UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

HILARY REMIJAS and JOANNE KAO, individually and on behalf of all others similarly situated, Plaintiffs, v. THE NEIMAN MARCUS GROUP, LLC, a Delaware limited liability company, Defendant.	Case No. 1:14-cv-01735 Judge Sharon Johnson Coleman

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS

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I. INTRODUCTION

In accordance with Fed. R. Civ. P. 23(h) and this Court's November 15, 2019 Order Certifying a Settlement Class, Preliminarily Approving Class Action Settlement, and Directing Notice to the Settlement Class (Dkt. 224) (the "Preliminary Approval Order"), Plaintiffs, on behalf of the Settlement Class, move for an award of **$530,000 in fees and expenses**. This request represents a significant discount on Plaintiffs' counsel's combined lodestar of $1,071,552.50, and total incurred expenses of $65,651.15 (which, together, total $1,137,203.65).[1] Class Counsel[2] also seek service awards in the amount of $2,500 for each of the two named Plaintiffs.

The requested awards would be paid out of the ***$1.6 million common fund*** (the "Settlement Fund")[3] achieved through Class Counsel's work. Class Counsel's agreement to accept less than the firms' lodestar increases the amount of money otherwise available to the Class. The negative multiplier of 0.47 that the requested award entails underscores its reasonableness. *See In re Sears, Roebuck & Co. Front–Loading Washer Prods. Liability Litig.*, No. 16-3554, 2017 WL 3470400, at *2 (7th Cir. Aug. 14, 2017) ("*Sears Front-Loading Washer*") (awarding class counsel full lodestar despite that fees exceeded settlement's benefits to the class). Indeed, the requested fees and expenses are less than half those actually incurred litigating this matter to date.

The requested award is within the range of approval under Seventh Circuit precedent, using either the lodestar method or the percentage-of-the-fund method. The requested fee award is less

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[1] *See infra* § III.A; concurrently filed Declaration of Tina Wolfson ("Wolfson Decl.") at ¶¶ 42-55.

[2] "Class Counsel" are Tina Wolfson, Theodore W. Maya, and Robert Ahdoot of Ahdoot & Wolfson, PC, and John A. Yanchunis of Morgan & Morgan Complex Litigation Department. (Dkt. 224 § 2.)

[3] Unless otherwise stated, capitalized terms are defined in the Revised Settlement Agreement. (Dkt. 221-1.)

than Class Counsel's actual lodestar, and amounts to 33.33% of the total Settlement Fund, or 44.17% of the $1.2 million remaining in the Settlement Fund after payment of Administration Charges. The fee request also is reasonable given the enormous risks and investment required to develop and prosecute a case of this nature, and the excellent result achieved for the Class here.

As detailed below and in the supporting declaration of Tina Wolfson ("Wolfson Decl."), multiple attorneys spent copious hours over more than six years to bring this case to its current posture, vigorously litigating the case before this Court and in the Seventh Circuit. The requested award is reasonable, particularly given the excellent result for the Settlement Class achieved here.

II. BACKGROUND

A. Procedural History Preceding the Prior Settlement

In January 2014, Neiman Marcus announced that it experienced the Cybersecurity Incident, which potentially compromised the credit or debit card information of some of its customers who used a credit card or debit card at certain store locations. In its notification letter to customers disclosing the Incident, Defendant offered anyone who made a payment card purchase at Neiman Marcus between January 2013 and January 2014 one year of free credit monitoring. Before initiating this litigation, plaintiffs' counsel investigated the underlying facts, including by analyzing Defendant's public statements concerning the Cybersecurity Incident.

On March 12, 2014, Plaintiff Remijas filed her original Complaint in this action. (Dkt. 1.) Prior to this time, other complaints related to the Incident already had been filed against Neiman Marcus, including *Frank v. Neiman Marcus Group*, No. 14-cv-00233-ADS-GRB (E.D.N.Y. filed Jan. 13, 2014), and *Wong v. The Neiman Marcus Group, LLC*, No. 2:14-cv-00703-SJO-JC (C.D. Cal. filed Jan. 29, 2014). Similar actions followed, including *Chau v. Neiman Marcus Group,*

