

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIO LOPEZ and MICHAEL OROS,

*On Behalf of Themselves and All Others
Similarly Situated,*

Plaintiffs,

v.

VOLUSION, LLC,

Defendant.

Case No.: 1:20-cv-00761-LY

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PAYMENT OF ATTORNEYS' FEES, REIMBURSEMENT OF
LITIGATION EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARDS**

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I. INTRODUCTION

After two years of litigation and maneuvering through various courts, Class Counsel has secured a significant settlement from a bankrupt defendant for the benefit of the Settlement Class that likely would not have otherwise recovered anything. Plaintiffs¹ and Class Counsel, respectfully submit this Motion for Payment of Attorneys' Fees, Reimbursement of Litigation Expenses, and Class Representative Service Awards and request that this Court to approve (1) an award of attorneys' fees in the amount of \$438,983.08; (2) reimbursement of reasonable and necessary litigation expenses in the amount of \$11,016.92;² and (3) a service award of \$2,500.00 to each of the Class Representative Plaintiffs, for a total of \$5,000.00.

First, the requested attorneys' fee award is reasonable, particularly given the significant obstacles faced by Class Counsel as a result of Defendant's bankruptcy proceeding and the challenges associated with pursuing data breach cases. It is also factually supported by Class Counsel's declarations, which explain their experience as class action practitioners and set forth their firms' collective lodestar. Class Counsel seek to apply a reasonable enhancement of their current, collective lodestar of \$330,078.60. *See* Declarations of Melissa S. Weiner of Pearson, Simon & Warshaw, LLP ("Weiner Decl."), ¶¶ 8-9; Jonathan M. Streisfeld of Kopelowitz Ostrow Ferguson Weiselberg Gilbert ("Streisfeld Decl."), ¶ 8; Hassan A. Zavareei of Tycko & Zavareei LLP ("Zavareei Decl."), ¶ 8; and Michael Singley of Edwards Law Group ("Singley Decl."), ¶ 8. Applying a reasonable lodestar multiplier of 1.33, Class Counsel respectfully request that the Court award \$438,983.08. Weiner Decl. ¶ 9. Class Counsel will spend additional time (and additional

¹ Unless defined herein, capitalized terms shall have the same meaning as those assigned to them in the Settlement Agreement. Dkt. No. 39-1.

² The Settlement Agreement permits Class Counsel to apply for a total of \$450,000.00 in attorneys' fees and reimbursement of litigation expenses. Settlement Agreement ¶ V.A.

costs) in preparing for and attending the final approval hearing, addressing any objections, responding to any appeals, and overseeing the administration of Settlement Class benefits, as described below and in Class Counsel's supporting declarations filed concurrently herewith. Weiner Decl. ¶ 13.

Second, the requested litigation expenses of \$11,016.92 are reasonable and represent necessary costs that were actually incurred by Class Counsel in connection with the Litigation. *See* Weiner Decl. ¶¶ 10, 12; Streisfeld Decl. ¶ 9; Zavareei Decl. ¶ 9; Singley Decl. ¶ 9.

Finally, the requested Service Awards of \$2,500.00 each (\$5,000.00 total) constitute modest and reasonable compensation to acknowledge the Class Representatives' zealous prosecution of this Litigation alongside Class Counsel, which was integral to the settlement of this Litigation for which they assumed risk.

Accordingly, and for the reasons set forth in detail below, Plaintiffs and Class Counsel respectfully request the Court award the requested amounts.

II. FACTUAL BACKGROUND

In the interest of judicial efficiency, for factual and procedural background on this Litigation, Plaintiffs refer this Court to, and hereby incorporate, Plaintiffs' Motion for Final Approval of Class Action Settlement with Defendant Volusion, LLC filed contemporaneously.

