IN THE SUPERIOR COURT OF ATHENS/CLARKE COUNTY
STATE OF GEORGIA

MISTY CECE and SHANITA REED, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ST. MARY'S HEALTH CARE SYSTEM, INC. and HEALTH FISCAL MANAGEMENT, INC.,

Defendants.

Civil Action No. SU20CV0500

PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

Plaintiffs Misty Cece and Shanita Reed ("Plaintiffs") submit this Motion for Approval of Attorneys' Fees, Costs, and Service Awards pursuant to the Court's December 15, 2021 Order and O.C.G.A. § 9-11-23.

I. INTRODUCTION

On December 15, 2021 this Court preliminarily approved a proposed class action settlement between Plaintiffs Misty Cece and Shanita Reed and Defendants St. Mary's Health Care System, Inc. and Health Fiscal Management, Inc. ("Defendants" or "HFMI") pertaining to cybersecurity incident implicating patients' personal identifying information ("PII") and private health information ("PHI") (the "Data Incident"). Class Counsel's efforts created three categories of relief for Settlement Class Members: (1) up to $750 in expense and time reimbursements; (2) two-years of credit monitoring and identity protection services; and (3) remedial measures carried out by HFMI to increase its data security and better protect the PII and PHI of Class Members and future patients. *See* Settlement Agreement ("Agr."), filed December 14, 2021.

Class Counsel have zealously prosecuted Plaintiffs' claims, achieving the Settlement Agreement only after extensive investigation, negotiations, and an all-day mediation with Rodney A. Max, a respected mediator and principal of Upchurch Watson White & Max in Miami, Florida. Even after the mediation, Class Counsel worked for months to finalize the Settlement Agreement and associated exhibits pertaining to notice, preliminary approval, and final approval.

As compensation for the substantial benefit conferred upon the Settlement Class, Class Counsel respectfully move the Court for a combined award of attorneys' fees and costs totaling $250,000, to be paid by Defendants separate and apart from any payments to Class Members. Georgia Courts have expressly endorsed the "percentage of the fund" method, and rely heavily on the Eleventh Circuit decision in *Camden 1 Condo. Ass'n v. Dunkeld*, 946 F.2d 768, 774 (11th Cir. 1991) in determining the proper percent to award—the benchmark for which ranges between 20–30% of the funds available to the class.

Here, the $250,000 requested fee is a small fraction of the amount available to Settlement Class Members. Class Counsel have negotiated a Settlement which provides for significant monetary recovery—that while capped at $750 per individual Class Member, *is uncapped in the aggregate.* Additionally, the Settlement provides for credit monitoring services and equitable relief in the form of data security enhancements implemented at considerable cost to Defendants. Thus, the $250,000 fee represents less than 1% of the total benefit negotiated and the total potential benefit to the Class. HFMI has agreed to pay the requested attorneys' fees, subject to Court approval. *See* Agr. § 7.2.

Plaintiffs' Motion should be granted because the request is reasonable and appropriate in light of factors typically considered by Georgia Courts in contemplating fees awards; and because the costs incurred were reasonable and necessary for the litigation. Class Counsel also respectfully

move the Court for an award of $1,000 to each of the two Plaintiffs for their work on behalf of the Class.[1]

II. CASE SUMMARY[2][3]

A. The Data Incident

Defendant St. Mary's Health Care System Inc. ("St. Mary's") is a non-profit healthcare system with three hospitals and numerous physician practices, including home health, hospice, outpatient services, and classes. *See* Decl. of David Lietz in Supp. of Pls.' Mot. for Prelim. Approval ¶ 15 ("Lietz MPA Decl."), filed November 23, 2021. Defendant Healthcare Fiscal Management, Inc. i/s/h/a Health Fiscal Management, Inc. ("HFMI") is a for-profit company which specializes in providing self-pay conversion and insurance eligibility services to clinics, physician groups and hospital systems, including St. Mary's. *Id.*

In the ordinary course of receiving treatment and health care services from St. Mary's, Plaintiffs and Class Members were required to and did provide Defendant St. Mary's with sensitive, personal and private information such as: names, addresses, phone numbers and email addresses; dates of birth; Social Security numbers; information related to individual medical history; insurance information and coverage; and information relating to individual medical history. *Id.* In the ordinary course of providing health care services to Plaintiffs and Class

[1] While Plaintiffs here move for attorneys' fees, costs, and service awards, they will move for final approval of the settlement by separate motion, which will be filed prior to the final fairness hearing

[2] Sections II and II of this memorandum have been largely adopted from the Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, filed November 23, 2021.

