UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

GEORGE NELSON, on behalf of himself and all others similarly situated, Plaintiff, v. ROADRUNNER TRANSPORTATION SYSTEMS, INC., Defendant.	)	Civil Action No.: 1:18-cv-07400 Honorable Sara L. Ellis

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNCONTESTED MOTION FOR FINAL APPROVAL OF ATTORNEYS' FEES, COSTS, AND EXPENSES, AND SERVICE AWARD

Plaintiff George Nelson respectfully submits this Memorandum of Law to support his Uncontested Motion for Final Approval of Attorneys' Fees, Costs, and Expenses, and Service Award.

I. INTRODUCTION

In this class action, Plaintiff, on behalf of himself and others similarly situated, sued Defendant, Roadrunner Transportation Systems, Inc. ("Defendant" or "Roadrunner"), for failing to adequately secure and safeguard the Personally Identifying Information ("PII") of Plaintiff and Class Members and for failing to provide timely, accurate, and adequate notice to Plaintiff and Class Members as to precisely how and when their sensitive PII had been exposed and provided to unknown persons. On February 26, 2020, this Court granted Preliminary Approval of the Settlement. (Doc. 48). The Parties' Settlement provides Plaintiff and Class Members with a recovery that compares favorably to what Class Members could have recovered if they had succeeded at trial. In addition, Class Counsel worked on a contingency basis, risking a considerable amount of time and expense in vigorously pursuing this Action.

Consistent with this Court's Order, Plaintiff now respectfully requests that this Court award to Class Counsel $388,000 in attorneys' fees, costs, and expenses. Class Counsel's request in reasonable under Seventh Circuit precedent. Counsel's request comprises (1) $212,229.10 in fees and (2) $10,130.33 for reimbursement of costs and expenses Moreover, Plaintiff also requests that the Court grant the Plaintiff David Nelson a service award of $2,500 for his efforts and time devoted to representing the Class in this case. For the reasons more fully articulated below, this Court should approve Class Counsel's request for fees, costs, and expenses, as well as approve the requested service award for Mr. Nelson.

II. PROCEDURAL HISTORY

On November 7, 2018, Plaintiff filed his Class Action Complaint ("CAC") (Doc. 1). On January 11, 2019, the Parties filed their Joint Initial Status Report, wherein Roadrunner denied liability in connection with Plaintiff's claims (Doc. 12). On January 15, 2019, Roadrunner was granted an unopposed extension of time to March 8, 2019 to respond to Plaintiff's Complaint (Doc. 14). On February 20, 2019, Roadrunner was granted an unopposed extension of time to April 8, 2019 to respond to Plaintiff's Complaint (Doc. 17). On April 5, 2019, Defendant filed its Motion to Dismiss and Memorandum in Support of its Motion to Dismiss Plaintiff's Complaint (Doc. 18 and Doc. 19). On April 10, 2019, Defendant's Motion to Dismiss was withdrawn (Doc. 21). On July 2, 2019, Plaintiff filed his Motion for Extension of Time to Submit Petition for Settlement Approval and for Continuance Status Hearing on July 10, 2019 (Doc. 28). On July 9, 2019, Plaintiff was granted an extension of time to August 2, 2019 to submit his Petition for Settlement Approval, and the Status Hearing was rescheduled to August 8, 2019 (Doc. 29). On August 21, 2019, Defendant filed an Unopposed Motion for Extension of Time to Submit Petition for Settlement Approval and for Continuance of Status Hearing (Doc. 33). On September 3, 2019, Defendant was granted an extension of time to November 4, 2019 to submit the petition for settlement approval, and the Status Hearing was rescheduled to November 12, 2019 (Doc. 35). On October 31, 2019, Plaintiff filed an Unopposed Motion for Extension of Time to Submit Petition for Settlement Approval and for Continuance of Status Hearing (Doc. 36). On November 8, 2019, Plaintiff was granted an extension of time to January 13, 2020 to submit the petition for settlement approval, and the Status Hearing was rescheduled to January 21, 2020 (Doc. 38). Consequently, the Parties worked together to negotiate, finalize, and memorialize a comprehensive set of settlement documents, which are embodied in the Settlement Agreement and the exhibits attached thereto. (Doc. 44-) (hereinafter cited as "SA").

