

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN**

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**SCOTT LINMAN**, on behalf of himself  
and all others similarly situated,

Plaintiff,

v.

**MARTEN TRANSPORT, LTD.**,

Defendant.

Case No.: 3:22-cv-00204-jdp

Judge James D. Peterson

Magistrate Judge Anita M. Boor

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**PLAINTIFF'S MEMORANDUM IN SUPPORT OF  
MOTION FOR ATTORNEYS' FEES, EXPENSES, AND  
CLASS REPRESENTATIVE SERVICE AWARD**

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Under Fed. R. Civ. P. 23(h) and Fed. R. Civ. P. 54(d)(2), as well as this Court's June 13, 2024, Opinion and Order Granting Preliminary Approval of Class Action Settlement [Doc. 44], Plaintiff and Class Counsel respectfully submit this memorandum of law in support of Plaintiff's Motion for Attorneys' Fees, Expenses, and the Class Representative Service Award.

### **INTRODUCTION**

Plaintiff Scott Linman ("Plaintiff") and the preliminary-approved Settlement Class, along with Class Counsels' assistance, reached a class action settlement with Defendant Marten Transport, Ltd. ("Defendant" or "Marten") for a \$520,000.00 non-reversionary common fund resolving claims arising from a 2021 data incident that impacted approximately 34,681<sup>1</sup> individuals (the "Data Incident"). The Data Incident is alleged to have included full names and Social Security numbers of certain of Defendant's current and former employees and job applicants.

The Settlement provides significant relief to Settlement Class Members including direct cash payments from the Settlement Fund. In addition to the benefits obtained under the Settlement, Class Counsel also designed an effective Notice program including a postcard Notice with tear-off claim form that simplified that claims process. To date, the Settlement Class is reacting very favorably to the Settlement and with roughly 4.2% of the Settlement Class having already submitted claims. Accordingly, the Settlement benefits and Class's reaction to the Settlement support Plaintiff's and Class Counsels' request for attorneys' fees of \$152,000.00 (33.33% of the Settlement Fund of \$520,000 less expenses, administrative costs, and the Class Representative Service Award (the "Net Settlement Fund")) and litigation expenses of \$10,896.25, which are well within the range of reasonableness under Rule 23(h).

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<sup>1</sup> This class size is updated from the 35,511 original total now that the Settlement Administrator has removed any duplicates from the Settlement Class.

## **I. Factual and Procedural Overview of the Litigation**

### **A. Negotiations and Settlement**

On April 11, 2022, Plaintiff Linman filed a nationwide Class Action Complaint against Defendant in this District alleging that Marten failed to implement and maintain reasonable data security measures. *See generally* Doc. 1. Plaintiff asserted claims for negligence, unjust enrichment, breach of implied contract, invasion of privacy, and breach of confidence. *Id.*

Thereafter, on June 1, 2022, Defendant filed its Motion to Dismiss Plaintiff's Class Action Complaint. Doc. 13. On March 17, 2023, the Court granted Defendant's Motion to Dismiss as to Plaintiff's claims for claims for injunctive relief, breach of contract, unjust enrichment, invasion of privacy, and breach of confidence, and denied Defendant's Motion to Dismiss as to Plaintiff's negligence claim. Doc. 22. After Defendant's Answer was filed, the Parties' Counsel initiated settlement discussions. Before reaching a settlement in principle, the parties exchanged information adequate to evaluate the merits of this case, including, confirming the number of individuals impacted by the Data Incident, confirming that the types of information potentially compromised are uniform for potentially all Class Members, discussing whether Defendant has email addresses for any Class Members, and evaluating other data breach settlements involving Social Security numbers and comparable class sizes. Declaration of Terence R. Coates in Support of Plaintiff's Amended Motion for Preliminary Approval of Class Action Settlement ("Coates Preliminary Approval Decl."), Doc. 39, ¶¶ 6-7.

On June 20, 2023, the Parties held a private mediation and reached a settlement in principle. The Parties then moved to stay the case pending the filing of a Motion for Preliminary Approval. Doc. 29. On June 26, 2023, this Court granted the Motion to Stay and ordered Plaintiff to file a Motion for Preliminary Approval by August 18, 2023. Doc. 30. Plaintiff submitted his original



request for preliminary approval of class action settlement on August 18, 2023. On November 16, 2023, the Court denied Plaintiff's request for preliminary approval without prejudice and issued detailed guidance for the content of the refiling of the preliminary approval request. Doc. 36. However, after the filing of the Amended Unopposed Motion for Preliminary Approval, the Court granted preliminary approval of the settlement on June 13, 2024. Doc. 44.