Ltd, Inc., No. 14-cv-597 (S.D. Cal. filed Mar. 14, 2014) and *Shields v. The Neiman Marcus Group, LLC*, No. 14-cv-752 (S.D. Cal. filed Apr. 1, 2014). After these actions were filed, plaintiffs' counsel in all the actions related to the Incident met and conferred in order to self-organize the cases for the sake of judicial economy and efficiency. (Wolfson Decl. ¶ 6.) Plaintiffs agreed to consolidate and proceed with their cases in the Northern District of Illinois. (*Id.* ¶ 7.) Ms. Remijas moved for leave to amend the complaint in her action to include additional plaintiffs and their claims (Dkt. 22), which the Court granted on June 2, 2014. (Dkt. 26.) Plaintiffs filed a First Amended Complaint on June 6, 2014. (Dkt. 27.)

After filing, plaintiffs' counsel's investigation continued. In this regard, plaintiffs' counsel retained and consulted with experts on data security issues, who helped analyze publicly available information concerning the Incident. Plaintiffs' counsel fought for early discovery, filing, in the *Frank* case cited above, a motion to expedite discovery and, later, a motion to compel Defendant to participate in a Rule 26 conference so that regular discovery could proceed. (*Frank*, Dkt. Nos. 5, 29.) Counsel to Plaintiff Frank also filed a motion for a protective order seeking to curtail Defendant's communications to the class. (*Frank*, Dkt. No. 4.) The *Frank* court did not rule upon those motions before the cases were effectively consolidated in this Court.

On July 2, 2014, in this action, Defendant moved to dismiss Plaintiffs' First Amended Complaint for lack of standing under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). (Dkt. 35.) Plaintiffs opposed but, on September 16, 2014, the Court granted Defendant's motion to dismiss under Rule 12(b)(1) and dismissed the action on standing grounds. (Dkt. 49.)

Plaintiffs appealed and, after oral argument, this Court's dismissal was reversed by the Seventh Circuit. *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015). The Seventh Circuit held that Plaintiffs adequately alleged standing under Article III of the U.S.

Constitution. (Dkt. 66 at 17.) Following the Seventh Circuit's reversal and denial of Neiman Marcus's petition for rehearing *en banc*, Defendant renewed its Motion to Dismiss under Rule 12(b)(6) for failure to state a claim. (Dkt. 75.) On January 13, 2016, the Court denied Defendant's Motion to Dismiss, stating that "[d]ismissal is not appropriate at this time." (Dkt. 84.) On October 26, 2016, the Court issued an Executive Committee Order, transferring the action from the Honorable James B. Zagel to the Honorable Samuel Der-Yeghiayan. (Dkt. 121.)

B. The Prior Settlement and Revised Settlement

In December 2015, the parties began discussing possible settlement, which resulted in a long series of arms' length negotiations, including mediation and numerous post-mediation discussions between counsel and the mediator. (Wolfson Decl. ¶ 12.) In connection with the mediation, Plaintiffs requested information from NMG. NMG provided information sufficient to permit Plaintiffs and Class Counsel to evaluate the claims and potential defenses and to meaningfully conduct informed settlement discussions. (*Id.* ¶ 15.) Before entering into the prior settlement agreement, Plaintiffs' counsel conducted a thorough examination, investigation, and evaluation of the relevant law and facts to assess the merits of the claims and defenses. (*Id.* ¶ 18.)

The Honorable Judge Wayne R. Andersen (Ret.) of JAMS served as the mediator in two formal all-day mediation sessions, taking place on December 22, 2015 and on March 2, 2016, as well as numerous subsequent telephonic conversations and negotiations. (*Id.* ¶ 13.) Judge Andersen is a highly respected and experienced class action mediator, who joined JAMS following more than twenty-six years on the bench, spending the most recent nineteen years as a U.S. District Judge for the Northern District of Illinois. (*Id.* ¶ 14.) During the settlement negotiations, Plaintiffs obtained substantial information from Defendant concerning the Incident. (*Id.* ¶ 15.)

Following these discussions, and extensive and detailed negotiations over the details of the prior settlement, Plaintiffs moved for preliminary approval of the prior settlement on March 17, 2017. (Dkt. 144.) In brief, the prior settlement included a settlement class of all individuals who held a payment card used to make a purchase at any Neiman Marcus store (excluding restaurant and online purchases) between July 16, 2013 and January 10, 2014 (that is, all Group 1 Class Members, Group 2 Class Members, as well as individuals whose cards were used only after the malware ceased operation on October 30, 2013). Group 1 Class Members filing valid and timely claims could recover up to $100; other class members were not eligible for a monetary recovery.

