IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE WAWA, INC. DATA SECURITY LITIGATION	Case No. 19-6019-GEKP
	Class Action
This Document Relates To: Consumer Track	

MEMORANDUM OF LAW IN SUPPORT OF CONSUMER TRACK PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(h)(1) and this Court's order granting preliminary approval of the proposed settlement (Dkt. 234 at ¶ 18), the Consumer Track[1] Plaintiffs respectfully seek an Order approving Defendant Wawa, Inc.'s ("Wawa") agreed upon payment of a $3.2 million lump sum to be allocated as follows: (i) $3,040,060 for Class Counsel's attorneys' fees; (ii) $45,940 for Class Counsel's litigation expenses; (iii) approximately $100,000 for the third party Settlement Administrator's fees;[2] and (iv) $1,000 Service Awards to each of the fourteen Class Representatives, totaling $14,000.

Under the terms of the Settlement Agreement, Wawa has agreed to pay the $3.2 million lump sum, subject to Court approval. SA ¶¶ 77-79. The payment by Wawa will not reduce any settlement benefits made available to the Class.

The $3.2 million amount was arrived at with the assistance of the mediator, the Honorable Diane Welsh (Ret.) of JAMS. It was agreed to only after the Parties reached agreement on all other material terms of the Settlement. *See* Joint Decl. of Co-Lead Class Counsel in Support of Consumer Track Pltfs.' Mot. for Award of Attorneys' Fees, Expenses, and Service Awards ("Jt. Decl.") at ¶ 73; *accord* Jan. 14, 2021 Decl. of Hon. Diane M. Welsh (Ret.) of JAMS in Support of Proposed Class Settlement ("Welsh Decl.") at ¶ 15 (ECF No. 181-2).

The proposed $3,040,060 attorneys' fee is reasonable under the lodestar method, the

---

[1] Unless otherwise noted, all capitalized terms herein are defined in the Amended Settlement Agreement ("Settlement Agreement") filed with the Court on April 29, 2021 (Dkt. 201-1). References to the Settlement Agreement are cited herein as "SA ¶ __."

[2] The Settlement Administrator's final fee amount is not yet known because its settlement administration efforts are ongoing. The fee is expected to be approximately $100,000. If the final fee amount is higher or lower than $100,000, the excess or shortfall will be taken from or allocated to Class Counsel's attorneys' fees.

percentage-of-the-benefit cross check, and the *Gunter* and *Prudential* factors used in the Third Circuit. The proposed fee represents a **negative multiplier of 0.78** based on Class Counsel's lodestar of $3,877,271 incurred to date. The fee also corresponds to **24.9%** of the $12.2 million overall value of the Settlement, which conservatively excludes the $35 million value of the Injunctive Relief.

The $45,940 expense reimbursement request is reasonable in amount and consistent in type with expense awards commonly approved in the Third Circuit. The expenses were necessary to the effective prosecution of this matter, as discussed below.

The proposed Service Awards are reasonable in light of the time and effort contributed by the Class Representatives to pursue this case on behalf of the Class. The $1,000 amount of the Service Awards is conservative relative to service awards commonly approved in the Third Circuit and in other data breach cases nationwide.

The $100,000 fees for the Settlement Administrator are reasonable in amount, and are the result of a competitive bidding process among several settlement administrators. Class Counsel selected a highly experienced administrator with the requisite expertise to manage a data breach settlement of this size and type.

In light of these factors, among others discussed below, Class Counsel respectfully request that the Court approve the agreed upon $3.2 million lump sum payment for attorneys' fees, litigation expenses, Service Awards, and settlement administration costs.

A. Summary of the Settlement Benefits

1. Cash and Wawa Gift Cards

The Settlement provides for monetary relief to Class Members via a three-tier system totaling up to $9 million in payments. The relief consists of: (i) Wawa Gift Cards totaling up to

$6 million for consumers who used payment cards at Wawa during the period of the data breach and did not experience any subsequent fraudulent activity on those cards ("Tier One"); (ii) Wawa Gift Cards totaling up to $2 million for consumers who used payment cards at Wawa during the period of the data breach and did experience subsequent fraudulent activity on those cards, which was reversed by their card-issuing banks ("Tier Two"); and (iii) cash payments as high as $500 per claimant and totaling up to $1 million in aggregate for consumers who incurred out-of-pocket fraud losses or other costs as a result of the data breach ("Tier Three"). SA ¶ 36.

Total Tier One compensation is subject to a $1 million floor, meaning that if the aggregate amount of all Tier One claims is less than $1 million, the value of each Gift Card will be increased *pro rata* above $5 until the total value distributed to Tier One claimants is $1 million. SA ¶ 36(a)(vi).

This package of benefits is reasonable relative to the defenses raised by Wawa regarding standing, damages, causation, and class certification, among other things. Jt. Decl. ¶¶ 48 - 51.

2. Injunctive Relief

The Settlement also includes Injunctive Relief designed to minimize the likelihood of an intrusion into Wawa's payment card systems in the future. This relief is a significant benefit to Class Members, who are typically repeat customers at Wawa. *See* Welsh Decl. ¶¶ 12-13 (noting that Wawa customers are likely to be repeat customers, and stating that the "value of these security enhancements are significant"). Specifically, for a period of two years, Wawa agrees to:

- Retain a qualified security assessor on an annual basis to assess Wawa's compliance with Payment Card Industry Data Security Standards ("PCI DSS") and issue a Report on Compliance that evidences compliance with all such requirements;
- Conduct annual penetration testing and, if critical vulnerabilities are identified, remediate those vulnerabilities or implement compensating controls;
- Operate a system that encrypts payment card information and complies with Europay,

Mastercard, and Visa ("EMV") security procedures at all point of sale terminals in Wawa's stores;

- Operate a system that implements EMV security procedures at all point of sale terminals at Wawa's fuel pumps; and
- Maintain written information security programs, policies, and procedures.

SA ¶ 40. Defendant's counsel will provide Class Counsel with semi-annual updates of the status of these enhancements during the two-year period in which Wawa will implement these measures. SA ¶ 41.

Defendant also made data security enhancements prior to the Settlement that were due in part to this litigation. SA ¶¶ 38-39. The Parties estimate that the enhancements listed above, along with other enhancements made prior to the Settlement and due in part to the litigation, are valued at no less than $35 million. SA ¶ 39. Class Members do not need to submit a claim to benefit from this aspect of the Settlement.

3. Wawa's Separate Payment of Attorneys' Fees, Expenses, Service Awards, and Settlement Administration Fees

Separate and apart from the monetary and injunctive benefits discussed above, Defendant also agreed to pay the $3.2 million lump sum for attorneys' fees, litigation expenses, Service Awards, and Settlement Administrator fees.

The $9 million in cash and Gift Cards made available to the Class, plus the $3.2 million lump sum payment by Wawa, totals $12.2 million in aggregate settlement value. This total conservatively excludes the Injunctive Relief valued at approximately $35 million.

II. ANALYSIS

A. The Court Should Approve the Attorneys' Fee Award Agreed to By the Parties

"In a certified class action, the court may award reasonable attorney's fees and . . . costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, the Parties agreed that Wawa will pay a $3.2 million lump sum to be used for attorneys' fees, expenses, Service Awards, and Settlement Administrator costs, subject to Court approval. SA ¶ 77.

Courts generally prefer that litigants agree to a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("Ideally, of course, litigants will settle the amount of the fee."); *In re Ford Motor Co. Spark Plug Engine Prod. Liab. Litig*, No 12-MD-2319, 2016 WL 6909078, at *9 (N.D. Ohio Jan. 26, 2016) ("Negotiated and agreed-upon attorneys' fees as part of a class action settlement are encouraged as an 'ideal' toward which the parties should strive.").

