

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: CAPITAL ONE CONSUMER)
DATA SECURITY BREACH LITIGATION) MDL No. 1:19-md-2915 (AJT/JFA)
_____)

This Document Relates to the Consumer Cases

ORDER

This matter comes before the Court on Plaintiffs’ Motion for an Award of Attorneys’ Fees, Costs, and Expenses and for Class Representative Service Awards (the “Motion”) [Doc. No. 2230]. Capital One (“Defendant”) takes no position on the Motion, other than having agreed as part of the Class Action Settlement Agreement that the fee amount requested and Service Awards are within the range contemplated. [Doc. No. 2236]. After detailed consideration of the applicable factors, and for the reason stated below, the Court will award attorneys’ fees in the amount of twenty-eight (28) percent of the \$190 million Settlement Fund, reasonable costs and expenses in the amount of \$2,345,821.98,¹ and seventeen service awards of \$5,000 to each of the eight Settlement Class Representatives and the nine other MDL Plaintiffs who were deposited by Capital One.²

I. BACKGROUND

This Court has previously summarized the events giving rise to this litigation, including the procedural history and appointment of Class Counsel, in detail. *See* [Doc. No. 2263] at 1-6. On September 13, 2022, this Court granted Final Approval of the Settlement. *Id* at 23-24. The Settlement requires Capital One to pay \$190 million into the Settlement Fund for class benefits, service awards,

¹ Plaintiffs originally requested \$2,325,516.11 in litigation costs and expenses. However, Class Counsel provided an updated figure in their August 29, 2022 filing to reflect additional costs and expenses incurred since the end of May 2022. [Doc. No. 2251-4] at ¶ 3.

² All capitalized terms not otherwise defined have the meanings set forth in the Settlement Agreement. [Doc. No. 2219-1] (“Settlement”).

administration costs, fees, and expenses, without any possibility that the fund will revert to Capital One. [Doc. No. 2219-1] at § 3.1-3.2. Under the Settlement, class members are entitled to reimbursements of up to \$25,000 for out-of-pocket losses, compensation for lost time, identity defense services, and fraud resolution and identity restoration support. [Doc. No. 2219] at 10-12. Additionally, the Settlement requires Capital One to implement business practice changes to improve its cybersecurity. *Id.* at 13.

In pursuing this complex, years-long litigation, Class Counsel engaged in, *inter alia*, extensive discovery—including reviewing nearly three million pages of documents and taking nearly fifty depositions—and significant motion practice—including for class certification, summary judgment, and expert exclusion. In total, Class Counsel devoted more than 65,000 hours to what Plaintiffs call “almost undoubtedly, the most heavily litigated data breach case in history.” [Doc. No. 2231] at 1.

II. LEGAL STANDARD

Attorneys’ fees in class actions may be calculated using either the percentage-of-the-fund method or the lodestar method, and it is up to the Court to determine which method to use. *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 575 (E.D. Va. 2016). The former awards a percentage of the funds secured for the class,³ while the latter awards attorneys’ fees based on the value of plaintiffs’ counsel’s billable time. *Id.* The Fourth Circuit has not adopted one method over another, but the percentage-of-the-fund method is more frequently applied in common fund cases. *Id.* Most federal courts apply this approach in part because it encourages experienced counsel to pursue meritorious claims and incentivizes results and efficiency. *See, e.g., In re The Mills Corp. Sec. Litig.*, 265 F.R.D.

³ Although the total funds secured for the class (\$190 million) do not reflect the value associated with the injunctive relief obtained against Capital One, which provides some benefit to consumers, the Court has not attributed any value beyond the value of the common fund in determining Class Counsel’s fee award. *See Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) (“[O]nly in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees.”).

246, 260-61 (E.D. Va. 2009). This Court finds the percentage-of-the-fund method to be most appropriate but will also follow the approach of other federal courts and use the lodestar method as a cross-check. *See, e.g., Thomas v. FTS USA, LLC*, No. 3:13-cv-825, 2017 WL 1148283, at *4 (E.D. Va. Jan. 9, 2017).

III. ANALYSIS

A. Percentage-of-the-Fund Calculation

Courts examine several factors in evaluating the reasonableness of attorneys' fees in the percentage-of-the-fund context: "(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 plaintiffs' counsel; and (7) awards in similar cases." *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 843 (E.D. Va. 2016) (citation omitted). While some courts consider public policy considerations in lieu of the sixth factor, this Court will add it as an eighth factor. *See, e.g., In re Celebrex (Celecoxib) Antitrust Litig.*, No. 2:14-cv-361, 2018 WL 2382091, at *4 (E.D. Va. Apr. 18, 2018); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. at 261.

