UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BREANDAN COTTER and JACK DINH, individually and on behalf of others similarly situated, Plaintiff, v. CHECKERS DRIVE-IN RESTAURANTS, INC., a Delaware corporation, Defendant.	Case No. 8:19-cv-01386-VMC-CPT Class Action

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND EXPENSES AND SERVICE AWARDS, AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs Breandan Cotter and Jack Dinh ("Plaintiffs") respectfully move for approval of their request for attorneys' fees, costs and service awards in this preliminarily approved class action settlement with Defendant Checkers Drive-In Restaurants, Inc. ("Defendant" or "Checkers").

In light of the exceptional monetary and non-monetary benfefits obtained for the Class, Class Counsel respectfully asks the Court to approve an award of attorneys' fees and expenses in the amount of $575,000, which is less than 3% of only the first tier of monetary benefits made available to the Class in this claims made settlement.

I. INTRODUCTION

On June 30, 2020, the Court issued an order preliminarily approving the proposed nationwide class action settlement with Checkers (Dkt. No. 46) who was the subject of third-party cyberattacks involving malware variants which compromised its customers' personally identifiable information ("PII").

The Settlement Agreement (Dkt. No. 43-1, "Agreement" or "SA.") was reached following

the filing of two lawsuits[1] which were effectively consolidated in this Court for purposes of Settlement, swift litigation, collaborative and targeted discovery, mediation before Steve Jaffe in Miami, Florida, and post-mediation confirmatory discovery.

Plaintiffs now respectfully request an award of combined attorneys' fees and costs of $575,000, and a service award of $2,500 to each of the two Class Representatives.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide that "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties agreement." Fed. R. Civ. P. 23(h) (emphasis added). "It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to an allowance of attorneys' fees based upon the benefit obtained." *In re Checking Account Overdraft Litigation*, 830 F. Supp. 2d at 1358 (citing *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir.1991); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

III. APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

Pursuant to the Agreement (SA § 11.03) and the notice of class action settlement (*see* Dkt. No. 43-1, p. 47 of 81), and consistent with recognized class action practice and procedure, Plaintiffs respectfully request a combined award of attorneys' fees, costs, and expenses not to exceed $575,000.00 or roughly 2.87% of the value of the vouchers made available under the Settlement to Settlement Class Members for non-documented losses (SA § 3.01 and 11.03; Declaration of Jean Sutton Martin, filed concurrently herewith ("Martin Decl.") ¶ 18). Plaintiffs and Defendant negotiated and reached agreement regarding attorneys' fees and costs only after

[1] Plaintiff Cotter filed the initial complaint in the above-captioned action on June 6, 2019. (Dkt. No. 1). On July 2, 2019, Jack Dinh filed a complaint in the Central District California in an action styled *Jack Dinh v. Checkers Drive-In Restaurants, Inc.*, No. 8:19-cv-01310 (C.D. Cal.).

reaching agreement on all other material Settlement terms. Martin Decl. ¶ 12. The requested fee is within the range of reason under the factors listed in *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). For the reasons detailed herein, Plaintiffs submit that the requested fee is appropriate, fair and reasonable and respectfully requests that it be approved by the Court.

A. The Law Awards Class Counsel Fees Based Upon the Fund Established for the Benefit of the Class.

It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained. *Camden I*, 946 F.2d at 771; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The doctrine serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1202 (N.D. Ill. 1989) (citation omitted). The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Van Gemert*, 444 U.S. at 478. As a result, the Supreme Court, the Eleventh Circuit, and courts in this District have all recognized that "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as whole." *Sunbeam*, 176 F. Supp. 2d at 1333. The common benefit doctrine is applied the same way to claims made settlements. *See Poertner v. Gillette Co.*, 618 F. App'x 624, 628 n.2 (11th Cir. 2015) ("properly understood a claims-made settlement is . . . the functional equivalent of a common fund settlement where the unclaimed funds revert to the defendant; indeed, the two types of settlements are fully synonymous.") (internal citations omitted).

