**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

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| *In re Morgan Stanley Data Security Litigation* | Civil Action No. 1:20-cv-05914-PAE |

**DECLARATION OF LINDA P. NUSSBAUM IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

Linda P. Nussbaum, pursuant to 28 U.S.C § 1746, hereby declares as follows:

1. I am the Managing Director of Nussbaum Law Group, P.C., a member of the Bar of this Court, and Court-appointed Settlement Class Counsel in this action, along with Jean S. Martin of Morgan & Morgan Complex Litigation Group ("Class Counsel"). *See* ECF No. 82.

2. I have been actively involved in prosecuting and resolving this Action and I am familiar with its proceedings, and have personal knowledge of the matters set forth herein.

3. I submit this Declaration in connection with Plaintiffs' Motion for Final Approval of Class Action Settlement ("Final Approval Motion") with Defendant Morgan Stanley Smith Barney LLC ("Morgan Stanley" or "Defendant") and in further support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs.

4. My law firm and I were fully and unequivocally committed to this action and the time-consuming task of prosecuting this litigation to conclusion, and even to trial, as were my co-counsel. The formidable resources of my law firm and our co-lead counsel, Morgan & Morgan, combined with our substantial data privacy and complex class action litigation experience, allowed us to achieve a highly favorable result for the Settlement Class.

5. In my Declaration in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs, which was refiled on April 20, 2022 (ECF No. 102), I discussed in detail the work performed by Class Counsel throughout this litigation and the terms of the Settlement reached by the Parties. For the Court's convenience, that declaration is annexed hereto as **Exhibit A**.

6. On January 18, 2022, Judge Analisa Torres preliminarily approved the Settlement. ECF No. 82 at ¶ 1. Judge Torres also approved the Notice Plan, preliminarily approved the Claims Process for the Settlement, and scheduled the hearing for final approval. *Id.* at ¶¶ 5, 12.

7. Pursuant to the Preliminary Approval Order (ECF No. 82), Class Counsel and the Court-approved Settlement Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), implemented a robust notice program whereby notice was given to potential Settlement Class Members by U.S. mail, email and publication. That notice program was then supplemented by the Stipulation and Order of this Court dated April 28, 2022. ECF No. 110.

8. The Court-approved Notice Plan disclosed, among other things, the following information: (i) the $60,000,000 Settlement Fund; (ii) the Claims Process; (iii) that Class Counsel would apply, on behalf of all Plaintiffs' Counsel, for an award of attorneys' fees of no more than one-third of the Settlement Fund, plus payment of litigation expenses and costs, and Service Awards for Class Plaintiffs; (iv) a schedule for exclusion from the Settlement, which was subsequently extended by this Court to July 12, 2022 (*see* ECF No. 110 at 3); (v) a schedule for objections to the Settlement, which was subsequently extended by this Court to July 12, 2022 (*see* ECF No. 110 at 3); and (vi) the deadline for submitting claims, which was subsequently extended by this Court to August 11, 2022 (*see* ECF No. 110 at 3).

9. The deadline for Settlement Class Members to submit requests for exclusion from the Settlement Class and objections to the Settlement passed on July 12, 2022. The response from the Settlement Class Members has been overwhelmingly positive. As of July 20, 2022, a total of 118,808 claims have been submitted, 300 requests for exclusion were received, and 43[1] objections received. *See* Declaration of Cameron R. Azari on Implementation of Notice Plan filed herewith at ¶¶ 30, 31, 32 ("Azari Decl. 7/22/2022").

10. Aura's Financial Shield Service provided by this Settlement is available to all Settlement Class Members, without the need to file a Claim Form, and is more valuable than, and not duplicative of, the Experian credit monitoring previously offered by Morgan Stanley after the data breach was announced. *See* Affidavit of Jerry Thompson of Aura Financial filed herewith ("Thompson Aff.") at ¶ 9.

11. Aura's Financial Shield offers powerful and comprehensive monitoring of a person's financial assets; identity authentication alerts; transaction monitoring of all registered financial accounts including spending, deposits, withdrawals, transfers and transfer requests; bank and financial account monitoring around any changes requested like new username and password, new signatory added or deleted, change of address of principal signatory, wire transfer requests to third parties, new accounts being set up using the person's Social Security number and date of birth; home title and property title monitoring; security freeze capability with not only the three major credit bureaus but also six other bureaus that cover other areas; monthly credit score which can act as an early warning for fraud events; monthly spending graphs; identity authentication

[1] The Settlement Administrator has counted 45 objections to the Settlement. As explained in Appendix A to Plaintiffs' Memorandum in Support of Final Approval, the Parties have concluded that one of the 45 objections was actually an exclusion and the other was a motion to proceed in his individual capacity, which Defendant responded to. *See* ECF No. 96.

alerts in near real-time if someone is trying to open up an account using the members Social Security number; $1 million in insurance backed by AIG to replace any money lost by theft; 24/7 customer support; and dark web monitoring. Importantly, the fraud insurance is not limited to fraud related to the Morgan Stanley data breach. Thompson Aff. at ¶¶ 10, 11.

12. Class Members will be able to enroll in the Aura Financial Shield upon the Effective Date of the Settlement and will be able to register at any time during the term of the policy, meaning that a Class Member may enroll at month 20 for the remaining 4 months of the minimum policy length provided in the Settlement. Over 88,300 Class Members have registered as of July 20, 2022, for email to remind them when the enrollment period for the Aura Financial Shield begins, but Class Members may enroll in the Aura Financial Shield whether or not they signed up for the reminder email. Azari Decl. 7/22/2022 at ¶ 27.

13. It is significant that 15,369,743 unique, identified potential Settlement Class Members were sent the Notice of the Settlement, yet only 43 have filed objections and 300 have asked to be excluded from participation. *See* Azari Decl. 7/22/2022 at ¶¶ 25, 30, 31.

14. Class Counsel have carefully reviewed every objection filed as well as the relevant law and do not believe that any objection merits a finding by this Court other than that the Settlement is fair, reasonable, and adequate. *See* Appendix A to the Final Approval Motion filed herewith, providing Plaintiffs' responses to objections.

15. The recovery in this Settlement compares favorably to other data privacy cases and supports the conclusion that the Settlement is fair, reasonable and adequate and should be approved. The chart below compares the recovery in this Settlement to a number of other data breach cases and supports a conclusion that this is an excellent recovery.

| Case | Class Size | Settlement Value[2] | Per Capita Recovery | Opt-Outs | Object | Source & Year |
|---|---|---|---|---|---|---|
| Morgan Stanley | 15 million | $68.2 million | $4.55 | 300 | 43 | 1:20cv05914 (S.D.N.Y.) |
| Banner Health | 2.9 million | $8.9 million | $3.07 | N/A | 1 | 2020 WL 12574227 2:16cv2696 (D.Ariz) ECF 170 at 1 & 185-3 at ¶ 12 |
| Equifax | 147 million | $380.5 million | $2.58 | 2,770 | 388 | 2020 WL 256132 1:17md2800 (N.D.Ga.) ECF 739-1 at 20 & 900-4 at ¶ 5 |
| LinkedIn | 797,757 | $1.25 million | $1.57 | 57 | 6 | 309 F.R.D. 573 2:14cv3088 (N.D.Cal.) ECF 122 at 2 & 145-2 at ¶ 12 |
| Anthem | 79.2 million | $115 million | $1.46 | 406 | 28 | 327 F.R.D. 299, 2018 5:15md2617 (N.D.Cal.) ECF 1007 at 4 & 1007-6 at ¶ 2 |
| Experian | 14,931,074 | $22 million | $1.47 | 519 | 6 | 8:15cv1592 (C.D.Cal.) ECF 286-1 at 20 & 309-3 at ¶ 8 |
| TikTok | 89 million | $92 million | $1.03 | 957 | 2 | 2021 WL 4478403 |
| Yahoo! | 194 million | $117.5 million | $0.60 | 1,779 | 31 | 2020 WL 4212811 |
| Countrywide | 17 million | $10.5 million | $0.62 | 2,943 | 89 | 2010 WL 3341200 |
| Home Depot | 40 million | $13 million | $0.33 | 45 | 5 | 2016 WL 6902351 1:14md2583 (N.D.Ga.) ECF 226-3 at ¶ 4 & 245-1 at ¶ 3 |
| Target | 97,447,983 | $10 million | $0.10 | 386 | 11 | 2017 WL 2178306 14md2522 (D.Minn.) ECF 615 at ¶¶ 4, 14 |

