STATE OF NORTH CAROLINA COUNTY OF GUILFORD	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24-CVS-4890-400
ALBERTA STEWART, CRYSTAL ADKINS-PENNIZ, and ABIGAIL HEDGECOCK, individually and on behalf of themselves and all others similarly situated, Plaintiffs v. GREENSBORO COLLEGE, INC., Defendant.	**MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS**

Plaintiffs Alberta Stewart, Crystal Adkins-Pennix, and Abigail Hedgecock ("Plaintiffs"), individually and on behalf of all others similarly situated, submit the following memorandum and exhibits in support of her motion for attorneys' fees, expenses, and service award.

I. INTRODUCTION

On December 13, 2024, this Court preliminarily approved a proposed class action settlement between Plaintiffs and Defendant Greensboro College, Inc. ("Defendant" or "Greensboro"). The Settlement creates a $550,000 non-reversionary Settlement Fund that will be used to pay Settlement Costs, award payments to Settlement Class Members, Administrative Costs, a Service Award to Plaintiff, and Attorneys' Fees and Expenses. From the Settlement Fund, Class Members may claim 3 years of three-bureau credit monitoring, documented out-of-pocket losses up to $5,000, and a *pro rata* cash payment of approximately $75, which may be increased or decreased based on the money remaining in the Settlement Fund after the payment

of any Fee Award and Expenses, Service Awards, Administrative Expenses, and claims for Out-of-Pocket Losses. Additionally, Defendant has or will make changes and improvements to its cybersecurity systems. These are substantial, tangible benefits to the Class Members.

Settlement Class Counsel have zealously prosecuted Plaintiffs' claims, achieving the Settlement Agreement only after an extensive investigation and prolonged arms'-length negotiations, including a formal mediation overseen by René Trehy, a well-respected mediator, as well as continued negotiations following the mediation. The arm's-length nature of the settlement negotiations between adversarial (yet collegial), competent and experienced counsel on both sides shows that this settlement was achieved free of collusion. Even after coming to an agreement to settle, Settlement Class Counsel worked for weeks to finalize the Settlement Agreement and associated exhibits pertaining to notice, preliminary approval, and final approval.

As compensation for the substantial benefit conferred upon the Settlement Class, Settlement Class Counsel respectfully moves the Court for an award of attorneys' fees totaling $183,333.33, which represents 33.33% percent of the value of the non-reversionary Settlement Fund created by Settlement Class Counsel. North Carolina courts have expressly and repeatedly approved fees that equal 25% to 40% of the common fund created. Plaintiffs also seek $4,899.25 in reimbursement of modest out-of-pocket costs and expenses actually spent on this litigation. Plaintiffs' motion should be granted because: (1) the request is reasonable and appropriate in light of the substantial risks presented in prosecuting this action, the quality and

extent of work conducted, and the stakes of the case; (2) the requested fees and costs were clearly delineated in notice to the class, and no class member has objected; and (3) the costs incurred were reasonable and necessary for the litigation. Plaintiffs also respectfully move the Court for an award of $3,000 to each Plaintiff for their work on behalf of the Settlement Class.[1]

II. 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' Unopposed Motion for Preliminary Approval of Class Action Settlement filed on November 1, 2024 and the accompanying Exhibits, including the proposed Settlement Agreement, filed in conjunction therewith.

III. SUMMARY OF SETTLEMENT

The settlement's key terms are as follows:

A. Certification of the Settlement Class

The settlement provides for certifying the Settlement Class for settlement purposes only. The "Settlement Class" is defined as:

> **All individuals impacted by the Data Incident, including all individuals who received notice of the Data Incident that occurred on or about August 17, 2023.**

Excluded from the Settlement Class are any judge presiding over this matter and any members of their first-degree relatives, judicial staff, Greensboro's officers, directors, and members, and persons who timely and validly request exclusion from the

[1] While Plaintiffs here move for attorneys' fees, expenses, and service awards, they will move for final approval of the settlement by separate motion, which will be filed prior to the final fairness hearing.

Settlement Class. The Settlement Class contains approximately 52,565 individuals (each, a "Settlement Class Member").

B. Settlement Benefits to the Settlement Class

The Settlement creates a $550,000 non-reversionary Settlement Fund which will be used to pay Settlement Costs, award payments to Settlement Class Members, Administrative Costs, Service Award to Plaintiffs, and Attorneys' Fees and Expenses. Settlement Agreement ("SA") ¶ 45.

1. Credit Monitoring. All Settlement Class Members are eligible to make a claim for three years of three-bureau credit monitoring services regardless of whether they submit a claim for reimbursement of documented losses. SA ¶ 58.

