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WINSTON FERNANDEZ,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

AUS, INC.,

Defendant.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:
BURLINGTON COUNTY**

Docket No. BUR-L-00674-24

**PLAINTIFF’S UNOPPOSED MOTION FOR
ATTORNEYS’ FEES, EXPENSES, AND SERVICE AWARDS**

Plaintiff Winston Fernandez, individually and behalf of others similarly situated (“Plaintiff”), hereby moves this Court to:

1. Enter an order awarding Plaintiff and Class Counsel \$200,000 in combined attorneys’ fees and reasonable case expenses, and;
2. Awarding Plaintiff a service award in the amount of \$2,500 for his work

on behalf of the Settlement Class in this matter.

3. Defendant does not oppose the relief sought in this motion, and to date, there has been no objection from any Settlement Class Member to the amount of fees and service awards, despite these amounts being publicized to the Settlement Class by way of the Notice Program.

4. This Motion is based upon: (1) this Motion and supporting brief; (2) the Brief in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement; (3) the Declaration of David K. Lietz filed herewith; (4) the Settlement Agreement; (5) the records, pleadings, and papers filed in this action; and (6) upon such other documentary and oral evidence or argument as may be presented to the Court at or prior to the hearing of this Motion, which shall be taken up at the Final Approval Hearing currently scheduled for March 3, 2025.

DATED: January 15, 2025

Respectfully submitted,

/s/ Vicki J. Maniatis

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*Counsel for Plaintiff and
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CERTIFICATE OF SERVICE

I, Vicki J. Maniatis, hereby certify that on this date, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court via this Court's CM/ECF System, which will send notice to all counsel and/or parties by electronic filing and/or regular mail.

DATED: January 15, 2025

/s/ Vicki J. Maniatis
Vicki J. Maniatis

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**BRIEF IN SUPPORT OF PLAINTIFF’S UNOPPOSED MOTION
FOR ATTORNEYS’ FEES, EXPENSES, AND SERVICE AWARDS**

Plaintiff Winston Fernandez, on behalf of himself and all others similarly situated (“Plaintiff”), hereby submits the following memorandum in support of Plaintiff’s Motion for Attorneys’ Fees, Expenses, and Service Awards.

I. INTRODUCTION

On November 1, 2024, this Court preliminarily approved a proposed class action settlement between Plaintiff and Defendant AUS, Inc. (“Defendant” or “AUS”). The Settlement negotiated on behalf of the Settlement Class provides for five forms of compensation: (1) reimbursement for up to four hours of lost time at \$30 per hour; (2) compensation for documented Ordinary Losses up to \$400 per claim; (3) compensation for documented Extraordinary Losses up to \$4500; (4) two years of three-bureau credit monitoring, or (5) an Alternative Cash payment of \$115 in lieu of all the other benefits. Settlement Agreement (“S.A.”) ¶ 2.1.

In addition to the monetary and credit monitoring benefits, Plaintiff also negotiated for and received commitments from AUS that it has implemented information security enhancements and will continue them in the future. S.A. ¶ 2.2.

Settlement Class Counsel has zealously prosecuted Plaintiff’s claims, achieving the Settlement Agreement only after an extensive investigation and prolonged arm’s-length negotiations. Even after coming to an agreement to settle, Settlement Class Counsel worked for months to finalize the Settlement Agreement and associated exhibits pertaining to notice, preliminary approval, and final approval.

As compensation for the substantial benefit conferred upon the Settlement Class, Settlement Class Counsel respectfully moves the Court for a combined award

of attorneys' fees and expenses totaling \$200,000, which represents no more than thirty-three percent (33%, or one third) of the Settlement benefit created by Settlement Class Counsel. New Jersey state and federal courts have expressly and repeatedly approved fees based on the potential recovery to the class that equal 19% to 45% of the benefit obtained. Plaintiff's motion should be granted because: (1) the request is reasonable and appropriate in light of the substantial risks presented in prosecuting this action, the quality and extent of work conducted, and the stakes of the case; (2) the requested fees and costs were clearly delineated in notice to the class, and no class member has objected; and (3) the costs incurred were reasonable and necessary for the litigation. Plaintiff also respectfully moves the Court for a service award of \$2,500.00 to Plaintiff for his work on behalf of the Settlement Class.¹

II. INCORPORATION BY REFERENCE

In the interest of judicial efficiency and for factual and procedural background on this case, Plaintiff refers this Court to and hereby incorporates Plaintiff's Motion for Preliminary Approval of Class Action Settlement filed on September 27, 2024,

¹ While Plaintiff here moves for attorneys' fees, expenses, and service awards, he will move for final approval of the settlement by separate motion, which will be filed prior to the final fairness hearing.

and the accompanying Exhibits, including the proposed Settlement Agreement, filed in conjunction therewith.

III. SUMMARY OF SETTLEMENT

A. Settlement Benefits

The Settlement negotiated on behalf of the Settlement Class provides for multiple forms of relief. Settlement Class Members will have the opportunity to make a claim for Lost Time, Ordinary Losses, Extraordinary Losses, and credit monitoring. S.A. ¶¶ 2.1(a) & (b). Alternatively, Settlement Class Members can make a claim for an Alternative Cash Payment in the amount of \$115. Id. ¶ 2.1(c). The Settlement also specifies that AUS has implemented information security enhancements and, under the terms of the Settlement, has committed to continue them in the future. Id. ¶ 2.2.