16. The Declaration of the Honorable Diane M. Welsh (Ret) of JAMS further supports the conclusion that the Settlement is fair, reasonable and adequate and should be approved. Judge Welsh, who mediated this matter over a six-month period before presenting the parties with the mediator's proposal, which was accepted and culminated in the Settlement, concluded that "from an experienced mediator's perspective, the negotiated settlement produced by the mediation process represents a thorough, deliberative, and comprehensive resolution that will benefit class

[2] "Settlement Value" includes defendant funding of payments to class members, benefits credited by the court for purposes of attorney fees, and any costs of notice and administration, attorney fees and expenses, and service awards to named plaintiffs that were funded by the defendant and additional to the common fund to the extent that such information was available in the public filings.

members through meaningful relief." *See* Declaration of Hon. Diane M. Welsh (Ret.) of JAMS in Support of Final Approval of Class Settlement dated June 21, 2022 at ¶ 11. Judge Welsh further stated: "With respect to the fee request, I can attest, based upon my observations of the diligence and work product produced by the counsel, that the lawyering in this case was of the highest caliber and that plaintiff and defense counsel left no stone unturned, and no argument unmade, in the representation of their respective clients." *Id.* at ¶ 12.

17. The fee application in this Action, ECF No. 102, reported a lodestar of $7,188,210.81. ECF No. 102 at ¶ 97.

18. Subsequent to the time reported to the Court in the Fee Application over three months ago, Class Counsel have continued to spend substantial time on this matter on a number of tasks, including administration of the Settlement; answering Class Member questions; preparation of Final Approval papers and proposed orders; and coordinating with representatives of Kroll and defense counsel with respect to the protocol to be followed by Kroll after Final Approval of the Settlement. Prior to the Final Approval Hearing, Class Counsel will file supplemental declarations in support of the Fee Application to report their additional lodestar. Class Counsel expect to continue to expend time, as needed, on administration of the Settlement and coordination with Kroll for a period of one year after Final Approval. Class Counsel do not intend to request any additional fees in this matter for the additional work that they will do.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 22, 2022
New York, New York

/s/*Linda P. Nussbaum*
Linda P. Nussbaum

# EXHIBIT A

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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|---|---|
| IN RE MORGAN STANLEY DATA SECURITY LITIGATION | Civil Action No. 1:20-cv-05014 (MKV) |

**DECLARATION OF SETTLEMENT CLASS COUNSEL LINDA P. NUSSBAUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARDS TO THE NAMED PLAINTIFFS**

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Linda P. Nussbaum, pursuant to 28 U.S.C § 1746, hereby declares as follows:

1. I am the Managing Director of Nussbaum Law Group, P.C., a member of the Bar of this Court, and Court-appointed Settlement Class Counsel in this action, along with Jean S. Martin of Morgan & Morgan ("Class Counsel").

2. I submit this Declaration in support of Plaintiffs' Motion for an Award of Attorneys' Fees in the amount of $20 million which represents less than 29.3% of total settlement value. The value of the overall settlement is greater than $68.2 million when valuing the $60 million non-reversionary cash settlement fund, the notice and administration costs of more than $8.2 million paid separately by Morgan Stanley outside the fund, the cost of retaining Kroll to locate and retrieve additional decommissioned devices[1], and the costs and value of business practice changes.

3. In addition, Class Counsel seek Service Awards of $5,000.00 to be paid to each of to the eleven named plaintiffs for a total of $55,000. The named plaintiffs all devoted significant time and effort to the successful prosecution of this litigation.[2]

4. I submit this declaration to describe the work performed by all plaintiffs' counsel that resulted in this ground-breaking settlement which provides very significant value to the class. The settlement includes a $60 million non-reversionary cash fund and additional substantial value to the class comprised of defendant-borne costs of notice to over 15 million class members and costs for settlement administration which, thus far, is $8.2 million; substantial business practice changes; and defendant's retention of Kroll, a global leader in forensic

[1] The expense for Kroll's effort cannot be projected as it is determinative upon the efforts it takes to locate devices, how many devices are found, and the efforts needed to retrieve those devices.
[2] The eleven named plaintiffs are: John Nelson, Midori Nelson, Sylvia Tillman, Mark Blythe, Vivian Yates, Cheryl Gamen, Richard Gamen, Amresh Jaijee, Richard Mausner, Disiree Shapouri and Howard Katz.

investigations, for a 12-month period to continue efforts to locate and retrieve decommissioned IT assets that were sold to third parties. Kroll will follow a detailed protocol to be agreed upon by Class Counsel and will regularly report to and consult with Class Counsel.

5. On September 17, 2020, the Honorable Analisa Torres entered an Order consolidating all related cases and appointing Co-Lead Class Counsel and an Executive Committee. (Doc. 26) ("Interim Leadership Order"). The structure proposed to and adopted by Judge Torres resulted from private ordering of all counsel for plaintiffs from all related actions. The Interim Leadership Order permitted all firms with plaintiffs in the litigation to perform work as long as each firm submitted monthly billing reports to Interim Co-Lead Counsel and that all counsel would be efficient in the staffing of all tasks in the litigation. *See* Interim Leadership Order at ¶ 3 ("All Plaintiffs' counsel shall endeavor to keep fees reasonable and to choose the most appropriate level of staffing for the tasks required in this litigation.").

6. When proposing the leadership structure, Class Counsel identified the specific areas in which Plaintiffs' counsel would be invited to provide assistance. ECF No. 24-1, p. 7 (the substantive areas included plaintiff vetting and pleadings, ESI protocol and written discovery, third party discovery, depositions, experts, law and briefing, and settlement. Consistent with this proposal, the work provided by counsel other than Class Counsel was limited to those substantive areas. Further, pursuant to the Interim Leadership Order, all tasks were performed at the direction of Class Counsel to ensure there would not be duplicative work. Additionally, all participating firms submitted monthly billing and expense reports pursuant to a protocol established by Class Counsel. ECF No. 24-1, p. 16 ("Co-Lead Counsel will ensure the efficient management of this litigation by adopting a detailed time and expense protocol for the Executive Committee and other Plaintiffs' counsel."). These reports were reviewed in a timely

manner to ensure accuracy and efficiency in the work being performed and recorded in the litigation.

7. While Class Counsel handled the majority of the litigation, all firms involved contributed to this excellent result, likely among the highest settlements ever achieved on a per-class member basis in a data security class action of this size class. I describe the work of all plaintiffs' counsel here, which was actively supervised by Class Counsel, and attach separate declarations from each firm providing details of the specific work performed by members of their firms and the lodestar and expenses incurred during the course of the litigation as of March 1, 2022.[3]

## I. The Litigation Risks in Prosecuting This Action

8. The fact pattern presented in this litigation is unique and posed very substantial challenges in prosecuting the classes claims against Morgan Stanley. Morgan Stanley steadfastly denied to regulators (the Office of the Comptroller of the Currency (OCC), various states attorney generals, and the Court) that any third party accessed any personal information of any former or current Morgan Stanley customer. For that reason, and others, Morgan Stanley did not even notify its customers of the data security incidents until years after it learned of them, and only after being forced to do so as part of a consent entered into with the OCC.

9. Neither the OCC nor any other regulator made findings with respect to the possible access of Morgan Stanley customer data by any third party. Rather, the OCC focused on Morgan Stanley's failure to exercise proper oversight, failing to maintain proper inventory

[3] *See* Consolidated Exhibit 2 attached hereto. The lodestar reflected in the present Motion reflects time and expenses for all firms as of March 1, 2022. A lodestar update for work performed from March 1, 2022 – May 31, 2022 will be filed with the Court prior to the Final Approval Hearing.

controls, and failing to properly select and monitor a vendor for decommissioning and data destruction.

