UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFFS' RESPONSE TO ROBINA FRANK'S OBJECTION TO PLAINTIFFS' ATTORNEYS' FEES REQUEST

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INTRODUCTION

Pursuant to the Court's Order granting permission for this filing (ECF No. 129), Plaintiffs respectfully submit this memorandum in response to the objection that has been filed in opposition to the proposed class action Settlement by Class Member Robina Frank.[1] (ECF No. 119) ("Frank Objection").[2]

Ms. Frank, objects to Class Counsel's request for attorneys' fees, arguing that the amount awarded should be capped at a lodestar multiplier of 1.65 (Frank Objection at 14), asserting that Class Counsel are asking the Court to value the settlement "as if it were cash" (Frank Objection at 1), and that the fee award should be 25% if the value of the Class benefit. Ms. Frank fails to appreciate that the settlement is cash. There is a $60 million non-reversionary cash fund in addition to defendant-borne costs of notice and administration of approximately $8.2 million.

Ms. Frank's objections are based on misstatements of law and misunderstandings of the relevant facts. In the very first paragraph of Ms. Frank's "Introduction," she misstates the terms of the Settlement, arguing that "plaintiffs' counsel agreed to a settlement that provides only fraud insurance services[.]" In her 18-page narrative, Ms. Frank entirely ignores the terms of the Settlement that provide Class Members with substantial direct cash relief for out-of-pocket expenses, as well as compensation for attested to and documented time spent. (Settlement Agreement ¶¶ 1.34, 2.2, 3.1, 4.1, 5.1.) Although the Frank Objection is limited to the requested attorneys' fees, she also raises criticisms of provisions of the proposed Settlement. Accordingly, Plaintiffs will address those points in the context of responding to the Frank Objection.

Ms. Frank is represented pro bono by Anna St. John of the Hamilton Lincoln Law Institute

[1] Ms. Frank is incorrect in her statement that she has standing to bring her objection on the basis that she was a beneficiary to her late husband's Morgan Stanley account. The class definition preliminarily certified by Judge Torres comprises only current and former Morgan Stanley accountholders. However, Morgan Stanley's records indicate that Ms. Frank had a Morgan Stanley account and, therefore, is a Class Member and has standing to bring her objection.

[2] In addition to the arguments raised in this filing, Plaintiffs incorporate by reference all arguments made in Plaintiffs' Fee Motion, Plaintiffs' Motion for Final Approval, and all supporting documents, to include Appendix A. *See* ECF No. 101-106, 133-141.

and Center for Class Action Fairness. Ms. Frank's son, Theodore Frank, is the director of the organization, has a long history of representing objectors, and has been characterized as a "serial" objector.[3] In the *Equifax* case, Chief Judge Thomas Thrash found that Mr. Frank was "in the business of objecting to class action settlements." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *42 (N.D. Ga. Mar. 17, 2020), *aff'd in part, rev'd in part and remanded*, 999 F.3d 1247 (11th Cir. 2021), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431, 211 L. Ed. 2d 254 (2021), and *cert. denied sub nom. Watkins v. Spector*, 142 S. Ct. 765, 211 L. Ed. 2d 479 (2022). Plaintiffs asks this Court to consider this observation by Judge Thrash when evaluating the objection of Ms. Frank.

> "The fact that the objections are asserted by a serial or 'professional' objector, however, may be relevant in determining the weight to accord the objection."

Id. at 41 (citing *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1104 (D. Kan. 2018)). *See also Dennis v. Kellogg Co.*, No. 09-cv-1786-L (WMc), 2013 WL 6055326, at *4 n.2 (S.D. Cal. Nov. 14, 2013) ("when assessing the merits of an objection to a class action settlement, courts consider the background and intent of objectors and their counsel, particularly when indicative of a motive other than putting the interest of the class members first") (citations and quotes omitted).

Just as Judge Thrash noted in *Equifax*, Mr. Frank and his organization "previously and unsuccessfully made some of the same or similar objections." *Id.* (citations omitted).[4] As Judge

[3] Mr. Frank, both individually and through the Center for Class Action Fairness and related organizations, has objected to class action settlements dozens upon dozens of times over the past several years. *See, Kumar v. Salov N. Am. Corp.*, 14-CV-2411-YGR, 2017 WL 2902898, at *4 n.4 (N.D. Cal. July 7, 2017)(noting that as of 2017, "Frank has personally objected to class action settlements at least eleven times, and [his organization] has done so dozens of times.").