Notably, the relief is uncapped in the aggregate, meaning that each and every one of the Settlement Class Members may claim the full amount of any of the forms of relief offered. For purposes of this motion, that means that all 3,365 Settlement Class Members may claim the \$115 Alternative Cash Payment, which means that the Class relief is not less than \$386,975. Adding the estimated \$19,000 in Settlement Administration costs, the requested \$200,000 in combined attorneys' fees and expenses, and the requested Service Award of \$2500, the total value of this Settlement is not less than \$608,475, and the requested fees are almost exactly 33%

of that amount.

B. Fees, Expenses, and Service Award

The Parties did not discuss the payment of attorneys' fees, costs, expenses, and/or a service award to Plaintiff until after the substantive terms of the Settlement Agreement had been agreed upon. *See* Declaration of David K. Lietz filed with Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("Lietz MPA Decl.) ¶ 44. After reaching agreement on all material terms of the Settlement Class relief, the Parties agreed that Plaintiff may seek, and AUS would not oppose, a combined attorneys' fee and expense award of \$200,000.

It is important to note that this Settlement is *uncapped in the aggregate*, meaning that each and every one of the 3,365 Settlement Class Members can claim up to 4500 in Ordinary Losses and Lost Time, as well as any Extraordinary Losses of up to \$4500, as defined in the Settlement Agreement, and two years of three-bureau credit monitoring protection (which has a retail value of not less than \$8.95 per month, the lowest current retail price for three-bureau monitoring, or \$214.80 for 24 months). That means the potential value of the credit monitoring service alone offers a potential benefit of over \$722,902 to the Settlement Class, the potential value of the compensation for Ordinary Losses and lost time is over \$1.34 million, and the potential value of compensation for Extraordinary Losses protection is over \$15 million, ensuring that every Settlement Class Member has the opportunity to be

made whole under the Settlement Agreement. The attorneys' fees requested are just a fraction of the potential value of this Settlement.

But, as shown above, under the most conservative valuation (where every Settlement Class Member can claim the \$115 Alternative Cash Payment, the overall value of this Settlement is estimated to be \$608,475. Thus, the fees requested represent only 33% of the Settlement Benefit. Settlement Class Counsel's fee request is well within the range of reasonableness for settlements of this nature and size.

The Settlement Agreement calls for a reasonable service award to be sought for Plaintiff in the amount of \$2,500. The service award is meant to compensate Plaintiff for his efforts on behalf of the Settlement Class. In addition to lending his name to this matter, and thus subjecting herself to public attention, Plaintiff was actively engaged in this action, which included, among other things, maintaining contact with counsel, assisting in the investigation of the case, producing relevant documents, reviewing and approving pleadings, remaining available for consultation throughout the mediation, reviewing the Settlement documents, and answering counsel's many questions. Declaration of David K. Lietz in Support of Plaintiff's Motion for Attorneys' Fees ("Lietz. Fee Decl."), Expenses, and Service Award, attached hereto as **Exhibit A**. ¶¶ 27-31.

Settlement Class Counsel's fees were not guaranteed. The purely contingent basis upon which Settlement Class Counsel took the case meant that Settlement

Class Counsel assumed significant risk. Settlement Class Counsel spent time on this matter that could have otherwise been spent on other, fee-generating matters, and shouldered the risk of expending substantial costs and time without any monetary gain in the case of adverse judgment.

Due to the early stage of litigation at which Plaintiff was able to reach settlement, costs incurred by Plaintiff are relatively low. Plaintiff's current costs are \$11,145.70, which includes the filing of the complaint in federal court, and the refiling in this Court, pro hac vice admission fees, a filing fee for the Motion for Preliminary Approval, and the cost of the mediator. *Id.* ¶25. These costs are reasonable and were necessary for the litigation.

IV. LEGAL STANDARD

New Jersey courts consider two different approaches to analyzing a request for attorneys' fees: the lodestar method and the percentage-of-fund (or percent-of-benefit or percent-of-recovery) method. *See Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, 406 N.J. Super. 86, 103, 966 A.2d 508, 519 (App. Div. 2009).²

² Because N.J. Ct. R. 4:32 strongly tracks Fed.R.Civ.P. 23, cases applying the federal rule are instructive. *See, e.g., Saldana v. City of Camden*, 252 N.J. Super. 188, 194 n.1 (App. Div. 1991) ("Since R.4:32 is modeled after Fed. R. Civ. P. 23(a) and (b), treatises discussing the federal rule and federal cases may, although not binding, be considered persuasive authority.") (*citing Kronisch v. Howard Sav. Inst.*, 133 N.J. Super. 124, 138 (Ch. Div. 1975), *rev'd on other grounds*, 143 N.J. Super. 423 (App. Div. 1976)); *Morris County Fair Housing Council*, 197 N.J. Super. at 359 (holding it is appropriate to seek guidance from federal case law in determining the procedures and standards for approval of class action settlements since N.J. R. 4:32-2 was taken from and is identical to F.R.C.P.

Each has “distinct attributes suiting them to particular types of cases.” *Id.*, quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litg.*, 55 F.3d 768, 821 (3d Cir.), *cert. denied sub nom, GMC v. French*, 516 U.S. 824 (1995). A “court making or approving a fee award should determine what sort of action the court is adjudicating and then primarily rely on the corresponding method of awarding fees.” *Id.* The ultimate choice of methodology rests within the court's discretion. *Id.*

The lodestar method is usually used in fee-shifting case. *Id.* In cases like this one, where a “common benefit” has been created by Settlement Class Counsel, New Jersey courts employ the “percentage recovery method.” *Id.* As the court in *Sutter* wrote:

The percentage recovery method, also known as the “common fund” method, 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, including attorneys' fees.” *Id.* at 820 n. 39. “Courts use the percentage of recovery method in common fund cases on the theory that the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class.” *Id.* at 821. Because there is no fee statute, common fund cases are not presumed to serve the public interest, so there is “no social policy reason that demands an adequate fee.” *Ibid.*

Instead, the court apportions the fund between the class and its counsel in a manner that rewards counsel for success and penalizes it for failure.