In the Eleventh Circuit, class counsel are awarded a percentage of the funds made available through a settlement. *See Hanley v. Tampa Bay Sports & Entm't Ltd. Liab. Co.*, No. 8:19-CV-

00550-CEH-CPT, 2020 U.S. Dist. LEXIS 89175, at *15 (M.D. Fla. Apr. 23, 2020) (noting that the percentage of the fund analysis applies to claims made settlements and that the "percentage applies to the total fund created, even where the actual payout following the claims process is lower."); *Marty v. Anheuser-Busch Cos., LLC*, No. 13-cv-23656-JJO, 2015 U.S. Dist. LEXIS 144290, at *5 (S.D. Fla. Oct. 22, 2015) (same);); *see also, Montoya v. PNC Bank*, N.A., No. 14-20474, 2016 WL 1529902, *23 (S.D. Fla. Apr. 14, 2016) ("the valuation of counsel's fee should be based on the opportunity created for the Settlement Class … [a]nd counsel should not be penalized for class members' failure to take advantage of such a settlement"). In *Camden I* – the controlling authority regarding attorneys' fees– the Eleventh Circuit held that "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I*, 946 F.2d at 774; *see also, Hamilton v. SunTrust Mortg. Inc.*, No. 13-60749-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 154762, at *20 (S.D. Fla. Oct. 24, 2014) (Attorneys representing a class action are entitled to an attorneys' fee based solely upon the total benefits obtained in or provided by a class settlement); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 695 (S.D. Fla. 2014) (noting that in a claims made situation, the attorneys' fees in a class action are determined based upon the total fund, not just the actual payout to the class); *Carter v. Forjas*, 701 F. App'x 759, 766-67 (11th Cir. 2017) (same).

The Court has discretion in determining the appropriate fee percentage. "There is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774).

The Eleventh Circuit has provided a set of factors the Court should use to determine a reasonable percentage to award as an attorney's fee to class counsel in class actions:

(1) the time and labor required;
(2) the novelty and difficulty of the relevant questions;
(3) the skill required to properly carry out the legal services;
(4) the preclusion of other employment by the attorney as a result of his acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the clients or the circumstances;
(8) the results obtained, including the amount recovered for the Clients;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and the length of the professional relationship with the clients;
(12) fee awards in similar cases.

Camden I, 946 F.2d at 772 n.3 (citing factors originally set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

These 12 factors are guidelines and are not exclusive. "Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 775). The Eleventh Circuit has "encouraged the lower courts to consider additional factors unique to the particular case." *Camden I*, 946 F.2d at 775. As applied, the *Camden I* factors support the requested fee.

1. The Claims Against Defendant Required Substantial Time and Labor.

Prosecuting and settling these claims demanded considerable time and labor on a contingency fee basis, making this fee request reasonable. Martin Decl. ¶¶ 6-11, 17, 20-21. Class Counsel devoted substantial time to investigating the claims against Defendant. *Id.* at ¶ 6. Class Counsel also expended resources researching and developing the legal claims at issue. *Id.*. Time and resources were dedicated to conducting informal discovery as well as confirmatory discovery. *Id*. at ¶¶ 10, 20-21.

The all-day mediation session was held before Steven R. Jaffe[2] in Miami, Florida (with some of the attorneys for Plaintiffs' traveling from California and Utah) and required substantial preparation and review of 660 pages of documentation. Martin Decl. ¶¶ 10-11; *see also*, SA § 1.05. Subsequent settlement negotiations consumed time and resources. Martin Decl. ¶¶ 11-13. Finally, significant time was devoted to negotiating and drafting of the Agreement and the preliminary approval process, and to all actions required thereafter pursuant to the preliminary approval order. All of this work consumed a substantial amount of time. *Id.* at ¶ 14.

