SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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LISA SIMMONS and KELLY PERTERSON-SMALL, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

ASSISTCARE HOME HEALTH SERVICES, LLC, d/b/a/ Preferred Home Care of New York/Preferred Gold,

Defendant.

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Index No.: 511490/2021

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

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Plaintiffs Lisa Simmons and Kelly Peterson-Small ("Plaintiffs") submit this Memorandum of Law in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards to Class Representative.

INTRODUCTION

From January 8, 2021 through January 10, 2021, Defendant Assistcare Home Health Services, LLC, d/b/a Preferred home Health Care of New York/Preferred Gold ("Preferred home" or "Defendant") was the victim of a data incident through which unauthorized parties gained access to the files of approximately 92,283 current and former patients and employees, including Plaintiffs, potentially compromising their personally identifiable information ("PII") and protected health information ("PHI"). This class action arises out of Defendant's alleged failure to safeguard the PII that it collected and maintained from and for Plaintiff and class members. Defendant denies all liability and wrongdoing.

After extensive arms' length negotiations, the parties reached a settlement that is fair, adequate, and reasonable. The Settlement Agreement, if approved, will provide Class Members with substantial potential relief, including: (a) reimbursement of up to $400 of out-of-pocket expenses per class member, including payment for up to four hours of attested lost time, compensable at the rate of $20 per hour if at least one full hour was spent dealing with the Data Breach; (b) reimbursement of up to $3,500 for extraordinary losses not covered by one of the out-of-pocket reimbursement categories; and (c) one-year of credit monitoring and identity theft protection services for all members of the Settlement Class, and an additional one year of credit monitoring (for a total of two years offered) for Settlement Subclass Members.[1] Plaintiffs strongly

[1] The Settlement Agreement ("Agreement") in its entirety is attached as Exhibit A to Plaintiff's Memorandum of Law in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement. (NYSCEF No. 46-2). Capitalized terms shall have the same meaning as assigned to them in the Settlement Agreement.

believe the settlement is favorable to the Settlement Class.[2] Defendant's and/or its insurer's maximum payment for categories (a) and (b), out-of-pocket losses and extraordinary losses, will be $1,000,000, and payments to Settlement Class Members who make Valid Claims shall be reduced on a pro rata basis according to the number of claims made if the total exceeds the overall $1,000,000 cap. Payment for category (c), credit monitoring, will be paid by defendant separate and apart from these funds.

Pursuant to the Settlement Agreement and the Court's inherent authority, Gary Klinger ("Class Counsel") respectfully submits this Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards for Class Representative ("Fee Application"). First, Class Counsel request that the Court award $235,000.00 for payment of attorneys' fees and expenses ("Fee Request"). This represents just 23.5% of just the $1,000,000 cap reimbursement of lost time and expenses available to the class, and less than one percent of the total benefits available to the class when you factor in the value of the credit monitoring services Defendant will make available to each Settlement Class Member, the value of the security enhancements, the cost of settlement administration, and the attorneys' fees (all of which will be paid by Defendant separate and apart from the other monetary relief). 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 for much of the past year.

[2] *See* the Declaration of Gary M. Klinger in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement, attached as Exhibit 2 to Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement. (the "Klinger MPA Dec.) (NYSECF No. 46-2). at ¶ 82.

In addition, Class Counsel request that the Court approve a service award for each Class Representative, Plaintiff Simmons and Plaintiff Peterson-Small, in the amount of $1,500 each. 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 declaration from Class Counsel attached as Exhibit 1 (Declaration of Gary Klinger in support of Plaintiffs' Motion for Approval of Attorneys' Fees Award, Expense Reimbursement, and Service Awards to Representative Plaintiffs) ("Klinger Fee Decl.").

