

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

RUSSELL DOMITROVICH and THOMAS
GUSSIE, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

M.C. DEAN, INC.,

Defendant.

Civil Action No. 1:23-cv-00210-CMH-JFA

**PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES, AND SERVICE AWARD TO PLAINTIFFS**

Pursuant to Fed. R. Civ. P. 23(h) and Fed. R. Civ. P. 54(d)(2), as well as this Court's February 1, 2024 Order Granting Plaintiffs' Unopposed Motion for Preliminary Approval and to Direct Notice of Proposed Settlement to the Class (ECF No. 62), Plaintiffs, through Class Counsel, respectfully bring this Motion to the Court seeking an award of attorneys' fees, reimbursement of expenses, and a service award to Plaintiffs Russell Domitrovich and Thomas Gussie.

This Motion is supported by the Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award to Plaintiffs; the Declaration Ryan D. Maxey in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award to Plaintiffs; and attached exhibits, and all files, records, and proceedings in this matter.

Plaintiffs intend to file a proposed Order regarding Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award in the forthcoming filing pertaining to Plaintiff's Motion for Final Approval of Class Action Settlement.

Dated: May 10, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

/s/ Steven T. Webster
Steven T. Webster (VSB No. 31975)
WEBSTER BOOK LLP

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Civil Action No. 1:23-cv-00210-CMH-JFA

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION FOR AN AWARD OF
ATTORNEYS’ FEES, REIMBURSEMENT OF EXPENSES, AND
SERVICE AWARD TO PLAINTIFFS**

Pursuant to Fed. R. Civ. P. 23(h) and this Court’s Preliminary Approval Order (ECF No. 23), Plaintiffs seek approval of the requested attorneys’ fees, expense, and service award as described in the Settlement Agreement (“S.A.”). (ECF No. 59-1).

I. BACKGROUND

A. History

This matter arose after a letter from M.C. Dean, Inc. (“Defendant” or “M.C. Dean”), dated on or about September 14, 2022, notified Plaintiffs Russell Domitrovich and Thomas Gussie (“Plaintiffs”) that someone without authorization accessed M.C. Dean systems between December 24, 2021 and June 2, 2022, and could have accessed Plaintiffs’ and Settlement Class Members’ sensitive personal information, including their names, Social Security numbers, and driver’s license numbers (the “Incident”). As a result of the Incident, Plaintiffs Domitrovich and Gussie, respectively, filed class action lawsuits against M.C. Dean in the United States District Courts for

the Eastern District of Tennessee and the Eastern District of Virginia. On March 28, 2023, after the *Domitrovich* case was transferred to this District, these two cases were consolidated by the Court under the *Domitrovich* case number. (ECF No. 35). On April 21, 2023, Plaintiffs filed the operative Consolidated Class Action Complaint (the “Complaint”). (ECF No. 37).

B. Settlement Negotiations

Parallel to their litigation of the Actions, the Parties engaged in arm’s-length settlement negotiations beginning on June 13, 2023 where the parties participated in a full-day mediation facilitated by United States Magistrate Judge John F. Anderson. After a full day of negotiations, the parties came to an agreement in principle on the amount of the \$750,000.00 Settlement Fund, and later finalized the other material terms in the Settlement Agreement. *See* Proposed Class Counsel’s Declaration in Support of Plaintiffs’ Motion for Preliminary Approval and to Direct Notice of Proposed Settlement to Class at ¶ 16. (ECF 59-2). While the negotiations were professional throughout, they were marked by significant factual and legal disputes impacting the value of the case. *Id.*, ¶ 17. With Judge Anderson’s assistance, the Parties were able to reach a resolution. *Id.* At all times the negotiations were made at arm’s length, and free of collusion of any kind. *Id.* Attorneys’ fees were not discussed in any manner until the Parties had reached agreement on the material terms of the settlement, including the payment of the Settlement Fund. *Id.* On January 29, 2024, Plaintiffs filed their Motion for Preliminary Approval and to Direct Notice of Proposed Settlement to the Class (ECF Nos. 58-59). The Court granted preliminary approval of the Settlement Agreement on February 4, 2024. *See* ECF No. 62.

C. Terms of the Settlement

As described in the Settlement Agreement, the settlement benefits are substantial in that they include monetary payments and will be paid from the Settlement Fund.