[3] The facts in this section are those set forth in the Complaint. Neither Defendant makes any admission as to the facts alleged in the Complaint, and each Defendant reserves their right to challenge the alleged facts should the Court deny this Motion, in whole or in part.

Members, St. Mary's also creates protected health information ("PII") about Plaintiffs and Class Members, including treatment details and dates of service. *Id.*

Pursuant to a contract between HFMI and St. Mary's, the parties specifically agreed that data and information provided by St. Mary's would be held by HFMI in "the strictest confidence". *Id.* On its website, St. Mary's unequivocally states: "We have a duty to protect the confidentiality of medical information about you." *Id.* In addition, St. Mary's maintains, and is required to maintain, a HIPAA compliant Notice of Privacy Practices, which is posted on St. Mary's website and is provided to patients prior to receiving treatment. *Id.*

On or about April 13, 2020, computer hackers gained access to HFMI's computer servers and data infrastructure which resulted in potential access to and/or acquisition of files containing Personal Information and Protected Health Information that had been collected by St. Mary's and stored at HFMI's servers. *Id.* The computer hackers also installed ransomware software on HFMI's computers and servers which it triggered, locking out HFMI from accessing its files, and alerting HFMI to the presence of ransomware. *Id.* As a result of the Data Incident, approximately 55,652 individuals' PII and PHI was impacted and potentially compromised. *Id*. at ¶ 14. Upon learning of the incident HFMI, on behalf of St. Mary's, provided all potentially impacted individuals with notice of the Data Incident. *Id.* ¶ 14.

B. Procedural Posture

On October 22, 2020, Plaintiffs filed their operative Class Action Complaint alleging six separate counts against Defendant: negligence (against both Defendants); intrusion into private affairs / invasion of privacy (against both Defendants); breach of implied contract (against St. Mary's); negligence *per se* (against both Defendants); breach of fiduciary duty (against St.

Mary's); and breach of confidence (against St. Mary's).[4] Plaintiffs sought certification of a Class of "[a]ll persons who utilized Defendant St. Mary's and whose Private Information was maintained on Defendant HFMI's computer systems that were compromised in the Ransomware Attack, and who were sent Notice of the Data Breach." *Id*. ¶ 20.

Plaintiffs sought equitable relief enjoining Defendants from engaging in the wrongful conduct complained of and compelling them to utilize appropriate methods and policies with respect to consumer data collection, storage, and safety. *Id.* ¶ 21. Plaintiffs also sought an award of actual, compensatory, and statutory damages as well as attorneys' fees and costs, and any such further relief as may be deemed just and proper. *Id.* ¶ 22.

On or about January 4, 2021, Defendants filed an answer to the Complaint and a Motion to Dismiss the Complaint pursuant to O.C.G.A. §§ 9-11-12(b)(6), 9-11-12(f), 9-11-23(c)(1) and (d)(4). *Id.* ¶ 23. In filing their Motion, Defendants sought to dismiss causes of action for Plaintiffs' failure to state a claim upon which relief could be granted, to strike certain class action allegations, and to strike other allegations as redundant, immaterial, impertinent or scandalous. *Id.* ¶ 24. After full briefing, on or about March 2, 2021, the Court denied Defendants' Motion to Dismiss in its entirety. *Id.* ¶ 25.

Plaintiffs proceeded with litigation, serving initial sets of interrogatories and requests for production on Defendants. *Id.* ¶ 26.

C. History of Negotiations

After the Court denied Defendants' Motion to Dismiss, the Parties—through their counsel—agreed that an early mediation was warranted. *Id.* ¶ 27. The Parties decided to mediate the matter with Rodney Max, a respected mediator and principal of Upchurch Watson White &

[4] Compl. ¶¶ 123–234.

