IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

LOUISE PREVOST, PAUL FREDERICK, AMY RICHARDSON, JANE DOE #1, JANE DOE #2, and JANE DOE #3, Individually and on behalf of all others similarly situated, Plaintiffs, vs. ROPER ST. FRANCIS HEALTHCARE, Defendant.	C.A. NO.: 2021-CP-1001754

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

Plaintiffs, individually and on behalf of all others similarly situated, submit the following memorandum and exhibits in support of their motion for attorneys' fees, expenses, and service awards.

I. INTRODUCTION

On January 18, 2024, this Court preliminarily approved a proposed class action settlement between Plaintiffs and Defendant Roper St. Francis Healthcare ("Defendant"). The Settlement negotiated on behalf of the Class provides for three separate forms of monetary relief: (1) reimbursement of ordinary expenses and lost time up to $325 per Class Member; (2) reimbursement of lost time of up to 4 hours at $20 per hour (under the $325 out-of-pocket loss cap); and; (3) reimbursement of

extraordinary expenses up to $3,200 per Class Member. The value of all these benefits is capped at $1,500,000.

In addition to the potential monetary benefits, Plaintiffs here negotiated for additional identity theft protection for the Settlement Class, the cost of which is being borne by Defendant separate from the $1,500,000 aggregate cap. The retail value of this credit monitoring is an immense potential benefit to Class Members.

Class Counsel has zealously prosecuted Plaintiff's claims, achieving the Settlement Agreement only after an extensive investigation and prolonged arms'-length negotiations. The arm's-length nature of the settlement negotiations between adversarial (yet collegial), competent and experienced counsel on both sides, and supervised by retired federal district court judge Hon. Wayne Andersen, shows that this settlement was achieved free of collusion, Even after coming to an agreement to settle, 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 moves the Court for a combined award of attorneys' fees and expenses totaling $515,000, which represents no more than 19.08% percent of the value of the Settlement benefit created by Class Counsel. South Carolina courts have expressly and repeatedly approved fees based on the potential recovery to the class that equal 25% to 40% of the benefit created. Plaintiffs' motion should be granted because: (1) the request is reasonable and appropriate in light of the substantial risks presented in prosecuting this action, the

quality and extent of work conducted, and the stakes of the case; (2) the requested fees and costs were clearly delineated in notice to the class, and no class member has objected; and (3) the costs incurred were reasonable and necessary for the litigation. Plaintiffs also respectfully move the Court for an award of $1500 to each Plaintiff for their work on behalf of the Settlement Class.[1]

II. INCORPORATION BY REFERENCE

In the interest of judicial efficiency, for factual and procedural background on this case, Plaintiffs refer this Court to and hereby incorporate Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement filed on November 7, 2023 and the accompanying Exhibits, including the proposed Settlement Agreement, filed in conjunction therewith.

III. SUMMARY OF SETTLEMENT

The settlement's key terms are as follows:

A. Certification of Settlement Classes

The settlement provides for certifying the Settlement Class for settlement purposes only. The "Settlement Class" is defined as follows:

> The approximately 190,000 individuals who were notified that their personally identifiable information and/or personal health information may have been exposed to unauthorized third parties as a result of the Data Incident experienced by Roper on or around October 2020. The Settlement Class specifically excludes: (i) Roper and its respective officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the

[1] While Plaintiffs here move for attorneys' fees, expenses, 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.

Settlement Class; (iii) the Judge and/or magistrate assigned to evaluate the fairness of this settlement; and (iv) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding, or abetting the Data Incident or who pleads *nolo contender* to any such charge.

B. Monetary Terms

This settlement provides real and substantial monetary relief to the Settlement Class including Ordinary Out-of-Pocket Expenses, Lost Time spent dealing with the effects of the Data Incident, Extraordinary Out-of-Pocket Expenses, and the Costs of Notice and Administration not to exceed an aggregate amount of $1,500,000. This compensation is described below:

Ordinary Out-of-Pocket Expenses: All Settlement Class Members who submit a valid Claim are eligible to recover compensation for up to $325 of their ordinary unreimbursed out-of-pocket expenses, that were incurred between October 2020 and the Claims Deadline, as a result of the Data Incident,

Lost Time. All Settlement Class Members may also claim compensation for attested-to lost time spent dealing with the Data Incident, at the rate of $20 per hour for up to four (4) hours of lost time. Claims for lost time are also subject $325 limit for reimbursement for Ordinary Out-of-Pocket Expenses.

