IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ANDE KYLES and DIANE TAYLOR, on behalf of themselves and all others similarly situated, Plaintiffs, v. STEIN MART , INC., a Florida corporation, and SOCIAL ANNEX, INC. (d/b/a, ANNEX CLOUD), a Delaware corporation, Defendants.	CASE NO. 1:19-cv-00483-CFC **CLASS ACTION** **JURY TRIAL DEMANDED**

BRIEF IN SUPPORT OF PLAINTIFFS' UNOPPOSED
MOTION FOR ATTORNEYS' FEES, EXPENSES AND INCENTIVE AWARDS

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RELEVANT FACTUAL BACKGROUND 1

A. Plaintiffs' Claims 1

B. History of the Litigation 2

1. The Complaint 2

2. Briefing on Defendants' Motions to Dismiss 2

C. Settlement Negotiations 3

III. ARGUMENT 4

A. The Fee Request Should Be Evaluated Under the Lodestar Method 6

B. Class Counsel's Lodestar Figure is Reasonable 7

C. The Gunter Factors Confirm the Reasonableness of the Fee Request 10

1. The Size of the Fund Created and the Number of Persons Benefitted 11

2. The Presence or Absence of Substantial Objections by Members of the Class 12

3. The Skill and Efficiency of the Attorneys Involved 12

4. The Complexity and Duration of the Litigation 13

5. The Risk of Nonpayment 13

6. The Amount of Time Devoted to the Case by Class Counsel 15

7. The Awards in Similar Cases 15

D. Plaintiffs' Counsel's Expenses Should Be Approved 16

E. The Requested Incentive Awards Should be Approved 17

IV. CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Alessandro Demarco v. Avalon Bay Communities, Inc.,
No. 2:15-628-JLL-JAD (D.N.J. July 11, 2017), D.I. 223 9

In re Anthem, Inc. Data Breach Litig.,
No. 15-MD-02617-LHK, 2018 U.S. Dist. LEXIS 140137 (N.D. Cal. Aug. 17, 2018) 14

In re AT&T Corp. Secs. Litig.,
455 F.3d 160 (3d Cir. 2006)..6, 11

Boone v. City of Phila.,
668 F. Supp. 2d 693 (E.D. Pa. 2009) 13

Bray et al v. GameStop Corp.,
Civ. No. 1:17-cv-01365-JEJ 7

Bray v. Gamestop Corp.,
No. 1:17-cv-01365-JEJ, 2018 U.S. Dist. LEXIS 226221 (D. Del. Dec. 19, 2018) 15, 18

Careccio v. BMW of N. Am. LLC,
Case No. 08-2619, 2010 U.S. Dist. LEXIS 42063 (D.N.J. Apr. 29, 2010) 16

In re Cendant Corp. PRIDES Litig.,
243 F.3d 722 (3d Cir. 2001)..6

Chambers v. Whirlpool Corp.,
214 F. Supp. 3d 877, 889 (C.D. Cal. 2016) 9

Charles v. Goodyear Tire & Rubber Co.,
976 F. Supp. 321 (D.N.J. 1997) 7

In re Elk Cross Timbers Decking Marketing, Sales Practices and Prods. Liab. Litig.,
No. 15-0018 (JLL) (JAD) (D.N.J Feb 27, 2017), Dkt. No. 126 at 2 9

Foltz v. Del. State Univ.,
70 F. Supp. 3d 699, 701-02 (D. Del. 2014) 4

In re Google Inc.,
No. 12-MD-2358 (SLR), 2014 U.S. Dist. LEXIS 196444 (D. Del. Apr. 1, 2014) 7, 17

Gordon v. Chipotle Mexican Grill, Inc.,
No. 17-cv-01415-CMA-SKC, 2019 U.S. Dist. LEXIS 215430 (D. Colo. Dec. 16, 2019) 15, 18

Gunter v. Ridgewood Energy Corp.,
223 F.3d 190 (3d Cir. 2000)....................5, 6, 10, 11

In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.,
293 F.R.D. 21 (D. Me. 2013)....................14

Hapka v. Carecentrix, Inc.,
No. 2:16-cv-02372-KGG, 2018 U.S. Dist. LEXIS 68186 (D. Kan. Feb. 15, 2018) 10

Haught v. Summit Res., LLC,
No. 1:15-cv-0069, 2016 U.S. Dist. LEXIS 45054 (M.D. Pa. Apr. 4, 2016)....................6, 16, 17

Henderson v. Volvo Cars of N. Am., LLC,
No. 09-4146 (CCC), 2013 U.S. Dist. LEXIS 46291 (D.N.J. Mar. 22, 2013).................... *passim*

In re Ins. Brokerage Antitrust Litig.,
579 F.3d 241 (3d Cir. 2009)....................11

In re Ins. Brokerage Antitrust Litig.,
No. 04-5184 (CCC), 2012 U.S. Dist. LEXIS 46496 (D.N.J. Mar. 30, 2012)....................14, 16

