

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT COURT OF WISCONSIN**

SANGER POWERS, ROBERT LEGG,
JENNIFER McCREARY, BETTY OWEN, and
LYDIA POSTOLOWSKI, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

FILTERS FAST, LLC, a North Carolina
corporation,

Defendant.

CASE NO. 3:20-cv-00982-jdp

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR RENEWED,
UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS**

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I. INTRODUCTION

On November 17, 2021 this Court preliminarily approved a proposed class action settlement between Plaintiffs Sanger Powers, Robert Legg, Jennifer McCreary, Betty Owen, and Lydia Postolowski (collectively, “Plaintiffs”) and Defendant Filters Fast, LLC (“Defendant” or “Filters Fast”). Doc. No. 43. Class Counsel’s¹ efforts created distinct monetary benefits for the approximate 323,000 Settlement Class Members: (1) up to \$750 in cash reimbursements for ordinary out-of-pocket expenses; (2) \$15 per hour for up to four hours of lost time spend dealing with fraud likely to have been caused by the Incident; or (3) a fixed payment of up to \$25. In addition to the monetary relief provided, the Settlement provides up to 24-months of credit monitoring services for each Settlement Class Member. Plaintiffs also negotiated equitable injunctive relief in the form of information security enhancements designed to ensure Settlement Class Members’ Personal Identifying Information is better protected in the future.

On January 28, 2022, Plaintiffs filed their unopposed motion for attorneys’ fees, costs, and service awards. Doc. No. 46. On February 15, 2022, the Court denied the motion, granting leave to refile no later than February 22, 2022. Doc. No. 54. Plaintiffs now come before this Court with a renewed motion for attorneys’ fees, costs, and service awards. Plaintiffs’ counsel has endeavored to address the issues raised by the Court in its February 15, 2022 Order. Class Counsel represents to the Court that the fees and costs requested (\$303,816.31 in attorneys’ fees, and \$16,183.69 in costs) are fair, reasonable, and are fully supported by Class Counsel’s lodestar. Indeed, the lodestar analysis demonstrates that Class Counsel is employing a negative multiplier (fees that amount to less than the amount actually billed) to the actual hours worked.

¹ All capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreement and Release (“Settlement Agreement” or “Agreement”), Doc. No. 35-1.

Importantly, Class Counsel is proceeding under a straight lodestar request for fees and is not seeking fees based on any “percentage of the fund” argument. This, by itself, should ameliorate many (if not all) of the Court’s concerns relating to Class Counsel’s prior fee request that was based on a percentage of the fund analysis. It should also render moot any need to evaluate the business practice changes negotiated by Class Counsel on behalf of the Class.

While the Court raises important questions in its February 15, 2022 Order – questions that are clearly aimed at protecting the interests of the Class – there are good answers to all of them. These answers, a more fulsome explanation of the scope and course of the litigation against Filters Fast (which did not, as the Court suggests, merely involve a preliminary pretrial conference without any prior substantive motions), and a full lodestar submission demonstrates that the fees and costs requested are fair, reasonable, and should be awarded.

While the Court may currently have doubts about this, Class Counsel have in fact zealously prosecuted Plaintiffs’ claims against Filters Fast in two separate lawsuits that were simultaneously pending in two separate federal courts – this Honorable Court, and the United States District Court for the Western District of North Carolina. Exhibit B, Declaration of David Lietz, ¶ 10. It was the cumulative effort and pressure applied by this “two-front war” that brought Filters Fast to the table to negotiate a possible resolution. *Id.* ¶ 11. It was the full briefing of twin motions to dismiss filed by Filters Fast in the North Carolina action – motions that were ultimately denied by the federal court in North Carolina – that brought about the possibility of settlement. *See McCreary v. Filters Fast LLC*, No. 3:20-CV-595-FDW-DCK, 2021 WL 3044228 (W.D.N.C. July 19, 2021). *Id.* ¶ 12.

The motions to dismiss were filed by able defense counsel from a well-regarded national law firm, in a case-law environment that is increasingly hostile towards consumer class actions and consumer data breach litigation in particular – *see e.g. TransUnion LLC v. Ramirez*, 141 S. Ct.

2190, 2197, 210 L. Ed. 2d 568 (2021). Notably, *TransUnion* was decided on June 25, 2021, just days before the North Carolina court's ruling in the companion case against Filters Fast.

Class Counsel only reached a settlement after an extensive investigation, substantive (and successful) motions' practice, and prolonged arms' length negotiations presided over by an immensely talented mediator and former federal court judge, The Honorable Wayne Andersen (Ret.). Ex B. ¶ 13. Even after coming to an agreement on the central terms, Class Counsel negotiated for weeks over the fine points of the settlement, including heightened notice consisting of two rounds of email notice for the Class. Class Counsel worked for weeks to finalize the Settlement Agreement and associated exhibits (such as the Class notices and claim form) pertaining to notice, preliminary approval, and final approval. *Id.* ¶ 14. Class counsel moved for preliminary approval twice – responding to and satisfying the Court's concerns about jurisdiction. *Id.* ¶ 15. This was not a case where Class Counsel merely “phoned it in,” attempting to secure a big payday for the lawyers at the expense of the Class. Instead, as the negative lodestar multiplier demonstrates, Class Counsel worked hard for the Class, and worked hard for the attorneys' fees requested here.

As compensation for the substantial benefit conferred upon the settlement class, Class Counsel respectfully renew their motion for attorneys' fees, costs, and service awards, asking the Court for a combined award of attorneys' fees and costs totaling \$320,000, to be paid by Filters Fast separate and apart from the Settlement Fund. Plaintiffs' motion should be granted because the request is reasonable and appropriate using the lodestar method of calculating attorneys' fees.

Class Counsel also respectfully moves the Court for an award of \$2,500 to each of the five Plaintiffs for their work on behalf of the Class.²

II. CASE SUMMARY

A. The Data Breach

This case involves a putative class action against Filters Fast relating to a data security breach that potentially exposed payment card information of certain of Filters Fast's customers who used payment cards to make purchases on the Filters Fast website located at www.filtersfast.com from July 15, 2019 to July 10, 2020. Filters Fast announced the Incident in a Notice of Data Breach sent to customers in August 2020.

B. Procedural Posture

On October 26, 2020, Plaintiffs Legg and Powers filed their Complaint alleging, among other things, that Defendant failed to take adequate measures to protect their and other putative Class Members' payment card information and failed to disclose that Defendant's systems were susceptible to a cyber-attack. *See* Doc. No. 1. On October 27, 2020, Plaintiffs Jennifer McCreary, Betty Owen, and Lydia Postolowski filed suit against Filters Fast in the Western District of North Carolina related to the Incident (*see* Doc. No. 1, Case No. 3:20-cv-595, Western District of North Carolina) (the "*McCreary Action*").³

² While Plaintiffs here renew their motion for attorneys' fees, costs, and service awards, they will renew their motion for final approval of the settlement by separate motion, which will be filed contemporaneously with this motion.

³ Both counsel in this action and counsel in the *McCreary Action* worked closely together while negotiating with Filters Fast. Thus, in the interest of judicial economy and efficiency, Counsel in the instant action and the *McCreary Action* filed an Amended Complaint in this action in order to add the plaintiffs from the *McCreary Action* as parties to this action (*see* Doc. No. 25, filed on June 29, 2021), and to add counsel in the *McCreary Action* to this case. Counsel for this action and the *McCreary Action* shall be referred to collectively herein as "Class Counsel" and all Plaintiffs and Filters Fast are collectively referred to as the "Parties."