2. Out-of-Pocket Losses. Settlement Class Members who submit a valid claim using the Claim Form are eligible for the following documented out-of-pocket expenses fairly traceable to the Data Breach, up to $5,000 per member of the Settlement Class, including but not limited to: (i) unreimbursed losses relating to fraud or identity theft; (ii) credit monitoring costs that were incurred on or after the Incident through the date of claim submission; and (iii) bank fees, long distance phone charges, postage, or gasoline for local travel. SA ¶ 56. Settlement Class Members with Monetary Losses must submit documentation supporting their claims. *Id.* This can include receipts or other documentation not "self-prepared" by the claimant that documents the costs incurred. *Id.*

3. *Pro Rata* Cash Payment: Settlement Class Members may file a claim for a cash payment of approximately $75.00. The amount of this claim shall be *pro rata* increased and decreased based on the money remaining in the Settlement

Fun after the payment of any Fee Award and Expenses, Service Awards, Administrative Expenses, and claims for Out-of-Pocket Losses. Settlement Class Members may make claims for both Out-of-Pocket Losses and the *Pro Rata* Cash Payment. SA ¶ 57.

4. Business Practices Changes: Defendant has provided reasonable access to confidential confirmatory discovery regarding its information security policies and the changes and improvements that have been made or are being made to protect sensitive data. Even though the exact value of the security upgrades is not available, the upgrades are believed to cost Defendant more than $30,000 on an annual basis.

A. Other Aspects of the Settlement

The $550,000 non-reversionary common fund will also be used to pay for the cost of notice and administration. The Settlement Fund will also be used to pay for the requested attorneys' fees, expenses, and service awards sought here. Importantly, after payment of all these costs, the Settlement Class will still take home the majority of the Settlement Proceeds here. And, given the fact that the *Pro Rata* Payments effectively "sweep" all of the Settlement Fund into actual payments to Class Members, the benefits of this Settlement will be delivered almost entirely to the Class (with only uncashed checks or unnegotiated electronic payments, if any, likely going to the Downtown Greenway Final Mile Campaign).

IV. LEGAL ARGUMENT

A. Plaintiffs' Counsel's Request for Attorneys' Fees and Expenses

Should be Approved

Settlement Class Counsel requests an award of attorneys' fees in the amount of $183,333.33. The amount of the requested attorneys' fees amounts to 33.33% of the Settlement Fund and is reasonable. Settlement Class Counsel further requests $4,899.25 in actual out-of-pocket case expenses, to be awarded in addition to the fees requested. This expenses reimbursement request is modest, and the amounts spent were all reasonably incurred costs necessary for the prosecution and settlement of this case. Settlement Class Counsel also recommends and requests an award of $3,000 to each of the Settlement Class Representatives.

1. The Fee Request Should Be Approved Under the Percentage of Common Benefit Method.

North Carolina has long approved granting attorneys' fees upon the creation of a common allocation of money. This doctrine was first recognized in *Horner v. Chamber of Commerce, Inc.*, 236 N.C. 96, 97-98 (1952), which established that a court in equity may order an allowance for attorney fees to a litigant who has created a common fund that benefits others.

Plaintiffs' attorneys in a successful class action lawsuit may petition the Court for compensation for any benefits conferred on the Class. *See, e.g., Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980). The percentage-of-the-fund method is the preferred approach in such cases, as it aligns attorneys' incentives with class members' recovery. Courts within the Fourth Circuit overwhelmingly support this method. See *Phillips v. Triad Guaranty Inc.*, No. 1:09CV71, 2016 U.S. Dist. LEXIS 60950, at *5-6 (M.D.N.C. May 9, 2016); *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 U.S. Dist. LEXIS 193107, at *7 (M.D.N.C. Sep. 29, 2016).

While North Carolina courts generally recognize the validity of the percentage method, the North Carolina Business Court has emphasized the importance of evaluating the reasonableness of fees using local market rates. In *McManus v. Gerald O. Dry, P.A.*, No. 22-CVS-1776, 2023 WL 2785559, at *3 (N.C. Super. Mar. 29, 2023), the court analyzed fee requests based on North Carolina-specific hourly rates rather than adopting national standards.

Given this precedent, Settlement Class Counsel submits that the requested fee is reasonable and consistent with North Carolina law. The requested 33.33% is within the range North Carolina courts typically approve, particularly when cases involve complex litigation and significant risks. See *Byers v. Carpenter*, No. 94 CVS 04489, 1998 NCBC 1, 1998 WL 34031740, at *9 (N.C. Super. Jan. 30, 1998) (noting that reasonable fees range from 25%-40% depending on case complexity and stage of resolution).