[4] The arguments propounded by Ms. Frank in her objection are eerily similar to those presented by Mr. Frank in the past and rejected by other courts. *See, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *38-42 (overruling Mr. Frank's objections that the value of credit monitoring should not be considered when determining attorneys' fee award, that the costs of notice and administration should similarly not be considered when determining the

Thrash and other courts have rejected objections lodged by Mr. Frank and his organization, Plaintiffs request that, based on the facts of this case, this Court do likewise.

While Ms. Frank claims to be objecting for the benefit of the Class, her arguments, if accepted, would have the opposite effect, and do nothing more than delay an excellent and comprehensive recovery. For the reasons that follow and that are stated in Plaintiffs' Motion for Final Approval and Motion for Attorneys' Fees, Reimbursement of Litigation Expenses and Service Awards, which are incorporated herein by reference, the objection of Robina Frank should be overruled.

ARGUMENT

I. Class Counsel Have Reasonably Requested 29.3% of the Total Settlement Value

Class Counsel's request for $20 million represents 29.3% of the total value of the Settlement or 33 1/3 % of the Qualified Settlement Fund, not 33.76% as suggested by Ms. Frank. As detailed at length in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards for Named Plaintiffs ("Fee Motion") (ECF No. 101), although the terms of the Settlement Agreement allow Class Counsel to

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settlement value, and that the fee award should be 10% because plaintiffs faced little risk in litigation); *City of Livonia Employees' Ret. Sys. v. Wyeth*, No. 07 CIV. 10329 RJS, 2013 WL 4399015, at *5 (S.D.N.Y. Aug. 7, 2013) ("Petri's objection on this count does not seem grounded in the facts of this case, but in her and her attorney's [Ted Frank] objection to class actions generally."); *Delacruz v. CytoSport, Inc.*, 4:11-cv-03532-CW, 2014 WL 12648451, at *7 (N.D. Cal. July 1, 2014) (overruling objection of Frank and finding that the settlement was reached only after contested litigation, including through motion practice, written discovery, depositions, three mediations and months of settlement negotiations); *In re Groupon, Inc., Marketing and Sales Practices Litigation*, 11md2238 DMS (RBB), 2012 WL 13175871, at *5 (S.D. Cal. Sept. 28, 2012) (overruling Frank's objection on the grounds the settlement leaves class members worse off than they would be if the case had never been filed, and because it benefits the attorneys at the expense of the class).

"apply to the Court for an award of attorneys' fees not to exceed 33 1/3% of the Settlement Amount" (Settlement Agreement ¶ 12.1), Class Counsel have requested only 29.3% of the total settlement value[5] for the substantial time and effort they have put into litigating this Action on an entirely contingent basis. In arguing that Class 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[,]" Ms. Frank uses inaccurate and improper numerical values. ECF No. 119, Objection of Robina Frank ("Frank Objection") at 3.

As a preliminary matter, Ms. Frank improperly includes expenses in her calculation of Class Counsel's fee request percentage. *See, e.g.*, *In re JPMorgan Treasury Futures Spoofing Litig.*, 1:20-cv-03515-PAE, ECF No. 96, (S.D.N.Y. Jun. 3, 2022) (awarding attorney fees in the amount of one third of the net settlement fund less litigation expenses and incentive awards; and separately and additionally awarding litigation expenses); *Run Guo Zhang v. Lin Kumo Japanese Restaurant Inc.*, No. 13-cv-6667-PAE, 2015 WL 5122530, at *4 (S.D.N.Y. Aug. 31, 2015) (awarding attorney fees of 33% of the net settlement amount and separately and additionally awarding costs).

Furthermore, the Settlement Agreement expressly contemplates that Class Counsel will seek reimbursement of litigation expenses in addition to an award of attorneys' fees not to exceed a third of the Settlement Amount.[6] The proper valuation of the Settlement is at least $68.2 million[7],

[5] *See* Declaration of Brian T. Fitzpatrick (ECF No. 106) for discussion of settlement value at ¶¶ 13-14; Memorandum of Law in Support of Plaintiffs' Motion for An Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs (ECF No. 101).

[6] "Class Counsel will apply to the Court for an award of attorneys' fees not to exceed 33 1/3% of the Settlement Amount *plus* expenses to be paid from the Settlement Amount." (Settlement Agreement ¶ 12.1)(emphasis added).