Consequent upon a hearing on the matter (Doc. 46), on February 26, 2020, the Court preliminarily approved the Settlement, (Doc. 48). Concurrently herewith, Plaintiff moves unopposed for a final order and judgment granting final approval of the Settlement.

III. THE SETTLEMENT BENEFITS

A. Proposed Settlement Class

The Settlement affords relief for the following Settlement Class, which was preliminarily approved by this Court:

> All current and former Roadrunner employees whose HR Data was compromised as a result of the Data Exposure that occurred between April and May 2018.

Doc. 48 at 2.

B. Settlement Relief

Pursuant to the terms of the Settlement Agreement, Defendant will make the following relief available to Settlement Class Members who, except where noted in the Settlement Agreement, submit a valid Claim Form: (1) identity theft protection; (2) reimbursement of expenses; and (3) injunctive relief in the form of significant business practice changes, as discussed below. SA ¶¶ 52-3.

1. Identity Theft Protection

All Settlement Class Members will be given an opportunity to enroll in Experian's IdentityWorks identity theft protection services for a period of 24 months. This enrollment will be for an additional 24 months beyond the AllClear or Kroll identity theft protection services provided to affected employees following the Data Exposure. Settlement Class Members will be given one year from the date the activation codes are mailed in which to activate the additional credit monitoring. The approximate retail value to each class member accepting this benefit is

$19.99 per month of enrollment, although this does not reflect the actual cost to Defendant in providing the benefit. SA ¶ 52(a).

2. Reimbursement of Expenses

Defendant has also agreed to reimburse Settlement Class Members for the out-of-pocket expenses and lost time resulting from the Data Exposure. The Settlement Agreement is structured so that Settlement Class Members can be compensated for two different claim types – ordinary losses (Claim A) and extraordinary losses (Claim B). SA ¶ 52(b).

Specifically, compensation for ordinary losses (Claim A) includes up to a total of $250 per Class Member upon submission of a valid claim with supporting documentation. Ordinary losses include: (i) costs associated with credit monitoring or identity theft insurance purchased directly by the claimant, provided that the claimant attests the product was purchased primarily as a result of the Data Exposure; (ii) costs associated with requesting a credit report or credit freeze, provided that the claimant requested the report or credit freeze as a result of the Data Exposure; (iii) lost time of at least one hour and up to three hours at the rate of $20 per hour, provided that the claimant provides documentation or a narrative explanation plausibly establishing that the time was spent dealing with issues relating to the Data Exposure; and (iv) postage, long-distance charges, and other incidental expenses, provided that the claimant provides documentation of the charges and a narrative explanation plausibly establishing their relationship to the Data Exposure. SA ¶ 52(b).

Additionally, compensation for extraordinary losses (Claim B) includes up to a total of $5,000 per Class Member, provided that the losses are otherwise unreimbursed, plausibly the result of the Data Exposure, and supported by reasonable documentation of the amount of the losses. Extraordinary losses include: losses associated with identity theft, tax fraud, other forms of fraud, and other actual misuse of personal information, provided that the claim is supported by reasonable

documentation of the amount of the losses and provided that the losses are otherwise unreimbursed and plausibly the result of the Data Exposure. Settlement Class Members who submit qualifying claims under Claim B may also seek reimbursement for up to 10 hours of lost time at the rate of $25 per hour, for time spent dealing with issues relating to the identity theft, fraud, or other misuse. Before being eligible for payment for extraordinary losses, Settlement Class Members who previously signed up for AllClear's identity theft protection services or Kroll's identity theft protection services offered by Roadrunner must submit their claim to AllClear or Kroll and have that claim denied or exhausted. Settlement Class Members may submit claims for both claim types. SA ¶ 52(b).

Settlement Class Members may seek reimbursement for each hour of lost time only once, regardless of whether the time was spent addressing issues in multiple categories simultaneously. The overall cap for any individual claimant is $250 for all amounts claimed in Claim A, and $5,000 for all amounts claimed in Claim B. For purposes of any claim for reimbursement for lost time, the claimant must have spent at least one full hour before being entitled to claim one or more hours of time. SA ¶ 52(b).