Extraordinary Out-of-Pocket Expenses: Settlement Class Members are also eligible to receive reimbursement for up to $3,250 per Settlement Class Member for documented expenses directly associated with dealing with identity theft or identity fraud directly related to the Data Incident.

Costs of Notice and Administration: Roper is providing for the costs of notice of this Settlement Agreement to Settlement Class Members and Claims Administration.

In addition to the substantial monetary benefits outlined above, Settlement Class Members are also eligible to claim twelve (12) months of credit monitoring. The cost of this credit monitoring is separate from the $1,500,000 aggregate cap. The retail value of this credit monitoring is an immense potential benefit to Class Members. The least expensive single bureau credit monitoring available on the market today is $8.95 per month. *See* Joint Declaration in Support of Unopposed Motion for Preliminary Approval ("Joint Decl."), previously filed on November 7, 2023. ¶ 21. At a cost of $8.95 per month, the retail value of 12-months of coverage is $107.40. *Id.* ¶ 22. This credit monitoring is available to all 190,000 Settlement Class Members. If even 5% of the Class (9,500 persons) claims this benefit, that would mean that the value of this part of the Settlement alone would be over another $1 million dollars to this class (9500 x $107.40 = $1,020,300).

The terms of this Settlement also call for the payment of attorneys' fees, expenses, and service awards to be paid separately by Roper, and are not part of the $1,500,000 aggregate cap. Structured this way, the payment of attorneys' fees, expenses, and services awards will not diminish the Class relief in any way. Attorneys' fees and services awards were negotiated only after the material terms of the Settlement Class relief were reached. Joint Decl ¶ 23. Plaintiffs and Class

Counsel now move this Honorable Court for an Award of Attorneys' Fees, Expenses, and Service Awards.

IV. ARGUMENT

A. PLAINTIFFS' COUNSEL'S REQUEST FOR ATTORNEYS' FEES AND EXPENSES, AND AN INCENTIVE AWARD TO THE CLASS REPRESENTATIVES SHOULD BE APPROVED

Class Counsel requests a combined award of attorneys' fees and expenses in the amount of $515,000. The amount of the requested attorneys' fees (which is $481,029.99, after deducting the $33,970.01 in out-of-pocket expenses sought as part of the combined fee and expense award) amounts to just under one-third (32.06%) of the $1.5 million cap on the monetary relief obtained for this Class. However, if one includes the conservative estimate of the retail value of the credit monitoring benefit set out above (another $1,020,300), the requested fee drops to **19.08%** ($2.520,300 divided by $481,029.99) of the total Settlement benefit obtained for the Class. Either way, the attorneys' fees sought are fair and reasonable. Class Counsel also recommends and requests an award of $1,500 each to the Class Representatives.

1. The Fee Request Should Be Approved Under the Percentage of Common Benefit Method.

South Carolina courts have long recognized that an award of attorneys' fees may be made pursuant to the common fund, or common benefit, doctrine. "The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorneys' fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common

fund or common property." *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329–30 (2008), citing *Petition of Crum. Johnson v. Williams,* 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941). Attorneys' fees awarded pursuant to the common fund doctrine come directly out of the common fund created or preserved. *Id.* The justification for awarding attorneys' fees in this manner is based on the principle that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses." *Id.* at 531–32, 14 S.E.2d at 23. The *Layman* court explained that the percentage of recovery method is appropriate for cases where the fees are "are taken directly from the common fund or recovery and borne by the prevailing party through *fee-spreading*. *Layman*, 376 S.C. at 452, 658 S.E.2d at 330; *see also Edmonds v. United States*, 658 F. Supp. 1126, 1145 (D.S.C. 1987)(finding use of percentage-based fees is appropriate in common fund cases, not the lodestar method that is used in statutory fee shifting cases). The Honorable John Hayes agreed in *Anderson Memorial Hosp. v. W.R. Grace*, No. 92-CP-25-279 (Hampton Cty. Ct. Com. Pl. Dec. 10, 2008), "that the percentage of recovery method [is] the accepted way to analyze fees to be paid from a common fund." Slip op. at 3