Max in Miami, Florida. *Id.* ¶ 28. Prior to mediation, the Parties provided Mr. Max with detailed briefs, outlining the central issues, strengths and weaknesses of the case. *Id.* ¶ 29.

On June 29, 2021, a virtual mediation was conducted via Zoom video conference before Mr. Max in Miami, Florida. *Id.* ¶ 30. By the end of a full-day of negotiations, and after a significant exchange of information through Mr. Max, the Parties were unable to reach an agreement. *Id.* Arm's-length negotiations continued in the weeks following the mediation. By August 30, 2021, the Parties had reached an agreement in principle on the central terms of the settlement and executed a term sheet. *Id.* ¶ 31. In the months following the execution of the term sheet the Parties continued to negotiate the finer points of the agreement, and draft the Settlement Agreement and accompanying notice documents. *Id.* ¶ 32. The Settlement Agreement and various exhibits ("Agr.") were finalized and signed in late November 2021. *Id.* ¶ 33.

III. THE SETTLEMENT AGREEMENT

The Settlement negotiated on behalf of the class provides for three categories of relief for Settlement Class Members, valued at over $55,000,000: (1) up to $750 in expense and time reimbursements; (2) two years of credit monitoring and identity protection services valued at $120 per year; and (3) remedial measures carried out by HFMI to increase its data security and better protect the PII and PHI of Class Members and future patients, at the cost of $90,000 to implement and an additional $80,000 per year thereafter. *Id*. ¶ 36. The Settlement Class includes approximately 55,652 individuals and is defined as: "all persons who were notified by HFMI on behalf of St. Mary's regarding the Data Incident." *Id*. ¶¶ 36–37. It specifically (i) St. Mary's and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge assigned to evaluate the fairness of this settlement; and (iv) any other Person found by a court of competent jurisdiction to be guilty under

criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Data Incident or who pleads *nolo contendre* to any such charge. *Id.* ¶ 36.

A. Settlement Benefits

1. Settlement Payments

The first category of benefits provides Settlement Class Members who submit a valid claim may receive up to $750 per person for reimbursement of out-of-pocket expenses incurred as a result of the Data Incident including: documented out-of-pocket losses fairly traceable to the Data Incident, including, but not limited to unreimbursed losses relating to fraud or identity theft; professional fees including attorneys' fees, accountants' fees and fees for credit repair services; costs associated with freezing or unfreezing credit with any credit reporting agency; credit monitoring costs that were incurred on or after April 12, 2020, through the date of the Claim Deadline; and miscellaneous expenses such as notary, fax, postage, copying, mileage and long-distance telephone charges, that were incurred on or after April 12, 2020, through the date of the Claims Deadline. *Id.* ¶ 39. Included within the $750 individual cap, each Settlement Class Member can claim up to three (3) hours of documented lost time spent in response to the Data Incident, *e.g.*, time spent dealing with replacement card issues, reversing fraudulent charges, (calculated at the rate of Twenty Dollars and Zero Cents ($20.00) per hour), but only if at least one full hour was spent. *Id.*

While these reimbursements are capped per individual, *they are not capped in the aggregate*, bringing the total value of the monetary payments made available by the Settlement Agreement to over $40,000,000.

2. Credit Monitoring and Identity Protection Services

The second benefit offered to Settlement Class Members is two (2) years of one (1) bureau credit monitoring services through TransUnion *my*TrueIdentity credit monitoring and identity theft protection service. *Id.* ¶ 40. The TransUnion *my*TrueIdentity credit monitoring and identity theft protection service is different from the free TrueIdentity product provided by Transunion, and has a retail value of $10 per month, ($120 per year), per person. *Id.* Settlement Class Members who previously enrolled in the one (1) year of credit monitoring offered as part of the notification letter provided by HFMI on behalf of St. Mary's regarding the Data Incident on or about June 26, 2020, will be offered one (1) additional year. *Id.* Settlement Class Members who did not sign up for the credit monitoring previously offered, will be offered two (2) years. *Id.*

With 55,652 Settlement Class Members, the total value of this benefit is approximately $13.35 million if all Settlement Class Members claimed two (2) years. Even if every Settlement Class Member were only eligible to claim one (1) additional year of credit monitoring services made available by the Settlement (because they claim one-year previously offered), the total value of this relief alone would be approximately $6,600,000.

