant factors that courts in the District of Columbia employ when determining the reasonableness of an attorneys' fee request.

B. The Settlement Establishes a Non-Reversionary Common Fund

Data breach class action settlements typically fall under one of two structures: (1) a common fund or (2) claims made. The Settlement here is a non-reversionary common fund from which Settlement Class Members may claim reimbursement for documented out-of-pocket expenses or a *pro rata* cash payment. *See, e.g.*, *Hart v. Movement Mortg., LLC*, No. 814CV1168JLSPLAX, 2016 WL 11756826, at *7 (C.D. Cal. Nov. 30, 2016) ("The non-reversionary nature of these amounts counsels in favor of final approval."). Class Counsel have negotiated many *pro rata* cash payments under non-reversionary common fund settlement structures with the understanding that *pro rata* payments increase direct benefits to Settlement

Class Members, by "sweeping" all remaining funds in the non-reversionary Settlement Fund to Settlement Class Members making valid claims (as opposed to awarding settlement funds to a *cy pres* recipient).

C. Analysis Under the Percentage Method and the Factors Followed by this Court Support the Requested Fee Award

Class Counsel's request for a fee award of one-third of the Settlement Fund is eminently reasonable, as it readily satisfies the following factors, which are often used by courts in the District of Columbia to evaluate the reasonableness of a requested fee: (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; and (7) the awards in similar cases. *Doe v. Georgetown Synagogue - Kesher Isr. Congregation*, 2018 D.C. Super. LEXIS 16, *13, No. 2014 CA 007644 B (D.C. Super. Ct. Oct. 24, 2018) (quoting *Stephens v. US Airways GRP., Inc.*, 102 F. Supp. 3d 22, 230 (D.D.C. 2015)). As set forth below, all the above factors militate in favor of approving the requested fee.

1. The Size of the Fund and the Number of Persons Benefitted Support the Requested Fee Award

The substantial size of the common fund and the number of persons benefitted weigh in favor of the requested fee. A non-reversionary common fund of $1,450,000 has been established to provide benefits for the Settlement Class Members. SA ¶ 68. Under the Settlement, all 254,388 Class Members may claim reimbursement of certain documented expenses or an alternative cash payment plus one year of credit monitoring and identity theft protection services. SA ¶ 75. Thus, the Settlement Fund offers a recovery of roughly $5.69 per Class Member, not inclusive of the non-monetary benefits of the Settlement.

This per-person rate compares favorably with those approved in a number of recent data breach class action settlements. *See, e.g.*, *Desue v. 20/20 Eye Care Network, Inc.*, No. 21-CIV-61275-RAR, 2023 U.S. Dist. LEXIS 117355, at *11 (S.D. Fla. July 8, 2023) (approving data breach settlement fund of $3,000,000 where the settlement value per class member was $0.75); *Kostka v. Dickey's Barbecue Restaurants Inc.*, No. 3:20-cv-3424-K (N.D. Tx. June 6, 2023), ECF No. 103 (approving $2.35 million common fund in data breach settlement, which was worth $3.24 per class member); *In re Forefront Data Breach Litig.*, No. 1:21-CV-00887-LA (E.D. Wis. Mar. 1, 2023), ECF No. 81 (approving $3.75 million fund in data breach settlement, which equaled $1.55 per class member); *Dearing v. Magellan Health Inc.*, No. CV2020-013648 (AZ Sup. Ct. Maricopa Cnty. Dec. 2, 2022) (approving $1.43 million fund in data breach class action with 273,000 class members, for a per class member rate of $5.24); *Nelson v. Bansley & Kiener, L.L.P.*, No. 2021CH06274 (Ill. 1st Jud. Cir. Ct. Cook Cnty. Nov. 29, 2022), Dkt. No. 67 (approving $900,000 fund in data breach settlement with 274,115 class members, for a per class member rate of $3.28); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 318 (N.D. Cal. 2018) (approving a settlement where the settlement value per class member was $1.45).

