UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PATRICK REYNOLDS, DANIEL LEWIS, LUCIA MARANO, KRISTEN FRANCE, ABBEY ABRECHT, and JAHIDAH DIAAB, on behalf of themselves and all others similarly situated, Plaintiffs, v. MARYMOUNT MANHATTAN COLLEGE, Defendant.	Case No. 1:22-cv-06846 Judge Lorna G. Schofield

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS TO CLASS REPRESENTATIVES

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Plaintiffs Patrick Reynolds, Daniel Lewis, Lucia Marano, Kristen France, Abbey Abrecht, and Jahidah Diaab ("Plaintiffs" or "Class Representatives") submit this Memorandum in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards to Class Representatives.

I. INTRODUCTION

On or about November 12, 2021, Defendant Marymount Manhattan College ("Defendant" or "MMC") experienced a data incident in which unauthorized parties gained access to and obtained data from MMC's network, potentially compromising the personally identifiable information ("PII") of 191,752 individuals (the "Data Incident"). This class action arises out of Defendant's alleged failure to safeguard the PII that it collected and maintained from Plaintiffs and Class Members. Defendant denies all liability and wrongdoing.

After prolonged and extensive arms' length negotiations, the parties reached a settlement that is fair, adequate, and reasonable. The Settlement Agreement, if granted final approval, will provide Class Members benefits from a non-reversionary $1.3 million Common Fund. Doc. 46-1, Ex. A ("Settlement Agreement" or "Agr.") ¶ 46.[1] From that Common Fund, Class Members can receive significant relief, including: (1) reimbursement for ordinary out-of-pocket losses up to $750 for items such as credit monitoring purchased in response to the data incident; (2) reimbursement for extraordinary out-of-pocket losses up to $7,500 to cover losses suffered as a result of fraud or identity theft; (3) compensation for lost time up to five hours at $20/hour; (4) credit monitoring for one year with three bureaus, including $1 million in identity theft insurance; and (5) in the alternative to out-of-pocket losses and credit monitoring, a cash payment for $150.

[1] The Settlement Agreement ("Agr.") in its entirety is attached as Exhibit A to the Declaration of Gary Klinger ("Klinger Dec.") filed at Doc. 46-1. Capitalized terms shall have the same meaning as assigned to them in the Settlement Agreement.

Id. ¶¶ 52-61. Moreover, Defendant has agreed to take certain remedial measures in response to the Data Incident, including annual audits of its IT infrastructure, updates of policies and procedures, encryption of all PII that was subject to the Data Incident, and to delete PII that was subject to the Data Incident that it is no longer required to maintain. *Id.* ¶¶ 71-42. The cost of these remedial measures is being paid for by Defendant separate and apart from the $1,300,000 Common Fund. These are valuable benefits to Class Members that directly address the harm they suffered as a result of the data breach. This excellent result could not have been obtained absent Class Counsel's efforts on behalf of the Class.

Pursuant to the Settlement Agreement, Class Counsel respectfully submits this Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards for Class Representatives ("Fee Application"). First, Class Counsel requests that the Court award 30% of the Common Fund, or $390,000, for payment of attorneys' fees, and reimbursement of reasonable litigation expenses of up to $10,000. This request is well-within the range of fee awards in similar class cases in this Circuit, and, as detailed more fully herein, the factual and legal complexity of these claims required extensive investment of labor and advancement of costs by counsel. The work performed advancing the claims of Class Members – on a fully contingent basis – carried significant risk, and counsel performing that work, including Class Counsel, forwent other opportunities and dedicated themselves to this case.

In addition, Class Counsel request that the Court approve a service award for the Class Representatives, Patrick Reynolds, Daniel Lewis, Lucia Marano, Kristen France, Abbey Abrecht, and Jahidah Diaab, in the amount of $3,500 each ($21,000 total). This request is modest and is fully justified by the law and the work performed by Plaintiffs.

This Memorandum is supported by the cited and attached evidence, including the Joint

Declaration of Class Counsel (attached as Exhibit 1 hereto), the Declarations of the Class Representatives (attached as Exhibit 2 hereto), and the summary time records of Class Counsel. Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards to Class Representatives.

II. FACTUAL AND PROCEDURAL BACKGROUND

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 March 10, 2023 (Doc. 45) and the accompanying memorandum and exhibits (including the proposed Settlement Agreement) filed in conjunction therewith.