The monetary relief outlined above was developed and negotiated on the basis of the experience of Class Counsel in other cases of the type at issue here, the interview of consumers affected by the type of breach that occurred here, including the results of claims filed by class members in other cases, as well as their interactions and interviews of present and former employees whose information is taken in compromises similar to the one at the heart of the litigation here. It is Class Counsel's seasoned judgment that the relief fairly addresses what Settlement Class Members may experience or have experienced as a result of the compromise. *See* Declaration of John A. Yanchunis filed contemporaneously herewith as Exhibit 2 in Support of

Plaintiff's Motion for Final Order and Judgment Granting Final Approval of Class Action Settlement at ¶ 2. and Declaration of Shannon M. McNulty in Support of Plaintiff's Uncontested Motion for Final Approval of Fees, Costs, and Expenses, and Service Award

3. Business Practice Changes

In addition to the monetary relief detailed above, Roadrunner has agreed to make significant business practice changes in order to prevent future cyberattacks and data exposures. For a period of three years following the date of execution of the Settlement Agreement, Defendant will implement and maintain certain data security measures through at least December 31, 2022, including:

Incident Response Plan: Prior to the entry of final approval of the Settlement Agreement, Roadrunner will develop and implement an Incident Response Plan to immediately respond to future data security issues.

Additional Personnel: Roadrunner agrees to (i) employ a Chief Information Officer who reports directly either to the Chief Executive Officer or the Chief Operating Officer, and (ii) create an Immediate Response IT Team and add immediate response personnel to existing teams, including the End User Support and Server Engineering Teams, to increase IT responsiveness and to support other data security initiatives.

Cybersecurity Training and Awareness Program: Roadrunner agrees to implement annual on-line cybersecurity training for all employees, covering different aspects of cybersecurity and to further educate employees on cybersecurity.

Data Security Policies: Roadrunner will create and implement new policies, protocols, and controls related to the ownership, review, and distribution of personally identifiable information

and other private data; the security of any files containing the personally identifiable information of employees; and, the electronic transfer of such files.

Enhanced Security Measures For Email Accounts, Servers, And Employee Computers: Roadrunner will (i) deploy Cofense PhishMe or a similar product to advance employee awareness through training, education, and testing, and to create a culture of cyber safety, and (ii) deploy Cofense Triage or a similar product to quickly and efficiently identify and shut down phishing attacks in progress.

Restricted Access to Tax, Payroll, and Health Plan Information: Before December 31, 2019, Roadrunner will: (i) implement policies reducing the number of administrators with access to tax, payroll, and health plan information, and (ii) block foreign access to Office 365 from 140 countries, including China, Russia, and Nigeria.

Testing of Policies and Information Security Environment: Roadrunner will implement monthly random testing to validate adherence of employees to Roadrunner's data security policies, including quarterly sweeps and analyses of email access to monitor for threats.

Access Audits: Roadrunner will conduct audits to monitor attempts by employees to access tax, payroll, and health plan information to ensure adherence to restricted access policies. Through December 31, 2019, Roadrunner will conduct quarterly audits. From January 1, 2020 through December 31, 2022, Roadrunner will conduct biannual audits. SA ¶ 53.

C. Other Benefits to the Class

Further, separate and apart from providing the foregoing benefits, Defendant will separately pay the following items, which will not reduce in any way the relief afforded by the Settlement to the Settlement Class: (1) The costs of class notice and claims administration, currently estimated to be $100,000 (CRA Dec ¶ 23); (2) subject to Court approval, a Service Award

of $2,500 to Plaintiff in recognition for his efforts in serving as the class representative in this matter (SA ¶ 94); and (3) subject to Court approval, Class Counsel's attorneys' fees, costs, and expenses in an aggregate amount not to exceed $388,000 (SA ¶ 95).