[7] The $68.2 million is comprised of the Settlement Fund of $60 million and $8.2 million in separately paid costs of notice and administration.

not $60 million as argued by Ms. Frank. Included in the $68.2 million value is the $60 million common fund which will be used to provide at least 24 months of Aura's Financial Shield to every participant, up to $10,000 of out of pocket expense reimbursements, up to $100 in attested lost time, any award of attorneys' fees, any award for reimbursement of litigation expenses, and any awarded Plaintiff service awards. Morgan Stanley is separately paying the substantial costs of notice and administration. This $68.2 million value does not include the cost of Morgan Stanley's hiring Kroll for its efforts to recover additional IT devices, which was negotiated by Class Counsel as an integral part of the Settlement Agreement or the value of Morgan Stanley's agreement to maintain certain implemented business practice changes. Class Counsel have not assigned a dollar value to these additional settlement benefits.[8]

Under the percentage-of-recovery approach for evaluating requests for attorneys' fees, an approach which Ms. Frank does not contest, Class Counsel respectfully submit that the requested fee is reasonable. Ms. Frank cites to *Espinal v. Victor's Café 52nd Street, Inc.*, No. 16-CV-8057 (VEC), 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) in support of her argument that a one-third fee request is not the norm in the Second Circuit. But, even *Espinal* acknowledges that the percentage of the fund awarded "generally falls within a range of 15% to 33%." *Espinal* (citing *Donoghue v. Morgan Stanley High Yield Fund*, 2012 WL 6097654, at *2 (S.D.N.Y. Dec. 7, 2012)). The weight of authority agrees. "The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs' counsel have achieved a good recovery for the

[8] Rather than estimating the value of the retention of Kroll and included it in the calculated settlement value, Class Counsel asks the Court to consider this negotiated non-economic benefit for purposes of evaluating the appropriate percentage of the fund to award. *See, In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132 at *36 (stating that courts can "compensate class counsel for their work in extracting non-cash relief from the defendant" in a variety of ways including evaluating the value of the relief to justify the percentage to award).

class, ranges from 20 to 50 percent of the gross settlement benefit." *Velez v. Novartis Pharmaceuticals Corp.*, No. 04 Civ. 09194(CM), 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010); *see also, In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) ("Traditionally, courts in this Circuit and elsewhere have awarded fees in the 20%–50% range in class actions." (internal quotes omitted)); *Hernandez v. Compass One, LLC*, 2021 WL 4925561, at *4 (S.D.N.Y. Oct. 21, 2021) (collecting cases in which fee requests between 30% and 33% of the settlement are approved); *In re Lloyd's Am. Tr. Fund Litig.*, 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002) ("[i]n this district alone, there are *scores* of common fund cases where fees alone (i.e., where expenses are awarded in addition to the fee percentage) were awarded in the range of 33-1/3% of the settlement fund.")(emphasis added). Indeed, this Court has frequently approved such awards. *See, e.g., In re JPMorgan Treasury Futures Spoofing Litig.*, No. 1:20-cv-03515-PAE (S.D.N.Y. Jun. 3, 2022) (ECF No. 96 at ¶ 3) (awarding 33.3% of settlement fund); *Spicer v. Pier Sixty LLC*, No. 08-cv-10240-PAE, 2012 WL 4364503, at *4 (S.D.N.Y. Sep. 14, 2012) (approving award of 33.3% of settlement fund as "consistent with the trend in this Circuit"); *Montalvo v. Flywheel Sports, Inc.*, No. 16-cv-6269-PAE, 2018 WL 7825362 (S.D.N.Y. Jul. 27, 2018) (approving award of 33% of the settlement fund in a case that settled rather quickly and did not involve onerous discovery and holding "courts in this district will often approve multipliers between two and four times"); *In re Giant Interactive Group, Inc. Securities Litig.*, 279 F.R.D. 151, 166 (S.D.N.Y. 2011) (awarding 33% of the settlement fund). [9]

[9] Ms. Frank implies that Plaintiffs are creating their own caselaw by submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications. See Frank Objection at 9. Plaintiffs urge the Court to reject this argument, as, even if it were accepted as true, it is the courts, not the plaintiffs' bar, who make caselaw.

Ms. Frank requests that the Court lower Class Counsel's fee request to "25% of the actual benefit to the class, which she wants calculated as the value of the fraud insurance services actually claimed and the cash actually paid to the class or alternatively to (2) reduce the percentage awarded for fees to 10-15% of the gross settlement." Frank Objection at 4. Ms. Frank provides absolutely no basis for the numerical percentages which she suggests. Interestingly, although Ms. Frank accuses Plaintiff's expert Professor Brian T. Fitzpatrick[10] of seeking to "usurp the role of the Court by telling the Court which of the available methodologies it should use and how to apply it," that is exactly what Ms. Frank is trying to do. *See* Frank Objection at 10.

