UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JADYN NEWMAN, individually and on behalf of classes of similarly situated individuals, Plaintiffs, v. AUDIENCEVIEW TICKETING CORPORATION and UNIVERSITYTICKETS.COM, INC., Defendants.	Case No.: 1:23-cv-03764-VEC
RICHARD Z. TOLEDO, individually and on behalf of classes of similarly situated individuals, Plaintiffs, v. AUDIENCEVIEW TICKETING CORPORATION and UNIVERSITYTICKETS.COM, INC., Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARDS

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Lead Counsel, Bradley Grombacher LLP ("Bradley Grombacher") and Glancy Prongay & Murray LLP ("Glancy Prongay" and, together with Bradley Grombacher, "Lead Counsel" or "Class Counsel"), respectfully submits this memorandum of law in support of their motion for an award of attorneys' fees, including litigation expenses, in the amount of 30% of the Settlement Fund.

PRELIMINARY STATEMENT

As demonstrated herein and in the supporting Declarations of Brian Murray and Kiley Grombacher, the requested attorneys' fee award is fair and reasonable when considering the factors set forth in *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980); *see also Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 47 (2d Cir. 2000), including but not limited to the risks that Class Counsel undertook, and the results obtained for the Class. The percentage requested for the attorneys' fee award is wholly consistent with percentages endorsed and allowed by other courts in this district and elsewhere involving complex class action litigation.

In accordance with the Settlement Agreement, which resulted in among other things a $435,000 common fund (the "Settlement Fund"), Class Counsel request, and Defendants do not oppose, an award of attorneys' fees and reimbursement of litigation expenses totaling $130,500.00, which represents $17,765.30 in expenses and $112,734.70 in fees. In addition, Defendants do not oppose service awards to the two named plaintiffs, totaling $7,000, to be paid out of the Settlement Fund. The Court has discretion to base an award of attorneys' fees on either a "percentage of the fund" or lodestar method. Under either method, an analysis shows that the fee request is reasonable and should be approved.

A fee award pursuant to the "percentage of the fund" method is the preferred method by federal courts in New York in class action settlements that result in a common fund. The cash

value of the ***Settlement Fund alone*** is approximately $435,000.00. Further, as Defendants are also paying for corporate therapeutics to prevent future breaches, the total value of the Settlement is even higher. Thus, the requested attorneys' fee award is 25.9% of the cash value of the Settlement Fund alone, or 25.9%, which is fair, reasonable, and entirely consistent with similar awards granted by federal courts in New York and elsewhere hearing class action litigation.

Class Counsel's fee request is also reasonable under a lodestar analysis. As the Court is aware, this case has been litigated for nearly two years, and resolved at mediation after extensive work among four firms representing the Plaintiffs (Glancy Prongay & Murray LLP, Bradley Grombacher LLP, Mastando & Artrip LLC, and Siri & Glimstad LLP). Class Counsel's total lodestar incurred in litigating this matter is $213,758. Thus, the requested fee award of $112,734.70 represents only 53% of Class Counsel's incurred lodestar. Moreover, the factors identified in *Goldberger*, as applied to the facts here, further support the reasonableness of the requested fee award.

For the reasons stated herein, Class Counsel respectfully requests the Court to approve their Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Class Representative Service Awards, the amounts of which are routinely authorized in class actions as fair and reasonable, and are supported by established class action jurisprudence. In support of this motion, Plaintiffs are filing herewith the Declarations of Kiley L. Grombacher ("Grombacher Dec.") and Brian Murray ("Murray Dec.").

BACKGROUND OF LITIGATION

This litigation stems from a data breach involving Defendants AudienceView Ticketing Corporation and UniversityTickets.com, Inc. During February of 2023, malicious actors infiltrated Defendants' systems, compromising Payment Card Information ("PCI") of approximately 13,045

individuals, including cardholder names, payment card numbers, and expiration dates. AudienceView notified affected individuals of the breach in April 2023. On May 4, 2023, Plaintiff Jadyn Newman filed the initial complaint in the United States District Court for the Southern District of New York and shortly after, Plaintiff Richard Toledo filed a related action, which was consolidated with Newman's case under the lead docket.

Throughout the litigation, Defendants denied liability and contested the claims asserted against them. They filed a motion to dismiss the consolidated complaint on October 2, 2023, prompting Plaintiffs to amend their pleadings again. The First Amended Complaint, filed on October 16, 2023, included additional details about the breach and the alleged deficiencies in Defendants' data security practices. The amended filing rendered the motion to dismiss moot, and the case proceeded under the revised pleadings.