The percentage-of-the-fund method provides a strong incentive to 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 "over-litigate" or "draw out" cases in an effort to increase the number of hours used to calculate their fees. *See Jones v. Dominion Res. Servs., Inc.,* 601 F. Supp. 2d 756, 759 (S.D.W. Va. 2009); *see also Ferris*, 2012 WL 12914716, at *6 (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 WL 6408371, 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.").[2]

2. Reasonableness of Requested Fees Under Lodestar Cross-Check

While a lodestar cross-check is not required, for a non-reversionary common fund case such as this, it serves as an additional safeguard of fairness. To date, Settlement Class Counsel has spent approximately 279.4 hours on this litigation. The chart below summarizes the hours worked by each attorney and staff member at each firm, along with their standard hourly rate and the adjusted North Carolina rate[3],

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[2] This is just one of several drawbacks to the lodestar approach. *See Manual for Complex Litigation*, § 14.121 (4th ed. 2018) ("In practice, the lodestar method is difficult to apply, time consuming to administer, inconsistent in result, . . . capable of manipulation, . . . [and] creates inherent incentive to prolong the litigation . . . ."); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 255 (1985) (enumerating nine deficiencies in the lodestar process and concluding that in common fund cases the best determinant of the reasonable value of services rendered to the class by counsel is a percentage of the fund); *Lopez v. Youngblood*, No. CV-F-07-0474 DLB, 2011 WL 10483569, at *4 (E.D. Cal. Sept. 2, 2011) "Among the drawbacks to the lodestar method . . . are that the lodestar method increases the amount of fee litigation; the lodestar method lacks objectivity; the lodestar method can result in churning, padding of hours, and inefficient use of resources; when the lodestar method is used, class counsel may be less willing to take an early settlement since settlement reduces the amount of time available for the attorneys to record hours; and the lodestar method inadequately responds to the problem of risk."). Perhaps it is unsurprising, then, that the lodestar method has fallen increasingly out of favor. *See, e.g.*, Theodore Eisenberg, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Review 937, 945 (2017) (finding that the lodestar method used only 6.29% of the time from 2009–2013, down from 13.6% from 1993–2002 and 9.6% from 2003–2008); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 832 (2010) (finding that the lodestar method used in only 12% of settlements).

[3] The Adjusted North Carolina hourly rates in this motion reflect the 3.7% cost-of-living increase for Management, Professional, and Related occupations for the 12

reflecting their contribution to the total lodestar:

Biller	Position	Standard Hourly Rate	Adjusted NC Rate	Time Spent	Lodestar (Standard Rate)	Lodestar (NC Rate)
Milberg Coleman Bryson Phillips Grossman, PLLC						
David Lietz	Senior Partner	$1,057/$1,141	$753	39.8	$42,177.80	$29,969.40
Scott C. Harris	Senior Partner	$878/$948	$753	33.5	$29,518.00	$25,225.50
Dean Meyer	Associate	$437	$376	5.8	$2,534.60	$2,180.80
Mariya Weekes	Senior Counsel	$878	$619	2.0	$1756.00	$1238.00
John Nelson	Associate	$538	$376	2.0	$1,076.00	$750.00
Scott E. Heldman	Paralegal	$239	$240	8.5	$2,031.50	$2,031.50
Sandra Passanisi	Paralegal	$239	$240	5.1	$1,218.90	$1,218.90
Heather Sheflin	Paralegal	$239	$240	6.9	$1,649.10	$1649.10
Ashley Tyrrell	Paralegal	$239	$240	1.5	$358.50	$358.50
Michelle Benvenuto	Paralegal	$239	$240	2.4	$573.60	$573.60
Kerry Brennan	Paralegal	$239	$240	0.2	$47.80	$47.80
			Total:	**107.7**	**$82,941.80**	**$65,269.70**

months ending December 2024, per the U.S. Bureau of Labor Statistics. See *Employment Cost Index Summary*, U.S. Bureau of Labor Statistics, https://www.bls.gov/news.release/eci.t08.htm. These rates, based on *McManus v. Gerald O. Dry, P.A.*, remain aligned with North Carolina precedent. Courts recognize inflation-based adjustments as appropriate. See *In re Equifax Inc. Customer Data Security Breach Litigation*, 999 F.3d 1247, 1281 (11th Cir. 2021); N.C. State Bar, RPC 166 (1994). This 3.7% adjustment for both 2024 and 2025 ensures fees remain reasonable and consistent with market standards.

Strauss Borrelli, PLLC						
Raina C. Borrelli	Senior Partner	$700	$700	10.8	$7,560.00	$7,560.00
Cassandra Miller	Senior Partner	$700	$700	30.2	$21,140.00	$21,140.00
Samuel Strauss	Senior Partner	$700	$700	17.2	$12,040.00	$12,040.00
Sarah Soleiman	Associate	$400	$376	18.2	$7,280.00	$6,843.20
Zog Begolli	Associate (former)	$425	$376	.9	$382.50	$338.40
			Total:	**88.1**	**$55,962.50**	**$47,921.60**
Chestnut Cambronne PA						
Philip J. Kreski	Partner	$625-695	$619	49.20	$31,121.00	$30,454.80
Gary K. Luloff	Partner	$625	$619	.6	$375.00	$371.40
Elizabeth A. Orrick	Associate	$475	$376	9.0	$4,275.00	$3,384.00
Allison E. Cole	Associate	$475	$376	12.6	$5,985.00	$4,737.60
Heather Crawford	Paralegal	$195	$240	2.5	$487.50	$600.00
Evan Robert	Law Clerk	$250	$240	9.7	$2,425.00	$2,328.00
			Total:	**83.6**	**$44,668.50**	**$41,875.80**