When viewed in this context, it is evident that this factor weighs in favor of the requested award. As described throughout, the Settlement provides an excellent result for Class Members considering the risk presented in this case. This substantial recovery will be shared by all Members of the Settlement Class, who are eligible to receive significant benefits that support the requested fee.

2. The Absence of Objections to Date Supports Approval

Settlement Class Members received notice of the Settlement terms, including those terms setting out the amount of attorneys' fees. To date, no objections have been filed to the requested

amount of attorneys' fees or, indeed, to the Settlement itself. Mason Fee Decl. ¶ 9. "The existence of even a relatively few objections certainly counsels in favor of approval . . . ." *In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 WL 22037741, at *6. Likewise, no Settlement Class Members have opted out of the Settlement in its entirety. Mason Fee Decl. ¶ 9. Accordingly, this factor also favors the requested attorneys' fee award as "the reaction of the Class members is overwhelmingly in favor of the proposed settlement." *Osher v. SCA Realty I*, 945 F. Supp. 298, 305 (1996); *see, e.g.*, *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d at 17 (finding it "noteworthy . . . that only one objection to counsel's application for attorneys' fees ha[d] been filed" and finding that objection to be "of no value to the Court" given the absence of helpful legal or factual analysis); *accord also Greenberg v. Colvin*, No. 13-1837 (RMC), 2015 U.S. Dist. LEXIS 85478, at *30 (D.D.C. July 1, 2015) (finding a fee request out of the settlement common fund reasonable despite objection from eight settlement class members); *Trombley v. Nat'l City Bank*, 826 F. Supp. 2d 179, 206 (D.D.C. 2011) (same).

3. The Skill and Efficiency of the Attorneys Involved Support Approval of the Requested Attorneys' Fees

The experience, skill, and efficiency of class counsel is another factor courts evaluate in determining an appropriate attorneys' fee. Zealous advocacy and innovative legal skills were required to achieve the favorable Settlement here. This is a complex data breach case that involves legal issues that are rapidly changing and evolving as new laws and precedent develop. It took highly skilled counsel to represent the Class and bring about the recovery that has been obtained. Class Counsel have not only used their knowledge, skill, and experiences from prior cases, but they were also compelled to develop case-specific expertise on the subject matters presented here—i.e., the type of PII compromised, the number of individuals affected, the method of the

Data Incident, and the ramifications of the Data Incident. The favorable Settlement is attributable in substantial part to the diligence, skill, and hard work of Class Counsel.

As detailed in the attached Declaration, Class Counsel (Gary E. Mason of Mason LLP and Joseph M. Lyon of The Lyon Firm), in conjunction and cooperation with the other Plaintiffs' firms involved in this matter, relied upon their vast experience handling data privacy class actions across the country to negotiate a non-reversionary common fund settlement with experienced data breach defense counsel. Mason Fee Decl. ¶ 18. Class Counsel utilized their experience to reach a class-wide settlement even considering the risks of class certification or potentially losing at the dismissal, summary judgment, trial, or appellate stage. *Id.* Class Counsel's experience in handling many other data privacy class action cases permitted Class Counsel to recover the $1,450,000 non-reversionary common fund. Class Counsel's experience in prosecuting data breach cases has proven to be critical to the efficient prosecution and ultimate resolution of this case. Furthermore, Class Counsel have a national reputation for handling complex class action cases. *See Id.*, Exhibits A and B.[3]

As demonstrated by their respective firm resumes, Class Counsel are renowned advocates with a proven track record of success. *Id.*, Exhibits A and B. Class Counsel submit that the skill of the attorneys involved, the quality of their efforts, their extensive experience in class actions, and their commitment to negotiating a favorable Settlement through mediation were essential to their success. *See Fed. Nat'l Mortg. Ass'n*, 4 F. Supp. 3d at 112 ("the skill and performance of the attorneys also justifies approval of a substantial fee in this case" where "[p]laintiffs' counsel included firms and attorneys with a great deal of experience in complex class action").

