

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: GE/CBPS DATA BREACH LITIGATION

Case No. 1:20-cv-02903-KPF

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR AWARD OF
ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARD**

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Plaintiff Steven Fowler (“Plaintiff”) submits this Memorandum of Law in Support of Plaintiff’s Motion for Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Award.

INTRODUCTION

In February of 2020, cybercriminals used a phishing scheme to gain access to a dedicated email box operated by Defendant Canon Business Process Services, Inc. (the “Data Incident”). Current and former employees of Defendant General Electric Company (“GE”) used Canon’s dedicated email box to send benefits-related information to GE (“Canon Email Box”). The Canon Email Box contained documents such as direct deposit forms, driver’s licenses, passports, birth certificates, marriage certificates, death certificates, medical child support orders, tax withholding forms, beneficiary designation forms and applications for benefits such as retirement, severance and death benefits and related forms and documents, may have included names, addresses, Social Security numbers, driver’s license numbers, bank account numbers, passport numbers, dates of birth, and other information (collectively, “Personal Financial Information” or “PFI”).

Plaintiff alleges that the Data Incident was due to Defendants’ failure to properly safeguard the Personal Financial Information of its employees and their beneficiaries. Plaintiff alleges the data breach exposed Personal Financial Information and brought this lawsuit to recover damages and other relief resulting from the Data Incident, including but not limited to, compensatory damages and reimbursement of costs that Plaintiff and others similarly situated will be forced to bear.

After extensive arms’ length negotiations that took place over the course of almost a year, the parties reached a settlement that is fair, reasonable, and adequate. The Court granted preliminary approval of the proposed Settlement on August 24, 2022, after which class notice was sent to Settlement Class members. The Settlement’s benefits, if finally approved, is valued at approximately \$1.867 million and may be higher based on the following (1) Defendants’ payments

of reimbursement of up to \$3,500 of out-of-pocket expenses per class member, including payment for up to four hours of attested lost time, compensable at the rate of \$18 per hour, not to exceed \$350,000.00; (2) eighteen months of Credit Monitoring Protections provided by Aura's Financial Shield Services (without the need to submit a claim) which has a market value of \$8-\$10 a month, for a minimum total value of \$1,482,192 (\$8 x 18 mos. x 10,293 class members); (3) estimated notice and settlement administration costs of \$35,000.00; and (4) any attorneys' fees, reimbursement of expenses, and service award approved by the Court. Plaintiff strongly believes the settlement is favorable to the Settlement Class, particularly in light of Defendants' defenses, including that there is no injury and that many Settlement Class members' claims are subject to arbitration.

Pursuant to the Settlement Agreement and the Court's inherent authority, Class Counsel respectfully submit this Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award ("Fee Application") and asks that the Court award them a modest 25% of the value of the \$1,867,192 fund (or \$466,798.00) ("Fee Award") and \$12,943.16 for expenses ("Expense Request"). The Agreement provides for it to be paid outside of any other benefits to the Class. SA ¶¶ 7.3-7.4. As detailed more fully herein, the factual and legal complexity of these claims required the time and resources that Class Counsel invested. The work performed advancing the claims of the Settlement Class members – on a fully contingent basis – carried significant risk, and Class Counsel forwent other opportunities and dedicated themselves to this case since 2020.

In addition, Class Counsel request that the Court approve a service award for the Class Representative, Plaintiff Fowler, in the amount of \$1,500. This request is modest and is fully justified by the law and the work performed by Plaintiff Fowler in connection with defeating the motion to dismiss and bringing this lawsuit on behalf of all others similarly situated.

This Memorandum is supported by: (1) the Declaration of Gary Klinger in support of Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award ("Klinger Decl."); (2) the Declaration of Rosemary M. Rivas in support of Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award ("Rivas Decl."); (3) the Declaration of Alec M. Leslie in support of Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award ("Leslie Decl."); (4) the Declaration of Courtney E. Maccarone in support of Plaintiff's Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award ("Maccarone Decl."); and (5) the Declaration of Gerald Thompson ("Thompson Decl.").

FACTUAL BACKGROUND

A. PROCEDURAL HISTORY

Plaintiff Fowler filed the original proposed class action complaint on April 8, 2020, (*see* ECF No. 1), commencing this litigation against Canon and GE (the "Litigation"). On April 22, 2020, the Court related *Baz v. General Electric Co., et al.*, Case No. 20-cv-3149, brought by another former GE employee, Maher Baz ("Baz"). ECF No. 10.

On June 11, 2020, the Court appointed Gary M. Klinger, Rosemary M. Rivas, and Joseph L. Marchese as Co-Lead Interim Class Counsel. ECF No. 35. Plaintiff and Baz, by and through Co-Lead Interim Counsel, jointly filed the Consolidated Class Action Complaint on August 11, 2020. ECF No. 40. The causes of action in the Consolidated Class Action Complaint included claims for: (1) negligence; (2) negligence per se; (3) breach of express contract; (4) breach of implied contract; (5) violation of the Florida Deceptive and Unfair Trade Practices Act; (6) violation of the New York General Business Law § 349; and (7) breach of fiduciary duty.