In supplement to those filings, and as further support for awards requested, Class Counsel took this Litigation on a contingent fee basis and persevered through challenges presented by Defendant's Chapter 11 bankruptcy that stayed the Litigation immediately after it was filed in this Court. Weiner Decl. ¶ 2. Many attorneys would have stopped when Defendant had its Chapter 11 bankruptcy plan confirmed as unsecured creditors have little leverage, however Class Counsel persisted to obtain Defendant's agreement to return this Litigation to this Court to be litigated on

the merits in exchange for the reasonable agreement to allow Plaintiffs to pursue class recovery for a putative class with approximately 500,000 members who fell victim to Defendant's data breach. After working with defense counsel and creatively and resourcefully managing the stayed litigation, Class Counsel were able to obtain a valuable settlement for the Settlement Class utilizing insurance that Defendant maintained. *Id.* ¶ 4. Under the terms of the Settlement, Defendant and its insurer Hartford have agreed to use the remainder of the policy limits (approximately \$4.3 million) to fund the Settlement, which is itself an accomplishment, given that the landscape for data breach litigation has become increasingly more difficult for plaintiffs and their counsel in recent years. *See generally* Settlement Agreement.

Once the relief for the Settlement Class was agreed to (and only after that time), Class Counsel and Volusion agreed that Class Counsel could "file a fee application of attorneys' fees and costs not to exceed Four Hundred and Fifty Thousand Dollars (\$450,000.00)." *Id.* ¶ V.A; Weiner Decl. ¶ 9, n.1. Any Class Representative service awards are to be paid separately. Settlement Agreement ¶¶ IV, VI.

III. ARGUMENT

A. Legal Standard

Fed. R. Civ. P. 23(h) provides that parties may agree to an award of reasonable attorneys' fees and nontaxable costs in a certified class action, including in a settlement context. As the Supreme Court has explained: "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The Fifth Circuit has also "encourage[d] counsel on both sides to utilize their best efforts to understandably, sympathetically, and professionally arrive at a settlement as to attorney's fees." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322 (W.D. Tex. 2007) (quoting

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974)). Thus, litigants are encouraged to resolve fee issues by agreement as long as the amount is reasonable. *See Id.* (citations omitted).

B. The Award Sought for Attorneys' Fees is Reasonable and Appropriate

The Fifth Circuit applies a two-step process to determine the reasonableness of an attorneys' fee award. *See Black v. SettlePou, P.C.*, 732 F.3d 492, 502 (5th Cir. 2013). First, the Court calculates the fee using the "lodestar" method by "multiplying the number of hours an attorney reasonably spent on the case by an appropriate hourly rate, which is the market rate in the community for this work." *Id.* Second, the court must consider the weight of the twelve factors set forth in *Johnson*, 488 F.2d at 717-19 ("*Johnson* factors"), which it may use to enhance the lodestar, with the lodestar amount being presumed to be reasonable. *See Fessler v. Porcelana Corona De Mexico, S.A. DE C.V.*, 23 F.4th 408, 415 (5th Cir. 2022); *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 821 (5th Cir. 1996) (citing *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir.), *cert. denied*, 116 S. Ct. 173 (1995)). Here, the requested \$438,983.08 attorneys' fee award is reasonable, and the application of a 1.33 lodestar multiplier is supported by the *Johnson* factors.

1. Class Counsel's Lodestar is Reasonable

To compensate Class Counsel for their work in prosecuting this Litigation, it is appropriate to use current billing rates in calculating the lodestar. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (current rates, rather than historical rates, should be applied in order to compensate for delay in payment). Courts also determine whether the hourly rates are reasonable by comparing them to prevailing hourly rates in the community for similar services by lawyers of comparable caliber in their skills, legal reputation, experience, and status (*e.g.*, partner, counsel, associate). *See, e.g., City of San Antonio, Texas v. Hotels.com, L.P.*, No. 5-06-CV-381-OLG, 2017 WL

1382553, at *9 (W.D. Tex. Apr. 17, 2017); *McClain v. Lufkin Indus.*, 649 F.3d 374, 381 (5th Cir. 2011).