Additionally, after the entry of Preliminary Approval, Class Counsel initiated Confirmatory Discovery as to the investigative efforts and remedial measures undertaken by Defendant after the Data Breach. Class Counsel served special interrogatories to Defendant and, conducted a deposition of Defendant's corporate representative pursuant to Fed. R Civ. P. 30(b)(6) to acertain details as to Defendant's investigation of the Data Breach, the containment and remediation efforts taken in the wake of the breach, and the training and other business practice

[2] *See* https://www.uww-adr.com/Steven-R--Jaffe-10-727.html

changes Defendant has implemented in its corporate and franchise restaurants as a result of the Data Breach, and the cost of such measures. Martin Decl. ¶¶ 20-21.

In sum, Class Counsel's coordinated work in this consolidated Action paid dividends for the Settlement Class who are entitled to submit a claim based on either documented losses or non-documented losses. SA, Article III. Each of the above-described efforts was essential to achieving the Settlement before the Court. The time and resources devoted to this litigation readily justify the requested fee.

2. The Issues Involved Were Difficult and Required the Skill of Highly Talented Attorneys.

"[P]rosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. U.S.*, 658 F. Supp. 1126, 1137 (D.S.C. 1987). This is particularly true for data breach litigation. *See e.g., In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 U.S. Dist. LEXIS 135573, at *13 (N.D. Ohio Aug. 12, 2019) ("The realm of data breach litigation is complex and largely undeveloped."); *Fulton-Green v. Accolade, Inc.*, 2019 U.S. Dist. LEXIS 164375, at *21 (E.D. Pa. Sep. 23, 2019) ("This is a complex case in a risky field of litigation because data breach class actions are uncertain and class certification is rare."). The Court in *In re TD Ameritrade Account Holder Litig.*, No. C 07-2852 SBA, 2011 U.S. Dist. LEXIS 103222, at *36 (N.D. Cal. Sep. 12, 2011) has noted that "many [data breach class actions] have been dismissed at the pleading stage."

The work of Plaintiffs' counsel at three law firms required the acquisition and analysis of a significant amount of factual and legal information. Martin Decl. ¶¶ 6-11, 17, 20-21. In total, Plaintiffs' counsel incurred 620.3 hours to date in this litigation, with a combined lodestar of $410,663.3 and combined expenses of $16,257.52. See, Martin Decl. ¶¶ 32-33; Declaration of Abbas Kazerounian ("Kazerounian Decl."), ¶¶ 7-12; Declaration of Brad King ("King Decl.) ¶¶

11-12. In any given case, the skill of legal counsel should be commensurate with the novelty and complexity of the issues, as well as the skill of the opposing counsel. Litigation of this Action required counsel trained in class action law and procedure as well as the specialized issues relating to data breach litigation, such as analyzing class certification and navigating case dispositive merits issues. Class Counsel possess these attributes, and their participation added value to the representation of this Settlement Class. *See* Dkt. No. 43-2 (firm resumes)

In evaluating the quality of representation by Class Counsel, the Court should also consider opposing counsel. *See Camden I*, 946 F.2d at 772 n.3; *Ressler*, 149 F.R.D. at 654. Throughout the litigation, Defendant was represented by extremely capable counsel at Hunton Andrews Kurth LLP.[3] They were worthy, highly competent adversaries and recognized the benefit of early mediation. *See* Martin Decl. ¶ 25; *Walco Invs. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) (stating that "[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results").

3. Class Counsel Achieved a Successful Result.

"The range of potential recovery 'spans from a finding of non-liability through varying levels of injunctive relief,' in addition to any monetary benefits to class members." *Figueroa v. Sharper Image Co.*, 517 F. Supp. 2d 1292, 1326 (S.D. Fla. 2007) (quoting *Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 1319 (S.D. Fla. 2005)). Given the significant litigation risks Class Counsel faced, the Settlement represents a successful result. Rather than facing years of costly and uncertain litigation, each Settlement Class Member (there were approximaly 1,500,000 payment card transaction affected) is eligible to receive four (4) Vouchers of $5.00 each, valid for

[3] www.huntonak.com/en/people/jason-kim.html;
www.huntonak.com/en/people/john-delionado.html

one (1) year from the date of issuance that are freely and fully transferrable, for non-documented losses and time spent dealding with the Data Breach. SA § 3.01. For Settlement Class Members with documented losses, the Settlement provides up to $5,000 for out-of-pocket expenses and time spent dealing with the Data Breach, which could include up to four hours of time spent investigating and remedying losses (calculated at a rate of $20.00 per hour). SA § 3.02. There are no caps on this potential recovery for Settlement Class Members.

