UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Target Corporation Customer Data Security Breach Litigation This Document Relates to: All Consumer Cases	MDL No. 14-2522 (PAM/JJK)

CONSUMER PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PAYMENT OF SERVICE AWARDS TO CLASS REPRESENTATIVES AND FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Consumer Plaintiffs' Lead Counsel Vincent J. Esades, on behalf of the Settlement Class Representatives and the Settlement Class, respectfully asks the Court to approve service awards of $500 to each Settlement Class Representative and a $1,000 service award each to Plaintiffs Thomas Dorobiala, Brystal Keller and Deborah Guercio, whose service to the Class additionally included providing deposition testimony. Such modest service awards are routinely authorized by courts and are appropriate in recognizing the special, dedicated services Settlement Class Representatives performed for the benefit of all Settlement Class Members. Lead Counsel further requests an order awarding attorneys' fees and expenses in the amount of $6.75 million. Under either the lodestar approach advanced here in support of the requested fee award or the percentage of the common benefit approach, Lead Counsel's request for reimbursement of attorneys' fees and expenses is fair, reasonable and supported by established fee jurisprudence.

I. INTRODUCTION

A. Consumer Plaintiffs' Claims and Procedural History Highlights.

Consumer Plaintiffs filed their Consolidated Class Action Complaint (ECF No. 182) on August 25, 2014 and filed their First Amended Consolidated Class Action Complaint (ECF No. 258) ("Complaint") on December 1, 2014. Consumer Plaintiffs allege claims against Defendant Target Corporation ("Target") arising from the breach of Target's computer systems first announced by Target on December 19, 2013, including claims asserting violations of state consumer laws and state data breach statutes, as well as negligence, breach of implied and express contract, bailment and unjust enrichment. Following briefing and a hearing, the Court on December 18, 2014, granted in part and

denied in part Target's motion to dismiss the Complaint. ECF No. 281. On March 19, 2015, following briefing and a hearing, the Court entered its Order Certifying a Settlement Class, Preliminarily Approving Class Action Settlement and Directing Notice to the Settlement Class ("Preliminary Approval Order") (ECF No. 364).

B. The Settlement Agreement.

On March 9, 2015, Consumer Plaintiffs, on behalf of the Settlement Class, and Target, by its Counsel, entered into a Settlement Agreement and Release, including attached exhibits (together, the "Settlement Agreement" or "Settlement").[1] The Settlement resolves all claims asserted in the Consumer Cases centralized in this Court by the JPML. Under the Settlement, Target has agreed to provide a Settlement Fund of $10 million to fund distributions to Settlement Class Members pursuant to the Distribution Plan approved by the Court in its Preliminary Approval Order (ECF No. 364 ¶ 12) and to pay any service awards to Settlement Class Representatives approved by the Court. Settlement ¶¶ 1.20, 5. As defined in the Settlement, the Settlement Class, certified by the Court in its Preliminary Approval Order, consists of:

> All persons in the United States whose credit or debit card information and/or whose personal information was compromised as a result of the data breach that was first disclosed by Target on December 19, 2013.

[1] The Settlement is attached as Exhibit 1 (ECF No. 358-1) to the Declaration of Consumer Plaintiffs' Lead Counsel Vincent J. Esades filed March 18, 2015 ("Esades Decl. I") (ECF No. 358). Mr. Esades is filing today the Declaration of Consumer Plaintiffs' Lead Counsel Vincent J. Esades in Support of Motion for Payment of Service Awards to Class Representatives and for an Award of Attorneys' Fees and Reimbursement of Expenses ("Esades Decl. II").

> Excluded from the class are the Court, the officers and directors of Target, and persons who timely and validly request exclusion from the Settlement Class.

Settlement ¶ 3.1; Prelim. Approval Order ¶ 1.

Target will pay the $10 million Settlement Fund into an interest bearing escrow account within ten business days of the effective date of the Settlement. Settlement ¶ 5.1.1. Importantly, no part of the Settlement Fund will revert to Target. *Id.* ¶ 5.1.3. The Settlement Fund will be used to pay Class Member claims and any service awards approved by the Court. Any residual amount in the escrowed Settlement Fund remaining after payment of any approved service awards to Class Representatives, claims by Settlement Class Members, and any feasible supplemental distributions to Class Members will be distributed as directed by the Court. *Id.* ¶¶ 5.1.2, 5.1.3, 7.1.

The Settlement provides for a consumer-friendly process for Settlement Class Members to submit claims to the experienced Settlement Administrator, Rust Consulting, Inc., appointed by the Court. Prelim. Approval Order ¶ 6. Claims are submitted and processed primarily online through the dedicated website, www.TargetBreachSettlement.com, established by the Settlement Administrator and activated on April 30, 2015 (with an option for submission of claims by U.S. mail). Settlement ¶ 1.16.

The Distribution Plan is efficient, fair and beneficial to all Class Members. Settlement Class Members who submit a Documentary Support Claim and reasonable documentation showing their losses (for example, a credit card statement, invoice or receipt) are eligible for reimbursement up to a maximum of $10,000. Settlement, Ex. 1,

Distribution Plan ¶ 1.1. Class members who submit valid documentation for their losses may also include two hours of lost time (at $10 per hour) for each type of documented loss they incurred (for example, unauthorized charges or replacement of a driver's license, etc.). *Id*. ¶ 1.1.2. Class Members who submit a valid Self-Certification Claim need not provide documents evidencing losses caused by the data breach and are eligible to receive equal shares of the Settlement Fund after payment from the Settlement Fund of any service payments and approved Documentary Support Claims. *Id.* ¶ 4.1. The amount paid to such Class Members will be calculated by dividing the amount remaining in the Settlement Fund by the total number of valid Self-Certification Claims. The Claim Form for Documentary Support and Self-Certification claims is attached as Exhibit 1 to the Distribution Plan (Settlement, Ex. 1). The Distribution Plan further provides for a claim validation procedure and a procedure for resolving any disputes relating to Documentary Support Claims. *Id.* ¶¶ 2, 3.

The Settlement also provides for significant non-monetary relief that benefits each Class Member by improving Target's data retention and security practices. Specifically, for five years after the Settlement, Target will implement the following data security measures:

a. **Chief information security officer**. Target will designate a high level executive to coordinate and take responsibility for its information security program entrusted with the protection of consumers' personally identifiable information;

b. **Maintain a written information security program**. Target will identify internal and external risks to the security of consumers' personally identifiable information that could result in unauthorized access to Target's system and periodically review the sufficiency of safeguards to control such risks. Target will develop metrics to measure its security program and will ensure that those metrics are periodically reviewed and approved by senior Target leadership;

c. **Maintain a process to monitor for information security events and respond to such events determined to present a threat**. Target will design and implement reasonable safeguards to control information security risks, including through reasonable and appropriate software security testing; and

d. **Provide security training to Target employees**. Target will implement a program to educate and train relevant employees concerning the importance of the security of consumers' personally identifying information.

Settlement ¶ 5.2.

The Settlement further provides that Target will pay all costs of providing notice to the Settlement Class and all costs of administering the Distribution Plan, including the Settlement Administrator's fees. *Id.* ¶¶ 4.3, 5.1.4. Target's obligation to pay the costs of class notice and administration is an additional significant benefit to the Settlement Class, as it is independent of (and in addition to) the $10 million Settlement Fund. As a result,

class notice and administrative costs will not reduce the amount of the Settlement Fund and therefore will not decrease the amount of benefits distributed to any Class Member.

The Settlement also requires Target to pay any attorneys' fees and expenses awarded by the Court to Settlement Class Counsel. *Id.* ¶ 7.2. As with administrative costs and the costs of class notice, Target's agreement to pay an award of attorneys' fees and expenses approved by the Court is in addition to the Settlement Fund, so any fee award will not decrease Class Members' benefits. The Settlement's finality is not dependent on the Court awarding attorneys' fees and expenses. There is no "clear-sailing" agreement on attorneys' fees – Target reserves the right to object to Settlement Class Counsel's request for attorneys' fees in any amount but waives its right to appeal any award of attorneys' fees that does not exceed $6.75 million. *Id.*

In summary, the Settlement provides for significant monetary and non-monetary benefits to all Settlement Class Members.