The Parties also filed a series of procedural motions, including motions to consolidate, appoint lead counsel, and establish a case management plan. Discovery deadlines were formally stayed at several points while substantive motions were briefed and resolved.

The Parties, following and during these stays, engaged in settlement discussions, beginning with informal exchanges of information in early 2024. These steps forward culminated into a formal mediation process, as a single, full-day session on May 28, 2024, facilitated by the Honorable Morton Denlow, a mediator with expertise in complex class actions and data breach disputes. This session was characterized by extensive negotiations, during which both parties exchanged critical information to assess the strengths and weaknesses of their respective positions.

After a full day of mediation, the Parties reached an agreement on the material terms of a Class Settlement designed to conclusively resolve this matter. In the weeks following, the Parties collaborated to memorialize and finalize the details of the Settlement Agreement and its exhibits.

Counsel for both sides worked extensively to draft, edit, and finalize the comprehensive Settlement Agreement and its supporting documents, ensuring that all terms reflected the negotiated resolution. This process was lengthy.

In September 2024, the Parties executed the final Settlement Agreement. Class Counsel believe the Settlement provides meaningful and substantial relief to Class Members, including monetary compensation and significant data security enhancements to protect against future breaches. Class Counsel have carefully evaluated the Settlement and affirm that it is fair, reasonable, and adequate to resolve Plaintiffs' claims, making it in the best interest of the Class.

Class Counsel subsequently prepared the Joint Motion for Preliminary Approval, which was filed in its final form after receiving feedback from the Court on its previously filed motion in August 2024, on September 20, 2024. Since the entry of the Preliminary Approval Order, Class Counsel have actively monitored the settlement administration process, ensuring compliance with the Court's directives and responding to inquiries from Class Members. Class Counsel remains committed to overseeing the Settlement's implementation and, if final approval is granted, will continue working to ensure that monetary benefits are properly administered and distributed to eligible Class Members.

KEY TERMS OF THE SETTLEMENT AGREEMENT

The Settlement Agreement previously preliminarily approved by the Court defined the Class, described the Parties' agreed-upon Settlement relief, and proposed a plan for disseminating notice to the Class Members, which has been accomplished. The Settlement Agreement and its exhibits, which were attached to the Joint Motion for Preliminary Approval, (Doc. 70-2), set forth and described all details and components of the Settlement. Key highlights of the Settlement include:

- **Establishment of Settlement Fund.** Within ten (10) days of the Preliminary Approval Order, Defendants shall deposit or cause to be deposited the total sum of Four Hundred Thirty-Five Thousand Dollars and Zero Cents ($435,000.00) into an interest-bearing account established and administered by the Settlement Administrator at a financial institution agreed upon by the Settlement Administrator and Defendants.

- **Non-Reversionary.** The Settlement Fund is non-reversionary. As of the Effective Date, all rights of Defendants in or to the Settlement Fund shall be extinguished, except in the event this Settlement Agreement is terminated.

- **Use of the Settlement Fund.** As further described in this Agreement, the Settlement Fund shall be used by the Settlement Administrator to pay for the following: (i) Notice and Administrative Expenses; (ii) Taxes and Tax-Related Expenses; (iii) Approved Claim(s) for Out-of-Pocket Losses; (iv) Approved Claim(s) for Attested Time; (v) Approved Claim(s) for Alternative Cash Payment(s); (vi) Service Awards Payments approved by the Court; and (vii) Fee Award and Costs approved by the Court. Following payment of all of the above expenses, any amount remaining in the Residual Settlement Fund shall be distributed pro rata to Participating Settlement Class Members and shall thereafter be paid to the Non-Profit Residual Recipient in accordance. No amounts may be withdrawn from the Settlement Fund unless expressly authorized by this Agreement or approved by the Court.

- **Reimbursement for Out-of-Pocket Losses.** All Settlement Class Members may submit a claim for up to Five Thousand Dollars and Zero Cents ($5,000.00) for reimbursement of Out-of-Pocket Losses. "Out-of-Pocket Losses" are unreimbursed costs or expenditures incurred by a Settlement Class Member that are fairly traceable to the Data Incident including, without limitation, the following: (i) unreimbursed costs, expenses, losses or charges incurred as a result of identity theft or identity fraud, or other possible misuse of class member's Payment Card Information; and/or (ii) other miscellaneous expenses incurred related to any Out-of-Pocket Loss such as notary, fax, postage, copying, mileage, and long-distance telephone charges.