FACTUAL BACKGROUND

A. PROCEDURAL HISTORY

On May 14, 2021, Plaintiffs filed a Class Action Complaint ("Complaint" or "Comp.") against Preferred Home. (NYSCEF Doc. No. 1.) Plaintiffs alleged causes of action for: (1) Negligence; (2) Breach of Implied Contract; (3) Violation of the New York General Business Law, § 349; (4) Invasion of Privacy; and (5) Breach of Confidence. (NYSCEF Doc. No. 1.) On June 30, 2021, Preferred Home filed a Motion to Compel Arbitration, to Stay Action or to Dismiss Complaint, arguing that Plaintiff Peterson-Small's claims were subject to binding arbitration and that the entire action should be stayed pending the final outcome of that arbitration. (NYSCEF Doc. No. 17.) In the alternative, Preferred Home argued that, to the extent any claims in the Complaint were not compelled to arbitration or stayed, such claims were legally insufficient and should be dismissed. *Id.* On February 9, 2022, the Court issued an Order denying Preferred Home's motion to compel arbitration and to stay the action pending arbitration. (NYSCEF Doc. No. 36.) The Court also dismissed Plaintiffs' causes of action for Violation of the New York General Business Law, § 349 and Breach of Confidence, but denied Preferred Home's motion in all other respects (the "Lawsuit"). *See id.* After the Court's ruling on Preferred Homes' motion, the Parties

agreed to mediate the Lawsuit. On March 14, 2022, the Court stayed all proceedings in the matter pending the outcome of the mediation. (NYSCEF Doc. No. 38.)

This Settlement came about as the result of protracted, arms' length negotiations after a day-long mediation with a preeminent data breach mediator, Bennett G. Picker of the firm, Stradley Ronon Stevens & Young, LLP, which took place on August 4, 2022. (NYSCEF Doc. No. 42.) *See* Klinger MPA Dec., ¶ 36. The Parties were able to reach an agreement on all the principal terms of settlement for this matter at the mediation, subject to final mutual agreement on all necessary documentation. *See* Klinger MPA Dec., ¶ 37. After the mediation, the Parties negotiated and executed a Term Sheet. *See id.* ¶ 38. Since then, the Parties continued to negotiate in good faith and at arms' length, the finer points of the settlement and drafted the Settlement Agreement and accompanying Notice documents and other exhibits. *See id.* ¶ 38. While negotiations were always collegial and professional between the Parties, there is no doubt that the negotiations were also adversarial in nature, with both Parties strongly advocating their respective client's positions. *See id.* ¶ 37. The Settlement Agreement and the various exhibits thereto were ultimately finalized and signed on October 31, 2022. *See id.* ¶ 38. Preliminary approval was granted on January 23, 2023. NYSCEF Doc. No. 51.

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. Klinger Fee Decl, ¶ 24.

In the Preliminary Approval Order the Court set the final fairness hearing for June 27, 2023 at 2:30 p.m. NYSCEF Doc. No. 51.

B. SUMMARY OF SETTLEMENT

1. Settlement Benefits

The Settlement Class is defined as:

> "All persons Preferred Home identified as being among those individuals impacted by the Data Breach, including all who were sent a notice of the Data Breach."

See S.A. ¶ 1.31(a). The Settlement Class is comprised of approximately 92,283 individuals (each, a "Settlement Class Member"). *See* Klinger MPA Decl. ¶ 39. The Settlement Subclass is defined as:

> "All persons Preferred Home identified as being among those individuals impacted by the Data Breach, who were further identified as being among those whose Social Security Numbers were potentially compromised, and who were sent a notice of the Data Breach."

See Agreement. ¶ 1.31(b). The Settlement Subclass is comprised of approximately 34,938 individuals (each, a "Settlement Subclass Member"), which are included in the 92,283 individuals in the Settlement Class. *See* Klinger MPA Dec. ¶ 40. For avoidance of doubt, Settlement Subclass Members are also Settlement Class Members, and references herein to the Settlement Class include the Settlement Subclass. Agreement. ¶ 1.32(a)(iii). In addition, the Settlement Class and Settlement Subclass are combined referred to as the "Settlement Classes." Excluded from the Settlement Class definition are:

> (i) officers and directors of Preferred Home and/or the Related Entities; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the members of the judiciary who have presided or are presiding over this matter and their families and staff; and (iv) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding, or abetting the criminal activity occurrence of the Data Breach or who pleads *nolo contendere* to any such charge.

See Agreement. ¶ 1.31(d).

i. Monetary Relief

Each Settlement Class Member will be eligible to receive reimbursement for documented monetary losses incurred by him or her as a result of the Data Breach. *See* Agreement. ¶ 3. Specifically, each eligible Settlement Class Member may choose from all applicable claim categories below—Claim A (Compensation for Ordinary Losses) and Claim B (Compensation for Extraordinary Losses). The overall compensation cap for any Settlement Class Member is $400.00 for all amounts claimed in Claim A, and $3,500.00 for all amounts claimed in Claim B. *See* Agreement. ¶ 3.1.

a. Claim A: Compensation for Ordinary Losses.

