UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CHARLES MILLIKEN, JR., and MARY KAY MILLIKEN, individually and all others similarly situated, Plaintiff, v. BAYER HERITAGE FEDERAL CREDIT UNION Defendants.	**CASE NO. 5:24-cv-00057-JPB**

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

Plaintiffs Charles Milliken, Jr. and Mary K. Millikin, individually and on behalf of the Settlement Class respectfully apply for entry of an Order approving Class Counsel's requested $175,000.00 for attorneys' fees and costs as well as approval of Service Awards in the amount of $2,500.00 per plaintiff. This application is supported by the Declaration of David K. Lietz in Support of this Motion.

Date: April 7, 2025

Respectfully submitted,

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

Pursuant to Fed. R. Civ. P. 23(h) and this Court's Preliminary Approval Order (ECF No. 23), Plaintiffs seek approval of the requested attorneys' fees, reimbursement of expenses, and service awards described in the Settlement Agreement ("S.A.") (ECF No. 21-1).

I. BACKGROUND

A. History

This class action arises out of Defendant Bayer Heritage Federal Credit Union's ("Bayer Heritage" or "Defendant") alleged failure to safeguard the personally identifiable information ("PII") that it maintained regarding Plaintiffs Charles Milliken Jr. and Mary Kat Milliken (collectively, "Plaintiffs," and, together with Defendant, the "Parties") and Settlement Class Members.[1] Plaintiffs allege that Bayer Heritage discovered on or about October 31, 2023 an unauthorized third party gained access to its computer systems ("Data Security Incident"). Defendant took steps to secure the network and launched an investigation to determine the nature and scope of the incident. The investigation concluded that approximately 61,000 individuals were potentially impacted by the Security Incident. Defendant began notifying persons impacted (including Plaintiffs) in late January 2024, by sending a notice of data breach letter.

B. Procedural Posture

Defendant notified Plaintiffs of the breach in or around March 2022. Following an investigation, Plaintiffs filed this action on March 20, 2024. ECF 1. Plaintiffs allege that their PII, and that of Class Members, was encrypted, exfiltrated, and stolen in the cyber-attack. Plaintiffs asserted claims of negligence, breach of implied contract, and unjust enrichment.

[1] The capitalized terms used in this Motion shall have the same meaning as defined in the Settlement Agreement, except as may otherwise be indicated.

After service of the Complaint, the Parties began a period of intensive informal discovery and mutual exchange of information. This informal discovery provided Plaintiffs and their counsel with the necessary information to evaluate the facts and circumstances of this Security Incident, the size of this potential class, and the fact and legal issues that would face Plaintiffs and the Class in the litigation.

During this same time frame, the Parties began settlement discussions, and ultimately agreed to participate in a private mediation before experienced data breach mediator Bruce Friedman, Esq. of JAMS. Mediation was scheduled for July 2024, and the Parties moved the Court to stay this action pending the mediation (a request granted by this Court). In the lead up to the mediation, the Parties engaged in additional intensive informal discovery, designed to fully inform both Parties of the facts of this case. The Parties also both prepared fulsome mediation statements. Just prior to mediation, on or around July 29, 2024, the Parties reached agreement on the material terms of this proposed Settlement, and the mediation was canceled. The Parties thereafter negotiated the granular terms of the Settlement and finalized the Settlement Agreement and its exhibits in January 2025.

C. Summary of Settlement

The proposed settlement will provide substantial relief to a proposed Settlement Class consisting of: "All persons residing in the United States whose PII was compromised in the October 2023 Security Incident announced by Bayer Heritage Federal Credit Union Property Management in 2024."

Excluded from the Class are: (1) any entity in which Bayer Heritage has a controlling interest and (2) the affiliates, legal representatives, attorneys, successors, heirs, and assigns of Bayer. Excluded also from the Class are members of the judiciary to whom this case is assigned, their families and members of their staff. The Settlement Class consists of approximately 61,000 individuals. S.A. ¶ 47

D. Settlement Benefits

The Settlement negotiated on behalf of the Settlement Class provides for three separate forms of Class Relief: (1) reimbursement for up to $4,000.00 in documented out-of-pocket expenses (such as fees for credit reports, unreimbursed bank fees, credit monitoring, or other identity theft insurance product, etc.); (2) lost time (up to 4 hours at $20.00 per hour), which is also subject to the $4,000.00 per Class Member cap; and (3) two-years of three-bureau credit monitoring. S.A. ¶¶ 50. These benefits are uncapped in the aggregate, meaning that every Settlement Class Member may claim the full measure of all the relief offered.