- **Reimbursement for Attested Time.** All Settlement Class Members may submit a claim for reimbursement of Attested Time up to four (4) hours at Twenty-Five Dollars and Zero Cents ($25.00) per hour, but only if at least one (1) full hour was spent. Settlement Class Members can receive reimbursement of Attested Time with a brief description of the actions taken in response to the Data Incident and the time associated with each action. Claims for Attested Time are capped at One Hundred Dollars and Zero Cents ($100.00) per individual. A claim for Attested Time may be combined with a claim for reimbursement for Out-of-Pocket Losses but in no circumstance will a Settlement Class Member be eligible to receive more than the Five Thousand Dollars and Zero Cents ($5,000.00) individual cap.

- **Alternative Cash Payment.** In lieu of the benefits made available to Settlement Class Members, all Settlement Class Members may submit a claim for an Alternative Cash Payment of Seventy-Five Dollars and Zero Cents ($75.00).

- **Service Award Payment**. At least thirty (30) days before the Opt-Out and Objection Deadlines, Class Counsel will file a motion seeking a service award payment not to exceed Three Thousand Five Hundred Dollars and Zero Cents ($3,500.00) for each of the Class Representatives, for a total of Seven Thousand Dollars and Zero Cents ($7,000.00), in recognition of their contributions to this Action, subject to Court approval.

- **Attorney's Fees and Costs and Expenses.** At least (30) days before the Opt-Out and Objection Deadlines, Class Counsel will file a motion for an award of attorney's fees and litigation costs and expenses not to exceed thirty percent (30%) of the Settlement Fund, or One Hundred Thirty Thousand Five Hundred Dollars and Zero Cents ($130,500.00) to be paid from the Settlement Fund, and subject to the Courts approval.

To recognize their efforts on behalf of the Class, the named plaintiffs, Jadyn Newman and Richard Toledo, will receive modest Class Representative Service Awards of $3,500 each, subject to Court approval. These awards acknowledge the time, energy, and commitment the representatives dedicated to pursuing this litigation, including their involvement in discovery and mediation. The requested service awards are to be paid from the Settlement Fund and are consistent with the class representatives' contributions.

ARGUMENT

For the reasons outlined herein and in the supporting Murray and Grombacher Declarations, Plaintiffs respectfully request that the Court grant the requested award for attorneys' fees, litigation expenses, and Class Representative service awards.

I. PLAINTIFFS' COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND

As stated, the requested fee award is reasonable using either a "percentage of the fund" or lodestar method. In the Second Circuit, an award of fees to class counsel is typically (and

preferentially) based on the "percentage of the fund". The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 47 (2d Cir. 2000). Courts recognize that awards of fair attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons," and therefore "discourage future misconduct of a similar nature." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.,* 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8, 2010) (citation omitted).

For nearly two decades, this Circuit has awarded attorneys' fees as a percentage of the total common fund—*i.e.*, the "percentage of the fund method." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). "The percentage method is . . . advantageous over the lodestar alternative because it 'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.,* 504 F. Supp. 3d 265, 269 (S.D.N.Y. 2020); *see also Savoie v. Merchs. Bank,* 166 F.3d 456, 460 (2d Cir. 1999) (the "percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases").

II. THE COURT SHOULD AWARD A REASONABLE PERCENTAGE OF THE COMMON FUND

Class Counsel respectfully submits that the Court should award a fee based on a percentage of the common fund. The *Goldberger* court specifically described the difficulties with the lodestar method versus the percentage of the fund method:

As so often happens with simple nostrums, experience with the lodestar method

> proved vexing. Our district courts found that it created a temptation for lawyers to run up the number of hours for which they could be paid. For the same reason, the lodestar created an unanticipated disincentive to early settlements. But the primary source of dissatisfaction was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits. There was an inevitable waste of judicial resources.

Goldberger, 209 F.3d at 48-49 (internal citations omitted).

In contrast, the percentage of the fund method provides "appropriate financial incentives" necessary "to attract well-qualified plaintiffs' counsel who are able to take a case to trial," while also "directly align[ing] the interests of the class and its counsel" by providing "a powerful incentive for the efficient prosecution and early resolution of [the] litigation." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355, 359 (S.D.N.Y. 2005). This is particularly true here where Plaintiffs' Counsel litigated the case, and through extensive mediation efforts achieved a settlement with significant benefits that might otherwise have taken more resources and multiple years in similarly complex actions. More recently, the Second Circuit has reiterated its approval of the percentage method, stating that it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," and has noted that the "trend in this Circuit is toward the percentage method." *Wal-Mart*, 396 F.3d at 121 (citations omitted); *see also Christine Asia Co., Ltd. v. Ma,* 2019 WL 5257534, at *17 (S.D.N.Y. Oct. 16, 2019); *In re Facebook, Inc., IPO Sec. & Deriv. Litig.,* 343 F. Supp. 3d 394, 416 (S.D.N.Y. 2018).

III. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE UNDER THE PERCENTAGE FUND METHOD

Federal Rule of Civil Procedure 23(h) provides that courts may award "reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "It is well established that '[w]here an attorney succeeds in creating a common

fund from which members of a class are compensated for a common injury inflicted on the class … the attorneys whose efforts created the fund are entitled to a reasonable fee-set by the court-to be taken from the fund.'" I*n re IMAX Sec. Litig.,* No. 06 Civ. 6128 (NRB), 2012 WL 3133476, at *5 (S.D.N.Y. Aug. 1, 2012) (quoting *In re Merrill Lynch Tyco Research Sec. Litig.,* 249 F.R.D. 124, 136 (S.D.N.Y. 2008)). "The party seeking fees bears the burden of demonstrating that its requested fees are reasonable." *Abel v. Town Sports Int'l, LLC,* No. 09 Civ. 10388 (DF), 2012 WL 6720919, at *26 (S.D.N.Y. Dec. 18, 2012). Any award of attorneys' fees "must reflect 'the actual effort made by the attorney to benefit the class'." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.,* 504 F.3d 229, 249-50 (2d Cir. 2007) (quoting *City of Detroit v. Grinnell Corp*., 560 F.2d 1093, 1099 (2d Cir. 1977)). Here, given the volume of work performed by Plaintiffs' counsel, especially in a limited time frame, and the benefits achieved on behalf of the Class that resulted from that effort, Plaintiffs' Counsel's request for attorneys' fees is reasonable and should be awarded.

The court "may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method." *McDaniel v. Cnty. of Schenectady,* 595 F.3d 411, 417 (2d Cir. 2010); *Goldberger v. Integrated Res.,* 209 F.3d 43, 50 (2d Cir. 2000). However, "[t]he trend in the Second Circuit is to assess a fee application using the 'percentage of the fund' approach, which 'assigns a proportion of the common settlement fund toward payment of attorneys' fees'." *Jander v. Ret. Plans Comm. of IBM,* 2021 WL 3115709, at *7 (S.D.N.Y. July 22, 2021) (quoting *Oklahoma Firefighters Pension & Ret. Sys. v. Lexmark Int'l, Inc.,* 2021 WL 76328, at *4 (S.D.N.Y. Jan. 7, 2021)); *see also Wal-Mart*, 396 F.3d at 121 (noting that "[t]he trend in this Circuit is toward the percentage method, which 'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of

litigation'") (internal quote omitted). This is particularly true in cases such as this one in which the Settlement provides for a common fund plus additional benefits, applicable to all Class members, to be paid by the Defendants outside the fund. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (noting that in common fund cases, "a reasonable fee is based on a percentage of the fund bestowed on the class").

IV. FACTORS CONSIDERED BY COURTS IN THE SECOND CIRCUIT CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

In the Settlement Agreement, the Parties have agreed that Plaintiffs' Counsel may seek attorneys' fees. (Doc. 70-2, SA § 93). Accordingly, Plaintiffs' Counsel requests a fee award of $112,734.30 to be paid from the $435,000.00 Settlement Fund. Plaintiffs' Counsel's fee request is 25.9% of the $435,000 cash value of the Settlement Fund. That value does not take into account the additional value of the corporate therapeutics provided by the Settlement to prevent a future breach

Under either the percentage-of-recovery or lodestar approach, Plaintiffs' Counsel respectfully submits that the request of 25.9% of the Settlement value is reasonable. The fee request compensates Plaintiffs' Counsel for their investment of time, expertise, and capital, which produced a successful outcome for the Settlement Class in a case that was high risk. "The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs [sic] counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit." *Velez v. Novartis Pharms. Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010); *see also In re Marsh ERISA Litig.,* 265 F.R.D. 128, 149 (S.D.N.Y. 2010)

"District courts in this Circuit typically approve fee requests between 30% and 33% of the settlement." *Hernandez v. Compass One*, LLC, 2021 WL 4925561, at *4 (S.D.N.Y. Oct. 21, 2021)

(quoting *Strauss v. Little Fish Corp.,* 2020 WL 4041511, at *9 n.1 (S.D.N.Y. July 17, 2020) (collecting cases)). In fact, "[i]n this district alone, there are scores of common fund cases where fees alone (*i.e.*, where expenses are awarded in addition to the fee percentage) were awarded in the range of 33-1/3% of the settlement fund)." *In re Lloyd's Am. Tr. Fund Litig.*, 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002) (collecting cases). This is especially true in non-megafund cases, like this one. *See In re Marsh ERISA Litig*., 265 F.R.D. at 149.

