SUPERIOR COURT OF BIBB COUNTY
STATE OF GEORGIA

KATHY JACKSON-BATTLE
and
JESSICA RAMIREZ, *et al.*,

Plaintiffs,

vs.

NAVICENT HEALTH, INC.,

Defendant.

Civil Action No. 2020-CV-072287

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

Plaintiffs Kathy Jackson-Battle and Jessica Ramirez ("Plaintiffs") submit this Motion for Approval of Attorneys' Fees, Costs, and Service Awards pursuant to the Court's April 21, 2021 Order and O.C.G.A. § 9-11-23.

I. INTRODUCTION

On April 21, 2021, this Court preliminarily approved a proposed Class Action Settlement between Plaintiffs Kathy Jackson-Battle and Jessica Ramirez and Defendant Navicent Health, Inc. ("Defendant" or "Navicent") pertaining to cybersecurity incident implicating patients' personal identifying information and private health information (the "Data Incident"). Class Counsel's efforts created two distinct categories of monetary relief for each of the approximate 360,000 Class Members: (1) reimbursement of up to $200 per person for ordinary expenses and lost time incurred because of the Data Incident; and (2) reimbursement of up to $2,500 per person for extraordinary expenses incurred because of the Data Incident. In addition to the monetary benefits described, the Settlement Agreement provides for equitable and prospective relief in the form of data security enhancements designed to better protect the personal identifying information and private health information of Plaintiffs, Class Members, and future patients of Defendant.

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 Navicent 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 $2,700 per individual Class Member, *is uncapped in the aggregate.* Thus, the $250,000 fee represents less than 1% of the total benefit negotiated and the total potential benefit to the Class.

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

moves 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]

A. The Data Incident

Defendant Navicent Health, Inc. operates a regional healthcare system in the state of Georgia that has more than 1,000 beds for medical, surgical, rehabilitation, and hospice purposes, offers over 53 specialties in more than 50 facilities throughout the region, and hosts over 100 medical residents and fellows. *See* Decl. of David K. Lietz in Supp. of Pls.' Mot. for Prelim. Approval ¶ 12 ("Lietz MPA Decl."), filed January 27, 2021. In July 2018, Navicent was the victim of a criminal cyberattack in which criminals, through phishing means, gained access to certain Navicent employee email accounts, which contained some individuals' PII or PHI, to attempt to facilitate a fraudulent wire transfer (hereinafter, the "Data Incident"). Lietz MPA Decl. ¶ 10. As a result of the Data Incident, approximately 360,000 patients' PII and PHI was impacted and potentially compromised. *Id*. ¶ 11. Upon learning of the incident, Navicent initiated an investigation, notified law enforcement, and retained forensic security firms to investigate and conduct a search for any Private Information in the impacted email accounts. *Id.* ¶ 12.

B. Plaintiffs' Complaint

On April 29, 2020, Plaintiffs filed their Class Action Complaint alleging seven separate counts against Defendant: negligence; intrusion into private affairs / invasion of privacy; breach of express contract; breach of implied contract; negligence *per se*; breach of fiduciary duty; breach

[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] This section has been largely adopted from the Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, filed January 27, 2021.

of confidence. *Id.* ¶ 15.[3] Plaintiffs sought certification of a Class including "[a]ll persons who utilized Defendant Navicent's services whose Private Information was maintained on Defendant Navicent's email and computer system that was compromised in the Data Breach, and who received notice of the data breach. *Id*. ¶ 16.

Plaintiffs sought equitable relief enjoining Navicent from engaging in the wrongful conduct complained of and compelling Navicent to utilize appropriate methods and policies with respect to consumer data collection, storage, and safety. *Id.* ¶ 17. 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.* ¶ 18.

C. History of Negotiations

After Plaintiffs filed and served their Complaint, but prior to Navicent filing its Answer, the Parties—through their counsel—met and conferred on several occasions to discuss the merits of Plaintiffs' claims and Navicent's defenses, as well as the potential for early resolution. *Id.* ¶ 19. Given Navicent's role as a primary healthcare provider and hospital system in south and central Georgia, and its focus on providing emergency medical care during the novel coronavirus pandemic, the Parties agreed to early mediation before Rodney A. Max, a respected mediator and principal of Upchurch Watson White & Max in Miami, Florida. *Id.* ¶ 20. Both Parties had an opportunity to fully brief the issues, and mediation went forward via Zoom Video Conference on October 22, 2020. *Id.* ¶ 21. After a full day of arm's-length negotiations, and significant exchange of information through Mr. Max, the Parties had reached an Agreement in principle. *Id.* ¶ 22. Over the next couple of months, the Parties continued negotiations and drafting of the Settlement Agreement. *Id.* ¶ 23.

