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

MAGDALYNE HILLIARD, *et al.* Plaintiffs, v. DOMINION DENTAL USA, INC., *et al.,* Defendants.	Civil Action No. 1:19-cv-01050-LMB-MSN

PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS, EXPENSES, AND FOR PLAINTIFF SERVICE AWARDS

INTRODUCTION

After nearly two years of contested litigation and on the eve of appellate argument, Plaintiffs and Class Counsel negotiated a settlement that provides meaningful relief to class members and constitutes an outstanding resolution of this data breach class action litigation. The settlement makes available $2 million in direct monetary benefits to class members who suffered losses arising from the data breach and provides additional remedial and injunctive relief, valued at $2,679,500, in the form of business practice commitments related to Defendants' IT security practices that will protect class members and other policyholders in the future. The settlement also provides that Defendants will pay separately the notice and administration costs, exceeding $1 million, as well as service awards, and reasonable attorney's fees and costs, as approved by the Court. The payment of reasonable attorneys' fees and costs is separate from and will not diminish class recovery.

Class Counsel and Plaintiffs secured this relief for the class after engaging in years of hard-fought litigation, including substantial motion practice, discovery, and an appeal to the Fourth Circuit. To compensate Class Counsel and the Plaintiffs for their efforts, Class Counsel request that the Court approve service awards to each Plaintiff in the amount of $1,500, attorneys' fees in the amount of $1,000,000, and expenses in the amount of $65,627.38, in accordance with the terms of the Settlement Agreement.

BACKGROUND

Litigating this case to a successful resolution required substantial commitments of time and resources from Class Counsel and other Plaintiffs' counsel. In this memorandum, Class Counsel summarize their work throughout this case, their efforts to bring about the proposed settlement, the additional work they have performed since the Court granted preliminary

approval and directed notice of the proposed settlement, and the additional time they anticipate spending through the process of settlement approval and claims administration.

A. The Data Breach and Appointment of Interim Class Counsel

On June 21, 2019, Dominion National announced that it was the subject of a data breach that potentially exposed the sensitive personal information of nearly three million individuals, including current and former Dominion National members, and current and former members of other plans for which Dominion National provides administrative services. Dkt. 89, ¶¶ 58–60. The compromised information includes names, addresses, email addresses, dates of birth, Social Security numbers, taxpayer identification numbers, member ID numbers, group numbers, subscriber numbers, which constitutes protected health information ("PHI"), and for members who enrolled online through Dominion National's website, bank account and routing numbers (collectively "Personal Information"). *Id*. at ¶¶ 60, 63.

Following this announcement, multiple plaintiffs filed actions in this Court against Defendants related to the data breach. The first complaint was filed by Plaintiffs Sayed Abubaker, Magdalyne Hilliard, Daniel Cho and Joseph Cardiff on August 9, 2019. Dkt. 1. Matthew Slate filed a complaint on August 14, 2019 (Case No. 1:19-cv-01063-LMB-MSN) and Mark Bradley filed a complaint on September 17, 2019 (Case No. 1:19-cv-01199-LMB-MSN). On October 2, 2019, the Parties filed a stipulation to consolidate all three actions under this case number. Dkt. 38. Shortly thereafter, counsel for each of these Plaintiffs coordinated and agreed to a leadership structure and Plaintiff's Steering Committee, thereby avoiding a time-consuming leadership battle. Declaration of Kim D. Stephens ("Stephens Decl."), ¶ 5. On November 1, 2019, the Court appointed Kim D. Stephens and Barrett J. Vahle as interim co-lead counsel, Bernard J. DiMuro as Plaintiffs' liaison counsel, and Swathi Bojedla, Thiago M. Coelho,

Andrew N. Friedman, Mark S. Goldman, and Matthew D. Schultz to the Plaintiffs' Steering Committee ("PSC"). Dkt. 75. Class Counsel researched, prepared, and filed an 86-page Consolidated Complaint on November 22, 2019. Dkt. 89.

Following the leadership appointment, Class Counsel spearheaded collaborative efforts to prepare a Consolidated Complaint, begin discovery, and assigned subsequent tasks to PSC members. Stephens Decl., ¶ 7. This was accomplished through weekly telephonic status conferences with PSC members led by Class Counsel. *Id.* These weekly meetings, which continued until the Court stayed the case pending appeal to the Fourth Circuit, allowed Class Counsel an opportunity to update all PSC members efficiently on case developments, and provided a forum for discussion of litigation strategy and assignment of tasks within the PSC. *Id.*

Class Counsel set express time and expense guidelines for PSC members reporting common benefit time. PSC members were required to submit monthly hours reports. Stephens Decl. ¶ 9. Lead Counsel reviewed the bills and hourly reports to ensure that any hours billed were solely for efforts spent on matters common to all claimants, and to minimize duplicative work or billing. *Id.*

B. Overview of Litigation

Plaintiffs brought various claims against Defendants alleging breach of their duties to secure Plaintiffs sensitive personal and medical information by, *inter alia*: (a) failing to implement and maintain adequate data security practices; (b) failing to detect the data breach in a timely manner; and (c) failing to disclose that its data security practices were inadequate to safeguard class members' sensitive personal information. Plaintiffs asserted several state law claims, including negligence, breach of contract, and violation of Virginia's Consumer Protection Act. Stephens Decl., ¶ 10. From the outset, Defendants fiercely contested Plaintiffs'

claims through every phase of litigation. *Id.* at ¶ 11.

