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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Morgan Stanley Data Security Litigation	Case No. 1:20-cv-05914 (PAE)

OBJECTION OF ROBINA FRANK
TO PLAINTIFFS' ATTORNEYS' FEE REQUEST

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Fed. R. Evid. 702 10

Other Authorities

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Eisenberg, Theodore & Miller, Geoffrey P.,
Attorneys Fees & Expenses in Class Action Litigation:
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INTRODUCTION

Plaintiffs' counsel ask this Court to award them an excessive 33.76%—over $20.25 million—for a settlement that provides almost entirely non-cash relief in a form that is of virtually no benefit to the vast majority of the class. Rather than provide the class with the option to receive a cash award, as many other data breach resolutions do, plaintiffs' counsel agreed to a settlement that provides only fraud insurance services, even though over 90% of the class already has received this option from other class action settlements over the last four years, and even though the data security incidents took place years ago. Plaintiffs' counsel now ask the Court to value this settlement relief as if it were cash, and to award an above-benchmark fee that will result in a lodestar multiplier well above the mean supported by empirical data or Circuit precedent.

Ms. Robina Frank asks this Court to defer awarding attorneys' fees until the parties provide the number of class members who register for the fraud insurance services so that the Court can base the fee award on the actual benefit to the class or, at a minimum, discount the settlement fund to account for the lower value of those services compared to cash relief. Although the length of services will be supplemented for class members if so few class members register that funding for the services remains available, the Court should consider the value actually elected by the class and consider the lack of enthusiasm for the relief as a factor to reduce the fee percentage. *See* Section III; *see also* Rule 23(e)(2)(C)(ii). To the extent the fee award results in a lodestar above 1.65, the Court should further reduce the award to align it with empirical data and applicable precedent. *See* Section IV.

ARGUMENT

I. Objector is a member of the Settlement Class.

Objector Robina Frank's late husband William Frank had a Morgan Stanley account established in the United States identifying her as a beneficiary (and thus Morgan Stanley had her personal information). She received a Notice Letter regarding the Data Security Incidents

and providing a Settlement Unique ID and a Financial Shield Code. Decl. of Robina Frank ("R. Frank Decl.") ¶ 3. Ms. Frank therefore is a member of the class with standing to object to the settlement. Fed. R. Civ. P. 23(e)(5). Ms. Frank's address is 5422 Jackwood St., Houston, TX 77096. Her telephone number is (832) 567-9587. R. Frank Decl. ¶ 2.

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF"), through attorney Anna St. John, represents Ms. Frank *pro bono*. St. John gives notice of her intent to appear at the fairness hearing on behalf of Ms. Frank, where she wishes to discuss matters raised in this Objection. CCAF represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See, e.g. Berni v. Barilla S.P.A*, 964 F.3d 141 (2d Cir. 2020) (sustaining CCAF's objection to improper settlement certification). CCAF's track record—and preemptive response to the most common false *ad hominem* attacks made against it by attorneys defending unfair settlements and fee requests—can be found in the Declaration of Theodore H. Frank. To avoid doubts about her motives, Ms. Frank is willing to stipulate to an injunction prohibiting her from accepting compensation in exchange for the settlement of this objection. R. Frank Decl. ¶ 6. Ms. Frank brings this objection through CCAF in good faith to protect the interests of the class, and her objection applies to the entire class. *Id.* ¶¶ 6, 10. She adopts any arguments filed or submitted to the Court regarding the settlement and fee request that are not inconsistent with this objection.

II. A court owes a fiduciary duty to unnamed class members.

A "district court ha[s] a fiduciary responsibility to the silent class members," *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987), and must act "with a jealous regard" for the rights and interests of such absent class members, *Goldberger v. Integrated Res.*, 209 F.3d 43, 53 (2d Cir. 2000) (cleaned up). The fiduciary role is necessary because unlike in bilateral settlements, "there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *In re Dry Max Pampers*, 724 F.3d 713, 715 (6th Cir. 2013). The representatives assume a fiduciary obligation to the class,

and the Court, through its oversight responsibility, assumes a derivative fiduciary obligation to the class. *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982).

"The concern is not necessarily in isolating instances of major abuse, but rather is for those situations, short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." *In re "Agent Orange" Prod. Liab. Litig.,* 818 F.2d 216, 224 (2d Cir. 1987) (internal quotation omitted). The Court's oversight role thus does not end at making sure that the parties engaged in arm's length settlement negotiations. "[T]the adversarial process—or … 'hard-fought' negotiations—extends only to the amount the defendant will pay, not the manner in which that amount is *allocated* between the class representatives, class counsel, and unnamed class members." *Pampers*, 724 F.3d at 717.

