UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOLYNNE CHRISTIANSEN; JOHN DOE; EVELYN HARRIS; DANIEL MCCORMICK; JOAN MIGLIACCIO; MICHELLE MULANAX; KELLY ROSAL; GARY ROWE; and DAVID YANCEY, individually and on behalf of a putative class, Plaintiffs, v. PARKER-HANNIFIN CORPORATION, Defendant.	Lead Case No. 1:22-cv-00835 Consolidated with: Case No.: 1:22-cv-00852 Case No.: 1:22-cv-00891 Case No.: 1:22-cv-00943 Case No.: 1:22-cv-01073 Case No.: 1:22-cv-01229 The Honorable Dan Aaron Polster

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

I. INTRODUCTION

Pursuant to the Settlement Agreement [Doc. 37-3][1] preliminarily approved by the Court on March 14, 2023 [Doc. 38], Class Counsel respectfully move for an order awarding (1) $583,333.33 for attorney fees (one-third (1/3) of the $1,750,000 common fund); (2) $14,981.67 for reimbursement of costs and expenses; and (3) Service Awards of $3,500 for each Class Representative. As demonstrated herein, the fee requested by Class Counsel is appropriate under the "percentage of the fund" method, which is the preferred approach for determining a reasonable fee in a common fund case such as this one. The requested fee percentage is approximately

[1] All capitalized terms not defined herein have the same meaning as in the Settlement Agreement.

33.33%, which is well within the range typically approved in the Sixth Circuit. Further, the requested fee is supported by the discretionary lodestar cross-check analysis.

II. BACKGROUND

The case arises from the compromise of personal identifying information ("PII") and protected health information ("PHI") as a result of a March 2022 ransomware attack (the "Data Incident") experienced by Defendant Parker-Hannifin Corporation ("Parker" or "Defendant"). Plaintiffs initiated this nationwide consumer class action on behalf of themselves and a class of "all persons Defendant identified as being among the individuals impacted by a Data Incident, including all who were sent a notice of the [Data Incident.]" Plaintiffs' Consolidated Class Action Compl. ("CAC") [Doc. 14], ¶ 175. Plaintiffs and Class Members include current and former employees of Defendant and its acquired entities, their dependents, and other individuals affiliated with Defendant whose PII and PHI (collectively referred to as "Private Information") was compromised in the Data Incident. In response to the Data Incident, Defendant sent a Notice Letter ("Notice Letter") to each impacted individual providing a description of the type of Private Information involved, which may have potentially included: full names, Social Security numbers, dates of birth, addresses, driver's license numbers, U.S. passport numbers, financial account information (bank account and routing numbers), online account usernames and passwords, health insurance plan member ID numbers, and dates of coverage.

On May 20, 2022, Plaintiff Joan Migliaccio filed the first complaint against Defendant in this Court for claims arising from the Data Incident. Additional complaints were subsequently filed and on June 15, 2022, the Court entered an order consolidating the related actions. On July 20, 2022, the Court also entered an order appointing Terence R. Coates (Markovits, Stock & DeMarco, LLC) and Joseph M. Lyon (The Lyon Firm) as Interim Class Counsel and Marc Dann (DannLaw)

as Interim Liaison Counsel for all Plaintiffs. In their CAC, filed July 15, 2022, Plaintiffs alleged individually and on behalf of the Class that, as a direct result of the Data Incident, Plaintiffs and Class Members suffered numerous injuries and would likely suffer additional harm in the future. Plaintiffs' claims for alleged damages and remedies included the following categories of harms: (a) invasion of privacy; (b) financial costs incurred mitigating the imminent risk of identity theft; (c) loss of time and loss of productivity incurred mitigating the imminent risk of identity theft (d) loss of time and loss of productivity heeding Defendant's warnings and following its instructions in the Notice Letter; (d) financial costs incurred due to actual identity theft; (e) the cost of future identity theft monitoring for the Class; (f) loss of time incurred due to actual identity theft; (g) loss of time and annoyance due to increased targeting with phishing attempts and fraudulent robo-calls; (h) deprivation of value of their Private Information; and (i) statutory damages. Plaintiffs, individually and on behalf of those similarly situated, asserted claims for (i) negligence; (ii) negligence per se; (iii) breach of implied contract; (iv) unjust enrichment; (v) declaratory relief; (vi) violations of the California Consumer Privacy Act, Cal. Civ. Code § 1798.100 et seq.; (vii) violations of the Confidentiality of Medical Information Act, Cal. Civ. Code § 56 et seq.; (viii) invasion of privacy under the California Constitution, Article I, Section 1; (ix) violations of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.; and (x) violations of the New York General Business Law § 349. Plaintiffs also sought injunctive relief, declaratory relief, monetary damages, and all other relief as authorized in equity or by law.