Thereafter, Defendants filed a motion to compel Baz to arbitration. ECF No. 48. After considering and analyzing Defendants' motion to compel arbitration, Baz filed a notice of

voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). ECF Nos. 53, 54. Plaintiff Fowler remained as the only named plaintiff and proposed class representative on behalf of the proposed class members.

On January 21, 2021, Defendants filed a motion to dismiss the Consolidated Class Action Complaint for lack of Article III standing under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) as to the six causes of action. ECF Nos. 57, 58. Among other things, Defendants argued that Fowler failed to allege any injury-in-fact that is causally related to the Data Incident - *i.e.*, that Fowler alleged neither present injury nor the compromise of information that poses any substantial risk of injury in the future. Defendants also argued, along with other claim-specific defenses, that Fowler's purported failure to allege damages required the dismissal of Fowler's negligence, contract, GBL § 349, and breach of fiduciary duty claims.

In support of their motion to dismiss, Defendants claimed that Fowler did not allege that he had suffered any present injury, and that the only information of Fowler's even present in the Canon Email Box at the time of the Data Incident was an eFax with a "Change of Address" form containing only his name, mailing address, GE employee number, phone number, and email address—but no sensitive personal or financial information -- which, Defendants argued, undermined any possible claim by Fowler (individually or as a class representative) of present, or substantial risk of future, injury.

Plaintiff, through Class Counsel, argued that the type of information about him that was compromised in the Data Incident was precisely the type of information that could be used to commit identity theft. Plaintiff extensively researched and prepared a thorough brief opposing Defendants' challenges to the Consolidated Class Action Complaint, and also consulted with an expert whose declaration was submitted with Plaintiff's opposition papers. ECF No. 64. On August

4, 2021, the Court denied in part, and granted in part, Defendants' motion to dismiss. The Court determined that Plaintiff had Article III standing and upheld the claims for negligence and breach of implied contract, but granted the motion to dismiss as to Plaintiff's claims for negligence *per se*, breach of express contract, and for violation of GBL § 349. ECF No. 72.

Thereafter, upon the parties' joint request, the Court entered a stay to allow the parties to focus their efforts on resolving the case. ECF No. 74. On December 20, 2021, the parties participated in a mediation before a neutral and experienced mediator, Bennett G. Picker, of Stradley Ronon Stevens & Young, LLP. The parties were unable to reach a resolution at the mediation but continued to engage in settlement discussions over the months that followed, including with the assistance of Mr. Picker. Following continued negotiations, including the sharing of certain information regarding security changes, the parties reached an agreement in principle on all material terms of the class settlement in February 2022. ECF No. 81. The parties then began negotiating the remaining terms of settlement, the settlement agreement, and class notice over the course of the next six months, and during that process exchanged several drafts. ECF Nos. 82-89. The proposed Settlement Agreement is the result of that mediation process and the parties' continued and extensive efforts afterward. Plaintiff filed the proposed Settlement Agreement, along with a motion for preliminary approval, on August 15, 2022 (ECF No. 91), which the Court granted on August 24, 2022. ECF No. 94.

B. SUMMARY OF SETTLEMENT

The proposed Settlement negotiated on behalf of the Settlement Class provides for two separate forms of relief: (1) monetary relief; and (2) credit monitoring and identity theft protection services. The Settlement provides for relief for a Settlement Class defined "as the 10,392 of individuals identified on the Settlement Class List to whom GE sent letters, on or about March 20,

2020, notifying those individuals that information relating to them may have been compromised as a result of the Data Incident announced by the Defendants in March of 2020.” SA ¶ 1.24. The Settlement Class includes even those individuals who may be subject to arbitration.

The proposed Settlement Agreement provides the following benefits:

Monetary Benefits

All Settlement Class members can submit a claim for reimbursement of out-of-pocket costs or expenditures actually incurred that are fairly traceable to the data breach up to \$3,500 per person. SA ¶ 2.1. Out-of-pocket costs or expenditures that are eligible for reimbursement include: (i) unreimbursed losses relating to fraud or identity theft; (ii) professional fees, including attorney’s fees (excluding the Class Counsel); (iii) accountants’ fees; (iv) fees for credit repair services; (v) costs associated with freezing or unfreezing credit with any credit reporting agency; and (vi) miscellaneous expenses such as notary, fax, postage, copying, mileage, and long-distance telephone charges (“Out-of-Pocket Expenses”).¹

Additionally, all Settlement Class members can submit a claim for reimbursement for up to four (4) hours of lost time remedying issues fairly traceable to the data breach at \$18 per hour. SA ¶ 2.2. Defendants will pay valid claims for out-of-pocket expenses and lost time for all Settlement Class Members up to a total of, and not to exceed, \$350,000.00, in the aggregate. SA ¶ 2.