Settlement Class Members who submit timely, valid claims, with supporting documentation (other than claims for Lost Time (defined below), are eligible to receive compensation for unreimbursed ordinary losses for up to a total of 400.00 per Settlement Class Member. *See* Agreement. ¶ 3.1(a). Ordinary losses may include: (i) out-of-pocket expenses incurred as a result of the Data Breach, 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; (ii) fees for credit reports, credit monitoring, or other identity theft insurance product purchased between January 8, 2021 and the Claim Deadline; and (iii) up to four (4) hours of lost time ("Lost Time"), calculated at $20/hour, if at least one (1) full hour was spent dealing with the Data Breach, provided that the Settlement Class Member attests that the claimed lost time was spent responding to issues raised by the Data Breach. *See* Agreement. ¶ 3.1(a). Claims for Lost Time are subject to the same $400.00 cap on ordinary losses. *See id.*

b. Claim B: Compensation for Extraordinary Losses.

Settlement Class Members who submit timely, valid claims, with supporting documentation, are eligible to receive claim up to $3,500.00 per Settlement Class Member for proven monetary losses if: (a) the loss is an actual, documented, and unreimbursed monetary loss; (b) the loss was more likely than not caused by the Data Breach; (c) the loss occurred between January 8, 2021 and the Claim Deadline; (d) the loss is not already covered by one or more of the normal reimbursement categories; and (e) the Settlement Class Member made reasonable efforts to avoid, or seek reimbursement for, the loss, including, but not limited to, exhaustion of all available credit monitoring insurance and identity theft insurance. *See* Agreement ¶ 3.1(b). The maximum amount any one Claimant may recover under Claim B is $3,500.00. *See id.*

ii. Credit Monitoring and Identity Theft Protection

Settlement Class Members will be offered a one (1)-year membership of three bureau (3B) credit monitoring services without the need to file a Claim Form for monetary relief. *See* Agreement. ¶ 3.1(c). Settlement Subclass Members will be offered an additional one (1)-year membership of 3B credit monitoring (or a total of two (2) years offered). *See id.*

The value of this benefit to the Settlement Class is significant. The least expensive 3B credit monitoring product available in the retail marketplace today costs $16.67 per month.[3] The potential value of one (1) year of this benefit is as high as $200.04 per Settlement Class Member.

Preferred Home's and/or its insurers' maximum payment obligation under the Settlement Agreement for any and all payments under ¶¶ 3.1(a)-(c) is $1,000,000, and payments to Settlement Class Members who make Valid Claims shall be reduced on a *pro rata* basis according to the number of claims made if the total exceeds the overall $1,000,000 cap. *See* Agreement. ¶ 3.2.

[3] https://www.identityguard.com/plans (last visited Oct. 12, 2022).

iii. Data Security Measures

Plaintiffs also negotiated for and received commitments from Preferred Home that it will continue to provide security for current and former patient and employee PII and PHI going forward. *See* Klinger MPA Decl. ¶ 48. Preferred Home has agreed to pay the costs of these security-related measures separate and apart from other settlement benefits. *See id.*

iv. Release

The relief provided to Settlement Class Members in the Lawsuit is tailored to the claims that have been pleaded or could have been pleaded that are related in any way to the activities stemming from the Data Breach. *See* Klinger MPA Dec. ¶ 50. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release claims related to the Data Breach. *See* Klinger MPA Dec. ¶ 51.

v. Claims Administration

Defendant has agreed to pay for the entire cost of Claims Administration and Notice separately from any funds made available to the class, much like the Attorneys Fees, expenses, and service award payments. Klinger Fee Decl., ¶ 3. The cost of the claims administration is estimated to be $109,953, and is another benefit to the Class. *Id*.

ARGUMENT

A. THE FEE REQUEST IS FAIR AND REASONABLE AND SHOULD BE APPROVED.

This case is complex, with the procedural issues of class action litigation combined with the novelty of data breach class actions. In spite of this, Class Counsel was able to effectively litigate Plaintiffs' claims to reach a successful resolution for the Class.