After Plaintiffs filed their Unopposed Motion for Preliminary Approval of the Settlement. (Docs. 45, 46, 46-1, and 46-2), the Court held a preliminary approval hearing on April 25, 2023. During that hearing, the Court asked the Parties to implement certain changes to the claim form, the proposed preliminary approval order, the short form notice, and the long form notice, to ensure they were consistent with the Settlement Agreement. Doc. 51. The Parties submitted the final revised materials on May 12, 2023 (Docs. 54, 54-1, 54-2), and the Court entered an order preliminarily approving the Settlement on May 18, 2023 (the "Preliminary Approval Order"). Doc. 55.

Since this Court granted entered the Preliminary Approval Order, the Parties, in conjunction with the Settlement Administrator, Kroll Settlement Administration, have effectuated Class notice consistent with the Settlement and Preliminary Approval Order. Joint Dec. ¶11. Over the next several weeks and continuing to today, Class Counsel have continued to work with Defendant and the Settlement Administrator regarding claims administration and processing as

well as answering class members questions about the settlement and the process. *Id.* ¶12. While the claims process is ongoing, and while Kroll will submit a detailed declaration about the notice program and claims process in connection with the motion for final approval, preliminary data about the notice and claims process is positive. Through July 28, 2023, 191,581 notices were mailed, 3,025 claims have been filed, 22 Settlement Class Members have requested exclusion and there have been no objections to the Settlement. *Id.* ¶15.

Class Counsel's work is not over and will continue throughout the claims period. Based on experience, each Class Counsel will spend substantial additional hours seeking final approval, defending the Settlement from potential objections (of which there are none to date), and supervising claims administration and the distribution of proceeds. *Id.* ¶14.

III. SUMMARY OF SETTLEMENT

A. Settlement Benefits

Under the proposed Settlement, Defendant will pay $1,300,000.00 to establish the Settlement fund to be distributed to Class Members under the Settlement Agreement. Furthermore, under the Settlement Agreement, Defendant has implemented certain cybersecurity enhancements. The Settlement provides for relief for a Settlement Class defined as:

> "All persons who are identified on the Settlement Class List, including all individuals who were sent notification by MMC that their personal information was or may have been compromised in the Data Incident."

Agr. ¶39. The Settlement Class specifically excludes: (1) the judges presiding over this Action, and members of their direct families; (2) MMC, its subsidiaries, parent companies, successors, predecessors, and any entity in which MMC or its parents have a controlling interest and their current or former officers, directors, and employees; and (3) Settlement Class Members who

submit a valid a Request for Exclusion prior to the Opt-Out Deadline. *Id.* The Settlement Class is estimated to include approximately 191,752 individuals.

1. Monetary Relief

Under the terms of the Settlement Agreement, MMC will pay $1,300,000 into a Settlement Fund, which will be used to make payments to Class Members and to pay the costs of Notice, Settlement Administration, attorneys' fees and expenses, and Service Awards to Plaintiffs. *Id.* ¶¶21,42, 46.

All Settlement Class Members can submit a claim for Ordinary Out-of-Pocket Losses, which provides for up to $750.00 per person reimbursement of documented unreimbursed costs or expenditures fairly traceable to the Data Incident, including, but not limited to 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; and miscellaneous expenses such as notary, fax, postage, copying, mileage and long-distance telephone charges that were incurred on or after November 12, 2021. *Id*. ¶52. Settlement Class Members can also submit a claim for Extraordinary Out-of-Pocket Losses which will provide reimbursement of up to $7,500 per person for documented unreimbursed costs or expenditures incurred on or after November 12, 2021, more likely than not caused by the Data Breach, and not already covered by one of the Ordinary Out-of-Pocket Losses reimbursement categories. *Id*. ¶54.

Additionally, Settlement Class Members can submit claim for compensation for up to five (5) hours of lost time spent in response to the Data Incident, e.g., time spent dealing with replacement card issues, reversing fraudulent charges, (calculated at the rate of Twenty Dollars and Zero Cents ($20.00) per hour). *Id.* ¶56. To make a claim for lost time the Settlement Class

member must only include an attestation that any lost time incurred is/was reasonably spent in response to the Data Incident together with a description of the time incurred. *Id.* Claims for lost time are subject to and included within the cap of $750 for ordinary losses. *Id.*

In lieu of submitting documentation and attestations for reimbursement of ordinary or extraordinary losses and/or lost time, Settlement Class Members may choose to make a claim for an Alternative Cash Payment of $150, subject to a pro rata increase or reduction based on the number of valid claims submitted. *Id*. ¶¶60, 69(d).