Credit Monitoring and Identity Theft Protections

Without the need to file a claim, all Settlement Class members, even those who may be subject to an arbitration agreement, may enroll in eighteen (18) months of Credit Monitoring

¹ To receive reimbursement for Out-of-Pocket Expenses, Settlement Class Members must submit a Valid Claim, including necessary supporting documentation to the Claims Administrator, as described in ¶ 2.4 of the Settlement Agreement.

Protections provided by Aura's Financial Shield Services. Settlement Class Members are not required to submit a claim for reimbursement of out-of-pocket expenses or lost time to receive the Credit Monitoring Protections; all Settlement Class Members are automatically eligible to receive it. SA ¶ 2.5.

Aura's Financial Shield product offers monitoring and protection services not typically available through other credit monitoring or identity theft services and includes the following:

1. **Transaction Monitoring** of all registered financial accounts including spending, deposits, withdrawals, transfers, and transfer requests;
2. **Bank & Financial Account Monitoring** around any changes requested like new username and password, new signatory added or deleted, change of address of principal signatory, wire transfer requests to third parties, new accounts being set up using the persons SSN and DOB;
3. **Home Title & Property Title Monitoring** to ensure that most family's largest asset is not hijacked and resold or mortgaged by a criminal third party;
4. **Security Freeze Capability** to let consumers take control of their credit data not only at the 3 major credit bureaus but also at 7 other bureaus that can act as an early warning for a fraud event;
5. **Monthly Spending Graphs** that provide detailed views of all spending and highlight any changes from month to month;
6. **Dark Web Monitoring** on 17 different data points that will allow the service to give our members early warning that their PII is in play in the criminal arena;
7. **Authentication Alerts** are sent to our members when their SSN is used as part of an Identity Verification Event;

8. **Fictitious Identity Monitoring** alerts our members when their SSN is used in association with someone else's name;
9. **High Risk Transaction Monitoring** that looks for member PII that is included in transactions like Payday Loans, new credit account openings and the like to verify that these are legitimate events;
10. **Identity and Financial Fraud restoration services** from the longest tenured and most experienced customer support team in our industry; and
11. **\$1 million in Insurance provided by AIG** to replace any funds lost via fraud or identity theft and the reimbursement of any personal expenses including professional fees, lost wages, postage, messenger services, and much more.

See Thompson Decl., ¶ 6. Settlement Class members may enroll in Financial Shield at any time during the coverage period and obtain the benefits and protection associated with Financial Shield for the remainder of the coverage period. *Id.* at ¶ 8. Financial Shield is available for purchase to consumers at retail for \$8-\$10 per month. *Id.* at ¶ 9.

Defendants will pay all costs of notice and settlement administration and all costs of Dispute Resolution described in Paragraph 2.8. SA ¶ 2.9. Defendants have also agreed to pay any attorneys' fees, reimbursement of costs, and service award as approved by the Court. SA ¶¶ 3.2, 7.3.

In exchange for the benefits provided under the Settlement, Settlement Class Members will release any legal claims that may arise from or relate to the facts alleged in the Consolidated Complaint, as specified in the Settlement Agreement. SA ¶¶ 1.21, 6.1-6.3.

ARGUMENT

A. LEGAL STANDARDS

Plaintiff's attorneys in a successful class action lawsuit may petition the Court for

compensation relating to any benefits to the Class that result from the attorneys' efforts. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). Rule 23(h) of the Federal Rule of Civil Procedure expressly states that in a certified class action such as this one, that the Court may award "reasonable attorney's fees and nontaxable costs that are authorized by law or the parties' agreement." Fed. R. Civ. P. 23(h). Pursuant to *Boeing*, Courts in the Second Circuit favor the use of the percentage of the settlement approach. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *McDaniel v. Cnty. Of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010) ("the percentage method has the advantage of aligning the interests of plaintiffs and their attorneys more fully by allowing the latter to share in both the upside and downside risk of litigation[.]"). The Second Circuit has held that in determining a percentage of the recovery, the Court should calculate the attorney's fees based on the settlement's total value: "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, **whether claimed or not.**" *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (emphasis added).

Courts in this Circuit have found numerous advantages to using the percentage method of awarding fees. First, the percentage method "directly aligns the interests of the class and its counsel" because it provides an incentive to attorneys to resolve a case efficiently and to create the largest total value for the class. *Wal-Mart Stores, Inc.*, 396 F.3d at 121; *In re Lloyd's American Trust Fund Litig.*, 2002 WL 31663577 at *25 (S.D.N.Y. Nov. 26, 2002) (collecting cases); *In re Polaroid ERISA Litig.*, 2007 WL 2116398 at *2 (S.D.N.Y. July 19, 2007); *Velez v. Majik Cleaning Serv., Inc.*, 2007 WL 7232783, at *7 (S.D.N.Y. June 25, 2007).