1. The Settlement Class

The proposed Settlement Class is defined as: “All individuals whose Personal Identifying Information (‘PII’) was impacted by the Incident that was discovered on June 2, 2022.” S.A., ¶ II.B. Excluded from the Settlement Class are (1) the Judge and Magistrate Judge presiding over the Lawsuits, any members of the Judges’ respective staffs, and immediate members of the Judges’ respective families; (2) officers, directors, members and shareholders of Defendant; (3) persons who timely and validly request exclusion from and/or opt-out of the Settlement Class; and (4) the successors and assigns of any such excluded persons; and (5) any person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity or occurrence of the Incident or who pleads *nolo contendere* to any such charge. *Id.* Defendant represents that the Settlement Class contains approximately 45,499 individuals.

2. The Settlement Benefits

Pursuant to the Settlement Agreement, Defendant will pay \$750,000.00 to establish a non-reversionary Settlement Fund. S.A., ¶ IV.A. Settlement Class Members (“Class Members”) have, and will continue to have, an opportunity to submit a claim for the benefits provided by the Settlement Agreement. *Id.*, ¶¶ V.A-B. To submit a claim, a Class Member need only submit a Claim Form before the Claims Deadline. *Id.*, ¶¶ V.B.1.a, V.B.2.a, Ex. A. Claims for Ordinary and/or Extraordinary Out-of-Pocket Losses and Attested Time will be paid first. *Id.*, ¶ IV.E. Alternative Cash Payments be paid last and will be increased or decreased *pro rata* to consume the remaining amount of the Settlement Fund after payment for notice and administration costs, service award payments approved by the Court, and attorney’ fees and expenses awarded by the Court. *Id.* As explained *infra*, this settlement fund is an excellent result and in line with settlements in the data breach context across the country.

II. LEGAL ARGUMENT

A. Legal Standard Governing Attorneys' Fees

Rule 23(h) of the Federal Rules of Civil Procedure provides that in a class action settlement, “the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). The Supreme Court has “recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); see *United States v. Tobias*, 935 F.2d 666, 667 (4th Cir. 1991) (explaining common fund is an “equitable exception to the “American rule” that parties bear their own costs of litigation”). The common fund doctrine vests the district court holding jurisdiction over the fund to spread the costs of litigation proportionately across all persons benefited by the suit. *Id.* The Supreme Court has “applied it in a wide range of circumstances as part of [its] inherent authority.” *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 104 (2013) (collecting cases).

Class Counsel, with Plaintiffs’ assistance, have obtained significant results and benefits for the Settlement Class in the form of monetary payments from the \$750,000.00 non-reversionary common fund. Accordingly, and pursuant to the common fund doctrine and the Settlement Agreement, Class Counsel now apply for a total fee award of one-third of the Settlement Fund, or \$250,000.00, and reimbursement of reasonably incurred expenses of \$5,785.08. Plaintiffs also request approval of Service Awards in the amount of \$5,000.00 per Plaintiff (\$10,000.00 total) for their time and effort on behalf of the Settlement Class. These requests are reasonable considering the risk undertaken, the work performed, and the results achieved, and are consistent with similar awards approved in this Circuit. The Settlement Agreement is the product of skilled and dedicated

efforts by Class Counsel through considerable litigation in a case involving complex issues of fact and law. Accordingly, these requests should be approved.

A. Percentage of the Fund Method is Appropriate

The award of attorneys' fees is within the sound discretion of the trial judge. *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (further citation omitted). While the Fourth Circuit has not made obligatory a particular method of determining fees in common fund cases, it has recognized the financial significance of the contingency fee and associated risks. *In re Abrams & Abrams, PA*, 605 F.3d 238, 245 (4th Cir. 2010); *Brundle on behalf of Constellis Employee Stock Ownership Plan v. Wilmington Tr., NA*, 919 F.3d 763, 786 (4th Cir. 2019), *as amended* (Mar. 22, 2019) ("courts routinely impose enhanced common fund awards to compensate counsel for litigation risk at the expense of beneficiaries who do not shoulder this risk.").

In a class action settlement, "[c]ourts either use the lodestar method, the percentage of the fund method, or a combination of both." *Phillips v. Triad Guaranty Inc.*, No. 1:09CV71, 2016 WL 2636289, at *2 (M.D.N.C. May 9, 2016). Within the Fourth Circuit, the percentage-of-the-fund method "is the preferred approach to determine attorneys' fees." *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) (internal citation omitted); *see also Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 758 (S.D.W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases." (collecting cases)).