2. Credit Monitoring and Identity Theft Restoration

In addition to the cash payments offered, each Settlement Class Member is eligible to enroll in one (1) year of three bureau credit monitoring services, the cost of which will be paid for out of the Settlement Fund. *Id.* ¶59.

3. Data Security Measures

In addition to the monetary relief and credit monitoring services provided, MMC has represented that it has implemented significant data security measures, which it continues to assess. *Id*. ¶71. Specifically, Defendant has agreed to delete all PII that is the subject of the Data Incident other than that which is required to be maintained by federal and state law or regulation, or as otherwise required by other regulatory oversight bodies and their applicable requirements or regulations. *Id*. ¶72. Defendant has further agreed to encrypt all PII that is the subject of the Data Incident containing Social Security Numbers, driver's license numbers, passport numbers, and any other government issued ID number while the data is in transit and at rest. *Id.* MMC has already adopted and implemented other data security measures following the Data Incident to strengthen the security of its systems, including audits of their Information Security infrastructure, review and update of policies and procedures, updated firewall and changes, deployment of multi-factor

authentication for all access to MMC's systems, Active Directory auditing of account access via domain controllers, updated password policies, and updated employee education and training. *Id*. ¶71. The costs associated with these extensive remedial measures are being paid for by MMC separately, and in addition to, the benefits to the Settlement Class provided by the Common Fund.

4. Claims Administration

The entire cost of the notice program and claims administration will be paid from the Common Fund. To date, the Settlement Administrator has issued notice to the Settlement Class, established the Settlement website and toll-free help line, and assisted Class Members with questions about the Settlement and filing claims. Joint Dec. ¶13.

5. Attorneys' Fees and Service Awards

The Settlement Agreement calls for a reasonable service award to Plaintiffs in the amount of $3,500 to each Plaintiff. Agr. ¶93. The Service Award is meant to compensate Plaintiffs for their efforts on behalf of the Settlement Class, including maintaining contact with counsel, assisting in the investigation of the case, reviewing the Complaint, remaining available for consultation throughout settlement negotiations, reviewing the Settlement Agreement, and answering counsel's many questions.

After agreeing to the terms of the settlement on behalf of the Class, counsel for Plaintiffs negotiated their fees and costs in the amount of 30% of the Settlement Fund ($390,000) for fees and $10,000 for costs. *Id.* ¶95. Pursuant to the terms of the Settlement Agreement and the Court's Preliminary Approval Order, Plaintiffs' Motion for Service Award Payments and Fee Award and Costs is due 14 days before the Objection Deadline and Opt-Out Deadline. *Id.* ¶21; Doc. 55. Class Counsel is submitting its Motion for Service Award Payments and Fee Award and Costs prior to

filing the Motion for Final Approval of Class Action Settlement, and prior to Settlement Class Members' deadline to exclude themselves from or object to the Settlement Agreement. Agr. ¶83.

B. Total Claims and Awards to Date.

As of July 28, 2023, a total 3,025 claims have been made by the Class. Joint Dec. ¶15. The claims period closes on August 15, 2023.

IV. ARGUMENT

A. Legal Standard

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

Courts in this Circuit have found numerous advantages to using the percentage method of awarding fees. First, the percentage method "directly aligns the interests of the class and its counsel" because it provides an incentive to attorneys to resolve a case efficiently and to create the largest total value for the class. *Wal-Mart Stores, Inc.*, 396 F.3d at 122; *In re Lloyd's Am. Tr. Fund Litig.*, 2002 U.S. Dist. LEXIS 22663, at *72 (S.D.N.Y. Nov. 26, 2002) (collecting cases); *In re Polaroid ERISA Litig.*, 2007 U.S. Dist. LEXIS 51983, at *6 (S.D.N.Y. July 19, 2007); *Velez v. Majik Cleaning Serv.*, 2007 U.S. Dist. LEXIS 46223, at *24 (S.D.N.Y. June 22, 2007).

Second, this method is aligned with market practices, as it "mimics the compensation system actually used by individual clients to compensate their attorneys." *In re Sumitomo Copper Litig.,* 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999); *see also Sewell v. Bovis Lend Lease LMB, Inc.*, 2012 U.S. Dist. LEXIS 53556, at *29 (S.D.N.Y. Apr. 16, 2012) (opining "[the percentage] method is similar to private practice where counsel operates on a contingency fee, negotiating a reasonable percentage of any fee ultimately awarded."); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (noting the percentage method "is consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients.").

