IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE: CAPITAL ONE CONSUMER DATA SECURITY BREACH LITIGATION	)))	MDL No. 1:19md2915 (AJT/JFA)

This Document Relates to the Consumer Cases

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Following more than two years of intense and challenging litigation, and correspondingly hard-fought settlement negotiations, the Parties[1] agreed to resolve consumer claims arising from the Data Breach announced by Capital One in July 2019. On February 7, 2022, the Court granted Plaintiffs' Motion for Preliminary Approval and to Direct Notice. Doc. 2220. In its order, the Court found that the Settlement terms negotiated by the Parties are fair, reasonable, and adequate under Rule 23(e), and that the Class Representatives and Class Counsel have adequately represented the Class. *Id.* Accordingly, the Court held that it would likely be able to certify the proposed Settlement Class under Rule 23(b)(3) and directed the Parties to issue notice to putative class members. *Id.* Pursuant to the Court's direction, the Claims Administrator appointed by the Court implemented a robust notice program, and the claims process is ongoing.

After completion of the ordered class notice, the Settlement has received an overwhelmingly positive response from the Settlement Class. Hundreds of thousands of class members have filed claims, and Class Counsel expects that every Class Member submitting a valid, Out-Of-Pocket Loss claim will be completely (or nearly completely) reimbursed for losses the Class Members believe are fairly traceable to the Data Breach. Conversely, only 4 Class Members submitted substantive objections—or just .000004% of the class. This handful of objections should be considered and overruled.

The Settlement is a tremendous result for the Settlement Class, securing valuable benefits tailored to the facts of the case developed during full discovery, through a $190 million Settlement Fund that is one of the largest created in any MDL data breach litigation. The Settlement is fair,

[1] The parties to the Settlement are the consumer Settlement Class Representatives, on behalf of the proposed Settlement Class, and Defendants Capital One Financial Corporation, Capital One Bank (USA) N.A., and Capital One, N.A. (collectively, "Capital One"). Capitalized terms used in this memorandum have the same meaning as in the Settlement Agreement and the proposed Consumer Settlement Benefits Plan.

reasonable, and adequate and meets the requirements of Rule 23(e). Plaintiffs therefore move for final approval of the Settlement, and request that the Court grant their motion for attorneys' fees, expenses, and service awards. *See* Docs. 2230, 2231.

In support of the motion, Plaintiffs submit the following exhibits: the Declaration of Cameron R. Azari, Esq. on Implementation and Adequacy of Notice Plan ("Azari Decl.") (Ex. 1), the Declaration of Stuart E. Madnick, a renowned expert in cybersecurity ("Madnick Decl.") (Ex. 2), the Declaration of David F. Reign in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Reign Decl.") (Ex. 3), Class Counsel Karen Hanson Riebel's Supplemental Declaration in Support of Motion for Attorneys' Fees, Costs, Expenses and Service Awards ("Class Counsel Supp. Decl.") (Ex. 4), and a proposed final approval order and judgment (Ex. 5). Because Plaintiffs "front-loaded" their Motion to Direct Notice as guided by the Committee Notes to Rule 23(e), this memorandum will refer back to the exhibits to that motion. *See* Docs. 2218, 2219.

FACTUAL BACKGROUND

The factual background of the case, the procedural history, and history of negotiations were extensively set forth in the Motion for Preliminary Approval and to Direct Notice and are not repeated here. Doc. 2219 at 2-9. A summary of the material terms of the Settlement is set forth below.

A. THE TERMS OF THE PROPOSED SETTLEMENT

1. The Settlement Class

The proposed Settlement Class is defined as follows:

> The approximately 98 million U.S. residents identified by Capital One whose information was compromised in the Data Breach that Capital One announced on July 29, 2019, as reflected in the Class List.

Excluded from the Settlement Class are (i) Capital One, any entity in which Capital One has a controlling interest, and Capital One's officers, directors, legal representatives, Successors, Subsidiaries, and assigns; (ii) any judge, justice, or judicial officer presiding over the Action and the members of their immediate families and judicial staff; and (iii) any individual who timely and validly opted out of the Settlement Class. Doc. 2219-1, § 2.39.

2. The Settlement Fund

Capital One will pay $190 million into a Settlement Fund for class benefits, notice and administration costs, fees, expenses, and service awards to the Settlement Class Representatives. *Id.* § 3. No proceeds will revert to Capital One. *Id.* The specific benefits available to Settlement Class Members are detailed in the proposed Consumer Settlement Benefits Plan (Doc. 2219-2), and include:

- Reimbursement for up to $25,000 in "Out-of-Pocket Losses", which are verifiable unreimbursed costs or expenditures that a Settlement Class Member actually incurred and believes are fairly traceable to the Data Breach.
- Compensation for "Lost Time", which is time spent remedying fraud, identity theft, or other misuse of a Settlement Class Member's personal information that the Settlement Class Member believes is fairly traceable to the Data Breach and time spent taking preventative measures to avoid such losses. Lost Time will be paid at the "Reimbursement Rate," which shall be the greater of $25 per hour, or, if the Settlement Class Member took time off work, at the Settlement Class Member's documented hourly wage.
- At least three years of Identity Defense Services provided by Pango.
- Further, Pango will make available to all Settlement Class Members, even those who do not enroll in Identity Defense Services or do not submit a claim, access to fraud resolution and identity restoration support ("Restoration Services") for at least three years.

Doc. 2219-2; 2219-8. If valid claims exceed the Net Settlement Fund, payments for Out-of-Pocket Losses and Lost Time will be reduced on a pro rata basis. Doc. 2219-2. If the Net Settlement Fund is not exhausted by valid claims, remaining funds will be used first to purchase up to 2 years of

additional Identity Defense Services and Restoration Services, and second to increase payments for valid claims on a pro rata basis. *Id.* No funds will revert to Capital One.

3. Proposed Injunctive Relief—Business Practice Changes

Capital One has also agreed to entry of a consent order requiring at least two years of Business Practice Changes and commitments to improve its cybersecurity through the implementation of a Cyber Event Action Plan. Doc. 2219-1 at 46-49; Doc. 2219-4 ¶ 39. Professor Madnick has reviewed information relating to Capital One's implementation of the Business Practice Changes and believes these improvements will reduce the likelihood of the repetition of the events that led to the Data Breach and will proactively detect and prevent other types of intrusion events and vulnerabilities. Madnick Decl. ¶ 21.

4. Notice And Claims Program

The Court appointed Epiq Class Action & Claims Solutions, Inc. and its affiliate Hilsoft Notifications (together "Epiq") as Settlement Administrator to provide notice to class members and to process claims. The success of the notice and administration process to date is detailed in the Azari Decl., attached as Ex. 1.

The approved Notice Plan consisted of (1) an individual notice campaign to Settlement Class Members involving emails when email addresses were reasonably available and direct mail postcards when a physical address was available but a valid email address was not; and (2) a media plan employing internet advertising, sponsored internet search listings linking searchers to the Settlement Website, and media monitoring for news stories about the Settlement. Azari Decl. ¶¶ 9-31.

Epiq implemented the Notice Plan as follows: Capital One sent Epiq data files containing records and contact information for 97,988,220 Settlement Class Members ("Class List"). *Id.* ¶ 9. Epiq applied industry-best-practices processes to reduce duplicates and look up missing email

addresses. *Id.* Epiq sent 122,521,798 Email Notices to 90,084,485 of the Settlement Class Members (because some records contained more than one valid email address). *Id.* ¶¶ 10, 13. In addition, Epiq sent 5,158,236 direct mail Postcard Notices to Settlement Class Members with an associated physical address for whom a valid email address was not available. *Id.* ¶¶ 10, 18. After Capital One identified a technical error that caused incorrect contact information for a very small percentage of records in the Class List (0.28%) and transmitted 274,357 corrected records, Epiq performed the same de-dupe and look-up processes on these corrected records and sent out 174,817 Additional Email Notices and 97,174 Additional Postcard Notices. *Id.* ¶¶ 11, 12. Epiq followed up on undelivered email and postcard notices with additional attempts. *Id.* ¶¶ 16, 21. Epiq has also mailed 46,726 Claim Forms to all persons who have requested one by phone or by mail. *Id.* ¶ 22. All told, as of August 24, 2022, the individual notice efforts reached approximately 96% of the identified Settlement Class. *Id.* ¶¶ 8, 23.