10. This action presented enormous risks, particularly with respect to Article III standing, and was awaiting decision on a fully briefed motion to dismiss the Complaint when it settled after a six-month mediation process before the Hon. Diane M. Welsh (Ret.).

## II. Work Performed by Class Counsel

### A. Procedural History

11. On July 29, 2020, the initial Class Action Complaint (the *Tillman* action) was filed in the U.S. District Court for the Southern District of New York, alleging that Morgan Stanley failed to properly dispose of its unencrypted retired information technology ("IT") equipment containing the Personal Identifying Information ("PII") of over 15 million current and former Morgan Stanley clients. Two separate data security incidents were alleged to have occurred, one in 2016 and another in 2019 (collectively, the "Data Security Incidents").

12. This litigation raised unique and groundbreaking issues from the start as there was no criminal or outsider activity involved with regards to customer data possibly being in the hands of a third party. There was no "hacker" alleged to have breached Morgan Stanley's computer network, as there is in the typical data security case. This case also did not involve computer equipment that was stolen or misused.

13. Rather, plaintiffs alleged not one, but two separate incidents, three years apart, where Morgan Stanley's practically non-existent inventory control systems caused it to lose track of and resell retired IT equipment containing the unencrypted PII of millions of Morgan Stanley's clients. Morgan Stanley denied all liability, asserting various defenses, including its contention that the PII of its customers was not recoverable from the decommissioned equipment

and that the PII had not and could not have been accessed by any third party. The diligence and investigation done by plaintiffs' counsel in this litigation ultimately led to the recovery of at least one Morgan Stanley decommissioned device from an online third-party purchaser. That device was forensically examined by experts for the class and Morgan Stanley, and its recovery is what I believe ultimately led to the proposed settlement.

14. Subsequent to the filing of the *Tillman* complaint, several related actions were also filed before the Honorable Analisa Torres[4], and on September 2, 2020, Judge Torres indicated that she intended to consolidate the eight putative class action lawsuits into *In re Morgan Stanley Data Security Litigation*, Case No. 1:20-cv-05914-AT (S.D.N.Y.). Judge Torres also set a schedule for applications for lead counsel.

15. On September 17, 2020, Judge Torres appointed Linda P. Nussbaum of Nussbaum Law Group, P.C. and Jean S. Martin of Morgan & Morgan as Interim Co-Lead Counsel, appointed an Executive Committee comprised of Melissa Emert (Kantrowitz, Goldhamer & Graifman, P.C.), Katrina Carroll (Carlson Lynch LLP), Jonathan M. Jagher (Freed Kanner London & Millen LLC), Michael L. Roberts (Roberts Law Firm, P.A.), Erich P. Schork (Barnow and Associates, P.C.), and Lori G. Feldman (George Gesten McDonald, PLLC), and ordered the consolidation of all of the pending cases. The order permitted plaintiffs' counsel to participate in the litigation in an efficient and non-duplicative manner.

16. Once appointed by Judge Torres, Ms. Nussbaum and Ms. Martin efficiently coordinated the efforts of all plaintiffs' counsel; conducted extensive research and very thorough investigation as to the challenging and complex legal and factual claims in this anything but "run of the mill" data security class action; selected representative plaintiffs; retained data security

[4] As of the time of filing, this case was assigned to the Honorable Mary Kay Vyskocil.

and forensic experts and investigators; retained damages experts; and began to work on a consolidated complaint that focused on the novel and evolving factual narrative as well as fundamental legal issues including standing, damages, accessibility, and the applicability of various state law statutes and could withstand any Rule 12 motion raised by the defendant.

17. Class Counsel devised and implemented a time and expense reporting protocol for the submission and monitoring of all work performed and expenses incurred by all plaintiffs' counsel in the case. This protocol facilitated the assignment of work by Class Counsel and enabled all participating firms to work in an efficient, non-duplicative manner in the best interests of the Class.

18. Class Counsel coordinated with defense counsel to prepare the October 1, 2020 status report for Judge Torres. Class Counsel had several meet-and-confers with counsel for Morgan Stanley in preparation of the October 1, 2020 status report. During that process, Morgan Stanley's counsel stressed their client's defenses to the alleged legal and equitable claims, their view that plaintiffs lacked Article III standing, and their contention that the case would likely be dismissed.

19. Morgan Stanley argued that after years of internal investigation, as well as proceedings and investigations by regulators, including the Office of the Controller of the Currency (OCC) and various State Attorneys General, and its extensive work with retained outside technical experts, there was no proof of any misuse or third-party access to plaintiffs' or class members' personal identifying information. This was Morgan Stanley's primary defense in the case, which plaintiffs' counsel, through its independent extensive investigation, party and third-party discovery and work with various experts, eventually overcame in order to reach a settlement.

20. As part of those initial discussions and, as requested by Judge Torres, counsel for the parties discussed initial discovery that plaintiffs' counsel would require to evaluate the claims and defenses and the means by which they would potentially consider early dispute resolution.

21. On October 8, 2020, Judge Torres held an Initial Pretrial Conference and on October 13, 2020 set a schedule for amended pleadings, motions and expert discovery. That schedule permitted, as requested by plaintiffs' counsel, party and third-party discovery to immediately proceed. Plaintiff's counsel took advantage of the opportunity for early discovery and set about fully discovering the case.

22. The case management plan provided for approximately one year to complete fact discovery and ordered that defendant produce non-privileged reports from experts that it had retained which were requested by plaintiff's counsel. Morgan Stanley produced two sets of third-party forensic expert reports which were promptly and thoroughly analyzed by Class Counsel and their experts and then used to focus ongoing discovery efforts.

23. Plaintiffs also immediately engaged in comprehensive party and non-party discovery. The parties met to prioritize the discovery that would be needed before any early mediation, as suggested by Judge Torres, could occur. The discovery that ensued was far more complex and complete than the typical informal pre-meditation discovery. The amount of discovery that actually took place over the next nine months was extensive and voluminous, involving party and non-party depositions, witness interviews, numerous document productions totaling over 163,300 pages, analysis and negotiation of multiple privilege logs, exchanges of expert materials, and third-party discovery served by plaintiffs involving approximately twenty third-parties. Discovery-wise, the case proceeded very rapidly with this expedited discovery schedule.

24. On October 22, 2020, as ordered, the parties reported to Judge Torres that they had engaged in discussions regarding potential alternative dispute resolution, and that if such discussions were to proceed, the parties would work with a private mediator.

25. On November 4, 2020, plaintiffs filed their 84-page Consolidated Class Action Complaint which further described the alleged wrongful conduct of Morgan Stanley based on the investigation that plaintiffs' counsel had conducted to date, and set forth multiple causes of action including negligence, gross negligence, New York Gen. Bus. Law § 349, breach of fiduciary duty, unjust enrichment, and breach of confidence.

26. The Consolidated Class Action Complaint included additional detailed allegations reflecting counsel's extensive work in interviewing and vetting the named plaintiffs and conducting factual and legal research with regard to Morgan Stanley's duties to safeguard its customers' information; prior regulatory proceedings against Morgan Stanley and a former employee; prior bad acts alleged against Morgan Stanley; investigation into specific vendors that Morgan Stanley had selected to do the decommissioning; Morgan Stanley's privacy policies throughout the class period; document retention and destruction standards for financial advisors; the Department of Defense and Department of Commerce National Institute of Standards and Technology Criteria for Media Sanitation; jurisdictional issues; standing issues; potential causes of action; state privacy statutes; and damages.

27. The parties continued to engage in intensive discovery while also continuing to explore possible alternative dispute resolution. On November 9, 2020 the parties informed Judge Torres that they intended to engage the Honorable Diane M. Welsh (Ret.) of JAMS to conduct a private mediation. Initially the mediation was set for March 2021 but it was rescheduled to May

24, 2021, to permit a significant amount of discovery, investigation and expert and legal analysis to occur.