Factor 1, Results for the Class: This Court previously commended Class and Defense Counsel at the September 8, 2022 Final Approval Hearing for the "exceptional outcome for all the parties given the difficult legal issues," calling it an "outstanding result" attributed "in no small measure, to counsel, counsel's efforts, and . . . the level of competence and professionalism that they've brought to every aspect of this case." [Doc. No. 2261] at 30:19-31:3. The Court stands by that statement. Class Counsel effectively and efficiently pursued the case, resulting in purportedly the second largest data breach settlement to date, in addition to the injunctive relief. *See* [Doc. No. 2231] at 15-16. This factor weighs heavily in support of a significant fee award to Class Counsel.

Factor 2, Substantial Objections to Fees: Only four class members, or just 0.000004 percent of the class, submitted substantive objections. [Doc. No. 2251] at 1. The Court previously examined and overruled those objections. *See* [Doc. No. 2263] at 13-18. The small number of objections, given the Notice Plan reached approximately 96 percent of the Settlement Class, reflects favorably upon Class Counsel. *See* [Doc. No. 2251-1] at ¶ 40.

Factor 3, Attorneys' Skill and Efficiency: Class Counsel were carefully selected for their skill and experience in a process that featured more than three dozen applications for class leadership. *See* [Doc. No. 2231] at 17, n.9. The performance of counsel and the strong result for class members demonstrates Class Counsel's skill and efficiency and validates the Court's selection.

Factor 4, Litigation's Complexity and Duration: As the more than 2,200 docket entries in the case reflect, this litigation spanned several years and presented complex legal issues related to causation, certification, and damages. *Cf. In re Citrix Data Breach Litig.*, No. 19-61350-CIV, 2021 WL 2410651, at *3 (S.D. Fla. June 11, 2021) (noting challenging aspects of data breach litigation). Here, Class Counsel has, *inter alia*, defeated Capital One's motion to dismiss; completed discovery and litigated related issues; and briefed and argued class certification, *Daubert* challenges, and summary judgment motions. Accordingly, this factor reflects well upon Class Counsel.

Factor 5, Risk of Nonpayment: Data breaches are a "risky field of litigation" because they "are uncertain and class certification is rare." *Fulton-Green v. Accolade, Inc.*, No. 18-274, 2019 WL 4677954, at *8 (E.D. Pa. Sept. 24, 2019). Class Counsel's representation was on a contingency fee basis, and after spending more than \$2.3 million dollars out-of-pocket, [Doc. No. 2231] at 20, Class Counsel faced a substantial risk of not just nonpayment, but loss on the merits and a financial loss. This factor weighs in favor of a substantial fee award.

Factor 6, Time Devoted by Plaintiffs' Counsel: Class Counsel dedicated a significant amount of time to the case—over 65,000 hours, equating to nearly 7.5 years. [Doc. No. 2251-4] at ¶ 3. This

supports a significant fee award.

Factor 7, Awards in Similar Cases: Without diminishing Class Counsel’s performance, the most challenging issue for the Court is whether a 33.3 percent fee award can be justified given the size of the common fund and the awards in other data breach cases. In that regard, the Court has reviewed the twenty-two cases Class Counsel has cited in support of this factor. *See* [Doc. No. 2231] at 22-25 (Sec. III(B)(8)). Of the twenty-one cases cited with settlement funds,⁴ the size of the funds in nineteen of the cases are less than half of the amount of the settlement fund in the instant case,⁵ and twelve of those cases contain settlement funds of five million dollars or less. Moreover, none of the cited cases pertain to data breaches. The one cited case with a comparable settlement fund size, *In re Titanium Dioxide Antitrust Litig.*, No. 10-cv-318, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (\$163.5 million fund), does award one-third of the fund but it involved an alleged price-fixing conspiracy in violation of the Sherman Act. *Id.*; *In re Titanium Dioxide Antitrust Litig.*, 2012 WL 5947283, at *1 (D. Md. Nov. 27, 2012). The only cited case with a larger fund, *In re Sygenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094 (D. Kan. 2018), *appeal docketed*, No. 21-3021 (10th Cir.

