

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

IN RE U.S. VISION DATA BREACH
LITIGATION

Civ. Action No. 1:22-cv-06558
(CPO/SAK)

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs Ian Torres, Bonita Odell, and Lacie Morgan, collectively referred to herein as “Plaintiffs,” hereby move this Court pursuant to Federal Rules of Civil Procedure 23(h) and 54(d), for an award of attorneys’ fees in the amount of \$1,150,000.00, and reasonable out-of-pocket case costs and expenses of \$13,819.38 (together, the “Requested Fee and Expense Award”). Plaintiffs also respectfully move this Court for Service Awards¹ for the Class Representatives in the amount of \$3,500 each (for a total of \$10,500).

The Settlement, and the efforts of Class Counsel, created substantial relief for Settlement Class Members, in the form of a \$3,450,000.00 non-reversionary settlement fund, which will be used to pay for (i) Administration and Notice Costs; (ii) Service Awards approved by the Court; (iii) Attorneys’ Fees approved by the Court; (iv) Expenses approved by the Court; and (v) all Approved Claims. Specifically, the Settlement provides for various forms of relief for Settlement Class Members. All Settlement Class Members who submit an Approved Claim are eligible to claim either: (1) a Pro-Rata Cash Payment estimated at \$50, *or* (2) Out-of-Pocket Expense and Time Reimbursement and Credit Monitoring Benefits, consisting of (i) Documented Ordinary Expense Reimbursement (up to \$300), (ii) Documented Extraordinary Expense Reimbursement (up to \$5,000), (iii) Lost-Time Reimbursement (up to 4 hours at \$25 per hour), and/or Credit Monitoring (24 months of 3-bureau credit and identity theft monitoring).

This Settlement represents an excellent result for the Settlement Class in this litigation and was obtained against a well-funded defense by Nationwide Optometry, P.C. (referred to herein collectively with its affiliates Sightcare, Inc. and Nationwide Vision Center, LLC as “Defendant”

¹ Unless otherwise indicated, capitalized terms have the same meaning as those terms are used in the Settlement Agreement.

or “Nationwide-Sightcare”). Although Plaintiffs believe in the merits of their claims, this litigation was inherently risky and complex, and they are aware of the risks of continued litigation. Declaration of Terence Coates (“Coates Decl.”), attached hereto as Exhibit 1, ¶ 10. The area of data breach litigation is rapidly developing, and Plaintiffs recognize the risks faced at every stage of continued litigation. *Id.* Despite this, and through a rigorous negotiations process, Class Counsel and the Class Representatives have created a Settlement for the benefit of the Settlement Class. *Id.*

As compensation for the substantial benefit conferred upon the Settlement Class, Class Counsel request this Court grant the Requested Fee and Expense Award. The \$1,150,000.00 fee request represents one-third (33.33%) of the Settlement Fund. This request is contemplated by the Settlement Agreement and in Plaintiffs’ Motion for Preliminary Approval. Settlement Agreement (“SA”) ¶ 18.2. This amount was also clearly delineated in both the Short and Long Form Notices to the Settlement Class.

The requested fees and costs are a reasonable percentage of the non-reversionary common fund benefit recovered for the Settlement Class. Federal district courts in New Jersey and the Third Circuit routinely approve attorneys’ fees equaling one-third of a common fund. Plaintiffs’ \$13,819.38 request for costs and expenses actually incurred, sought in addition to attorneys’ fees, is also reasonable and necessary for litigation of this nature and size. Finally, Plaintiffs request that the Court grant a \$3,500 Service Award to each Class Representative. This amount falls well within the range of service awards that have been approved by this Court and other courts within the Third Circuit.

STATEMENT OF FACTS

A. Incorporation By Reference

In the interest of judicial efficiency, for factual and procedural background on this case,

Plaintiffs refer this Court to and hereby incorporate Plaintiffs' Brief in Support of the Unopposed Motion for Preliminary Approval of Class Action Settlement filed on April 4, 2024, and the accompanying Exhibits, including the proposed Settlement Agreement, filed in conjunction therewith.

B. Summary of Settlement

The settlement establishes the following Settlement Class:

All residents of the United States who are current or former patients, customers, employees, members, or covered dependents of Nationwide Optometry, P.C., Nationwide Vision Center, LLC, Sightcare Inc. (collectively "Nationwide-Sightcare"), or any of their affiliated or related business entities whose Personal Information was accessed, stolen, or compromised as a result of the Data Breach.