1. Discovery

Even before litigating the merits of the claims, Defendants refused to produce a copy of a report generated by its cyber-security consultant, Mandiant, that analyzed the extent and cause of the data breach; Defendants asserted that the report was privileged and work product because Mandiant was retained and purportedly directed by Defendants' legal counsel. Stephens Decl., ¶¶ 12–13. On December 6, 2019, Class Counsel filed a Motion to Compel Dominion National Defendants to Produce Mandiant Report and Related Documents. Dkt. 93. Oral argument was held on this motion before Magistrate Judge Michael S. Nachmanoff and the Motion was granted. Dkt. 113. Obtaining the Mandiant report was a substantial victory for Class Counsel because it allowed counsel to evaluate the deficiencies in Defendants' data security systems economically without the need to pay an expert to conduct the same investigation and analysis from scratch. Stephens Decl., ¶ 13.

During this period, the Parties also served discovery requests. On November 14, 2019, Plaintiffs served interrogatories and requests for production on Defendants. Stephens Decl., ¶ 12, On November 27, 2019, Defendants served discovery requests on the named plaintiffs in the Consolidated Complaint. *Id.* at ¶ 14. Class Counsel coordinated with Plaintiffs to gather responsive documents and respond to Defendants' interrogatories. *Id.* Meanwhile, Class Counsel reviewed the documents produced by Defendants and consulted with a data security expert to assist with identifying the deficiencies in Defendants' systems. *Id.* at ¶ 15.

2. Motions to Dismiss

On December 13, 2019, Defendants filed motions to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkts. 106, 109. Class Counsel's response to these motions

analyzed the complex and evolving issue of Article III standing in the context of a data breach. Dkt. 120; Stephens Decl., ¶¶ 16–17. Additionally, the response argued that Plaintiffs had pleaded adequately their breach of contract claims; that Defendants had a duty to protect Plaintiffs' personal information; that Plaintiffs sufficiently alleged a nationwide Virginia Consumer Protection Act Claim and consumer protection claims under Georgia and District of Columbia law; and finally, that Plaintiffs had sufficiently pleaded a claim for declaratory and injunctive relief. *Id.*

On January 17, 2020, the Court held oral argument on the motions to dismiss. Following presentations by Defendants and Class Counsel, the Court granted in part and denied in part the motions to dismiss, finding that certain plaintiffs lacked standing to pursue their claims. Dkt. 131. The Court did not find that the remaining Plaintiffs' claims should be dismissed under Rule 12(b)(6). *Id.*

Plaintiffs Slate and Bradley appealed that decision to the U.S. Court of Appeals for the Fourth Circuit on January 19, 2020. Appeal Nos. 20-1102, 20-1103. On February 7, 2020, the Parties moved jointly to stay the proceedings and requested entry of final judgment pursuant to Rule 54(b) as to the Plaintiffs the Court held lacked standing. Dkt. 134. The Court granted the motion on February 18, 2020. Dkt. 137. On February 18, 2020, Plaintiffs Cardiff and Cho appealed as well. Appeal No. 20-1180. The appeals were consolidated under Appeal No. 20-1102.

On June 11, 2020, Plaintiffs filed their opening appellate brief, asserting that they had sufficiently alleged injury in fact, that their injuries were traceable to Defendants' failure to secure their personal information adequately, and that their injuries could be redressed by an award of damages. Stephens Decl., ¶ 18. On July 13, 2020, Defendants filed their Consolidated

Brief in response. *Id.* Plaintiffs filed their reply brief on August 3, 2020. *Id.* As a result of a settlement reached days before the scheduled Fourth Circuit oral argument, the Parties requested that the argument be cancelled. *Id.* at ¶ 19. The Fourth Circuit cancelled the oral argument and remanded the case for the limited purpose of considering the Parties' settlement under Rule 23(e). *Id.* Pursuant to the Fourth Circuit's order, the Parties file joint status reports every 30 days. *Id.* at ¶¶ 19–20.