1. Reimbursement for Actual Out-of-Pocket Losses

Bayer Heritage will provide compensation for unreimbursed losses, up to a total of $5,000.00 per person who is a member of the Settlement Class, upon submission of a claim and supporting documentation, such as the following losses:

- out-of-pocket expenses incurred as a result of the Incident, including bank fees, long distance phone charges, cell phone charges (only if charged by the minute), data charges (only if charged based on the amount of data used), postage, or gasoline for local travel; and

- fees for credit reports, credit monitoring, or other identity theft insurance product purchased between October 31, 2023, and the date of the close of the Claims Period.

Settlement Class Members with out-of-pocket losses set forth above must submit adequate documentation establishing the full extent of their claims

2. Lost Time

Settlement Class Members may submit claims for up to 4 hours of lost time, reimbursed at a rate of $20.00 per hour, by submitting an attestation that they spent the claimed time responding to issues raised by the 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 Bayer's October 2023 data security incident." No other documentation is needed for a lost time claim. Lost time

claims are subject to the $4,000.00 per person cap on Out-of-Pocket Expenses.

3. Credit Monitoring

All Settlement Class Members shall be offered a two-year membership of three-bureau ("3B") credit monitoring with at least $1,000,000.00 in identity theft/fraud insurance. The additional credit monitoring services noted in (i) are in addition to any credit monitoring services Bayer Heritage initially offered related to the October 2023 Incident.

4. Business Practice Commitments

Bayer Heritage also agreed to provide written confirmation to class counsel of business practices changes taken after the Security Incident to protect the data security of the Class Representatives and the Settlement Class during the term of the claims administration process.

II. LEGAL ARGUMENT[2]

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).

[2] Plaintiffs incorporate by reference Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (ECF No. 21).

Class Counsel, with Plaintiffs' assistance, have obtained significant results and benefits for the Settlement Class. Accordingly, and pursuant to the common fund doctrine and the Settlement Agreement, Class Counsel now apply for attorneys' fees and costs in the amount of $175,000.00. Plaintiffs also request approval of Service Awards in the amount of $2,500.00 per Plaintiff for their time and effort on behalf of the Settlement Class. These requests are reasonable considering the risk undertaken, the work performed the results achieved and the other work that Plaintiff's counsel forewent to prosecute this litigation on behalf of the Class. They are also consistent with similar awards approved in this Circuit and in other data breach cases. The Settlement Agreement is the product of skilled and dedicated efforts by Class Counsel through considerable litigation in a case involving complex issues of fact and law. Accordingly, these requests should be approved.

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 on behalf of 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."). 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 WL 6769066, at *2 (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)).

Courts in the Fourth Circuit routinely use the percentage of the fund method for common fund cases such as this and do not require a lodestar crosscheck. *See 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, et al., v. Rock Spring Contracting LLC, et al.*, No. 3:23CV407 (RCY), 2024 WL 1417955, at *10, n.8 (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 WL 2288441, at *4 (E.D. Va. May 29, 2019) (indicating that a lodestar cross-check was unnecessary); *Devine v. City of Hampton, Virginia*, No. 4:14CV81, 2015 WL 10793424, 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 WL 5023950, at *5 (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 v. Sprint Communs. Co. LP*, No. 5:11-cv- 00667-H, 2012 WL 12914716, 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 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.").

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 WL 12914716, 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 WL 2636289, at *2 (M.D.N.C. May 9, 2016)). In the Fourth Circuit, fees constituting one-third or more of the settlement have been found reasonable. *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 WL 6769066, 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 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)); *In re Cotton*, 3:18-cv-00499, 2019 WL 1233740, at *4 (W.D.N.C. Mar.15, 2019) (approving an award of 33 percent of the total settlement value); *Neal v. Wal-Mart Stores,Inc.*, 3:17-cv-00022, 2021 WL 1108602, at *2 (W.D.N.C. Mar. 19, 2021). Attorneys' fees in common fund cases typically reflect "around one-third of the recovery."[3]

[3] *See* 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 court 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 Empiriacl Study*, 1 J. OF EMPIRICAL LEGAL STUDIES, 27, 31, 33 (2004) (finding that courts consistently award 30-33% of the common fund).