The Settlement is the result of months of arm's-length negotiations and hard bargaining. The Parties exchanged informal discovery, including information regarding, but not limited to, the allegations in the Complaint, the class size, the types of data potentially impacted in the Data Incident, and information supporting Plaintiff's damages allegations. Coates Preliminary Approval Decl., Doc. 39, ¶ 7. The Parties also exchanged formal discovery requests and received responses from each other before agreeing to mediate the case. *Id.* Through the informal and formal discovery process, Plaintiff was able to properly consider damages on a class-wide basis. *Id.*, ¶ 8. After the exchange of a series of offers and demands, the Parties were able to resolve the matter for a common fund settlement of \$520,000.00. *Id.*, ¶ 6. The \$520,000 non-reversionary common fund settlement amount was reached upon a mediator's proposal from Bennett G. Picker – a mediator with extensive experienced mediation data breach class actions such as this one.<sup>2</sup> Marten also disclosed certain cybersecurity business practice changes it implemented and will further implement to limit the potential for future data security incidents. *See* S.A., ¶ 56. Furthermore, Plaintiff learned the steps that Defendant understood to assist governmental authorities in identifying the threat actor responsible for the Data Incident and in effectively causing the threat actor organization to disband. This Settlement would resolve all claims related to the Data Incident on behalf of the Class. *Id.*, ¶ 78.

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<sup>2</sup> *See* <https://www.stradley.com/professionals/p/picker-bennett-g> (last visited August 19, 2024).

**B. Summary of Settlement Terms**

The Settlement is the result of months of arm's-length negotiations and hard bargaining. The Parties exchanged informal discovery, including, but not limited to, the allegations in the Complaint, the class size, and information supporting Plaintiff's damages allegations. Declaration of Terence R. Coates in Support of Plaintiff's Motion for Attorneys' Fees, Expenses, and Class Representative Service Award ("Coates Decl."), ¶ 8 (filed herewith as **Exhibit 1**); Declaration of M. Anderson Berry in Support of Plaintiff's Motion for Attorneys' Fees, Expenses, and Class Representative Service Award ("Berry Decl."), ¶ 12 (filed herewith as **Exhibit 2**); Declaration of Nathan D. Prosser in Support of Plaintiff's Motion for Attorneys' Fees, Expenses, and Class Representative Service Award ("Prosser Decl."), ¶ 5 (filed herewith as **Exhibit 3**).

Under the proposed Settlement, Defendant will pay \$520,000.00 to establish the non-reversionary Settlement Fund to be distributed to Class Members under the Settlement Agreement.

The Settlement defines the Class as follows:

the individuals identified on the Class List whose certain personal information may have been involved in the Data Incident who does not timely elect to be excluded from the Class. Excluded from the Class are: (1) the judge presiding over this Action, and members of his direct family; (2) Marten, its subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and their current or former officers and directors; and (3) Class Members who submit a valid Request for Exclusion prior to the Opt-Out Deadline.

S.A., ¶ 12. Under the Proposed Settlement, Marten agrees to pay a total of \$520,000.00 into the Settlement Fund, which will be used to make payments to Class Members submitting valid claims under the Settlement and to pay the costs of notice and administration, attorneys' fees and expenses, and Plaintiff's service award. *See* S.A., ¶¶ 46, 54.

## LEGAL STANDARD

Federal Rule of Civil Procedure 23(h) allows a district court supervising a class action to “award reasonable attorney’s fees and nontaxable costs that are authorized by law.” Fed. R. Civ. P. 23(h). The United States Supreme Court noted that attorneys who represent a class and whose efforts achieve a benefit for the class are “entitled to a reasonable attorney’s fee from the fund as a whole” as appropriate compensation for their services to the class. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). District courts have discretion in setting fee awards in class action cases. *McKinnie v. JP Morgan Chase Bank, NA*, 678 F. Supp. 2d 806, 814 (E.D. Wis. 2009) (“The district court has considerable discretion to determine the reasonableness of attorneys’ fees because it has the greatest familiarity with the case and is in the best position to scrutinize the attorneys’ work.”) (Internal citations omitted).

In common fund cases, such as this case, “class counsel who wins a settlement or judgment creating a commonly-held fund for the benefit of the class is entitled to a reasonable fee drawn from that fund.” *McKinnie*, 678 F. Supp. 2d at 814 (citing *Boeing*, 444 U.S. at 478). Concurrently, the court “must attempt to award the market price for legal services when determining appropriate fees in common-fund cases, in light of the risk of nonpayment and the normal rate of compensation in the market price at the time.” *Id.*

## ARGUMENT

### **I. The Requested Attorneys’ Fees are Reasonable and Should be Approved**

Class Counsel’s substantial efforts in guiding the Settlement Class to a \$520,000.00 Settlement Fund support the requested attorneys’ fees of \$152,000.00 (29.23% of the \$520,000.00 common fund or 33.33% of the Net Settlement Fund). As discussed below, Class Counsel’s

attorneys' fees request is consistent with the market rate for attorney services in contingency fee class action cases and reflects the substantial recovery achieved in this case.