3. Equitable and Prospective Relief

The third and final category of benefits include information security enhancements that will ensure that the PII and PHI of Settlement Class Members and future patients will be better protected. *Id.* ¶ 41. The enhancements include annual compliance tests, quarterly penetration tests, vulnerability assessments, quarterly and annual employee training and education, and installation of updated anti-virus and anti-malware software. *Id.* At the time of Settlement, HFMI estimated that the improvements had already cost HFMI $90,000, and that the continued implementation of the improvements would cost an additional $80,000 per year. *Id.* If HFMI continues

implementation of security enhancement through 2023, the total value of this equitable relief is approximately $250,000.

4. Release

The release in this case is tailored to the claims that have been plead or could have been plead in this case. *Id*. ¶ 43. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release claims against Defendants related to the Data Incident. *Id*. ¶ 44.

B. The Notice and Claims Process

The notice and claims process was implemented by Kroll Settlement Administration ("Claims Administrator") pursuant to the Court's preliminary Approval Order. The estimated cost for Settlement Administration, including both notice and claims administration, is $88,507.00—all of which is to be borne by Defendants and shall not impact the amount available to Settlement Class Members. Lietz MPA Decl. ¶ 46.

The Notice plan provides for individual notice to be sent to Settlement Class Members directly via direct mail to the postal address used by HFMI for providing notice to the Settlement Class Members on behalf of St. Mary's. *Id.* ¶ 45. In addition to the individual direct notice provided, the Settlement requires the Settlement Administrator to establish and maintain a dedicated Settlement Website that will be updated throughout the claims period with the forms of Short Notice, Long Notice, and Claim Form approved by the Court, as well as the Settlement Agreement. *Id*. ¶ 49. The Long Form Notice, available at the Settlement Website, explains the terms of the Settlement Agreement, provides contact information for Proposed Class Counsel, and explains the different options available. *Id.* ¶ 50; *see also*, Agr., Ex. C. The Settlement Administrator is also required to establish and maintain a toll-free help line to provide Settlement Class Members with additional information about the Settlement. *Id.*

The individualized nature of the notice and the timing of the claims process are structured to ensure that all Class Members have adequate time to review the terms of the Settlement Agreement, make a claim or decide whether they would like to opt-out or object. *Id.* ¶ 40. Class Members have ninety (90) days from the completion of Notice to complete and submit a claim to the Settlement Administrator. *Id.* ¶ 41. All Settlement Class Members also have up to sixty (60) days following entry of the Preliminary Approval Order to exclude themselves from or object to the Settlement. *Id.* ¶ 56.

C. Fees, Costs, and Service Awards

The Settling Parties did not discuss the payment of attorneys' fees, costs, expenses and/or service award to Representative Plaintiffs until after the substantive terms of the Settlement had been agreed upon. *Id*. ¶ 63.

The Settlement Agreement calls for a reasonable service award to Plaintiffs in the amount of $1,000 per Plaintiff, subject to approval of the Court. *Id.* ¶ 64. The Service Award is meant to compensate Plaintiffs for their efforts on behalf of the Settlement Class, including assisting in the investigation of the case, reviewing the pleadings, remaining available for consultation throughout the mediation and settlement negotiations, answering counsel's many questions, and reviewing the terms of the Settlement Agreement. *Id.* ¶ 65.

HFMI has also agreed to pay, subject to Court approval, up to $250,000 to Proposed Settlement Class Counsel for combined attorneys' fees and costs *Id.* ¶ 66. Class Counsel's requested fees are reasonable in light of the percent of common fund/common benefit method of calculating fees accepted by Georgia Courts. As of the date of filing, Class Counsel has received no objections to either the Settlement Agreement in general or to the proposed attorneys' fees, costs (the amount of which was made known to the Class via the Court-approved notice program)

in particular. Decl. of David Lietz in Supp. of Pls.' Mot. for Attorneys' Fees, Costs, and Service Awards ¶ 9 ("Lietz Fees Decl."), filed herewith.