23(e) in light of limited discussion in New Jersey case law of procedures to be followed in presenting proposed settlements of class actions for judicial approval); *Muise v. GPU, Inc.*, 371 N.J. Super. 13, 30-31 (App. Div. 2004) (“construction of the federal rule may be considered helpful, if not persuasive, authority”).

Courts have relied on “common fund” principles and the inherent management powers of the court to award fees to lead counsel in cases that do not actually generate a common fund. The rationale behind the percentage of recovery method also applies in situations where, although the parties claim that the fee and settlement are independent, they actually come from the same source.

Sutter, 406 N.J. Super. At 104–05, 966 A.2d at 519.

Under the percentage-of-recovery method, a court must (1) value the proposed settlement and (2) decide what percentage of the proposed settlement should be awarded as attorneys' fees. *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 129 (D.N.J. 2002). In valuing a settlement offer, the court must “determine a precise valuation of the settlement on which to base its award.” *Id.* (quoting *In re Gen. Motors Corp.*, *supra*, 55 F.3d at 822). In a common fund case, the trial court should consider certain factors in determining the percentage of fees awarded. *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n. 1 (3d Cir.2000). Those factors include: (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of non-payment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) awards in similar cases. *Sutter*, 406 N.J. Super. At 105, 966 A.2d at 519–20. Other pertinent factors under *Gunter* include the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained; and

any innovative terms of settlement. *Gunter*, 223 F.3d at 195 n.1;

Armed with these legal principles, the requested attorneys' fees and expenses are fair and reasonable, and should be approved by this Court.

V. LEGAL ARGUMENT

A. The Settlement Class Has Received Reasonable Notice of the Requested Fees and Litigation Expenses, and Has Been Given a Reasonable Opportunity to Object

N.J. Ct. R. 4:32-2(h) (h) provides that “[n]otice of the motion [for an award of attorneys’ fees and costs] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.” N.J. Ct. R. 4-32-2(h). Settlement Class Counsel has provided reasonable notice of this motion, through direct notice efforts and has afforded Settlement Class Members an opportunity to object to such motion. Lietz Fee Decl. ¶¶ 8-12.

i. Summary of the Notice.

The Court appointed Atticus Administration, LLC (“Atticus” or the “Claims Administrator”) as Claims Administrator. Pursuant to this Court’s order, Atticus effectuated a notice program (outlined in the Declaration of Chris Longley, attached to the Memorandum in Support of Plaintiff’s Unopposed Motion for Preliminary Approval as Exhibit 3) that constitutes the best notice practicable and ensures that Settlement Class Members are apprised of their rights. The Notice Plan provided for individual direct notice to all reasonably identifiable Settlement Class Members

through U.S. postal mail. The Notice Plan further required the creation of a dedicated settlement website where Settlement Class Members can learn more about their rights and options pursuant to the terms of the Settlement.

Notably, the Short Form notice that was approved by this Court and subsequently mailed to Settlement Class Members directly informed the Settlement Class Members that the Court will hold a hearing on whether to approve Settlement Class Counsel's Application for Attorneys' Fees and Expenses of up to \$200,000. *See* Exhibit B to the Settlement Agreement, attached as Exhibit 1 to Plaintiff's Unopposed Motion for Preliminary Approval filed September 27, 2024. The Long Form Notice (Exhibit C to the Settlement Agreement), which is posted on the Settlement Website, contains similar information about the \$200,000 attorneys' fees and expenses, and also the \$2,5000 Service Award.

ii. Timing of Motion for Fees and Costs and Opportunity to Object.

The schedule approved by the Court requires Settlement Class Counsel to file their Motion for an Award of Attorneys' Fees and Reimbursement of Costs in advance of the deadline for asserting objections. Under the Preliminary Approval Order, objections to the Settlement, including the request for attorneys' fees and costs, are due no later than 60 days after the Notice Commencement date, or January 27, 2025. As such, Settlement Class Members have almost two weeks after the filing of this motion to lodge any objections to the requested Fee and Expenses Award.

Settlement Class Members will be able to view this motion for fees and costs and supporting papers on the Settlement website.

Other courts have held that periods of two weeks constitute a reasonable time frame; thus this schedule provides the Settlement Class with a reasonable amount of time to object to this motion. *See, e.g., In re Imprelis Herbicide Mktg., Sales Practices & Prods. Liability Litig.*, 296 F.R.D. 351 (E.D. Pa. 2013) (granting fee award where class members had two weeks to review motion); *Batmanghelich v. Sirius XM Radio, Inc.*, No. CV 09-9190, 2011 U.S. Dist. LEXIS 155710, at *5 (C D. Cal. Sept. 13, 2011) (“Plaintiff’s application for attorneys’ fees and costs and a Class Representative service payment was filed with the Court and made available for Class Members to review on the settlement website two weeks prior to the deadline for Class Members to file objections to the Settlement, giving Class Members adequate time to review the application and object to the attorneys’ fees, costs and/or service payment.”).

Plaintiff has satisfied all requirements of N.J. Sup. Ct. R. 4-32-2(h).