[3] For brevity's sake, Class Counsel attach each firm resume to the Mason Fee Decl., which lists each firm's tremendous experience and success in data breach class action litigation.

The result achieved here is particularly noteworthy considering that the nature of every data breach is different, and that some cases have failed at the dismissal or class certification stages. *See, e.g.*, *SELCO Cmty. Credit Union v. Noodles & Co.*, 267 F. Supp. 3d 1288, 1292 (D. Colo. 2017) (dismissing a nationwide class action for a data breach at Noodles & Co, holding Colorado's economic loss rule prohibited tort damages caused by the data breach); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, MDL No. 09-2046, 2012 WL 896256 (S.D. Tex. Mar. 14, 2012) (after three rounds of dismissal motions, dismissing among other claims, negligence), *rev'd sub nom.*, *Lone Star Nat'l Bank N.A. v. Heartland Payment Sys., Inc*., 729 F.3d 421, 424 (5th Cir. 2013) (concluding that New Jersey's economic loss doctrine could not be applied at dismissal stage); *In re TJX Cos. Retail Sec. Breach Litig.*, 524 F. Supp. 2d 83 (D. Mass. 2007) (dismissing claims for negligence and negligence per se), *aff'd*, 564 F.3d 489 (1st Cir. 2009).

Moreover, Class Counsel prosecuted this case expeditiously and efficiently. Plaintiff's Complaint was filed on March 14, 2023, and the Parties reached an agreement as to the central terms of the Settlement roughly fourteen months later. The Parties thus avoided engaging in the uncertainty and cost of protracted litigation, which inured to the benefit of the Settlement Class.

Accordingly, the skill and efficiency of the attorneys involved supports approval.

4. The Complexity and Duration of the Litigation Support Approval of the Fee Request

The complexity and duration of this Action is another factor this Court should consider, and one that further supports the requested fee.

Even though the duration of the litigation was relatively short, the complexity of this Action was not diminished. *See Trombley*, 826 F. Supp. 2d at 205 (finding that "[a]lthough the duration of litigation was relatively short (there were no dispositive motions filed), the issues to be resolved in th[e] case were complex."). Indeed, class action data breach litigation is regularly acknowledged

to be particularly complex and expensive, usually requiring expert testimony on multiple issues, including class certification and damages. *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) ("[C]lass actions 'have a well-deserved reputation as being most complex."). Although Plaintiff and Class Counsel believe their claims would have ultimately prevailed on the merits, the factual and legal issues involved in this dispute are unquestionably complex and it is far from clear what the result would be if the case had proceeded to trial. *See, e.g.*, *id*. at 477 ("There can be no doubt that this class action would be enormously expensive to continue, extraordinarily complex to try, and ultimately uncertain of result.").

Only through effective advocacy, experienced counsel, and diligent preparation was such an excellent Settlement secured for the Settlement Class. Mason Fee Decl. ¶ 18. Thus, this factor weighs in favor of approval. *See In re Citigroup Inc. Bond Litig.*, 988 F. Supp.2d 371, 379 (S.D.N.Y. 2013) ("The upshot is that the magnitude and complexity of the litigation also weigh in favor of a significant award.").

5. The Risk of Non-Payment Supports the Fee Request

"It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases." Richard Posner, *Economic Analysis of Law* §21.9, at 534–35 (3d ed. 1986). Accordingly, courts in the District of Columbia and across the country have recognized that the determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties that were overcome in obtaining the settlement. *See, e.g.*, *In re Fed. Nat'l Mortg. Ass'n*, 4 F. Supp. 3d at 112 (holding that the "high risk of nonpayment" militates in favor of the fee award); *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016) ("Risk multipliers incentivize attorneys to represent class clients, who might otherwise be denied access to counsel,

on a contingency basis."). Contingent fees that may exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002).

