IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ROBERT FERNANDEZ, as an individual and on behalf of all others similarly situated, Plaintiff, v. 90 DEGREE BENEFITS, LLC and 90 DEGREE BENEFITS – WISCONSIN (f/k/a EBSO, Inc.), Defendant.	Case No.: 2022-cv-00799-SCD

PLAINTIFF'S CORRECTED MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS, AND MEMORANDUM IN SUPPORT

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I. INTRODUCTION

On July 21, 2023, this Court preliminarily approved a proposed class action settlement between Plaintiff ROBERT FERNANDEZ ("Plaintiff") and Defendants 90 DEGREE BENEFITS, INC. f/k/a EBSO, INC. i/s/h/a 90 DEGREE BENEFITS – WISCONSIN (f/k/a EBSO, Inc.) ("90 Degree Benefits"), and PREFERRED CARE SERIVCES, INC. i/s/h/a 90 DEGREE BENEFITS, LLC ("Defendants"). ECF No. 26. Class Counsel's efforts created a $990,000, non-reversionary common fund for the benefit of approximately 185,461 individuals whose personal identifying information ("PII") and private health information ("PHI") was potentially compromised by the February 2022 and December 2022 breaches of Defendants' computer systems (collectively, the "Data Incidents").

Class Counsel have zealously prosecuted Plaintiff's and Class Members' claims, achieving the Settlement Agreement only after extensive investigation, formal and informal discovery, briefing, and arm's-length negotiations. Even after reaching 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 an award of attorneys' fees of $298,981.07 (30% of the common fund) and to reimburse their reasonable litigation costs of $31,018.93. This request should be approved because (1) it represents the market rate for this type of settlement, and (2) represents a reasonable and appropriate amount in light of the substantial risks presented in prosecuting this action, the quality and extent of work conducted, and the stakes of the case. Class Counsel also respectfully move the Court for an award of $10,000 to Plaintiff and Class Representatives ($2,500 each) for their work on behalf of the Class.

II. CASE SUMMARY[1]

A. The February Data Incident

On or about January 28, 2022 through February 28, 2022, 90 Degree Benefits discovered that an unauthorized person had gained access to their computer systems (the "February 2022 Incident"). *See* Decl. of Danielle L. Perry in Supp. of Pl.'s Mot. for Prelim. Approval ¶ 10, ECF No. 25 ("Perry PA Decl."). In June 2022, 90 Degree Benefits began notifying customers and state Attorneys General about the February 2022 Incident. *Id.* ¶ 11. Plaintiff Robert Fernandez received notice that his name, date of birth, Social Security number, phone number, address and health information had potentially been compromised. *Id.* ¶ 12.

B. The Class Action Complaint

This class action lawsuit was initiated on July 12, 2022. ECF No. 1. The original Complaint, as well as the later filed Amended Complaint alleged four claims for relief on behalf of himself and a class of similarly situated individuals: negligence; negligence *per se*; violation of Arizona's Consumer Fraud Act; and declaratory judgment. ECF No. 1; Perry PA Decl. ¶ 16. The Complaint sought certification of a single national class as well as a subclass for Arizona residents. ECF No. 1; Perry PA Decl. ¶ 17. Plaintiff sought equitable relief enjoining 90 Degree Benefits from engaging in the wrongful conduct complained of and compelling 90 Degree Benefits to utilize appropriate methods and policies with respect to consumer data collection, storage, and safety. ECF No. 1; Perry PA Decl. ¶ 18. Plaintiff further sought an order requiring Defendants to provide credit monitoring services to themselves and the rest of the Class. ECF No. 1; Perry PA Decl. ¶ 19. Finally, Plaintiff sought an award of actual, compensatory, and statutory damages as well as attorneys' fees and costs, and any such further relief as may be deemed just and proper.

[1] Sections II and III have been largely adopted from Plaintiffs' Motion for Preliminary Approval, filed on July 19, 2023. *See* ECF No. 24.