Second, this method is aligned with market practices, as it "mimics the compensation

system actually used by individual clients to compensate their attorneys.” *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999); *see also Sewell v. Bovis Lend Lease, Inc.*, 2012 WL 1320124 at *10 (S.D.N.Y. April 16, 2012) (opining “[the percentage] method is similar to private practice where counsel operates on a contingency fee, negotiating a reasonable percentage of any fee ultimately awarded.”); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (noting the percentage method “is consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients.”).

Third, the percentage method promotes efficiency and early resolution, as it eliminates any incentive plaintiffs’ lawyers may have to run up billable hours—one of the most significant downsides to using the lodestar approach. *Savoie v. Merchants Bank*, 166 F.3d 456, 460-61 (2d Cir. 1999) (“It has been noted that once the fee is set as a percentage of the fund, the plaintiffs’ lawyers have no incentive to run up the number of billable hours for which they would be compensated under the lodestar method.”); *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 48-49 (2d Cir. 2000) (citing *In re Union Carbide Corp., Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 167-168 (S.D.N.Y. 1989)); *see also In re Interpublic Sec. Litig.*, 2004 WL 2397190, at *11 (S.D.N.Y. Oct. 26, 2004).

Finally, the percentage method preserves judicial resources because it relieves the “cumbersome, enervating, and often surrealistic process of evaluating fee petitions.” *Savoie v. Merchants Bank*, 166 F.3d at 461 n.4, quoting *Third Circuit Task Force*, 108 F.R.D. 237, 258. The “primary source of dissatisfaction [with the lodestar method] was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits.” *Goldberger*, 209 F.3d at 48-49; *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, 2007

WL 2230177, at *16 (S.D.N.Y. July 27, 2007). As one New York district court stated:

[The percentage method is] bereft of the largely judgmental and time-wasting computations of lodestars and multipliers. These latter computations, no matter how conscientious, often seem to take on the character of so much Mumbo Jumbo. They do not guarantee a more fair result or a more expeditious litigation.

In re Union Carbide Corp., Consumer Prods. Bus. Sec. Litig., 724 F. Supp. 160, 170 (S.D.N.Y. 1989).

While courts still use the lodestar method as a “cross check” when applying the percentage of the fund method, courts are not required to scrutinize the fee records as rigorously. *Goldberger*, 209 F.3d at 50; *see In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) (using an “implied lodestar” for the lodestar cross check, and noting that when used as a cross-check, the reasonableness of the claimed lodestar can be tested by the court’s familiarity with the case); *Varljen v. H.J. Meyers & Co.*, 2000 WL 1683656, at *5 (S.D.N.Y. Nov. 8, 2000) (using an “unexamined lodestar figure” for the lodestar cross check).

B. THE REQUESTED FEES ARE FAIR AND REASONABLE

“In calculating the overall settlement value for purposes of the ‘percentage of the recovery’ approach, Courts include the value of both the monetary and non-monetary benefits conferred on the Class.” *Fleisher v. Phoenix Life Insurance Co.*, 2015 WL 10847814, at *15 (S.D.N.Y. Sept. 9, 2015) (awarding fees based on the value of both monetary and non-monetary benefits, such as injunctive relief); *Moukengeshcaie v. Eltman*, 2020 WL 5995978, at *7 (E.D.N.Y. April 21, 2020) (basing award of fees on value of monetary and non-monetary benefits); *In re Hudson’s Bay Co. Data Sec. Incident Consumer Litig.*, 2022 WL 2063864, at *21-22 (S.D.N.Y. June 8, 2022) (basing award of fees on value of cash payments, claims administration and notice costs, and attorneys’ fees); *Zink v. First Niagra Bank, N.A.*, 2016 WL 7473278, at *8 (W.D.N.Y. Dec. 29, 2016)

(granting award of fees of 25% of the full amount made available in a claims-made settlement); *Faican v. Rapid Park Holding Corp.*, 2010 WL 2679903, at *3 (E.D.N.Y. July 1, 2010). As shown below, the attorneys' fees and expenses requested in the amount of 25% of the value of the settlement benefits (or \$466,798.00) are reasonable based on the settlement's value to the class. In this case, a conservative value of the settlement benefits is \$1.867 million and includes:

- Up to \$350,000.00 in cash payments for reimbursement of out-of-pocket expenses and time spent;
- Credit Financial Protections automatically provided to Settlement Class members without the need to submit a claim and with a market value of \$1,482,192; and
- \$35,000 in claims administration and notice costs.

