UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

In re: BUILDERS MUTUAL DATA SECURITY INCIDENT LITIGATION	Case No. 5:23-CV-579-M-KS

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

Pursuant to Fed. R. Civ. P. 23(h), this Court's Preliminary Approval Order (ECF No. 42), and the Settlement Agreement entered into between the Parties (ECF No. 40, Ex. 1) ("S.A."),[1] Plaintiffs Matthew Kocher, Mark Rogolino, and James Jackson collectively file this memorandum of law in support of their Motion for Attorneys' Fees, Reimbursement of Expenses, and Service Awards.

I. BACKGROUND

A. Procedural History

The Settlement Agreement entered into by the Parties and preliminarily approved by the Court seeks to resolve this class action, which arises out of Builders Mutual Insurance Company and Builders Mutual Insurance Company, Inc.'s ("Defendants" or "Builders Mutual") alleged failure to safeguard the sensitive information that it maintained regarding Plaintiffs Matthew Kocher, Mark Rogolino, and James Jackson (collectively "Plaintiffs" or "Settlement Class Representatives"), and Settlement Class Members. Plaintiffs allege that, on December 14, 2022, Builders Mutual's network was hacked (the "Data Incident"). Plaintiffs allege that this hacking

[1] Capitalized terms herein have the same meaning as those set forth in the Settlement Agreement.

exposed certain personally identifiable information ("PII") as well as personal health information ("PHI") (collectively, the "Private Information") of Builders Mutual's stakeholders, customers, employees of policyholders, current and former employees, and claimants. Specifically, the following types of Private Information were allegedly exposed: names, Social Security numbers, dates of birth, medical information, health insurance information, and worker's compensation information provided in connection with employment. On September 29, 2023, Builders Mutual began notifying Plaintiffs and the Settlement Class about the Data Incident.

On October 16, 2023, Plaintiff Matthew Kocher, individually and on behalf of a putative class, filed an action against Builders Mutual in the Eastern District of North Carolina, titled *Kocher v. Builders Mutual Insurance Company et al*., Case No. 5:23-cv-579-M. On October 24, 2023, Plaintiff Mark Rogolino filed a class action complaint against Defendants arising out of the same Data Incident (Case No.5:23-cv-00597-BO) and on October 27, Plaintiff James Jackson filed a class action complaint against Defendants arising out of the same Data Incident (Case No. 4:23-cv-00181-M). Plaintiffs moved to consolidate their actions on November 7, 2023, which was granted by the Court. Plaintiffs subsequently filed a Consolidated Complaint on January 16, 2024 alleging: Negligence, Negligence *Per Se*, Breach of Implied Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, Breach of Fiduciary Duty, Breach of Third-Party Beneficiary Contract, Unjust Enrichment, and Violation of the North Carolina Unfair and Deceptive Trade Practices Act.

B. History of Negotiations

After meeting and conferring on multiple occasions and exchanging and reviewing informal, pre-mediation discovery, the Parties mediated the case on April 29, 2024 before retired Federal Magistrate Judge and experienced data breach mediator, Morton Denlow of JAMS. The

full-day mediation resulted in a proposed agreement, including certain material terms, which are memorialized in the S.A. The Parties agreed to settle the Litigation on the terms and conditions set forth in the Settlement Agreement in recognition that the outcome of the Litigation would be uncertain, and that achieving a final result through the Litigation would require substantial additional risk, uncertainty, discovery, time, and expense for the Parties.

C. Summary of the Settlement Achieved

The proposed settlement provides substantial relief to the proposed Settlement Class, which includes approximately 106,918 individuals. *See* S.A. ¶ 48. The Settlement negotiated on behalf of the Settlement Class provides for the creation of a non-reversionary Settlement Fund in the amount of one million four hundred and seventy-five thousand dollars ($1,475,000), which will be used for the payment of the costs of notice and settlement administration, applicable taxes, Plaintiffs' Fee Award and Costs, Service Awards to the Class Representatives, and payments to Settlement Class Members, which will be allocated pursuant to Section IV of the Settlement Agreement as described below. S.A. ¶ 62-79.