The Settlement Agreement is the product of extensive arm's-length negotiations before Bennett Picker of Stradley Ronon Stevens & Young, LLP – a mediator with substantial experience handling data breach class action mediations. Before entering into this Settlement Agreement, the parties engaged in informal discovery during which Defendant produced information about the

manner and mechanism of the Data Incident, the number of impacted individuals broken down by state, Defendant's notice program and incident response, and security enhancements implemented by Defendant following the Data Incident.

Under the proposed settlement, Defendant will pay $1,750,000 to establish the non-reversionary Settlement Fund which shall be used to pay benefits to Class Members, settlement administration and class notice costs, attorneys' fees and expense reimbursement, and service awards as approved by the Court.

III. ATTORNEYS' FEES

A. Class Counsel's Attorneys' Fee Request is Fair and Reasonable

Rule 23(h) of the Federal Rules of Civil Procedure expressly authorizes a court to award "reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Through the Settlement Agreement, Parker has agreed to pay Class Counsel "reasonable attorneys' fees, costs, [and] expenses … as ordered by the Court." Settlement Agreement, ¶ 7.1. Parker did not agree to pay a specific amount and the Settlement Agreement does not contain a "clear sailing" provision. Instead, Class Counsel agreed "to move the Court for an award of attorneys' fees not to exceed 33.33% of the Settlement Fund." *Id.* at ¶ 7.2.

"When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). The Sixth Circuit "require[s] only that awards of attorneys' fees in common fund cases be reasonable under the circumstances." *Id.* at 516.

"District courts apply a two-part analysis to assess the reasonableness of an attorney fee petition." *O'Donnell v. Fin. Am. Life Ins. Co.*, No. 2:14-cv-1071, 2018 WL 11357092, at *5 (S.D.

Ohio Aug. 24, 2018). "First, the court must determine the appropriate method to calculate the fees, using either the percentage of fund or the Lodestar approach." *Id.* "Second, the Court must consider six factors to assess the reasonableness of the fee." *Id.* (citing *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009)). The Court should provide a concise and clear explanation of the reasoning for adopting a particular method and the factors considered to arrive at the fee. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Rawlings*, 9 F.3d at 516. Here, Class Counsel's request for attorneys' fees is appropriately assessed using the percentage of the fund analysis.

B. Class Counsel's Attorneys' Fee Request is Fair and Reasonable Under a Common Fund Analysis

Courts have "the historic power of equity" to permit a party recovering a fund for the benefit of others to recover his costs, including his attorney fees, from the fund itself or from the other parties enjoying the benefit. *Alyeska Pipeline SVC Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975). Indeed, "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This is known as the "common fund doctrine" and it is premised upon the principal "that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1277 (S.D. Ohio 1996) (citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939); *Boeing*, 444 U.S. at 478).

"Counsel who creates a common fund for the benefit of a class is entitled to a payment of fees and expenses from the fund relative to the benefit achieved." *Harsh v. Kalida Mfg., Inc.*, No. 3:18-CV-2239, 2021 WL 4145720, at *7 (N.D. Ohio Sept. 13, 2021); *Connectivity Sys. Inc. v. Nat'l City Bank*, No. 2:08-CV-1119, 2011 WL 292008, at *12 (S.D. Ohio Jan. 26, 2011) (because "counsel's efforts create a substantial common fund for the benefit of the class, they are, therefore,

entitled to payment from the fund based on a percentage of that fund"); *see also New Eng. Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006); *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 900 (S.D. Ohio 2001). Pursuant to the proposed settlement, Parker will create a $1,750,000 common fund for the benefit of the Class.