IV. LEGAL ARGUMENT

In class action settlements, the district court has discretion to measure an award of attorneys' fees in an equitable manner, by either the lodestar with multiplier method (based on the hours expended by class counsel advocating for the class) or the percentage method (in relation to the total benefits available to the class where the value of those benefits are capable of reasonable calculation). *Americana Art China Company, Inc. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014); *see also Florin v. NationsBank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994) (holding that both the lodestar approach and the percentage approach are appropriate ways to determine attorneys' fee awards, and the decision of which method to use remains in the discretion of the court).

A. The District Court Should Apply the Lodestar Method.

1. Class Counsel's rates are reasonable and within the range of rates previously approved by other courts.

A reasonable hourly rate is "one that is derived from the market rate for the services rendered." *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 640 (7th Cir. 2011) (internal quotation marks omitted). The focus is "the prevailing market rate for lawyers engaged in the type of litigation in which the fee is being sought." *Cooper v. Casey*, 97F.3d 914, 920 (7th Cir. 1996) (emphasis omitted); *see also Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 555 (7th Cir. 1999).

Class Counsel's total lodestar in this case is $212,229.10, comprising $197,311.60 from the Morgan and Morgan Complex Litigation Group and $14,917.50 from the Clifford Law Office.

Declarations of John A. Yanchunis ¶ 7 ("JAY Dec") and of Shannon M. McNulty ¶ 5 ("SMM Dec"), attached hereto, respectively, as **Exhibit 1** and **Exhibit 2**. JAY Dec ¶ 7; SMM Dec ¶ 5. The rates of Class Counsel are set forth in the charts included in or attached to the Yanchunis and McNulty declarations. JAY Dec ¶ 7; SMM Dec ¶ 5. These rates are at or below rates approved in similar class actions in this Circuit. *See, e.g., Abbott v. Lockheed Martin Corp.*, No. 3:06-cv-701-MJR-DGW, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015) (finding reasonable rates as follows: $974/hour (25+ years experience); $826/hour (15-24 years exp.); $595/ hour (5-14 years exp.); $447/ hour (2-4 years exp.); $300/hour (Paralegals and Law Clerks); $186/ hour (Legal Assistants)); *Beesley v. Int'l Paper Co.*, No. 3:06-cv-703-DRH-CJP2014, 2014 WL 375432, at **3-4 (S.D. Ill. Jan. 31, 2014) (finding reasonable rates as follows: $892/hour (25+ years exp.); $757/hour (15-24 years exp.); $545/hour (5-14 years exp.); $394/hour (2-4 years exp.); $275/hour (Paralegals and Law Clerks); $170/hour (Legal Assistants)).

These same rates have also been approved in other cases of a similar nature litigated by Class Counsel, which is further evidence of their reasonableness. *Spegon v. Catholic Bishops of Chicago*, 175 F.3d 544, 557 (7th Cir. 1999) ("evidence of fee awards from prior similar case relevant to a district court's determination of a reasonable hourly rate and cannot be ignored out of hand."). Numerous courts around the country have approved counsel's same rates for similar work.

2. <u>Class Counsel's rates are commensurate with what counsel have actually received from fee-paying clients</u>.

Where an attorney has an actual billing rate that he or she typically charges and obtains for similar litigation, that is presumptively his or her hourly rate. *Pickett*, 664 F.3d at 640 ("an attorney's actual billing rate for similar litigation is appropriate to use as the market rate"); *Denius v. Dunlap*, 330 F.3d 919, 930 (7th Cir. 2003) (same); *Blackwell v. Kalinowski*, No. 08 C

7257, 2012 WL 469962, at **2-3 (N.D. Ill. Feb. 13, 2012) ("the attorney's actual billing rate for comparable work is 'presumptively appropriate' to use as the market rate") (quoting *Denius*).