On December 29, 2020, Defendant filed two Motions to Dismiss and a Motion to Transfer Venue to the Western District of North Carolina Pursuant to 28 U.S.C. §1404. *See* Doc. Nos. 8, 11 and 13, respectively. During this time, the Parties began discussing settlement. Accordingly, Plaintiffs Legg and Powers and Filters Fast submitted a Joint Motion to Stay Deadlines on January 14, 2021. *See* Dkt. Nos. 17 and 19 (granting the Joint Motion to Stay until February 19, 2021). Following a telephonic status conference held on February 2, 2021, this Court granted their joint request to stay further briefing on the pending motions. *See* Doc. No. 19.

Unlike this case, the *McCreary* Action was not stayed. On December 28, 2020, Filters Fast filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6). *See* Docket Sheet for *McCreary* Action (attached hereto as Exhibit D), Doc. Nos. 10 and 11. In response, Plaintiff McCreary filed an amended complaint on January 15, 2021, adding Plaintiffs Owen and Postlowski and additional allegations. *Id.*, Doc. No. 12. On January 29, 2021, Filters Fast then re-filed its motion to dismiss, splitting the motion into twin motions (one filed under Rule 12(b)(1) and another motion filed under Rule 12(b)(6)). *Id.* Doc. Nos. 15, 16, 17, and 18. The parties to the *McCreary* Action then jointly moved to stay briefing on Filters Fast's motions pending the resolution of the voluntary mediation with Judge Andersen on March 31, 2021 that the Parties to both cases (this case and the *McCreary* Action) had scheduled during this time. *Id.*, Doc. No. 19.

The Court in North Carolina denied the requested stay. *Id.*, Text Order entered Feb. 4, 2021. As a consequence, Plaintiffs' counsel in the *McCreary* Action prepared and filed detailed and substantive oppositions to Filters Fast's twin motions. *Id.*, Doc. Nos. 20 and 21. Filters Fast filed reply briefs, and the twin motions to dismiss were fully briefed and ripe for decision as of February 19, 2021.

Prior to mediation, the Parties to both cases negotiated a stipulated protective order. Filters Fast served information requests upon Plaintiffs. These requests were related to Plaintiffs' experiences and damages as a result of the Incident. All Plaintiffs responded in good faith. Plaintiffs also sought and received documents from Filters Fast that was utilized in preparation of mediation and to gauge the strength of Plaintiffs' allegations and Filters Fast's defenses.

On March 31, 2021, the Parties participated in an all-day mediation before retired federal court judge Hon. Wayne R. Andersen (Ret.). Following multiple exchanges of information and negotiations of terms, the Parties were able to reach a settlement in principle. However, the negotiations continued for weeks after the principle terms were negotiated. Among the additional terms that needed to be negotiated were the specifics of the notice program, including the number of email "blasts" of notice that would be disseminated by the Settlement Administrator. These continuing negotiations were as intense and as involved as the principal negotiations at the mediation.

After the Parties negotiated the remaining terms, drafts of the Settlement Agreement and Release and its exhibits were circulated back and forth. The Agreement was finalized and executed on June 15, 2021.

Notably, despite filing a joint motion to stay the North Carolina action after there was a settlement in principle, the court in North Carolina denied the motion to stay. *See* Docket Sheet for *McCreary* Action (attached hereto as Exhibit C), Doc. No. 24 & Text Order dated Apr. 21, 2021. Thus, while it may seem at first as though the *McCreary* Action plaintiffs were needlessly litigating after a settlement in principle was reached (and were securing the important ruling on Filters Fast's twin motions to dismiss), this was not the case at all.

During the interim time between finally reaching agreement on the settlement terms and the filing of Plaintiffs' initial motion for preliminary approval, the Parties also needed to bring the two actions together for purposes of consummating this settlement. This involved preparing and filing a motion for leave to amend the complaint in this case, and preparing and filing a joint amended complaint. *See* Doc. No. 25, filed June 29, 2021.

On July 2, 2021, Plaintiffs moved this Honorable Court for preliminary approval of this proposed class action settlement and certification of the settlement class for purposes of the settlement. *See* Doc. No. 26. On September 24, 2021, the Court denied the motion without prejudice, holding that Plaintiffs failed to satisfy the diversity requirement of 28 U.S.C. § 1332(d)(2)(A), but granting Plaintiffs leave to file a renewed motion that established the Court's basis for jurisdiction. After securing declarations from all named plaintiffs and adding additional sections to the motion for preliminary approval (sections that attempted to address all conceivable concerns about the Court's jurisdiction, including those potentially raised by the Supreme Court's *TransUnion* decision), on September 30, 2021, Plaintiffs renewed their motion for preliminary approval, making the requisite showing of diversity through attached sworn declarations of Plaintiffs and the sole member of the Defendant limited liability company. Doc. Nos. 34 and 35. This Court granted preliminary approval on November 17, 2021. Doc. No. 43.

Class Counsel then worked with the Settlement Administrator to get notice disseminated to the Class and to manage the claims process. Class Counsel also prepared and filed the original motion for attorneys' fees, costs, and service awards, and the original motion for final approval. Doc. Nos. 46, 47, 50, 51. While these motions were denied, they did take substantial time to prepare, and are being used as a jumping off point for the renewed filings.⁴

⁴ Class Counsel excludes a portion of the time spent on the original motions in its lodestar analysis.

III. SUMMARY OF SETTLEMENT

A. Settlement Benefits

The Settlement negotiated on behalf of the Class provides for a choice of three separate forms of monetary relief, as well as 24-months of credit monitoring services and equitable relief in the form of business practice changes implemented to better protect Class member data in the future. *See* Settlement Agreement (“Agr.”), attached as Ex. 1 to Plaintiffs’ Mot. for Preliminary Approval at Doc. No. 35-1. The Settlement Agreement calls for certification of a Settlement Class defined as follows:

Settlement Class:

All residents of the United States whose payment card was used on the Filters Fast website (www.filtersfast.com) to make a purchase between July 15, 2019 and July 10, 2020.

Agr. ¶ 34. The Settlement Class specifically excludes: (i) judges presiding over this Action and the *McCreary* Action and any members of their judicial staff(s); (ii) the officers and directors of Filters Fast; and (iii) persons who timely and validly request exclusion from the Settlement Class.

Id. The Parties estimate the size of the Settlement Class to be approximately 323,000 Filters Fast customers.

1. Up to \$750 in Expense Reimbursements

Under the terms of the Settlement Agreement, Settlement Class Members can submit a claim for expense reimbursements of up to \$750 per Settlement Class Member. Agr. ¶ 42.a. While capped at an individual level, this sum is *uncapped in the aggregate*, meaning every Class Member can recover the whole \$750 without *pro rata* reduction should they have eligible expenses and make a valid claim. *Id.*

Pursuant to the Agreement, Settlement Class Members who attest that they used one or more of their payment cards at the Filters Fast website to make a purchase during the Settlement Class

Period, and who provide reasonable documentation of unreimbursed out-of-pocket expenses or losses in connection with a fraudulent transaction incurred on the subject payment card, will be entitled to cash payments equal to their out-of-pocket expenses or losses up to \$750.00, subject to the terms of ¶42(a). These losses may include, but are not limited to: unreimbursed fraudulent charges, bank fees, replacement card fees, late fees from transactions with third parties that were delayed due to fraud or card replacements, credit freeze fees, parking expenses or other transportation expenses for trips to a financial institution to address fraudulent charges or receive a replacement payment card, credit monitoring purchased for up to three years, or other expenses reasonably attributable to the Incident. The submitted evidence must show: the loss is an actual, documented, and unreimbursed monetary loss; the loss was more likely than not caused by the Incident; the loss occurred after the Settlement Class Member used the Payment Card on the Filters Fast website to make a purchase; and 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. *Id.*

2. Up to \$60 for Lost Time

In the alternative, Settlement Class Members who attest that they used one or more of their Payment Cards at the Filters Fast website to make a purchase during the Settlement Class Period, who submit reasonable documentation of a subsequent fraudulent charge on the Payment Card that was more likely than not caused by the Incident, and who attest to the time they spent addressing the fraudulent transaction or monitoring their account as a result of the Incident, will be entitled to a cash payment equal to \$15.00 per hour of time spent addressing the fraudulent transaction or monitoring their account as a result of the Incident up to a maximum of four hours (\$60.00 maximum). Agr. ¶ 41.b.