Courts in this district routinely use the percentage of the fund method for common fund cases such as this and do not require a lodestar crosscheck. *See Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 503 (E.D. Va. 1995) (declining to utilize the lodestar method in a common fund case, because many "courts ... have concluded that the percentage method is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable

measure of compensation for common fund cases”); *Rosales, et al., v. Rock Spring Contracting LLC, et al.*, No. 3:23CV407 (RCY), 2024 WL 1417955, at * fn 8 (E.D. Va. Apr. 2, 2024) (noting courts in the district prefer the percentage method for common fund cases); *Gagliastre v. Capt. George's Seafood Rest., LP*, No. 2:17CV379, 2019 WL 2288441, at *4 (E.D. Va. May 29, 2019) (indicating that a lodestar cross-check was unnecessary); *Devine v. City of Hampton, Virginia*, No. 4:14CV81, 2015 WL 10793424, at *3 (E.D. Va. Dec. 1, 2015) (noting that courts may use lodestar principles to cross-check for reasonableness, but declining to do so); *Arledge v. Domino's Pizza, Inc.*, No. 3:16-CV-386-WHR, 2018 WL 5023950, at *5 (S.D. Ohio Oct. 17, 2018) (noting that a lodestar cross-check was “unnecessary”).

The percentage-of-the-fund method also provides a strong incentive for plaintiff’s counsel to obtain the maximum possible recovery in the shortest time possible under the circumstances by removing the incentive, which occurs under the lodestar method, for class counsel to “over-litigate” or “draw out” cases in an effort to increase the number of hours used to calculate their fees. *See Jones*, 601 F. Supp. 2d at 759; *see also Ferris v. Sprint Communs. Co. LP*, No. 5:11-cv-00667-H, 2012 WL 12914716, at *6 (E.D.N.C. Dec. 13, 2012) (noting that the percentage method “better aligns the interests of class counsel and class members because it ties the attorneys’ award to the overall result achieved rather than the hours expended by the attorneys”); *DeWitt v. Darlington Cty.*, No. 4:11-cv-00740, 2013 WL 6408371, at *6 (D.S.C. Dec. 6, 2013) (“The percentage-of-the fund approach rewards counsel for efficiently and effectively bringing a class action case to a resolution, rather than prolonging the case in the hopes of artificially increasing the number of hours worked on the case to inflate the amount of attorneys’ fees on an hourly basis.”).

Under the percentage method, the attorneys’ fee award is calculated using the gross amount of benefits provided to class members, including administrative costs, attorneys’ fees and expenses. *See Ferris*, 2012 WL 12914716, at *7-8. In the Fourth Circuit, fees constituting one-third or more of the settlement have been found reasonable. *McAdams v. Robinson*, 26 F. 4th 149, 162 (4th Cir. 2022) (affirming attorneys’ fees award of \$1,300,00 or 43% of the \$3,000,000 common fund class action settlement); *Kruger*, 2016 WL 6769066, at *6 (awarding attorneys’ fees of \$10,666,666 comprising 1/3 of the monetary benefits made available to the class); *Chrismon v. Pizza*, No. 5:19-CV-155-BO, 2020 WL 3790866, at *5 (E.D.N.C. July 7, 2020) (noting that “[m]any courts in the Fourth Circuit have held that attorneys’ fees in the amount of 1/3 of the settlement fund is reasonable.”) (collecting cases)); *In re Cotton*, 3:18-cv-00499, 2019 WL 1233740, at *4 (W.D.N.C. Mar.15, 2019) (approving an award of 33 percent of the total settlement value); *Neal v. Wal-Mart Stores, Inc.*, 3:17-cv-00022, 2021 WL 1108602, at *2 (W.D.N.C. Mar. 19, 2021). Attorneys’ fees in common fund cases typically reflect “around one-third of the recovery.”¹

B. The Relevant Factors Support the Fee Award.

The Fourth Circuit has not required specific factors for consideration in determining an appropriate attorneys’ fees award in a common fund case. Instead, there are two sets currently deployed in this Circuit, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th

¹ *See* 5 NEWBERG ON CLASS ACTIONS § 15:73 (5th ed. 2016) (noting that a “33% figure provides some anchoring for the discussion of class action awards [to counsel]” and that “many courts have stated that ... fee award in class actions average around one-third of the recovery.”); *accord* Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUDIES, 27, 31, 33 (2004) (finding that courts consistently award 30–33% of the common fund).

Cir.1974) (adopted in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978))² and *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 261 (E.D. Va. 2009). Both focus on the reasonableness of the fees and many of the factors overlap. The *In re Mills* factors support the fee request here: “(1) the results obtained for the [c]lass; (2) objections by members of the [c]lass to the settlement terms and/or fees requested by counsel; (3) the quality, skill, and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) public policy; and (7) awards in similar cases.” *In re Mills Corp. Sec. Litig.*, 265 F.R.D. at 261.