Judge Der-Yeghiayan granted preliminary approval of the prior settlement and preliminarily certified the settlement class on June 21, 2017 (Dkt. 154). The Settlement Administrator then provided the notice ordered by the Court. Objections were filed to the prior settlement (Dkt. 164, 165), on which the parties and objectors submitted briefing. Judge Der-Yeghiayan held a fairness hearing on October 26, 2017. (Dkt. 183.) On January 16, 2018, in light of Judge Der-Yeghiayan's decision to retire from the Court as of February 17, 2018, this action was reassigned to Judge Sharon Johnson Coleman. (Dkt. 188.)

On September 17, 2018, the Court issued an opinion denying final certification of the prior settlement and decertifying the settlement class, citing primarily a conflict that existed in the prior settlement between class members who shopped during the Malware Period and those who did not. (Dkt. 194 at 8-9.)

Following the Court's rejection of the prior settlement, the parties began to negotiate a revised settlement that would address the concerns raised by the Court. The parties participated in another all-day mediation with Judge Andersen on January 23, 2019, which was also attended

by counsel to one of the objectors to the prior settlement. (Wolfson Decl. ¶ 24.) The parties reached agreement as to all material terms of the Revised Settlement on June 12, 2019 and thereafter continued to negotiate with that objector's counsel, including in communications through Judge Andersen. (Wolfson Decl. ¶ 26.) After those negotiations failed to bear fruit, the parties determined to seek approval of the Revised Settlement without the objector's counsel's agreement.

The parties designed the Revised Settlement to address each of the Court's concerns with the prior settlement, including by:

- Narrowing the settlement class to exclude those whose cards were not used at one of Defendant's stores during the Malware Period, thus resolving the "fundamental" conflict identified by the Court and eliminating the need for a settlement class representative who shopped exclusively outside the Malware Period;

- Making all settlement class members eligible for significant monetary relief, including those class members whose cards were not used at a store when the malware was actually operating; and

- Effectively doubling notice efforts by providing an entirely new round of notice to settlement class members, while still honoring claims filed under the previous settlement.

Plaintiffs filed a Second Amended Complaint that narrowed the Settlement Class definition and removed as proposed class representatives two individuals (Melissa Frank and Debbie Farnoush) who no longer are class members under the narrowed settlement class definition. (Dkt. 213.) The Second Amended Complaint also removes allegations that the malware continued to operate after October 30, 2013, which information gleaned since the original complaint was filed confirms to be true. (*Id.*)

C. Summary of the Revised Settlement's Terms

The terms of the Revised Settlement are set forth in detail in the concurrently filed Motion for Final Approval. In sum, the Settlement features a $1.6 million Settlement Fund. (Dkt. 221-1, ¶ 49.) Up to $400,000 of the Settlement Fund will be used to pay charges and costs invoiced or charged by the Settlement Administrator arising from implementation of the notice program and administration of the Settlement, which the parties expect will amount to $400,000. (*Id*. ¶ 50.)

The remaining $1.2 million of the Settlement Fund will be used to pay eligible claimants who submit valid and timely claims, any taxes due, any service awards to Plaintiffs and attorneys' fees and expenses ordered by the court. (*Id*. ¶ 51.) Each Group 1 Class Member who submits a valid Claim will receive up to $100, and each Group 2 Class Member who submits a valid Claim will receive up to $25. (*Id*. ¶ 53(b).)

Also as explained in the Final Approval Motion, the Settlement features a carefully designed claims process, under which Claimants need only answer two questions to submit a claim. All of the information requested is easily ascertainable from billing records that claimants may have in their files or should be able to quickly obtain from the websites maintained by the issuers of their payment cards. Unlike other data breach class action settlements, claimants need not collect or submit any documents to the settlement administrator in order to obtain a monetary benefit, which would substantially increase the burden on potential claimants.