Similar to the expense reimbursements, there is no aggregate cap on the amount available to be claimed for lost time. As such, every Settlement Class Member can claim the full \$60 available for lost time.

3. Up to \$25 Cash Payment

Lastly, Settlement Class Members can claim a flat payment of up to \$25 by simply attesting that they used one or more of their payment cards at the Filters Fast website to make a purchase during the Settlement Class Period. Agr. ¶41.c. This is essentially a “no documentation” payment to any Class Member who simply attests that they used their payment card on Defendant’s website during the Class period. Unlike the expense reimbursements and compensation for lost time, payments made pursuant to this section are capped at \$175,000.00 in aggregate. If the total amount of Approved Claims under this paragraph exceeds the \$175,000.00, then each approved claim under this paragraph shall be calculated on a pro rata basis (by taking \$175,000.00 divided by the number of Approved Claims under ¶41(c)), such that the total aggregate payment made under this paragraph does not exceed \$175,000.00. *Id.*

4. Credit Monitoring and Identity Theft Restoration

In addition to the choice of monetary compensation available, Settlement Class Members who submit a valid and timely Claim Form and who did not previously enroll in the 12 months of ID Experts service offered by Filters Fast are eligible to receive 24 months of 1-bureau credit monitoring provided by ID Experts paid for by Filters Fast. Agr. ¶ 47. Settlement Class Members who previously received and enrolled in the 12 months of ID Experts service offered by Filters Fast are eligible to receive an additional 12 months of 1-bureau credit monitoring provided by ID Experts paid for by Filters Fast. *Id.*

In response to the Court's question about the value of this service, the Identity Protection service provided by ID Experts can be found here: <https://www.idx.us/idx-identity/plans>. Ex. B, Lietz Dec. ¶ 21, This webpage shows it would cost a Class Member \$9.95 per month to receive this particular ID monitoring and protection service secured by this Settlement:

The screenshot displays the 'Identity Essentials' service page for the 'INDIVIDUAL' plan. At the top, a grey bar reads 'BEST VALUE'. Below it, a blue header contains the text 'Identity Essentials'. Two tabs, 'INDIVIDUAL' and 'FAMILY', are shown, with 'INDIVIDUAL' selected. The price '\$9.95/mo' is prominently displayed. A descriptive sentence states: 'Perfect for individuals who want world-class protection at a great value.' Below this, a list of six features is provided, each preceded by a green checkmark: 'Dark Web CyberScan™ Monitoring', 'Single Bureau Credit Monitoring', 'Unlimited Advice from Recovery Experts', 'Fully-Managed, U.S. Based Identity Recovery', '\$1 Million Identity Theft Insurance', and '100% Recovery Guarantee'. At the bottom, an orange button is labeled 'Enroll Now'.

BEST VALUE

Identity Essentials

INDIVIDUAL FAMILY

\$9.95/mo

Perfect for individuals who want world-class protection at a great value.

- ✓ Dark Web CyberScan™ Monitoring
- ✓ Single Bureau Credit Monitoring
- ✓ Unlimited Advice from Recovery Experts
- ✓ Fully-Managed, U.S. Based Identity Recovery
- ✓ \$1 Million Identity Theft Insurance
- ✓ 100% Recovery Guarantee

Enroll Now

The value of this service is therefore not speculative – it is easily quantified as being worth exactly \$9.95 per month for a 24-month period, which equals \$119.40 per year, or \$238.80 for the 24-month period secured by this settlement. *Id.* ¶ 22. These amounts are fully in line with the conservative estimates offered by Class Counsel (via a sworn declaration) in the original motion for attorneys’ fees: from \$90.00 (\$7.50 per month, which is the lowest retail value of comparable identity theft protection) up to \$107.88 per Settlement Class Member. *Id.* ¶ 23. The potential value of this benefit to the Class is therefore up to \$77,132,400 (if no Class Member had availed him or herself of the 12 months of coverage previously offered by Filters Fast and claimed the full 24 months). *Id.* ¶ 24. The potential value might also be expressed as half that amount, or \$38,566,200, if all Class Members had signed up for the coverage offered previously and only claimed 12 months. *Id.* Or, making a reasonable assumption that Class Members might occasionally be able to find a discount on the price of this service, the \$29 million dollar figure previously offered by Class Counsel (which assumes an annual cost of only \$90 per person) is supported by the actual retail cost of the actual service offered, as plainly expressed on the IDX website. *Id.* There is nothing speculative about this number.

Class Counsel also now has available actual claims data of how many Class Members have signed up for the identity protection benefit offered, and the value of that benefit. As of February 17, 2022, 162 claimants signed up for 12 months of coverage and 2,744 claimants signed up for 24 months (for a total of 2,914 Class Members). This amounts to \$674,610.00 of value actually claimed by Class Members that they would not (and will not) otherwise receive but for the proposed settlement.⁵ Ex. B., Lietz Dec., ¶ 25.

⁵ $(162 \times 12 \times \$9.95 = \$19,342.8) + (2,744 \times 24 \times \$9.95 = \$655,267.20) = \$674,610.00.$

Class Counsel also believes that providing this identity protection benefit to all Class Members is a critical and necessary element of this settlement. *Id.* ¶ 26. This benefit – a benefit that any Class Member can take without having any other claim at all (whether it be a claim for out-of-pocket expenses, lost time, or even the \$25 “no documentation” claim) provides good and valuable consideration to each and every Class Member for the release that he or she is providing. *Id.* Without this extremely valuable benefit, an argument might be made that some Class Member was giving a release without receiving any consideration for the release. *Id.* That is why Class Counsel made the determination to bargain for and obtain 24 months of identity protection for the entire Class, as opposed to simply putting those dollars into cash payments that only a limited subset of the Class might potentially claim. *Id.*

5. Equitable and Prospective Relief

Pursuant to the Agreement, Filters Fast has implemented multiple important business practice changes in response to the Incident:

- *Enhanced Website Security.* Filters Fast moved the website to a new hosting provider (Rackspace) with greater focus on security. Rackspace also utilizes a change control process to approve and verify all website code changes.
- *24/7 Security and Breach Monitoring.* Filters Fast hired Alert Logic for 24/7 security and breach monitoring and detection services. All website code that processes cardholder data is now controlled and managed by AlertLogic’s file integrity monitoring system.
- *Ongoing Third-Party Review of PCI DSS Compliance.* Filters Fast has agreed to obtain third party review and assessments of its information security practices by a Payment Card Industry Security Standards Council Qualified Security Assessor (“QSA”) biennially for the next five years.
- *Training and Appointment of an Information Security Program Employee.* Filters Fast has agreed to appoint a qualified employee responsible for implementing, maintaining, and monitoring the Information Security Program. The appointed individual shall report regularly to the Chief Executive Officer concerning Filters Fast’s security posture, the security risks faced by Filters Fast, and the Information Security Program

Addressing and Remediating Findings within the PFI's Report. Filters Fast has addressed and remediated each of the PCI DSS deficiencies noted in the final report from Foregenix.

