STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

KEEFE JOHN and JILLIAN CATHERINE KLUG, *individually and on behalf of all others similarly situated*,

Plaintiffs,

v.

Case No.: 23-CV-1935

FROEDTERT HEALTH, INC.,

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES AND SERVICE AWARDS FOR CLASS REPRESENTATIVES

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PRELIMINARY STATEMENT

Plaintiffs Keefe John and Catherine Jillian Klug (collectively, "Plaintiffs" or "Class Representatives"), individually and on behalf of all others similarly situated, respectfully submit this memorandum of law in support of their motion for entry of an Order (i) awarding Class Counsel's attorneys' fees in the amount of $700,000, plus reimbursement of reasonable and necessary litigation costs and expenses in the amount of $20,302.78 and (ii) awarding Service Awards to the two Class Representatives in the amount of $3,500 each (for a total of $7,000), for their efforts and commitment on behalf of the Class.[1]

In addition to the usual risks presented in contingent-fee class action litigation, this case involved even greater risks for Class Counsel as the case involved a particularly nascent area of the law concerning whether the collection of and disclosure of web usage data containing personally identifiable information ("PII") and protected health information ("PHI" and with PII, "Private Information"), to third-party Meta Platforms, Inc. d/b/a Facebook is legally actionable. Specifically, this case involved allegations that Froedtert Health Inc. ("Froedtert" or "Defendant") used certain tracking technologies (namely, the Meta Pixel) on its website, https://www.froedtert.com/ (the "Website") and its MyChart patient portal (the "Portal" and collectively with the Website, the "Properties") in order to collect and to share Private Information with Facebook resulting in the invasion of Plaintiffs' and Class Members' privacy.

Despite the challenges, Class Counsel procured an exceptional Settlement on behalf of the Class members consisting of a non-reversionary, common fund of $2,000,000 that compensates Class Members for their losses and privacy injuries, as well as significant injunctive relief, as

[1] Unless otherwise indicated, the defined terms herein shall have the same definition and meaning as set forth in the Class Settlement Agreement and Release ("Settlement Agreement" or "Agr."), which was filed with this Court on May 5, 2023.

Defendant as removed the Meta Pixel from its Properties. The Settlement is an outstanding result for the Class as it will—if finally approved—provide extraordinary relief to the approximately 459,044 individuals whose Private Information was allegedly disclosed to Facebook by Froedtert without their consent (the "Settlement Class Members").

These results are directly attributable to Class Counsel's work investigating and prosecuting Plaintiffs' claims as well as their negotiations on behalf of the Class. The Settlement is a product of an extensive investigation, prolonged arm's-length negotiations, an all-day mediation with Hon. Stuart E. Palmer (ret.) of JAMS, as well as follow-up negotiations and discussions between counsel. *See* Affidavit of Gary M. Klinger in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, Expenses, and Service Awards for Class Representatives ("Klinger Aff."), ¶¶ 7-9 (**Exhibit 1** hereto); Affidavit of David S. Almeida in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, Expenses, and Service Awards to Class Representatives ("Almeida Aff."), ¶¶ 9-10 (**Exhibit 2** hereto). After coming to an agreement on the principal terms of the Settlement, Class Counsel worked for weeks to finalize the Settlement Agreement, Notices, Claim Form, and other associated exhibits pertaining to preliminary approval. *See* Klinger Aff. ¶c10; Almeida Aff. ¶ 11. Class Counsel also obtained competitive bids from various experienced Settlement Administrators and thereafter chose Kroll Settlement Administration ("Kroll") to serve as the Settlement Administrator. *See* Klinger Aff. ¶ 13.

The Settlement is an excellent result for the Settlement Class and was obtained against a well-funded defense by Froedtert, which was represented by an extremely well-regarded law firm. *See* Klinger Aff. ¶ 20; Almeida Aff. ¶ 17. This result is even more impressive due to the inherently risky and complex nature of this litigation. *See* Klinger Aff. ¶ 21; Almeida Aff. ¶ 18. Against the backdrop, it was through the skill and hard work of Class Counsel and the Class Representatives

that the Settlement was achieved for the benefit of Class Members. *See* Klinger Aff. ¶¶ 20-22; Almeida Aff. ¶ 19.

As compensation for the significant, real benefits conferred upon the Settlement Class, Class Counsel respectfully move the Court for an award of attorneys' fees in the amount of $700,000. Class Counsel's fee request is reasonable when considered under the applicable Seventh Circuit standards and is well within the normal range of fee awards in contingent-fee class actions in this Circuit. *See* Klinger Aff. ¶¶ 41-47; Almeida Aff. ¶¶ 46-48. Moreover, Plaintiffs seek $20,302.78 in litigation costs and expenses, which are reasonable and were necessary in litigating this case. *See* Klinger Aff. ¶¶ 48; Almeida Aff. ¶¶ 42-43. Finally, Plaintiffs seek $3,500 in Service Awards for each of the Class Representatives—for a total of $7,000. The requested Service Awards are reasonable, as well as standard, for this type of action and in this Circuit, and should be approved. *See* Klinger Aff. ¶ 31; Almeida Aff. ¶¶ 25-26.

