UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHERYL COVINGTON, on behalf of herself and all others similarly situated, Plaintiff, v. GIFTED NURSES, LLC d/b/a GIFTED HEALTHCARE, Defendant.	**Case No. 1:22-cv-04000-VMC** **MOTION FOR ATTORNEYS' FEES**

Plaintiff Cheryl Covington respectfully moves this Court for an Order approving Class Counsel's attorneys' fees of $350,000. Because Class Counsel's requested fees and expenses are reasonable, at 2.2% of the available fund, the Court should grant the motion.

I. Background

This matter, originally filed on October 4, 2022, stems from a Data Breach that occurred between August 25, 2021, and December 10, 2021. Doc. 1 (Class Complaint). After fully litigating a motion to dismiss, which the Court granted in part and denied in part, Plaintiff filed an Amended Class Action Complaint, which is now operative. Doc. 34 (Amended Complaint). Plaintiff, on behalf of herself and all others similarly situated, alleges that Defendant failed to implement reasonable cybersecurity safeguards in line with industry standards, which were necessary to

protect her sensitive data from the known and foreseeable risks of such a breach. *Id.* ¶ 57. Plaintiff alleges that the Data Breach exposed her sensitive personally identifiable information ("PII") to cybercriminals. *Id.* ¶¶ 45–58. Though Defendant has not admitted liability, it has now agreed to a class-wide settlement. Doc. 50-1 (Corrected Settlement Agreement, hereinafter "Settlement Agreement"). After deduplication of the Class List, Defendant notified 11,317 individuals that their PII was potentially affected by the Data Breach. *Id.* at 2. On August 9, 2023, the Parties participated in an arms'-length mediation with Bennett G. Picker, who has significant experience mediating data breach class actions. That mediation resulted in the present Class Settlement Agreement. Doc. *Id.* § 1.

The Settlement provides Class Members with three years of important identity theft protection services from three bureaus, which includes $1,000,000 of identity theft insurance. *Id.* at 2. The Settlement Agreement further requires that Defendant pay for Class Members' lost time up to $100, ordinary out-of-pocket expenses up to $400 per Class Member, and extraordinary losses up to $4,000 per Class Member—provided that such expenses were fairly traceable to the Data Breach. *Id.* §§ 4.1–4.4, 5.3. Alternatively, Class Members may claim a $50 cash payment in lieu of the above remedies. *Id.* § 4.5. Moreover, the Settlement Agreement provides tangible prospective relief in that it requires Defendant to implement multi-factor authentication across all accounts and divisions, implement a password management

system, audit its network accounts to remove inactive computer and user accounts, upgrade security policies to prevent logins from outside North America, implement a centralized logging system, and more. *Id.* § 4.6. In exchange for these benefits, the Class Members will release Defendant from all claims related to the Data Breach, as provided for in the Settlement Agreement. *Id.* § 6. The Settlement Agreement also provides for Class Counsel's attorneys' fees and expenses up to $350,000. *Id.* at 2. Defendant agreed to take no position regarding whether the Court should approve these amounts. *Id.* § 8.

The Settlement Administrator was responsible for collecting and processing all Class Members' claims, providing Notice as required by the Court and the Class Settlement Agreement, and determining the validity of claims.[1] *Id.* § 5. To facilitate Notice, the Settlement Administrator was required to create a Settlement Website, establish a toll-free number and email address whereby Class Members could obtain information, email the summary notice to all individuals for whom an email address was known, and mail the remaining Class Members the same summary notice. *Id.* § 7.3. If Class Members wish to opt-out or object to the Class Settlement, they must do so by May 20, 2024, which is 30 days after the Settlement Administrator sent Notice and after the present motion for fees—as required in the Eleventh Circuit. *Id.* at 3 (providing for the 30-day deadline following the date of notice).

[1] The Settlement was administered by Kroll Settlement Administration LLC.