The requested fees of 25% of the total settlement value is fair and reasonable in light of value of the benefits to the Settlement Class members. *See, e.g., Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007) (affirming fee award of 30 percent of recovery); *In re Gilat Satellite Networks, Ltd.*, 2007 WL 2743675, at *16 n.41 (E.D.N.Y. Sept. 18, 2007) (30 percent fee); *Warren v. Xerox Corp.*, 2008 WL 4371367, at *7 (E.D.N.Y. Sept. 19, 2008) (awarding class counsel attorneys' fees and expenses at 33.33 percent of the total settlement value, and finding such a sum "comparable to sums allowed in other cases"); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 397-400 (S.D.N.Y. 1999) (approving a fee of 27.5 percent); *In re Dime Sav. Bank*, 1994 WL 60884, at *2 (E.D.N.Y. Feb. 23, 1994) (listing cases and noting percentage rates between 20 and 30 percent are not uncommon). Indeed, Courts have approved fees as high as 60 percent in other data breach cases with similar benefits. *In re Hudson's Bay Company Data Security Incident Consumer Litig.*, 2022 WL 2063864, at *22 (where the court approved attorneys' fees in the amount of \$897,866.26

compared to an estimated total value for the settlement of \$1,479,550.67 (approving a fee of 60.7 percent).

C. THE *GOLDENBERG* FACTORS SUPPORT CLASS COUNSEL’S REQUESTED AWARD.

Regardless of the method utilized by the Court, the reasonableness of fees requested from a common fund or total settlement value should be analyzed using the six factors set out by the Second Circuit in *Goldberger*: ““(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.”” *In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *18 (S.D.N.Y. July 21, 2020) (quoting *Goldberger*, 209 F.3d at 50). Each of these factors supports the reasonableness of Plaintiff’s Fee Application.

1. Class Counsel’s Time and Labor

Plaintiff’s Counsel have devoted a total of 584.89 hours in this case, for a total lodestar of \$440,337.66.² *See* Klinger Decl., ¶ 25, Rivas Decl., ¶ 26, Leslie Decl., ¶ 29, Maccarone Decl., ¶ 4. They began investigating the Data Incident and the potential causes of action in March 2020 shortly after the Data Incident, and drafted separate complaints that were filed on April 8, 2020 and April 20, 2020. *See* Klinger Decl., ¶ 8-9, Rivas Decl., ¶ 8-9, Leslie Decl., ¶ 8. Shortly after the Court’s appointment of Interim Co-Lead Counsel, they worked together on preparing and filing a Consolidated Class Action Complaint.

Class Counsel also worked together efficiently in opposing Defendants motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6), which they defeated in part and crucially, resulted in an order finding that Plaintiff had Article III standing. Their hard work on the motion to dismiss

² Plaintiff’s Counsel have excluded all time relating to the lead counsel motions and this fee application from the aggregate lodestar figure.

then motivated Defendants to engage in settlement negotiations, which were hard fought and took place over the course of almost one year. On May 27, 2021, Class Counsel moved the Court for preliminary approval of the Settlement Agreement. *See* ECF No. 91. On August 24, 2022, the Court preliminarily approved the Settlement Agreement and scheduled the deadlines for further motions (including the present motion) as well as the Final Approval Hearing. *See* ECF No. 94.

In performing these and other tasks, Class Counsel has expended approximately 584 hours of attorney time. *See* Plaintiff's Counsel's Declarations. This amount of hours is reasonable for complex class actions of this type and was compiled from contemporaneous time records maintained by each individual attorney or paraprofessional who performed work on the case. *See id.* Moreover, the hourly rates are reasonable. *See e.g., Vista Outdoor, Inc. v. Reeves Family Tr.*, 2018 WL 3104631, at *6 (S.D.N.Y. May 24, 2018) (finding reasonable hourly partner rates between \$1,165 and \$1,260 and hourly associate rates between \$569.02 and \$753.42 (citing *MSC Mediterranean Shipping Co. Holdings S.A. v. Forsyth Kownacki LLC*, 2017 WL 1194372, at *3 (S.D.N.Y. Mar. 30, 2017)); *see also U.S. Bank Nat'l Ass'n v. Dexia Real Estate Capital Mkts.*, 2016 WL 6996176, at *8 (S.D.N.Y. Nov. 30, 2016) (“[P]artner billing rates in excess of \$1000 an hour[] are by now not uncommon in the context of complex commercial litigation.”) (internal quotation marks omitted). Using the lodestar of \$440,337.66 as a “cross check,” the requested Fee Award of \$466,798.00 results in a tiny multiplier of approximately 1.06, which is reasonable.³

³ *See, e.g., In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (approving attorneys' fees constituting a multiplier of 6.36 times the lodestar); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (“Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers.”); *Asare v. Change Grp. Of N.Y., Inc.*, 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) (“Typically, courts use multipliers of 2 to 6 times the lodestar.”).