Where, as here, the fee award is to be paid separately by the defendant rather than as a reduction to a common fund, the "Court's fiduciary role in overseeing the award is greatly reduced, because there is no potential conflict of interest between attorneys and class members." *Rossi v. Proctor & Gamble Co.*, No. 11-cv-07238, 2013 WL 5523098, at *9 (D.N.J. Oct. 3, 2013); *accord Granillo v. FCA US LLC*, No. 16-cv-00153, 2019 WL 4052432, at *2 (D.N.J. Aug. 27, 2019) ("[O]ne important consideration in this Court's analysis is the . . . provision that any award of attorneys' fees and costs is wholly separate and apart from the relief provided for the Settlement Class; thus relief will not be reduced by an award of the fees."); *Haas v. Burlington Cty.*, No. 08-cv-01102, 2019 WL 413530, at *9 (D.N.J. Jan. 31, 2019) ("[T]he amount of attorneys' fees was negotiated as a separate aspect of the settlement agreement, which further supports reasonableness.").

1. The Lodestar Method Should Be the Primary Method Used Because This is Not a Traditional Common Fund Case

Courts in the Third Circuit have discretion to select between the lodestar method and percentage-of-the-benefit method when approving a class action fee award. *See, e.g.*, William B. Rubenstein, 5 *Newberg on Class Actions* § 15:98 (5th ed. 2021) (hereinafter "*Newberg*") ("The Third Circuit gives its district courts discretion as to whether to use a percentage or lodestar method.").

"Most courts use the lodestar method in data breach cases." *Fulton-Green v. Accolade, Inc.*, No. 18-cv-00274, 2019 WL 4677954, at *13 (E.D. Pa. Sept. 24, 2019) (Pratter, J.). That is because where, as here, the fee is not part of a traditional common fund, the fee is best evaluated under the lodestar method. *Id.* at *11 ("Because this [data breach case] is not a traditional common fund case, it is most appropriately considered under the lodestar method."); *Dungee v. Davison Design & Dev. Inc.*, 674 F. App'x 153, 156 (3d Cir. 2017) ("[T]he District Court [properly] chose the lodestar method, reasoning that 'the nature of the settlement ma[de] it difficult to make a precise calculation using the percentage of recovery method.' Indeed, there was no established 'common fund' from which a simple percentage could be taken, and the ultimate value of the settlement depended upon the number of claims made by former customers for cash and service vouchers.").

The lodestar method is also preferred where the settlement involves significant injunctive relief, as it does here. *See Glenz v. RCI, LLC*, No. 09-cv-00378, 2013 WL 12250260, at *7 (D.N.J. May 14, 2013) ("The Court finds that the lodestar method of calculating fees in this Action is appropriate because, inter alia, . . . the settlement . . . incorporates a substantial injunctive component . . . [that] evade[s] the precise evaluation needed for the percentage of recovery method."); *In re LivingSocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1, 16 (D.D.C.

2013) ("Because the value of injunctive relief can be so difficult to quantify, some courts have opted to use the lodestar method in jurisdictions in which they have the discretion to use either the lodestar or the percentage-of-the-fund method."); *In re Johnson & Johnson Deriv. Litig.*, 900 F. Supp. 2d 467, 498 n.15 (D.N.J. 2012) ("[A]s . . . Third Circuit case law makes clear, courts may use the lodestar method, without attaching a monetary value to injunctive relief, where 'the nature of the settlement evades the precise evaluation.'"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995) (noting the "preferability of the lodestar method for . . . actions where the difficulty of valuing injunctive relief complicates the calculation of a fee using the percentage method").

i. The Number of Hours Incurred by Class Counsel Was Reasonable

Under the lodestar method, the fee award is analyzed by "'multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services.'" *Accolade,* 2019 WL 4677954, at *11 (citation omitted).

The number of hours incurred by Class Counsel was reasonable for a case of this type and size. Class Counsel expended 5,942 hours on this case through September 30, 2021, which correlates to a lodestar amount of $3,877,271. These figures are net of reductions of 25% of Class Counsel's hours and lodestar and 30% of all other Consumer Track plaintiffs' counsel's hours and lodestar, which reductions were made in exercising billing judgment and conservatism. Jt. Decl. ¶ 86. These reductions are consistent with how all Consumer Track plaintiffs' counsel reported their lodestar to the Court in the quarterly lodestar submissions.

The following chart summarizes the adjusted hours and lodestar incurred by each firm, recorded at historical hourly rates, as of September 30, 2021:

Law Firm	Hours	Lodestar
Class Counsel		
Berger Montague PC	1,346.40	$927,345.00
Chimicles Schwartz Kriner & Donaldson-Smith LLP	1,329.23	$698,526.38
Fine, Kaplan and Black, R.P.C.	1,202.27	$849,911.26
Nussbaum Law Group, P.C.	866.10	$655,142.25
All Other Plaintiffs' Counsel	1,198.23	$746,346.19
Total	**5,942.23**	**$3,877,271.08**

Jt. Decl. ¶¶ 89, 90, 93, 96, 99. Charts specifying the hours incurred by each individual biller and each biller's hourly rates are set forth in the Joint Declaration at ¶¶ 90, 93, 96, 99, and the accompanying Declarations attached thereto.

The aggregate hours were spent on tasks that were necessary to the overall litigation and settlement of this case. Plaintiffs' counsel's efforts included, among other things (Jt. Decl. ¶¶ 36, 81):

- Investigating the facts of the data breach and its aftermath;
- Drafting and filing twenty-five pre-consolidation Complaints with fifty collective plaintiffs;
- Filing a motion to consolidate all cases filed in the Consumer Track (Dkt. 3-1);
- Filing briefing seeking leadership appointments (*E.g.*, Dkt. 78);
- Vetting multiple data security experts, retaining a primary expert, and consulting with that expert throughout the litigation and settlement negotiations;
- Retaining and working with a private investigator to gather facts about the breach and Wawa's data security systems;
- Corresponding with approximately 1,000 Class Members who contacted Class Counsel to discuss the litigation prior to reaching the Settlement;
- Interviewing dozens of potential class representatives using a detailed vetting questionnaire tailored to the Wawa data breach;
- Drafting a 97-page thirteen-count Consolidated Complaint with plaintiffs from all six states and the District of Columbia in which Wawa operates (Dkt. 132);
- Performing legal research regarding, *e.g.*, standing, damages, causation, duty, class

certification, and legal counts for potential common law and state statutory claims;

- Researching relevant data security standards and PCI-DSS rules;
- Coordinating with counsel in the Financial Institution Track and Employee Track on various administrative issues, and monitoring case filings in those tracks;
- Negotiating a Protective Order (Dkt. 130) and ESI Protocol (Dkt. 139) with defense counsel and plaintiffs' counsel in the other Tracks;
- Engaging in formal and informal discovery including issuing document requests, reviewing 3,596 pages of documents produced by Wawa, and producing 212 pages of documents of behalf of Plaintiffs;
- Preparing Plaintiffs' Fed. R. Civ. P. 26(a)(1) Initial Disclosures;
- Filing briefs (Dkt. 148, 154) in connection with the Consumer Plaintiffs' joinder of Defendant's motion to stay the Employee Track case in light of the Consumer Track settlement;
- Engaging in countless meet and confer phone calls with defense counsel regarding discovery and settlement issues;
- Preparing a detailed mediation statement and counterpoints to Defendant's mediation statement;
- Participating in a successful 12-hour mediation overseen by Judge Welsh;
- Drafting the Settlement Agreement, exhibits, and preliminary approval briefing (Dkt. 180);
- Filing a brief (Dkt. 193) responding to detailed settlement objections raised by the Employee Track Plaintiffs;
- Working closely with Defendant's counsel to ensure that the notice program was adequately implemented and voluntarily expanded to maximize notice; and
- Preparing for and arguing at four Court hearings: (i) the January 24, 2020 preliminary status conference; (ii) the June 11, 2020 hearing on leadership applications; (iii) the November 10, 2020 hearing on Defendant's motion to dismiss or stay the Employee Track case; and (iv) the May 5, 2021 hearing on the Consumer Plaintiffs' motion for preliminary approval of the Settlement.

Throughout the litigation, Class Counsel coordinated with and delegated work to other plaintiffs' counsel in the Consumer Track as proposed in Class Counsel's leadership brief (Dkt.