Regardless of whether the percentage of the fund or lodestar method is used, courts in the Second Circuit evaluating the reasonableness of a fee request consider: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger,* 209 F.3d at 50. Plaintiffs' Counsel respectfully submit that an analysis of the *Goldberger* factors, as well as the percentage of the fund and lodestar analyses herein, demonstrate that the fee and expense request is reasonable and appropriate and warrants approval by the Court.

A. The Time and Labor Expended Support the Requested Fee

The time and effort expended by Plaintiffs' Counsel in prosecuting the Action and achieving the Settlement support the requested fee, all on a purely contingent basis. Before filing suit, Plaintiffs' Counsel conducted an investigation into the data breach affecting Defendants AudienceView Ticketing Corporation and UniversityTickets.com, Inc. This investigation included analyzing publicly available information about the breach, reviewing legal frameworks governing data privacy and payment card security, and assessing potential defenses. Plaintiffs' Counsel's efforts resulted in a well-researched initial complaint and, subsequently, a detailed First Amended Complaint, which strengthened the factual allegations surrounding Defendants' failure to maintain

adequate data security. Throughout the litigation, Plaintiffs' Counsel undertook the following efforts, among others:

- Conducted an extensive investigation into the claims asserted in the Action, which included a thorough review of publicly available sources such as company announcements, press releases, news articles, and technical reports related to the data breach. (Murray Dec. ¶ 3).
- Researched and drafted a detailed consolidated complaint based on this investigation, including allegations regarding AudienceView's failure to implement reasonable data security measures to protect sensitive customer information. (Grombacher Dec. ¶¶ 5-7).
- Successfully coordinated the consolidation of related actions and appointment of Lead Counsel, ensuring an efficient and organized litigation structure. Counsel worked with the Court to establish case management orders while navigating stays of discovery and briefing schedules to streamline the litigation process. (Grombacher Dec. ¶ 7, Murray Dec. ¶¶ 6-8).
- Plaintiffs' Counsel's efforts culminated in a rigorous and successful formal mediation process on May 28, 2024, facilitated by the Honorable Morton Denlow. Leading up to this mediation, Plaintiffs' Counsel engaged in months of informal exchanges of critical information, allowing both sides to meaningfully assess the strengths and weaknesses of their respective positions. The mediation session itself involved extensive negotiations. (Grombacher Dec. ¶ 8, Murray Dec. ¶¶ 9-11).
- Following the mediation, Plaintiffs' Counsel worked diligently to memorialize the Settlement Agreement and its exhibits, collaborating with Defendants' counsel to

address all material terms and ensure that the final agreement accurately reflected the Parties' negotiated resolution. This process required substantial drafting, revisions, and review to achieve a comprehensive and fair settlement structure. (Grombacher Dec. ¶¶ 3-4, Murray Dec. ¶¶ 9-10).

Plaintiffs' Counsel expended over 332 hours prosecuting this Action with a lodestar value of approximately $213,758. (Murray Dec. ¶ 14). The time and effort devoted to this case by Plaintiffs' Counsel was critical in obtaining the Settlement and supports the reasonableness of the fee request.

B. The Risk of the Litigation Supports the Requested Fee

The risk of the litigation is one of the most important *Goldberger* factors. *See Goldberger*, 209 F.3d at 54; *In re Comverse Tech, Inc. Sec. Litig.*, 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010). The Second Circuit has recognized that the risks associated with a case undertaken on a contingent-fee basis is an important factor in determining an appropriate fee award: No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. "Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Id; see also In re Am. Bank Note Holographics, Inc. Sec. Litig.,* 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award").

"It is well-established that litigation risk must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55. At the time of filing of this Action, there were complex issues of fact and law, which presented significant risks that continue today. In particular, data security cases like this one involving the ticketing data breach, generally face substantial hurdles even just to

make it past the pleading stage. "Data breaches are a 'risky field of litigation' because they 'are uncertain and class certification is rare.'" *In re Capital One Data Security Breach Litig.*, 2022 WL 17176495, at *2 (E.D. Va. Nov. 17, 2022) (citing *Fulton-Green v. Accolade, Inc.*, 2019 WL 4677954, at *8 (E.D. Pa. Sept. 24, 2019)).