With regard to the monetary benefits provided to Settlement Class Members alone, this settlement compares favorably to other data breach class action settlements. *See e.g.*, *Jackson et al. v. Wendy's International, LLC*, No. 6:16-cv-21-PGB-DCI (M.D. Fla.) (Doc. 157) (approving settlement that provides class members reimbursement of documented losses of up to $5,000); *Hapka v. CareCentrix, Inc.*, No. 2:16-CV-02372-KGG, 2018 WL 1879845, at *3 (D. Kan. Feb. 15, 2018) ("The Settlement addresses past harms through reimbursement of Out-of-Pocket Losses or the alternative minimum $200 payment for tax fraud and also helps Settlement Class Members protect against future harm through the Credit Monitoring Services."); *Parsonsv. Kimpton Hotel & Restaurant Group, LLC,* No. 3:16-cv-05387-VC (N.D. Cal. July 11, 2019) (finally approving claims made settlement that would reimburse up to $250/claim including, *inter alia*, expenses for lost time, payment for each card on which fraudulent charges incurred, costs of obtaining credit report, costs of credit monitoring and identity theft protection, as well as up to $10,000/claim for extraordinary expenses)[4]; *T.A.N. v. PNI Digital Media, Inc*., No. 2:16-cv 00132, Doc. 46 (S.D. Ga. Oct. 20, 2017) (approving settlement for reimbursement up to $250/claim for out-of-pocket expenses plus up to $10,000/claim for reimbursement of extraordinary expenses)[5]; *In re Home Depot Inc., Customer Data Sec. Breach Litig.*, No. 1:14-md-02583-TWT, 2016 U.S. Dist. LEXIS

[4] Exhibit 1 to Kazerounian Declaration, ¶ 14 (Settlement Agreement, Dkt. 106-1, pp. 3-27).
[5] Exhibit 2 to Kazerounian Declaration, ¶ 15.

200113, at *41 (N.D. Ga. Aug. 23, 2016) (finally approving data breach class action settlement providing for reimbursement up to $10,000 for documented losses, credit monitoring and injunctive relief).[6]

Additionally, all Settlement Class Members will benefit from meaningful remedial measures to provide for cybersecurity and data privacy training for all restaurant managers over the next two years, and ensuring use of point of sale systems that encrypt payment card data and and routes the authorization message out to the payment card networks without the authorization message data being unencrypted on devices owned and managed by Checkers and/or Affected Franchisees. SA § 4.01. *See Mahoney v. TT of Pine Ridge, Inc.*, No. 17-80029-CIV-DMM, 2017 U.S. Dist. LEXIS 217470, at *34 (S.D. Fla. Nov. 17, 2017) ("It is also important to recognize that the cash benefits obtained by the class are supplemented by the injunctive relief afforded to class members."). In *In re Home Depot Inc., Customer Data Sec. Breach Litig.*, No. 1:14-md-02583-TWT, 2016 U.S. Dist. LEXIS 200113, at *41 (N.D. Ga. Aug. 23, 2016), the Court noted that settlement made "recovery significantly easier and more immediate than pursuing claims at trial" because "Settlement Class Members with out-of-pocket losses can make a claim against the Settlement Fund for damages even remotely linked to the data breach". According to information ascertained through Confrimatory Discovery, the cost of these business practice changes and remedial measures have been approximately $1,270,000. *See* Martin Decl. ¶ 22. Additionally, Defendant anticipates on-going expenses totalling more than $120,000 annually for training of