Third, the percentage method promotes efficiency and early resolution, as it eliminates any incentive plaintiffs' lawyers may have to run up billable hours—one of the most significant downsides to using the lodestar approach. *Savoie v. Merchants Bank*, 166 F.3d 456, 460-61 (2d Cir. 1999) ("It has been noted that once the fee is set as a percentage of the fund, the plaintiffs' lawyers have no incentive to run up the number of billable hours for which they would be compensated under the lodestar method"); *see also Goldberger v. Integrated Res. Inc.*, 209 F.3d

43, 48-49 (2d Cir. 2000) (citing *In re Union Carbide Corp., Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 167-168 (S.D.N.Y. 1989)).

Finally, the percentage method preserves judicial resources because it relieves the "cumbersome, enervating, and often surrealistic process of evaluating fee petitions." *Savoie*, 166 F.3d at 461 n.4 (quoting *Third Circuit Task Force*, 108 F.R.D. 237, 258). The "primary source of dissatisfaction [with the lodestar method] was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits." *Goldberger*, 209 F.3d at 48-49; *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, 2007 U.S. Dist. LEXIS 57918, at *46 (S.D.N.Y. July 27, 2007). As one New York court stated:

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

In re Union Carbide, 724 F. Supp. at 170.

While courts still use the lodestar method as a "cross check" when applying the percentage of the fund method, courts are not required to scrutinize the fee records as rigorously. *Goldberger*, 209 F.3d at 50; *see In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) (using an "implied lodestar" for the lodestar cross check, and noting that when used as a cross-check, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case).

Regardless of whether the percentage of the fund or lodestar method is used, courts in the Second Circuit evaluating the reasonableness of a fee request consider: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . .; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50. Plaintiffs' Counsel respectfully

submit that the Court should apply the percentage of the fund method here and, under the *Goldberger* factors, the fee and expense request is reasonable and appropriate and warrants approval by the Court.

B. The *Goldberger* Factors Support the Fee Award Requested by Class Counsel

The Fee Request will compensate Plaintiffs' Counsel for their investment of time, expertise, and capital, which produced an extraordinarily successful outcome for the Settlement Class in a case that was novel, complex and high risk. *See Velez*, 2010 U.S. Dist. LEXIS 125945, at *58 ("The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs' counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit."). Each of the six *Goldberger* factors weigh in favor of granting Class Counsel's request for attorneys' fees of 30% of the Common Fund.

1. The Time and Labor Expended

The ligation required extensive time and labor by Class Counsel. The Joint Declaration submitted by Class Counsel shows a total of 411 hours spent on the litigation. Joint Dec., ¶22. This number is not surprising given the breadth and scope of the litigation and fully supports the requested fee.

As set forth above, Class Counsel drafted separate class action complaints to initiate this litigation, and then worked together to consolidate the related actions and file a Consolidated Complaint. *Id.* ¶3. As litigation commenced, Class Counsel coordinated the litigation schedule with defense counsel; analyzed topics for discovery; conducted settlement negotiations, including drafting of the notices and claim form; prepared and filed of Plaintiffs' Motion and Memorandum of Law in Support of Preliminary Approval of the Settlement (Doc. 46); attended a hearing in support of their Motion for Preliminary Approval; revised and updated the exhibits to the

Settlement Agreement in light of the Court's comments, and worked with the Settlement Administrator and Defendant's counsel to effectuate notice and administer the Settlement. Joint Dec., ¶11.

A lodestar crosscheck also supports the requested fee. As noted above, the lodestar fee calculation method has "fallen out of favor particularly because it encourages bill-padding and discourages early settlements." *In re Colgate-Palmolive Co. ERISA Litig*., 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014). Accordingly, the lodestar method is used in this Circuit only "as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall." *Id*. "[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)." *Silberblatt v. Morgan Stanley*, 524 F.Supp.2d 425, 434 (S.D.N.Y. Nov. 19, 2007) (internal citations omitted). Class Counsel need only submit documentation appropriate to meet the burden establishing an entitlement to an award, not to satisfy "green-eyeshade accountants." *Fox v. Vice*, 563 U.S. 826, 838 (2011).

