IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

EDWARD D. HOZZA, III, on behalf of himself all other persons similarly situated, Plaintiff, vs. PRIMOHOAGIES FRANCHISING, INC. Defendant.	**Case No. 1:20-cv-04966** **Honorable Renée Marie Bumb, U.S.D.J.** **Honorable Matthew J. Skahill, U.S.M.J.**

NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 10, 2022, the undersigned Class Counsel shall move before the Honorable Renée Marie Bumb, U.S.D.J., in the U.S. District Court for the District of New Jersey, for attorneys' fees and expenses, and Plaintiff's application for an Incentive Award.

PLEASE TAKE FURTHER NOTICE that, in support of their Motion, Class Counsel relies upon their Memorandum of Law, the Declaration of Christian Levis, and the Declaration of Navid Zivari, filed in support herewith.

PLEASE TAKE FURTHER NOTICE that a Proposed Form of Order granting the relief requested has been submitted herewith.

Respectfully submitted,

Dated: November 10, 2022

By: */s/ Christian Levis*

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CERTIFICATE OF SERVICE

I, Christian Levis, hereby certify that on November 10, 2022, I filed and served through the Court's ECF system a true and correct copy of the foregoing document. Those attorneys who are registered with the Court's electronic filing system may access these filings through the Court's system and notice of these filings will be sent to these parties by operation of this Court's electronic filing system.

/s/ Christian Levis
Christian Levis

IN THE UNITED STATES DISTRICT COURT
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[PROPOSED] ORDER AWARDING
ATTORNEYS' FEES, EXPENSES, AND AN INCENTIVE AWARD

This matter came before the Court for a duly noticed hearing on March 22, 2023 (the "Fairness Hearing"), upon Class Counsel's Motion for Award of Attorneys' Fees and Expenses, and Plaintiff's Application for an Incentive Award (the "Fee and Expense Application") in the above-captioned action ("Action"). The Court has considered the Fee and Expense Application and all supporting and other related materials, including the matters presented at the Fairness Hearing. Due and adequate notice of the Stipulation and Agreement of Settlement with Defendant

PrimoHoagies Franchising, Inc. d/b/a PrimoHoagies ("PrimoHoagies") entered into on March 17, 2022 (the "Settlement Agreement")[1] having been given to the Settlement Class Members, the Fairness Hearing having been held, and the Court having considered all papers filed and proceedings held herein and otherwise being fully informed in the premises and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has personal jurisdiction over Plaintiff Edward D. Hozza, III ("Plaintiff"), Defendant PrimoHoagies, and all Settlement Class Members, and subject matter jurisdiction over the Action to approve the Settlement Agreement and all exhibits attached thereto.

2. Notice of the Fee and Expense Application was provided to potential Settlement Class Members in a reasonable manner, and such notice complies with Rule 23(h)(1) of the Federal Rules of Civil Procedure and due process requirements.

3. Class Counsel is hereby awarded attorneys' fees in the amount of $_____, which shall be paid by PrimoHoagies. Such payment shall be made pursuant to the terms of the Settlement Agreement, which terms, conditions, and obligations are incorporated herein.

[1] Unless otherwise defined herein, all capitalized terms used have the meanings set forth and defined in the Settlement Agreement. *See* ECF No. 54-1.

4. Class Counsel is hereby awarded expenses in the amount of $_____, which shall be paid by PrimoHoagies. Such payment shall be made pursuant to the terms of the Settlement Agreement, which terms, conditions, and obligations are incorporated herein.

5. Plaintiff is awarded $_____ as an Incentive Award in recognition of his efforts on behalf of the Settlement Class, which shall be paid by PrimoHoagies. Such payment shall be made pursuant to the terms of the Settlement Agreement, which terms, conditions, and obligations are incorporated herein.

6. In making these awards, the Court has considered and found that:

a. The Action involves numerous complex factual and legal issues; in the absence of a settlement, the Action would have involved lengthy proceedings with an uncertain resolution of the numerous complex factual and legal issues involved in the case;

b. Had Class Counsel not achieved the Settlement, a risk would remain that Plaintiff and the Settlement Class may have recovered less or nothing from PrimoHoagies;

c. Class Counsel has prosecuted the Action and achieved the Settlement with skill, perseverance, and diligent advocacy;

d. Class Counsel's approved attorneys' fee award is based on a lodestar that the Court finds to be reasonable after a review of the hours worked and the

applicable hourly rates and represents a reasonable negative multiplier on Class Counsel's lodestar;

e. The attorneys' fee award is fair, reasonable, appropriate and consistent with the awards in similar cases, in view of the applicable legal principles and the particular facts and circumstances of the Action.

f. The expenses incurred by Class Counsel were reasonable and necessary to the prosecution of the Action;

g. Plaintiff contributed his time and efforts to the prosecution of this Action for the benefit of the Settlement Class; and

h. Notice was disseminated stating that Class Counsel would be moving for an award of attorneys' fees and expenses in an amount not to exceed $111,495.09, and Plaintiff would be seeking an Incentive Award in an amount no greater than $1,000.00.

7. In the event that the Settlement is terminated or the Effective Date does not occur in accordance with the terms of the Settlement, this Order shall be null and void, of no further force or effect, and without prejudice to any of the Parties, and may not be introduced as evidence or used in any actions or proceedings by any Person against the Parties.

8. Pursuant to the Settlement Agreement, the Fee and Expense Application is independent of the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement.

IT IS SO ORDERED.

Date: _____, 2023.

_____

HON. RENÉE MARIE BUMB, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

EDWARD D. HOZZA, III, on behalf of himself all other persons similarly situated, Plaintiff, vs. PRIMOHOAGIES FRANCHISING, INC. Defendant.	**Case No. 1:20-cv-04966** **Honorable Renée Marie Bumb, U.S.D.J.** **Honorable Matthew J. Skahill, U.S.M.J.**

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES AND EXPENSES, AND PLAINTIFF'S APPLICATION FOR AN INCENTIVE AWARD

Motion Day: December 5, 2022

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INTRODUCTION

Pursuant to FED. R. CIV. P. 23(h)(1) and this Court's order granting preliminary approval of the proposed settlement (ECF No. 55), Class Counsel[1] respectfully seeks an Order awarding $108,481.57 as attorneys' fees and $3,013.52 for Class Counsel's litigation expenses. Plaintiff Edward D. Hozza, III ("Plaintiff") also seeks an Incentive Award of $1,000.00 as compensation for the services that he provided to the Class and the risks he undertook as the class representative (collectively the "Fee and Expense Application").[2] Under the terms of the Settlement Agreement, in addition to the Settlement Relief available to eligible Class Members, PrimoHoagies has agreed to separately pay up to $111,495.09 for Class Counsel's attorneys' fees and expenses and $1,000.00 to Plaintiff as an Incentive Award, subject to Court approval. SA §§ 6(A)-(B); 6(D). These amounts were negotiated with the assistance of The Honorable Matthew J. Skahill, U.S.M.J. (D.N.J.) after the parties reached agreement on all other material terms of the Settlement. *See* Declaration of Christian Levis in Support of (A) Plaintiff's Motion for Final Approval of The Class Action Settlement; and (B) Class Counsel's Motion for

[1] "Class Counsel" is Lowey Dannenberg, P.C. as appointed by the Court in its July 13, 2022 Preliminary Approval Order. *See* ECF No. 55 at ¶ 8.