[6] *See also, In re Heartland Payment Sys., Inc. Customer Data Security Breach Litig*., 851 F. Supp. 2d 1040, 1048 1069 (S.D. Tex. 2012) (approving settlement that provided up to $2.4 million to pay for out-of-pocket losses); *In re Countrywide Financial Corp. Customer Data Security Breach Litig*., No. 3:08-MD-01998, 2009 WL 5184352, at *1-4 (W.D. Ky. Dec. 22, 2009) (approving settlement that provided up to $1.5 million to pay out-of-pocket costs, up to $5 million to pay identity theft losses, and 2 years of free credit monitoring services).

managers within its organization and endpoint encryption measures. *See* Martin Decl. ¶ 22. These negotiated business practice changes were designed to ensure that Defendant not only employs the necessary, immediate resources to address existing data security vulnerabilities, but also employs the consistent best practices and accountabilities needed for long-term, proactive data security.

4. The Claims Presented Serious Risk.

Consideration of the "litigation risks" factor under *Camden I* "recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk. Such aversion could be due to any number of things, including social opprobrium surrounding the parties, thorny factual circumstances, or the possible financial outcome of a case. All of this and more is enveloped by the term 'undesirable.'" *Sunbeam*, 176 F. Supp. 2d at 1336. Further, "[t]he point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them." *Skelton v. General Motors Corp*., 860 F.2d 250, 258 (7th Cir. 1988).

The Settlement is particularly noteworthy given the combined litigation risks. Defendant would likely raise substantial and potentially meritorious defenses. Indeed, prosecuting the Action was risky from the outset. *See, e.g., In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig*., 2010 WL 3341200, at *6 (W.D. Ky. Aug. 23, 2010) (approving data breach settlement, in part, because "proceeding through the litigation process in this case is unlikely to produce the plaintiffs' desired results"). Multiple other payment card data breach cases have resulted in no recovery for the plaintiff or class members. *See, e.g., Dugas v. Starwood Hotels & Resorts Worldwide, Inc*., 3:16-cv-00014-GPC-BLM (S.D. Cal.), Doc. 56 (order dismissing payment card data breach case) (July 11, 2017); *Whalen v. Michaels Stores, Inc*., 689 F. App'x 89 (2d Cir. 2017) (order affirming dismissal of payment card data breach case); *Storm v. Paytime, Inc*., 90 F. Supp.

3d 359, 368 (M.D. Pa. 2015) (dismissed for lack of standing as plaintiffs failed to demonstrate that they had suffered actual harm, such as, identity theft); *Longenecker-Wells v. Benecard Servs. Inc,* 658 F. App'x 659, 663 (3d Cir. 2016) (negligence claim barred by economic loss doctrine and breach of implied contract dismissed for failure to plead sufficient allegations); *Bray v. Gamestop Corp.*, No. 1:17-cv-1365, 2018 U.S. Dist. LEXIS 226220, at *22 (D. Del. Mar. 16, 2018) (dismissing claims for negligence, negligence *per se*, and breach of contract).

Defendant was confident in their opposition to Plaintiffs' claims. An additional layer of complexity for Plaintiffs stems from Defendant's claim that the 105 affected restaurants were operated by multiple franchisees across the country. SA § 1.05. Through this Settlement, however, Plaintiffs and Class Members gain significant benefits without having to face further risk. The combined monetary and non-monetary Settlement benefits obtained here are substantial, given the complexity of the litigation and the significant risks and barriers that loomed in the absence of Settlement. Any of these risks could easily have impeded, if not prevented, Plaintiffs' and the Settlement Class's successful prosecution of these claims.

As explained in Plaintiffs' motion for preliminary approval, data breach cases such as this one are especially risky, expensive, and complex. *See In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 WL 3773737, 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."). Although data breach law is continuously developing, data breach cases are still relatively new, and courts around the country are still grappling with what legal principles apply to the claims. *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"). Since the "legal issues involved in [in data breach litigation] are

cutting-edge and unsettled … many resources would necessarily be spent litigating substantive law as well as other issues." *In re Target Corp. Customer Data Security Breach Litig*., No. 14-2522 (PAM/JJK), 2015 WL 7253765, at *2 (D. Minn. Nov. 17, 2015).