3. The Requested Fee is Reasonable in light of Roadrunner's likely defense costs.

When defendants challenge a lodestar-based fee application, the reasonableness of class counsel's fee cannot be reviewed in isolation without considering defendants' own litigation costs. *See also United States ex rel. Liotine v. CDW Gov't, Inc.*, 2013 U.S. Dist. LEXIS 54882, at **4-6 (S.D. Ill. Apr. 15, 2013) (in a case litigated for over eight years, it is appropriate for the district court judge "to examine the [defendant's] billing records as a comparison tool as he conducts his analysis of [plaintiff's] attorney's fees"); *see also Robinson v. City of Edmond*, 160 F.3d 1275, 1284 (10th Cir. 1998) (noting that the Supreme Court has recognized that part of an attorney's calculus of the amount of time reasonably necessary for a case is the vigor which the opponents bring to the dispute) (citing *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (plurality opinion)); *Patrick v. Board of Trustees*, 603 F. Supp. 754, 759 (E.D. Tex. 1984) (with respect to fee award disputes, "what is sauce for the goose is sauce for the gander").

Indeed, this District's Local Rule 54.3(d)(5) makes clear that defendants' litigation costs are a relevant factor when considering fee disputes. In its essence, the rule requires parties involved in a fee dispute to confer and attempt in good faith to agree on the amount of fees or related nontaxable expenses that should be awarded prior to filing a fee motion, and if no agreement is reached, defendants must provide the same information to plaintiffs that plaintiffs provided to defendants (which includes the time and work records pertaining to the litigation, evidence of the hourly rates for all billers paid by defendants during the litigation, evidence of the specific expenses incurred or billed in connection with the litigation, and any other evidence the defendant will use to oppose the requested hours, rates, or related nontaxable expenses). N.D. Ill.

L.R. 54.3(d)(5). Plaintiffs' Counsel need not review Defendants' attorneys' fees and litigation expenses, but the quality of counsel and counsel's work in this litigation strongly suggest that the rates are within the range of Plaintiffs' Counsels' rate. This is a factor weighing in favor of approval of the requested fee. *See also Camden Condominium Ass'n v. Dunkle*, 946 F.2d 768, 772 n.3 (11th Cir. 1991) (in assessing the quality of representation by Class Counsel, Court also should consider the quality of their opposing counsel).

4. The Requested Multiplier is Appropriate.

A court "must award a multiplier when attorneys' fees are contingent upon the outcome of the case (i.e., there is the possibility that the attorney will not receive any fee)." *In re Sw. Airlines Voucher Litig.*, 11 C 8176, 2013 WL 5497275, at *12–13 (N.D. Ill. Oct. 3, 2013) (hereinafter "*Southwest*") (citing *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998)); *see also Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 255 (7th Cir. 1988) (suggesting that "a standard risk multiplier be used in all contingent fee arrangements" and that "reasonable compensation may demand more than the hourly rate multiplied by the hours worked, for that is exactly what the attorneys would have earned from clients who agreed to pay for services regardless of success."). The choice of a particular multiplier is a matter of discretion, with the overall standard being "whether the fees are reasonable in relation to the difficulty, stakes, and outcome of the case." *Southwest*, 2013 WL 5497275, at *12-13 (quoting *Connolly v. Nat'l Sch. Bus. Serv., Inc.*, 177 F. 3d 593, 597 (7th Cir. 1999). The multiplier is designed to reflect the fact that, no matter how many hours were invested, there was, at the outset, the possibility of no recovery. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991) (rejecting the argument that the element of complexity is adequately compensated by the fact that increased complexity results in increased hours which produce a higher lodestar).

As noted above, Class Counsel's lodestar is $212,229.10. Given Plaintiff's request for fees (exclusive of the $10,130.33 for costs and expenses) of $377,869.67, Plaintiff respectfully seeks a multiplier of 1.80 submits that a multiplier of 1.80 is clearly appropriate here. A multiplier of 1.80 is well within the range of multipliers approved in this jurisdiction. *See* Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 (Table 14) (2010) (noting that between 1993 and 2008 the mean multiplier in class actions in the Seventh Circuit was *1.85*); s*ee Harman*, 945 F.2d at 975 (noting "[a risk] multiplier is, within the court's discretion, appropriate when counsel assume a risk of non-payment in taking a suit" and "[m]ultipliers anywhere between one and four . . . have been approved"); *In re Cenco, Inc. Sec. Litig.*, 519 F. Supp. at 327 (applying a lodestar multiplier of 4 to lead counsel's lodestar and 2 to other counsels' lodestar); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 9 C 897, 2000 WL 204112, (N.D. Ill. Feb. 9, 2000) (awarding $91 million above lodestar and noting that "[an] award of more than two times the lodestar calculation is believed to be fair and just in these circumstances").