**A. A Contingency Fee is the Market Rate in Class Action Cases**

In assessing the reasonableness of an attorney fee award for a class action settlement, district courts should “do their best to award counsel the market price for legal services, in light of the risk of non-payment and the normal rate in the market at this time.” *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) (quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001)). The market rate in a consumer class action for services provided by class counsel is a contingency fee. *McKinnie*, 678 F. Supp. 2d at 815. Here, Class Counsel were retained on a contingency fee basis and, as a result, the market rate for this case is a contingency fee. Coates Preliminary Approval Decl., ¶ 23.

**B. The Percentage of the Fund Method is Appropriate for Calculating Attorneys' Fees**

Courts have discretion to determine the “market rate” based on either a lodestar or percentage of the fund method. *Lueng v. XPO Logistics*, 326 F.R.D. 185, 204 (N.D. Ill. 2018); *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.”); *Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014) (“[T]he choice of methods is discretionary . . . in our circuit., it is legally correct for the district court to choose either.”).<sup>3</sup> The percentage of the fund approach is the preferred method for determining attorneys’

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<sup>3</sup> A lodestar cross-check is not required in the Seventh Circuit. *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) (“[C]onsideration of a lodestar check is not an issue of required methodology.”); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 849 (N.D. Ill. 2015) (“A district court is under no obligation to cross check fees against the lodestar.”); *Bell v. Pension Comm. of Ath Holding Co., LLC*, No. 1:15-cv-02062, 2019 WL 314388 (S.D. Ind. Jan. 24, 2019) (“In determining fees in a common fund class actions settlement the use of a lodestar cross-check is no longer recommended in the Seventh Circuit”).

fees in consumer class actions in the Seventh Circuit: “there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration.” *Florin v. Nationsbank of Ga., NA*, 34 F.3d 560, 566 (7th Cir. 1994). Wisconsin federal courts have found in class action cases where the market rate is a contingency fee that it is appropriate to “award attorneys’ fees as a percentage of the common fund because it most closely replicates the market for the legal services provided.” *McKinnie*, 678 F. Supp. 2d at 815.

**C. A Fee Request of 33.33% of the Net Settlement Fund and less than 30% of the total Settlement Fund is Fair and Reasonable**

In addition to analyzing the risk of non-payment and fee awards in similar cases,<sup>4</sup> courts review the quality of the attorneys’ performance, the amount of work necessary to resolve the litigation, and the complexity, length, and expense of the litigation. *Id.* at 693.

**1. Attorneys’ Fees of 33.33% of the Net Settlement Fund and less than 30% of the Settlement Fund are lower than Typical**

Class Counsel’s request for \$152,000.00 is reasonable and consistent with market rates and with Seventh Circuit precedent. The Seventh Circuit has held:

When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund, in recognition of the fact that most suits for damages in this country are handled on the plaintiff’s side on a contingent fee basis. The typical contingent fee is **between 33 and 40 percent**...

*Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) (emphasis added).

For this reason, Courts within the Seventh Circuit consistently award attorneys’ fees of 1/3 or above of the common fund in class action cases. *See, e.g., Karpilovsky v. All Web Leads, Inc.*, No. 2017-cv-01307 (N.D. Ill. Aug. 8, 2019), ECF No. 173 (approving fees amounting to 35% of the entire settlement fund); *Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 795 (7th Cir.

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<sup>4</sup> *Sutton*, 504 F.3d at 692.

2018) (affirming fee award in TCPA class action that included, inter alia, “the sum of 36% of the first \$10 million”); *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (finding 40% to be “the customary fee in tort litigation”); *Behrens v. Landmark Credit Union*, No. 17-CV-101-JDP, 2018 WL 3130629, at \*16 (W.D. Wis. June 26, 2018) (“And generally, a 33 to 40 percent contingency fee is considered consistent with the market rate and reasonable.”); *In re Forefront Data Breach Litig.*, No. 21-cv-887, 2023 WL 6215366, at \*8 (E.D. Wis. Mar. 22, 2023) (similar); *Neeck v. Badger Bros. Moving, LLC*, No. 19-cv-834, 2021 WL 1945829, at \*3 (W.D. Wis. May 14, 2021) (similar). Class Counsel’s attorneys’ fee request of \$152,000.00 (29.23% of the Settlement Fund and 33.33% of the Net Settlement Fund) is reasonable in that it is within the range typically approved by courts within the Seventh Circuit.<sup>5</sup>

## 2. The Results Obtained and Fees in Similar Cases

The \$520,000.00 non-reversionary common fund is a strong recovery for the Settlement Class of 34,681 individuals and compares favorably to other recent data breach cases involving similar data. The following chart compares the amount recovered per Settlement Class Member here against the amount recovered per class member in other recent data breach class action settlements, and highlights the substantial result achieved for the Settlement Class:

| Case Name                                      | Case Number                    | Settlement Amount | Class Size | Per Person |
|--|--------------------------------|-------------------|------------|------------|
| <i>Reynolds v. Marymount Manhattan College</i> | No. 1:22-cv-6846<br>(S.D.N.Y.) | \$1,300,000       | 191,752    | \$6.78     |