In re LG/Zenith Rear Projection TV Class Action Litig.,
No. 06-5609 (JLL), 2009 U.S. Dist. LEXIS 13568 (D.N.J. Feb. 18, 2009)....................17

McCoy v. Health Net, Inc.,
569 F. Supp. 2d 448 (D.N.J. 2008)....................13, 15

Milliron v. T-Mobile United States,
423 Fed. Appx. 131 (3d Cir. 2011)....................6

O'Keefe v. Mercedes-Benz United States, LLC,
214 F.R.D. 266 (E.D. Pa. 2003)....................14

In re Philips/Magnavox TV Litig.,
No. 09-3072 (CCC), 2012 U.S. Dist. LEXIS 67287 (D.N.J. May 14, 2012).................... *passim*

Planned Parenthood of Cent. New Jersey v. Attorney General of the State of New Jersey,
297 F.3d 253 (3d Cir. 2002)....................8

Reinhart v. Lucent Techs., Inc. (In re Lucent Techs., Inc. Sec. Litig.),
327 F. Supp. 2d 426 (D.N.J. 2004)....................12

In re Rite Aid Corp. Sec. Litig.,
396 F.3d 294 (3d Cir. 2005)........6, 13

Roxberry v. Snyders-Lance, Inc.,
No. 1:16-cv-02009-JEJ, 2017 U.S. Dist. LEXIS 193573 (M.D. Pa. Nov. 15, 2017)........16, 17

Sanders v. City of Phila. & First Judicial Dist. of Pa.,
No. 15-0868, 2016 U.S. Dist. LEXIS 35388 (E.D. Pa. Mar. 17, 2016)........12

In re Schering-Plough/Merck Merger Litig.,
No. 09-cv-1099 (DMC), 2010 U.S. Dist. LEXIS 29121 (D.N.J. Mar. 26, 2010)........7

In re Schnuck Markets, Inc. Consumer Data Security Breach Litigation,
No. 4:13-MD-02470-JAR (E.D. Mo. Jan. 23, 2015), D.I. 41........16

Stalcup v. Schlage Lock Co.,
505 F. Supp. 2d 704 (D. Colo. 2007)........13

T.A.N. v. PNI Digital Media, Inc.,
No. 2:16-CV-00132 (S.D. Ga. Dec. 1, 2017), D.I. 46........15

OTHER AUTHORITIES

FED. R. CIV. P. 23(b)(3)s........14

I. INTRODUCTION

Plaintiffs Ande Kyles and Diane Taylor ("Plaintiffs") submit this Brief in support of their Motion for Attorneys' Fees, Expenses and Incentive Awards. In accordance with the preliminary approval order (D.I. 28), Plaintiffs have filed contemporaneously herewith a motion for final approval of the settlement and for certification of a settlement class. The relief sought in this motion is unopposed by Defendants Stein Mart, Inc. ("Stein Mart") and Social Annex, Inc. (d/b/a Annex Cloud) ("Annex") (collectively, "Defendants").

As detailed below, the Court should grant this motion because the attorneys' fees sought are reasonable under the circumstances and pursuant to Third Circuit case law; the litigation expenses incurred were reasonable and necessary to the prosecution of this case; and the incentive awards are also reasonable and appropriate to compensate the two named Plaintiffs for their work on this matter. Moreover, the total sum earmarked for both Plaintiffs' attorneys' fees and their expenses—$300,000—is an amount the parties negotiated in arm's length, separate and apart from, and in the days following, their mediation, only *after* all of the other material terms of the settlement had been agreed upon. This separate payment will not decrease the relief being made available to the class under the Settlement Agreement. *See* D.I. 26-1 (the Parties' Settlement Agreement filed in conjunction with Plaintiffs' Unopposed Motion for Preliminary Approval by the parties) ("SA" or "Settlement"), at ¶7.5. For the reasons set forth below, Plaintiffs respectfully request that their motion be granted.

II. RELEVANT FACTUAL BACKGROUND

A. Plaintiffs' Claims

Plaintiffs are consumers whose personal and non-public information, including their names, addresses, and credit card and debit card numbers, expiration dates, and other information was

allegedly compromised in a security breach due to Defendants' alleged failure to adequately safeguard it (the "Data Breach"). The Complaint sought to represent a class consisting of all consumers who were notified by Stein Mart that they made purchases on Stein Mart's online store using their credit, debit, or other payment card on certain dates between December 28, 2017 and July 9, 2018.

B. History of the Litigation

1. *The Complaint*

On March 8, 2019, Plaintiffs filed their Complaint alleging that Defendants failed to (1) take adequate measures to protect their Personal Information (*see, e.g.*, ¶¶ 4-7, 39, 41, 58, 60, 69-70, 92, 102, 110, 120, 123, 145, 152)[1]; (2) disclose that their systems and/or websites were susceptible to a cyber-attack (*id.*); and (3) inform Plaintiffs and the Class that their information was compromised for months after learning of the Data Breach (*see, e.g.*, ¶¶ 42, 46-47, 55). Defendants reported that between at least December 28, 2017 and July 9, 2018, unauthorized users were able to access Annex's system on at least five different dates (May 19, June 1, June 5, and July 8-9 2018), and had the ability to access, view, and download Plaintiffs and the Class' Personal Information. ¶¶ 1, 42-57, 51. Plaintiffs and Class members are consumers whose non-public Personal Information was allegedly compromised in the Data Breach.