Class Counsel undertook this Action on an entirely contingent fee basis, assuming a substantial risk that the litigation would potentially yield no recovery. In undertaking this responsibility, Class Counsel were duty-bound to devote sufficient time and resources to the prosecution of this Action. Indeed, Class Counsel have received no compensation during the course of this litigation, which has required counsel to incur hundreds of thousands of dollars in billable attorneys' fees and expenses, all of which have gone unpaid. Mason Fee Decl. ¶ 19.

What is more, the outcome of this Action was far from predestined. Indeed, even if Class Counsel prevailed in surviving the motion to dismiss in its entirety, in certifying the putative Class, and then further prevailed at trial, no judgment would have been secured until after rulings on the inevitable post-judgment motions and appeals became final—a process that would likely take years.[4] Class Counsel know from experience that despite the most vigorous and skillful efforts, a firm's success in contingent litigation, such as this, is by no means assured. There are many class actions in which plaintiffs' counsel have expended tens of thousands of hours and millions of dollars in expenses and have received nothing for their efforts. *See, e.g.*, *In re Oracle Corp. Sec*

[4] *See, e.g.*, *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversal of jury verdict of $81 million after a 19-day trial); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict following two decades of litigation); *In re Apple Comput. Sec. Litig.*, No. 84-cv-20148, 1991 WL 238298, at *1–2 (N.D. Cal. Sept. 6, 1991) ($100 million jury verdict vacated on post-trial motions); *see also Landy v. Amsterdam*, 815 F.2d 925 (3d Cir. 1987) (directed verdict for defendants after five years of litigation).

Litig., 627 F.3d 376 (9th Cir. 2010) (affirming district court's order granting defendants' motion for summary judgment in class action); *In re JDS Uniphase Corp. Sec. Litig.*, No. 02-cv-1486 CW, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict after years of litigation and four weeks of trial). Even judgments initially affirmed on appeal by an appellate panel do not guarantee recovery. *See, e.g.*, *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (after 11 years of litigation and following a jury verdict for plaintiffs and an affirmance by a First Circuit panel, plaintiffs' claims were dismissed by an en banc decision and plaintiffs recovered nothing). Quite simply, it is one thing to plead a case, but it is another to maintain the case and present sufficient evidence on each element.

In the absence of a settlement, the Settlement Class faced the substantial risk of years of litigation and potential appeal with no guarantee of a greater recovery. Despite those challenges and uncertainties, Class Counsel achieved a significant result for the Class in the face of very real risks. Under these circumstances, this factor strongly favors approval of the requested fee.

6. The Amount of Time Devoted to the Action by Class Counsel Supports Approval of the Requested Fee

Class Counsel have expended considerable time, more than 502 hours, investigating, prosecuting, and settling this Action. Mason Fee Decl. ¶ 15. This time includes only the hours spent by Class Counsel to date, and does not include the hours worked by Migliaccio Rathod LLP, counsel for Plaintiff Caston, or Barnow & Associates, counsel for Plaintiff McAteer. During these hours, Class Counsel (i) researched and drafted the Complaint; (ii) conducted informal discovery, (including the review of relevant documents and information); (iii) prepared a thorough mediation statement and settlement demand; (iv) participated in a full-day mediation session; (v) engaged in weeks of post-mediation settlement negotiations with Defendant (which also involved numerous conversations with, and input obtained from, each of the Plaintiffs); (vi) reached an agreement on

the Settlement in principle; (vii) obtained proposals from various potential claims administrators and worked with Defendant's counsel to select a knowledgeable claims administrator for the Settlement; (viii) drafted and negotiated the Settlement Agreement and the exhibits thereto, including the notices and claim form; (ix) prepared and filed the Motion for Preliminary Approval of the Settlement and the supporting documents; (x) supervised (and are still currently supervising) the creation and operation of the Settlement Website and the claims process; and (xi) assisted (and are still assisting) in answering questions from Class Members regarding the Settlement and the submission of claims. Mason Fee Decl. ¶ 12.

Additional work will also be required of Class Counsel on an ongoing basis, including: preparation of the final approval documents and exhibits; responding to any objections; continuing to supervise the claims administration process; preparation for, and participation in, the Final Approval Hearing; and working with the Claims Administrator on the distribution of the Settlement Fund to Class Members who submit valid claim forms. Mason Fee Decl. ¶ 12. Nevertheless, Class Counsel will not seek additional payment for this work.