1. <u>Compensation for Unreimbursed Economic Losses</u>: The Settlement Administrator, from the Settlement Fund, will provide compensation, up to a total of $10,000 per person who is a Participating Settlement Class Member, upon submission of a claim and supporting documentation, for Unreimbursed Economic Losses as a result of the Data Incident, including, without limitation, unreimbursed losses relating to fraud or identity theft; professional fees including attorneys' fees, accountants' fees, and fees for credit repair services; costs associated with freezing or unfreezing credit with any credit reporting agency; credit monitoring costs that were incurred on or after the Data Incident through the date of claim submission; and

miscellaneous expenses such as notary, fax, postage, copying, mileage, and long-distance telephone charges.

2. Compensation for Lost Time: The Settlement Administrator, from the Settlement Fund, will provide compensation for up to 6 hours of lost time, at $25.00/hour ($150 cap), for time spent mitigating the effects of the Data Incident. Participating Settlement Class Members may submit claims for up to 6 hours of lost time with only an attestation demonstrating that they spent the claimed time responding to issues raised by the Data Incident. This attestation may be completed by checking a box next to the sentence: "I swear and affirm that I spent the amount of time noted in response to the Builders Mutual Data Incident." Claims for lost time can be combined with claims for unreimbursed ordinary and/or extraordinary economic losses but are subject to the $10,000 cap.

3. Alternative Cash Payment: In the alternative to the remedies outlined above, participating Settlement Class Members can also elect to make a claim for a $100 Alternative Cash Payment. To receive this benefit, Participating Settlement Class Members must submit a valid claim form, but no documentation is required to make a claim. The amount of the Alternative Cash Payments will be increased or decreased on a *pro rata* basis, depending upon the number of valid claims filed and the amount of funds available for these payments.

4. Credit Monitoring: Settlement Class Members are eligible to enroll in three (3) years of Credit Monitoring Services, upon submission of a valid Claim Form regardless of whether the Participating Settlement Class Member submits a claim for reimbursement of Unreimbursed Economic Losses or Lost Time.

II. LEGAL ARGUMENT

Rule 23(h) of the Federal Rules of Civil Procedure provides that in a class action settlement, "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." FED. R. CIV. P. 23(h). The Supreme Court has "recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); s*ee United States v. Tobias*, 935 F.2d 666, 667 (4th Cir. 1991) (explaining common fund is an "equitable exception to the "American rule" that parties bear their own costs of litigation"). The common fund doctrine vests the district court holding jurisdiction over the fund to spread the costs of litigation proportionately across all persons benefited by the suit. *Id*. The Supreme Court has "applied it in a wide range of circumstances as part of [its] inherent authority." *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 104 (2013) (collecting cases).

Within the Fourth Circuit, the percentage-of-the-fund method "is the preferred approach to determine attorneys' fees." *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 U.S. Dist. LEXIS 193107, at *7 (M.D.N.C. Sept. 29, 2016) (internal citation omitted); *see also Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 758 (S.D.W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases.") (collecting cases). Even so, courts in the Fourth Circuit may incorporate a lodestar cross-check into their review of percentage-based attorneys' fee requests "to ensure the fee award is reasonable." *See, e.g., In re Capital One Consumer Data Sec. Breach Litig.*, No. 1:19-md-2915 (AJT/JFA), 2022 U.S. Dist. LEXIS 213070, at *12 (E.D. Va. Nov. 17, 2022) ("*In re Capital One*") (citing *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 467 (D. Md. 2014)). As set forth in

Section II(D), *infra*, application of both the percentage of the fund analysis as well as a lodestar cross-check supports the fee award Plaintiffs seek.

A. Percentage-of-the-Fund Method is Appropriate

The award of attorneys' fees is within the sound discretion of the trial judge. *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (further citation omitted). While the Fourth Circuit has not made obligatory a particular method of determining fees in common fund cases, it has recognized the financial significance of the contingency fee and associated risks. *In re Abrams & Abrams, PA*, 605 F.3d 238, 245 (4th Cir. 2010); *Brundle o/b/o Constellis Employee Stock Ownership Plan v. Wilmington Tr., NA*, 919 F.3d 763, 786 (4th Cir. 2019), *as amended* (Mar. 22, 2019) ("courts routinely impose enhanced common fund awards to compensate counsel for litigation risk at the expense of beneficiaries who do not shoulder this risk.").