Given (1) the increased difficulty of legal issues and stakes of this litigation, (2) the greater degree of legal success achieved, (3) the fact that the Settlement affords the Class with significant and comprehensive relief without concern for hitting a "ceiling" that could otherwise cause a pro-rata diminution of compensation to the Class, (4) the fact that Class Counsel will henceforth invest significant time and effort in this Action (JAY Dec ¶ 9; SMM Dec ¶ 7), and (4) the fact that the class notice and administration costs, and the payment of fees, costs, expenses, and service award awarded by the Court will be paid separately by Defendant independent of the Settlement's agreed-upon benefits to the Class, a slightly higher multiplier is appropriate.

B. <u>Percentage of the Common Fund May Also be Applied to the Instant Settlement</u>.

Likewise applicable is the percentage-of-the recovery formula utilized in *Redman v. RadioShack Corp*., 768 F.3d 622, 630 (7th Cir. 2014), and *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014). The expected percentage would reflect the ratio of (1) the fee to (2) the fee plus what the class members received. *Pearson v. NBTY, Inc*., 772 F.3d 778 (7th Cir. 2014). In the instant case, that would translate to (1) $388,000 to (2) $81,790,064, resulting in a fee and expense request that is .47% of the $81.7 million made available through the Settlement.[1] Quite plainly, and under any measure, Class Counsel's request fits clearly within the Seventh Circuit's algorithm. *See also Abrams v. Van Kampen Funds, Inc*., No. 01 C 7538, 2006 WL 163023, at *19 (N.D. Ill. Jan. 18, 2006), (courts typically calculate 25% of the fund as the "benchmark" for a reasonable fee award in cases involving recoveries of between $5 and $15 million).

In this case, the amount made available is $81.7 million, and Plaintiffs' Counsel propose that $388,000 for attorneys' fees, costs and expenses is justified, fair and reasonable. The proposed $388,000 sought by Plaintiffs' Counsel is consistent with the algorithm applied in this District and the Seventh Circuit. Importantly, the proposed amount of $388,000 allocated for fees

[1] The $81,790,064 value is based on the informed and documented premise that the Class comprises approximately 14,189 individuals. *See* CRA Dec. ¶ 9. First, with respect to the 24-month Identity Theft Protection benefit available to all Class Members, that Protection has a retail value of $19.99 per month per class member. SA ¶ 52. The Identity Theft Protection affords the entire class an aggregate *retail* value of $6,807,314.64. While the actual cost paid by Defendant for that benefit is less, *id.*, this amount of value has still been provided to the Class. Second, the Claim A and Claim B Expense Reimbursement benefit affords an individual claimant up to $250, and up to $5,000, respectively, or up to $5,250 cumulatively per claimant, without any aggregate limit. Given the class size, the Remuneration benefit comprises an aggregate cost commitment by Defendant of $74,492,250. Finally, Defendant is further committed to pay the costs of Class Notice and Settlement Administration (estimated to be approximately $100,000), to pay for Class Counsel's fees, costs, and expenses up to $388,000, and to pay for Mr. Nelson's service award of $2,500, an additional aggregate total of $490,500. Thus: $6,807,314.64 + $74,492,250 + $490,500 = $81,790,064.64. This amount, of course, does not include the value of Defendant's Business Practice Changes.

and expenses is not a number simply conceived by the Parties, rather, the number is the result of extended negotiations through an experienced mediator, and only so *after* the Parties had reached an agreement as to the benefits to the Class.

Compensation of Plaintiffs' Counsel in the amount of $388,00 for fees and expenses is further supported by the Seventh Circuit's holding in *Americana Art China Company, Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247-48 (7th Cir. 2014). The court explicitly stated that a district court must not place undue focus upon the calculus of the class recovery, but instead should choose the method that most equitably compensates class counsel for the results achieved and the risks undertaken in accepting and litigating the case—be that the percentage method *or* the lodestar method.

