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) JURY TRIAL DEMANDED

This Document Relates to the Consumer Cases

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS, AND EXPENSES AND FOR CLASS REPRESENTATIVE SERVICE AWARDS

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I. INTRODUCTION

Even a cursory review of the docket in this matter—spanning more than 2,200 entries—illustrates the prodigious efforts Plaintiffs' Counsel undertook in litigating and ultimately resolving this case. This Court's first-hand experience with Class Counsel's briefing and in-person argument, having held multiple day-long hearings along with monthly status conferences, makes it uniquely aware of the zealous advocacy Class Counsel provided, and the vehement defense they faced. This case was, almost undoubtedly, the most heavily litigated data breach case in history. Over 350,000 documents were reviewed, scores of depositions were taken and defended, and dozens of discovery motions were litigated. All the while, Class Counsel operated under the processes and procedures of this Court's "rocket-docket," albeit modified some here to accommodate the size and scope of the undertaking. These efforts brought the case through class certification proceedings and cross motions for summary judgment, and ultimately led to one of the largest data breach settlements in history. In recognition of those efforts, 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 $2,325,516.11. Plaintiffs also request service awards of $5,000 for each of the 8 Settlement Class Representatives and the 9 other MDL Plaintiffs who were deposed by Capital One.

II. FACTUAL BACKGROUND

A. Overview of the Litigation

On July 29, 2019, Capital One announced that the sensitive personal information of approximately 98 million Americans who had applied for Capital One credit cards had been stolen by a malicious criminal hacker from Amazon's AWS cloud where Capital One stored this information (the "Data Breach"). Affected individuals across the country immediately began filing class action lawsuits against Capital One and Amazon. Ultimately, more than 60 such lawsuits

were filed. In October 2019, the Judicial Panel on Multidistrict Litigation consolidated and transferred these lawsuits to this Court, the location of Capital One's headquarters.[1]

On December 2, 2019, after review of over 30 applications for plaintiffs' counsel leadership, the Court appointed the undersigned counsel as Plaintiffs' Lead Counsel and Local Counsel. Doc. 210 (Pretrial Order #3). Plaintiffs' Lead Counsel immediately began preparation of a detailed proposed discovery plan, exchanged initial written discovery with Capital One, reached agreement on a proposed schedule for the litigation, negotiated an ESI protocol and crafted and negotiated search terms for ESI discovery, and negotiated a protective order. Docs. 270, 312, 329.

1. Pleadings and Related Motion Practice

On March 2, 2020, after extensive factual investigation and legal research and the vetting and selection of appropriate, dedicated named plaintiffs ("Representative Plaintiffs"), Plaintiffs filed a 91-page Representative Complaint, which the Court approved (Doc. 302) as the vehicle for litigating the Plaintiffs' claims (the "Representative Complaint"). The Representative Complaint named Representative Plaintiffs from the states of California, Florida, New York, Texas, Virginia, and Washington, asserting representative common law claims on behalf of a nationwide class against Capital One and Amazon for negligence, negligence per se, unjust enrichment, breach of express and implied contract, and declaratory judgment, and state statutory claims under state data breach notification and consumer protection statutes on behalf of state subclasses. Doc. 332, Doc. 354 (corrected).[2]

[1] Unless otherwise noted, factual statements set forth in this Memorandum are supported by the Consolidated Declaration of Class Counsel ("Class Counsel Decl.") attached as Exhibit 1.

[2] During the next few months, three of the Representative Plaintiffs voluntarily dismissed their claims, primarily due to exigent circumstances created by COVID-19, without prejudice to their ability to submit claims as absent class members (Docs. 399, 436, 852) and a new Representative Plaintiff was substituted, ultimately resulting in the eight current Representative Plaintiffs who are the proposed Settlement Class Representatives. Doc. 971 (Second Amended Representative Complaint).

On April 10, 2020, Capital One and Amazon each filed motions to dismiss the Representative Complaint in its entirety. Docs. 386, 389. Defendants' primary focus in these motions was arguing that Representative Plaintiffs had not alleged legally-cognizable harms arising out of the Data Breach and that Defendants were not the proximate cause of any such harms. Defendants further argued that Virginia law does not recognize a duty of care in tort to safeguard personal information. Docs. 387, 390. Plaintiffs filed extensive opposition briefing and the motions were fully briefed in just over one month. *See* Docs. 426, 427 (Plaintiffs' Memoranda in Opposition); Docs. 463, 464 (Defendants' Replies).

On May 27, 2020, the Court heard nearly five hours of oral argument on Defendants' motions to dismiss. *See* Doc. 494. On September 18, 2020, the Court issued an extensive ruling largely denying the motions. Doc. 879. However, extensive briefing related to Representative Plaintiffs' allegations continued for months thereafter. On October 2, 2020, Capital One asked the Court to reconsider one of its rulings—that Representative Plaintiffs had sufficiently alleged Capital One assumed a duty of care to them in tort under Virginia law, and alternatively asked the Court to certify this question to the Virginia Supreme Court. Doc. 916. Plaintiffs submitted opposition briefing, and the Court denied the motion for reconsideration. Doc. 934 (Plaintiffs' Opposition); *see also* Doc. 951 (Joinder by Amazon); Doc. 965 (Capital One's Reply); Doc. 1059 (Order denying). Later, after concluding Virginia law applied as to all Representative Plaintiffs' common law claims (Doc. 1293; *see also* Doc. 879 at 9), the Court granted Capital One's request to certify the question of tort duty to the Virginia Supreme Court (Doc. 1291). The Virginia Supreme Court subsequently declined to accept the certified question. Doc. 1380. On October 16, 2020, Defendants each filed Answers. Docs. 953, 955. On October 30, 2020, Capital One moved for judgment on the pleadings on Representative Plaintiffs' unjust enrichment and implied contract

claims (Doc. 996), which Plaintiffs opposed. Doc. 1032 (Plaintiffs' Opposition); *see also* Doc. 1060 (Capital One's Reply). After a hearing, the Court denied the motion. Doc. 1096 (12/09/2020 Hr'g Tr.); Doc. 1290 (Order denying).