78 at pg. 19-20 and Ex. 5 thereto) and approved by the Court in its Order appointing the leadership team (Dkt. 120 at pg. 2, 4) ("The Court also expects Interim [Co-Lead] Counsel to confer conscientiously with all other counsel representing any plaintiff in this Litigation"; Co-Lead Counsel may "[d]elegate specific tasks to Plaintiffs' counsel on an as-needed basis to ensure the efficiency and non-duplication of effort in this Litigation.").

In performing the tasks outlined above, Class Counsel took measures to ensure that the work was necessary in light of the needs of the case, carried out efficiently, and non-duplicative. For example, Class Counsel allocated specific tasks among the members of the Class Counsel group and delegated certain narrowly tailored assignments to other Consumer Track plaintiffs' counsel. Jt. Decl. ¶¶ 29, 34, 84. Class Counsel also implemented a monthly billing protocol in which all plaintiffs' counsel (including Class Counsel) were required to submit monthly time and expense reports to the Class Counsel team to ensure that the time spent was reasonable, not excessive, and consistent with assignments from Class Counsel. Jt. Decl. ¶ 85. In an abundance of caution and billing conservatism, the hours of Class Counsel and all other Consumer Track plaintiffs' counsel were reduced by 25% and 30%, respectively, as noted above. Jt. Decl. ¶ 86.

Class Counsel submitted quarterly lodestar summaries to the Court to keep the Court informed of the cumulative hours and lodestar amounts incurred by each plaintiffs' firm in the Consumer Track. Jt. Decl. ¶¶ 86, 103.

Notably, the number of hours incurred in this case (5,942) is modest relative to the hours incurred in similar payment card data breach class actions that settled in the early stages of the proceedings. *See In re: Home Depot, Inc. Customer Security Breach Litig.*, No. 14-md-02583 (N.D. Ga.) (consumer track counsel devoted 10,186 hours in reaching settlement before motion

to dismiss was decided);[3] *In re: Target Corp. Customer Data Security Breach Litig*., No. 14-md-02522 (D. Minn.) (consumer track counsel devoted 20,482 hours in reaching settlement three months after motion to dismiss was decided);[4] *In re TJX Cos. Retail Security Breach Litig*., No. 07-cv-10162 (D. Mass.) (consumer track counsel devoted 7,400 hours in reaching settlement before motion to dismiss was decided).[5] Data breach cases are inherently time consuming because, *e.g.*, many underlying complaints are typically filed prior to consolidation; significant coordination is needed among counsel in the underlying cases and counsel in any other tracks; a high number of class representatives is usually set forth in the consolidated complaint to ensure diversity in types of damages and states of residency; lengthy consolidated complaints are generally filed asserting both common law and state statutory claims from many different states; experts are retained and consulted early in the proceedings; and settlements are multi-faceted involving several types of relief. Each of those circumstances existed here.

In sum, the number of hours incurred was reasonable given the tasks at hand and the overall needs of the case.

ii. Class Counsel's Hourly Rates are Reasonable

"'Generally, a reasonable hourly rate is calculated according to the prevailing market rates in the relevant community.' An appropriate starting point is usually the attorney's normal billing rate." *Gonzalez v. Account Resolution Servs., LLC*, No. 20-cv-03259, 2021 WL 3007257, at *2 (E.D. Pa. July 15, 2021) (Pratter, J.). "'When determining reasonable hourly rates, district

[3] *See Home Depot*, Dkt. 227-1 at pg. 19 (motion for attorneys' fees).

[4] *See Target*, Dkt. 483 at pg. 23 (Decl. in support of motion for attorneys' fees).

[5] *See TJX*, Dkt. 353 at pg. 4-5 (motion for attorneys' fees).

courts may rely on their own experience and knowledge of prevailing market rates.' There is no precise rule or formula for making these determinations." *Swinton v. SquareTrade, Inc.*, No. 18-cv-00144, 2020 WL 1862470, at *27 (S.D. Iowa April 14, 2020).

Class Counsel's hourly rates are their standard billing rates. Jt. Decl. ¶¶ 91, 94, 97, 100, and exhibits thereto. The hourly rates range from $275 to $1,005 for attorneys, and $160 to $330 for paralegals and administrative staff. Jt. Decl. ¶¶ 90, 93, 96, 99, and exhibits thereto. These hourly rates are consistent with rates this Court has accepted in numerous class action settlements. *See Accolade,* 2019 WL 4677954, at *12 (approving lodestar-based fee where rates ranged from "$202 to $975" per hour in data breach case); *In re Imprelis Herbicide Mktg., Sales Practices & Prod. Liab. Litig.*, 296 F.R.D. 351, 370 (E.D. Pa. 2013) (approving fee request where hourly rates peaked at $1,200 and several attorneys' rates were at or above $900) (Pratter, J.);[6] *In re Processed Egg Prod. Antitrust Litig*., No. 08-MD-2002, 2012 WL 5467530, at *6 (E.D. Pa. Nov. 9, 2012) (approving fee request where hourly rates peaked at $1,100 and several attorneys' rates were at or above $900; "the Court finds that the stated hourly rates of these attorneys and staff . . . are reasonable") (Pratter, J.).[7]

Other courts in this District have approved similar hourly rates. *See, e.g., Cunningham v. Wawa, Inc.*, No. 18-cv-03355, 2021 WL 1626482, at *8 (E.D. Pa. Apr. 21, 2021) (approving hourly rates of $235 to $975); *In re Cigna-Am. Specialty Health Admin. Fee Litig*., No. 16-cv-

[6] The Order cited class counsel's total lodestar amount but not the underlying hourly rates. The hourly rates were set forth in various Declarations filed by class counsel (Dkt. 189-2 to 189-4). Hourly rates greater than $900 are located at Dkt. 189-2 at ECF pg. 15, Dkt. 189-3 at ECF pg. 30, 216, and Dkt. 189-4 at ECF pg. 32.

[7] The Order cited class counsel's total lodestar amount but not the underlying hourly rates. The hourly rates were set forth in various Declarations filed by class counsel (Dkt. 735 to 736). Hourly rates greater than $900 are located at Dkt. 735-17, 736-6, 736-12, and 736-14.

03967, 2019 WL 4082946, at *15 (E.D. Pa. Aug. 29, 2019) ("Class Counsel and support staff are claiming . . . . hourly rates between $175 and $995. . . . These hourly rates are well within the range of what is reasonable and appropriate in this market."); *In re Viropharma Inc., Secs. Litig.*, No. 12-cv-02714, 2016 WL 312108, at *18 (E.D. Pa. Jan. 25, 2016) (approving fee where "hourly billing rates of all Plaintiff's Counsel range from $610 to $925 for partners, $475 to $750 for of counsels, and $350 to $700 for other attorneys").

Further, the hourly rates of each firm here have been accepted by many courts in Pennsylvania and beyond. *See* Jt. Decl. ¶¶ 92, 95, 98, 101, and exhibits thereto (collecting cases). For example, this Court accepted the hourly rates of Berger Montague and Chimicles Schwartz in *Imprelis*.[8] Also, this Court accepted the hourly rates of Fine Kaplan in *Processed Egg Prods*.[9]

The hourly rates of each attorney and paralegal are appropriately tailored to the individual's level of seniority and experience. The highest hourly rates are limited to only those attorneys with the greatest expertise, and vice versa. Jt. Decl. ¶¶ 90, 93, 96, 99, and exhibits thereto. *See Moore v. GMAC Mortg.*, No. 07-cv-04296, 2014 WL 12538188, at *2 (E.D. Pa. Sept. 19, 2014) ("A reasonable hourly rate reflects an attorney's experience and expertise, [thus] the rates for individual attorneys vary.").

Each Consumer Track plaintiffs' counsel firm is highly specialized with abundant experience in complex class actions, which further supports the reasonableness of the hourly

[8] *Imprelis*, 296 F.R.D. at 370 (approving overall fee request); *Imprelis* Dkt. 189-3 at ECF pg. 13 (Decl. setting forth Berger Montague's hourly rates); Dkt. 189-3 at ECF pg. 30 (Decl. setting forth Chimicles Schwartz's hourly rates).