28. On December 2, 2020, pursuant to Judge Torres' rules and schedule, Morgan Stanley filed its pre-motion letter with respect to the Amended Complaint. The letter outlined Defendant's arguments for dismissal with prejudice of the Complaint in its entirety, including their primary contention that plaintiffs lacked Article III standing to assert any of their claims. Morgan Stanley stressed the issue of standing and lack of proof as to dissemination or third-party access to PII of its clients. Morgan Stanley insisted that there was a total failure of proof by plaintiffs to support its allegation that a third party actually accessed or misused their clients' data. This was the crux of Morgan Stanley's defense and presented serious risks for plaintiffs in light of prevailing law. Defendant, in its pre-motion letter to Judge Torres, also argued that all counts in the Complaint should be dismissed, including negligence, invasion of privacy, unjust enrichment, and the state statutory claims, specifically claims under NY Gen. Bus. Law § 349.

29. On December 9, 2020, plaintiffs responded to defendant's pre-motion letter. Plaintiffs' letter addressed all of the arguments raised by Morgan Stanley and cited authority supporting, *inter alia*, plaintiffs' Article III standing. Plaintiff's letter stressed the legal duties that Morgan Stanley had to its former and current clients and detailed the damages that flowed from Morgan Stanley's conduct. Plaintiffs also responded to Morgan Stanley's specific arguments as to their causes of action for negligence, invasion of privacy, unjust enrichment and state statutory claims, including N.Y. Gen. Bus. Law § 349.

30. On December 10, 2020, having reviewed the parties pre-motion letters, Judge Torres set a schedule for defendant to file its motion to dismiss.

31. On January 14, 2021, Morgan Stanley, in accordance with Judge Torres' schedule, filed its motion to dismiss the Consolidated Class Action Complaint in its entirety pursuant to Rules 12(b)(1) and 12(b)(6). Class Counsel, in addition to its work on ongoing discovery and investigation, commenced working on an opposition to the motion.

32. On May 24, 2021, the parties had their first full-day in-person mediation session with Judge Welsh. At a time when most mediations were being held virtually, the parties realized that the nature of this case required in-person discussions and negotiations.

33. On July 5, 2021, plaintiffs filed their Consolidated Amended Class Action Complaint (the Operative Complaint). This complaint totaled 119 pages and contained allegations supported by scores of references to documents that had been produced by Morgan Stanley or had been subpoenaed from over a dozen third parties. The Operative Complaint reflected extensive discovery that plaintiffs had obtained from Morgan Stanley and third parties, as well as evidence adduced from deposition testimony, including that of a key third party that plaintiffs had deposed, and plaintiffs' ongoing investigation. This Complaint definitively addressed defendant's arguments as to Article III standing, accessibility, state statutory claims and damages.

34. On August 9, 2021, Morgan Stanley filed its opening brief in support of its motion to dismiss the Operative Complaint in its entirety. Defendant argued that the plaintiffs lacked standing to bring their claims and specifically moved to dismiss all of the state statutory claims.

35. During the course of simultaneously litigating and mediating the case, plaintiffs' counsel through third party discovery and investigation independently located and recovered one

of the missing Morgan Stanley IT devices. The device was recovered and was forensically analyzed by experts for both plaintiffs and Morgan Stanley.

36. On August 18 and 23, 2021, the parties participated in two additional full-day, in-person mediation session with Judge Welsh.

37. On September 15, 2021, plaintiffs filed their opposition to Morgan Stanley's motion to dismiss. Plaintiffs' opposition answered and responded to each of defendant's legal and factual arguments, including those addressed to Article III standing, damages and the various state statutory claims, most importantly N.Y. Gen. Bus. Law § 349.

38. On September 29, 2021, defendant filed its Reply Memorandum in support of its motion to dismiss, again arguing that the Operative Complaint be dismissed in its entirety. Defendant refuted each of plaintiffs' arguments again requesting dismissal in total and with prejudice.

39. On November 3, 2021, after three full days of mediation conducted over a six-month period before Judge Welsh, as well as numerous calls with Judge Welsh, the submission of additional mediation letters and legal memoranda, and the exchange of materials regarding the expert and forensic analysis of the IT device located by plaintiffs' counsel and the exchange of other expert materials, the parties each accepted a Mediator's proposal through a double-blind process, entered into a Term Sheet resolving this matter, and jointly informed the Court of the settlement reached.

**B. Discovery**

**1. Discovery of Morgan Stanley**

40. Plaintiffs engaged in extensive expert and factual discovery of Morgan Stanley. This intensive discovery, which included document requests, interrogatories, analysis and

researching privilege issues, numerous meet-and-confer sessions, and supplemental productions, took place over the course of close to a year.

41. Class Counsel researched, drafted, and filed the Protective Order governing discovery in the case. There were significant negotiations of the provisions of the proposed order in meet and confer sessions with Morgan Stanley's counsel and the review of multiple drafts exchanged by the parties. The parties also exchanged legal memoranda on the Bank Examiners Privilege in this regard.

42. Class Counsel researched, drafted and filed an ESI protocol order to govern the production of documents in the case. This work included detailed negotiation of the terms of the ESI order in meet and confer sessions with Morgan Stanley's counsel and the review of multiple drafts exchanged by the parties. The work also included research on the confidential supervisory information and suspicious activity report privileges identified by Morgan Stanley in the proposed ESI protocol order.

43. Class Counsel researched, drafted and served Rule 408 discovery requests on Morgan Stanley in conjunction with settlement discussions and Initial Disclosures pursuant to Rule 26(a)(1), as well as analyzed the Initial Disclosures served by Morgan Stanley. Those disclosures provided leads for third party discovery and investigation. Plaintiffs interviewed or subpoenaed all of the entities identified through defendants Initial Disclosures.

44. Class Counsel researched, drafted and served four additional sets of Requests for the Production of Documents to Morgan Stanley containing a total of 72 requests for production, as well as four sets of Interrogatories containing a total of 12 interrogatories. Through the course of numerous meet-and-confer sessions, Counsel also negotiated the scope of the document requests and interrogatories and search terms to be used for defendant's document production.

The work included the analysis of the responses to the discovery served by Morgan Stanley, response to various privilege issues raised by Morgan Stanley, and multiple follow-up requests.

45. Class Counsel researched, drafted and served responses to Requests for the Production of Documents and Interrogatories served upon plaintiffs by Morgan Stanley, as well as negotiated the scope of plaintiff discovery in meet-and-confer sessions with Morgan Stanley's counsel. This work included extensive interviews of the eleven named plaintiffs and conferences with them to answer discovery and provide documents related to their claims. In addition, plaintiffs' counsel interviewed other class members and identified class members alleging injury based on a Morgan Stanley document that plaintiffs specifically requested in discovery concerning calls to Morgan Stanley from their clients about the Data Security Incidents.

46. Class Counsel investigated the facts relating to the Data Security Incidents with the assistance of consultants in cybersecurity and identity theft damages; analyzed the evidence adduced during pretrial discovery; and researched the applicable law with respect to the class's claims against defendant.

47. Class Counsel also consulted with experts regarding the types of IT equipment at issue, the possibility of data recovery from such equipment, and whether stand-alone devices could be accessed and how, which was directed at Morgan Stanley's primary contention regarding the accessibility of data on the devices in question.

48. Plaintiffs' counsel reviewed, analyzed, and utilized in pleadings, mediation materials, depositions, and witness interviews over 31,000 documents produced by Morgan Stanley, comprising more than 160,000 pages. These documents were contemporaneously-created, concerning both the facts leading up to the Data Security Incidents and Morgan Stanley's internal investigation and review once it learned of the incidents.

49. Plaintiffs' counsel also analyzed documents concerning practices and procedures used by Morgan Stanley in the selection and supervision of vendors and investigated each of the relevant vendors that Morgan Stanley engaged as part of the decommissioning process.

