IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

TODD GORDON, MARC and KRISTEN MERCER, h/w, MICHELLE FOWLER, GREG LAWSON, and JUDY CONARD, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CHIPOTLE MEXICAN GRILL, INC., Civil Action No. 1:17-cv-01415-CMA-SKC

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND SERVICE AWARDS

I. INTRODUCTION

Over the course of over a year and a half, Plaintiffs Todd Gordon, Marc Mercer, Kristen Mercer, Michelle Fowler, Judy Conard, and Greg Lawson ("Plaintiffs") and Class Counsel vigorously litigated this data breach class action against Defendant Chipotle Mexican Grill, Inc. ("Chipotle"). On June 19, 2019, the Court preliminarily approved a class-wide Settlement that addresses virtually all types of harm that class members are likely to have incurred as a result of the Chipotle security incident (the "Security Incident") described in Plaintiffs' Complaint. Plaintiffs' counsel now respectfully request that the Court award $1,200,000 in attorneys' fees and costs for their work associated with bringing this case to a successful resolution. The fee requested ($1,165,782 after more than $34,000 in expenses are deducted) represents a negative multiplier of the lodestar Class Counsel incurred, and is well within range of what courts have found to be reasonable in Colorado and elsewhere. The six Class Representatives also seek

service awards of $2,500 each for their work in prosecuting this case. Without these individuals' investment of time, and their courage to step forward and vindicate the class' rights against a large institution, the class would not have obtained the substantial relief offered by the Settlement.

As discussed in detail below and in the accompanying declarations, Class Counsel and other counsel devoted 2,405.70 hours to investigation, prosecution and settlement of this litigation, totaling a lodestar of $1,440,520.40. This figure does not include any future work Class Counsel will invest to finalize the Settlement (including the Motion for Final Approval). Moreover, the total amount earmarked for Plaintiffs' attorneys' fees and expenses is a figure that the mediator proposed to both sides after all of the other material terms of the settlement had been agreed upon, but at a time when the parties were at an impasse with respect to this remaining point. The separate payment of fees, litigation costs, and service awards to the class representatives will not diminish the recovery to the class made available under the settlement.

Class Counsel submit that the requested fee amount is amply justified in light of the valuable settlement benefits obtained on behalf of Plaintiffs and the class (despite the numerous risks they faced), the significant work invested in this case, and the caliber of Class Counsel's work. For the reasons set forth below, Plaintiffs respectfully request that their motion be granted. The relief sought in this motion is unopposed by Chipotle.[1]

[1] In accordance with the preliminary approval order (ECF No. 107, at 14), Plaintiffs separately will be moving for final approval of the settlement and for certification of a settlement class by November 21, 2019.

II. RELEVANT FACTUAL BACKGROUND

A. The Pleadings

This action ("*Gordon*") was commenced in this Court on June 9, 2017. *See* ECF No. 1. On the same day, a second action, *Baker v. Chipotle Mexican Grill*, No. 5:17-cv-01134, was filed in the United States District Court for the Central District of California. The *Baker* action was subsequently voluntarily dismissed on July 5, 2017 (*Baker*, ECF No. 14), and the plaintiff in *Baker* joined as a plaintiff in the *Gordon* action. On August 18, 2017, a third similar action, *Lawson v. Chipotle Mexican Grill, Inc.*, Civil Action No. 17-cv-01997-CBS, was filed in this Court by separate counsel. After meeting and conferring over the course of several weeks, Class Counsel – each of whom had filed these three separate actions – were able to reach an agreement amongst themselves, without court intervention, as to a proposed leadership structure of Plaintiffs' counsel in these actions. *See In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.,* No. MDL No. 1674, 2011 U.S. Dist. LEXIS 107366, at *22 (W.D. Pa. Sept. 20, 2011) (". . . the private ordering method of selecting interim lead counsel has long been the preferred approach.").

On December 8, 2017, Plaintiffs filed the operative Consolidated Amended Class Action Complaint. ECF No. 36 ("CAC"). The CAC alleges that because of Chipotle's failure to protect its customers' debit and credit card Information, Plaintiffs and class members were victimized during the Security Incident – they had their card Information compromised, were exposed to identity theft, were subjected to the increased risk of fraud, lost control over their personal information, and spent multiple hours attempting to address and mitigate the fallout of the Security Incident. CAC ¶¶ 6-7. Plaintiffs also alleged that Chipotle failed to make meaningful assistance available to its customers in

the wake of the breach, such as fraud insurance or credit monitoring. *Id*. ¶ 8. The CAC sought to represent a class consisting of all Chipotle customers who used a credit or debit at an affected Chipotle or Pizzeria Locale location during the period of the Security Incident. *Id*. ¶ 105.

On January 22, 2018, Chipotle responded to the CAC by filing a motion to dismiss the case in its entirety based upon standing arguments under FED R. CIV. P. 12(b)(1). ECF Nos. 43-44. It also advanced legal challenges to Plaintiffs' claims under FED R. CIV. P. 12(b)(6). *Id.* After the motion was fully briefed by the parties, Magistrate Judge Mark Carman issued a 61 page long Report and Recommendation on August 1, 2018 that granted in part and denied in part Chipotle's motion to dismiss. ECF No. 73.