<sup>5</sup> After taking into account deductions for administrative expenses, which include the costs of Notice and settlement administration through completion of the Settlement estimated to be at least \$44,000.00, litigation costs and expenses not exceeding \$15,000.00, and a Service Award of \$5,000 to the Class Representative, the Net Settlement Fund amounts to \$456,000.00. Class Counsel’s fee request of \$152,000.00 equates to 29.23% of the gross Settlement Fund. It represents roughly 33.33% of the Net Settlement Fund, which is consistent with the market rate in the Seventh Circuit. *See, e.g., Karpilovsky, v. All Web Leads, Inc.*, No. 2017-cv-01307 (N.D. Ill. Aug. 8, 2019), ECF No. 173 (approving fees amounting to 35% of the entire settlement fund, which amounted to approximately 38% of the net settlement fund); *see also Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014).

|   |  |                  |               |                |
|---|--|------------------|---------------|----------------|
| <i>Julien v. Cash Express, LLC</i>                              | No. 2022-CV-221<br>(Putnam Cty., Tenn.)  | \$850,000        | 106,000       | \$8.02         |
| <i>Tucker v. Marietta Area Health Care</i>                      | No. 2:22-CV-00184<br>(S.D. Ohio)         | \$1,750,000      | 216,478       | \$8.08         |
| <i>In re Cinfed Federal Credit Union Data Breach Litig.</i>     | No. 1:23-CV-776<br>(S.D. Ohio)           | \$700,000        | 58,000        | \$12.00        |
| <i>Pederson v. AAA Collections, Inc.</i>                        | No. 4:22-cv-04166<br>(D.S.D.)            | \$865,000        | 66,488        | \$13.00        |
| <b><i>Linman v. Marten Transport, Ltd.</i></b>                  | <b>No. 3:22-cv-00204<br/>(W.D. Wis.)</b> | <b>\$520,000</b> | <b>34,681</b> | <b>\$14.99</b> |
| <i>In re Marshall &amp; Melhorn, LLC Data Breach Litigation</i> | No. 3:23-CV-01181<br>(N.D. Ohio)         | \$800,000        | 47,000        | \$17.02        |

Coates Decl., ¶ 30. Notably, the Settlement Class has responded favorably to the Settlement to date with the claims rate being approximately 4.2%, which is a steady initial claims rate in a data privacy class action where the final claims rates typically range from 1-3%. With the claim deadline being September 25, 2024, the claims period remains open for over five more weeks, meaning that the claim rate will grow as additional Settlement Class Members submit claims to receive a cash payment from the Settlement. The objection and opt out deadlines are August 26, 2024. Class Counsel will detail the number of exclusions including whether objections are filed in the Motion for Final Approval of Class Action Settlement. Class Counsel’s fee request in this case is reasonable because it is consistent with awards in the Seventh Circuit and around the country in data privacy class action cases.

### **3. The Complexity, Length, and Expense of the Litigation**

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 of data privacy. *See Cotter v. Checkers Drive-In Rests., Inc.*, No. 8:19-cv-1386, 2021 WL 3773414, at \*12 (M.D. Fla. Aug. 25, 2021) (noting data breach class actions present “serious risks” due, in part, to “the ever-developing

law surrounding data breach cases”); *In re Citrix Data Breach Litig.*, No. 19-61350-CIV, 2021 WL 2410651, at \*3 (S.D. Fla. Jun 11, 2021) (“Data breach cases in particular present unique challenges with respect to issues like causation, certification, and damages.”); *In re Arby’s Rest. Grp., Inc. Data Sec. Litig.*, No. 1:17-cv-1035-WMR, 2019 WL 2720818, at \*3 (N.D. Ga. June 3, 2019) (“Further, data breach litigation involves the application of unsettled law with disparate outcomes across states and circuits.”). This case is no exception. The pursuit of nationwide claims and relief presented complex issues of law and fact. Plaintiff would still need to fight possible summary judgment and gain class certification. *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) (“Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation.”); *Leung*, 326 F.R.D. at 197 (noting that when “there would still be substantial motion practice on class certification and a possible summary judgement motion, plus trial and appeal” supports a finding “continued litigation is likely to be lengthy, complex, and expensive.”). While Class Counsel remain confident in Plaintiff’s claims, there is a recognized element of risk in any litigation, particularly complex and expensive data privacy class litigation. *See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 964 (N.D. Ill. 2011) (“The costs associated with discovery in complex class actions can be significant.”); *Adams v. Aztar Indian Gaming Co., LLC*, No. 3:20-cv-143, 2023 WL 6536785, at \*5 (S.D. Ind. Aug. 11, 2023) (“[c]ontinuing to litigate the case will require vast expense and a great deal of time, on top of that already expended, as well as expose it to the inherent risk of continued litigation.”). This factor supports Class Counsel’s requested fee.