The recovery achieved by this Settlement must be measured against the fact that any recovery by Plaintiffs and Settlement Class Members through continued litigation could only have been achieved if: (i) Plaintiffs were able to certify a class and establish liability and damages at trial; and (ii) the final judgment was affirmed on appeal. In *Pinto v. Princess Cruise Lines*, 513 F. Supp. 2d 1334, 1339-43 (S.D. Fla. 2007), the Court calculated the bench mark based for the attorneys' fee request in relation to monetary common fund obtained while acknowledging injunctive relief also obtained for class. The Settlement here is a fair and reasonable recovery for the Settlement Class in light of Defendant's defenses, and the challenging and unpredictable path of likely protracted litigation Plaintiffs and the certified class would have faced absent the Settlement. Martin Decl. ¶ 25.

5. Class Counsel Assumed Considerable Risk to Pursue This Action on a Pure Contingency Basis.

In undertaking to prosecute this case on a contingent fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. Martin Decl. ¶ 26. That risk warrants an appropriate fee. Indeed, "[a] contingency fee arrangement often justifies an increase in the award of attorney's fees." *Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens*, 118 F.R.D. at 548).

The progress of the Action to date shows the inherent risk faced by Class Counsel in accepting and prosecuting the Action on a contingency fee basis. Despite Class Counsel's effort in litigating this Action, Class Counsel remain completely uncompensated for the time invested in the Action, in addition to the expenses they advanced. Martin Decl. ¶ 26. There can be no dispute

that this case entailed substantial risk of nonpayment for Class Counsel. As of October 20, 2020, Class Counsel have incurred combined expenses of at least $16,257.52 without the assurance that they would recover those expenses. *See*, Martin Decl. ¶¶ 27-28; Kazerounian Decl.¶ 12; King Decl. ¶ 12.

6. The Requested Fee Comports with Fees Awarded in Similar Cases.

Counsel's requested combined award of fee and costs of $575,000 is well within the range of fees typically awarded in similar cases. This request for $575,000 represents a mere 2.87% of the aggregate value of only the first tier of monetary relief in the form of four (4) vouchers at $5.00 each made available for non-documented losses concerning the approximately 1,500,000 payment card transactions at issue when assuming only 1,000,000 Settlement Class Members.[7]

Numerous decisions within and outside of the Southern District of Florida and the Eleventh Circuit have found that a 33.33% fee is well within the range of reason under the factors listed by the court in *Camden I*. *See Wolff v. Cash 4 Titles*, No. 03-22778- CIV, 2012 WL 5290155, at *5-6 (S.D. Fla. Sept. 26, 2012) ("The average percentage award in the Eleventh Circuit mirrors that of awards nationwide—roughly one-third.") (citing Circuit case law and listing Southern and Middle District of Florida attorneys' fees awards); *see also, Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295 (11th Cir. 1999) (approving fee award where the district court determined that the benchmark should be 30% and then adjusting the fee award higher based on the circumstances of the case).

Class Counsel's fee request falls well below the range of the private marketplace, where contingency fee arrangements often approach or equal forty percent of any recovery. *See*

[7] $20.00 ($5.00 x 4 vouchers) x 1,000,000 class members = $20,000,000.

Continental, 962 F.2d at 572 ("The object in awarding a reasonable attorneys' fee . . . is to simulate the market."); *RJR Nabisco, Inc. Sec. Litig*., Fed. Sec. L. Rep. (CCH) ¶ 94, 268 (S.D.N.Y. 1992) ("[W]hat should govern [fee] awards is . . . what the market pays in similar cases"). And, "[i]n tort suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum v. Stenson*, 465 U.S. 886, 904 (1984) (Brennan, J., concurring).