[9] *Processed Egg Prod.*, 2012 WL 5467530, at *6 ("the Court finds that the stated hourly rates of these attorneys and staff . . . are reasonable"); Dkt. 735-9 (Decl. setting forth Fine Kaplan's hourly rates).

rates. Jt. Decl. ¶¶ 3 - 30 and exhibits thereto.

iii. The 0.78 Negative Multiplier is Reasonable

The $3,040,060 fee request relative to Class Counsel's reduced $3,877,271 lodestar results in a **0.78 negative multiplier**. "A negative multiplier reflects that counsel is requesting only a fraction of the billed fee; negative multipliers thus 'favor[ ] approval.'" *Dickerson v. York Int'l Corp.*, No. 15-cv-01105, 2017 WL 3601948, at *11 (M.D. Pa. Aug. 22, 2017); *accord Shannon v. Sherwood Mgmt. Co.*, No. 19-cv-01101, 2020 WL 5891587, at *3 (S.D. Cal. Oct. 5, 2020) ("The negative multiplier suggests that the requested fee award is reasonable."); *Beane v. Bank of N.Y. Mellon*, No. 07-cv-09444, 2009 WL 874046, at *8 (S.D.N.Y. Mar. 31, 2009) ("'Here . . . the multiplier is negative . . . [and] the lodestar cross-check demonstrates that a 15% fee is reasonable because it will not bring a windfall to co-lead plaintiffs' counsel.'") (citation omitted).

The 0.78 multiplier is much lower than multipliers commonly awarded in the Third Circuit. *See Newberg* § 15:89 (noting two separate studies in which the mean multiplier in the Third Circuit was 2.01 and 1.38, respectively); *Stevens v. SEI Investments Co.*, No. 18-cv-04205, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) ("multiples ranging from 1 to 8 are often used in common fund cases"; approving 6.16 multiplier) (collecting cases); *Dickerson v. York Int'l Corp.*, No. 15-cv-01105, 2017 WL 3601948, at *11 (M.D. Pa. Aug. 22, 2017) ("Multipliers between one and four are routinely approved in the Third Circuit."); *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 225 (E.D. Pa. 2014) ("The [Third Circuit] Court of Appeals has recognized that multipliers 'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'"); *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 173 (3d Cir. 2006) ("[W]e approved of a lodestar multiplier of 2.99 in *Cendant PRIDES*, in a case we stated 'was neither legally nor factually complex.' The case lasted only four months, 'discovery

was virtually nonexistent,' and counsel spent an estimated total of 5,600 hours on the case.").

The 0.78 multiplier is also lower than multipliers awarded nationwide, which typically range from 1 to 3. *See Newberg* § 15:89 ("[T]he basic range of multipliers [nationwide] . . . run[s] from a floor around counsel's lodestar to a ceiling around three times lodestar, as the mean.").

Notably, the multiplier would be even lower if Class Counsel and Consumer Track plaintiffs' counsel had not reduced their lodestar by 25% and 30%, respectively. Without those reductions, the aggregate lodestar would be $5,240,775, resulting in a **0.58 negative multiplier**. (Jt. Decl. ¶ 89).

iv. The Multiplier Will Decrease Further as Class Counsel Incurs Future Lodestar

The negative multiplier will decrease further going forward as Class Counsel incurs future lodestar. Class Counsel will at a minimum spend time drafting the motion for final settlement approval, preparing for and attending the Final Approval Hearing, overseeing the claims administration and distribution process, and responding to inquiries from Class Members. Class Counsel will also monitor the Injunctive Relief for two years, including analyzing periodic compliance reports from Wawa. SA ¶ 41.

Courts in data breach class actions have held that it is appropriate to consider future anticipated lodestar when evaluating the reasonableness of a fee award. *See In re: Yahoo! Inc. Customer Data Security Breach Litig*., No. 16-MD-02752, 2020 WL 4212811, at *30 (N.D. Cal. July 22, 2020) ("[T]he Court acknowledges that certain tasks will continue to occupy Class Counsel following final approval. Indeed, . . . Class Counsel must work with a Third Party Assessor to review annual audits of Yahoo's information security program for four years. Accordingly, for purposes of the lodestar calculation, the Court will [adopt] the anticipated future lodestar requested by Plaintiffs . . . ."); *In re Equifax Inc. Customer Data Sec. Breach*

Litig., No. 17-MD-2800, 2020 WL 256132, at *40 (N.D. Ga. Mar. 17, 2020) ("[C]ourts have included future time in lodestar calculations . . . . Excluding such time would misapply the lodestar methodology and needlessly penalize class counsel.").

Thus, Class Counsel's anticipated future lodestar (and the resulting decrease in the multiplier) further supports the reasonableness of the fee request.

2. The Fee Request is Reasonable Under the Percentage of the Benefit Cross Check

The Court may use the percentage of the benefit method as a cross-check to the lodestar-based fee. *See Newberg* § 15:92 ("Courts that utilize the lodestar method sometimes will ensure the reasonableness of a lodestar award by assessing what percentage of the class's fund the lodestar fee amounts to. . . . This process is referred to as a 'percentage cross-check.'"); *Accolade*, 2019 WL 4677954, at *12 ("Although the Court agrees with Class Counsel that the lodestar method is the appropriate calculation in this case, courts within the Third Circuit will often perform a [percentage-of-recovery] 'cross-check' to ensure reasonable fees.").

i. The Attorneys' Fees, Expenses, and Settlement Administration Costs Should Be Added to the Settlement Value for Purposes of the Percentage of Benefit Analysis

Pennsylvania courts have held that where, as here, attorneys' fees, expenses, and settlement administration costs are paid directly by the defendant as opposed to from a common fund, those costs may be added to the settlement value when applying the percentage of the benefit method. For example, in *Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 706, 718-19 (W.D. Pa. 2015), the court stated:

> [T]he $2.8 million to be paid directly to Settlement Class members represents less than half of the total value of the settlement. Under the Settlement Agreement, defendants also will pay $1.5 million for attorneys' fees and expenses and what is estimated to be at least $1.5 million for the costs of administering the settlement. **These are costs for which the class would otherwise be responsible, and**

> **therefore properly are considered in valuing the settlement**. [Emphasis added.] These amounts bring the total value of the settlement to, at minimum, $5,859,452.50.
>
> . . . .
>
> [T]he value of the settlement fund is $5,859,452.50 . . . . At $1.5 million, the requested fee award equates to 25.6% of this value. . . .
>
> . . . .
>
> [C]lass counsel has met its burden of showing that its requested fee award is reasonable.

Other courts have reached similar conclusions. *See Rose v. Travelers Home & Marine Ins. Co.*, No. 19-cv-00977, 2020 WL 4059613, at *9 (E.D. Pa. July 20, 2020) ("This case does not involve a true common fund because Defendants are not paying the attorneys' fees and costs through the reimbursement fund. 'However, where the reality is that the fund and the [attorneys'] fee are paid from the same source – in this case, [Defendants] – the arrangement 'is, for practical purposes, a constructive common fund,' and courts may still apply the percent-of-fund analysis in calculating attorney's fees.'"); *Hall v. Best Buy Co.*, 274 F.R.D. 154, 171-73 (E.D. Pa. 2011) ("[T]he Settlement Agreement caps the total award to class members at $592,566, and provides for a separate fund of up to $300,000 for attorneys fees. . . . [T]he total amount of [these funds] is a 'constructive common fund.' . . . [T]he requested fee award amount[s] to 33% of the [constructive] common fund."); Manual for Complex Litig. § 21.7 (4th ed. 2017) ("If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees and expenses, . . . the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class . . . . The total fund could be used to measure whether the portion allocated to the class and to attorney fees is reasonable.").