Claims submitted under the prior settlement will be treated as though submitted under the Revised Settlement; no further action by such claimants is required. Each class member who submits a valid and timely claim—including those who submitted valid and timely claims under the prior settlement—are eligible to receive a monetary payment. The Settlement Administrator will pay up to $100 to each Group 1 Class Member who submitted a valid and timely claim (the

same relief offered to them under the prior settlement) and up to $25 to each Group 2 Class Member who submitted a valid and timely claim. In the event that the aggregate value of valid and timely claims exceeds the amount remaining in the Settlement Payments Fund after taxes, service awards, and attorneys' fees and expenses are paid, then the cash payment provided to each class member who submitted a valid and timely claim will be reduced on a *pro rata* basis, and such class members will be paid a *pro rata* amount that exhausts the Settlement Payments Fund.

In the event that there are funds left in the Settlement Payments Fund after all Group 1 Class Members who submitted a valid and timely claim have been paid $100, and all Group 2 Class Members who submitted a valid and timely claim have been paid $25, then the remaining funds will be distributed as follows: First, such funds will be used to pay any costs of providing class notice and administering the Revised Settlement in excess of $400,000. Second, if there are funds remaining in the Settlement Payments Fund after payment of any such excess notice and administration costs, the Settlement Administrator will estimate the cost of sending a check to each class member who could have submitted a valid claim but did not for whom Defendant has a mailing address, and subtract that amount from the remaining funds. After subtracting this cost, any remaining amounts will be distributed to such class members on a *pro rata* basis, provided that each such distribution would exceed $5.00. Third, if there are funds remaining in the Settlement Payments Fund after any such distribution, such remaining funds shall be donated to a charitable organization chosen jointly by the Parties. (*Id.* ¶ 53.)

The Revised Settlement Agreement provides that Class Counsel will make their application for reasonable attorneys' fees, costs, and expenses at least 14 days before the Objection Deadline. (*Id.* ¶ 78.) Class counsel agree not to seek an award of attorneys' fees, costs, and expenses in excess of five hundred and thirty thousand dollars ($530,000). (*Id.*) This

maximum amount is stated on the relevant notice forms. (*Id*. Exs. D, G.) Neiman Marcus reserves the right to object to Class Counsel's request for attorneys' fees, costs, and expenses. (*Id*. ¶ 78.)

III. ARGUMENT

A. Counsel Merit a Recovery of Their Lodestar and Expenses

"[T]he district judge has discretion to choose between the lodestar and percentage-of-fund approaches" to compute the appropriate fee award, but the Court need apply only one of these methods for computing fees. *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998) ("[W]e have never ordered the district judge to ensure that the lodestar result mimics that of the percentage approach."); *see also* Fed. R. Civ. P. 23 ("In a certified class action, the court may award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement."); *Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014) ("[T]he choice of methods is discretionary.").

Indeed, in appropriate cases the Seventh Circuit has even approved lodestar-based awards of attorneys' fees that exceed the amount recovered by the class at issue. *See Sears Front-Loading Washer*, 2017 WL 3470400 at *2. Of course, Class Counsel here seeks no such award, and even measured using the percentage-of-the-fund approach, the requested amount is within the range explicitly endorsed as approvable by the Seventh Circuit.

To calculate the lodestar, counsel's reasonable hours expended on the litigation are multiplied by counsel's reasonable rates. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986). This base lodestar often is adjusted upward to reflect the contingent nature of the attorneys' undertaking based on the likelihood of success in obtaining a judgment or settlement measured at the time the attorneys began work on the case. *See Florin v.*

Nationsbank of Ga., 34 F.3d 560, 565 (7th Cir. 1994) ("[A] risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel 'had no sure source of compensation for their services.'") (citations omitted); *Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998) ("The unenhanced lodestar usually accounts for the difficulty of prevailing on the merits, . . . [b]ut the unenhanced lodestar does not reflect . . . the fact that at the outset of the litigation, no matter how dazzling the array of legal talent or how many hours will eventually be logged, there is nonetheless the possibility of no recovery.").

The lodestar and expenses incurred by Plaintiffs' counsel supporting the requested award can be summarized as follows:

Firm	**Hours**	**Lodestar**	**Expenses**
Ahdoot & Wolfson, PC	962.5	$702,428.20	$48,256.00
Morgan & Morgan	123.5	$114,341.80	$14,835.91
Siprut PC	297.9	$186,112.50	$1,039.24
Law Offices of Wendy Stein	176.1	$44,025.00	$0.00
Heninger Garrison Davis, LLC	65	$24,645.00	$1,520.00
Subtotals:	1,625	$1,071,552.50	$65,651.15
Total Fees and Expenses:			**$1,137,203.65**

(Wolfson Decl. ¶¶ 42-55.)