ECF No. 1; Perry PA Decl. ¶ 20. Soon after filing, the Parties agreed that it would be beneficial to explore opportunities for early resolution. Perry PA Decl. ¶ 21.

C. Initial Negotiations

After meeting and conferring on multiple occasions regarding the potential for early settlement, the Parties agreed to mediate the case before the Hon. Wayne Andersen (Ret.). *Id.* ¶ 22. Hon. Wayne Andersen (Ret.) is a retired federal judge and respected JAMS mediator with extensive experience in class action mediation generally and data breach mediations in particular. *See*, *id.* ¶ 23. The mediation proceeded via ZOOM Video Conference on November 28, 2022. *Id.* ¶ 24. After a full day of arm's-length negotiations, and significant exchange of information through Judge Andersen, the Parties came to an agreement on the central terms of a settlement agreement. *Id.* ¶ 25. On December 12, 2022, Counsel for Defendant notified the Court that a settlement had been reached in principle, and requested the Court set a deadline of January 27, 2022 to allow the Parties to prepare and execute the necessary settlement documents. *Id.* ¶ 26.

Over the next few weeks, the Parties diligently drafted and negotiated a term sheet designed to encapsulate all central terms of the settlement agreement. *Id.* ¶ 27. On January 24, 2023, Counsel for Defendant filed a request for a further extension on behalf of the Parties, up to and including February 24, 2022. *Id.* ¶ 28.

D. A Second Breach

In approximately January or February of 2023, Counsel for Defendants notified Counsel for Plaintiff that 90 Degree Benefits had been the victim of a second data breach that occurred on or around December 5, 2022 through December 11, 2022 (the "December 2022 Incident"), and confirmed that Plaintiff's information had again been impacted. *Id.* ¶ 29. As a direct result, on February 24, 2022, Plaintiff filed his Amended Complaint. *Id.* ¶ 30; ECF No. 19. The Amended Complaint included the same claims for relief as had been included in his original Complaint, but

was expanded to include both the February 2022 Incident and the December 2022 Incident (collectively, the "Data Incidents"). *Id*.

E. Renewed Negotiations

After Counsel for Defendant, upon information and belief, consulted with Hon. Wayne Andersen (Ret.), they reached out to Counsel for Plaintiff to explore the possibility of expanding the settlement to include both breaches. *Id.* ¶ 31. Counsel for Plaintiff required additional information regarding the scope of the breach in order to further negotiate the settlement. *Id.* ¶ 32.

The information took some time to gather, but Defendant eventually provided it, confirming that 185,461 individuals had been impacted by the combined Data Incidents, and that the same or similar information that was impacted by the February 2022 Incident was impacted by the December 2022 Incident. *Id.* ¶ 33. Renewed settlement negotiations began between the Parties, and continued for the next few months. *Id.* ¶ 34. Counsel for Plaintiffs negotiated a proportional increase in the overall settlement fund, as well as a significantly increased alternative cash payment, residual credit monitoring, and residual cash payments. *Id*. The Parties reached an agreement on the new central terms in or about April 2023. *Id.* ¶ 35.

On April 21, 2023, Plaintiffs Steven Greek and John Boyajian filed a Complaint against Defendants in the United States District Court for the Eastern District of Wisconsin, captioned as *Steven Greek et al. v. 90 Degree Benefits, Inc. et al*., Case No. 2:23-cv-00511 (the "*Greek* Action") asserting claims relating to the December 2022 Incident. *Id.* ¶ 36. On May 3, 2023, Plaintiff Jenny Olmstead filed a Complaint against Defendants in the United States District Court for the Eastern District of Wisconsin, captioned as *Jenny Olmstead et al v. 90 Degree Benefits – Wisconsin (f/k/a EBSO, Inc.)*, Case No. 2:23-cv-00564 (the "*Olmstead* Action") asserting claims relating to the December 2022 Incident. *Id.* ¶ 37.