In *Americana Art*, the Seventh Circuit affirmed the district court's discretion to measure attorneys' fees using the lodestar method instead of the percentage method even where the percentage method would have yielded a fee significantly less than lodestar, stating that the district court had already taken the amount of recovery into account when deciding between the lodestar method and the percentage method, and that "that is exactly what we have suggested a district court *should* do" when evaluating a request for attorneys' fees. 743 F.3d at 47 (emphasis in original). As *Americana Art* suggests, the method for determining attorneys' fees must not be formulaic, but rather should be at the district court's discretion based on the unique facts of each case. *Id.* (noting that while district courts *may* consider the amount received by the class, they must not rely "*solely* on the degree of success in determining fee awards") (emphasis in original) (citing *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007)). In this case, under any method applied, $388,000 is a fair and reasonable amount to compensate Class Counsel's fees and expenses.

C. All Other Factors to be Considered Weigh In Favor of Approval of the Requested Fee

1. The Lawsuit Involved Complex, Novel Questions of Fact and Law.

This case did not have a straightforward path to victory for plaintiff and the Class. By their very nature data breach cases, such as this, are at the forefront of today's privacy litigation, and often involve complex and evolving technology and cyberattack methods that may have not yet been the subject of litigation. They chart a nascent and developing legal landscape.

2. The Degree of Success Obtained.

Plaintiffs achieved a significant degree of success on behalf of consumers, both legally and practically (in terms of benefits being offered to the Class). This is not a case that was quickly settled for relatively meager or illusory compensation for the class. As noted above, Settlement Class Members are entitled to claim to receive a comprehensive set of benefits that includes monetary and injunctive relief that are not capped in the aggregate. Instead of facing the uncertainty of a potential award in their favor years from now, the Settlement allows Plaintiff and Class Members to receive immediate and certain relief. *See, e.g., 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.") (citation omitted). As noted in *Southwest*, a settlement that provides nearly complete relief to class members is the model of an adequate settlement warranting commensurate compensation for class counsel. 799 F.3d at 704. This weighs in favor of approval of the requested fee.

3. Public Interest Considerations.

The Settlement yields considerable and comprehensive benefits to the Class, a recognition that cybersecurity is important. Moreover, the Business Practice Changes afforded by the

Settlement also inures to the benefit of Defendant's current and former employees, and also to future employees of the company.

4. Preclusion of Other Work.

Without these extraordinary efforts and sacrifices by Plaintiff's Counsel, consumers would not have realized the significant benefits that the Settlement provides. In sum, this was not a straightforward case factually or legally, and plaintiffs faced the real possibility of a lesser recovery or no recovery at all. Absent Plaintiff's Counsel's dedication to this matter, Class Members would have received little if anything. This weighs in favor of the requested fee. *Cook*, 142 F.3d at 1015 ("the unenhanced lodestar does not reflect the factual and legal merits of the claim – the fact that at the outset of the litigation, no matter how dazzling the array of legal talent or how many hours will eventually be logged, there is nonetheless the possibility of no recovery.")

D. Class Counsel's Costs and Expenses are Reasonable

Federal Rule of Civil Procedure 23(h) allows a court approving a class settlement to "award reasonable . . . nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Seventh Circuit instructs that costs and expenses should be awarded based on the types of "expenses private clients in large class actions (auctions and otherwise) pay." *Synthroid*, 264 F.3d at 722; *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *see also Spicer v. Chi. Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (noting that courts regularly award reimbursement of those expenses that are reasonable and necessarily incurred in the course of litigation).

Reimbursable expenses include many litigation expenses beyond those narrowly defined "costs" recoverable from an opposing party under Rule 54(d), such as: expert fees; travel; long distance and conference telephone; postage; delivery services; and computerized legal research. *See, e.g.*, *Matter of Cont'l Illinois Sec. Litig*., 962 F.2d 566, 570 (7th Cir. 1992) ("clear error" to deny reimbursement of LEXIS and Westlaw expenses because "the arms' length market reimburses" such expenses); *Beesley*, 2014 WL 375432, at *3 (granting reimbursement from common fund for litigation expenses including "expert witness costs; computerized research; court reports; travel expense; copy, phone and facsimile expenses and mediation."); *City of Greenville v. Syngenta Crop Prot., Inc*., 904 F. Supp. 2d 902, 910 (S.D. Ill. 2012) (granting reimbursement of expenses "of the type that are routinely reimbursed by paying clients," including "experts' fees, other consulting fees, deposition expenses, travel, and photocopying costs").