Indeed, courts in data breach cases frequently analyze fee requests by adding the value of the attorneys' fees and settlement administration costs to the overall settlement value. *See, e.g.*,

In re: Citrix Data Breach Litig., No. 19-cv-61350, 2021 WL 2410651, at *4 (S.D. Fla. June 11, 2021) (adding attorneys' fees and settlement administration costs to settlement value and approving 32.9% fee award); *In re Arby's Rest. Grp., Inc. Data Sec. Litig.*, No. 17-cv-01035, 2019 WL 2720818, at *2 (N.D. Ga. June 6, 2019) ("In this case, when adding the requested [attorneys'] fee, litigation expenses, and costs of administration to the $2 million aggregate cap for claims, Arby's will provide a total potential benefit to the class of up to $3,306,000. . . . Attorneys' fees therefore represent approximately 29.6% of that recovery. This percentage falls within the range [of reasonableness]."); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617, 2018 WL 3960068, at *8-9, 16 (N.D. Cal. Aug. 17, 2018) (approving 27% fee award as percent of total settlement value, which included settlement benefits plus payment of attorneys' fees and settlement administration and notice costs); *In re Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 14-MD-02583, 2016 WL 11299474, at *2 (N.D. Ga. Aug. 23, 2016) (approving 28% fee award as percent of total monetary payout defendant was required to make, which included settlement benefits plus defendant's separate payment of attorneys' fees); *In re Target Corp. Data Sec. Breach Litig.*, No. 14-MD-02522, 2015 WL 7253765, at *2-3 (D. Minn. Nov. 17, 2015) (approving 29% fee award as percent of the "total monetary payout Target is required to make," which included the common fund amount plus defendant's separate payment of attorneys' fees and settlement administration and notice costs); *In re LinkedIn User Priv. Litig.*, 309 F.R.D. 573, 581-82, 590-91 (N.D. Cal. 2015) (approving 25% fee award as percent of total monetary payout defendant was required to make, which included settlement benefits plus payment of attorneys' fees and settlement administration costs).

Thus, the Court should add the $3.2 million lump sum payment to the $9 million in available cash and Gift Cards to arrive at a $12.2 million settlement value for purposes of the

percent-of-the-benefit cross check.

The Court should also consider the value of the Injunctive Relief estimated at $35 million when performing this cross-check. As discussed more fully below, innovative non-monetary relief such as the enhanced security measures agreed to in the Injunctive Relief are routinely considered by courts assessing fee applications. *See, e.g.*, *Best Buy*, 274 F.R.D. at 154 n.107 (in approving the fee award, the court considered "relief that . . . goes beyond pure monetary relief and protects Best Buy's hourly workers going forward").

ii. The Settlement Value Should be Measured by Settlement Benefits Offered to the Class, Regardless of Claims Rates

Courts in Pennsylvania, the Third Circuit, and elsewhere have held that where a settlement involves a claims-made or reversionary structure, the settlement benefits made available to the Class (versus those claimed during the claims process) may be used for purposes of the percentage of the benefit calculation.

These holdings have typically followed U.S. Supreme Court precedent. In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980), the Supreme Court held that class counsel were entitled to a fee based on the funds available to be claimed by class members regardless of the amount actually claimed during the claims process. The Court stated that class members' "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel." *Id.* at 480.

The Third Circuit has followed this precedent. The Third Circuit, citing *Boeing*, held that a district court "properly relied on the entire fund as the appropriate benchmark for assessing the size of the fund" for purposes of calculating a fee award, as opposed to calculating fees based only on the amount actually claimed by class members. *Landsman & Funk, P.C. v. Skinder-Strauss Associates*, 639 Fed. Appx. 880, 884 (3d Cir. 2016).

Courts in this District have reached similar holdings. In *Teh Shou Kao v. CardConnect Corp.*, No. 16-cv-05707, 2021 WL 698173, at *8-9 (E.D. Pa. Feb. 23, 2021), Judge Pappert calculated a fee award as 33% of the fund made available to the class in a reversionary settlement, despite a low claims rate, stating:

> In calculating a percentage of recovery fee award, the Supreme Court has 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," even if part of the fund reverts to the defendant. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Although some settlement class members may not file claims and receive compensation, "[t]heir right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel." *Id.* at 480.

Similarly, in *In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.*, 333 F.R.D. 364, 386-87 (E.D. Pa. 2019), Judge Brody based a fee award on the total amount of the fund made available to the class in a reversionary settlement, despite a low claims rate, stating that a "'lawyer who recovers a common fund for the benefit of persons other than . . . his client is entitled to a reasonable attorneys' fee from the fund as a whole,' even if part of the fund reverts to the defendant." *Id.* at 386 (citing *Boeing*). The fee award there was based on $15.5 million in funds offered to the class even though class members submitted claims totaling just "$211,255.00 in cash payments plus an additional $286,986.50 in in-kind relief." *Id*. at 386.

Further, in *Fickinger v. C.I. Plan. Corp.*, No. 81-cv-00951, 1989 WL 146695, at *3 (E.D. Pa. Dec. 1, 1989), Judge Shapiro stated:

> "It is immaterial to an award of attorney's fees whether beneficiaries claim or accept the benefits obtained on their behalf." [Citation omitted.] Therefore, the benefit to the plaintiff class in this litigation must be determined from the amount that would have been recovered if every class member had exercised his, her or its rights under the settlement agreement. . . . **Counsel should not be penalized because members of the class failed to exercise their vested right to collect from the Fund**.

Id. (discussing *Boeing*) (emphasis added).

Other Pennsylvania district courts, including this Court, have reached similar conclusions without expressly citing *Boeing*. *See Accolade*, 2019 WL 4677954, at *3, 12 (analyzing the fee request based on, *e.g.*, the total "potential cash compensation" if all class members submit claims for all available benefits in a claims-made settlement, even though the anticipated claims rate was just 3%); *Best Buy*, 274 F.R.D. at 171-73 ("[T]his is not a traditional common fund case because unclaimed amounts in the net settlement fund are returned to Best Buy. . . . [T]he Settlement Agreement caps the total [potential] award to class members at $592,566 . . . . [T]he requested [$300,000] fee award amounts to 33% of the [$892,566 constructive] common fund. . . . [T]he Court will approve Plaintiffs' Motion for Attorneys' fees.").[10]

Appellate courts in several other circuits have reached the same conclusion. For example, the Second Circuit stated the following in *Masters v. Wilhelmina Model Agency, Inc*., 473 F.3d 423, 436-37 (2d Cir. 2007):

> In this case, the District Court calculated the percentage of the Fund on the basis of the claims made against the fund, rather than on the entire Fund created by the efforts of counsel. We hold that this was error.
>
> . . . .
>
> The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not.

[10] The Third Circuit, in an analogous setting involving a *cy pres* distribution of unclaimed settlement funds, held that unclaimed funds may be included in the settlement value for purposes of calculating the attorneys' fee award. The Court stated: "**There are a variety of reasons that settlement funds may remain even after an exhaustive claims process – including if the class members' individual damages are simply too small to motivate them to submit claims**. **Class counsel should not be penalized for these or other legitimate reasons unrelated to the quality of representation they provided**. Nor do we want to discourage counsel from filing class actions in cases where few claims are likely to be made but the deterrent effect of the class action is equally valuable." *In re Baby Prod. Antitrust Litig*., 708 F.3d 163, 178 (3d Cir. 2013) (emphasis added).

The Eleventh Circuit stated the following in *Waters v. Int'l Precious Metals Corp.,* 190 F.3d 1291, 1296-97 (11th Cir. 1999):

> [A] leading commentator [*Newberg on Class Actions*] has agreed that fee awards may be based on the total available fund:
>
> > When a lump sum has been recovered for a class, that sum represents the common fund benchmark on which a reasonable fee will be based. When, however, the defendant reserves the right to recapture any unclaimed portion of the common fund after class members have had an opportunity to make their claims against the fund, . . . the question arises concerning whether the benchmark common fund amount for fee award purposes comprises only the amount claimed by class members or that amount potentially available to be claimed. In *Boeing Co. Van Gemert*, the Supreme Court settled this question by ruling that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed.

Similarly, the Ninth Circuit held that a "district court abused its discretion by basing the fee on the class members' claims against the fund rather than on a percentage of the entire fund." *Williams v. MGM-Pathe Communications Co*., 129 F.3d 1026, 1027 (9th Cir. 1997).