Plaintiffs' attorneys in a successful class action lawsuit may petition the Court for compensation relating to any benefits to the Class that result from the attorneys' efforts. *See, e.g., Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980). Under this "common benefit" approach, attorneys' fees are awarded as a percentage of the common benefit created by the settlement. In calculating the percentage, it is

appropriate to compare the fee to the total amount recovered for the benefit of the class, even if some of the fund ultimately reverts to the defendant because some class members choose not to claim their share. *See Van Gemert*, 444 U.S. at 481 (attorneys' fees must be based on the value of the entire common fund, even if some beneficiaries make no claim). The rationale for the common fund principle was explained in *Van Gemert,* 444 U.S. at 478, "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." *Savani v. URS Pro. Sols. LLC*, 121 F. Supp. 3d 564, 568 (D.S.C. 2015)

The percentage-of-the fund method is the preferred method of calculating attorneys' fees in cases involving common fund settlements in federal courts as well. *Savani*, 121 F. Supp. 3d at 568 (citations omitted). "Indeed, there is a consensus among the federal circuit courts of appeal that the award of attorneys' fees in common fund cases may be based on a percentage of the recovery." *Ferris v. Sprint Comm'ns Co. L.P.*, No. 5:11-cv-667, 2012 WL 12914716, at *6 (E.D.N.C. Dec. 13, 2012) (quoting *Muhammad v. Nat'l City Mortgage, Inc.*, No. 2:07-0423, 2008 WL 5377783, at *7 (S.D. W. Va. Dec. 19, 2008)); s*ee also Phillips v. Triad Guaranty Inc.,* No. 1:09CV71, 2016 WL 2636289, at *2 (M.D.N.C. May 9, 2016) (noting that district courts within the Fourth Circuit "overwhelmingly" prefer the percentage-of-the-fund method in common fund settlement); *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) (Internal citation omitted))(noting that within the Fourth Circuit, the percentage-of-the-fund method

"is the preferred approach to determine attorneys' fees."); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009) (explaining that "[w]hile the Fourth Circuit has not definitively answered this debate, other districts within this Circuit, and the vast majority of courts in other jurisdictions consistently apply a percentage of the fund method[.]").[2]

The percentage-of-the-fund method provides a strong incentive to plaintiff's counsel to obtain the maximum possible recovery in the shortest time possible under the circumstances by removing the incentive, which occurs under the lodestar method, for class counsel to "over-litigate" or "draw out" cases in an effort to increase the number of hours used to calculate their fees. *See Jones v. Dominion Res. Servs., Inc.,* 601 F. Supp. 2d 756, 759 (S.D.W. Va. 2009); *see also Ferris*, 2012 WL 12914716, at *6 (noting that the percentage method "better aligns the interests of class counsel and class members because it ties the attorneys' award to the overall result achieved rather than the hours expended by the attorneys"); *DeWitt v. Darlington Cty.*, No. 4:11-cv-00740, 2013 WL 6408371, at *6 (D.S.C. Dec. 6, 2013) ("The percentage-of-the fund approach rewards counsel for efficiently and effectively bringing a class action case to a resolution, rather than prolonging the case in the

[2] Because the South Carolina Class Action Rule is consistent with, but more expansive than the Federal Class Action Rule, South Carolina courts often rely on federal precedent as a baseline in evaluating class action issues. *See Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999).

hopes of artificially increasing the number of hours worked on the case to inflate the amount of attorneys' fees on an hourly basis.").[3]

2. The Fees Requested are Fair and Reasonable under the *Jackson* Factors.

The fundamental test for awarding attorneys' fees is whether the request is "reasonable." *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). The Court has discretion to determine what is reasonable. *Hueble v. S.C. Dep't of Nat. Res.*, 416 S.C. 220, 232, 785 S.E.2d 461, 467 (2016); *Hodge v. First Fed. Sav. & Loan Ass'n of Spartanburg*, 267 S.C. 270, 276, 227 S.E.2d 310, 313 (1976).