In the Sixth Circuit, the "percentage of the fund has been the preferred method for common fund cases, where there is a single pool of money and each class member is entitled to a share." *Lott v. Louisville Metro Gov't*, No. 3:19-CV-271-RGJ, 2023 WL 2562407, at *3 n.4 (W.D. Ky. Mar. 17, 2023) (quotation omitted); *Robles v. Comtrak Logistics, Inc.*, No. 15-CV-2228, 2022 WL 17672639, at *10 (W.D. Tenn. Dec. 14, 2022) ("The percentage-of-the-fund method, however, tends to be favored over the lodestar approach by courts in this circuit."); *Lonardo v. Travelers Indem. Co.*, 706 F.Supp.2d 766, 789 (N.D. Ohio 2010) ("percentage of the fund has been the preferred method for common fund cases"); *Sweetwater Valley Farm, Inc. v. Dean Foods Co. (In re Se. Milk Antitrust Litig.)*, No. 2:07-CV 208, 2018 U.S. Dist. LEXIS 131855 at *13 (E.D. Tenn. July 11, 2018) ("[T]he percentage-of-the-fund method, however, clearly appears to have become the preferred method in common fund cases.").

In the Sixth Circuit, attorneys' fees awarded pursuant to the percentage of the fund method "typically range from 20 to 50 percent of the common fund." *Lott*, 2023 WL 2562407, at *3; *Connectivity Sys. Inc.*, 2011 WL 292008, at *12 (same); *Brotherton*, 141 F. Supp. 2d at 902 (same).[2] Here, Plaintiffs request an award of attorneys' fees equal to one-third (1/3) of the common fund created. *See, e.g., Hunter v. Booz Allen Hamilton Inc.*, No. 2:19-CV-00411, 2023 WL

[2] *See also In re Telectronics Pacing Systems, Inc.*, 137 F. Supp. 2d 1029, 1046 (S.D. Ohio 2001) ("the range of reasonableness … has been designated as between twenty to fifty percent of the common fund"); *In re S. Ohio Corr. Facility*, 173 F.R.D. 205, 217 (S.D. Ohio 1997) ("[t]ypically, the percentage awarded ranges from 20 to 50 percent of the common fund"), *rev'd on other grounds*, 24 F. App'x 520 (6th Cir. 2001).

3204684, at *8 (S.D. Ohio May 2, 2023) ("When using the percentage-of-the-fund method, courts in the Sixth Circuit generally approve of awards that are one-third (1/3) of the total settlement."); *Zilinsky v. LeafFilter N., LLC*, No. 2:20-CV-6229, 2023 WL 2696554, at *6 (S.D. Ohio Mar. 29, 2023) (awarding attorneys' fees of "one-third of the total Settlement Fund"); *Love v. Gannett Co.*, No. 3:19-cv-296, 2021 WL 4352800, at *5 (W.D. Ky. Sept. 24, 2021) (approving 33.85% of fund as reasonable attorneys' fees); *Dillworth v. Case Farms Processing, Inc.*, No. 5:08-CV-1694, 2010 WL 776933, at *7 (N.D. Ohio Mar. 8, 2010) (approving fee equal to 33% of settlement fund).

The Sixth Circuit has adopted the following factors (often referred to as the *Ramey* factors) to consider when determining what constitutes a reasonable fee in a common fund case:

1) the value of the benefit rendered to the plaintiff class (i.e. the results achieved);

2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;

3) whether the services were undertaken on a contingent fee basis;

4) the value of the services on an hourly basis [the lodestar cross-check];

5) the complexity of the litigation; and,

6) the professional skill and standing of counsel involved on both sides.[3]

Each factor supports Class Counsel's fee request here.

1. The Results Achieved in this Litigation

The first *Ramey* factor requires the Court to evaluate the benefit of the settlement to the Class and is often cited as the most important factor. *Bowling*, 922 F. Supp. at 1280. The Settlement has a total value of $1,750,000, and provides a range of valuable benefits for the Class Members:

[3] *Swigart v. Fifth Third Bank*, No. 1:11-CV-88, 2014 WL 3447947, at *6 (S.D. Ohio July 11, 2014) (citing *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975)).

Class Members are eligible for a Pro Rata Cash Payment of $50; can receive compensation for out-of-pocket losses up to $5,000; can receive payment for up to four (4) hours at $25 per hour of lost time; can receive a $100 in payment for California Statutory Claims to the members of the California Subclass; and can receive $250 for each verified and documented incidence of fraud (included within the cap of $5,000 for unreimbursed expenses). Settlement Agreement, §§ 2.1(a)-(e).