Class Counsel have collectively spent 498.50 hours prosecuting this Litigation, and estimate they will spend at least an additional 40 hours preparing for and attending the Final Approval Hearing, responding to any objection(s) to the Settlement, if filed, and aiding the Settlement Administrator in the claims submission, approval, and distribution process. Weiner Decl. ¶¶ 9, 13; Streisfeld Decl. ¶ 8; Zavareei Decl. ¶ 8; Singley Decl. ¶ 8. Based on current hourly rates, Class Counsel's base lodestar is \$330,078.60. Weiner Decl. ¶ 9. The time reflected in Class Counsel's lodestar calculations is reasonable and necessary for the effective and efficient prosecution and resolution of this Litigation. *Id.* In addition, the attorneys' fees incurred in this Litigation are all of a type that would normally be charged to a fee-paying client in the private legal marketplace. *Id.*

Class Counsel's current rates are also appropriate in light of prevailing rates for similar legal services provided not only by Class Counsel in other class action litigation throughout the country, as well as lawyers of reasonably comparable skill, experience, and reputation. *See* Weiner Decl. ¶¶ 7, 9; Streisfeld Decl. ¶ 7; Zavareei Decl. ¶ 7; Singley Decl. ¶ 7; *see also In re Chesapeake Energy Corp.*, 567 F. Supp. 3d 754, 790 (S.D. Tex. 2021) (finding rates ranging from \$1,250 for an attorney to \$125 for a paralegal were reasonable in class action); *Cruson v. Jackson Nat'l Life Ins. Co.*, No. 4:16-CV-912-ALM, 2021 WL 3702483, at *3 (E.D. Tex. June 4, 2021); *In re Hudson's Bay Co. Sec. Incident Consumer Litig.*, No. 18-cv-8472 (PKC), 2022 WL 2063864, at *19 (S.D.N.Y. June 8, 2022) (finding hourly rates, which "account[ed] for the fact that the plaintiffs' firms are all experienced in class-action litigation," were reasonable in data breach class action where "[s]enior partners at certain of plaintiffs' firms billed at hourly rates in the \$900 to

\$1,000 range, while other partners billed at rates beginning at \$600,” “[a]ssociates generally billed in the range of \$350 to \$650, although a small number of senior associates billed at hourly rates of more than \$700,” and “[p]aralegals billed time at hourly rates ranging from \$150 to, in one instance, \$400”); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at *26 (N.D. Cal. July 22, 2020) (finding billing rates appropriate in data breach class action when “the billing rates for partners range[d] from about \$450 to \$900,” “[t]he billing rates for non-partner attorneys...range from about \$160 to \$850,” and “[t]he billing rates for paralegals range from \$50 to \$380”). Other courts have found Class Counsel’s rates to be reasonable and have approved them. Weiner Decl. ¶ 7; Streisfeld Decl. ¶ 7; Zavareei Decl. ¶ 7; Singley Decl. ¶ 7; *see also, e.g., In re: Capture Rx Data Breach Litig.*, No. 5:21-CV-00523-OLG, ECF No. 49 (W.D. Tex. June 23, 2022) (finding Class Counsel’s fee request, including application of a 2.2 lodestar multiplier, reasonable in data breach class action). Here, Plaintiffs’ requested fee award represents a conservative 1.33 multiplier of Class Counsel’s collective lodestar. Weiner Decl. ¶ 9. Because there is additional work required to obtain final approval, monitor the Settlement, and assist Settlement Class Members, Class Counsel will continue to expend time and resources for the benefit of the Settlement Class. *Id.* ¶ 13.

Therefore, the requested fee is reasonable under the lodestar/multiplier method.

2. The *Johnson* Factors Support that the Requested Fee is Fair and Reasonable under the Lodestar Method

Application of the *Johnson* factors confirms that the requested fee is fair and reasonable under the lodestar method with the requested multiplier. The 12 *Johnson* factors are:

(1) The time and labor required. . . . (2) The novelty and difficulty of the questions. . . . (3) The skill requisite to perform the legal service properly. . . . (4) The preclusion of other employment by the attorney due to acceptance of the case. . . . (5) The customary fee [for similar work in the community]. . . . (6) Whether the fee is fixed or contingent. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) The amount involved and the results obtained. . . . (9) The

experience, reputation, and ability of the attorneys. . . . (10) The “undesirability” of the case. . . . (11) The nature and length of the professional relationship with the client. . . . [and] (12) Awards in similar cases.