Here, the monetary portion of the Settlement consists of $9 million in cash and Gift Cards made available to Class Members. The settlement value should include the full $9 million, not a lesser sum based on actual claims rates.

The deadline for Class Members to submit claims is November 29, 2021. *See* Preliminary Approval Order ¶ 18 (Dkt. 234). In the event the value of the valid claims is relatively low or lower than the requested fee award, courts have held that fee awards may exceed the amount of benefits actually claimed by class members during the claims process. *See Perdue v. Hy-Vee, Inc*., No. 19-cv-01330, 2021 WL 3081051, at *2 (C.D. Ill. July 21, 2021) (in payment card data breach case, the court stated: "As the Seventh Circuit found in *In re Sears,* this Court agrees that Class Counsel's fees are appropriate, despite exceeding the cash payout that class members will receive, particularly considering that Counsel['s] . . . fees [are] approximately half of the hourly

fees that they billed."); *In re Sears, Roebuck & Co. Front-Loading Washer Prod. Liab. Litig.*, 867 F.3d 791, 792 (7th Cir. 2017) (approving fee award that was "thrice the damages awarded to the class"); *Comcast*, 333 F.R.D. at 386-87 (approving $1.1 million fee award where class members submitted claims totaling "$211,255.00 in cash payments plus an additional $286,986.50 in in-kind relief") (citing *Boeing*).

iii. The 24.9% Ratio is Consistent with Fee Awards Commonly Approved in the Third Circuit

When adding the $9 million in cash and Gift Cards to the $3.2 million lump sum payment for attorneys' fees, expenses, Service Awards, and Settlement Administrator costs, the resulting settlement value is $12.2 million. This excludes the $35 million value of the Injunctive Relief. The $3,040,060 fee request equals 24.9% of the $12.2 million settlement value.

The 24.9% ratio is consistent with fee awards commonly granted in the Third Circuit, including this Court. *See, e.g.*, *Accolade*, 2019 WL 4677954, at *11 ("'Courts have allowed attorney compensation ranging from 19% to 45% of the settlement fund created, and one Circuit panel has concluded that the appropriate benchmark for fee awards is 25%.'"; approving 21% fee) (citation omitted); *Haas v. Burlington Cty.*, No. 08-cv-01102, 2019 WL 413530, at *9 (D.N.J. Jan. 31, 2019) ("typical [percentage-of-recovery] fee awards range between 25%-45%"; approving fee of "60% of the settlement fund"); *Leap v. Yoshida*, No. 14-cv-03650, 2016 WL 1730693, at *10 (E.D. Pa. May 2, 2016) ("fee awards in common fund cases within this district generally range between 19% and 45% of the fund"; approving 30% fee) (Pratter, J.); *Alexander v. Washington Mut., Inc.*, No. 07-cv-04426, 2012 WL 6021103, at *3 (E.D. Pa. Dec. 4, 2012) (approving 30% fee award, collecting cases); *Processed Egg Prods.*, 2012 WL 5467530, at *6 (approving 30% fee award) (Pratter, J.); *In re Ikon Office Solutions, Inc., Secs. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa.

2000) ("most fees appear to fall in the range of nineteen to forty-five percent").

Several studies found that the average fee award in the Third Circuit is between 25% and 33%. *See Newberg* § 153 (three studies of class action fee awards found that the mean percentage award in the Third Circuit was 26%, 25.4%, and 25%, respectively); *Williams v. Aramark Sports, LLC*, No. 10-cv-01044, 2011 WL 4018205, at *10 (E.D. Pa. Sept. 9, 2011) ("[A]nother court in this District took note of a study of class action fee awards within the Third Circuit . . . and determined that the average attorney's fees percentage in such cases was 31.71% and that the median fee award was 33.3%.") (Pratter, J.).

On a national scale, "empirical data on fee awards demonstrate that percentage awards in class actions are generally between 20-30%, with the average award hovering around 25%." *Newberg* § 153.

Notably, fee awards in data breach settlements commonly exceed 25%. *See, e.g.*, *Citrix*, 2021 WL 2410651, at *4 (32.9% fee award); *Arby's*, 2019 WL 2720818, at *2 (29.6% fee award); *Anthem*, 2018 WL 3960068, at *9 (27% fee award); *Home Depot*, 2016 WL 11299474, at *2 (28% fee award); *Target*, 2015 WL 7253765, at *2-3 (29% fee award); *LinkedIn*, 309 F.R.D. at 590-91 (25% fee award).

Accordingly, the 24.9% fee requested here is in line with fee award trends in the Third Circuit and across the country.

iv. The Injunctive Relief Further Supports the Reasonableness of the Fee Request

The Injunctive Relief further supports the reasonableness of the 24.9% fee request. Courts generally treat the existence of injunctive relief as a factor in determining the size of the percentage fee to approve, as opposed to adding the costs of the injunctive relief to the settlement value. This is because injunctive relief is often difficult to value. *See, e.g.*, *In re LivingSocial*

Mktg. & Sales Prac. Litig., 298 F.R.D. 1, 17 (D.D.C. 2013) ("'[C]ourts should consider the value of the injunctive relief obtained as a relevant circumstance in determining what percentage of the common fund class counsel should receive as attorneys' fees, rather than as a part of the fund itself.'") (citation omitted); *Bodnar v. Bank of Am., N.A.*, No. 14-cv-03224, 2016 WL 4582084, at *5 (E.D. Pa. Aug. 4, 2016) ("The value of the settlement is actually greater in light of the meaningful injunctive relief to which Bank of America has agreed, but which has not been quantified monetarily. . . . [T]his factor weighs in favor of the requested fee award."); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 478 (D.N.J. 2008) ("The value of the injunctive relief here is a highly relevant circumstance in determining what percentage of the common fund class counsel should receive as attorneys' fees.").

The existence of the Injunctive Relief here serves as a factor supporting approval of the 24.9% fee award.

If the estimated $35 million value of the Injunctive Relief were instead added to the $12.2 million monetary value of the settlement, the overall settlement would be valued at $47.2 million. The $3,040,060 fee request would represent just 6.4% of that settlement value. This low percentage further supports the reasonableness of the fee request.

3. The Fee Request is Reasonable Under the Third Circuit's *Gunter* and *Prudential* Factors

i. The Requested Fee Satisfies the Seven-Factor *Gunter* Analysis

Courts in the Third Circuit use the seven-factor *Gunter* analysis to evaluate the reasonableness of a class action fee award. *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000); *Newberg* § 15:98 ("The Third Circuit requires its district courts to assess

the reasonableness of a given award according to a multifactor test entitled the '*Gunter* factors.'"). The *Gunter* factors are:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter, 223 F.3d at 195 n.1. "The factors . . . need not be applied in a formulaic way." *Id.* Not every *Gunter* factor is necessarily applicable in a given case.

The "*Gunter* factors are not applicable to the lodestar method." *Burlington Cty.*, 2019 WL 413530, at *9. Class Counsel nevertheless address them here as an additional measure of the reasonableness of the requested fee.

Gunter Factor 1: The Size of the Fund Created and Number of Persons Benefitted. The size of the fund available for distribution is $9 million. The number of persons benefitted by the Settlement is approximately 22 million Class Members. Jt. Decl. ¶ 42.

The Class will also benefit from the Injunctive Relief, which further supports this *Gunter* factor. *See Mirakay v. Dakota Growers Pasta Co.*, No. 13-cv-04429, 2014 WL 5358987, at *13 (D.N.J. Oct. 20, 2014) (first *Gunter* factor met because, *e.g.*, "an even broader spectrum of persons . . . will benefit from the injunctive provisions of the settlement"); *Johnson v. Community Bank, N.A.*, No. 12-cv-01405, 2013 WL 6185607, at *7 (M.D. Pa. Nov. 25, 2013) (first *Gunter* factor met because, *e.g.*, the "settlement confers certain nonmonetary [injunctive] benefits on . . . class members").