Specifically, Magistrate Judge Carman rejected Chipotle's argument that Plaintiffs Lawson and Baker lacked Article III standing to bring their claims. *Id*. at 16. As for Plaintiffs' substantive claims, Magistrate Judge Carman recommended that the Court dismiss claims for negligence, negligence *per se*, violations of the Colorado Consumer Protection Act, and violations of the Illinois Deceptive Trade Practices Act. *Id*. at 60. However, Magistrate Judge Carman recommended denying Chipotle's motion to dismiss with respect to the majority of Plaintiffs' claims, including: breach of implied contract; unjust enrichment; claim for violations of the Arizona Consumer Fraud Act; claim for violations of the California Customer Records Act; claim for violations of the California Unfair Competition Law; claim for violations of the California Consumers Legal Remedies Act; claim for violations of the Illinois Consumer Fraud Act; and claim for violations of the Missouri Merchandising Practices Act. *Id*.

On September 26, after the parties had filed objections (and respective responses thereto) to the Magistrate's ruling, Judge Christine M. Arguello issued an Order Affirming in Part and Rejecting in Part Magistrate Judge Carman's Recommendation. ECF No. 82. This Court affirmed the Recommendation as to Plaintiffs' negligence, negligence *per se*, Colorado CPA, and Illinois DTPA claims, which were dismissed. The Court rejected the Recommendation as to Plaintiffs' unjust enrichment claim, which was also dismissed. *Id*. at 39-40. Over Chipotle's objection, however, this Court affirmed the Recommendation as to Plaintiffs' claims for implied contract, claims for violations of the Arizona, Illinois, and Missouri consumer protection statutes, and claims for violations of California consumer protection and data privacy statutes. *Id*. The motion to dismiss was, thus, denied as to these claims. *Id*. Chipotle filed an Answer to the CAC on October 10. ECF No. 83.

On August 22, 2018, Plaintiffs' renewed motion seeking appointment of interim co-lead counsel was granted. ECF No. 78. The Court appointed the law firms of Chimicles Schwartz Kriner & Donaldson-Smith LLP, Ahdoot & Wolfson PC, and Morgan & Morgan as interim co-lead counsel for the class. *See id.*

B. Discovery and Investigation

Prior to commencing this case, Class Counsel investigated all publicly available information surrounding the Security Incident, and researched applicable laws and potential causes of action. *See* Declaration of Benjamin F. Johns ("Johns Decl.") at ¶ 3. They also consulted with an expert regarding damages and dark web activity. *Id*. Further details of Class Counsel's investigation and efforts in litigating this case from

commencement through settlement are set forth in more detail below and in the Class Counsel declarations submitted herewith.

The parties conducted significant discovery over the course of the litigation. Chipotle produced over 31,000 pages of documents, which Class Counsel thoroughly reviewed. *See* Johns Decl. at ¶ 3. On August 2, 2018, Class Counsel participated in a FED. R. CIV. P. 30(b)(6) deposition of Chipotle, along with counsel for the Financial Institution Plaintiffs in a parallel action. *Id*. Class Counsel also worked with Plaintiffs to respond to written discovery propounded by Chipotle. *Id*.

C. Settlement Negotiations and Administration

After the ruling on Chipotle's Motion to Dismiss, the parties began discussing the possibility of reaching a negotiated, class-wide settlement. Plaintiffs sent a written settlement demand to Chipotle on November 20, 2018 and, thereafter, the parties agreed to seek the aid of Bennett G. Picker of Stradley Ronon Stevens & Young, LLP as a private mediator. The parties held several pre-mediation telephone calls with Mr. Picker, and subsequently submitted *ex parte* mediation briefs ahead of the mediation session. *See* Declaration of Bennett G. Picker ("Picker Decl.") at ¶ 4.

On February 12, 2019, the parties engaged in a full-day mediation session in Florida with Mr. Picker. Johns Decl. at ¶¶ 3-4; Picker Decl. at ¶¶ 2-3, 6. With the assistance of the mediator, the parties reached agreement on the material terms of the settlement. Johns Decl. at ¶¶ 3-4. Only after reaching agreement on these material terms did the parties begin negotiations as to attorneys' fees and expenses. Johns Decl. at ¶ 4. After significant negotiation, and being unable to reach agreement as to the amount of Plaintiffs' attorneys' fees and expenses, Mr. Picker submitted a

mediator's proposal which both sides ultimately accepted. Johns Decl. at ¶ 4; Picker Decl. at ¶ 8. The parties agreed that Chipotle would pay (subject to Court approval) Plaintiffs' attorneys' fees and expenses in the amount of $1,200,000, and $15,000 collectively in incentive awards to the six Class Representatives. *See* SA at ¶¶ 7.2-7.3; Picker Decl. at ¶ 8. All negotiations regarding settlement were conducted at arm's length, in good faith, and free of any collusion. Johns Decl. at ¶ 4; Picker Decl. at ¶¶ 7, 9.

Class Counsel then drafted and negotiated the details of the written Settlement Agreement. Johns Decl. at ¶ 5. Class Counsel thoroughly vetted blind, competing settlement notice and administration bids from three vendors, and agreed upon the appropriate vendor for this settlement. *Id.* Class Counsel also reviewed, negotiated, and made sure that all administrative aspects of the Settlement, including the notice plan, the form of the claim form, the settlement schedule, were in the best interest of the class, all the while conferring with defense counsel and the administrator. *Id*.