1. Class Counsel Obtained an Excellent Result for the Class

The most critical factor in determining the reasonableness of an attorney fee award is “the degree of success obtained.” *McDonnell v. Miller Oil Co.*, 134 F.3d 638, 641 (4th Cir. 1998) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). The results achieved and benefits conferred in this case is an incredible result, with Defendant agreeing to establish a \$750,000.00 non-reversionary common fund from which the following benefits will be paid:

- Reimbursement for “Ordinary” Out-of-Pocket Losses and Attested Time which are unreimbursed costs or expenditures incurred by a Class Member in responding to notice of the Incident that were incurred between September 14, 2022 and the

² The *Johnson* factors are as follows:

(1) the time and labor required in the case, (2) the novelty and difficulty of the questions presented, (3) the skill required to perform the necessary legal services, (4) the preclusion of other employment by the lawyer due to acceptance of the case, (5) the customary fee for similar work, (6) the contingency of a fee, (7) the time pressures imposed in the case, (8) the award involved and the results obtained, (9) the experience, reputation, and ability of the lawyer, (10) the “undesirability” of the case, (11) the nature and length of the professional relationship between the lawyer and the client, and (12) the fee awards made in similar cases.

Claims Deadline, as a result of the Incident. Settlement Class Members with Ordinary Out-of-Pocket Losses may also submit a claim for up to 3 hours of time spent remedying issues related to the Incident at a rate of \$35 per hour by providing an attestation and a brief description of (1) the actions taken in response to the Incident and (2) the time associated with each action.

- Reimbursement for “Extraordinary” Out-of-Pocket Losses, which are unreimbursed costs or expenditures incurred by a Settlement Class Member that are fairly traceable to the Security Incident, and are losses that are not already covered by one or more of the normal reimbursement categories. proven monetary losses incurred by a Settlement Class Member that are more likely than not caused by the Incident and are losses that are not already covered by one or more of the normal reimbursement categories. Extraordinary Out-of-Pocket Losses are actual, documented, and unreimbursed costs, expenses, losses or charges incurred a result of identity theft or identity fraud, falsified tax returns, or other possible misuse of the Settlement Class Member’s personal information.
- Settlement Class Members may, in lieu of making a claim for reimbursement of Ordinary and/or Extraordinary Out-of-Pocket Losses and Attested Time, elect to receive a cash payment in an amount equal to approximately \$225 on a claims-made basis. Alternative Cash Payments will be increased or decreased *pro rata*.

These benefits reflect an enormous success given the circumstances, and directly address the damages claimed by Plaintiffs and the Settlement Class in this action by reimbursing them for out-of-pocket losses and lost time stemming from the breach and offering cash payments. The size of the fund and the number of persons benefitting from the Settlement also weigh in favor of

the reasonableness of the fees requested. The result here is all the more extraordinary in light of the very real litigation risks faced by Plaintiffs in this matter, given that class actions in general are inherently risky and the continuously developing law on data breaches. Further, the Settlement benefits are available to Settlement Class Members immediately, rather than years from now which would be the case absent settlement. The amount at issue and the results justifies the requested award.

2. The Class is Responding Favorably to the Settlement so Far.

As of May 10, 2024, no class member has objected and only 3 class members have opted out. Declaration of Ryan D. Maxey in Support of Unopposed Motion for Attorneys' Fees, Reimbursement of Expenses, and Service Award (the "Maxey Decl."), ¶ 21 (attached hereto as **Exhibit 1**). Settlement Class Counsel will update the number of exclusions including whether objections are filed in the Motion for Final Approval of Class Action Settlement. *Id.* The objection and opt out deadlines are May 31, 2024. Notably, the Settlement Class has responded favorably to the Settlement to date with the claims rate being over 1.4% (as of May 7, 2024), which is an excellent claims rate in a data privacy class action where the claims rates typically range from 1-3%. *Id.*, ¶ 18. With the Claims Deadline being May 31, 2024, the claims period remains open for roughly three more weeks meaning that the claim rate will increase as additional Settlement Class Members submit claims for settlement benefits.

3. The Skill Required to Perform the Services Rendered Supports the Fee Request.

The expertise of the attorneys involved in this matter, combined with the complexity of the case, likewise supports the requested fee award. Class Counsel have demonstrated skill commensurate with their reputations and prosecuted a tough case on behalf of the Plaintiffs and the Settlement Class. *See generally* Memorandum in Support of Plaintiffs' Motion for Preliminary

Approval and to Direct Notice of Proposed Settlement to the Class. (ECF No. 59). Three firms experienced in the field of data privacy litigation cooperated to efficiently prosecute this action. *Id.*, Ex 2. Each invested substantial hours of both attorney and paralegal time. *See* Maxey Decl., ¶ 16.