Furthermore, the recovery per Class Member in this case of roughly $15 per person ($1,750,000 for roughly 115,000 Class Members) exceeds the amount recovered in other similar data breach class action settlements. *See* Declaration of Terence R. Coates in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Class Representative Service Awards ("Coates Decl.,"), ¶ 13 (Exhibit 1) (noting several recent data breach class action settlements also involving Social Security numbers that settled for less than $15 per Class Member). This indicates that the $1,750,000 Settlement Fund is a tremendous recovery for the Class. The Settlement is further bolstered by the fact that Parker possessed substantial defenses to the merits of the claims at issue, both at the trial court level and on appeal. Parker has denied liability and has consistently maintained that the Plaintiffs' allegations lack merit. While the Plaintiffs are confident in their claims, Parker could appeal a favorable judgment in the absence of settlement which would delay or even nullify any benefit to members of the Class.

Given the risk of proceeding, the value obtained from bringing, prosecuting, persevering, and settling this litigation should not be underestimated. Moreover, in addition to the inherent risk as to the outcome, achieving a result that resolves this litigation *now* is valuable in that it avoids the certain delay of continuing litigation with the possibility of appeals. Any delay in the process could be of great detriment to the Class. *See Connectivity Sys. Inc.*, 2011 WL 292008, at *4 ("Given

the time value of money, a future recovery, even one greater than the proposed Settlement Amount, may be less valuable to the Settlement Class than receiving the benefits of the Settlement Agreement now."). The results achieved here are substantial and timely, and support Class Counsel's fee request.

2. The Requested Fee Provides Adequate Incentive to Undertake this Representation for the Benefit of Others

Awarding Class Counsel the requested attorneys' fee amount provides an incentive for qualified and experienced attorneys to undertake this type of speculative and risky litigation. Thus, "class counsel's expenditure of time and money benefitted small claimants who lack the resources to prosecute a case of this nature." *Hainey v. Parrott*, No. 1:02-CV-733, 2007 WL 3308027, at *3 (S.D. Ohio Nov. 6, 2007). Without counsel willing to take the risk of challenging companies like Parker, Plaintiffs would have been left with no recourse since the cost to pursue their individual claims far exceeded their damages. *Myers v. Mem'l Health Sys. Marietta Mem'l Hosp.*, No. 15-CV-2956, 2022 WL 4079559, at *6 (S.D. Ohio Sept. 6, 2022) ("Society has a stake in rewarding attorneys who achieve a result that the individual class members probably could not obtain on their own." (quoting *Kritzer v. Safelite Sols., LLC*, No. 2:10-cv-0729, 2012 WL 1945144, at *9 (S.D. Ohio May 30, 2012)); *Karpik v. Huntington Bancshares Inc.*, No. 2:17-cv-1153, 2021 WL 757123, at *8 (S.D. Ohio Feb. 18, 2021) ("Without a class action, the individual plaintiffs would not have had a strong incentive to pursue recovery because any monetary award would have been severely outweighed by the costs to litigate their cases."). This second factor also supports the requested attorneys' fee award.

3. Class Counsel Undertook this Representation on a Contingent Basis

The third *Ramey* factor "stands as a proxy for the risk that attorneys will not recover compensation for the work they put into a case." *In re Cardinal Health Inc. Sec. Litig.*, 528 F.

Supp. 2d 752, 765 (S.D. Ohio 2007) (citing *Bowling*, 922 F. Supp. at 1282). Some courts consider the risk of non-recovery to be the most important factor in the fee determination. *Id*. (citing cases). "[C]ontingency fee arrangements indicate that there is a certain degree of risk in obtaining a recovery." *Whitlock v. FSL Mgmt., LLC*, No. 3:10cv-00562, 2015 WL 9413142, at * 9 (W.D. Ky. Dec. 22, 2015) (quoting *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d at 1043).

Class Counsel agreed to undertake this litigation on a contingent basis.[4] Class Counsel took a considerable risk here in advancing all costs (which presently total $14,981.67),[5] while receiving no compensation for the work they have performed over the past two years. Moreover, had there been no recovery, Class Counsel would not have been paid a fee or reimbursement for their expenses. Therefore, this factor weighs in support of Class Counsel's fee request.