The individual notice efforts were accompanied by the Media Plan, which used internet advertising on Google Display Network and social media (Facebook, Instagram, and Twitter), and which has resulted in 123,493,930 "Delivered Impressions." *Id.* ¶¶ 24-28. The Settlement was widely covered by the news media such that Epiq has identified more than 165 news stories about it. *Id.* ¶ 29, Att. 9. Epiq established a dedicated website in English and Spanish and sponsored search listings on Google, Yahoo! and Bing to facilitate searchers locating it. *Id.* ¶¶ 30-32. The Settlement Website includes detailed information about the Settlement, including important documents and FAQs. *Id.* Epiq also established a toll-free telephone number, including an automated system available 24-hours per day, 7 days per week, and an option to speak to a live operator during normal business hours. *Id.* ¶ 33. As of August 24, 2022, there have been 1,648,597 unique visitor sessions displaying 7,263,148 website pages on the Settlement Website, and

197,094 calls to the toll-free number, including 32,330 handled by live service agents. *Id.* ¶¶ 32, 33. Epiq further established a post office box for correspondence by mail. *Id.* ¶ 34.

Settlement Class Members can file an online Claim on the website or mail a paper Claim Form. *Id.* ¶ 38. The email notices included an embedded link to the Settlement Website, where recipients can easily file an online Claim. *Id.* ¶ 15.

5. Attorneys' Fees And Expenses And Service Awards

Class Counsel have applied separately for a fee of 33.3% of the Settlement Fund, or $63,270,000, and reimbursement of litigation expenses of $2,345,821.98. *See generally* Docs. 2230, 2231, Class Counsel Supp. Decl., Ex. 4. Class Counsel have also requested service awards of $5,000 each for the eight Settlement Class Representatives and the nine other MDL Plaintiffs who were deposed by Capital One. *Id.* Capital One takes no position on these requests.

6. Releases

The Settlement Class will release Capital One and Amazon from claims that were or could have been asserted in this case. The releases are detailed in the Settlement Agreement. Doc. 2219-1 § 14.

ARGUMENT

I. ARTICLE III STANDING.

This Court must assure itself of the Plaintiffs' "standing under Article III," which "extends to court approval of proposed class action settlements." *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam). As set forth in the Court's order granting preliminary approval of the Settlement, to have standing to sue in federal court a plaintiff must have "'(1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" Doc. 2220 at 4-5 (quoting *Hutton v. Nat'l Bd. Of Exam'rs in Optometry, Inc.*, 892 F.3d 613, 619 (4th Cir. 2018) (citation omitted)).

The Court should reaffirm its prior conclusion that it has subject matter jurisdiction to approve the Settlement. *See* Doc. 2220. The Court concluded it had subject matter jurisdiction to approve the Settlement because, among other reasons, each Plaintiff and Settlement Class Member is a party to an alleged contract under which Capital One agreed to provide safeguards for their personal information, which Capital One allegedly breached, resulting in the theft of their personal information. Doc. 2220 at 5-6 (citing *L-3 Commc'ns Corp. v. Serco, Inc.*, 673 Fed. App'x 284, 289 (4th Cir. 2016) (the existence of an express or implied contract, and the asserted breach thereof, provides the plaintiff standing to sue)); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) ("[T]here is scant need for courts to pause over the standing inquiry" for a breach of contract claim, because it is "readily" apparent that "a party to a breached contract bears the kind of claim that he may press in court.").[2] Indeed, the Settlement Class is defined to include only individuals whose information was compromised in the Data Breach and who were allegedly parties to Capital One's contracts creating enforceable data security commitments that were violated. *See* Doc. 971 ¶¶ 96, 212-227; Doc. 1261 at 2-3 & n.4, 25-27 & nn.18-20; Doc. 1649 at 3-5; Doc. 879 at 41-42, 46-47. Thus, all Settlement Class Members have Article III standing.[3] The Court should conclude it has subject matter jurisdiction to approve

[2] Although Capital One disputes the merits of Plaintiffs' claims for breach of express and implied contract, a challenge to the merits does not impact the Court's subject matter jurisdiction. *See, e.g.*, *Am. Civ. Liberties Union v. Mote*, 423 F.3d 438, 441 n.1 (4th Cir. 2005). Moreover, because approval of a settlement agreement is "not a substantive adjudication of the underlying causes of action," *Marshall v. Nat'l Football League*, 787 F.3d 502, 511 n.4 (8th Cir. 2015), the Court need not definitively determine whether Plaintiffs and the Settlement Class Members have in fact proven their claims. As the Fifth Circuit observed, "it would make no practical sense for a court to require evidence of a party's claims when the parties themselves seek settlement under Rule 23(e)." *See In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014). Requiring class members "to prove their claims prior to settlement under Rule 23(e) would eliminate class settlement because there would be no need to settle a claim that was already proven." *Id.*

[3] Prior to reaching the Settlement now before the Court, the Parties argued extensively about the impact of *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), on Plaintiffs' Article III standing.

the Settlement and enter final judgment thereon.

II. THE COURT SHOULD FINALLY APPROVE THE SETTLEMENT.

The Court previously determined that the proposed Settlement meets the requirements of Rule 23(e) such that notice should issue. Doc. 2220 ¶ 2. The Court should now finally determine that the Settlement is fair, reasonable, and adequate and should be approved in a class judgment. In determining whether a settlement is fair, reasonable, and adequate, the Court must consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Further, the Court's Rule 23(e) obligations are addressed with a "two-level analysis." *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 254 (E.D. Va. 2009). To determine whether a settlement is fair, the Court considers the four factors set forth by the Fourth Circuit in *Jiffy Lube*: "(1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of

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Ramirez did not address standing in the context of a class action settlement, let alone one that was reached prior to any ruling on class certification or summary judgment. Even if *Ramirez* requires Settlement Class Members to have standing, that requirement is satisfied here.

counsel." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). To determine whether a settlement is adequate, the courts also look to: "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *Id*.

Evaluation under these factors confirms that the Settlement is fair, reasonable, and adequate.

A. THE CLASS WAS ADEQUATELY REPRESENTED.

"[T]he adequacy requirement is met when: (1) the named plaintiff does not have interests antagonistic to those of the class; and (2) plaintiff's attorneys are qualified, experienced, and generally able to conduct the litigation." *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 567 (E.D. Va. 2016) (citation omitted). Here, the Settlement Class Representatives have the same interests as all other Settlement Class Members as they are asserting the same claims and share the same injuries. Further, the Court has already recognized Class Counsel's experience and qualifications in appointing them to lead this litigation and the record shows Class Counsel worked diligently to litigate and ultimately bring this case to resolution. Doc. 2219-4 ¶¶ 3-31; *see also In re: Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Practices & Prod. Liab. Litig.*, 952 F.3d 471, 485 (4th Cir. 2020) (finding counsel's experience in complex civil litigation supported fairness of settlement).

B. THE PROPOSED SETTLEMENT WAS NEGOTIATED AT ARM'S LENGTH.

The Court can conclude this Settlement was negotiated at arm's length, without collusion, based on the terms of the Settlement itself; the Parties' vigorous pursuit of fact and expert discovery and briefing and argument of numerous legal issues; the length and difficulty of the

negotiations; and the involvement of two experienced mediators, including Judge Brinkema across several mediation sessions. *See In re NeuStar, Inc. Sec. Litig.*, No. 1:14–CV–885(JCC/TRJ), 2015 WL 5674798, at *10 (E.D. Va. Sept. 23, 2015) (adversarial encounters support a finding of arms' length negotiations).

C. THE RELIEF IS FAIR, REASONABLE, AND ADEQUATE.

The relief offered to Class Members in the proposed Settlement addresses the types of repercussions and injuries arising from the Data Breach, and is more than adequate under the factors outlined in Rule 23(e)(2)(C). Settlement Class Members are entitled to benefits that are tailored to the relief sought through the litigation: recovery of up to $25,000 in Out-of-Pocket Losses; payment for Lost Time spent dealing with the Data Breach; at least three years of Identity Defense Services to help detect and remediate potential identity theft and fraud; and at least three years of Restoration Services including access to U.S.-based specialists in fraud resolution and identity restoration available to all Settlement Class Members without making a claim. Capital One's agreed Business Practice Changes are likewise an important benefit flowing to Settlement Class Members, whose sensitive personal information may still reside at Capital One.

Class Counsel, a group with extraordinary experience in leading major data breach class actions, strongly believe that the relief is fair, reasonable, and adequate. Doc. 2219-4 ¶¶ 3-10. The Court may rely upon such experienced counsel's judgment. *See, e.g.*, *Nelson v. Mead Johnson & Johnson Co.*, 484 Fed. App'x 429, 434 (11th Cir. 2012) ("Absent fraud, collusion, or the like, the district court should be hesitant to substitute its own judgment for that of counsel.") (quotation omitted).

That the relief is fair, reasonable, and adequate is further confirmed by considering the four specific factors enumerated in Rule 23(e)(2).