"Several district courts in this circuit have . . . elected to use the percentage method instead of the lodestar method." *Ferris v. Sprint Communs. Co. L.P.*, Civil Action No. 5:11-cv-00667-H, 2012 U.S. Dist. LEXIS 198702, at *6 (E.D.N.C. Dec. 13, 2012) (collecting cases). "Indeed, 'there is a consensus among the federal circuit courts of appeal that the award of attorneys' fees in common fund cases may be based on a percentage of the recovery. This consensus derives from the recognition that the percentage of fund approach is the better-reasoned and more equitable method of determining attorneys' fees in such cases.'" *Id.; see also Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 503 (E.D. Va. 1995) (declining to utilize the lodestar method in a common fund case because many "courts ... have concluded that the percentage method is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases"); *Rosales v. Rock Spring Contracting LLC*, Civil Action No. 3:23CV407 (RCY), 2024 U.S. Dist. LEXIS 60970, at *28 (E.D. Va. Apr. 2, 2024)

(noting courts in the district prefer the percentage method for common fund cases); *Gagliastre v. Capt. George's Seafood Rest., LP*, No. 2:17cv379, 2019 U.S. Dist. LEXIS 90468, at *17 (E.D. Va. May 29, 2019) (indicating that a lodestar cross-check was unnecessary); *Devine v. City of Hampton*, Civil Action No. 4:14cv81, 2015 U.S. Dist. LEXIS 177155, at *3 (E.D. Va. Dec. 1, 2015) (noting that courts may use lodestar principles to cross-check for reasonableness, but declining to do so); *Arledge v. Domino's Pizza, Inc.*, No. 3:16-cv-386-WHR, 2018 U.S. Dist. LEXIS 179474, at *13 (S.D. Ohio Oct. 17, 2018) (noting that a lodestar cross-check was "unnecessary").

The percentage-of-the-fund method also provides a strong incentive for plaintiff's counsel to obtain the maximum possible recovery in the shortest time possible under the circumstances by removing the incentive, which occurs under the lodestar method, for class counsel to "overlitigate" or "draw out" cases in an effort to increase the number of hours used to calculate their fees. *See Jones*, 601 F. Supp. 2d at 759*; see also Ferris*, 2012 U.S. Dist. LEXIS 198702, at *6 (E.D.N.C. Dec. 13, 2012) (noting that the percentage method "better aligns the interests of class counsel and class members because it ties the attorneys' award to the overall result achieved rather than the hours expended by the attorneys"); *DeWitt v. Darlington Cty.*, No. 4:11-cv-00740, 2013 U.S. Dist. LEXIS 172624, at *6 (D.S.C. Dec. 6, 2013) ("The percentage-of-the fund approach rewards counsel for efficiently and effectively bringing a class action case to a resolution, rather than prolonging the case in the hopes of artificially increasing the number of hours worked on the case to inflate the amount of attorneys' fees on an hourly basis.").

Under the percentage method, the attorneys' fee award is calculated using the gross amount of benefits provided to class members, including administrative costs, attorneys' fees and expenses. *See Ferris*, 2012 U.S. Dist. LEXIS 198702, at *7-8*; see also In re Zetia (Ezetimibe)*

Antitrust Litig., 699 F. Supp. 3d 448, 461 (E.D. Va. 2023) ("As its name suggests, the percentage-of-recovery method calculates an award based on a percentage of the recovery for the Class.") (*citing Phillips v. Triad Guaranty Inc.*, No. 1:09CV71, 2016 U.S. Dist. LEXIS 60950, at *2 (M.D.N.C. May 9, 2016)). "Many courts in the Fourth Circuit have held that attorneys' fees in the amount of 1/3 of the settlement fund is reasonable." *Huffman v. Team Carolinas, Inc.,* No. 4:19-cv-00034, 2021 U.S. Dist. LEXIS 264539, at *13 (E.D.N.C. Mar. 3, 2021); *see also McAdams v. Robinson*, 26 F. 4th 149, 162 (4th Cir. 2022) (affirming attorneys' fees award of $1,300,00.00 or 43% of the $3,000,000.00 common fund class action settlement); *Kruger*, 2016 U.S. Dist. LEXIS 193107, at *6 (awarding attorneys' fees of $10,666,666.00 comprising 1/3 of the monetary benefits made available to the class); *Chrismon v. Pizza*, No. 5:19-cv-155-BO, 2020 U.S. Dist. LEXIS 119873, at *12 (E.D.N.C. July 7, 2020) (noting that "[m]any courts in the Fourth Circuit have held that attorneys' fees in the amount of 1/3 of the settlement fund is reasonable.") (collecting cases). Attorneys' fees in common fund cases typically reflect "around one-third of the recovery." 5 NEWBERG ON CLASS ACTIONS § 15:73 (5th ed. 2016) (noting that a "33% figure provides some anchoring for discussions of class action awards [to counsel]" and that "many courts have stated…fee award in class actions average around one-third of the recovery."); *accord* Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUDIES, 27, 31, 33 (2004) (finding that courts consistently award 30-33% of the common fund).