4. The Value of the Services Supports the Fee Requested

Although performing a cross-check on the percentage method using Class Counsel's lodestar is optional and solely within the Court's discretion, *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 Fed. App'x 496, 500 (6th Cir. 2011), courts may perform a lodestar cross-check to ensure counsel does not receive a windfall. *Love*, 2021 WL 4352800, at *6; *see also In re Cardinal Health Inc. Sec. Litig*., 528 F. Supp. 2d at 764. The purpose of the exercise is "not to supplant the court's detailed inquiry into the attorney's skill and efficiency in recovering the settlement" using the percentage of the fund and *Ramey* factors, but instead merely to ensure that the fee award is still "roughly aligned with the amount of work the attorneys contributed." *Id*.

"The Court performs a lodestar cross-check by comparing the lodestar multiplier used in this case to lodestar multipliers used in similar cases." *Id.* at 767. "In contrast to employing the lodestar method in full, when using a lodestar cross-check, 'the hours documented by counsel need

4 *See* Coates Decl., ¶ 2.
5 *Id*., ¶ 11.

not be exhaustively scrutinized by the district court.'" *Id*. (quoting *In re WorldCom, Inc. Sec. Litig*., 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005)). This is because "the lodestar cross-check is 'not a full-blown lodestar inquiry' and a court 'should be satisfied with a summary of the hours expended by all counsel at various stages with less detailed breakdown than would be required in a lodestar jurisdiction.'" *In re Rite Aid Corp. Sec. Litig*., 396 F.3d 294, 306 n.16 (3d Cir. Pa. 2005) (quoting Report of the Third Circuit Task Force, Selection of Class Counsel, 208 F.R.D. 340, 423 (2002)).[6]

From June 15, 2022 through May 22, 2023, Class Counsel and their co-counsel have spent more than 900 hours prosecuting this litigation.[7] Class Counsel omitted all hours expended by any of Plaintiffs' counsel before June 15, 2022 – the date the underlying actions where consolidated in this case. Notably, Class Counsel will necessarily spend substantial additional time from this point to conclusion of the case, time that will not be reflected in this fee application. Class Counsel and their co-counsel's current lodestar exceeds $583,333.33.[8] The hourly rates that form the basis of the lodestar calculation reflect the experience of Class Counsel and co-counsel and have been previously approved by other courts.[9] Class Counsel went to great lengths to ensure that Plaintiffs' counsel were able to participate in this matter on behalf of their clients without duplicating work. Coates Decl., ¶¶ 6-7. For example, Class Counsel and Liaison Counsel attended the mediation for Plaintiffs in this matter and stayed in frequent contact with the rest of Plaintiffs' counsel throughout

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6 *Accord* The Manual For Complex Litigation (Fourth) § 14.122 (2004) ("the lodestar is at least useful as a cross-check . . . using affidavits and other information provided by the fee applicant"); *Milliron v. T-Mobile United States*, 423 F. App'x 131, 136 (3d Cir. N.J. 2011) ("the crosscheck is not the primary analysis in this type of case and does not entail 'mathematical precision []or bean-counting,'"); *In re Cincinnati Gas & Elec. Co. Sec. Litig.*, 643 F. Supp. 148, 150 (S.D. Ohio 1986) ("Counsel have provided the Court with helpful charts summarizing the hours logged and the rate requested by each of the attorneys involved in this case.").

7 *See* Coates Decl., ¶ 11.

8 *Id*.

9 *Id*.

the Settlement negotiations. *Id*., ¶ 6. This permitted Plaintiffs to efficiently negotiate a meaningful Settlement on behalf of the Class. *Id*.

The requested $583,333.33 fee is one-third (1/3) of the value of the $1,750,000 Settlement Fund. Thus, when cross-checked, the requested fee is equivalent to the application of a multiplier to the lodestar of less than 1 because the lodestar amount already exceeds $583,333.33. The fact the lodestar cross-check results in a negative multiplier strongly suggests that Plaintiffs' requested fees are reasonable. *See, e.g.*, *Walls v. JPMorgan Chase Bank, N.A.*, No. 3:11-CV-673-DJH, 2016 WL 6078297, at *6 (W.D. Ky. Oct. 14, 2016); *Kimber Baldwin Designs, LLC v. Silv Commc'ns, Inc*., No. 1:16-CV-448, 2017 WL 5247538, at *6 (S.D. Ohio Nov. 13, 2017); *Rikos v. Procter & Gamble Co*., No. 1:11-CV-226, 2018 WL 2009681, at *10 (S.D. Ohio Apr. 30, 2018).