2. *Briefing on Defendants' Motions to Dismiss*

On May 10, 2019, Annex filed a Motion to Dismiss Plaintiffs' Class Action Complaint (D.I. 14) and supporting brief (D.I. 15), arguing that, among other things, the Economic Loss Rule barred Plaintiffs' negligence claims, Plaintiffs' state statutory claims were deficient, and Plaintiff

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[1] Unless otherwise indicated, all references herein to "¶___" refer to the enumerated paragraphs of Plaintiffs' Class Action Complaint, D.I. 1.

Kyles lacks Article III standing. Stein Mart also filed a Motion to Dismiss Class Action Complaint (D.I. 16) and supporting brief (D.I. 17) arguing that, among other things, the Court lacked personal jurisdiction, Plaintiffs failed to allege actual damages, and that the Economic Loss Rule barred Plaintiffs' negligence claims. On June 7, Plaintiffs filed a single omnibus brief in response to both Defendants' motions to dismiss (D.I. 20). On July 1, 2019, both Defendants filed separate reply briefs in support of their respective motions to dismiss. *See* D.I. 21 (Annex reply); D.I. 22 (Stein Mart reply). On January 29, 2020, the Court administratively denied Defendants' motions to dismiss without prejudice to renew. D.I. 24.[2]

C. Settlement Negotiations

Subsequent to the filing of Defendants' Motions to Dismiss and Plaintiffs' Opposition thereto, the parties commenced discussions regarding the possibility of a negotiated settlement on behalf of Plaintiffs and the Class. *See* Johns Declaration in Support of Plaintiffs' Unopposed Motion for Attorneys' Fees, Expenses and Incentive Awards ("Johns Decl."), attached as Exhibit 1 hereto, at ¶ 4. On July 1, counsel for all parties conducted a conference call to begin discussions of a possible resolution. *Id*. During that call, Plaintiffs' counsel suggested that they would send defense counsel a letter containing Plaintiffs' proposed settlement terms. *Id.* Thereafter, on July 3, Plaintiffs' counsel sent a written settlement demand to defense counsel. On September 6, defense counsel sent a settlement counterproposal to Plaintiffs' counsel. *Id*. In early September 2019, the parties agreed to seek the aid of private mediator Bennett Picker of Stradley Ronon Stevens & Young, LLP in Philadelphia to continue settlement negotiations. *Id*. ¶ 5.

[2] On December 13, 2019, the parties advised the Court that they had participated in a mediation and reached an agreement in principle to settle all claims, and would be working to execute a settlement agreement that memorializes the parties' agreement.

In anticipation of mediation, on November 6, 2019, Plaintiffs served a set of document requests upon both Defendants, requesting information that would aid them in evaluating a possible resolution of their claims. *Id.* ¶ 6. In response thereto, both Defendants produced to Plaintiffs certain relevant information, including but not limited to: an Investigation Report on Annex's investigation of the Data Breach, Stein Mart's insurance policy providing coverage for data breach incidents, Stein Mart's factual timeline of the Data Breach, documents indicating the number of orders placed and payment cards transacted on Stein Mart's online store during the Data Breach period, and documents identifying 108,335 individuals who Stein Mart notified of the breach. *Id*.

On November 14, 2019, the parties engaged in a full-day mediation session with Mr. Picker. *Id*. ¶ 7. With the significant assistance of Mr. Picker, the parties reached agreement on the material terms of the settlement, with the exception of the amount of Plaintiffs' attorneys' fees and expenses. *Id*. This issue was not discussed until after the parties had reached agreement on the material substantive terms of the settlement. *Id.* While the parties were unable to reach agreement on this term at the mediation, counsel for both parties continued to directly negotiate the amount of Plaintiffs' attorneys' fees and expenses. They were ultimately able to reach an agreement on that term on December 13, 2019. *Id*.

On March 25, 2020, the Court issued an Amended Order granting preliminary approval of the settlement, authorizing the dissemination of class notice, and scheduling a final approval hearing for July 16, 2020, which was subsequently rescheduled for August 10, 2020. *See* D.I. 28 & 30.

III. ARGUMENT

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement …." *Foltz v. Del. State Univ.,* 70 F.

Supp. 3d 699, 701-02 (D. Del. 2014) (quoting FED. R. CIV. P. 23(h)). "The awarding of fees is within the discretion of the Court, so long as the Court employs the proper legal standards, follows the proper procedures, and makes findings of fact that are not clearly erroneous." *In re Philips/Magnavox TV Litig.*, No. 09-3072 (CCC), 2012 U.S. Dist. LEXIS 67287, at *42 (D.N.J. May 14, 2012) (citing *In re Cendant Corp. PRIDES Litig*., 243 F.3d 722, 727 (3d Cir. 2001)). The Third Circuit has recognized that awards of fair attorneys' fees ensure that "competent counsel continue[s] to be willing to undertake risky, complex, and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (citations omitted).