After finalizing all details of the Settlement Agreement, notice, and administration plan and executing the Settlement Agreement, Plaintiffs filed a motion for preliminary approval of the Settlement on June 13, 2019. *See* ECF Nos. 102, 103. As discussed therein, the Settlement provides for cash payments to Class Members for a variety of losses, inconveniences, and virtually all conceivable expenses that could have been incurred as a result of the Security Incident. *See* ECF No. 103, at 5-6; *see also* SA at ¶¶ 2.1-2.2. In addition, during settlement negotiations, Chipotle made certain representations to Class Counsel regarding the measures taken following the breach to increase Chipotle's data security measures and consumer information protection

procedures. Picker Decl. at ¶ 8. As part of the settlement, Chipotle agreed to numerous forward-looking improvements concerning its data security practices. *See* SA at ¶ 2.4.

As noted above, on June 19 the Court issued an Order granting preliminary approval of the settlement, authorizing the dissemination of class notice, and scheduling a final approval hearing for December 12, 2019. *See* ECF No. 107. Since then, Class Counsel have continued to expend numerous hours overseeing settlement administration, taken additional steps to maximize the reach and results of the class notice, and engaging in regular communications with the claims administrator.

As noted above, Plaintiff's Counsel expended a total lodestar of $1,440,520.40 through October 31, 2019. This amount does not include any additional work Class Counsel will expend toward finalizing the Settlement, including drafting the Motion for Final Approval, addressing objections, if any, attending the fairness hearing, and overseeing the work of the claims administrator to make sure claims are fairly and timely paid.

III. ARGUMENT

Rule 23(h) of the Federal Rules of Civil Procedure provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by . . . the parties' agreement." *Barr v. Qwest Communs. Co., Ltd. Liab. Co.,* No. 1:01-cv-00748-WYD-KLM, 2013 U.S. Dist. LEXIS 4662, at *9 (D. Colo. Jan. 11, 2013) (quoting FED. R. CIV. P. 23(h)). The Rule further provides that "[a] claim for an award must be made by motion under Rule 54(d)(2)," notice of which must be "directed to class members in a reasonable manner," and that the Court "must find the facts and state its legal conclusions under Rule 52(a)." FED. R. CIV. P. 23(h)(1) and

(3). In turn, Rule 54(d)(2) requires a claim for fees to be made by motion, and specifies its timing and content, including, in relevant part, "the grounds entitling the movant to the award" and "the amount sought." FED. R. CIV. P. 54(d)(2)(B).[2]

Pursuant to the Settlement Agreement, Plaintiffs move for an award of $1,200,000, which accounts for both the attorney's fees for all of the law firms representing Plaintiffs (who, as discussed below, have amassed a collective lodestar of $1,440,520.40 through October 31, 2019, thus representing a 0.83 multiplier), and the reimbursement of $34,001.57 in their cumulative litigation expenses. As noted above, Chipotle does not object to this request. Plaintiffs also request – and Chipotle has agreed to pay, subject to Court approval – an additional $15,000 to be distributed evenly to the six Class Representatives, i.e., $2,500 per Class Representative, as incentive award payments for their service in this litigation.

These requests are reasonable considering the work performed and the results achieved (detailed in the Preliminary Approval brief, ECF No. 103 at 5-6, and the Johns Decl., at ¶¶ 3-6), and are consistent with similar awards approved by courts that have presided over data breach class action settlements. Plaintiffs' motion should be granted.

A. <u>The Fee Request Should Be Evaluated Under the Lodestar Method</u>.

"Attorneys' fees are properly calculated by determining the 'lodestar' – the number of hours reasonably expended multiplied by reasonable hourly rates – and then adjusting the lodestar figure, if appropriate, by considering one or more of the factors in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)" (the "Johnson

[2] Notice of the amount sought in fees/expenses was provided in the class notice, and this motion is being posted on the settlement website contemporaneously with this filing.

factors").[3] *Reiskin v. Reg'l Transp. Dist.*, No. 14-cv-03111-CMA-KLM, 2017 U.S. Dist. LEXIS 204242, at *14 (D. Colo. July 11, 2017) (quoting *In re Davita Healthcare Partners, Inc. Derivative Litig.*, No. 12-CV-2074-WJM-CBS, 2015 U.S. Dist. LEXIS 74372 (D. Colo. June 5, 2015)). "The lodestar method yields a fee that is presumptively appropriate." *Reiskin,* 2017 U.S. Dist. 20424, at *14 (citation omitted) (Arguello, J.).

The *Johnson* Factors are:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

In re Davita Healthcare Partners, Inc., 2015 U.S. Dist. LEXIS 74372, at *12-13, n.1 (citing *Johnson*, 488 F.2d at 717-19).

As noted above, the Court should use the lodestar method in this case because there is no common fund.