1. The Costs, Risk, And Delay Of Trial And Appeal

Plaintiffs faced significant risks and costs should they have continued to litigate the case. First, there was a risk that Plaintiffs' claims would not have survived, or survived in full, on a class-wide basis after a ruling on the fully briefed and argued motion for class certification, motions for summary judgment, *Daubert* motions on damages methodologies and other issues, and challenges to the existence of a tort duty under Virginia law, among other motions. Second, if Plaintiffs had prevailed on their pending motion for class certification and successfully defeated Defendants' pending motions thus proceeding to trial, Plaintiffs still would have faced significant risk, cost, and delay including likely interlocutory and post-judgment appeals.

In contrast to the risk, cost, and delay posed by the pending motions and possible appeals and trial, the proposed Settlement provides certain, substantial, and immediate relief to the proposed Settlement Class. It ensures that Settlement Class Members with valid claims for Out-of-Pocket Losses or Lost Time will receive guaranteed compensation now and provides Settlement Class Members with access to Identity Defense Services and Restoration Services, benefits that may not have been available at trial. It also requires injunctive relief that will help protect Class Member data from potential subsequent exposure.

The substantial costs, risk, and delay of a trial and appeal support a finding that the proposed Settlement is adequate.

2. The Method Of Distributing Relief Is Effective.

The proposed distribution process will be efficient and effective. The available relief was detailed clearly in the Notice, which lays out clearly the benefits to which Settlement Class Members are entitled, including benefits provided regardless of whether a Settlement Class Member files a claim. The three categories of relief will be distributed as follows:

First, Settlement Class Members have made claims and may continue to make claims until September 30, 2022, online via the Settlement Website or by mail for reimbursement for Out-of-Pocket Losses that the Settlement Class Members believe are fairly traceable to the Data Breach. Settlement Class Members need only submit a claim form on the website or by mail accompanied by reasonable documentation showing the claimed expenses to establish Out-of-Pocket Losses, or a self-certification of their Lost Time. *See* Doc. 2219-2 ¶ 8. If a claim is rejected for any reason, there is also a consumer-friendly appeals process whereby claimants will have the opportunity to cure any deficiencies in their submissions or request an automatic appeal if the Settlement Administrator determines a claim is deficient in whole or part. *Id.* ¶ 9.

Second, Settlement Class Members will be entitled to at least three years of Identity Defense Services provided by Pango. Settlement Class Members need only visit the Settlement Website and sign-up via an online form in order to claim this benefit. And even if a Settlement Class Member does not initially claim Identity Defense Services, they can later enroll directly with Pango during the period of the service.

Third, for at least three years all Settlement Class Members will be entitled to utilize Restoration Services offered through Pango, regardless of whether they submit a claim for losses or enroll in Identity Defense Services. This coverage is a separate benefit and permits all Settlement Class Members to have access to U.S.-based fraud resolution specialists who can assist with important tasks such as placing fraud alerts with the credit bureaus, disputing inaccurate information on credit reports, scheduling calls with creditors and other service providers, and working with law enforcement and government agencies to dispute any fraudulent transactions or credit applications.

Because Settlement Class Members may make claims through a simple online form or by mail—and have the benefit of additional services for which they need take no action, including the Restoration Services detailed above as well as the business practices Capital One has agreed to—the method of distributing the relief is both efficient and effective, and the proposed Settlement is adequate under this factor.

3. The Terms Relating To Attorneys' Fees Are Reasonable.

Class Counsel has requested a fee from the $190 million common fund based on the widely accepted "percentage of the fund" approach. Doc. 2231. After robust notice directed at the approximately 98 million putative class members, only 3 objections relating to attorneys' fees are before the Court, as discussed in Section VI below. Importantly, the Settlement Agreement is not conditioned upon the Court's approval of the fee award or the requested service awards. Doc. 2219-1, §§ 18.3, 19.3. This factor supports approval of the proposed Settlement.

4. Any Agreement Required To Be Identified Under Rule 23(e)(3).

The Parties previously submitted to the Court, *in camera*, the specific terms of the provision allowing Capital One to terminate the Settlement if more than a certain number of Class Members excluded themselves from the Settlement Class. These provisions have not been triggered, and thus do not affect the adequacy of the relief obtained here.

D. THE PROPOSED SETTLEMENT TREATS CLASS MEMBERS EQUITABLY.

The Settlement Class Members are treated equitably because they all have similar claims arising from the same data breach, and they all are treated the same under the Settlement. Fed. R. Civ. P. 23(e)(2)(D). All Settlement Class Members are eligible to claim the various benefits provided by the Settlement if they meet the requirements, including compensation for Out-of-Pocket Losses, compensation for time spent responding to the breach, and free Identity Defense

Services and Restoration Services. Moreover, all Settlement Class Members—even those who do not submit claims—benefit from Capital One's Business Practice Commitments.

E. THE LIMITED OPPOSITION TO THE SETTLEMENT SUPPORTS APPROVAL.

In assessing adequacy, the Court should consider the degree of opposition to the Settlement. *Jiffy Lube*, 927 F.2d at 158-59. After a far-reaching extensive direct notice and publication notice campaign, only four Settlement Class Members submitted substantive obections, which are addressed in Section VI below. This limited opposition supports approval.

III. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS.

Settlement classes are routinely certified in consumer data breach cases.[4] There is nothing unique about this case that would counsel otherwise. This Court already found when it preliminarily approved the Settlement that it likely would certify the Settlement Class. As demonstrated below, that decision should be made final.

A. THE RULE 23(a) REQUIREMENTS ARE SATISFIED.

Numerosity: The proposed Settlement Class consists of approximately 98 million U.S. residents, indisputably rendering individual joinder impracticable. *See Jeffreys v. Commc'ns Workers of Am., AFL–CIO*, 212 F.R.D. 320, 322 (E.D. Va. 2003) (noting that "where the class numbers twenty-five or more, joinder is generally presumed to be impracticable").

Commonality: "Commonality requires the plaintiff to demonstrate that the class members

[4] *See*, *e.g.*, *Abubaker v. Dominion Dental USA, Inc.*, No. 1:19-cv-01050, 2021 WL 6750844 (E.D. Va. Nov. 19, 2021) (Brinkema, J.); *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, No. 1:16-cv-03025, 2019 WL 3183651 (D. Md. July 15, 2019); *In re Equifax Inc. Customer Data Security Breach Litig.*, No. 1:17-md-2800-TWT, 2020 WL 256132 (N.D. Ga. March 17, 2020), *aff'd in relevant part* 999 F.3d 1247 (11th Cir. 2021), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431 (2021), and *cert. denied sub nom. Watkins v. Spector*, 142 S. Ct. 765 (2022); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299 (N.D. Cal. 2018); *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 341 F.R.D. 128, 172-74 (D. Md. 2022) (certifying certain statewide classes; Rule 23(f) appeal granted).

have suffered the same injury," such that "all their claims can productively be litigated at once." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350 (2011) (internal quotations and citations omitted). This requires that the determination of the common question "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. "Even a single common question will do." *Id.* at 359 (internal quotations omitted). All Settlement Class Members suffered the same injury from the same conduct—exposure of their personal data in the Data Breach—and are asserting the same legal claims. Accordingly, common questions of law and fact abound. *See, e.g.*, *Dominion*, 2021 WL 6750844 at *3; *Equifax*, 2020 WL 256132, at *11-12; *Anthem*, 327 F.R.D. at 307-09.

***Typicality**:* Typicality under Rule 23(a)(3) requires an inquiry into the "representative parties' ability to represent a class . . . ." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (internal quotations and citations omitted). In other words, the "plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Deiter*, 436 F.3d at 466-67. This requirement is readily satisfied in data breach cases. The Settlement Class Representatives' claims are typical of other Settlement Class Members' because they arise from the same Data Breach and involve the same overarching legal theories, including the theories that Capital One breached its contracts with Settlement Class Representatives and Class Members and failed in its common-law duty to protect their personal information. *See*, *e.g.*, *Dominion*, 2021 WL 6750844, at *3; *Equifax*, 2020 WL 256132, at *12.

***Adequacy of Representation*:** "The adequacy inquiry . . . serves to uncover conflicts of

interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). As noted above, the Settlement Class Representatives do not have any interests antagonistic to other Settlement Class Members and have retained lawyers who the Court has already recognized are abundantly qualified and experienced, thus satisfying the adequacy requirement. Doc. 2219-4 ¶¶ 3-9, 50.

B. THE REQUIREMENTS OF RULE 23(b)(3) ARE SATISFIED.

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members," and that class treatment is "superior to other available methods for fairly and efficiently adjudicating the controversy." One part of the superiority analysis—manageability—is irrelevant for purposes of certifying a settlement class. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997); *Brown*, 318 F.R.D. at 569.