⁴ One cited case, *Blum v. Stenson*, 465 U.S. 886 (1984), a federal civil rights action, did not have a settlement fund involving attorneys’ fees.

⁵ In order of their citation in Plaintiffs’ Memorandum accompanying their Motion, [Doc. No. 2231], the nineteen cases are: *In re Celebrex (Celecoxib) Antitrust Litig.*, 2018 WL 2382091, at *1 (\$94 million fund); *Hatzev v. Divurgent, LLC*, No. 2:18-cv-191, 2018 WL 5624300, at *1 (E.D. Va. Oct. 9, 2018) (\$2.45 million fund); *Hooker v. Sirius XM Radio, Inc.*, No. 4:13-cv-003, 2017 WL 4484258, at *1 (E.D. Va. May 11, 2017) (\$35 million fund); *In re Star Sci., Inc. Sec. Litig.*, No. 3:13-cv-183, 2015 WL 13821326, at *1 (E.D. Va. June 26, 2015) (\$5.9 million fund); *Sanchez v. Lasership, Inc.*, No. 1:12-cv-246, 2014 WL 12780145, at *1 (E.D. Va. Aug. 8, 2014) (\$800,000 fund); *In re: Allura Fiber Cement Siding Litig.*, No. 2:19-mn-02886, 2021 WL 2043531, at *1 (D.S.C. May 21, 2021) (\$12.5 million fund); *Seaman v. Duke U.*, No. 1:15-cv-462, 2019 WL 4674758, at *1 (M.D.N.C. Sept. 25, 2019) (\$54.5 million fund); *Muhammad v. Nat’l City Mortg., Inc.*, No. 2:07-0423, 2008 WL 5377783, at *2 (S.D.W. Va. Dec. 19, 2008) (\$700,000 fund); *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05-cv-187, 2007 WL 119157, at *1 (M.D.N.C. Jan. 10, 2007) (\$4.75 million fund); *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 476 (D. Md. 2014) (\$3.05 million fund); *McDaniels v. Westlake Services, LLC*, No. ELH-11-1837, 2014 WL 556288, at *5 (D. Md. Feb. 7, 2014) (\$520,000 fund); *Adkins v. Midland Credit Mgmt., Inc.*, No. 5:17-cv-04107, 2022 WL 327739, at *7 (S.D.W. Va. Feb. 3, 2022) (\$995,000 fund); *Dijkstra v. Carenbauer*, No. 5:11-cv-152, 2015 WL 12750449, at *7 (N.D.W. Va. July 29, 2015) (~\$2.66 million fund); *Archbold v. Wells Fargo Bank, N.A.*, No. 3:13-cv-24599, 2015 WL 4276295, at *7 (S.D. W. Va. July 14, 2015) (\$555,500 fund); *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ.03-0085, 2005 WL 3008808, at *12 (D.N.J. Nov. 9, 2005) (\$75 million fund); *Montague v. Dixie Nat’l Life Ins. Co.*, No. 3:09-00687, 2011 WL 3626541, at *1 (D.S.C. Aug. 17, 2011) (~\$3.36 million fund); *Thomas*, 2017 WL 1148283, at *7 (\$1.3 million fund); *Trombley v. Bank of America Corp.*, No. 08-cv-456, 2012 WL 1599041, at *2 (D.R.I. May 4, 2012) (\$5 million proposed settlement fund, but denying motions, including for award of fees, without prejudice); *Poertner v. Gillette Co.*, 618 Fed. App’x. 624, 626 (11th Cir. 2015) (\$50 million “somewhat illusory” settlement fund valuation).

Feb. 5, 2021), is also not a data breach case but does provide a one-third fee award of a \$1.51 billion fund. 357 F. Supp. 3d at 1110. But there, class counsel billed 1.2 million hours, equating to an award equivalent of \$419 per hour billed. *Id.* at 1112. Here, Class Counsel’s 65,409 hours equates to \$967 per hour billed based on the requested fee award. And a 28 percent fee award would result in a rate of \$813 per hour billed—nearly double the rate in *In re Sygenta*.

The Court has also considered three data breach cases involving “mega-settlements,”⁶ all of which award fees at a lower percentage of the settlement fund than Class Counsel requests. Table 1 compares the outcomes of those three “mega settlement” data breach class actions and this case with fees at both the 33.3 and 28 percent levels.