While the "determination as to the proper amount of an award of [counsel] fees lies largely within the discretion of the court, the discretion is not unlimited" *Matter of Rahmey v. Blum,* 95

A.D.2d 294, 299–300, 466 N.Y.S.2d 350 (1983). When reviewing a fee application in a class action, the court acts as a fiduciary and must protect the rights of absent class members. *See Silberblatt v. Morgan Stanley,* 524 F.Supp.2d 425, 433 [S.D.N.Y.2007]). Although no single method of determining fees is mandated (*see Bear Stearns Cos. v. Jardine Strategic Holding, Ltd.,* N.Y.L.J., Aug. 7, 1991, at 22, col. 3 (Sup. Ct., New York County)), two acceptable options are the percentage approach and the lodestar method, the latter having originated in class action litigation. *See Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 50 (2d Cir.2000); *Frank v. Eastman Kodak Co.,* 228 F.R.D. 174, 188 (W.D.N.Y. 2005); *Sheppard v. Consolidated Edison Co. of N.Y.,* 2002 WL 2003206, at *7 (E.D.N.Y.2002); *Friar v. Vanguard Holding Corp.,* 125 A.D.2d 444, 447, 509 N.Y.S. 2d 374 [1986]).

"In testing the reasonableness of the negotiated fee, [courts] first look[] to the percentage of recovery approach." *Michels v. Phoenix Home Life Mut. Ins.,* 1997 WL 1161145, at *31 (Sup. Ct. N.Y. Cnty. Jan 7, 1997). "Federal Courts around the country, including federal district courts in New York, are turning away from the lodestar/multiplied approach and are returning to the percentage of the recovery approach. *Id*. Courts 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. v. Visa U.S.A., Inc.*, 396 F.3d at 122 (2d Cir. 2005).[4]

[4] In addition to citing New York state case law authority, this Memorandum will cite to federal case law authority for approval of attorneys' fees, costs, and service awards to class representatives. "New York's courts have recognized that its class action statute is similar to the federal statute and have looked to federal case law for guidance." *Fiala*, 899 N.Y.S.2d at 537 (citing cases); *Colt Indus. Shareholder Litig. v. Colt Indus. Inc*., 77 N.Y.2d 185, 194 (1991) ("New York's class action statute has much in common with Federal Rule 23.").

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

The percentage method also promotes efficiency and early resolution, as it eliminates any incentive plaintiffs' lawyers may have to run up billable hours—one of the most significant downsides to using the lodestar approach. *Savoie v. Merchants Bank*, 166 F.3d 456, 460-61 (2d Cir. 1999) ("It has been noted that once the fee is set as a percentage of the fund, the plaintiffs' lawyers have no incentive to run up the number of billable hours for which they would be compensated under the lodestar method"); *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 48-49 (2d Cir. 2000) citing *In re Union Carbide Corp., Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 167-168 (S.D.N.Y. 1989); see also *In re Interpublic Sec. Litig.*, Nos. 02-cv-6527, 03-cv-1194, 2004 WL 2397190, at *11 (S.D.N.Y. Oct. 26, 2004). "The Lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours." *Lopez v. The Dinex Group, LLC*, 2015 WL 5882842, at *5 (Sup. Ct. N.Y. Cnty. Oct. 06, 2015); *see also Matter of Karp*, 145 A.D.2d 208, 216 (1st Dep't 1989) ("To base a fee solely on hours worked is to penalize the experienced and skillful lawyer who can perform the services in substantially less time than the inexperienced one.".

