SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

JOHN FINN and SALVATORE J. CONTRISTANO, individually and on behalf of all others similarly situated, Plaintiffs, v. EMPRESS AMBULANCE SERVICE, LLC, Defendant.	Index No. 61058/2023 CLASS ACTION

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

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Plaintiffs John Finn and Salvatore J. Contristano submit this memorandum in support of their Motion for Attorneys' Fees, Costs, and Expenses, and for Class Representative Service Awards (the "Fee Motion").

I. INTRODUCTION

Faced with the risks inherent to data breach lawsuits, Class Counsel secured a $1,050,000 non-reversionary common fund Settlement[1] that compensates Class Members for their losses and provides meaningful prospective relief which protects against future risks arising from the Network Incident. Class Counsel now respectfully request that the Court award $350,000 in attorneys' fees as compensation for their work bringing this case to a successful resolution. The fee requested, $350,000, amounts to approximately 33.33% of the $1,050,000 Settlement Fund, and is consistent with that routinely awarded in similar cases in New York. Based solely on fees incurred to date, the requested fee award represents a 1.06 multiplier on Class Counsel's collective current lodestar of $328,757.50, which is within the range of multipliers approved by New York courts.

Class Counsel separately request payment of $12,846.74 as reimbursement for Class Counsel's litigation costs and expenses incurred in the prosecution of this matter. These expenses were necessary and reasonable in advancing the litigation and reaching the Settlement.

Additionally, Class Counsel respectfully request that the Court approve Service Awards in the amount of $1,500 for each of the two Class Representatives in recognition of their time and efforts in pursuing this litigation. The Class Representatives actively participated in the prosecution of the case to obtain an excellent outcome for the Class and fulfilled all their duties as

[1] All capitalized terms used and not otherwise defined herein have the definitions set forth in the Class Action Settlement Agreement and Release ("SA," "Settlement," or "Settlement Agreement") filed on June 16, 2023.

lead plaintiffs. No Settlement or recovery would have been possible without their vital role.

Class Counsel respectfully submit that the requested fee award is justified because of the significant Settlement benefits obtained despite the risks and obstacles presented by this litigation, the significant resources Class Counsel have invested and will continue to invest in this case, and all other factors New York courts consider when determining whether a requested fee is reasonable. Given the time and effort the Plaintiffs devoted to this litigation on behalf of the Class, Class Counsel submit that the requested Service Awards are reasonable.

For all these reasons, and for those set forth in more detail below, Plaintiffs respectfully request that the Court grant this Motion in its entirety.

II. BACKGROUND

A. The Empress Network Incident and Subsequent Litigation

On or about July 14, 2022, Empress discovered that an unauthorized individual or individuals had gained access to Empress's network systems. Empress conducted an investigation and determined that the unknown parties first accessed Empress's computer networks on May 26, 2022, and copied files on July 13, 2022. On or about September 9, 2022, Empress notified patients and the U.S. Department of Health and Human Services' Office of Civil Rights that the unauthorized individual(s) had access to the following Personal Information: patient names, dates of service, insurance information and, for some, Social Security numbers.

On September 22, 2022, Plaintiff Finn commenced the lawsuit captioned as *Finn v. Empress Ambulance Services, Inc. d/b/a Empress EMS*, No. 7:22-cv-08101, in the United States District Court for the Southern District of New York, alleging the following claims for relief: (1) negligence; (2) negligence per se; (3) breach of fiduciary duty; (4) breach of implied contract; (5) unjust enrichment; and (6) violations of the New York Deceptive Acts and Practices Act, N.Y.

Gen. Bus. Law § 349 ("GBL"). After *Finn* was filed in the Southern District of New York, numerous related actions were filed in New York state court (subsequently removed to federal court) and New York federal court (collectively, "Later-Filed Actions").[2]

Empress subsequently sought to stay all Later-Filed Actions. During a status conference on November 10, 2022, before Judge Kenneth M. Karas of the Southern District, the Court agreed that a stay was appropriate and authorized Ahdoot & Wolfson, PC to proceed with efforts to negotiate settlement on behalf of Class Members. *Finn,* ECF Nos. 17–19. All Later-Filed Actions were subsequently stayed by Judge Karas. *Finn*, November 14, 2022 text Order. The Later-Filed Actions remain stayed, with a status report due on April 14, 2024, to report on the progress of the Settlement in this Court.

B. Class Counsel Conducted Extensive Factual and Legal Investigations and Diligently Litigated the Case

As set forth in the concurrently filed Declarations of Tina Wolfson ("Wolfson Fee Decl.") and Anthony L. Parkhill ("Parkhill Fee Decl."), Class Counsel expended considerable efforts and resources litigating this case, and they persistently advanced and protected the interests of the Class from inception. Wolfson Fee Decl. ¶¶ 8-9, 12-22, 28-29; Parkhill Fee Decl. ¶¶ 6–13.