Johnson, 488 F.2d at 717-19.

Applying the *Johnson* factors ensures “fairness to the class and to the class attorneys.” *Welsh v. Navy Fed. Credit Union*, No. 5:16-CV-1062-DAE, 2018 WL 7283639, at *16 (W.D. Tex. Aug. 20, 2018) (citation omitted). However, the importance of each *Johnson* factor will vary depending on the facts of each case. *See Brantley v. Surles*, 804 F.2d 321, 325 (5th Cir. 1986). Thus, instead of imposing a rigid application of each factor, the Fifth Circuit has entrusted district courts to apply those factors in view of the particular circumstances of the case before it. *Id.* at 325-26. “In evaluating these factors, the Fifth Circuit has explained that courts should ‘give special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience reputation and ability of counsel.’” *Welsh*, 2018 WL 7283639, at *16 (quoting *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998)). As explained below, the *Johnson* factors support Class Counsel’s fee request and the enhancement of their lodestar.

(a) *The Time and Labor Required for the Litigation*

The first *Johnson* factor supports a finding that the requested award of fees is appropriate because this Litigation consumed the attention of four reputable law firms and partners, associates, law clerks, and paralegals, who devoted a substantial number of hours focused on the issues, and flexibility and cooperation to meet the deadlines required. As reflected in the declarations submitted herewith, Class Counsel expended a total of 498.50 hours on this matter, all of which were reasonably required to achieve the significant relief the Settlement will confer on the Settlement Class Members. Weiner Decl. ¶ 9.

Class Counsel, among other tasks in connection with this Litigation, have:

- before filing Plaintiffs’ Class Action Complaint in this Litigation (the “Complaint”), investigated the potential claims against Volusion, interviewed potential plaintiffs, and gathered information about the Data Security Incident (referred to in the Complaint as the “Data Breach”) and its potential impact on consumers;
- conducted continued investigation of the facts underlying the Data Security Incident Breach during the course of the Litigation;
- drafted and filed a complaint in the United States District Court for the Southern District of Florida (which was voluntarily dismissed because of Volusion’s personal jurisdiction challenge in a motion to dismiss) and the Complaint in this Court (asserting the same claims alleged in the Florida action, as well as additional claims);
- participated in Volusion’s Chapter 11 bankruptcy proceeding, which was filed after the Litigation was commenced, filing a bankruptcy claim for the Plaintiffs;
- negotiated a stipulation in the bankruptcy court following confirmation of Volusion’s bankruptcy plan to allow this Litigation to return to this Court so it could be litigated on the merits in exchange for an agreement to cap Volusion’s exposure to the limits of its Hartford insurance coverage for the benefit of the putative class;
- briefed a heavily contested Motion to Dismiss in advance of mediation;
- pursued and discussed with Volusion the potential for early resolution, pursuant to which Volusion provided settlement discovery to Plaintiffs regarding the limited insurance funds it had to resolve this Litigation;
- reviewed and analyzed documents produced by Volusion;
- drafted a lengthy mediation brief and prepared for and participated in a mediation session with Volusion before well-respected mediator Bruce A. Friedman, Esq. of JAMS on February 7, 2022, and engaged in numerous follow-up telephonic efforts after the mediation in order to resolve this Litigation and agree to the material terms of the Settlement;
- prepared and submitted the Joint Notice of Settlement and Request to Stay Deadlines Pending Settlement Approval (Dkt. No. 35);
- negotiated and prepared the Settlement Agreement and supporting documents, including the Claim Form, Postcard Notice, Email Notice, Long Form Notice, proposed preliminary and proposed final approval orders;
- solicited and analyzed bids from settlement and claims administrators;
- prepared and submitted Plaintiffs’ Preliminary Approval Motion (Dkt. No. 39), which was ultimately granted when the Court preliminarily approved the Settlement (Dkt. No. 40);
- worked with the Settlement Administrator and Volusion’s counsel to implement the notice plan, including the notices and claims forms sent to Settlement Class Members, create and launch the settlement website and toll-

free line, and monitor the receipt of claims from Settlement Class Members;
and

- regularly conferred with Plaintiffs about the status, strategy, and direction of the Litigation and settlement negotiations.