[2] Unless otherwise noted, capitalized terms not defined herein have the same meaning as in the Stipulation and Agreement of Settlement dated March 17, 2022 (the "Settlement Agreement" or "SA"). *See* ECF No. 54-1. Unless otherwise noted, internal citations and quotation marks are omitted and ECF citations are to the docket in this Action.

Attorneys' Fees and Expenses, and Plaintiff's Application for an Incentive Award ("Levis Decl."), ¶¶ 8, 40-41, 49, 65, filed herewith. Accordingly, any attorneys' fees, litigation expenses, and Incentive Award granted by the Court will not reduce any settlement benefits available to the Class. *Id.* ¶ 49.

As discussed below, the proposed attorneys' fees award is reasonable when viewed in light of Class Counsel's lodestar in the Action as well as through a "percentage of the recovery" cross-check. The proposed fee of $108,481.57 represents a **multiplier of 0.24** based on Class Counsel's lodestar of $458,000.05 incurred from inception (April 17, 2020) to October 31, 2022. If the benefits of the Settlement are viewed as forming a constructive common fund, the requested attorneys' fee corresponds to **0.74%** of the overall value of the Settlement, further confirming the reasonableness of the request. In addition, the fee request is substantively fair and reasonable in light of the *Gunter*[3] and *Prudential*[4] factors considered by Third Circuit courts in awarding fees.

As further described below, Class Counsel's requested award for litigation expenses is reasonable in amount, and the expense items reflect the type of reasonable and necessary litigation expenditures that courts routinely approve for payment in the Third Circuit. Finally, the proposed Incentive Award is reasonable

[3] *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000) ("*Gunter*").
[4] *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) ("*Prudential*").

in light of the time and effort Plaintiff invested to pursue this case on behalf of the Class. The amount of the Incentive Award is comparable to incentive/service awards approved in the Third Circuit and in other data breach cases nationwide.

I. Summary of the Settlement Benefits

Under the terms of the Settlement, each Settling Class Member that files a timely and valid Claim Form may be eligible to receive one or more of the following three (3) forms of Settlement Relief:

A. Credit Monitoring: Settling Class Members are eligible to receive one (1) year of free credit monitoring (valued at $119.40/year). Class Members who elect to receive credit monitoring will have one (1) year from the date of issue to activate the service. SA § 4(A)(i). This Settlement Relief is in addition (and is intended to supplement) the free credit monitoring initially offered in PrimoHoagies' Incident Notice. *Id.*

B. Reimbursement For Out-Of-Pocket Charges and Expenses: Settling Class Members are also eligible for reimbursement of up to $120.00 for certain out-of-pocket charges and expenses that were incurred as a result of the Data Breach to the extent they can provide supporting documentation. *Id.* § 4(A)(ii). Out-of-pocket charges and expenses that qualify for reimbursement under the Settlement are: (i) unreimbursed fraudulent charges incurred on a Payment Card used at PrimoHoagies during the Data Breach Period, where the fraudulent charge occurred

during or up to five (5) months after the end of the Data Breach Period; and (ii) unreimbursed costs for purchasing credit reports, credit monitoring, and/or identity theft protection services after a fraudulent charge or notice of some suspicious activity subsequent to the use of the Payment Card at PrimoHoagies during the Data Beach Period but before PrimoHoagies offered free credit monitoring in its April 2020 notice of the Data Breach. *Id.* §§ 4(A)(ii)(a) & (b).

C. Reimbursement for Lost Time and Effort: Settling Class Members that submit a timely and valid Claim Form are also eligible to receive $7.50 for lost time and effort that the Settling Class Member expended as a result of a documented fraudulent charge incurred on a Payment Card after that Payment Card was used at PrimoHoagies, where the fraudulent charge occurred during or up to five (5) months after the end of the Data Breach Period. *Id.* § 4(A)(iii).

Each Settling Class Member may receive one or more forms of the above Settlement Relief. Further Class Counsel negotiated that each of the above categories would be *uncapped*, *i.e.*, the amount of Settlement Relief available would not be decreased on a *pro rata* basis if the number of Settling Class Members filing a claim exceeds a certain number. As a result, if every Class Member filed a claim seeking all three (3) types of Settlement Relief, the value of the Settlement, including PrimoHoagies' agreed-upon payments of attorneys' fees, litigation expenses,

Incentive Award, and Class Notice and Settlement Administration Costs, would total $14,687,203.29. SA §§ 6(A)-(E); 7(J); Levis Decl. ¶¶ 7, 50.

ARGUMENT

I. The Requested Attorneys' Fee Award Should be Approved as Fair and Reasonable

"In a certified class action, the court may award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." FED. R. CIV. P. 23(h). The determination of the appropriate fee is left to a court's discretion subject to the application of the correct legal standard and procedures to reach that determination. *See Granillo v FCA US LLC*, No. 16-cv-153 (FLW) (DEA), 2019 WL 4052432, at *2 (D.N.J. Aug. 27, 2019) (quoting *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 727 (3d Cir. 2001)).

In applying their analysis, courts may consider whether the parties have reached an agreed-upon attorneys' fee award such as the one embodied in the Settlement. Such a fee award benefits the Settlement Class by not reducing the relief that flows to Class Members; the U.S. Supreme Court has indicated a "preference [to] allow[] litigants to resolve fee issues through agreement." *Granillo*, 2019 WL 4052432, at *2 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). While not dispositive, when the requested fee award is "the product of arms-length negotiations," as has occurred here, it "weighs strongly in favor of approval." *Khona*

v. Subaru of Am., Inc., No. 19-cv-9323 (RMB) (AMD), 2021 WL 4894929, at *1 (D.N.J. Oct. 20, 2021) (internal citations and quotations omitted).

Further, when the proposed fee award is to be paid separately by the defendant rather than as a reduction to a common fund, the "[c]ourt's fiduciary role in overseeing the award is greatly reduced, because there is no potential conflict of interest between attorneys and class members." *Rossi v. Proctor & Gamble Co.*, No. 11-cv-07238, 2013 WL 5523098, at *9 (D.N.J. Oct. 3, 2013); *accord Haas v. Burlington Cnty.*, No. 08-cv-01102, 2019 WL 413530, at *9 (D.N.J. Jan. 31, 2019) ("[T]he amount of attorneys' fees was negotiated as a separate aspect of the settlement agreement, which further supports reasonableness."). Class Counsel and PrimoHoagies agreed upon the proposed fee award with the assistance of Magistrate Judge Skahill only after the Settlement Relief for Class Members had been agreed to, ensuring that there was no conflict between the interests of the Settlement Class and Class Counsel in negotiating a fee.[5] Levis Decl. ¶ 49.