Finally, Class Counsel's fee request also falls within or below the range of awards in data breach cases. *See e.g., Hapka v. Carecentrix, Inc.*, No. 2:16-cv-02372-KGG, 2018 U.S. Dist. LEXIS 68186, at *10 (D. Kan. Feb. 15, 2018) (approving a combined attorneys' fees and expenses award to Class Counsel in the amount of $400,000 in settlement involving approximately 2,000 settlement class members[8]); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 U.S. Dist. LEXIS 7841, at *239 (N.D. Ga. Jan. 13, 2020) (approving attorneys' fee award of 20.36% of the $380.5 million minimum settlement fund); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 U.S. Dist. LEXIS 140137, at *119-20 (N.D. Cal. Aug. 17, 2018) (approving attorneys' fee award of 27% of the 115 million fund); *In re Target Corp. Customer Data Sec. Breach Litig.*, No. 14-2522 (PAM/JJK), 2015 U.S. Dist. LEXIS 155137, at *13 (D. Minn. Nov. 17, 2015) (approving attorneys' fees of 29% of the total monetary payout the defendant was required to make under the settlement).

Consequently, the combined attorneys' fee and costs request of $575,000 is appropriate and should be awarded.

[8] *Hapka v. Carecentrix, Inc.*, No. 2:16-cv-02372-KGG, 2018 U.S. Dist. LEXIS 68185, at *10 (D. Kan. Feb. 15, 2018) (noting a $5,000 cap on documented losses and an alternative minimum payment of $200 in the settlement).

IV. APPLICATION FOR SERVICE AWARDS

Pursuant to the Settlement, Plaintiffs respectfully request a service award to the two Class Representatives in the amount of $2,500.00 each. Service awards "compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006). "[T]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action." *David v. American Suzuki Motor Corp*., 2010 WL 1628362, at *6 (S.D. Fla. Apr. 15, 2010); *see also, Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) ("Incentive awards are not uncommon in class action litigation . . . [which] compensate named plaintiff's for the services they provided and the risks they incurred during the course of the class action litigation."). In *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1197 (11th Cir. 2019), the Eleventh Circuit affirmed an award of $10,000 to the class representative for his efforts in the class settlement.

The relevant factors include: (1) the actions the class representatives took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives expended in pursuing the litigation. *See, e.g.*, *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). These factors, as applied to this Action, demonstrate the reasonableness of the requested Service Awards to Plaintiffs.

Here, both Plaintiffs provided assistance that enabled Class Counsel to successfully prosecute the Action, including providing supporting information to Class Counsel, making themselves available by telephone should they be needed during the mediation, and reviewing and approving the Agreement. Martin Decl. ¶ 36. *See e.g.*, *Hapka v. Carecentrix, Inc.*, No. 2:16-cv-

02372-KGG, 2018 U.S. Dist. LEXIS 68186, at *10 (D. Kan. Feb. 15, 2018) (approving service award of $2,500).

Finally, the concerns raised by the Eleventh Circuit in reversing the incentive award in *Johnson v. NPAS Solutions, LLC*, No. 18-12344 (Sept. 17, 2020) are not present in this case. Here, the Settlement is not contingent on the Plaintiffs receiving any service award; it merely allows Plaintiffs to seek one. SA § 11.02. Importantly, any service awards authorized by this Court will be paid by Checkers *directly* – rather than deducted from any common fund – and will not reduce any benefits available to the Settlement Class. As the Settlement Class will have the benefit of Plaintiffs' representation regardless of whether or not their request for service awards is ultimately approved, such an arrangement dispels any concerns of conflict or unfairness to the Class.

Thus, the Service Awards requested are reasonable and should be approved.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve the requested award of $575,000 as combined attorneys' fees and costs, and approve a service award of $2,500 to the two Class Representatives.

RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), the undersigned has conferred with counsel for the Defendant and is authorized to represent that the Defendant does not oppose this motion.

Dated: October 23, 2020

Respectfully submitted,

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Counsel for Plaintiffs and the putative class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 23, 2020, I electronically filed a true and correct copy of the foregoing unopposed motion with the Clerk of the Court using the CM/ECF system, which will send notification to all attorneys of record in this matter.

/s/ Jean Sutton Martin
Jean S. Martin (admitted *pro hac vice*)