Prior to commencing this litigation, Class Counsel diligently investigated potential legal claims and defenses arising from Empress's alleged failure to implement adequate and reasonable data security procedures and protocols necessary to protect PII/PHI. Wolfson Fee Decl. ¶ 8. Class Counsel expended considerable effort reviewing and analyzing reports and publicly available information regarding the Network Incident, including Defendant's organizational structure and potential co-defendants. *Id*. Class Counsel communicated at length with potential class members

[2] *See* Wolfson Fee Decl. ¶ 11 & n.2.

to assess the extent of the harm caused by the Network Incident. Wolfson Fee Decl. ¶ 9. Class Counsel reviewed similar data breach lawsuits pending in New York state court and familiarized themselves with the current state of data breach litigation in New York courts. *Id*. In all phases of the litigation, Class Counsel stayed abreast of material developments involving the Network Incident and endeavored to gain an ample understanding of the legal issues underlying Plaintiffs' claims. *Id*.

C. Class Counsel Engaged in Extensive Arms' Length Settlement Discussions and Negotiated All Aspects of the Settlement on Behalf of Class Members

Class Counsel advocated zealously on behalf of Class Members during the Settlement negotiation process. Wolfson Fee Decl. ¶ 12.

In early November 2022, with Judge Karas's imprimatur, the Parties began arm's length negotiations to potentially settle this matter. *Id*. ¶ 13. The Parties agreed to attend a mediation on November 17, 2022, with respected mediator Rodney Max of Upchurch Watson White & Max Mediation Group. *Id*. ¶ 14. In advance of the mediation, the Parties discussed their respective positions on the merits of the claims and class certification, which they provided to the mediator in detailed mediation statements. *Id*. ¶ 15. The mediation was hard fought with each party zealously advocating for their client's respective positions. *Id*. ¶ 16.

Prior to the mediation, Class Counsel requested information (i.e., informal discovery) from Defendant to ascertain a fair, reasonable, and adequate settlement in this case. Wolfson Fee Decl. ¶ 17. This discovery guided Class Counsel in its negotiations with Defendant and gave Class Counsel confidence that the Settlement exceeds the standards of NY CPLR § 901, *et seq*, and § 908. *Id.*

The mediation resulted in an agreement to settle this matter in principle. *Id*. ¶ 18. During the weeks that followed, the Parties exchanged numerous drafts of the Settlement Agreement and

its exhibits, and exhaustively negotiated the remaining finer details of the Settlement. Wolfson Fee Decl. ¶ 18. These negotiations continued to be contested and involved detailed discussions regarding every provision of the Settlement Agreement and the plan for Class Notice. *Id*.

Class Counsel solicited competing bids from multiple third-party administrators for settlement notice and administration. *Id*. ¶ 19. The Parties ultimately agreed to the appointment of Epiq Class Action and Claims Solutions, Inc. ("Epiq") as Settlement Administrator. *Id.* ¶ 20. Class Counsel crafted, negotiated, and meticulously refined the final Notice Plan and each document comprising the notice, with the assistance of a class action notice expert, to ensure the information disseminated to Class Members is clear and concise. *Id.* ¶ 21.

The information gleaned from an investigation and research into the facts and potential legal claims enabled Class Counsel to assess the strengths and weaknesses of this case, analyze potential damages models that could be utilized at trial, and informed the decision to engage in negotiation with Defendant's Counsel about attending mediation and later settling the matter. *Id.* ¶ 28. Class Counsel's diligence in preparing for mediation, including obtaining information necessary to analyze all claims and defenses, allowed Class Counsel to negotiate a robust relief package and valuable outcome for the Class, and to determine a fair and efficient structure and distribution plan. *Id.* ¶ 29. At all times during settlement discussions, the negotiations were at arm's length. *Id.* ¶ 22. Furthermore, it was always Class Counsel's primary goal to achieve the maximum substantive relief possible for the Class. *Id.*

D. Class Counsel Obtained Preliminary Settlement Approval and Implemented the Court-Approved Notice Plan

After the lengthy process that led to finalizing the Settlement Agreement and its numerous exhibits, Class Counsel prepared and filed Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement ("Mot. for Prelim. App."). *Id.* ¶ 27.

On November 27, 2023, the Court preliminarily approved the Settlement and ordered that the Class be given notice. *See* Order Granting Preliminary Approval of Class Action Settlement ("Prelim. App. Order"). Thereafter, the Parties continued to work with the Settlement Administrator to supervise dissemination of Notice. Wolfson Fee Decl. ¶ 30. These efforts included review and drafting of the language and format of the Settlement Website, the script for the automated response to the toll-free number, the language and format of the Notice forms, monitoring for exclusion requests and objections, and ensuring prompt response to every Class Member inquiry regarding the Settlement, among others. *Id*.