B. The Relevant Factors Support the Fee Award

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))[4] and *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 261 (E.D. Va. 2009). Both focus on the reasonableness of the fees, and many of the factors overlap. The *In re Mills* factors support the fee request here: "(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 The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 261 (E.D. Va. 2009) *In re Mills Corp. Sec. Litig.*, 265 F.R.D. at 261.

1. Class Counsel Obtained an Excellent Result for the Class

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 this case is an incredible result, with Defendant agreeing to provide compensation for documented losses and lost time, up to $5,000.00 per Settlement Class Member who submits a valid claim, and two years of three bureau credit monitoring with identity theft

[4] 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.

protection.

These benefits reflect an enormous success given the circumstances. 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 breach and provide the opportunity to protect their identity in the future. Thesize of the 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 matter, given that class actions in general are inherently risky, and the continuously developing law on data breaches. Further, the Settlement benefits are available to Settlement Class Members immediately, rather than years from now which would be the case absent settlement. The amount at issue and the results justifies the requested award.

2. The Class is Responding Favorably to the Settlement So Far

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. Approximately 1,300 claims have been filled, and there have been no objections and only one request for exclusion. This lends support to the reasonableness of the fee. *Stechertv. Travelers Home & Marine Ins. Co*., No. 17-cv-0784-KSM, 2022 WL 2304306, 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.").

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

The expertise of the attorneys involved in this matter, 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* Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and to Direct Notice of Proposed Settlement to the Class. (ECF No. 21). Several leading class action firms in the field of data privacy litigation cooperated to efficiently prosecute this action. *See* ECF No. 21-2. Each invested substantial hours of both attorney and paralegal time. *See id.*

4. There was Substantial Risk of Non-Payment

Plaintiffs and Class Counsel faced the genuine and ever-present risk of zero recovery in the case, like all cases on a contingency fee basis. Data privacy 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 *240 (N.D. Ga. Mar. 17, 2020) (recognizing the complexity and novelty of issues in data privacy class actions); *Gordon v. Chipotle Mexican Grill, Inc*., Civil Action No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("noting that data privacy "cases are particularly risky,expensive, and complex."). This case is no exception to that rule. It involves novel data privacy issues involving over 61,000 Class Members, complicated and technical facts, and a well- funded and motivated defendant.

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); *In re Dun & 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 risk of nonpayment was

real and justifies the requested fee.

5. Attorneys' Fees Awards in Similar Cases

As evidenced above, the attorneys' fee requested in this case are significantly less than the range of common fund attorney fee requests in this circuit and nationwide. *See Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, 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. Fam. Dollar Stores, Inc.*, No. 308CV00540MOCDSC, 2018 WL 1321048, at *15 (W.D.N.C. Mar. 14, 2018) (awarding one-third of the settlement fund plus reimbursement of costs); *Brown v. Lowe's Companies, Inc.*, No. 513CV00079RLVDSC, 2016 WL 6496447, 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., Inc. v. Am. Int'l Grp., Inc.*, No. 3:08-CV-00271-JFA, 2012 WL 2370523, 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, Settlement Class Members may claim up to $4,000.00 each in documented losses, inclusive of up to four hours of lost time reimbursed at a rate of $20.00 per hour, in addition to the ability to claim two years of credit monitoring services. Class Counsel's fee request of $175,000.00 is just a fraction of the tens of millions of dollars the Settlement is potentially valued at if each Settlement Class Member makes a claim for documented losses. When looking at the value of credit monitoring alone, which can be conservatively valued at $10.00 per month, or $240.00 per

Settlement Class Member, the Settlement provides Class Members with the opportunity to claim up to $14,640,000.00, meaning Class Counsel's requested fee award is just 1.2% of the benefit, significantly less what is routinely approved by Courts in this district.

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).

Here, Class Counsel's costs are included in their fee request. Class Counsel's request for $175,000.00 in attorneys' fees is inclusive of litigation expenses of $10,282.00 in reasonable and necessary costs and expenses. *See* Declaration of David K. Lietz in support of Plaintiffs' Motion for Attorneys' Fees, Costs, Expenses, and Service attached as Exhibit 1, ¶ 15. The costs are attributed to the filing fees, the costs of service of process, pro hac vice admissions, and mediation costs. *Id*. Class Counsel will also incur expenses in connection with the final approval hearing. 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 WL 5077636, at *10 (D. Md. Oct. 17, 2012) ("It is well-established that Plaintiff 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. The Requested Service Awards are 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 WL 2285972, 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 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016) (approving a $10,000.00 service award); *Berry v. LexisNexis Risk & Info. Analytics Grp., Inc.*, No. 3:11-CV-754, 2014 WL 4403524, at *16 (E.D. Va. Sept. 5, 2014), *aff'd sub nom. Berry*, 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 WL 1070819, 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 plaintiff 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).