C. Mediated Settlement Negotiations.

While aggressively prosecuting the litigation, Consumer Plaintiffs' Lead Counsel pursued good faith, arm's length and strongly contested negotiations with Target's Counsel. Negotiations were supervised by the Honorable Arthur J. Boylan, who conducted nine mediation sessions with the parties' counsel extending over five months from August 2014 to January 2015. The details of the mediation process are discussed in Consumer Plaintiffs' Memorandum in Support of Motion for Certification of a Settlement Class and Preliminary Approval of Class Action Settlement, ECF No. 357, at 6-8. In his Declaration, Judge Boylan opines that the Settlement "provides for substantial

benefits and relief to the Class and is a fair, adequate and reasonable settlement reached through arm's length negotiations by skilled, well informed counsel." Decl. of the Hon. Arthur J. Boylan (Ret.) ¶ 10, ECF No. 360.

II. THE REQUESTED SERVICE AWARDS FOR THE CLASS REPRESENTATIVES ARE REASONABLE AND APPROPRIATE.

Any service awards awarded by the Court will be paid from the Settlement Fund. Settlement ¶ 7.1. Lead Counsel seeks awards for each of the 113 Consumer Plaintiffs named in the Complaint and listed in revised Exhibit 8 (ECF No. 373-1) of the Settlement Agreement, whom the Court has designated as the Settlement Class Representatives. Preliminary Approval Order ¶ 2. Lead Counsel requests a service award in the amount of $1,000 each to three Class Representatives, Plaintiffs Thomas Dorobiala, Brystal Keller and Deborah Guercio, whose service to the Class included providing deposition testimony, and a service award in the amount of $500 to each other Settlement Class Representative.

Courts routinely approve such service awards to recognize individuals' service to the class and to reward them for contributing to the enforcement of laws through the class action mechanism. *See, e.g.*, *White v. Nat'l Football League*, 822 F. Supp. 1389, 1406 (D. Minn. 1993) (noting that "[c]ourts . . . routinely approve such awards for class representatives who expend special efforts that redound to the benefit of absent class members"); *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1068 (D. Minn. 2010) (approving $5,000 service awards to each class representative and explaining that "[s]mall incentive awards . . . promote the public policy of encouraging individuals to

undertake the responsibility of representative lawsuits" and "may be 'merited for time spent meeting with class members, monitoring cases, or responding to discovery'") (citation omitted); *In re Xcel Energy, Inc., Sec., Derivatives & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1003 (D. Minn. 2005) (awarding $2,000 to each of three class representatives and noting that "the three plaintiffs reviewed pleadings, conferred with counsel, provided information about the plan, responded to discovery, and reviewed and consented to the settlement"); *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 225 (E.D. Pa. 2014) (noting that "'[t]he purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws'") (citation omitted).

Each of the Settlement Class Representatives could have simply awaited the outcome of this litigation and received the same benefits as any other Settlement Class Member. Instead, they stepped forward to lead this litigation and represent the interests of all Class members. They remained committed to and actively participated in this significant litigation of public importance against a formidable defendant on behalf of millions of class members. They provided Class Counsel with documents and information concerning their purchases at Target, patiently responded to numerous inquiries from Class Counsel about their experiences, and provided information and documents to Class Counsel relating to the harm they suffered as a result of the breach. Esades Decl. I ¶ 52, ECF No. 358). Settlement Class Representatives have monitored the litigation through continued contact with counsel. *Id*.

They took the time to serve as plaintiffs and assist in the prosecution of a case involving the enforcement of important consumer protection laws. Their services have benefited the Settlement Class. *Id*. Class Representatives Thomas Dorobiala, Brystal Keller and Deborah Guercio further benefited the Class by sitting for depositions taken by Target, and are deserving of an increased award. *Id*. *See In re Zurn Pex Plumbing Prods. Liab. Litig*., No. 08-MDL-1958 ADM/AJB, 2013 WL 716460, at *2 (D. Minn. Feb. 27, 2013) (approving $5,000 service award to each of nine class representatives and $7,500 to seven class representatives who were deposed, noting that the service payments "reflect the efforts by the class representatives to gather and communicate information to counsel and act as the public face of the litigation" and explaining that each class representative "assisted with the investigation and preparation of these suits, gathered documents for production, and helped class counsel" and "[s]ome of the class representatives gave depositions").

The Detailed Notice to Class Members, available on the Settlement website since its activation on April 30, 2015, and approved by the Court (Preliminary Approval Order ¶ 7), notified Class Members that Class Counsel would ask the Court for service awards of up to $500 for each Settlement Class Representative and an additional payment of up to $500 for the three Settlement Class Representatives deposed by Target. To date, there have been no objections from any Class Members to the requested service awards. Esades Decl. II ¶ 67. The requested service payments for the Settlement Class Representatives are appropriate and should be awarded.

III. CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES IS REASONABLE AND SHOULD BE APPROVED.

A. Legal Standards Governing Fee Requests.

Determining an appropriate attorneys' fee award lies within the Court's discretion. *In re Monosodium Glutamate Antitrust Litig.*, No. 00-md-1328 (PAM), 2003 WL 297276, at *1 (D. Minn. Feb. 6, 2003) ("*MSG*") (citing *Blum v. Stetson*, 465 U.S. 886, 896-97 (1984)); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999). In considering a fee request, courts owe a fiduciary duty to absent class members. *Xcel Energy*, 364 F. Supp. 2d at 992; *MSG*, 2003 WL 297296, at *1.

As this Court has observed, "[t]he theory behind attorneys' fee awards in class actions is not merely to compensate counsel for their time, but to award counsel for the benefit they brought to the class and take into account the risk undertaken in prosecuting the action." *MSG*, 2003 WL 297276, at *1. *See also Zurn Pex*, 2013 WL 716460, at *4 (noting that "[a] financial incentive is necessary to entice capable attorneys . . . to devote their time to complex, time-consuming cases for which they may never be paid" and that "[t]o make certain that the public interest is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding") (citations and internal quotations omitted).

In exercising their discretion, courts within the Eighth Circuit may base an award of attorneys' fees either under the lodestar method or the percentage of the common benefit recovered. *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244-45, 246 (8th Cir. 1996). "Under the 'lodestar' methodology, the hours expended by an attorney are

multiplied by a reasonable hourly rate of compensation so as to produce a fee amount which can be adjusted, up or down, to reflect the individualized characteristics of a given action." *Id.* at 244. "[T]he 'percentage of the benefit' approach . . . permits an award of fees that is equal to some fraction of the common fund that the attorneys were successful in gathering during the course of the litigation." *Id.* at 244-45.

B. Efficiency in Case Prosecution

In exercising Your Honor's discretion in considering Plaintiffs' fee request, we commend to the Court Judge Doty's opening, overarching observation:

> The first observation is a simple one and one in which litigants and their counsel in civil litigation, and especially in complex civil litigation, too often lose sight. The Federal Rules of Civil Procedure "shall be construed and administered to ensure the *just, speedy and inexpensive determination* of every action." Fed. R. Civ. P. 1. Under Rule 1, as officers of the court, attorneys share the responsibility with the court of ensuring that cases are "resolved not only fairly, but without undue cost or delay." Fed. R. Civ. P. 1 advisory committee's notes on 1993 amendments.
>
> All counsel – both those representing plaintiffs and defendants – conducted this litigation in an exemplary manner and fulfilled their obligations under Rule 1. This is the type of complex litigation that easily could have dragged on for several more years. Instead, it had a relatively short stay of two and a half years on this court's docket because counsel litigated the case efficiently and inexpensively. The lodestar of plaintiffs' counsel could easily have been much higher had not counsel cooperated with one another through the litigation and settlement process. Instead, all plaintiffs' counsel presented a modest lodestar because they moved the case along efficiently to a just result in a remarkably short period of time.