SA ¶ 2.40. The Settlement Class excludes (i) Nationwide-Sightcare, any Entity in which Nationwide-Sightcare has a controlling interest, and Nationwide-Sightcare's officers, directors, legal representatives, successors, subsidiaries, and assigns; (ii) any judge, justice, or judicial officer presiding over the Action and the members of their immediate families and judicial staff; (iii) any individual who timely and validly opts out of the Settlement; and (iv) USV, any Entity in which USV has a controlling interest, and USV's officers, directors, legal representatives, successors, subsidiaries, and assigns. *Id.*

Pursuant to the Settlement, Defendant agreed to create a non-reversionary cash Settlement Fund in the amount of \$3,450,000.00 for the benefit of the Settlement Class. The Settlement Fund will be used to pay all Settlement Claims, Settlement Administration Costs, any Service Awards to Class Representatives awarded by the Court, and any attorneys' fees and costs awarded by the Court to Class Counsel. SA ¶ 3.2. Settlement Class Members who submit a valid and timely Claim Form may receive compensation for one or more of the following categories of loss resulting from the Incident: (1) a Pro-Rata Cash Payment estimated at \$50 *or* (2) Out-of-Pocket Expense and

Time Reimbursement and Credit Monitoring Benefits, consisting of (i) Documented Ordinary Expense Reimbursement (up to \$300), (ii) Documented Extraordinary Expense Reimbursement (up to \$5,000), (iii) Lost-Time Reimbursement (up to 4 hours at \$25 per hour), and/or Credit Monitoring (24 months of 3-bureau credit and identity theft monitoring).

The Settlement does not release Plaintiffs' and Settlement Class Members' claims against Defendants U.S. Vision, Inc. and USV Optical, Inc.

ARGUMENT

For the reasons set forth below, the Requested Fee and Expense Award is reasonable and should be granted.

A. The Class Has Received Reasonable Notice of the Requested Fee and Expense Award, and Has Been Given a Reasonable Opportunity to Object

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.” Class Counsel provided reasonable notice of this motion through direct notice efforts, and Settlement Class Members were provided ample opportunity to object or opt-out of the Settlement.

After preliminary approval was granted, notice was sent in postcard form via U.S. mail, postage prepaid, to the approximately 714,000 Settlement Class members for whom Defendant provided unique Settlement Class Member records with complete and mailable addresses. Coates Decl. ¶ 2. A description of the notice program will be submitted in the Claims Administrator’s declaration to be filed in connection with the motion for final approval.

The postcard notices sent to Settlement Class Members plainly indicated that Class Counsel would seek “an amount not to exceed 1/3 of the \$3.45 million Settlement Fund” and “Service Awards of \$3,500” for each Class Representative. The fees, expenses, and service awards

to be sought were also prominently featured in the Long Form Notice, which is posted on the Settlement Website (<https://nationwidesightcare.com>) and has been maintained by the Settlement Administrator.

The schedule approved by the Court requires Class 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. 74. As such, Settlement Class Members have two weeks after the filing of this motion to offer any objections to the requested fees, expenses, and service awards.

B. Legal Standards for Fee Awards

“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 Prac. 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 at n.6 (3d Cir. 2020) (“we give district courts considerable deference in fee decisions”).

Here, in the Settlement Agreement, the Parties agreed that Class Counsel will move the Court for an Order awarding attorneys’ fees not to exceed one-third of the Settlement Fund

(33.33%), and for reasonable costs and expenses incurred in prosecuting and settling the action.

The Third Circuit utilizes two methods to calculate appropriate attorneys' fees in class action settlements—the lodestar method and the percentage-of-recovery method. *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006). Determining the proper amount of attorneys' fees is within the Court's discretion based on the facts of the case. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 280 (3d Cir. 2009). The use of the percentage-of-recovery method is appropriate here, although the reasonableness of the fee request is also supported by a lodestar cross-check. Accordingly, the fee should be approved regardless of the method used by the Court.

C. The Court Should Award a Reasonable Percentage of the Common Fund.

“The Third Circuit favors the percentage-of-recovery method of calculating fee awards in common fund cases.” *Glaberson v. Comcast Corp.*, No. 03-6604, 2015 WL 5582251, at *11 (E.D. Pa. Sept. 22, 2015) (collecting cases). “Courts use the percentage of recovery method in common fund cases on the theory that the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class.” *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995).