50. Plaintiffs' counsel reviewed and analyzed all of the discovery produced by Morgan Stanley and followed up with formal and informal additional requests. There were numerous issues concerning custodians, privilege, and confidentiality that were researched, negotiated and ultimately resolved by the parties.

51. Plaintiffs' counsel analyzed and negotiated extensive privilege logs not only from Morgan Stanley, but also from a number of third parties, including several law firms that had been retained by Morgan Stanley and various third parties, and subpoenaed by plaintiffs' counsel with respect to their various roles once Morgan Stanley learned of the data security incidents.

52. Plaintiffs' counsel served and negotiated a Rule 30(b)(6) deposition notice on Morgan Stanley then prepared for and conducted the deposition. The Rule 30(b)(6) witness identified by Morgan Stanley was Gerard Brady, the then Morgan Stanley Director of Technology and Information Risk. Mr. Brady was the Morgan Stanley employee who led the internal investigation by Morgan Stanley once it learned from a third-party purchaser of the breach.

53. In addition, plaintiffs' counsel interviewed the former Morgan Stanley employee who had been in charge of the decommissioning project and who had been terminated by Morgan Stanley as a result of its internal investigation.

54. At the time that the case resolved, plaintiffs' counsel had prepared for the depositions of several additional Morgan Stanley employees, as well as a number of third-party witnesses, one of whom was scheduled to be deposed the following week.

**2. Third-Party Discovery**

55. Plaintiffs' counsel also subpoenaed nineteen third parties for both document production and depositions. In this litigation and the complex fact pattern that emerged, the actions and inactions of third parties were as critical as those of Morgan Stanley in developing the complete factual record and proving the elements of plaintiffs' claims.

56. Plaintiffs' counsel conducted extensive third party discovery, including research and investigation of the subpoenaed firms and individuals; planning and strategizing with regard to the content and scope of third-party discovery; drafting and service of the discovery requests; and preparing for and attending numerous meet and confer sessions with counsel for the third parties to negotiate the scope and logistics of the productions, as well as privilege issues raised by the several law firms that were engaged by either Morgan Stanley or some of the other third parties once the data security incident was discovered.

57. Over 3,300 pages of documents were produced by third parties; one third party was deposed; two third parties were extensively interviewed; and plaintiffs' counsel were scheduled to take and had prepared for two additional third-party depositions when the parties reached the proposed settlement.

58. Highlights of the third-party discovery engaged in by Class Counsel included the following:

**a. <u>Mr. Oklahoma</u>**

Mr. Oklahoma contacted Morgan Stanley using an internal Morgan Stanley e-mail address saying "I am sending this as a courtesy to you. I recently purchased NetApp gear from eBay. [Upon turning it on], I had access to all of your data…" The communication from Mr. Oklahoma was how Morgan Stanley became aware of the 2016 Data Security Incident. Mr.

Oklahoma's records, including emails, and those of his attorney were subpoenaed, and he was the first witness deposed by plaintiffs' counsel. Documents recovered from Mr. Oklahoma were not duplicative to those produced by Morgan Stanley, and through review of these documents, plaintiffs' counsel discovered that a Morgan Stanley employee had used his personal email accounts in most of the communications with Mr. Oklahoma. His deposition provided key evidence in this litigation, setting the stage to unravel the complex factual and technical issues that ultimately led to the very favorable resolution on behalf of the class.

**b. Triple Crown**

Triple Crown, a Long Island moving company engaged by Morgan Stanley to move and dispose of Morgan Stanley's decommissioned IT equipment, was subpoenaed by plaintiffs' counsel. Triple Crown produced voluminous documents and its principal was extensively interviewed by plaintiffs' counsel on two occasions. Plaintiffs' counsel had prepared to depose Triple Crown at the time the matter resolved. Morgan Stanley took the position in this litigation that Triple Crown was at fault and that Morgan Stanley was not informed of any subcontractor substitution made by Triple Crown. Plaintiffs' counsel were able to definitively refute that claim.

**c. IBM**

IBM was Morgan Stanley's IT legacy vendor, which housed Morgan Stanley's IT equipment prior to the decommissioning. IBM's records were subpoenaed by plaintiffs' counsel. Morgan Stanley chose not to retain IBM for the decommissioning project, citing cost concerns, and instead contracted with the Long Island moving company, Triple Crown. IBM produced thousands of pages of documents that were extensively analyzed by plaintiffs' counsel and their

experts. The IBM production was very significant to refute assertions with respect to the condition of the IT devices at the time that they left IBM's premises.

**d. eWorks**

eWorks was the data technology company that was originally slated to work with Triple Crown to decommission and recycle the devices that were subject to the 2016 Data Security Incident. eWorks produced documents concerning their role in the in the decommissioning process and Morgan Stanley's efforts to trace devices subject to the 2016 Data Security Incident.

**e. Weed Hire (F/K/A Anything IT)**

Weed Hire, formerly known as Anything IT, was subpoenaed by plaintiffs' counsel and produced documents. Weed Hire was the subcontractor that ultimately worked with Triple Crown to assist in the disposal and resale of Morgan Stanley's used IT devices. Records produced by Weed Hire, as well as certain discovery responses from defendant, provided leads followed by plaintiffs' counsel to subpoena additional third parties involved in the decommissioning and resale process.

**f. Krusecom**

Krusecom, one of the companies that received and resold Morgan Stanley's decommissioned IT devices, was also subpoenaed for document production and thoroughly interviewed by plaintiffs' counsel. Krusecom was the vendor that sold Morgan Stanley's used IT equipment over the internet, and their records identified "Mr. Oklahoma," as well as the third-party purchaser of the Morgan Stanley device which plaintiffs' counsel, through their discovery and investigation, ultimately recovered. The information developed from the Krusecom records, as well as the attorneys later retained by Morgan Stanley to aid in the device recovery effort, will

be used by Kroll, the vendor hired by Morgan Stanley as part of the proposed settlement, to continue efforts to locate and retrieve additional missing IT devices.

**g. Stroz Friedberg**

Morgan Stanley retained forensic expert Stroz Freidberg (Stroz) once it learned of the 2016 Data Security Incident after being contacted by Mr. Oklahoma. Stroz performed a forensic examination of the devices ultimately recovered from Mr. Oklahoma and additional examination and analysis of decommissioned IT devices for Morgan Stanley. Plaintiffs subpoenaed documents from Stroz and engaged in extensive negotiation to ultimately get them. Plaintiffs' counsel also negotiated with Stroz and Morgan Stanley's counsel for Plaintiffs' expert's examination of imaging of the devices recovered from Mr. Oklahoma.

**h. Price Waterhouse Coopers (PWC)**

PWC was also retained by Morgan Stanley shortly after it learned of the 2016 Data Security Incident. Plaintiffs received numerous PWC reports and internal records and had those reports analyzed by experts. The PWC documents reflected the close relationship between PWC and Morgan Stanley. Further, plaintiffs' counsel discovered that the author of an exculpatory PWC report was hired, just weeks later, by Morgan Stanley for a high-ranking position in their data security department.

**i. McDonald Hopkins LLC**

McDonald Hopkins was a law firm retained by Krusecom related to the 2016 Data Security Incident. Plaintiffs' counsel subpoenaed McDonald Hopkins' documents, which detailed the insufficient efforts engaged in by Morgan Stanley and their agents to locate and recover the missing IT devices. There was significant negotiation involved in plaintiffs ultimately obtaining those records.

This discovery led in part to plaintiffs' counsel's insistence, as part of any proposed settlement, on the retention of an independent investigator to locate and attempt to recover additional IT devices. Ultimately Kroll, a global leader in forensic investigations, was selected as part of the proposed settlement. Kroll will follow a detailed protocol acceptable to plaintiffs' counsel, and will report its progress to plaintiffs' counsel quarterly and at the conclusion of the one-year period.

**j. Sidley Austin LLP**

Sidley Austin was retained by Morgan Stanley in its effort to contain the repercussions of the 2016 Data Security Incident. Plaintiffs' counsel subpoenaed Sidley's records with respect to the recovery efforts. Morgan Stanley's recovery efforts were ultimately proved to be so deficient that years later plaintiffs' counsel were able, through their own investigation and diligence, to recover a missing IT device, the forensic examination of which, by both parties, led to the proposed settlement.