Xcel Energy, 364 F. Supp. 2d at 992 (citations omitted). This theme of efficient case prosecution is a common thread running through fee jurisprudence in this District. *See, e.g.*, *Yarrington*, 697 F. Supp. 2d at 1063 (approving 33% fee award from $16.5 million settlement and stating, "Plaintiffs' counsel moved the case along expeditiously, and made

every effort to limit duplicative efforts and to minimize the use of judicial resources in the management of the case" and "[c]ounsel exhibited diligence and efficiency throughout the litigation, resulting in a favorable result for the Class"); *Dworsky v. Bank Shares Inc.*, No. 3:93-cv-0013, 1993 WL 331012, at *2 (D. Minn. May 3, 1993) (approving fee award and observing that "[t]he expeditious settlement avoided the likely alternative of protracted and costly litigation" which "would likely have consumed a large portion of any class recovery" and "would have consumed substantial judicial time and fiscal resources"); *Zurn Pex*, 2013 WL 716460, at *3 (approving $8.5 million fees and expense award and observing that "[t]o a large degree, the settlement and resolution of the complex issues present in this MDL litigation are the result of the diligence and focus of class counsel"). In awarding fees, Judge Rosenbaum again struck the efficiency chord:

> There is no question of the quality of lead counsel. Both they and their opposite numbers are exceptionally skilled. While hard-fought, the litigation was conducted cordially and efficiently. It is evident that absent counsel's willingness to work efficiently together, this case could well have lasted many more months, if not years.

In re UnitedHealth Group Inc. PSLRA Litig., 643 F. Supp. 2d 1094, 1105 (D. Minn. 2009).

In applying for a leadership position in this case, Consumer Plaintiffs' Lead Counsel committed to work cooperatively and efficiently in handling this case. That is exactly what Lead Counsel has done. That work included the significant initial task of coordinating and organizing the work of the at least 108 law firms and the multitude of lawyers from across the country who filed at least 81 Consumer Cases that were

consolidated in these MDL proceedings, so the litigation could be managed efficiently, workably and in a streamlined fashion. Similarly, in transferring the case to this District, the MDL Panel found that "centralization in the District of Minnesota will . . . promote the just and efficient conduct of this litigation." MDL Transfer Order filed April 2, 2014, ECF No. 1. True to that finding and prediction, this Court, through a series of case management orders, set an aggressive discovery, motion practice and pretrial schedule and an early trial date – all designed to promote the fair, efficient and expedited prosecution of the claims of all Plaintiffs. Class Counsel have pursued this litigation efficiently within that expedited framework and have kept the case moving smoothly on the dual tracks of litigation and good faith efforts, with Target's counsel, of implementing the Court's suggestion made at the initial, May 14, 2014, case management conference, to develop "a road map for resolution." Tr. 49:17-19, ECF No. 70.

Indeed, Class Counsel litigated and settled this case **within nine months** following their appointment – from the Court's May 15, 2014, appointment of counsel Order to the March 9, 2015 Settlement providing significant benefits to the Class. The services provided by Class Counsel are summarized below.

Before filing the Consumer Plaintiffs' Consolidated Class Action Complaint on August 25, 2014 (ECF No. 182), Lead Counsel, working cooperatively with members of the Steering Committee and other consumer plaintiff firms, investigated the facts and law to identify potential claims and develop a prosecution strategy. Esades Decl. I ¶ 4, ECF No. 358. Class Counsel implemented an efficient, effective four step litigation strategy. *Id*. First, Class Counsel conducted in-depth factual research into the events leading to the

Target data breach. *Id*. ¶ 5. This factual investigation drew from public sources and included reviewing announcements by Target concerning the data breach; examining iterations of Target's privacy policy over a number of years preceding and during the period of the breach; analyzing testimony before and reports issued by Congressional committees; reviewing news articles, including investigative reports, examining the causes of the data breach; evaluating analysts' reports; reviewing Target's annual reports and submissions to federal agencies; conducting factual research into Target's data security practices, including public information about past breaches of Target's and other retailers' systems; researching warnings and alerts issued by credit card issuers; studying industry standards governing data security; evaluating studies examining data security practices, breaches, risks and the impact of breaches; and retaining and communicating with knowledgeable consultants and experts on data security. *Id.*

Second, Class Counsel engaged in comprehensive legal research into potential claims that could be brought on behalf of Consumer Plaintiffs. *Id*. ¶ 6. This in-depth research included reviewing claims asserted in previous data breach and consumer privacy litigation and considering potential claims based on the statutory and common law of all 50 states. *Id*. Class Counsel identified the elements of the claims and governing case law, assessed the viability of the claims through class certification and trial, identified the common evidence available to support each claim, and analyzed Target's likely defenses based on defense theories advanced in other data breach litigations. *Id.*

Third, because numerous consumer actions arising out of retailer data breaches have failed at the pleading stage, Class Counsel carefully identified and vetted potential

class representatives, including gathering and examining documents to confirm their purchases during the period affected by the Target data breach and collecting documentary evidence of consumer harm suffered as a result of the breach. *Id*. ¶ 7. This process narrowed the number of plaintiffs while ensuring that the plaintiffs were geographically dispersed across the United States and had suffered both actual and imminent harm resulting from the Target breach and therefore had standing to assert viable claims on behalf of the Class. *Id*. This important step narrowed the group of potential plaintiffs, benefited the Class, eased burdens on the Court and enhanced the efficiency and effectiveness of case prosecution. *Id.*

Finally, Class Counsel developed and implemented an efficient case prosecution strategy. *Id*. ¶ 8. Rather than asserting every colorable claim, Class Counsel focused the case on a core set of claims. *Id*. The Court ruled promptly on Target's motion to dismiss, and allowed the majority of Consumer Plaintiffs' statutory and common law claims to proceed. *Id.* Further details demonstrating the manner in which Class Counsel prosecuted and settled this case in a just, speedy and cost effective manner are discussed in Consumer Plaintiffs' memorandum in support of their motion for certification of a settlement class and preliminary approval of the settlement. Mem. at 11-13, ECF No. 357.

Class Counsel's focus and efficiency in achieving resolution in less than one year bears favorably on the quality of services provided by Class Counsel and should be rewarded.

C. The Fee Request is Reasonable Under Lodestar Analysis.

The lodestar approach may be used as an independent basis for a fee award (*see, e.g.*, *Zurn Pex.*, 2013 WL 716460), or as a cross-check in evaluating a fee request under the common fund approach (*e.g., Petrovic*, 200 F.3d at 1157; *Xcel Energy*, 364 F. Supp. 2d at 999), or as a side-by-side analysis alongside the common fund approach (*e.g. MSG*, 2003 WL 297276, at *2). The attributes of lodestar analysis are appropriate in fee-shifting cases such as this case. *See Johnston*, 83 F.3d at 245 (noting that the Third Circuit Task Force Report dated October 8, 1995, recommended the lodestar approach for statutory fee-shifting cases). *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995) (noting that "[b]ecause the lodestar award is de-coupled from the class recovery, the lodestar assures counsel undertaking socially beneficial litigation (as legislatively identified by the statutory fee shifting provision) an adequate fee irrespective of the monetary value of the final relief achieved for the class"). In their Complaint,[2] Consumer Plaintiffs invoked fee-shifting consumer laws providing the basis for recovery of attorneys' fees and costs, supporting the application of the lodestar approach in this case.

Under the lodestar approach, district courts within the Eighth Circuit apply four factors in determining whether requested attorneys' fees are reasonable: (1) "the number of hours spent in various legal activities by the individual attorneys"; (2) "the reasonable

[2] Consumer Plaintiffs' First Amended Consolidated Class Action Complaint, Count I ¶ 263, ECF No. 258.

hourly rate for the individual attorneys"; (3) "the contingent nature of success"; and (4) "the quality of the attorneys' work." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 127 (8th Cir. 1975).