3. Settlement Negotiations

During the pendency of the Appeals, Class Counsel worked with Defendants' counsel to resolve the case, first under the supervision of the Fourth Circuit mediator and then independently. Stephens Decl., ¶ 24. After months of negotiations, including detailed analysis of Dominion National's data security systems and protocols, the Parties were able to reach an agreement on an appropriate settlement, including valuable injunctive relief. *Id.* at ¶¶ 25–26. Shortly before the scheduled Fourth Circuit oral argument, the Parties reached an agreement and executed a term sheet with all material settlement terms on March 8, 2021. *Id.* The Parties finalized and executed the Settlement Agreement that is now before the Court on May 18, 2021. *Id*. at ¶¶ 27–30. Plaintiffs negotiated all material terms related to relief for the class before negotiating compensation for attorneys' fees and costs. *Id.* at ¶ 25.

C. Preliminary Approval and Settlement Administration

On May 18, 2021, Plaintiffs filed an Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement and for Issuance of Notice to Settlement Class. Dkt. 144. The motion was granted on May 20, 2021, indicating that the Court would likely approve the settlement as fair, reasonable, and adequate and that it would likely certify the Settlement Class. Dkt. 149. The order appointed Barrett J. Vahle of Stueve Siegel Hanson and Kim D. Stephens of

Tousley Brain Stephens as interim class counsel pursuant to Rule 23(g)(3), appointed Angeion Group to serve as claims administrator, approved the Parties' proposed form, content, and method of providing notice to the class members, set deadlines for objections and opt-outs, and set a Final Approval hearing for November 19, 2021. *Id.*

Consistent with that Order, Class Counsel has coordinated with the appointed claims administrator, Angeion, and Defendants' counsel to issue notice of the settlement. Stephens Decl., ¶ 31. Angeion began email notice to class members on July 2, 2021, and direct mail notice to class members was completed on July 19, 2021, informing them of the terms of the settlement and how to submit a claim. *Id.* at ¶ 32. The notice informed potential class members that Class Counsel intended to submit a motion for fees of up to $1 million and costs of up to $75,000. *Id.* The notice also informed class members that Class Counsel would seek service awards of $1,500 for each Plaintiff. *Id.*

The claims process is ongoing through the end of the claims period on January 15, 2022. To date, no objections to the settlement have been received by Angeion. Stephens Decl., ¶ 37.

D. Class Benefits Achieved Through Settlement

The benefits achieved by Class Counsel for the class are substantial. The Settlement Class is defined as:

> "All individuals notified by or on behalf of Dominion National regarding the Security Incident. Excluded from the Settlement Class are: (1) the Judge presiding over the Action, and members of her family, (2) the Defendant, its subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and their current or former officers and directors; (3) Persons who properly execute and submit a request for exclusion prior to the expiration of the Opt-Out Period; and (4) the successors or assigns of any such excluded Persons."

Dkt. 146-1 ("SA"), ¶ 1.26. The benefits fall into four categories: monetary compensation, injunctive relief, administration costs, and attorneys' fees, costs, expenses and service awards.

Monetary Compensation. Dominion National has agreed to pay up to $2 million for monetary claims submitted by class members. (SA, ¶ 2.5). Allowable claims include up to $300 per person for ordinary losses. (SA, ¶ 2.1). This includes up to 5 hours of time, at $20 per hour, that class members spent dealing with the data breach based on the claimant's attestation and description of their time spent, without the need for supporting documentation. *Id.* This is a significant benefit as it will enable individuals who were forced to take time out of their schedules to deal with issues related to the data breach to obtain compensation for their lost time that they may not otherwise have documentation to support. The monetary compensation also includes reimbursement for out-of-pocket expenses traceable to the data breach. This encompasses a broad range of potential harms stemming from the data breach, including bank fees, phone charges, data charges, postage, gasoline, credit reports, credit monitoring, or other identity theft protection services.

Individuals who experienced extraordinary losses that are not covered by the ordinary loss provisions—such as out-of-pocket fraud losses—may seek up to $7,500 in compensation for actual, documented, unreimbursed losses fairly and reasonably traceable to the data breach between August 25, 2010 and the claims deadline. (SA, ¶ 2.1). If the total reimbursement for Approved Claims exceeds $2 million, payments to class members will be reduced *pro rata* based on the total amount of all Approved Claims. (SA, ¶ 2.5).

Injunctive relief. In addition to the monetary payments to class members, Dominion National agreed to provide equitable injunctive relief in the form of enhanced data security for two years from the date of final approval of the Settlement Agreement (the "Settlement Term"). These data security commitments include a variety of methods for securing sensitive personal information, including: malware protection software; hardening end-points; hardening all

externally facing ports and eliminating all insecure remote access protocols; vulnerability scanning and maintenance of a vulnerability management program; annual IT training for its associates; engaging a third party to perform assessments to identify threats, score risks, and define remediation plans; maintaining an incident response readiness plan and conducting annual penetration tests on its computer network systems; and other commitments (SA, ¶ 2.8, Ex. 3).