[3] *See also*, Complaint ¶¶ 87–178, filed April 29, 2020 ("Compl.").

III. THE SETTLEMENT AGREEMENT

A. Settlement Benefits

The Settlement negotiated on behalf of the Class provides for two categories of relief for Settlement Class Members: (1) expense and time reimbursements for both ordinary and extraordinary expenses; and (2) remedial measures carried out by Navicent to increase its data security and better protect the PII and PHI of Class Members and future patients. *Id* ¶ 27. The Settlement Class includes approximately 360,000 individuals and is defined as: "all persons who were notified by or on behalf of Navicent regarding the Data Incident[,]" with specific and narrow exclusions. *Id*. ¶¶ 25, 26.

1. Monetary Relief

i. Ordinary Expense and Time Reimbursements

The first category of monetary benefits provides Settlement Class Members who submit a valid claim may receive up to $200 per person for reimbursement of ordinary expenses incurred as a result of the Data Incident including: bank fees, certain long distance phone charges, cell phone charges, data charges, postage, or gasoline for local travel incurred between July 1, 2018 and the Claims Deadline; and fees for credit reports, credit monitoring, or other identity theft insurance product purchased between March 22, 2019 and the Claims Deadline. *Id*. ¶ 28.

Additionally, Settlement Class Members who submit a valid claim may receive compensation at $15 per hour for up to four hours spent dealing with the Data Incident such as time spent dealing with replacement card issues, reversing fraudulent charges, rescheduling medical appointments and/or finding alternative medical care and treatment, retaking or submitting to medical tests, locating medical records, retracing medical history, and any other demonstrable form of disruption to medical care and treatment. *Id.*

While capped at $200 per person, ordinary expense and time reimbursements are uncapped in the aggregate—meaning as many Settlement Class Members who make a valid claim will be paid out, *without any pro rata reduction. Id.*

ii. Extraordinary Expense Reimbursements

The second category of monetary benefits provides Settlement Class Members who submit a valid claim up to $2,500 per person for reimbursement of extraordinary expenses, given that they were more likely than not incurred as a result of the Data Incident. *Id.* ¶ 29.

Like the ordinary expenses, the extraordinary expense reimbursements are not capped in aggregate: any Settlement Class Member who makes a valid claim can receive up to $2,500 in extraordinary expense reimbursements, *without any pro rata reduction*. *Id.*

2. Equitable and Prospective Relief

As a part of the Settlement Agreement, Navicent has also agreed to implement enhanced data security measures to ensure that the PII and PHI of Settlement Class Members and future patients will be better protected. *Id*. ¶ 30. The enhancements include third party security monitoring, third party logging, network monitoring, firewall enhancements, email enhancements, and equipment upgrades that will continue to be made throughout 2021 and 2022. *Id.* Such enhancements could easily cost Navicent hundreds of thousands of dollars.

B. The Notice and Claims Process

The Notice and Claims Process was implemented pursuant to the Court's Preliminary Approval Order. The estimated cost for Settlement Administration, including both Notice and Claims Administration, is $190,000 all of which is to be borne by Defendant and shall not impact the amount available to Settlement Class Members. *See* Decl. of David K. Lietz in Supp. of Pls.' Mot. for Attorneys' Fees, Costs, & Service Awards ¶¶ 5, 19 ("Lietz Fees Decl."), filed herewith.

The Notice Plan provides for individual Notice to be sent to Settlement Class Members directly via first-class mail, to the last postal address that Navicent has on record for each Settlement Class Member. Lietz MPA Decl. ¶ 35. 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*. ¶ 37. 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.* ¶ 38; *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 to exclude themselves from or object to the Settlement. *Id.* ¶¶ 43, 46.

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 Plaintiff until after the substantive terms of the Settlement had been agreed upon. *Id*. ¶ 50.