Table 1⁷

	<i>In re Yahoo! Inc.</i> ⁸	<i>In re Equifax Inc.</i> ⁹	<i>In re Anthem, Inc.</i> ¹⁰	Instant Case at 33.3% award	Instant Case at 28% award
Fund Size	\$117,000,000	\$380,500,000	\$115,000,000	\$190,000,000	\$190,000,000
Award (\$)	\$22,763,643	\$77,500,000	\$31,050,000	\$63,270,000	\$53,200,000
Award (%)	19.46%	20.36%	27.00%	33.30%	28.00%

⁶ The Court also identified other data breach cases with significantly smaller settlement funds and/or fewer hours billed. *See, e.g., Ne. Eng’rs Fed. Credit Union v. Home Depot, Inc.*, No. 20-10667, 2022 WL 40210, at *1-3 (11th Cir. Jan. 5, 2022) (reversing the district court’s grant of 33 percent of the estimated \$42.5 million common fund and instead awarding the lodestar of \$11.733 million, which amounted to approximately 27.6 percent); *In re Wawa, Inc. Data Sec. Litig.*, No. 19-6019, 2022 WL 1173179, at *2 (E.D. Pa. Apr. 20, 2022) (~\$3 million in fees to be paid separately from \$9 million class fund); *Pfeiffer v. RadNet, Inc.*, No. 2:20-cv-9553, 2022 WL 2189533, at *2-3 (C.D. Cal. Feb. 15, 2022) (awarding 25 percent of a \$2.6 million fund; class counsel billed 1,400 hours); *In re: Arby’s Rest. Grp., Inc. Data Sec. Litig.*, No. 1:17-cv-1035, 2019 WL 2720818, at *2-4 (N.D. Ga. June 6, 2019) (awarding 29.6 percent of the roughly \$3.3 million maximum potential value of the settlement); *In re Heartland Payment Sys., Inc. Cust. Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1080, 1082 (S.D. Tex. 2012) (awarding 20 percent of ~\$3 million settlement value; class counsel billed 1,960 hours).

⁷ Figures are rounded to the nearest whole number, except for the percentages and lodestar multipliers, which are rounded to the nearest hundredth.

⁸ *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-md-2752, 2020 WL 4212811, at *37-38 (N.D. Cal. July 22, 2020).

⁹ *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-2800, 2020 WL 256132 (N.D. Ga. Mar. 17, 2020) *aff’d* as to attorneys’ fees, 999 F.3d 1247 (11th Cir. 2021).

¹⁰ *In re Anthem, Inc. Data Breach Litig.*, No. 15-md-02617, 2018 WL 3960068, at *3, 28 (N.D. Cal. Aug. 17, 2018). Notably, after carefully scrutinizing class counsel’s hours billed, the court in *In re Anthem, Inc.* used modified figures for the lodestar calculations. Table 1 uses the court’s adjusted figures, not those that class counsel submitted.

Lodestar	\$19,424,791	\$29,584,135 (includes estimated future costs)	\$31,027,079	\$38,163,226	\$38,163,226
Lodestar Multiplier	1.15	2.62	1.00	1.66	1.39
Hours Billed	40,047	43,591 (includes estimated future hours)	68,637	65,409	65,409
Award / Hours	\$568	\$1,778	\$452	\$967	\$813
Total Award Above Lodestar	\$3,338,852	\$47,915,865	\$22,921	\$25,106,774	\$15,036,774

As Table 1 illustrates, the requested fee award as a percentage of the settlement fund is greater here than in the other three cases. Further, the lodestar multiplier, rate per hour billed based on the total award, and the award above the lodestar are greater in this case (at either the requested or 28 percent fee award) than in two of the other three cases.¹¹ Conversely, those same metrics show a more favorable award in *In re Equifax*. In addition, both the requested fee award and a 28 percent award here would be greater, as a percentage of the fund, than in all three like cases, and in two of the three cases, a 28 percent award results in a higher recovery by any of the listed measures. Accordingly, this factor suggests that a 28 percent fee award is either in line with, or by some metrics exceeds, awards in similar cases.

Factor 8, Public Policy Considerations: Public policy counsels in favor of a significant fee award. The class action device, when not abused, serves an important public interest in securing remedies for consumers who, for economic and practical reasons, would be unable to recover on an

¹¹ Notably, those two cases, *In re Yahoo! Inc.* and *In re Anthem, Inc.*, were decided by the same judge.

individual basis. Here, suits by individual consumers against a large corporation like Capital One for a data breach would be, at best, problematic, as the cost to litigate would quickly outpace any possible recovery. But even if a claim were to result in recovery for discrete plaintiffs, the overwhelming majority of the roughly 98 million class members here would fail to receive any relief. Accordingly, this class action serves the public interest. Moreover, law firms can only be expected to take on consumer class actions on a contingent basis if there is a significant upside. Therefore, public policy favors a significant award of attorneys' fees above what Class Counsel would have charged on an hourly fee basis.