Here, Class Counsel, with Plaintiffs' assistance, have obtained significant results and benefits for the Settlement Class in the form of monetary payments from the $1,475,000 non-reversionary common fund. Accordingly, Plaintiffs' request of one-third of the Settlement Fund, or $491,617.50, and reimbursement of reasonably incurred expenses of $12,661.51 is reasonable

under the percentage-of-the-fund method and consistent with the law in this and other circuits. As explained below, the factors courts generally consider when assessing percentage-of-the-fund requests demonstrate the reasonableness of Class Counsel's requested fee, which is further confirmed by cross-checking the requested amount against the calculated lodestar.

B. The *Mills* Factors Support Plaintiffs' Fee Request

The Fourth Circuit has not required specific factors for consideration in determining an appropriate attorneys' fees award in a common fund case. Instead, there are two sets currently deployed in this Circuit, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974) (adopted in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978)), and *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 261 (E.D. Va. 2009).[2] Both focus on the reasonableness of the fees, and many of the factors overlap. The "*Mills* Factors," which include "(1) the results obtained for the [c]lass; (2) objections by members of the [c]lass to the settlement terms and/or fees requested by counsel; (3) the quality, skill, and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) public policy; and (7) awards in similar cases" (*In re Mills Corp. Sec. Litig.*, 265 F.R.D. at 261), support the fee request here.[3]

1. <u>Class Counsel Obtained an Excellent Result for the Class.</u>

[2] The *Johnson* factors are as follows: (1) the time and labor required in the case, (2) the novelty and difficulty of the questions presented, (3) the skill required to perform the necessary legal services, (4) the preclusion of other employment by the lawyer due to acceptance of the case, (5) the customary fee for similar work, (6) the contingency of a fee, (7) the time pressures imposed in the case, (8) the award involved and the results obtained, (9) the experience, reputation, and ability of the lawyer, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship between the lawyer and the client, and (12) the fee awards made in similar cases.

[3] Some district courts in this Circuit have applied a slightly different version of this standard, replacing the sixth factor – public policy considerations – with "the amount of time devoted to the case by plaintiffs' counsel." *See, e.g.*, *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 843 (E.D. Va. 2016).

The most critical factor in determining the reasonableness of an attorney fee award is "the degree of success obtained." *McDonnell v. Miller Oil Co.*, 134 F.3d 638, 641 (4th Cir. 1998) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). The results achieved and benefits conferred in here are substantial, with Defendants agreeing to establish a $1,475,000 non-reversionary common fund that will provide for up to $10,000.00 for out-of-pocket expenses, compensation for lost time up to 6 hours at $25.00/hour ($150.00 cap), an alternative cash payment, and additional credit reporting benefits to protect Class Members' Private Information for years to come. *See supra* § I(D). These benefits reflect an enormous success given the circumstances, as they directly address the damages claimed by Plaintiffs and the Settlement Class by reimbursing them for any out-of-pocket losses and lost time stemming from the Data Incident, cash payments in recognition of the injury they've suffered and/or are at a substantial risk of suffering in the future as a result of the Data Incident, and providing the opportunity to protect their identity in the future. The size of the Settlement Fund and the number of persons benefitting from the Settlement also weigh in favor of the reasonableness of the fees requested. The result here is all the more extraordinary in light of the very real litigation and non-litigation risks faced by Plaintiffs in this Litigation, especially given that data breach class actions in general are inherently risky in light of the continuously developing law thereon. Further, the Settlement benefits are available to the Settlement Class immediately rather than years from now, which would be the case absent settlement. The excellent results achieved therefore justify the requested fee award.

2. The Class Has Thus Far Responded Favorably to the Settlement.

While Plaintiffs will provide more detailed information in connection with their forthcoming motion for final approval, the response from the Settlement Class to date has been overwhelmingly positive, no opt-outs or objections submitted. *Kyle Stechert v. Travelers Home &*

Marine Ins. Co., No. 17-0784-KSM, 2022 U.S. Dist. LEXIS 113277, at *18 (E.D. Pa. June 27, 2022*)*, at *12 (E.D. Pa. June 27, 2022) ("No one has objected to any part of the Settlement, including to the $1,210,000.00 carveout for attorneys' fees. The lack of objection from the Settlement Class weighs in favor of approval."). Thus, this factor currently weighs heavily in favor of Plaintiffs' fee request.