The attorneys' fee request of one third of the \$3.45 million Settlement Fund is reasonable under this framework. Courts in the Third Circuit have found reasonable fee awards “generally range from 19% to 45% of the settlement fund.” *Rose v. Travelers Home & Marine Ins. Co.*, No. CV 19-977, 2020 WL 4059613, at *11 (E.D. Pa. July 20, 2020) (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 736 (3d Cir. 2001)); *see also In re Gen. Motors*, 55 F.3d at 822 (same); *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 315 (E.D. Pa. 2012) (same); *Galt v. Eagleville Hosp.*, 310 F. Supp. 3d 483, 498 (E.D. Pa. 2018) (“fee awards ranging from 30% to 43% have been awarded in cases with funds ranging from \$400,000 to \$6.5 million”).

Class Counsel’s fee request also is commensurate with fee awards in other data breach cases. *See, e.g., Thomsen v. Morley Companies, Inc.*, No. 1:22-CV-10271, 2023 WL 3437802, at *2 (E.D. Mich. May 12, 2023) (awarding fee award of 33% in a data breach class action settlement that was “presumptively reasonable”); *Stoll v. Musculoskeletal Inst.*, No. 8:20-CV-1798-CEH-AAS, 2022 WL 16927150, at *3 (M.D. Fla. July 27, 2022), *report and recommendation adopted sub nom. Stoll v. Musculoskeletal Inst., Chartered*, No. 8:20-CV-1798-CEH-AAS, 2022 WL 16923698 (M.D. Fla. Nov. 14, 2022) (awarding 33% fee award in a data breach class action settlement).

D. The Gunter/Prudential Factors Weigh in Favor of Awarding the Fees Requested.

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).

1. 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. Sec., 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, Class Counsel obtained a significant amount for the Settlement Class, negotiating a settlement fund of \$3,450,000.00 for approximately 714,000 Settlement Class Members. This works out to approximately \$4.83 per Settlement Class Member, which is commensurate with recoveries achieved in other similarly sized data breach class action settlements finally approved by courts.² Here, Plaintiffs have potential additional recovery as they also have claims pending against Defendants U.S. Vision, Inc. and USV Optical, Inc. The current settlement only releases claims relating to Defendant Nationwide-Sightcare.

All Settlement Class Members may claim the substantial benefits offered in this settlement. And to date, many have, with the total number of claims through August 2, 2024 standing at 12,226, which works out to a 1.7% claims rate. Coates Decl. ¶ 28. This already matches or exceeds the claims rate in other settlements and Settlement Class Members still have until September 23,

² *See, e.g., In re: Lincare Holdings, Inc. Data Breach Litigation*, Case No. 8:22-cv-1472-TPB-AAS (M.D. Fla.) (\$7,250,000 for 2,918,444 class members, \$2.48 per person); *In re Wright & Filippis, LLC Data Security Breach Litigation*, No. 22-cv-12908 (E.D. Mich.) (\$2,900,000 for 877,584 class members, \$3.30 per class member); *Thomsen v. Morley Companies, Inc.*, No. 1:22-cv-10271 (E.D. Mich.) (\$4,300,000 for 694,679 class members, \$6.19 per class member).

2024 to submit claims. *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).

Considering the complexity, length and expense of continued litigation, and the risk of success at trial, Plaintiffs have achieved an excellent result for Settlement Class Members. *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 strongly supports Class Counsel’s fee request.

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

As of August 1, 2024, Class Counsel are aware of zero objections to the Settlement or proposed Fee Award. Coates Decl. ¶ 28. The deadline for submitting objections is August 23, 2024. *Id.* The lack of objections weighs in favor of Class 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 at 170 (“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”).

3. The skill and efficiency of the attorneys involved

The substantial recovery obtained demonstrates that Class 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”)). 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 NFL Concussion Litig.*, No. 2:12-MD-02323, 2018 WL 1635648, at *5 (E.D. Pa. Apr. 5, 2018), *aff’d in part, remanded in part*, 814 F. App’x 678 (3d Cir. 2020).

Class Counsel vigorously represented the Settlement Class and will continue to do so through Final Approval. Coates Decl. ¶ 21. To date, proposed Class Counsel have engaged in months of contested, arms’ length negotiations, including mediation before the Honorable Diane M. Welsh; conducting a thorough pre-suit investigation; conducting settlement discussions, achieving a favorable Settlement for the Settlement Class; negotiating a comprehensive Agreement that includes a robust Notice Program, well-crafted Notices and Claim Form, and an easy to understand Claims Process; and overseeing the successful implementation of the Notice Program and a robust and favorable response from the Settlement Class Members in making claims. Coates Decl. ¶ 2. Accordingly, this factor supports the proposed fee award.