Agr. ¶ 46.

According to Filters Fast, the estimated value of its business practice changes is no less than \$528,269.43. *Id.*⁶ Further, Filters Fast will continue to implement business practice changes designed to enhance the security of its website in each of the years 2021 and 2022. *Id.*

In response to the Court's observations about this equitable relief, Class Counsel makes the following observations: first, Class Counsel's renewed fee request is predicated upon a straight lodestar analysis, and not upon any "percentage of the fund" analysis. Ex. B, Lietz Dec. ¶ 28. For this reason, the estimated value assigned to the business practice changes by Defendant Filters Fast (and not by Class Counsel) is not germane to this fee petition. Second, while all of the Court's observations about these business practice changes are correct, Class Counsel believes that the deterrent effect from filing these lawsuits had a material effect upon Filters Fast's decisions to make the business practice changes that it did, and to commit (albeit on a voluntary basis) to continue to make positive changes in the future. *Id.* Put another way, there is some question whether Filters Fast would have made the fixes that it did to its systems had there been no lawsuits, since Filters Fast's initial response to becoming aware of this issue in February 2020 was to do nothing. *See* Doc. No. 25, Am. Compl. ¶ 62-66.

⁶ Contrast against *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 283 (7th Cir. 2002), reversing the district court's ruling where "the value of [the injunctive relief] no one has attempted to monetize and which is barely discussed in the briefs or by the judge." *See also, Grok Lines, Inc. v. Paschall Truck Lines, Inc.*, 2015 WL 5544504 at *8 (N.D. Ill. Sept. 18, 2015) (denying approval of settlement while noting the proposed injunctive relief had "little or no value.").

B. Plaintiffs' Service Awards

The Settlement Agreement calls for a reasonable service award to be sought for Plaintiffs in the amount of \$2,500 per Plaintiff. Agr. ¶ 81. The service award was negotiated through the mediator following the Parties reaching agreement on the substantive terms of the settlement. The proposed award is meant to recognize Plaintiffs for their efforts on behalf of the class, which include maintaining contact with Counsel, participating in client interviews, providing relevant documents, assisting in the investigation of the case, providing guidance during the litigation, remaining available for consultation throughout settlement negotiations, participating in the mediation, reviewing relevant pleadings and the settlement agreement, and for answering Counsel's many questions. Ex. B, Lietz Dec. ¶ 30.

Class Counsel hereby moves the Court to award \$2,500.00 to be paid by Filters Fast to each of the five Settlement Class Representatives, separate and apart from any Class settlement benefits, as Service Awards in recognition of their efforts spent in prosecuting this action on behalf of the Settlement Class. Agr. ¶ 81. Filters Fast has agreed not to oppose or object to any such application that is consistent with the terms of the Agreement. *Id.* Plaintiffs' support for the Settlement as fair and reasonable is not conditioned upon the Court's award of the requested Service Awards, and in the event the Court declines to approve, in whole or in part, the payment of the Service Awards, the remaining provisions of the Agreement shall remain in full force and effect. Agr. ¶ 85. The finality or effectiveness of the Settlement will not be dependent on the Court awarding Class Representatives the Service Awards and shall not alter the Effective Date. *Id.* Any payment made by Filters Fast for Service Awards will be made separate and apart from the funds available for payment to Settlement Class Members. Agr. ¶ 81.

C. Class Counsel's Attorneys' Fees and Costs.

After agreeing to the terms of the settlement on behalf of the Class, counsel for Plaintiffs negotiated their fees and costs separate from the benefit to Class Members, in the amount of \$320,000 for fees and costs combined, subject to Court approval. Ex. B, Lietz Dec. ¶ 31; *see also* Agr. ¶ 83. This figure was determined by direct negotiations between the Parties after the substantive terms of the Settlement were agreed upon. *Id.* The Parties considered the range of fee awards from other payment card data breaches that were considered comparable cases in negotiating the fee. *Id.* But, more importantly, the fees and costs negotiated were and are commensurate with the actual lodestar of Class Counsel. While there was necessarily some estimation of what the ultimate total of the accrued lodestar would be (because Class Counsel needed to estimate the costs of bringing the settlement through preliminary approval, notice to the class and the claims process, and final approval), Class Counsel's estimates have now proven to be dead-on. At this point, as Class Counsel will show the Court, the actual accrued lodestar is greater than the fees requested and represents a negative multiplier for Class Counsel.

Class Counsel's fees were not guaranteed—the retainer agreement Counsel had with Plaintiffs did not provide for fees apart from those earned on a contingent basis, and, in the case of class settlement, approved by the Court. Lietz Dec. ¶¶ 33-38. The purely contingent basis upon which Class Counsel took the case meant that Class Counsel assumed significant risk. *Id.* Class Counsel spent time on this matter that could have otherwise been spent on other, fee-generating matters, and shouldered the risk of expending substantial costs and time without any monetary gain in the case of adverse judgment. *Id.* Moreover, Class Counsel undertook the risk of potentially not being able to collect on a judgment due to Defendant's financial situation and lack of applicable insurance coverage. Federman Dec. ¶ 8.

Due to the stage of litigation at which Plaintiffs were able to reach settlement and Class Counsels' experience in the field of consumer data breach cases, costs incurred by Plaintiffs are low. *Id.* at ¶ 20. *See also*, Lietz Dec. ¶ 39, Federman Dec. ¶ 12. Plaintiffs' current costs are \$16,183.69 and include filing fees and the cost of mediation. *Id.* These costs are reasonable and were necessary for the litigation. *Id.* These costs do not include the projected expense of claims and settlement administration, which is to be covered by Filters Fast separate and apart from the Settlement benefits available to Class Members. Agr. ¶ 33.

Plaintiffs and Class Counsel therefore renew their motion for combined attorneys' fees and costs in the amount of \$320,000.

The requested attorneys' fee award is reasonable, appropriate, and consistent with the market rate for legal services in complex class actions, including data breach cases. Class Counsels' firms and other Plaintiffs' firms working on the case collectively report having spent more than 515 hours⁷ advancing the litigation—resulting in a cumulative lodestar of in excess of \$318,000. Approval of the requested award will result in a negative lodestar multiplier of 0.95 (\$303,861 divided by \$318,345) —a figure that will be further reduced by the additional work Class Counsel has already performed finalizing this motion and the renewed motion for final approval, and will still need to perform in support of the Settlement, including appearing at the final fairness hearing, assisting with claims administration, and resolving appeals filed by any Class Member (if any).

In its February 15, 2022 Order, the Court directed Class Counsel to address the following question: should any fees deemed “excessive” be distributed to the Class, or should they revert to

⁷ After a reasonable exercise of billing discretion, the hours utilized for the lodestar calculation are cumulatively 514.9 through February 20, 2022. Additional time was accrued on February 21-22, 2022, but was not included here, due to time constraints in preparing this motion.