Pursuant to that rule and the Settlement, Plaintiffs now respectfully apply for a total fee and expense award of $300,000 which, as noted above, accounts for both the attorneys' fees for both of the law firms representing Plaintiffs (who have amassed a collective lodestar of $405,920.50 through the end of May 2020). This amount will also be utilized for the reimbursement of $7,337.04 in their cumulative litigation expenses. Plaintiffs also request—and Defendants have agreed to pay, subject to Court approval—an additional $2,500 in incentive awards for each of the two Class Representatives.

These requests are reasonable considering the work performed and the results achieved, and are consistent with similar awards recently approved by this Court and others that have presided over data breach class action settlements. The settlement achieved here is the product of strenuous and efficient efforts by Plaintiffs' Counsel through investigation and adversarial litigation, in a case involving complex issues of fact and law. And as noted above, these fees and costs will be paid separately from—and in addition to—the benefits made available to the Settlement Class. For these reasons and those that follow, these requests should be approved.

A. The Fee Request Should Be Evaluated Under the Lodestar Method

Preliminarily, there are two methods typically employed to award fees in class action settlements: "the percentage-of-recovery method [and] the lodestar method." *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005)). Under the lodestar method, the district court "determines an attorney's lodestar by multiplying the number of hours he or she reasonably worked on a client's case by a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer." *Gunter*, 223 F.3d at 195 n.1.[3] In undertaking this approach, the Court "is not required to engage in this analysis with mathematical precision or 'bean-counting'" and "may rely on summaries submitted by the attorneys" without "scrutiniz[ing] every billing record." *Henderson v. Volvo Cars of N. Am., LLC,* No. 09-4146 (CCC), 2013 U.S. Dist. LEXIS 46291, at *43-44 (D.N.J. Mar. 22, 2013) (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 306-07).

The lodestar method is "preferable where 'the nature of the settlement evades the precise evaluation needed for the percentage of recovery method.'" *Haught v. Summit Res., LLC,* No. 1:15-cv-0069, 2016 U.S. Dist. LEXIS 45054, at *22 (M.D. Pa. Apr. 4, 2016) (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 821 (3d Cir. 1995)); *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 300. It is "designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." *In re Cendant Corp. Prides Litig.*, 243 F.3d at 732 (quoting *In re Prudential Ins. Co. Am. Sales*

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[3] The percentage-of-recovery methodology, on the other hand, "is favored in common fund cases," and is calculated by applying "a certain percentage to the settlement fund." *Milliron v. T-Mobile United States*, 423 Fed. Appx. 131, 135 (3d Cir. 2011). The settlement in this case is not a common fund.

Practice Litig. Agent Actions, 148 F.3d 283, 333 (3d Cir. 1998)). Which one of these two methodologies should be used "will rest within the district court's sound discretion." *Charles v. Goodyear Tire & Rubber Co*., 976 F. Supp. 321, 324 (D.N.J. 1997).

While either methodology will confirm the reasonableness of the fee requested here, Plaintiffs respectfully submit that the Court should use the lodestar method in this case. This is consistent with how courts have analyzed fee requests in similar cases. *See In re Google Inc.,* No. 12-MD-2358 (SLR), 2014 U.S. Dist. LEXIS 196444, at *8 (D. Del. Apr. 1, 2014) (applying the lodestar method in non-common fund settlement where "[t]he recovery for the class involves both the dismantlement of the acts complained of by the plaintiffs in the Consolidated Complaint but also injunctive relief going forward in the future," and where "[t]hese important settlement provisions provide for a settlement which does not allow and easy determination of monetary value."); *see also Bray et al v. GameStop Corp.*, Civ. No. 1:17-cv-01365-JEJ, at Dkt. No. 54 (D. Del.) (approving Chimicles Schwartz Kriner & Donaldson-Smith LLP's and Abington, Cole + Ellery's requested fee based on lodestar analysis).

B. Class Counsel's Lodestar Figure is Reasonable.

The lodestar analysis involves two steps. The first step is to determine the appropriate hourly rate, based on the attorneys' usual billing rate and the "prevailing market rates" in the relevant community. *See In re Schering-Plough/Merck Merger Litig.*, No. 09-cv-1099 (DMC), 2010 U.S. Dist. LEXIS 29121, at *54 (D.N.J. Mar. 26, 2010) (citations omitted). The second step is to assess whether the billable time was reasonably expended. *Id.* "Time expended is considered 'reasonable' if the work performed was 'useful and of a type ordinarily necessary to secure the final result obtained from the litigation.'" *Id*. at *54-55 (quoting *Public Interest Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1188 (3d Cir. 1985)). The lodestar figure is "presumptively

reasonable" where it arises from a reasonable hourly rate and a reasonable number of hours. *Planned Parenthood of Cent. New Jersey v. Attorney General of the State of New Jersey*, 297 F.3d 253, 265 n.5 (3d Cir. 2002) (citations omitted).