**k. Marino, Tortorella & Boyle, P.C.**

Marino, Tortorella & Boyle, P.C. was retained by Morgan Stanley to assist with its investigation of the 2016 Data Security Incident and device recovery efforts. Marino produced documents regarding the process Morgan Stanley used to make contact with downstream purchasers of the devices in question.

**l. "Downstream Purchaser"**

The Downstream Purchaser is the individual referred to in paragraph 130 of Plaintiffs' Consolidated Amended Complaint filed on July 5, 2021. Plaintiffs' counsel, through its own investigation, telephone and email contact and additional telephonic interviews, were able to determine that the Downstream Purchaser had purchased an IT device that pertained to the 2016

Data Security Incident and had kept that device in its original condition in his home since its purchase. Plaintiffs' counsel worked collaboratively with defense counsel to recover this key piece of evidence and to have its contents analyzed. Plaintiffs' experts' findings on the device were crucial to obtaining this settlement.

**m. Additional Third Parties**

Plaintiffs' counsel were in contact with numerous other third parties over the course of this litigation. These parties include IT decommissioning companies, IT resellers, cyber security consultants, additional downstream purchasers and former Morgan Stanley employees. At the time the settlement was reached, plaintiffs' counsel served subpoenas on a number of these third parties and had received and reviewed documents from some, was negotiating the acceptance of service with certain others, and had interviewed several more. These included the former Morgan Stanley employee that Morgan Stanley identified to regulators as the individual that it had terminated as the result of the Data Security Incidents. Plaintiffs' counsel also were in contact with other outside vendors including 4YourBusiness, Titan Datacom, Flashpoint and Arrow Electronics.

**C. Plaintiffs' Experts**

59. Plaintiffs' counsel also retained multiple experts to assist them in evaluating some of the complex technical issues; to forensically analyze the recovered IT devices; to opine as to the "market" for the missing IT devices and the data contained thereon; and to opine as to the value of the PII included on the IT devices.

60. Several of plaintiffs' experts supplied materials that were used in the various mediation sessions. One of plaintiffs' technical experts made a lengthy presentation at the second mediation session on how one could access information on the type of IT devices at

issue, and his findings and analysis of the IT device that plaintiffs' counsel recovered from the "Downstream Purchaser" at the second mediation session marked a significant turning point in the litigation.

**D. The Mediation and Settlement**

61. In November 2020, Judge Welsh[5] was engaged by the parties to mediate this matter. Judge Torres was so informed in a joint letter by the parties.

62. The parties participated in three full-day, in-person, arm's-length mediation sessions under the direction of Judge Welsh held on May 24, 2021, August 18, 2021 and August 23, 2021. The later sessions occurred after almost a year of intensive litigation and discovery. Legal memoranda, power point presentations, expert reports and expert analyses were prepared for each of the mediation sessions.

63. Prior to the first mediation session, plaintiffs shared with the mediator and Morgan Stanley a draft of its Operative Complaint and all supporting documentation. These materials were voluminous and contained in over three large binders. In addition, the parties exchanged lengthy, comprehensive mediation statements analyzing the complex and novel legal and factual issues presented in this case.

64. There were detailed presentations by both sides and lengthy mediation statements were submitted to Judge Welch and exchanged by the parties. In addition to its counsel, senior executives of Morgan Stanley attended the session. A director from Morgan Stanley's

[5] The Declaration of Hon. Diane M. Welsh in support of the settlement was submitted on the motion for preliminary approval of the settlement (*see* ECF No. 81-3) and is re-submitted here for the Court's convenience as Exhibit 1. Judge Welch expressed her strong approval of the settlement terms as fair and providing meaningful relief to the class members. The settlement terms were, in fact, proposed by Judge Welsh, on her own initiative, in a mediator's proposal. *See* Welsh Declaration at ¶¶ 15, 19.

cybersecurity and privacy team made a lengthy presentation concerning the IT devices at issue and Morgan Stanley's position that any data potentially residing on the devices could not be accessed due to the structure and operation of the devices and the systems which use these devices. Counsel for plaintiffs made presentations regarding the various factual and legal issues, as well as damages. Although the mediation lasted a full day and the parties shared a great deal of information, little progress was made at the first session with regard to a settlement, and the litigation continued at full tilt.

65. Counsel agreed to continue discovery, exchange additional factual, expert and legal material and to schedule additional mediation sessions once the record was more complete.

66. On August 18, 2021, some three months after the first mediation session, the second in-person session took place. Prior to the August 18th session, the Parties exchanged supplemental mediation statements focused on those issues that had been contested at the first session. The second session was attended by Class Counsel, Morgan Stanley's counsel, senior Morgan Stanley employees, and Morgan Stanley's insurance carrier representatives. At this session, Plaintiffs' forensic expert presented his analysis of the device found by the independent investigation of Plaintiffs' counsel. This analysis included his finding of data on the device regarding one of the named plaintiffs. Locating, retrieving, and analyzing this device became a catalyst for progress in the settlement negotiations.

67. On August 23, 2021, the parties participated in a third in-person mediation session with Judge Welsh. The same participants appeared for both sides, and the parties made presentations and continued their arms-length disciplined but hard-fought negotiations. The third session was productive in that it substantially narrowed issues, as well as developed a possible settlement framework. However, no resolution was reached. The parties agreed to continue

their good-faith exchanges of legal and factual memoranda and to discuss and evaluate the others' arguments and proposals and to continue discussions with Judge Welsh.

68. For the next two months, the parties continued to exchange materials and to speak on a regular basis. In addition, the preliminary forensic examination by both parties of the device recovered by plaintiffs' counsel was concluded and the parties shared that information. Each of the parties had a number of separate telephonic mediation sessions with Judge Welsh.

69. On October 17, 2021, after additional telephonic conferences with the parties, and with knowledge of the conclusions reached by each party's forensic expert with respect to the device that had been recovered due to plaintiffs' investigation, Judge Welsh made a mediator's proposal to resolve this litigation. Her proposal was accepted by both sides, and a term sheet was subsequently negotiated, drafted and executed.

70. After weeks of additional negotiations, on November 3, 2021, Class Counsel and Morgan Stanley executed a term sheet, the substance and terms of which were used to develop and execute a binding settlement agreement.

71. When the Settlement Agreement was executed, Class Counsel and their experts had access to very comprehensive information and forensic and expert analysis which allowed them to conclude that the proposed settlement was fair, reasonable and adequate.

72. The Settlement Agreement provides for multifaceted benefits for the class, specifically tailored to meet the challenges and unusual facts of this litigation:

**The Common Fund**

A 60-million-dollar non-reversionary common fund will be established which will provide the following relief to Class Members:

a) Aura Financial Shield fraud monitoring and insurance services for at least 24 months available to all Class Members. Financial Shield focuses on protecting financial assets, freezing identity at 10 different Bureaus including the 3 main credit bureaus, home and property title monitoring, income tax protection, bank account monitoring, dark web monitoring, identity verification alerts, and other services. This service provides real-time monitoring of financial accounts. Financial Shield also carries a $1 million policy protecting the subscriber. Out-of-pocket expense reimbursement up to $10,000 per Class Member for all actual, incurred costs or expenditures that are fairly traceable to the Data Security Incidents, such as unreimbursed costs related to identity fraud or identity theft, attorneys' fees, accountant fees, fees for credit repair services, costs associated with freezing or unfreezing credit with any credit reporting agency, credit monitoring, and related miscellaneous expenses related thereto, such as postage and mileage.

b) Attested lost time reimbursement of up to four (4) hours a person at $25 per hour for time the Class Member spends researching or remedying issues related to the Data Security Incidents. No separate documentation is required for a lost time claim. The Class Member merely makes an attestation as to the hours spent. This claim may be made in addition to a claim for reimbursement of out-of-pocket expenses.

c) An additional five (5) hours of lost time reimbursement compensation at either $25 per hour or higher (up to $50 per hour), if there was additional lost time at work, so long as such additional hours are supported by documentation. This additional reimbursement is subject to the $10,000 cap for out-of-pocket expenses.

d) To the extent valid claims are less than the amount remaining in the settlement fund after the payments for the benefits described above are spent, excess funds will be used to extend the term of the Aura Financial Shield Services available to all Class Members who elect to enroll. The Aura product was specifically selected to meet the needs of class members and is not duplicative of credit monitoring services that class members may already have.

e) No portion of the $60 million common fund shall revert to or be repaid to Morgan Stanley.