Filters Fast? Under the terms of this Settlement, any fees not awarded to Class Counsel would revert to Filters Fast (or, perhaps more accurately, such fees would never be paid by Filters Fast). The Settlement Agreement calls for the fees and costs to be paid separate from the benefit to Class Members. The Settlement does not establish a “fund” of fees and costs that could be reallocated to the Class if not awarded to Class Counsel. Instead, the Settlement allows Class Counsel to make application to the Court for their fees and costs, and Filters Fast will pay any amount awarded by the Court up to \$320,000. Even if there was a “fund” of attorneys’ fees and costs, there is no mechanism in this Settlement by which any fees deemed “excessive” could be re-allocated to the Class Members. Indeed, even within the Class compensation sections of this Settlement, there is not any mechanism for re-allocating any amounts not claimed under the Tier 3 overall cap (i.e., if not enough Class members claim the \$25 offered to hit the cap, any money left under the overall cap reverts to Filters Fast, rather than being added to the amounts paid to Class members who filed Tier 3 claims). That is not to suggest that a settlement that creates non-reversionary funds for both class relief and attorneys’ fees could not be negotiated. Rather, Class Counsel simply avers that the Settlement preliminarily approved by this Court does not include those types of non-reversionary, re-allocation provisions. Any agreement that would include such provisions would require the Parties to return to the negotiating table (with no guarantee that Filters Fast would agree to a settlement structured in that manner) and would require the Plaintiffs to re-start from square one in terms of providing notice to the Class and the claims process, incurring the additional costs of doing so.

IV. LEGAL STANDARD

Rule 23 provides that “[i]n a certified class action, the court may award reasonable attorney's fees...that are authorized by law or by the parties' agreement.” Fed. R. Civ. P. 23(h). In

the Seventh Circuit, courts determine class action attorneys' fees by "[d]oing their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mkt. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*") (collecting cases). "At the time" is at the start of the case: the Court must "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)." *Id.* "The best time to determine this rate is the beginning of the case, not the end (when hindsight alters of the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets." *Id.* Relevant factors include the risk of nonpayment, the quality of the attorney's performance, the amount of work necessary to resolve the litigation, and the stakes of the case." *Sutton v. Bernard*, 504 F.3d 688, 693 (7th Cir. 2007).

Courts have discretion to determine the "market rate" based on either a lodestar or percent-of-benefit method. *See Leung v. XPO Logistics*, 326 F.R.D. 185, 204 (N.D. Ill. May 30, 2018). *See also Williams v. Rohm & Haas Pension Plan*, 658 F.3d at 629, 636 (7th Cir. 2011); *see also Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998) ("[W]e have never ordered the district judge to ensure that the lodestar result mimics that of the percentage approach."); *Americana Art China Co., Inc. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014) ("[T]he choice of methods is discretionary ... in our circuit, it is legally correct for a district court to choose either."). Because this Settlement Agreement is a "claims made" settlement, the lodestar method is an appropriate approach. *See Daluge v. Cont'l Cas. Co.*, No. 15-CV-297-WMC, 2018 WL 6040091, at *4 (W.D. Wis. Oct. 25, 2018). ("Here, given that there is no common fund, the court

opts to review plaintiffs’ request under the lodestar method.”); *see also* 5 Newberg on Class Actions §§ 15:56 & 15.70 (5th ed.) (describing claims-made settlements in the context of fees).

The lodestar is “the product of the hours reasonably expended on the case multiplied by a reasonable hourly rate.” *Id.* “There is a strong presumption that the lodestar calculation yields a reasonable attorneys’ fee award.” *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d. 632, 639 (7th Cir. 2011). Here, the requested fees are reasonable, under a lodestar analysis.

V. **ARGUMENT**

Plaintiffs respectfully request that the Court approve attorneys’ fees of \$304,191.70, costs of \$15,808.30 (for a total of \$320,000) and \$2,500 service awards for each of the five Plaintiffs. As explained below, the requested fee award is reasonable and appropriate and fairly reflects the result achieved. Similarly, the requested incentive award is comparable to other privacy cases and should be approved.

A. **Class Counsel’s Requested Fee is Reasonable and Should Be Approved.**

“In assessing the reasonableness of an attorney fee award for a class action settlement, district courts should ‘do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.’” *Sutton*, 504 F.3d at 692 (quoting *In re Synthroid*, 264 F.3d at 718).

Attached in support of Plaintiffs’ motion are sworn declarations of William B. Federman of Federman & Sherwood and David K. Lietz of Mason Lietz & Klinger LLP. *See* Exhibits A and B, respectively. The declarant-attorney in each declaration attests to the total time their firm spent litigating this matter and the hourly rates of the attorneys from their firm. The Lietz Declaration also summarizes the total hours, lodestar, and costs and expenses as reported by the firms involved in the litigation pursuant to the contemporaneous timekeeping of Plaintiffs’ counsel. The lawyers

and law firms representing the named Plaintiffs in what started as two entirely separate lawsuits, Class Counsel's firms and other Plaintiffs' firms working on the case collectively report having collectively spent more than 514.90 hours advancing the litigation. Approval of the requested award will result in a negative lodestar multiplier of 0.95—a figure that will be further reduced by the additional work Class Counsel has already performed, and will necessarily perform, in support of the Settlement.

The quality of the work performed by Class Counsel and the quality of the result achieved would have supported the award of a lodestar multiplier. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991) (noting that “[a risk] multiplier is, within the court’s discretion, appropriate when counsel assume a risk of non-payment in taking a suit” and “[m]ultipliers anywhere between one and four have been approved”). That is especially true because the contingent nature of the action here and risk of not being able to collect on a judgment would warrant a positive multiplier. *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 660 (7th Cir. 1985) (“[D]istrict courts may add a bonus to the lodestar to compensate for the contingent nature of success.”).

Given the negative lodestar multiplier provided by the requested fee, this factor heavily favors approval of the requested award of attorneys’ fees. *See, e.g., Hapka v. Carecentrix, Inc.*, No. 2:16-CV-02372-KGG, 2018 WL 1879845, at *2 (D. Kan. Feb. 15, 2018) (“a negative multiplier (0.87) on Class Counsel's lodestar—is inherently reasonable.”); *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1023 (E.D. Cal. 2019) (negative multiplier supports finding of reasonableness); *Schiller v. David's Bridal, Inc.*, 2012 WL 2117001, at *23 (E.D. Cal. June 11, 2012) (a negative lodestar multiplier strongly supports the reasonableness of the fee request); *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *15 (N.D. Cal. Nov. 26, 2007) (finding

that a negative multiplier suggests that “the requested percentage[-]based fee is fair and reasonable”).

The lodestar is “the product of the hours reasonably expended on the case multiplied by a reasonable hourly rate.” *Montanez v. Simon*, 755 F.3d 547, 553 (7th Cir. 2014). “Counsel should also provide enough information for the court to assess reasonableness under a lodestar approach.” *Jones v. Cruisin’ Chubbys Gentlemen’s Club*, 2018 WL 11236460 at *2 (W.D. Wis. Nov.21, 2018). A lodestar analysis here supports the requested fee.

1. Counsel Reasonably Spent More than 500 Hours Prosecuting the Litigation.

Since the inception of this litigation, Class Counsel and other Plaintiffs’ firms have worked diligently to advance Representative Plaintiffs’ and other Settlement Class Members’ interests. Over the course of litigation, Class Counsel and other Plaintiffs’ Counsel have collectively carried out 514.9 hours of work on the litigation (pending in two separate federal courts) that led to this settlement. *See* Detailed Time Records of Counsel, attached hereto as Exhibit C (and filed under seal, due to concerns regarding attorney-client privilege).