Based on this analysis, the total resulting lodestar is $183,572.80 under the standard rate and **$**155,067.10 under the adjusted North Carolina rate, yielding a multiplier of .999 and 1.18, respectively, to reach the requested $183,333.33 in fees. North Carolina courts have found multipliers in the range of 2-4 to be reasonable. See *Byers*, 1998 WL 34031740, at *11* (approving multipliers of 2-4); *Kirkpatrick v. Cardinal Innovations Healthcare Sols.*, 352 F. Supp. 3d 499, 507 (M.D.N.C. 2018) (same). Given that Class Counsel anticipates that an additional 30-40 hours of

attorney time will be spent through final approval and the distribution of the Settlement proceeds, the lodestar is highly likely to be negative when applying either set of hourly rates. Numerous courts – including the North Carolina Business Court – have found that when there is a lodestar is negative, the fee request based upon the percentage of the fund is presumptively reasonable. *See e.g., In re Fasteners Antitrust Litig.*, Civil Action No. 08-md-1912. 2014 WL 296954, at *8 (E.D. Pa. Jan. 27, 2014) ("Since the multiplier here is less than one, which means that the requested fee is less than the amount that would be awarded using the lodestar method, we are satisfied that a lodestar cross-check confirms the reasonableness of Co-Lead Counsel's request for attorney's fees."); *Green v. EmergeOrtho, P.A.*, 22VS003533-310 (N.C. Bus. Ct.)(Final Approval Order, July 19, 2024, awarding attorneys' fees of one-third of $550,000 common fund where the lodestar was negative).

Thus, the lodestar cross-check confirms that the requested percentage is within a reasonable range.

B. The Requested Attorneys' Fees Are Reasonable Under the *Ehrenhaus* Factors

The fundamental test for awarding attorneys' fees in class action settlements is whether the request is "fair and reasonable." *Ehrenhaus v. Baker*, 243 N.C. App. 17, 30 (2015). The Court has discretion to determine what is reasonable. *In re Hatteras Fin., Inc., Shareholder Litig.,* 286 F. Supp. 3d, 727, 735 (M.D.N.C. 2017).

The reasonableness of an attorneys' fee award is determined by a set of non-exclusive factors, including "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular

employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent." *Ehrenhaus*, 216 N.C. App. at 96-97. No single *Ehrenhaus* factor is dispositive. However, attorney fee requests are presumptively fair and reasonable when they seek a third or less of the common fund. For example, the North Carolina Business Court in *Byers v. Carpenter*, No. 94 CVS 04489, 1998 NCBC 1, 1998 WL 34031740, at *9 (N.C. Super. Jan. 30, 1998) held that the appropriate level of compensation using a percentage-of-recovery method is typically 25% of the relief obtained if the case is settled before filing; 33% if after filing; and 40% if after an appeal has been taken. "The percentage fee is paid in addition to any expenses that the attorney has incurred on behalf of the client." *Id.*

Federal courts in North Carolina and in the Fourth Circuit often award fees equal to (or greater than) 33 percent of the settlement value. *See e.g. Earls v. Forga Contracting, Inc.*, No. 1:19-CV-00190-MR-WCM, 2020 WL 3063921, at *4 (W.D.N.C. June 9, 2020) ("Within the Fourth Circuit, contingent fees of roughly 33% are common."); *In re Cotton,* 3:18-cv-00499, 2019 WL 1233740, at *4 (W.D.N.C. March 15, 2019) (approving an award of 33 percent of the total settlement value); *Neal v. Wal-Mart Stores, Inc.*, 3L17-cv-00022, 2021 WL 1108602, at *2 (W.D.N.C. March 19, 2021) (same); *McAdams v. Robinson*, 26 F. 4th 149, 162 (4th Cir. 2022) (affirming attorneys' fees award of $1,300,00 or 43% of the $3,000,000 common fund class action

settlement); *Kruger*, 2016 WL 6769066, at *6 (awarding attorneys' fees of $10,666,666 comprising 1/3 of the monetary benefits made available to the class); *Chrismon v. Pizza*, No. 5:19-CV-155-BO, 2020 WL 3790866, at *5 (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."[4]

Here, the 33.33% requested equals the amount that North Carolina courts find presumptively reasonable. Relevant federal court precedent from North Carolina and the Fourth Circuit is in accord that a one-third attorneys' fee request is reasonable. Learned treatises are in agreement as well. An examination of the *Ehrenhaus* factors further bears this out.