2. Discovery Practice

Meanwhile, as motion practice related to Representative Plaintiffs' allegations was underway and the global COVID-19 pandemic forced much of the case to be litigated remotely, Plaintiffs were engaged in a massive, time-consuming discovery effort. Plaintiffs served several rounds of written discovery on Defendants and eighteen third-party subpoenas, including six subpoenas to former Capital One employees, and reviewed over 350,000 documents—totaling nearly 3 million pages—produced by Defendants and nearly 7,500 documents—totaling an additional 50,000 pages—produced by third parties. *See* (Doc. 2219-4 ¶ 20). Plaintiffs also took 33 depositions of Defendants' fact witnesses, 13 depositions of Defendants' Rule 30(b)(6) witnesses, and two third-party depositions. *Id.* In addition, Plaintiffs answered Defendants' written discovery requests, which involved searches of Plaintiffs' electronic documents in addition to the collection and review of physical documents. Plaintiffs ultimately produced nearly 1,750 documents totaling over 7,500 pages in 54 document productions after collecting and reviewing over 145,000 documents from 24 custodians. *Id.* at ¶ 21. Furthermore, discovery involved the completion and collection of a verified "Fact Sheet," including ten pages of questions and eight document requests, to MDL Plaintiffs. Ultimately, 101 MDL Plaintiffs submitted verified Fact Sheets and responsive documents; while 147 MDL Plaintiffs chose to dismiss their pending complaints without prejudice.[3] *Id.* Between May and November, 2020, each of the Representative

[3] Of the 101 MDL Plaintiffs who submitted verified Fact Sheets and documents, an additional 32 eventually chose to dismiss their pending complaints without prejudice.

Plaintiffs sat for remote depositions. In addition, Defendants deposed nine other MDL Plaintiffs. *Id.* at ¶ 22. In total, Class Counsel defended seventeen plaintiff depositions. *Id.*[4]

That offensive and defensive discovery was spurred on by significant motion practice before Judge Anderson, much of which resulted in the production of important evidence for Plaintiffs' case. Indeed, from the very commencement of the case, Plaintiffs litigated multiple skirmishes concerning the form of the stipulated protective order, *see* (Docs. 286, 287, 304) & (Docs. 341, 349, 350, & 364), and the ESI Protocol (Docs. 351, 352, 362, 372, 373). The discovery battles also included several rounds of motions regarding Capital One's assertion of the bank examination privilege over thousands of documents, which involved contested briefing and argument from the Office of the Comptroller of the Currency. Motion practice regarding Defendants' assertion of the attorney-client privilege and work product claims involved review of Defendants' privilege logs which consisted of thousands of lines of Excel spreadsheets, months of meet and confers, and repeated iterations of additional logging from Defendants.

Specifically, as demonstrated by the charts attached as Ex. A to the Consolidated Declaration of Class Counsel, over two dozen discovery motions were filed by the parties in total—not accounting for attendant motions to seal, or Rule 72 objections and motions for reconsideration. Plaintiffs filed some 19 discovery related motions, and the vast majority of these motions were briefed and decided on the Court's required one-week schedule.

Expert discovery was similarly intensive. Beginning in August 2019, Plaintiffs engaged numerous experts, including five disclosed testifying experts, to develop opinions for class certification and trial. Dr. Stuart E. Madnick, of the Massachusetts Institute of Technology,

[4] The preliminary approval filings incorrectly state this number as eighteen. *Id*. However, Defendants ultimately took depositions of just nine MDL Plaintiffs, plus the eight Representative Plaintiffs, for a total of seventeen.

rendered opinions as to the mechanism and root causes of the Data Breach, how the Data Breach should have been prevented, and how the risk of further breaches can be mediated going forward. Kevin Mitnick, an expert in "black hat" and "white hat" hacking, explained how the types of personal information stolen in the Data Breach are misused to cause harm and the present risk of continuing harm to victims of the Data Breach. Gary Olsen, a CPA and appraisal expert, and Terry Long, an actuary, developed opinions relating to damages. Brian Kelley gave opinions concerning the relation between and among Capital One's contracts with applicants and cardholders, Capital One's cybersecurity policies and practices, and legal and regulatory requirements governing Capital One's protection of customer personal information. These experts were ultimately disclosed, with full reports, on March 21, 2021. Several of them also drafted supplemental or rebuttal reports, and all sat for at least one deposition. Both Defendants designated numerous experts as well, each of whom Plaintiffs deposed. (Doc. 2219-4 at ¶ 23).

3. Class Certification, *Daubert*, and Dispositive Motions

On April 28, 2021, Plaintiffs filed their Motion for Class Certification, seeking certification of a nationwide class of approximately 98 million Americans. Docs. 1259, 1261. This motion was fully briefed on June 18, 2021. *See* Doc. 1443 (Capital One's Opposition); Doc. 1435 (Amazon's Opposition); Doc. 1558 (Plaintiffs' Reply as to Capital One); Doc. 1571 (Plaintiffs' Reply as to Amazon). Defendants each filed several *Daubert* challenges related to Plaintiffs' class certification motion, which Plaintiffs opposed, and which were fully briefed by July 2, 2021. *See* Docs. 1389, 1390, 1394, 1395, 1397, 1398, 1427, 1428, 1431, 1432 (Defendants' motions to exclude and memoranda in support); Docs. 1528, 1534, 1540, 1546, 1552 (Plaintiffs' Oppositions); Docs. 1607, 1609, 1611, 1633, 1647 (Defendants' Replies). Plaintiffs also moved to exclude one of Capital One's experts related to Plaintiffs' Motion for Class Certification. *See* Docs. 1559-60.

During the briefing on class certification, Capital One challenged the Court's jurisdiction over the case, arguing no Representative Plaintiff could prove their harms were caused by Capital One where Capital One contended Representative Plaintiffs could not prove the known hacker, Paige Thompson, further disseminated the personal information stolen in the Data Breach before her arrest. *See* Docs. 1385-86. Capital One's jurisdictional challenge ultimately resulted in several rounds of briefing in which Plaintiffs opposed the premise of Capital One's contention that the Court's jurisdiction to adjudicate the case depended on the resolution of what were undisputedly merits issues. *See* Doc. 1502 (Plaintiffs' Opposition); Doc. 1513 (Capital One's Reply); Doc. 1653 (Capital One's Supplemental Memorandum regarding *TransUnion v. Ramirez*); Doc. 1721 (Plaintiffs' Response); Doc. 1727 (Amazon's Joinder); Doc. 1780 (Capital One's Supplemental Brief challenging the Court's jurisdiction to adjudicate Plaintiffs' contract and unjust enrichment claims); Doc. 1871 (Plaintiffs' Response); Doc. 1921 (Capital One's Reply); Docs. 2041, 2042, 2052, 2074, 2075, 2138, 2150, 2151 (filings related to supplemental authorities regarding jurisdictional challenge).