This Honorable Court previously granted preliminary approval of the class action settlement reached in this case by its June 2, 2023 Preliminary Approval Order. (*See* Case 2023CV001935, Doc. # 29 ("Preliminary Approval Order" or "PAO").) Further to that Order, notice has been provided to the Class, along with the opportunity to make claims, opt out, or object to the settlement. Through these formal responses, the Class has been overwhelmingly supportive of the Settlement Agreement. In short, the Motion for Fees should be approved in its entirety.

CASE SUMMARY

A. The Dispute.

Froedtert Health, Inc. is a health care corporation operating a large regional network of hospitals which includes six hospitals in the State of Wisconsin. In administering and providing health care services, Froedtert maintains a Website (available at https://www.froedtert.com/) and a

patient portal called MyChart. Unbeknownst to Plaintiffs and Settlement Class Members, Froedtert embedded a Meta Pixel on its MyChart Portal from on or about February 1, 2017 to on or about January 22, 2020 and on its Website from on or about February 1, 2017 to on or about May 23, 2022. *See generally* Class Action Complaint, filed on March 16, 2023. *See* Almeida Aff. ¶ 14. Plaintiffs contend that, when operating as designed and implemented by Froedtert, the Meta Pixel allowed the Private Information that Plaintiffs and Class Members provided to Froedtert to be unlawfully disclosed to Facebook alongside the individual's unique Facebook ID. *See generally id*. Plaintiffs allege that as a result of Froedtert's actions, the private information of approximately 459,044 individuals who logged into Froedtert's MyChart patient portal account between February 1, 2017 and May 23, 2022 was transmitted to Facebook—without the knowledge or permission of those individuals. *See* Almeida Aff. ¶ 20.

B. Class Counsel Engaged in Substantial Pre-Suit Investigations & Negotiations with Froedtert & Its Counsel.

In the Fall of 2022, prior to bringing a lawsuit and after an extensive investigation, Plaintiffs, through Class Counsel, approached Froedtert and ultimately its retained counsel to explore the possibility of a potential resolution since they believed that early settlement discussions could benefit the putative Class. *See* Klinger Aff. ¶ 6; Almeida Aff. ¶¶ 7 & 8. The Parties engaged in discovery in aid of a full day mediation before Hon. Stuart E. Palmer (ret.) on February 9, 2023. *See* Klinger Aff. ¶ 7; Almeida Aff. ¶ 9. The Mediation resulted in a settlement in principle, and for the next month the Parties continued to engage in arm's length negotiations to finalize the terms of the Settlement, which are reflected in the Settlement Agreement. *See* Klinger Aff. ¶ 9; Almeida Aff. ¶¶ 10 & 11.

Though cordial and professional, the settlement negotiations were adversarial, arm's-length and non-collusive in nature. *See* Klinger Aff. ¶ 12; Almeida Aff. ¶ 13. The attorneys on

both sides are very experienced class action and data security and privacy practitioners. *See* Klinger Aff. ¶ 12; Almeida Aff. ¶ 13. The Settlement was reached after extensive investigation, specifically, Class Counsel gathered all the information that was available regarding Froedtert's Website Usage Disclosure—including results of independent research and publicly-available documents as well as after a thorough evaluation of Plaintiffs' claims considering such information. *See* Klinger Aff. ¶¶ 6-12; Almeida Aff. ¶¶ 5, 7-13.

C. The Settlement.

Based on information exchanged between the Parties, the Settlement Class (defined as "all persons who logged into a MyChart patient portal account at least once between February 1, 2017 and May 23, 2022") consists of approximately 459,044 Settlement Class Members. *See* Klinger Aff. ¶ 23; Almeida Aff. ¶ 20. If finally approved, Froedtert will establish a $2,000,000 non-reversionary Settlement Fund through which Settlement Class Members will have an opportunity to submit a claim for a *pro rata* share of the settlement fund to compensate them for their losses. *See* Klinger Aff. ¶ 24; Almeida Aff. ¶ 21. In order to be eligible to receive monetary payment, a Class Member need only submit a Claim Form prior to the Claim Deadline. *See* Klinger Aff. ¶ 25; Almeida Aff. ¶ 22. The Claim form requires only that Class Members attest that they logged into a MyChart patient portal account through Froedtert's Website at least once between February 1, 2017 and May 23, 2022. *See* Klinger Aff. ¶ 25; Almeida Aff. ¶ 22.

First and foremost, the Settlement provides for substantial monetary relief for the Settlement Class members as it creates a non-reversionary common fund of $2,000,000 (the "Settlement Fund"). *See* Klinger Aff. ¶ 24; Almeida Aff. ¶ 21. To determine the precise Cash Fund Payment for each Settlement Class Member, the Settlement Administrator will first distribute

monies from the Settlement Fund as outlined in the Settlement Agreement. The Settlement provides for the distribution of those funds, subject to court approval, as follows:

> (i) reasonable Notice and Claims Administration Costs incurred pursuant to this Settlement as approved by the Parties and approved by the Court,
> (ii) any taxes owed by the Settlement Fund,
> (iii) any Service Awards approved by the Court,
> (iv) any Attorneys' Fees, Costs and Expenses Award as approved by the Court and
> (v) a *pro rata* share to each Settlement Class Member, pursuant to the terms and conditions of the Settlement.