[3] On the other hand, the Tenth Circuit has implied a preference for the percentage-of-the-fund method in common fund cases. *See Gottlieb v. Barry*, 43 F.3d at 483 (10th Cir. 1994) (citing *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 853 (10th Cir.1993)). The settlement in this case is not a common fund—rather, it is an uncapped claims-based settlement. The lodestar method is consistent with how courts have analyzed fee requests in other claims-based settlement where, as here, the settlement value is uncertain. *See, e.g., In re Google Inc.,* No. 12-MD-2358 (SLR), 2014 U.S. Dist. LEXIS 196444, at *8 (D. Del. Apr. 1, 2014).

B. An Analysis of the *Johnson* Factors Makes Clear that the Requested Attorneys' Fees are Reasonable.

As demonstrated below, an analysis of the *Johnson* Factors demonstrates the reasonableness of the fee request.

1. The Time and Labor Required.

The first *Johnson* factor supports the fee request. Bringing this case to a successful conclusion demanded a significant commitment of time and resources by a team of experienced lawyers. *See* Johns Decl. at ¶ 3. Over the course of nearly two years of litigating this case from its initiation until reaching a settlement – which included, *inter alia*, pre-suit investigation of the relevant facts and potential claims, communications with potential plaintiffs and class members, drafting an initial complaint and the comprehensive CAC, active motion practice, participating in a deposition, review of over 31,000 pages of documents produced by Chipotle, and extensive efforts to mediate and settle this action – Class Counsel have expended 2,405.70 hours of time in prosecuting this case. Johns Decl. at ¶ 7; Wolfson Decl. at ¶ 8; Martin Decl. at ¶ 18.

As set forth *infra,* Class Counsel's rates are reasonable. Using current, reasonable billable rates, this equates to a lodestar of $1,440,520.40. Johns Decl. at ¶ 7; Wolfson Decl. at ¶ 8; Martin Decl. at ¶ 18. Class Counsel has expended and will continue to expend significant hours and resources beyond the point at which the parties reached a settlement in seeing this litigation to its conclusion.[4] The substantial

[4] Because Class Counsel's reported time does not include any of the billable time after October 31, 2019, it does not account for the work performed subsequent to that date, such as future work that will be associated with the final approval hearing and claims and settlement administration. *See In re Philips/Magnavox TV Litig*., No. 09-3072, 2012 U.S. Dist. LEXIS 67287, at *47 (D.N.J. May 14, 2012) (observing, in analyzing a fee request, that the submitted figures did not include time and expenses incurred by

investment of time and money strongly support the reasonableness of the requested fee.[5]

2. Novelty and Difficulty of the Questions; Undesirability of the Case.

The second and tenth *Johnson* factors also support the fee request. This case presented complex and uncertain questions of fact and law. Indeed, other courts have concluded that data breach litigation presents difficult and novel issues for the parties and the courts. *See, e.g., In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 U.S. Dist. LEXIS 135573, at *14 (N.D. Ohio Aug. 12, 2019) ("Data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts. And of course, juries are always unpredictable."); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (". . . many of the legal issues presented in this data-breach case are novel . . . ."); *Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.*, No. JKB-16-3025, 2019 U.S. Dist. LEXIS 120558, at *23 (D. Md. July 15, 2019) (finding fee in data breach case reasonable in light of, *inter alia*, "the complex and novel nature of the case"); *see also* Picker Decl. at ¶ 4 (acknowledging that this case presented significant risks).

This case is no different in that it presented novel and difficult issues. For example, Plaintiffs briefed (and prevailed on) complex issues relating to Article III standing and injury, about which there is disagreement among the federal circuit courts of appeals. Plaintiffs also raised novel issues regarding Chipotle's obligations for data

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counsel subsequent to the submission of that motion).

[5] Summary timekeeping records for each firm are provided with the Declaration submitted herewith. *See* Johns Decl. at Exhibit A; Wolfson Decl. at Exhibit A; Martin Decl. at Exhibit A.

privacy and payment card security. Although many of the issues and claims proceeded past the motion to dismiss and into discovery, the path to class certification was far from certain. Notably, "[a]s of May 2018, nationwide only one data breach consumer class had been certified." *Linnins v. HAECO Ams., Inc*., No. 1:16CV486, 2018 U.S. Dist. LEXIS 183839, at *5 (M.D.N.C. Oct. 26, 2018) (referring to *Smith v. Triad of Ala., LLC*, No. 1:14-CV-324-WKW, 2017 U.S. Dist. LEXIS 38574, at *45-46 (M.D. Ala. Mar. 17, 2017)). Numerous courts to consider class certification motions in data breach cases have denied certification. *See, e.g., DoImage v. Combined Ins. Co. of Am.*, No. 14 C 3809, 2017 U.S. Dist. LEXIS 67555, at *7 (N.D. Ill. May 3, 2017) (class certification denied); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21, 33 (D. Me., 2013) (same); *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389, 397-98 (D. Mass., 2007) (same); *see also Hammond v. Bank of N.Y. Mellon Corp.,* 08 Civ. 6060, 2010 U.S. Dist. LEXIS 71996, at *47 (S.D.N.Y. June 25, 2010) (granting summary judgment for defendant due to lack of standing in data security/theft action).

This uncertainty and the novelty of this case, as well as the possibility of no recovery, equally supports the "undesirability" *Johnson* factor. *Hapka v. Carecentrix, Inc.*, No. 2:16-cv-02372-KGG, 2018 U.S. Dist. LEXIS 68186, at *9 (D. Kan. Feb. 15, 2018) (finding "undesirability" *Johnson* factor to be satisfied by uncertainty of success and novelty of the case). Accordingly, these factors militate strongly in favor of approval of Plaintiffs' fee request.