More detail regarding each firms' time and expenditures is included in the supporting Declarations of Tina Wolfson and of John Yanchunis. (*Id.*; Dkt. 161 ¶¶ 19-20; concurrently filed Declaration of John Yanchunis ("Yanchunis Decl.").)

These services were reasonable and necessary to litigate this case effectively and to the reach the terms of the proposed Settlement as set forth in the Settlement Agreement. These attorneys invested time such that their requested compensation from this Settlement represents a *negative* multiplier — indeed, less than half — of their actual lodestar and expenses. Given that

Courts regularly approve *positive* lodestar multipliers, the negative multiplier attendant to the requested award demonstrates its reasonableness. *See, e.g.*, *Sears Front-Loading Washer*, 2017 WL 3470400 at *2 ("[T]he average multiplier in this circuit when the court awards a multiplier has been 1.85."); *Standard Iron Works v. Arcelormittal*, No. 08-cv-5214, 2014 U.S. Dist. LEXIS 162557, at *10 (N.D. Ill. Oct. 22, 2014) (awarding multiplier of 1.97 as "well within the range of reasonable multipliers awarded in similar contingent cases").

It was only through the expenditure of the time and money summarized above that Class Counsel was able to secure the Settlement for the benefit of the Class. These attorneys devoted enormous time and money to the prosecution of this action, including:

- extensive, independent factual investigation, before and after the original independent complaints were filed, into the data breach, the exposure of Plaintiffs' PII, and Plaintiffs' damages including fraud and attempted fraud and identity theft;
- self-organizing and coordinating their combined legal talents for the benefit of the Class, bringing the various lawsuits then pending in multiple districts here;
- retaining and consulting with experts in data security and data breaches;
- preparation of and research for a consolidated, nationwide Class Action Complaint;
- opposing Defendant's first motion to dismiss (Dkts. 35-36, 39-41, 45);
- litigating a precedent-setting appeal before the Seventh Circuit, which resulted in reversal of the trial court's order granting Defendant's motion to dismiss (Dkts. 50-66);
- defending against a renewed motion to dismiss in this Court after the Seventh Circuit's remand, this time prevailing against Defendant's efforts to dismiss the case on the pleadings (Dkts. 75, 80-84);
- engaging in a long series of arms' length negotiations, including mediation and numerous post-mediation discussions between counsel and the mediator;

- requesting and reviewing information from Defendant sufficient to allow Class Counsel to evaluate the value of the claims and the viability of potential defenses;
- painstaking negotiation of the prior settlement agreement and its eight exhibits, the notice program, and the notice forms;
- researching and drafting the preliminary approval and final approval motions concerning that prior settlement (Dkts. 145-48, 221);
- overseeing dissemination of notice with the Settlement Administrator in connection with the prior settlement;
- negotiating the Revised Settlement after the Court denied final approval to the prior settlement, including another full-day mediation and extensive additional negotiations with Defendant and with objector's counsel;
- preparing the preliminary approval papers in support of the current Revised Settlement and arguing in favor of preliminary approval before this Court;
- working with Defendant and the Settlement Administrator to ensure that notice was disseminated in accordance with the Revised Settlement, and negotiating issues concerning the Settlement Website's portal for preliminary assessment of Claims, and extensions of the Notice Deadline required in connection with that process (Dkts. 225-30); and
- preparing the present motion as well as the concurrently filed Motion for Final Approval, along with the supporting declarations.

(Wolfson Decl. ¶¶ 3-28.)

Notably, the work is not done: Class Counsel will undoubtedly continue to incur significant additional time and expense in seeing this Settlement through to its conclusion, including working with the Settlement Administrator, answering questions from Class Members, arguing final approval, analyzing and responding to any objections, litigating possible appeals, and continuing to assist class members with any claims. (*See* Wolfson Decl. ¶ 56.)

The Court-appointed Class Counsel are nationally recognized for the successful prosecution of complex class action litigation. (*See* Wolfson Decl., Ex. A; Dkt. 161 ¶¶ 1-14.) As set forth above, Class Counsel worked expeditiously and efficiently, reflecting their knowledge and practical experience in litigating claims of this nature. Their expertise was the primary factor in bringing about the expeditious resolution of this litigation on extremely favorable terms for the Settlement Class.