In addition, the Settlement provides for injunctive relief for Settlement Class Members as Froedtert has agreed to remove the Meta Pixel from its Properties. The Parties, through counsel, negotiated the Settlement Benefits (and structure) as fair compensation by discussing the type of personal information allegedly collected and shared with Facebook as well as the amount of damages this sharing caused Class Members. *See* Klinger Aff. ¶ 27. These benefits outweigh the risk, time delay and net expected value of continued litigation. *Compare* Klinger Aff. ¶ 27; Almeida Aff. ¶ 48, *with*, *e.g.*, *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002).

D. Preliminary Approval & Dissemination of Class Notice.

On March 16, 2023, Plaintiffs John and Klug filed this putative class action lawsuit in Milwaukee County Circuit Court where Froedtert maintains its principal office. *See* Klinger Aff. ¶ 15; Almeida Aff. ¶ 14.[2] Thereafter, this Court, on June 2, 2023, preliminarily approved the Settlement and ordered that the Settlement Class be given notice. *See* PAO, Doc. # 29. The Court appointed Plaintiffs Keefe John and Jillian Catherine Klug as Class Representatives; Gary M. Klinger of Milberg Coleman Bryson Phillips Grossman, PLLC and David S. Almeida of Almeida

[2] Plaintiffs filed the Complaint in this Court to avoid the risk that the federal court for the Eastern District of Wisconsin might conclude it lacked subject matter jurisdiction over the claims of Plaintiffs and/or the Settlement Class Members given the United States Supreme Court's recent decision in *TransUnion v, Ramirez*, 141 S. Ct. 2190 (2021). *See* Klinger Aff. ¶ 16.

Law Group LLC as Class Counsel and Kroll as Settlement Administrator. *Id.*, ¶¶ 2 & 6. The Court also approved the forms of notice which state the amount of fees that would be requested, the fact that litigation costs and expenses would be requested and the amount of service awards that would be requested and approved the plan for providing notice to the Settlement Class. *Id.*, ¶¶ 7 & 8.[3]

On July 7, 2023, Court-approved notice was sent to the Settlement Class, and Class Members have until September 5, 2023, to file requests for exclusion and objections, if any. *See id.*, ¶ 16. As of August 22, 2023, Kroll reports that, out of the approximately 459,044 individuals who were sent Notice via first class U.S. mail and/or email, thirty (30) individuals have submitted requests for exclusion from the Settlement (meaning only 0. 007% of the Settlement Class has requested exclusion from the Settlement). *See* Klinger Aff. ¶ 35; Almeida Aff. ¶ 30. The claims period ends October 5, 2023. *See* PAO, ¶ 16. As of August 21, 2023, Kroll has not received any objections in this case, and Class Counsel has not received any objections to the Settlement Agreement in general or to the proposed attorneys' fees, costs, or expenses (the amount of which was made known to the Settlement Class via the Court-approved Notice) in particular. *See* Klinger Aff. ¶ 36; Almeida Aff. ¶ 31. Notice will be reported on more extensively in Plaintiff's Motion for Final Approval of Class Action Settlement ("Motion for Final Approval"), which is due on or before September 15, 2023.[4]

[3] The Settlement Agreement contains a provision limiting the total attorneys' fees and reimbursed costs and expenses, including expenses of settlement administration, to no more than 35% of the Settlement Package. *See* Agr., ¶ 60. This cap was agreed upon after the underlying relief had been negotiated. *See* Klinger Aff., ¶ 28. The Settlement Agreement is not contingent upon the award of any amount to Class Counsel. The Settlement Agreement also provides for an incentive award of $3,500 to the Class Representative, at the Court's discretion. (*See* Agr., ¶ 61.) This is the only way in which the treatment of Plaintiff differs from that of the Class.

[4] In the Preliminary Approval Order, the Court set the Final Approval Hearing for September 25, 2023, and ordered that the instant motion be heard at that hearing. *See* PAO, ¶ 16. Plaintiffs will submit a Affidavit from Kroll detailing the notice and claims administration with their Motion for Final Approval prior to that hearing.

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE, APPROPRIATE, AND SHOULD BE GRANTED

Plaintiffs request that this Honorable Court approve attorneys' fees of $700,000, costs and expenses of $20,302.78, and $3,500 Service Awards for both Class Representatives (for a total of $7,000). As explained below, the requested fee award is in line with the market rate for similar attorney services in this Circuit and fairly reflects the results achieved in this Settlement. Similarly, the requested Service Awards are routinely awarded in this Circuit and should be approved.