Finally, the percentage method preserves judicial resources because it relieves the "cumbersome, enervating, and often surrealistic process of evaluating fee petitions." *Savoie v. Merchants Bank*, 166 F.3d at 461 n.4, quoting *Third Circuit Task Force*, 108 F.R.D. 237, 258. The "primary source of dissatisfaction [with the lodestar method] was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits." *Goldberger v. Integrated Res. Inc.*, 209 F.3d at 48-49; *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05-cv-10240, 2007 WL 2230177, at *16 (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 Corp., Consumer Prods. Bus. Sec. Litig., 724 F. Supp. 160, 170 (S.D.N.Y. 1989). While courts still use the lodestar method as a "cross check" when applying the percentage of the fund method, courts are not required to scrutinize the fee records as rigorously. *Goldberger v. Integrated Res. Inc.*, 209 F.3d at 50; *see In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) (using an "implied lodestar" for the lodestar cross check, and noting that when used as a cross-check, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case); *Varljen v. H.J. Meyers & Co*., No. 97-cv-6742, 2000 WL 1683656, at *5 (S.D.N.Y. Nov. 8, 2000) (using an "unexamined lodestar figure" for the lodestar cross check). In the instant matter the "lodestar" fully justifies the fees requested by counsel, particularly considering the inherent reasonableness of counsel seeking $235,000 in combined fees and expenses compared to a settlement that brings benefits estimated to be worth over $20,000,000 in potential value to the Class, in addition to significant non-monetary benefits in the form of the

substantial additional data security measures undertaken by Defendant to prevent future Data Incidents from harming the class.

In cases such as this one, with a "claims made" model of recovery, many Courts in the Second Circuit have adopted the method of valuing the settlement based on a calculation of the total "benefit of the settlement." *See e.g. In re Hudson's Bay Co. Data Sec. Incident Consumer Litig.,* 18-cv-8472-PKC, 2022 WL 2063864, at *14-15 (S.D.N.Y. June 6, 2022); *but see Zink v. First Niagra Bank, N.A.*, 13-cv-01076, 2016 WL 7473278, at *5 (W.D.N.Y. Dec. 29, 2016); *Faican v. Rapid Park Holding Corp.,* No. 10-cv-1118, 2010 WL 2679903, at *3 (E.D.N.Y. July 1, 2010). Other Courts, such as the *Zink* and *Faican* Courts determined that using the total value of the settlement available to the class, rather than the amount actually claimed, was superior in assessing Attorneys' fees requests. As will be shown below, the Attorneys' fees and expenses requested are reasonable under either method.

B. THE FEES REQUESTED BY CLASS COUNSEL ARE WELL WITHIN THE RANGE OF FEES APPROVED BY SECOND CIRCUIT COURTS.

Class Counsel request an award of only 23.5% of the $1,000,000 cap on payments from Defendant to Settlement Class Members for reimbursement of out-of-pocket losses, lost time, and extraordinary losses, which will be paid separate and apart from amounts that Defendant has pledged to pay for credit monitoring, security enhancements, the cost of settlement administration, and the attorneys' fees themselves. These fees requested by counsel here are well within the range typically awarded by courts. New York courts "have routinely granted requests for one-third or more of the fund in cases with settlement funds similar to or substantially larger than this one." *Massiah v. MetroPlus Health Plan, Inc.,* 2012 WL 5874655, at *7 (E.D.N.Y. Nov. 20, 2012) (citing cases); *Milton,* 2015 WL 9271692, at *5 (collecting cases and noting that 33.3% is "consistent with the norms of class litigation in this circuit"); *Josephs v. United Hebrew of New*