Predominance: The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "If the 'qualitatively overarching issue' in the litigation is common, a class may be certified notwithstanding the need to resolve individualized issues." *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D 183, 214 (E.D. Va. 2015) (citing *Ealy v. Pinkerton Gov't Servs.*, 514 Fed. App'x 299, 305 (4th Cir. 2013)). Common liability issues often predominate where class members "all assert injury from the same action." *Gray v. Hearst Commc'ns, Inc.*, 444 Fed. App'x 698, 701-02 (4th Cir. 2011); *see also Stillmock v. Weis Markets, Inc.*, 385 Fed. App'x 267, 273 (4th Cir. 2010) (finding common issues predominated where class members were exposed to "the identical risk of identity theft in the identical manner by the repeated identical conduct of the same defendant.").

Here, as in other data breach cases, common questions predominate because all claims arise out of a common course of conduct by Capital One and the only significant individual issues

involve damages, which rarely present predominance problems. *See*, *e.g.*, *Dominion*, 2021 WL 6750844, at *3; *Equifax*, 2020 WL 256132, at *13; *Anthem*, 327 F.R.D. at 311-15. The focus on a defendant's security measures in a data breach class action "is the precise type of predominant question that makes class-wide adjudication worthwhile." *Anthem*, 327 F.R.D. at 312. Further, the Court previously found that Virginia law applies across all common law claims, e.g., Plaintiffs' claims for breach of contract (Doc. 879 at 9) and Plaintiffs' tort and quasi-contract claims (Doc. 1293), such that any "variations in state law will not predominate over the common questions." *Equifax*, 2020 WL 256132, at *13.

Superiority: "[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy . . . ." 7AA Charles Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1779 (3d ed. 2005). Litigating the same claims of 98 million Americans through individual litigation would obviously be inefficient. The superiority requirement thus is satisfied. *See Equifax*, 2020 WL 256132, at *14; *Anthem*, 327 F.R.D. at 315-16.

IV. NOTICE TO THE SETTLEMENT CLASS COMPLIED WITH DUE PROCESS AND RULE 23.

The Court previously approved the Notice Plan proposed in this case and found it satisfied all requirements of due process and Rule 23. Doc. 2220 at 6-7. The Notice Plan has been successfully implemented and reached approximately 96 percent of the Settlement Class by the individual notice efforts alone. Azari Decl. ¶¶ 8-23, 40. Targeted internet advertising and extensive news coverage enhanced public awareness of the Settlement. Azari Decl. ¶¶ 24-29, 40.

By having reached approximately 96 percent of the identified Settlement Class Members, the Notice Plan as implemented easily meets the requirements of Rule 23 and due process. *See*, *e.g.*, Federal Judicial Center, "Judges' Class Action Notice and Claims Process Checklist and Plain

Language Guide" (2010) (recognizing the effectiveness of notice that reaches between 70 and 95 percent of the class). Thus, the Court should find that the Class received the best notice practicable under the circumstances in compliance with Rule 23 and the Due Process Clause. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

V. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS.

A. ATTORNEYS' FEES AND EXPENSES.

As demonstrated by Plaintiffs' Motion for an Award of Attorneys' Fees, Costs and Expenses and for Class Representative Service Awards (Docs. 2230, 2231) (hereinafter, "Motion for Fees"), the requested attorneys' fees, costs, and expenses are reasonable and should be approved. Class Counsel request a fee award of 33.3% of the $190,000,000 Settlement Fund they secured for the Settlement Class, or $63,270,000, as well as reimbursement of reasonable litigation costs and expenses of $2,345,821.98. As the Court is aware, and as the Motion for Fees and accompanying declaration of Class Counsel demonstrate, the effort of Class Counsel to achieve the result here was exceptional. *See* Doc. 2231 (memorandum in support of motion for fees).

As of May 31, 2022, Class Counsel had devoted 64,739.3 hours to prosecuting this case, resulting in a total lodestar of $37,640,583.50. Doc. 2231-1 ¶¶ 30, 34-41. Based on that lodestar amount, the requested fee reflected a multiplier of 1.68. *Id.* ¶ 41.

As was necessary and expected, however, additional effort has been expended by Class Counsel since the filing of the Motion for Fees. Specifically, as of August 24, 2022, Class Counsel has devoted 65,409 hours to prosecuting this case, resulting in a total lodestar of $38,163,226, reflecting an additional 669.7 hours and $522,642.50 lodestar since the filing of the Motion for Fees. *See* Class Counsel Supp. Decl., Ex. 4, ¶¶ 3-4. Based on that lodestar amount, the requested fee reflects a multiplier of 1.66. Additionally, and as reflected in Class Counsel's Supplemental

Declaration, Class Counsel incurred an additional $20,305.87 in reasonable litigation expenses, bringing their total requested expenses through August 24, 2022 to $2,345,821.98. *Id.* ¶ 5.

B. SERVICE AWARDS.

Plaintiffs have requested a $5,000 service award ("Service Awards") for each of the eight Settlement Class Representatives and the nine other MDL Plaintiffs who were deposed by Capital One. Service awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015) (internal quotation omitted). In that case, the Fourth Circuit stated that such awards are "fairly typical in class action cases" and upheld $5,000 service awards as within the district court's discretion "because the Class Representatives acted for the benefit of the class." *Id.* (citation omitted).

Courts in this district routinely grant service awards of the requested amount. *See Brown*, 318 F.R.D. at 578-79 (citing *Cappetta v. GC Servs. LP*, No. 3:08-cv-288(JRS) (E.D. Va. Apr. 27, 2011); *Henderson v. Verifications Inc.*, No. 3:11-cv-514 (E.D. Va. Mar. 13, 2013); *Pitt v. Kmart Corp.*, No. 3:11-cv-697 (E.D. Va. May 24, 2013); *Conley v. First Tennessee Bank*, No. 1:10-cv-1247 (E.D. Va. Aug. 18, 2011) (each of the foregoing cases awarded a $5,000 service award to one or more named plaintiffs); *Ryals, Jr. v. HireRight Solutions, Inc.*, No. 3:09-cv-625 (E.D. Va. Dec. 22, 2011) (awarding a $10,000 service award to each class representative)). Among the factors to be considered in determining the reasonableness of a service award are "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14CV238 (DJN), 2016 WL 1070819, at *6 (E.D. Va. 2016) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)).

Here, the eight Settlement Class Representatives and the nine other MDL Plaintiffs who were deposed by Capital One have fulfilled their duties to the class, making the requested Service Awards appropriate. *See* Doc. 2231-1 ¶ 44. Specifically, the Plaintiffs made themselves available to Class Counsel to assist with the investigation into their claims. *Id.* The Plaintiffs responded to discovery requests propounded by Defendants, including numerous interrogatories and document requests or to extensive Fact Sheets, and had full day depositions taken. *Id.* The eight Settlement Class Representatives also considered and approved the terms of the proposed Settlement as in the best interests of the Class after extensive review and discussion with Co-Lead Counsel. *Id.* The Court should therefore award Plaintiffs the reasonable and typical Service Awards in the amount of $5,000 each.

VI. RESPONSES TO OBJECTIONS.

From among the 98 million putative Settlement Class Members, only seven filed purported "objections" to the Settlement. Putative class members Rosemary Burnham McDaniel (Doc. 2237) and Greg Zoccali (Doc. 2240) have opted-out, and are therefore not part of the Settlement Class and have no standing to object. The filing from Raymond John (Doc. 2239, filed under seal because of personal identifiers on documents), contains no discernable substantive objection to the Settlement.[5] As set forth below, the Court should overrule the objections of the remaining four objectors: Steven Helfand (Doc. 2238), Constance Pentz (Doc. 2241), Paul Higgitt (Doc. 2242), and Daniel Komen (Doc. 2243).

[5] Even were the Court to consider the content of those filings, the "objections" should be overruled. McDaniel believes that opting out should not be required, but that is an objection to a Federal Rule, not the Settlement. And both McDaniel and Zoccali believe that class actions benefit lawyers too much, but offer no substantive complaint regarding the Settlement before the Court.

A. OBJECTION TO ADEQUACY OF SETTLEMENT CLASS REPRESENTATIVES AND CLASS COUNSEL.

The Court should reject Objector Helfand's claim that a fundamental conflict of interest exists among three groups: "class members who have accrued damages, those still accruing damages, and those facing the prospect of future damage accrual." This objection has already been explicitly rejected by multiple courts in analogous cases, and it can be rejected here.