Weiner Decl. ¶ 4. Accordingly, Class Counsel’s time and labor expended supports the requested fee.

(b) *The Novelty and Difficulty of the Questions*

The second *Johnson* factor also weighs in favor of enhancing the lodestar and awarding the fee requested because data breach class actions are still relatively new and present novel and complex issues, making a successful outcome difficult to predict. *Id.* ¶ 21. Also, a successful outcome would ensue, if at all, only after prolonged and arduous litigation with an attendant risk of drawn-out appeals. *Id.* Even if Plaintiffs prevailed, the amount Plaintiffs and the Class would have been awarded in damages, if any, is uncertain, as are the sources available to fund those allowed claims given Volusion’s extremely limited resources following bankruptcy. *Id.*

Among national consumer protection class action litigation, data breach cases are some of the most complex and involve a rapidly evolving area of law. *See Bahnmaier v. Wichita State Univ.*, No. 2:20-cv-02246-JAR-TJJ, 2021 WL 3662875, at *3 (D. Kan. Aug. 18, 2021) (finding second *Johnson* factor weighed in favor of the lodestar amount requested based on “[d]ata-breach litigation [being] a technical, emerging area of the law”); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *11 (N.D. Cal. Aug. 17, 2018) (“[D]ata-breach litigation is an actively developing field of the law where much of the legal landscape is still shifting and unsettled. This baseline uncertainty manifested itself in a threshold question that threatened to end the litigation at an early stage as well as ongoing issues that endangered class recovery.”). As such, these cases are particularly risky for plaintiffs’ attorneys. *See Id.*

Consequently, the requested fee award will appropriately compensate Class Counsel for the risk undertaken.

(c) *The Skill Requisite to Perform the Legal Service Properly*

Class Counsel exemplifies the third *Johnson* factor where they “performed diligently and skillfully, achieving a speedy and fair settlement, distinguished by the use of informal discovery and cooperative investigation to provide the information necessary to analyze the case and reach a resolution.” *King v. United SA Fed. Credit Union*, 744 F. Supp. 2d 607, 614 (W.D. Tex. 2010) (citing *Di Giacomo v. Plains All Am. Pipeline*, No. Civ.A.H-99-4137, Civ.A.H-99-4212, 2001 WL 34633373, at *12 (S.D. Tex. Dec. 18, 2001)).

The result achieved here is particularly notable because the Parties were able, through skillful and experienced counsel, to reach a negotiated Settlement despite Volusion’s bankruptcy, limited resources, and without having the Court decide the contested motion to dismiss. Weiner Decl. ¶¶ 4, 21 Class Counsel worked on behalf of the Class to obtain information from Volusion regarding the Data Security Incident and used that information (along with their experience and the knowledge gained from other data breach class actions) to negotiate the Settlement. *Id.* The Settlement reached here is also notable for the simplicity of the claims process and the speed with which Class Counsel was able to secure a favorable settlement. *Id.* Therefore, this factor also weighs in favor of enhancing the lodestar.

(d) *Preclusion of Other Employment by the Attorney Due to Acceptance of the Case*

The fourth *Johnson* factor further supports the requested fees because the pursuit of this Litigation was an economic risk for the firms and diverted their resources from other less risky cases. Class Counsel invested substantial time, effort, and resources into the Litigation of this risky and uncertain case with no guarantee or promise of return on their investment. Class Counsel seeks

reimbursement of their lodestar already incurred, even though additional time and effort will be required to wrap up the Litigation. *Id.* Moreover, Class Counsel also undertook a risk that any judgment would become uncollectable due to Volusion’s financial condition. *Id.* It is relatively unique that a class settlement be reached when the defendant has filed for bankruptcy. Therefore, this factor also favors the requested lodestar enhancement.

