

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

MICHAEL WARSHAWSKY and MICHAEL
STEINHAUSER, on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

CBDMD, INC. and CBD INDUSTRIES LLC,

Defendants.

Case No. 20-cv-00562

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED
MOTION FOR AN AWARD OF ATTORNEYS FEES,
REIMBURSEMENT OF LITIGATION EXPENSES,
AND SERVICE AWARDS TO THE NAMED PLAINTIFFS**

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INTRODUCTION

CBD Industries, LLC and cbdMD, Inc. (“Defendants” or “cbdMD”) gave notice to Plaintiffs and the Class of their unauthorized disclosure of sensitive personal information to unknown third parties on or about September 25, 2020. This unauthorized disclosure occurred between March 30, 2020 to May 8, 2020, and again from May 14, 2020 to May 18, 2020 (the “Data Security Incident” or “Security Incident”). Defendants offered the impacted Class Members little information regarding the scope of the Security Incident while offering 12 months of credit monitoring services. As a result of the efforts of Plaintiffs’ Counsel throughout the duration of this Action, however, Class Members will receive both monetary compensation and peace of mind that cbdMD has committed to changing its business practices, which will greatly reduce the likelihood of additional unauthorized disclosures of personal information.

Plaintiffs’ Counsel¹ have worked diligently in prosecuting this matter on behalf of the Settlement Class and have achieved a favorable result. The Settlement Agreement provides a substantial relief package on a per-Class Member basis, especially considering that the information involved in this Security Incident did not involve Social Security numbers, drivers’ license numbers, or other government ID numbers, but was limited to names, email addresses, billing addresses, payment card information, and bank account numbers.

If the Settlement receives final approval, cbdMD will provide the following benefits to Class Members, preliminarily approved by this Court on January 3, 2022 (ECF No. 12):

- 1) Expense Reimbursement: for documented out-of-pocket losses, plausibly caused by the Data Security Incident, not to exceed \$210 per Settlement Class

¹ Unless otherwise noted, all capitalized terms are defined in the Settlement Agreement and Release, previously filed at ECF No. 11-2, and referred to hereafter as “SA” or “Settlement.”

Member, that were incurred as a result of the Data Security Incident including:

(i) card replacement fees; (ii) late fees; (iii) overlimit fees; (iv) interest; (v) other bank or credit card fees; (vi) postage, mileage, and other incidental expenses resulting from lack of access to a payment card or account resulting from the Data Security Incident; (vii) up to three (3) hours of documented lost time spent monitoring accounts, reversing fraudulent charges, or otherwise dealing with the aftermath/clean-up of the Data Security Incident (calculated at the rate of \$20 per hour for up to three (3) hours); (viii) an additional payment of \$20 for each payment card on which a Class Member incurred one or more actual, documented fraudulent charge(s); and (ix) up to \$80 in costs associated with credit monitoring or identity theft insurance, if purchased primarily as a result of the Security Incident and if purchased between March 30, 2020 and the Claims Deadline;

- 2) Extraordinary Expense Reimbursements: cbdMD will reimburse each Settlement Class Member in the amount of his or her proven loss, up to \$2,500 per claim, for out-of-pocket losses that occurred more likely than not as a result of the Security Incident; are actual, documented, and unreimbursed; occurred during the Claims Period; and are not already covered by the Expense Reimbursement above.

The reimbursements provided are subject to an aggregate cap of \$300,000.00.

Not only does the Settlement offer Class Members the opportunity to be reimbursed for out-of-pocket expenses and time spent in mitigating the impact of the Security Incident, the Settlement offers the Class further value by mitigating the risk of future identity theft or fraud

arising out of the Security Incident; that is, a key component of the Settlement is that cbdMD committed to engaging in several business practice changes that are to be made in response to the Security Incident. These changes are provided in detail below in Section II.

Defendants have also agreed to pay, in addition to all of the value to the Settlement Class discussed above, all of the costs for notice to the Settlement Class, the costs of Claims Administration, and the costs of Dispute Resolution.