Class Counsel performed various other litigation-related work during the pendency of this matter, including meetings, emails, and phone calls between co-counsel, other plaintiffs' counsel, and with opposing counsel, communicating with Plaintiffs regarding case developments and litigation strategy, and Settlement. *Id.* ¶ 31. Class Counsel will continue to litigate this matter diligently and efficiently through the Final Approval Hearing. *Id.*

E. Class Counsel Achieved a Strong Result for the Class

The Court is familiar with the details of the Settlement. As set forth in detail in Plaintiffs' Motion for Preliminary Approval, the Settlement would create a non-reversionary Settlement Fund in the amount of $1,050,000 to pay for Administrative Expenses, class Notice, taxes, Approved Claims, attorneys' fees, costs and expenses, and Class Representative Service Awards.

Under the Settlement, Class Members can submit a Claim Form for one of two forms of cash payment: a Documented Loss Payment to recover unreimbursed out-of-pocket losses stemming from the breach (up to $10,000), or a pro rata Cash Fund Payment that requires no documentary support. Settlement Agreement ("SA") ¶ 3.2(a)–(b). Additionally, Class Members may also submit a claim for twelve (12) months of Credit Monitoring and Insurance Services

("CMIS") provided by TransUnion that provides three bureau credit monitoring services and $1 million in identity theft insurance. *Id.* ¶ 3.4.

The Settlement also provides significant injunctive relief in the form of improved data security measures to be maintained by Empress for a period of no less than three years from the Settlement Effective Date, from which all Settlement Class Members will benefit irrespective of whether they submit a Claim Form. *Id.* ¶ 2.1.

The Settlement permits Plaintiffs to petition the Court for an award of reasonable attorneys' fees and, separately, litigation costs and expenses, *see* SA ¶ 9.1, as well as for Service Awards to the Class Representatives in the amount of $1,500 each, *see id.* ¶ 8.1, all of which is to be paid out of the Settlement Fund. *Id.* ¶¶ 8.2, 9.1. The Settlement is not conditioned upon the Court's approval of an award of attorneys' fees, costs, or expenses, or Service Awards. *Id.* ¶¶ 8.3, 9.3.

III. CLASS COUNSEL'S FEE REQUEST IS REASONABLE AND SHOULD BE APPROVED

New York Civil Practice Law and Rules ("NY CPLR") § 909 authorizes a court to grant attorneys' fees to class counsel who obtain a judgment on behalf of a class. "If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered . . . ." NY CPLR § 909.

A court may calculate reasonable attorneys' fees by either the lodestar method or based on a percentage of the recovery. *Fiala v. Metropolitan Life Ins. Co*., 899 N.Y.S.2d 531, 540 (Sup. Ct. 2010); *Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 56 A.D.3d 162, 165 (N.Y. App. Div. 2008); *In re Lloyd's Am. Tr. Fund Litig.*, No. 96 CIV.1262 RWS, 2002 WL 31663577,

at *25 (S.D.N.Y. Nov. 26, 2002).[3] The lodestar method "calculates attorneys' fees by multiplying hours reasonably expended against a reasonable hourly rate." *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.* 396 F.3d 96, 123 n. 27 (2d Cir. 2005). Under the percentage method, the fee award is simply "some percentage of the fund created for the benefit of the class." *Savoie v. Merchants Bank*, 166 F.3d 456, 460 (2d Cir. 1999).

"In testing the reasonableness of the negotiated fee, [courts] first look[] to the percentage of recovery approach." *Michels v. Phoenix Home Life Mut. Ins*., 1997 WL 1161145, at * 31 (Sup. Ct. N.Y. Cnty. Jan 7, 1997). The percentage of the fund method is acceptable in class action attorney fee requests where a common fund is created. *Ousmane v. City of New York*, 22 Misc. 3d 1136(A), 880 N.Y.S.2d 874 (Sup. Ct. 2009). New York state courts have recognized that courts around the country are "turning away from the lodestar/multiplier approach, and are returning to the more traditional percentage of the recovery approach." *Willson v. New York Life Ins. Co.,* Index No. 94/127804, 1995 N.Y. Misc. LEXIS 652, at *90–91 (N.Y. Sup. Ct. Nov. 8, 1995). That is because "the lodestar [method] create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in gimlet-eyed review of line-item fee audits." *Wal-Mart Stores,* 396 F.3d at 121. Furthermore, "[t]he lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours." *Lopez*, 2015 WL 5882842, at *5; *see also Matter of Karp*, 145 A.D.2d 208, 216 (1st Dep't 1989) ("To base a fee solely on hours worked is to penalize the experienced and skillful lawyer who can perform the services in

[3] "New York's courts have recognized that its class action statute is similar to the federal statute and have looked to federal case law for guidance." *Fiala*, 899 N.Y.S.2d at 537 (citing cases); *Colt Indus. Shareholder Litig. v. Colt Indus. Inc*., 77 N.Y.2d 185, 194 (1991) ("New York's class action statute has much in common with Federal Rule 23.").

substantially less time than the inexperienced one."). Indeed, the Second Circuit has described difficulties with the lodestar method:

> As so often happens with simple nostrums, experience with the lodestar method proved vexing. Our district courts found it created a temptation for lawyers to run up the number of hours for which they could be paid. For the same reason, the lodestar created an unanticipated disincentive to early settlements. But the primary source of dissatisfaction was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits. There was an inevitable waste of judicial resources.