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*

Exhibit 1, ¶¶ 12-14; *see Burke v. Shapiro, Brown & Alt, LLP*, No. 3:14-cv-201 (DJN), 2016 WL 2894914, 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.*, *Kruger*, 2016 WL 6769066, at *6 (granting $25,000.00 service awards); *In re: Lumber Liquidators Chinese-Manufactured Flooring Durability Mktg*., No. 115MD2627AJTTRJ, 2020 WL 5757504, at *91 (E.D. Va. Sept. 4, 2020) (granting service award of $5,000.00); *Brown v. Charles Schwab & Co., Inc.*, No. 2:07-cv-03852, 2011 WL 13199227, at *7 (D.S.C. July 26, 2011) (approving $10,000.00 service award to named plaintiff); *see also In re MI Windows & Doors Prods. Liab. Litig*., 2015 WL 4487734, at *5 (D.S.C. July 23, 2015) (granting "modest" service award of $5,000.00 for each named Plaintiff); *see also Neal v. Wal-Mart Stores, Inc.*, 3:17-cv-00022, 2021 WL 1108602, at *2 (W.D.N.C. Nov. 2, 2015) (approving service awards of $10,000.00 to each Settlement Class Representative); *In re Cotton*, 2019 WL 1233740, at *4 (approving service awards of $10,000.00 to each Settlement Class Representative); *see also Manuel*, 2016 WL 1070819, 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 $2,500.00 each are less than 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 Consumer Data Sec. Breach Litig.*, 119MD2915AJTJFA, 2022 WL 18107626, at *4 (E.D. Va. Sept. 13, 2022) (service award of $5,000.00 to each plaintiff in a data privacy class action).

The Class Representative amply fulfilled their duties, making the Service Award requested appropriate. *See* Exhibit 1, ¶¶ 12-14. 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 Class Action Complaint and were actively involved in the settlement

negotiations that ultimately resolved this case. *See id*.

III. CONCLUSION

Because the Settlement Agreement is fair, reasonable, and adequate, Plaintiffs respectfully request that the Court grant final approval of the Class Action Settlement, including *pro rata* cash payments to Settlement Class Members who have submitted valid claims and awarding Service Awards in the amount of $2,500.00 to each Class Representative, and $175,000.00 in combined attorneys' fees, and litigation expenses.

Date: April 7, 2025

Respectfully submitted,

/s/ Ryan McCune Donovan

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Co-Lead Counsel for Plaintiffs and the Class

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CHARLES MILLIKEN, JR., and MARY KAY MILLIKEN, individually and all others similarly situated, Plaintiff, v. BAYER HERITAGE FEDERAL CREDIT UNION Defendants.	**CASE NO. 5:24-cv-00057-JPB**

CERTIFICATE OF SERVICE

I, Ryan McCune Donovan, do hereby certify that on April 7, 2025, the foregoing **"*Plaintiffs' Motion and Memorandum in Support of Motion for Attorneys' Fees, Reimbursement of Expenses, and Service Award to Plaintiffs*"** was filed with the Clerk of the Court using the CM/ECF system which will notify all counsel of record via the Court's ECF filing system.

/s/ Ryan McCune Donovan
Ryan McCune Donovan (WVSB #11660)

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DECLARATION OF DAVID K. LIETZ IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARDS

I, David K. Lietz, hereby declare the following is true and accurate and based on my personal knowledge:

1. I am an adult, I have personal knowledge of the facts stated herein, and I am competent to so testify.

2. I am currently a partner of the law firm Milberg Coleman Bryson Phillips Grossman, PLLC ("Milberg"). I submit this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Costs, Expenses, and Service Awards. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them if called upon to do so.

Class Counsel's Work on the Case

3. The Parties engaged in months of hard-fought, arm's-length negotiations.

4. After service of the Complaint, the Parties began a period of intensive informal discovery and mutual exchange of information. This informal discovery provided Plaintiffs and their counsel with the necessary information to evaluate the facts and circumstances of this Security Incident, the size of this potential class, and the fact and legal issues that would face Plaintiffs and the Class in the litigation.