The combined lodestar to date equals $300,464.60. Joint Dec., ¶22. Class Counsel have calculated that their total lodestar yields a modest multiplier of 1.30**,** which is well within the range accepted by courts in the Second Circuit. *See id*. In fact, courts in this jurisdiction regularly award lodestar multipliers of two times the lodestar or higher. *See, e.g., James v. China Grill Mgmt.*, 2019 U.S. Dist. LEXIS 72759, at *8 (S.D.N.Y. Apr. 30, 2019) (collecting cases with multipliers between 2 and 4.9); *Sewell,* 2012 U.S. Dist. LEXIS 53556, at *38 ("Courts commonly award lodestar multipliers between two to six."); *In re Lloyd's Am. Trust Fund Litig,* 2002 U.S. Dist. LEXIS 22663, at *81 (a "multiplier of 2.09 is at the lower end of the range of multipliers awarded by

courts within the Second Circuit"). Also, the lodestar multiplier will ultimately be much lower once final approval is sought. Joint Dec., ¶22.

2. The Magnitude and Complexity of Litigation

"The size and difficulty of the issues in a case are significant factors to be considered in making a fee award." *Beckman v. KeyBank, N.A.,* 293 F.R.D. 467, 481-83 (S.D.N.Y. 2013) (citation omitted). In cases that require more expertise, a larger percentage of the fund should be awarded to the lawyers who can competently prosecute the case. *See In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) ("The upshot is that the magnitude and complexity of the litigation also weigh in favor of a significant award."). This matter is no exception, as courts recognize that data breach cases enhance the risk litigants face in class litigation. *Hashemi v. Bosley, Inc.*, No. CV 21-946 PSG (RAOx), 2022 U.S. Dist. LEXIS 119454, at *18-19 (C.D. Cal. Feb. 22, 2022) ("Moreover, these risks are compounded by the fact that data breach class actions are a relatively new type of litigation and that damages methodologies in data breach cases are largely untested and have yet to be presented to a jury").

Class Counsel knew from their initial investigations that this litigation would involve extensive research on challenging and complex legal and factual claims in this unique data security class action. Data security and data breach cases across the country are presenting novel issues to the courts for consideration. Class Counsel were also aware that pursuing this case beyond settlement would likely be lengthy and expensive, requiring discovery, briefing, argument, trial, and potential appeals. Joint Dec., ¶16. All of this would require hundreds, or perhaps thousands, of hours of work, which would result in significant costs. Ultimately, Plaintiffs' Counsel accrued 411 hours litigating the matter up to this point, though there is more work to do, including

preparing for and appearing at the Final Approval Hearing, overseeing claims administration, and resolving any appeals.

The magnitude and complexity of the litigation were significant; this this factor weighs in favor of granting Plaintiffs' Motion.

3. The Risk of Litigation

Plaintiffs' Counsel undertook significant risk in accepting this case on an entirely contingent basis, supporting the requested fee award. The Second Circuit "has identified the risk of success as perhaps the foremost factor to be considered in determining" reasonable attorneys' fees. *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008) ("Courts have repeatedly recognized 'that the risk of the litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award plaintiffs' counsel in class actions.") (citation omitted). Class Counsel here took on the risks of litigation knowing full well their efforts might not bear fruit. Fees were not guaranteed. This case involved complexities of data breach that are novel and evolving, and the risk of non-payment is especially high in class actions with contingent fee arrangements, like here. *See Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-CV-11814(MP), 2004 U.S. Dist. LEXIS 8608, at *11 (S.D.N.Y. May 14, 2004) ("Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.").

"It is well-established that litigation risk must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55. While Plaintiffs were confident that their claims would prevail, they faced several strong legal defenses and difficulties in demonstrating causation and injury, at the time of filing of this Action, there were complex issues of fact and law, which presented significant risks that continue through today. In particular, the claims asserted herein have been met with

strong opposition in courts nationwide. Due at least in part to their cutting-edge nature and the rapidly evolving law, data security cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. Bank of N.Y. Mellon Corp.*, 2010 U.S. Dist. LEXIS 71996, at *4 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). In addition to the questions as to whether Plaintiffs' claims would survive a motion to dismiss, there was always a risk that MMC would successfully oppose class certification. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (noting that "[w]hile plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might be not certified is not illusory"). Even if the Class was certified by the Court, Defendant could have then attempted to appeal the certification decision under Federal Rule of Civil Procedure 23(f) or argued for decertification as the litigation progressed. *See Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992). Such defenses, if successful, could drastically decrease or eliminate any recovery for Plaintiffs and Settlement Class Members.