The Court held a two-day hearing on July 12 and 13, 2021, on Plaintiffs' Motion for Class Certification, the various related *Daubert* challenges, and Capital One's challenge to the Court's jurisdiction to adjudicate Representative Plaintiffs' tort and statutory claims. *See* Docs. 1745, 1747; Docs. 1901-1902 (7/12-13/21 Hr'g Tr.). Soon thereafter, briefing on dispositive motions commenced. On June 3, 2021, Capital One filed its motion for summary judgment seeking judgment on each of Representative Plaintiffs' claims on several bases. Capital One's principal argument was that Representative Plaintiffs could not prove they were harmed by Capital One because they could not prove the hacker, Paige Thompson, further disseminated the personal information stolen in the Data Breach before her arrest. *See* Docs. 1460, 1463. Plaintiffs filed

extensive opposition briefing, contending there was substantial evidence from which a jury could conclude Plaintiffs' personal information was further disseminated beyond Thompson and that they had suffered compensable damages resulting from Capital One's failure to protect their personal information. *See* Doc. 1807. On July 2, 2021, Representative Plaintiffs moved for partial summary judgment on their claims for breach of express and implied contract against Capital One. *See* Docs. 1646, 1649. On the same day, Amazon moved for summary judgment on each of Representative Plaintiffs' claims, arguing it owed no duty of care to them and that it could not be liable to them for unjust enrichment and under the asserted state statutes, to which Plaintiffs submitted a detailed opposition. *See* Docs. 1678, 1693, 1820. Each of these motions were also accompanied by sealing motions that had separate, additional briefing.

The summary judgment motions were fully briefed on August 23, 2021. Capital One and Amazon also filed additional *Daubert* motions in connection with summary judgment, which Plaintiffs opposed. Docs. 1658, 1675, 1828, 1840. Plaintiffs also filed a motion to exclude the testimony of one of Capital One's experts related to summary judgment. *See* Docs. 1638, 1640. These *Daubert* motions were also fully briefed on August 23, 2021. On September 30, 2021, the Court held a full-day summary judgment hearing, including additional argument on Capital One's jurisdictional challenge. Doc. 2027; 9/30/21 Hr'g Tr. At the time of the settlement, the motions for class certification, summary judgment, and to exclude expert testimony were fully submitted to the Court and under advisement.

B. Mediation and Settlement

Parallel to their litigation of the Actions, the Parties engaged in arm's-length settlement negotiations beginning in March 2020. The negotiations were first overseen by former United States District Court Judge Layn R. Phillips and later overseen by United States District Judge Leonie M. Brinkema. The Parties engaged in four mediation sessions, on March 21, 2020,

November 18, 2020, April 16, 2021, and August 3, 2021, with Judge Brinkema presiding over the last three conferences. The Parties also engaged in several direct conferences and joint communications with Judge Brinkema to assist on particular issues that arose in these negotiations. On December 17, 2021, the Parties executed a binding term sheet, to be superseded by the Settlement Agreement. (Doc. 2219-4 at ¶ 30).

While the negotiations were professional throughout, they were marked by significant factual and legal disputes impacting the value of the case. From Plaintiffs' perspective, the hard work through discovery and motion practice framed the key issues for both sides, positioned the case for settlement, and—with Judge Brinkema's assistance—the Parties were able to reach a resolution. At all times the negotiations were made at arm's length, and free of collusion of any kind. Attorneys' fees were not discussed in any manner until the Parties had reached agreement on the material terms of the settlement, including the payment of the Settlement Fund. *Id.* ¶ 31.

C. The Terms of the Proposed Settlement

The following are the material terms of the 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 opts 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 that 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 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 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).

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). The agreed Business Practice Changes are subject to confirmatory discovery and review by Plaintiffs' expert Dr. Stuart Madnick in advance of Plaintiffs' motion for final approval.

III. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

A. The Settlement Creates a Common Fund from Which Percentage-of-the-Fund Is the Appropriate Method for Awarding Attorneys' Fees.

Under Fed. R. Civ. P. 23(h), "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." As the Supreme Court recognized, "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The common fund doctrine is based on the inherent powers of the federal court to "prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.*

Two methods of calculating attorneys' fees in class actions are: (1) the percentage-of-the-fund method; and (2) the lodestar method. *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009). The percentage-of-the-fund method involves an award based on a percentage of the Class's recovery, set by the court based on several factors. *Id*. The lodestar method requires multiplying the number of hours worked by a reasonable hourly rate, the product of which the Court can then adjust by employing a "multiplier." *Id.*

The Supreme Court has suggested that the percentage-of-the-fund is the appropriate method for awarding fees under the common fund doctrine. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . . ."). Likewise, within the Fourth Circuit, "the percentage-of-recovery approach is not only permitted, but is the preferred approach to determine attorney's fees." *Savani v. URS Prof'l Sols. LLC*, 121 F. Supp. 3d 564, 568 (D.S.C. 2015); *see also, e.g., Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 575 (E.D. Va. 2016) ("The Fourth Circuit has not decided which of the general approaches to adopt, although the 'current trend

among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases.'") (quoting *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 462 (D. Md. 2014)). Indeed, most federal courts of appeals have endorsed the percentage-of-the-fund method for determining an award of attorneys' fees in common fund cases.[5]

As another court in this district recently concluded, "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." *Mills*, 265 F.R.D. at 260; *see, e.g.*, *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14CV238 (DJN), 2016 WL 1070819, at *5 (E.D. Va. Mar. 15, 2016) ("District Courts within this Circuit have also favored the percentage method."); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-cv-333, 2018 WL 6305785, at *2 (M.D.N.C. Dec. 3, 2018) ("District courts in the Fourth Circuit overwhelmingly prefer the percentage method in common-fund cases . . . ."); *Archbold v. Wells Fargo Bank, N.A.*, No. 3:13-CV-24599, 2015 WL 4276295, at *5 (S.D.W. Va. July 14, 2015) ("[T]here is a clear consensus among the federal and state courts, consistent with Supreme Court precedent, that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery."); *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 758 (S.D. W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases."); *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995) ("Although the Fourth Circuit has