Plaintiffs faced significant risks in establishing standing and causation, particularly where Defendants could contest whether Class Members had suffered concrete harm or economic losses resulting directly from the breach. Defendants also raised jurisdictional issues since the servers in this case were located in Canada. "Counsel should be rewarded for undertaking [those risks] and for achieving substantial value for the class." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,* 991 F. Supp. 2d 437, 441 (E.D.N.Y. 2014); *see also Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ. 214 CM, 2012 WL 2505644, at *10 (S.D.N.Y. June 27, 2012) ("[T]he risk of non-payment in cases prosecuted on a contingency basis where claims are not successful … can justify higher fees."). Despite these hurdles, Plaintiffs' Counsel achieved a settlement, including monetary compensation for Class Members as well as robust data security enhancements to protect against future breaches. This was done despite the significant risks Plaintiffs faced in pursuing claims against a large corporation with substantial resources. The Settlement provides meaningful relief to more than 13,000 individuals whose Payment Card Information was compromised, delivering tangible benefits where litigation outcomes remained far from certain. As such, the Settlement is a direct result of Plaintiffs' Counsel's skills and dedication in this Action.

C. The Magnitude and Complexity of the Action Support the Requested Fee

The magnitude and complexity factor also supports the requested fee award. "[C]lass actions 'have a well deserved reputation as being most complex.'" *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998). In cases that require more expertise, a larger

percentage of the fund should be awarded to the lawyers who can competently prosecute the case. *See In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) ("The upshot is that the magnitude and complexity of the litigation also weigh in favor of a significant award.") As noted above and in the Murray and Grombacher Declarations, Plaintiffs' Counsel knew from their initial investigations that this litigation would involve extensive research on challenging and complex legal and factual claims in this data security class action. Data breach class actions are inherently challenging due to the evolving legal standards governing claims for standing, causation, and damages in cases involving compromised payment card information.

D. The Requested Fee is Supported by the Quality of Representation

When evaluating *Goldberger's* "quality of representation" factor, courts in the Second Circuit "review the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Merrill Lynch Tyco Rsch. Sec. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y. 2008). Plaintiffs' Counsel practice extensively in complex federal civil litigation, particularly the litigation of data security class actions, and have successfully litigated these types of actions in courts throughout the country. "[T]he quality of representation . . . may be measured in large part by the results that counsel achieved for the class[]." *Payment Card*, 991 F. Supp. 2d at 441. Class Counsel submit that the quality of their representation is best evidenced by the quality of the result achieved. *See, e.g.*, *In re Veeco Instruments Inc. Sec. Litig.,* 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007). Here, as discussed above and in the Declarations of Kiley Grombacher and Brian Murray, the Settlement provides an outstanding result for the Class considering the serious risks of continued litigation. *See* Grombacher Dec. ¶¶ 14-15.

Courts have recognized that the quality of the opposition should also be taken into consideration in assessing the quality of counsel's performance. *See, e.g.*, *Veeco*, 2007 WL

4115808, at *7 (among factors supporting 30% award of attorneys' fees was that defendants were represented by "one of the country's largest law firms"); *In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig.*, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work") (citation omitted), *aff'd*, 272 F. App'x 9 (2d Cir. 2008). Defendants were represented by able counsel from Gordon Rees Scully Mansukhani, LLP, a large national law firm with offices in all 50 states, who aggressively represented their clients throughout this Action. *See* Murray Dec. ¶ 4. The Gordon Rees firm had defended hundreds of class actions involving data breaches and cyber security incidents. Notwithstanding this capable opposition, Class Counsel's litigation efforts and ability to present a strong case enabled them to achieve the Settlement for the benefit of the Class.

E. The Requested Fee is Reasonable in Relation to the Settlement

Another *Goldberger* factor compares the requested fee award to the settlement. *Goldberger*, 209 F.3d at 50. In assessing this factor, courts consider whether the requested fee (i) is in line with fee percentages in comparable actions; and (ii) would not result in an "unwarranted windfall." *Id*. Here, a 25.9% fee in this case is consistent with fee percentages awarded in comparable cases and would not result in any "windfall."

"Courts have interpreted this factor as requiring the review of the fee request in terms of the percentage it represents of the total recovery." *Cates v. Trs. of Columbia Univ. in City of N.Y.*, 2021 WL 4847890, at *7 (S.D.N.Y. Oct. 18, 2021) (finding class counsel's request for one-third of settlement fund to be reasonable). As previously discussed, in non-megafund cases like this one, "[c]ourts in this District routinely approve fee awards of one-third of the common fund or more." *Id; see also In re BHP Billiton Limited Sec. Litig.,* No. 1:16-cv-01445-NRB, 2019 WL 1577313,

at *1-2 (S.D.N.Y. Apr. 10, 2019) (this Court's finding that lead counsel's request for 30% of a $50,000,000 settlement fund was fair, reasonable, and consistent with similar awards within the Second Circuit).

