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 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"). ECF No. 43. Class Counsel's[1] 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 flat payment of up to $25. In addition to the monetary relief provided, the Settlement provides for up to 24-months of credit monitoring services for each Settlement Class Member, and equitable relief in the form of information security enhancements designed to ensure Settlement Class Members' Personal Identifying Information is better protected in the future. The Settlement makes hundreds of millions of dollars available to Settlement Class Members willing to claim it.

Class Counsel have zealously prosecuted Plaintiffs' claims, achieving the Settlement Agreement only after an extensive investigation and prolonged arm's-length negotiations. Even after coming to an agreement on the central terms, Class Counsel worked for weeks to finalize the Settlement Agreement and associated exhibits pertaining to notice, preliminary approval, and final approval.

As compensation for the substantial benefit conferred upon the Settlement Class, Class Counsel respectfully move the Court for a combined award of attorneys' fees and costs totaling $320,000—a mere 22% of the benefit actually claimed by and provided to Settlement Class

[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"), ECF No. 35-1.

Members—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 considering both the percent-of-benefit method and the lodestar method of calculating attorneys' fees. Class Counsel also respectfully moves the Court for an award of $2,500 to each of the Plaintiffs for their work on behalf of the Class.[2]

II. CASE SUMMARY[3]

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* ECF 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* ECF No. 1, No. 3:20-cv-595 (W.D.N.C.) (the "*McCreary* Action")). Both counsel in this action and counsel in the *McCreary* Action have worked closely

[2] While Plaintiffs here move for attorneys' fees, costs, and service awards, they will move for final approval of the settlement by separate motion, which will be filed prior to the final fairness hearing.
[3] This section has been largely adopted from the Memorandum in Support of Plaintiffs' Renewed Unopposed Motion for Preliminary Approval of Class Action Settlement, filed September 30, 2021 at ECF No. 35.

together while negotiating with Filters Fast. Thus, in the interest of judicial economy and efficiency, Counsel in the instant action and the *McCreary* Action have since filed an Amended Complaint in order to add the plaintiffs from the *McCreary* Action as parties to this action (*see* ECF No. 25, filed on June 29, 2021). 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* ECF Nos. 8, 11 & 13, respectively. During this time, the Parties continued to make meaningful progress towards reaching a settlement. Accordingly, Plaintiffs Legg and Powersand Filters Fast submitted a Joint Motion to Stay Deadlines on January 14, 2021. *See* ECF Nos. 17 & 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* ECF No. 19.

Prior to mediation, the Parties negotiated a stipulated protective order. Filters Fast served informal discovery requests upon Plaintiffs. These requests were related to Plaintiffs' experiences and damages as a result of the Incident. All Plaintiffs responded in good faith. Filters Fast also produced documentation to Plaintiffs that was utilized in preparation of mediation.

On March 31, 2021, the Parties participated in an all-day mediation before JAMS mediator Hon. Wayne R. Andersen (Ret.). Following multiple exchanges of information and negotiations of terms, the Parties were able to reach a settlement in principle. Thereafter, the Parties negotiated the remaining terms, circulating drafts back and forth of the Settlement

Agreement and Release and its exhibits. The Agreement was finalized and executed on June15, 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* ECF 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. 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. This Court granted preliminary approval on November 17, 2021. ECF No. 43.

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 significant 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 ECF 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 exclusionfrom 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 upto 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*.

Conservative estimates of the value of this credit monitoring range from $90.00 ($7.50 per month, which is the lowest retail value of comparable identity theft protection) to $107.88 per Class Member per year. *See* Decl. of William Federman, filed as Ex. 2 to Pls.' Mot. for Prelim. Approval at ECF No. 35-2. Given the size of the Class (approximately 323,000), the benefit of this additional credit monitoring is tremendous—possibly as much as $29 million using the lower, $90 retail value, for just one year of services per Settlement Class Member.

5. Equitable and Prospective Relief

Pursuant to the Agreement, Filters Fast has implemented multiple 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 alsoutilizes 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 Fasthas addressed and remediated each of the PCI DSS deficiencies noted in thefinal report from Foregenix.

Agr. ¶ 46.

According to Filters Fast, the estimate value of its business practice changes is no less than $528,269.43. *Id.*[4] 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.*

B. Attorneys' Fees, Costs, and 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 is meant to compensate 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, remaining available for consultation throughout settlement negotiations, reviewing

[4] Contrast against *Reynolds v. Beneficial Nat'l 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.*, No. 14 C 08033, 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.").

relevant pleadings and the Settlement Agreement, and for answering Counsel's many questions. Lietz Fees Decl. ¶ 15.