#### **4. The High Stakes of the Case**

Class action cases are inherently high stakes litigation and data breach lawsuits each carry their own uncertainties and inherent risks. Class Members’ claims faced opposition and the risk



that the Court would dismiss all or some of their claims, decline to certify the Class or decertify the Class, granting of a potential motion for summary judgment in Defendant's favor, or that Plaintiff would not prevail at trial. *Synthroid*, 264 F.3d at 721. This factor supports the requested fee because of the immense uncertainty that exists about the outcome of Plaintiff's claims.. *See also In re Omnivision Techs.*, 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").

#### **5. Class Counsel Assumed the Risk of Nonpayment**

"Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (citing *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986)). The risk of nonpayment is important in determining the reasonableness of an attorneys' fees request due to the "risk that attorneys will receive no fee (or at least not the fee that reflects their efforts) when representing a class because their fee is linked to the success of the suit[;] ... [b]ecause the district court failed to provide for the risk of loss, the possibility exists that Counsel, whose only source of a fee was a contingent one, was undercompensated." *Sutton*, 504 F.3d at 694. Class Counsel undertook this case on a contingency fee basis and faced substantial risk of nonpayment. *Schulte*, 805 F. Supp. 2d at 598 ("All contingent fee class actions involve some degree of risk for plaintiffs' counsel.").

#### **6. The Experience, Reputation, and Ability of the Attorneys**

The experience, reputation and ability of class counsel is another factor courts evaluate in determining an appropriate attorneys' fees award. Here, Class Counsel relied upon their vast experience handling data privacy class actions across the country to negotiate a non-reversionary

common fund settlement with experienced defense counsel. Coates Decl., ¶ 4; Berry Decl., ¶ 4; Prosser Decl., ¶ 4. Class Counsel used their experience to efficiently resolve this case after a mediation session with a highly-qualified mediator and to reach a uniform, class-wide settlement in a cutting-edge, highly-uncertain and largely untested area of the law. Coates Decl., ¶ 8; Berry Decl., ¶ 12; Prosser Decl., ¶ 5. Class Counsel’s experience in handling many other data privacy class action cases permitted Class Counsel to avoid the risk of no recovery at all and, instead, to establish the \$520,000.00 non-reversionary common fund.

Furthermore, Class Counsel have a national reputation for handling complex class action cases. *Bedont v. Horizon Actuarial Servs., LLC*, No. 1:22-CV-01565, 2022 WL 3702117, at \*2 (N.D. Ga. May 12, 2022) (noting that class counsel “are well qualified to serve as Interim Co-Lead Class Counsel and that they will fairly, adequately, responsibly, and efficiently represent all Plaintiffs in the Cases in that role” in a data privacy class action); *Shy v. Navistar Int’l Corp.*, No. 3:92-CV-00333, 2022 WL 2125574, at \*4 (S.D. Ohio June 13, 2022) (“Class Counsel, the law firm Markovits, Stock & DeMarco, LLC, are qualified and are known within this District for handling complex including class action cases such as this one.”); *Bechtel v. Fitness Equip. Servs., LLC*, 339 F.R.D. 462, 480 (S.D. Ohio 2021) (“plaintiffs’ attorneys have appeared in this Court many times and have substantial experience litigating class actions and other complex matters.”). Coates Decl., ¶ 5.

## **7. The Time and Labor Required**

Class Counsel should be rewarded for litigating this matter with considerable diligence and efficiency. This matter was resolved over years of litigation, and Class Counsel and Plaintiff conducted substantial pre-suit investigation including consulting with a data privacy expert, seamlessly coordinating as counsel for Plaintiff to conduct a unified proceeding before this Court

and to lead this case for Plaintiff and the Class, drafting a comprehensive and detailed Complaint, conducting significant motion practice, and discovery for settlement purposes. Coates Decl., ¶ 8; Berry Decl., ¶ 12; Prosser Decl., ¶ 5.

***a. Class Counsel's Pre-Suit Investigation & Discovery***

Class Counsel conducted a pre-suit investigation to determine exactly what occurred during the data breach and to determine the types of personal information it was unlawfully disclosing to third parties without Plaintiff's consent. Coates Decl., ¶ 8; Berry Decl., ¶ 12; Prosser Decl., ¶ 5. Furthermore, Plaintiff drafted and served discovery requests to Defendant, and also provided written discovery responses to Defendant's discovery requests. *Id.* Class Counsel's efforts in investigating the Data Incident and participation in discovery permitted Class Counsel to make very informed decisions about presenting Plaintiff's claims in this case and to participate in protracted settlement negotiations under well-qualified and well-respected Mediator Bennett G. Picker's steady guidance.