Due to the early stage of litigation, costs incurred by Plaintiffs are low. Plaintiffs' current costs are $9,679.89, and include filing fees, service fees, and costs of mediation. These costs are reasonable, and necessary for the litigation. *Id.* ¶ 16.

As of the January 27, 2022, neither Class Counsel nor the Settlement Administrator has received any objection to either the Settlement Agreement in general or to the requested attorneys' fees, costs, and service awards in particular. *Id* ¶ 19. Similarly, neither Class Counsel nor the Settlement Administrator has received any requests for exclusion. *Id.* ¶ 18.

IV. LEGAL DISCUSSION[5]

A. Plaintiffs' Requested Service Awards are Justified and Should be Approved.

Service awards to class representative may be given to "to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, . . . to recognize their willingness to act as a private attorney general." *Fla. Educ. Ass'n v. Dep't of Educ.*, 447 F. Supp. 3d 1269, 1279 (N.D. Fla. Mar. 21, 2020) (awarding service awards of $10,000) (quoting *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1219 (11th Cir. 2018) (approving service awards of $10,000)).

[5] Since its enactment, Georgia Courts have read O.C.G.A. § 9-11-23, the statute that governs class actions in Georgia, to track Federal Rule 23. In 2003 the state legislature shored up this interpretation, modifying O.C.G.A. § 9-11-23 to actually conform to the Federal Rule. Thus, and in acknowledgement of the few definitive holdings in Georgia on the subject, Georgia Courts rely on federal cases interpreting Federal Rule 23(e) when interpreting O.C.G.A. § 9-11-23(e). *See Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 953 (1975); *Brenntag Mid S., Inc. v. Smart*, 308 Ga. App. 899, 903 (2011). Plaintiffs do the same here, where state authority is not otherwise available.

Here, Plaintiffs seek modest service awards in the amount of $1,000 each ($2,000 total) to reward the risk they took on and work they put into the case on behalf of the Class, including assisting in the investigation of the case, reviewing the pleadings, remaining available for consultation throughout the mediation and settlement negotiations, answering counsel's many questions, and reviewing the terms of the Settlement Agreement. *See* Lietz Fees Decl. ¶ 8. Such an award is eminently reasonable, and should be approved.

B. Counsel's Request for Attorneys' Fees is Reasonable and Should be Approved.

While many courts historically utilize two main approaches to analyzing a request for attorneys' fees—the lodestar approach and the percent-of-benefit approach—in Georgia, Courts specifically adhere to the percent-of-benefit, or common fund, approach. *Barnes v. City of Atlanta,* 281 Ga. 256, 260 (2006). The approach "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.* (quoting *State of Ga. v. Priv. Truck Council of Am.*, 258 Ga. 531, 534–35(5) (1988)). Georgia Courts have specifically found "the percentage of the fund approach to be the most equitable, sensible, and fair" and the "preferred method of determining fees, unless unusual circumstances would make its use unfair or impracticable." *Friedrich v. Fid. Nat'l Bank*, 247 Ga. App. 704 (2001). The "common fund" analysis is appropriate even where the fee award will be paid separately by Defendants. *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 694–95 (S.D. Fla. Feb. 28, 2014) (approving $20 million in attorneys' fees in claims made settlement where class members can recover $300 million) (citing *David v. Am. Suzuki Motor Corp*., No. 08-cv-22278, 2010 WL 1628362, at *8 n.14 (S.D. Fla. Apr. 15, 2010) (citing *Duhaime v. John Hancock Mut. Life–Ins. Co*., 183 F.3d 1, 4 (1st Cir. 1999))). The attorneys' fees in a class action

can be determined based upon the total fund, not just the actual payout to the class. *See Waters v. Int'l Precious Metals Corp*., 190 F.3d 1291, 1295–96 (11th Cir.1999).

"The majority of common fund fee awards fall between 20% to 30% of the fund," although "an upper limit of 50% of the fund may be stated as a general rule[,]" and 25% has been considered the "benchmark" which may be adjusted due to the facts and circumstances of the particular case. *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F. Supp. 768 (11th Cir. 1991).