Ms. Frank ignores the fact that this case was heavily discovered and litigated with Plaintiffs' Counsel conducting a significant amount of investigation, research, expert analysis and discovery in a relatively short time period. *See* Declaration of Linda P. Nussbaum in Support of Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs at ¶¶ 11-70 (ECF No. 103); Declaration of Hon. Diane M. Welsh (Ret.) of JAMS in Support of Final Approval of Class Settlement dated 6/21/2022 at ¶ 12. Ms. Frank also ignores the reality that the Class faced substantial risk in this case that their recovery would be zero, given the facts and circumstances presented with regard to the Data Security Incidents and the pending motion to dismiss. If the settlement is not approved and litigation resumes, a ruling on Morgan Stanley's motion to dismiss or a future ruling on a motion for class certification could leave most class members without a remedy. Data privacy litigation remains uncertain and underdeveloped, making it far riskier than other consumer class actions, particularly when, like here, there is no intervening hacker or criminal act that caused the compromise of data.

[10] See Declaration of Prof. Brian T. Fitzpatrick, ECF No. 106, and attached as Exhibit 2 to the Declaration of Linda P. Nussbaum in Support of Class Plaintiffs' Motion for Final Approval of Class Settlement.

Absent the settlement, the class action would have faced serious hurdles to recovery. With this Settlement, the Class is entitled to significant benefits including some, such as the retention of Kroll, that may not have even been achieved at trial. Thus, Ms. Frank's unsupported argument should be rejected.

A. Aura Financial Shield Service Is a Value To the Settlement Class

Ms. Frank argues that the Settlement is of virtually no benefit and provides only fraud insurance services that, in her estimate, over 90% of the Class has already received in other data breach cases. Ms. Frank is incorrect. The Aura Financial Shield was a key component in the negotiation of the Settlement because Plaintiffs wanted to ensure that Class Members received the most robust fraud protection and insurance possible given the unique circumstances of the Data Security Incidents. This is not the typical credit monitoring offered in other data breach matters. *See* Affidavit of Gerald Thompson. Ms. Frank suggests that Class Counsel should be punished for negotiating this service as part of the Settlement, or, in her words, their decision "must have consequences in the form of their attorneys' fee award." Frank Objection at 5. Ms. Frank appears to be projecting her own feelings of dissatisfaction with Aura Financial Shield onto other Class Members, making broad assumptions that "most class members don't need" the service and are indifferent. *Id.*

Ms. Frank argues the Aura Financial Shield is not worth anything[11] because fraud monitoring is widely available and class members prefer alternative compensation, but she offers no support for this opinion. The robust identity theft $1 million fraud insurance and account monitoring services offered here are far better than the free or low-cost services typically offered

[11] As set forth in the Thompson Affidavit, dated July 22, 2022, the retail value of the Aura product offered in approximately $135 per person per year.

in settlements, and provide qualitatively different and meaningful protection from what was offered previously by Morgan Stanley. Moreover, courts have often recognized the benefit of basic credit monitoring, used its retail cost as evidence of value, and considered that value in awarding fees. *See, e.g.*, *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 218 (E.D. Pa. 2011) (overruling an objection that the settlement offered "worthless credit monitoring services that no one wants" and valuing the services at their retail price in awarding a fee)

Without any support and only generalizations, Ms. Frank argues that there is a 94.231% chance that a Class Member is a member of one of the other large-scale data breach class actions that offered some form of fraud protection services. Notably, Ms. Frank does not claim that any of them offered the Aura Financial Shield. Unlike Experian or other credit monitoring services,, the Aura Financial Shield Service includes: $1 million in Insurance backed by AIG to replace any money lost by theft; 24/7 customer support; dark web monitoring; and many other superior benefits. In addition, the covered fraud need not be related to the Morgan Stanley Data Security Incidents. *See* Thompson Aff. at ¶¶ 10-11.