II. Legal Standard

Federal Rule of Civil Procedure 23(h) requires Court approval of any award of attorneys' fees and expenses in a class action settlement:

> (1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> (2) A class member, or a party from whom payment is sought, may object to the motion.
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> (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).
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> (4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Fed. R. Civ. P. 23(h). Still, the Supreme Court "has endorsed the consensual resolution of the amount of attorneys' fees to be paid to plaintiffs' counsel in representative litigation" and noted that a request for fees "should not result in a second major litigation." *In re S. Co. Shareholder Derivative Litig.*, No. 1:17-cv-725-MHC, 2022 WL 4545614, at *9 (N.D. Ga. June 9, 2022) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). "Where there is no evidence of collusion, courts accord substantial deference to fee and expense amounts determined by the parties." *Id.*

To determine whether a fee request is reasonable under Rule 23, courts in the Eleventh Circuit choose "one of two methods: the percentage method or the lodestar

method." *In re Home Depot Inc.*, 931 F.3d 1065, 1076 (11th Cir. 2019). The lodestar method looks to the number of hours spent on the case and the reasonable hourly rate, which sometimes includes a multiplier to upward adjust the total amount of fees to reward class counsel on top of their hourly rates. *Id.* (citing 5 William B. Rubenstein, *Newberg on Class Actions* § 15.91, at 353 (5 ed. 2015)). The percentage method provides class counsel with a percentage of the class benefit obtained. *Id.*

"The percentage method . . . remains the proper method to apply when awarding attorney's fees in common fund settlement cases." *In re Equifax Inc. Cust. Data Sec. Breach Litig.*, 999 F.3d 1247, 1279 (11th Cir. 2021). Courts typically award between 20 and 30 percent of the fund, and in some cases more. *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th 1070, 1100 (11th Cir. 2023). If the percentage is between 20 and 25 percent, then it is presumptively reasonable. *Id.* If the percentage is between 25 and 30 percent, then the district court applies the twelve factors detailed in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). *Id.* Though the district court must articulate its basis for the award of fees and expenses, the court has "ample discretion" in awarding such fees and expenses. *In re Home Depot*, 931 F.3d at 1088–89.

III. Argument

a. The Settlement created a common fund rather than a fee-shifting scheme.

In determining the reasonableness of a fee request under Rule 23(h), the Court should first determine whether the settlement created a common fund or is merely an exercise in fee shifting. This is the first step because if the settlement created a common fund, then courts award a reasonable percentage of the total fund value to class counsel for their reasonable attorneys' fees and expenses. *Camden I Condo Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991). If the settlement merely created a fee-shifting mechanism, then the court must undertake a lodestar calculation. *Roll. v. Enhanced Recovery Co., LLC*, No. 6:20-cv-212, 2023 WL 2919839, at *2 (M.D. Fla. Jan. 5, 2023), *report & recommendation adopted by* 2023 WL 2535081 (M.D. Fla. Mar. 16, 2023). Moreover, courts often classify class settlement fee arrangements as a "constructive common fund" that is governed by "common-fund principles" even when the defendant pays class counsel's attorneys' fees separately. *In re Johnson & Johnson Aerosol Sunscreen Mktg., Sales Pract. and Prods. Liab. Litig.*, No. 0:21-md-3015, 2023 WL 2284684, at *12 (S.D. Fla. Feb. 28, 2023) (approving a $2.5 million fee request representing about 1/3rd of the common fund that included nonmonetary injunctive relief).

Here, the Court should classify the fee arrangement in this case as a settlement fund arrangement, rather than a fee-shifting arrangement because the Parties' Settlement Agreement provides for a maximum amount of attorneys' fees and provides that those fees will be paid by Defendant "from the Settlement Fund." Doc.

50-1, § 8; Doc. 49, Order Granting Prelim. Approval, § 14. Indeed, Class Counsel negotiated an uncapped settlement. The uncapped fund in this case is effectively better than the fund in *Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759, 767 (11th Cir. 2017), in which the Eleventh Circuit affirmed $8.3 million in fees in a reversionary fund and rejected an objector's argument that the defendant was able to keep any unclaimed money. The only difference is that the settlement fund in *Carter* applied a top-end limit on how much the class members could recover, and Class Counsel here negotiated a limitless recovery. Thus, the Court should hold that the Settlement here is common fund. To hold otherwise would create a negative incentive for other class counsel in future cases to negotiate a limit on future class members' recovery, thereby creating a rule that would harm class members.

b. The award is presumptively reasonable.

When calculating the size of the common fund, courts consider the amount made available to the class, and not the amount that is ultimately paid to class members. "[N]o case has held that a district court must consider only the actual payout in determining attorneys' fees." *Carter*, 701 F. App'x at 767. "The percentage applies to the total fund created, even where the actual payout following the claims process is lower." *Cotter v. Checkers Drive-In Rests., Inc.*, No. 8:19-cv-1386, 2021 WL 3773414, at *11–12 (quoting *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007)); *Ali v. Laser Spine Institute, LLC*, No.