Payment for Notice and for Settlement Administration. Dominion National also agreed to pay for the costs of implementing and developing a notice plan, as well as the costs of a Court-approved settlement administrator to disseminate notice, administer the settlement, and evaluate and pay claims. (SA, ¶ 3.2).

Attorneys' Fees, Costs, Expenses, and Service Awards. Finally, as part of the settlement, Dominion National agreed to pay, subject to the Court's approval, $1 million in attorneys' fees, up to $75,000 in costs and expenses, and service awards of $1,500 to each Plaintiff. (SA, ¶¶ 7.2, 7.3).

ARGUMENT AND AUTHORITIES

A. The Requested Attorneys' Fees are Reasonable

Plaintiffs' attorneys in a successful class action lawsuit may petition the Court for compensation relating to any benefits to the Class that result from the attorneys' efforts." *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 575 (E.D. Va. 2016) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Rule 23 permits a court to award "reasonable attorney's fees . . . that are authorized by law *or by the parties' agreement*." Fed. R. Civ. P. 23(h) (emphasis added). Here, under the Settlement Agreement, Defendants have agreed to pay up to $1 million for Plaintiffs' attorneys' fees. (SA, ¶ 7.2). Thus, "the only question for the Court is whether the unopposed fee is 'reasonable.'" *Brown*, 318 F.R.D. at 575.

Attorneys' fees can be calculated in one of two ways: "(1) the 'percentage of recovery' or 'percentage of the fund' method, which awards fees as a percentage of the benefit secured for the Class; and (2) the 'lodestar' method, which awards fees based on the value of Counsel's time spent litigating the claims." *Brown*, 318 F.R.D. at 575. The "percentage of the fund" method is generally favored, with some courts supplementing the analysis with a lodestar "cross check". *Id.* (citing *Boyd v. Coventry Health Care Inc.*, 299 F.R.D 451, 462 (D. Md. 2014)); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260–61 (E.D. Va. 2009) (discussing both methods). "[C]ourts will typically employ one method as the primary calculation method and use the other method as a cross check on the reasonableness of the first." *Skochin v. Genworth Fin., Inc.*, No. 3:19-CV-49, 2020 WL 6708388, at *4 (E.D. Va. Nov. 13, 2020).

Where, as here, Defendants have agreed to pay class member claims, with independent payments of administrative costs and attorneys' fees, it is appropriate to apply the lodestar method. *See Brown*, 318 F.R.D. at 575. Additionally, the Court should consider the requested fee as a percentage of the value of the settlement as a whole in determining reasonableness. *Cf. Boeing*, 444 U.S. at 480–82 (a litigant or lawyer who recovers a common benefit is entitled to a reasonable attorneys' fee from the fund as a whole, regardless of whether some class members fail to exercise their right to possession in the fund); *Skochin*, 2020 WL 6708388, at *4 (where there is a separate fund for claimants and a separate fund for attorneys' fees and expenses, or a "constructive common fund," the percentage of the fund method may be considered).

Regardless of whether the fee is calculated using the percentage or lodestar method, courts in this district apply either (or both) the 12-factor *Johnson* test from the Fifth Circuit or the 7-factor *Gunter* test from the Third Circuit. *See Galloway v. Williams*, No. 3:19-CV-470, 2020 WL 7482191, at *5 (E.D. Va. Dec. 18, 2020). The *Johnson* test considers the following

factors:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Barber v. Kimbrell's, Inc., 577 F.2d 216, 226, n. 28 (4th Cir. 1978). The *Gunter* test considers: "(1) the results obtained for the class; (2) the quality, skill, and efficiency of the attorneys' involved; (3) the complexity and duration of the case; (4) the risk of nonpayment; (5) awards in similar case; (6) objections; and (7) the amount of time devoted to the case by plaintiffs' counsel." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000).

Under these standards, the Court should readily find that the requested fees are reasonable.

1. Class Counsel's Requested Fees are Supported by a Lodestar Calculation

Class Counsel requests, and Defendants do not oppose, an award of $1 million for Counsel's attorneys' fees. This payment will be paid by Defendants separately from class claims and will not reduce the recovery available to the class. Here, Plaintiffs' counsel worked 2,257 hours pursuing the result achieved for the class, for a total lodestar of $1,600,084. The requested fee award of $1 million constitutes a significant negative multiplier—0.625—on Plaintiffs' counsels' lodestar, and should be approved by the Court as a reasonable fee.

Class Counsel's lodestar reflects the time, labor, and skill reasonably required to prosecute this complex action to a successful resolution. Stephens Decl., ¶¶ 39–42, 45–59.