That Class Counsel and PrimoHoagies reached agreement on the proposed attorneys' fee award after arms-length negotiations alone is sufficient for the Court

[5] *See Alves v. Main*, No. 01-cv-789 (DMC), 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012), *aff'd*, 559 F. App'x 151 (3d Cir. 2014) (approving requested attorneys' fees when the parties "benefitted from the involvement of a magistrate judge in mediating the Settlement" and noting that the involvement of a magistrate judge "provides a great deal of comfort at the threshold of our fairness consideration") (quoting *Kolar v. Rite Aid Corp.*, No. 01-cv-1229, 2003 WL 1257272, at *3 (E.D. Pa. Mar. 11, 2003)).

to find that the proposed award is reasonable. However, should the Court wish to further analyze the proposed fee award, there are two common methods used to calculate attorneys' fee awards: the lodestar method and the percentage of the recovery method. *See Fulton-Green v. Accolade, Inc.*, No. 18-cv-00274, 2019 WL 4677954, at *11 (E.D. Pa. Sept. 24, 2019); William B. Rubenstein, 5 NEWBERG ON CLASS ACTIONS § 15:98 (5th ed. 2021) (hereinafter "NEWBERG ON CLASS ACTIONS") ("The Third Circuit gives its district courts discretion as to whether to use a percentage or lodestar method."). As this case is not a traditional common fund case, the proposed fee award is more appropriately considered under the lodestar method. But under either approach, Class Counsel's attorneys' fee award is empirically reasonable, as described below. In addition to the empirical reasonableness of the proposed award, analysis of the Class Counsel's fee request under the *Gunter* and *Prudential* factors demonstrates that the fee request is substantively reasonable.

A. The Lodestar Method Confirms that the Requested Fee is Reasonable

The lodestar method is frequently used in data breach cases and in other cases where "the nature of the settlement evades the precise evaluation needed for the percentage of recovery method" and is intended to "assure counsel undertaking socially beneficial litigation an adequate fee irrespective of the monetary value of the final relief achieved for the class." *Granillo*, 2019 WL 4052432, at *3-4 (internal citation omitted); *see also Fulton-Green*, 2019 WL 4677954, at *13; *Dungee v.*

Davison Design & Dev. Inc., 674 F. App'x 153, 156 (3d Cir. 2017) (using the lodestar method where "the ultimate value of the settlement depended upon the number of claims made by former customers for cash and service vouchers."). Under the lodestar method, the fee award is determined first by "multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services." *Fulton-Green*, 2019 WL 4677954, at *11 (citation omitted). "After arriving at this lodestar figure, the district court may, in certain circumstances, adjust the award upward or downward to reflect the particular circumstances of a given case." *Gunter*, 223 F.3d at 195, n.1. For example, the court has "discretion to adjust the lodestar after it is calculated based on the results obtained, the litigation's complexity and scope, the quality of counsel's representation, and any public policy considerations." *Dickerson v. York Int'l Corp.*, No. 15-cv-1105, 2017 WL 3601948, at *10 (M.D. Pa. Aug. 22, 2017) (citing *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990).

As reflected in the Levis Decl., Class Counsel expended 651.33 hours on this case from inception (April 17, 2020) through October 31, 2022. Using the current hourly rates for the applicable timekeepers, this work correlates to a lodestar amount of $458,000.05. *See* Levis Decl. ¶¶ 66-67. As explained below, both the hours incurred and the rates applied should be considered reasonable.

1. Class Counsel's Total Hours Worked are Reasonable for This Case

The 651.33 hours Class Counsel spent went to tasks that were necessary to the prosecution of the Action and the successful Settlement attained in this case. While not limited to just working on the following tasks, critically, Class Counsel: engaged in a thorough investigation of the Data Breach, *id.* ¶ 65; drafted the Complaint, *id.*; responded to PrimoHoagies' Pre-Motion Conference Letter and Motion to Dismiss, *id.*; attended and presented at multiple Court conferences concerning PrimoHoagies' Pre-Motion Conference Letter and potential settlement, *id.*; performed legal research regarding various issues including standing, damages, causation, duty, legal counts for potential common law and state statutory claims, and settlement structure, *id.*; researched relevant data security standards and PCI-DSS rules, *id.*; engaged in discovery with PrimoHoagies, including issuing document requests, reviewing documents produced by PrimoHoagies, and producing documents of behalf of Plaintiff, *id.*; engaged with defense counsel regarding settlement issues, *id.*; attended and presented at status and settlement conferences with Magistrate Judge Schneider on October 14, November 2, November 23, and December 21, 2020, *id.*; attended and presented at the pre-settlement conference with Magistrate Judge Skahill on April 6, 2021, *id.*; drafted three settlement memoranda in preparation for the settlement conferences with Magistrate Judge Skahill, *id.*; participated in three settlement conferences with

PrimoHoagies and Magistrate Judge Skahill on May 7, June 23, and August 5, 2021, *id.*; negotiated the Settlement Agreement with PrimoHoagies, *id.*; drafted the Settlement Agreement, exhibits, preliminary approval briefing, and proposed orders (ECF Nos. 52 – 54), *id.*; conducted a Request for Proposal process for selecting the Settlement Administrator, *id.*; worked closely with the Settlement Administrator and PrimoHoagies to develop and ensure that the Notice Plan was adequately implemented, *id.*; and communicated with Plaintiff on various issues, including document production, review of the pleadings and important case materials, and settlement terms and structure, *id.*

Class Counsel's time spent in this Action was significant as it was the sole law firm prosecuting the Action. Their work was also efficient and effective, resulting in an early resolution that will distribute the Settlement Relief to Class Members sooner than if the case was extensively litigated to trial. Settlements reached "early" are "favored." *In re Lucent Techs., Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 644 (D.N.J. 2004); *see also Weiss v. Mercedes–Benz of North Am., Inc.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995), *aff'd*, 66 F.3d 314 (3d Cir.1995) (settlement approved while the "case is still in the early stages of discovery"); *In re Novacare Sec. Litig.*, No. 94-cv-5808, 1995 WL 605533, at *7 (E.D. Pa. Oct. 13, 1995) ("one of the benefits of settlement at an early stage is avoidance of the expense of extended discovery that might well effect plaintiffs' proof at trial."). An important

consideration in the reasonableness of the hours is whether the hours expended suggest that there was excessive, redundant or otherwise unnecessary work performed. *See Nance v. City of Newark*, No. 97-cv-6184 (JLL), 2014 WL 3519094, at *4 (D.N.J. July 16, 2014) ("The Supreme Court has held that counsel is expected to exercise 'billing judgment' and that district courts 'should exclude from this initial fee calculation hours that were not reasonably expended' including 'excessive, redundant, or otherwise unnecessary' work.") (quoting *Hensley*, 461 U.S. at 434 (class action)). Four attorneys performed the majority of work for this Action, including the negotiation and preparation of the Settlement and supervision of the claims administration process, with additional attorneys providing specific limited assistance when needed. *See* Levis Decl. ¶¶ 65-66.