While Plaintiffs do not know exactly how many participants will ultimately sign up for the Aura product, Plaintiffs have received information from the Settlement Administrator that presently more than 88,300 individuals have requested reminder emails to sign up for the service when it becomes effective. Further, there are Class Members who see great value in this protection and seek coverage for longer than the twenty-four months negotiated by Plaintiffs. Ms. Frank repeatedly states that as the time increases from the Data Security Incident, the likelihood of a class member experiencing identity theft or other harm declines, therefore any pro rata increase in the length of the service is of minimal value to claimants. Ms. Frank's position is in direct contrast to those Class Members wanting to extend the coverage period. In addition, the Financial Shield

insurance and services are not limited to fraud connected to the Morgan Stanley Data Security Incidents. The Financial Shield service helps with *any* fraud suffered by the participant during the coverage period. Considering the wide range of views on the matter, the Court should give weight to the detailed information provided by Class Counsel and the Affidavit of Gerald Thompson.

Ms. Frank provides no support that Aura Financial Shield is not valuable, and there is much evidence to the contrary. Courts evaluating settlements in data privacy cases routinely recognize the value that services such as Financial Shield provide to class members. *Equifax*, 2020 WL 256132, at *17 ("This Court has repeatedly lauded high-quality credit monitoring services as providing valuable class-member relief that would likely not otherwise be recoverable at trial, as have other courts in connection with other data breach settlements."). As explained in the Thompson Affidavit, Financial Shield is unlike typical credit monitoring products available on the retail market and can work in tandem with credit monitoring services to provide greater protection for individuals as they are not duplicative in their benefits. Moreover, any Class Member such as Ms. Frank who does not recognize the value of Financial Shield has the option to opt out and pursue different recourse from Morgan Stanley.

Despite her arguments regarding the benefits of the Aura Financial Shield, Ms. Frank then acknowledges that the service does have a monetary value,[12] though she contends that the value is less than what a monetary payment would be. Ms. Frank contends that "the denominator of the fee calculation should be reduced from $60 million to the actual benefit of such services elected by the class." Alternatively, Ms. Frank argues the Court should "reduce the percentage award to account for the lower value of such services as compared with cash relief."

[12] The retail value for a year's coverage of the Aura Financial Shield is $135. *See* Thompson Aff. at ¶ 16.

Ms. Frank relies on *Perks v. TD Bank, N.A.*, 2022 U.S. Dist. LEXIS 83761, 2022 WL 1451753 (S.D.N.Y. May 9, 2022), to support her argument that the Aura Financial Shield cannot be valued equivalently to cash. The facts of *Perks*, however, are inapposite here. In *Perks*, 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." Ms. Frank's citation to *Perks* is convenient for her argument, yet it ignores that *Perks* explicitly acknowledged that it did not consider the debt relief offered by the settlement to be a monetary value because of the specific instances of the case. Ms. Frank fails to appreciate that the Morgan Stanley Settlement establishes a non-reversionary $60 million cash Fund in addition to other benefits, and that the cash will all be spent for the Class. Any residual monies after payment of claims will be used to extend the period of coverage of Financial Shield for all those who enroll; thus, contrary to Ms. Frank's assertions, the number of participants who choose to enroll does not alter the "actual benefit" or "actual value" of the Financial Shield services. Neither does the enrollment alter the $60 million that Morgan Stanley has already contributed to the common fund, which is non-reversionary.

Aura's Financial Shield service is not analogous to a coupon or voucher service settlement, as Ms. Frank suggests. In fact, the only case she cites for this proposition, *Rodriguez v. It's Not Just Lunch Int'l*, No. 07-CV-9227, 2020 WL 1030983, at *10 (S.D.N.Y. Mar. 2, 2020), is easily distinguishable. Under the settlement agreement in *Rodriguez*, class members had the choice to either obtain a cash award drawn from a common fund of $4.75 million or a transferrable voucher that could be used for Defendant's services in the future. Class counsel attempted to calculate the total value of the settlement at $77 million for the purpose of their fee request by adding in the

approximate value of the service vouchers. The *Rodriguez* court noted: "Throughout the course of this litigation, there have been significant indications that a voucher award would result in a low redemption rate by members of the National Class. This case's core claims suggest that former IJL customers no longer desire IJL's services . . ." *Rodriguez* further noted that while class counsel claimed that vouchers were worth $450 each, there was no support in the record for that amount.