Rochelle Certified Home Health Agency, Inc. d/b/a United Hebrew Geriatric Center, Index No. 50926/2019, NYSCEF No. 28 (Sup. Ct. Westchester Cnty. June 9, 2020) (Walker, J.) (awarding one-third of $2.1 million settlement fund in attorneys' fees); *Contreras v. Dania Marina, Inc. d/b/a Marina Del Rey Caterers*, Index No. 54536/2018, NYSCEF No. 54 (Sup. Ct. Westchester Cnty. Oct. 3, 2019) (Walsh, J.) (awarding one-third of the settlement fund in attorneys' fees); *Lopez*, 2015 WL 5882842, *6 ("[O]ne-third of the settlement fund as attorney's fees … is well within the range of reasonableness and within the percentage regularly approved in class action[s]"); *Ryan v. Volume Services America, Inc*., 2013 WL 12147011, at *4 (Sup. Ct. N.Y. Cnty. Mar. 07, 2013) (same); *Fernandez v. Legends Hospitality, LLC*, 2015 WL 3932897, at *5 (Sup. Ct. N.Y. Cnty. June 22, 2015) (same); *Mancia v. HSBC Securities (USA) Inc*., 2016 WL 833232, at *4 (Sup. Ct. N.Y. Cnty. Feb. 19, 2016) (same); see also *Hayes,* 2011 WL 6019219, at *1 (awarding "attorneys' fees in the amount of one third" of a $9 million settlement fund), aff'd 509 F. App'x 21, 23-24 (2d Cir. 2013); *See, e.g., Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C*., 504 F.3d 229, 249 (2d Cir. 2007) (affirming fee award of 30 percent of recovery); *In re Gilat Satellite Networks, Ltd*., CV-02-1510 (CPS)(SMG), 2007 WL 2743675, at *16 n.41 (E.D.N.Y. Sept. 18, 2007) (30 percent fee); *Warren v. Xerox Corp*., 01-CV-2909 (JG), 2008 WL 4371367, at *22 (E.D.N.Y. Sept. 19, 2008) (awarding class counsel attorneys' fees and expenses at 33.33 percent of the total settlement value, and finding such a sum "comparable to sums allowed in other cases"); *In re Sumitomo Copper Litig*., 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999) (approving a fee of 27.5 percent), *In re Dime Sav. Bank*, MDL 846, CV 89-2189, 1994 WL 60884, at *6-7 (E.D.N.Y. Feb. 23, 1994) (listing cases and noting percentage rates between 20 and 30 percent are not uncommon). Even in a case where the Court used the "alternative calculations" discussed above, the Court approved attorneys' fees in the amount of $897,866.26 compared to an

estimated total value for the settlement of $1,479,550.67 (approving a fee of 60.7 percent). *In re Hudson's Bay Company Data Security Incident Consumer Litig.,* 2022 WL 2063864 at *22.

C. PLAINTIFF'S REQUEST FOR APPROVAL OF REIMBURSEMENT OF LITIGATION EXPENSES AND ATTORNEYS' FEES IS FAIR REASONABLE AND SHOULD BE GRANTED.

CPLR 909 permits courts to award attorneys' fees in class action litigation. In order to assess a reasonable fee, a court should consider:

> [T]he risks of the litigation, whether counsel had the benefit of a prior judgment, standing at bar of counsel for the plaintiffs and defendants, the magnitude and complexity of the litigation, responsibility undertaken, the amount recovered, the knowledge the court has of the case's history and the work done by counsel prior to trial, and what it would be reasonable for counsel to charge a victorious plaintiff.

Fiala v. Metro. Life Ins. Co., 899 N.Y.S.2d 531, 610 (Sup. Ct. N.Y. Cnty. 2010).

Each of these factors supports approval of Class Counsel's fee and expense request here.

1. The Risk of Litigation

"Contingency risk is the principal, though not exclusive, factor courts should consider in their determination of attorneys' fees." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481-83 (S.D.N.Y. 2013), quoting *In re Dreyfus Aggressive Growth Mut. Fund Litig*., 2001 WL 709262, *6 (S.D.N.Y. June 22, 2001); *see also Gevaerts v. TD Bank*, 2015 WL 6751061, at *13 (S.D. Fla., Nov. 5, 2015) (class counsel "assumed a significant risk of non-payment or underpayment. Numerous cases recognize such a risk as an important factor in determining a fee award."). Class Counsel here took on the risks of litigation knowing full well their efforts might not bear fruit. Fees were not guaranteed.

The risks undertaken in pursuing this data breach litigation were significant. this case involved complexities of data breach that are novel and evolving. While Plaintiffs were

confident that their claims would prevail, they faced several strong legal defenses and difficulties in demonstrating causation and injury. 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:

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). *Fox v. Iowa Health Sys.*, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021) (also approving attorneys' fees and costs in the amount of $1,575,000); *see also Hammond v. The Bank of N.Y. Mellon Corp*., 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).

Accordingly, this factor weighs in favor of approving the requested fee percentage.

2. Whether Counsel Had the Benefit of a Prior Judgement

Data breach litigation is evolving; there is no guarantee of the ultimate result. *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."). Indeed, instead of relying on a prior judgment, Class Counsel took on the risk of filing this class action on an entirely contingent basis. While data breach litigation is still an emerging area of law, Class Counsel was able to draw on their extensive experience in this area to achieve a settlement that offers a substantial benefit to the class in spite of the novelty of and risks associated with the litigation. This factor weighs in favor of the requested fee award.