8:19-cv-535, 2023 WL 7411246, at *6 (M.D. Fla. June 16, 2023), *report & recommendation adopted by* 2023 WL 7411305 (M.D. Fla. July 3, 2023) (explaining that the fund value is the amount "established for the benefit of the class" in a reversionary fund and approving a 1/3rd award); *Gonzalez v. TCR Sports Broad. Holding, LLP*, No. 1:18-cv-20048, 2019 WL 2249941, at *6 (S.D. Fla. May 24, 2019) (further noting that "various federal appellate courts" have held "that it is an abuse of discretion to base fee awards only on claims made rather than the funds made available).

Here, the Settlement allows every Class Member to fully realize the benefits made available to them.[2] Each of the 11,317 Class Members may file a file claim for ordinary out-of-pocket expenses capped at $400 per Class Member.[3] Each of the Class Members may file a claim for extraordinary losses up to $4,000 per Class Member. Thus, the Settlement makes $4,526,800 available to Class Members in ordinary out-of-pocket expenses alone.[4] Moreover, Class Members have access to three years of credit monitoring from all three credit bureaus. Class Members purchasing credit monitoring on their own would pay around $25 per month for a three-bureau product, thus adding another $10,185,300 in value available to the

[2] The calculations detailed herein are based on the class benefits as outlined on page two and section 4 of the Corrected Settlement Agreement. Doc 50-1.
[3] Although the Parties believed the class size was approximately 13,770 individuals, Doc. 40-1, at 4, the Parties discovered during the administration of the Notice Program that the true class size was 11,317 after deduplication, Doc. 50, at 1.
[4] Ordinary expenses capped at $400 * 11,317 Class Members = $4,526,800.

Class. Decl. of J. Gerard Stranch, IV, ¶ 14. Additionally, Class Members may claim reimbursement for time spent up to four hours at $25 per hour. This adds another $1,131,700 in value to the Class.[5] Moreover, Class Counsel has paid for $13,599.69 in out-of-pocket expenses without charging those expenses to Class Members, most of which were incurred to pay for mediation. Decl. J. Gerard Stranch, IV, ¶ 17. Still further, the costs to administer the settlement were approximately $54,971.[6] *Pinon v. Daimler AG*, No. 1:18-cv-3984, 2021 WL 6285941, at *17 (N.D. Ga. Nov. 30, 2021) (including attorneys' expenses and administration costs in the calculation of the settlement benefits). This is a minimum available fund of $15,912,370.69.[7] In addition to that $15,912,370.69, Class Counsel negotiated up to $4,000 in extraordinary loss recovery for each Class Member and substantial and valuable equitable relief in the form of enhanced cybersecurity measures that provide tangible relief to Class Members, whose data still resides on Defendant's systems.[8]

Based on the above calculations, Class Counsel's requested attorneys' fees of $350,000 is 2.2% of the $15,912,370.69 in benefits made available to the Class, even without counting significant additional benefits discussed above. Thus, the requested

[5] (Four hours of lost time * $25 per hour = $100) * 11,317 Class Members = $1,131,700.
[6] Though costs of Settlement Administration are not final, the $54,971 fee cited here is the amount that Kroll originally quoted for its services. Decl. of J. Gerard Stranch, IV, ¶ 18.
[7] $4,526,800 (ordinary losses) + $1,131,700 (lost time) +$10,185,300 (credit monitoring) + $13,599.69 in expenses + $54,971 in settlement administration fees = $15,912,370.69.
[8] *In re S. Co. Shareholder Derivative Litig.*, 2022 WL 4545614, at *10 (approving a $3.5 million fee request in a shareholder derivative suit and explaining that "the value of effective corporate therapeutics may well exceed the value of any probably monetary judgment").

attorneys' fees fall well below the twenty to twenty-five percent range at which the requested fees are presumptively reasonable. *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th 1070, 1100 (11th Cir. 2023); *Arkin v. Pressman, Inc.*, 38 F.4th 1001, 1005 (11th Cir. 2022); *Desouza v. Aerocare Holding LLC*, No. 6:22-cv-1047, 2024 WL 982436, at *4 (M.D. Fla. Jan. 22, 2024) ("If a fee award falls between 20 and 25 percent, it is presumptively reasonable.").