3. The Skill Required to Perform the Services Rendered Supports the Fee Request.

The expertise of the attorneys involved in this Litigation, combined with the complexity of the case, likewise supports the requested fee award. Class Counsel respectfully submit that they have demonstrated skill commensurate with their reputations and prosecuted a tough case on behalf of the Plaintiffs and the Settlement Class. *See generally* Joint Declaration of Proposed Class Counsel Supporting Motion For Preliminary Approval of Class Action Settlement (ECF No. 40). Three leading class action firms in the field of data privacy litigation, who serve as counsel on hundreds of similar data privacy matters, cooperated to efficiently prosecute this action, with each investing substantial hours of both attorney and paralegal time. *See* Borrelli Decl., ¶¶ 13-17.

4. Data Breach Cases are Highly Complex

Numerous courts have recognized that data privacy cases are, by nature, inherently complex. *See In re Novant Health, Inc.,* No. 1:22-CV-697, 2024 U.S. Dist. LEXIS 107949, at *20 n.6 (M.D.N.C. June 17, 2024) (*quoting In re TikTok, Inc., Consumer Priv. Litig.*, 617 F. Supp. 3d 904, 941 (N.D. Ill. 2022)) (""[d]ata privacy law is a relatively undeveloped and technically complex body of law"); *In re Equifax Customer Data Sec. Breach Litig*., 2020 U.S. Dist. LEXIS 118209, at *177 (N.D. Ga. Mar. 17, 2020) (recognizing the complexity and novelty of issues in data privacy class actions*); Blake v. R&B Corp. of Va.,* No. 4:23-cv-66, 2023 U.S. Dist. LEXIS 127456, at *6 (E.D. Va. July 20, 2023) (*quoting Gordon v. Chipotle Mexican Grill, Inc.*, Civil

Action No. 17-cv-01415-CMA-SKC, 2019 U.S. Dist. LEXIS 215430, at *1 (D. Colo. Dec. 16, 2019)) ("data breach class action cases are 'particularly risky, expensive, and complex'"). This case is no exception to that rule. It involves novel data privacy issues involving over 106,918 Class Members, complicated and technical facts, and well-funded and motivated defendants.

5. Plaintiffs and Class Counsel Faced a Substantial Risk of Non-Payment.

Numerous courts have noted that "data breaches are a 'risky field of litigation' because they 'are uncertain and class certification is rare.'" *In re Capital One*, 2022 U.S. Dist. LEXIS 213070, at *8 (E.D. Va. Nov. 17, 2022) (*Fulton-Green v. Accolade, Inc*., No. 18-274, 2019 U.S. Dist. LEXIS 164375, at *8 (E.D. Pa. Sept. 24, 2019*); see also Blake*, 2023 U.S. Dist. LEXIS 127456, at *6 (E.D. Va. July 20, 2023) (*quoting Gordon*, 2019 U.S. Dist. LEXIS 215430, at *1) ("data breach class action cases are 'particularly risky, expensive, and complex'"). Further, "[t]he risk of nonpayment incurred by [Plaintiffs' Counsel] is evident in the fact that they undertook this action on an entirely contingent fee basis." *In re Mills*, 265 F.R.D. 246, 263 (E.D. Va. 2009). Courts have recognized that such risk deserves extra compensation and is a critical factor in determining the reasonableness of a fee. *See, e.g., Stocks v. Bowen*, 717 F. Supp. 397, 402 (E.D.N.C. 1989); *Gilbert LLP v. Tire Eng'g & Distribution, Ltd. Liab. Co.*, 689 F. App'x 197, 201 (4th Cir. 2017); *In re Dunn & Bradstreet Credit Svcs. Cons. Lit.*, 130 F.R.D. 366, 373 (S.D. Ohio 1990); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), aff'd, 889 F.2d 21 (11th Cir. 1990); *In re Cont. Ill, Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992). Thus, the existence of these issues, which were issues of first impression, exemplify that Class Counsel's risk of nonpayment was real and justifies the requested fee.