There are two declarations filed by counsel in support of this fee petition, submitted by each of the firms working on this matter. Plaintiffs' Counsel billed their time at their current billing rates charged to their clients, and all of the billable time was necessary to secure the results obtained. The following represents Plaintiffs' Counsel's fees and costs in this matter from inception until May 31, 2020[4]:

The law firm of Chimicles Schwartz Kriner & Donaldson Smith LLP ("CSK&D") billed 682.10 hours at a total lodestar of $335,265.50. The firm's total expenses are $7,337.04. *See* Ex. 1 at ¶¶ 8-11; *see also* Johns Decl. Ex. A (lodestar chart) & Ex. B (expense chart). As described in the Johns Declaration, the work performed by CSK&D in this case included the following:

- investigating the Data Breach;
- speaking with multiple prospective clients and consumers who contacted CSK&D about the Data Breach;
- drafting and filing the complaint on March 8, 2019;
- maintaining ongoing communications with clients to keep them apprised of litigation developments and secure their approval and insight where necessary;
- researching, writing, and filing an omnibus opposition to the two separate motions to dismiss filed by Defendants;
- preparing for the mediation session with Defendants. This included selecting a mediator, participating in a pre-mediation session with the mediator, speaking with the

[4] Because this reported time does not include any of the billable time after May 31, 2020, it does not account for the work performed by Plaintiffs' counsel subsequent to that date, such as future work that will be associated with the final approval hearing and claims and settlement administration. *See In re Philips/Magnavox TV Litig*., 2012 U.S. Dist. LEXIS 67287, at *47 (observing, in analyzing a fee request, that the submitted figures did not include time and expenses incurred by counsel subsequent to the submission of that motion); *Henderson,* 2013 U.S. Dist. LEXIS 46291, at *44, n.11 (same).

mediator several times over the telephone, researching relevant data breach settlements, and submitting a mediation statement;

- reviewing and analyzing documents produced by Defendants for settlement purposes only, including without limitation a forensic report on the Data Breach;
- participating in an all-day mediation session with Bennett G. Picker at the Stradley Ronon law firm in Philadelphia on November 14, 2019;
- preparing the preliminary approval brief, drafting the claim form and class notices, and working with the claims/notice administrator; and
- performing necessary factual and legal research throughout the course of the case.

See Ex. 1 at ¶ 3.

Many courts across the country have approved the hourly rates of CSK&D attorneys and paralegals, even in cases where the rates were contested. *See, e.g*., *Chambers v. Whirlpool Corp.,* 214 F. Supp. 3d 877, 889 (C.D. Cal. 2016) (approving rates in contested fee petition over defendants' objections); *In re Philips/Magnavox TV Litig.,* 2012 U.S. Dist. LEXIS 67287, at *47 ("The Court finds the billing rates [of CSK&D and other firms] to be appropriate and the billable time to have been reasonably expended."); *In re Elk Cross Timbers Decking Marketing, Sales Practices and Prods. Liab. Litig.*, No. 15-0018 (JLL) (JAD) (D.N.J. Feb 27, 2017), Dkt. No. 126 at 2 (reviewed Class Counsel's "time summaries and hourly rates," and found that "the hourly rates of each of Plaintiffs' Steering Committee firm are . . . reasonable and appropriate in a case of this complexity."); *Alessandro Demarco v. Avalon Bay Communities, Inc.*, No. 2:15-628-JLL-JAD (D.N.J. July 11, 2017), D.I. 223 at ¶18 ("The Court, after careful review of the time entries and rates requested by Class Counsel [including CSK&D] and after applying the appropriate standards required by relevant case law, hereby grants Class Counsel's application for attorneys' fees . . . .").

The law firm of Abington Cole + Ellery billed 108.7 hours at a total lodestar of $70,655.00. *See* Declaration of Cornelius P. Dukelow in Support of Plaintiffs' Unopposed Motion for

Attorneys' Fees, Expenses, and Incentive Awards, attached hereto as Exhibit 2, at ¶ 3. Mr. Dukelow assisted with litigating this matter, including communicating with clients, briefing a motion to dismiss, and participating in the day-long mediation session. *See id*. at ¶2. Mr. Dukelow did not incur any expenses. *See id*. at ¶3.

Together, the combined cumulative lodestar for those two firms is 405,920.50. They have collectively incurred a total of $7,337.04 in unreimbursed expenses, and have billed 790.80 contingency fee hours on this case. As noted above, all of these fees and expenses will be paid from the $300,000 amount requested. *See* SA at ¶ 7.2.