Thus, Class Counsel respectfully submit that the significant investment of time litigating this Action for the benefit of the Class weighs in favor of the requested attorneys' fee.

7. The Requested Fee Award is Comparable to Attorneys' Fees Awarded in Similar Cases

The requested award of one-third (33.33%) of the Settlement Fund compares favorably to fees awarded in class actions across the country.

As courts in the District of Columbia have recognized, "fee awards in common fund cases may range from fifteen to forty-five percent." *Lorazepam II*, 2003 WL 22037741, at *7; *see also Fleisher v. Phoenix Life Ins. Co.*, No. 11-8405, 2015 WL 10847814, at *12 (S.D.N.Y. Sept. 9, 2015) (quoting *Velez v. Novartis Pharm. Corp.*, No. 04-09194, 2010 WL 4877852, at *21

(S.D.N.Y. Nov. 30, 2010) ("'The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs' counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit,' which includes the value of both monetary and nonmonetary relief[.]'")).

The requested percentage of the Settlement Fund in this Action—one-third—is commensurate with multiple other settlements in courts in the District of Columbia. *See Carr v. Transit Emps. Fed. Credit Union*, No. 2017 CA 008613 B (approving an award to the plaintiff's attorneys in the amount of $71,666 where the settlement provided, which was one-third of the common fund); *Hawkins v. Transit Emps. Fed. Credit Union*, No. 2012 CA 007335 B (approving an award of attorneys' fees of $112,500 where settlement provided for a pro rata distribution of a $150,000 settlement fund). Courts in the District of Columbia have regularly approved fee awards equal to one-third of the settlement fund, and some have approved even higher percentages. *See Doe*, 2018 D.C. Super. LEXIS 16, *18 (awarding attorneys' fees of one-third the total settlement amount); *Hardy v. Dist. of Columbia*, 49 F. Supp. 3d 48, 50 (D.D.C. 2014) (awarding attorney's fees in the amount of 33% of the settlement fund); *Radosti*, 760 F. Supp. 2d at 78 (D.D.C. 2011) (awarding 33%); *see also In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *57 (awarding $123,188,032 in attorney's fees based on one-third percentage of recovery); *see also Wells v. Allstate Ins. Co.,* 557 F. Supp. 2d 1, 7 (D.D.C. 2008) (awarding 45%). Accordingly, this factor, along with all the foregoing factors, supports Class Counsel's requested fee award.

Although performing a cross-check on the percentage method using Class Counsel's lodestar is optional and solely within the Court's discretion, *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d at 101, courts in the District of Columbia may perform a lodestar cross-check to ensure counsel does not receive a windfall. *See Doe*, 2018 D.C. Super. LEXIS 16, at *23

(performing lodestar cross-check). The lodestar analysis is performed by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Here, Class Counsel have expended 502.7 hours on this case, which amounts to a total lodestar of $349,969—even before preparing the Final Approval Motion, appearing for the Final Approval Hearing, and completing supervision of the notice and claims administration. Mason Fee Decl. ¶ 15. This represents a multiplier of 0.72. This multiplier is below the range of multipliers approved by courts in the District of Columbia. *In re Fannie Mae Sec., Derivative, & ERISA Litig.*, 4 F. Supp. 3d 94, 113 n.20 (D.D.C. 2013) ("Generally, multipliers from 1–3 are the norm.") (quoting 4 *Newberg On Class Actions* § 14:7 (4th ed. 2002)); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d at 102 (finding that a multiplier of "less than two time the lodestar – is unremarkable in common fund cases."); *In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *32 (approving of a multiplier of 1.36 and noting that "multiples ranging up to 'four are frequently awarded in common fund cases when the lodestar method is applied.'"). Accordingly, the lodestar cross-check strongly supports the requested fee award.