Application of these factors is straightforward and supports the reasonableness of Class Counsel's requested fee. Class Counsel devoted substantial time and resources to litigating this case. In summary, their work included: successfully opposing Target's motion to stay discovery pending a ruling on its motion to dismiss; negotiating a stipulation governing disclosure and discovery of ESI, a subsequent supplemental stipulation governing joint e-discovery and numerous discovery issues, including a deposition protocol and an expert discovery stipulation; making Plaintiffs' initial disclosures, issuing their first set of document requests to Target and responding and objecting to Target's first request for documents; producing, receiving and reviewing a substantial volume of documents produced in discovery; defending depositions taken by Target of three Consumer Plaintiffs; jointly with Financial Institution Plaintiffs' Counsel, taking depositions of three former employees of Target, issuing eight third party subpoenas and successfully opposing a non-party's motion to quash subpoena and motion for a protective order litigated in the Northern District of California; and submitting an in-depth memorandum and supporting state law charts in opposing Target's motion to dismiss. See Esades Decl. I ¶¶ 10-25, ECF No. 358. And Lead Counsel appeared for Plaintiffs at all Court conferences, negotiated and prepared settlement documents, drafted preliminary approval papers and continues to work on settlement administration, including responding to numerous inquiries from Class Members.

At the outset of this MDL litigation, the Court directed all counsel to submit monthly time and expense reports to the Court for its *in camera* review. *See* Order for Appointment of Lead and Liaison Counsel and Preliminary Scheduling Order, ECF No. 64. Through Liaison Counsel, Michelle Drake, Nichols Kaster PLLP, Consumer Plaintiffs' Lead Counsel has submitted to the Court the hours billed and expenses incurred by Consumer Plaintiff firms in this matter. The most recent report submitted for time through May 2015 provides the aggregate lodestar amount of $8,893,103.80. This lodestar amount includes both time billed before May 15, 2014, when the Court appointed Lead and Liaison Counsel ($3,777,502.98), and time devoted to the case post-leadership appointment ($5,115,600.82). Esades Decl. II, Ex. 2.

In order to litigate this matter in an efficient and cost effective manner, Coordinating Lead Counsel Karl C. Cambronne, in consultation with Consumer Plaintiffs' Lead Counsel and Financial Institution Plaintiffs' Lead Counsel, directed all Plaintiff firms to use the lesser of their standard billing rates or the following harmonized rates in reporting their time to the Court in this matter:

Partners:	
1-5 years of practice	$425
6-10 years of practice	$500
11-20 years of practice	$550
21-30 years of practice	$625
More than 30 years	$675
Associates	$350
Paralegals and Law Clerks	$150

Throughout the litigation, Class Counsel's periodic reporting of time and expenses for the Court's *in camera* review has adopted these harmonized billing rates, which are

consistent with and well within (and even below) the rates typically approved in complex litigation in Minnesota. *See*, *e.g.*, *Yarrington*, 697 F. Supp. 2d at 1066 (recognizing partner rates ranging from $500-$800 "are based on prevailing fees for complex class actions of this type that have been approved by other courts"); *Austin v. Metro. Council*, No. 11-cv-03621-DWF-SER, slip op. ¶ 57 (D. Minn. Mar. 27, 2012) (ECF No. 27) (noting that attorney rate of $500 per hour was "at the lower end of complex class action rates approved in this District"); *Xcel Energy*, 364 F. Supp. 2d at 989-90, 1004 (implicitly approving attorney rates ranging from $225-$650); *Zurn Pex*, 2013 WL 716460, at *5 (approving $8.5 million fee award based on rates shown in supporting declaration and noting "[t]hese hourly rates are market rates similar to those charged by firms with expertise in class action and other complex litigation").

The third and fourth *Grunin* lodestar factors ("the contingent nature of the success" and "the quality of the attorneys' work"), discussed more fully below, further support Class Counsel's fee request under a lodestar analysis.

Courts recognize that "[i]n cases where fees are calculated using the lodestar method, counsel may be entitled to a multiplier to reward them for taking on risk and high-quality work." *In re UnitedHealth Group Inc. PSLRA Litig.*, 643 F. Supp. 2d at 1106 (using lodestar cross-check and finding appropriate a multiplier of nearly 6.5). *See MSG*, 2003 WL 297276, at *3 (finding "a multiplier of slightly less than 2" is "within the range of multipliers that courts typically use"); *Dworsky v. Bank Shares Inc.*, 1993 WL 331012, at *2 (finding a 2.75 multiplier appropriate); *Yarrington*, 697 F. Supp. 2d at 1067 (determining that multiplier of 2.26 times lodestar to be "modest" and reasonable "given

the risk of continued litigation, the high-quality work performed, and the substantial benefit to the Class"); *Xcel Energy*, 364 F. Supp. 2d at 999 (finding lodestar multiplier of 4.7 reasonable); *In re St. Paul Travelers Sec. Litig.*, Civ. No. 04-3801 JRT-FLN, 2006 WL 1116118, at *1 (D. Minn. Apr. 25, 2006) (approving multiplier of 3.9).

Here, after accounting for the requested expenses of $152,099.57, Class Counsel's fee request – if all time is considered – amounts to a negative multiplier of .74. This multiplier will continue to shrink as time spent implementing the settlement after May 30, 2015, is considered. Where the lodestar is greater than the requested fee award, as is the case here, discussion of multipliers is unnecessary. *See, e.g.*, *Fleisher v. Fiber Composites, LLC*, Civ. A. No. 12-1326, 2014 WL 866441, at *15 (E.D. Pa. Mar. 5, 2014) ("Where, as here, counsel requests a fee that represents less than their lodestar, 'there is no need to discuss multipliers and the appropriateness of an increase to the lodestar.'") (citation omitted).

Even if the Court excludes all pre-appointment time from consideration, the requested fee would reflect a modest multiplier of 1.29 – which again will decline as time after May 30, 2015 is considered. Such a modest multiplier is both appropriate and well within (indeed, at the lower end of) the range of multipliers frequently approved in this District.

Numerous factors support application of a reasonable multiplier on Class Counsel's lodestar as to post-leadership appointment time. Those factors include the diligence and efficiency of Class Counsel, the substantial settlement benefits achieved for the Class, the reasonableness of the harmonized, customary rates used consistent with

prevailing fees in complex class litigation, the fact Class Counsel undertook the case on a contingency basis, the substantial risk Class Counsel assumed and the high-quality work of Class Counsel in expeditiously moving this case to resolution in less than one year.

A final point on the application of lodestar analysis is in order. Consumer Plaintiffs' Lead Counsel intends to continue to exercise his responsibility of ensuring that "unnecessary expenditures of time and of funds are avoided." Order at 5, ECF No. 64 (detailing the duties of Lead Counsel). This Court appropriately expects sound billing judgment and has recognized in other cases that "[o]nly time and expenses authorized and incurred on matters that advance the litigation on behalf of all class members will be considered as compensable." *Dryer v. Nat'l Football League*, Civ. No. 09-2182 (PAM/AJB), 2013 WL 1408351, at *6 (D. Minn. Apr. 8, 2013). Consumer Plaintiffs' Lead Counsel will carefully evaluate and scrutinize Plaintiff firms' time and expense reports in allocating any fee and expense award.[3] Lead Counsel anticipates some

[3] Courts recognize that "submission of a combined fee application with actual allocation to be made by lead counsel has generally been adopted by the courts." *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *17 (E.D. Pa. June 2, 2004). "[F]rom the standpoint of judicial economy, leaving allocation to such counsel makes sense because it relieves the Court of the 'difficult task of assessing counsel's relative contributions.'" *Id.* at *18 (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 329 n. 96 (3d Cir. 1998)). Courts afford broad discretion to lead counsel in initially allocating attorneys' fee awards. *See In re Indigo Sec. Litig.*, 995 F. Supp. 233, 235 (D. Mass. 1998) (directing that "[a]ny and all allocations of attorneys' fees and expenses among counsel for all class representatives shall be made by lead counsel for the class, who shall apportion the fees and expenses based upon their assessment of the respective contribution to the litigation made by each counsel"); *In re Vitamin Cases*, No. 301803, 2004 WL 5137597, at *8 (Cal. Super. Ct. S.F. Cnty. Apr. 12, 2004) (stating that "[f]ederal courts nationwide have recognized that

appropriate reductions in pre-appointment billings, which could involve substantially discounting such time based on established criteria centered on class benefit. We recognize that just as the Supreme Court has held that the standard for evaluating fee awards is reasonableness, *see Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), Class Counsel's allocation must be fair and reasonable. *See, e.g.*, *Vitamin Cases*, 2004 WL 5137597, at *9. The Supreme Court has also cautioned that "[a] request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437. Should the Court award attorney fees and expenses in this matter, Lead Counsel will allocate the award on a fair and reasonable basis applying factors courts consider in awarding fees in class litigation, including each firm's contribution to the litigation for the benefit of the Settlement Class, the risks borne by counsel in litigating this complex case on a contingency fee basis, leadership and other roles assumed, lodestars, the quality of work performed, contributions made, the magnitude and complexity of assignments executed and the time and effort expended by counsel – all in accordance with the Court's directive in its Order for Appointment of Lead and Liaison Counsel and Preliminary Scheduling Order, ECF No. 64.