4. 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*, 55 F.3d at 812 (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”).

Here, approximately 714,000 persons’ data was impacted in the Data Incident; this is a complex action with many potential risks. This case involved complex issues in the novel and evolving area of data breach litigation. *See Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) (“Data breach cases . . . are particularly risky, expensive, and complex.”). Defendant has consistently denied the allegations raised by Plaintiffs and made clear its intention to vigorously defend the case. While Plaintiffs have arguments and authorities that support their allegations, the number of issues in this case, which centers on a developing area of the law—data breach litigation—creates uncertainty.

Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data breach cases like this one face substantial hurdles—even just to make it past the pleading stage. *See, e.g., Hammond v. The Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060(RMB)(RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Plaintiffs faced the risk of obtaining class certification. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying class certification in data breach class action). Though they strongly believe in the merits of their claims, Plaintiffs and Class Counsel acknowledge that proving causation and damages in the emerging area of data breach cases can be difficult, and is by no means guaranteed. *See, e.g., S. Indep. Bank v. Fred’s, Inc.*, No. 2:15-CV-799-WKW, 2019 WL 1179396, at *8 (M.D. Ala. Mar. 13, 2019) (holding under Daubert motion that causation was not met for class certification purposes in data security breach case); *In re TJX Cos. Sec. Breach Litig.*, 246 F.R.D. 389, 398 (D. Mass. Nov. 29, 2007) (“[T]he need for individualized damages decisions

does not ordinarily defeat predominance where there are . . . disputed common issues as to liability.”) (quoting *Tardiff v. Knox Co.*, 365 F.3d 1, 6 (1st Cir. 2004)). Continued litigation further would have required formal discovery, depositions, expert reports, maintaining class certification throughout trial, and summary judgment proceedings, as well as possible appeals, which would require additional rounds of briefing and the possibility of no recovery at all.

While Plaintiffs are confident in the strength of their claims, they are also pragmatic in their awareness of the various defenses available to Defendant, as well as the risks inherent to continued litigation. Through the Settlement, Plaintiffs and Settlement Class Members gain significant benefits without having to face further risk of not receiving any relief at all, or at some point likely far in the future. *In re Viropharma Inc. Sec. Litig.*, Civ. No. 12-2714, 2016 WL 312108, at *16 (E.D. Pa. Jan. 25, 2016) (settlement ensures recovery now, rather than the “speculative promise of a larger payment years from now”). Thus, this factor weighs in favor of granting this fee request.

5. The risk of non-payment

Class Counsel took this case on a purely contingent basis. Coates Decl. ¶ 6. The retainer agreements Class Counsel have with Plaintiffs do not provide for fees apart from those earned on a contingent basis, and, in the case of class settlement, attorneys’ fees would only be awarded to Class Counsel if approved by the Court. Coates Decl. ¶ 11 As such, attorneys’ fees were not guaranteed in this case. *Id.* Class Counsel assumed significant risk of nonpayment of attorneys’ fees. *Id.* Thus, Class Counsel took on these significant risks knowing full well their efforts may not bear fruit. *Id.*

“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). In this case, while Class Counsel were optimistic that Plaintiffs' claims would prevail, they recognized that success in this case was not assured. The risk of nonpayment was substantial. *See, e.g., 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 unsettled area of law often presents novel questions for courts. And of course, juries are always unpredictable.”); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (noting that “many of the legal issues presented in [] data-breach case[s] are novel”). As one Third Circuit district court noted in another data breach class action case, “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).

From the outset, Class 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, Class Counsel were able to obtain a settlement that provides significant immediate relief to the Settlement Class, including substantial monetary benefits. Class Counsel undertook a significant risk here and the fee award should reflect that risk.

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

Plaintiffs' Counsel devoted 735.8 hours, through August 8, 2024, to this litigation. The time expended by Plaintiffs' Counsel was necessary to obtain this recovery, and to consummate this 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.

7. The awards in similar cases

As shown above, awards of one-third of the common fund are common in data breach cases. An award of one-third of the fund has been deemed reasonable by courts in the Third Circuit.³ The \$1,150,000.00 fee request is one-third of the Settlement Fund and compares favorably to the awards in similar data breach cases.

8. 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 Class Counsel without the benefit of findings from any government investigation. There has been no publicly announced action by any federal or state authorities relating to this data breach. “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.