3. The Skill Required; the Experience, Reputation, and Ability of the Attorneys.

The third and ninth *Johnson* factors also support the fee request. As discussed above, this litigation raised complex and novel questions relating to data breaches,

consumer protection laws, class certification and constitutional standing. The three firms comprising Class Counsel are well-experienced in complex civil litigation, including in consumer and data breach actions. *See, e.g., Bray v. Gamestop Corp*., No. 1:17-cv-01365-JEJ, 2018 U.S. Dist. LEXIS 226221, at *8 (D. Del. Dec. 19, 2018) (appointing Benjamin Johns and the Chimicles firm as co-lead counsel in data breach case, and granting final approval of settlement); *In re Experian Data Breach Litig.*, No. SACV 15-01592 AG (DMFx) (C.D. Cal. Dec. 3, 2018), ECF No. 289 at 7 (granting preliminary approval and appointing Tina Wolfson and AW as co-lead class counsel); *Linnins*, 2018 U.S. Dist. LEXIS 183839, at *6 (recognizing Jean Martin's "unique experience in data breach class actions, as well as significant experience in data privacy cases and other class actions."). Each is of the opinion that the settlement reached here is in the best interest of the Class.

There is no question that Class Counsel are qualified to serve as co-lead counsel. Indeed, this Court has already appointed them as interim co-lead counsel and, subsequently, class counsel for the Settlement Class. *See* ECF Nos. 78, 107. Class Counsel's specialized knowledge "facilitated and promoted the settlement of this action," *Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1008-09 (D. Colo. 2014), and thus supports the fee request.

4. Preclusion of Other Employment; Customary Fee; Contingent Fee; Awards in Similar Cases.

Johnson factors 4, 5, 6, and 12 all strongly weigh in favor of the requested fee. As previously noted, Class Counsel spent 2,405.70 hours litigating this class action. Johns Decl. at ¶ 7; Wolfson Decl. at ¶ 8; Martin Decl. at ¶ 18. This is time that counsel could have devoted to other matters. *See, e.g., Tuten*, 41 F. Supp. 3d at 1009

("Moreover, the time expended by Class Counsel on this case prevented them from working on other matters."); *Burford v. Cargill, Inc.*, No. 05-0283, 2012 U.S. Dist. LEXIS 161232, at *10 (W.D. La. Nov. 8, 2012) ("The affidavits of Class Counsel prove that while this case did not preclude them from accepting other work, they were often times precluded from working on other cases due to the demands of the instant matter. . . . This factor weighs in favor of a substantial fee award.").

Additionally, Class Counsel accepted this case on a contingent fee basis and, therefore, accepted a significant risk of non-payment. *See Tuten*, 41 F. Supp. 3d at 1009 ("Class Counsel took the case on a contingent basis, which permits a higher recovery to compensate for the risk of recovering nothing for their work. . . . This is notable, particularly because this case involved novel legal issues for which recovery was uncertain.").

The requested fee amount is also consistent with those approved in other data breach settlements, and is in line with fee awards in this Court. Class Counsel have amassed a collective lodestar of $1,440,520.40 through October 31, 2019, thus representing a 0.83 (negative) multiplier.[6] The fact that the lodestar multiple is negative supports the reasonableness of the fee requested. *See, e.g., Hapka v. Carecentrix, Inc.*, No. 2:16-cv-02372-KGG, 2018 U.S. Dist. LEXIS 68186, at *5 (D. Kan. Feb. 15, 2018) (fee award implicating "a negative multiplier (0.87) on Class Counsel's lodestar—*is inherently reasonable*.") (emphasis added); *Carlin v. DairyAmerica, Inc.*, No. 1:09-cv-04300AWI-EPG, 2019 U.S. Dist. LEXIS 78026, at *44 (E.D. Cal. May 8, 2019) (citing *Schiller v. David's Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776, at *23 (E.D. Cal. June 11,

[6] When expenses are deducted from the numerator, the net lodestar multiple becomes 0.81.

2012) for the proposition that "a negative lodestar multiplier strongly supports the reasonableness of the fee request").

The lodestar multiple is also well below the upper limit of the acceptable range of multipliers that have been approved by courts in the Tenth Circuit. *See, e.g., In re Davita Healthcare Partners, Inc.*, 2015 U.S. Dist. LEXIS 74372, at *14-16 (approving a multiplier of three where "Plaintiff has established that the significant risk it assumed by taking this case on contingency warrants compensation"); *Connolly v. Harris Trust Co. of Ca. (In re Miniscribe Corp.)*, 309 F.3d 1234, 1245 (10th Cir. 2002) (affirming fee award based on a lodestar multiplier of 2.57 in class action); *Tuten*, 41 F. Supp. 3d at 1009 (approving fees with lodestar multiplier estimated to be at or below two).