***b. Protracted Settlement Negotiations***

Plaintiff also engaged in detailed, protracted settlement negotiations with Defendant that included full-day mediation session with Bennet G. Picker. *Id.* In preparation for the mediation, Plaintiff issued detailed settlement information requests to Defendant so that Plaintiff would be in a position to make informed settlement demands and participate in productive settlement negotiations. *Id.* Furthermore, Plaintiff conducted extensive legal research to analyze the strengths and weaknesses of his legal claims. Coates Decl., ¶ 10; Berry Decl., ¶ 14; Prosser Decl., ¶ 7. Class Counsel were extremely prepared during settlement negotiations. As previously discussed, this case was resolved after over a year of active litigation, providing a significant Settlement. In awarding attorneys' fees, courts have consistently recognized and rewarded class counsel for moving the

litigation to conclusion with diligence and efficiency. *Ressler v. Jacobson*, 149 F.R.D. 651 (M.D. Fla. 1992) (noting class counsel’s efficiency in resolving the case as a factor supporting the requested fee award); *see also Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1063 (D. Minn. 2010) (noting that “Plaintiffs’ counsel moved the case along expeditiously, and made every effort to limit duplicative efforts and to minimize the use of judicial resources in the management of the case” and “[c]ounsel exhibited diligence and efficiency throughout the litigation, resulting in a favorable result for the Class”). This factor, like the others, weighs in favor of approving Class Counsel’s’ fee request.

#### **8. Class Counsel’s Lodestar is Reasonable**

As discussed above, in the Seventh Circuit, courts may elect to use either the lodestar method or the percentage-of-the-fund method to determine whether plaintiffs’ fee requests are reasonable. *Americana Art China Co., Inc.*, 743 F.3d at 247. As discussed above Plaintiffs’ fee request is reasonable according to the percentage-of-the-fund method, and it is also reasonable according to the lodestar method. In determining whether a fee is reasonable under the lodestar method, a Court multiplies “the ‘number of hours reasonably expended on the litigation ... by a reasonable hourly rate.’” *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 639 (7th Cir. 2011) quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

In total Class Counsel expended approximately 368.9 hours of work at their usual and customary hourly rates for a lodestar total of \$237,441.60. Coates Decl., ¶ 28. The \$152,000 fee request therefore represents a negative multiplier of .64. *Id.*

##### ***a. The Number of Hours Class Counsel Billed are Reasonable***

The current billing rates for each attorney or staff who contributed to this case, along with the hours billed and resulting lodestar as of August 19, 2024, are set forth in the declarations filed herewith. Coates Decl., ¶ 24; Berry Decl., ¶ 29; Prosser Decl., ¶ 19. Class Counsel maintained

contemporaneous and detailed time records, which include separate entries for the hours spent on specific tasks. Each entry should indicate who performed the work and give a description of the task. Coates Decl., Ex. A; Berry Decl., Ex. A; Prosser Decl., Ex. A. The time committed by each firm was necessary to the successful resolution of this litigation, and all attorneys made sure to efficiently allocate work, coordinate assignments, and prevent the unnecessary duplication of work. Coates Decl., ¶ 8; Berry Decl., ¶ 33; Prosser Decl., ¶ 23. The 368.9 hours incurred by Class Counsel were reasonable, appropriate, and necessary for the effective prosecution of this case especially considering the amounts of motion practice and various hurdles present throughout the more than two years of litigation on this matter. Coates Decl., ¶ 28. Specifically, this time included investigating the cause and effects of the Data Incident, including consulting with a data privacy expert;; drafting a comprehensive and detailed Class Action Complaint; conducting significant motion practice both formal and informal discovery for settlement purposes including drafting and serving discovery requests on Defendant and drafting and serving written responses to Defendant’s discovery requests; engaging in protracted settlement negotiations; assisting in the drafting of a detailed mediation statement; attending a full-day mediation session with the well-qualified and well-respected Mediator Bennett G. Picker of Stradley & Ronon; negotiating the detailed terms of the class action settlement agreement; and drafting the preliminary approval motion. Coates Decl., ¶ 8; Berry Decl., ¶ 12; Prosser Decl., ¶ 5.