**Other Benefits**

f) In addition to the Common Fund, Morgan Stanley will pay the reasonable costs of notice and claims administration. These costs are typically paid out of the settlement fund. At present, such costs are estimated by Epic Class Action & Claims Solutions, Inc., the claims administrator, to be at least $8.2 million.

g) Morgan Stanley, coordinating with Class Counsel, has engaged Kroll to continue efforts to search for and to retrieve additional missing Morgan Stanley IT devices for a year at the expense of Morgan Stanley. Kroll is a global leader in forensic investigations and has teams of dedicated cyber risk experts with extensive experience in tracing and recovering data. The recovery efforts will continue for a year and will follow a detailed protocol agreed to by the parties, and with regular reports to plaintiffs' counsel.

h) Morgan Stanley has made and will continue to maintain substantial business practice changes related to the protection of information security to safeguard Settlement Class Members' PII. These changes include significant and ongoing investments in its

technology decommissioning processes. The business practice changes, along with the retention of Kroll, are novel aspects of the proposed settlement and will substantially reduce the risk of any further harm to the class.

73. Negotiations leading to the settlement were entirely non-collusive, vigorous, and strictly at arm's-length. And, as discussed above, prior to reaching the settlement, Class Plaintiffs and Class Counsel were very well informed regarding the strengths and weaknesses of class plaintiffs' claims. Class Counsel had the benefit of the information it had developed from its investigation and analyses, regulatory investigations, experts and extensive party and third-party discovery. In addition, because the negotiations were conducted over a period of many months and simultaneous with extensive party and non-party discovery, the parties were able to weigh the strengths and weaknesses of their respective claims and fully evaluate the facts, legal issues, and proposals and counter-proposals.

74. Although the mediator's proposal was accepted by both parties on November 3, 2021 and a term sheet was executed on that day, it took an additional seven weeks, until December 31, 2021, until a definitive settlement agreement was executed.

75. The settlement agreement and accompanying exhibits were subject to extensive negotiation and multiple drafts before full agreement was reached.

76. At all times while negotiating and executing the proposed Settlement Agreement, class plaintiffs were represented by Class Counsel, who have significant experience prosecuting federal class action claims. Defendant was represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP, a leading international law firm that has significant experience defending federal class actions.

77. The negotiations were undertaken on behalf of plaintiffs and the class by counsel who are well versed in complex litigation and, more specifically, consumer class actions. These experienced lawyers advocated for the interests of the Settlement Class throughout negotiations, utilizing their combined experience of litigating consumer class actions, including breach of privacy claims, to ensure the proposed settlement serves the best interests of the Settlement Class.

78. The settlement here is a very substantial recovery by any metric and based on our experience, as well as publicly available information, this is one of the highest, if not the highest, recovery in a data security class action on a per class member basis.

## III. Class Counsels' Fee and Expense Application

79. Class Counsel are applying for an award of attorneys' fees and reimbursement of expenses incurred during the course of the action, as well as modest service awards for each of the named plaintiffs. Specifically, Class Counsel, on behalf of all plaintiffs' counsel, are applying for attorneys' fees in the amount of $20,000,000 and for out-of-pocket costs and expenses in the total amount of $253,994.53.[6]

[6] The lodestar and expense submissions of: (i) Linda P. Nussbaum on behalf of Nussbaum Law Group, P.C. ("Nussbaum Law Fee and Expense Decl."); (ii) Jean S. Martin on behalf of Morgan & Morgan ("Morgan Fee and Expense Decl."); (iii) Michael L. Roberts on behalf of Roberts Law Firm, P.A. ("Roberts Fee and Expense Decl."); (iv) Melissa Emert on behalf of Kantrowitz, Goldhamer & Graifman, P.C. ("Kantrowitz Fee and Expense Decl."); (v) Jonathan M. Jagher on behalf of Freed Kanner London & Millen LLC ("Freed Fee and Expense Decl."); (vi) Erich P. Schork on behalf of Barnow and Associates, P.C. ("Barnow Fee and Expense Decl."); and (vii) Lori G. Feldman on behalf of George Gesten McDonald, PLLC ("George Fee and Expense Decl.") are consolidated and attached hereto as Exhibit 2. These declarations set forth the names of the attorneys and professional support staff members who worked on the action and their hourly rates, the lodestar value of the time expended by such attorneys and professional support staff as of March 1, 2022, the expenses incurred by plaintiffs' counsel as of March 1, 2022, and the background and experience of the firms.

80. In the Settlement notices, the class was advised that Class Counsel intended to make a fee request up to 33 1/3% of the non-reversionary cash Settlement Fund. While the $20,000,000 sought by Counsel is 33 1/3% of the non-reversionary cash Settlement Fund, it represents less than 29.3% of the cash portion of the settlement which includes $8.2 million in defendant-borne costs for notice and administration, and much less when considering the total value of the settlement. *See* Declaration of Brian T. Fitzpatrick, annexed as to the Fee Memorandum as Exhibit B.

81. In addition, Class Counsel also seek a service award of $5,000 for each of o the eleven named plaintiffs ($55,000 total) who devoted significant time and effort to the action during its pendency.

82. Named plaintiffs approve of and support the requested application for fees and expenses.

83. Class Counsel's Fee and Expense Application is consistent with the disclosure set forth in the Notice.

84. As also noted above, Class Counsel's fee request is made on behalf of all plaintiffs' counsel and all plaintiffs' counsel firms will share in the attorneys' fees awarded by the Court. Class counsel have submitted declarations from the firms representing the class setting forth each firms' work attorneys' fees and expenses in prosecuting this matter.

85. Below is a summary of the primary factual bases for Class Counsel's Fee and Expense Application. A full analysis of the factors considered by courts in this Circuit when

evaluating requests for attorneys' fees and expenses from a common fund, as well as the supporting legal authority, is presented in the accompanying Fee Memorandum.[7]

### A. Settlement Class Counsel's Fee Request is Fair and Reasonable and Warrants Approval

#### 1. The Favorable Settlement Achieved

86. The Settlement represents a very favorable recovery for the Settlement Class, providing an all-cash, non-reversionary settlement fund in the amount of $60 million and additional value to the class comprised of defendant-borne costs of notice to over 15 million class members, defendant's payment of all costs of settlement administration (in excess of $8.2 million in the aggregate), substantial and valuable business practice changes, and defendant's retention of Kroll to continue efforts to locate and retrieve decommissioned IT devices that were sold over the internet.

87. Accordingly, the settlement represents a substantial result for the Settlement Class with value greater than $68.2 million.[8]

88. The Settlement also avoids the significant risks to obtaining a larger recovery (or, any recovery at all). The motion to dismiss was fully briefed and Morgan Stanley raised a substantial issue with respect to Article III standing. In addition, this case presented very challenging factual issues as well as serious impediments to possible class certification. *See* Fee Memorandum § I.E.2. Here, as a result of the Settlement, class members will benefit and receive

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[7] Courts in this Circuit consider the following factors when determining whether a fee percentage sought from a common fund is fair and reasonable: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (citation omitted) (alteration in the original). *See also* Fee Memorandum, § III.C.

[8] *See* the Declaration of Brian Fitzpatrick at ¶¶ 5-8 annexed as Exhibit B to the Fee Memorandum.

compensation for their losses and will have the risk of any future potential harm substantially mitigated.