[3] This is just one of several drawbacks to the lodestar approach. *See Manual for Complex Litigation*, § 14.121 (4th ed. 2018) ("In practice, the lodestar method is difficult to apply, time consuming to administer, inconsistent in result, . . . capable of manipulation, . . . [and] creates inherent incentive to prolong the litigation . . . ."); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 255 (1985) (enumerating nine deficiencies in the lodestar process and concluding that in common fund cases the best determinant of the reasonable value of services rendered to the class by counsel is a percentage of the fund); *Lopez v. Youngblood*, No. CV-F-07-0474 DLB, 2011 WL 10483569, at *4 (E.D. Cal. Sept. 2, 2011) "Among the drawbacks to the lodestar method . . . are that the lodestar method increases the amount of fee litigation; the lodestar method lacks objectivity; the lodestar method can result in churning, padding of hours, and inefficient use of resources; when the lodestar method is used, class counsel may be less willing to take an early settlement since settlement reduces the amount of time available for the attorneys to record hours; and the lodestar method inadequately responds to the problem of risk."). Perhaps it is unsurprising, then, that the lodestar method has fallen increasingly out of favor. *See, e.g.*, Theodore Eisenberg, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Review 937, 945 (2017) (finding that the lodestar method used only 6.29% of the time from 2009–2013, down from 13.6% from 1993–2002 and 9.6% from 2003–2008); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 832 (2010) (finding that the lodestar method used in only 12% of settlements).

The reasonableness of an attorneys' fee award is determined by a set of non-exclusive factors. In South Carolina, the factors used in the overall assessment of a reasonable fee are set forth in *Jackson, supra,* and include:

1. The nature, extent, and difficulty of the case;.
2. The beneficial results obtained;
3. The professional standing of counsel;
4. The contingency of compensation;
5. The time necessarily devoted to the case; and
6. The customary legal fee for similar services.

Taken in combination, these factors support the view that a 19.08% fee here is extremely reasonable.

The first *Jackson* factor – the nature, extent, and difficulty of the case – fully supports the fees requested. It is well-settled that "the riskier the case, the greater the justification for a substantial fee award." *Montague v. Dixie Nat'I Life Ins. Co.,* 2011 WL 3626541, at *3 (D.S.C. Aug. 17, 2011). This was a case that involved novel and difficult legal questions. Data breach cases are, by nature, particularly risky and expensive. Such cases also are innately complex. *See, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.,* No. 1:17-MD-2800-TWT, 2020 WL 256132, at *32 (N.D. Ga. Mar. 17, 2020), *aff'd in part, rev'd in part and remanded,* 999 F.3d 1247 (11th Cir. 2021) (recognizing the complexity and novelty of issues in data breach class actions); *In re Sonic Corp. Customer Data Sec. Breach Litig.,* No. 1:17-md-2807, 2019 WL 3773737m at *7 (N.D. Ohio Aug. 12, 2019) ("Data breach litigation is

complex and risky. This unsettled area of law often presents novel questions for courts. And of course, juries are always unpredictable."); *In re Anthem, Inc. Data Breach Litig.,*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (noting that "many of the legal issues presented in [] data-breach case[s] are novel"). This case is no exception to that rule. It involves 190,000 Class Members, complicated and technical facts, and a well-funded and motivated defendant defended by one of the most well-regarded defense firms in the data breach space (Baker Hostetler, an AmLaw 100 firm).

Class Counsel also took on significant risks with this particular case. While Plaintiffs believed they could prevail on their claims against Defendant, they also were aware that they would likely face several strong legal defenses and difficulties in demonstrating causation and injury. *Id.* ¶ 32. Such defenses, if successful, could drastically decrease or eliminate any recovery for Plaintiff and putative class members. *Id.* A preview of these issues was provided in Defendant's substantial motion to dismiss, and subsequent motion for reconsideration. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on either certification or merits. The general risks of litigation are further heightened in the data breach arena. Among national consumer protection class action litigation, data breach cases are some of the most complex and involve a rapidly evolving area of law. *Id.* Moreover, the theories of damages remain untested at trial and appeal. As another court recently observed:

> 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.").

Fox v. Iowa Health Sys., No. 3:18-CV-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021). These cases are particularly risky for plaintiffs' attorneys. Consequently, the requested fee award appropriately compensates for the risk undertaken by Plaintiffs' counsel here.

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. The 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).

Another significant risk faced by Plaintiffs here is the risk of maintaining class action status through trial. The class has not yet been certified, and Defendant will certainly oppose certification if the case proceeds. Thus, Plaintiffs "necessarily risk losing class action status." *Grimm v. American Eagle Airlines, Inc.*, No. LA CV 11-00406 JAK(MANx), 2014 WL 1274376, at *10 (C.D. Cal. Sept. 24, 2014). In one of the few significant data breach class actions that have been certified on a national basis, this risk was very real. *In re Marriott International Customer Data Securities Breach Litigation*, 341 F.R.D. 128 (D.Md. 2022), was recently decertified

on appeal. *See In re Marriott Int'l, Inc.*, 78 F.4th 677, 680 (4th Cir. 2023).[4] The relative absence of trial class certification precedent in the relatively novel data breach setting adds to the risks posed by continued litigation.