Thus, among the most essential obligations of a reviewing court is zealously scrutinizing any fee requests with an "overarching concern for moderation." *Goldberger*, 209 F.3d at 53. "For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23,…courts should avoid awarding 'windfall fess' and that they should likewise avoid every appearance of having done so." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974). Otherwise, courts risk reifying the lamentable proverb that "[a] lawsuit is a fruit tree planted in a lawyer's garden." *Id.* (quotation omitted).

III. Class Counsel's Attorneys' Fee Award Should Be Reduced to 25% of the Actual Value of the Class Benefit.

Plaintiffs' counsel request an attorneys' fee and expense award of $ $20,253,994.53 ($20 million in fees and $253,944.53 in expenses), which works out to 33.76% of the $60 million settlement value they assert. Especially in common fund cases, when each dollar of additional fees reciprocally decreases class recovery, courts must act as a "guardian of the rights of class members" and conduct a "searching assessment" of the fee request. *Fresno County Emples. Ret. Ass'n v. Isaacson*, 925 F.3d 63, 71-72 (2d Cir. 2019). In no event may fees "exceed what is 'reasonable' under the circumstances." *Goldberger*, 209 F.3d at 47.

The request here, however, exceeds "the increasingly used benchmark of 25%" deemed a

reasonable recovery of a fund. *See, e.g.*, *City of Pontiac Gen. Empls. Ret. Sys. v. Lockeed Martin*, 954 F. Supp. 2d 276, 281 (S.D.N.Y. 2013) (25% is "benchmark"); *Ortiz v. Chop't Creative Salad Co.*, 89 F. Supp. 3d 573, 598 (S.D.N.Y. 2015) (awarding 20%).[1] "[A] one-third fee" while "not unheard of" is simply not the "norm in the Second Circuit." *Espinal v. Victor's Cafe 52nd St., Inc.*, 2019 WL 5425475, 2019 U.S. Dist. LEXIS 183642, at *6 (S.D.N.Y. Oct. 23, 2019) (internal quotations omitted). The request for over one-third of the asserted settlement value is not justified and strays from the *Grinnell* and *Goldberger* principle of moderation.

Of course, a benchmark is "no substitute for the searching assessment that should properly be performed in each case." *Goldberger*, 209 F.3d at 52. "Starting an analysis with a benchmark could easily lead to routine windfalls where the recovered fund runs into the multi-millions." *Id.* "Obviously, it is not ten time as difficult to prepare, and try or settle a 10 million dollar case as it is to try a 1 million dollar case." *Id.* (internal quotation omitted).

Rather than award the full $20.25 million request, the court should award either (1) award 25% of the *actual* benefit to the class, as reflected in the value of the fraud insurance services actually claimed and the cash actually paid to the class or (2) reduce the percentage awarded to 10-15% of the gross settlement.

A. Plaintiffs' counsel's fee award should reflect that fraud insurance services are less valuable to the class than cash compensation, especially where over 90% of the class already has had the opportunity to obtain similar services.

Fraud insurance services are obviously less valuable to the class than cash. Unlike fraud monitoring services—which an overwhelming majority of class members already have and, if they don't, may not want now years after the data security incidents when the risk has significantly reduced—cash can be used toward anything that class members do want. *See In re*

[1] *See also* Theodore Eisenberg & Geoffrey P. Miller*, Attorneys Fees & Expenses in Class Action Litigation:* 1993-2008, 7 J. EMPIRICAL LEGAL STUD. 248, 262 (2010) (surveying cases and finding a mean fee in consumer cases of 25%); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 833 (2010) (analyzing 688 class action settlements in 2006 and 2007 and finding a mean of 25% and a median of 25.4% for the award of attorneys' fees "with almost no awards more than 35 percent").

Trans Union Corp. Privacy Litig., No. 00 C 4729, 2009 WL 4799954, at *14 (N.D. Ill. Dec. 9, 2009) ("The class here (indeed, probably most classes) would rather have cash than in-kind relief. A check for $60 is more valuable to most people than getting free credit monitoring services."); *In re Anthem Inc. Data Breach Litig.*, 2018 WL 3960068, at *7 (N.D. Cal. Aug. 17, 2018) ("Plaintiffs' method is that treating credit monitoring as equivalent to cash conflicts with the general principle that 'compensation in kind is worth less than cash of the same nominal value.'" (quoting *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001))).

It is thus unclear why, as fiduciaries, class counsel would agree to a settlement whose primary benefit is one that most class members don't need, without providing even an option for class members to choose cash as an alternative, as many other data breach settlements have done. *See, e.g.*, *Pfeiffer v. Radnet, Inc.*, No. 20-cv-09553-RGK, Dkt. 70 (C.D. Cal. Feb. 22, 2022) (approving settlement that offered $125 in alternative cash compensation for those who already have credit monitoring); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 17-md-2800-TWT, 2020 U.S. Dist. LEXIS 118209, 2020 WL 256132 (N.D. Ga. Jan. 13, 2020); *In re Citrix Data Breach Litig.*, No. 19-cv-61350, Dkt. 67 (S.D. Fla. Jun. 11, 2021); *Cochran v. Kroger Co.*, No. 21-cv-01887-EJD, Dkt. 115 (N.D. Cal. Mar. 24, 2022).