In sum, Class Counsel's fee request is reasonable based on a percentage of the common fund, and on the discretionary lodestar cross-check.

5. The Complexity of the Litigation Supports the Requested Fee

The fifth *Ramey* factor requires the Court to consider the complexity of the case. Although nearly all class actions involve a high level of risk, expense, and complexity, this is a particularly complex class action in an especially risky area. Historically, data breach cases have faced substantial hurdles in making it past the pleading stage. *See, e.g., In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig*., No. 3:08-MD-01998, 2010 WL 3341200, at *6 (W.D. Ky. Aug. 23, 2010) (approving a data breach settlement in part because "proceeding through the litigation process in this case is unlikely to produce the plaintiffs' desired results"); *Hashemi v. Bosley, Inc.*, No. CV 21-946 PSG (RAOX), 2022 WL 18278431, at *4 (C.D. Cal. Nov. 21, 2022) (noting the challenges in litigating data breach cases meant that "Plaintiffs would have faced prolonged litigation and significant obstacles as trial approached"); *Antman v. Uber Techs., Inc*., No. 3:15-

cv-01175, 2015 WL 6123054, at *11 (N.D. Cal. Oct. 19, 2015) (holding that the risk that plaintiff's identity could be stolen was insufficient to confer standing based on a data breach exposing plaintiff's name and driver's license number); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 966 (S.D. Cal. 2012) (loss of personal information and allegations of a heightened risk of identity theft, without more, calls standing into question); *Hammond v. Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060 (RMB), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting cases and noting that "every court to [analyze data breach cases] has ultimately dismissed under Rule 12(b)(6) . . . or under Rule 56 following the submission of a motion for summary judgment").

Success at class certification has also been mostly nonexistent in these cases.[10] Even if this Court were to certify a contested class, the inherent risks attendant to trying a data breach class action would only magnify the difficult legal questions at issue here. *See, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *12 (N.D. Cal. Aug. 17, 2018) ("class certification was not guaranteed, in part because Plaintiffs had a scarcity of precedent to draw on"). Although Plaintiffs believe they would ultimately prevail in such a trial, a verdict for the defense would be entirely possible.

To the extent the law has gradually accepted this relatively new type of litigation, the path to a class-wide monetary judgment remains unforged, particularly in the area of damages. Data

[10] *See Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686, 691 (N.D. Cal. Nov. 26, 2019) (granting motion to certify injunctive-only class, but denying motion to certify damages and issues classes in data breach class action); *Cheryl Gaston v. FabFitFun, Inc.*, No. 2:20-CV-09534-RGK-E, 2021 WL 6496734, at *3 (C.D. Cal. Dec. 9, 2021) ("data breach cases have experienced minimal success in moving for class certification"); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (denying class certification in data breach action); *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389 (D. Mass. 2007) (same). *Cf In re Brinker Data Incident Litig.*, No. 3:18-cv-686-TJC-MCR, 2021 WL 1405508, at *14 (M.D. Fla. Apr. 14, 2021) ("The Court acknowledges it may be the first to certify a Rule 23(b)(3) class involving individual consumers complaining of a data breach involving payment cards….").

breach cases are among the riskiest and uncertain of all class action litigation, making settlement the more prudent course when a reasonable deal is available.

Here, the litigation was fraught with numerous risks. While Class Counsel remain confident in Plaintiffs' claims, there is a recognized element of risk in any litigation, particularly complex and expensive data breach class litigation. *See In re Omnivision Tech*s., 559 F. Supp. 2d 1036, 1047 (C.D. Cal. 2008) ("The risk that further litigation might result in plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees").