Here, Class Counsel relied upon their vast experience handling data privacy class actions across the country to negotiate a non-reversionary common fund settlement with experienced defense counsel. *Id.*, ¶ 23. Class Counsel utilized their experience to efficiently resolve this case after a full-day mediation session under the guidance of Judge Anderson and to reach a uniform, class-wide settlement in a cutting-edge, highly uncertain, and largely untested area of the law. *Id.*, ¶ 24. The result achieved here is particularly noteworthy considering that data breach cases such as this one are relatively novel without much guiding legal precedence. Class Counsel's skill in efficiently negotiating a robust \$750,000.00 non-reversionary common fund despite such serious legal risk and the risk of no recovery at all justifies the requested fee of the common fund. *See In re The Mills Corp. Sec. Litig.*, 265 F.R.D. at 262-63 (finding that Counsel's ability to resolve the case within one year of the Court's denial of Defendant's Motion to Dismiss to be indicative of Counsel's "skill and efficiency."). Accordingly, this factor further supports Class Counsel's request for attorneys' fees.

4. There was Substantial Risk of Non-Payment.

Plaintiffs and Class Counsel faced the genuine and ever-present risk of zero recovery in the case, like all cases on a contingency fee basis. Data privacy cases are, by nature, particularly risky and expensive. Such cases also are innately complex. *See, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *240 (N.D. Ga. Mar. 17, 2020) (recognizing the complexity and novelty of issues in data privacy class actions);

Gordon v. Chipotle Mexican Grill, Inc., Civil Action No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) (“noting that data privacy “cases are particularly risky, expensive, and complex.”). This case is no exception to that rule. It involves novel data privacy issues involving approximately 45,499 Class Members, complicated and technical facts, and a well-funded and motivated defendant.

Class Counsel, who took this matter on contingency, faced numerous challenges. Courts have recognized that such risk deserves extra compensation and is a critical factor in determining the reasonableness of a fee. *See, e.g. Stocks v. Bowen*, 717 F. Supp. 397, 402 (E.D.N.C. 1989); *Gilbert LLP v. Tire Eng’g & Distribution, Ltd. Liab. Co.*, 689 F. App’x 197, 201 (4th Cir. 2017); *In re Dun & Bradstreet Credit Svcs. Cons. Lit.*, 130 F.R.D. 366, 373 (S.D. Ohio 1990); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff’d*, 889 F.2d 21 (11th Cir. 1990); *In re Cont. Ill, Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992). Thus, the existence of these issues, which were issues of first impression, exemplify that Class Counsel risk of nonpayment was real and justifies the requested fee.

5. Attorneys’ Fees Awards in Similar Cases

As evidenced above, the attorneys’ fee requested in this case falls well within the range of common fund attorney fee requests in this circuit and nationwide. *See Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *7 (M.D.N.C. Sept. 29, 2016) (noting that a “one-third fee is consistent with the market rate” in ERISA class action); *Scott v. Fam. Dollar Stores, Inc.*, No. 308CV00540MOCDS, 2018 WL 1321048, at *15 (W.D.N.C. Mar. 14, 2018) (awarding one-third of the settlement fund plus reimbursement of costs); *Brown v. Lowe’s Companies, Inc.*, No. 513CV00079RLVDSC, 2016 WL 6496447, at *11 (W.D.N.C. Nov. 1, 2016) (finding a one-third attorneys’ fee reasonable in light of the results obtained, is consistent with Fourth Circuit precedent); *City Nat. Bank v. Am. Commonwealth Fin. Corp.*, 657 F. Supp. 817, 822 (W.D.N.C.

1987) (approving attorney’s fee award of one-third of approximately \$1.3 million class recovery); *Temp. Servs., Inc. v. Am. Int’l Grp., Inc.*, No. 3:08-CV-00271-JFA, 2012 WL 2370523, at *22-23 (D.S.C. June 22, 2012) (“A total fee of one-third of the class settlement for all work performed and to be performed in this case is well within the range of what is customarily awarded in settlement class actions. An award of fees in this range for work performed in the creation of a settlement fund has been held to be reasonable by many federal courts”) (citations omitted). Here, Class Counsel’s fee request amounting to one-third of the settlement fund is squarely in line with the typical amount awarded in similar cases.