Because Class Counsel's requested fee is presumptively reasonable, the Court need not analyze the *Johnson* reasonable factors. *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th 1070, 1100 (11th Cir. 2023); *Monroe Cty. Emps. Ret. Sys. v. S. Co.*, No. 1:17-cv-241, 2021 WL 451670, at *3 (N.D. Ga. Feb. 5, 2021).[9]

c. The award nonetheless satisfies the *Johnson* factors.

Notwithstanding that the Court need not analyze the *Johnson* reasonableness factors, they also counsel in favor of approving the fee request. The *Johnson* court articulated twelve factors that district courts consider when determining whether the requested fee award is reasonable, though some overlap: (1) the time and labor required to litigate the case, (2) the novelty and difficulty of the questions presented,

[9] Even if the Court performed a lodestar calculation, Plaintiff's requested multiplier would be under 2. Decl. of J. Gerard Stranch, IV, ¶ 22; *see also In re Ethicon Physiomesh Flexible Composite Hernia Mesh Prod. Liab. Litig.*, No. CV 1:17-MD-02782-RWS, 2022 WL 17687425, at *13 (N.D. Ga. Nov. 14, 2022) ("Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee."); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-cv-3066-JEC, 2012 WL 12540344, at *5 & n.4 (N.D. Ga. Oct. 26, 2012) (noting a multiplier of 4 times the lodestar is "well within" the accepted range and citing examples); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 696 (N.D. Ga. 2001) (noting courts apply multipliers ranging from less than two to more than five); *Cox v. Cmty. Loans of Am., Inc.*, No. 11-177-CDL, 2016 WL 9130979, at *3 (M.D. Ga. Oct. 6, 2016) (lodestar multipliers "in large and complicated class actions range from 2.26 to 4.5 while three appears to be the average[.]")

(3) the skill required, (4) the preclusion of other employment by taking the case, (5) the customary fee awarded for similar work, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount of benefits involved and the results obtained, (9) the experience, ability, and reputation of counsel, (10) whether the case was undesirable such that counsel may face hardships in the community by taking the case, (11) the nature and length of the professional relationship with the client, and (12) whether other awards made in similar litigation within the Circuit are in line with the requested fee. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974).[10] Though the *Johnson* court illuminated twelve factors, courts need not analyze every factor in every case. *In re S. Co. Shareholder Derivative Litig.*, 2022 WL 4545614, at *10 (explaining further that the degree of success obtained for the class is the most important factor). Plaintiff will analyze the relevant factors in turn.

1. The Time, Labor, and Skill Required, and the Novelty the Issues

The time, labor, and skill required to litigate data breach class actions is significant, particularly because of the novelty of the issues presented. *Stoll v. Musculoskeletal Institute*, No. 8:20-cv-1798, 2022 WL 16927150, at *3 (M.D. Fla.

[10] Although *Johnson* was a Fifth Circuit opinion, the Eleventh Circuit adopted its factors in *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768, 772 (11th Cir. 1991). *In re Home Depot Inc.*, 931 F.3d 1065, 1090 (11th Cir. 2019) (explaining that courts in the Eleventh Circuit apply the *Johnson* factors when analyzing the percentage method).

July 27, 2022) (noting that data breach matters are inherently complex because of the technical questions involved); *Cotter*, 2021 WL 3773414, at *9 (explaining that data breach cases are complex and "the law surrounding data-breach litigation cases is new and evolving"). The time and labor required to navigate this complex area of law is further enhanced because states often disagree as to the results of the complex questions presented, which leads to inconsistent, disparate opinions. *In re Arby's Rest. Grp.*, 2019 WL 2720818, at *3 (explaining that "data breach litigation involves the application of unsettled law with disparate outcomes across states and circuits").

And though Class Counsel strongly believe that the claims presented are meritorious, data breach matters are inherently risky, which increases the time and labor required to respond to significant challenges presented by defendants—as was evident in the motion to dismiss that was litigated in this case. *Desue v. 20/20 Eye Care Network, Inc.*, No. 21-CIV-61275-RAR, 2023 WL 4420348, at *8 (S.D. Fla. July 8, 2023) (collecting cases and accepting the contention "that data breach cases, such as this one, can be especially risky, expensive, and complex"). Thus, these factors weigh heavily in favor of approving Class Counsel's fee request.[11]

2. Customary Fees Awarded[12]

[11] The risks to counsel associated with data breach cases, such as this one, are enhanced because counsel takes these matters on a contingency basis.
[12] The analysis here includes both factors 5 and 12.