The costs and expenses sought by Plaintiffs' Counsel in this Action is $9,687.84 for the Morgan and Morgan Complex Litigation Group, and $442.49 for the Clifford Law Office, comprising a total of costs and expenses of $10,130.33. JAY Dec. ¶ 8; SMM Dec ¶ 6. Class Counsel has incurred these expenses over the course of two years, but do not seek to compensate for the time value of this money or the costs associated with advancing these expenses to the Class. In light of the length and complexity of this litigation, Counsel's request for reimbursement of costs and expenses should be approved as fair and reasonable. Plaintiffs' Counsel had a strong incentive to keep expenses at a reasonable level due to the high risk of no recovery when the fee is contingent, as well as the fact that all expenses were advanced by Plaintiffs' Counsel and not a funding source. *See Beesley*, 2014 WL 375432, at *3. Further, the fact that Class Counsel does not

seek interest as compensation for the time value of money or costs associated with advancing these expenses to the Class makes this request all the more reasonable. *Id.*

E. Class Representative's Service Award Should be Approved.

The district court has a substantial amount of authority in permitting class representatives to obtain awards for their service. *See Tenuto v. Transworld Sys., Inc.*, No. 99-4228, 2002 WL 188569, at *5 (E.D. Pa. Jan. 31, 2002) (incentive award appropriate where class representative "actively assisted counsel in the prosecution of this litigation to the benefit of the class"); *see also In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. at 225 (determining that it was proper to give the service awards to the named plaintiffs). "The purpose of these payments is to compensate named Plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws." *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. at 225.

Per the Settlement Agreement, Plaintiff may seek Attorneys' Fees and Expenses not to exceed a combined total of $388,000.00 and requests a Service Award of $2,500, for a total of $390,500. Mr. Nelson has been actively engaged in this matter at all times, remaining focused on the advancement of the interests and claims of the Class over his own interests and has always been concerned about obtaining a result that was best for the Class. Throughout the litigation, Mr. Nelson did everything that was required of him to represent the interests of the Class, including responding to interrogatories, requests for admission, and document requests, and being engaged in the decision as to whether to ultimately agree to the terms of the Settlement. The subject of a service award was not raised nor negotiated until after the parties had reached a settlement of the underlying claims, and Mr. Nelson's consent and agreement to the terms of the Settlement was not, nor is it in any way, conditioned on his receipt of a service award. JAY Dec. ¶ 10. Therefore,

it is appropriate to make this $2,500 payment to the class representative, Mr. Nelson. *See Bredbenner v. Liberty Travel, Inc.*, No. 09-905 (MF), 2011 U.S. Dist. LEXIS 38663, at *63-68 (D.N.J. 2011) (approving service award payments of $10,000 to each of the named plaintiffs); *In re Ins. Brokerage Antitrust Litig.*, No. 04-5184 (CCC), 2012 U.S. Dist. LEXIS 46496, at *146 (approving service awards totaling $85,000 – which amounted to $5,000 to each of the class representatives). Plaintiff respectfully requests that the Court likewise approve the requested Service Award here.

V. CONCLUSION

For the foregoing reasons, this Court should grant this motion and award a total of $388,000 in Attorneys' Fees, Costs, and Expenses, and a Service Award of $2,500.00 to the Class Representative.

Dated: July 17, 2020

Respectfully submitted,

MORGAN & MORGAN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 17, 2020, I electronically filed a true and correct copy of the foregoing unopposed motion with the Clerk of the Court using the CM/ECF system, which will send notification to all attorneys of record in this matter.

/s/ *John A. Yanchunis*
John A. Yanchunis (admitted *pro hac vice)*