B. Plaintiff’s Request for Combined Fees and Expenses is Reasonable and Should be Approved

Settlement Class Counsel here seeks \$200,000 in combined fees and costs, or approximately 33% of the monetary benefit of the Settlement if only 2% of the Settlement Class submit claims for identity theft protection and Ordinary Losses. “The Parties to the Settlement have agreed that Settlement Class Counsel may seek,

and Defendant will not oppose, this amount of fees and expenses. Courts often prefer that litigants agree to a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (“Ideally, of course, litigants will settle the amount of the fee.”); *In re Ford Motor Co. Spark Plug & Three Valve Engine Prods. Liab. Litig.*, No. 1:12-MD-2316, 2016 WL 6909078, at *9 (N.D. Ohio Jan. 26, 2016) (citing *Bailey v. AK Steel Corp.*, No. 1:06-cv-468, 2008 U.S. Dist. LEXIS 18838, at *3 (S.D. Ohio Feb. 28, 2008) (“Negotiated and agreed-upon attorneys’ fees as part of a class action settlement are encouraged as an ‘ideal’ toward which the parties should strive.”)).

Courts in the State of New Jersey and the Third Circuit have followed the Supreme Court’s decision in *Boeing Co. v. Van Gemert*, which held that where a settlement involves a claims-made structure, the settlement benefits made available to the Class (versus those claimed during the notice process) may be used for purposes of the total common fund when analyzing the percentage of the benefit calculation. There, the Supreme Court held that where plaintiffs obtain a claims-made settlement, they “have recovered a determinate fund for the benefit of every member of the class whom they represent.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980). Class members’ “right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.” *Id.* at 480 (emphasis added). This is true even where a defendant has the right “to the return of money

eventually unclaimed[,] contingent on the failure of absentee class members to exercise their present rights” to the money. *Id.* at 482.

The Third Circuit, citing *Boeing*, held that a district court “properly relied on the entire fund as the appropriate benchmark for assessing the size of the fund” for purposes of calculating a fee award, as opposed to calculating fees based only on the amount claimed by class members. *See Landsman & Funk, P.C. v. SkinderStrauss Associates*, 639 Fed. Appx. 880, 884 (3d Cir. 2016). In *Landsman*, the Court held that “the reverter element of this settlement was fair and reasonable because there were ‘no indicia of self-dealing by counsel’ and ‘counsel has met its responsibility to seek an award that adequately prioritizes direct benefit to the class.’” *Id.* (citing *Landsman & Funk, P.C., v. SkinderStrauss Associates*, 2015 WL 2383358, at *8 (D.N.J. May 18, 2015) (citing *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013)).

Settlement Class Counsel, in the Motion for Preliminary Approval, laid out the steps that they took to always keep the interests of the Settlement Class paramount to their own. The Settlement Agreement with Defendant is the result of hard-fought, arm’s-length negotiations between Settlement Class Counsel and Defendant’s counsel, all experienced and capable lawyers in complex class actions. Settlement Class Counsel and Defendant’s counsel vigorously advocated their respective clients’ positions in the settlement negotiations and were prepared to

proceed to trial if no settlement was reached. Additionally, it was only after all the details of the Settlement Agreement were fully negotiated that Settlement Class Counsel and counsel for Defendant negotiated the amount of Attorneys' Fees and Expenses that would be paid as the fee award and costs award to Settlement Class Counsel.

Here, Plaintiff is requesting just 33% of the projected settlement benefit in attorneys' fees (the percentage of the negotiated potential benefit to Settlement Class Members under the Settlement Agreement is just a fraction of this number) and expenses is well within the range of what is reasonable. The Third Circuit has held in common fund cases, in which the percentage-of-recovery methodology is used, that fees between 19% and 45% of the settlement fund are reasonable. *In re Gen. Motors*, 55 F.3d at 822. Thus, the requested award is well below the reasonable range of awards approved by the Third Circuit and the District of New Jersey and is consistent with similar class action settlements. *Compare In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013 (approving fee award equal to 33 1/3% of \$10.5 million settlement); *Milliron v. T-Mobile USA, Inc.*, No. CIV.A. 08-4149 (JLL), 2009 WL 3345762, at *14 (D.N.J. Sept. 10, 2009), as amended (Sept. 14, 2009), *aff'd*, 423 F. App'x 131 (3d Cir. 2011) (approving fees equal to 33 1/3 % of \$13.5 million settlement fund)); *see also In re AremisSoft*, 210 F.R.D. at 133-34 (awarding 33 1/3% of initial recovery); *In re Remeron Direct Purchaser Antitrust*

Litig., No. Civ. 03-0085 (FSH), 2005 WL 3008808, at *17 (D.N.J. Nov. 9, 2005), *judgment entered*, 2005 WL 8181042 (D.N.J. Nov. 9, 2005) (awarding 33 1/3%); *In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706, 735 (E.D. Pa. 2001) (“stating that a review of 289 settlements demonstrates “average attorney’s fees percentage [of] 31.71%” with a median value of one-third”).

The *Gunter* factors further support that the requested fee is reasonable here:

i. The size of the benefit created and the number of persons benefitted.

As shown above, the overall settlement benefit is conservatively estimated at \$608,475, without assigning any value to the information security enhancements. But, as also pointed out, the potential benefit is far greater than this amount, as this settlement is *uncapped in the aggregate*. Each and every one of the Settlement Class Members can claim the full amount of compensation offered for Ordinary Losses and Lost Time, compensation for Extraordinary Losses, and two years of identity theft protection. This factor unequivocally weighs in favor of approving the fees sought here.

ii. The presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel.