Overall, this *Gunter* factor supports the requested fee.

Gunter Factor 2: The Presence or Absence of Substantial Objections by Class Members. To date, no Class Members submitted objections to the Settlement or proposed fee award. The

deadline for submitting objections is November 12, 2021. *See* Preliminary Approval Order ¶ 18 (Dkt. 234). Objections are addressed further in the objection section below.

Gunter Factor 3: The Skill and Efficiency of the Attorneys. Each Class Counsel and their firms have substantial experience in complex class actions, including data breach litigation. Jt. Decl. ¶¶ 3 - 30. The Court analyzed Class Counsel's collective experience when approving their leadership application and found that each Class Counsel was qualified to serve in a leadership role. *See generally* Dkt. 120 (Order appointing leadership). Class Counsel litigated this case efficiently by reaching a resolution before dispositive motion practice, avoiding protracted and costly litigation. *See Community Bank*, 2013 WL 6185607, at *7 (third *Gunter* factor met because, *e.g.*, "'[c]onsidering the potential for this case to turn into a multi-year litigation, class counsel [have] done a good job of negotiating a quick settlement'") (citation omitted). This *Gunter* factor is thus satisfied here.

Gunter Factor 4: The Complexity and Duration of the Litigation. This Court has acknowledged that data breach litigation is inherently complex, and that such complexity supports the fourth *Gunter* factor:

> The complexity and duration of this data breach class action requires experienced counsel. This type of case presents issues on the duty of care . . . in storing their personal information, Article III standing . . . , types of damages available at trial, and whether the plaintiffs can obtain and maintain class certification. This [*Gunter*] factor . . . weighs in favor of finding the fee reasonable.

Accolade, 2019 WL 4677954, at *13. Numerous other courts have similarly recognized that data breach class actions are inherently complex. *See, e.g., Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases such as the instant [payment card] case are particularly risky, expensive, and complex."); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 17-md-02807, 2019 WL 3773737, at *7 (N.D.

Ohio Aug. 12, 2019) ("[Payment card] data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts."); *Arby's*, 2019 WL 2720818, at *3 ("data breach litigation involves the application of unsettled law with disparate outcomes across states and circuits"; payment card case); *Target*, 2015 WL 7253765, at *2 ("The legal issues involved [in this payment card data breach] are cutting-edge and unsettled, so that many resources would necessarily be spent litigating substantive law as well as other issues.").

These same complexities exist here. For example, Wawa raised aggressive defenses regarding standing, damages, causation, and class certification, among other things. Jt. Decl. ¶¶ 48 - 51. Also, the Consolidated Complaint included thirteen legal counts asserting common law and state statutory claims from several states, further adding to the complexity of the litigation.

With respect to the duration of the litigation, Class Counsel reached an early settlement that avoided the need for protracted litigation. Class Counsel should be rewarded for resolving this complex matter quickly. *See CertainTeed*, 303 F.R.D. at 223 ("Absent Settlement, litigation would likely continue for some time and would require both Plaintiffs and Defendants to incur considerable expert witness fees and other expenses. I find that the complexity and duration of the litigation weigh in favor of the requested award of fees.").

Gunter Factor 5: The Risk of Nonpayment. Class Counsel undertook this case on a purely contingent basis and faced a risk of receiving no compensation at all if the litigation was unsuccessful. In working on behalf of the class, Class Counsel devoted thousands of hours of time and significant out of pocket costs. Taking on that risk on behalf of the class lends weight to the fee request. *See Accolade*, 2019 WL 4677954, at *13 ("Class Counsel invested considerable resources into this case with no guarantee that they would recover those costs given that they were retained on a contingency fee basis. This factor again weighs in favor of determining that

the fee is reasonable."); *Tavares v. S-L Distribution Co.*, No. 13-cv-01313, 2016 WL 1743268, at *11 (M.D. Pa. May 2, 2016) ("[C]ourts have noted that where plaintiffs' counsel faces a risk of nonpayment . . . that risk should be considered when assessing attorneys' fee awards.").

Gunter Factor 6: The Amount of Time Devoted by Plaintiffs' Counsel. The number of hours Class Counsel devoted to the litigation (5,942 hours) was substantial. The hours were reasonable based on the needs of the case, and were consistent with the number of hours incurred in other large payment card data breach cases. Further, the requested fee will result in a significant negative multiplier of 0.78, a fact that supports this *Gunter* factor. *See In re Royal Dutch/Shell Transportation Secs. Litig.*, No. 04-cv-00374, 2008 WL 9447623, at *28 (D.N.J. Dec. 9, 2008) (sixth *Gunter* factor met because the "multiplier of only 1.002" was reasonable).

Gunter Factor 7: Awards in Similar Cases. Analogous payment card data breach cases have resulted in attorneys' fee awards significantly higher than the $3,040,060 fee requested here. *See Home Depot*, 2016 WL 11299474, at *1-2 ($7.5 million fee award representing 1.3 multiplier and 28% of total settlement value in case involving theft of 40 million payment cards settled before motion to dismiss decided); *Target*, 2015 WL 7253765, at *3 ($6.75 million fee award representing .74 multiplier and 29% of total settlement value in case involving theft of 110 million payment cards settled three months after motion to dismiss decided). Also, as discussed above, the requested multiplier and percentage-of-the-benefit award are modest relative to fee awards commonly approved in the Third Circuit.

In sum, application of the seven *Gunter* factors, individually and in the aggregate, indicates that the fee request is reasonable and should be approved.

ii. The Requested Fee Satisfies the Three *Prudential* Factors

Courts in the Third Circuit also utilize three additional "*Prudential* factors" when

analyzing class action fee requests. *See In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 336-40 (3d Cir.1998); *accord Imprelis*, 296 F.R.D. at 370 (listing *Prudential* factors); *Processed Egg Prod.*, 2012 WL 5467530, at *3 (same). The *Prudential* factors support the fee request here.

First, the "value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations," supports the fee request. *Imprelis*, 296 F.R.D. at 370. No governmental agencies initiated formal investigations or litigation against Wawa. The benefits to Class Members were achieved solely from the efforts of Class Counsel, before any resolutions were reached in the Financial Institution Track or Employee Track.

Second, the "percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement" supports the fee request. *Id.* The proposed 24.9% fee award is low relative to contingent fee percentages commonly entered into in private fee agreements. *See, e.g., Hall v. Accolade, Inc*., No. 17-cv-03423, 2020 WL 1477688, at *11 (E.D. Pa.) ("Contingency fees generally range between 30% to 40%.") (Pratter, J.).

Third, the inquiry into whether there are any "innovative terms of settlement" supports the requested fee. *Imprelis*, 296 F.R.D. at 370. The Settlement includes cash reimbursements of up to $500 to fully compensate a given consumer's out-of-pocket losses. The Settlement also compensates Class Members who did not experience any fraudulent transactions on their payment cards and thus arguably lack compensable damages.[11]

[11] Even if the terms of the Settlement were deemed not to be innovative, that would result in this *Prudential* factor being merely neutral as opposed to detrimental to the fee request. *See Processed Egg Prods.*, 2012 WL 5467530, at *6 ("Plaintiffs' counsel admit that the . . . Settlement does not contain any particularly 'innovative' terms. Therefore, 'this factor neither weighs in favor nor detracts from a decision to award attorneys' fees.'") (citation omitted).

In sum, application of the three *Prudential* factors, individually and in the aggregate, indicates that the fee request is reasonable and should be approved.

B. No Objections to the Fee Request Have Been Received to Date

The deadline for Class Members to submit objections to the Settlement or requested fee award is November 12, 2021. *See* Preliminary Approval Order ¶ 18 (Dkt. 234).

The amount of the proposed $3.2 million lump sum payment was disclosed in the Settlement Notice. Thus far, no Class Members have objected to the Settlement or fee request. Class Counsel will update the Court regarding any subsequent objections to the fee request when Plaintiffs file their motion for final approval of the Settlement on December 27, 2021.