On balance, seven of the eight factors weigh in favor of a significant fee award above the lodestar amount. As to the other factor, it appears that no court has awarded one-third of a nine-figure settlement fund in a data breach class action, and instead a slightly reduced fee award would still promote the other seven factors while being more comparable—but still largely above—awards in like cases.

B. Lodestar Cross-Check

Courts have often performed a lodestar cross-check to ensure the fee award is reasonable. *See, e.g., Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 467 (D. Md. 2014). To perform this cross-check, the Court will multiply Class Counsel's hours by a reasonable hourly rate, and then identify the multiplier that equates to a particular fee award. *Id.* Here, Class Counsel most recently accounted for 65,409 hours, resulting in a lodestar of \$38,163,226, which amounts to an average hourly rate of \$583.46, which the Court finds reasonable.¹² [Doc. No. 2251-4] at 5. Accordingly, the lodestar multiplier for Class Counsel's requested 33.3 percent fee award is 1.66. The Court has

¹² When the lodestar method is used only as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 688 (D. Md. 2013) (citation and quotations omitted). Nevertheless, the Court has considered the basis upon which the asserted hours have been claimed and Class Counsel's declaration concerning the process used to account for and list the asserted number of hours.

considered those cases that Plaintiffs cite for the proposition that district courts within this Circuit have awarded a lodestar multiplier of two to three times the lodestar amount. *See* [Doc. No. 2231] at 27. Notably, the lodestar multiplier for a 28 percent award is 1.39.

Ultimately, the lodestar cross-check reveals that a 28 percent award would not be excessively high. *Cf. In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) (“The lodestar cross-check serves the purpose of alerting the trial judge [] when the multiplier is too great.”).

C. Costs

Class Counsel have requested \$2,345,821.98 in reasonable and necessary litigation costs and expenses. [Doc. No. 2251] at 18. Such costs and expenses are reimbursable from settlement funds. *In re Microstrategy, Inc.*, 172 F. Supp. 2d at 791. Class Counsel has accounted for the costs and expenses, [Doc. No. 2251-4] at 6, which this Court finds reasonable and necessary.

D. Service Awards

Plaintiffs request \$5,000 service awards for eight Settlement Class Representatives and nine other MDL Plaintiffs who were deposed by Capital One. Service awards within this range (both above and below) are regularly awarded in this District where they compensate class representatives for their work, sacrifices, and time. *Brown*, 318 F.R.D. at 578-79 (collecting cases). Here, the aforementioned plaintiffs, *inter alia*, assisted Class Counsel with investigations and numerous discovery requests, participated in full-day depositions, and reviewed and approved the Settlement Agreement. Accordingly, this Court finds service awards of \$5,000 to each of the seventeen plaintiffs to be reasonable.

IV. CONCLUSION

After carefully considering Plaintiffs’ Motion, memoranda, and oral argument, this Court concludes an attorneys’ fee award of \$53,200,000, or twenty-eight (28) percent of the settlement fund, is reasonable and appropriate in this case.

Accordingly, it is hereby

ORDERED that Plaintiffs' Motion for an Award of Attorneys' Fees, Costs, and Expenses and for Class Representative Service Awards [Doc. No. 2230] be, and the same hereby is, **GRANTED** to the extent that Class Counsel receive from the Settlement Fund reasonable attorneys' fees in the amount of twenty-eight (28) percent of the value of the Settlement Fund, or \$53,200,000; and it is further

ORDERED that Class Counsel receive from the Settlement Fund reasonable litigation costs and expenses in the total amount of \$2,345,821.98; and it is further

ORDERED that each of the seventeen plaintiffs who were deposed in this litigation receive a \$5,000 Service Award from the Settlement Fund; and it is further

ORDERED that the Clerk enter final judgment as to the contents of this Order, the Court finding, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no reason for delay.

The Clerk is directed to forward copies of this Order to all counsel of record.

Alexandria, Virginia
November 17, 2022



Anthony J. Trenga
Senior U.S. District Judge