As a preliminary matter, the Court should consider that Helfand "has a history of improper conduct in class action litigation." *Equifax*, 2020 WL 256132, at *42;[6] *see also Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1260 n.11 (C.D. Cal. 2016) (recognizing that Helfand is a "known serial objector"). Plaintiffs ask the Court to take this background information into account when considering the weight of Helfand's arguments. *See Equifax*, 2020 WL 256132, at *41 ("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."); *In re TikTok, Inc., Consumer Privacy Litig.*, No. 20 C 4699, 2022 WL 2982782, at *11 (N.D. Ill. July 28, 2022) (similar); Manual for Complex Litig. (Fourth) § 21.643 ("Some objections, however, are made for improper purposes . . . . A challenge for the judge is to distinguish between meritorious objections and those advanced for improper purposes.").

On the merits, Helfand's argument—that there is a fundamental conflict between individuals who have already experienced or are experiencing money damages resulting from the Data Breach and individuals who face future exposure to damages—is without merit and has been repeatedly overruled in factually similar cases and should be rejected here. *See, e.g.*, *In re Target*

[6] In *Equifax*, Chief Judge Thomas Thrash, in characterizing Helfand as a serial objector, noted that he was disbarred as a California lawyer after misleading a court about his objections to a settlement "and other acts of moral turpitude." 2020 WL 256132, at *42.

Corp. Customer Data Sec. Breach Litig., 892 F.3d 968, 974-76 (8th Cir. 2018); *Equifax*, 2020 WL 256132, at *20-22; *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 309-11 (N.D. Cal. 2018); *In re: The Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 1:14-md-02583, 2016 WL 6902351, at *4 (N.D. Ga. 2016) (rejecting all objections, including objection that separate counsel was necessary to represent allegedly conflicting subclasses) (Doc. 237 at 39-40 (objection); Doc. 245 at 21-23 (reply in support of final approval)). In fact, Helfand's "adequacy" objection is almost entirely cut and pasted from his identical objection to the Morgan Stanley data breach settlement, which was rejected by the Southern District of New York earlier this month. *See In re Morgan Stanley Data Sec. Litig.*, No. 1:20-cv-05914-PAE (S.D.N.Y.) (Doc. 98 (Helfand objection), and Doc. 156 (August 5, 2022, Final Order and Judgment overruling Helfand objection)).

As in *Morgan Stanley*, Helfand argues that those who incur future harm will be unfairly time-barred by expiration of the Claims Period but fails to acknowledge that the Settlement provides benefits for these individuals in the form of Pango's Identity Defense Services and Restoration Services. Indeed, as explained in the Declaration of Gerald Thompson on Behalf of Proposed Provider of Identity Defense Services and Restoration Services, Pango's Identity Defense Service has a $1 million insurance policy to protect enrolled Settlement Class Members from future harm they may experience. Doc. 2219-8, ¶ 4. All Settlement Class Members were subject to the same event—the Data Breach—and the settlement relief compensates and protects them all equally. Furthermore, any Settlement Class Members who were unhappy with the relief made available under the Settlement had the option to opt out and pursue their own claims against Capital One related to the Data Breach.

Helfand's reliance on *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Oritz*

v. Fibreboard Corp., 527 U.S. 815 (1999), is misplaced. Unlike in this case, *Amchem* and *Ortiz* were massive personal-injury "class action[s] prompted by the elephantine mass of asbestos cases" that "defie[d] customary judicial administration." *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 646-48 (8th Cir. 2012). In those cases, adequacy was not sufficiently protected within a single class because claimants who suffered diverse medical conditions as a result of asbestos exposure wanted to maximize the immediate payout, whereas healthy claimants had a strong countervailing interest in preserving funds in case they became ill in the future. These vast differences between groups of claimants required "caution [because] individual stakes are high and disparities among class members great." 521 U.S. at 625. Those concerns are simply not present in this consumer case where all Settlement Class Members allege the same injury from the compromise of their personal information. *See Equifax*, 2020 WL 256132, at *21.

Moreover, there is no conflict between the two groups Helfand imagines, as there was in *Amchem*, because of the nature of the harm caused by the Breach. Those who have already suffered losses stand just as likely to continue to suffer future losses by the misuse of their information as those who have not suffered any money losses to date. Thus, unlike in *Amchem*, everyone has an incentive to protect all Settlement Class Members against future harms. As the Eighth Circuit explained when confronted with identical objections in another data breach settlement: "Accordingly, the interests of the two subclasses here are more congruent than disparate, and there is no fundamental conflict requiring separate representation." *Target*, 892 F.3d at 976; *see also Anthem*, 327 F.R.D. at 309. The Settlement provides both compensation for current losses and protection against future losses, including identity theft insurance—all of which benefit all Settlement Class Members. Helfand's objection—that this fact pattern is akin to *Amchem* and *Ortiz*

because some class members have presently incurred out-of-pocket costs while others have not—was thoroughly analyzed and rejected in *Target*:

> The *Amchem* and *Ortiz* global classes failed the adequacy test because the settlements in those cases disadvantaged one group of plaintiffs to the benefit of another. There is no evidence that the settlement here is similarly weighted in favor of one group to the detriment of another. Rather, the settlement accounts for all injuries suffered. Plaintiffs who can demonstrate damages, whether through unreimbursed charges on their payment cards, time spent resolving issues with their payment cards, or the purchase of credit-monitoring or identity-theft protection, are reimbursed for their actual losses, up to $10,000. Plaintiffs who have no demonstrable injury receive the benefit of Target's institutional reforms that will better protect consumers' information in the future, and will also receive a pro-rata share of any remaining settlement fund. It is a red herring to insist, as [Objector] does, that the no-injury Plaintiffs' interests are contrary to those of the demonstrable-injury Plaintiffs. All Plaintiffs are fully compensated for their injuries.

In re Target Corp. Customer Data Sec. Breach Litig., 2017 WL 2178306, at *5 (D. Minn. May 17, 2017), *aff'd*, 892 F.3d at 973-76 (8th Cir. 2018); *see generally id.* at *2-9. Further, "the interests of the various plaintiffs do not have to be identical to the interests of every class member; it is enough that they share common objectives and legal or factual positions." *Id.* at *6 (quoting *Petrovic v. Amoco Oil Co*., 200 F.3d 1140, 1148 (8th Cir. 1999). As in *Target*, the Class Representatives are adequate here because they seek essentially the same things as all Class Members: compensation for whatever monetary damages they suffered, protection against further damage, and reassurance that their information will be safer in Capital One's hands going forward.

As it has been in numerous other courts, this objection should be overruled.

B. OBJECTIONS TO ATTORNEYS' FEES AND SERVICE AWARDS.

Three of the submitted objections relate, at least in part, to the requested attorneys' fees—those of Objectors Helfand, Higgitt, and Pentz (Docs. 2238, 2241, 2242). The Court should overrule each of them.

1. Objection That the Requested Fee Is Improper Under Virginia Law.

Helfand argues that Virginia law governs the calculation of fees in this case and that Virginia law somehow requires a different methodology than that set out in the Motion for Fees. Doc. 2238 at 8. He is wrong on both counts. The entitlement to, and the computation of, fees in this case is governed by federal, not state, law. "Federal courts award attorneys' fees under the common fund doctrine *as a matter of federal common law*, based on 'the historic equity jurisdiction of the federal courts.'" *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012) (emphasis added) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939)).

In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), the Supreme Court recognized that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to reasonable attorney's fees from the fund as a whole." "The common fund exception to the American Rule is grounded in *equitable powers of the courts* under the doctrines of *quantum meruit* and unjust enrichment." Manual for Complex Litig. (Fourth) § 14.121 (emphasis added). As the Court explained in *Boeing*:

> The common-fund doctrine reflects the traditional practice in courts of equity, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

444 U.S. at 478 (cleaned up). Thus, the determination of fees "lies within the Court's discretion." *In re The Mills*, 265 F.R.D. at 260. That discretion is "guided by the historic equity jurisdiction of the federal courts." *Rodriguez*, 688 F.3d at 657 (cleaned up) (quoting *Sprague*, 307 U.S. at 164). And "districts within this Circuit, and the vast majority of courts in other jurisdictions consistently

apply a percentage of the fund method for calculating attorneys' fees in common fund cases." *In re The Mills*, 265 F.R.D. at 260; MCL § 14.121 at 187 ("After a period of experimentation with the lodestar method . . . the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases."). Helfand's major premise then—that the analysis here is governed by Virginia law—is simply incorrect.