Following further negotiations with Defendant, and with counsel for Plaintiffs Greek, Boyajian, and Olmstead, the Parties were able to come to a final agreement on the terms of the settlement. *Id.* ¶ 38. The *Greek* Action and the *Olmstead* Action were voluntarily dismissed without prejudice pursuant to Fed. R. Civ. P. 41 on or about June 1, 2023 and May 31, 2023, respectively. *Id.* ¶ 39.

The final Settlement Agreement ("Agr.") was fully executed on July 17, 2023, and is attached in full to the Perry PA Decl., ECF No. 25-1.

III. THE SETTLEMENT

A. The Settlement Class

The proposed Settlement Class, approved for settlement purposes by the Court on July 21, 2023 is defined as:

> All individuals who were notified by 90 Degree Benefits of the cyberattacks perpetrated against 90 Degree Benefits on or around January 28, 2022 through February 28, 2022 and December 5, 2022 through December 11, 2022.

ECF No. 26. The Settlement specifically excludes: (1) the judges presiding over this Action, and members of their direct families; (2) Defendants, their subsidiaries, parent companies, successors, predecessors, and any entity in which Defendants or their parents have a controlling interest and their current or former officers, directors, and employees; and (3) Settlement Class Members who submit a valid a Request for Exclusion prior to the Opt-Out Deadline. *Id*. ¶ 43.

The Settlement Class is comprised of approximately 185,641 individuals. *Id.* ¶ 44.

B. The Settlement

1. Settlement Benefits

The Settlement negotiated on behalf of the Class provides for the creation of a non-reversionary common fund in the amount of $990,000. *Id.* ¶ 45. The fund is structured to cover both cash benefits and credit monitoring services for valid claimants, as well as the costs of notice and administration, and court approved attorneys' fees, costs, and service awards. *Id*. From the fund, Settlement Class Members can claim one of two categories of relief. First, Class Members can claim up to $5,000 in reimbursements for out-of-pocket monetary losses, including compensation for up to three hours of lost time at $25 per hour and one year of three-bureau credit monitoring services. *Id.* ¶ 46. Or, in the alternative to the first category of relief, Settlement Class Members can make a claim for cash payment of up to $50. *Id.* ¶ 47. And finally, the Settlement Agreement requires Defendants to provide confirmatory discovery regarding significant data security enhancements it has put in place since the Data Incidents. *Id.* ¶ 60.

Any funds remaining in the Settlement Fund after payment of valid claims, purchase of credit monitoring, payment of notice and administration costs, and payment of court-approved attorneys' fees, costs and Plaintiff service awards will be used, to the extent practical, to purchase: first, up to a total of five years of credit monitoring services for Settlement Class Members who made a claim for credit monitoring services ("Residual Credit Monitoring Services"); and second, a payment of up to $100 to each Settlement Class Member who submitted a valid claim ("Residual Cash Payment"). *Id.* ¶¶ 55–57.

2. Court Approved Notice Program

The Court appointed Epiq Class Action and Claims Solutions, Inc. ("Epiq") to carry out notice and claims administration in this case. ECF No. 26 ¶ 7. Since preliminary approval was granted, Epiq has worked with Class Counsel and Counsel for Defendant to ensure that Notice is

disseminated according to the approved plan including: individual notice; the establishment and maintenance of a Settlement Website on which Class Members can access relevant filings and fill out and submit claim forms; the establishment of a toll-free helpline and P.O. Box. Settlement Class Members have until October 17, 2023 to object to or exclude themselves from the Settlement, and until November 16, 2023 to make a claim. Notice and claims administration is estimated to cost approximately $180,000. Decl. of Danielle L. Perry in Supp. of Pl.'s Mot. for Fees, Costs, and Service Awards ¶ 22 ("Perry Fees Decl."), *filed herewith*.