(e) *Customary Fee for Similar Work in the Community*

The fifth *Johnson* factor supports the requested attorneys’ fee because, as discussed previously, Class Counsel’s respective billing rates reflect each attorney’s, paralegal’s, and law clerk’s particular legal experience and are also based on established competitive market rates for national cases involving complex and class action litigation. *See See* Weiner Decl. ¶¶ 7, 9; Streisfeld Decl. ¶ 7; Zavareei Decl. ¶ 7; Singley Decl. ¶ 7.

(f) *Whether the Fee is Fixed or Contingent*

Consideration of the sixth *Johnson* factor is designed to “demonstrate[e] the attorney’s fee expectations when he accepted the case.” *King*, 744 F. Supp. 2d at 615 (quoting *Johnson*, 448 F.2d at 718). Here, Class Counsel undertook this Litigation on a purely contingent basis, with no assurance of recovery of litigation costs or attorneys’ fees. Weiner Decl. ¶ 2. Further, “[t]he legal profession accepts contingent fees that exceed the market value of the services if rendered on a non-contingent basis as a legitimate way of assuring competent representation for plaintiffs who cannot afford to pay on an hourly basis regardless of whether they win or lose.” *King*, 744 F. Supp. 2d at 615 (citing *In re Washington Public Power Supply System Secs. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994)).

The nature of contingency fees is that they are inherently uncertain and require counsel to assume more risk than in cases where compensation is based on billable hours; these risks are properly considered in awarding attorneys’ fees. *See Id.* at 615 (“Courts have consistently

recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees" in a contingent fee case.). Despite the many significant risks (discussed above), Class Counsel continued prosecuting this Litigation and ultimately obtained an excellent result on behalf of the Class. *See* Weiner Decl. ¶ 21. Accordingly, the sixth *Johnson* factor tips the scales in favor of enhancing the requested award.

(g) *Time Limitations Imposed by the Client or the Circumstances*

The time constraints here were typical of like-litigation; the seventh *Johnson* factor is therefore neutral. *See In re Chesapeake Energy Corp.*, 567 F. Supp. 3d at 791 (finding seventh *Johnson* factor irrelevant, without further discussion).

(h) *The Amount Involved and the Results Obtained*

The eighth and most critical *Johnson* factor in determining the reasonableness of a fee award is the "degree of the success obtained." *Fessler v. Porcelana Corona De Mex., S.A.*, 23 F.4th 408, 418 (5th Cir. Jan. 10, 2022) (citing *Farrar v. Hobby*, 506 U.S. 103 (1992)). The result achieved through the Settlement weighs in favor of the requested lodestar enhancement to award the requested attorneys' fees. The Settlement Agreement provides significant monetary relief, particularly given the litigation risks involved and the complexity of the underlying issues. Weiner Decl. ¶ 21. Specifically, Hartford's and Volusion's obligation to pay is subject to an agreed aggregate cap or maximum obligation of Hartford's remaining policy limits (approximately \$4,300,000.00 at the time of the Settlement Agreement), less additional defense expenses reasonably incurred in connection with the documentation, approval, and administration of the Settlement Agreement. Settlement Agreement. ¶ VI.

Each Settlement Class Member who files a valid Claim will be eligible to receive (a) reimbursement for documented out-of-pocket losses up to a maximum of \$1,500.00 per person, upon submission of a Claim Form and supporting documentation, including out-of-pocket

expenses incurred as a result of the Data Security Incident and fees for credit reports, credit monitoring, or other identity theft insurance product purchased between the date of Volusion's Notice of Data Incident and the date of the Claims deadline; and (b) compensation for time spent responding to the Data Security Incident (up to 3 hours at \$20.00/hour), which will be included within the \$1,500.00 per-person limit and will not require supporting documentation. *See* Settlement Agreement ¶ III. In addition to the Settlement Benefits, Hartford shall pay to the Settlement Administrator an amount sufficient to pay for and fund: the Costs of Administration, Class Counsel's attorneys' fees and costs as determined by the Court, and Class Representative service awards as determined by the Court. *Id.*

Class Counsel achieved an excellent result on behalf of the Class in the Settlement of this Litigation. This factor heavily weighs in favor of enhancing the lodestar to approve Class Counsel's requested fee award.