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. Lietz Fees Decl. ¶ 16; *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.* Again, the Parties considered the range of fee awards from other payment card data breaches that were considered comparable cases in negotiating the fee. *Id.*

Class Counsels' 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 Fees Decl. ¶¶ 18–23. 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.*

Due to the early stage of litigation at which Plaintiffs were able to reach settlement, costs incurred by Plaintiffs are low. *Id.* at ¶ 20. Plaintiffs' current costs are $15,053.44 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.

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 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. The Notice and Claim Process

1. Notice

In its Order granting preliminary approval, the Court appointed Kroll Settlement Administration as the Notice Specialist and Claims Administrator in this case. Prelim. App. Order, ECF No. 43. Filters Fast is to pay for the cost of providing notice and claims administration separate and apart from the Settlement Payments available to Settlement Class Members. Agr. ¶ 33.

Kroll provided notice of the proposed Settlement reflected in the Settlement Agreement pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715(b) ("the CAFA Notice"). Decl. of Matthew Neylon of Kroll Settlement Administration LLC in Support of Final Approval ("Kroll Decl."), filed as Ex. 1 to Pls.' Mot. for Final Approval of Class Action Settlement. At Defense

Counsel's direction, Kroll sent the CAFA Notice and an accompanying thumb drive containing the documents required under 28 U.S.C. § 1715(b)(1)–(8) to the Attorney General of the United States and 50 state Attorneys General identified in the Manifest for the CAFA Notice via First-Class Certified Mail, on July 9, 2021. *Id.* ¶ 4.

On December 8, 2021, Kroll caused the emailing of the email Notices to 323,309 Class Members with an email in the Class List. Kroll Decl. ¶ 9. Of the 323,309 emails Trustify rejected 26,581. Of the 296,728 attempted for delivery, 33,309 emails bounced. *Id.* In order to provide the best notice practicable, Kroll ran the data through the United States Postal Services' (USPS) National Change of Address (NCOA) database and updated the data with the changes received from NCOA. *Id.* ¶ 10. On December 14, 2021, Kroll caused the mailing of Notices to the 25,916 Class Members. *Id.* On January 6, 2021, Kroll caused the emailing of reminder email Notices to 321,291 Class Members who had not yet submitted a claim. *Id.* ¶ 11. In all, Kroll estimated that direct and individual notice reached 89% of the Settlement Class. *Id.* ¶ 14.

2. Claims

As of January 27, 2022, Kroll has received 69 claim forms received through the mail and 3,476 claims filed electronically through the Settlement Website, totaling $103,067.46 in monetary compensation. *Id.* ¶ 17. A total of 2,733 Settlement Class Members have made a claim for credit monitoring services. *Id.* Of those 2,733 individuals, approximately 150 are only eligible for one additional year of monitoring: the remaining 2,583 are eligible for two years. *Id.* Conservatively valued at $90 per year, the estimated value of the claimed credit monitoring services is $478,440. The claims period will remain open until February 11, 2022. *Id.*[5]

[5] Although Class Members were provided with unique identifiers to decrease the chances of fraud, claims are subject to vetting for fraud and duplications. Kroll Decl. ¶ 18.

3. Objections and Requests for Exclusion

The deadline for Settlement Class Members to object to or exclude themselves from the Settlement Agreement is February 11, 2022. *Id.* ¶¶ 15–16. As of January 27, 2022, Kroll has received only five requests for exclusion and *zero* objections. *Id*.

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 Mktg. 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*. As part of this inquiry, "the judge must assess the value of the settlement to the class and the reasonableness of the agreed-upon attorneys' fees for class counsel," the central consideration being what class counsel achieved for members of the class. *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 235 (N.D. Ill. Mar. 2, 2016) (quoting *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014)).

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 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 & 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.") A lodestar analysis can (but is not required to be) used as a crosscheck on the common fund method of awarding attorneys' fees. *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 829 (7th Cir. 2018).