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

Class Counsel's requested fee is reasonable relative to contingent fee percentages

³ *E.g.*, *McIntyre v. RealPage, Inc.*, No. 18-cv-03934, 2023 WL 2643201, at *3, n.5 (E.D. Pa. Mar. 24, 2023) (finding a fee request of 1/3 of a fund to be “squarely within the range of awards found to be reasonable by the courts.”) (quoting *Rossini v. PNC Fin. Servs. Grp., Inc.*, No. 18-cv-1370, 2020 WL 3481458, at *19 (W.D. Pa. June 26, 2020)); *Ahrendsen v. Prudent Fiduciary Servs., LLC*, No. 21-cv-2157, 2023 WL 4139151, at *5 (E.D. Pa. June 22, 2023) (“class counsel reasonably seeks one-third of the settlement fund . . . for attorneys’ fees”); *In re Innocoll Holdings Pub. Ltd. Co. Sec. Litig.*, No. 17-cv-341, 2022 WL 16533571, at *8 (E.D. Pa. Oct. 28, 2022) (“The fees requested constitute one third of the Settlement fund, which is within a reasonable range given both lead counsel’s efforts in a challenging action made more complex by certain adverse facts and a comparison with fee awards in other Third Circuit class action settlements.”) (citations omitted).

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.”); *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.

10. Any innovative terms of settlement

The Settlement Agreement provides for a multi-tiered claims system whereby Settlement Class Members may obtain a recovery based on the type and severity of harm caused by the Data Breach. Settlement Class Members are eligible to claim either: (1) a Pro-Rata Cash Payment estimated at \$50, *or* (2) Out-of-Pocket Expense and Time Reimbursement and Credit Monitoring Benefits, consisting of (i) Documented Ordinary Expense Reimbursement (up to \$300), (ii) Documented Extraordinary Expense Reimbursement (up to \$5,000), (iii) Lost-Time Reimbursement (up to 4 hours at \$25 per hour), and/or Credit Monitoring (24 months of 3-bureau credit and identity theft monitoring). 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).

As all the *Gunter/Prudential* factors weigh in favor of the fees requested, the Court should grant Plaintiffs' fee motion.

E. A Lodestar Cross-Check Confirms the Fee Request is Reasonable.

The Third Circuit has recommended that courts crosscheck the reasonableness of the attorneys' fee request using the lodestar method. *Gunter*, 223 F.3d at 195 n.1. "The purpose of the cross-check is to ensure that the percentage approach does not result in an 'extraordinary' lodestar multiple or windfall." *Whiteley v. Zynerba Pharms., Inc.*, No. 19-4959 2021 WL 4206696, at *13 (E.D. Pa. Sept. 16, 2021) (quoting *In re Cendant*, 264 F.3d at 285). The Third Circuit has stated that a lodestar cross-check entails an abridged lodestar analysis that requires neither "mathematical precision nor bean counting." *In re Rite Aid*, 396 F.3d at 305. The Court need not receive or review actual billing records when conducting this analysis. *Id.* at 307.

Under the lodestar method, a court begins the process by calculating the "lodestar," i.e., the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *McKenna v. City of Phila.*, 582 F.3d 447, 455 (3d Cir. 2009). Once the lodestar is determined, the court must then decide whether additional adjustments are appropriate. *Id.* A reasonable hourly rate in the lodestar calculation is "[g]enerally . . . calculated according to the prevailing market rates in the relevant community," taking into account "the experience and skill of the . . . attorney and compar[ing] their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001). The prevailing market rate is usually deemed reasonable. *Pub. Int. Rsch. Grp. v. Windall*, 51 F.3d 1179, 1185 (3d Cir. 1995).

Class Counsel spent 735.8 hours litigating this action, producing a lodestar amount of \$587,380.10 based on standard, current hourly rates. Coates Decl. ¶¶ 12, 20. The reasonableness

of Class Counsel's rates is also supported by the declaration, which establishes that the rates are the same as their standard hourly rates charged to paying clients on non-contingent matters and are in accord with the prevailing rates for class action and complex commercial litigation in the relevant legal markets (i.e. the national market for data breach litigation). *See New Berry, Inc. v. Smith*, No. CV 18-1024, 2021 WL 5332165, at *2 (W.D. Pa. Nov. 15, 2021) ("The best evidence of a prevailing market rate is counsel's customary billing rate."); *Animal Legal Def. Fund v. Lucas*, No. CV 2:19-40, 2021 WL 4479483, at *1 (W.D. Pa. Sept. 30, 2021) ("[T]he attorney's normal billing rate is an appropriate baseline for assessing the reasonableness of the rate requested."). These rates have been approved in other class action cases.