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lead counsel are generally better suited than the trial court to decide the weight and merit of the relative contributions made by those performing common benefit work"). Courts may review the reasonableness of the allocation if a dispute arises. *See, e.g.*, *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 224 (D.D.C. 2005) (determining that co-lead counsel have broad authority to make initial allocation of fee award but once law firm objected co-lead counsel's decisions were subject to court review under an abuse of discretion standard). If there are any issues arising from Lead Counsel's initial allocation of any award of fees and expenses, we will seek to resolve them without seeking the Court's assistance.

D. Class Counsel's Fee Request is Reasonable Under the Percentage of the Fund Approach.

The Supreme Court has "recognized consistently that . . . 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). The Eighth Circuit has upheld the use of a percentage of the fund approach. *Petrovic*, 200 F.3d at 1157. "In the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also well established." *Yarrington*, 697 F. Supp. 2d at 1061 (citations and internal quotation marks omitted). This Court has recognized that "in common fund cases, attorneys' fees are generally awarded as a percentage of the fund." *MSG*, 2003 WL 297276, at *1 (citation omitted).

The Eighth Circuit has not established mandatory factors for use by district courts in determining a reasonable percentage to award as attorneys' fees in a common fund case. *Xcel Energy*, 364 F. Supp. at 992. Early Eighth Circuit cases looked to the 12-factor test articulated in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-20 (5th Cir. 1974). In several recent cases, the court applied the following factors in determining a reasonable attorneys' fee award: "(1) the benefit conferred on the class, (2) the risk to which plaintiffs' counsel were exposed, (3) the difficulty and novelty of the legal and factual issues in the case, including whether plaintiffs were assisted by a relevant governmental investigation, (4) the skill of the lawyers, both plaintiffs and defendants, (5) the time and labor involved, including the efficiency in handling the case, (6) the

reaction of the class and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases." *Xcel Energy*, 364 F. Supp. 2d at 993; *Yarrington*, 697 F. Supp. 2d at 1062. These factors are similar to those referenced by this Court. *MSG*, 2003 WL 297276, at *1-2.

Because Target will pay all administrative and class notice costs, as well as any attorneys' fees approved by the Court, all outside of and in addition to the $10 million cash component of the Settlement, no Class Member's benefits will be reduced by administrative costs, notice expenses or attorneys' fees or expenses awarded by the Court.

It is appropriate to consider each of these components as directly benefiting each Class Member and therefore within the entire common benefit recovery. In *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2012 WL 5055810, at *5 (D. Minn. Oct. 18, 2012), Judge Montgomery preliminarily approved a class settlement in which the defendants agreed to pay for the costs of a claims administrator, an engineering consultant, class notice and up to $8.5 million in attorneys' fees, in addition to paying up to $20 million for class members' claims, "making the total value of this settlement approximately $30 million." In awarding attorneys' fees and expenses of $8.5 million, Judge Montgomery noted that the reasonableness of the award was shown by the fact that the amount does not impact the relief afforded to the class. *Zurn Pex*, 2013 WL 716460, at *3 (noting that "[t]he fact that fees and expenses will be paid separate from, and in addition to the class members' benefits, is an important consideration"); *see also In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-

1958, ADM/AJB, 2013 WL 716088, at *7 (D. Minn. Feb. 27, 2013) (granting final approval and noting that the settlement "provides up to $20 million to compensate class members" and "additional expenses, such as attorneys' fees, administrative costs, and notice costs, are all shouldered by [Defendants] and do not diminish class members' recovery").

Similarly, in awarding attorneys' fees representing 26% of the common fund, the court noted that the cash amount of the settlement ($1.103 million), attorney fees and expenses ($548,000) and administrative costs (estimated at $450,000) were all properly included within the common fund calculation:

> Under the percentage-of-the-fund method, it is appropriate to base the percentage on the gross cash benefits available for class members to claim, plus the additional benefits conferred on the class by the Settling Defendants' separate payment of attorney fees and expenses, and the expenses of administration. *See Boeing v. Gemert*, 444 U.S. 472, 479 (1980) ("Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery.") (citation omitted).

9-M Corp. v. Spring Commc'ns Co., Civ. No. 11-3401 (DWF/JSM), 2012 WL 5495905, at *2 (D. Minn. Nov. 12, 2012) (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 821).

As the Eighth Circuit has explained:

> Although under the terms of each settlement agreement, attorney fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source. The award to the class and the agreement on the attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery.

Johnston, 83 F.3d at 246. *See also Snell v. Allianz Life Ins. Co. of N. Am.*, No. Civ. 97-2784 RLE, 2000 WL 1336640, at *19 (D. Minn. Sept. 8, 2000) (awarding attorneys' fees of $6.6 million, concluding "we are fully satisfied that the requested award of attorneys' fees is both reasonable and deserving," and reasoning that "Class Counsel have secured a favorable recovery for the Class Members, and they should be commensurately rewarded for that recovery" and that the fee amount "comes from a source that does not impact upon the total settlement fund that is available to the Class"). *See also DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) (affirming district court's fee award where "[t]he vast majority of the fee will be paid by [defendant] and will not come out of any class recovery").

Additionally, it is appropriate for the Court to consider the significant non-monetary relief provided under the Settlement that benefits each and every member of the Settlement Class. *See, e.g.*, *Carlson v. C.H. Robinson Worldwide, Inc.*, No. Civ. 02-3780 JNE/JJG, 2006 WL 2671105, at *8 (D. Minn. Sept. 18, 2006) (approving fees representing 35.5% of $15 million common fund and noting that "[i]n addition to monetary relief, the settlement provides for substantial programmatic relief"); *Xcel Energy*, 364 F. Supp. 2d at 1003 (stating that "[d]espite the relief in this case being nonmonetary, plaintiff's counsel negotiated what could be coined 'therapeutic relief' for the class" going to "the very nature of the corporate governance" challenged by plaintiffs and that "[t]hese benefits are meaningful and justify an award of attorney fees"); *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1392 (8th Cir.

1990) (upholding fee award based on the substantial results achieved including both monetary terms and "substantial nonmonetary injunctive relief, past, present and future").

The total value of the common benefits secured by the Settlement to Class Members is approximately $23,320,816, consisting of the $10 million Settlement Fund; the $470,162.71 costs associated with the paid and earned media portions of the Court-approved Notice Plan (*see* Wheatman Decl. ¶ 4); the incurred and estimated future costs of E-mail Notice, Postcard Notice and settlement administration services provided by the Claims Administrator, Rust Consulting, Inc., in the estimated amount of approximately $6,100,654 (*see* Lake Decl. ¶ 5); and, if approved, the requested attorneys' fee and expense award of $6.75 million.

Application of the relevant percentage of the fund factors fully supports Class Counsel's fee request.