A cash distribution would be feasible because the parties know who the class members are, with Morgan Stanley possessing their personal information and account data. With no apparent reason for counsel to prefer a less valuable form of relief for the class, counsel's decision to award less valuable and less desirable relief must have consequences in the form of their attorneys' fee award—lest their choice of a lesser form of relief was intended to inflate the settlement value to their own gain. This is necessary to maintain the "align[ment]" of interests between the class and its counsel, the very selling point for awarding fees on a percentage-of-recovery basis. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005).

As such, the denominator of the fee calculation should be reduced from $60 million to the actual benefit of such services elected by the class in the first instance. Or, at a minimum, the Court should reduce the percentage awarded to account for the lower value of such services as

compared with cash relief. This approach is in accord with a recent decision in *Perks v. TD Bank, N.A.*, 2022 U.S. Dist. LEXIS 83761, 2022 WL 1451753 (S.D.N.Y. May 9, 2022). There, class counsel asked for 25% of a fund that was half cash and half debt relief. The court rejected the 25% for the non-cash relief, instead applying 5% to the face value of the debt relief. The court reasoned that "each dollar of debt forgiveness is not the functional equivalent to the Class Member as a dollar in cash. By way of analogy, in class actions in which the settlement class receives benefits that could be affixed with a dollar amount, such as coupons or vouchers, but in which the likelihood of the coupon or voucher actually being used is low, courts routinely discount the face value of the coupon or voucher when ascertaining the value of the settlement as part of an award of attorneys' fees." *Id.* at *7 (citing *Rodriguez v. It's Just Lunch Int'l*, No. 07-CV-9227, 2019 U.S. Dist. LEXIS 228270, 2020 WL 1030983, at *10 (S.D.N.Y. Mar. 2, 2020)). "In sum, it is appropriate for the Court to conduct its own analysis of the actual benefit conferred on Settlement Class members when ascertaining the value of the Settlement for purposes of awarding a fair amount of attorney's fees." *Id.*

Under the settlement, class members appear to have up to 24 months after the Effective Date of the settlement, *i.e.*, after the Court enters the Final Approval Order and judgment and they become final, to activate the insurance fraud services code contained in the class notice. Accordingly, we will not know the final number of activated fraud services for at least two years, by design. As discussed below, it is appropriate to defer evaluation of plaintiffs' counsel's fee request until that information is available.

Empirical data shows why class members are particularly unlikely to benefit from the fraud insurance services. *See, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 310 (N.D. Cal. 2018) ("[T]he Settlement's main form of relief—credit monitoring—would not be of much value to Settlement Class Members who already have such services, so the Settlement allows them to claim an alternative cash payment."). Looking at data breach settlements since 2018, the chance that a class member is a member of one of the other large-scale data breach class actions offering some form of fraud protection services is a whopping **<u>94.231%</u>**. There is

only a 5.769% chance that a class member has not already been part of a data breach settlement providing credit monitoring services within the past three-and-one-half years. These figures are calculated by approximating 260 million adults in the United States and multiplying that number by the percentage of the population that was not part of a class provided similar credit monitoring services in recent data breach settlements, *i.e.*, the product of all the individual chances that they aren't in any of the classes: 260 million x 25.38% (*Yahoo*[2]) x 43.46% (*Equifax*[3]) x 62.30% (*Capital One*[4]) x 94.23% (*Experian*[5]) x 95.92% (*Premera*[6]) x 98.26% (*UCLA*[7]) x 98.42% (*Minted*[8]) x 98.53% (*Cochran*[9]) x 98.85% (*Informatics*[10]) x 98.88%

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[2] *In re Yahoo Inc. Customer Data Sec. Breach Litig.*, No. 16-md-02752-LHK, 2020 U.S. Dist. LEXIS 129939, 2020 WL 4212811 (N.D. Cal. Jul. 22, 2020) (class of 194 million received 2 year-minimum credit monitoring).

[3] *Equifax*, 2020 WL 256132 (class of 147 million received four years of three-bureau credit monitoring).

[4] *In re Capital One Inc. Customer Data Sec. Breach Litig.*, 488 F. Supp. 3d 374 (E.D. Va. 2020) (class of 98 million is to receive a minimum of three years of identity theft and restoration services).

[5] *In re Experian Data Breach Litig.*, No. 15-cv-01592 AG, 2019 U.S. Dist. LEXIS 81243 (C.D. Cal. May 10, 2019) (class of 15 million received two years of credit monitoring).