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. Lietz Fees Decl. ¶ 7. The Service Award

is meant to compensate Plaintiffs for their efforts on behalf of the Settlement Class, including maintaining contact with counsel, assisting in the investigation of the case, remaining available for consultation throughout the mediation and answering counsel's many questions. *Id.* ¶ 8. The amount of the Service Award will not impact the funds available for payment to Settlement Class Members. *Id.* ¶ 7.

Navicent 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.* ¶ 7. Like Plaintiffs' Service Awards, any approved costs and fees will be paid by Navicent, and will not affect the amount available to satisfy Class Member claims. *Id.* Class Counsels' fees were not guaranteed—the retainer agreement counsel had with Plaintiffs did not provide for fees apart from those earned on a contingent basis, and, in the case of class settlement, approved by the court. *Id.* ¶ 16. 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.

Due to the early stage of litigation, costs incurred by Plaintiffs are low. Plaintiffs' current costs are $8,160.54, and include filing fees, service fees, and costs of mediation. These costs are reasonable, and necessary for the litigation. *Id.* ¶¶ 17–18; Decl. of John Yanchunis in Supp. of Pls.' Mot. for Approval of Attorneys' Fees, Costs, & Service Awards ¶ 10 ("Yanchunis Fees Decl."), filed herewith.

As of June 4, 2021, 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. Lietz Fees Decl. ¶ 20. Similarly, neither Class Counsel nor the Settlement Administrator has received any requests for exclusion. *Id.* ¶ 19.

IV. LEGAL DISCUSSION[4]

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." *Florida 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)).

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 maintaining contact with counsel, assisting in the investigation of the case, remaining available for consultation throughout mediation and for answering counsel's many questions. *See* Lietz Fees Decl. ¶ 7. Such an award is eminently reasonable, and should be approved.

B. Counsel's Request for Attorneys' Fees are 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

[4] 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.

of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.* (quoting *State 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. 683, 694–95 (S.D. Fla. Feb. 28, 2014) (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 are capped at $200 per person for ordinary expenses and lost time and at $2,500 per person for extraordinary expenses—*they are uncapped in the aggregate*. Accordingly, the total cash value of the Settlement negotiated includes up to approximately $972,000,000 in ordinary reimbursements, extraordinary reimbursements, and lost time; approximately $190,000 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 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 ordinary expense reimbursements and lost time up to $200 per person, and extraordinary expense reimbursements up to $2,500 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.* This result is extraordinary, and will allow every Settlement Class Member to be reimbursed for any costs resulting from the data breach. 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 and filing their complaint. Lietz MPA Decl. ¶ 19–24. Given Navicent's role as a primary healthcare provider and hospital system

in south and central Georgia, and its focus on providing emergency medical care during the novel coronavirus pandemic, the Parties agreed to early mediation before Rodney A. Max, a respected mediator and principal of Upchurch Watson White & Max in Miami, Florida. *Id.* ¶ 20. Both Parties had an opportunity to fully brief the issues, and mediation went forward via Zoom Video Conference on October 22, 2020. *Id.* ¶ 21. After a full day of arm's-length negotiations, and significant exchange of information through Mr. Max, the Parties had reached an Agreement in principle, which they refined over the next couple of months of negotiations. *Id*. ¶¶ 22–23.

As early settlement in this matter will result in quicker monetary and equitable relief to the Class, 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*., No. 08 Civ. 6060(RMB)(RLE), 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's decision in *Dep't of Lab. 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 Defendant, 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 50 cases across the country involving violations of the TCPA, privacy violations, data breaches, and ransomware attacks. *See* Lietz MPA Decl. ¶¶ 2–9. Ex. 2; *see generally,* Yanchunis Fees Decl. 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 contingency-fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. Lietz Fees Decl. ¶¶ 10, 16. Such a risk warrants an appropriate fee. *George v. Acad. Mortg. Corp. (UT)*, 369 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.* ¶ 11. At various times during the litigation of this class action, this lawsuit consumed significant amounts of Settlement Class Counsel's time. *Id.* 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, we 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.* 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 v. Acad. Mortg. Corp. (UT)*, 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 (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 Defendant's 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. ¶ 20. Similarly, no Settlement Class Member has requested exclusion. *Id.* ¶ 19. 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 $8,160.54 in litigation costs, including filing fees, service fees, and costs of mediation. Lietz Fees Decl. ¶ 16; Yanchunis Fees Decl. ¶ 14. 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: June 7, 2021

Respectfully submitted,

/s/ David K. Lietz

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