In comparison, the number of hours incurred in this case (651.33 hours) is relatively modest relative to the hours incurred in similar payment card data breach class actions that settled in the early stages of the proceedings. For example, in *In re Wawa, Inc. Data Sec. Litig.*, where no motion to dismiss was filed in the consumer track, consumer track counsel devoted 5,942 hours in reaching a settlement that provided similar relief, i.e., $5 gift card to customers who used a card to make a purchase and who attest that they spent at least some time monitoring their credit card; $15 gift card to customers who used a card and who had a subsequent fraudulent charge on their card, and spent at least some time addressing the

fraudulent transaction or otherwise monitoring their account; and $500 to customers demonstrate certain expenditures or other out-of-pocket losses resulting from the data breach. No. 19-cv-6019, 2022 WL 1173179, at *1, 11 (E.D. Pa. Apr. 20, 2022).

Data breach cases are highly technical and complex, with complaints asserting both common law and state statutory claims from different states, and any settlements reached in such cases are multi-faceted involving several types of relief to address the various alleged harms. But for the early settlement, substantial time and resources would have been invested to litigate the various claims. And as is evident from Class Counsel's work, the settlement process itself was nevertheless protracted, extensive, and difficult, requiring significant hours despite being performed at an early stage in the ligation. Between June 2020 and January 2021, the Parties informally attempted to resolve the Action by negotiating among themselves and working with Magistrate Judge Schneider, but no avail. Levis Decl. ¶¶ 28-39, 65. During this period the Parties exchanged and reviewed discovery. *Id.* Between April and August 2021, there were three settlement conferences with Magistrate Judge Skahill, each requiring substantive and detailed settlement memoranda before the parties agreed to a settlement in principle. *Id.* ¶¶ 40-41, 65. After reaching the contours of the agreement in August 2021, the parties engaged in hard fought negotiations until March 2022 to hammer out the specific terms of the Settlement Agreement. Class Counsel also reviewed confirmatory discovery,

worked with PrimoHoagies to select the Settlement Administrator, and prepared notice documents. *Id.* ¶¶ 42-45.

Class Counsel's investment of hours (and corresponding lodestar) does not stop here, and instead is likely to increase at least moderately going forward. In addition to the time spent preparing the motion for final approval of the Settlement and this application that is not captured by the lodestar chart in the Levis Decl., Class Counsel continues to bear responsibility for responding to any objections that may be lodged and any Class Member's inquiries, overseeing the claims administration and distribution process, and preparing for and presenting arguments at the Fairness Hearing.

Courts in data breach class actions have held that it is appropriate to consider future anticipated hours when evaluating the reasonableness of a fee award. *See, e.g.*, *In re: Yahoo! Inc. Customer Data Security Breach Litig.*, No. 16-md-02752, 2020 WL 4212811, at *30 (N.D. Cal. July 22, 2020) ("[T]he Court acknowledges that certain tasks will continue to occupy Class Counsel following final approval."); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 17-md-2800, 2020 WL 256132, at *40 (N.D. Ga. Mar. 17, 2020) ("[C]ourts have included future time in lodestar calculations . . . . Excluding such time would misapply the lodestar methodology and needlessly penalize class counsel."). Given that Class Counsel's fee request already results in a negative multiplier (*see infra*) and the uncompensated

time that Class Counsel will invest in the Action going forward is not included in the hours submitted to the Court, the number of hours comprising Class Counsel's lodestar certainly falls within the range of reasonableness.

2. Class Counsel's Hourly Rates are Reasonable

In determining the reasonable hourly rate to be applied to the lodestar calculation, courts will typically look to "the market rate in the attorney's community for lawyers of similar expertise and experience." *Mosquito Hunters, LLC v. Kelwood, Inc.*, No. 21-cv-05033 (FLW), 2021 WL 2850419, at *3 (D.N.J. July 7, 2021) (quoting *Machado v. Law Offices of Jeffrey H. Ward*, No. 14-cv-7401, 2017 WL 2838458, at *2 (D.N.J. June 30, 2017)); *accord Phillips v. Philadelphia Hous. Auth.*, No. 00-cv-4275, 2005 WL 1899504, at *4 (E.D. Pa. Aug. 8, 2005), *supplemented,* 2005 WL 3488872 (E.D. Pa. Dec. 20, 2005). The rates utilized are those as of the time of the fee petition, and not the rates that applied when the services occurred. *Lanni v. New Jersey*, 259 F.3d 146, 149 (3d Cir. 2001).

While not dispositive, courts begin their evaluation by looking at the timekeeper's normal billing rate. *See Granillo*, 2019 WL 4052432, at *4; *accord Gonzalez v. Acct Resol. Servs., LLC*, No. 20-cv-03259, 2021 WL 3007257, at *2 (E.D. Pa. July 15, 2021). The rates for Class Counsel's attorneys working this case ranged from $430 per hour to $1,015 per hour, resulting in blended hourly rate of $703.17. The hourly rates and the blended rate are in line with rates approved by

other courts in this Circuit. *See In re Wawa, Inc. Data Sec. Litig.*, 2022 WL 1173179, at *11-12 (citing cases approving of blended hourly rates of more than $600 and finding the blended hourly rate of $653 to be reasonable); *see also In re Imprelis Herbicide Mktg., Sales Practices & Prod. Liab. Litig.*, 296 F.R.D. 351, 370 (E.D. Pa. 2013) (approving fee request where hourly rates peaked at $1,200 and several attorneys' rates were at or above $900);[6] *In re Cigna-Am. Specialty Health Admin. Fee Litig.*, No. 16-cv-03967 (NIQA), 2019 WL 4082946, at *15 (E.D. Pa. Aug. 29, 2019) ("Class Counsel and support staff are claiming…hourly rates between $175 and $995…These hourly rates are also well within the range of what is reasonable and appropriate in this market.").