Goldberger v. Integrated Res., Inc., 209 F.3d, 43, 48-49 (2d Cir. 2000). Other courts in New York have also been critical of the lodestar method and have noted that "courts in the Second Circuit no longer use the 'lodestar' method for computing attorneys' fees" in fee-shifting cases. *GB ex rel NB v. Tuxedo Union Free School Dist.*, 894 F. Supp. 2d 415, 427 (S.D.N.Y. 2012) (citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182 (2d Cir. 2008)).

While courts still use the lodestar method as a "cross check" when applying the percentage of the fund method, courts are not required to scrutinize the fee records as rigorously. *Goldberger v. Integrated Res. Inc.*, 209 F.3d at 50; *see In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) (using an "implied lodestar" for the lodestar cross check, and noting that when used as a cross-check, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case); *Varljen v. HJ. Meyers & Co.*, No. 97-cv-6742, 2000 WL 1683656, at *5 (S.D.N.Y. Nov. 8, 2000) (using an "unexamined lodestar figure" for the lodestar cross check).

Class Counsel seeks an award of $350,000 in attorneys' fees (i.e., 33.3% of the fund)—an award warranted under either the percentage or lodestar methods, as explained below.

A. The Requested Fee Amount is Reasonable Under the Percentage Method

Class Counsel's fee request of $350,000, which represents one-third (33.3%) of the Settlement Fund, is reasonable and "consistent with the norms of class litigation . . . ." *Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 CIV. 3452 (RLE), 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (granting one-third of the settlement fund).

Courts in New York, including this Court, "have routinely granted requests for one-third or more of the fund . . . ." *Contreras v. Dania Marina, Inc. d/b/a Marina Del Rey Caterers*, Index No. 54536/2018, NYSCEF No. 54 (Sup. Ct. Westchester Cnty. Oct. 3, 2019) (Walsh, J.) (awarding one-third of the settlement fund in attorneys' fees); *Josephs v. United Hebrew of New Rochelle Certified Home Health Agency, Inc. d/b/a United Hebrew Geriatric Center*, Index No. 50926/2019, NYSCEF No. 28 (Sup. Ct. Westchester Cnty. June 9, 2020) (Walker, J.) (awarding one-third of $2.1 million settlement fund); *Brown v. Sisense, Inc.*, 80 Misc. 3d 1221(A), 196 N.Y.S.3d 347 (N.Y. Sup. Ct. 2023) ("The attorneys' fee sought … — one-third of the settlement fund — is routinely granted by courts . . . ."); *Milton v. Bells Nurses Registry & Emp. Agency, Inc.*, 2015 WL 9271692, at *5 (Sup. Ct., Kings County 2015) (collecting cases and noting that 33.3% is "consistent with the norms of class litigation in this circuit"); *M.F. v. Amida Care, Inc*., 75 Misc. 3d 1209(A), 167 N.Y.S.3d 771 (N.Y. Sup. Ct. 2022) (citation omitted) (noting that New York trial courts have awarded a class action contingency fee ranging from 15% to 50%); *Reeves v. La Pecora Bianca, Inc.*, 2020 NY Slip Op 31817[U], *8 (N.Y. Sup. Ct. 2020) (finding 33.33% of the Settlement Fund "reasonable and consistent with that awarded in similar cases in New York"); *Lopez v. The Dinex Group, LLC*, 2015 WL 5882842, at *6 (N.Y. Sup. Ct. Oct. 06, 2015) ("[O]ne-third of the settlement fund as attorney's fees … is well within the range of reasonableness and within the percentage regularly approved"); *Ryan v. Volume Services America, Inc.*, 2013 WL

12147011, at *4 (N.Y. Sup. Ct. Mar. 07, 2013) (same); *Fernandez v. Legends Hospitality, LLC*, 2015 WL 3932897, at *5 (N.Y. Sup. Ct. June 22, 2015) (same); *Mancia v. HSBC Securities (USA) Inc.*, 2016 WL 833232, at *4 (N.Y. Sup. Ct. Feb. 19, 2016) (same); *Heigl v. Waste Management of New York, LLC*, No. 19-cv-05487, at ECF No. 35 (E.D.N.Y. May 20, 2021) (awarding fees of one-third of a $2.7 million settlement fund). Indeed, as courts have noted, fee requests for one-third of settlement funds "reasonably approximate[] the market for the services rendered," because they represent what "reasonably paying clients typically pay . . . pursuant to contingency retainer agreements." *In re Nigeria Charter Flights Litig.*, 2011 WL 7945548, at *4 (citing *Arbor Hill*, 522 F.3d 182).