A review of similar data breach settlements also demonstrates that the fee request here is reasonable and appropriate. *See*, *e.g.*, *In re Ashley Madison Customer Data Security Breach,* Case No. 4:15-MD-02669-JAR (E.D. Mo. Nov. 20, 2017), ECF. No. 383 ($3,733,333.33 in fees plus $78,032.38 in approved expenses in a website breach); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, 2019 U.S. Dist. LEXIS 135573, at *24-25 (granting preliminary approval of data breach settlement, including fee request of $1,297,500 and expenses of $209,536.76 with only estimated 1.5 million settlement class members). Plaintiffs' requested award of $1,200,000 is less than the amounts approved in many similar cases, and is appropriate here.

5. The Time Limitations Imposed by the Client or the Circumstances.

Counsel's efficient work has allowed Settlement Class members to take advantage of reimbursements for fraud up to $250, including, *inter alia*, an automatic payment for each impacted card, payment for time spent dealing with fraud, and

reimbursement for credit monitoring and identity theft insurance. Johns Decl. at ¶ 6. In addition, any Class Members who experienced extraordinary expenses will be eligible for reimbursement in the amount up to $10,000 per claim. *Id.*; SA at ¶ 2.2. The Settlement also allows class members to enroll in credit monitoring and other similar services, which will help mitigate future harms. Johns Decl. at ¶ 6. "Given the nature of [data breach] case[s], it was important for Class Counsel to litigate this case on an expedited schedule, which Class Counsel successfully did." *Hapka*, 2018 U.S. Dist. LEXIS 68186, at *8 (finding fee request appropriate where settlement provided $200 payment for fraud). The seventh *Johnson* factor thus supports the fee request.

6. The Amount Involved and the Results Obtained.

The eighth *Johnson* factor also supports the fee request. "[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *O'Dowd v. Anthem, Inc.*, No. 14-cv-02787-KLM-NYW, 2019 U.S. Dist. LEXIS 153610, at *52 (D. Colo. Sep. 9, 2019). In negotiating the amounts to be paid under the Settlement, Class Counsel relied upon published reports documenting data breach and identity theft costs, actual costs incurred by Class Members (as relayed in conversations with Class Counsel), information uncovered in discovery, their own experience in other data breach litigation, and reported settlements in other data breach class actions. The monetary benefits offered to Settlement Class Members are more than fair and reasonable in light of reported average out-of-pocket expenses due to a data breach.[7]

[7] For individuals who experienced actual identity theft, a 2014 Congressional Report stated that these victims incurred an average of $365.00 in expenses in dealing with the fraud. *See* Kristin Finklea, Congressional Research Service, *Identity Theft: Trends and*

The benefits available here compare favorably to what Class Members could recover if successful at trial. In the experience of Class Counsel, the relief provided by this Settlement should be considered an outstanding result and benefit to the Class. *See, e.g., Hapka*, 2018 U.S. Dist. LEXIS 68186, at *8-9 ("By any measure, Class Counsel obtained a robust result in this data breach class action. The Settlement addresses past harms through reimbursement of Out-of-Pocket Losses or the alternative minimum $200 payment for tax fraud and also helps Settlement Class Members protect against future harm through the Credit Monitoring Services."). The equitable, forward-looking relief obtained with respect to Chipotle's data security practices also provides substantial non-monetary benefits to the class members. *See* Picker Decl. at ¶ 8; SA at ¶ 2.4; *see also O'Dowd*, 2019 U.S. Dist. LEXIS 153610, at *53 (injunctive relief provides "substantial non-monetary benefits" to the class).

7. Nature and Length of the Relationship with the Clients.

Finally, the eleventh *Johnson* factor weighs in favor of the fee award. Class Counsel have been in communication with their clients since before this action was commenced in June 2017, and remain in close contact with them regarding details of this settlement and its progression. Johns Decl. at ¶ 3. The Plaintiffs have been actively involved in this litigation (*id.*) and, have approved of and support the Settlement. *See* SA at 62. Accordingly this factor weighs in favor of the agreed upon fee.

C. <u>Class Counsel's Rates are Reasonable</u>.

In conducting a lodestar analysis, "current rates, rather than historical rates, should be applied in order to compensate for the delay in payment." *Konits v. Valley*

Issues (January 16, 2014), p. 2, available at https://fas.org/sgp/crs/misc/R40599.pdf (last visited May 21, 2019).

Stream Cent. High Sch. Dist., 350 Fed. Appx. 501, 505 n.2 (2d Cir. 2009). A "reasonable rate" is defined as the prevailing market rate in the relevant community for an attorney of similar experience. *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1078 (10th Cir. 2002). "Because of the significant resources and skill required, as well the risks entailed, to litigate large-scale actions . . . very few attorneys handle such cases." *Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK-CBS, 2006 U.S. Dist. LEXIS 51420, at *13 (D. Colo. July 27, 2006). "Thus the relevant community for purposes of determining a reasonable billing rate for Class Counsel likely consists of attorneys who litigate nationwide, complex class actions." *Id.* Class Counsel's current rates are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984), i.e., in the nationwide class action practice.