3. Standing at the Bar of Counsel for Plaintiffs and Defendant

In determining the quality of representation, Courts examine the experience of the attorneys involved and the result obtained in the lawsuit. *Taft v. Ackermans,* No. 02-cv-7951, 2007 WL 414493, *1 (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* Klinger MPA Dec., ¶¶ 2-25. It required significant skill and experience, as well as high quality representation, to even be able to identify the issues of standing, relatively new statutes like the California Consumer Protection Act, 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.

Furthermore, "[t]her quality of the opposition should be taken into consideration in assessing the quality of the plaintiff's counsel's performance." *In re Metlife Demutualization Litig.,* 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). In the instant case, Defendant was represented by competent and well respected counsel, who were experienced in data breach litigation. Both sides zealously advocated on behalf of their respective clients and the excellent result here is a function of the high quality of the work and intense negotiations by both sides. As such, this factor weighs in favor of approval.

4. 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), *citing In re Prudential Sec. Inc. Ltd. P'ship Litig*., 912 F. Supp. 97, 100 (S.D.N.Y.1996). "[C]lass actions have a well-deserved reputation as being most complex." *In re Nasdaq Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 477 (S.D.N.Y. 1998). This case was no exception. Defendant's business practices impacted thousands of consumers in New York and elsewhere and presented many novel and complex issues. While Plaintiffs believe that their claims are strong, they are not without risk. Trial of this matter would necessitate costly preparation of experts who in all likelihood would have to conduct their own, original clinical studies. The magnitude and complexity of legal issues involved in this case reinforces the reasonableness of Counsel's requested fee percentage.

5. The Case History and the Responsibility Undertaken by Class Counsel

Class Counsel's activities included, but were not limited to, conducting an extensive pre-filing investigation of Plaintiffs' and Class Members' claims and damages and vigorously prosecuting those claims. Class Counsel engaged in extensive discovery prior to mediation,

prepared mediation statements, and ultimately negotiated a comprehensive settlement for the Settlement Class.

Since reaching the Settlement, Class Counsel has drafted a motion for preliminary approval of the Settlement, and assisted with the drafting and preparation of the Settlement Agreement, short and long form notice, and claim forms. Class Counsel anticipates expending additional time administering the Settlement after final approval. Thus, the work performed by Class Counsel to date has been comprehensive, complex, and wide ranging, and this factor supports the requested fee award.

6. The Amount Recovered

As discussed above, the requested fee represents 23.5% percent of the $1,000,000 cap on reimbursement to Settlement Class Members for reimbursement of out-of-pocket losses, lost time, and extraordinary losses. The 23.5% is the most conservative valuation of this settlement, and doesn't include the cost of credit monitoring, security enhancements, costs of claims administration, and attorneys' fees, all of which are substantial benefits to the Class.[5] This percentage is inherently reasonable and weigh in favor of approval. *See Rodriquez v. It's Just Lunch Int'l*, No. 07-cv-09227, 2020 WL 1030983, at *10 (S.D.N.Y. Mar. 2, 2020) ("Courts in this Circuit routinely grant fee applications based on the percentage method when the fee award is one-third of a common fund.").

7. The Knowledge The Court Has Of The Case's History And The Work Done By Counsel Prior To Trial, And What Would Be Reasonable For Counsel To Charge A Victorious Plaintiff.

Under CPLR 909, "[i]f a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees…. Based on the reasonable

[5] If one were to attempt to value the potential benefit of the entire settlement, the amount would exceed $20 million.

value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class." The Settlement Agreement provides that Class Counsel may petition the Court for an award up to $235,000, which is to be paid by Defendant separate and apart from the funds payable to Settlement Class Members. The "Fee Award" also includes all costs and expenses incurred by Class Counsel. As mentioned above, New York courts routinely approve fee requests for one-third of a common fund. See cases cited in Argument § I, *supra*. Furthermore, this percentage does not include the substantial prospective relief secured by the Settlement, which is properly considered. *See Fleisher*, 2015 WL 10847814, at *15. As explained *supra,* Class Counsel's fee request equates to approximately 23.5% of $1 million cap on monetary benefits, and is a fraction of the potential overall settlement value.

Furthermore, 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, and data breach class actions in particular, and persevered in obtaining

a settlement allowing for Settlement Class Members to receive cash, injunctive, and mitigative compensation. Such a result should be rewarded.