6. Public Policy Supports the Award

"[P]ublic policy favors incentivizing "capable and seasoned counsel" to undertake complex litigation. *Haney v. Genworth Life Ins. Co.*, Civil Action No. 3:22cv55, 2023 U.S. Dist. LEXIS 26173, at *20 (E.D. Va. Feb. 15, 2023) (*quoting In re The Mills*, 265 F.R.D. at 263). Where there have been "have been no objection(s) to the settlement terms or the requested award of attorneys' fees and expenses," "[t]he attorneys involved as Class Counsel are skilled and experienced and litigated the case on a contingent basis even at risk of non-payment," and the fee request is "within the range of percentage-of-recovery awards that routinely receive approval in this District and the Fourth Circuit," public policy supports granting the proposed fee. *Rodriguez v. Riverstone Cmtys., LLC*, Civil Action No. 5:21-CV-486-CD, 2024 U.S. Dist. LEXIS 22802, at *5 (E.D.N.C. Feb. 2, 2024). Here, as shown throughout this brief, all of these factors are met, and public policy supports the award.

7. Similar Attorneys' Fees Awards have been Approved in Similar Cases.

As evidenced above, the attorneys' fee requested in this case falls well within the range of common fund attorney fee requests in this circuit and nationwide. *See Kruger,* 2016 U.S. Dist. LEXIS 193107, at *7 (M.D.N.C. Sept. 29, 2016) (noting that a "one[-]third fee is consistent with the market rate" in ERISA class action*); Scott v. Family Dollar Stores, Inc*., No. 3:08-cv-00540-MOC-DSC, 2018 U.S. Dist. LEXIS 41908, at *8 (W.D.N.C. Mar. 14, 2018) (awarding one-third of the settlement fund plus reimbursement of costs); *Brown v. Lowe's Cos*., No. 5:13-CV-00079-RLV-DSC, 2016 U.S. Dist. LEXIS 192451, at *11 (W.D.N.C. Nov. 1, 2016) (finding a one-third attorneys' fee reasonable in light of the results obtained, is consistent with Fourth Circuit precedent); *City Nat. Bank v. Am. Commonwealth Fin. Corp.*, 657 F. Supp. 817, 822 (W.D.N.C. 1987) (approving attorney's fee award of one-third of approximately $1.3 million class recovery);

Temp. Servs. v. Am. Int'l Grp., Inc., No. 3:08-cv-00271-JFA, 2012 U.S. Dist. LEXIS 86474, at *22-23 (D.S.C. June 22, 2012) ("A total fee of one-third of the class settlement for all work performed and to be performed in this case is well within the range of what is customarily awarded in settlement class actions. An award of fees in this range for work performed in the creation of a settlement fund has been held to be reasonable by many federal courts") (citations omitted). Here, Class Counsel's fee request amounting to one-third of the Settlement fund falls squarely in line with the typical amount awarded in similar cases and should be approved.

C. Class Counsel's Litigation Expenses are Reasonable

Federal Rule of Civil Procedure 23(h) allows a court approving a class settlement to "award reasonable...nontaxable costs that are authorized by law or by the parties' agreement." Accordingly, courts in the Fourth Circuit allow plaintiffs to recover "reasonable litigation-related expenses as part of their overall award." *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 483 (D. Md. 2014) (internal citation omitted). Recoverable costs may include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988). "Litigation expenses such as supplemental secretarial costs, copying, telephone costs and necessary travel are integrally related to the work of the attorney and the services for which outlays are made may play a significant role in the ultimate success of litigation…." *Daly v. Hill*, 790 F.2d 1071, 1083 (4th Cir. 1986).

The Settlement Agreement permits Class Counsel to request reimbursement of litigation expenses not to exceed $25,000.00. S.A., ¶ 101. Class Counsel's request for litigation expenses of $12,661.51 is reasonable because each expense was incurred in the prosecution of this litigation. Borrelli Decl., ¶ 20. The majority of Class Counsel's expenses were for Judge Denlow's mediation

services. *Id.* ¶ 10. The remaining costs are attributed to the filing fees, the costs of service of process, and pro hac vice admissions, and travel to and from the final approval hearing.[4] *Id*. Courts regularly award litigation expenses in addition to attorneys' fees in class action cases. *See, e.g., Kabore v. Anchor Staffing, Inc*., No. L-10-3204, 2012 U.S. Dist. LEXIS 149761, at *27 (D. Md. Oct. 17, 2012) ("It is well-established that Plaintiffs who are entitled to recover attorneys' fees are also entitled to recover reasonable litigation-related expenses as part of their overall award."). Class Counsel's request for expenses should be approved as fair and reasonable given that counsel has a strong incentive to keep costs and expenses at a reasonable level due to the high risk of no recovery when the fee is contingent.

D. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee Award

Even though it is not necessary to perform a lodestar cross-check, doing so here supports the reasonableness of the fees requested. "A lodestar cross-check first computes the plaintiffs' attorneys' reasonable hourly rate for the litigation and multiplies that rate by the number of hours dedicated to the case," and "then compares that figure with the attorneys' fees award, typically resulting in a positive multiplier." *Genworth*, 210 F. Supp. 3d at 845. When using the lodestar as a cross-check, courts "take a somewhat truncated approach to the lodestar analysis" and "generally do not apply the same scrutiny in a lodestar cross-check as they do when using the lodestar method to calculate the fee." *Thomas v. FTS USA, LLC*, No. 3:13cv825 (REP), 2017 U.S. Dist. LEXIS 45217, at *17 (E.D. Va. Jan. 9, 2017). Thus, when "using the lodestar method as a cross-check," the court "need not apply the 'exhaustive scrutiny' normally required by that method," "[i]nstead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case . .

[4] Travel expenses related to the final approval hearing are not yet included in this total. Class Counsel will provide an update total of their expenses in their motion for final approval.

. ." *Dominion Res. Services, Inc.*, 601 F. Supp. 2d at 765-66 (S.D.W. Va. 2009) (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000)).

Despite the risks, complexities, and challenges posed by this Litigation, Class Counsel have devoted approximately $193,889.50 to date in attorney time to this matter, resulting in a current multiplier of 2.5. Borrelli Fee Decl. ¶ 13.[5] A 2.5 multiplier is reasonable and well within accepted ranges for class actions generally, and is consistent with fee rulings in similar cases within the Fourth Circuit. *See, e.g., Genworth*, 210 F. Supp. 3d at 845 ("[d]istrict courts within the Fourth Circuit have regularly approved attorneys' fees awards with 2-3 times lodestar multipliers."); *In re Titanium Dioxide Antitrust Litig., 2013 U.S. Dist. LEXIS 176099 (D. Md. Dec. 13, 2013)* (court awarded attorneys' fees of one-third of settlement fund, which resulted in a multiplier of 2.39); *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 790 (E.D. Va. 2001) (approving a 2.6 times lodestar multiplier); *DeLoach v. Philip Morris Cos.*, No. 1:00CV01235, 2003 U.S. Dist. LEXIS 23240 (M.D.N.C. Dec. 19, 2003) (approving a 4.45 times lodestar multiplier); *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2019 U.S. Dist. LEXIS 163811, at *6 (M.D.N.C. Sep. 25, 2019) (approving a 2.89 times lodestar multiplier).

Further, the lodestar figure above does not include the substantial amount of time that Class Counsel will be required to devote to achieving final approval, responding to any objections, overseeing the claims administration process and the distribution of settlement funds to the Class,

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[5] To whatever extent the court finds Class Counsel's rates to be higher than the prevailing rates in Raleigh, North Carolina, in cases involving "complex issues requiring specialized experience"— such as this one—"it is reasonable to look beyond local rates in calculating the reasonable rate for a lodestar comparison." *Seaman*, 2019 U.S. Dist. LEXIS 163811, at *5; *see also Sims v. BB&T Corp.*, 15-cv732, 2019 U.S. Dist. LEXIS 75839, at *2 (M.D.N.C. May 6, 2019) (stating that "a national market rate is appropriate for matters involving complex issues requiring specialized expertise"); *Kruger*, 2016 U.S. Dist. LEXIS 193107, at *4 (M.D.N.C. Sept. 29, 2016) ("This court finds the relevant market rate for cases such as the present case to be a nationwide market rate."). Class Counsel's hourly rates reflect their national class action practices specializing in complex, high-risk class action and, particularly large data breach cases, and are the rates they customarily charge in these types of cases. *See Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 689 n.12 (D. Md. 2013) (finding hourly rates to be reasonable because, "while somewhat high for this district, [they] are within a reasonable range for firms with national class action practices").

and litigating any appeals. Borrelli Decl., ¶ 16. These additional hours, for which Class Counsel will not receive any additional compensation from the Settlement Fund, effectively reduce the multiplier, and should be considered in evaluating the reasonableness of the fee request. *Id*. Given that the multiplier here falls within a range that has been consistently approved within the Fourth Circuit, a lodestar cross-check strongly supports granting the attorneys' fees requested herein.