[5] *See, e.g.*, *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019); *Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-50 (9th Cir. 2002); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49-50 (2d Cir. 2000); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268-70 (D.C. Cir. 1993); *Camden I. Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

not yet ruled on this issue, the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases.").[6]

These courts recognize that the percentage-of-the-fund method is "more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases." *Strang*, 890 F. Supp. at 503. It also better aligns the interests of class counsel and class members because it ties the attorneys' fees award to the overall result achieved, rather than hours expended by the attorneys. *Thomas v. FTS USA, LLC*, No. 3:13cv825 (REP), 2017 WL 1148283, at *3 (E.D. Va. Jan. 9, 2017), *report and recommendation adopted*, 2017 WL 1147460 (E.D. Va. Mar. 27, 2017); *see also Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 WL 2285972, at *5 (S.D.W. Va. May 23, 2013) ("The percentage method 'is designed to allow courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.'" (quoting *In re Prudential Ins. Co. Am. Sales Litig.*, 148 F.3d 283, 333 (3d Cir. 1998))).

"Some courts incorporate the lodestar analysis into the percentage method by cross-checking the lodestar calculation against the percentage calculation." *Thomas*, 2017 WL 1148283, at *4 (citing *Jones*, 601 F. Supp. 2d at 759; Manual for Complex Litigation § 14.122 (4th ed. 2004)). The lodestar calculation "adds an extra layer of assurance as to reasonableness by ensuring that 'the fee award is still roughly aligned with the amount of work the attorneys contributed.'" *Id.* (quoting *Jones*, 601 F. Supp. 2d at 759).

In addition, where, as here, important non-monetary relief is part of the relief provided to the class pursuant to the settlement, courts in this district have utilized a "bonus" percentage of the

[6] *See also* Brian T. Fitzpatrick, *The Conservative Case for Class Actions* at 92 n. 38 (2019) ("Today, most judges use the percentage method").

ascertainable value of the fund to compensate counsel for the non-monetary benefits provided. *Hooker v. Sirius XM Radio, Inc.*, No. 4:13-CV-003, 2017 WL 4484258, at *5–6 (E.D. Va. May 11, 2017) ("[T]he Court calculates the appropriate fee award based on 35 percent of the concrete, ascertainable, value of the cash fund. This includes a 10 percent 'bonus' to compensate counsel for the nonmonetary benefits in this case."); *see also, e.g.*, *Poertner v. Gillette Co.*, 618 Fed. Appx. 624, 630 (11th Cir. 2015) (agreeing that "the value of the nonmonetary relief" is "part of the settlement pie," and that an objection regarding the fee was based on a "flawed valuation of the settlement pie" that failed to account for "the substantial nonmonetary benefit"); *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1243-44 (11th Cir. 2011) (finding portion of fee properly allocated compensation for "non-monetary benefits [counsel] achieved for the class—like company-wide policy changes").

Class Counsel's application of the percentage-of-fund method is therefore consistent with the law in this and other circuits. As explained below, the factors courts consider when assessing percentage-of-fund requests demonstrate the reasonableness of Class Counsel's requested fee, which is further confirmed by cross-checking the requested amount against the calculated lodestar.

B. Class Counsel's Fee Request Is Fair and Reasonable Under Fourth Circuit Authority.

"In determining the reasonableness of attorneys' fees, courts look at the following factors: (1) the result obtained for the class; (2) the presence or absence of substantial objections by members of the class to the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by the plaintiffs' counsel; and (7) awards in similar cases." *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 843 (E.D. Va. 2016). Some district courts in this Circuit have applied a slightly different version of this standard, replacing the sixth factor with

public policy considerations. *See, e.g.*, *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 2:14-CV-00361, 2018 WL 2382091, at *4 (E.D. Va. Apr. 18, 2018); *Mills*, 265 F.R.D. at 261 (citing, *inter alia*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000)).[7] Consideration of these factors supports Plaintiffs' request fee of 33.3% of the fund.

1. Class Counsel Obtained an Excellent Result for the Class.

"The first and most important factor for a court to consider when making a fee award is the result achieved." *Genworth*, 210 F. Supp. 3d at 843; *see also Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("[T]he most critical factor is the degree of success obtained."); *McKnight v. Circuit City Stores, Inc.*, 14 F. App'x. 147, 149 (4th Cir. 2001) (same).

Class Counsel's zealous, effective, and efficient prosecution of this case through fact and expert discovery, and full briefing and argument on class certification, *Daubert* motions, and summary judgment, resulted in an excellent result for the Class, and the second largest data breach settlement to date. Settlement Class Members are entitled to benefits that are tailored to the relief

[7] There is some disagreement as to whether to apply these seven factors, which were adopted from the Third Circuit, *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 & n.1 (3d Cir. 2000), or the 12-factor test from the Fifth Circuit adopted in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)). *See Galloway v. Williams*, No. 3:19-CV-470, 2020 WL 7482191, at *5, n. 5 (E.D. Va. Dec. 18, 2020) (Payne, J.); 5 Newberg on Class Actions § 15:82 (5th ed.) ("The Fourth Circuit utilized the Fifth Circuit's *Johnson* factors in a statutory fee-shifting case, so some district courts have utilized those factors in setting a percentage in common fund cases, while other district courts have used the Second Circuit's *Goldberger* factors and/or the Third Circuit's *Gunter* factors."). However, many of the *Johnson/Barber* factors overlap with factors in the Third Circuit test or are "subsumed in the calculation of the hours reasonably expended and the reasonableness of the hourly rate." *Galloway*, 2020 WL 7482191, at *6, *10-11; *see also Genworth*, 210 F. Supp. 3d at 843 (using the seven-factor Third Circuit test in evaluating the reasonableness of the requested fee and incorporating the *Johnson*/*Barber* factors into the lodestar cross-check). Notably, "fee award reasonableness factors 'need not be applied in a formulaic way' because each case is different, 'and in certain cases, one factor may outweigh the rest.'" *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 463 (D. Md. 2014) (citations omitted). Given the overlap in the factors, a consideration of the relevant factors under any standard supports Class Counsel's requested fee.

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. *See* Class Counsel Decl. ¶ 25; Declaration of Craig C. Reilly ("Reilly Decl."), Exhibit 2, at ¶ 20.