D. THE REQUESTED ATTORNEYS' FEES ARE ALSO REASONABLE UNDER A LODESTAR CROSS-CHECK

The ligation required extensive time and labor by Class Counsel. The fee declarations submitted by Class Counsel show a total of 180.7 hours spent on the litigation. Klinger Fee Decl, ¶ 23. This number is not surprising given the breadth and scope of the litigation and fully support the requested fee.

As set forth above, Class Counsel drafted a class action complaint; coordinated the litigation schedule with defense counsel; analyzed topics for discovery; prepared and filed the complaint; responded to Defendant's motion to compel arbitration, stay action, and dismiss the complaint; conducted settlement negotiations, including drafting of the notices and claim form; and prepared and filed of Plaintiff's Motion Memorandum of Law in Support of Preliminary Approval of the Settlement. *See* Klinger Fee Decl, ¶ 2.

A lodestar crosscheck also supports the requested fee. The lodestar fees to date equal $153,172.30. Klinger Fee Decl, ¶ 23. Class Counsel have calculated that their total lodestar yields a modest multiplier of 1.53**,** which is well within the range accepted by courts in New York and the Second Circuit. *See* Klinger Fee Decl, ¶ 24. In fact, courts in this jurisdiction regularly award lodestar multipliers of two times the lodestar or higher. New York courts have observed that multipliers as high as 7.6 times the lodestar have been approved and that "in contingent litigation, 'lodestar multiples of over 4 are routinely awarded.'" *Milton*, 2015 WL 9271692, *6; *Lopez*, 2015 WL 5882842, *7 (same); *see also Yuzary*, 2013 WL 5492998, at *11 (approving 7.6 lodestar multiplier); *Perez*, 2020 WL 1904533, at *21 (approving lodestar multiplier ranging from 13.42 to 18.15); *James v. China Grill Mgmt., Inc.*, No. 18 Civ. 455, 2019 WL 1915298, at *3 (S.D.N.Y.

Apr. 30, 2019) (collecting cases with multiples between 2 and 4.9); *Sewell,* 2012 WL 1320124, at *13 ("Courts routinely award lodestar multipliers between two to six."); *In re Lloyd's Am. Trust Fund Litig,* No. 96 Civ. 1262, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002) (a "multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit"). Further, the lodestar multiplier will ultimately be much lower once final approval is sought, as Counsel expects to spend additional time in the finalization and filing of this motion, at the final approval hearing, and through the end of the claims process and distribution of funds to those Settlement Class Members who made eligible claims. Klinger Fee Decl, ¶ 24.

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

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 $9,455. Klinger Fee Decl, ¶ 28. These expenses are of the type of expenses routinely charged to hourly clients, are appropriately documented, and were necessary and reasonable to prosecute the litigation. The full requested amount should be awarded as part of the combined $235,000 attorneys' fee and expense request.

F. PLAINTIFFS' REQUESTED SERVICE AWARDS ARE JUSTIFIED AND SHOULD BE APPROVED.

It is common for courts to grant service awards in class action suits. Such awards "reward[] the named plaintiffs for the effort and inconvenience of consulting with counsel over the many years [a] case was active and for participating in discovery, including depositions." *Milton*, 2015 WL 9271692, *2-3 (citing *Cox v. Microsoft Corp.*, 26 Misc. 3d 1220(A), at *4 (Sup. Ct. N.Y. Cnty. 2007)). 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 Lisa Simmons and Kelly Peterson-Small seek $1,500 each ($3,000 in total). Plaintiffs were subjected to extensive interviews. They also submitted documentation to prove they were impacted by the Data Incident, and they were prepared to take on the responsibilities of a class representative, including being deposed and testifying at trial. Klinger Fee Decl., ¶¶ 29-31.

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 v. KeyBank, N.A.,* 293 F.R.D. 467, 481-83 (S.D.N.Y. 2013) (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).

CONCLUSION

For the foregoing reasons, Class Counsel request that the Court grant this motion and (1) award $235,000 as attorneys' fees and expenses and (2) approve a service award of $1,500 each to Plaintiffs Lisa Simmons and Kelly Peterson-Small.

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Respectfully submitted,

/s/ *Gary M. Klinger*

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