1. The Time and Labor

The first and seventh *Ehrenhaus* factors – the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the service properly, and the experience, reputation, and ability of the lawyers involved – overwhelmingly support the requested fee award. Here, Settlement Class Counsel has expended over 279 hours on this case to date, and anticipates spending another 30-40 hours bringing this case through final approval and distribution of all Settlement benefits to Class Members. *See* Joint Declaration of Class Counsel in

[4] *See* 5 NEWBERG ON CLASS ACTIONS § 15:73 (5th ed. 2016) (noting that a "33% figure provides some anchoring for the discussion of class action awards [to counsel]" and that "many courts have stated that … 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).

Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Award ("Joint Decl.") ¶¶ 13, 22.

While Settlement Class Counsel does not believe that a lodestar cross-check is necessary for a non-reversionary common fund case such as this, as detailed above, Settlement Class Counsel has spent approximately 279 hours on this litigation, resulting lodestar is $183,572.80 under the standard rate and $155,067.10 under the adjusted North Carolina rate, yielding a multiplier of .999 and 1.18, respectively. *Id.* ¶13. This is well within the range of lodestar multipliers approved by North Carolina courts in conducting lodestar cross-checks. *Byers*, 1998 WL 34031740, at *11 ("A reasonable multiplier based on these factors would be 2 to 4."); *see also Kirkpatrick v. Cardinal Innovations Healthcare Sols*., 352 F. Supp. 3d 499, 507 (M.D.N.C. 2018) (citing cases where "courts have found that lodestar multipliers ranging from 2 to 4.5 demonstrate the reasonableness of a requested percentage fee."). A 1.18 multiplier is fully warranted here, given the excellent results obtained.

The skill required to litigate data breach cases is great, in part due to the quickly evolving nature of data breach and privacy law. Here, as the supporting declaration in support of the preliminary approval motion abundantly shows, the lawyers representing Plaintiffs are some of the most experienced in this area of the practice. Lietz Preliminary Approval Decl. ¶¶ 3-38. Indeed, in the case of Mr. Lietz and the Milberg team, this Court has previously recognized their skill and experience.[5] Settlement Class Counsel brought this established track record and

[5] *See McManus v. Gerald O. Dry, P.A.*, Case No. 22 CVS 1776, Order on Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards, May 5, 2023 (Bledsoe,

experience to work in litigating Plaintiff's and Class Members' claims. The significant experience and qualifications of counsel easily justify the attorneys' fee award.

Settlement Class Counsel's expertise is important because this was a case where Plaintiffs faced substantial hurdles on a case that involved novel and difficult legal questions. Data breach cases are, by nature, particularly risky and expensive. Such cases also are innately complex. *See, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.,* No. 1:17-MD-2800-TWT, 2020 WL 256132, at *32 (N.D. Ga. Mar. 17, 2020), *aff'd in part, rev'd in part and remanded*, 999 F.3d 1247 (11th Cir. 2021) (recognizing the complexity and novelty of issues in data breach class actions); *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").

This case is no exception to that rule. It involves 52,565 Class Members, complicated and technical facts, and a well-funded and motivated defendant. While Plaintiffs believe they would have ultimately prevailed on the merits at trial or summary judgment, the risk of nonpayment was substantial. Moreover, the fact that Class Counsel was able to resolve this difficult case within several months of initiating it is further indicative of their skill and efficiency in litigating this matter.

C.J.) ("the Court recognizes that data breach class action litigation is a complex and novel area of the law and that Lietz and his law firm are national leaders in this field.")

See In re The Mills Corp. Sec. Litig., 265 F.R.D. 246, 262-63 (E.D. Va. 2009) (finding that Counsel's ability to resolve the case within one year of the Court's denial of Defendant's Motion to Dismiss to be indicative of Counsel's "skill and efficiency."). In other words, Settlement Class Counsel did not run up the bill to seek additional fees.

Settlement Class Counsel already devoted significant time to this matter – over 279 hours. Of course, Settlement Class Counsel's work was not over after negotiating the Settlement. After preliminary approval of the Settlement Agreement was granted, Settlement Class Counsel has worked diligently to ensure that Settlement Class members would be able benefit from the Settlement. The work performed by Class Counsel to date has been comprehensive, complex, and wide-ranging. Thus, the first and seventh factors amply support the requested fee award.

2. Significant Risk and Contingency Nature of Representation Justify the Requested Fee Award

The second and eighth factors – the preclusion of other employment and whether the fee was fixed or contingent – likewise support the requested fee award.