The request for $350,000 in attorneys' fees here—representing one-third of the Settlement Fund—under the percentage of recovery method is supported by abundant precedent, and should be approved.

B. The Requested Fee is Fair and Reasonable When Applying the Relevant Factors

The hallmark of an attorneys' fee award is still one of reasonableness. The Court in *Fiala v. Metro. Life Ins. Co., Inc.,* 899 N.Y.S. 2d 531, 540 (Sup. Ct. 2010), set forth a series of factors that New York courts consider when determining whether a requested fee is reasonable:

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

Id. at 540. All these factors weigh in favor of granting Class Counsel's requested fee.

1. Risks of the Litigation

Contingency risk is the principal, though not exclusive, factor courts should consider in their determination of attorneys' fees. *Beckman v. KeyBank, NA,* 293 F.R.D. 467, 481-83 (S.D.N.Y. 2013) (quoting *In re Dreyfus Aggressive Growth Mut. Fund Litig.,* 2001 WL 709262, *6 (S.D.N.Y. June 22, 2001)); *see also In re Global Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) (noting that "[t]he contingent nature of ... Lead Counsel's representation is a key factor in determining a reasonable award of attorneys' fees").

Here, Class Counsel accepted this action without any assurance of payment for their services, litigating this case on a wholly contingent basis in the face of significant risks. *See Brown v. Sisense, Inc.*, 80 Misc. 3d 1221(A), 196 N.Y.S.3d 347 (N.Y. Sup. Ct. 2023) (citation omitted) ("[C]ontingency fees ... transfer a significant portion of the risk of loss to the attorneys taking a case. Access to the courts would be difficult to achieve without compensating attorneys for that risk").

While Plaintiffs remain confident in the merits of their claims and believe they would prevail in this matter, serious questions of law and fact exist. Data breach litigation remains a risky, novel, and ever-changing area of the law, and few, if any, such cases have advanced all the way to trial. Numerous courts have noted the legal and factual uncertainty in this field. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 17-md-2800-TWT, 2020 WL 256132, at *7 (N.D. Ga. Mar. 17, 2020) (identifying disputed legal issues including duty, causation, class certification, and additional risks related to discovery, juries, and appeals); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 17-md-2807, 2019 WL 3773737, at *6 (N.D. Ohio Aug. 12, 2019) ("[t]he realm of data breach litigation is complex and largely undeveloped. It would present the parties and the Court with novel questions of law").

Even if the Court certified a litigation class, there is a risk of de-certification on appeal, and no guarantee that class status would be maintained. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013). The case could also be dismissed during summary judgment proceedings. *See Hammond v. The Bank of New York 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). At trial, the jury could award a defense verdict and the Class could receive nothing at all. *See*, *e.g.*, *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses.").

Class Counsel prosecuted this matter on a purely contingent basis, agreeing to advance all necessary expenses and agreeing that they would only receive a fee if there was a recovery. Wolfson Fee Decl. ¶ 36. To date, Class Counsel have received no compensation at all litigating this case on behalf of the Class. *Id*. Class Counsel's willingness to advance more than 469.8 hours of time and $12,846.74 in costs, with no promise of recovering those funds unless the case was successful, weighs in favor of approving the fee request.

2. Magnitude and Complexity of the Litigation

Large data breach cases are, by nature, especially complex and expensive. *See, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800, 2020 WL 256132, at *32-33 (N.D. Ga. Mar. 17, 2020) (recognizing the complexity and novelty of issues in data breach class actions); *see also Beckman,* 293 F.R.D. at 481-83 (citation omitted) ("The size and difficulty of the issues in a case are significant factors to be considered in making a fee award."). This case is no exception. This is a highly complicated data breach case. It involves hundreds of thousands of

Class Members, complicated and technical facts, a well-funded defendant, and numerous contested issues on class certification and substantive defenses.

There are numerous substantial hurdles that Plaintiffs would have had to overcome before the Court might find a trial appropriate. Empress adamantly denied liability and expressed an intention to defend itself through trial. Wolfson Fee Decl. ¶ 23. There are limited attorneys who are willing and capable of taking on complex privacy cases, much less with the added complexity of class action rules and pitfalls.

Absent the Settlement, Plaintiffs would have had to "to survive summary judgment, prevail at trial, and secure an affirmance of their victory on appeal in order to recover damages. Moreover, they would also need to certify and maintain the class, over the [] Defendant's possible opposition." *Rosenfeld*, 2021 WL 508339, at *5. Instead, the Parties were able to craft a settlement providing substantial monetary benefits to the Class and significant changes to Defendant's data security practices while avoiding the expense and delay of continued litigation.

The magnitude, complexity, and numerous legal and factual issues involved in the resolution of Plaintiffs' claims favors Class Counsel's fee request. *Cox v. Microsoft Corp.,* 907 N.Y.S.2d 436, 436 ("Plaintiffs were able to avoid what would have been a difficult and costly litigation").