B. The Percentage-of-Fund Method also Supports the Requested Award

1. The *Redman* Ratio Supports the Fee Request.

As mentioned above, the Court has discretion to award fees based on either the lodestar or the percentage-of-fund methods. Although a "district court should compare attorney fees to what is actually recovered by the class," the comparison is not necessarily controlling, and sometimes an award of attorney fees may even exceed the amount recovered by the class. *Sears Front-Loading Washer*, 2017 WL 3470400 at *2. Although Class Counsel ask to be awarded their fees and expenses based on their reasonable lodestar, which exceeds the requested award, a comparison of the requested fees and expenses to the Class's recovery underscores the reasonableness of the request.

In conducting the percentage-of-fund analysis, the "ratio that is relevant . . . is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman*, 768 F.3d at 630; *Pearson*, 772 F.3d at 781 (quoting same). Administration expenses are deducted from the Settlement Fund when calculating the *Redman* ratio. *Id.* ("[A]dministrative costs should not have been included in calculating the division of the spoils between class counsel and class members. Those costs are part of the settlement but not part of the value received from the settlement by the members of the class.") (quoting *Redman*, 768 F.3d at 630).

The Seventh Circuit has emphasized that, in awarding fees under the percentage-of-fund method, "a third or at most a half of the total amount of money going to class members and their counsel" is an appropriate aware. *Pearson*, 772 F.3d at 782. The award requested here amounts to approximately 44% of the Settlement Fund remaining after administrative costs are deducted, and thus satisfies this approach.

This is not a "megafund" settlement, amounting to tens or hundreds of millions of dollars, but the Seventh Circuit's "sliding scale" approach to the percentage-of-fund analysis in such cases is instructive here in that it recognizes that, the smaller the overall Class recovery, the higher the percentage of that fund are attorneys' fees likely to represent. *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 980 (7th Cir. 2003) ("*Synthroid II*") (awarding counsel "30% of the first $10 million and 25% of the next $10 million"). Indeed, in *Sears, Roebuck & Co. Front–Loading Washer Prods. Liability Litig.*, which involved a much smaller payout to the class than that anticipated here, the Seventh Circuit actually awarded counsel more than the class received. 2017 WL 3470400 at *1-2 (awarding $2.7 million to class counsel where class members would receive no more than $900,000 from settlement).

2. The *Synthroid* Factors Support Plaintiffs' Fee Request.

The Seventh Circuit instructs district courts to award fees to class counsel based on the "market rate," by "approximating the terms that would have been agreed to *ex ante*, had negotiations occurred." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) ("*Synthroid I*"); *see also, e.g.*, *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011) ("When attorney's fees are deducted from class damages, the district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys."). The "market rate for legal fees depends [1] in part on the risk of nonpayment a firm agrees to bear, [2] in part on the

quality of its performance, [3] in part on the amount of work necessary to resolve the litigation, and [4] in part on the stakes of the case." *Synthroid I*, 264 F.3d at 721. "[W]hen deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Id.* at 718.

a. The Risk of Nonpayment Was Significant

At the outset of this litigation, Counsel agreed to represent their clients and the Class on a contingency basis knowing that there was a real possibility that these cases could be litigated for years with no recovery for the time, effort, and costs expended in furtherance of the matter. *See In re Transunion Corp. Priv. Litig.*, 629 F.3d 741, 746 (7th Cir. 2011) (stating that "within the set of colorable legal claims, a higher risk of loss does argue for a higher fee"); *see also* Wolfson Decl. ¶ 32; Dkt. 161, ¶ 17.

At one point, this action was dismissed. Though the prospects for a successful outcome at that time were not good, Class Counsel fought on, and ultimately prevailed before the Seventh Circuit, breathing new life into the case. Even then, the Seventh Circuit recognized that "the plaintiffs may eventually not be able to provide an adequate factual basis for" their claimed damages. *Remijas*, 794 F.3d at 694. Assuming Plaintiffs were able to overcome such obstacles and survive summary judgment briefing, before they had a chance to win at trial they would have had to obtain class certification, in the face of arguments from Defendant to the effect that different members of the Class suffered different, or different degrees of, harm. (Wolfson Decl. ¶ 16.)

b. Agreement Between Plaintiffs and Their Counsel.