1. The Settlement confers substantial benefits to the Class.

The Settlement provides substantial benefits to all Class Members. The $10 million Settlement Fund will be distributed under a fair Distribution Plan attached to the Settlement Agreement and preliminarily approved by this Court. Preliminary Approval Order ¶ 12. The distribution process is consumer friendly, using a simple claim form and a claims submission process that is being ably administered online by the Settlement Administrator, Rust Consulting, Inc. No part of the $10 million Settlement Fund will revert to Target. Settlement ¶ 5.1.3. Target will pay all administrative costs, class notice expenses and any attorneys' fees and expenses awarded by the Court, which are clear and

direct benefits to the Class. *See Zurn Pex*, 2012 WL 5055810, at *5, and cases discussed *supra*.

Besides significant monetary relief, the Settlement provides substantial benefits to all Class Members in the form of non-monetary relief designed to safeguard customers' sensitive information held by Target. Dr. Larry Ponemon, an expert on data security, has submitted his opinion concerning the importance of these non-monetary relief measures:

> In my opinion, the equitable relief provided by this Settlement is of substantial value to the millions of consumers who are victims of the Target data breach incident and to consumers whose credit or debit card data and/or personal information is maintained or in the future will be maintained by Target, in the following ways:
>
> - Increases accountability and centralizes responsibility for data breach incident management;
> - Improves the company's ability to quickly detect and contain security threats through aggressive monitoring and agile response;
> - Raises the level of awareness and understanding about data security and privacy issues among the company's employees (who serve as the first line of defense); and
> - Reduces the risk of future data breaches for customers, consumers, employees and other stakeholders.

Decl. of Larry Ponemon, Ph.D. ¶ 17, ECF No. 361. Dr. Ponemon further opines that "[w]hile a corporate information security or privacy program can never guarantee the mitigation of all privacy and data protection risks, I believe that implementation of the requirements included in the Settlement will lead to important improvements in Target's protection of customer data to the benefit of all members of the proposed Settlement Class." *Id.* ¶ 18.

The fact that the Settlement compares favorably with settlements reached in other retailer data security breach cases (*see* Esades Decl. II ¶ 50 & Ex. 1) further underscores the significant benefits achieved for the Class under the Settlement.

In considering the Settlement, Class Counsel carefully weighed a range of factors, including the significant monetary and equitable relief offered by the Settlement, the uncertainty of trial, the fact that both sides faced the risks that a jury could react unfavorably to the evidence presented, and the uncertainties, risks, substantial expenses and significant delays associated with appeals that would inevitably be pursued following trial. Esades Decl. I ¶¶ 48-49.

The efficiency with which Class Counsel pursued case prosecution and achieved a beneficial settlement for the Class protected all Class Members' interests. All Class Members who submit valid claims will receive payment and will avoid the alternative of protracted trial and inevitable appellate proceedings that would diminish (or eliminate) the value of their recoveries. From the claims submitted so far, it is clear that Class Members with documented claims will have their claims reimbursed in full from the $10 million monetary relief component, with the remainder to be distributed pro rata in payment of all undocumented claims. Judge Kyle's reasoning in awarding attorneys' fees in a consumer class action settlement is equally applicable here:

> Absent the Settlement, this case . . . would continue to generate vigorously disputed issues of law and fact. Even if a class had been certified [defendant] likely would have contested liability, causation, and damages at trial. Additionally, the Settlement Class will receive settlement benefits faster than they would receive awards obtained after trial and a likely appeal. By itself, the cash settlement is beneficial to the Class, but weighed

> against the inherent risks of trial, the Court finds that the $16,500,000 cash settlement provides a substantial and immediate benefit to the Class.

Yarrington, 697 F. Supp. 2d at 1062. *See also Zurn Pex*, 2012 WL 5055810, at *6 (noting that the litigation "was hotly contested and its outcome was by no means certain" and that "[t]he Settlement provides the members of the Settlement Class with an immediate and substantial source of recovery while eliminating the risk that further litigation would yield little or no recovery").

The significant benefits, both monetary and non-monetary, provided to all Class Members under the Settlement, support Class Counsel's fee request.

2. The substantial risks to which Class Counsel were exposed.

"Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." *Xcel Energy*, 364 F. Supp. 2d at 994 (citation omitted). Risks "must be assessed as they existed in the morning of the action, not in light of the settlement ultimately achieved at the end of the day." *Id.* (citation omitted). At the commencement of this litigation, and throughout case prosecution, Class Counsel faced significant risks.

Even though Class Counsel were successful in largely defeating Target's motion to dismiss, and despite their firm belief that the record evidence identified and that would be marshalled for trial would establish Target's liability and prove damages on a class-wide basis, they faced multiple, ongoing and potentially case-ending risks. These include the significant risks and challenges of obtaining and maintaining class certification through trial based on the claims which survived Target's motion to dismiss, which are

based on state statutory and common law cutting across multiple jurisdictions. Risks further included establishing causation, an issue that has proved to be challenging and a barrier to consumer plaintiffs' success in retailer data breach litigation. Additional risks related to proving damages for class members, both those who suffered unauthorized charges, loss of access to their accounts and costs such as late fees, card replacement fees and credit monitoring services, as well as claims that all class members suffered imminent, certainly impending harm from potential fraud and identity theft as a result of the Target data breach. The litigation entailed the further risk that neither side could be sure of a favorable jury verdict, that further developments in the law or the factual evolution of the case could undermine Consumer Plaintiffs' claims and the risk that if class certification were achieved and maintained and the Class was successful in establishing liability at trial, the jury could award damages in an amount lower than that sought by the Class or the amount offered in the Settlement. Both sides also faced the uncertainties, risks, expense and significant delays associated with appeals that would inevitably be pursued following trial. *See* Esades Decl. I ¶ 49, ECF No. 358.

Judge Arthur J. Boylan, the experienced mediator who helped the parties in their negotiations, identified the substantial risks all parties faced in this litigation. Decl. of Hon. Arthur J. Boylan (Ret.) ¶ 7, ECF No. 360.

Such risks in complex class litigation are quite real. *See, e.g.*, *Xcel Energy*, 364 F. Supp. 2d at 994 (stating that "[t]he risk of no recovery in complex cases of this sort is not merely hypothetical" and that "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced

costs yet have lost the case despite their advocacy") (citing *Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002) (reversing class certification) and *In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437-38 (8th Cir. 1999) (affirming dismissal of complaint)). Indeed, there are many examples of cases in which plaintiffs succeeded at trial on liability but recovered little or no damages following a trial or an appeal. *See, e.g., U.S. Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1174 (7th Cir. 1983) (antitrust judgment remanded for new trial on the issue of damages); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (after two trips to the Second Circuit and one to the Supreme Court, plaintiffs and the proposed class recovered nothing). As one court aptly remarked, "[i]t is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971).

Class Counsel undertook this litigation on a wholly contingent basis:

> From the outset, we understood we were embarking on extensive and costly litigation through an evolving data breach jurisprudence landscape, all the while confronting highly skilled lawyers who would vigorously advocate Defendant's cause and uncertain as to whether our firms would ever receive any compensation for the significant investment of time and money in advancing the interests of the Class. The commitment of time, staff and financial resources made by Plaintiffs' Lead Counsel and Class Counsel . . . was substantial. Consumer Plaintiffs' Lead and Class Counsel assumed these resource and financial burdens regardless of whether a recovery would ever reimburse their firms for out-of-pocket expenses or compensate

> them for any of the time and effort they dedicated to this case on behalf of the Class.

Esades Decl. I ¶ 47, ECF No. 358.

The contingent nature of the case and the substantial risks involved in this complex litigation strongly support Class Counsel's fee request. *Gunter v. Ridgewood Energy Corp.*, 223 F. 3d 190, 195 n.1, 199 (3d Cir. 2000) (explaining that the risk counsel takes in prosecuting a client's case should be considered in assessing a fee award); *Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J. concurring) (noting "the risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee"); *Yarrington*, 697 F. Supp. 2d at 1062-63 (reasoning that "[g]iven the numerous state laws that would likely be at issue, the Court recognizes that certifying a class would have presented some difficulties," that "the trial of their claims under multiple state consumer laws would have required substantial preparation and involved the presentation of dozens of witnesses and numerous experts, with no assurance of a favorable outcome" and finding that "the significant risk undertaken by Settlement Class Counsel supports the reasonableness of the 33% attorneys' fee award"); and *Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1083 (D. Minn. 2009) ("In the Eighth Circuit, courts must take 'into account any contingency factor' where plaintiffs' counsel assumes a 'high risk of loss.' Plaintiffs' counsel assumed the risk this case would 'produce no fee,' and courts see fit to reward such gambles.") (citations omitted). *See also Dryer v. Nat'l Football League*, Civ. No. 09-2182 (PAM/AJB), 2013 WL 5888231,

at *4-7 (D. Minn. Nov. 1, 2013) (preliminarily approving settlement after considering that "it is likely that the law of many jurisdictions will apply to Plaintiffs' claims," class members' varying damages, and the numerous benefits of the settlement for class members).