As to Ms. Frank's contention that the fee award should be reduced because she would have preferred a cash payment, "[c]ontrary to objectors' expectations, the settlement is not a wish-list of class members" that must be fulfilled. *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 65 (S.D.N.Y. 2003) (internal quotations omitted). Class Counsel's negotiation of the proposed Settlement was guided by their experience in other data privacy settlements and the unusual facts and circumstances of this case. Claim rates in other settlements have shown a strong preference for the available monitoring service over an offered alternative cash payment. *See In re Anthem, Inc. Data Breach Litig.*, No. 15-md-02617-LHK (NC) [Doc. 1042, Ex. A] (1,257,208 timely claims were received for the two years of credit monitoring services made available under that settlement, while only 144,208 claims were submitted for alternative compensation.) "A Settlement is not, and cannot be, all things to all people." *Charron v. Pinnacle Group NY LLC*, 874 F.Supp.2d 179, 184 (S.D.N.Y. 2012), *aff'd sub nom, Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013).

Any class members such as Ms. Frank who are unsatisfied with the relief made available have the opportunity to opt out, which weighs in favor of finding the settlement fair and adequate. *See, e.g., In re Oil Spill By Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 156 (E.D. La. 2013) ("Those objectors who are unhappy with their anticipated settlement compensation could have opted out and pursued additional remedies through individual litigation."). Regardless, the Court

can readily conclude that the settlement provides fair and adequate relief under all the circumstances.

B. The Court Should Not Disregard the Fitzpatrick Declaration

Ms. Frank asks the Court to strike or disregard the Declaration of Prof. Brian T. Fitzpatrick because it "contains inadmissible legal conclusions and other legal arguments regarding the calculation of attorneys' fees." The reality is, courts frequently consider expert testimony at the final approval stage. *See, e.g., In re Equifax Inc., Customer Data Security Breach Litigation*, No., 2020 WL 256132, at *43.

Indeed, Ms. Frank's son and counsel, Theodore Frank and his organization, have brought this very argument various times in other cases, and each time, the argument was overruled. *See, id.* at 45 n. 56; *Briseño v. Conagra Foods, Inc.*, No. 11-cv-05379-CJC-AGR, Doc. 695 (C.D. Cal. Oct. 8, 2019); *In re Samsung Top-Load Washing Machine Marketing, Sales Practices and Prods. Liab. Litig.*, No. 17-ml-2792-D, Doc. 208 (W.D. Okla. Nov. 18, 2019); *see also In re Target Corporation Customer Data Security Breach Litigation*, MDL No. 14-2522 (PAM/JJK), 2015 WL 7253765, at *4 (D. Min.. 2015) ("even if the affidavit contained impermissible legal conclusions, the Court is capable of separating those conclusions from Magistrate Judge Boylan's helpful and insightful factual descriptions of the settlement process in this case") *reversed on other grounds*, 874 F.3d 608 (8th Cir. 2017). Nothing is untoward about this practice.

As set forth in NEWBERG ON CLASS ACTIONS, "courts have generally accepted law professor experts in class action cases. The core concerns that arise when lawyers serve as experts are inapplicable." W. Rubenstein, *Using Law Professors as Expert Witnesses in Class Action Litigation*, 6 BNA Expert Evidence Report 561, 562 (Oct. 23, 2006); *see also, e.g., United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the

gate when the gatekeeper is keeping the gate only for himself."). Further, courts have found that Rule 702 does not apply at the final approval stage, recognizing that a court may consider any helpful material in evaluating a settlement or awarding a fee. *See, e.g., Int'l Union, United Auto., Aerospace & Agicr. Implement Workers of Am. v. Gen. Motors Corp*., 497 F.3d 615, 636-37 (6th Cir. 2007) (noting that the Rule 702 argument overlooks the differences between a full trial and a fairness hearing insomuch as in a fairness hearing, the judge does not resolve the parties' factual disputes but merely ensures that the disputes are real and that the settlement fairly and reasonably resolves the parties' differences).

Professor Fitzpatrick is a prominent law professor at Vanderbilt University and the author of a widely-cited article on class action attorneys' fees. *See* Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010).[13] As discussed in Professor Fitzpatrick's Declaration (ECF No. 106), this study has been relied upon regularly by courts, scholars, and testifying experts. Several judges have relied on Professor Fitzpatrick's expertise in similar settings. *See, e.g., Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217 (D.N.M. 2016*); In re Loestrin 24 Fe Antitrust Litigation*, MDL No. 2472, 2020 WL 4035125 (D.R.I. 2020); *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2672 CRB (JSC), 2017 WL 1352859 (N.D. Cal. Apr. 12, 2017).[14] Professor Fitzpatrick does not seek to "usurp the role of the Court[,]" rather; this Court,

[13] While asking the Court to strike Professor Fitzpatrick's Declaration, Ms. Frank inexplicably cites to his empirical study upon which he relies in his Declaration. Frank Objection, p.4 n.1.