Settlement Class Counsel took this case on a purely contingent basis. Joint Fee Decl. ¶ 7. The Fourth Circuit has recognized the importance of the risk of non-payment in awarding fees. In a 2010 case, the United States Court of Appeals for the Fourth Circuit reversed the district court's "reduction of attorney's fees from thirty-three percent to a mere three percent," noting that "[t]he chief error in the district court's analysis was its failure to recognize the significance of the contingency fee in this case." *Pellegrin v. Nat'l Union Fire Ins.* (*In re Abrams & Abrams, P.A.*), 605 F.3d 238, 245, 249 (4th Cir. 2010). The Fourth Circuit noted that "contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining

representation," stating, "[t]he contingency agreement was, as the saying goes, the key to the courthouse door that allowed [plaintiff] to retain the attorneys who eventually provided for his son's ongoing needs." *Id.* at 245-46. The Fourth Circuit further noted that "contingency fee agreements transfer a significant portion of the risk of loss to the attorneys taking a case," and "[a]ccess to the courts would be difficult to achieve without compensating attorneys for that risk." *Id.* at 246. Stated differently, "plaintiffs may find it difficult to obtain representation if attorneys know their reward for accepting a contingency case is merely payment at the same rate they could obtain risk-free for hourly work, while their downside is no payment whatsoever." *Id.* This reasoning applies to the realm of privacy law in spades since there is no shortage of well-paid legal defending or advising corporations as to their obligations to protect PII.

Here, the retainer agreements Settlement Class Counsel has 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 Settlement Class Counsel, if approved by the Court. Joint Fee Decl. *Id.* at ¶ 12. As such, attorneys' fees were not guaranteed in this case. *Id.* Settlement Class Counsel assumed significant risk of nonpayment or underpayment of attorneys' fees. *Id.* ¶¶ 7, 11-12. Settlement Class Counsel took on these significant risks knowing full well their efforts may not bear fruit. *Id.* Plaintiffs' counsel's acceptance of the work on a contingency basis is a significant factor counseling in favor of its fee request.

Settlement Class Counsel also took on significant risks with this particular case. While Plaintiffs believed they could prevail on their claims against Defendant,

they were also aware that they would likely face several strong legal defenses and difficulties in demonstrating causation and injury. *Id.* ¶ 11. Such defenses, if successful, could drastically decrease or eliminate any recovery for Plaintiffs and putative class members. *Id.* Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on either certification or merits. The general risks of litigation are further heightened in the data breach arena. Among national consumer protection class action litigation, data breach cases are some of the most complex and involve a rapidly evolving area of law. *Id.* At present, courts have certified only five contested classes in this area.[6] Moreover, the theories of damages remain untested at trial and appeal. As another court recently observed:

> Data breach litigation is evolving; there is no guarantee of the ultimate result. *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.").

Fox v. Iowa Health Sys., No. 3:18-CV-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021). These cases are particularly risky for plaintiffs' attorneys. Consequently, the requested fee award appropriately compensates for the risk undertaken by Plaintiffs' counsel here.

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[6] *See, e.g., In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, No. 19-MD-2879, 2022 WL 1396522, at *1 (D. Md. May 3, 2022)*; In re Equifax, Inc. Customer Data Security Breach Litigation*, Case No. 1:17-md-2800-TWT (N.D. Ga. 2019); *In re Brinker Data Incident Litig.*, No. 3:18-CV-686-TJC-MCR, 2021 WL 1405508, at *14 (M.D. Fla. Apr. 14, 2021)*; In re Target*, 309 F.R.D. 482 (D. Minn. 2015); *In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litig.*, 851 F.Supp.2d 1040 (S.D. Tex. 2012).

Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data breach cases like this one are particularly complex and face substantial hurdles—even just to make it past the pleading stage. *See 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). Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013).

Another significant risk faced by Plaintiffs here is the risk of maintaining class action status through trial. The class has not yet been certified, and Defendant will certainly oppose certification if the case proceeds. Thus, Plaintiffs "necessarily risk losing class action status." *Grimm v. American Eagle Airlines, Inc.*, No. LA CV 11-00406 JAK(MANx), 2014 WL 1274376, at *10 (C.D. Cal. Sept. 24, 2014). In one of the few significant data breach class actions that have been certified on a national basis, this risk was very real. *In re Marriott International Customer Data Securities Breach Litigation*, 341 F.R.D. 128 (D.Md. 2022) was recently decertified on appeal. *See In re Marriott Int'l, Inc.*, 78 F.4th 677, 680 (4th Cir. 2023).[7] The relative absence of trial class certification precedent in the relatively novel data breach setting adds to the risks posed by continued litigation.

This over-arching risk simply puts a point on what is true in all class actions – class certification through trial is never a settled issue, and is always a risk for the

[7] To complete the story, the classes were re-certified by the district court on remand. *See In re Marriott Int'l Customer Data Sec. Breach Litig.*, No. 19-MD-2879, 2023 WL 8247865, at *1 (D. Md. Nov. 29, 2023).