F. Public Policy Considerations Support the Requested Fee

Public policy strongly supports the requested fee award. Without private counsel taking on the risk of this litigation, the thousands of individuals whose PCI was compromised in the AudienceView data breach would have recovered nothing, and important public interests would not have been addressed. Class actions "level[] . . . the playing field" and "increase[] the likelihood that the judgments in such cases will reflect the actual legal harms defendants cause." Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. PA. L. REV. 2043, 2059 (2010).

Data breach cases in particular serve an important public interest: they hold companies accountable for failing to implement adequate safeguards to protect consumers' sensitive personal and financial information, incentivize stronger data security practices, and provide meaningful relief to those harmed. Awarding a reasonable percentage of the common fund properly motivates enforcement of consumer protection and data privacy laws and incentivizes skilled counsel to bring meritorious cases even where, at the outset, the prospect of any recovery is uncertain and the costs are daunting. *See WorldCom*, 388 F. Supp. 2d at 359 ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."). In data breach cases like this one, Plaintiffs' Counsel take on substantial risks due to the technical complexities involved, as well as the evolving legal landscape surrounding issues such as standing, causation, and damages.

As this Court has recognized, "[a]ttorneys' fees should 'reflect the important public policy goal of providing lawyers with sufficient incentive to bring common fund cases that serve the

public interest.'" *In re J.P. Morgan Stable Value Fund ERISA Litig.*, 2019 WL 4734396, at *3 (S.D.N.Y. Sept. 23, 2019) (quoting *In re Sumitomo Copper Litig.,* 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999)). Fee awards "should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature." *Id*.

Plaintiffs' Counsel's efforts in this Action are the only way Plaintiffs will receive any compensation. Plaintiffs' counsel in such cases are typically retained on a contingent basis due to the massive commitment of time and expense required relative to the losses suffered by an individual representative plaintiff. Furthermore, the significant expense, combined with the high degree of uncertainty of ultimate success, means that contingent fees are virtually the only means of recovery in such cases. Plaintiffs' Counsel assumed substantial risk by undertaking this Action and achieved a significant benefit to the Class. An important public policy interest is served by awarding attorneys' fees that adequately compensate counsel. Accordingly, public policy supports Plaintiffs' Counsel's requested fee.

G. The Requested Attorneys' Fees are Reasonable Under the Lodestar Crosscheck

As noted above, the lodestar fee calculation method has "fallen out of favor particularly because it encourages bill-padding and discourages early settlements." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014). Accordingly, the lodestar method is used in this Circuit only "as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall." *Id*. "[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50. "Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)." *Silberblatt v. Morgan Stanley*, 524

F. Supp. 2d 425, 433-34 (S.D.N.Y. Nov. 19, 2007) (internal citations omitted). Class Counsel need only submit documentation appropriate to meet the burden establishing an entitlement to an award, not to satisfy "green-eyeshade accountants." *Fox v. Vice,* 563 U.S. 826, 838 (2011).

Plaintiffs' Counsel collectively worked 332.6 hours in this Litigation. (Murray Dec. ¶ 14). At their usual and customary rates and applying the rates in existence at the time the work was undertaken, these hours translate into approximately $213,000. (*Id.)* As such, Plaintiffs' Counsel's request for $112,734.70 in attorneys' fees, represents a total negative multiplier of approximately .53. The tasks and time devoted to this matter have been documented by Class Counsel in detailed time records maintained since the outset.[1]

"The lodestar is typically enhanced by an appropriate multiplier which accounts for a number of factors unique to the case, including the contingent nature of success and the quality of counsel's work." *Dial Corp. v. News Corp.,* 317 F.R.D. 426, 433 (S.D.N.Y. 2016). Here Counsel is requesting a negative multiplier of .53.

Therefore, Plaintiffs' Counsel respectfully submits that the lodestar cross-check supports the reasonableness of the requested fee award.

V. PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Pursuant to Fed. R. Civ. P. 23(h), a trial court may award nontaxable costs that are authorized by law or the parties' agreement. Fed. R. Civ. P. 23(h). Here, an award of expenses incurred by Plaintiffs' Counsel is authorized by both the Settlement Agreement and the common fund doctrine. (Doc 70-2, SA § 93); *see Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970)

[1] If needed, Class Counsel's voluminous time and billing records can be made available upon request for the Court's review in camera, as those records include matters subject to the attorney-client privilege and the work-product privilege. (Grombacher Dec. ¶ 12).