To the extent any Class Members submit generic, boilerplate, or undeveloped assertions that the fee request is too high, without providing a substantive or meaningful analysis, those objections should not be credited. *See Newberg* § 13:21 ("[C]lass members are most apt to focus on the fact that they, individually, are getting little compared to what the attorneys are getting – and they typically lack the sophistication to appreciate that the attorney's fee is generally an acceptable portion of the class's aggregate award."); *In re Royal Dutch/Shell*, 2008 WL 9447623, at *30 (rejecting "boilerplate objections" to fee request).

C. The Expense Reimbursement Request is Reasonable

Class Counsel request reimbursement of $45,940 in out-of-pocket litigation expenses. In the interests of billing judgment and conservatism, Class Counsel are seeking recovery of only their filing fees, service of process fees, expert and professional services fees, mediation fees, Westlaw/LEXIS fees, and PACER fees. Class Counsel will forgo reimbursements of all in-house administrative expenses such as printing, photocopies, and similar items. Jt. Decl. ¶ 103. This is consistent with how Class Counsel reported their expenses to the Court in their quarterly expense

submissions.

Defendant consents to the reimbursement of Class Counsel's expenses from the $3.2 million lump sum payment. SA ¶ 77. Reimbursement of these expenses will not detract from any settlement benefits made available to the Class.

A chart summarizing the expense categories and amounts incurred by each firm is set forth in the Joint Declaration at ¶ 104. The expense categories are consistent with the types of expenses commonly approved by courts in the Third Circuit. *See Cunningham v. Wawa, Inc.*, No. 18-cv-03355, 2021 WL 1626482, at *8 (E.D. Pa. Apr. 21, 2021) (approving class counsel's request for reimbursement of, *e.g.*, "filing fees, . . . mediation fees, and other similar, ordinary litigation expenses"); *Acevedo v. Brightview Landscapes, LLC*, No. 13-cv-02529, 2017 WL 4354809, at *20 (M.D. Pa. Oct. 2, 2017) (approving class counsel's request for reimbursement of, *e.g*., filing fees, mediation fees, and legal research costs); *Glaberson v. Comcast Corp.*, No. 03-cv-06604, 2015 WL 5582251, at *16 (E.D. Pa. Sept. 22, 2015) (approving class counsel's request for reimbursement of, *e.g.*, expert witness fees and legal research costs); *In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Pracs. Litig*., 263 F.R.D. 226, 245 (E.D. Pa. 2009) (approving class counsel's request for reimbursement of, *e.g.*, "expert witness fees; mediation fees; . . . legal research; . . . and service of process").

The $45,940 expense total is modest for a case of this size and type. *See, e.g., Home Depot*, 2016 WL 11299474, at *2 (approving $166,925 expense reimbursement in case involving theft of 40 million payment cards settled before motion to dismiss decided).

D. The Service Award Request is Reasonable

Plaintiffs request approval of a $1,000 Service Award to each of the fourteen Class Representatives for their time and effort pursuing the litigation on behalf of the Class. Defendant

consents to funding these payments from the $3.2 million lump sum. SA ¶ 77. The $14,000 aggregate amount will not detract from any settlement benefits made available to the Class.

The Class Representatives' efforts included, among other things, undergoing lengthy initial and follow-up interviews by Class Counsel to gather their facts; searching for, culling, and producing documents regarding their transactions with Wawa, fraudulent activity on their accounts, out of pocket losses, and history with other data breaches; agreeing to burdensome evidence preservation obligations regarding hardcopy documents, emails, financial records, and other ESI; reviewing major case filings; monitoring the overall progress of the litigation; engaging in frequent communications with Class Counsel; and approving the Settlement Agreement. Jt. Decl. ¶ 110.

The $1,000 Service Award amount is conservative relative to service awards commonly approved in the Third Circuit. *See Diaz v. BTG Int'l, Inc*., No. 19-cv-01664, 2021 WL 2414580, at *9 (E.D. Pa. June 14, 2021) ($10,000 service awards where plaintiffs were not deposed); *Stevens v. SEI Invs. Co*., No. 18-cv-04205, 2020 WL 996418, at *14 (E.D. Pa. Feb. 28, 2020) ($10,000 service award where plaintiff was not deposed); *Accolade*, 2019 WL 4677954, at *13 ($1,000 service awards in data breach case settled prior to discovery) (Pratter, J.); *Brown v. Progressions Behav. Health Servs., Inc*., No. 16-cv-06054, 2017 WL 2986300, at *7 (E.D. Pa. July 13, 2017) ($10,000 service awards where plaintiffs were not deposed); *Moore v. GMAC Mortg*., No. 07-cv-04296, 2014 WL 12538188, at *3 (E.D. Pa. Sept. 19, 2014) ($5,000 service awards for plaintiffs who "respond[ed] to document requests and consult[ed] with Counsel about developments in the case"); *Imprelis*, 296 F.R.D. at 371 (service awards of $1,500 for individual property owners and $2,500 for commercial entities, none of whom were deposed); *In re CertainTeed Corp. Roofing Shingle Prod. Liab. Litig*., 269 F.R.D. 468, 476 (E.D. Pa. 2010) ("if

the named plaintiff was not deposed, the . . . incentive payment will be $2,500").

The $1,000 Service Award amount is also conservative relative to awards routinely approved in data breach cases nationwide. *See, e.g., Hy-Vee*, 2021 WL 3081051, at *5 ($2,000 service awards for each plaintiff in case that settled prior to depositions); *Yahoo*, 2020 WL 4212811, at *43 (approving "$2,500 for the five Settlement Class Representatives who participated in the instant case without being deposed"); *Chipotle*, 2019 WL 6972701, at *2 ($2,500 service awards for each of six plaintiffs in case that settled prior to depositions); *Arby's*, 2019 WL 2720818, at *1 ($4,500 service awards for each of five plaintiffs in case that settled prior to depositions); *LinkedIn*, 309 F.R.D. at 592 ($5,000 service award where plaintiff "did not need to respond to any discovery" and "was not deposed"). Accordingly, the requested Service Awards are reasonable and should be granted.

III. CONCLUSION

The Consumer Track Plaintiffs respectfully request that the Court approve Defendant's agreed upon payment of a $3.2 million lump sum to be allocated as follows: (i) $3,040,060 for Class Counsel's attorneys' fees; (ii) $45,940 for Class Counsel's litigation expenses; (iii) approximately $100,000 for the third party Settlement Administrator's fees; and (iv) $1,000 Service Awards to each of the fourteen Class Representatives, totaling $14,000. A Proposed Final Order and Judgment approving both this request and the overall Settlement will be submitted to the Court with Plaintiffs' motion for final approval of the Settlement to be filed on December 27, 2021.

Dated: October 28, 2021

Respectfully submitted,

/s/ Sherrie R. Savett
Sherrie R. Savett (PA Bar No. 17646)
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Tel: (215) 875-3000
Email: ssavett@bm.net

/s/ Roberta D. Liebenberg
Roberta D. Liebenberg (PA Bar No. 31738)
FINE, KAPLAN AND BLACK, R.P.C.
One South Broad St., 23rd Floor
Philadelphia, PA 19107
Tel: (215) 567-6565
Email: rliebenberg@finekaplan.com

/s/ Benjamin F. Johns
Benjamin F. Johns (PA Bar No. 201373)
CHIMICLES SCHWARTZ KRINER
& DONALDSON-SMITH LLP
361 W. Lancaster Avenue
Haverford, PA 19041
Tel: (610) 642-8500
Email: bfj@chimicles.com

/s/ Linda P. Nussbaum
Linda P. Nussbaum *(admitted pro hac vice)*
NUSSBAUM LAW GROUP, P.C.
1211 Avenue of the Americas, 40th Fl.
New York, NY 10036-8718
Tel: (917) 438-9102
Email: lnussbaum@nussbaumpc.com

Co-Lead Class Counsel for Consumer Track Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2021, a true and correct copy of the accompanying document was filed via the Court's CM/ECF system for electronic service on all counsel of record and is available for viewing and downloading from the ECF system.

Dated: October 28, 2021

By: */s/ Benjamin F. Johns*
Benjamin F. Johns