The comparability of the rates with those of other attorneys in this district and Circuit demonstrates that Class Counsel's rates are appropriate. Moreover, the relevant community does not simply require the Court to look at the attorney rates in its local district or circuit but may include the market for attorneys nationwide if the matter requires certain skill sets and experience, *e.g.*, complex and class action litigation. *See, e.g., Lucas v. Kmart Corp.*, No. 99-cv-01923 (JLK) (CBS), 2006 WL 2729260, at *4 (D. Colo. July 27, 2006) (finding that the relevant community "likely

[6] The Order cited class counsel's total lodestar amount but not the underlying hourly rates. The hourly rates were set forth in various declarations filed by class counsel (ECF No. 189-2 to 189-4). Hourly rates greater than $900 are located at ECF No. 189-2 at ECF pg. 15, ECF No. 189-3 at ECF pg. 30, 216, and ECF No. 189-4 at ECF pg. 32.

consists of attorneys who litigate nationwide, complex class actions" because few attorneys have the skill and resources to "litigate large-scale actions on behalf of a class"); *Casey v. City of Cabool, Mo.*, 12 F.3d 799, 805 (8th Cir. 1993) ("A national market or a market for a particular legal specialization may provide the appropriate market.") (internal quotations and citations omitted); *Boxell v. Plan for Group Ins. of Verizon Comm., Inc.*, No. 13-cv-089 (JD), 2015 WL 4464147 at *9 (N.D. Ind. July 21, 2015) ("when 'the subject matter of the litigation is one where the attorneys practicing it are highly specialized and the market for legal services in that area is a national market,' the relevant 'community' is not the local market area, but the community of practitioners in that subject matter") (quoting *Jeffboat, LLC v. Dir., Off. of Workers' Comp. Programs*, 553 F.3d 487, 490 (7th Cir. 2009)); *Wi-LAN Inc. v. Sharp Elecs. Corp.*, No. 15-cv-379 (LPS), 2022 WL 1224901, at *4, n.4 (D. Del. Apr. 25, 2022) ("although the Third Circuit has not yet ruled on this issue, other circuits have recognized that an attorney's actual billing rate is presumptively reasonable if it is comparable to rates provided for similar services performed by similarly skilled and experienced attorneys.") (citing *Jeffboat*, 553 F.3d at 490).

Here, the litigation required the expertise of counsel experienced in class actions and the niche practice area of data breach litigation. Class Counsel is based out-of-state (metro-New York City and metro-Philadelphia regions) and brings extensive experience in data breach and/or consumer protection class actions, which

were necessary pre-requisites to effectively litigate this action. The hourly rates of each attorney are appropriately tailored to the individual's level of seniority and experience. Levis Decl. ¶ 66; *see also Moore v. GMAC Mortg*., No. 07-cv-04296, 2014 WL 12538188, at *2 (E.D. Pa. Sept. 19, 2014) ("A reasonable hourly rate reflects an attorney's experience and expertise, [thus] the rates for individual attorneys vary."). The rates are also consistent with those charged in national, complex class actions, including data breach cases. *See, e.g.*, *In re Wawa, Inc. Data Sec. Litig.*, 2022 WL 1173179 (consumer data breach class action where court approved blended hourly rate of $653, averaging the partner, associate, rates); Brief in Support of Motion for Attorney Fees, *Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415 (CMA) (SKC), (D. Colo. Nov. 1, 2019), ECF No. 113 (consumer data breach class action where listing billing rates were between $950 and $675 for partners, $500-$325 for associates, and $250-$165 for professional staff to calculate lodestar); (Dec. 16, 2019), ECF No. 128 (finding attorneys' fees and costs reasonable); Motion for Attorney Fees, *In re Arby's Restaurant Grp, Inc. Data Sec. Litig*., 17-cv-01035 (WMR), (N.D. Ga. May 7, 2019), ECF Nos. 188-2, 188-3, 188-4, 188-5 (consumer data breach class action listing billing rates up to $950 for partners and up to $864 for other attorneys), (June 6, 2019), ECF No. 191 (order determining that "the hourly rates . . . are reasonable for a case of this nature"); Brief in Support of Motion for Attorney Fees, *Bray v. Gamestop Corp*., No. 17-cv-01365

(JEJ), ECF Nos. 47-1, 47-2 (D. Del. Nov. 26, 2018) (consumer data breach class action calculating lodestar using rates between $750-$575 for partners and $475-$350 for associates), ECF No. 54 (Dec. 19, 2018) (approving attorneys' fees).

Accordingly, the rates used by Class Counsel should be similarly considered reasonable.

3. The Lodestar Multiplier is Reasonable

When compared against the reasonable lodestar of $458,000.05 incurred in this case, Class Counsel's fee request represents a fee multiple of 0.24. In other words, even if the Court fully grants the fee award, Class Counsel will still not be compensated for all of their time, resulting in a negative multiplier on its lodestar. *See Dickerson*, 2017 WL 3601948, at *11 ("A negative multiplier reflects that counsel is requesting only a fraction of the billed fee; negative multipliers thus 'favor[ ] approval.'"); *accord In re Valeant Pharms. Int'l, Inc. Third-Party Payor Litig.*, No. 16-cv-3087 (MAS) (LHG), 2022 WL 525807, at *7 (D.N.J. Feb. 22, 2022); *Castro v. Sanofi Pasteur Inc.*, Civ. No. 11-7178 (JMV)(MAH), 2017 WL 4776626, at *9 (D.N.J. Oct. 20, 2017); *Lincoln Adventures LLC v. Those Certain Underwriters at Lloyd's, London Members*, No. 08-cv-235, 2019 WL 4877563, at *8 (D.N.J. Oct. 3, 2019). Courts in the Third Circuit routinely grant fee requests that result in counsel receiving *more* than the lodestar value of the work. *See, e.g.* NEWBERG ON CLASS ACTIONS § 15:89 (noting two separate studies in which the

mean multiplier in the Third Circuit was 2.01 and 1.38, respectively); *Stevens v. SEI Investments Co.*, No. 18-cv-04205, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) ("multiples ranging from 1 to 8 are often used in common fund cases"; approving 6.16 multiplier) (collecting cases); *Dickerson*, 2017 WL 3601948, at *11 ("Multipliers between one and four are routinely approved in the Third Circuit."); *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 225 (E.D. Pa. 2014) ("The [Third Circuit] Court of Appeals has recognized that multipliers 'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'"); *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 173 (3d Cir. 2006) ("[W]e approved of a lodestar multiplier of 2.99 in *Cendant PRIDES*, in a case we stated 'was neither legally nor factually complex.' The case lasted only four months, 'discovery was virtually nonexistent,' and counsel spent an estimated total of 5,600 hours on the case."). Moreover, if the full fee request is granted, the negative multiplier will result in an effective blended hourly rate of $166.55 ($108,481.57 proposed fee / 651.33 hours). In light of the applicable case law providing fees at or above the reasonable lodestar incurred, Class Counsel's fee request that seeks less than its lodestar should be granted.