A court should consider an actual agreement between the parties when assessing a fee request. *See Synthroid I*, 264 F.3d at 718. The client representation agreements between Plaintiffs

and their counsel provide for legal services to be provided on a contingent basis to be determined by the Court without generally specifying a specific percentage for payment of attorneys' fees. (Wolfson Decl. ¶ 32.) Accordingly this factor supports Class Counsel's fee request.

c. The Quality of Class Counsel's Performance.

A high level of skill and relevant experience was required to prosecute these matters. (*See generally* Wolfson Decl., Ex. A) Class Counsel faced fierce opposition from Defendant who fought vigorously throughout this litigation, before this Court and in the Seventh Circuit. Despite repeated setbacks and palpable risks and obstacles facing them, Class Counsel were able to negotiate this meaningful Settlement. (*Id.*)

Class Counsel respectfully submit that they conducted themselves in this action in a professional, diligent, and efficient manner. Moreover, in litigating this case, Class Counsel focused on the prosecution of this case forgoing other potentially more lucrative cases. (*See id.* ¶ 32; Dkt. 161 ¶¶ 17-18.) In this case, the lead attorneys as Class Counsel allocated tasks internally and within the attorneys with filed cases to prevent over-lawyering and inefficiency. (Wolfson Decl. ¶ 47; Dkt. 161, ¶ 18.) Lead Counsel performed the bulk of the work in this case, all fully familiar with the factual and legal issues presented by this litigation and highly experienced in consumer protection litigation. This division of labor permitted the work to be done efficiently, resulting in an economy of service and avoiding duplication of effort. (Wolfson Decl. ¶ 47; Dkt. 161, ¶¶ 17-18.)

"The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work." *Fleisher v. Phx. Life Ins. Co.*, Nos. 11-cv-8405, 14-cv-8714, 2015 U.S. Dist. LEXIS 121574, at *71 (S.D.N.Y. Sep. 9, 2015); *see also In re Vitamins Antitrust Litig.*, Misc. No. 99-197 (TFH), MDL No. 1285, 2001 U.S. Dist. LEXIS 25067, at *62 (D.D.C. July 13, 2001) ("The

experience, skill and professionalism of counsel and the performance and quality of opposing counsel all weigh in favor of the requested fee."); *In re Pub. Serv. Co. Sec. Litig.*, 125 F.R.D. 480, 483 (S.D. Ind. 1988) (finding class counsel "achieved a fair result for the plaintiffs in light of the complexities of the litigation and the quality of the defense"). Defendant was well represented by one of the country's most prestigious and diligent law firms, Sidley Austin. The ability of Class Counsel to obtain favorable results in the face of formidable legal opposition further evidences the superior quality of their work and of the proposed Settlement.

d. The Amount of Work Necessary to Resolve This Litigation.

As demonstrated by the negative multiplier on Plaintiffs' counsel's lodestar that the current request represents, counsel have spent some 1,625 hours advancing this matter. (*See* Wolfson Decl. ¶¶ 42-55; Dkt. 161, ¶ 19.) Without question, Class Counsel will spend significant hours and incur additional expenses before the case concludes—indeed, should a professional objector appeal, Class Counsel could be back before the Seventh Circuit—and continue to represent the class members in fulfilling the Settlement Agreement. Accordingly, this factor also favors approval of the requested award of attorneys' fees and expenses.

e. The Stakes of This Litigation.

In light of the Seventh Circuit's opinion on appeal in this case—secured through Class Counsel's diligent and zealous advocacy in the face of what at the time looked like a trend among courts (particularly in this District) toward dismissing such cases for lack of Article III standing—this case became precedent-setting. The law relating to liability for such data breaches is still developing but, at the time these actions were filed, this represented an even newer type of litigation. As demonstrated by the history of this case and its journey to the Seventh Circuit, this litigation was risky and entailed high stakes. Despite the risks, Class Counsel obtained

demonstrable benefits from the proposed Settlement.

The timeliness of class relief is also particularly important where, as here, Plaintiffs and the Settlement Class members already have waited years to receive compensation, if any, and would have had to wait more years had the case proceeded through trial and appeal. The class would be exposed to the attendant risks of litigation, including the uncertainties and difficulties pertaining to a disputed class certification proceeding, a likely summary judgment motion, the length of time necessary to see this matter through to trial, the uncertainties of the outcome of the litigation, and the likelihood that resolution of the class claims, whenever and however determined, would be appealed. (Wolfson Decl. ¶ 62.) Thus, the practical-minded approach of Class Counsel to achieve earlier benefits for the Settlement Class should also support the attorneys' fee award requested here.