As the contemporaneous time records demonstrate, Class and other Plaintiffs’ Counsel performed myriad tasks on this litigation, including: conducting an investigation into the facts regarding Plaintiffs’ claims and Class Members’ claims; researching law relevant to and preparing class action complaints in this Court and in the Western District of North Carolina; reviewing motions to dismiss filed by Filters Fast in both this action and the *McCreary* Action; filing an amended complaint in the *McCreary* Action; reviewing Filters Fast’s re-filed motion to dismiss in the *McCreary* Action, splitting the motion into twin motions (one filed under Rule 12(b)(1); jointly moved to stay briefing on Filters Fast’s motions in the *McCreary* Action pending the resolution of the voluntary mediation with Judge Andersen on March 31, 2021; preparing and filing detailed

and substantive oppositions to Filters Fast’s twin motions; reviewing reply briefs; researching law relevant to the defenses raised in Defendant’s answer to the *McCreary* Action’s Plaintiffs’ complaint; preparing for and attending mediation with Judge Wayne Andersen (Ret.) of JAMS, including researching and preparing a detailed mediation statement, as well as attending pre-mediation conferences and calls with Judge Andersen; participating in further negotiations about the notice program and number of email notice “blasts” that would be sent; negotiating and preparing the Parties’ class action settlement agreement along with the proposed class notice and claim form; negotiating with settlement administration companies to secure the best notice plan practicable; drafting the initial motion for preliminary approval; reviewing and revising Plaintiffs’ motion for preliminary approval of the class action settlement; working with the Settlement Administrator to ensure the timely completion of Notice and processing of claims; monitoring the claims process and corresponding with the Settlement Administrator regarding the same; preparing the initial and renewed motions for attorneys’ fees, costs, expenses, and an incentive award; preparing Plaintiffs’ motion for final approval of class action settlement; closely monitoring evolving law regarding data security and its potential impacts on the case; conferring with Plaintiffs throughout the case; working with Plaintiffs to respond to Defendant’s informal discovery requests; reviewing Defendant’s informal discovery responses; and responding to Settlement Class Member inquiries regarding the claims process. Ex. B, Lietz Dec. ¶ 55; Ex. A, Federman Dec. ¶ 18. Where possible, Class Counsel made efforts to carefully assign work so as to avoid duplication of efforts. Ex. A, Lietz Dec. ¶ 33.

All of this work – and more – is carefully laid out in the contemporaneous time records of Class Counsel and other Plaintiffs’ Counsel. *See* Exhibit C. Class Counsel’s sworn declarations attest that the hours have been reviewed for reasonableness, and that Class Counsel has exercised

billing judgment for the number of hours charged to the Plaintiffs and the Class. See Exhibits A and B.

2. Counsel's Hourly Rates are Reasonable.

Reasonable hourly rates are determined by “prevailing market rates in the relevant community.” *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Class Counsel are entitled to the hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Blum*, 465 U.S. at 895 n.11. Here, the relevant community is that of attorneys practicing multi-state class action litigation: “if an out-of-town attorney has a higher hourly rate than local practitioners, district courts should defer to the out-of-town attorney’s rate when calculating the lodestar amount.” *Mathur v. Bd. of Trs. of S. Ill. Univ.*, 317 F.3d 738, 743–44 (7th Cir. 2003).

Class Counsel’s lodestar is calculated using rates that have been accepted in numerous other data breach and consumer class action cases. See, e.g., Ex. A, *Federman Dec.*, ¶ 14; Ex. B, *Lietz Dec.*, ¶ 51. Class Counsel’s rates also compare very favorably with rates approved by other trial courts in data breach and other class action litigation, by what attorneys of comparable skill and experience charge in similar areas of specialization. See *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (approving these hourly rates: attorneys with at least 25 years of experience, \$998 per hour; for attorneys with 15–24 years of experience, \$850 per hour; for attorneys with 5–14 years of experience, \$612 per hour; for attorneys with 2–4 years of experience, \$460 per hour; for paralegals and law clerks, \$309 per hour; for legal assistants, \$190 per hour).

The hourly rates charged by Class Counsel are commensurate with hourly rates charged by their contemporaries around the country, including those rates charged by lawyers with similar experience who practice in the area of data breach class litigation in the Seventh Circuit and across

the nation. Ex. B, Lietz Dec. ¶ 26. The rates utilized are also commensurate with rates approved by this Court and courts within the Seventh Circuit. *Id.*; *see also Daluge*, 2018 WL 6040091, at *3–4 (W.D. Wis. Oct. 25, 2018) (approving rates of \$795 for partners and \$225 for paralegal); *Chesemore v. All. Holdings, Inc.*, No. 09-CV-413-WMC, 2014 WL 4415919, at *6 (W.D. Wis. Sept. 5, 2014) (from “\$395 (for lower-level associates) to \$895 (for highest-level partners)”). These rates are lower than or are comparable to rates that have been approved by this Court in another data breach class action settlement within the last year. *See, e.g. Fox v. Iowa Health Sys.*, No. 3:18-CV-00327-JDP, 2021 WL 826741, at *6 (W.D. Wis. Mar. 4, 2021) (awarding \$1,575,000 in attorneys’ fees and costs, at hourly rates from \$815-\$865 per hour for partners, \$550-\$625 for senior associates, \$415-\$500 for associates, and \$215-\$350 for paralegals).

Class Counsel’s hourly rates are also on par with market rates usually charged by other plaintiffs’ firms handling multistate data-breach class actions. *See Perdue v. Hy-Vee, Inc.*, No. 19-1330, 2021 WL 3081051, at *5 (C.D. Ill. July 21, 2021) (approving reasonable hourly rates requested by Class Counsel of \$700-\$815 for partners, \$325-\$700 for associates, \$200-\$275 for paralegals, and \$150-\$225 for law clerks); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *39 (N.D. Ga. Mar. 17, 2020) (finding reasonable hourly rates charged by partners who billed \$1050, \$1000 \$750, and \$935 per hour); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at *26 (N.D. Cal. July 22, 2020) (finding reasonable rates from \$450 to \$900 for partners, \$160-\$850 for non-partner attorneys, and \$50 to \$380 for paralegals); *Fulton-Green v. Accolade, Inc.*, No. CV 18-274, 2019 WL 4677954, at *12 (E.D. Pa. Sept. 24, 2019) (finding reasonable hourly rates range \$202 to \$975 per hour); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *16 (N.D. Cal. Aug. 17, 2018) (finding reasonable hourly rates of partners from \$400

to \$970, non-partner attorneys from \$185 to \$850, and non-attorneys from \$95 to \$440). See Exs. A (Federman Dec.) and B (Lietz Dec.). These rates are reasonable in light of Class Counsel's significant experience and the relatively specialized nature of this data breach class actions. These rates have been approved by other courts. See Exs. A (Federman Dec.) and B (Lietz Dec.). In addition, Federman & Sherwood's request for \$350,000.00 in fees and expenses was recently approved in another data breach class action at approximately the same stage as the instant case, and which was also filed in October 2020: *Poling, et al. v. Artech, L.L.C.*, Case No. 3:20-cv-07630-LB (N.D. Cal. February 10, 2022) (Doc. No. 63) (granting request for \$350,000.00 for fees and expenses and requested multiplier of 1.59). Federman Dec., ¶ 14.