3. This litigation presents complex issues of fact and law.

As reflected in this Court's comprehensive motion to dismiss opinion, this case involves many complex factual and legal issues. These issues include Target's various challenges to Consumer Plaintiffs' standing; the basis for and Consumer Plaintiffs' entitlement to injunctive relief; Plaintiffs' ability to bring consumer protection claims in 49 jurisdictions; the application of state consumer laws and data breach statutes in multiple jurisdictions; issues involved in Consumer Plaintiffs' negligence claims (including whether Target owed them a duty to reasonably safeguard sensitive customer data and to provide timely notice of the data breach, breach of duty, damages, and causation, as well as application of the economic loss doctrine in various jurisdictions); and the application of multiple state laws governing Consumer Plaintiffs' implied contract and unjust enrichment claims.

Also, while Class Counsel reviewed the Senate Report on the Target data breach, drawing from news reports Class Counsel had examined, no federal or state governmental agency provided any assistance to Class Counsel's prosecution of the case or contributed in any way to the achievement of the Settlement. This case did not follow on the heels of any guilty pleas following government investigations or prosecutions. The Settlement's substantial benefits to the Class are attributable solely to the efforts of

Class Counsel. *See In re AT&T Corp., Sec. Litig*., 455 F.3d 160, 173 (3d Cir. 2006) (absence of assistance from any government group supported district court's conclusion that the fee award to class counsel was fair and reasonable).

The complexity of the factual and legal issues presented by this litigation supports Class Counsel's request for fees. *See Dryer*, 2013 WL 5888231, at *3 (approving settlement where "[t]here is no doubt that further litigation in this matter would be both complex and extraordinarily expensive"; "[t]he class certification process would undoubtedly be hard-fought and would also require a detailed analysis of the claims of the class members"; "Plaintiffs' claims themselves are complex"; and damages determinations would be "exceedingly time-consuming and complex"); *Yarrington*, 697 F. Supp. 2d at 1063 ("Moreover, the trial of claims under multiple state consumer-protection laws would have heightened the complexity of the factual and legal issues being presented.").

4. The skill and efficiency of counsel.

In appointing Lead and Liaison Counsel, the Court noted that "all of the lawyers applying for leadership positions have excellent credentials and more than sufficient experience and expertise to serve in leadership roles in the litigation, as Rule 23(g)(1)(A) requires." Order for Appointment of Lead and Liaison Counsel and Prelim. Scheduling Order, ECF No. 64. In preliminarily approving the Settlement, the Court designated Settlement Class Counsel, finding, pursuant to Fed. R. Civ. P. 23(g), that they are "experienced and adequate counsel." Prelim. Approval Order ¶ 2, ECF No. 364. In its Order for Reappointment of Lead and Liaison Counsel, the Court renewed Class

Counsel's leadership appointments for an additional year after noting that "[t]he Court is satisfied that all appointed counsel had faithfully discharged their duties." ECF No. 436.

In efficiently litigating and settling this litigation, Class Counsel have sought to earn the Court's trust and confidence. Class Counsel are some of the leading plaintiff class action litigation firms in the country, with deep experience prosecuting and trying complex actions. Lead Counsel and Class Counsel devoted substantial time and resources to this case, including developing the factual basis of the claims, working with experts, filing pleadings, resisting Target's multiple challenges to the Complaint, engaging in motion practice, conducting discovery (including requests for production of documents, significant document production and review, and deposition discovery), negotiating a favorable class settlement under the supervision of Judge Boylan, drafting the settlement papers, responding to the numerous inquiries from class members, continuing to work through settlement administration issues, and advocating for final approval of the Settlement.

The result achieved here is particularly noteworthy considering the track record for data breach class actions. Many cases have failed at the motion stage either for lack of plaintiff standing or failure to assert valid claims. *See, e.g., Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 10 (D.D.C. 2007); *Bell v. Acxiom Corp.*, No. 4:06-cv-00485-WRW, 2006 WL 2850042, at *2 (E.D. Ark. Oct. 3, 2006); *Key v. DSW, Inc.*, 454 F. Supp. 2d 684, 690 (S.D. Ohio 2006); *Giordano v. Wachovia Sec., LLC*, Civ. No. 06-476 (JBS), 2006 WL 2177036, at *5 (D.N.J. July 31, 2006); *Hammond v. Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060 (RMB) (RLE), 2010 WL 2643307, at *2 (S.D.N.Y. June

25, 2010); *Krottner v. Starbucks Corp*., 406 Fed. Appx. 129, 130 (9th Cir. 2010). Cognizant of such rulings, Class Counsel carefully vetted Consumer Plaintiffs whose facts demonstrated standing, advanced solid standing theories and deliberately streamlined the litigation by focusing on a core set of the strongest legal claims. That approach was largely validated in the Court's motion to dismiss opinion that has significantly contributed to the constellation of rulings allowing consumer challenges to retailer data breaches to proceed. *See, e.g., In re Sony Gaming Networks and Customer Data Security Breach Litig.*, 996 F. Supp. 2d 942 (S.D. Cal. 2014); *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151 (1st Cir. 2011); and *In re Adobe Sys., Inc. Privacy Litig.*, No. 13-CV-05226-LHK, 2014WL 4379916 (N.D. Cal. Sept. 4, 2014).

We respectfully urge the Court to consider the applicability here of Judge Doty's observation that "[c]ounsel – both the lawyers representing lead plaintiffs and defendants – conducted themselves in an exemplary manner." *Xcel Energy*, 364 F. Supp. 2d at 995. We believe that the significant benefits conferred on the Settlement Class appropriately reflect Class Counsel's skill, dedication and efficiency:

> All counsel consistently demonstrated considerable skill and cooperation to bring this matter to an amicable conclusion. Thus, the effort of counsel in efficiently bringing this case to fair, reasonable and adequate resolution is the best indicator of the experience and ability of the attorneys involved, and this factor supports the court's award of 25%.

Id. See also Yarrington, 697 F. Supp. 2d at 1063 (noting that "Plaintiffs' counsel have advanced and fully protected the common interests of all Members of the Settlement Class and have successfully navigated the complex legal and factual issues presented," and that defendants' "attorneys consist of multiple well-respected and capable defense

firms," and concluding that "[c]ounsel for all parties exhibited a great deal of skill in advocating on behalf of their clients and in bringing this case to a fair and reasonable resolution"). This factor further supports Class Counsel's request for fees.

5. Class Counsel invested significant time and effort in litigating and settling this case.

As discussed previously in the lodestar analysis section of this memorandum, Lead and Class Counsel devoted substantial time and resources in advancing the interests of the Class through litigation and a prompt, beneficial settlement.

In awarding fees, Courts have consistently recognized and rewarded class counsel for moving the litigation to conclusion with diligence and efficiency. *See Yarrington*, 697 F. Supp. 2d at 1063. As Judge Doty reasoned:

> [P]laintiffs' counsel presented a reasonable lodestar in a case that was not yet ancient, but easily could have become so. But for the cooperation and efficiency of counsel, the lodestar plaintiffs' counsel would have been substantially more and would have required this court to devote significant judicial resources to its management of the case. Instead, counsel moved the case along expeditiously, and the court determines that the time and labor spent to be reasonable and fully supportive of the 25% attorney fee.