This over-arching risk simply puts a point on what is true in all class actions – class certification through trial is never a settled issue, and is always a risk for the Plaintiffs and their Counsel. There is no doubt that this difficult case satisfies the first *Jackson* factor.

The second *Jackson* factor – the beneficial results obtained – also weighs in favor of the fees requested. The benefit conferred upon the Settlement Class is substantial, and includes valuable credit monitoring, the ability to claim cash for lost time spent mitigating the effects of the data security incident without any documentation, and the ability to claim up to $3,250 for documented out-of-pocket losses. All 190,000 Settlement Class Members can claim any and all of these benefits. These benefits reflect an enormous success given the circumstances, and directly address the damages claimed by Plaintiffs and the Class in this action by reimbursing them for out-of-pocket losses and lost time stemming from the breach, and providing the opportunity to protect their identity in the future through monitoring. These are real, tangible benefits—that without the efforts of Plaintiffs and Class Counsel, and their willingness to take on the attendant risks of litigation, would not have been available to Settlement Class Members. Further, the

[4] To complete the story, the classes were re-certified by the district court on remand. *See In re Marriott Int'l Customer Data Sec. Breach Litig.*, No. 19-MD-2879, 2023 WL 8247865, at *1 (D. Md. Nov. 29, 2023).

Settlement benefits are available to Class Members immediately, rather than years from now which would be the case absent settlement. Thus, this factor weighs heavily in favor of granting this fee request.

The third *Jackson* factor – the professional standing of counsel – is satisfied. The skill required to litigate data breach cases is great, in part due to the quickly evolving nature of data breach and privacy law. Here, as the joint declaration in support of the preliminary approval motion abundantly shows, the lawyers representing Plaintiffs are some of the most experienced in this area of the practice. Joint Decl. ¶ 30, Exhibits A-F. Class Counsel brought this established track record and experience to work in litigating Plaintiffs' and Class Members' claims. The significant experience and qualifications of counsel easily justify the attorneys' fee award.

The fourth *Jackson* factor – contingency of compensation – weighs in favor of the requested fees. Class Counsel also took this case on a purely contingent basis. See Declaration of David Lietz, attached hereto as Exhibit A ("Lietz Decl"). ¶ 6. The Fourth Circuit has recognized the importance of the risk of non-payment in awarding fees. In a 2010 case, the United States Court of Appeals for the Fourth Circuit reversed the district court's "reduction of attorney's fees from thirty-three percent to a mere three percent," noting that "[t]he chief error in the district court's analysis was its failure to recognize the significance of the contingency fee in this case." *Pellegrin v. Nat'l Union Fire Ins.* (*In re Abrams & Abrams, P.A.*), 605 F.3d 238, 245, 249 (4th Cir. 2010). The Fourth Circuit noted that "contingency fees

provide access to counsel for individuals who would otherwise have difficulty obtaining representation," stating, "[t]he contingency agreement was, as the saying goes, the key to the courthouse door that allowed [plaintiff] to retain the attorneys who eventually provided for his son's ongoing needs." *Id.* at 245-46. The Fourth Circuit further noted that "contingency fee agreements transfer a significant portion of the risk of loss to the attorneys taking a case," and "[a]ccess to the courts would be difficult to achieve without compensating attorneys for that risk." *Id.* at 246. Stated differently, "plaintiffs may find it difficult to obtain representation if attorneys know their reward for accepting a contingency case is merely payment at the same rate they could obtain risk-free for hourly work, while their downside is no payment whatsoever." *Id.* This reasoning applies to the realm of privacy law in spades since there is no shortage of well-paid legal defending or advising corporations as to their obligations to protect PII.