Class Counsel's requested fee award represents a modest lodestar multiplier of 1.96. The 1.96 multiplier is commensurate with multipliers commonly awarded in the Third Circuit. *See Dickerson v. York Int'l Corp.*, No. 15-cv-01105, 2017 WL 3601948, at *11 (M.D. Pa. Aug. 22, 2017) ("Multipliers between one and four are routinely approved in the Third Circuit."); *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 225 (E.D. Pa. 2014) ("The [Third Circuit] Court of Appeals has recognized that multipliers 'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'"). Given the quality of Class Counsel's work and results achieved in these circumstances, the lodestar cross-check supports the reasonableness of the requested fee.

Class Counsel expect to expend significant additional time consummating this Settlement, including preparing and filing a motion for final approval, participating in the final fairness hearing, assisting Settlement Class Members with their claims and answering their questions, and working with the Claims Administrator on claims administration and distribution of benefits to the Settlement Class. This means that by the time this case is brought to final approval, the lodestar

“multiplier” will be lower, once these additional attorney hours are expended. Accordingly, the lodestar cross-check fully supports the fees requested.

1. Class Counsel’s Request for Reimbursement of Expenses is Reasonable.

“Counsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case.” *O’Hern v. Vida Longevity Fund, LP*, No. CV 21-402-SRF, 2023 WL 3204044, at *10 (D. Del. May 2, 2023). Class Counsel seeks reimbursement of \$13,819.38 for the reasonable expenses incurred to advance this litigation. These expenses are outlined in the supporting declaration submitted concurrently herewith. Coates Decl. ¶ 25. These expenses are typical in litigation, were necessary for the successful prosecution and resolution of the claims against Defendant (as the bulk of the expenses are the mediator’s fees) and should be approved.

2. The Requested Service Awards Are Reasonable.

Service awards are “not uncommon in class action litigation and particularly where, as here, a common fund has been created for the benefit of the entire class.” *McDonough v. Toys R Us, Inc.*, 80 F. Supp. 3d 626, 665 (E.D. Pa. 2015) (quotations omitted). Generally, “[c]ourts 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.” *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000) (quotations omitted). Factors courts consider when deciding to give service awards include “the risk to the plaintiff in commencing litigation, both financially and otherwise; the notoriety and/or personal difficulties encountered by the representative plaintiff; the extent of the plaintiff’s personal involvement in the lawsuit in terms of discovery responsibilities and/or testimony at depositions or trial; the duration of the litigation; and the plaintiff’s personal benefit (or lack thereof) purely in her capacity as a member of the

class.” *Vista Healthplan, Inc. v. Cephalon, Inc.*, No. 2:06-CV-1833, 2020 WL 1922902, at *33 (E.D. Pa. Apr. 21, 2020) (quoting *McGee v. Ann’s Choice, Inc.*, No. 12-2664, 2014 WL 2514582, at *3 (E.D. Pa. June 4, 2014)). Courts in the Third Circuit routinely approve service awards of \$1,000 to \$5,000.⁴

For their efforts on the case, Plaintiffs seek Service Awards in the amount of \$3,500. Plaintiffs were actively engaged in this action, including providing assisting in the investigation of the case, producing relevant documents, reviewing and approving pleadings, reviewing the Settlement documents, and answering counsel’s many questions. Coates Decl. ¶ 27. Moreover, the Service Award requested falls well below the range of service awards that have been approved by federal courts in New Jersey and in the Third Circuit. Thus, the Court should grant the requested Service Awards.

CONCLUSION

Class Counsel, with the help of Plaintiffs, have made significant benefits available to Settlement Class Members. In return, Plaintiffs seek attorneys’ fees, expenses, and service awards commensurate with those regularly approved by courts sitting in Third Circuit. The attorneys’ fees, costs, expenses, and service awards are reasonable, and should be approved.

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Respectfully submitted,

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⁴ See, e.g., *Wood v. Saroj & Manju Invs. Phila. LLC*, No. CV 19-2820-KSM, 2021 WL 1945809, at *10 (E.D. Pa. May 14, 2021) (awarding a service award of \$2,500 to the settlement class representative); *Fulton-Green*, 2019 WL 4677954, at *13 (awarding service awards of \$1,000 to each settlement class representative); *Krimes v. JPMorgan Chase Bank, N.A.*, No. CV 15-5087, 2017 WL 2262998, at *11 (E.D. Pa. May 24, 2017) (awarding service award of \$5,000 to the settlement class representative).

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