Following the appointment of Interim Class Counsel and the PSC, Class Counsel filed an amended complaint, responded to two motions to dismiss, pursued and responded to discovery—including filing a successful motion to compel a critical report—and fully briefed a complex Article III standing issue to the Fourth Circuit. *Id.* at ¶¶ 10–20, 39–42. All the while, Class Counsel engaged in negotiations with Defendants to attempt to reach a joint resolution. *Id.* at ¶¶ 24–30, 39–42. Class Counsel coordinated early in the litigation to avoid duplication of efforts and to assign work within the PSC. *Id.* at ¶¶ 7, 39–42. The number of hours expended were reasonable and necessary to accomplish these tasks. *Id.* at ¶¶ 10–20, 24–31, 39–49. Further, the fee request is intended to compensate Class Counsel for work that remains to be completed including: preparing for and attending the final approval hearing; responding to inquiries from class members; overseeing the distribution of the settlement and the claims process; and handling any appeals. *Id.* at ¶ 46.

Class Counsel's current billing rates, which are used to calculate its lodestar, are reasonable and reflect the market rates for attorneys with similar skill, knowledge, and experience. Stephens Decl., ¶ 43. Here, Plaintiffs' counsel include some the nation's leading experts on class action litigation. Dkt. 54–55. These hourly rates are in the range of rates charged by attorneys with similar levels of experience and credentials in this district and for prosecution of nationwide class actions. *See, e.g.*, *Brown*, 318 F.R.D. at 575 (approving 2016 regular hourly rates the DiMuro Ginsberg and Hausfeld firms, which are both involved in this litigation); *In re Neustar, Inc. Sec. Litig.*, No. 1:14CV885 (JCC/TRJ), 2015 WL 8484438, at *10 (E.D. Va. Dec. 8, 2015) (approving rates of $260 - $310 for paralegal services, $420 - $700 for associates, and $800 - $975 for partners; noting the fee award requested represented a substantial discount off the total lodestar calculated using these rates); *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778,

788 n. 33 (E.D. Va. 2001) (concluding that $555 per hour for a senior partner and $220 per hour for a junior associate *in 2001* were rates "not inconsistent with the rates charged by lawyers in large, prominent, and . . . expert law firms"); *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289, at *8 (M.D.N.C. May 9, 2016) (finding that partner billing rates of $640 - $880 per hour and associate billing rates of $375 - $550 per hour were "within the range of reasonableness" especially given that "the market for class action attorneys is nationwide and populated by very experienced attorneys with excellent credentials"); *Boyd*, 299 F.R.D. at 467 (D. Md. 2014) (accepting as reasonable rates ranging from $325 - $700 per hour in 2014). Indeed, many other courts have found Class Counsel's rates to be reasonable. Stephens Decl., ¶ 43; Declaration of Barrett Vahle, ¶ 8.

Here, Plaintiffs' lodestar of $1,600,864 is substantially greater than—1.6 times—the requested fees. Because both the hours worked and rates charged by Class Counsel are reasonable, it follows that Plaintiffs' request for a reduced fee award is also reasonable.

2. Class Counsel's Fees as a Percentage of the Value of the Settlement are Reasonable

The requested fee should also easily be approved under a "percentage of recovery" analysis.

The settlement provides up to $2 million[1] in direct monetary benefits to the class, $1.1 million in administration costs[2], including notice to the class, and non-monetary relief with an

[1] Based on the number of claims filed to date, it is likely that the full $2 million will be paid to class members. Plaintiffs will update the Court with additional information regarding likely aggregate claims amounts at or before the final approval hearing.

[2] Although the Fourth Circuit has not addressed the issue, courts in this circuit have approved settlement awards that allowed administrative costs to be deducted from the settlement fund. *See e.g.*, *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 690 (D. Md. 2013). Accordingly,

estimated value of $2,679,500. In total, the value to the class is $5,779,500. Including Class Counsel's requested fees, as is appropriate, the total "constructive" settlement fund value is $6,779,500. *See Skochin*, 2020 WL 6708388, at *7 (calculating "constructive" fund by combining class benefits with agreed attorneys' fees). Class Counsel's requested fee of $1 million is just 17.3% of the class benefit and less than 15% of the constructive settlement fund including attorneys' fees. This percentage is substantially lower than what courts typically award. Empirical data demonstrates that class action percentage awards typically fall between 20% and 30%. *See* Applying the Percentage Method—Reasonableness of Percentage—Empirical Data on Percentages Awarded, 5 Newberg on Class Actions § 15:83 (5th ed.). In the Fourth Circuit, the mean percentage awards have increased over the last three decades. *Id*. (showing 20% in 1993-2008 study, 25.2% in 2006-2007 study, and 27.7% in 2006-2011 study); *see In re The Mills Corp.*, 265 F.R.D. at 264 (chart with approved percentages awards in Fourth Circuit cases with range between 18% and 33.3% in 2009); *In re Neustar*, 2015 WL 8484438, at *9 (finding 19% award reasonable in light of other cases in Fourth Circuit, including chart identifying cases with awards between 25–28% in 2015).