3. Whether Counsel Had the Benefit of a Prior Judgment

There was no relevant prior judgment when this action was filed. Instead of relying on a prior judgment, Class Counsel took on the associated risk of filing this class action on a full contingency basis. This action and the instant Settlement provided a substantial benefit to hundreds of thousands of Class Members. This factor favors the fee request.

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

In determining the quality of representation, Courts examine the experience of the attorneys involved and the result obtained in the lawsuit. *Taft v. Ackermans,* No. 02-CIV-7951, 2007 WL 414493, * 1 (S.D.N.Y. Jan. 31, 2007). This case presented difficult challenges that required experienced and excellent attorneys. In general, data breach class actions present relatively unchartered territory, and rarely reach class certification proceedings.

The attorneys at both Ahdoot & Wolfson, PC and Barnow and Associates, P.C. regularly engage in major complex litigation and have extensive experience in consumer class actions that are similar in size, scope, and complexity to this case. *See* Wolfson Fee Decl. ¶¶ 47-65 & Ex. A; Parkhill Fee Decl. ¶¶ 14–18 & Ex. A. Class Counsel's skill and relevant experience were critical to achieving the Settlement. As discussed herein and in counsels' supporting declarations, investigating, prosecuting, and ultimately bringing this case to a successful conclusion demanded a significant commitment of time and resources by a team of experienced lawyers.

Furthermore, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs counsel's performance." *In re Metlife Demutualization Litig*., 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Here, the caliber of opposing counsel supports the requested fee award, given that Plaintiffs opposed competent and well-respected counsel with extensive resources at their disposal. Both sides zealously advocated on behalf of their respective clients and the excellent result here is a function of the high quality of the work and intense negotiations by both sides. This factor weighs in favor of the requested fee.

5. The Case History and Responsibility Undertaken by Class Counsel

Class Counsel litigated this action from inception to settlement and spent significant time and effort to achieve this result. Class Counsel conducted thorough investigations of the factual

and legal issues surrounding the Network Incident; stayed abreast of and analyzed voluminous reports, articles, and other public materials discussing the Network Incident; communicated at length with potential Class Members to assess the extent of the harm caused by the Network Incident; investigated the adequacy of the Plaintiffs to represent the putative class; articulated the nature of the Network Incident in detailed pleadings; and engaged in a hard-fought mediation with Empress in an all-day session, including the exchange of information prior to the mediation. Wolfson Fee Decl. ¶¶ 8-9, 12-17.

Class Counsel engaged in rigorous negotiations to finalize the Settlement's terms, including exchanging numerous drafts of the Settlement Agreement and its exhibits, negotiating a myriad of details to maximize the benefits to the Class Members to ensure that the Settlement is fair, reasonable, and adequate. *Id*. ¶ 18. Class Counsel prepared and filed Plaintiffs' Motion for Preliminary Approval and supporting documents, and thereafter obtained preliminary settlement approval. *Id*. ¶¶ 27-30. "The work that Class Counsel have performed in litigating and settling this case demonstrates their commitment to the Class and to representing the Class's interests." *Massiah*, 2012 WL 5874655, at *6.

But Class Counsel's responsibilities do not end upon the filing of this fee application. Class Counsel anticipate spending significant additional time on this matter before it concludes, and beyond final approval. Wolfson Fee Decl. ¶ 42. Class Counsel will be required to: oversee and assist with administration of the Settlement and distribution of the Settlement Fund; prepare for, and attend the Final Approval Hearing; ensure that Empress complies with the injunctive relief aspects of the Settlement; communicate with Class Members who have questions or require assistance; respond to objections (if any); and, if required, litigate this matter on appeal. *Massiah*, 2012 WL 5874655, at *8 ("The fact that Class Counsel's fee award will not only compensate them

for time and effort already expended, but for time that they will be required to spend administering the settlement going forward also supports their fee request.").

6. The Amount Recovered

Class Counsel's efforts generated a non-reversionary common fund of $1,050,000 for the benefit of the Class. The $1,050,000 cash fund value of the Settlement does not include the value of the Settlement's prospective relief in the form of additional, robust security enhancements to Empress's data security measures Empress has agreed to adopt as part of the Settlement, or the actual retail value of the credit monitoring product claimed by Class Members.

The amount recovered represents considerable value given the attendant risks of litigation. *Cox*, 907 N.Y.S.2d at 436 ("[R]esults of the settlement have the potential to benefit the class members as a whole in a substantial way"). Here, the $1,050,000 non-reversionary Settlement provides a *per capita* recovery of approximately $3.41 per Class Member. Wolfson Fee Decl. ¶ 64 (table). This is in line with and superior to the per-capita cash recoveries in other approved data breach settlements, including some of the largest settlements on record. *Id.* Weighing the benefits of the Settlement against the risks associated with proceeding in the litigation, the Settlement presents a robust relief package and valuable outcome the Class compared to other recent data breach class action settlements. The Settlement is an excellent result.