[14] The court in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation* found that Professor Fitzpatrick's opinion "actually elucidates the Court's reasoning." 2017 WL 1352859, at *3 n.3.

like countless others, can review Professor Fitzpatrick's declaration and consider whether his analysis is a useful aid in its determination.

C. The Financial Shield Activation Rate Has No Bearing On The Value of The Settlement and Does Not Warrant Deferral of the Attorneys' Fee Award

Ms. Frank argues that Class Counsel's fee award should be deferred until Class Counsel provide the fraud insurance service activation rate and the total cash payment to the class. Ms. Frank's argument that the attorneys' fee award should be deferred until the "value of class members' recovery" is known is misplaced and ignores the Settlement structure.

The Settlement establishes a non-reversionary Settlement Fund of $60 million. Morgan Stanley paid the $60 million into a QSF after preliminary approval. There is no reversion to Morgan Stanley under any circumstances, regardless of how many Class Members file claims for out-of-pocket losses and lost time and regardless of the Financial Shield activation rate. The important piece that Ms. Frank fails to appreciate is that the Class here will receive all of the Settlement Fund, as even the residual funds will be used to extend the coverage period for Financial Shield, as opposed to reverting to Defendant or being paid to a *cy pres* recipient.

This Court should not venture down the rabbit hole suggested by Ms. Frank. Participants have up to 24 months to activate the Aura insurance services using a code that they received. Individuals may wait until they experience an incident of fraud, which will be covered as long as enrollment is within the coverage period.

Ms. Frank cites to various cases that withhold a percentage of fees until funds are distributed to a class, as a means of incentivizing class counsel to stay on top of the settlement administration. Class Counsel here do not need such an incentive, and have already committed to staying active in the settlement administration in addition to involvement in the recovery efforts

by Kroll, with no provision for further compensation for this work. Whether individuals elect to activate the Financial Shield coverage is a personal decision and entirely outside Class Counsel's control. Here, the benefit is distributed when the opportunity to sign up for the Aura Financial Shield service is presented.

"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). Ms. Frank cites this maxim as support for her arguments, but applied to the facts and circumstances of this matter, it weighs in favor of the requested fee award. Class Counsel have achieved a significant result in the form of a $60 million non-reversionary Settlement Fund, plus defendant paid substantial costs of notice and administration, and additional monies for the retention of Kroll. The negotiated Settlement Agreement required Morgan Stanley to pay the $60 million into a QSF subsequent to the entry of the preliminary approval order. Accordingly, the value of the Settlement and the value of the Class Member's recovery is fully realized as long as the Court grants final approval of the Settlement.

D. The Total Value of The Settlement Appropriately Includes Settlement Notice and Administration Costs

Ms. Frank, in a confusing argument, states that the appropriate settlement value must exclude settlement notice and administrative costs, but then argues that what must really be excluded from the settlement value is expenses. Plaintiffs do not value in the costs of their expenses when calculating the total settlement fund value and agree with Ms. Frank, that awarding fees as a percentage of recovery is consistent with notions of public policy. Settlement notice and administration costs, however, which are substantial, presently $8.2 million, and being paid separately by Morgan Stanley in addition to the non-reversionary $60 million Settlement Fund, are appropriately included in the total settlement value. *In re Warner Comm'ns. Secs. Litig*, 798 F.2d 35, 37 (2d Cir. 1986) (including costs of notice and administration as part of the total value

of the settlement to the class); *see also, In Re Marine Midland Motor Vehicle Leasing Litigation*, 155 F.R.D. 416, 419 (W.D.N.Y. 1994) (recognizing notice and claims administration costs as contributing to the total value of the settlement when determining attorneys' fees under a percentage of the fund method).

II. Class Counsel's Lodestar is Accurate

With generalizations and innuendo, Ms. Frank suggests that Plaintiffs' Counsel has "likely overstated" its lodestar. This argument is without merit. As noted in the Fee Motion, Plaintiffs' Counsel contend that a percentage of recovery is the appropriate method of calculating attorneys' fees in this matter. *See, In re Beacon Assocs. Litig.*, No. 09 CIV. 3907 CM, 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013)("[T]he trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases."); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 388 (S.D.N.Y. 2013)(finding that the trend of courts applying the percentage of the fund method to compensate class counsel for their time and effort is "firmly entrenched in the jurisprudence of this Circuit."). Plaintiffs' Counsel provided lodestar information to allow the Court to conduct a lodestar cross-check. *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) (noting the lodestar method is used in this Circuit only "as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall."). In addition, declarations from each firm attest to the accuracy of their respective lodestars.