In fact, the approach favored for consumer class actions in the Seventh Circuit is to compute attorneys' fees as a percentage of the benefit conferred upon the class: "there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *In re Cap. One TCPA Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (finding percentage-of-the-fund to be the "normal practice in consumer class actions"). Courts have explained that "[t]he percentage method is bereft of largely judgmental and time-wasting computations of lodestars and multipliers." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 170 (S.D.N.Y. 1989); *see also In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992) (easier to establish market based contingency fee percentages than to "hassle over every item or category of hours and expense and what multiple to fix and so forth,"); *Gaskill v. Gordon*, 942 F. Supp. 382, 386 (N.D. Ill. 1996) (percentage-of-fund method "provides a more effective way of determining whether the hours expended were reasonable"), *aff'd*, 160 F.3d 361 (7th Cir. 1998). While the benefits provided here do not meet the technical definition of a common fund, the percent of benefit method for calculating attorneys' fees is still appropriate.

Here, the requested fees are reasonable, under both a common fund assessment and a lodestar analysis.

V. ARGUMENT

Plaintiffs respectfully request that the Court approve attorneys' fees of $304,946.56, costs of $15,053.44 and $2,500 Service Awards for each of the Plaintiffs. As explained below, the requested fee award is in line with the market rate for similar attorney services in this jurisdiction, 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.

1. Class Counsel's Requested Fee Award Represents a Modest Percent of the Benefit Made Available to Settlement Class Members.

Class Counsel here have created a significant benefit for Settlement Class Members consisting of monetary payments, up to 24-months of credit monitoring services and valuable equitable relief in the form of significant data security enhancements. In return, Class Counsel seeks fees and costs of $320,000—less than 1% of the total value of the benefit created for Settlement Class Members, and only approximately 22% of the value actually claimed by and provided for Settlement Class Members.

When assessing the reasonableness of requested attorneys' fees, most federal courts compare the amount requested against the total value of the benefit created by the Settlement. "In calculating a percentage fee award in a class action involving a settlement fund, the Supreme Court has recognized 'that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole,' even if part of the fund reverts to the defendant." *In re Comcast Corp. Set-Top Cable TV Box Antitrust Litig.*, 333 F.R.D. 364, 386 (E.D. Pa. 2019) (quoting *Boeing Co. v. Van Gemert*, 444 U.S.

472, 478 (1980)); *see also id*. at 480 (the class members' "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel"); *Drazen v. Godaddy.com*, No. 1:19-00563-KD-B, 2020 WL 8254868, at *12 (S.D. Ala. Dec. 23, 2020) (citing *In re Sunbeam Sec. Litig*., 176 F. Supp. 2d 1323, 1333 (S.D. Fla. 2001) (in turn, citing *Van Gemert*, 444 U.S. at 478)). Pursuant to the Supreme Court's reasoning in *Van Gemert*, numerous courts have recognized that "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as whole." *Sunbeam*, 176 F. Supp. 2d at 1333. The common benefit doctrine is applied the same way to claims-made settlements and is not limited by the number of individuals that ultimate claim. *See Poertner v. Gillette Co*., 618 F. App'x 624, 628 n.2 (11th Cir. 2015) ("properly understood a claims-made settlement is . . . the functional equivalent of a common fund settlement where the unclaimed funds revert to the defendant; indeed, the two types of settlements are fully synonymous.") (internal citations omitted). Under this analysis, Class Counsel seeks less than 1% of the value of the benefit negotiated—an inarguably reasonable figure.

In the Seventh Circuit however, Courts prefer to consider the ratio of "(1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014) (omitting administrative costs and incentive awards from analysis). The "presumption" should be that "attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014). "[A] district court should compare attorney fees to what is actually recovered by the class and presume that fees that exceed the recovery to the class are

presumptively unreasonable." *In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, 867 F.3d 791, 792 (7th Cir. 2017) (citing *Pearson,* 772 F.3d at 782).

Here, the requested fees do not run afoul of the presumption set forth in *Pearson*. Thus far, Settlement Class Members have submitted claims for $103,067.46 in monetary compensation, and 2,733 Settlement Class Members have submitted a claim for credit monitoring services valued at $478,440. Moreover, all Settlement Class Members will receive the benefit of the extensive business practice changes implemented by Filters Fast, the estimated cost of which is no less than $528,269.43. Agr. ¶ 46. Thus, under *RadioShack Corp.*, Class Counsel seeks fees and reimbursement of costs at 22% of the value claimed and received by Settlement Class Members.[6] Class Counsel submit that at 22% of the benefit actually claimed and provided, this fee request is inherently reasonable, lower than market rates, and should be approved. *See Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 795 (7th Cir. 2018) (affirming post-*Pearson* fee award in TCPA class action that included, inter alia, "the sum of 36% of the first $10 million"); *In re Cap. One TCPA Litig.*, 80 F. Supp. 3d 781 (N.D. Ill. 2015) (same); *see also Taubenfeld v. Aon Corp.*, 415 F.3d 597, 600 (7th Cir. 2005) (noting table of 13 cases in the Northern District of Illinois submitted by class counsel showing fees awarded ranged from 30% to 39% of the settlement fund); *Karpilovksy v. All Web Leads, Inc.*, No. 2017-cv-01307 (N.D. Ill. Aug. 8, 2019), ECF No. 173 (approving 35% of the settlement fund).