The reasonableness of those amounts requested is confirmed by the fact that the requested amount of fees ($300,000) is approximately 72% of Plaintiffs' counsel's actual lodestar (405,920.50). In other words, Plaintiffs are seeking a 0.72 negative multiplier. Multiple courts have held in other data breach class actions like this one that negative multipliers are "inherently reasonable." *See, e.g.*, *Hapka v. Carecentrix, Inc.*, No. 2:16-cv-02372-KGG, 2018 U.S. Dist. LEXIS 68186, at *5 (D. Kan. Feb. 15, 2018) (fee award implicating "a negative multiplier (0.87) on Class Counsel's lodestar—*is inherently reasonable*." (emphasis added)). Thus, because Plaintiffs seek a negative multiplier of only 0.72, Plaintiffs counsel will, if the request is approved, be compensated at an amount below their collective lodestar.

C. The *Gunter* Factors Confirm the Reasonableness of the Fee Request.

Some courts that have decided to use the lodestar method will nonetheless "perform a percentage-of-recovery analysis to cross-check the lodestar analysis and ensure the reasonableness of the fee." *In re Philips/Magnavox TV Litig.,* 2012 U.S. Dist. LEXIS 67287, at *44. The purpose of doing a lodestar cross-check is "to insure that plaintiffs' lawyers are not receiving an excessive fee at their clients' expense." *Gunter*, 223 F.3d at 199.

In *Gunter*, the Third Circuit provided a series of non-exhaustive factors for district courts to consider in this regard:

> (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.

223 F.3d at 195 n.1. In addition to these factors, the Third Circuit has listed three other factors that may be relevant: "(1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any 'innovative' terms of settlement." *In re AT&T Corp. Secs. Litig*., 455 F.3d at 165 (internal citations omitted).

These factors "need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest." *In re Ins. Brokerage Antitrust Litig*., 579 F.3d 241, 280 (3d Cir. 2009). As set forth below, each of the *Gunter* factors support the fee request here.

1. *The Size of the Fund Created and the Number of Persons Benefitted*

The settlement in this case makes available substantial relief, including but not limited to monetary compensation for lost time spent dealing with replacement card issues or in reversing fraudulent charges, as well as reimbursement for credit reports, identity theft protection, and miscellaneous other specified expenses incurred as a result of the data breach. As noted in Plaintiffs' preliminary approval brief, there were approximately 108,335 individuals who Stein Mart notified of the Data Breach. All Class Members will have the opportunity to participate in the settlement. *Henderson,* 2013 U.S. Dist. LEXIS 46291, at *49-50 ("Class Counsel obtained a settlement that substantially benefits '[a]ll current and former owners and lessees of model years

2003-2005 Volvo XC90 T6 vehicles that were sold or leased in the United States.' . . . Given the potential combined value of the reimbursements, and the number of Class Members potentially entitled to benefits, this factor weighs in favor of approval.").

2. *The Presence or Absence of Substantial Objections by Members of the Class*

As discussed above, the deadline by which class members may object to the Settlement—including Plaintiffs' request for attorneys' fees—is July 23, 2020. While this fee petition is being filed *before* the expiration of the objection period, as of the date of this filing there have been no objections filed with the Court.[5] This factor supports approval of the requested fee. *See Reinhart v. Lucent Techs., Inc. (In re Lucent Techs., Inc. Sec. Litig.)*, 327 F. Supp. 2d 426, 435 (D.N.J. 2004) ("[T]he Court concludes that the lack of a significant number of objections is strong evidence that the fees request is reasonable."); *Sanders v. City of Phila. & First Judicial Dist. of Pa.,* No. 15-0868, 2016 U.S. Dist. LEXIS 35388, at *6 (E.D. Pa. Mar. 17, 2016) ("The absence of objections to the settlement itself and to the requested award of attorneys' fees and expenses, and the small number of persons opting out of the settlement demonstrate support for the approval of this settlement as fair and reasonable.").

3. *The Skill and Efficiency of the Attorneys Involved*

The result obtained in this case is in large measure a reflection of the tenacity with which Plaintiffs' Counsel litigated this matter. Plaintiffs' Counsel have achieved highly valuable benefits for Settlement Class Members, which speaks volumes for Plaintiffs' Counsel's abilities. They secured a Settlement in a case that was defended by able counsel, and each Defendant filed separate

[5] Plaintiffs reserve the right to address any objections that may be filed in their motion seeking final approval of the settlement, and will also be prepared to address any questions the Court may have about any such objections at the Final Approval Hearing on August 19, 2020.

motions to dismiss Plaintiffs' Complaint in its entirety with prejudice. *Henderson,* 2013 U.S. Dist. LEXIS 46291, at *51-52 ("Class Counsel obtained substantial benefits for the Class Members—despite vigorous defense by Volvo's counsel—a consideration that further evidences Class Counsels' competence."). And Plaintiffs' Counsel respectfully submit that their submissions to the Court in this case were of high quality. As such, this factor supports the fee request. *Boone v. City of Phila.,* 668 F. Supp. 2d 693, 714 (E.D. Pa. 2009) ("The submissions made in this case were thorough and of high quality. Finally, class counsel worked effectively and efficiently to bring this action to settlement. The skill and efficiency brought to this action by class counsel support the fee request.").