Even if the Court discounted the value of the non-monetary relief to the class, the requested fee remains reasonable. Where the value of non-monetary class relief is not readily ascertainable, courts in this district have utilized a "bonus" percentage of the ascertainable value of the fund to compensate counsel for the non-monetary benefits provided to the class. *Hooker v. Sirius XM Radio, Inc.*, No. 4:13-CV-003, 2017 WL 4484258, at *5–6 (E.D. Va. May 11, 2017)

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separately apportioned administrative funds should be included as part of the total class benefit. Other Circuits have held that administrative costs paid for by the defendant may be considered to calculate to the total settlement fund. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015); *Huyer v. Buckley*, 849 F.3d 395, 398 (8th Cir. 2017).

(awarding 35% fee, which included 10% bonus for non-monetary benefits). Here, the ascertainable direct monetary value to the class is $3.1 million, with an additional $1 million of ascertainable value to the class from the requested and agreed fees, for a total of $4.1 million. Under that formulation, the requested fees would constitute 24.4% of the "constructive" settlement fund. If this includes a "bonus" for non-monetary relief, the effective percentage would be even less.

And even if the Court were to find that it should not include the administrative costs Defendants have agreed to pay in valuing the settlement fund, the requested percentage remains within the generally accepted range. Without administrative costs, the total benefit made available is $3 million ($2 million for direct class benefits and $1 million for fees), resulting in a reasonable 33.33% attorneys' fee award; if this includes a "bonus" for non-monetary relief, the effective percentage of the monetary relief would be even less and, well within the range of average percentage awards.

3. The Reasonableness of the Requested Fee is Also Supported by the *Johnson*/*Gunter* Factors

The reasonableness of Class Counsel's requested fees, whether evaluating counsel's lodestar or the percentage of recovery, is also supported by the *Johnson* and *Gunter* factors[3].

i. The amount involved and the results obtained by Class Counsel for the class weigh in favor of the requested fee award.

The most critical lodestar factor is the amount in controversy and the results obtained. *See Imaginary Images Inc.v. Evans*, No. 3:08-CV-398, 2009 WL 2488004, at *2 (E.D. Va. Aug.

[3] Class Counsel posits that the following *Johnson* factors are not implicated by this litigation and are therefore not relevant to the analysis: (1) the time limitations imposed by the client or circumstances; (2) the undesirability of the case within the legal community in which the suit arose; or (3) the nature and length of the professional relationship between attorney and client.

12, 2009) ("Of those factors, the eighth—the 'degree of success' that a party achieves—is the most important."); *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 481 (D. Md. 2014) ("In the Fourth Circuit, the most critical factor in calculating a reasonable fee award is the degree of success obtained.").

The results Class Counsel obtained for the class are substantial and redress the key harms suffered by data breach victims. Stephens Decl., ¶¶ 33–36. First, the settlement allows class members to submit claims for reimbursement for time spent remedying or addressing issues related to the data breach for up to 5 hours at $20 per hour. *Id.*; SA, ¶ 2.1. Importantly, class members need not submit documentation to support their claimed time, only a description of their time spent with an attestation. *Id.* This is a significant benefit as dealing with issues stemming from a data breach, such as monitoring accounts, disputing fraudulent charges and accounts, and freezing credit, is one of the primary harms data breach victims suffer and for which they often do not have substantiating documentation. *Id.* Second, the settlement provides for both ordinary losses up to $300 and extraordinary losses up to $7,500. Stephens Decl., ¶¶ 33–36; SA ¶ 2.1. The settlement therefore encompasses the typical monetary losses experienced by data breach victims, such as paying incidental costs associated with identity theft or fraud (e.g., professional services, overdraft fees, and postage) and mitigative measures such as credit monitoring and credit freezes, but also extraordinary losses for individuals who suffered atypical losses fairly traceable to the breach and can document proof of those losses. *Id*.

Additionally, the settlement requires Dominion National to implement substantial and critical business practices changes to improve data security for two years following the final approval of the settlement. Stephens Decl., ¶ 34; SA, ¶ 2.8, Ex. 3. These measures, which will cost Defendant approximately $2,679,500, will provide additional security for class member data

moving forward. *Id.*

These results are excellent. They provide reasonable compensation for each class members' personal harms and are tailored to the facts of the case. These factors support approval of Class Counsel's fee request.

ii. The absence of objections by class members to the settlement terms and/or fees requested by Class Counsel weighs in favor of the requested fee award.

The Administrator disseminated the approved notice of the proposed settlement, which identifies the amount of Class Counsel's attorneys' fees and expenses, by the Notice Date of July 19, 2021. Stephens Decl., ¶ 32. Some class members received notice as early as July 2, 2021 by email. *Id.* The objection deadline is October 2, 2021. As of the date of filing this motion, no objections have been received by the Claims Administrator to either the settlement terms or the fees requested by counsel. Stephens Decl., ¶ 37. This factor supports approval of Class Counsel's fee request.

iii. The requisite skill required and the experience, reputation and ability of Class Counsel weighs in favor of the requested fee award.