As of January 17, 2025, no Class Members submitted objections to the Settlement or proposed fee award. Lietz Fee Decl. ¶ 5. The deadline for submitting objections is January 27, 2025. A lack of any objections weighs in favor of

Settlement Class Counsel's request. See *In re Diet Drugs (Phenterine/Fenfluramie/Dexfenfluramine) Prod. Liab. Litig.*, 582 F.3d 524, 541-42 (3d Cir. 2009) (affirming district court's conclusion that "few objections to the settlement terms and to the fees requested by counsel" counseled in favor of approval of fees sought by plaintiffs' counsel); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 170 (3d Cir. 2006) (affirming district court's conclusion that "the absence of substantial objections by class members to the fees requested by counsel strongly supports approval," where eight potential class members objected); *In re Rite Aid*, 396 F.3d at 305 (holding that "[t]he class's reaction to the fee request supports approval of the requested fees," where two class members objected).

iii. The skill and efficiency of the attorneys involved.

The skill required to litigate data breach cases is great, in part due to the quickly evolving nature of data breach and privacy law. Here, Settlement Class Counsel are some of the most experienced attorneys in this area of the law. Lietz MPA Decl. ¶¶ 2-25. Settlement Class Counsel brought this established track record and experience to work in litigating Plaintiff's and Settlement Class Members' claims.

Also, the most important inquiry pertains to the results obtained for the class. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("the most critical factor is the degree of success obtained"). As shown above, the Settlement provides a significant

benefit to Settlement Class Members. These are real, tangible benefits—that without the efforts of Plaintiff and Settlement Class Counsel, and their willingness to take on the attendant risks of litigation, would not have been available to Settlement Class Members. The significant experience and qualifications of counsel, as well as the skillful manner in which this case was brought to an excellent resolution for the Settlement Class, easily justify the attorneys’ fee award.

iv. The complexity and duration of the litigation.

Settlements are favored where “continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial.” *Talone v. Am. Osteopathic Ass’n*, No. 1:16-cv-04644-NLH-JS, 2018 U.S. Dist. LEXIS 203983, at *35-37 (D.N.J. Dec. 3, 2018)(quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 536 (3d Cir. 2004) (internal quotations omitted)); *Castro v. Sanofi Pasteur Inc.*, No. 11-7178 (JMV)(MAH), 2017 U.S. Dist. LEXIS 174708, at *9 (D.N.J. Oct. 20, 2017) (internal quotations omitted) (“[s]ettlement is favored under this factor if litigation is expected to be complex, expensive and time consuming.”)). All of this is true here – continuing this litigation would be complex, time-consuming, expensive, and full of risk for Plaintiff.

The general risks of litigation are further heightened in the data breach arena. Among national consumer protection class action litigation, data breach cases are

some of the most complex and involve a rapidly evolving area of law. *Id.* Moreover, the theories of damages remain untested at trial and appeal. As another court recently observed:

Data breach litigation is evolving; there is no guarantee of the ultimate result. *See Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) (“Data breach cases ... are particularly risky, expensive, and complex.”).

Fox v. Iowa Health Sys., No. 3:18-CV-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021). These cases are particularly risky for plaintiffs.

Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data breach cases like this one are particularly complex and face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060 (RMB)(RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013).

Another significant risk faced by Plaintiff are the risks of maintaining class action status through trial. The class has not yet been certified, and Defendant will certainly oppose certification if the case proceeds. Thus, Plaintiff “necessarily risk[s] losing class action status.” *Grimm v. Am. Eagle Airlines, Inc.*, No. LA CV 11-00406

JAK(MANx), 2014 WL 1274376, at *10 (C.D. Cal. Sept. 24, 2014). It is true in all class actions, and especially in the relatively new area of data breach class actions, that class certification through trial is never a settled issue, and is always a risk for the Plaintiff and their Counsel.

Accordingly, this factor weighs in favor of approval of the attorneys' fees request here.

v. *The risk of nonpayment.*

Settlement Class Counsel, who have litigated this case completely on contingency, have invested considerable attorney time while facing a risk of receiving nothing in compensation for their efforts. *See Kanefsky v. Honeywell Int'l Inc.*, No. 18-CV-15536 (WJM), 2022 WL 1320827, at *10 (D.N.J. May 3, 2022)(citing *In re Merck & Co., Inc. Vytarin ERISA Litig.*, No. 08-CV-285, 2010 WL 547613, at *11 (D.N.J. Feb. 9, 2010)(“[T]he Court has already analyzed the risk of nonpayment (factor 5) by noting the various risks, including the risk of an unsuccessful trial or appeal, that would render Plaintiffs, and their contingency-fee based counsel unable to recover anything at all”); *see also, Fulton-Green v. Accolade, Inc.*, Civ. No. 18-274, 2019 WL 4677954 at *13 (E.D. Pa. Sep. 23, 2019) (“Class Counsel invested considerable resources into this case with no guarantee that they would recover those costs given that they were retained on a contingency fee basis. This factor again weighs in favor of determining that the fee is reasonable.”);

Tavares v. S-L Distribution Co., No. 1:13-CV-1313, 2016 WL 1743268, at *11 (M.D. Pa. May 2, 2016) (citing *Gunter*, 327 F. Supp. 2d at 438) (“[C]ourts have noted that where plaintiffs’ counsel faces a risk of nonpayment . . . that risk should be considered when assessing attorneys’ fee awards.”).

Settlement Class Counsel took this case on a purely contingent basis. Lietz Fee Decl. ¶¶ 13-18. The retainer agreement Settlement Class Counsel has with Plaintiff does not provide for fees apart from those earned on a contingent basis, and, in the case of class settlement, attorneys’ fees would only be awarded to Settlement Class Counsel, if approved by the Court. *Id.* As such, attorneys’ fees were not guaranteed in this case. *Id.* Settlement Class Counsel assumed significant risk of nonpayment or underpayment of attorneys’ fees. *Id.* ¶ 14. Thus, Settlement Class Counsel took on these significant risks knowing full well their efforts may not bear fruit. *Id.*

vi. The amount of time devoted to the case by plaintiff’s counsel.