[6] *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, No. 15-md-2633-SI, 2019 U.S. Dist. LEXIS 127093, 2019 WL 3410382 (D. Or. Jul. 29, 2019) (class of 10.6 million received two years of deferable credit monitoring).

[7] *Adlouni v. UCLA Health Sys. Auxiliary*, No. BC 589243 (Sup. Ct. Cal.) (class of 4.5 million received two years of credit monitoring).

[8] *Atkinson v. Minted, Inc.*, No. 20-cv-03869-VC, Dkt. 65 (N.D. Cal. Dec. 17, 2021) (class of 4.1 million received two years of credit monitoring).

[9] *Cochran*, No. 21-cv-01887, Dkt. 115 (class of 3.82 million received two years of credit monitoring).

[10] *In re Medical Informatics Engineering, Inc., Customer Data Security Breach Litig.*, No. 15-md-2667, Dkt. 192 (N.D. Ind. Jan. 30, 2020) (class of over 3 million received at least three years of credit monitoring).

(*Banner*[11]) x 99.15% (*21st Century*[12]) x 99.46% (*Fox*[13]) = 5.769%. Thus, the chances that someone is part of at least one such settlement is the complement: 94.231%. In-kind relief is itself worth less than the cash equivalent; but *duplicative* in-kind relief is worth nearly nothing.

In addition, Morgan Stanley voluntarily gave class members 24 months of credit monitoring after the data security incidents. *See* Dkt. 93 at 1. That the defendant already provided class members with related services at no cost in the immediate wake of the incident is another reason that the fraud monitoring services should not be considered at full value. Moreover, as the time increases since the data security incident, the likelihood of a class member experiencing identity theft or other harm declines. Thus, any *pro rata* increase in the length of the service is of minimal value to claimants.

Under Rule 23 it is necessary for the Court to consider the class's actual expression of interest *vel non* in the fraud insurance services. The indifference that class members exhibit to such relief—as reflected in the number who activate the service—will reveal the lack of value of the settlement benefit to them and underscores why class counsel's decision to deny any cash option is such a red flag. Taking account of the lesser benefit that this form of settlement relief provides to the class will incentivize counsel to maximize class recovery and is appropriate under Rule 23(e)(2)(C)(ii), which requires courts to consider the effectiveness of any proposed method of distributing relief to the class. *See Lachance v. Harrington*, 965 F. Supp. 630, 648 (E.D. Pa. 1997) (explaining importance of incentivizing counsel to maximize class recovery). The class cares about monetary relief; "class counsel should not be [indifferent] either." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013). If class counsel are only paid on the amount of the benefit received, they will be encouraged to minimize costs and maximize benefit.

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[11] *In re Banner Health Data Breach Litig.*, No. 16-cv-02696-PHX, Dkt. 198 (D. Ariz. Apr. 21, 2020) (class of 2.9 million received two years of credit monitoring).

[12] *In re 21st Century Oncology Customer Data Sec. Breach Litig.*, No. 16-md-2737-MSS, Dkt. 269 (M.D. Fla. Jun. 25, 2021) (class of 2.2 million received two years of credit monitoring).

[13] *Fox v. Iowa Health Sys.*, No. 18-cv-00327-JDP, Dkt. 115 (W.D. Wis. Mar. 4, 2021) (class of 1.4 million received 18 months of credit monitoring).

Awarding the attorneys an above-benchmark cash fee award equal to over one-third of the settlement fund, while class members are stuck with unneeded fraud insurance services gives credence to the worst stereotypes of class action abuse. This Court can rectify the situation by either reducing the fee award to a more appropriate 25% of the actual value of the settlement benefits to the class, or by reducing the percentage awarded to 10%-15% of the gross fund.

That plaintiffs' counsel can cite a handful of cases in which courts have awarded a higher percentage does not justify such a result here, particularly where they negotiated sub-par relief rather than awarding cash relief to the class members, all of whom are known by the defendant. *See, e.g.*, *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-cv-7126, 2018 U.S. Dist. LEXIS 202526, at *14 (S.D.N.Y. Nov. 29, 2018) ("the sheer volume of federal court class action settlements means that isolated string cites to cases in which class counsel received a higher percentage of the settlement are not particularly meaningful"). "By submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications, the class action bar is in fact creating its own caselaw on the fees it is entitled to. . . . No wonder that 'caselaw' is so generous to plaintiffs' attorneys." *Sakiko Fujiwara v. Sushi Yasuda Ltd*., 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014).