B. The Fee Request is also Reasonable Under the Percentage of the Benefit Cross Check

While not required, courts may use the percentage of the benefit method as a cross-check to the lodestar-based fee. *See* NEWBERG ON CLASS ACTIONS § 15:92

("Courts that utilize the lodestar method sometimes will ensure the reasonableness of a lodestar award by assessing what percentage of the class's fund the lodestar fee amounts to…This process is referred to as a 'percentage cross-check.'"); *Fulton-Green,* 2019 WL 4677954, at *12 ("Although the Court agrees with Class Counsel that the lodestar method is the appropriate calculation in this case, courts within the Third Circuit will often perform a [percentage-of-recovery] 'cross-check' to ensure reasonable fees."); *see also Dewey v. Volkswagen Aktiengesellschaft,* 558 F. App'x 191, 197 (3d Cir. 2014) (when a defendant is the source of both the settlement fund and the fees and costs that are to be paid, "the arrangement 'is, for practical purposes, a constructive common fund,' and courts may still apply the percent-of-fund analysis in calculating attorney's fees.") (internal citation omitted). Such a check is ordinarily performed to ensure that the fee award does not result in a windfall compared to the relief provided to the Settlement Class. In this case, the cross-check simply confirms the reasonableness of Class Counsel's fee request.

To determine the size of the constructive fund, courts first "consider the funds made available to class members rather than the amount actually claimed during the claims process." *In re Wawa, Inc. Data Sec. Litig.,* 2022 WL 1173179, at *9 (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980)); *see also Landsman & Funk, P.C. v. Skinder- Strauss Associates,* 639 F. App'x 880, 884 (3d Cir. 2016) (holding that a district court "properly relied on the entire fund as the appropriate benchmark

for assessing the size of the fund" for purposes of calculating a fee award, as opposed to calculating fees based only on the amount actually claimed by class members). In this case, the Settlement Class is comprised of approximately 58,718 members, who each may be entitled all three forms of Settlement Relief including credit monitoring, with a retail value of $119.40, lost time reimbursement of $7.50, and out of pocket costs up to $120.00. *See* SA §§ 4(A)(i) – (iii); Levis Decl. ¶ 46. As the Settlement Relief is uncapped, the maximum potential value of the Settlement Relief is $14,497,474.20. *Id.*

In addition, the constructive fund should also include the fees and costs paid by PrimoHoagies that would otherwise have been paid from a common fund. *See Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 706, 718-19 (W.D. Pa. 2015) ("Under the Settlement Agreement, defendants also will pay . . . for attorneys' fees and expenses and . . . the costs of administering the settlement. These are costs for which the class would otherwise be responsible, and therefore properly are considered in valuing the settlement."); *accord Rose v. Travelers Home & Marine Ins. Co.*, No. 19-cv-00977, 2020 WL 4059613, at *9 (E.D. Pa. July 20, 2020); MANUAL FOR COMPLEX LITIG. § 21.7 (4th ed. 2017) ("If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees and expenses, . . . the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class"). In this case, $111,495.09, representing the agreed-

upon fee and expense payment to the Class Counsel, the proposed Incentive Award of $1,000.00 and the Class Notice and Settlement Administration Costs, estimated to be $77,234.00, are all properly included in the constructive fund. *See* SA §§ 6(A) – (D); 7(J); Levis Decl. ¶ 48. As a result, the total value of the relief obtained by Class Counsel is $14,687,203.29. *Id.* ¶¶ 46-50.

As a percentage of this constructive fund, Class Counsel's fee request amounts to 0.74%. This percentage is well below the size of award granted in the Third Circuit. *See, e.g.*, *Fulton-Green*, 2019 WL 4677954, at *11 ("'Courts have allowed attorney compensation ranging from 19% to 45% of the settlement fund created, and one Circuit panel has concluded that the appropriate benchmark for fee awards is 25%.'"; approving 21% fee) (citation omitted); *Haas*, 2019 WL 413530, at *9 ("typical [percentage-of-recovery] fee awards range between 25%-45%"; approving fee of "60% of the settlement fund"); *Leap v. Yoshida*, No. 14-cv-03650, 2016 WL 1730693, at *10 (E.D. Pa. May 2, 2016) ("fee awards in common fund cases within this district generally range between 19% and 45% of the fund"; approving 30% fee).

C. The Fee Request is Reasonable Under the Third Circuit's *Gunter* and *Prudential* Factors

1. The Requested Fee Satisfies the Seven-Factor *Gunter* Analysis

In addition to an empirical analysis of the proposed fee award, courts in the Third Circuit use the seven-factor *Gunter* analysis to evaluate the substantive

reasonableness of a class action fee award. *See Gunter*, 223 F.3d at 195 n.1; NEWBERG ON CLASS ACTIONS § 15:98 ("The Third Circuit requires its district courts to assess the reasonableness of a given award according to a multifactor test entitled the '*Gunter* factors.'"). The *Gunter* factors are:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter, 223 F.3d at 195 n.1. "The factors . . . need not be applied in a formulaic way." *Id*. Not every *Gunter* factor is necessarily applicable in a given case.

The "*Gunter* factors are not applicable to the lodestar method." *Haas*, 2019 WL 413530, at *9, n.11. However, Class Counsel nevertheless address them here as an additional measure of the reasonableness of the requested fee.

Gunter Factor 1: The Size of the Fund Created and Number of Persons Benefitted. The size of the fund available for distribution is $14,687,203.29. The number of persons benefitted by the Settlement is approximately 58,718 Class Members. Levis Decl. ¶¶ 46, 50, 54. Notwithstanding the possibility that the relief distributed may not approach the maximum amount of available under the Settlement, Class Counsel should still be credited with for its outstanding efforts to make a significant set of Settlement Relief available to Class Members:

> There are a variety of reasons that settlement funds may remain even after an exhaustive claims process—including if the class members' individual damages are simply too small to motivate them to submit claims. Class counsel should not be penalized for these or other legitimate reasons unrelated to the quality of representation they provided. Nor do we want to discourage counsel from filing class actions in cases where few claims are likely to be made but the deterrent effect of the class action is equally valuable.

In re Wawa, Inc. Data Sec. Litig., 2022 WL 1173179, at *9-10 (internal citation omitted). Class Counsel provided excellent representation to the Class, and as a result, this *Gunter* factor supports the requested fee.

Gunter Factor 2: The Presence or Absence of Substantial Objections by Class Members. To date, no Class Members submitted objections to the Settlement or proposed fee award. Levis Decl. ¶ 58. The deadline for submitting objections is November 25, 2022. *See* Preliminary Approval Order ¶ 46 (ECF No. 55). Class Counsel will update and address the Court regarding any subsequent objections should any be submitted. But in the absence of any substantive objections, this factor should support awarding the requested fee.

Gunter Factor 3: The Skill and Efficiency of the Attorneys. Class Counsel has substantial experience in complex class actions, including data breach litigation. Levis Decl. ¶¶ 51, 61; Class Counsel's resume (ECF No. 54-8). The Court previously appointed the firm to represent the Class. *See* Preliminary Approval Order ¶ 8 (ECF No. 55). Class Counsel has litigated this case efficiently by reaching a resolution

before dispositive motion practice, avoiding protracted and costly litigation. *See Johnson v. Cmty. Bank, N.A.*, No. 12-cv-01405, 2013 WL 6185607, at *7 (M.D. Pa. Nov. 25, 2013) (third *Gunter* factor met because, *e.g.*, "[c]onsidering the potential for this case to turn into a multi-year litigation, class counsel [have] done a good job of negotiating a quick settlement") (internal quotations and citations omitted). This *Gunter* factor is thus satisfied here.