Plaintiffs and their Counsel. Settlement Class Counsel, who took this matter on contingency, faced numerous challenges. 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) ("Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel.").

As for preclusion of other employment (the second *Ehrenhaus* factor), in the *McManus* case, Settlement Class Counsel was candid with this Court about other matters they are handling, and the Court found that preclusion of employment is not a positive factor for a fee request. Nevertheless, the fact remains that time spent on this matter meant that Settlement Class Counsel could not devote that time to other matters. Joint Fee Decl. ¶ 10. The "preclusion of other employment" factor is therefore neutral. Accordingly, these two factors either weigh in favor of approval of the attorneys' fees request, or are neutral.

3. Fees Customarily Charged in Similar Cases

The third factor – the fee customarily charged for similar services – weighs heavily in favor of approving the fee requested here.

Here, Settlement Class Counsel's requested 33.33% fee aligns with other North Carolina class action settlements and remains within the presumptively reasonable range. North Carolina courts have recognized that awards of 25%-40% of the common

fund are typical, particularly in complex cases. See *Byers*, 1998 WL 34031740, at *9 (approving 33% fee in a post-filing settlement).

In data breach cases with similar class relief, there have been fee awards well exceeding a million dollars. *See Fox*, *supra*, 2021 WL 826741, at *6 (approving attorneys' fees and costs in the amount of $1,575,000 in data breach settlement with similar class relief). The class relief here is similar to results obtained in other data breach cases, and which include, for instance: *Culbertson, et al v. Deloitte Consulting LLP*, Case No. 1:20-cv-3962-LJL (S.D.N.Y. 2022); *Carrera Aguallo v. Kemper Corp*., Case No. 1:21-cv-01883 (N.D. Ill. Oct. 27, 2021), ECF 33 (finally approving $2,500,000 in attorneys' fees in data breach class action involving 6 million class members); *Henderson V. Kalispell Reg'l Healthcare*, No. CDV 19-0761 (Mont. Dist. Ct., Cascade Cnty. Nov. 25 2020) (court awarded attorneys fee of 33% of the common fund of $4.2 million). A 33.33% fee is fully in line with other cases with similar results obtained for the Class.

4. Amount involved and results

The fourth factor – the amount involved and the results obtained – strongly favors the requested award. This is, without question, the most important inquiry. *Hensley v. Eckerhart,* 461 U.S. 424, 436 (1983) ("the most critical factor is the degree of success obtained"). As shown above, the Settlement provides a significant benefit to Settlement Class Members – a non-reversionary $550,000 Settlement Fund, which includes a wide array of benefits, such as credit monitoring and cash. These are real, tangible benefits—that without the efforts of Plaintiffs and Settlement Class Counsel, and their willingness to take on the attendant risks of litigation, would not have been

available to Settlement Class Members. Thus, this factor weighs heavily in favor of granting this fee request.

Finally, the result achieved in this Settlement is notable because the parties were able, through capable and experienced counsel, to reach a negotiated Settlement without involvement of the Court in managing this litigation or discovery disputes. *Id.* at ¶ 30. Class Counsel worked on behalf of the Settlement Class to obtain information from Defendant regarding the Data Incident and used that information (along with their experience and the knowledge gained from other data breach class actions) to negotiate the Settlement. *Id.* at ¶ 30. The Settlement reached here is notable for the simplicity of the claims process; relief that addresses the type of injury and repercussions sustained by consumers in the wake of a Data Incident of the type here; the speed with which counsel was able to secure a favorable settlement; and the cooperation of Plaintiffs' counsel which aided in the ability to resolve this matter efficiently. *Id.* at ¶¶ 28-30.

5. Limitations imposed by client

The fifth and sixth factors – the time limitations imposed by the client or circumstances and the nature and length of the professional relationship with the client – are neutral factors. Settlement Class Counsel did not have a professional relationship with Plaintiffs prior to this case, and there were no time limitations.

Therefore, all the *Ehrenhaus* factors overwhelmingly support the requested fee award.

6. Other Factors Support the Reasonableness of the Requested Award

In addition to satisfying the *Ehrenhaus* factors, there are additional reasons to support the requested award. Notably, the requested fee award has been approved by the Settlement Class members themselves. Settlement Class members received direct notice of the Settlement, which provides the best possible and most practicable notice in a class settlement. The settlement notice described the amount that Settlement Class Counsel intended to request in attorneys' fees and costs in plain and clear language. As of February 25, 2025, no Settlement Class member has objected to the requested attorneys' fee, the case expenses sought, or the proposed service award. *See Varacallo v. Massachusetts Mutual Life Insurance Company*, 226 F.R.D. 207, 251 (D.N.J. 2005) (even a small number of objectors to a fee award favors approval of request). Accordingly, Settlement Class members have approved the requested award.