A. The Percentage of the Fund Method is the Appropriate Method for Calculating Attorneys' Fees in this Case

Rule 23(h) provides that "[i]n a certified class action, the court may award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). In the Seventh Circuit, courts determine class action attorneys' fees by "[d]oing their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) [hereinafter, "*Synthroid I*"] (collecting cases).[5]

"At the time" is at the start of the case: the Court must "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)." *Id.* "The best time to determine this rate is the beginning of the case, not the end (when hindsight alters of the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets." *Id.* As part of this inquiry, "the judge must assess the

[5] When "a state rule mirrors the federal rule, [Wisconsin courts] consider federal cases interpreting the rule to be persuasive authority." *Luckett v. Bodner*, 2009 WI 68, ¶29, 318 Wis. 2d 423, 437, 769 N.W.2d 504, 511.

value of the settlement to the class and the reasonableness of the agreed-upon attorneys' fees for class counsel," the central consideration being what class counsel achieved for members of the class. *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 235 (N.D. Ill. 2016) (quoting *Redman v. RadioShack Corp*., 768 F.3d 622, 629 (7th Cir. 2014)).

Courts have discretion to determine the "market rate" based on either a lodestar or percentage of the fund method. *See, e.g.*, *Leung v. XPO Logistics*, 326 F.R.D. 185, 204 (N.D. Ill. 2018); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998) ("[W]e have never ordered the district judge to ensure that the lodestar result mimics that of the percentage approach."); *Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc*., 743 F.3d 243, 247 (7th Cir. 2014) ("[T]he choice of methods is discretionary . . . in our circuit, it is legally correct for a district court to choose either.").

"Although . . . [the] Court has discretion to use 'either a percentage of the fund or lodestar methodology,' the 'percentage method is employed by the vast majority of courts in the Seventh Circuit." *T.K. Through Leshore v. Bytedance Tech. Co., Ltd*., Case No. 19-CV-7915, 2022 WL888943, at *24 (N.D. Ill. Mar. 25, 2022) (quoting *Hale v. State Farm Mut. Auto. Ins. Co*., No. 12-0660-DRH, 2018 WL 6606079, at *10 (S.D. Ill. Sept. 16, 2018)); *Chambers v. Together Credit Union*, Case No. 19-CV-00842-SPM, 2021 WL 1948452, at *1 (S.D. Ill. May 14, 2021) (same); *T.K. Through Leshore v. Bytedance Tech. Co*., Ltd., Case No. 19-CV-7915, 2022 WL 888943, at *24 (N.D. Ill. Mar. 25, 2022), appeal docketed, *T.K., et al. v. Bytedance Tech. Co*., Ltd., et al. (7th Cir. Apr. 25, 2022) (same); *Beesley v. Int'l Paper Co*., No: 3:06–cv–703–DRH–CJP, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("When determining a reasonable fee, the Seventh Circuit Court of Appeals uses the percentage basis rather than a lodestar or other basis.").

Moreover, the approach favored for consumer class actions in the Seventh Circuit is to compute attorneys' fees as a percentage of the fund conferred upon the class: "there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *see also In re Cap. One TCPA Litig*., 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (finding percentage-of-the-fund to be the "normal practice in consumer class actions" and the "most efficient" and "most likely to yield an accurate approximation of the market rate"). Courts have explained that "[t]he percentage method is bereft of largely judgmental and time-wasting computations of lodestars and multipliers." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 170 (S.D.N.Y. 1989); *see also In re Cont'l Ill. Sec. Litig*., 962 F.2d 566, 573 (7th Cir. 1992) (easier to establish market based contingency fee percentages than to "hassle over every item or category of hours and expense and what multiple to fix and so forth,"); *Gaskill v. Gordon*, 942 F. Supp. 382, 386 (N.D. Ill. 1996) (percentage-of-fund method "provides a more effective way of determining whether the hours expended were reasonable"), *aff'd*, 160 F.3d 361 (7th Cir. 1998). Courts have also explained that the percentage of the fund method can be just as effective as the lodestar method at determining a reasonable fee since both methods require the court to "consider the circumstances of the case." *Id*. at 386 (citing *Donovan v. Robbins*, 588 F. Supp. 1268, 1272 (N.D. Ill. 1984)).

Here, the Settlement creates a non-reversionary Settlement Fund of $2,000,000 for the benefit of the Settlement Class due to the efforts of Class Counsel, and, for the reasons stated above, the percentage of the fund method is the appropriate method for calculating attorneys' fees in this consumer privacy case. *See* Klinger Aff. ¶¶ 48-52; Almeida Aff. ¶¶ 21 & 36-41; *see also Leung*, 326 F.R.D. at 199 (using percentage of the fund method where Settlement Fund created in

consumer TCPA class action); *Birchmeier v. Caribbean Cruise Line, Inc*., 896 F.3d 792, 795 (7th Cir. 2018) (same).

B. The Requested Attorneys' Fee Award is Reasonable and Appropriate.

"In assessing the reasonableness of an attorney fee award for a class action settlement, district courts should 'do their best to award counsel the market price for legal services, in light of the risk of non-payment and the normal rate of compensation in the market at the time.'" *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) (quoting *Synthroid I*, 264 F.3d at 718). Relevant factors include the quality of the attorneys' performance, the amount of work necessary to resolve the litigation, and the stakes of the case, and the complexity, length, and expense of the litigation. *See id*. at 693; Synthroid I, 264 F.3d at 721; *Isby v. Bayh*, 75 F.3d 1191, 1198-99 (7th Cir. 1996).