Finally, although the settlement also includes the retention of Kroll to locate and retrieve additional missing devices, plaintiffs' counsel don't rely upon such relief to justify their fee request, and nor could they carry their burden of proving the value of that relief. *See Pampers*, 724 F.3d at 719. Injunctive relief "is difficult to value, [and] its value is also easily manipulable." *Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003); *see also In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 387 (S.D.N.Y. 2005) (quoting *Staton*). "[O]nly in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees." *Staton*, 327 F.3d at 974. This is not such an unusual instance. Plaintiffs' brief reference to the value of Kroll's retention to locate and retrieve additional missing devices falls far short of proving its value and

therefore may not be included as part of the value of the settlement fund.

B. The Court should disregard the Fitzpatrick Declaration.

Plaintiffs submit a Declaration of Brian T. Fitzpatrick in support of their fee award. Ms. Frank asks the Court to strike or, in the alternative, to disregard the declaration because it contains inadmissible legal conclusions and other legal arguments regarding the calculation of attorneys' fees. Testimony regarding matters of law is inadmissible under either Federal Rule of Evidence 701 or 702 because "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge." *Nationwide Transport Finance v. Cass Info. Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (internal quotation omitted). Experts may not be permitted to "usurp" the court's role. *Nimely v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005). "[E]xpert testimony on law is excluded because 'the tribunal does not need the witness' judgment. . . . The judge (or the jury as instructed by the judge) can determine equally well….'" *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 510 (2d Cir. 1977) (quoting VII Wigmore on Evidence § 1952, at 81)).

Here, Mr. Fitzpatrick seeks to usurp the role of the Court by telling the Court which of the available methodologies it should use and how to apply it when the Court is fully capable of determining the law on this point. Mr. Fitzpatrick's declaration consists of little more than discussion of his interpretation of the case law and improper legal opinion dressed up as statistics. Citations to case law remain legal argument when the case law is averaged, and this is especially true when the averages are stretched into dubious legal conclusions. District courts often approve unopposed fee requests, and Fitzpatrick does not discuss how the characteristics of the averaged cases fare in comparison to this case. "Expert testimony" which simply surveys the law ought to be excluded under Rule 702. *See Lukov v. Schindler Elevator Corp.*, 2012 WL 2428251, at *2 (N.D. Cal. June 26, 2012) (excluding expert opinion based on "survey of state laws"); *Stobie Creek Invs., LLC v. United States,* 81 Fed. Cl. 358, 364 (Ct. Fed. Cl. 2008), *aff'd* 608 F.3d 1366 (Fed. Cir. 2010) (striking report that spent pages surveying, examining and discussing cases); *Heighley v. J.C. Penney Life Ins. Co.*, 257 F. Supp. 2d 1241, 1260 & n.23 (C.D. Cal. 2003) (striking

"interpretations of case law"); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 2017 WL 1352859, at *3 (N.D. Cal. Apr. 12, 2017) (refusing to follow Fitzpatrick's opinion and exercising discretion to award a more reasonable fee than requested by counsel).

Mr. Fitzpatrick is doing what lawyers do every day in our common law legal system: they compare this case with previous cases to argue that plaintiffs' request complies with the law. Arguing the case law is the job of a party's counsel, and should not be submitted under the guise of "expert opinion." In *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, the court admonished that the expert's report included improper legal opinions regarding the merits of plaintiffs' case: "But an expert is not supposed to be doing the work of counsel; an expert must 'bring to the jury more than the lawyers can offer in argument.' The statements highlighted above are fodder for a legal brief, not an expert's report." 525 F. Supp. 2d 558, 654 (S.D.N.Y. 2007) (quoting *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992)). *Accord Zahler v. Twin City Fire Ins. Co.*, 2007 WL 4563417, 2007 U.S. Dist. LEXIS 94966, at *5-6 (S.D.N.Y. Dec. 21, 2007) (legal brief "dressed up as an expert opinion" is "clearly impermissible").

Compounding these legal and evidentiary problems with his declaration, Mr. Fitzpatrick opines without foundation that non-cash settlement relief should be counted at face value and administrative and notice costs should be included in the denominator of the fee calculation—no matter the actual value to the class or the precedent to the contrary. Ms. Frank addresses the actual law—not simply an opinion—on these issues in this objection and asks the Court to consider the law rather than Mr. Fitzpatrick's opinion in reaching a decision.

C. The Court should defer the attorneys' fee award until plaintiffs' counsel provides the fraud insurance service activation rate and total cash payment to the class.

A fee award needs to be attuned to the result actually achieved for the class, to the value that the settlement actually puts in class members' hands. *See, e.g.*, *Baby Prods.*, 708 F.3d at 179. The Advisory Committee Notes agree, counseling that a "fundamental focus is the result actually achieved for class members" and advise "defer[ring] some portion of the fee award until

actual payouts to the class are known." Notes of Advisory Committee on 2003 Amendments to Rule 23(h). The appropriate inquiry "is not how much money a company spends on purported benefits, but the value of those benefits to the class." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011) (Rule 23(e)) (quoting *In re TD Ameritrade Accountholder Litig*., 266 F.R.D. 418, 423 (N.D. Cal. 2009)). The appropriate denominator, therefore, is the actual settlement benefit for the class. *See* Section III.A, *supra*.