4. *The Complexity and Duration of the Litigation*

This complex class action litigation has lasted over 25 months, and required extensive work by Plaintiffs' Counsel (including motion practice and extensive briefing, a full-day mediation session and associated preparation) to reach a very favorable and beneficial result for the Class. Several courts have recognized that "any class action presents complex and difficult legal and logistical issues which require substantial expertise and resources." *Stalcup v. Schlage Lock Co*., 505 F. Supp. 2d 704, 707 (D. Colo. 2007); *see also McCoy v. Health Net, Inc*., 569 F. Supp. 2d 448, 477 (D.N.J. 2008). The amount of compensation sought by the Class Counsel is reasonable when assessed in light of these factors. *See In re Rite Aid Corp. Sec. Litig*., 396 F.3d at 305 (court did not abuse discretion in concluding that—in light of legal issues, duration of case, discovery, and necessity of resorting to mediation to reach a final settlement—the matter was complex).

5. *The Risk of Nonpayment*

Plaintiffs fronted all of the litigation costs and took this matter on a contingency fee basis. *See* Ex. 1 at ¶ 9. The risks of non-recovery, which were faced by Class Counsel from the outset of

this litigation, are thus sufficiently substantial to justify the fee request. *See O'Keefe v. Mercedes-Benz United States, LLC*, 214 F.R.D. 266, 309 (E.D. Pa. 2003) (the risk of non-payment in such a case "is why class counsel will be paid a percentage that is several times greater than an hourly fee in this case."); *see also In re Ins. Brokerage Antitrust Litig.*, No. 04-5184 (CCC), 2012 U.S. Dist. LEXIS 46496, at *135 (D.N.J. Mar. 30, 2012) ("Courts recognize the risk of non-payment as a major factor in considering an award of attorney fees.") (citations omitted); *Henderson,* 2013 U.S. Dist. LEXIS 46291, at *52 ("Class Counsel undertook this action on a contingent fee basis, assuming a substantial risk that they might not be compensated for their efforts. Courts recognize the risk of non-payment as a major factor in considering an award of attorney fees."). And two separate motions to dismiss were pending at the time the parties reached the settlement, such that there was a very immediate risk that Plaintiffs' Complaint may have been dismissed, perhaps even with prejudice as sought by both Defendants.

Even if Plaintiffs had subsequently prevailed on the motions to dismiss and/or the merits at summary judgment, there is authority from other courts denying class certification in data breach cases such as this one. *See In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying class certification after determining that Rule 23(b)(3)'s predominance requirement was not satisfied); *In re Anthem, Inc. Data Breach Litig.,* No. 15-MD-02617-LHK, 2018 U.S. Dist. LEXIS 140137, at *107 (N.D. Cal. Aug. 17, 2018) ("Other risks remained for the litigation moving forward. For example, class certification was not guaranteed, in part because Plaintiffs had a scarcity of precedent to draw on. The parties represent that only one non-settlement data-breach class has been certified in federal court to date, and that case post-dates Plaintiffs' filing of their motion for class certification."). While Plaintiffs believe that they have grounds to distinguish these cases, they do recognize the risk inherent in any class action

litigation. As such, this factor supports approving the fee request. *See McCoy*, 569 F. Supp. 2d at 477 ("Given the nature of this litigation and the difficulty of the issues presented, Plaintiffs faced a substantial risk that they would recoup nothing. These risks counsel in favor of a substantial fee award."); *Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 U.S. Dist. LEXIS 215430, at *3 (D. Colo. Dec. 16, 2019) ("Data breach cases such as the instant case are particularly risky, expensive, and complex, ... and they present significant challenges to plaintiffs at the class certification stage.") (internal citations omitted).

6. *The Amount of Time Devoted to the Case by Class Counsel*

In terms of the sheer amount of genuine labor involved on the part of the Plaintiffs, there were, as noted above, 790.80 billable hours[6] devoted by Class Counsel in litigating this matter through the end of May. All of this time and expense was advanced without any guarantee of recoupment, and necessarily prevented Class Counsel from devoting those resources to other matters. This commitment of time and effort clearly supports Class Counsel's fee request.

7. *The Awards in Similar Cases*

A review of similar data breach settlements demonstrates that the fee request here is reasonable and appropriate. *See*, *e.g.*, *Gordon*, 2019 U.S. Dist. LEXIS 215430, at *6 (D. Colo. Dec. 16, 2019) (approving $1,200,000 in fees and expenses in a payment card data breach with a claims made settlement structure similar the one in this case); *Bray v. Gamestop Corp.,* No. 1:17-cv-01365-JEJ, 2018 U.S. Dist. LEXIS 226221, at *8 (D. Del. Dec. 19, 2018) (same; approving $557,500 in Plaintiffs' attorneys' fees and expenses); *T.A.N. v. PNI Digital Media, Inc.,* No. 2:16-

[6] This does not include Plaintiffs' counsel's time and expenses incurred after May 31, 2020, and the further time and expenses that Plaintiffs' counsel will incur following the filing of this motion. *See In re Philips/Magnavox TV Litig*., 2012 U.S. Dist. LEXIS 67287, at *47 (observing, in analyzing a fee request, that the submitted figures did not include time and expenses incurred by counsel subsequent to the submission of that motion).