1. <u>The Requested Fee is Well Within the Range of Typical Contingency Fee Arrangements in this Circuit</u>.

The "actual fee contracts that were negotiated for private litigation" are relevant considerations to a fee request. *Taubenfeld v. AON Corp*., 415 F.3d 597, 599 (7th Cir. 2005) (citing Synthroid I, 264 F.3d at 719); *Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) (requiring weight be given to the judgment of the parties and their counsel where the fees were agreed to through arm's length negotiations after the parties agreed on the other key deal terms). "'Where, as here, the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee is the market rate.'" *Chambers*, Case No. 19-CV-00842-SPM, 2021 WL 1948452, at *1 (quoting *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (emphasis in original)).

Class Counsel's fee request for $700,000, or 35% of the Settlement Fund, is reasonable and consistent with market rates and with Seventh Circuit precedent:

> When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund, in recognition of the fact that most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis. ***The typical contingent fee is between 33 and 40 percent.***

Gaskill v. Gordon, 160 F.3d 361, 362 (7th Cir. 1998) (emphasis added) (upholding the award of 38 percent of a $20 million settlement). Indeed, District Courts within the Seventh Circuit "regularly award percentages of 33.33% or higher to counsel in class action litigation." *Hale*, No. 12-0660-DRH, 2018 WL 6606079, at *10; *Kirchoff*, 786 F.2d at 323 (finding 40% to be "the customary fee in tort litigation"); *Retsky Fam. Ltd. P'ship v. Price Waterhouse, LLP*, No. 97-7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (customary contingent fee is "between 33 1/3% and 40%"); *Behrens v. Landmark Credit Union*, No. 17-cv-101-jdp, 2018 U.S. Dist. LEXIS 106358 at *16 (W.D. Wis. June 26, 2018) ("And generally, a 33 to 40 percent contingency fee is considered consistent with the market rate and reasonable."); *Birchmeier*, 896 F.3d at 795 affirming fee award in TCPA class action that included, inter alia, "the sum of 36% of the first $10 million"); *In re Cap. One TCPA Litig*., 80 F. Supp. 3d at 781 (same); *see also Martin v. Caterpillar Inc*., No. 07-CV- 1009, 2010 U.S. Dist. LEXIS 145111, 2010 WL 11614985, at *2 (C.D. Ill. Sept. 10, 2010) ("[C]ourts in the Seventh Circuit award attorney fees 'equal to approximately one-third or more of the recovery.' . . . The Seventh Circuit itself has specifically noted that 'the typical contingent fee is between 33 and 40 percent.'") (citation omitted); *Taubenfeld*, 415 F.3d at 600 (noting table of 13 cases in the Northern District of Illinois submitted by class counsel showing fees awarded ranged from 30% to 39% of the settlement fund).

The fees contemplated under Class Counsel's representation agreements for cases in this District and elsewhere generally fall within the one-third (33.33%) to 40% range. *See* Klinger Aff. ¶ 52; Almeida Aff. ¶ 47. Here, Class Counsel's fee request of thirty-five percent (35%) of the

Gross Settlement Fund and approximately 40% of the estimated Net Settlement Fund is in the range of Class Counsel's representation agreements and reflects the amount Class Counsel would have received had they negotiated their fee ex ante. *See* Klinger Aff. ¶¶ 41-47; Almeida Aff. ¶¶ 45-48. This factor weighs in favor of Class Counsel's fee request.

2. The Requested Fees Reflect the Fees Awarded in Other Similar Settlements.

"As the Seventh Circuit has held, attorney's fee awards in analogous class action settlements shed light on the market rate for legal services in similar cases." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 493–94 (N.D. Ill. 2015) (citation omitted). Class Counsel's request for fees is reasonable compared to similar cases as awards of more than 35% of a settlement fund are commonplace in similar privacy cases in the Seventh Circuit. *See, e.g.*, *Birchmeier*, 896 F.3d at 795 (affirming award in TCPA class action that included, inter alia, "the sum of 36% of the first $10 million"); *In re Cap. One TCPA Litig.*, 80 F. Supp. 3d at 781 (same); *Karpilovksy v. All Web Leads, Inc.*, No. 2017-cv-01307, ECF No. 173 (N.D. Ill. 2017) (approving 35% of the settlement fund); *see generally Taubenfeld*, 415 F.3d at 600 (noting table of 13 cases in the Northern District of Illinois submitted by class counsel showing fees awarded ranged from 30% to 39% of the settlement fund). Consequently, the requested fees of 40% of the Net Settlement Fund, or 33.33% of the gross Settlement Fund, falls well within the range of fee awards approved as reasonable in similar cases in this Circuit.