E. The Requested Service Award for Each Plaintiff is Reasonable

Courts recognize the purpose and appropriateness of service awards to class representatives. *See, e.g., Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 U.S. Dist. LEXIS 72981, at *6–7 (S.D.W. Va. May 23, 2013) (approving award $7,500.00 per lead Plaintiff); *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14CV238 (DJN), 2016 U.S. Dist. LEXIS 33708, at *6 (E.D. Va. Mar. 15, 2016) (approving a $10,000.00 service award); *Berry v. Schulman*, 807 F.3d 600 (4th Cir. 2015) (approving a $5,000.00 service award). "A fairly typical practice, incentive awards are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Manuel*, 2016 U.S. Dist. LEXIS 33708, at *6 (E.D. Va. Mar. 15, 2016) (internal quotations omitted).

Service awards are "routinely approved" in class actions to "encourage socially beneficial litigation by compensating named plaintiffs for their expenses on travel and other incidental costs, as well as their personal time spent advancing the litigation on behalf of the class and for any personal risk they undertook." *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 472 (S.D.W. Va. 2010); *Berry*, 807 F.3d at 613 (Service awards compensate the class representative for work done on behalf of the class and make up for financial risk undertaken in bringing the action). Serving as a class representative "is a burdensome task and it is true that without class

representatives, the entire class would receive nothing." *Id*. at 473; *see also Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

In this litigation, Plaintiffs put themselves forward in litigating this case, kept abreast of the case's status, participated in settlement negotiations, and discussed with counsel various aspects of the case. *See* Borrelli Decl., ¶ 22; *see Burke v. Shapiro, Brown & Alt, LLP*, No. 3:14-cv-201 (DJN), 2016 U.S. Dist. LEXIS 65120, at *6 (E.D. Va. May 17, 2016). Much larger service awards have been regularly approved by judges in this District and the Fourth Circuit. *See e.g., Speaks v. U.S. Tobacco Coop.*, No. 5:12-CV-729-D, 2018 U.S. Dist. LEXIS 26597, at *9 (E.D.N.C. Feb. 20, 2018) (awarding $10,000 incentive award); *Kruger*, 2016 U.S. Dist. LEXIS 193107, at *6 (granting $25,000.00 service awards); *Brown v. Charles Schwab & Co.*, No. 2:07-cv-03852-DCN, 2011 U.S. Dist. LEXIS 170270 (D.S.C. July 26, 2011(approving $10,000.00 service award to named plaintiff); *Neal v. Wal-Mart Stores, Inc.*, 021 U.S. Dist. LEXIS 57731, at *2 (W.D.N.C. Mar. 19, 2021) (approving service awards of $10,000.00 to each Settlement Class Representative); *see also Manuel*, 2016 U.S. Dist. LEXIS 33708, at *17 n.3 (E.D. Va. Mar. 15, 2016) ("Various studies have found that the average incentive award per plaintiff ranged from $9,355.00 to $15,992.00" citing Newberg on Class Actions § 17.8 (5th ed.)). The requested Service Awards of $5,000.00 each are in-line with what has been approved in similar common fund data privacy class action settlements. *See, e.g., Lutz v. Electromed, Inc.*, No. 21-cv-02198, ECF No. 73 (D. Minn.) (service award of $9,900.00 in a data breach class action); *In re Capital One*, 2022 U.S. Dist. LEXIS 213070, at *15 (approving service award of $5,000.00 to each plaintiff in a data privacy class action).

The Class Representatives amply fulfilled their duties, making the Service Award requested appropriate. Borrelli Decl., ¶ 22. While Class Representatives did not have to undergo

extensive discovery or depositions, Plaintiffs did gather documents and material in support of their claims that were used in drafting their separate complaints and Consolidated Class Action Complaint and were actively involved in the mediation that ultimately resolved this case. *Id.*

III. CONCLUSION

In light of the foregoing, Plaintiffs respectfully request the Court grant Plaintiffs' request for Service Awards in the amount of $5,000 to each Class Representative, $491,617.50 in attorneys' fees, and $12,661.51 in litigation expenses.

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Respectfully submitted,

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