The Court can best gauge the value to the class of the settlement relief by reviewing the number of class members who activated their fraud monitoring services. Class members appear to have up to 24 months to activate the insurance fraud services code contained in the class notice. *See* Dkt. 81-2 ¶ 3.3. Accordingly, we will not know the final number of activated fraud services for up to two years, and likely more because the 24-month period does not begin until after the final approval order has been entered and finalized.

Ms. Frank therefore requests that the Court require plaintiffs and the settlement administrator to provide data regarding how many class members redeemed their activation codes for fraud monitoring services once the activation period closes before the Court awards attorneys' fees.

Deferring the attorneys' fee award is common practice in such circumstances, where the value of class members' recovery is unknown at the time or settlement approval or class members will not be paid until a future time. *See, e.g.*, *In re Giant Interactive Group, Inc. Secs. Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (holding half the fee award in abeyance pending a report to the Court on the progress of the claims administration process); *In re Petrobras Secs. Litig.*, 2018 WL 3091256, at *15 (S.D.N.Y. Jun. 22, 2018) (deferring 50% of the fee award because "counsel should not be paid in full before their clients have received any of their recovery, nor would it be helpful to eliminate an incentive for counsel to monitor the distribution agent and ensure that the settlement funds are distributed expeditiously")*; Fessler v. Porcelana Corona De Mexico*, 23 F.4th 408, 419 (5th Cir. 2022) ("The court's mere uncertainty about the actual monetary value obtained by the Class is no reason to duck the required inquiry. If the

projections of future benefit to the Class are too fluid, the district court is capable of staying its determination of attorneys' fees until the comparison can be properly made."); Report on Contingent Fees in Class Action Litigation, 25 REV. LITIG. 459, 476 (2006) ("The Task Force endorses the policy of payment of class counsel fees only as and when class members receive compensation. The Class Action Fairness Act creates such a system for coupon settlements, but the policy behind that change is generally applicable to settlements in which payments are made in uncertain amounts over time."). The court would be "well within its discretion" to do so. *Cline v. TouchTunes Music Corp.*, 765 Fed. Appx. 488, 492 (2d Cir. 2019) (affirming decision to award a fee based only on the song credits actually redeemed).

This approach accords not only with Rule 23 but also with the maxim that "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013).

If the Court is inclined to award an attorneys' fee without such information, the Court should reduce the percentage awarded to 10-15% of the settlement based on the inadequate justification for failing to provide class members with an option to recover cash and instead to only provide a service for which the large majority of them have no use.

D. The appropriate denominator excludes settlement notice and administration costs.

Plaintiffs' counsel ask for their percentage-based fee award based on the total of the settlement fund ($60 million) and notice and administrative costs ($8.2 million) to be paid by Morgan Stanley. *See* Dkt. 93 at 3. But "if the fee is calculated as a percentage of the total class fund, [plaintiffs' counsel] would be reimbursed for its reasonable expenses and be awarded a percentage of their expenses." *Seijas v. Republic of Argentina*, 2017 WL 1511352, 2017 U.S. Dist. LEXIS 64398, at *40 (S.D.N.Y. Apr. 27, 2017). There "is no justification for that result." *Id.* (calculating fees as a percentage of the net fund). Rather, "awarding fees as a percentage of net recovery is more consistent with notions of public policy in that doing so encourages class counsel's prudence and discretion in incurring expenses—expenses that may not be as closely

scrutinized given that there is no single client footing the bill." *In re Libor-Based Financial Instruments Antitrust Litig.*, 2018 WL 3863445, at *4 (S.D.N.Y. Aug. 14, 2018); *see also Bank of Am. Corp.*, 2018 WL 6250657 (applying fee percentage to net fund). Accordingly, whether the Court awards fees now or defers the fee award until the value of the settlement benefit is known, the fee award should be calculated as a percentage of the net fund that excludes settlement notice and administration costs.