7. The Knowledge the Court Has of the Case's History and the Work Done by Counsel Prior to Trial, and What Would Be Reasonable for Counsel to Charge to a Victorious Plaintiff

The Settlement Agreement provides that Class Counsel may file a motion requesting an award of attorneys' fees, costs, and expenses, which, if approved by the Court, will be paid from the Settlement Fund. SA ¶ 9.1. The Parties have not agreed to an amount of attorneys' fees or separate payment of costs and expenses. Wolfson Fee Decl. ¶ 26.

As explained above, Class Counsel's requested fees amount to approximately 33.3% of the Settlement Fund and is reasonable, as percentages of this amount are routinely approved. *See Rodriquez v. It's Just Lunch Int'l*, No. 07-CV-09227 (SN), 2020 WL 1030983, at *10 (S.D.N.Y. Mar. 2, 2020) ("Courts in this Circuit routinely grant fee applications based on the percentage method when the fee award is one-third of a common fund."). Moreover, this percentage does not include the value of the prospective relief or the retail value of the credit monitoring benefit offered by the Settlement.

Furthermore, public policy supports providing attorneys' fees in class action cases, as class actions are also an invaluable safeguard of public rights. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). Where, as here, the settlement amount is relatively small, an award of attorneys' fees ensures that "plaintiffs' claims [will] likely . . . be heard." *Frank v. Eastman Kodak Co*., 228 F.R.D. 174, 189 (W.D.N.Y. 2005). If courts denied sufficient attorneys' fees "no attorneys . . . would likely be willing to take on . . . small-scale class actions[.]" *Id.*; *see also Maley v. Del Glob. Techs. Corp*., 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) (private attorneys "should be encouraged" to take the risks required to represent those who would not otherwise be protected from socially undesirable activities, including fraud). Public policy favors rewarding counsel who persevere through risky litigation and achieve favorable results for the class they represent.

Here, Class Counsel took on this case despite the uncertainty and volatility of law pertaining to consumer class actions, and data breach class actions in particular, and persevered in obtaining a robust Settlement that provides significant and *immediate* relief to Class Members. Wolfson Fee Decl. ¶¶ 23-24. Indeed, efficient resolution of data breach class actions is in the best interests of Class Members because it allows Class Members to take advantage of settlement benefits and protect their identities moving forward. *Id.* ¶ 24. The results achieved in this case are

even more significant in that they were achieved relatively quickly while avoiding the attendant risks of litigation and non-recovery. This factor favors the approval of the requested fee.

C. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Request

Application of the lodestar method as a cross-check confirms the reasonableness of the fees requested.

Where the lodestar is "used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50; *see also Cassese v. Williams*, 503 F. App'x 55, 59 (2d Cir. 2012) (noting the "need for exact [billing] records [is] not imperative" where the lodestar is used as a "mere cross-check"). The accompanying declarations of Class Counsel set forth the hours of work and billing rates used to calculate the lodestar here. Class Counsel and their staff have devoted a total of approximately 469.8 hours to this litigation and have a total lodestar to date of $328,757.50. Wolfson Fee Decl. ¶¶ 33-34; Parkhill Fee Decl. ¶ 11. All this time was reasonable and necessary for the prosecution of this action. Class Counsel took meaningful steps to ensure the efficiency of their work. Wolfson Fee Decl. ¶ 38; Parkhill Fee Decl. ¶ 9.

Based upon Class Counsel's 469.8 billed hours—which, utilizing their hourly rates, amounts to a lodestar of $328,757.50—the requested fee award reflects a 1.06 multiplier on Class Counsel's regular hourly rates, which is within the range of reasonableness. Indeed, New York courts have observed that multipliers as high as 7.6 times the lodestar have been approved and that "in contingent litigation, 'lodestar multiples of over 4 are routinely awarded.'" *Milton v. Bells Nurses Registry & Emp't Agency, Inc*., 2015 WL 9271692, at *6 (Sup. Ct., Kings County, Dec. 21, 2015); *Lopez*, 2015 WL 5882842, *7 (same); *see also Yuzary v. HSBC Bank USA, N.A*., No. 12 CIV. 3693 PGG, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) (approving 7.6 lodestar

multiplier); *James v. China Grill Mgmt., Inc*., No. 18 Civ. 455, 2019 WL 1915298, at *3 (S.D.N.Y. Apr. 30, 2019) (collecting cases with multiples between 2 and 4.9); *Sewell v. Bovis Lend Lease, Inc.,* No. 09 CIV. 6548 RLE, 2012 WL 1320124, at *13 (S.D.N.Y. Apr. 16, 2012) ("Courts commonly award lodestar multipliers between two to six."); *In re Lloyd's Am. Trust Fund Litig*, No. 96 Civ. 1262, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002) (a "multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit").

