[NOT FOR PUBLICATION]

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** **ORDER GRANTING PLAINTIFF'S MOTION FOR FEES**

Before the Court is Plaintiff Cheryl Covington's motion for an award of attorneys' fees and expenses in the amount of $350,000. For the reasons set out more fully below, the motion is granted.

I. Background

This matter, originally filed on October 4, 2022, stems from an alleged Data Breach that occurred between August 25, 2021, and December 10, 2021. Plaintiff alleges that Defendant failed to adequate protect her and the putative class members' sensitive data, and that cybercriminals exploited weaknesses in Defendant's cybersecurity to steal that sensitive data. Shortly thereafter, Defendant filed a motion to dismiss, which the Court granted in part and denied in part. The Court allowed Plaintiff the opportunity to amend. After Plaintiff filed her amended complaint, the Parties engaged in mediation, and ultimately agreed to a class-wide settlement. As

is recognized by the Corrected Settlement Agreement, the Class is made up of 11,317 individuals. Doc. 50-1.

II. Settlement Benefits

The Settlement provides Class Members with three years of credit monitoring and identity theft protection services from three bureaus, which includes $1,000,000 of identity theft insurance. Doc. 50-1, 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 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 then provides that Defendant will not challenge Class

Counsel's motion for attorneys' fees and expenses up to $350,000 inclusive of both fees and expenses. *Id.* at 2, § 8.

III. 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).

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.*

IV. Discussion

a. The award is presumptively reasonable.

Plaintiff argues that the Settlement is a limitless common fund that was created by allowing all Class Members to file claims for the various types of relief available. The Court agrees.

According to the Corrected Settlement Agreement, all 11,317 Class Members are eligible to file claims. In the Eleventh Circuit, the value of the common fund is the amount the Settlement makes available to the Class, not the amount ultimately paid out by the fund. *See Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759, 767 (11th Cir. 2017); *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). Because the Settlement made at least $15,912,370.69, the Court finds that the Settlement agreement created a common fund in that amount, though the true value of the settlement is higher in that it provides Class Members with the ability to claim extraordinary losses up to $4,000 each, and it requires that Defendant better protect Class Members' data—neither of which are included in the $15,912,370.69. Decl. of J. Gerard Stranch, ¶¶ 14–17.

Based on the value of the common fund, Class Counsel's request of $350,000 in attorneys' fees is 2.2% of the common fund. That is far below the range at which the Eleventh Circuit considers fee awards to be 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."). Thus, the fee request is presumptively reasonable.

b. The Court sees no reason to question the presumption of reasonableness.

The Court is not aware of any reason to question the presumption that the request for fees is reasonable. Indeed, Defendant agreed not to challenge any request up to $350,000. "Where there is no evidence of collusion, courts accord substantial deference to fee and expense amounts determined by the parties." *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)).

Moreover, even if the Court did not credit the request's presumption of reasonableness, the fee request would nonetheless satisfy the factors the Eleventh Circuit would require the Court to consider, as recognized in *Camden I Condo Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) and *In re Home Depot Inc.*, 931 F.3d 1065, 1090 (11th Cir. 2019).[1]

[1] Though not all factors are relevant in each case, the *Johnson* factors are (1) the time and labor required to litigate the case, (2) the novelty and difficulty of the questions presented, (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).

First, the Court finds that the instant fee request is particularly reasonable in light of the typical fees awarded in similar matters. In consumer class actions, fee awards of one-third the common fund are typical, including in data breach matters. *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). By comparison, the fee request here is only 2.2% of the fund created by the Settlement.

Second, the Court is cognizant of the additional time and skill required to litigate novel issues like data breach matters, which require heightened understanding of deeply technical matters and how those new and novel issues can apply to older concepts rooted in the common law from times well before today's technology could be conceived. *Stoll v. Musculoskeletal Institute*, No. 8:20-cv-1798, 2022 WL 16927150, at *3 (M.D. Fla. 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 Court is also aware that courts across the country have often disagreed about how to apply those old concepts of the common law to the newer arena of data breach litigation, which has added significant risk to counsel bringing these matters and has no doubt required significant research and effort. *In re Arby's Rest. Grp.*, No. 1:17-cv-1035, 2019 WL 2720818, at *3 (N.D. Ga. June 6, 2019) (explaining that "data breach litigation involves the application of unsettled law with disparate outcomes across states and circuits"); *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").

Third, the details of the Settlement negotiations and its results weigh in favor of the reasonableness of the fee request. The Settlement Agreement was the product of an arms'-length negotiation with a neutral mediator, and the Court is unaware of any 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)). That mediation resulted in an Agreement that offers substantial benefits to the Settlement Class, which provide immediate relief without waiting for the lengthy litigation process to play out. Indeed, the Settlement will help Class Members protect against future risk of harm by offering them credit

monitoring services now, and it will compensate them for various out-of-pocket expenses and for their time spent responding to the Data Breach.

Lastly, the Court notes that Class Counsel has significant experience in data breach litigation, as well as other consumer class action litigation. Decl. of J. Gerard Stranch, IV, ¶ 8–10. Class Counsel's level of experience weighs in favor of the reasonableness of the fee request.

c. A lodestar analysis confirms the reasonableness of the award.

Though the Court need not engage in a lodestar cross check, especially given the mere 2.2% fee request, such a cross-check nevertheless weighs in favor of the award. In a lodestar calculation, the Court would use Class Counsel's hourly rate and time to determine the reasonableness of the request. Then, courts often apply multipliers to that number to determine whether the ultimate request is reasonable. The multipliers are often between two and four times, with an average of about three. *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[.]"). In this case, Class Counsel has explained in its declaration that the current multiplier would be 1.74, based on the fees incurred as of the date that the motion for fees was filed. This low multiplier further confirms the reasonableness of the fee request.

V. Conclusion

The request is 2.2% of the amount made available by the Settlement and is nonetheless reasonable based on an analysis of the relevant *Johnson* factors. The Court, therefore, grants Plaintiff's motion for an award of fees in the amount of $350,000, inclusive of any expenses.

Dated: **August 1, 2024**

The Honorable Victoria M. Calvert

Dated: May 6, 2024

Respectfully submitted for entry by:

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CERTIFICATION OF SERVICE

The undersigned hereby certifies that on May 6, 2024, this Motion was filed via the CM/ECF system, which will electronically serve all counsel of record.

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