Even if Virginia state law, and not federal law, governed the Court's fee inquiry, the result would be the same. Class actions in Virginia are non-existent, and so is their attendant caselaw. "Virginia jurisprudence does not recognize class actions . . . ." *Casey v. Merck & Co.*, 283 Va. 411, 418 (2012) (quoted by *In re Volkswagen "Clean Diesel" Litig.*, 94 Va. Cir. 189 (2016)). That is because "Virginia has no class action statute or rule similar to Rule 23 of the Federal Rules of Civil Procedure." *Moore v. Nat'l Wildlife Fed'n*, No. 10884, 1987 WL 488717, at *1 (Va. Cir. Ct. Sept. 11, 1987); *Skeen v. Indian Acres Club etc. Inc.*, 27 Va. Cir. 167 (1992) ("Given the nature of this action and the manner in which it was brought, as well as the unmistakably clear law of Virginia with regard to class action suits, the relief sought by Skeen on behalf of all property owners in the subdivision is clearly unavailable."). It is not surprising, then, that Virginia courts have developed no discernible, much less definitive, caselaw on the proper methodology for calculating attorney's fees consequent upon the creation of a common fund for the benefit of a class. Accordingly, even if Virginia law governed, the lack of state court jurisprudence on the question would, in any event, devolve the inquiry back to federal jurisprudence. *Cf. Apple Computer, Inc. v. Superior Court*, 126 Cal. App. 4th 1253, 1264 n.4, 24 Cal. Rptr. 3d 818 (2005) ("California courts may look to federal authority for guidance on matters involving class action procedures.").

It is also not surprising that the cases upon which Helfand appears to rely are clearly

inapposite. *See, e.g.*, *Mullins v. Richlands Nat. Bank*, 241 Va. 447, 447, 403 S.E.2d 334, 334 (1991) (individual action regarding contract interpretation); *W. Square, L.L.C. v. Commc'n Techs., Inc.*, 274 Va. 425, 430, 649 S.E.2d 698, 700 (2007) (same); *Denton v. Browntown Valley Assocs., Inc.*, 294 Va. 76, 88, 803 S.E.2d 490, 497 (2017) (same); *City of Burlington v. Dague*, 505 U.S. 557, 557 (1992) (individual action regarding federal fee-shifting statute). And these cases cannot be cited for the propositions that Helfand appears to attribute to them—*e.g.*, that "No multiplier can be awarded" and "Percentage of award is not allowed under Virginia law." Doc. 2238 at 10. Those cases do not—and could not in the class action common fund context—so hold.

Helfand's factual attacks are equally off base. For example, he speculates that the lodestar is "grossly inflated and unsupported," that Class Counsel provided "[n]o explanation as to why and what steps were taken to avoid duplication and when," and "have not meaningfully explained any steps taken to avoid duplication of efforts and waste avoidance." Doc. 2238 at 10-11. This is simply false. Class Counsel's declaration in support of the Motion for Fees detailed the numerous steps taken to achieve efficiency in the litigation of this case, including: (1) capping the hourly rate of attorneys conducting first-level document review at the lawyer's regular hourly rate or $377, whichever was lower, regardless of the experience of the reviewer; (2) implementing a rigorous timekeeping process from the outset of the case in which inadequate or incomplete time entries, or time that was not performed at the direction of Co-Lead Counsel, or reports that did not meet the billing protocol, were eliminated or returned for correction; and (3) engaging in a rigorous time entry and expense review process prior to submission of the Motion for Fees to assure that all submitted time was non-duplicative and performed at the direction of Plaintiffs' Co-Lead Counsel, with time and expenses that were excessive or not consistent with the billing protocol being disallowed and not included in the submission, ultimately resulting in approximately 5,000 hours

being eliminated from consideration. Doc. 2231-1 ¶¶ 35-40.

Helfand's unsupported statement that "motion practice is exceedingly thin relative to a case of this magnitude" (Doc. 2238 at 10), likewise demonstrates his reckless disregard of the record. Dozens of discovery motions were filed in this case, in addition to the motion for class certification, *Daubert* motions, and numerous dispositive motions.

Helfand's speculation that the work here was somehow derivative of "Morgan & Morgan's case against Morgan Stanley" and thus the "[w]ork performed was redundant and duplicative" (*id.* at 10-11), is also facially incorrect. As an initial matter, the "Morgan Stanley" case was filed on July 29, 2020. *See Tillman et al. v. Morgan Stanley Smith Barney, LLC*, No. 1:20-cv-05914, Doc. 1 (S.D.N.Y.). The cases against Capital One began being filed a year earlier, in July 2019. *See, e.g.*, *Baird v. Capital One Fin. Corp., et al*., No. 1:19-cv-00979, Doc. 1 (E.D. Va.). Helfand does not explain how Class Counsel's work in this case could be "redundant and duplicative" of a case that was not filed until a year later. Moreover, plaintiffs in the Morgan Stanley data breach case did not file a motion for class certification nor litigate dispositive motions, as was the case here—again undermining any possibility of duplication. Finally, and most pertinently, the cases are completely factually dissimilar. The Capital One Data Breach concerned infiltration of Capital One's AWS cloud environment, whereas in Morgan Stanley, "Plaintiffs allege[d] . . . Morgan Stanley failed to properly dispose of retired IT Assets . . . . This unencrypted equipment was then re-sold, without being properly wiped of data, to unauthorized third parties." *In re Morgan Stanley Data Security Incident*, No. 1:20-cv-05914-AT, Doc. 81-1 at 6 (S.D.N.Y.). The factual dissimilarity again undermines any potential redundancy or duplication of efforts.

Finally, Helfand speculates—again without any support—that the document review undertaken here was "surely cumulative," "[n]ot each one had to be reviewed," and included

"review of millions of documents that were useless facilitating class claims." Doc. 2238 at 10-11. Yet, Helfand fails to explain how Plaintiffs would be able to determine what documents were important and necessary to their claims absent actually reviewing them. And, as noted above, Class Counsel put numerous procedures in place to ensure efficiency in the prosecution of this case, including capping document review rates and closely reviewing and auditing time entries.

Accordingly, Helfand's objection fails on both the facts and the law and should be overruled.

2. Objection That the Requested Percentage Fee Is Too High.

Objector Pentz[7] argues Class Counsel should receive no more than the average percentage fee in "megafund" recoveries of $190 million, which according to Pentz is between 16.9% and 17.9%. Doc. 2241 at 1-2. Pentz bases this objection on nonbinding authority and, principally, on a law review article: Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010). She also makes several mistaken factual assertions.

As an initial matter, Pentz does not cite a single Fourth Circuit case adopting the analysis

[7] Pentz is the mother of John J. Pentz. *See* Reign Decl., Ex. 3, ¶¶ 7-8. Like Helfand, Mr. Pentz has been criticized by courts as a serial objector. *See, e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 721 F. Supp. 2d 210, 214-15 (S.D.N.Y. 2010) (calling Pentz a "serial" objector, finding "evidence of bad faith or vexatious conduct" by Pentz and other attorneys for objectors, and requiring Pentz to post an appeal bond), *appeal denied*, No. 21 MC 92, 2010 WL 2605233 (S.D.N.Y. June 28, 2010), and enforced, No. 21 MC 92, 2010 WL 5186791 (S.D.N.Y. July 20, 2010); *In re Wal-Mart Wage & Hour Emp. Pracs. Litig.*, MDL No. 1735, No. 06-CV-00225, 2010 WL 786513, at *1-2 (D. Nev. Mar. 8, 2010) (noting, in requiring that Pentz post an appeal bond, that Pentz has "a documented history of filing notices of appeal from orders approving other class action settlements, and thereafter dismissing said appeals when [he and his clients] were compensated by the settling class or counsel for the settling class"); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 350-51 (E.D.N.Y. 2010) (characterizing Pentz's objections as "meritless"); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361, 2003 WL 22417252, at *2 n.3 (D. Me. Oct. 7, 2003) (requiring an appeal bond, calling Pentz a "repeat objector," and characterizing his objection as "groundless" and potentially frivolous).

she seeks; that is, reduction of the applicable percentage of the common fund in so called "megafund" cases, those involving a common fund of more $100 million. This lack of binding authority is not coincidental—Plaintiffs' research likewise has revealed no case in which the Fourth Circuit has discussed, much less has adopted, this methodology. Much to the contrary, district courts within the Fourth Circuit have criticized this analysis—sometimes also referred to as the "declining percentage approach"—remarking, for example, that one study underlying this theory "shows that the average lodestar multiplier in those cases was 4.5, substantially higher than the applicable multiplier in this case," and that "basing an objection completely on a comparison of the size of the fund and percentage of the award in other cases discounts the specifics of each case—namely the amount of work done and the difficulty in that specific case of reaching a favorable result." *In re The Mills*, 265 F.R.D. at 261-62. Other circuits likewise rightly eschew rote application of such an approach. *See, e.g.*, *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 302-03 (3d Cir. 2005), *as amended* (Feb. 25, 2005) ("[T]here is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund. Put simply, the declining percentage concept does not trump the fact-intensive *Prudential/Gunter* analysis. We have generally cautioned against overly formulaic approaches in assessing and determining the amounts and reasonableness of attorneys' fees.").