3. Class Representatives' Service Award

The Settlement Agreement calls for a reasonable service award to the Class Representatives in the amount of $2,500 per Class Representative. Perry PA Decl. ¶ 78. The Class Representatives have given their time and accepted their responsibilities admirably, participating actively in this litigation as required and in a manner beneficial to the Class generally, including: participating in client interviews, publicly attaching their names to the lawsuit, maintaining contact with counsel, assisting in the investigation of the case, reviewing Complaints, remaining available for consultation throughout settlement negotiations, reviewing the Settlement Agreement, and answering counsel's many questions. *Id*. ¶ 79. The Service Award was negotiated only after agreement was reached on the benefits to be made available to the Settlement Class. *Id.*

4. Attorneys' Fees and Costs

Pursuant to the Settlement Agreement, Class Counsel here seek $330,000 in fees and costs. Perry Fees Decl. ¶ 10. As Class Counsel has incurred $31,018.93 in reasonable out-of-pocket expenses including filing fees, service charges, and mediation costs, they seek only the remaining $298,981.07 in fees. *See* Perry Fees Decl. ¶ 20. The requested fees represent only 30% of the benefit negotiated for the Class.

Notably, the Parties did not negotiate this agreement or any other issue with respect to attorneys' fees, costs, and expenses until they had reached an agreement on Class relief. Perry Fees Decl. ¶ 25.

IV. LEGAL STANDARD FOR ATTORNEY'S FEE DECISIONS

Rule 23(h) permits a district court to award reasonable attorneys' fees "that are authorized by law or by the parties' agreement." The Seventh Circuit requires courts to 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). In this context, "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.* That is so because "[t]he 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.*

The "common fund" doctrine applies where, as here, litigation results in the recovery of a certain and calculable fund on behalf of a group of beneficiaries. The Seventh Circuit and other federal courts have long recognized that when counsel's efforts result in the creation of a common fund that benefits the plaintiff and unnamed class members, counsel have a right to be compensated from that fund for their successful efforts in creating it. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] lawyer who recovers a common fund . . . is entitled to a reasonable attorneys' fee from the fund as a whole."); *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) ("[T]he attorneys for the class petition the court for compensation from the settlement or common fund created for the class's benefit.").

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"). As other courts have explained:

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

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).

The Seventh Circuit has also determined that, in assessing the reasonableness of requested attorneys' fee, courts should 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 Seventh Circuit has clarified that 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).

V. ARGUMENT

Plaintiff respectfully requests that the Court approve attorneys' fees of $298,981.07, costs of $31,018.93, and $10,000 incentive awards for Class Representatives (payable at $2,500 per Representative). 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 data breach cases and should be approved.

A. Class Counsel's Requested Fee Award Is Reasonable

The percentage-of-the-fund method should be used here. *See Florin*, 34 F.3d at 566. Class Counsel's and Plaintiff's efforts have resulted in a $990,000 non-reversionary Settlement Fund that provides substantial, actual value to the Settlement Class. Class Members will have the opportunity to submit a claim for up to $5,000 in reimbursements for out-of-pocket monetary losses, including compensation for up to three hours of lost time at $25 per hour and one year of three-bureau credit monitoring services. In the alternative, Class Members can claim a straight cash payment of up to $50. Should any residual funds remain after payment of valid claims, purchase of credit monitoring, payment of notice and administration costs, and payment of court-approved attorneys' fees, costs and service awards will be used, to the extent practical, to purchase: first, Residual Credit Monitoring Services; and second, a Residual Cash Payment.

Class Counsel seek attorneys' fees *and costs* totaling 33% of the Settlement Fund, or $330,000. As Class Counsel has incurred $31,018.93 in reasonable out-of-pocket expenses including filing fees, service charges, and mediation costs, they seek only the remaining $298,981.07 in fees. The requested fees therefore represent only 30% of the total common fund. Under the *Radio Shack* analysis, omitting both the costs of notice and incentive awards from the total calculation of the common benefit, Plaintiff seeks attorneys' fees of 37%. Given the result obtained for the Class, and the fact that the fee request is set at the "market range," the requested

fee award is presumptively reasonable. Further, under any calculation the requested fee award is also consistent with the "market price" as reflected in the fees approved by judges in this Circuit in other class cases, considering the risks of non-payment, the quality and extent of Class Counsel's work on behalf of the Settlement Class, and the overall stakes of the case.