3. Class Counsel Assumed the Risk of Non-Payment.

Courts emphasize the severity of the financial risk class counsel assumed in taking on a class action when determining the reasonableness of a fee request. *See, e.g.*, *In re Dairy Farmers of Am., Inc.*, 80 F.Supp.3d at 847; *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011) ("[I]f the market-determined fee for a sure winner were $1 million the market

determined fee for handling a similar suit with only a 50% chance of a favorable outcome should be $2 million."). "Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Sols., Inc*., 739 F.3d 956, 958 (7th Cir. 2013) (citing *Kirchoff*, 786 F.2d 320). Thus, the risk of non-payment is a key consideration in assessing the reasonableness of a requested fee and must be incorporated into any ultimate fee award. *See Sutton*, 504 F.3d at 694 (finding abuse of discretion where lower court, in applying percentage-of-the-fund approach, refused to account for the risk of loss on basis that "class actions rarely go to trial and that they all settle[,]" noting that "there is generally some degree of risk that attorneys will receive no fee (or at least not the fee that reflects their efforts) when representing a class because their fee is linked to the success of the suit[;] . . . [b]ecause the district court failed to provide for the risk of loss, the possibility exists that Counsel, whose only source of a fee was a contingent one, was undercompensated").

The reasonableness of Class Counsel's requested fees is underscored by the numerous risks of non-recovery to Plaintiffs (and thus non-payment to Class Counsel) that existed at the outset of the litigation. *See* Klinger Aff. ¶¶ 41-47; Almeida Aff. ¶¶ 5 & 36-41. Class Counsel agreed to take on these risks knowing full well that their efforts may not bear fruit. *See* Klinger Aff. ¶ 42; Almeida Aff. ¶ 37. Fees were not guaranteed—the retainer agreements Class Counsel have 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. *See* Klinger Aff. ¶ 42; Almeida Aff. ¶ 36. Class Counsel and their firms labored and advanced their own funds to prosecute the case at the risk of never being paid for their work or reimbursed for their costs and expenses. *See* Klinger Aff. ¶ 43; Almeida Aff. ¶¶ 36-41. Class Counsel devoted their time and resources to this matter, instead of pursuing other

income, at the risk of never getting paid and, at best, being paid at some point potentially many years down the road. *See* Klinger Aff. ¶ 45; Almeida Aff. ¶¶ 36-41. Had Froedtert prevailed on the merits, on class certification, or on appeal, Class Counsel might have recovered nothing for the time and expense they invested in this litigation. *See* Klinger Aff. ¶ 47; Almeida Aff. ¶¶ 36-41.

This case involved complexities at the intersection of privacy law with the use of tracking technologies to collect and to share PHI that are novel and rapidly evolving. *See* Klinger Aff. ¶ 4; Almeida Aff. ¶ 5. While Plaintiffs were confident that their claims would prevail, they faced several strong legal defenses. *See* Klinger Aff. ¶ 20; Almeida Aff. ¶¶ 40 & 41. Due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data privacy cases like this one face substantial hurdles—even just to make it past the pleading stage. *See, e.g., Hammond v. The Bank of N.Y. Mellon Corp*., 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).

As one federal district court recently observed in the data breach context which is analogous to pixel-related litigation:

> 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) (approving attorneys' fees & costs in the amount of $1,575,000).

Plaintiffs also faced the risks of obtaining and maintaining class status throughout trial. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013) (denying class certification in data breach class action). Moreover, they would have had difficulties in demonstrating causation and damages. *See, e.g., Southern Independent Bank v.*

Fred's, Inc., No. 2:15-CV-799-WKW, 2019 WL 1179396, at *8 (M.D. Ala. Mar. 13, 2019) (holding under Daubert motion that causation was not met for class certification purposes in data security breach case); *In re TJX Cos. Sec. Breach Litig.*, 246 F.R.D. 389, 398 (D. Mass. Nov. 29, judgment, as well as possible appeals (interlocutory and/or after the merits), which would require additional rounds of briefing and the possibility of no recovery at all.

Although this matter presented numerous risks of non-recovery to the Class and non-payment to Class Counsel at the outset, Class Counsel confronted those risks head on and ultimately achieved an excellent result for the Settlement Class. *See* Klinger Aff. ¶ 21; Almeida Aff. ¶ 5, 21 & 48. Accordingly, this factor weighs in favor of approval of Class Counsel's fee request.

4. The Quality of Counsel's Performance and Work Invested Support the Requested Fee Award.

The quality of Class Counsel's performance and time invested through extensive preliminary investigation, informal discovery and adversarial negotiations to achieve a Settlement worth millions of dollars for the benefit of the Settlement Class further supports the requested fee award. *See Sutton*, 504 F.3d at 693. The Settlement is a fair, reasonable, and adequate remedy for Class Members when compared to the facts and law at issue in this matter. *See* Klinger Aff. ¶ 54; Almeida Aff. ¶ 48. In addition to accepting considerable risk in litigating this action, Class Counsel committed their time and resources to this case without any guarantee of compensation, whatsoever, only achieving the Settlement after extensive investigation and considerable negotiations. *See* Klinger Aff. ¶ 41-47; Almeida Aff. ¶¶ 36-41. Prior to filing the Complaint, Class Counsel expended considerable hours in investigating and preparing a pre-suit demand. *See* Klinger Aff. ¶ 4; Almeida Aff. ¶ 7 & 8. They prepared for and participated in an all-day mediation with the assistance of Hon. Stuart E. Palmer (ret.) of JAMS, and spent weeks negotiating, drafting,