C. Class Counsels’ Litigation Expenses are Reasonable.

Federal Rule of Civil Procedure 23(h) allows a court approving a class settlement to “award reasonable...nontaxable costs that are authorized by law or by the parties’ agreement.” Accordingly, courts in the Fourth Circuit allow plaintiffs to recover “reasonable litigation-related expenses as part of their overall award.” *Decohen*, 299 F.R.D. at 483 (citation omitted). Recoverable costs may include “those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services.” *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988). “Litigation expenses such as supplemental secretarial costs, copying, telephone costs and necessary travel are integrally related to the work of the attorney and the services for which outlays are made may play a significant role in the ultimate success of litigation....” *Daly v. Hill*, 790 F.2d 1071, 1083 (4th Cir. 1986).

The Settlement Agreement permits Class Counsel to request reimbursement of litigation expenses not to exceed \$15,000. S.A., ¶ 7.2. Class Counsel’s request for litigation expenses of \$5,785.08 is reasonable because each expense was incurred in the prosecution of this litigation. Maxey Decl., ¶¶ 25-27. The majority of these expenses are attributed to \$4,200 for a dark web

expert; the remainder were for typical litigation expenses such as the filing fee, the costs of service of process, and pro hac vice admissions. *Id.* Courts regularly award litigation expenses in addition to attorneys' fees in class action cases. *See, e.g., Kabore v. Anchor Staffing, Inc.*, No. L-10-3204, 2012 WL 5077636, at *10 (D. Md. Oct. 17, 2012) ("It is well-established that Plaintiff who are entitled to recover attorneys' fees are also entitled to recover reasonable litigation-related expenses as part of their overall award."). Class Counsel's request for expenses should be approved as fair and reasonable given that counsel has a strong incentive to keep costs and expenses at a reasonable level due to the high risk of no recovery when the fee is contingent.

D. The Requested Service Awards are Reasonable.

Courts recognize the purpose and appropriateness of service awards to class representatives. *See, e.g., Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 WL 2285972, at *6–7 (S.D.W. Va. May 23, 2013) (approving award \$7,500 per lead Plaintiff); *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14CV238 (DJN), 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016) (approving a \$10,000 service award); *Berry v. LexisNexis Risk & Info. Analytics Grp., Inc.*, No. 3:11-CV-754, 2014 WL 4403524, at *16 (E.D. Va. Sept. 5, 2014), *aff'd sub nom. Berry*, 807 F.3d 600 (4th Cir. 2015) (approving a \$5,000 service award) "A fairly typical practice, incentive awards are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Manuel*, 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016) (internal quotations omitted).

Service awards are "routinely approved" in class actions to "encourage socially beneficial litigation by compensating named plaintiff for their expenses on travel and other incidental costs, as well as their personal time spent advancing the litigation on behalf of the class and for any

personal risk they undertook.” *Kay Co.*, 749 F. Supp. 2d at 472; *Berry*, 807 F.3d at 613 (Service awards compensate the class representative for work done on behalf of the class and make up for financial risk undertaken in bringing the action). Serving as a class representative “is a burdensome task and it is true that without class representatives, the entire class would receive nothing.” *Id.* at 473; *See also Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

In this litigation, Plaintiffs put themselves forward in litigating this case, kept abreast of the case’s status, participated in settlement negotiations, discussed with counsel various aspects of the case, and attended the full-day mediation. *See Burke v. Shapiro, Brown & Alt, LLP*, No. 3:14-cv-201 (DJN), 2016 WL 2894914, at *6 (E.D. Va. May 17, 2016). Much larger service awards have been regularly approved by judges in this District and the Fourth Circuit. *See e.g., Kruger*, 2016 WL 6769066, at *6 (granting \$25,000 service awards); *In re: Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg. In re: Lumber Liquidators Chinese-Manufactured Flooring Durability Mktg.*, No. 115MD2627AJTTRJ, 2020 WL 5757504, at *91 (E.D. Va. Sept. 4, 2020) (granting service award of \$5,000); *Brown v. Charles Schwab & Co., Inc.*, No. 2:07-cv-03852, 2011 WL 13199227, at *7 (D.S.C. July 26, 2011) (approving \$10,000 service award to named plaintiff); *see also In re MI Windows & Doors Prods. Liab. Litig.*, 2015 WL 4487734, at *5 (D.S.C. July 23, 2015) (granting “modest” service award of \$5,000.00 for each named Plaintiff); *see also Neal v. Wal-Mart Stores, Inc.*, 3:17-cv-00022, 2021 WL 1108602, at *2 (W.D.N.C. Nov. 2, 2015) (approving service awards of \$10,000 to each Settlement Class Representative); *In re Cotton*, 2019 WL 1233740, at *4 (approving service awards of \$10,000 to each Settlement Class Representative); *see also Manuel*, 2016 WL 1070819, at *17 n.3 (E.D. Va. Mar. 15, 2016) (“Various studies have found that the average incentive award per plaintiff ranged from \$9,355 to \$15,992.” *citing* Newberg on Class Actions § 17.8 (5th ed.)). The requested Service Awards of

\$5,000 each are less than what has been approved in similar common fund data privacy class action settlements. *See, e.g., Lutz v. Electromed, Inc.*, No. 21-cv-02198, ECF No. 73 (D. Minn.) (service award of \$9,900 in a data breach class action); *In re Capital One Consumer Data Security Breach Litig.*, 2022 WL 18107626, at *4 n.5 (service award of \$5,000 to each plaintiff in a data privacy class action).