IV. Plaintiffs' unsupported lodestar is likely overstated and confirms that counsel's fee request is excessive.

When class counsel request a fee award based on the percentage of recovery, courts use a lodestar cross-check to test the "reasonableness of the requested percentage" and to avoid awarding plaintiffs' counsel a windfall at the expense of the class. *Goldberger*, 209 F.3d at 52; *Fresno County Emples. Ret. Ass'n*, 925 F.3d at 72. But "the lodestar serves little purpose as a cross-check if it is accepted at face value." *In re Citigroup Inc., Secs. Litig*, 965 F. Supp. 2d 369, 376 (S.D.N.Y. 2013). Here, however, neither the Court nor the class can appropriately evaluate the lodestar beyond its face value because of the dearth of information provided by plaintiffs. As such, the Court should request additional lodestar information from plaintiffs' counsel and/or draw an adverse inference in this short, barely-litigated case (as evidenced by the settlement agreement being docket number 81). In addition, the lodestar multiplier should be limited to the upper mean of 1.65 supported by the empirical data that even plaintiffs acknowledge, rather than the excessive and unjustified 2.75 requested.

A. Plaintiffs' lodestar submission is inadequate to allow a crosscheck and likely overstated.

Plaintiff's counsel improperly provides inadequate records from which the Court or class members can review their lodestar as a crosscheck. "[C]ontemporaneous time records are a prerequisite for attorney's fees in this Circuit." *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983); *Scott v. City of New York*, 626 F.3d 130, 133 (2d Cir. 2010) ("[W]e are adamant that, after *Carey*, applications for attorney's fees allowed by federal

law 'must' be accompanied by contemporaneous time records."). Although a cross-check does not require the bean-counting that the base lodestar method entails, it would "serve[] little purpose as a crosscheck if it is accepted at face value." *Citigroup Secs.*, 965 F. Supp. 2d at 389. Class members are impaired in realizing that objection right when a fee request contains as little lodestar data as class counsel's does here. Additional detail is necessary because a "summary spreadsheet reciting attorney names, hourly rates, and total hours spent" provides an "inadequate basis for the Court to place great weight on the lodestar as a valid cross-check." *Lacovara v. Hard Rock Cafe Int'l (USA), Inc.*, 2012 WL 603996, at *3 (S.D.N.Y. Feb. 24, 2012). "Class counsel cannot present effectively unreviewable hours in the name of convenience." *Citigroup Secs.*, 965 F. Supp. 2d. at 393.

Moreover, the proclaimed hours are distended with duplication and inefficiency. Plaintiffs have asserted a total of 9,952.55 hours from 12 law firms. *See* Dkt. 93-1 ¶ 96. Yet, almost no actual litigation occurred in these short-lived proceedings. *Compare Brown v. Rita's Water Ice Franchise Co. LLC*, 242 F. Supp. 3d 356, 366 (E.D. Pa. 2017) (1498.5 hours when settlement was reached 6 months after complaint "appears excessive"). This Court has found 8,830 hours **in a five-year litigation** "unreasonable" and "facially disproportionate when measure against benchmarks of other litigation." *Schoolcraft v. City of New York*, 2016 WL 4626568, 2016 U.S. Dist. LEXIS 183036, *20-*21 (S.D.N.Y. Sept. 6, 2016). It has characterized 2900 hours in limited litigation as "eye-popping." *Marino v. COACH, Inc.*, 2021 WL 827647, 2021 U.S. Dist. LEXIS 40821, at *11 (S.D.N.Y. Mar. 3, 2021). It has determined that the submission of 33 timekeepers with "more than 2,900 hours devoted to a relatively straightforward and not heavily litigated, case" was excessive, and "reflected [not as] efficient a use of personnel as the class members were entitled to expect." *In re Cpi Card Group Secs. Litig.*, No. 16-cv-4531, 2019 U.S. Dist. LEXIS 25305, at *2-*4 (S.D.N.Y. Feb. 4, 2019). Plaintiffs' counsel fail to explain why a dozen law firms were needed for a case where the settlement agreement was filed as docket entry number 81.

While the lodestar is facially excessive, the actual extent of overstatement cannot be

calculated because plaintiffs' attorneys have failed to provide sufficient detail in their billing summaries. Plaintiffs' counsel's exhibits accompanying the fee application provide no specific breakdown at all; they merely list the hourly fees of each biller and total hours expended without a description of the tasks. Class members do not know how much time was expended when and on what tasks during the stages of the short-lived litigation. Providing this information to class members is necessary under Rule 23(h) to ensure a full and fair opportunity to object to counsel's fee request. *See, e.g., In re Mercury Interactive Secs. Litig*., 618 F.3d 988, 994 (9th Cir. 2010); *Redman v. Radioshack Corp*., 768 F.3d 622, 637-38 (7th Cir. 2014).[14] Class review is even more important in the common fund context, particularly in a settlement such as this with clear sailing, where the "adversary system is typically diluted—indeed suspended." *Goldberger*, 209 F.3d at 52.

B. A lodestar multiplier of 1.65 stands at the outer limit of what the Court should allow.

Plaintiffs' counsel's fee request equals an excessive multiplier enhancement of 2.75 of their purported $7,188,210.81 lodestar. Dkt. 93 at 3. Once counsel submit their full lodestar, there will likely be excessive amounts that, once removed, will inflate the multiplier further.