1. The Requested Fee Is Reasonable Under Seventh Circuit Attorney Fee Analysis.

"Reversionary" or "claims made" settlements, where the defendant takes back any amount of unclaimed/unused settlement funds, have come under scrutiny by the Seventh Circuit. Here, however, there is a non-reversionary, "true" lump-sum cash fund of $990,000. *Pearson*'s discussion of *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980), highlights the difference:

> [I]n [*Boeing*] the "harvest" created by class counsel was an actual, existing judgment fund, and each member of the class had "an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." *Id.* at 479. "Nothing in the court's order made Boeing's liability for this amount contingent upon the presentation of individual claims." *Id.* at 480 n.5. The class members [in *Boeing*] were known, the benefits of the settlement had been "traced with some accuracy," and costs could be "shifted with some exactitude to those benefiting." *Id.* at 480–81. [Unlike in *Boeing*,] . . . [t]here is no fund in the present case and no litigated judgment, and there was no reasonable expectation in advance of the deadline for filing claims that more members of the class would submit claims than did.

Pearson, 772 F.3d at 782.

Here, the $990,000, non-reversionary common fund presents precisely the type of "actual, existing judgment fund" cited with approval by the Seventh Circuit in *Pearson*. Further, each Class Member has "an undisputed and mathematically ascertainable claim" to their share of a lump-sum judgment. And while, in a reversionary settlement "class counsel lack any incentive to push back against the defendant's creating a burdensome claims process in order to minimize the number of claims," *id.*, the notice plan in *this* case (i.e., direct mail notice supplemented with a dedicated settlement website) presents no such issue because no money will revert to Defendant.

The Seventh Circuit has regularly found that "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). Class Counsel's requested fee award does not run afoul of the *Pearson* presumption of unreasonableness: it is approximately 37% of the total of requested attorneys' fees plus anticipated Settlement Class benefits (Requested Fee of $298,981.07 / ($990,000 Settlement Fund - $180,000 Estimated Settlement Administration Expenses - $10,000 in Service Awards) = approximately 0.37). This is well under the presumptively unreasonable 50.1% in *Pearson*.

Class Counsel submit that at 30% of the common fund, this fee request is reasonable, consistent with—and in fact at the low end of—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).

2. 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*, 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").

The difficulty and risk of data breach litigation is high, and weighs in favor of granting Plaintiff's request for attorneys' fees. Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data breach cases like this one are particularly complex and face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. Bank of N.Y. Mellon Corp*., No. 08 Civ. 6060(RMB)(RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g.*, *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013). Data privacy law is unsettled, and the magnitude and complexity of legal issues involved in this case demonstrates the heightened risk Plaintiffs' Counsel were willing to take on, and reinforces the reasonableness of Counsel's requested fee.

3. The Requested Fee Comports with the Contract Between Plaintiffs and Class Counsel, and Typical Contingency Fee Agreements 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 597, 599 (7th Cir. 2005) (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, as here, 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 Plaintiff and Counsel for Plaintiff is consistent with such customary contingency agreements. Perry Fees Decl. ¶ 13.

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. This factor supports a finding that the requested fee reflects an amount less than Class Counsel would have received had they negotiated their fee ex ante, and should be awarded.

4. The Requested Fee Reflects the Fees Awarded In Other 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).

Class Counsel's 28.7% fee request is reasonable compared to similar cases. Awards of more than 35% of a settlement fund are commonplace. *See, e.g.*, *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); *Karpilovksy*, 2017-cv-01307, ECF No. 173 (approving 35% of the settlement fund); *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). Consequently, the requested fee award falls below numerous other settlements approved as reasonable in this Circuit.