The requested fee award is also meant to compensate for work still to be performed in the future. Following submission of this motion, Plaintiff's Counsel will still need to, among other things: (1) draft and file a motion for final approval of the Settlement; (2) prepare for and attend the Final Approval Hearing before the Court; (3) address any objections that may be raised to the Settlement; (4) communicate with Settlement Class members to answer any questions they may have or address any issues with the claims process; and (5) if the Settlement is approved, continue to work with the Settlement Administrator to ensure that the Settlement is fully implemented and all claims are timely and accurately paid. *See* Klinger Decl., ¶ 27, Rivas Decl., ¶ 28, Leslie Decl., ¶ 30; *see also Parker v. Jekyll & Hyde Entm't Holdings, L.L.C.*, 2010 WL 532960, at *2 (S.D.N.Y. Feb. 9, 2010) (“[A]s class counsel is likely to expend significant effort in the future implementing the complex procedure agreed upon for collecting and distributing the settlement funds, the multiplier will diminish over time.”). Accordingly, this factor strongly supports the requested Fee Award.

2. The Magnitude and Complexity of the Litigation

The magnitude and complexity of the Litigation support the Fee Award sought. “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 classwide relief would require that Plaintiff, *inter alia*, succeed in prevailing on a motion for class certification and any motion for decertification; defeating any future motions for summary judgment; and ultimately obtaining a class judgment following trial. This process, as with any class action litigation, would be fraught with risks at every stage, particularly when Defendants claim many class members are subject to an arbitration clause. And at the end of the

day, while Plaintiff believes that he would be able to vindicate the claims at trial, Defendants take the opposite view, and a jury might agree with either Plaintiff or Defendants.

An additional challenge is the calculation of class-wide damages stemming from the Data Incident, which would be a complicated and costly process. *See, e.g., Ebbert v. Nassau Cty.*, 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 Plaintiff is confident that he could establish the damages incurred by the Settlement Class to the Court’s satisfaction, the Settlement eliminates this complexity and risk. And even if Plaintiff was 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.”).

This case’s complexity is not diminished by the fact that Plaintiff’s Counsel was able to reach a prompt and efficient settlement. To do so on terms that provide important relief to Plaintiff and the Settlement Class members, Class Counsel were required to conduct prolonged settlement negotiations over the terms and then the Settlement Agreement for approximately a year. *See* Klinger Decl., ¶ 15-16, Rivas Decl., ¶¶ 15-16, Leslie Decl., ¶ 15-16. At a minimum, absent settlement, litigation (and potential appellate review) of these issues would likely continue for years before Plaintiff 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, Plaintiff and the Settlement Class members avoid significant expense and delay, and instead ensure a fair and meaningful recovery for the Settlement Class. *See Babcock v. C.*

Tech Collections, Inc., 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.*, 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.

3. The Risks of the Litigation

The risks of continuing to litigate this case through trial strongly support the requested fee award. This factor is often cited as the “first, and most important, *Goldberger* factor.” *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 361 (E.D.N.Y. 2010) (internal quotation marks omitted). Class Counsel took the risk of prosecuting this Litigation on a full contingency basis, without charging Plaintiff or any Settlement Class members for fees or expenses. *See* Klinger Decl., ¶ 28, Rivas Decl., ¶ 29, Leslie Decl., ¶ 29; *see also Goldberger*, 209 F.3d at 53 (“(o)f course contingency risk . . . must be considered in setting a reasonable fee.”); *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).⁴

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. Class action suits “have a well-deserved reputation as being most complex.” *Rosenfeld v. Lenich*, 2021 WL 508339, at *5 (E.D.N.Y. Feb. 11, 2021) (internal quotation marks omitted); *In re Sonic Corp. Customer Data*

⁴ In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974), *abrogated on other grounds by Goldberger*, the Second Circuit observed that “[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success.”

Sec. Breach Litig., 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) (“Data breach litigation is complex and risky.”).

Settlements resolve any inherent uncertainty on the merits, and are therefore strongly favored by the courts, particularly in class actions. *See Wal-Mart*, 396 F.3d at 116. The parties disagree about the merits of Plaintiff’s claims and there is substantial uncertainty about the ultimate outcome of this Litigation. Assuming that the Litigation was to proceed, the hurdles that Plaintiff would face prior to certification and trial, as discussed *supra*, Section II.B.2, are significant.

In pursuing the investigation and Litigation against Defendants, Class Counsel were aware that resolution of the case in Plaintiff’s favor might take years, with the possibility that the claims would never be vindicated. *See Klinger Decl.*, ¶ 28-30, *Rivas Decl.*, ¶ 29-31. Despite this, Class Counsel vigorously investigated, negotiated and litigated this case without any assurance that they would ever be compensated. All of these risks were apparent when Plaintiff’s Counsel began this action, further justifying the requested fee award.