(i) *The Experience, Reputation, and Ability of the Attorneys*

Plaintiffs discussed the ninth *Johnson* factor when addressing factors one and three, above, and it also supports the requested fee here. Class Counsel have demonstrated a high degree of competence to the Court throughout this Litigation, which was defended by highly qualified and nationally recognized counsel with a great deal of experience in data breach cases. Weiner Decl. ¶ 4. Class Counsel's ability to efficiently resolve the Litigation following the bankruptcy and motion to dismiss in this Court, in the face of a zealous defense from experienced counsel, in the ever-challenging landscape of data breach litigation further attests to their experience, reputation, and ability. *See King*, 744 F. Supp. 2d at 617 (finding class counsel's prompt and efficient resolution of the case demonstrated their experience, reputation and ability).

(j) *The Undesirability of the Case*

Given that data breach cases pose unique challenges, with unsettled law making outcomes of cases more uncertain and harder to predict, this case is inherently risky and, thus, less desirable. Moreover, “[c]lass action cases often carry elevated risks, a requirement of lengthy investigation through informal discovery, and a possibility of no recovery, all of which speak to the undesirability of such a case.” *King*, 744 F. Supp. 2d at 617-18. Finally, Class Counsel here undertook this Litigation on a contingency fee basis, which in itself carries more risk, and then had to navigate the bankruptcy obstacle that presented itself during the Litigation. Weiner Decl. ¶ 2. All these factors contribute to the undesirability of the Litigation.

(k) *The Nature and Length of the Professional Relationship with the Client*

The eleventh *Johnson* factor also supports the instant fee request. Indeed, Class Counsel spent considerable time building relationships with Plaintiffs, routinely discussing their claims, responding to questions, and addressing concerns throughout the Litigation. *Id.* ¶¶ 2, 4 As explained above in connection with the first *Johnson* factor, before filing the Complaint, Class Counsel investigated the potential claims against Volusion, interviewed potential plaintiffs, and gathered information about the Data Security Incident and its potential impact on consumers. *Id.* Class Counsel also regularly conferred with the Plaintiffs about the status, strategy, and direction of the Litigation and settlement negotiations. *Id.* Class Counsel have, therefore, demonstrated their efforts to protect the best interests of Plaintiffs and the Class. *See King*, 744 F. Supp. 2d 607 (finding eleventh *Johnson* factor satisfied where class counsel was the primary contact for plaintiffs and spent several hours with them to ensure adequate representation).

(1) *Awards in Similar Cases*

Finally, the twelfth *Johnson* factor also supports the requested fee award. The Settlement achieved here is similar to results obtained in other data breach cases in this District, including in *In re: Capture Rx Data Breach Litigation*, No. 5:21-CV-00523-OLG, ECF No. 49 (W.D. Tex. May 3, 2022), where the Court approved a 2.2 lodestar multiplier that represented 33% of the settlement funds. *Evans on behalf of United Development Funding IV v. Greenlaw*, Nos. 3:16-cv-0635-M, No. 3:17-cv-2433-M, 2019 WL 7879735 (N.D. Tex. Feb. 27, 2019) (approving 3.06 multiplier and noting that multipliers often range between 1 and 4); *Cruson*, 2021 WL 3702483, at *6 (“The average lodestar multiplier for complex consumer cases is 1.82.”); see *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1088 n.52 (S.D. Tex. 2012) (“In our informal review of opinions evaluating a lodestar cross-check, the multipliers ranged from about 1.0 to over 5.0, with a substantial number of multipliers in the 3.0 to 4.0 range”). Here, Class Counsel’s requested fee represents a 1.33 multiplier of their lodestar and approximately 10% of the Settlement Benefits available to the Class. For these reasons, Class Counsel should be reasonably compensated for its successful efforts in representing the Class and achieving a beneficial settlement just six months after the bankruptcy stay was lifted.