Class Counsel's $350,000 fee request—at 2.2% of the available fund—is well below the percentage of the fund awarded in most class actions. *Wolff v. Cash 4 Titles*, No. 03-22778-CIV, 2012 WL 5290155, at *5–6 (S.D. Fla. Sept. 26, 2012) (collecting cases and noting that fee awards of 33% are common in class actions); *Tweedie v. Waste Pro of Florida, Inc.*, No. 8:19-cv-1827, 2021 WL 5843111, at *8 (M.D. Fla. Dec. 9, 2021) (approving a fee request of 1/3rd the fund and noting that the percentage fell within the range generally considered reasonable); *Roubert v. Capital One Fin. Corp.*, No. 8:21-cv-2852, 2023 WL 5916714, at *10 (M.D. Fla. July 10, 2023), *report & recommendation adopted by* 2023 WL 5320195 (M.D. Fla. Aug. 18, 2023) (same and collecting cases). The same is true of data breach class actions specifically. Decl. of J. Gerard Stranch, IV, ¶¶ 12, 21; *Cotter*, 2021 WL 3773414, at *12. Thus, Class Counsel's request, which is 2.2% of the fund, is well below the percentage requested in similar matters.

3. The Benefits Involved and the Results Obtained

The Settlement Agreement provides significant benefits to Class Members. As noted above, Class Members may claim reimbursement for ordinary losses up to $400 per Class Member. They may also claim reimbursement for any time spent responding to the Data Breach, up to four hours at $25 per hour for each Class Member. They may also sign up for credit monitoring for three years with all three bureaus, with an additional $1,000,000 in identity theft insurance. If Class Members

have documented extraordinary expenses, they may claim reimbursement up to $4,000 per Class Member. Moreover, the Settlement Agreement provides tangible prospective relief in that it requires Defendant to implement multi-factor authentication across all accounts and divisions, implement a password management system, audit its network accounts to remove inactive computer and user accounts, upgrade security policies to prevent logins from outside North America, implement a centralized logging system, and more. Settlement Agreement, § 4.

These benefits provide immediate relief and help prevent this from occurring again. Without the Settlement Agreement, Class Members would be forced to wait potentially years for this case to wind its way through the trial and appellate process. And the ultimate result of those years of waiting is unknown. Instead of waiting, these benefits are tailored to address the harm caused by Class Members' sensitive PII being in the hands of cybercriminals. Decl. of J. Gerard Stranch, IV, ¶ 12–13. Thus, in light of the uncertainty of complex data breach litigation, Class Counsel has successfully negotiated a significantly favorable recovery that will provide Class Members with the tools and compensation necessary to make them whole.

4. The Experience, Ability, and Reputation of Counsel

Class Counsel in this matter offer a wealth of experience, ability, and reputation. Decl. of J. Gerard Stranch, IV, ¶ 8–10. Class Counsel have been litigating complex class actions for years and are currently litigating dozens of data breach

class actions across the country in both state and federal court. *Id.* Moreover, Class Counsel often serve in leadership roles, including in some of the largest data breach matters. *Id*. This experience and reputation further justifies Class Counsel's request for fees.

5. The Parties Negotiated the Attorneys' Fees at Arms'-Length

In addition to the above factors, the Court should furthermore approve Class Counsel's requested fees because the amount was vigorously negotiated between the Parties. *Id.* ¶ 11. Indeed, "courts accord substantial deference to fee and expense amounts" that are negotiated and agreed upon between the parties and where there is no evidence of collusion. *In re S. Co. Shareholder Derivative Litig.*, No. 1:17-cv-725-MHC, 2022 WL 4545614, at *9 (N.D. Ga. June 9, 2022) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). Here, the negotiations were performed at arms-length in front of a neutral and experienced mediator, and there is no evidence of any collusion between the Parties or their counsel. Decl. of J. Gerard Stranch, IV, ¶ 11.

IV. Conclusion

Plaintiff's requested attorneys' fees of $350,000 is reasonable. The percentage of the common fund—2.2%—easily supports a presumption of reasonableness. Nevertheless, the *Johnson* factors establish the reasonableness of the fees and

expenses. The Court should, therefore, grant Plaintiff's motion awarding her reasonable attorneys' fees.

Dated: May 6, 2024

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