As set forth in Class Counsel's separate Declarations, partner billing rates in this case range from $950-675; associate rates range from $500-325; and professional staff rates range from $250-165. The respective hours billed and lodestars for Plaintiffs' counsel on this matter as of October 31, 2019 are summarized below:

Firm	Hours	Lodestar
Chimicles Schwartz Kriner & Donaldson-Smith LLP	1,081.50	$ 509,309.50
Ahdoot & Wolfson, PC	816.30	$ 608,760.00
Law Office of Jean Sutton Martin PLLC	191.80	$ 122,180.00
Morgan & Morgan	77.50	$ 64,572.40
Ben Barnow & Associates	70.80	$ 36,406.00
Glancy, Prongay & Murray LLP	1.50	$ 1,387.50
Johnson Firm	30.40	$ 21,280.00
Hannon Law Firm PC	135.90	$ 76,625.00
TOTAL	2,405.70	$ 1,440,520.40

Class Counsel's rates are in line with those recognized across the country (including in the Tenth Circuit) as acceptable in data breach and large complex class action cases. *See, e.g., Hapka*, 2018 U.S. Dist. LEXIS 68186, at *4 (Tenth Circuit data breach settlement; finding reasonable partner rates of $645-865 per hour, associate rates of $375-475 per hour, and professional staff rates of $225-275 per hour); *Fulton-Green v. Accolade, Inc.*, No. 18-274, 2019 U.S. Dist. LEXIS 164375, at *32 (E.D. Pa. Sep. 23, 2019) (finding in data breach lawsuit that "Class Counsel's rates range from $202 to $975 per hour. Courts have considered *similar rates reasonable* in the past." (emphasis added)); *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1087-88 (S.D. Tex. 2012) (finding rates reasonable where class action attorney rates ranged from $825 per hour for one the co-lead class counsel to as low as $90 per hour for a paralegal, and where the mean hourly rate for all lawyers was $400.81); *Lucas*, 2006 U.S. Dist. LEXIS 51420, at *14-15 (finding, in 2006, that attorney rate of $330 per hour for class counsel was reasonable). Class Counsel's rates fall squarely within the national average rates for attorneys of comparable skill and experience who charge by the hour for their work.

Class Counsel's rates are also reasonable as compared to hourly rates for attorneys in the regional legal market. *See, e.g., Biax Corp. v. NVIDIA Corp.*, No. 09-cv-01257-PAB-MEH, 2013 U.S. Dist. LEXIS 113318 (D. Colo. Aug. 12, 2013) (considering 2010 National Law Journal ("NLJ") billing survey showing Denver firms billed between $285 and $810 per hour for partners; approving rates of over $700 per hour for partners with comparable experience); *Watson v. Dillon Cos., Inc.,* No. 08-cv-

00091-WYD-CBS, 2013 U.S. Dist. LEXIS 122594, at *7 (D. Colo. Aug. 28, 2013) (approving rate of $550 per hour for lead attorney).

Furthermore, the rates of each firm comprising Class Counsel have previously been approved by other district courts. *See, e.g., Mendoza v. Hyundai Motor Co.*, No. 15-cv-01685-BLF, 2017 U.S. Dist. LEXIS 9129, at *36-38 (N.D. Cal. Jan. 23, 2017) (approving Chimicles firm's hourly rates); *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877, 899 (C.D. Cal. 2016) (same, and holding: "the court finds that the challenged rates are reasonable . . . ."); *In re Experian Data Breach Litig.*, Case No. 8:15-cv-01592-AG-DFM (C.D. Cal. May 10, 2019), ECF No. 322 (approving Ahdoot & Wolfson's rates); *Williamson, et al. vs. McAfee, Inc*., Case No. 5:14-cv-00158-EJD (N.D. Cal. Feb. 15, 2017, ECF No. 118 (same); *Torres v. Wendy's International, LLC*, No. 6:16-cv-210 (M.D. Fla. Feb., 26, 2019), ECF No. 157 (Morgan & Morgan's rates); *Fuentes, et al. v. UniRush, LLC, et al.,* No. 1:15-cv-08372 (S.D.N.Y. Sept. 12, 2016), ECF No. 49 (same).

D. <u>The Requested Expenses Are Reasonable and Appropriate</u>.

Out-of-pocket expenses that are reasonable and necessary are routinely reimbursed in representative litigation such as this. *See Ryskamp v. Looney,* No. 10-cv-00842-WJM-KLM, 2012 U.S. Dist. LEXIS 114190, at *15-18 (D. Colo. Aug. 14, 2012); *Mohammed v. Ells,* No. 12-cv-1831-WJM-MEH, 2014 U.S. Dist. LEXIS 118796, at *13-16 (D. Colo. Aug. 26, 2014). As summarized in the chart below (and in more detail in the accompanying declarations), Class Counsel have collectively incurred $34,001.57 in unreimbursed, properly documented litigation expenses for the common benefit of the class.

Firm	Expenses
Chimicles Schwartz Kriner & Donaldson-Smith LLP	$11,859.97
Ahdoot & Wolfson, PC	$10,401.37
Law Office of Jean Sutton Martin PLLC	$1,913.07
Morgan & Morgan	$6,694.33
Hannon Law Firm LLC	$2,077.87
Ben Barnow & Associates	$826.96
Glancy, Prongay & Murray LLP	$228.00
TOTAL	**$34,001.57**

These expenses include, *inter alia*: online legal research; mediation expenses; copying, printing and filing fees; mailing costs; telephone charges; costs associated with accessing PACER and LEXIS; and reasonable travel and lodging expenses. *See* Johns Decl. at ¶ 9; Wolfson Decl., at 14; Martin Decl. at 21. "Reimbursement of similar expenses is routinely permitted." *In re Remeron End-Payor Antitrust Litig.*, No. 02-2007 (FSH), 2005 U.S. Dist. LEXIS 27011, at *92 (D.N.J. Sept. 13, 2005) (citation omitted); *see also Alcantar v. Hobart Serv.*, No. EDCV 11-1600 PSG (SPx), 2018 U.S. Dist. LEXIS 221900, at *26 (C.D. Cal. Aug. 13, 2018) ("Attorneys are typically permitted 'to recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters.'") (citation omitted). Furthermore, as noted above, the requested expenses will be paid out of – and not in addition to – the total $1,200,000 fee request.