Settlement Class Counsel has committed a significant commitment of resources to this litigation without any guarantee of compensation, whatsoever, only achieving the Settlement after substantial negotiations. Lietz Fee Decl. ¶¶ 14-15. The time expended by Settlement Class Counsel has been necessary to obtain this recovery, and to effectively prosecute this action to a point where Defendants were willing to entertain a settlement.

Prior to filing the Complaint, Settlement Class Counsel expended considerable hours in preparing a pre-suit investigation into the claims. Lietz Fee Decl. ¶ 2. They spent months negotiating the terms of the Settlement and spent significant additional time negotiating, drafting, and finalizing the preliminary settlement approval papers. *Id.* After the Court preliminarily approved the Settlement, Settlement Class Counsel continued to work with the Settlement Administrator to supervise dissemination of Notice to the Settlement Class and to monitor the Claims process. *Id.* ¶ 3. These efforts resulted in a Settlement with significant benefits to and protections for the Settlement Class that they would not otherwise have. Settlement Class Counsel will continue to spend additional time on this matter including assisting with the remainder of the Settlement Administration process and preparing for and attending the final fairness hearing.

vii. The awards in similar cases.

As discussed at length above, Plaintiff is seeking a request of \$200,000.00 in attorneys' fees and expenses, which represents no more than 33% of the Settlement benefit created. This fee request falls well within the 19% and 45% range that New Jersey courts have found reasonable. *In re Gen. Motors*, 55 F.3d at 822. It is also less than the Third Circuit average of 31.7%. *See In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d at 735.

Particularly instructive as a comparator is the fee award in *Fulton-Green v. Accolade, Inc.*, *supra*, as that case was a data breach class action involving a similar claims made settlement. There, the Court approved a \$300,000 attorneys' fee for a class of only 937 persons. *Fulton-Green*, 2019 WL 4677954, at *13. Compared to *Fulton-Green*, the fees here are modest.

viii. The percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained.

As noted above the fee and costs requested equal just 33% of the common benefit. Courts have found private contingency requests significantly higher to be reasonable. *See Kanefsky*, 2022 WL 1320827, at *11 (“The requested award of fees and expenses relative to the size of the recovery and constructive common fund is also in line with contingent fees that are routinely negotiated in the private marketplace.”); *In re Merck*, 2010 WL 547613, at *12 (“[T]he 33 1/3 % fee award requested reflects commonly negotiated fees in the private marketplace.”); *Remeron*, 2005 WL 3008808, at *16 (“Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation.”); *Karcich v. Stuart (In re Ikon Office Sols., Inc., Sec. Litig.)*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (“[I]n private contingency fee cases . . . plaintiffs’ counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery”). The fee contemplated under Settlement Class Counsel’s representation

agreements for similar cases in New Jersey and elsewhere generally fall within the one-third to 40% range. Lietz Fee Decl. ¶ 18.

ix. Any innovative terms of settlement.

The data breach sector is a quickly emerging area of law. Settlement Class Counsel in this case has been at the forefront of data privacy litigation, as indicated in their firm resumes. Through their experience, Settlement Class Counsel have crafted an innovative settlement that not only provides fair, adequate, and reasonable relief to Settlement Class Members for past harms, but also offers protection from future harms through the ability for Settlement Class Members to claim two years of identity theft protection. Plaintiff and Settlement Class Counsel also took steps to ensure that AUS would enact enhanced data security practices, which benefits all Settlement Class Members whose information remains in the custody of AUS regardless of whether they choose to submit a claim.

All the applicable *Gunter* factors weigh in favor of granting the fee and expense award requested here.

C. Plaintiff's Requested Costs are Reasonable and Necessary to Litigation

Due to Settlement Class Counsel's ability to reach an early and excellent settlement for Plaintiff and the Settlement Class Members, costs are very modest and total just \$11,145.70, which is included in Plaintiff's request for attorneys' fees and costs in the amount of \$200,000. Lietz Fee Decl., ¶ 25. Such costs were reasonable

and necessary to litigation and are of the type typically charged to fee-paying clients.

Id. Plaintiff's request for expenses should be approved.

E. Plaintiff's Request for a Service Award is Reasonable and Should be Granted

For his efforts on the case, Plaintiff seeks a Service Award in the amount of \$2,500. Lietz Fee Dec. ¶¶ 26-32. The Service Award is meant to compensate Plaintiff for his efforts on behalf of the Settlement Class. *Id.* Plaintiff's actions protected the interests of the Settlement Class and helped achieve an outstanding settlement of this matter for the Settlement Class Members.

The service award requested, given the amount of time devoted by Plaintiff to the litigation, fits within awards approved by courts in the Third Circuit. *See, e.g., Kanefsky*, 2022 WL 1320827, at *13 (finding the requested case contribution awards of \$10,000 to each class representative to be fair and reasonable); *Elkin v. Walter Inv. Mgmt. Corp.*, No. 2:17-cv-02025-JCJ, 2018 U.S. Dist. LEXIS 234716, at *5 (E.D. Pa. Dec. 17, 2018) (awarding lead plaintiff \$10,000 from settlement fund of \$2.95 million); *In re PAR Pharm. Sec. Litig.*, No. 06-3226 (ES), 2013 U.S. Dist. LEXIS 106150, at *33 (D.N.J. July 29, 2013) (approving an award of \$18,000 from a settlement fund of \$8.1 million after finding that the lead plaintiff had reviewed and approved pleadings and regularly communicated with lead counsel, and no objections had been raised by class members in receipt of notice that the award was sought).