Plaintiffs' counsel are highly experienced litigators with substantial experience with complex class actions generally, and with nationwide data breach class actions in particular. Dkt. 54–55 (Plaintiffs' Joint Motion for Appointment of Co-Lead and Interim Class Counsel, Liaison Counsel, and Plaintiffs' Steering Committee).

Class Counsel provided highly quality and skilled representation for the class. Following Defendants' notice of the data breach, multiple individuals contacted Class Counsel's firms seeking advice and representation. Class Counsel investigated the data breach and analyzed the available causes of action arising therefrom. Because of their experience in the data breach field,

Class Counsel were able to serve and enforce targeted discovery requests, coordinate with a liability expert early in the case, litigate dispositive motions, and ultimately negotiate meaningful monetary and injunctive relief. Stephens Decl., ¶¶ 10–23. Class Counsel's experience litigating class actions, and complex data breach class actions in particular, allowed them to understand all the relevant factual and legal issues that arose in the course of the litigation, properly evaluate the risks of continued litigation compared to the benefits derived from the negotiated settlement, and to efficiently resolve the case to achieve its litigation goals. This factor therefore supports approval of the requested fee.

iv. The complexity and duration of the litigation and the amount of time devoted to the case by Class Counsel weigh in favor of the requested fee award.

Effective litigation of this case required substantial efforts from Class Counsel, as well as significant skill to competently address complex issues of fact and law. Here, the factual issues required knowledge of complex, technical subject matter on issues of data security, industry best practices, and mechanisms of the data breach to not only prosecute the claims asserted, including drafting targeted discovery requests and conducting a meaningful and productive review of documents produced, but to ensure that the business practices changes incorporated in the settlement were adequate to protect class members. This case also required litigation of complex and evolving standards of Article III standing in the context of data breaches before this Court as well as the Fourth Circuit. Class Counsel's experience at both the trial and appellate levels allowed Class Counsel to handle the appellate briefing without the need to bring in additional appellate counsel.

In total, Plaintiffs' counsel has spent 2,257 hours over two years litigating this case to date. Class Counsel anticipates that they will spend significant hours over the next year

managing the claims process and administration of the settlement with the claims administrator. Stephens Decl., ¶¶ 45–48. This factor weighs in favor of approving Class Counsel's requested fee.

v. The litigation risks and opportunity costs to Class Counsel for pursing this litigation weigh in favor of the requested fee award.

In data breach cases, the harms suffered by individual victims tend to be relatively small which makes individual litigation of claims economically infeasible as the costs of litigation, including attorneys' fees, would quickly surpass the amount in controversy for each plaintiff. As a result, Class Counsel undertook the representation of Plaintiffs and the class on a fully contingent basis and would only recover their fees and expenses if they prevailed. Accordingly, in the absence of a favorable jury verdict or settlement, Plaintiffs' counsel would have received no payment for their work. Further, although Class Counsel strongly believe in the merits of the case, they were at all times cognizant of the significant legal hurdles that data breach cases have faced across the country, including, for example, challenges to Article III standing and whether there is a tort duty to protect personal information. While the Court did not grant Defendants' motion to dismiss under Rule 12(b)(6), it is likely that Defendants would have raised legal challenges on summary judgment. Likewise, in the absence of a settlement, Defendants likely would have challenged class certification. Finally, there is no clear consensus regarding what classwide damages are available to data breach victims.

As there was a substantial risk of non-payment to Class Counsel, this factor weighs in favor of approving the requested fee.

vi. The requested fee award is substantially lower than attorneys' fees awards in other similar cases.

The fee request is much less than the lodestar incurred by Plaintiffs' counsel; in other words, the request, if granted, would award a negative multiplier. This fact bears on the reasonableness of Class Counsel's request. *See Burke v. Shapiro, Brown & Alt, LLP*, No. 3:14CV201 (DJN), 2016 WL 2894914, at *6 (E.D. Va. May 17, 2016) ("[T]he fact that Class Counsel request the reduced fee . . . further weighs in favor of a finding that the hours expended were reasonable."); *Triad Guar. Inc.*, 2016 WL 2636289, at *8 (reasoning that even though lead counsel's rates were on the higher end of rates approved in this Circuit, "the [0.35] multiplier is so far below those generally accepted as demonstrating reasonableness that, in the context of the facts of this case, it does suggest that the requested . . . fee is reasonable").