Because complex litigation, and especially data breach litigation, often requires a team structure, courts have compensated time spent in collaborative efforts. *See Doe v. MacLeod*, No. 18-CV-03191, 2024 WL 1335041, at \*11 (C.D. Ill. Mar. 28, 2024) (finding that duplicative billing as a result of collaborative efforts were reasonable in a lengthy and complex matter); *see also Tchekou v. Mukasey*, 517 F.3d 506, 511–12 (7th Cir. 2008) (“The practice of law often, indeed

usually, involves significant periods of consultation among counsel. Talking through a set of authorities or seeking advice on a vexing problem is often significantly more efficient than one attorney's [sic] trying to wade through the issue alone.”). Moreover, Class Counsel’s responsibility for this case is far from over. Class Counsel must continue to work with the Claims Administrator, review and respond to questions from Settlement Class Members about the settlement and the claims adjudication process, and oversee the final administration of benefits to Settlement Class Members. Coates Decl., ¶¶ 16, 17; Berry Decl., ¶¶ 20, 21; Prosser Decl., ¶¶ 13-14. Class Counsel will likely spend dozens of additional hours in this regard. *Id.*

***b. Class Counsel’s Hourly Rates are Reasonable***

Counsel’s rates are reasonable if they are within the range charged by and awarded to attorneys of comparable experience, reputation, and ability for similar work, *i.e.*, complex class action litigation. *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). Moreover, such rates “are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel.” *Id.*, at 895; *see also Gusman v. Unisys Corp.*, 986 F.2d 1146, 1149 (7th Cir. 1993) (“A reasonable fee should approximate the prevailing market rate in the relevant community.”).

The hourly rates sought by Class Counsel range from \$190 to \$308 for paralegals and from \$375 to \$850 for attorneys up to senior partners. Coates Decl., ¶ 24; Berry Decl., ¶ 29; Prosser Decl., ¶ 19. These rates are consistent with the prevailing market rates in data breach class action litigation for attorneys of comparable experience, reputation, and ability. Moreover, similar rates have been approved nationwide, by the Seventh Circuit, and also by this District. *See Powers, Sanger et al v. Filters Fast LLC*, Case 3:20-cv-00982-jdp (W.D. Wis. July 22, 2022), ECF 84) (data breach settlement approving rates for \$700-\$875 per hour for partners); *Fox v. Iowa Health Sys.*, No. 3:18-

CV-00327-JDP, 2021 WL 826741, at \*6 (W.D. Wis. Mar. 4, 2021) (data breach settlement awarding \$1,575,000 in attorneys' fees and costs, at hourly rates from \$815-\$865 per hour for partners, \$550-\$625 for senior associates, \$415-\$500 for associates, and \$215-\$350 for paralegals); *Perdue v. Hy-Vee, Inc.*, No. 19-1330, 2021 WL 3081051, at \*5 (C.D. Ill. July 21, 2021) (approving reasonable hourly rates requested by Class Counsel of \$700-\$815 for partners, \$325-\$700 for associates, \$200-\$275 for paralegals, and \$150-\$225 for law clerks); *In re: Capital One Consumer Data Breach Litigation*, MDL No. 1:19-md-02915-AJT-JFA (Doc. 2231-1 – approving rates for partners in data breach ranging from \$919 to \$1,050 per hour); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at \*39 (N.D. Ga. Mar. 17, 2020) (finding reasonable hourly rates charged by partners who billed \$750-\$1,050 per hour); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at \*26 (N.D. Cal. July 22, 2020) (finding reasonable rates from \$450-\$900 for partners, \$160-\$850 for non-partner attorneys, and \$50-\$380 for paralegals); *Fulton-Green v. Accolade, Inc.*, No. CV 18-274, 2019 WL 4677954, at \*12 (E.D. Pa. Sept. 24, 2019) (finding reasonable hourly rates range \$202-\$975 per hour); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at \*16 (N.D. Cal. Aug. 17, 2018) (finding reasonable hourly rates of partners from \$400-\$970, non-partner attorneys from \$185-\$850, and non-attorneys from \$95-\$440). Further, Class Counsel's hourly rates sought here have been previously reviewed by other federal courts. *See* Coates Decl., ¶¶ 20-25; Berry Decl., ¶ 28; Prosser Decl., ¶ 22. Here, the majority of the work on this matter was performed by partner level attorneys with considerable experience in data breach litigation further establishing that the rates are reasonable here. *See* Coates Decl., ¶ 24; Berry Decl., ¶ 29; Prosser Decl., ¶ 19. Moreover, the rates here are reasonable and are in line with the hourly rates charged by local practitioners within this District.