V. CONCLUSION

Settlement Class Counsel, with the help of Plaintiff, has made significant benefits available to Settlement Class Members. In return, Plaintiff seeks attorneys' fees, expenses, and a service award commensurate with those regularly approved by New Jersey courts and courts sitting in Third Circuit. The attorneys' fees, expenses, and service awards are reasonable, and Plaintiff respectfully requests their approval as part of any Final Approval Order entered in this case.³

DATED: January 15, 2025

Respectfully submitted,

/s/ Vicki J. Maniatis

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³ No separate order is submitted with this motion as the proposed Final Approval Order will encompass both this motion and the motion for Final Approval.

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*Counsel for Plaintiff and
the Settlement Class*

CERTIFICATE OF SERVICE

I, Vicki J. Maniatis, hereby certify that on this date, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court via this Court's CM/ECF System, which will send notice to all counsel and/or parties by electronic filing and/or regular mail.

DATED: January 15, 2025

/s/ Vicki J. Maniatis
Vicki J. Maniatis

EXHIBIT A

Vicki J. Maniatis (NJ – 001321994)
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[Additional Counsel on Signature Page]

Attorneys for Plaintiff and the Proposed Class

WINSTON FERNANDEZ,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

AUS, INC.,

Defendant.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:
BURLINGTON COUNTY**

Docket No. BUR-L-00674-24

**DECLARATION OF DAVID K. LIETZ
IN SUPPORT OF PLAINTIFF’S MOTION FOR
ATTORNEYS’ FEES, EXPENSES, AND SERVICE AWARD**

I, David K. Lietz, being competent to testify, make the following declaration:

1. I am currently a senior partner of the law firm Milberg Coleman Bryson Phillips Grossman, PLLC (“Milberg”), and have previously outlined my credentials for this Court in my declaration submitted in connection with the Unopposed Motion for Preliminary Approval. I have been appointed class counsel for Plaintiff in this

matter. I submit this declaration in support of Plaintiff's Motion for Attorneys' Fees, Expenses, and Service Award. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them if called upon to do so.

2. My work, that of other attorneys in my firm, and that of my co-counsel in this matter involved investigating the cause and effects of the AUS, Inc. ("AUS") Data Incident, interviewing potential clients, evaluating the potential class representative, contributing to the evaluation of the merits of the case before filing the Complaint in Federal Court; subsequently re-filing the Complaint in this Court; conducting legal research; the settlement term sheet, the settlement agreement, the relevant notices of settlement, the Unopposed Motion for Preliminary Approval, and this instant motion for attorneys' fees; conducting extensive research into data security incidents and their causes and effects, conducting further extensive research into data security practices and standards across e-Commerce platforms and industries, communicating with defense counsel; engaging in extensive settlement negotiations with Defendant over the course of weeks; updating and handling questions from our class representative; overseeing the launching of the notice program with substantial interaction between me and the Claims Administrator; and overseeing the claims process. I conferred with my colleagues about strategy and case status while being mindful to avoid duplicative efforts within my firm.

3. Continuing through to today my colleagues and I have continued to work with Defendant and the Claims Administrator regarding claims administration and processing as well as answering class members questions about the settlement and the process.

4. Based on my past experience I expect to spend another 30-40 hours seeking final approval, defending the Settlement from and potential objections, and supervising claims administration and the distribution of proceeds.

5. As of the date of filing, I have received no objections to either the Settlement Agreement in general or to the proposed attorneys' fees, costs (the amount of which was made known to the Class via the Court-approved notice program) in particular.

The Settlement Benefit and Value of the Settlement

6. This Settlement is uncapped in the aggregate, meaning that each and every one of the Settlement Class Members can claim up to \$400 in ordinary reimbursements (including four hours of lost time at \$30 per hour), reimbursement for extraordinary losses, and the 2-years of identity theft protection. The attorneys' fees requested are just a fraction of the potential value of this Settlement.

7. But even under much more conservative valuations, the overall value of this Settlement is estimated to be \$608,475, as follows:

a. 3,365 Settlement Class Members may claim the \$115 Alternative Cash

- Payment, which means that the Class relief is not less than \$386,975;
- b. \$19,000 in Settlement Administration costs;
 - c. the requested \$200,000 in combined attorneys' fees and expenses, to be paid separately by Defendant, and;
 - d. the requested Service Award of \$2500.

Adding these amounts together means the total value of this Settlement would be \$608,475 without assigning any value whatsoever to the significant information security enhancements implemented by AUS. The \$200,000 in fees and costs requested represent only 33% of this amount.

Notice to the Class of the Requested Fees

8. Class Counsel has provided reasonable notice of this motion, through direct notice efforts and has afforded Class Members an opportunity to object to such motion.

9. Atticus Administration, LLC ("Atticus"), the court-appointed Claims Administrator, effectuated a notice program that constitutes the best notice practicable and ensures that Class Members are apprised of their rights. Pursuant to the Court's Preliminary Approval Order, Atticus commenced effectuating the notice and claims process. The Notice Plan provided for individual direct notice to all reasonably identifiable Class Members through U.S. postal mail. The Notice Plan further required the creation of a dedicated settlement website where Class Members

can learn more about their rights and options pursuant to the terms of the Settlement.

10. Notably, the Short Form notice that was approved by this Court and subsequently mailed to Settlement Class Members directly informed the Settlement Class Members that the Court will hold a hearing on whether to approve Settlement Class Counsel's Application for Attorneys' Fees and Expenses of up to \$200,000. *See* Exhibit B to the Settlement Agreement, attached to Plaintiff's Motion for Preliminary Approval filed September 27, 2024. The Long Form Notice (Exhibit C to the Settlement Agreement), which is posted on the Settlement Website, contains similar information about the attorneys' fees and expenses, as well as the requested \$2,500 Service Award.