4. The Quality of Representation

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., MetLife Demutualization*, 689 F. Supp. 2d at 362.

Here the high quality of Class Counsel’s representation comes into focus when considering the challenges they faced and the benefits they have attained for the Settlement Class. For example, many data breach class actions are dismissed at the pleading stage due to Article III standing. ECF No. 58 (Defendants’ MTD at 4-13 (citing cases)). Here, however, Plaintiff was

able to defeat Defendants' challenge on the grounds of Article III standing where others have failed.

Further, the primary goals of the Litigation were to provide monetary compensation for the Settlement Class members for losses stemming from the Data Incident. Class Counsel's efforts in the Litigation achieved those important goals, even on behalf of those who may be subject to arbitration. Class Counsel were also able to negotiate the added benefit of the Credit Financial Protections for 18 months, with a conservative retail value of \$1,482,192.⁵ While Defendants initially provided their employees with credit monitoring when they announced the Data Incident, identity thieves may take a year or more to use stolen data to commit a crime.⁶

Class 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. *See* Klinger Decl., ¶ 6, Rivas Decl., ¶ 6, Leslie Decl., ¶ 5. And Class Counsel obtained these results while facing opposing counsel of significant skill and reputation. *See Jermyn v. Best Buy Stores, L.P.*, 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.

⁵ Courts use the retail price of credit monitoring to determine the value of the benefits to class members. *See, e.g., In re Volkswagen and Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 169 (D. Mass. 2015).

⁶ *See United States Government Accountability Office, Report to Congressional Requesters, "PERSONAL INFORMATION, Data Breaches are Frequent, but Evidence of Resulting Identity Theft is Limited; However, the Full Extent is Unknown,"* at p. 6, available at <https://www.gao.gov/products/gao-07-737> (last visited Nov. 8, 2022).

5. The Requested Fee in Relation to the Settlement

“[T]he percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement.” *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (internal quotation marks omitted). Where the size of the fund is relatively small, courts typically find that requests for a greater percentage of the fund are reasonable. *See Hicks v. Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) (“settlement amount of \$10 million does not raise the windfall issue in the same way as would a \$100 million settlement”); *see also Beckman*, 293 F.R.D. at 481 (a 33% fee is not excessive “because the requested amount is ‘consistent with the norms of class litigation in this circuit’”).

Class Counsel seek \$466,798.00 or (25% of the value of the settlement benefits) in attorneys’ fees. This amount is set against the total value of the Settlement for: (1) cash payments of Settlement Class Member claims up to \$350,000.00; (2) the value of the Credit Monitoring Protections, valued at \$1,482,192 on the low end, which every class member will receive without the need to file a claim⁷; and (3) costs of notice and administration up to \$35,000.00 to be paid separately by Defendants.

Class Counsel’s request of 25% of the value of the Settlement benefits is eminently reasonable, as the amount of attorneys’ fees awarded under the percentage methodology in this Circuit is often one-third of the settlement value or higher. *See, e.g., Torres v. Gristede’s Operating Corp.*, 519 F. App’x 1, 5-6 (2d Cir. May 22, 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.*, 2017 WL 5508915, at *3 (S.D.N.Y. Apr. 28, 2017), ECF Nos. 60 at 6 & 76 (awarding 33.3% of \$4.5 million settlement

⁷ Rather than file a claim, Class Members received a code on their notice form that will allow them to enroll in the Credit Monitoring Protections.

fund); *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 216, 220-22 (S.D.N.Y. 2015) (approving one-third of \$4,650,000 settlement as fees); *Mayhew, et al. v. KAS Direct, LLC, et al.*, No. 7:16-cv-06981-VB, ECF Nos. 133 at 1-2 & 149 at 6 (S.D.N.Y. Nov. 30, 2018) (33.3% of \$2,215,000 settlement fund); *In re Dental Supplies Antitrust Litig.*, No. 1:16-cv-00696-BMC-GRB, ECF Nos. 328 at 1, 350 at 28 (E.D.N.Y. June 25, 2019) (awarding one-third of \$80,000,000 settlement fund); *see also, e.g., Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (finding 38% of fund as reasonable). Accordingly, the relation of the fee request to the value of the Settlement supports approval of the requested fee award. *See Torres*, 519 F. App'x at 5 (award of 52.2% of settlement value “does not constitute an abuse of discretion simply because it deviates materially from the percentage usually awarded in similar cases”) (internal quotation marks omitted).

6. Public Policy Considerations Favor the Requested Fee Award

Public policy considerations weigh in favor of granting the Fee Application. In awarding attorneys' fees, the Second Circuit “take[s] into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation.” *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999).