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. 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. As one federal district court recently observed in finally approving a data breach settlement with similar class relief and similar attorneys' fees:

> 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."). Plaintiffs also faced the risk that [defendant] would successfully oppose class certification, obtain summary judgment on one or more of their claims, or win at trial or on appeal. Also, the cost for [defendant] and

> Plaintiffs to maintain the lawsuit would be high, given the amount of documentary evidence as well as the expert costs both parties would incur in the context of class certification, summary judgment, and trial. As such, the current Settlement strikes an appropriate balance between Plaintiffs' "likelihood of success on the merits" and "the amount and form of the relief offered in the settlement." *See Carson v. Am. Brands, Inc*., 450 U.S. 79, 88 n.14 (1981).

Yvonne Mart Fox v. Iowa Health Sys., No. 3:18-cv-00327-JDP, 2021 U.S. Dist. LEXIS 40640, at *14 (W.D. Wis. Mar. 4, 2021) (also approving attorneys' fees and costs in the amount of $1,575,000). 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).

"Counsel should be rewarded for undertaking [those risks] and for achieving substantial value for the class." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 441 (E.D.N.Y. 2014); *see also Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ. 214 CM, 2012 WL 2505644, at *10 (S.D.N.Y. June 27, 2012) ("[T]he risk of non-payment in cases prosecuted on a contingency basis where claims are not successful…can justify higher fees.").

Plaintiffs' Counsel were able to secure a significant settlement on behalf of Class members for complex claims asserted against Defendant. This was done despite the significant risks Plaintiffs faced in pursuing these claims. As such, the Settlement is a direct result of Class Counsel's skills and dedication in this Action. Accordingly, this factor weighs in favor of approving the requested fee percentage.

4. The Quality of Representation

In determining the quality of representation, Courts examine the experience of the attorneys involved and the result obtained in the lawsuit. *See Taft v. Ackermans*, 2007 U.S. Dist. LEXIS 9144, at *31 (S.D.N.Y. Jan. 31, 2007). Here Class Counsel have substantial experience in both class actions generally, and complex consumer class actions involving cybersecurity incidents in

particular. *See* Joint Dec., Exs. A-D. It required significant skill and experience, as well as high quality representation, to even be able to identify the issues of Article III standing and the highly technical aspects of the data breach mechanism (i.e. the means by which Defendant's systems were breached), not to mention the specialized knowledge of class action procedure required to achieve certification, let alone settlement.

With respect to the results achieved for the Class, as discussed above, they are undoubtedly exemplary. MMC has agreed to establish a $1,300,000 Common Fund to provide benefits to the Settlement Class that will directly address the harm they suffered as a result of the Data Breach, including reimbursement for out-of-pocket expenses, identity theft and fraud, and lost time. Agr. ¶¶52-71. The Settlement also provides the option to enroll in credit monitoring. *Id.* Alternatively, Settlement Class Members can choose to file a claim for a $150 cash payment. *Id.* Finally, MMC has committed to enacting changes to its data security and storage in direct response to the Data Incident and this Action, and to pay for the costs of those changes separately from benefits to the Class. *Id.*

Given the quality of Class Counsel's representation, as evidenced by the excellent Settlement achieved for the Class, this factor weighs in favor of approval.

5. The Requested Fee in Relation to the Settlement

Class Counsel request an award of attorneys' fees of 30% of the $1,300,000 Common Fund, or $390,000. This is consistent with the range typically awarded by courts in this Circuit. *See, e.g., Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007) (affirming fee award of 30% of recovery); *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS)(SMG), 2007 U.S. Dist. LEXIS 68964, at *50 n.41 (E.D.N.Y. Sep. 18, 2007) (30% fee); *Warren v. Xerox Corp.*, No. 01-CV-2909 (JG), 2008 U.S.

Dist. LEXIS 73951, at *22 (E.D.N.Y. Sep. 19, 2008) (awarding class counsel attorneys' fees and expenses at 33.33 percent of the total settlement value, and finding such a sum "comparable to sums allowed in other cases"); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d at 397 (approving a fee of 27.5%). Additionally, when considering the value offered to the Settlement Class by the remedial measures that MMC is implementing and paying for outside of the Common Fund, Plaintiffs' fee request is certainly reasonable in light of the significant benefits achieved on behalf of the Class.