CV-00132 (S.D. Ga. Dec. 1, 2017), D.I. 46 ($650,000 in fees plus $3,735.70 in expenses in a data breach involving debit and credit cards); *In re Schnuck Markets, Inc. Consumer Data Security Breach Litigation,* No. 4:13-MD-02470-JAR (E.D. Mo. Jan. 23, 2015), D.I. 41 ($635,000 in fees plus $10,061 costs/expenses in a data breach involving debit and credit cards). Plaintiffs' requested award of $300,000 is less than the amounts approved in these cases, and is appropriate here.

D. Plaintiffs' Counsel's Expenses Should Be Approved

There is little question that "[c]ounsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *Careccio v. BMW of N. Am. LLC*, Case No. 08-2619, 2010 U.S. Dist. LEXIS 42063, at *22 (D.N.J. Apr. 29, 2010) (quoting *In re Safety Components Int'l Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001)); *accord, In re Ins. Brokerage Antitrust Litig.*, No. 04-5184 (CCC), 2012 U.S. Dist. LEXIS 46496, at *144-45 (recognizing the same principle, and approving an expense request of $394,192.76).

In this case, Plaintiffs' Counsel have incurred $7,337.04 in properly documented expenses for the common benefit of Class Members. These expenses included, *inter alia*, the filing fee, mediation expenses, and costs for performing legal research on Lexis. *See* Ex. 1 at ¶ 10. As noted above, the requested expenses will be paid from the total $300,000 fee and expense request. The requested amount is likewise reasonable and should be approved. *See Roxberry v. Snyders-Lance, Inc.*, No. 1:16-cv-02009-JEJ, 2017 U.S. Dist. LEXIS 193573, at *6 (M.D. Pa. Nov. 15, 2017) (approving the requested $33,670.00 in litigation expenses where class counsel was able to demonstrate that they "were reasonable and necessary to the pursuit of this litigation and the administration of the settlement."); *Haught,* 2016 U.S. Dist. LEXIS 45054, at *37-38 ("We find

that the $7,575.67 in expenses were adequately documented and were reasonably and appropriately incurred through the course of litigation in this case.").

E. The Requested Incentive Awards Should be Approved

The service provided by the Class Representatives in this action should not go without financial recognition. While service as a representative plaintiff is not a profit-making position, the law recognizes that it is appropriate to make modest payment in recognition of the services that such plaintiffs perform in successful class litigation. "Incentive awards are 'fairly typical' in class actions." *In re Google Inc.,* 2014 U.S. Dist. LEXIS 196444, at *11 (citations omitted). Indeed, "[c]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Haught,* 2016 U.S. Dist. LEXIS 45054, at *19-20 (quoting *Hegab v. Family Dollar Stores, Inc.*, Civ. A. No. 11-1206(CC), 2015 U.S. Dist. LEXIS 28570, at *16 (D.N.J. Mar. 9, 2015)).

The Settlement here recognizes this principle by providing incentive award payments of $2,500 to each of the two Class Representatives. *See* SA ¶¶7.3-7.4. These Class Representatives were the principal catalysts of achieving this result for the Class. They participated in numerous conferences and meetings with their attorneys, and stayed abreast of significant developments in the case. And like Plaintiffs' fee and expense request, these incentive awards will be paid separately from the consideration in the Settlement, and will not reduce the recovery to any Class Member (*see* SA at ¶7.5). *See In re LG/Zenith Rear Projection TV Class Action Litig.*, No. 06-5609 (JLL), 2009 U.S. Dist. LEXIS 13568, at *25 (D.N.J. Feb. 18, 2009) (approving incentive award that "will not decrease the recovery of other class members."); *see also, Roxberry v. Snyders-Lance, Inc.*, No. 1:16-cv-02009-JEJ, 2017 U.S. Dist. LEXIS 193573, at *5 (M.D. Pa. Nov. 15, 2017) (approving $19,000 service awards to each of the plaintiffs in a wage and hour class

action). These amounts are also comparable with those approved in other data breach settlements. *See Bray*, 2018 U.S. Dist. LEXIS 226221, at *4 (approving $3,750 in incentive awards to the two plaintiffs); *Gordon*, 2019 U.S. Dist. LEXIS 215430, at *6 (finding that "service awards of $2,500 for each Class Representative for their substantial time and effort in prosecuting the instant case is appropriate."). Consistent with the law and the terms of the Settlement, Plaintiffs respectfully request that the Court likewise approve the requested incentive awards here.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court award Plaintiffs' counsel the payment of $300,00 in attorneys' fees and expenses, and approve the payment of $2,500 in incentive awards to each of the two Class Representatives. A proposed order granting this requested relief is submitted herewith.

Dated: June 25, 2020

Respectfully submitted,

/s/ Tiffany J. Cramer

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