Not only does the Settlement permit Class Members to receive a substantial cash payment, but it also eliminates the risk of adverse rulings on class certification, summary judgment, at trial, or on appeal. Balanced against the many significant risks, the settlement value here provides an exceptional result for the Class and supports Class Counsel's request for attorneys' fees. *See* Class Counsel Decl. ¶ 25.

2. To Date No Class Member Has Objected to Class Counsel's Fee Request.

The Court-approved notice informed Settlement Class Members that Co-Lead Counsel would request attorneys' fees not to exceed 35% of the Settlement Fund (as well as reimbursement of litigation expenses, and service awards for the Class Representatives). Doc. 2219-6 at 15, 20, 24, 26. To date, no objections have been submitted to the requested fee,[8] however the deadline for objections is not until July 7, 2022. Doc. 2220 at 12. To the extent such objections are received after the filing of this motion, Plaintiffs will address them in their Final Approval Brief and

[8] On June 14, 2022, a putative class member filed a purported generalized objection to the settlement (*see* Doc. 2228), but because the putative class member opted out of the Settlement Class, the objection is invalid.

Response to Objections, due on August 9, 2022, (Doc. 2220 at 13). *See* Class Counsel Decl. ¶ 26; Reilly Decl. ¶ 21.

3. Class Counsel Are Skilled and Efficient Lawyers.

The quality of the representation is another significant factor supporting Class Counsel's fee request. *See Genworth*, 210 F. Supp. 3d at 844 ("The skill required in complex cases such as this involving massive discovery efforts and complicated issues of fact and law also weighs in favor of supporting the substantial attorneys' fees award in this case."). As reflected by the leadership application process—including some 37 applications for leadership[9] and objections thereto[10]—and this Court's Pretrial Order #3, Appointing Plaintiffs' Lead Counsel, Doc. 210, Class Counsel have substantial experience litigating complex class actions and, specifically, data breach cases.[11] *See* Class Counsel Decl. ¶ 27.

Here, the creation of the $190,000,000 Settlement Fund—the second largest data breach settlement in history—is the simplest reflection of counsel's skill and expertise in the field. *See, e.g.*, *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004) ("the result achieved is the clearest reflection of petitioners' skill and expertise."). Moreover, courts often evaluate the quality of the work performed by plaintiff's counsel in light of the quality of the opposition's representation. *See, e.g.*, *Mills*, 265 F.R.D. at 262 (noting that counsel reached a favorable settlement against "experienced and sophisticated defense attorneys"); *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05cv00187, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007) ("Additional skill is required when the opponent is a sophisticated corporation with sophisticated

[9] *See* Docs. 106–111, 114, 118, 120–126, 129–133, 135–137, 140–142, 144–150, 153–155, 176
[10] Docs. 201–204
[11] *See* Applications of Siegel-Riebel-Yanchunis Slate and exhibits thereto, Docs. 135, 136, and 140.

counsel."). Defendants were represented by highly skilled and experienced litigators from some of the leading defense law firms in the United States—King & Spalding (for Capital One) and Fenwick (for Amazon)—both of which are ranked among the Vault Law 100 for most prestigious law firms and have extensive experience advising corporate defendants in data breach litigation. *See* Class Counsel Decl. ¶ 27; *see also* Reilly Decl. ¶ 22. It was in the face of such skilled and vigorous opposition that Class Counsel obtained the benefits for the Settlement Class that they did. This factor weighs in favor of the requested fee.

4. The Duration and Complexity of This Litigation Supports the Requested Fee.

As explained below in section III.B.III.B.8, the requested 33.3% fee is in line with other awards in this district and Circuit. However, to the extent the Court believes the requested percentage to be above average, courts recognize that "there are good reasons to award higher-than-typical fees when the issues in a case are particularly 'novel and complex.'" *Good v. W. Virginia-Am. Water Co.*, No. 14-1374, 2017 WL 2884535, at *25 (S.D.W. Va. July 6, 2017). As to the complexity of the case, although nearly all class actions involve a high level of risk, expense, and complexity, "[c]onsumer class action litigation" is particularly "complex and difficult to prosecute. . . . Further, data breach litigation involves the application of unsettled law with disparate outcomes across states and circuits." *In re Arby's Rest. Group, Inc. Data Sec. Litig.*, 1:17-CV-1035-WMR, 2019 WL 2720818, at *3 (N.D. Ga. June 6, 2019).

Data breach cases face substantial hurdles in surviving even past the pleading stage. *See, e.g., Hammond v. The Bank of N.Y. Mellon Corp.*, 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting cases). And, as evidenced by a review of the docket here, "[d]ata breach cases in particular present unique challenges with respect to issues like causation, certification, and damages." *In re Citrix Data Breach Litig.*, 19-61350-CIV, 2021 WL 2410651, at *3 (S.D. Fla.

June 11, 2021). Thus, these are "complex case[s] in a risky field of litigation because data breach class actions are uncertain and class certification is rare." *Fulton-Green v. Accolade, Inc.*, CV 18-274, 2019 WL 4677954, at *8 (E.D. Pa. Sept. 24, 2019) (citing *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-1998, 2010 WL 3341200, at *6 (W.D. Ky. Aug. 23, 2010)).

"In evaluating the complexity and duration of the litigation, courts consider not only the time between filing the complaint and reaching settlement, but also the amount of motions practice prior to settlement and the amount and nature of discovery." *Jones*, 601 F. Supp. 2d at 761. As demonstrated above, this case was heavily litigated—likely the most heavily litigated data breach case in history—including scores of depositions, dozens of discovery motions, and millions of pages of document review. Since filing the Representative Complaint (Doc. 332) in March 2020, Class Counsel (1) fully briefed and defeated Defendants' motions to dismiss; (2) completed all fact and expert discovery under an aggressive schedule; (3) litigated numerous discovery and sealing motions before Judge Anderson; (4) fully briefed and argued Plaintiffs' class certification motion and related *Daubert* challenges; (5) fully briefed and argued Defendants' summary judgment motions; and (6) fully briefed and argued merits *Daubert* motions, amongst other things. Likewise, Defendants fervently defended this case. This case's complexity and duration therefore strongly support the reasonableness of Class Counsel's request. *See* Class Counsel Decl. ¶ 28; Reilly Decl. ¶¶ 24-25.