Here, the retainer agreements Class Counsel have with Plaintiffs do not provide for fees apart from those earned on a contingent basis, and, in the case of class settlement, attorneys' fees would only be awarded to Class Counsel, if approved by the Court. *Id.* at ¶ 12. As such, attorneys' fees were not guaranteed in this case. *Id.* Class Counsel assumed significant risk of nonpayment or underpayment of attorneys' fees. *Id.* ¶¶ 11-12. Class Counsel took on these significant risks knowing full well their efforts may not bear fruit. *Id.* Plaintiffs' counsel's acceptance of the work on a contingency basis is a significant factor counseling in favor of its fee request.

Class Counsel also took on significant risks with this particular case, as outlined above. This case could have been lost right out of the starting blocks, on Defendant's motion to dismiss. Class Counsel, who took this matter on contingency, faced numerous challenges. Courts have recognized that such risk deserves extra compensation and is a critical factor in determining the reasonableness of a fee. *See, e.g. Stocks v. Bowen*, 717 F. Supp. 397, 402 (E.D.N.C. 1989); *Gilbert LLP v. Tire Eng'g & Distribution, Ltd. Liab. Co.*, 689 F. App'x 197, 201 (4th Cir. 2017); "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."

The fifth *Jackson* factor – the time necessarily devoted to the case – weighs in favor of the fees requested. Here, Class Counsel has expended over 625 hours (625.0 hours through April 14, 2024, not including Mr. Richter's time) on this case to date, and anticipates spending another 50-60 hours bringing this case through final approval and distribution of all Settlement benefits to Class Members. Lietz Decl. ¶¶ 13-14. This case has been litigated for almost four (4) years to this point. Class Counsel already devoted significant time to this matter. Counsel actively litigated this case, and then spent considerable time and effort settling it. Class Counsel's work was not over after negotiating the Settlement. After preliminary approval of the Settlement Agreement was granted, Class Counsel has worked diligently to ensure that Settlement Class members would be able benefit from the Settlement. The work performed by Class Counsel to date has been comprehensive,

complex, and wide-ranging. Thus, this factor amply support the requested fee award.

The sixth and final *Jackson* factor – the fee customarily charged for similar services – weighs heavily in favor of approving the fee requested here. In data breach cases with similar class relief, there have been fee awards well exceeding a million dollars. *See Fox*, supra, 2021 WL 826741, at *6 (approving attorneys' fees and costs in the amount of $1,575,000 in data breach settlement with similar documented loss, lost time, and credit monitoring class relief). The class relief here is similar to results obtained in other data breach cases, and which include, for instance: *Culbertson, et al v. Deloitte Consulting LLP*, Case No. 1:20-cv-3962-LJL (S.D.N.Y. 2022); *Carrera Aguallo v. Kemper Corp.*, Case No. 1:21-cv-01883 (N.D. Ill. Oct. 27, 2021), ECF 33 (finally approving $2,500,000 in attorneys' fees in data breach class action involving 6 million class members); *Henderson V. Kalispell Reg'l Healthcare*, No. CDV 19-0761 (Mont. Dist. Ct., Cascade Cnty. Nov. 25 2020) (court awarded attorneys fee of 33% of the common fund of $4.2 million). A 33.33% fee is fully in line with other cases with similar results obtained for the Class, and a $515,000 fee request is a relative bargain compared to other, similar data breach settlements with much higher dollar fees.

Therefore, all factors set out in *Jackson* to analyze a fee request in a class action settlement overwhelmingly support the requested fee award.

3. Other Factors Support the Reasonableness of the Requested Award

In addition to satisfying the *Jackson* factors, there are additional reasons to support the requested award. Notably, the requested fee award has been approved by the Settlement Class members themselves. Settlement Class members received direct notice of the Settlement, which provides the best possible and most practicable notice in a class settlement. The settlement notice described the amount that Class Counsel intended to request in attorneys' fees and costs in plain and clear language. As of April 15, 2024, no Settlement Class member has objected to the requested award. *See Varacallo v. Massachusetts Mutual Life Insurance Company*, 226 F.R.D. 207, 251 (D.N.J. 2005) (even a small number of objectors to a fee award favors approval of request). Accordingly, Settlement Class members have approved the requested award.