[6] Class Counsel seeks $320,000 in fees and costs. Settlement Class Members have claimed $478,440 in credit monitoring services, $103,067.46 in monetary compensation, and will receive the benefit of equitable relief costing Defendant no less than $528,269.43. Class Counsel's requested fees thus equal approximately 22% of the $1,429,776.89 recovered by Settlement Class Members in equitable relief, credit monitoring services, monetary compensation, and attorneys' fees. As is consistent with Seventh Circuit standards, this total does not take into account the costs of Settlement Administration or the Plaintiffs' requested Service Awards.

2. Class Counsel's Requested Fee Award is Also Reasonable Under a Lodestar Analysis.

Where a settlement does not create a non-reversionary common fund from which attorneys' fees are drawn, Seventh Circuit Courts will often opt to review or cross-check a requested fee under the lodestar method. *Daluge v. Cont'l Cas. Co.*, No. 15-cv-297-WMC, 2018 WL 6040091, at *4 (W.D. Wis. Oct. 25, 2018). 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, PTB, Inc.*, No. 17-cv-125-jdp, 2018 WL 11236460, at *2 (W.D. Wis. Nov. 21, 2018). While this assessment is by no means required (*see Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d at 247; *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F. 3d at 829), similar to the percent of benefit analysis, a lodestar analysis here supports the requested fee.

Here, Class Counsel has incurred a lodestar of $300,066.50, meaning the $304,946.56[7] in fees sought represent an extremely modest multiplier of .016—not including the additional approximate $20,000–$25,000 in fees Class Counsel expects to incur bringing the case to closure. Lietz Fees Decl. ¶ 25; Federman Fees Decl. ¶ 13. In fact, by the close of the case, if Counsel recovers the requested fees, they will likely represent a *negative multiplier* of their lodestar.

Over the course of litigation, Counsel has carried out 493.15 hours of work including: conducting an investigation into the facts regarding Plaintiffs' claims and Class Members' claims; researching law relevant to, and preparing, Plaintiffs' operative class action complaint; researching law relevant to the defenses raised in Defendant's answer to Plaintiffs' Complaint; preparing for

[7] This total represents the $320,000 in combined requested fees and costs, minus the $15,053.44 in costs actually incurred by Counsel.

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; 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; 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 instant Motion 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. Lietz Fees Decl. ¶ 30; Federman Fees Decl. ¶ 18. Where possible, Class Counsel made efforts to carefully assign work so as to avoid duplication of efforts. Lietz Fees Decl. ¶ 33. Upon request, Class Counsel will provide detailed contemporaneous records to the Court for review. *Id.* ¶ 34.

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. Lietz Fees Decl. ¶ 26; Federman Fees Decl. ¶ 14. The rates utilized are also commensurate with rates approved by courts within the Seventh Circuit. *Id.*; *see also Daluge v.*

Cont'l Cas. Co., 2018 WL 6040091, at *3–4 (approving rates of $795 for partners and $225 for paralegal).

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 Fees Decl. ¶ 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 v. The Neiman Marcus Grp., LLC*, No. 1:14-cv-01735 (N.D. Ill. June 4, 2021) (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.*, No. 19-cv- 6019-GEKP (E.D. Pa. Oct. 28, 2021) (the class counsel petitioned for up to $3,200,000 in fees).

Moreover, Class Counsel's request for fees of 22% request is reasonable compared to similar cases. In fact, awards of more than 35%—over 10% higher than those requested here—of a settlement fund are commonplace. *See, e.g.*, *Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d at 795 (affirming post-*Pearson* fee award in TCPA class action that included, inter alia, "the sum of 36% of the first $10 million"); *In re Cap. One TCPA Litig.*, 80 F. Supp. 3d 781 (N.D. Ill. 2015) (same); *Karpilovksy*, No. 2017-cv-01307, ECF No. 173 (approving 35% of the settlement fund); *see also Taubenfeld v. Aon Corp.*, 415 F.3d at 600 (noting table of 13 cases in the Northern District of Illinois submitted by class counsel showing fees awarded ranged from 30% to 39% of the

settlement fund). 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 counsel." *Silverman v. Motorola Sols., 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 v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) (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"). Further, according to counsel for Filters Fast, a closely held company, there was no applicable insurance coverage. 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 the advancement of time, costs, and expenses necessary to prosecute this matter zealously on behalf of Plaintiffs and the Class. Lietz Fees Decl. ¶ 18–21. 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. This factor supports the requested fee award.