5. Class Counsel Faced the Risk of Nonpayment.

Class Counsel undertook this case on a wholly contingent basis and ran a substantial risk of no recovery whatsoever. The risk of receiving little or no recovery—which was magnified here by the rigorous defense mounted by Capital One and Amazon—is an important factor courts in this Circuit consider when awarding attorneys' fees. *See, e.g.*, *Mills*, 265 F.R.D. at 263 ("[C]ounsel

bore a substantial risk of nonpayment . . . . [t]he outcome of the case was hardly a foregone conclusion, but nonetheless counsel accepted representation of the plaintiff and the class on a contingent fee basis, fronting the costs of litigation." (citation omitted)); *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289, at *6 (M.D.N.C. May 9, 2016) (finding fee award justified where, "Lead Counsel bore the risks involved with surviving dispositive motions, obtaining class certification, proving liability, causation, and damages, prevailing with experts, and litigating through trial and possible appeals" knowing "that the only way [they] would be compensated was to achieve a successful result"). In addition to the risk of non-recovery at trial, "any victory at trial in this case would have to withstand appeals which could reverse or limit any award by a jury." *Genworth*, 210 F. Supp. 3d at 844. In the face of these risks, Class Counsel vigorously represented Plaintiffs and obtained a substantial recovery on behalf of the Class. *See* Class Counsel Decl. ¶ 29.

Additionally, Class Counsel self-funded $2,325,516.11 in total expenses to prosecute the litigation, which would not have been reimbursed absent a successful result. *Id.*; *see also Mills*, 265 F.R.D. at 263 (noting uncertainty of the case outcome, defendants' rigorous defense, and that "Lead Counsel devoted thousands of hours on the case and fronted nearly $3 million in costs in the process" to conclude that factor weighed in favor of awarding the requested fee); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) ("Aside from investing their time, counsel had to front copious sums of money . . . . Thus, the risks that counsel incurred in prosecuting this case were substantial and further support the requested fee award."). The risk of nonpayment weighs heavily in favor of the requested fee award. *See* Reilly Decl. ¶ 25.

6. Class Counsel Devoted Nearly 65,000 Hours Prosecuting this Action.

As detailed above and in their Declaration, Class Counsel devoted considerable time and effort researching, investigating, and prosecuting this case. Class Counsel devoted 64,739.3 hours to prosecuting this case, resulting in a total lodestar of $37,640,583.50. Class Counsel Decl. ¶¶ 30,

34-39 & Ex. C thereto. Class Counsel could have spent those attorney hours litigating other matters, which weighs in favor of awarding the requested fees. *Id.* ¶ 30; *see, e.g.*, *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2019 WL 4674758, at *4 (M.D.N.C. Sept. 25, 2019) (explaining that the "attorneys and staff have worked over 12,500 hours since it began" and "spent over $3 million from their own pockets litigating this case," which "was time and money the attorneys could have directed to other simpler and less risky opportunities" supported the fee request); *Genworth*, 210 F. Supp. 3d at 844-45 (finding that "counsel for plaintiffs devoted an enormous amount of time and effort into this case, totaling more than 66,000 hours and investing more than three million dollars in fees towards consulting experts" to be among the considerations that "support the attorneys' fees award"). The prodigious time and resources Class Counsel committed to this case weigh in favor of the requested fee. *See* Reilly Decl. ¶ 26.

7. Public Policy Considerations Support the Requested Fee.

"[A] central factor in fixing the amount of attorneys' fees is to ensure that competent, experienced counsel will be encouraged to undertake the often risky and arduous task of representing a class . . . ." *Mills*, 265 F.R.D. at 260. In complex cases, fee awards have been enhanced by courts "to provide an incentive for competent lawyers to pursue such actions in the future." *In re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 788 (E.D. Va. 2001). Public policy "generally favors attorneys' fees that will induce attorneys to act and protect individuals who may not be able to act for themselves but also will not create an incentive to bring unmeritorious actions." *Jones*, 601 F. Supp. 2d at 765 (citing *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 142 (S.D.N.Y. 2008); *Microstrategy*, 172 F. Supp. 2d at 789 n.36). "The cost and difficulty [of bringing a meritorious complex class action] naturally stands as a deterrent from doing so, and one object of an award of attorneys' fees should be to counteract this deterrence and incentivize competent attorneys to pursue these cases when necessary." *Mills*, 265

F.R.D. at 263; *see also Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 469 (S.D.W. Va. 2010) ("Attorneys' fee awards must be large enough to ensure the availability of counsel in class actions, where the plaintiffs' individual claims may not be large enough take on individually. The risks of investing time and resources in a class action cannot be discounted."). Public policy considerations support awarding the requested fee. *See* Reilly Decl. ¶ 28.

8. 33.3% of the Settlement Fund Is a Typical and Reasonable Fee Award for Cases Similar to this One.

A fee award of approximately one-third of the Settlement Fund, 33.3%, reflects a real-world arm's length transaction between the Class and Class Counsel and is a generally accepted percentage in the Fourth Circuit, as evinced by recent rulings in this District and Circuit. *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); *Hooker*, 2017 WL 4484258, *5 (awarding fees of 35% of the "concrete, ascertainable, value of the cash 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").[12]

[12] *See also, e.g., 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.*,

Here, the requested fee award is 1) well within the acceptable range of attorneys' fee awards in hotly contested, complex, and expensive litigation such as this, and 2) justified by the significant result obtained for the Class and the risks faced by Class Counsel. *See* Class Counsel Decl. ¶¶ 31-33.Class Counsel's fee request is consistent with awards in similar cases. In particular, the requested award of 33.3% of the common fund "is in-line with those awarded in consumer class actions involving a similar degree of complexity and risk to counsel." *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 482 (D. Md. 2014) (citing *Muhammad*, 2008 WL 5377783, at *8) ("[T]he one-third fee requested by counsel is in line with fee awards in similar common-fund cases heard in West Virginia."); *McDaniels v. Westlake Services, LLC*, Civ. A. No. ELH-11-1837, 2014 WL 556288, at *13 (D. Md. Feb. 7, 2014) (noting that the "the 33 1/3 percent award of the settlement fund requested by Class Counsel in this case is in line with the awards approved by other judges of the United States District Court for the District of Maryland in consumer class actions settled with a common fund.")); *see also, e.g.*, *Adkins v. Midland Credit Mgmt., Inc.*, 5:17-CV-04107, 2022 WL 327739, at *6 (S.D.W. Va. Feb. 3, 2022) ("[T]he one-third fee requested by counsel is very much in line with fee awards in similar common-fund cases.") (citing *Cox v. BB&T*, No. 5:17-cv-01982, 2019 WL 164814, at *5-6 (S.D. W. Va. Jan. 10, 2019); *Dijkstra v. Carenbauer*, 5:11-CV-152, 2015 WL 12750449, at *7 (N.D.W. Va. July 29, 2015); *Archbold v. Wells Fargo Bank, N.A.*, 3:13-CV-24599, 2015 WL 4276295, at *6 (S.D.W. Va. July 14, 2015)).