6. The Professional Skill of Counsel on both sides Supports the Requested Fee

The last *Ramey* factor addresses the professional skill of counsel. Here, Class Counsel has substantial experience representing plaintiffs in data breach class actions. Co-lead Class Counsel Messrs. Coates and Lyon devote a substantial percentage of their practices to data breach and privacy litigation, and are frequently appointed as class counsel in data privacy cases across the country.[11] Parker has likewise been represented by counsel who specialize in defending data breach cases from Baker & Hostetler, LLP, one of the nation's largest law firms. Class Counsel's professionalism, experienced, and skill support the requested fee.

7. The Fee Request is Supported by the Class Representatives

The utilization of the common fund doctrine as a basis for the payment of attorneys' fees and expenses is employed in addition to, and independent of, the contingent fee contract between lawyer and client. Bolstering the foregoing common fund considerations, the Plaintiffs support the payment of fees and expenses as requested in the instant motion.[12]

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11 *See* Coates Decl., ¶¶ 3-5.

12 *Id.*, ¶ 15.

Based upon the foregoing, a fee of $583,333.33 representing one-third (1/3) of $1,750,000 common fund is fair and reasonable, is within the range established in the Sixth and other Circuits, and is within the range established by federal courts in Ohio.

III. EXPENSES

"Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket expenses and costs in the prosecution of claims, and in obtaining settlement, including but not limited to expenses incurred in connection with document productions, consulting with and deposing experts, travel and other litigation-related expenses." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 534-535 (E.D. Mich. 2003). "[T]he categories of expenses for which Plaintiffs' counsel seek reimbursement are the type routinely charged to hourly fee-paying clients and thus should be reimbursed out of the settlement fund … [including] the cost of experts and consultants … computerized research; travel and lodging expenses; photocopying cost; filing and witness fees; postage and overnight delivery; and the cost of court reporters and depositions." *Fruit of the Loom*, 234 F.R.D. at 635 (approving expenses submitted pursuant to these categories).

The Settlement Agreement states that Class Counsel's expenses will be capped at $15,000.00. Class Counsel has incurred $14,981.67 in costs and expenses.[13] As set forth in the Coates Declaration, each expense for which Class Counsel seeks reimbursement was necessary and directly related to this litigation.[14] Accordingly, Class Counsel is entitled to this expense reimbursement.

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13 Coates Decl., ¶ 11.

14 *Id.*

IV. SERVICE AWARDS

The Settlement Agreement also provides that Class Counsel will apply to the Court for Service Awards in the amount of $3,500.00 to each Plaintiff. *See* Settlement Agreement, ¶ 7.3. Class Counsel moves for the approval of the Service Awards under principles of equity and the prior practice and case law in the district courts within the Sixth Circuit. *See, e.g., Bert v. AK Steel Corp*., No. 1:02-CV-467, 2008 WL 4693747, at *1 (S.D. Ohio Oct. 23, 2008) (approving $10,000 incentive award to each class representative).[15] Through their inclusion in the Consolidated Complaint, the Plaintiffs indicated their desire and willingness to undertake the responsibilities and fiduciary duties on behalf of the class. This is a voluntary obligation that goes well beyond the pursuit of their individual claims. Plaintiffs remained in close contact with Class Counsel, prior to the case filing and throughout the litigation; they also reviewed the Complaint and other court filings, and approved the Settlement.[16] Without their willingness to undertake these obligations on behalf of the Class Members, the recovery in this case would not have occurred.

Accordingly, a Service Award of $3,500.00 to each Plaintiff for their time and work on this case on behalf of all Class Members is appropriate.

V. CONCLUSION

Based upon the foregoing, Class Counsel respectfully requests this Court approve the payment from the $1,750,000 common fund of (1) $583,333.33 as fair and reasonable for attorneys' fees; (2) $14,981.67 for reimbursement of the expenses necessarily incurred in prosecution of this Class Action; (3) $3,5000 for each Plaintiff as Service Awards, and any further relief that this Court deems just and equitable.

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15 *See also Birr v. Amica Mut. Ins. Co.*, No. 1:08CV124, 2011 WL 1429171, at *1 (S.D. Ohio Apr. 14, 2011) (adopting magistrate's Report and Recommendation approving incentive payment to the Class Representative of $5,000).

16 *See* Coates Decl., ¶ 14.

Respectfully submitted,

/s/ Terence R. Coates
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Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2023, I served a copy of the foregoing via electronic filing in the ECF system.

/s/ *Terence R. Coates*
Terence R. Coates