The Class Representatives amply fulfilled their duties, making the Service Award requested appropriate. While Class Representatives did not have to undergo extensive discovery or depositions, Plaintiffs did attend the full-day mediation, gather documents and material in support of their claims that were used in drafting their separate complaints and Consolidated Class Action Complaint, and were actively involved in the mediation that ultimately resolved this case.

III. CONCLUSION

Because the Settlement Agreement is fair, reasonable, and adequate, Plaintiffs respectfully request that the Court grant final approval of the Class Action Settlement, including *pro rata* cash payments to Settlement Class Members who have submitted valid claims and awarding Service Awards in the amount of \$5,000 to each Class Representative, \$250,000.00 in reasonable attorneys' fees, and \$5,785.08 in litigation expenses.

Dated: May 10, 2024

Respectfully Submitted,

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/s/ Steven T. Webster

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

/s/ Steven T. Webster
Steven T. Webster (VSB No. 31975)
WEBSTER BOOK LLP

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

RUSSELL DOMITROVICH and THOMAS
GUSSIE, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

M.C. DEAN, INC.,

Defendant.

Civil Action No. 1:23-cv-00210-CMH-JFA

**DECLARATION OF RYAN D. MAXEY IN SUPPORT OF PLAINTIFFS' MOTION FOR
AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND
SERVICE AWARD TO PLAINTIFFS**

I, Ryan D. Maxey, being competent to testify, make the following declaration:

1. I am currently the owner and principal member of Maxey Law Firm, P.A. ("Maxey Firm"). In preliminarily approving the settlement, the Court appointed Laura Van Note and me as Class Counsel. (ECF No. 62 ¶ 2). I submit this declaration in support of Plaintiffs' Motion For an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award to Plaintiffs. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration and could testify competently to them if called upon to do so. A true and correct copy of the Settlement Agreement ("S.A.") was filed with the Court (ECF No. 59-1).

2. I incorporate by reference the Proposed Class Counsel's Declaration in Support of Plaintiffs' Motion for Preliminary Approval and to Direct Notice of Proposed Settlement to Class (ECF No. 59-2).

TIME AND LABOR EXPENDED

3. Although this matter was resolved through roughly a year of litigation, Class Counsel and Plaintiffs conducted substantial pre-suit investigation and seamlessly coordinated to conduct a unified proceeding before this Court, gaining the cooperation of all of Class Counsel, drafting a comprehensive and detailed consolidated complaint, conducting discovery for settlement purposes, and presenting this settlement for preliminary and final approval under Fed. R. Civ. P. 23.

4. Class Counsel conducted substantial pre-suit investigation to determine the scope and causes of the data breach and the types of personally identifiable information stolen in the data breach. Class Counsel's substantial efforts in investigating this case permitted Class Counsel to make very informed decisions about presenting Plaintiffs' claims in this case, researching and drafting the thorough and detail Consolidated Complaint, and participating in settlement negotiations.

5. Class Counsel spent significant time and effort coordinating among themselves.

6. Two class action complaints were filed within or transferred to this District. Class Counsel coordinated to ensure the first-filed case was transferred to this Court.

7. Notably, I was able to obtain the full support of my colleagues to be appointed as co-Class Counsel over the Settlement.

8. Class Counsel worked with potential Class Members to thoroughly review Class Members' claims to locate Plaintiffs who were willing to serve as Class Representatives.

9. Class Counsel spent time speaking with Plaintiffs about the content of the Consolidated Class Action Complaint and in responding to Defendant's discovery requests.

10. Class Counsel oversaw the filing of the consolidated class action complaint including reviewing all potential claims in the causes of action that were ultimately asserted in the Consolidated Complaint, prepared discovery requests, prepared the response to Defendant's motion to dismiss, and prepared the mediation statement.

11. Class Counsel also engaged in detailed, settlement negotiations with Defendant that included a full-day mediation session with U.S. Magistrate Judge John Anderson.

12. In preparation of the mediation, Class Counsel thoroughly analyzed Defendant's discovery responses and confidential mediation statement so that Plaintiffs would be in a position to make informed settlement demands and participate in productive settlement negotiations.