Contrary to Pentz's suggestion that 17.9% of the common fund should be the maximum available here, "the Honorable Liam O'Grady surveyed common fund fee awards in the Fourth Circuit and elsewhere and found percentage awards that ranged from 18% to 30%, inclusive of mega -fund recoveries that reached into the nine figure range." *In re LandAmerica 1031 Exch. Services, Inc. I.R.S. 1031 Tax Deferred Exch. Litig.*, 3:09-CV-00054, 2012 WL 5430841, at *4 (D.S.C. Nov. 7, 2012) (citing *In re The Mills*, 265 F.R.D. at 264). And, as thoroughly demonstrated

in the Motion for Fees, the requested 33.3% is supported by numerous decisions from within the Fourth Circuit.[8]

As explained by the Court in *In re The Mills*, the true concern illuminating the megafund cases is that of a windfall to counsel as shown by inordinate lodestar multipliers. However, as noted above, that is not the case here. Rather, the requested fee award of 33.3% of the Settlement Fund would result in a current multiplier of only 1.66, with much work remaining to finalize and administer the Settlement. Notably, as identified by the Third Circuit in *In re Cendant Corp. PRIDES Litig*., 243 F.3d 722 (3d Cir. 2001), lodestar multipliers of 1.35 to 2.99 are common in cases with funds in excess of $100 million, with the majority of those being 2.0 or above. *Id*. at 737-738, 742; *see also*, *e.g.*, *In re NASDAQ Mkt.-Makers Antitrust Litig*., 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (noting, in a megafund case, that "multipliers of between 3 and 4.5 have become

[8] *See, e.g.*, *In re Celebrex (Celecoxib) Antitrust Litig*., 2:14-CV-00361, 2018 WL 2382091, at *5 (E.D. Va. Apr. 18, 2018) (noting that "[f]ee awards of one-third of the settlement amount are commonly awarded in cases analogous to this one," and awarding fees of "one-third of the . . . settlement"); *Hatzey v. Divurgent, LLC*, 2:18-CV-191, 2018 WL 5624300, at *5 (E.D. Va. Oct. 9, 2018), *report and recommendation adopted sub nom. Hatzey v. Divurgent, LLC*, 2:18CV191, 2018 WL 5621967 (E.D. Va. Oct. 30, 2018) (approving fee request of one-third of settlement fund); *In re Star Sci., Inc. Sec. Litig*., 3:13-CV-00183-JAG, 2015 WL 13821326, *1 (E.D. Va. June 26, 2015) (Gibney, J.) (awarding fees of 33.33% of settlement fund); *Sanchez v. Lasership, Inc*., 1:12-cv-246 (GBL-TRJ), 2014 WL 12780145, at *1–2 (E.D. Va. Aug. 8, 2014) (Lee, J.) (awarding attorneys' fees of "one-third of the common settlement fund"); *see also In re: Allura Fiber Cement Siding Litig*., 2:19-mn-02886-DCN, 2021 WL 2043531, at *4 (D.S.C. May 21, 2021) ("Courts in the Fourth Circuit have held that attorneys' fees in the amount of 1/3 of the settlement fund are reasonable."); *Seaman v. Duke Univ*., 1:15-CV-462, 2019 WL 4674758, at *3 (M.D.N.C. Sept. 25, 2019) ("Contingent fees of one-third are common in this circuit in cases of similar complexity."); *In re Titanium Dioxide Antitrust Litig*., No. 10-CV-00318(RDB), 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) ("Class Counsel is hereby awarded thirty-three and one-third percent (33 1/3 %) in reasonable attorneys' fees from the $163.5 million in Settlement Funds."); *Muhammad v. Nat'l City Mortg., Inc.*, No. 2:07-0423, 2008 WL 5377783, at *6 (S.D.W Va. Dec. 19, 2008) ("[T]he requested award of one-third of the common fund, plus costs, is reasonable under the circumstances of this case."); *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05cv00187, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007) ("In this jurisdiction, contingent fees of one-third . . . are common.").

common").

Ultimately, then, the touchtone of the analysis must be the specifics of the case before the Court. As noted above and in the Motion for Fees, this case was likely the most heavily litigated data breach case in history. Class Counsel expended tremendous effort in zealously representing the Class, and the fee requested here amounts to a modest multiplier of 1.66, far less than the "common" multipliers detailed in the megafund cases analyzed in *In re Cendant Corp.* and *In re NASDAQ Mkt.-Makers*, among others.

Pentz also makes several factual assertions that demonstrate her unfamiliarity with the record in this case. For example, she states, "[g]iven the fact that mediation in this case began in 2020 . . . a large portion of the hours generated by Class Counsel consists of confirmatory document review . . . ." Doc. 2241 at 2. While multiple mediation sessions were held throughout the pendency of this case, this matter was, up until the time of resolution, actively litigated. *None* of the discovery here was "confirmatory document review." Rather, all of the document discovery, discovery-related motion practice, dozens of depositions, and the like, occurred during active litigation of this matter. Indeed, as the Court is well aware, a great amount of the litigation in this case occurred in 2021, including Plaintiffs' Motion for Class Certification (filed in April 2021), and Defendants' summary judgment and *Daubert* motions (filed in June and July 2021). Thus, the proposition that a mediation held in early 2020 demonstrates that a "large portion of the hours generated by Class Counsel consists of confirmatory document review" is transparently incorrect.

Lastly, Pentz states that "it is likely that at least $10 million of that figure was generated by staff attorneys, contract attorneys, and project attorneys performing rote document review, or firm associates performing the same work that could have been performed far more inexpensively by such attorneys." Doc. 2241 at 2. This is purely uninformed speculation and contrary to the

established record. As explained above, the fact of the matter is that Class Counsel: (1) capped the hourly rate of attorneys conducting first-level document review at the lesser of the lawyer's regular hourly rate or $377; (2) implemented a rigorous timekeeping process from the outset of the case; (3) engaged in a rigorous time entry and expense audit process prior to submission of the Motion for Fees; and (4) all submitted hourly rates are reasonable, based on each person's position and experience level; are based on rate scales each Co-Lead Counsel has submitted and Courts have approved in other contingency cases; are comparable to or lower than the rates charged by other law firms with similar experience, expertise, and reputation, for similar services in the nation's leading legal markets; and were extensively reviewed and attested to by a local leading expert on attorney hourly rates. Docs. 2231-1 ¶¶ 35-40, 2231-2. Accordingly, Pentz's speculation to the contrary should be disregarded.

3. Objection That the Fee Should be Reduced Because the Settlement Is "Absurdly Low".

Finally, Objector Higgitt argues: "Given the fact the Settlement is so absurdly low Attorney's fees at the rate of 35% of the total settlement amount is too high an [*sic*] is utterly predatory. I would suggest a figure of no more than 10%." Doc. 2242 at 2. As an initial matter, Plaintiffs seek 33.3% of the common fund in fees, not 35%. Moreover, as demonstrated in the Motion for Fees and above, Plaintiffs' request of 33.3% is in line with many class cases from within the Fourth Circuit. Higgitt's suggestion of 10% of the common fund is well below the floor identified in *In re The Mills*, 265 F.R.D. at 264, and would result in a significant negative multiplier to Class Counsel's lodestar thus disincentivizing future contingent work such as this case despite the favorable outcome reached for the Settlement Class. Higgitt's fee-related objection is unsupported by a single citation to any relevant authority. It should be overruled.

4. Objection That Service Awards Are Impermissible.

Objector Pentz claims that "the Fourth Circuit has [n]ever approved the practice of granting incentive or service awards." Doc. 2241 at 3. In fact, the Fourth Circuit has specifically ruled that service awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Berry*, 807 F.3d at 613 (internal quotation omitted). In that case, the Fourth Circuit stated that such awards are "fairly typical in class action cases" and upheld $5,000 service awards as within the district court's discretion "because the Class Representatives acted for the benefit of the class." *Id.* (citation omitted).

Pentz ignores this controlling Fourth Circuit precedent in a gambit to extend the effect of *Johnson v. NPAS Sols. LLC*, 975 F.3d 1244 (11th Cir. 2020). That recent Eleventh Circuit decision upset decades of federal jurisprudence that authorized limited service awards as part of Rule 23(e)'s analysis of adequacy of representation. Instead, *Johnson* held that two Supreme Court cases from the 1880s—*Trustees v. Greenough*, 105 U.S. 527 (1882) and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885)—prohibit incentive awards to class representative plaintiffs under Rule 23. *Johnson*, 975 F.3d at 1255. In a dissent from a denial of rehearing *en banc*, Judge Jill Pryor explains why these 140-year-old cases, (also cited on page 3 of Pentz's Objection), have no bearing on incentive awards under Rule 23, which was not passed at all until 1938, and not in its current form until 1966:

> By holding that incentive awards are unlawful *per se*, the majority opinion broke with decisions from this and every other circuit allowing these awards when properly approved under the strictures of Rule 23. Indeed, the majority opinion adopted a position that had never been embraced by any court. . . and since the majority opinion in this case issued, every court outside this circuit to have considered it has declined to follow it. And no wonder. In

> *Greenough* and *Pettus*, decided long before modern class actions were born, the Supreme Court applied equitable trust principles . . . in [a] now-super-seded legal landscape . . .
>
> . . The fairness-based standard for evaluating disparate settlement distributions between representative plaintiffs and class members . . . which panels of this court have continually applied in reviewing class action settlements, does not conflict with Supreme Court precedent and should continue to govern our analysis of incentive awards authorized by class action settlement agreements.