Courts have recognized that fee awards in cases like this serve the dual purposes of encouraging “private attorney[s] general” to seek redress for violations and discouraging future misconduct of a similar nature. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980); *Beckman*, 293 F.R.D. at 477. This class action on behalf of the Settlement Class has “resulted in a settlement that will improve the experiences of customers” *Jermyn*, 2012 WL 2505644, at *12. Moreover, through this action, Plaintiff has operated as a private attorney general to police the fallout from the alleged Data Incident. Only Plaintiff's and Class Counsel's

willingness to bring this Litigation has secured the Settlement Class with significant compensation for their injuries stemming from the Data Incident.

An award of attorneys' fees helps to ensure that "plaintiffs' claims [will] . . . be heard." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 189 (W.D.N.Y. 2005). If courts denied sufficient attorneys' fees, "no attorneys . . . would likely be willing to take on . . . small-scale class actions[.]" *Id.*; see also *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003), *aff'd sub nom, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005) (class action fee awards "must . . . serve as an inducement for lawyers to make similar efforts in the future"). This and the other *Goldberger* factors support approval of the attorneys' fees requested.

7. The Absence of Objections to the Fee Request Further Support It Is Reasonable

An additional factor in favor of the reasonableness of a request for attorneys' fees is the extent to which the class has raised any objections to the request. See, e.g., *Guevoura Fund Ltd. v. Sillerman*, 2019 WL 6889901, at *22 (S.D.N.Y. Dec. 18, 2019) (absence of objections to fee request at time of final approval hearing, despite deadline for objections having not yet occurred, "militates in favor of approval of the Fees as requested."). The deadline for objections in the Litigation is November 19, 2021. See ECF No. 180. As of the date of the filing of this Motion, no objections to the fee request have been received. Accordingly, this factor weighs in favor of approval of the attorneys' fees requested.

D. CLASS COUNSEL'S REQUESTED COSTS ARE REASONABLE, INCIDENTAL TO LITIGATION AND SHOULD BE APPROVED.

Courts typically permit counsel to recover their reasonable out-of-pocket expenses. *Beckman*, 293 F.R.D. at 482, citing *In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003). "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 at 183 n.3 (internal quotation marks omitted).

Class Counsel seek reimbursement of costs and expenses totaling \$12,943.16 spent on filing costs and mediation fees. *See* Klinger Decl., ¶ 28, Leslie Decl., ¶ 32, Maccarone Decl., ¶ 6. These expenses are of the type of expenses routinely charged to hourly clients, are appropriately documented, and were necessary and reasonable to prosecute the litigation.

E. THE REQUESTED SERVICE AWARD IS REASONABLE AND SHOULD BE APPROVED.

Service awards are commonly awarded in class action cases to compensate plaintiffs for the time and effort they expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained. *Beckman*, 293 F.R.D. at 483, *citing* *Reyes v. Altamarea Group LLC*, 2011 WL 4599822, at *9 (S.D.N.Y. Aug. 16, 2011). Courts consider such compensation important. *See Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *8 (E.D.N.Y. Nov. 20, 2012).

For his commitment to this case and work on behalf of the Settlement Class, Plaintiff Fowler seeks \$1,500. Plaintiff was subjected to an extensive interview and then reviewed pleadings and other documents associated with the case. He also submitted documentation to prove he was impacted by the Data Incident. He was prepared to take on the responsibilities of a class representative, including being deposed and testifying at trial. In opposition to the motion to dismiss, Plaintiff submitted a declaration explaining how he was impacted by the Data Incident. ECF No. 64-3.

The amount requested is reasonable and modest relative to awards regularly granted by courts in this jurisdiction and the request should be granted. *See Beckman*, 293 F.R.D. at 483 (granting an award of \$5,000 to \$7,500 to plaintiffs); *Dornberger v. Metro. Life Ins. Co.*, 203

F.R.D. 118, 124–25 (S.D.N.Y. 2001) (noting in class actions representative plaintiff awards for \$2,500 or more are commonly accepted).

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court award Class Counsel 25% of the value of the Settlement benefits (or \$466,798.00), \$12,943.16 for reimbursement of expenses, and a \$1,500 Service Award to Plaintiff Fowler.

Respectfully submitted,

Dated: November 8, 2022

By: /s/ Alec M. Leslie

Joseph I. Marchese
Alec M. Leslie
Bursor & Fisher, P.A.
888 Seventh Avenue
New York, NY 10019
Tel: 646-837-7150
Email: jmarchese@bursor.com
aleslie@bursor.com

Gary M. Klinger
**Milberg Coleman Bryson Phillips
Grossman, PLLC**
227 W. Monroe Street, Suite 2100
Chicago, IL 60606
Tel: 847-208-4585
Email: gklinger@milberg.com

Rosemary M. Rivas
Gibbs Law Group LLP
1111 Broadway, Suite 2100
Oakland, CA 94607
Tel: 510-350-9700
Email: rmr@classlawgroup.com

Class Counsel