The requested award also falls comfortably within the percentage typically approved by South Carolina courts in class settlements. As Judge Harwell noted in *DeWitt*, *supra*, 2013 WL 6408371, at *9, "attorney's fee awards generally range anywhere from nineteen percent (19%) to forty-five percent (45%) of the settlement fund." (internal quotations omitted). South Carolina common fund cases follow the consensus view and regularly award fees at or above 25%. In *Condon v. State*, 354 S.C. 634, 644 n..8, 583 S.E.2d 430, 435 n.8 (2003), where the circuit court awarded a 28% fee, the Supreme Court cited favorably a federal case saying that fees "ordinarily range from 20 percent to 30 percent of the common fund created." (quoting *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)). Other cases have awarded even higher fees based on their individual facts.

In *Anderson Memorial Hosp. v. W.R. Grace*, No. 92-CP-25-279 (Hampton Cty. Ct. Com. Pl. Dec. 10, 2008), Judge Hayes noted that the customary South Carolina fee for a complex contingent fee case "ranges from one-third to one-half of the gross recovery." Slip op. at 7. He ultimately awarded a one-third contingent fee on a $57 million recovery, finding:

> Here, Class Counsel has requested one-third of the settlement fund created. This request is well within the range of fees routinely approved by courts in class actions.

Id. The court noted that this fee was at the lower end of the range of common fund fees approved in South Carolina courts. Indeed, a higher percentage was approved by another South Carolina court in *Fairey v. Exxon Corp.,* C.A. No. 94-CP-38-118 (Orangeburg Cty. Ct. Com. Pl. Oct. 9, 2003) (40% of a $30 million recovery). Other South Carolina cases agree that a one-third common fund fee is within the range of appropriate fees. *See Edwards v. SunCom*, 2008 WL 4897935 (S.C. Ct. Com. Pl. May 5, 2008); *Lackey v. Green Tree Fin. Corp*., C.A. No. 96-CP-06-073, slip op. at 24 (S.C. Ct. Com. Pl. July 24, 2000); *Bazzle v. Green Tree Fin. Corp.,* C.A. No. 97- CP-18-258 (S.C. Ct. Com. Pl. July 24, 2000); *Neaten v. Northland Madison at Park West, LLC,* C.A. No. 2010-CP-10-9095, slip op. at 1-2 (S.C. Ct. Com. Pl. Apr. 15, 2015).

In *Montague, supra,* 2011 WL 3626541, Judge Joseph Anderson awarded a 33% fee in a common fund case, citing numerous decisions supporting that percentage:

> A total fee of 33 percent for all work performed in this case is well within the range of what is customarily awarded in settlement class actions. An award of fees in the range of 33% of the fund for work

> performed in the creation of a settlement fund has been held to be reasonable by many federal courts.

Id. at *2; *Ward v. Dixie Nat'I Life Ins. Co*., C.A. No. 3:03-cv-03239-JFA, slip op. at 2 (D.S.C. Dec. 15, 2008); *see also, Temp. Servs., Inc. v. Am. lnt'I Group, Inc.,* 2012 WL 4061537, at *8 (D.S.C. Sept. 14, 2012) (33½% fee); and *DeWitt*, 2013 WL 6408371, at *9 (33½% fee).

Here, as shown above, the percentage sought here is 19.8%, which is below all the applicable South Carolina benchmarks. The fees requested are reasonable.

B. A Summary Lodestar Crosscheck Confirms the Reasonableness of the Fees Requested.

Although no lodestar crosscheck is required, a summary lodestar crosscheck confirms the reasonableness of the fees requested here. Class Counsel has expended 625.0 hours of work on this matter to date, and will expend another 50-60 hours of time obtaining final approval and consummating this Settlement. Lietz Decl. ¶ 24. At the normal billing rates that have been approved by courts across the country, this equates to a lodestar of $471,008.30, and the fees requested represent a lodestar multiplier of 1.02 ($481,029.99 divided by $471,008.30). Courts sitting in South Carolina have found that lodestar multipliers falling between 1.5 to 4.5 demonstrate a reasonable attorneys' fee. *See Maybank v. BB&T Corp*., 416 S.C. 541, 581, 787 S.E.2d 498, 519 (2016)(1.5 multiplier approved); *In re MI Windows & Doors Inc. Prod. Liab. Litig*., No. 2:12-MN-00001-DCN, 2015 WL 4487734, at *5 (D.S.C. July 23, 2015) ("Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee), citing *Jones v.*

Dominion Res. Servs., Inc., 601 F.Supp.2d 756, 766 (S.D.W.Va.2009). A 1.02 lodestar multiplier thus falls within the range of reasonableness.