13. Furthermore, Plaintiffs had conducted extensive legal research to analyze the strengths and weaknesses of their legal claims.

14. Class Counsel were well prepared during settlement negotiations.

The Skill Required to Perform the Services Rendered

15. The expertise of the attorneys involved in this matter, combined with the complexity of the case, likewise supports the requested fee award. Class Counsel have demonstrated skill commensurate with their reputations and prosecuted a tough case on behalf of the Plaintiffs and the Settlement Class.

16. Three firms experienced in the field of data security litigation cooperated to bring and prosecute this action. Each invested substantial hours of both attorney and paralegal time.

17. Each firm is highly experienced and well-regarded in the data security class-action litigation field. Class Counsel have and are currently handling many data breach cases and are on the forefront of data breach litigation.

The Results Obtained Strongly Weigh in Favor of the Requested Fee Award

18. The Settlement Class has responded favorably to the Settlement to date with the claims rate being over 1.4% (as of May 7, 2024), which is an excellent claims rate in a data privacy class action where the claims rates typically range from 1-3%.

19. We believe this is an excellent claims rate for this type of case because consumer cases around the country often have very low claims' rates. *See, e.g., Poertner v. Gillette Co.*, 618 Fed.Appx. 624, 625–26 (11th Cir. 2015) (approving a settlement involving more than seven million class members where the claims rate was roughly 0.75%); *LaGarde v. Support.com, Inc.*, Case No. 13-609, 2013 WL 1283325, at *2–10 (N.D. Cal. Mar. 26, 2013) (approving class action settlement with a claims rate 0.17% and noting 92% of the class members received notice via email); *In re Apple iPhone 4 Prods. Liab. Litig.*, Case No. 10-2188, 2012 WL 3283432, at *1–3 (N.D. Cal. Aug. 10, 2012) (approving a class action settlement with claims rate between 0.16% and 0.28%); *Trombley v. Bank of Am. Corp.*, Case No. 08-CV-456, 2012 WL 1599041, at *2 (D. R.I. May 4, 2012) (approving a class action settlement that garnered 0.9% claims rate); *In re Packaged Ice Antitrust Litig.*, Case No. 08- MDL-1952, 2011 WL 6209188, at *14 (E.D. Mich. Dec. 13, 2011) (approving a class action settlement with a claims rate of less than 1%); *In re Online DVD– Rental Antitrust Litig.*, 779 F.3d 934, 944–45 (9th Cir. 2015) (approving thirty five million member settlement where less than four percent of class members filed claims); *Touhey v. United States*, Case No. 08-1418, 2011 WL 3179036, at *7–8 (C.D. Cal. July 25, 2011) (approving a class action settlement with a response rate of two percent); *Perez v. Asurion Corp.*, 501 F.Supp.2d 1360, 1377–78 (S.D. Fla. 2007) (approving settlement where 1.1% of class members filed claims before the Court issued its decision).

20. With the Claims Deadline being May 31, 2024, the claims period remains open for roughly three more weeks meaning that the claim rate will grow as additional Settlement Class Members submit claims to receive benefits from the Settlement. The objection and opt out deadlines are May 31, 2024.

21. As of May 10, 2024, no class member has objected and only 3 class members have opted out. Settlement Class Counsel will update the number of exclusions including whether objections are filed in the Motion for Final Approval of Class Action Settlement.

22. This fee request is similarly in line with settlements in the data breach context across the country.

The Experience, Reputation, and Ability of an Attorney Support the Fee Award

23. The experience, reputation and ability of class counsel is another factor courts evaluate in determining an appropriate attorneys' fees award. Here, Class Counsel relied upon their vast experience handling data privacy class actions across the country to negotiate a non-reversionary common fund settlement with experienced defense counsel.

24. Class Counsel utilized their experience to efficiently resolve this case after a mediation session with a qualified mediator and to reach a uniform, class-wide settlement in a cutting-edge, highly-uncertain and largely untested area of the law.

The Requested Fee Award Includes Class Counsels' Reasonably Incurred Expenses

25. The requested fee award also includes Settlement Class Counsel's reasonably incurred expenses. Counsel has incurred \$5,785.08 in costs litigating this case.

26. The majority of Class Counsel's expenses are attributed to \$4,200 for a dark web expert; the remainder were for typical litigation expenses such as the filing fee, the costs of service of process, and *pro hac vice* admissions.

27. Counsel's expenses here, totaling \$5,785.08, all fall into these categories and were all reasonably incurred in pursuing this litigation.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 10, 2024

/s/ Ryan D. Maxey
Ryan D. Maxey