(recognizing the right to reimbursement of expenses where a common fund has been produced or preserved for the benefit of a class).

"Reimbursable expenses include expert fees, travel, conference telephone, postage, delivery services, and computerized legal research." *Cates*, 2021 WL 4847890, at *8; *see also Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405 (CM), 2015 WL 10847814, at *23 (S.D.N.Y. Sept. 9, 2015) (noting as typical expenses in complex cases "fees paid to experts, mediation fees, notice costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with th[e] litigation").

Here, Plaintiffs' Counsel have incurred $17,756.30 in reasonable and necessary litigation costs and expenses. (Murray Dec. ¶ 14). The vast majority of the expenses were $13,257.78 for mediator's fees. These other expenses include filing fees, travel, and computer research expenses that were all incurred in the normal course of business and were essential to the successful prosecution of this lawsuit. None of Plaintiffs' Counsel's expenditures has yet been reimbursed. Indeed, "[t]he fact that Class Counsel was willing to expend their own money, where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." *Fleisher*, 2015 WL 10847814, at *23. The majority of expenses were incurred by Plaintiffs' Counsel in investigating and filing this motion, preparing the complaints, and the successful full day mediation.

Plaintiffs' Counsel therefore respectfully requests that litigation costs and expenses in the amount of $17,765.30 be reimbursed.

VI. PLAINTIFFS' REQUEST FOR MODEST SERVICE AWARDS IS REASONABLE

Consistent with the Settlement Agreement, Plaintiffs seek a modest service award in the amount of $3,500.00 for Plaintiff Jadyn Newman and the same $3,500.00 for Plaintiff Richard

Toledo for a total of $7,000.00. In the Second Circuit, plaintiff service awards "are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant and any other burdens sustained by plaintiffs." *DeLeon v. Wells Fargo Bank, N.A.*, No. 12 Civ. 4494 (RLE), 2015 WL 2255394, at *7 (S.D.N.Y. May 11, 2015).

Here, Plaintiffs Jadyn Newman and Richard Toledo each played a critical role in the successful prosecution and resolution of this Action. Their efforts included:

- Reviewing and discussing the facts surrounding the February 2023 data breach;
- Assisting Counsel in preparing the initial and consolidated complaints;
- Consulting with Plaintiffs' Counsel throughout the litigation and mediation processes;
- Reviewing documents and staying informed about case developments; and
- Demonstrating a commitment to achieving a meaningful resolution for the benefit of all Class Members.

By stepping forward to represent the Class, Plaintiffs assumed the responsibilities and risks inherent in serving as named representatives. Their participation was necessary in achieving the Settlement. Service awards are within the discretion of the court and amounts awarded vary considerably depending on time spent and risks incurred by named plaintiffs and the size and scope of the recovery. *See, e.g.*, *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (service award of $10,000).

The requested amounts reflect Plaintiffs' meaningful contributions to the case, while also being modest relative to the overall benefits secured for the Class. Accordingly, Plaintiffs respectfully request that the Court approve the proposed service awards as fair and reasonable.

CONCLUSION

The requested attorneys' fees, litigation expenses, and service awards are reasonable, fair, and well-supported under Second Circuit precedent. They reflect the exceptional result achieved in this complex and high-risk litigation and align the interests of Counsel with those of the Class.

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order granting Plaintiffs' Counsel's motion for an award of attorneys' fees and expenses in the amount of $130,500.00, representing 30% of the Settlement Fund, to be paid from the Settlement Fund, as reasonable and necessary to achieve the successful resolution of this Action, approving service awards of $3,500.00 each to Plaintiff, Jadyn Newman and Richard Toledo, to be paid from the Settlement Fund in recognition of their time, effort, and commitment to the Class; and granting such other and further relief as the Court deems just and proper.

Accordingly, Plaintiffs respectfully request that the Court grant the motion in its entirety.

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GLANCY PRONGAY & MURRAY LLP

By: */s/Brian P. Murray*
Brian P. Murray (BM 9954)
230 Park Avenue, Suite 358
New York, New York 10169
Phone: (212) 682-5340
Email: bmurray@glancylaw.com

BRADLEY GROMBACHER LLP
Kiley Grombacher (*pro hac vice*)
31365 Oak Crest Drive, Suite 24
Westlake Village, California 91361
Phone: (866) 881-0403
Email: kgrombacher@bradleygrombacher.com

Lead Counsel for the Plaintiff Class