11. The schedule approved by the Court requires Class Counsel to file their Motion for an Award of Attorneys' Fees and Reimbursement of Costs in advance of the deadline for asserting objections.

12. The objection and opt-out date is January 27, 2025. As such, Class Members have almost two weeks after the filing of this motion to lodge any objections to the requested Fee and Costs Award. Class members will be able to view this motion for fees and costs and supporting papers on the Settlement website.

The Contingent Nature of the Case

13. My Firm and my co-counsel prosecuted this case on a purely contingent basis. As such, the firm assumed a significant risk of nonpayment or underpayment.

14. This matter has required me, other attorneys at my Firm, and my co-counsel to spend time on this litigation that could have been spent on other matters. At various times during the litigation of this class action, this lawsuit has consumed significant amounts of my time and my Firm's time.

15. Such time could otherwise have been spent on other fee-generating work. Because our Firm and our co-counsel undertook representation of this matter on a contingency-fee basis, we shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment.

16. If not devoted to litigating this action, from which any remuneration is wholly contingent on a successful outcome, the time our Firm spent working on this case could and would have been spent pursuing other potentially fee generating matters.

17. Litigation is inherently unpredictable and therefore risky. Here, that risk was very real, due to the rapidly evolving nature of case law pertaining to data breach litigation, and the state of data privacy law. Therefore, despite my Firm's devotion to the case and our confidence in the claims alleged against Defendant, there have been many factors beyond our control that posed significant risks.

18. The fees contemplated under Class Counsel's representation agreements for cases in this District and elsewhere generally fall within the one-third

to 40% range. Class Counsel's fees were not guaranteed—the retainer agreement counsel had with Plaintiffs did not provide for fees apart from those earned on a contingent basis, and, in the case of class settlement, approved by the court.

The Costs and Fees Incurred

19. Due to the early stage of litigation and efficiency by which Class Counsel was able to obtain this significant settlement, expenses and fees incurred by Plaintiff are low.

20. Additional time (estimated to be another 30-40 hours) will be spent to prepare for and attend the Final Approval Hearing, defend any appeals taken from the final judgment approving Settlement, and ensure that the claims process and distribution of Settlement proceeds to Class Members is done in a timely manner in accordance with the terms of the Settlement.

21. I assert that the attorneys' fees sought in the Motion for Attorneys' Fees, Costs, and Service Awards are reasonable and seek fair and reasonable compensation for undertaking this case on a contingency basis, and for obtaining the relief for Plaintiff and the Class. As set forth in the Settlement Agreement, the attorneys' fees and expenses sought in this Motion will not reduce the benefits payable to the Class.

22. Where possible, Class Counsel made efforts to carefully assign work so as to avoid duplication of efforts and have the work completed by the appropriate level of attorney.

23. Upon request, I can provide detailed contemporaneous time records to the Court for review.

24. All books and records in this case regarding costs expended were maintained in the ordinary course of business, from expense vouchers and check records. I have reviewed the records of costs expended in this matter.

25. The expenses incurred on this case to date are minimal (\$11,145.70) and consist of filing fees, fees for pro hac vice admissions, and mediation fees (with the largest single expense being the cost of the mediator – Bennett Picker, Esq.). These costs are reasonable, and necessary for the litigation, and are included in the \$200,000 combined fee and expense request.

Efforts of Class Representative

26. I am familiar with the efforts of Plaintiff Fernandez in connection with this case, and these efforts warrant granting a service award of \$2,500 to Mr. Fernandez.

27. Mr. Fernandez sought out and spoke with experienced attorneys (me and my co-counsel Mr. Coates) to determine if he would retain them to handle his case. He spent significant time communicating with Mr. Coates about the facts of

this case and the law, including what was involved in being a class representative. In the end, he decided to vindicate not only his own rights, but also those of others affected by AUS's Data Breach, by serving as a class representative in this class action lawsuit. Since agreeing to serve, he has diligently and faithfully fulfilled her obligation, and he was instrumental in achieving the relief obtained for the Class.

28. Mr. Fernandez participated in this litigation from its inception through settlement discussions. He has been in regular contact with me during the course of this matter.

29. Mr. Fernandez spent time researching his rights and those of the Class; speaking with and otherwise communicating with Class Counsel; staying in touch with his attorneys throughout the litigation; reviewing pleadings and declarations in support of motions filed in the action; giving authority to settle the case on the terms negotiated; and reviewing and signing the Settlement Agreement.

30. Throughout this litigation, Mr. Fernandez made himself available to discuss developments in the case as part of his duty as a Class Representative. He has fairly represented the absent Class members and maintained the best interests of the Class while performing our class representative duties.

31. By serving as the only Class Representative in this action, Mr. Fernandez bore a certain amount of risk that other Class members did not bear. In addition to the time spent participating in the prosecution of this case, Mr. Fernandez

took a risk by coming forward and filing this class action. As a result of his stepping forward and conducting a pre-suit investigation, however, Class members will receive the benefits of the settlement to compensate them for the injuries directly and proximately caused by Defendant’s failure to implement or maintain adequate data security measures for PII.

32. Mr. Fernandez was not promised a service award in connection with his filing of this action.

33. I strongly believe that the Settlement Agreement is favorable for the Settlement Class. In the opinion of the undersigned and other Class Counsel, the settlement is fair, reasonable, adequate, as are the attorneys’ fees, expenses, and service award requested here.

* * * * *

I declare under penalty of perjury under the laws of the State of New Jersey that that foregoing is true and correct.

Executed January 15, 2025, at Washington, D.C.

David K Lietz

DAVID K. LIETZ (admitted *pro hac vice*)
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