* * *

In sum, Class Counsel’s requested fee of \$438,983.08 is reasonable under the lodestar method, and application of the *Johnson* factors confirms the appropriateness of the requested fee award.

C. Plaintiffs’ Expense Reimbursement Request is Reasonable

An agreed upon award of expenses is proper in a class action settlement. See Fed. R. Civ. P. 23(h) (authorizing the recovery of “nontaxable costs”). “The appropriate analysis to apply in determining which expenses are compensable in a class action case is whether such costs are the

variety typically billed by attorneys to clients.” *DeHoyos*, 240 F.R.D. at 334 (collecting cases). Class Counsel’s declarations demonstrate that the costs sought to be reimbursed were all advanced by Class Counsel and were necessarily incurred in the prosecution of this Litigation. *See* Weiner Decl. ¶¶ 10-12; Streisfeld Decl. ¶ 10; Zavareei Decl. ¶ 10; Singley Decl. ¶ 10. Such costs and expenses included court fees, mediation fees, research fees, and other services that are necessary and reasonable to prosecuting a class action. *Id.* The requested reimbursement of \$11,016.92 in collective costs are therefore appropriately reimbursable to Class Counsel. *See* Settlement Agreement ¶¶ V.A., VI.A.4. Class Counsel respectfully requests reimbursement of these reasonable and necessary costs.

D. The Requested Service Awards are Warranted

Class Counsel respectfully requests this Court to approve a Service Award of \$2,500.00 to each Plaintiff for their service as Class Representatives. Courts in the Fifth Circuit approve reasonable service awards to compensate the named plaintiffs for the services they provided and risks they incurred. *See Diaz v. World Acceptance Corp.*, No. 1:19-CV-957-RP, 2021 WL 2709677, at *2 (W.D. Tex. Jan. 7, 2021) (finding service award reasonable given the services provide and risks incurred by the representative plaintiff); *see also Guadalupe v. Am. Campus Communities Servs., Inc.*, No. 1:16-CV-967-RP, 2020 WL 12029307, at *2 (W.D. Tex. Oct. 23, 2020); *see also In re: Capture Rx Data Breach Litig.*, No. 5:21-CV-00523-OLG (W.D. Tex. June 23, 2022) (finding service award of \$2,000 to each of the five plaintiffs was justified by their service to the class); *Matson v. NIBCO Inc.*, No. 5-19-CV-00717-RBF, 2021 WL 4895915, at *13 (W.D. Tex. Oct. 20, 2021) (finding that an award of \$10,000 to each plaintiff was appropriate under the circumstances of the case and would adequately compensate plaintiffs for the service they provided and the burdens they shouldered.); *Blackburn v. Conduent Com. Sols. LLC*, No.

1:19-CV-1229-RP, 2020 WL 9810023, at *3 (W.D. Tex. Dec. 22, 2020) (approving an award of \$2,500 where plaintiff was instrumental in identifying the alleged violation and building the case).

Here, Plaintiffs were instrumental in assisting Class Counsel throughout this proceeding and ultimately reaching the Settlement. Weiner Decl. ¶ 4. Their involvement was not merely nominal. *Id.* They initiated and remained in contact with Class Counsel; reviewed and authorized the filing of the Complaint and settlement papers in this Litigation; supervised, monitored, and periodically communicated with Class Counsel; provided background documents and followed the progress of this Litigation; and have been actively involved in the prosecution of the Litigation, to ensure that Class Members received the best recovery possible given the particular circumstances and risks of the case. *Id.* Given their active participation in this Litigation, the Court should find that an award of \$2,500.00 each (\$5,000.00 total) is reasonable and warranted.

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs and Class Counsel respectfully request that the Court (1) award of attorneys' fees in the amount of \$438,983.08; (2) reimbursement of reasonable and necessary litigation expenses in the amount of \$11,016.92; and (3) a service award of \$2,500.00 to each of the Class Representative Plaintiffs, for a total of \$5,000.00.

Dated: August 4, 2022

Respectfully submitted,

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