Indeed, courts in this district have awarded positive multipliers of two or greater. *See, e.g.*, *In re Microstrategy, Inc.*, 172 F. Supp. 2d at 790 (approving a multiplier of 2.6); *Berry v. LexisNexis Risk & Info. Analytics Grp., Inc*., No. 3:11-CV-754, 2014 WL 4403524, at *15 (E.D. Va. Sept. 5, 2014), *aff'd sub nom. Berry v. Schulman*, 807 F.3d 600 (4th Cir. 2015) (approving a multiplier of 1.99). Moreover, other courts nationwide have—many times over—approved fee awards with significant multipliers. *See, e.g.*, *In re Cardinal Health Inc. Sec. Litig*., 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (finding that requested fee amount with a lodestar multiplier of 7.89 was not unreasonable "[g]iven the outstanding settlement in this case and the noticeable skill of counsel."); *In re MI Windows & Doors Inc. Prod. Liab. Litig.*, No. 2:12-MN-00001-DCN, 2015 WL 4487734, at *5 (D.S.C. July 23, 2015), *appeal dismissed* (Sept. 3, 2015) (holding that a multiplier of 2.5 was appropriate, bringing the total fee to $1,244,950); *In re Excel Energy, Inc., Sec., Derivative & ERISA Litig*., 364 F. Supp. 2d 980, 989 (D. Minn. 2005) (approving a multiplier of 4.7); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362

(S.D.N.Y 2002) (describing multiplier of 4.65 as "modest"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding 3.97 multiplier, reasoning that multipliers between 3 and 4.5 were common); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (affirming multiplier of 3.65 to compensate class counsel for risk of taking the case); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 197–98 (S.D.N.Y. 1997) (approving multiplier of 5.5 in what the court described as risky and hard fought litigation); *In re Interpublic Sec. Litig.*, No. 02 Civ.6527(DLC), 03 Civ.1194(DLC), 2004 WL 2397190, at *12 (S.D.N.Y. Oct. 26, 2004) (awarding multiplier of 3.96); *In re WorldCom, Inc., Sec. Litig.*, 388 F. Supp. 2d 319, 353 (S.D.N.Y. 2005) (awarding multiplier of 4).

The requested fees also comport with fees sought in other recent data breach cases. *See, e.g. In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *28 (N.D. Cal. Aug. 17, 2018) (awarding multiplier slightly above 1); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at *30 (N.D. Cal. July 22, 2020), *appeal dismissed,* No. 20-17438, 2021 WL 2451242 (9th Cir. Feb. 16, 2021) (awarding 1.15 multiplier); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *39 (N.D. Ga. Mar. 17, 2020), *aff'd in part, rev'd in part and remanded,* 999 F.3d 1247 (11th Cir. 2021) (approving 2.62 multiplier).

B. The Requested Expenses are Supported and Reasonable

Plaintiffs' counsel incurred out-of-pocket costs and expenses in prosecuting this litigation on behalf of the Class. "There is no doubt that costs, if reasonable in nature and amount, may appropriately be reimbursed from the common fund." *In re Microstrategy, Inc.*, 172 F. Supp. 2d at 791. Plaintiffs' counsel seek $65,627.38 for their costs incurred in prosecuting this litigation. Class Counsel's costs and expenses are detailed in the supporting declarations and are the same

costs that Counsel would normally charge a fee-paying client. Stephens Decl., ¶ 49. The requested costs will be paid separately from and will not diminish the class benefits.

C. Service Awards to Plaintiffs are Supported and Reasonable

Class Counsel requests that the Court approve service awards to the six Plaintiffs in the amount of $1,500 each. Courts typically approve service award to individual plaintiffs acting for the benefit of the class to compensate them "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 578–79 (quoting *Manuel v. Wells Fargo Bank*, No. 3:14–CV–238 (DJN), 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016)). Courts in this district routinely grant service awards in excess of the requested amount. *See*, *e.g.*, *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 Plaintiffs have fulfilled their duties to the class, making the requested service awards appropriate. Stephens Decl., ¶¶ 21–23. Specifically, the Plaintiffs made themselves available to Class Counsel to assist with the investigation into the claims. *Id.* The Plaintiffs responded to discovery requests propounded by Defendants, including numerous interrogatories and document requests. *Id.* The Plaintiffs also considered and approved the terms of the proposed

settlement agreement as in the best interests of the class. *Id.* The Court should therefore award Plaintiffs modest service awards in the amount of $1,500 each.

CONCLUSION

Class Counsel's request for $1,000,000 in attorneys' fees should be approved as reasonable based on the Parties' agreement, as a reasonable percentage of the class benefits created by the settlement and a negative multiplier of Plaintiffs' lodestar, and under the factors considered in determining a reasonable fee award. Further, the Court should grant Class Counsel's request for $65,627.38 in reasonable and necessary costs and expenses. Importantly, neither the requested fee nor the requested expenses will deplete funds available for class members in any way. Finally, service awards in the amount of $1,500 to each Plaintiff should be approved in recognition for their service to the class and contributions to the litigation.

Date: September 10, 2021

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2021, 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/
Bernard J. DiMuro, Esq. (VSB No. 18784)