**2. The Risks of Litigation and the Need to Ensure the Availability of Competent Counsel in High-Risk Contingent Cases**

89. The risks faced by Class Counsel in prosecuting this action are highly relevant to the Court's consideration of an award of attorneys' fees, as well as its approval of the Settlement. Here, Morgan Stanley adamantly denied plaintiffs' allegations and, if the action had continued, defendant would have aggressively litigated their defenses through class certification, summary judgment, trial, and the appeals that would likely follow. Class Counsel and plaintiffs faced significant risks in proving Morgan Stanley's liability and a motion to dismiss all claims was fully briefed and pending.

90. These case-specific litigation risks are in addition to the risk that Class Counsel undertook in taking the action on a purely contingent-fee basis. From the outset, Class Counsel understood that this would be a complex, expensive, and potentially lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and financial expenditures that vigorous prosecution of the case would require. In undertaking that responsibility, Class Counsel were obligated to ensure that sufficient resources (in terms of attorney and support-staff time) were dedicated to prosecuting the action, and that funds were available to compensate vendors and consultants and to cover the out-of-pocket costs that a case like this typically demands.

91. Class Counsel also bore the risk that no recovery would be achieved. Class Counsel are aware that despite the most vigorous and competent efforts, a law firm's success in contingent litigation such as this is never guaranteed. Moreover, it takes hard work and diligence by skilled counsel to develop the facts and theories that are needed to sustain a complaint or win

at trial, or to persuade sophisticated defendants to engage in serious settlement negotiations at meaningful levels. Indeed, Class Counsel are aware of, and have participated in, many hard-fought lawsuits in which, because of the discovery of facts unknown when the case commenced, or changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, excellent professional efforts by plaintiff's counsel produced no fee or reimbursement of expenses at all.

92. Class Counsel's efforts, in the face of substantial risks and uncertainties, have resulted in what Class Counsel believe to be a very favorable and certain recovery for the Settlement Class. In these circumstances, and in consideration of Class Counsel's hard work and the very favorable result achieved, Class Counsel believe that their fee request is fair and reasonable and should be approved.

**3. The Time and Labor Devoted by Class Counsel**

93. As noted above, during the course of this action, Class Counsel: (i) researched and drafted two detailed amended complaints; (ii) briefed two rounds of motions to dismiss; (iii) engaged in extensive discovery efforts, including the review of approximately 163,300 pages of documents from Morgan Stanley and nineteen third parties; (iv) conferred with various cybersecurity consultants and experts; (v) took depositions; (vi) engaged in extensive mediation; and (vii) negotiated an excellent settlement for the class. *See supra* ¶¶ 11-79.

94. Moreover, Class Counsel will continue to perform legal work on behalf of the class through the Fairness Hearing and beyond with respect to the work to be done by Kroll. Class Counsel have expended many hours speaking with class members and answering their questions upon receiving the settlement notice. Class Counsel have been communicating with approximately 20 class members per day since notice was sent. Additional substantial resources

will be expended assisting class members with their Claim Forms and related inquiries and working with the Claims Administrator, Epic Class Action & Claims Solutions, Inc., to ensure the smooth progression of claims processing and distribution of the Net Settlement Fund and to consult with Kroll with respect to their recovery efforts over the next year. No additional legal fees will be sought for this work.

95. Throughout the action, Class Counsel maintained an appropriate level of staffing that avoided unnecessary duplication of effort and ensured the efficient prosecution of this action. As the lead counsel on the case, we personally monitored and maintained control of the work performed in this action.

96. The time devoted to this action by Class Counsel is set forth in the Fee and Expense Declarations attached hereto as Exhibit 2 (consolidated). These declarations report the amount of time spent by each plaintiffs' attorney and professional support staff employee who worked on the action and their resulting "lodestar," *i.e.*, their hours multiplied by their historical hourly rates.[9] The below table summarizes the aggregate time and lodestar of Class Counsel from the inception of this action through the filing of Plaintiffs' Preliminary Approval Motion on December 31, 2021.

| **Firm Name** | **Total Hours** | **Total Loadstar** |
|---|---|---|
| Morgan & Morgan | 2987.00 | $2,156,743.40 |
| Nussbaum Law Group | 5299.5 | $3,851,299.16 |
| George Gesten McDonald PLLC | 200.6 | $145,040.50 |
| Freed Kanner London and Millen LLC | 62.60 | $49,119.00 |

[9] The historical hourly rates of plaintiffs' counsel range from $425 to $975 per hour for partners, $353 to $764 per hour for other attorneys and $170 to $208 per hour for paralegals. *See* lodestar charts included in the Fee and Expense Declarations of Plaintiffs' Firms (Exhibit 2 hereto).

| | | |
|---|---|---|
| Kantrowitz, Goldhamer & Graifman, P.C. | 75.95 | $54,876.75 |
| Criden Love | 303.20 | $159,087.50 |
| Lynch Carpenter, LLP | 42.7 | $34,595.00 |
| Roberts Law Firm | 376.5 | $261,858.50 |
| Arnold Law Firm | 145.9 | $67,718.50 |
| Barnow & Associates | 62 | $42,270.00 |
| Carella, Byrne, Cecchi, Brody & Agnello, P.C. | 378.70 | $350,630.00 |
| Calcaterra Pollack | 17.90 | $14,972.50 |
| TOTAL | 9,952.55 | $7,188,210.81 |

97. Thus, pursuant to a lodestar "cross-check," Class Counsel's fee request of $20,000,000, which is less than 29.7% of the total settlement value, if awarded, would yield a "positive" multiplier of approximately 2.75 on plaintiffs' counsel's lodestar, which falls within the range of positive multipliers awarded in other complex cases by courts in this Circuit and elsewhere. *See* Fee Memorandum, § I.D.

**4. The Quality of Class Counsel's Representation**

98. The skill and diligence of Class Counsel also supports the requested fee. As demonstrated by the firm résumés,[10] Class Counsel are experienced in complex class actions, including data security and privacy actions, and have long and successful track records representing class members in such cases. The result here reflects the superior quality of this representation.

99. The quality of the work performed by Class Counsel in obtaining the Settlement should also be evaluated in light of the quality of opposing counsel. Defendant in this case was

[10] Firm biographies or resumes are attached to the Fee and Expense Declaration of each firm.

represented by experienced counsel from the nationally prominent litigation firm Paul, Weiss, Rifkind, Wharton & Garrison LLP. This firm very vigorously and ably defended the action. In the face of this formidable defense, Class Counsel were nonetheless able to develop a case that was sufficiently strong to persuade Morgan Stanley to settle the action on terms that are very favorable to the class.

**B. Class Counsel's Request for Expenses Warrants Approval**

100. Class Counsel also seek reimbursement from the Settlement Fund of $253,994.53 for out-of-pocket costs and expenses that were reasonably and necessarily incurred by plaintiffs' counsel in connection with the action.

101. The Notice informs recipients that Class Counsel will ask the Court for reimbursement of reasonable, actual out-of-pocket costs and expenses incurred in the litigation in addition to an award of fees.

**C. Plaintiffs' Request For Service Awards Should be Granted**

102. Each of the Named Plaintiffs was advised on their obligations as a class representative to select adequate and skilled counsel, to cooperate with counsel, and to place the interests of the class on a level equal to or above his or her own interests. The Named Plaintiffs have met and continue to meet these obligations, cooperating fully with counsel to fulfill their fiduciary duties to the Class.

103. The Named Plaintiffs did everything asked of them in the course of this litigation, including participating in written discovery and document production. They maintained regular contact with counsel to keep apprised as to the progress of the litigation.

104. The Named Plaintiffs carefully reviewed pleadings, regularly communicated with Plaintiffs' Counsel to keep abreast of the developments, and participated in settling of the case.

Plaintiffs gave their permissions to allow Plaintiffs' retained experts to search for their personal data on the retrieved devices, as well as the dark web.

105. Their interests in the litigation are aligned with, and not antagonistic to, those of the Settlement Class. At all times, they have acted in the best interest of the Class in pursuit of this litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 12, 2022
New York, New York

/s/*Linda P. Nussbaum*
Linda P. Nussbaum