1. Counsel's requested fee is reasonable considering the significant benefit they have negotiated for the Settlement Class.

Eleventh Circuit guidance provides that attorneys' fees in class actions are regularly determined based upon the total fund, not just the actual payout to the class. *See Waters v. Int'l Precious Metals Corp*., 190 F.3d at 1295–96 (finding no abuse of discretion where a district Court awarded attorneys' fees in the amount of 33.3% of the total $40 million benefit, despite the fact that payments to Settlement Class Members based on claims made would be substantially less than $40 million) (citing *Williams v. MGM–Pathe Commc'ns Co*., 129 F.3d 1026 (9th Cir.1997) (finding attorney should be based on total $4.5 million recovery fund, even though actual payout to class ended up totaling approximately $10,000)); *see also Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. at 694–95 (approving $20 million in attorneys' fees in claims made settlement where class members could recover $300 million or more).

Counsel here has negotiated a substantial benefit for the Class. Where reimbursements and compensation for lost time are capped at $750 per person—*they are uncapped in the aggregate*. Accordingly, the total cash value of the Settlement negotiated includes over approximately $41,000,000 in expense reimbursements and lost time; well over $13.3 million in credit monitoring services, $250,000 in equitable relief, approximately $88,507.00 in notice and settlement administration costs, $250,000 in attorneys' fees and costs (subject to court approval). Lietz Fees

Decl. ¶ 4. Counsel's fee request thus amounts to less than 1% of this negotiated settlement value and is indisputably reasonable.

2. Class Counsel's Requested Fee is Supported by the *Johnson* factors, as well as by other factors regularly considered by Georgia Courts.

In adjusting the benchmark and awarding fees, Courts are encouraged to consider factors such as those articulated in *Johnson v. Ga. Hwy. Express*, 488 F.2d 714 (5th Cir. 1974) including but not limited to: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal service properly; the preclusion of other employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed of contingent; time limitations imposed; the amount involved and results obtained; the experience, reputation and ability of the attorneys; the undesirability of the case; the nature and length of the private relationship with the client; and awards in similar cases. *Johnson v. Ga. Hwy. Express,* 488 F.2d at 719. However, Georgia Courts are cautioned not to place undue weight on the time spent by counsel, as such focus would be in contravention of the principles underlying the percentage of the fund approach, and to also consider factors such as: whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel; any non-monetary benefits conferred upon the class by the settlement; and the economics involved in prosecuting a class action. *Friedrich v. Fid. Nat'l Bank*, 247 Ga. App. at 707 (quoting *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F. Supp. 768 (11th Cir. 1991)). Plaintiffs examine the pertinent factors below.

i. The Amount Involved and the Results—Both Monetary and Nonmonetary—Obtained

Counsel here has achieved an excellent result on behalf of Plaintiffs and the Class. Each Settlement Class Member may make a claim for expense reimbursements and lost time up to $750

per person. Importantly, while capped at the individual level, these sums are *uncapped in the aggregate*, meaning *there will be no pro rata reduction of any Settlement Class Members' recovery.* Additionally, Settlement Class Members may make a claim for up to two-years of credit and identity monitoring services, valued at $120 per person, per year. This result is extraordinary, and will allow every Settlement Class Member to be reimbursed for any costs resulting from the data breach, as well as ensure that Settlement Class Members are protected from potential future effects of the Data Incident. Additionally, the enhancements Defendant has committed to making to its data security systems will ensure that Class members' personal identifying information and private health information is better protected in the future.

As such, the results obtained by Counsel weigh heavily in favor of approval of the requested fee award.

ii. The Time and Labor Required

Plaintiffs here were able to reach a settlement of the case fairly early in litigation, attending mediation after completing an extensive internal investigation, filing their complaint, prevailing on Defendants' Motion to Dismiss, and beginning formal discovery. Lietz MPA Decl. ¶¶ 18–26. The Parties agreed to mediation before Rodney A. Max, a respected mediator and principal of Upchurch Watson White & Max in Miami, Florida. *Id.*¶ 28. Both Parties had an opportunity to fully brief the issues, and mediation went forward via Zoom Video Conference on October 22, 2020. *Id.* ¶¶ 29–30. Arm's-length negotiations continued in the weeks following the mediation. *Id.* ¶ 31. By August 30,2021, the Parties had reached an agreement in principle on the central terms of the settlement and executed a term sheet. *Id.* In the months following execution of the term sheet, the Parties continued to negotiate the finer terms of the agreement, and draft the Settlement

Agreement and accompanying notice documents, executing the final Settlement Agreement in November 2021. *Id.* ¶¶ 31–32.