Gunter Factor 4: The Complexity and Duration of the Litigation. Data breach litigation is inherently complex. Among that issues that are raised in data breach litigation are questions about "the duty of care . . . in storing their personal information, Article III standing . . . , types of damages available at trial, and whether the plaintiffs can obtain and maintain class certification" *Fulton-Green*, 2019 WL 4677954, at *13. Numerous other courts have similarly recognized that data breach class actions are inherently complex. *See, e.g.*, *Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases such as the instant [payment card] case are particularly risky, expensive, and complex."); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 17-md-02807, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) ("[Payment card] data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts."); *In re Arby's Rest. Grp., Inc. Data Sec. Litig.*, No. 1:17-cv-1035 (WMR), 2019 WL 2720818, at *3 (N.D. Ga. June 6, 2019) ("data

breach litigation involves the application of unsettled law with disparate outcomes across states and circuits"; payment card case); *In re Target Corp. Customer Data Sec. Breach Litig.*, No. MDL 14-2522 (PAM) (JJK), 2015 WL 7253765, at *2 (D. Minn. Nov. 17, 2015), *rev'd and remanded*, 847 F.3d 608 (8th Cir. 2017), *amended*, 855 F.3d 913 (8th Cir. 2017), *and aff'd*, 892 F.3d 968 (8th Cir. 2018), *and aff'd*, 892 F.3d 968 (8th Cir. 2018) ("The legal issues involved [in this payment card data breach] are cutting-edge and unsettled, so that many resources would necessarily be spent litigating substantive law as well as other issues.").

Such complexity was present in this Action and supports finding that the fourth *Gunter* factor also favors granting the requested attorneys' fee. PrimoHoagies raised aggressive defenses regarding standing, damages, causation, and class certification, among other issues in its motion to dismiss (ECF No. 5) and its subsequent request for a pre-motion conference to file a motion to dismiss. (ECF No. 11). But for Class Counsel ability to reach an early settlement, litigation likely would have been protracted and difficult. Class Counsel should be rewarded for resolving this complex matter quickly. *See CertainTeed*, 303 F.R.D. at 223 ("Absent Settlement, litigation would likely continue for some time and would require both Plaintiffs and Defendants to incur considerable expert witness fees and other expenses. I find that the complexity and duration of the litigation weigh in favor of the requested award of fees.").

Gunter Factor 5: The Risk of Nonpayment. Class Counsel undertook this case on a purely contingent basis and faced a risk of receiving no compensation at all if the litigation was unsuccessful. In working on behalf of the class, Class Counsel devoted hundreds of hours of time and incurred significant out of pocket costs. Further, in reaching an agreement on attorneys' fees and expenses that was well below its lodestar, Class Counsel opted to forego receiving payment on a significant portion of the work that it had performed and will perform on behalf of the Settlement Class. *See* Argument § I.A.3, *supra*. Taking on that risk on behalf of the class lends weight to the fee request. *See, e.g., Fulton-Green*, 2019 WL 4677954, at *13 ("Class Counsel invested considerable resources into this case with no guarantee that they would recover those costs given that they were retained on a contingency fee basis. This factor again weighs in favor of determining that the fee is reasonable."); *Tavares v. S-L Distribution Co.*, No. 13-cv-01313, 2016 WL 1743268, at *11 (M.D. Pa. May 2, 2016) ("[C]ourts have noted that where plaintiffs' counsel faces a risk of nonpayment . . . that risk should be considered when assessing attorneys' fee awards.").

Gunter Factor 6: The Amount of Time Devoted by Class Counsel. As described above, (Argument § I.A.1, *supra*), Class Counsel has already devoted to over 651.33 hours to effectively litigate this Action and seeks a fee award that will result in a negative multiplier of 0.24. This modest recovery in light of the

tremendous work invested supports finding that this *Gunter* factor is satisfied. *See In re Royal Dutch/Shell Transportation Secs. Litig.*, No. 04-cv-00374, 2008 WL 9447623, at *28 (D.N.J. Dec. 9, 2008) (sixth *Gunter* factor met because the "multiplier of only 1.002" was reasonable).

Gunter Factor 7: Awards in Similar Cases. Analogous payment card data breach cases have resulted in attorneys' fee awards significantly higher than the $108,481.57 fee requested here. *See In re Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 14-md-02583 (TWT), 2016 WL 11299474, at *1-2 (N.D. Ga. Aug. 23, 2019) ($7.5 million fee award representing 1.3 multiplier and 28% of total settlement value in case involving theft of 40 million payment cards settled before motion to dismiss decided); *Target*, 2015 WL 7253765, at *3 ($6.75 million fee award representing 0.74 multiplier and 29% of total settlement value in case involving theft of 110 million payment cards settled three months after motion to dismiss decided); *In re Wawa, Inc. Data Sec. Litig.*, 2022 WL 1173179, at *12 ("This leads to a "negative" multiplier of 0.78 for the requested attorneys' fees of $3,040,060 relative to the lodestar amount."). Also, as discussed above, the requested multiplier and percentage-of-the-benefit award are modest relative to fee awards commonly approved in the Third Circuit.

In sum, application of the seven *Gunter* factors, individually and in the aggregate, indicates that the fee request is reasonable and should be approved.

2. The Requested Fee Satisfies the Three *Prudential* Factors

Courts in the Third Circuit also utilize three additional "*Prudential* factors" when analyzing class action fee requests. *See Prudential*, 148 F.3d at 336-40; *accord Imprelis*, 296 F.R.D. at 370 (listing *Prudential* factors); *In re Processed Egg Prod. Antitrust Litig.*, MDL No. 2002, 2012 WL 5467530, at *3 (E.D. Pa. Nov. 9, 2012) (same). Each of the *Prudential* factors support the fee request here.

First, in considering the "value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations," *Imprelis*, 296 F.R.D. at 370, here no governmental agencies initiated formal investigations or litigation against PrimoHoagies. The benefits to Class Members were achieved solely from the efforts of Class Counsel.

Second, the "percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement" supports the fee request. *Id*. The proposed 0.76% fee award is low relative to contingent fee percentages commonly entered into in private fee agreements. *See, e.g.*, *Hall v. Accolade, Inc*., No. 17-cv-03423, 2020 WL 1477688, at *11 (E.D. Pa.) ("Contingency fees generally range between 30% to 40%.").