Moreover, as courts in New York and elsewhere have noted, a high multiplier "should not result in penalizing plaintiffs' counsel for achieving an early settlement, particularly where, as here, the settlement amount was substantial." *Beckman*, 293 F.R.D. at 482; *Hyun v. Ippudo USA Holdings*, 2016 WL 1222347, at *3 (S.D.N.Y. Mar. 24, 2016) ("[W]here the parties were able to settle relatively early and before any depositions occurred … the Court finds that the percentage method, which avoids the lodestar method's potential to 'create a disincentive to early settlement' … is appropriate.").

Further, the lodestar multiplier will ultimately be much lower once final approval is sought, as Class Counsel will spend additional time preparing and filing Plaintiffs' forthcoming Motion for Final Approval and supporting documentation, attending the Final Approval Hearing, overseeing the Settlement claims process and distribution, as well as addressing any possible objections or appeals. Wolfson Fee Decl. ¶¶ 42-43. Here, "[t]he fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward, also supports their fee request." *Yuzary*, 2013 WL 5492998, at *11.

IV. CLASS COUNSEL'S COSTS SHOULD BE APPROVED

Courts typically allow counsel to recover their reasonable out-of-pocket expenses. *Beckman,* 293 F.R.D. at 481-83*,* citing *In re Indep. Energy Holdings PLC Sec. Litig*., 302 F. Supp. 2d 180, 183 n. 3 (S.D.N.Y. 2003). "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation' of those clients." *In re Indep. Energy Holdings PLC Sec. Litig*., 302 F. Supp. 2d at 183 n.3 (internal quotation marks omitted).

Class Counsel also seeks reimbursement for out-of-pocket expenses in the amount of $12,846.74. Wolfson Fee Decl. ¶ 44; Parkhill Fee Decl. ¶ 12. The expenses were necessary for the continued prosecution and resolution of this litigation and were incurred by Class Counsel for the benefit of the Class Members with no guarantee that they would be reimbursed. *Id.* They are reasonable in amount and the Court should approve this reimbursement.

V. THE REQUESTED CLASS REPRESENTATIVE SERVICE AWARDS ARE REASONABLE AND SHOULD BE APPROVED

It is common for courts to grant service awards in class action suits. Such awards "reward[] the named plaintiffs for the effort and inconvenience of consulting with counsel over the many years [a] case was active and for participating in discovery, including depositions." *Milton,* 2015 WL 9271692, *2-3 (citation omitted).

The requested Service Awards of $1,500 each for the two Class Representatives is in line with Service Awards in similar data breach cases that resolve early in the litigation. *See, e.g., Breneman v. Keystone Health*, Case No. 2023-618 (Pa. Common Pleas, Franklin Cty. Aug. 15, 2023) (granting final approval of health data breach settlement that resolved early, and awarding $1,500 class representative service awards); *Dornberger v. Metropolitan Life Ins. Co*., 203 F.R.D.

118 (S.D.N.Y. 2001) (noting in class actions service awards for $2,500 or more are commonly accepted).

The requested Service Awards reflect the work the Class Representatives have performed in this litigation, including by consistently conferring with Class Counsel at every stage of litigation and the propriety of the Settlement. Wolfson Fee Decl. ¶ 25; Parkhill Fee Decl. ¶ 5. This Settlement would not have been possible without the efforts and assistance of the Class Representatives, who put their name on the line and sacrificed their personal time to participate in and advance this litigation. *Id.*

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion and enter the Final Approval Order (to be submitted with the Motion for Final Approval): (a) awarding Class Counsel attorneys' fees in the amount of $350,000, which represents one-third of the $1,050,000 Settlement Fund; (b) approving reimbursement of Class Counsel's litigation costs and expenses in the amount of $12,846.74; and (b) awarding the Class Representative Service Awards in the amount of $1,500 each for efforts and commitment on behalf of the Class.

Dated: February 23, 2024

Respectfully submitted,

TINA WOLFSON (NY Bar # 5436043)
DEBORAH DE VILLA (NY Bar # 5724315)
AHDOOT & WOLFSON, PC
521 5th Avenue, 17th Floor
New York, NY 10175
Telephone: 917-336-0171
Facsimile: 917-336-0177
twolfson@ahdootwolfson.com
ddevilla@ahdootwolfson.com

ANDREW W. FERICH*
AHDOOT & WOLFSON, PC
201 King of Prussia Road, Suite 650

Radnor, PA 19087
Telephone: 310-474-9111
Facsimile: 310-474-8585
aferich@ahdootwolfson.com

BEN BARNOW (NY Bar # 2253391)
ANTHONY L. PARKHILL*
BARNOW AND ASSOCIATES, P.C.
205 West Randolph Street, Ste. 1630
Chicago, IL 60606
Telephone: 312-621-2000
Facsimile: 312-641-5504
b.barnow@barnowlaw.com
aparkhill@barnowlaw.com

Class Counsel

* admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2024, I electronically filed the foregoing using the Court's CM/ECF system, which will send notifications of such filing to all counsel of record.