Even if this Court were to apply the rates approved for Wisconsin lawyers in Wisconsin class actions, the hourly rates of the Ademi law firm (\$750-\$775 for partners and \$450-550 for associates) have been repeatedly approved by the federal and state courts in Wisconsin. *See In Re Rev Group, Inc. Securities Litigation*, Lead Case No. 2:18-cv-1268-LA (E.D. Wis. Dec. 9, 2021), Doc. No. 137; *Ori v. Fifth Third Bank*, Case No. 08-C-00432 (E.D. Wis Jan. 10, 2012), Doc. No. 216; *Reetz v. First Portfolio Ventures I LLC*, Case No. 21-CV-20 (E.D. Wis. June 25, 2021), Doc. No. 17; *McKinnie v. JP Morgan Chase Bank, N.A.*, Case No. 07-CV-774 (E.D. Wis. Dec. 31, 2009), Doc. No. 52; *Lipital v. Spectrum Brands Holdings, Inc.*, Case No. 2018-CV-321 (Cir. Ct. Dane Cnty. Mar. 22, 2019), Doc. No. 83; *In re: Metavante Tech., Inc. S'holder Litig.*, Case No. 09-CV-5325 (Cir. Ct. Milwaukee Cnty. Apr. 14, 2010). Those rates are in line with the rates claimed by Class Counsel here, demonstrating that the hourly rates claimed are reasonable and commensurate with prevailing market rates in the relevant community.

3. The Requested Fee Reflects the Fees Awarded in Other Similar Settlements.

“As the Seventh Circuit has held, attorney’s fee awards in analogous class action settlements shed light on the market rate for legal services in similar cases.” *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 493-94 (N.D. Ill. 2015) (citation omitted).

The requested fees were determined by direct negotiations between the Parties after the substantive terms of the Settlement were agreed upon. Lietz Dec. ¶ 16. The Parties considered the range of fee awards from the other payment card data breaches that were considered comparable cases. *Id.*; see, e.g. *Remijas, et al. v. The Neiman Marcus Group, LLC*, Case No. 1:14-cv-01735 (N.D. Ill.) (where the parties reached an agreement for \$1,600,000.00 and had a class size of approximately 370,385 payment cards, and negotiated attorneys’ fees of \$530,000.00; see also, *In re Wawa, Inc. Data Sec. Litig.*, Case No. 19-cv- 6019-GEKP (E.D. Pa.) (the class counsel petitioned for up to \$3,200,000 in fees).

Recent data breach settlements in this Court and other Seventh Circuit district courts are also comparable. In *Fox*, 2021 WL 826741, at *6, this Court awarded \$1,575,000 for a data breach settlement that mirrors (in almost every aspect) or is inferior to the relief obtained for the Class here. In *Fox*, as in this case, there was the ability to claim for “ordinary” out-of-pocket expenses. *Id.* at *4. In *Fox*, as in this case, class members could claim for 3 hours of lost time, but at the lesser rate of \$15 per hour (as opposed to \$20 here). *Id.* And in *Fox*, the class members could claim one year of free credit monitoring, as opposed to the two years of monitoring offered here. *Id.* The *Fox* settlement also did not have the option to claim a \$25 cash payment with essentially no documentation, which is a benefit of the settlement here. In short, Class Counsel here obtained the

same or greater benefits than those found to be fair and adequate by this Court in *Fox* and did so for approximately 20% of the \$1.575 million in attorneys fees found reasonable in *Fox*.⁸

In *Perdue, supra*, the court awarded \$739,000 in attorneys' fees, even though the plaintiffs' counsel in *Perdue*:

estimated that nearly 6,000 class members filed claims for a total of approximately \$600,000, but that it was not yet clear how many of the claims would be approved. The Court expressed concern the class might just receive a fraction of the amount they requested, and that Counsel would receive substantially higher fees than the total class payout.

Perdue, 2021 WL 3081051, at *2. Here, the requested fees represent less than half the value of the claims made that will all be approved (\$108,432.37) plus the retail value of the credit monitoring actually claimed (\$676,281.60). These amounts total \$784,713.97, meaning the requested attorneys' fees and costs of \$320,000 are 40.78% of what the Class is getting. That compares more than favorably to *Perdue*, where even on the best day, the attorneys' fees awarded of \$739,000 were more than the approximately \$600,000 in claims filed (and possibly not even all approved).

Consequently, the requested fee award falls well below the range of settlements approved as reasonable in this Circuit.

4. The Risk Associated with this Litigation Justifies the Requested Fee Award.

“Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic

⁸ While the Court may note that while the *Fox* benefits offered were somehow greater because they were all “uncapped,” none of the caps came into play in this case, and uncapped benefits therefore would not have provided this Class with any more compensation. Also, while Class Counsel here is not privy to any breakdown of the claims actually made in *Fox*, upon information and belief the claims rate for the “100 percent of costs and up to 10 hours of lost time incurred responding to actual identity theft, up to \$6,000” was probably something approaching 0%. Class Counsel requests that the Court take judicial notice of its own records relating to the *Fox* case, in particular Pages 10 and 12 of Doc. No. 101 in Case No. 3:18-cv-00327-jdp (showing 1,420,337 postcards sent, and only 12,028 claims made – a .084 %, claims rate) and any other document that provides a detailed breakdown of the actual claims made.

counsel.” *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (citing *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986)). Thus, the risk of non-payment is a key consideration in assessing the reasonableness of a requested fee and must be incorporated into any ultimate fee award. *See Sutton*, 504 F.3d at 694 (finding abuse of discretion where lower court, in applying percentage-of-the-fund approach, refused to account for the risk of loss on basis that “class actions rarely go to trial and that they all settle[,]” noting that “there is generally some degree of risk that attorneys will receive no fee (or at least not the fee that reflects their efforts) when representing a class because their fee is linked to the success of the suit[;] ... [b]ecause the district court failed to provide for the risk of loss, the possibility exists that Counsel, whose only source of a fee was a contingent one, was undercompensated”).

As Class Counsel demonstrates above, the hours spent on this litigation alone justify the fee request. This fee request is especially reasonable in light of the fact that, like most “suits for damages in this country . . . on the plaintiff’s side,” this case was “handled on . . . contingent fee basis.” *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998); *see also Benoskie v. Kerry Foods, Inc.*, No. 19-CV-684-PP, 2020 WL 5769488, at *3 (E.D. Wis. Sept. 28, 2020). Class Counsel received no compensation for their efforts during the course of this litigation, which has gone on since October 2020, or for almost 16 months and counting. Class Counsel also advanced out-of-pocket expenses, knowing that if their efforts were unsuccessful, they would not receive payment or other reimbursement for either their work or expenses.

Further, according to counsel for Filters Fast, a closely held company, **there was no applicable insurance coverage**. Further, Filters Fast is a small e-commerce company (with less than fifty employees) and it does not have cyber insurance to cover the losses for this cyberattack. First Federman Dec. ¶ 8. Thus, it likely would be unable to satisfy any judgment for classwide

damages even if Plaintiffs ultimately prevailed. Thus, even if Plaintiffs were successful at trial, they may not have been able to collect on any judgment.

Class Counsel assumed the risk of this litigation, including advancing the time, costs, and expenses necessary to prosecute this matter zealously on behalf of Plaintiffs and the Class. Ex. B. Lietz Dec. ¶ 33-38. Given the uncertainty surrounding data breach law where both causation and actual damages are difficult to prove, and the unknown variables in relation to the size and nature of the class pre-suit, whether this Court would ultimately certify Plaintiffs' proposed Class, and whether Plaintiffs would ultimately be successful on the merits of their claims, the risk Class Counsel assumed was significant. Importantly, this very Court recently recognized the exact risks faced by Plaintiffs here:

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 UnityPoint 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 UnityPoint 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, 2021 WL 826741, at *5. This factor supports the requested fee award.

5. The Quality of Performance and Work Invested Support the Fee Request.

The quality of Class Counsel's performance also weighs in favor of and supports the requested fee award. *Sutton*, 504 F.3d at 693. In addition to accepting considerable risk in litigating this action, Class Counsel committed their time and resources to this case without any guarantee of compensation whatsoever, only achieving the Settlement after substantial motions practice and negotiations. Lietz Dec. ¶ 55. The work performed by Class Counsel here is detailed above, and

was significant, including fully briefing and prevailing on the Rule 12(b)(1) and Rule 12(b)(6) motions in the *McCreary* Action.