Third, the inquiry into whether there are any "innovative terms of settlement" supports the requested fee. *Imprelis*, 296 F.R.D. at 370. The Settlement includes cash reimbursements of up to $120.00 to fully compensate a given consumer's out-of-

pocket losses and $7.50 for lost time and effort. The Settlement also compensates Class Members who did not experience any fraudulent transactions on their payment cards by providing free credit monitoring.[7]

II. The Expense Reimbursement Request is Reasonable

Class Counsel request reimbursement of $3,013.52 in out-of-pocket litigation expenses. Class Counsel are seeking recovery of their filing fees, service of process fees, printing and mailing fees, document review, and legal research fees. Levis Decl. ¶ 70. As with the attorneys' fee request, reimbursement of these expenses will not detract from any settlement benefits made available to the Class. The expense categories are consistent with the types of expenses commonly approved by courts in the Third Circuit. *See Cunningham v. Wawa, Inc.*, No. 18-cv-03355, 2021 WL 1626482, at *8 (E.D. Pa. Apr. 21, 2021) (approving class counsel's request for reimbursement of, *e.g.*, "filing fees, . . . mediation fees, and other similar, ordinary litigation expenses"); *Machado*, 2017 WL 2838458, at *5 (awarding filing and service-of-process fees as recoverable costs); *Acevedo v. Brightview Landscapes, LLC*, No. 13-cv-02529, 2017 WL 4354809, at *20 (M.D. Pa. Oct. 2, 2017)

[7] Even if the terms of the Settlement were deemed not to be innovative, that would result in this *Prudential* factor being merely neutral as opposed to detrimental to the fee request. *See Processed Egg Prods.*, 2012 WL 5467530, at *6 ("Plaintiffs' counsel admit that the . . .Settlement does not contain any particularly 'innovative' terms. Therefore, 'this factor neither weighs in favor nor detracts from a decision to award attorneys' fees.'") (citation omitted).

(approving class counsel's request for reimbursement of, *e.g.*, filing fees, mediation fees, and legal research costs); *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001) (approving class counsel's request for reimbursement of, *e.g.*, "(1) photocopying and reproduction, (2) postage, messenger services and express mail services, (3) telephone and facsimile charges, (4) filing and witness fees, (5) computer-assisted research, such as Lexis and Westlaw").

Accordingly, the requested expenses are reasonable and should be granted.

III. The Incentive Award Request is Reasonable

Plaintiff requests approval of a $1,000.00 Incentive Award for his time and effort pursuing the litigation on behalf of the Class. Defendant consents to funding this payment separate and apart from the payment for attorneys' fees and expenses. SA § 6(D).[8] Court in this Circuit routinely grant incentive or service awards. *See Somogyi v. Freedom Mortg. Corp.*, 495 F. Supp. 3d 337, 354 (D.N.J. 2020) ("Until and unless the Supreme Court or Third Circuit bars incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances."); *Varacallo*, 226 F.R.D. at 257-58 ("The Court finds ample

[8] *See Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 257 (D.N.J. 2005) (when "the requested incentive awards would be paid solely from the Claim Review Process fund, depleting the financial resources for Class Members, this Court carefully reviews this request to ensure its fairness to the Class," but when "an incentive payment to come from the attorneys' fees awarded to plaintiff's counsel need not be subject to intensive scrutiny, as the interests of the corporation, the public, and the defendants are not directly affected.").

authority in this and other circuits for the approval of incentive funds."); *Talone v. The American Osteopathic Assoc.*, No. 16-cv-04644 (NLH) (JS), 2018 WL 6318371, at *17 (D.N.J. Dec. 3, 2018) ("Courts may grant incentive awards in class action cases to particular members of the class."). Plaintiff's work in this case merits granting the requested Incentive Award.

"[P]laintiffs who serve as the representatives provide assistance and incur risks during the litigation not imposed upon any other putative class member." *Koertge v. LG Elecs. USA, Inc.*, No. 12-cv-06204 (JLL) (MAH), 2013 WL 12156331, at *4 (D.N.J. Dec. 3, 2013) (internal quotations and citations omitted). In this instance, Plaintiff sat for lengthy initial and follow-up interviews with Class Counsel and provided facts that served as the basis for the Action; searched for and produced documents relating to his transactions with PrimoHoagies and the fraudulent activity on his Payment Card accounts; reviewed major case filings; monitored the overall progress of the litigation; engaged in frequent communications with Class Counsel; attended the October 14, 2020 conference with the Court; contributed his views on settlement negotiations; made himself available to answer questions and consult with Class Counsel during each of the three settlement conferences; and approved the terms contained in the Settlement Agreement. Levis Decl. ¶ 59.

The proposed $1,000.00 Incentive Award amount is reasonable relative to incentive/service awards commonly approved in the Third Circuit and in data breach cases nationwide. *See, e.g., In re Wawa, Inc. Data Sec. Litig.*, 2022 WL 1173179, at *13 (where case that settled prior to depositions, "[t]he Court finds that the requested Class Representative service awards of $1,000 per class representative are proportionate to the efforts expended."); *Diaz v. BTG Int'l, Inc*., No. 19-cv-01664, 2021 WL 2414580, at *9 (E.D. Pa. June 14, 2021) ($10,000 service awards where plaintiffs were not deposed); *Perdue v. Hy-Vee, Inc.*, 550 F. Supp. 3d 572, 578 (C.D. Ill. 2021) ($2,000 service awards for each plaintiff in case that settled prior to depositions); *Gordon,* 2019 WL 6972701, at *2 ($2,500 service awards for each of six plaintiffs in case that settled prior to depositions); *In re Arby's Rest. Grp.*, 2019 WL 2720818, at *1 ($4,500 service awards for each of five plaintiffs in case that settled prior to depositions); *Rufo v. Alpha Recovery Corp.*, No. 15-cv-00865 (CLW), 2016 WL 8679244, at *5 (D.N.J. June 24, 2016) ($2,000 incentive award when plaintiff not deposed); *In re CertainTeed Corp. Roofing Shingle Prod. Liab. Litig.*, 269 F.R.D. 468, 476 (E.D. Pa. 2010) (awarding $5,000 if the named plaintiff was deposed, if not deposed awarding named plaintiff $2,500). In light of the comparable awards, the Court should grant the requested Incentive Award.

CONCLUSION

Class Counsel respectfully request that the Court approve PrimoHoagies' agreed upon payment of: (i) $108,481.57 for Class Counsel's attorneys' fee and (ii) $3,013.52 for Class Counsel's litigation expenses; and (iii) that the Court approve a $1,000.00 Incentive Award to Plaintiff.

Respectfully submitted,

Dated: November 10, 2022 By: */s/ Christian Levis*

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CERTIFICATE OF SERVICE

I, Christian Levis, hereby certify that on November 10, 2022, I filed and served through the Court's ECF system a true and correct copy of the foregoing document. Those attorneys who are registered with the Court's electronic filing system may access these filings through the Court's system and notice of these filings will be sent to these parties by operation of this Court's electronic filing system.

/s/ Christian Levis
Christian Levis