5. The Parties agreed to a settlement in principle in July, 2024. The Parties then worked diligently to negotiate the finer points of the Settlement and finalize the Settlement Agreement. This settlement is the product of hard-fought, arm's length negotiations.

6. After the Settlement was reached, Plaintiffs' counsel spent, and continue to spend, significant time and resources developing settlement administration and Notice Program that comports with both the requirements of Rule 23 the Due Process Clause. Among other tasks, Plaintiffs' counsel sought proposals from different claims administrators, selected and worked with the Claims Administrator to prepare Notice and Claims documents, helped develop a Settlement website, monitored for potential opt-outs and objections to the Settlement, and spoke with Settlement Class Members regarding the Settlement and claims.

7. Plaintiffs' counsel will continue to expend time and resources for a considerable length of time to ensure that the Settlement administration follows the Court-approved claims process.

8. Class Counsel has been diligent in and committed to investigating claims on behalf of the Class. Prior to commencing this litigation, Counsel diligently investigated potential legal claims (and potential defenses thereto) arising from Defendant's failure to implement adequate and reasonable data security procedures and protocols necessary to protect Plaintiffs' PII going forward.

9. Class Counsel has performed the following work on behalf of Plaintiffs and Class Members, among other things:

- Investigated the circumstances surrounding the Security Incident;
- Stayed abreast of and analyzed reports, articles, and other public materials discussing the Security Incident and describing Defendant's challenged conduct;
- Reviewed public statements from Defendant concerning the Security Incident, including the contents of the breach notification letter sent to impacted Settlement Class Members;
- Drafted and filed an initial complaint against Defendant, and served that complaint on Defendant; and
- Analyzed information provided by Defendant in informal discovery.

10. Class Counsel has committed appropriate and substantial time and resources to organizing and working collaboratively toward the advancement of the litigation, and will continue to do so. As a result of these efforts, Class Counsel developed a clear understanding of the strengths and weaknesses of the claims and defenses in this case and they were well-prepared to evaluate the fairness, reasonableness, and adequacy of the Settlement.

11. Class Counsel will continue to work cooperatively, coordinate, and meet and confer with Defendant's counsel in this litigation through final settlement approval.

Plaintiffs' Efforts

12. Plaintiffs committed to participate actively in what they knew could be a long and hard-fought lawsuit and to do so on behalf of a Class of tens of thousands of people, with no guarantee of ever being compensated.

13. Here, Plaintiffs spent substantial time on this action, including by: (i) assisting with the investigation of this action and the drafting of the complaint, (ii) being in contact with counsel frequently, and (iii) and staying informed of the status of the action, including settlement.

14. Without the efforts of Plaintiffs, the Settlement Class would not have received the benefits gained under the Settlement. Accordingly, Plaintiffs should be granted service awards in the amount of $2,500 each.

Costs and Expenses

15. In addition to attorney time spent on the case, Class Counsel also advanced $10,282 in litigation costs, again with no guarantee of repayment. Because our firm handled this action on a contingent basis, we have not yet received reimbursement for any of these costs and expenses. The costs are attributed to the filing fees, the costs of service and process, *pro hac vice* admissions, and mediation costs.

16. These costs were necessary and reasonable expenses to bring this case to a successful conclusion, and they reflect market rates for various categories of expenses incurred.

17. Class Counsel's willingness to prosecute this action on a contingent fee basis and to advance costs diverted the time and resources expended on this action from other cases.

18. These expenses are included in the request of $175,000 for Attorneys' fees.

19. Based on my experience prosecuting this action and overseeing the conduct of the litigation, all of these expenses were reasonable and incurred in connection with the action.

20. Class Counsel's willingness to prosecute this action on a contingent fee basis and to advance costs diverted the time and resources expended on this action from other cases.

21. It is my belief, based on my extensive experience generally and my investigation and research into this case in particular, that the Settlement is fair, reasonable, and adequate, and in the best interests of the Settlement Class. The collective experience of my colleagues and I regarding similar types of privacy and data protection practices provided substantive knowledge on the subject to enable us to represent Plaintiffs' and Settlement Class Members' interests without

expending hundreds of hours and substantial financial resources to come up to speed on the subject area or engaging in formal discovery.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on April 7, 2025, in Washington, D.C.

/s/ David K. Lietz
David K. Lietz