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*, 2007 WL 119157, at *2 ("In this jurisdiction, contingent fees of one-third . . . are common.").

Additionally, "[t]he percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee which would be negotiated if the lawyer were offering his or her services in the private marketplace." *In re Remeron Direct Purchaser Antitrust Litig.*, No. CIV.03-0085 FSH, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005). "Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation." *Id.*; *see also Montague v. Dixie Nat'l Life Ins. Co.*, No. 3:09-00687-JFA, 2011 WL 3626541, at *3 (D.S.C. Aug. 17, 2011) ("A 33% fee award from the common fund in this case is consistent with what is routinely privately negotiated in contingency fee litigation.").[13] As one sister court recognized, "any discussion of percentage awards should acknowledge the age-old assumption that a lawyer receives a third of his client's recovery under most contingency agreements." *Thomas*, 2017 WL 1148283, at *5. Class Counsel regularly negotiates contingency fee arrangements with both individuals and sophisticated businesses with fees that amount to one-third the recovery, and in high-risk cases often substantially more. Thus, consideration of real-world contingency arrangements and the actual contingency fee arrangements used by Class Counsel supports the requested award of 33.3% of the Settlement Fund. *See* Class Counsel Decl. ¶ 32.

Moreover, courts have determined that a higher percentage rate is appropriate where discovery has been completed and the case is ready for trial. *See Trombley v. Bank of America Corp.*, No. 08-cv-456-JD, 2012 WL 1599041, at *3 n.3 (D.R.I. May 4, 2012) ("Higher percentage rates for attorneys' fees generally are reserved for cases that settle after the completion of formal

[13] A one-third fee is a standard percentage in many fee agreements, including large, complex non-class cases. *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 Fordham L. Rev. 247, 248 (1996) (noting that "standard contingency fees" are "usually thirty-three percent to forty percent of gross recoveries"); *see also Blum*, 465 U.S. at 903 (Brennan, J., concurring) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.").

discovery when the case is close to trial.").[14] Class Counsel achieved the settlement *after* the close of discovery, and *after* full briefing and argument on class certification, summary judgment, and *Daubert*. All that remained was trial.

Finally, the nonmonetary, business practice changes are an important part of the settlement and should also be considered in setting the fee, whether as a "bonus" percentage or further supporting the customary request here as reasonable. *Hooker*, 2017 WL 4484258, at *5–6; *Poertner v. Gillette Co.*, 618 Fed. Appx. at 630.

Accordingly, the 33.3% award requested by Class Counsel should be granted.

C. A Cross-Check of Class Counsel's Lodestar Confirms the Reasonableness of the Fee Request.

Courts often supplement their analysis of the percentage-of-fund method with the lodestar cross-check. "The purpose of a lodestar cross-check is to determine whether a proposed fee award is excessive relative to the hours reportedly worked by counsel, or whether the fee is within some reasonable multiplier of the lodestar." *Boyd*, 299 F.R.D. at 467. "A lodestar cross-check first computes the plaintiffs' attorneys' reasonable hourly rate for the litigation and multiplies that rate by the number of hours dedicated to the case," and "then compares that figure with the attorneys' fees award, typically resulting in a positive multiplier." *Genworth*, 210 F. Supp. 3d at 845. When using the lodestar as a cross-check, courts "take a somewhat truncated approach to the lodestar analysis" and "generally do not apply the same scrutiny in a lodestar cross-check as they do when using the lodestar method to calculate the fee." *Thomas*, 2017 WL 1148283, at *6. Thus, when "using the lodestar method as a cross-check," the court "need not apply the 'exhaustive scrutiny'

[14] *Cf. In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1113 (D. Kan. 2018) (Awarding 1/3 of a $1.5 billion fund, holding "[t]he Court finds that a one-third fee is customary in contingent-fee cases (factor 5), or is even on the low side, as that figure is often higher in complex cases or cases that proceed to trial.").

normally required by that method," "[i]nstead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case . . . ." *Jones v. Dominion Res. Services, Inc.*, 601 F. Supp. 2d 756, 765-66 (S.D.W. Va. 2009) (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000)).

A lodestar cross-check in this case supports the requested fee. Despite the risks, complexities, and challenges posed by this litigation, Class Counsel invested 64,739.3 hours of attorney and other professional time, and a lodestar of $37,640,583.50 on behalf of the Class from case inception through May 31, 2022. Class Counsel Decl. ¶¶ 34, 38, & Ex. C thereto. The work by Class Counsel was non-duplicative and performed at the direction of Plaintiffs' Co-Lead Counsel, who also audited and confirmed the validity of Class Counsels' time and expense submissions and removed unapproved hours (and hours inconsistent with the Lead Counsel's billing protocol) and expenses where appropriate. *Id*. at ¶¶ 35-37 & Ex. B thereto; *see also* Reilly Decl. ¶ 32.