The requested award also falls comfortably within the percentage typically approved in class settlements. The North Carolina Business Court in *Byers*, 1998 WL 34031740, at *9, held that the appropriate level of compensation in class cases are typically 25% of the relief obtained if the case is settled before filing; one-third if after filing; and 40% if after an appeal has been taken. Here, as outlined above, Class Counsel seeks 33.33% of the non-reversionary Settlement Fund recovered for the Class. Under *Byers* and the ample North Carolina case law cited throughout herein, Plaintiffs' attorneys' fee request is therefore well within the range of reasonable fees in this state.

C. Class Counsel's Request for Expenses is Reasonable.

Settlement Class Counsel seeks to recover reasonable litigation expenses in addition to the requested fee award of $4,899.25, representing filing fees, service fees, pro hac vice admission fees, and the cost of Ms. Trehy's services to mediate the case. Courts regularly award litigation expenses in addition to attorneys' fees in class action cases. Courts in North Carolina and the federal Fourth Circuit have explained that such costs and expenses 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) (internal quotations omitted). Counsel's expenses here, totaling $4,899.25 were all reasonably incurred in pursuing this litigation. Joint Fee Decl., ¶¶ 24-25. Counsel's expenses were reasonable and necessary to litigate this case, and the Court should therefore include them in addition to any fee award. *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, No. CIV.A. DKC 11-1823, 2013 WL 5506027, at *17 (D. Md. Oct. 2, 2013) (awarding expenses that the court deemed were "reasonable and typical.").

Settlement Class Counsel's requested expense reimbursement is modest, and is sought for reimbursement of actual out-of-pocket expenses that were reasonable, typical, and necessary for the litigation and settlement of this case. The Court should award these modest expenses.

D. The Requested Incentive Award to the Class Representative is Reasonable.

Class litigation cannot proceed without the willingness of an individual to step up and litigate on behalf of others. Putative class representatives must devote time

and energy to carry out tasks that are far above and beyond what absent class members are asked to do. In recognition, courts often award service awards to class representatives. Service awards are "awarded to class representatives in recognition of their time, expense, and risk undertaken to secure a benefit for the Class they represent" and such awards are "within the discretion of the Court." *Carl v. State*, No. 06CVS13617, 2009 WL 8561911 at ¶ 97 (N.C. Super. Dec. 15, 2009). The amount of the award is ultimately within the discretion of the Court, though the size of the award itself is typically commensurate with the level of activity performed and the size of the case. *See Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05CV00187, 2007 WL 119157, at *4 (M.D.N.C. Jan. 10, 2007) (awarding a service award of $15,000); *see also Chrismon*, 2020 WL 3790866, at *6 (awarding a service award of $10,000).

Factors courts consider when awarding incentive awards include: the risk to the plaintiff in commencing suit, 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 and trial; the duration of the litigation; and the plaintiff's personal benefit, or lack thereof, purely in his capacity as a class member. *Perry v. Fleetboston*, 229 F.R.D. at 118. The degree to which the Class has benefited from the Class Representatives' actions is also taken into account. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

Plaintiffs seek Service Awards of $3,000 each in recognition of the time and effort they have personally invested in this case. Plaintiffs were prepared to litigate this action through trial to properly represent the class and fight for significant relief.

Absent their efforts, the class would have received no compensation. Plaintiffs also assisted in Counsel's investigation of the case, reviewing pleadings, maintaining contact with counsel, remaining available for consultation during settlement negotiations, answering counsel's many questions, and reviewing the Settlement Agreement. The Class Representatives amply fulfilled their duties, making the Service Awards requested appropriate. While they did not have to undergo extensive discovery or depositions, Plaintiffs did gather documents and materials in support of their claims that were used in drafting the Complaint.

The requested service award is reasonable and commensurate with Plaintiffs' efforts in the litigation. It is modest compared to other, recent service awards in data breach cases before this Court. *See McManus*, 2023 WL 2785559, at *3 (final approval granted by Bledsoe, C.J., March 29, 2023, and awarding $5,000 service awards).

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the instant motion as part of final approval of this class action settlement, award Settlement Class Counsel attorneys' fees in the amount of $183,333.33, award reasonable case expenses in the amount of $4,899.25, and make service awards in the amount of $3,000 to each named Plaintiff for their service to the Class.

Dated: February 25, 2024

Respectfully submitted,

/s/Scott C. Harris

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CERTIFICATE OF COMPLIANCE WITH BUSINESS COURT RULE 7.8

The undersigned, in accordance with Business Court Rule 7.8, certifies that the foregoing memorandum (exclusive of the case caption, signature blocks, and required certificates) contains fewer than 7,500 words, as reported by word-processing software.

This the 25th day of February, 2025.

/s/Scott C. Harris

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been served on all counsel of record in accordance with Business Court Rule 3.9 through electronic filing with the North Carolina Business Court.

This the 25 day of February, 2025.

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