D. The Requested Expenses Are Reasonable in that They Were Necessary to Prosecute this Litigation

"In addition to being entitled to reasonable attorneys' fees, class counsel in common fund cases are also entitled to reasonable litigation expenses from that fund." *In re Fed. Nat'l Mortg. Ass'n*, 4 F. Supp. 3d at 113 (quoting *In re Lorazepam*, 2003 WL 22037741, at *10); *see In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *13 ("there is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund") (citation omitted). In assessing whether counsel's expenses are compensable in a common fund case, courts look to whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *See In re Vitamins Antitrust*

Litig., 2001 WL 34312839, at *13 ("Courts have routinely awarded expenses for which counsel would normally directly bill their clients.").

Here, Class Counsel have incurred expenses in an aggregate amount of $11,554.43 in prosecuting the Action. *See* Mason Fee Decl. ¶ 20. The litigation expenses for which Class Counsel seeks reimbursement, such as mediation fees, costs of legal research, filing fees, and travel costs were necessary and are exactly the type of expenses routinely charged to paying clients. *See Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla.*, 8 F.3d 722, 725–26 (10th Cir. 1993) (finding expenses reimbursable if they would normally be billed to a client); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (same).

Class Counsel have been prudent in monitoring their litigation expenses in this case to date. All expenses and costs were incurred for the benefit of the Settlement Class. Accordingly, the Court should grant Class Counsel's request for expenses and costs.

E. Class Representatives' Service Awards Are Warranted

Class Counsel seek service awards of $2,500 for each of the twelve Class Representatives in recognition of their service and diligence in protecting the interests of absent Settlement Class Members. In light of the work performed by the Class Representatives, without which there would be no Settlement for the Class, the requested awards of $2,500 are appropriate.

"[I]ncentive awards to named plaintiffs are not uncommon in class action litigation, particularly where a common fund has been created for the benefit of the entire class." *See In re Lorazepam*, 2003 WL 22037741, at *10. In fact, "courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Id.* Incentive awards are particularly appropriate in cases such as these, where Plaintiff has assisted in providing a "common fund created to benefit the entire

class." *Little v. Wash. Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 35 (D.D.C. 2018). The law recognizes that it is appropriate to make a wide range of awards in recognition of the services that such plaintiffs perform in a successful class action. *See Id.* at 39 (approving an award of $7,500 to named representatives); *Nat'l Veterans Legal Servs. Program*, 724 F. Supp. 3d at 31 (approving an award of $10,000); *Washington v. Navy Fed. Credit Union*, No. 2019-CA-005735-B (D.C. Super. Ct. Oct 30, 2020) (approving award of $7,500 to class representative).

In determining whether to grant a service award in class actions, courts consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class benefitted from those action[s], and the amount of time and effort the plaintiff expended in pursuing the litigation." *Doe*, 2018 D.C. Super. LEXIS 16 at *14 (approving service awards ranging from $2,500.00 to $25,000.00). Here, the Class Representatives invested time and effort representing the Class throughout the course of the litigation. The Class Representatives took personal time to provide detailed information to Class Counsel—information that became the basis for the Class allegations. They reviewed the Complaint and other pleadings prior to filing. They gathered and provided relevant documents. They also devoted several hours to regularly communicating with Class Counsel throughout the litigation. In addition, they were very involved in the settlement negotiations and frequently coordinated with Class Counsel about the specific terms for a potential class settlement. The Settlement could not have been achieved without the Class Representatives' efforts. Therefore, for their past and continuing dedication to the Settlement Class, Class Counsel respectfully requests that the incentive award be approved for the Class Representatives.

V. CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully ask the Court to enter an Order Granting Plaintiff's Motion for Attorneys' Fees in the amount of $483,285.00, Litigation Expenses in the amount of $11,244.43 (subject to update before the Final Approval Hearing), and Service Awards to the Class Representatives in the amount of $2,500 each.

Respectfully submitted,

Date: December 27, 2024

Respectfully submitted,

/s/ Gary E. Mason

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