The hourly rates charged by Class Counsel are reasonable, based on each person's position and experience level (and Plaintiffs' Lead Counsel capped the hourly rate of attorneys conducting first-level document review at $377), and have been approved by multiple courts in similar consumer class actions. *See* Class Counsel Decl. ¶ 39.[15] These rates are comparable to the rates charged by other law firms with similar experience, expertise, and reputation, for similar services in the nation's leading legal markets. *See, e.g.*, *Seaman*, 2019 WL 4674758, at *5 (listing comparable rates from national class action firm). Moreover, as set out in the attached declaration

[15] Co-Lead Counsel elected to use current rates in accord with Fourth Circuit guidance deeming it appropriate to do so to account for the risk and delay in payment. *See Daly v. Hill*, 790 F.2d 1071, 1081 (4th Cir. 1986); *Reaching Hearts Int'l, Inc. v. Prince George's Cty.*, 478 F. App'x 54, 60 (4th Cir. 2012).

of attorney Craig Reilly, Class Counsel's rates are reasonable and within the range of reasonableness for Northern Virginia, especially for cases of this scope and complexity. *See* Reilly Decl. ¶¶ 33, 8-12.[16]

Considering Class Counsel's lodestar of $37,640,583.50, 33.3% of the Settlement Fund would result in a fee award of $63,270,000, which would be a multiplier of 1.68. *See* Class Counsel Decl. ¶ 41. Such a multiplier is reasonable, well within accepted ranges for class actions generally, and is consistent with fee rulings in similar cases within the Fourth Circuit. *See* Reilly Decl. ¶¶ 51, 53. Indeed, "[d]istrict courts within the Fourth Circuit have regularly approved attorneys' fees awards with 2–3 times lodestar multipliers." *Genworth*, 210 F. Supp. 3d at 845; *see, e.g.*, *Titanium Dioxide*, 2013 WL 6577029 (court awarded attorneys' fees of one-third of settlement fund, which resulted in a multiplier of 2.39); *Microstrategy*, 172 F. Supp. 2d at 790 (approving a 2.6 times lodestar multiplier); *Deloach v. Philip Morris Cos.*, No. 1:00CV01235, 2003 WL 23094907, at *11 (M.D.N.C. Dec. 19, 2003) (approving a 4.45 times lodestar multiplier); *Seaman*, 2019 WL 4674758, at *6 (approving a 2.89 times lodestar multiplier); *see also Singleton*, 976 F. Supp. 2d at 689 ("Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate

[16] To whatever extent the court finds Class Counsel's rates to be higher than the prevailing rates in Alexandria, Virginia, in cases involving "complex issues requiring specialized experience"—such as this one—"it is reasonable to look beyond local rates in calculating the reasonable rate for a lodestar comparison." *Seaman*, 2019 WL 4674758, at *5; *see also Sims v. BB&T Corp.*, 15-cv-732, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019) (stating that "a national market rate is appropriate for matters involving complex issues requiring specialized expertise"); *Kruger v. Novant Health, Inc.*, 1:14CV208, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016) ("This court finds the relevant market rate for cases such as the present case to be a nationwide market rate."). Class Counsel's hourly rates reflect their national class action practices specializing in complex, high-risk class action and, particularly large data breach cases, and are the rates they customarily charge in these types of cases. *See Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 689 n.12 (D. Md. 2013) (finding hourly rates to be reasonable because, "while somewhat high for this district, [they] are within a reasonable range for firms with national class action practices"). Class Counsel's rates also likely compare favorably with those of Defendant's lead counsel, global law firms King & Spalding and Fenwick, based in Atlanta and Silicon Valley respectively.

a reasonable attorneys' fee."). Further, the lodestar figure above does not include the substantial amount of time that Class Counsel will be required to devote to achieving final approval, responding to any objections, overseeing the claims administration process and the distribution of settlement funds to the Class, and litigating any appeals. These additional hours, for which Class Counsel will not receive any additional compensation from the Settlement Fund, effectively reduce the multiplier, and should be considered in evaluating the reasonableness of the fee request. *See* Class Counsel Decl. ¶ 41.

Consideration of these factors therefore confirms the reasonableness of the requested fee.

IV. CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSES IS REASONABLE.

Class Counsel also request reimbursement of reasonable and necessary litigation costs and expenses in the amount of $2,325,516.11. "There is no doubt that costs, if reasonable in nature and amount, may appropriately be reimbursed from the common fund." *Microstrategy*, 172 F. Supp. 2d at 791. "It is well-established that plaintiffs who are entitled to recover attorneys' fees are also entitled to recover reasonable litigation-related expenses as part of their overall award." *Singleton*, 976 F. Supp. 2d at 689. Such costs and expenses may include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (internal quotations omitted).

Class Counsel's costs and expenses are summarized in the supporting declaration and are the same costs that Counsel would normally charge a fee-paying client. *See* Class Counsel Decl. ¶¶ 42-43 & Ex. C thereto. The vast majority of these costs and expenses relate to expert witnesses, depositions, and discovery-related matters. Accordingly, Class Counsel's request for the

reimbursement of $2,325,516.11 in expenses from the Settlement Fund is reasonable and should be approved.

V. THE REQUESTED SERVICE AWARDS ARE REASONABLE.

Plaintiffs also request approval for a $5,000 service award for each of the 8 Settlement Class Representatives and the 9 other MDL Plaintiffs who were deposed by Capital One. "At the end of a successful class action, it is common for trial courts to compensate class representatives for the time and effort they invested to benefit the class." *Reynolds v. Fidelity Invs. Institutional Operations Co.*, 1:18-CV-423, 2020 WL 92092, at *4 (M.D.N.C. Jan. 8, 2020). 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." *Brown.*, 318 F.R.D. at 578 (quoting *Manuel*, 2016 WL 1070819, at *6). 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*, 2016 WL 1070819, at *6 (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)).

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) (approving a $5,000 service award to each named plaintiff); *Henderson v. Verifications Inc.*, No. 3:11–CV–514 (E.D. Va. Mar. 13, 2013) (approving a $5,000 service award to named plaintiff); *Pitt v. Kmart Corp.*, No. 3:11–CV–697 (E.D. Va. May 24, 2013) (approving a $5,000 service award to the class representative); *Conley v. First Tennessee Bank*, No. 1:10–CV–1247 (E.D. Va. Aug. 18, 2011) (awarding a $5,000 service award to each named plaintiff); *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)).

Here, the 8 Settlement Class Representatives and the 9 other MDL Plaintiffs who were deposed by Capital One have fulfilled their duties to the class, making the requested service awards appropriate. See Class Counsel Decl. ¶ 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 the extensive Fact Sheets described above, and had full day depositions taken. *Id.* The 8 Settlement Class Representatives also considered and approved the terms of the proposed settlement agreement 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. CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that the Court: (1) award Class Counsel 33.3% of the Settlement Fund as attorneys' fees; (2) order reimbursement of litigation expenses incurred by Class Counsel in the amount of $2,325,516.11; and (3) award each of the 8 Settlement Class Representatives and the 9 other MDL Plaintiffs a service award of $5,000.

Dated: June 16, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 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.

/s/ Steven T. Webster
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