Class Counsel are experienced in litigating consumer class actions, including privacy cases. *See* Ex. B. Lietz Dec. ¶¶ 2-9. Successfully resolving this case required an understanding of the complex, technical subject matter of data security, industry best practices, and the mechanisms of a credit-card “skimming” data breach, which is a sub-specialty within data breach litigation, and about which Class Counsel (particular Mr. Federman, as lead counsel in *In re: Sonic Corp. Customer Data Breach Litig.*) has unparalleled experience. And because they were proceeding on a contingent fee basis, Class Counsel “had a strong incentive to keep expenses at a reasonable level[.]” *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010). Given the strength of the Settlement obtained for the Class (a settlement with benefits that exceed the benefits obtained in the *Fox* settlement approved by this Court in 2021), the hard-fought litigation, the lengthy and adversarial nature of the settlement negotiations, Class Counsel respectfully submit that their experience and the quality and amount of work invested for the benefit of the Class supports the requested fee.

These benefits were negotiated and obtained against Filters Fast’s strong defense mounted by experienced attorneys from the well-regarded international law firm of Bryan Cave. The Settlement provides real benefits (cash and identity protection that will be available to Settlement Class Members in the near future, as opposed to years from now, further enhancing the value of the Settlement to Class Members. *See Donovan v. Estate of Frank E. Fitzsimmons*, 778 F.2d 298, 309 n.3 (7th Cir. 1985) (recognizing that at a prime interest rate of 12.5% a \$2 million settlement sum today is worth the same as a \$3.6 million recovery five years from now). Moreover, reaching a settlement now avoids the specter of appeals related to class certification, thereby further

delaying benefits to Class Members. *See, e.g., Steinmetz, et al. v. Brinker Int'l, Inc.*, Case No. 21-13146 (11th Cir. 2021) (the first payment card data breach case to obtain class certification; it is now on appeal at the Eleventh Circuit).

6. The Stakes of the Case Support the Requested Fee.

The stakes of this case also support the requested fee. Plaintiffs represented over 323,000 Settlement Class members whose payment card information was compromised in the Incident. *See Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 202 (N.D. Ill. 2018) (agreeing that “the stakes . . . were high because hundreds of thousands of class members were involved.”). Given the above uncertainties in data breach class action litigation that this Court has previously recognized, the result was far from certain. *Cf. Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-CV-4462, 2015 WL 1399367, at *4 (N.D. Ill. Mar. 23, 2015) (finding the stakes of the case weigh in favor of a 30% fee, even where the “legal issues were not particularly unique”). As such, the stakes of this case align with this reasonable fee request.

B. The Court Should Also Award Reasonable Reimbursement for Expenses.

It is well established that counsel who create a common benefit like this one are entitled to the reimbursement of litigation costs and expenses. *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 WL 375432, *3 (S.D. Ill. Jan. 31, 2014) (citing Fed. R. Civ. P. 23; *Boeing*, 444 U.S. at 478). The Seventh Circuit has held that costs and expenses should be awarded based on the types of “expenses private clients in large class actions (auctions and otherwise) pay.” *Synthroid I*, 264 F.3d at 722; *see also Spicer v. Chi. Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (noting that courts regularly award reimbursement of those expenses that are reasonable and necessarily incurred in the course of litigation).

Here, Class Counsel have incurred \$16,183.60 in reimbursable expenses related to (1) legal research; (2) court fees; (3) mediation expenses. Ex. B, Lietz Dec., ¶ 58; Ex. A, Federman Dec. ¶

23; Ex. C., Detailed Billing Records. These expenses were necessary to prosecute this case and modest in comparison to both similarly sized lawsuits and the enormous costs that likely would have been incurred if litigation had continued. *Id.* Accordingly, Class Counsel request that the Court approve as reasonable expenses in the amount of \$16,183.60.

C. The Incentive Award to the Class Representative Should Be Approved.

Class Counsel requests that the Court grant Service Awards to Plaintiffs—in the amount of \$2,500 to each—for their efforts on behalf of the Class. Service awards compensating named plaintiffs for work done on behalf of the class are routinely awarded. Such awards encourage individual plaintiffs to undertake the responsibility of representative lawsuits. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (recognizing that “because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit”); *Synthroid I*, 264 F.3d at 722 (“Incentive awards are justified when necessary to induce individuals to become named representatives.”). Without Plaintiffs serving as Class Representative, the Class would not have been able to recover anything. *See In re Iowa Ready-Mix Concrete Antitrust Litig.*, No. 10-4038, 2011 WL 5547159, at *5 (N.D. Iowa Nov. 9, 2011) (“[E]ach ... plaintiff has provided invaluable assistance and demonstrated an ongoing commitment to protecting the interests of class members. The requested incentive award for each named plaintiff recognizes this commitment and the benefits secured for other class members and is thus reasonable under the circumstances of this case.”).

The Class Representatives spent considerable time pursuing Class Members’ claims. In addition to lending their names to this matter, and thus subjecting themselves to public attention, Plaintiffs were actively engaged in this Action. They (1) maintained contact with Class Counsel; (2) participated in client interviews; (3) provided relevant documents; (4) assisted in the

investigation of the case; (5) participated in the mediation; (6) remained available for consultation throughout settlement negotiations; (7) reviewed relevant pleadings and the settlement agreement, and (8) answered Class Counsel's many questions. Lietz Dec. ¶ 15. Their dedication to this Action was notable, particularly given the relatively modest size of their personal financial stakes in this case.

Moreover, the total amount requested here -- \$2,500 each for five Plaintiffs to be paid by Filters Fast separate from any Class relief -- is identical to the service awards approved by this Court in *Fox. Fox*, 2021 WL 826741, at *6. It is less than many other awards approved by federal courts in this Circuit. *See, e.g., Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 502 (N.D. Ill. 2015) ("a \$5,000 reward is justified based on Kolinek's role working with class counsel, approving the settlement agreement and fee application, and volunteering to play an active role if the parties continued litigating through trial"); *Cook*, 142 F.3d at 1016 (affirming \$25,000 incentive award); *Heekin v. Anthem, Inc.*, No. 05-01908, 2012 WL 5878032, *1 (S.D. Ind. Nov. 20, 2012) (approving \$25,000 incentive award to lead class plaintiff over objection); *Will*, 2010 WL 4818174, at *4 (awarding \$25,000 each to three named plaintiffs); *Benzion v. Vivint, Inc.*, No. 12-61826 (S.D. Fla. Feb. 23, 2015) (awarding \$20,000 incentive award in class settlement); *Desai v. ADT Security Servs., Inc.*, No. 11-1925 (N.D. Ill. Feb. 27, 2013) (Dkt. 243 ¶ 20) (awarding \$30,000 incentive awards in class settlement). Thus, the requested service awards should be approved.

V. CONCLUSION

Class Counsel, with the help of Plaintiffs, have made significant benefits available to Class Members. In return, they seek fees, costs, and service awards well below or within the range of those regularly approved by courts sitting in the Seventh Circuit. The fees, costs, and service

awards are inherently reasonable, and as such, Plaintiffs respectfully renew their request for approval.

Dated: February 22, 2022

Respectfully submitted,

s/David K. Lietz

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 22, 2022, the foregoing document was filed via the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on the following ECF-registered counsel of record.

/s/ David K. Lietz

David K. Lietz