Plaintiffs' counsel acknowledge that the mean and median of lodestar crosschecks in an empirical study are 1.65 and 1.34 respectively. There is no justification for a greater multiplier here. Under Second Circuit law, risk of success is "perhaps the foremost factor to be considered

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[14] In an unpublished non-precedential opinion the Second Circuit has previously disagreed with *Mercury*. *Cassesse v. Williams*, 503 Fed. Appx. 55 (2d Cir. 2012). *Cassesse* has been criticized for both doctrinal and policy reasons. Rubenstein, 3 NEWBERG ON CLASS ACTIONS § 8:24 (5th ed. 2014). At a doctrinal level, Rule 23(h)(1) requires notice of the fee motion and an opportunity to object to it; those marks are simply not hit by notice of a fee level. *Id*. From a policy standpoint, "[k]nowing the level of the fee alone is a weak substitute for reviewing the full fee petition as the latter ought to provide more detail about counsel's time and efforts, precisely the detail that would make the opportunity to object meaningful. For example, if class members were concerned that their counsel settled their claims for too low an amount in exchange for a large fee, it would be useful to know not only the level of that fee but how much of a multiplier of counsel's lodestar the fee represented." *Id*.

in determining whether to award an enhancement." *Goldberger*, 209 F.3d at 54. Here, the risk was virtually nonexistent. *See id.* (disputing notion that there is "substantial contingency risk in every common fund case"). Morgan Stanley disclosed the data security incident in the summer of 2020 to the Office of the Comptroller of Currency and in October 2020, entered into a consent order with the Office, paying a $60 million fine. *See* Dkt. 60 ¶¶ 9, 15-18. As reflected in the limited filings in this case, there was little doubt that this case would result in settlement, and quickly at that. Courts, too recognize that riding the coattails of government investigations and prosecutions eliminates substantial risk. *Grinnell*, 560 F.2d at 1102; *Goldberger*, 209 F.3d at 54.

Moreover, post-*Goldberger*, courts in this Circuit do not routinely accept multipliers above 2. Even "[a] lodestar multiplier of 2.5 would be considered high for a standard common fund case in this Circuit." *In re Tremont Secs. Litig*., 699 Fed. Appx. 8, 18 (2d Cir. 2017). To the extent there are exceptions to the general rule that courts in this Circuit no longer award multipliers of 2.75, it is important to recognize that language supporting excessive multipliers has "made its way into many court 'decisions' in this Circuit via proposed orders drafted by plaintiffs' attorneys." *Fujiwara*, 58 F. Supp. 3d at 437.

Moreover, *Goldberger*'s general presumption against substantial multipliers is buttressed by the Supreme Court's holding that "there is a strong presumption that the lodestar is sufficient" without an enhancement multiplier. *Perdue v. Kenny A.*, 559 U.S. 542, 546 (2010). *Kenny A.* allocates "the burden of proving that an enhancement is necessary [to] the fee applicant." *Id.* at 553. A lodestar enhancement is only justified in "rare and exceptional" circumstances where "specific evidence" demonstrates that an unenhanced "lodestar fee would not have been adequate to attract competent counsel." *Id*. at 554. Given the large number of firms willing to work on the case, there is no such specific evidence showing an unenhanced lodestar would not be sufficient compensation here. Although *Kenny A.* does not supplant common fund principles in awarding a fee, it remains true that "[f]ees that deviate wildly from the unenhanced lodestar fee are unlikely to pass [the lodestar] cross-check." *Fresno Cty. Emples. Ret. Ass'n*, 925 F.3d at 68-72.

Accordingly, a lodestar multiplier of 1.65, the mean of the empirical data cited by

plaintiffs, is the outer bounds of a reasonable fee award.

CONCLUSION

For the foregoing reasons, the Court should defer the attorneys' fee award and base any such award on the value of the actual class benefit determined by the amount of cash paid and the number of fraud insurance services activated or, in the alternative, reduce the fee award to a more reasonable 10-15%.

Dated: July 12, 2022

/s/ *Anna St. John*
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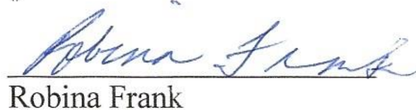
Attorney for Objector Robina Frank

I, Robina Frank, am the objector. I sign this written objection drafted by my attorneys as required by the Preliminary Approval Order ¶ 11.



Robina Frank

Certificate of Service

The undersigned certifies she electronically filed the foregoing Objection and associated declarations via the CM/ECF system for the Southern District of New York, thus sending the Objection and declarations to the Clerk of the Court and also effecting service on all attorneys registered for electronic filing.

Additionally, she caused to be mailed a copy of this Objection and associated declarations to the following:

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