Additionally, the *Real Rate Report: The Industry's Leading Analysis of Law Firm Rates, Trends, and Practices* (“Real Rate Report”) has often been consulted by numerous courts nationwide as a useful guidepost to determine the reasonableness of hourly rates. *See, e.g., Hashemi v. Bosley, Inc.*, No. CV 21-946 PSG (RAOX), 2022 WL 18278431, at \*9-10 (C.D. Cal. Nov. 21, 2022); *Sabinsa Corporation v. HerbaKraft, Inc.*, No. 14-cv-04738, 2022 WL 17446485, at \*4–\*6 (D.N.J. 2022). The Real Rate Report identifies attorney rates by location, experience, firm size, areas of expertise, and industry, as well as specific practice areas, and is based on actual legal billing, matter information, and paid and processed invoices. *See Hicks v. Toys ‘R’ Us-Del., Inc.*, No. CV13-1302 DSF (JCGx), 2014 WL 4670896, at \*1 (C.D. Cal. Sept. 2, 2014). The Real Rate Report has been found to be “a much better reflection of true market rates than self-reported rates in all practice areas.” *Id.*; *see also Tallman v. CPS Sec. (USA), Inc.*, 23 F. Supp. 3d 1249, 1258 (D. Nev. 2014) (considering the Real Rate Report); *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 433 (S.D.N.Y. 2012) (same); *Skeen v. BMW of N. Am., LLC*, No. 2:13-cv-1531, 2016 WL 4033969 (D.N.J. July 26, 2016) (same); *Bilazzo v. Portfolio Recovery Assocs., LLC*, 876 F. Supp. 2d 452, 470 (D.N.J. 2012).

The Real Rate Report provides that partner, associate, and paralegal rates have continued to climb. Specifically, the report provides that “[a] high-level overview of the 2023 findings shows a continuation of a multi-year trend that sees average rates continue to rise across timekeeper roles. The mean rate for partners saw the most significant increase, growing from \$768 in 2022 to \$784 in 2023. Paralegals experienced the second-largest bump, with an average rate of \$263 in 2023, up from \$252 in 2022.”<sup>6</sup> Based on these numbers and considering the complexity of this matter and

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<sup>6</sup> *See* Frank Ready, “Wolter Kluwer’s Real Rate Report shows legal rates continue to grow” *available at* <https://www.wolterskluwer.com/en/news/wolters-kluwers-real-rate-report-shows-legal-rates-continue-to-grow> (last visited August 14, 2024).



the experience of Class Counsel, the range of \$190 to \$308 for paralegals and from \$375 to \$850 for attorneys up to senior partners requested here is reasonable. Coates Decl., ¶ 24; Berry Decl., ¶ 29; Prosser Decl., ¶ 19.

**II. The Requested Expenses Are Reasonable in that They Are Minimal and Were Necessary to Prosecute the Litigation**

Under the Settlement, Class Counsel may seek up to \$15,000.00 in reimbursement of litigation expenses. Settlement Agreement, ¶ 83. Class Counsel have been prudent in monitoring their litigation expenses in this case to date. As of August 19, 2024, Class Counsel have \$10,898.25 in expenses consisting of filing fees, mediator fees, travel expenses, copying, and legal research fees. Coates Decl., ¶ 28. These expenses are minimal in comparison to the \$520,000.00 common fund and are incurred for the benefit of the Settlement Class.

**III. The \$5,000 Service Award is Reasonable**

The Class Representative has remained engaged in this Litigation including reviewing the detailed allegations in the complaint, approving of the factual allegations in the complaint, and approving the terms of the Settlement Agreement.<sup>7</sup> Furthermore, he reviewed and responded to Defendant's written discovery requests and prepared to have his deposition taken. He stayed in consistent communication with Class Counsel throughout the duration of the case. Class Representative has served the Class well by being a thorough representative of the Class. His efforts have been integral in establishing the \$520,000.00 Settlement Fund. Courts within this District have approved service awards similar to the \$5,000 Service Award sought in this case. *See Weninger v. Gen. Mills Operations, LLC*, No. 18-CV-321-JPS, 2019 WL 1746703, at \*1 (E.D. Wis. Apr. 18, 2019) (granting \$5,000 service award); *Benoskie v. Kerry Foods, Inc.*, No. 19-cv-

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<sup>7</sup> *See generally* the Declaration of Scott Linman in Support of Plaintiff's Motion for Attorneys' Fees, Expenses, and Class Representative Service Awards, filed herewith as **Exhibit 4**.

684-pp, 2020 WL 5769488, at \*5 (E.D. Wis. Sept. 28, 2020) (granting \$5,000 service award); *Pintor v. Hypro, Inc.*, No. 17-cv-890-pp, 2018 WL 4705847, at \*1 (E.D. Wis. Oct. 1, 2018) (granting \$5,000 service award). Accordingly, the Class Representative's request for a \$5,000 Service Award is reasonable and justified given Plaintiff's efforts on behalf of his fellow Class Members.

### **CONCLUSION**

For these reasons, Plaintiff and Class Counsel respectfully ask the Court to approve Plaintiff's request for \$152,000.00 in attorneys' fees, \$10,898.25 in reimbursement in litigation expenses, and Class Representative Service Awards in the amount of \$5,000 to Plaintiff Linman as the Class Representative.

Dated: August 20, 2024

Respectfully submitted,

/s/ Nathan D. Prosser

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 20, 2024, I served a copy of the foregoing via electronic filing in the ECF system.

*/s/ Nathan D. Prosser*  
Nathan D. Prosser