Johnson v. NPAS Solutions, LLC, 2022 WL 3083717, at *1-2 (11th Cir. Aug. 3, 2022) (dissent from denial of rehearing en banc) (cleaned up).

In *Berry*, the Fourth Circuit also specifically addressed the other case Pentz cites, *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013). The Fourth Circuit declined to follow *In re Dry Max*, and ruled that where "the incentive awards were not agreed upon ex ante, were not conditioned on the Class Representatives' support for the Agreement, . . . were not negotiated until after the substantive terms of the Agreement had been established, . . . and where the district court found that the class members were afforded substantial relief," the district court was within its discretion to approve the Class Representatives' awards. *Berry*, 807 F. 3d at 613-14. Each of these conditions was also fulfilled in this case. Doc. 2219-4 ¶¶ 42, 43.

By ignoring the Fourth Circuit binding precedent that upholds incentive awards under Rule 23, Objector Pentz hopes to lure this Court into extending the Eleventh Circuit's outlier opinion. To do so would itself violate the fairness analysis required by Rule 23. As Judge Pryor's dissent cogently explains, "a class representative's responsibilities are often time-consuming and burdensome. . . [and] may also expose her to reputational risk and even financial, emotional, and physical harm . . .[leading a major treatise on class actions to observe that, in the absence of reasonable service awards] they have a fair argument that the settlement is not treating *them* equitably relative to absent class members." *Johnson*, 2022 WL 3083717, at *10.

Here, the eight Settlement Class Representatives and the nine other MDL Plaintiffs who were deposed by Capital One have fulfilled their duties to the Settlement Class, making the requested Service Awards appropriate. Doc. 2231 at 29-30. The Court should overrule Pentz's Objection and grant the requested Service Awards as fair under Rule 23(e).

C. OTHER MISCELLANEOUS OBJECTIONS.

Higgitt objects to the value of the Settlement and the benefits conferred on the Class. For example, he claims that the $190 Million Settlement Fund is "absurdly low," is not "a sufficient punishment of the Companies for their negligent disregard for the safety of the customer data entrusted to their care," and that three years Restoration Services and Identity Defense Services is a "wholly inadequate" period of time. Doc. 2242 at 1-2.

However, "[i]n determining whether to approve a class action settlement, the issue is not whether everyone affected by the settlement is completely satisfied. Instead, the test is whether the settlement, as a whole, is a fair, adequate, and reasonable resolution of the class claims asserted." *Skochin v. Genworth Fin., Inc.*, 2020 WL 6532833, at *18 (E.D. Va. 2020). When a settlement results from hard-fought litigation and negotiation, objections regarding the amount of the settlement do not provide a justification for its rejection unless the amount secured is unfair, unreasonable, or inadequate. *Id.* Objections that the settlement fund is too small for the class size, or that a defendant should be required to pay more to punish and deter future bad behavior, while understandable, do not take into account the risks and realities of litigation, and are not a basis for rejecting the settlement. *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("[T]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes.") (cleaned up). As argued above, and as this Court provisionally determined in its Preliminary Approval Order, the relief provided by the Settlement is "fair, reasonable, and adequate, in accordance with Rule 23(e) of the Federal Rules of Civil Procedure." Doc. 2220 at 2.

Higgitt also objects to the processes by which customers can interact with the Settlement Administrator to gain information about the Settlement. Doc. 2242 at 2. These objections contain factual errors. His first process-related objection is that: "No provision has been made for each member of the Class to discover what exact private information was stolen during this breach." *Id.* In fact, those Settlement Class Members whose Social Security numbers or linked bank account numbers were accessed during the Data Breach were specifically notified of that fact. Doc. 2219-6 at 23. With respect to the remainder of the data accessed in the Data Breach, which included "some combination of people's names, addresses, zip codes/postal codes, phone numbers, email addresses, dates of birth, self-reported income, credit scores, credit limits, balances, payment history, contact data, and/or fragments of transaction data from a total of 23 days during 2016, 2017 and 2018," (Doc. 2242 at 2), it would be entirely impractical—if not impossible—to devise a system that would convey to Settlement Class Members the specific combination of accessed data for each of 98 million Settlement Class Members. Furthermore, Higgitt does not explain why that level of detail would be helpful to him or to other Settlement Class Members who did not have the most sensitive data (Social Security numbers and bank account numbers) accessed during the Data Breach. Where "the essence of the objection is that, to be fair and reasonable, the Settlement Agreement must be tailored to each individual['s] circumstance," the *Skochin* court overruled the "proposal [as] simply unworkable." 2020 WL 6532833, at *22. The same principle applies here.

Higgitt then objects that "it is not possible [to reach a human being] via the Settlement telephone numbers 855-604-1811." Doc. 2242 at 2. This is simply incorrect, as demonstrated by the Settlement Administrator's declaration:

> The toll-free telephone number was prominently displayed in all Notice documents. During normal business hours, callers also have the option to speak to a live operator. The automated phone system is available 24 hours per day, 7 days per week. As of August 24,

> 2022, there have been 197,094 calls to the toll-free telephone number representing 901,481 minutes of use, and service agents have handled 32,330 incoming calls representing 286,862 minutes of use and 2,843 outbound calls representing 13,857 minutes of use.

Azari Decl. ¶ 33. This Court should overrule the factually incorrect objection that human agents were not available at the toll-free number.

Finally, objector Komen takes issue with the benefits conferred on the Class, although only on behalf of the subset of Settlement Class Members who are also "members of the Equifax data breach settlement class" Doc. 2243 at 1. He argues that the "three years of Identity Defense Services and Restoration Services proposed as compensation for the Capital One breach" has a "likely overlap" with the "four years of Experian's credit monitoring services" offered in *Equifax*. *Id.* He states that the services provided here "do not provide sufficient additional value to us, who have had our sensitive information leaked twice." *Id.*

While apparently made in good faith, Komen's objection does not present a valid objection to the value of the Settlement. He ignores the monetary relief the Settlement provides, which includes compensation for Out-of-Pocket Losses and Lost Time up to $25,000. Doc. 2219-2 ¶¶ 3, 4, 6. And he ignores Capital One's Business Practice commitments relating to cybersecurity. Finally, there is no impediment to receiving services under both settlements, which are provided by different companies and could prove useful to individuals who had their "sensitive information leaked twice." As with Higgitt, Komen seeks "the Settlement Agreement [to be] tailored to each individual policyholder's circumstance," here including other settlement benefits they may receive in other, unrelated cases. This is "simply unworkable" in the class action context, and the objection should be overruled. *Skochin*, 2020 WL 6532833, at *22.[9]

[9] *See also In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at *18 (N.D. Cal. July 22, 2020), *appeal dismissed*, 20-17438, 2021 WL 2451242 (9th

CONCLUSION

For the reasons set forth above, Plaintiffs request that the Court enter an order overruling all objections, finally approving the Settlement as fair, reasonable, and adequate under Rule 23(e)(2), certifying the Settlement Class for purposes of judgment on the Settlement, and granting the request for attorneys' fees, expenses, and service awards.

Cir. Feb. 16, 2021), *and aff'd*, No. 20-16633, 2022 WL 2304236 (9th Cir. June 27, 2022) ("[T]he credit monitoring in the instant case is not entirely duplicative of the credit monitoring in *Equifax*. First, the *Equifax* settlement contemplates credit monitoring provided by different credit monitoring services, and in a different package, than the one provided by AllClear ID in the instant case. Credit monitoring by multiple, independent entities still provides value to Settlement Class Members. Second, importantly, it is unclear whether the Equifax credit monitoring will ever overlap with the Credit Services provided by the instant Settlement in the first place because the Equifax settlement is currently pending appeal before the Eleventh Circuit. It is therefore entirely possible that the two years' worth of Credit Services offered in the instant case will expire before the Equifax credit monitoring becomes active. Third . . . it would be inequitable to retrospectively render this Settlement invalid based on the contents of a subsequent settlement reached in a different court in a different case.").

Dated: August 29, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

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