Xcel Energy, 364 F. Supp. 2d at 996. This factor, like the others, weighs in favor of approving Class Counsel's fee request.

6. The reaction of the Class.

Class Members have not had a full opportunity to review Class Counsel's fee application. Following notice to the more than 97 million Class Members as approved by the Court, including notice that Class Counsel would seek approval of fees and expenses up to $6.75 million, Class Members have until July 31, 2015 to opt-out of the Class or

object to the Settlement, including to Class Counsel's fee request. Class Counsel will inform the Court of Class Members who have chosen to exclude themselves from the Class and will provide information concerning any objections in advance of the Final Approval Hearing. To date, only one objection to the Settlement, including Class Counsel's fee request, has been filed and 228 requests for exclusion have been received by the Claims Administrator. Esades Decl. II ¶ 67.

The favorable reaction of the Class provides further support for Class Counsel's fee request. *See, e.g.*, *Xcel Energy*, 364 F. Supp.2d at 996-97 (noting notices mailed to over 265,000 potential class members and concluding that "careful consideration of the merits of the seven [fee] objections and the minuscule number of total objections received in light of the size of the class" supports the fee award); *Yarrington*, 697 F. Supp. 2d at 1064 (concluding "the Settlement Class strongly supports Settlement Class Counsel's request for attorneys' fees of 33% of the Settlement Fund, based on the fact that only one untimely objection was made"); and *In re Ikon Office Solutions, Inc. Sec. Litig*., 194 F.R.D. 166, 179 (E.D. Pa. 2000) (six objectors constituted an "extremely limited" number).

7. The requested fee is well within the range of fees approved in similar cases.

Class Counsel's fees and expenses request of $6.75 million represents an estimated 28.9% of the previously discussed common fund benefits of $23,320,816 Class Counsel achieved for the Class, even without including the significant non-monetary relief benefits secured to all Class Members under the Settlement.

The requested fee award falls squarely within the range of percentages deemed reasonable and awarded in other cases. Courts in the Eighth Circuit and this District "have frequently awarded attorney fees between 25-36% of a common fund in other class actions." *Xcel Energy*, 364 F. Supp. 2d at 998 (collecting cases). In *MSG*, this Court noted that "[m]ost courts applying the percentage-of-the-fund approach award fees in the 25% to 30% range, adjusting up or down for the circumstances of the case." *MSG*, 2003 WL 297276, at *1 (noting that "the Court is convinced that Plaintiffs' counsel is entitled to a substantial award" and concluding that "an award of 30% of the settlement fund is reasonable," *id*. at *2, *3). *See also In re US Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (36% of $3.5 million settlement fund awarded); *In re Control Data Sec. Litig.*, No. 3:85-cv-01341 JMR-FLN, slip. op. (D. Minn. Sept. 23, 1994) (cited by the *Xcel Energy* Court as awarding 36.96% of $8 million settlement fund); *Harris v. Republic Airlines, Inc.*, No. 4:88-cv-1076, 1991 WL 238992, at *2 (D. Minn. Nov. 12, 1991) (awarding "slightly in excess of 30% of the common fund"); *Carlson v. C.H. Robinson Worldwide, Inc.*, 2006 WL 2671105, at *8 (approving fee of $5,325,000, amounting to 35.5% of the settlement fund of $15 million and finding the fee "is within the range established by other cases"); *Yarrington*, 697 F. Supp. 2d at 1064-65 (approving fee award of 33% of $16.5 million common fund as "certainly within the range established by other cases in this District," after noting that "this Court has recently approved attorney fee awards in other cases amounting to between 30-36% of a common settlement fund") (citations omitted); *9-M Corp.*, 2012 WL 5495905, at *3 (stating that "[a]t 26

percent of the value of the fund as a whole, the fee-and-expense award would be well within the range of reasonable percentage-fee awards in this Circuit") (citations omitted).

Additionally, the requested fee award is consistent with attorneys' fees awarded by other federal courts, which frequently award fees of one-third of the value of class action settlements. *See, e.g., In re Wellbutrin XL Antitrust Litig.*, No. 2:08-cv-2431, slip op. at 8 (ECF No. 485) (E.D. Pa. Nov. 7, 2012) (awarding one-third fee on settlement of $37.5 million); *In re Metoprolol Succinate Antitrust Litig.*, No. 06-52-MPT, slip op. at 9 (ECF No. 194) (D. Del. Feb. 21, 2012) (awarding one-third fee on settlement of $20 million); *Rochester Drug Coop, Inc. v. Braintree Labs., Inc.*, C.A. No. 07-142-SLR, slip op. at 9 (ECF No. 243) (D. Del. May 31, 2012) (awarding one-third fee on settlement of $17.5 million).

This factor, too, supports Class Counsel's fee request.

IV. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES.

"'The common fund doctrine provides that a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation . . . .'" *Zilhaver v. UnitedHealth Group*, 646 F. Supp. 2d 1075, 1084-85 (D. Minn. 2009) (citing *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 820 n.39).

Class Counsel respectfully request reimbursement of the $152,099.57 of out-of-pocket expenses they have incurred to date in this litigation (based on aggregate expenses reported to the Court through May 2015). These expenses are summarized in the

accompanying supporting declaration of Lead Counsel and are based on the expenses of Plaintiffs' firms reported to the Court during the course of the litigation. Esades Decl. II ¶ 64 & Ex. 5. Class Counsel incurred these expenses in the course of this litigation, all the while having no assurance of repayment. *Id.*¶ 52. Because expenses were incurred without any guarantee of reimbursement, Class Counsel had a strong incentive to keep them reasonable. As previously discussed, Lead Counsel intends to bring the same careful additional scrutiny to these out-of-pocket expenses, with an eye towards potentially discounting pre-leadership appointment expenses, to ensure payment of expenses reasonably incurred and necessary for the benefit of the Class. In fact, Lead Counsel eliminated from total reported expenses ($258,682.57) numerous categories of expenses, including over $125,000 in submitted expenses incurred for, *inter alia,* travel to the Judicial Panel on Multidistrict Litigation proceedings in San Diego, or travel and other organizational activities and meetings before Lead Counsel was appointed. *Id*. at ¶ 64. These reductions appropriately cut reported expenses to those included in Class Counsel's requested expense award.

Courts routinely approve expenses incurred in the prosecution of complex cases. *See, e.g., Zurn Pex,* 2013 WL 716460, at *5 (finding that "the requested costs and expenses are appropriate and reasonable" and that "[s]uch expenses are related and necessary to the prosecution of this type of litigation and are properly recovered by counsel who prosecute cases on a contingent basis," and further noting that "costs will be reimbursed from the $8.5 million and will not reduce the benefits available to class members"); *Yarrington*, 697 F. Supp. 2d at 1067 (approving reimbursement of

$245,720.31 in out-of-pocket expenses, including filing fees, expenses associated with research, preparation, filing and responding to pleadings, costs associated with copying, uploading and analyzing documents, fees and expenses for experts and mediation fees, as well as computer-based legal research, and noting that "[a]ll of these costs and expenses were advanced by Settlement Class Counsel with no guarantee they would ultimately be recovered, and most were 'hard' costs paid out of pocket to third-party vendors, court reporters, and experts"); *Zilhaver*, 646 F. Supp. 2d at 1085 (noting that "Plaintiffs' counsel has detailed its expenses," "[t]he Court finds them reasonable and necessary" and therefore reimburses counsel's expenses of $212,629.01); and *MSG*, 2003 WL 297276, at *3 (awarding 30% of settlement fund as reasonable attorneys' fee and determining that plaintiffs' counsel are also entitled to "the costs claimed in the Application").

V. CONCLUSION

Consumer Plaintiffs' Lead Counsel, on behalf of all Class Counsel and the Settlement Class, respectfully requests that the Court approve service awards in the amount of $500 for each of 110 Class Representatives and in the amount of $1,000 for the three Class Representatives who were deposed by Target, and that the Court approve an award of attorneys' fees and expenses in the aggregate amount of $6.75 million. Both requests are fair, reasonable and satisfy all legal standards.

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Respectfully submitted,

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