D. The Requested Incentive Awards Should be Approved.

"A class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class." *O'Dowd v. Anthem, Inc.*, No. 14-cv-02787-KLM-NYW, 2019 U.S. Dist. LEXIS 153610, at *57-58 (D. Colo. Sep. 9, 2019) (citing *Tuten*, 41 F. Supp. 3d at 1010). "The reasonableness of a service

award to a named Plaintiff is not generally listed as a factor to consider when deciding whether to approve a settlement." *Id.* (quoting *Thompson v. Qwest Corporation*, No. 17-cv-01745-WJM-KMT, 2018 U.S. Dist. LEXIS 79941, at *9 (D. Colo. May 11, 2018)). However, "reasonable incentive payments have become common for class representatives . . . ." *Id.* (citation omitted) (internal quotation marks and citations omitted). Factors to be considered when determining whether to approve an incentive award include: "(1) the actions that the class representative took to protect the interests of the class; (2) the degree to which the class has benefited from those actions; and (3) the amount of time and effort the class representative expended in pursuing the litigation." *Thompson*, 2018 U.S. Dist. LEXIS 79941, at *9.

The service provided by the Class Representatives in this action should not go without financial recognition. The Class Representatives were the principal catalysts to achieving the significant benefits to the class under the proposed Settlement. They participated in numerous meetings with their attorneys, and stayed abreast of significant developments in the case. *See* Johns Decl. at ¶ 3. And like Plaintiffs' expense request, the $15,000 in collective incentive awards – or $2,500 per Class Representative – will be paid separately from the consideration in the SA, and will not reduce the recovery to any Class Member. *See In re LG/Zenith Rear Projection TV Class Action Litig.*, No. 06-5609 (JLL), 2009 U.S. Dist. LEXIS 13568, at *25 (D.N.J. Feb. 18, 2009) (approving incentive award that "will not decrease the recovery of other class members."); *Edelen v. Am. Residential Servs., LLC*, No. DKC 11-2744, 2013 U.S. Dist. LEXIS 102373, at *47 (D. Md. July 22, 2013) (incentive award found reasonable *inter alia* where it "does not decrease the recovery available to other class members.").

A $2,500 incentive award is lower than those approved in numerous other data breach settlements. *See, e.g., In re Ashley Madison Customer Data Security Breach,* No. 4:15-md-02669 (E.D. Mo.) ($5,000 incentive awards); *T.A.N. v. PNI Digital Media, Inc.* No. 2:16-CV-00132 (S.D. Ga.) ($3,750); *Bray*, 2018 U.S. Dist. LEXIS 226221, at *7-8 ($3,750 incentive awards). Furthermore, the requested incentive awards of $2,500 is also below the amounts deemed reasonable by this Court in other class action settlements. *Thompson v. Qwest Corp.*, Civil Action No. 17-cv-1745-WJM-KMT, 2018 U.S. Dist. LEXIS 79941, at *9 (D. Colo. May 11, 2018) ("A $5,000 incentive award is comparatively on the lower end of awards deemed reasonable.").

Consistent with the law and the terms of the settlement agreement, it is appropriate to make these payments to these class representatives. Plaintiffs respectfully request that the Court likewise approve the requested incentive awards here.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court award Class Counsel the payment of $1,200,000 in attorneys' fees and expenses, and approve the payment of $2,500 in incentive awards to each of the six Class Representatives. A proposed order granting this requested relief is submitted herewith.

Dated: November 1, 2019

Respectfully submitted,

By: */s/ Benjamin F. Johns*

Benjamin F. Johns
Andrew W. Ferich
CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH LLP
361 W. Lancaster Avenue

Haverford, Pennsylvania 19041
Tel: (610) 642-8500
bfj@chimicles.com
awf@chimicles.com

Tina Wolfson
Theodore Maya
AHDOOT & WOLFSON, PC
10728 Lindbrook Drive
Los Angeles, California 90024
Tel: (310) 474-9111
Fax: (310) 474-8585
twolfson@ahdootwolfson.com
tmaya@ahdootwolfson.com

Jean Sutton Martin
MORGAN & MORGAN
2018 Eastwood Road, Suite 225
Wilmington, North Carolina 28403
Tel: (910) 292-6676
jean@jsmlawoffice.com

Co-Lead Counsel for Plaintiffs and the Class

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2019, I electronically filed a true and correct copy of the foregoing filing with the Clerk of the United States District Court for the District of Colorado using its CM/ECF system and thereby served the same via the CM/ECF system on all counsel of record.

/s/ Benjamin F. Johns
Benjamin F. Johns