As early settlement in this matter will result in quicker monetary relief, credit monitoring services, and equitable relief to the Class, and the Settlement was only reached after the Parties were well informed regarding the strengths and weaknesses of the case, the speed at which Settlement was reached should not weigh against Plaintiffs' request.

iii. The Novelty and Difficulty of the Questions

The novelty and difficulty of the questions presented by suits pertaining to data breaches is high, and weighs in favor of granting Plaintiffs' request for attorneys' fees. Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data breach cases like this one are particularly complex and face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp*., 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g.*, *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013). Georgia data privacy law is unsettled, with the Georgia Supreme Court' decision in *Dep't of Labor v. McConnell*, 305 Ga. 812 (2019) (*McConnell II*), casting real doubt on the question of whether any duty to protect confidential data exists in Georgia. The magnitude and complexity of legal issues involved in this case demonstrates the heightened risk Plaintiffs' Counsel were willing to take on, and reinforces the reasonableness of Counsel's requested fee percentage.

iv. The Economics and Risk of Continued Litigation

The risks undertaken in pursuing this data breach litigation were significant. While Plaintiffs and Counsel believed they could prevail on their claims against Defendants, they were also aware that they would likely face several strong legal defenses and difficulties in demonstrating causation and injury. Such defenses, if successful, could drastically decrease or eliminate any recovery for Plaintiffs and putative Class Members. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on either certification or merits, lengthening the time before recovery could be provided to the Class, and significantly increasing both the cost of litigation and the potential that Plaintiffs and Class Members receive no recovery at all.

Continued litigation would be lengthy and expensive. This is a very real concern, as evidenced by the experience of plaintiffs in another notable Georgia data privacy case—*Collins v. Athens Orthopedic Clinic, P.A.*, 307 Ga. 555, 563 (2019). That case was originally filed on January 20, 2017 and after winding its way all the way up to the Georgia Supreme Court and back down to the trial court, and it is still being litigated. In March 2021, the plaintiffs' counsel in *Collins* requested assignment to the Georgia state-wide business court. It is not hyperbole to state that these cases can occupy a court's docket for years on end. Accordingly, this factor weighs in favor of approving Plaintiffs' modest requested fee percentage.

v. The Skill Requisite to Perform the Legal Service Properly, and the Experience, Reputation, and Ability of the Attorneys

In light of the novelty, difficulty, and constantly evolving nature of questions related to data privacy, the skill required to advocate for victims of data breaches is high. Counsel here have decades of experience in class action litigation, and are currently litigating over fifty (50) cases across the country involving violations of the TCPA, privacy violations, data breaches, and

ransomware attacks. *See* Lietz MPA Decl. ¶¶ 2–11, Ex. 2. Their experience is indisputable, and in this case they were able to use that extensive experience to inform negotiations and drive this case to an early and excellent resolution. As such, this factor weighs in favor of approval of the fee request.

vi. The Contingent Nature of the Fee

In undertaking to prosecute this complex case entirely on a contingent fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. Lietz Fees Decl. ¶¶ 10–15. Such a risk warrants an appropriate fee. *George v. Acad. Mortg. Corp. (UT)*, 69 F. Supp. 1356, 1380 (N.D. Ga. Mar. 20, 2019) (collecting cases). Accordingly, this factor weighs in favor of granting Plaintiffs' fee request.

vii. The Preclusion of Other Employment by the Attorneys Due to Acceptance of the Case

This matter required Counsel to spend time on this litigation that could have been spent on other matters. *Id.* ¶ 13. At various times during the litigation of this class action, this lawsuit consumed significant amounts of Settlement Class Counsel's time. *Id.* ¶¶ 11–12. Such time could otherwise have been spent on other fee-generating work. *Id.* ¶ 12. Because Class Counsel undertook representation of this matter on a contingency-fee basis, they shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment. *Id.* ¶ 14. As such, this factor weighs in favor of approval of Plaintiffs' requested fees.

viii. The Customary Fee, and Awards in Similar Cases

Customary fees in common fund cases fall between 20% to 30% of the fund, and 25% has been considered the "benchmark" which may be adjusted due to the facts and circumstances of the particular case. *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F. Supp. 768 (11th Cir. 1991).