C. Class Counsel's Expenses Are Reasonable.

Class Counsel incurred high expenses litigating this matter, with no assurance that the investment would pay off. The majority of the $65,651.15 in expenses consists of the mediator's fees, travel costs (frequently between California and Chicago), and expert witness fees, in addition to less expensive items such as research and filing fees. (*See e.g.* Wolfson Decl. ¶¶ 45-46.) These expenses were necessary in order to litigate the case effectively and reach the present Settlement. (*Id.*) "It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses, which includes such things as expert witness costs; computerized research; court reporters; travel expense; copy, phone and facsimile expenses and mediation." *Abbott v. Lockheed Martin Corp.*, No. 06–cv–701–MJR–DGW, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015); *City of Greenville v. Syngenta Crop Protection, Inc.*, 904 F. Supp. 2d 902, 910 (S.D. Ill. 2012) ("[T]he costs sought here are of the type that are routinely

reimbursed by paying clients, such as experts' fees, other consulting fees, deposition expenses, travel, and photocopying costs.").

D. The Requested Service Awards to Plaintiffs Are Appropriate.

Each of the Settlement Class Representatives took the initiative to commence this litigation, assisted in case development, stayed apprised throughout the litigation, and accepted risks and responsibilities individually and on behalf of others similarly situated. Therefore, subject to Court approval and in recognition of these efforts, the Revised Settlement Agreement allows each Settlement Class Representative to apply for a service award of up to two thousand five hundred dollars ($2,500), no later than 14 days prior to the Objection Deadline, to be paid out of the Settlement Fund. (Dkt. 221-1, ¶ 77.)

Whether such an award "is proper, and if so, in what amount," turns on "'relevant factors include[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.'" *In re Sw. Voucher Litig.*, Case No. 11-cv-8176, 2013 U.S. Dist. LEXIS 120735, at *31 (N.D. Ill. Aug. 26, 2013). Class Counsel respectfully submit the service awards in the nominal amount of $2,500 to each Plaintiff are appropriate here. Each of the Plaintiffs was instrumental in assisting Class Counsel with the initial investigation of their claims and the extent of damages attributable to Defendant's conduct.

Because a plaintiff is essential to any class action, "[i]ncentive awards are justified when necessary to induce individuals to become named representatives." *Synthroid* I, 264 F.3d at 722–23. "Small incentive awards, which serve as premiums to any claims-based recovery from the Settlement, promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits." *Yarrington v. Solvay Pharmaceuticals, Inc.*, 697 F. Supp. 2d 1057,

1068 (D. Minn 2010). In deciding whether an incentive award is reasonable, factors relevant to the court's inquiry include the actions the plaintiff has taken to protect the interests of the class, the amount of time and effort the plaintiff expended in pursuing the litigation, and the degree to which the class has benefitted from those actions. *Cook*, 142 F.3d at 1016.

These factors easily justify the proposed service awards here. In the first place, an award of some kind is needed to induce individuals to come forward and prosecute the claims. *See Synthroid I*, 264 F.3d at 722-23. Plaintiffs reviewed case documents, stayed in regular contact with Class Counsel, and responded to all inquiries they were called to answer. (Wolfson Decl. ¶ 19.) Given Plaintiffs' efforts, a $2,500 service award, which is in line with or less than other such awards in this District, is appropriate. *See Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 239 (N.D. Ill. 2016) (noting that courts in this district "have recently and routinely granted $5,000 incentive awards to named plaintiffs").

IV. CONCLUSION

For all of the reasons stated above, Class Counsel respectfully request that the Court enter an order awarding Class Counsel $530,000 for fees and expenses, where their combined lodestar amounts to $1,071,552.50, they incurred expenses in the amount of $65,651.15, for a total of $1,137,203.65. In addition, both Plaintiffs ask that they be awarded a service award of $2,500, for a total of $5,000.

Dated: May 1, 2020

Respectfully submitted,

/s/ Theodore Maya

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 1, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court in the United States District Court for the Northern District of Illinois by using the CM/ECF system, which served copies on all interested parties registered for electronic service.

/s/ Theodore Maya
Theodore Maya