Indeed, even if this Court were to consider Plaintiff's fee request as compared to the "net settlement fund" under the *Pearson* reasonableness ratio (i.e., fee as a percentage of the fee plus total in direct benefits to the class), that 37% figure likewise plainly falls within the range of reasonableness in this Circuit. *See, e.g.*, *Martin v. JTH Tax, Inc.*, No. 13-6923 (N.D. Ill. Sept. 16, 2015) (38% of TCPA class settlement fund exclusive of expenses, administration costs, and service award); *Kolinek v. Walgreen Co*., 311 F.R.D. 483, 501 (N.D. Ill. 2015) (36% of TCPA class settlement fund exclusive of notice/admin costs and service award); *Vergara v. Uber Techs., Inc.*, 15–cv–6942 (N.D. Ill. Feb. 26, 2018), ECF No. 111 at 3–4 (awarding 36% of first $10 million of settlement fund exclusive of expenses, administration costs, and service award); *Bickel v. Sheriff of Whitley Cnty.*, No. 08-102, 2015 WL 1402018 (N.D. Ind. Mar. 26, 2015) (awarding 43.7% of the fund). Consequently, the requested fee award falls below numerous other settlements approved as reasonable in this Circuit.

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

The quality of Class Counsel's performance and time invested through substantial discovery and adversarial negotiations to achieve a $990,000 Settlement Fund 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 multiple exchanges of information and prolonged settlement negotiations. Perry Fees Decl. ¶¶ 12–16.

Class Counsel are experienced in consumer and class action litigation, and have substantial experience specific to data breach litigation. Perry Fees Decl. ¶¶ 3–4; Perry PA Decl. ¶¶ 2–9. 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 extensive exchange of information, and the adversarial nature of the litigation and settlement discussions, 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.

6. The Stakes of the Case Further Support the Fee Request.

The stakes of the case further support the requested fee award. This case involves approximately 185,461 Settlement Class Members whose PII and PHI was compromised in the Data Incident. Indeed, without class settlement, individual litigants likely would have to provide proof of causation far beyond what is required here to submit a claim. Such evidence is difficult and expensive to uncover, making it even less likely that people would file individual lawsuits. A class action is realistically the only way that many individuals would receive any relief. In light of the number of Settlement Class Members and the fact that they likely would not have received any relief without the assistance of Class Counsel, the requested fee is reasonable and should be granted.

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

It is well established that counsel who create a common fund 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; *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 $31,018.93 in reimbursable expenses related to (1) filing and service costs; (2) mediation fees; and (3) local counsel fees. Perry Fees Decl. ¶ 20. These expenses were necessary to prosecute litigation of this size and complexity on behalf of the Settlement Class, and they are typical of expenses regularly awarded in large-scale class actions, based on counsel's experience. *Id.* Accordingly, Class Counsel request that the Court approve as reasonable expenses in the amount of $31,018.93.

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

Class Counsel also respectfully request that the Court grant a service award of $10,000 to Plaintiff 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."). Indeed, without Plaintiffs serving as Class Representatives, 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, Robert Fernandez, Steven Greek, John Boyajian and Jenny Olmstead, spent considerable time pursuing Class Members' claims. In addition to lending their names to this matter (and their individual originally filed cases), and thus subjecting themselves to public attention, Plaintiffs were actively engaged in this Action. Among other things, they participated in client interviews, publicly attached their names to the lawsuit, maintained contact with counsel, assisted in the investigation of the case, reviewed Complaints, remained available for consultation throughout settlement negotiations, reviewed the Settlement Agreement, and answered counsel's many questions. Perry PA Decl. ¶ 79. Their dedication to this Action was notable, particularly given the relatively modest size of their personal financial stakes in this case. Importantly, the requested service award is less than the amount each Settlement Class Members is able to claim.

Moreover, the amount requested here, $2,500 per Representative, is comparable to or less than other awards approved by federal courts in this Circuit. *See, e.g.*, *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), ECF No. 201 (awarding $20,000 incentive award); *Desai v. ADT Sec. Servs., Inc.*, No. 11-1925 (N.D. Ill. Feb. 27, 2013), ECF No. 243 ¶ 20 (awarding $30,000 in incentive awards).

VI. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court grant this Motion and award Class Counsel $298,981.07 in attorneys' fees and to reimburse their reasonable

litigation costs of $31,018.07. Plaintiff further requests the Court approve $10,000 in incentive awards to Class Representatives.

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Respectfully Submitted,

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