Also, if Class Counsel completes the additional 50-60 hours of work estimated to final approval, the accrued lodestar may well equal (or even exceed) the $515,000 in combined fees and expenses requested.[5] "There is a strong presumption of the reasonableness of the lodestar amount." *Shelley v. Tribble*, No. CA 3:11-3477-CMC, 2014 WL 6460552, at *2 (D.S.C. Nov. 17, 2014). The presumption of reasonableness is even stronger when the lodestar multiplier is negative. *See, e.g. Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1023 (E.D. Cal. 2019) (citing cases for proposition that negative multiplier suggests fee request is reasonable). As presumptively reasonable, this amount should be approved by this Court.

C. **Class Counsel's Request for Expenses is Reasonable**.

Class Counsel seeks to recover reasonable litigation expenses as part of requested fee award of $33,970.01, representing filing fees, service fees, pro hac vice admission fees, and the out-of-pocket costs associated with the mediation in this case (which, standing alone, amount to approximately two-thirds of the total case expenses). Courts regularly award litigation expenses in addition to attorneys' fees in class action cases – yet here, they are sought as part of the combined $515,000 fee and expenses award.

[5] Also, when Mr. Richter's time is submitted, the lodestar multiplier will sure swing negative.

Courts in South Carolina and the federal Fourth Circuit have explained that such costs and expenses may include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (internal quotations omitted). Counsel's expenses here, totaling $33,970.01 were all reasonably incurred in pursuing this litigation. Lietz Decl., ¶ 29. Counsel's expenses were reasonable and necessary to litigate this case, and the Court should therefore include them in any fee award. *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, No. CIV.A. DKC 11-1823, 2013 WL 5506027, at *17 (D. Md. Oct. 2, 2013) (awarding expenses that the court deemed were "reasonable and typical.").

D. The Requested Incentive Award to the Class Representatives is Reasonable.

"'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.'" *In re MI Windows*, 2015 WL 4487734, at *5, quoting *Cook v. Niedert,* 142 F.3d 1004, 1016 (7th Cir.1998). "'Incentive or service awards reward representative plaintiffs' work in support of the class, as well as their promotion of the public interest" and "[c]ourts around the country have allowed such awards to named plaintiffs or class representatives.'" *Id., quoting Deem v. Ames True Temper, Inc.,* 2013 WL 2285972, at *6 (S.D.W.Va. May 23, 2013); *see also Savani v. URS Prof'l Solutions LLC,* No. 1:06–cv–02805, 2014 WL 172503, at *10 (D .S.C. Jan. 15, 2014) (citation omitted). The amount of the award is ultimately within the discretion of the Court, though the size of the award itself is typically

commensurate with the level of activity performed and the size of the case. *See Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05CV00187, 2007 WL 119157, at *4 (M.D.N.C. Jan. 10, 2007) (awarding a service award of $15,000).

Plaintiffs seek a service award of $1500 to each of the Class Representatives in recognition of the time and effort Plaintiffs have personally invested in this case. Plaintiffs took a considerable risk in suing their health care provider, as the relationship between health care providers and patients is one of high trust. Few professional relationships approach the level on intimacy. Defendant is well-known and well-respected in its community, and suing Defendant was fraught with the potential for negative consequences. Nevertheless, Plaintiffs were prepared to litigate this action through trial to properly represent the class and fight for significant relief. Absent their efforts, the class would have received no compensation. They also assisted in Counsel's investigation of the case, reviewing pleadings, maintaining contact with counsel, remained available for consultation during settlement negotiations, answering counsel's many questions, and reviewing the Settlement Agreement. The Class Representatives amply fulfilled their duties, making the Service Awards requested appropriate. While they did not have to undergo extensive discovery or depositions, they did gather documents and materials in support of their claims that were used in drafting the Complaint.

The requested service awards are reasonable and commensurate with Plaintiffs' efforts in the litigation.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the instant motion for attorneys' fees as part of final approval of this class action settlement, award Class Counsel combined fees and expenses in the amount of $515,000, and make service awards in the amount of $1500 per Class Representative.

Dated: April 16, 2024

/s/Paul Doolittle

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Class Counsel and Attorneys for Plaintiffs and

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was this date served upon all counsel of record by filing this document with this Court's Electronic Case Filing System for all attorneys of record.

Dated: April 16, 2024

/s/Paul Doolittle

Paul J. Doolittle