Plaintiffs here seek fees well below the benchmark 25% fee. *See George*, 369 F. Supp. at 1382 (collecting cases supporting an award of approximately one-third of the common fund); *Lunsford v. Woodforest Nat'l Bank*, No. 1:12-cv-103-CAP, 2014 WL 12740375 (N.D. Ga. May 19, 2014) (finding award of fees at one-third of common fund "falls within this accepted range and is in accord with this Court's prior fee rulings"); *In re Clarus Corp. Sec. Litig*., No. 1:00-cv-2841-CAP, 2005 U.S. Dist. LEXIS 50147 (N.D. Ga. Jan. 6, 2005) (awarding 33.33% of $ 4.5 million settlement fund plus interest and expenses); *McLendon v. PSC Recovery Sys., Inc.*, No. 1:06-cv-1770-CAP, 2009 WL 10668635 (N.D. Ga. June 2, 2009) (awarding fees at one-third of $4,000,000 common fund); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d at 1297–97 (affirming fee award of 33.33% of $40 million settlement).

Moreover, the requested fees fall well within the range of the private marketplace, where contingency fee arrangements are often between 30 and 40 percent of any recovery. *See George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. at 1382. Accordingly, this factor weighs in favor of approval of Plaintiffs' modest fee request.

ix. Time Limitations Imposed, and the Nature of the Relationship with the Client

While no time limitations were imposed by Plaintiffs, Counsel took on this case with the understanding that due to the nature of the alleged data breach, the sooner the Class received relief—especially the equitable relief in the form of data security enhancements to Defendants' systems—the better. Accordingly, this factor is neutral, and does not weigh against Plaintiffs' requested fees.

Similarly, Counsel's relationship with the client does not give rise to concerns weighing either for or against Plaintiffs' fee request.

x. No Objections by Settlement Class Members

Thus far, no Settlement Class Member has objected to the Settlement or to the request for fees, costs, and service awards. Lietz Fees Decl. ¶ 19. Similarly, no Settlement Class Member has requested exclusion. *Id.* ¶ 18. As such, this factor weighs in favor of approval of the requested fee award.

C. Counsel's Requested Costs are Reasonable, Incidental to Litigation, and Should be Approved.

As part of the requested $250,000, Plaintiffs here seek reimbursements of reasonable litigation costs that are incidental to the litigation. Combined, Counsel has incurred $9,679.89 in litigation costs, including filing fees, service fees, and costs of mediation. Lietz Fees Decl. ¶ 16. This sum is reasonable, and warrants reimbursement, as it corresponds with out-of-pocket costs borne by Counsel in connection with the prosecution and settlement of the action. *Lunsford v. Woodforest Nat'l Bank*, No. 1:12-cv-103-CAP, 2014 WL 12740375 (N.D. Ga. May 19, 2014) (citing *Mills v. Elec. Auto-Lite Co.,* 396 U.S. 375, 390–91 (1970)).

V. CONCLUSION

Settlement Class Counsel, with the help of Plaintiffs, have made significant benefits available to Class Members. In return, they seek fees, costs, and service awards well within the range of those regularly approved by Georgia Courts, and by federal courts in Georgia and the federal Eleventh Circuit. The fees, costs, and service awards are inherently reasonable, and as such Plaintiffs respectfully request their approval.

Dated: January 28, 2022

Respectfully submitted,

/s/ David K. Lietz
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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2022, I served a copy of the foregoing on all counsel of record using the Court's e-filing PeachCourt service.

/s/ David K. Lietz
David K. Lietz