A. Class Counsel Does Not Need to Provide Detailed Time Records to Class Members

"[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger v. Integrated Res.*, 209 F.3d 43, 50 (2d Cir. 2000). Instead, Class Counsel need only submit documentation appropriate to meet the burden

establishing an entitlement to an award, not to satisfy "green-eyeshade accountants." *Fox v. Vice*, 563 U.S. 826, 838 (2011).

The vast majority of work throughout this litigation was performed by only two law firms, both of which were appointed as Class Counsel by Judge Torres. Indeed, as detailed in the Declaration of Linda P. Nussbaum in support of Plaintiffs' Fee Motion (ECF No. 102), of the 9,952.55 hours billed, Ms. Nussbaum's law firm billed 5,299.5 hours and Ms. Martin's law firm billed 2,987 hours through February 28, 2022. The remaining 1,736.05 hours were split between 10 law firms.

Ms. Frank questions the litigation and discovery efforts that took place in reaching the proposed Settlement. As Ms. Frank's counsel is surely aware, the number of docket entries on the Court's electronic filing system is not "evidence" of how heavily the case has been litigated, particularly given that discovery is not filed. To achieve this significant Settlement, Plaintiffs' Counsel diligently and creatively litigated for over a year and a half; conducted extensive research and investigation as to the challenging and complex legal and factual claims; retained data security, dark web, and forensic experts and investigators and worked with them to provide forensic analysis; engaged a damages expert; drafted two voluminous and detailed consolidated amended complaints; defended against a motion to dismiss the entire action; reviewed over 163,300 pages of party and third party documents; analyzed and negotiated several privilege logs; deposed party and third party witnesses; prepared subpoenas for 19 third parties; engaged in three full day-long mediation sessions spread out over a period of several months before the Hon. Diane M. Welsh (Ret.), with substantial additional negotiations and exchange of legal and factual memoranda following each session; and drafted and submitted the Settlement Agreement and Preliminary Approval Motion and its concomitant notices. Judge Welsh, in her declaration, makes clear that

counsel vigorously litigated the case and no stone was left unturned. See Declaration of Diane M. Welsh (Ret.) of JAMS in Support of Final Approval of Class Settlement, at ¶ 12.

B. The Lodestar Multiplier is Reasonable

Plaintiffs' Counsel's requested multiplier is squarely within the range awarded by this Court, courts in this District, as well as across the country. *See, e.g.*, *Spicer*, 2012 WL 4364503, at *4 (awarding 3.36 multiplier of the lodestar as well within the range of reasonableness and citing cases approving multipliers of 4.34, over 4 and nearly 5); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (approving attorneys' fees constituting a multiple of 6.36 times the lodestar); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Asare v. Change Grp. of N.Y., Inc.*, No. 12 Civ. 3371 (CM), 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM), 2014 WL 1883494, at *13 (S.D.N.Y. May 9, 2014) (noting "lodestar multiples of over 4 are awarded by this Court"); *Maley v. Dale Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (describing a 4.65 lodestar multiple as "modest" and "fair and reasonable"); *In re RJR Nabisco, Inc. Sec. Litig.*, No. 88 Civ. 7905 (MBM), 1992 WL 210138, at *6-8 (S.D.N.Y. Aug. 24, 1992) (awarding a lodestar multiplier of 6); *Jander v. Retirement Plans Committee of IBM*, 15cv3781, 2021 WL 3115709, at *7 (S.D.N.Y. July 22, 2021)(approving request for 30% of gross settlement (1.*7* multiplier), noting that "multipliers of between 3 and 4.5 have been common"); *Capsolas v. Pasta Res. Inc.*, No. 10-cv-5595 (RLE), 2012 WL 4760910, at *9 (S.D.N.Y. Oct. 5, 2012) (awarding multiplier of 3.96); *Wal-Mart Stores, Inc.*, 396 F.3d at 123 ("Here, the lodestar yields a multiplier of 3.5, which has been deemed reasonable under analogous circumstances.").

CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Objection of Robina Frank to Plaintiffs' Attorneys' Fee Request be denied in its entirety.

Dated: July 22, 2022

Respectfully submitted,

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Co-Lead Counsel for Plaintiffs and Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2022, I caused a true and correct copy of the foregoing document to be filed and served via the Court's Electronic Filing System.

/s/ Jean S. Martin
Jean S. Martin