and finalizing the preliminary settlement approval papers. *See* Klinger Aff. ¶ 4; Almeida Aff. ¶ 9-11. After the Court preliminarily approved the Settlement, Class Counsel continued to work with the Settlement Administrator to supervise dissemination of Notice to the Class and to monitor the Claims process. *See* Klinger Aff. ¶ 39; Almeida Aff. ¶ 34. These efforts resulted in a Settlement with significant benefits to and protections for the Settlement Class that they would not otherwise have. Moreover, the Settlement provides real benefits that will be available to Class Members in the very near future, rather than years from now. *See* Klinger Aff. ¶ 54; Almeida Aff. ¶ 48. This is a further enhancement to the value of the Settlement to the Class Members. *See Donovan v. Est. of Frank E. Fitzsimmons*, 778 F.2d 298, 309 n.3 (7th Cir. 1985) (recognizing that at a prime interest rate of 12.5 percent of a $2 million settlement sum today is worth the same as a $3.6 million recovery five years from now).

Class Counsel are highly experienced in litigating consumer class actions, including privacy cases. *See* Klinger Aff. ¶ 1-2; Almeida Aff. ¶¶ 2 & 3. And because they were proceeding on a contingent fee basis, Class Counsel "had a strong incentive to keep expenses at a reasonable level[.]" *In re Marsh ERISA Litig*., 265 F.R.D. 128, 150 (S.D.N.Y. 2010). Given the strength of the Settlement obtained for the Settlement Class and the lengthy, adversarial nature of the settlement negotiations, Class Counsel submit that their experience and the quality and amount of work invested for the benefit of the Settlement Class support the requested fee.

5. The Complexity, Length, and Expense of the Litigation.

Data privacy and security class action lawsuits are complex, risky and expensive to litigate. *See generally Synthroid I*, 264 F.3d at 721 (noting that market rate depends "in part on the amount of work necessary to resolve the litigation")); *Isby*, 75 F.3d at 1198-99 (listing "an assessment of the likely complexity, length and expense of the litigation" as factors that determine the

reasonableness of a fee award)). As stated above, Class Counsel were aware that pursuing this case without a settlement would be lengthy and expensive. Plaintiffs would have to make it past several hurdles to achieve a potential recovery in this case—the pleadings stage, discovery, class certification, summary judgment, possibly maintaining class certification throughout trial, trial, and potential appeals. All of this would require hundreds, or perhaps thousands, of hours, which would result in significant costs.

As discussed herein and in Class Counsels' supporting affidavits, investigating, prosecuting, and settling this matter required considerable commitment of time and resources. *See* Klinger Aff. ¶¶41-47; Almeida Aff. ¶¶ 36-41. Class Counsel have vigorously and zealously represented the interests of the Settlement Class from the initial investigation, pre-suit attempts at resolution, the litigation and preliminary approval stages of this litigation and will continue to do so through final approval. *See* Klinger Aff. ¶¶ 39-40; Almeida Aff. ¶¶ 34-35. Class Counsel expended substantial time and effort in the prosecution of this case, and their coordinated efforts were critical to achieving a substantial Settlement for the Settlement Class. *See* Klinger Aff. ¶ 39-40; Almeida Aff. ¶ 48. Class Counsel expect to maintain a high level of oversight and involvement in this case and will continue to incur significant amounts of time given the future work still needed for completion of the Settlement, including drafting, and filing Plaintiffs' Motion for Final Approval, preparing for and appearing at the Final Approval Hearing, overseeing claims administration, answering Class Members' questions, responding to any potential objections, and resolving any appeals. *See* Klinger Aff. ¶ 40; Almeida Aff. ¶ 35. This factor likewise supports approval of the fee request.

6. The Stakes of the Case.

Class action lawsuits are high stakes litigation and data breach class action lawsuits come with their own set of uncertainties, as discussed above. Class Members' claims could have faced several defenses, such as the possibility that the Court would dismiss some or all of their claims, decline to certify the Settlement Class or decertify the Settlement Class or that Plaintiffs would not prevail at trial. *See* Klinger Aff. ¶ 46; Almeida Aff. ¶ 41. This factor weighs in favor of granting this motion because there was an uncertain nature of the lawsuit from the time the Class Action Complaints were first filed by each Plaintiff, yet Class Members are receiving the benefits of the Settlement. *See Synthroid I*, 264 F.3d at 721. Accordingly, Plaintiffs' request for attorneys' fees in the amount of $700,000 meets the factors for reasonableness, is within the well-established 33% to 40% range of fee requests (it represents 35% of the Net Settlement Fund) in class action litigation in the Seventh Circuit and should be granted.