5. The Requested Fee is Well Within the Range of Typical Contingency Fee Arrangements in this Circuit.

The "actual fee contracts that were negotiated for private litigation" may also be relevant considerations to a fee request. *Taubenfeld v. AON Corp.*, 415 F.3d at 599 (citing *Synthroid I*, 264 F.3d at 719); *Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) (requiring weight be given to the judgment of the parties and their counsel where the fees were agreed to through arm's length negotiations after the parties agreed on the other key deal terms).

The customary contingency agreement in this Circuit is 33% to 40% of the total recovery. *Gaskill v. Gordon*, 160 F.3d 361, 362–63 (7th Cir. 1998) (affirming award of 38%); *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) (finding 40% to be "the customary fee in tort litigation"); *Retsky Fam. Ltd. P'ship v. Price Waterhouse, LLP*, No. 97-7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (customary contingent fee is "between 33 1/3% and 40%"). The agreement between Plaintiffs and Class Counsel is consistent with such customary contingency agreements.

The fees contemplated under Class Counsel's representation agreements for cases in this District and elsewhere generally fall within the one-third to 40% range. Lietz Fees Decl. ¶ 23. Here, Class Counsel's fee request of less than 1% of the total benefit negotiated and 22% of the of the value actually claimed by Settlement Class Members is significantly below this range. This factor supports a finding that the requested fee reflects the amount Class Counsel would have received had they negotiated their fee *ex ante* and should therefore be awarded.

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

The quality of Class Counsel's performance and time invested through substantial informal discovery and adversarial negotiations to achieve a Settlement worth hundreds of millions of

dollars for the benefit of the Settlement Class further 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 negotiations. Lietz Fees Decl. ¶¶ 18–23. Prior to filing the Complaint, Class Counsel expended significant hours in preparing and negotiating the claims. They conducted a pre-suit investigation, participated in an all-day mediation, and spent weeks negotiating and finalizing the settlement approval papers. *Id.* ¶ 30. After preliminary approval was granted, counsel for Plaintiffs spent further time working with the Settlement Administrator to get notice out and monitor the claims process. *Id*.

Class Counsel are experienced in litigating consumer class actions, including privacy cases. *See* Lietz Fees Decl. ¶¶ 2–19, Ex. A. 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, 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.

B. <u>The Court Should Also Award Reasonable Reimbursement for Expenses.</u>

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, at *3 (S.D. Ill. Jan. 31, 2014) (citing Fed. R. Civ. P. 23; *Van Gemert*, 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 $15,053.44 in reimbursable expenses related to (1) legal research; (2) court fees; (3) mediation expenses. Lietz Fees Decl. ¶ 38; Federman Decl. ¶ 24. 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 $15,053.44.

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 at 1016 (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 counsel; (2) participated in client interviews; (3) provided relevant documents; (4) assisted in the investigation of the case; (5) remained available for consultation throughout settlement negotiations; (6) reviewed relevant pleadings and the Settlement Agreement, and (7) answered counsel's many questions. Lietz Fees Decl. ¶ 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, is less than many other awards approved by federal courts in this Circuit. *See, e.g.*, *Kolinek v. Walgreen Co.*, 311 F.R.D. at 502 ("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, at *1 (S.D. Ind. Nov. 20, 2012) (approving $25,000 incentive award to lead class plaintiff over objection); *Will v. Gen. Dynamics Corp.*, No. 06–698–GPM, 2010 WL 4818174, at *4 (S.D. Ill. Nov. 22, 2010) (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 Sec. Servs., Inc.*, No. 11-1925 (N.D. Ill. Feb. 27, 2013), ECF No. 243 ¶ 20 (awarding $30,000 incentive awards in class settlement). Thus, the requested service awards should be approved.

VI. CONCLUSION

Settlement 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 request their approval.

Dated: January 28, 2022

Respectfully submitted,

/s/ David K. Lietz

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 28, 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