6. Public Policy Considerations

Public policy supports providing attorneys' fees in class action cases, as class actions are also an invaluable safeguard of public rights. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). Where, as here, the settlement amount is relatively small, an award of attorneys' fees ensures that "plaintiffs' claims [will] likely . . . be heard." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 189 (W.D.N.Y. 2005). If courts denied sufficient attorneys' fees "no attorneys . . . would likely be willing to take on . . . small-scale class actions[.]" *Id.*; *see also Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) (private attorneys "should be encouraged" to take the risks required to represent those who would not otherwise be protected from socially undesirable activities, including fraud.). Public policy is in favor of rewarding counsel who persevere through risky litigation and achieve favorable results for the class they represent. Here, counsel took on this case despite the uncertainty and volatility of law pertaining to consumer class actions, especially ones seeking damages for personal injury and economic loss for data breach victims and persevered in obtaining a settlement allowing for Settlement Class Members to receive cash, injunctive, and mitigative compensation. Such a result should be rewarded.

C. Class Counsel's Requested Expenses are Reasonable

Courts typically allow counsel to recover their reasonable out-of-pocket expenses. *Beckman v. KeyBank, N.A.,* 293 F.R.D. 467, 481-83 (S.D.N.Y. 2013) (citing *In re Indep. Energy Holdings PLC Sec. Litig.,* 302 F. Supp. 2d 180, 183 n. 3 (S.D.N.Y.2003)). "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation' of those clients." *In re Indep. Energy Holdings PLC Sec. Litig*., 302 F. Supp. 2d at 183 n.3 (internal quotation marks omitted).

Class Counsel seek reimbursement of costs and expenses totaling $10,000. Agr. ¶95; Joint Dec., ¶26.[2] The actual out-of-pocket expenses reasonably incurred to date is $XXX, and this amount will necessarily increase prior to final approval. These expenses are expenses routinely charged to hourly clients, are appropriately documented, and were necessary and reasonable to prosecute the litigation. The full requested amount should be awarded.

D. Plaintiffs' Requested Service Awards are Justified and Should be Approved

Service awards are commonly awarded in class action cases to compensate plaintiffs for the time and effort they expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained. *Beckman v. KeyBank, N.A.,* 293 F.R.D. 467, 481-83 (S.D.N.Y. 2013) (citation omitted). Courts consider such compensation important. *See Massiah v. MetroPlus Health Plan, Inc.,* No. 11 Civ. 5669, 2012 WL 5874655, at *8 (E.D.N.Y. Nov. 20, 2012).

For their commitment to this case, Plaintiffs seek $3,500 each (or $21,000 total). Plaintiffs each assisted in preparing not only their original complaints, but also the Consolidated Complaint.

[2] Class Counsel's total expenses to date are $6,849.80. Class Counsel expects that those expenses will increase to at least $10,000 prior to the hearing on the motion for final approval however, if they do not, Plaintiffs will notify the Court of Class Counsel's total expenses at the final approval hearing.

Joint Dec., ¶28; Declarations of Patrick Reynolds, Daniel Lewis, Lucia Marano, Kristen France, Abbey Abrecht, and Jadidah Diaab. Plaintiffs remained in contact with Class Counsel after filing their actions regarding the progress of the case. *Id.* Plaintiffs provided information in advance of mediation and were available throughout the mediation and settlement process to answer questions and represent the interests of the Settlement Class. *Id.* They were each prepared to take on the responsibilities of a class representative, including being deposed and testifying at trial. *Id.*

The amount requested is reasonable and modest relative to awards regularly granted by courts in this jurisdiction and the request should be granted. *See Beckman*, 293 F.R.D. at 481-83 (granting an award of $5,000 to $7,500 to plaintiffs); *Dornberger v. Metropolitan Life Ins. Co*., 203 F.R.D. 118 (S.D.N.Y. 2001) (noting in class actions representative plaintiff awards for $2,500 or more are commonly accepted).

V. CONCLUSION

For the foregoing reasons, Class Counsel request that the Court grant this motion and (1) award 30% of the Common Fund, or $390,000 as attorneys' fees along with $10,000.00 in expenses and (2) approve a service award of $3,500 each ($21,000 total) for Plaintiffs Patrick Reynolds, Daniel Lewis, Lucia Marano, Kristen France, Abbey Abrecht, and Jahidah Diaab.

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By: */s/ Gary M. Klinger*

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