II. THE COURT SHOULD AWARD REASONABLE REIMBURSEMENT FOR LITIGATION COSTS AND EXPENSES

It is well established that counsel who create a common benefit for class are entitled to the reimbursement of litigation costs and expenses. *See, e.g.*, *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014) (citing Fed. R. Civ. P. 23; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). The Seventh Circuit has held that costs and expenses should be awarded based on the types of "expenses private clients in large class actions (auctions and otherwise) pay." *Synthroid I*, 264 F.3d at 722; *see also Spicer v. Chi. Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (noting that courts regularly award reimbursement of those expenses that are reasonable and necessarily incurred in the course of litigation); *Hale*, No. 12-0660-DRH, 2018 WL 6606079, at *10 ("'It is well established that counsel who create a common fund ... are entitled to the reimbursement of litigation costs and expenses, which includes such

things as expert witness costs; computerized research; court reports; travel expense; copy, phone and facsimile expenses and mediation.'") (quoting *Beesley*, No. 06-703, 2014 WL 375432, at *3)).

Here, Class Counsel have incurred $20,302.78 in reimbursable expenses related to: (1) filing fees; (2) CMIS expert fees; (3) court admission fees and notary costs; (4) service costs; (5) research costs; (6) reproduction costs; (7) telephone costs; and (8) mediation fees. *See* Klinger Aff. ¶ 48-50; Almeida Aff. ¶ 42. These expenses were necessary to prosecute this case and are modest in comparison to the enormous costs that likely would have been incurred if litigation had continued. Accordingly, the Court should grant Class Counsel's request for $20,302.78 as reasonable expenses.

III. THE REQUESTED SERVICE AWARDS ARE REASONABLE, APPROPRIATE, AND SHOULD BE GRANTED

Class Counsel requests that the Court grant Service Awards to Class Representatives—in the amount of $3,500 each—for their efforts on behalf of the Settlement Class. Service awards compensating named plaintiffs for work done on behalf of the class are routinely awarded. Such awards encourage individual plaintiffs to undertake the responsibility of representative lawsuits. *See, e.g.*, *Cook*, 142 F.3d at 1016 (recognizing that "because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit"); *Synthroid I*, 264 F.3d at 722 ("Incentive awards are justified when necessary to induce individuals to become named representatives."). Without Plaintiffs serving as Class Representatives, the Settlement Class would not have been able to recover anything. *See In re Iowa Ready-Mix Concrete Antitrust Litig.*, No. 10-4038, 2011 WL 5547159, at *5 (N.D. Iowa Nov. 9, 2011) ("[E]ach . . . plaintiff has provided invaluable assistance and demonstrated an ongoing commitment to protecting the interests of class members.").

Plaintiffs have been actively engaged in this litigation and were essential to the success achieved. *See* Klinger Aff. ¶ 29. Among other things, they provided information to Class Counsel, reviewed pleadings, stayed updated about the litigation, and reviewed and approved the Settlement. *See id.*, ¶ 30. The Settlement would not have been possible without the effort and commitment of Plaintiffs, who sacrificed time and put their name on the line for the sake of the Class. *See id.*, ¶ 31.

Moreover, the total amount requested here, $3,500 each for the two Class Representatives, is in line with other awards approved by federal courts in the Seventh Circuit. *See, e.g.*, *Kolinek*, 311 F.R.D. at 502 ("a $5,000 reward is justified based on Kolinek's role working with class counsel, approving the settlement agreement and fee application, and volunteering to play an active role if the parties continued litigating through trial"); *Cook*, 142 F.3d at 1016 (affirming $25,000 incentive award); *Heekin v. Anthem, Inc.*, No. 05-01908, 2012 WL 5878032, at *1 (S.D. Ind. Nov. 20, 2012) (approving $25,000 incentive award to lead class plaintiff over objection); *Will v. Gen. Dynamics Corp.*, No. 06–698–GPM, 2010 WL 4818174, at *4 (S.D. Ill. Nov. 22, 2010) (awarding $25,000 each to three named plaintiffs); *Desai v. ADT Sec. Servs., Inc.*, No. 11-1925 (N.D. Ill. Feb. 27, 2013), ECF No. 243 ¶ 20 (awarding $30,000 incentive awards in class settlement). Thus, the requested Service Awards are reasonable and should be approved.

CONCLUSION

As detailed in Plaintiffs' Motion for Preliminary Approval (and as will be further detailed in Plaintiffs' Motion for Final Approval), Class Counsel obtained a tremendous result for the Settlement Class in this case, which involves an incredibly nascent and unsettled area of the law. Class Counsel thoroughly investigated the technology at issue, researched potentially applicable law, made the reasoned decision to reach out to Froedtert and its counsel pre-suit, engaged in a full day mediation, negotiated the Settlement, the Settlement Agreement and the Motion for

Preliminary Approval (including the various notices and other exhibits).

As a direct result of Class Counsel's work and dedication to this case, Plaintiffs will receive a prompt and beneficial outcome while avoiding the significant cost, risk, and delay of further litigation. Plaintiffs respectfully request that this Court (i) award Class Counsel's attorneys' fees in the amount of $700,000, plus reimbursement of reasonable and necessary litigation costs and expenses in the amount of $20,302.78 and (ii) award Service Awards to the two Class Representatives in the amount of $3,500 each (for a total of $7,000), for their efforts on behalf of the Class.

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Respectfully submitted,

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