In all, the total Settlement value is greater than \$490,000 and provides for current compensation as well as protection against ongoing and future harm. To achieve this result, Plaintiffs' Counsel litigated diligently and creatively; conducted extensive research and investigation as to the challenging and complex legal and factual claims; drafted both a voluminous and detailed initial complaint and a voluminous and detailed amended complaint; engaged in a full day mediation with experienced mediator Bennet G. Picker, Esq. of the law firm Stradley Ronon Stevens & Young, LLP, with substantial negotiations and exchange of legal and factual memoranda and information; and drafted the Settlement Agreement and Preliminary Approval Motion and its concomitant notices.

In compensation for their efforts, Plaintiffs' Counsel seek \$135,000 for attorneys' fees, costs, and expenses. This requested amount is less than 27.5 percent of the total value of the proposed settlement of at least \$490,976, which includes up to \$300,000.00 in reimbursements to class members, the substantial costs of claims administration (estimated at \$50,976), and the attorneys' fees and service awards. The overall valuation of the settlement is greater when factoring in the substantial value of the non-monetary relief in the form of business practice changes adopted by Defendant which will inure to the benefit of all Class members and future customers of Defendant.

This request is on par with awards routinely granted by the Fourth Circuit and reflects a negative multiplier of 0.94 based on Plaintiffs' Counsels' lodestar of \$143,104.50², as described below and in the Declarations of M. Anderson Berry (attached as **Exhibit A**, hereinafter "Berry Decl.") and Jean Sutton Martin (attached as **Exhibit B**, hereinafter "Martin Decl.") and accompanying exhibits. With costs and expenses in the amount of \$7,381.28, (as described below and in the Berry and Martin Declarations) subtracted, the request reflects a negative multiplier of 0.89 based on Plaintiffs' Counsel's lodestar.

Finally, Plaintiffs seek modest Service Awards of \$2,500 per Settlement Class Representative, for the time and involvement they have put into this Action since its inception in October 2020, for a total of \$5,000. This request is supported by the Declarations of Michael Warshawsky (attached as **Exhibit C**, hereinafter "Warshawsky Decl.") and Michael Steinhauser (attached as **Exhibit D**, hereinafter "Steinhauser Decl.")

The fees, costs, expenses and Service Awards sought here are factually well-supported by the declarations of Plaintiffs' Counsel and the Class Representatives, the lodestar totals, expense breakdowns, and detailed time records.

I. FACTUAL BACKGROUND

a. Nature of the Action

Plaintiffs allege that beginning on or about September 25, 2020, cbdMD notified the U.S. Securities and Exchange Commission ("SEC"), various states' Attorneys General, and thousands of affected cbdMD customers about two data breaches that occurred through the cbdMD.com

² The lodestar and expense numbers presented are based on figures incurred as of May 16, 2022. Plaintiffs' counsel have spent and will continue to spend additional time preparing for the Final Approval Hearing, including speaking with class members and answering their questions regarding the Settlement and, claims process, and funds distribution. Plaintiffs' counsel will provide an update on their lodestar prior to the Final Approval Hearing.

website from March 30, 2020 through May 8, 2020, and again from May 14, 2020 through May 18, 2020. Hackers not only “scraped” many of cbdMD’s consumers’ names from Defendants’ website by infecting the ecommerce platform with a “malicious code,” hackers also stole customers’ payment card numbers, CVV security codes, credit card expiration dates, addresses, email addresses, and bank account numbers (“PII”). Plaintiffs allege that the criminals obtained everything they needed to illegally use cbdMD’s customers’ payment cards to make fraudulent purchases, and to commit myriad financial crimes and fraud. Defendants assert that 42,694 customers had their PII compromised as a result of the Security Incident.

b. The Litigation

After first receiving notice of the Security Incident, Plaintiffs Michael Warshawsky and Michael Steinhauser, who had purchased products from cbdMD’s website during the Security Incident, retained their respective counsel, and after investigation, counsel, who are very experienced in data security class actions, filed the initial Complaint. (ECF No. 1; Berry Decl. ¶ 11). Plaintiffs filed the operative, First Amended Complaint (“FAC”) on December 18, 2020. (ECF No. 3). In the FAC, Plaintiffs seek to represent a class of consumers residing in the United States who made a purchase online with cbdMD between March 30, 2020 and May 8, 2020, or between May 14, 2020 through May 18, 2020, the two specific time periods of the Security Incident. Plaintiffs allege that, due to the Security Incident, they and other similarly situated cbdMD consumers became victims of identity theft and asserted claims for negligence; declaratory judgment; unjust enrichment; violation of Florida’s Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.203, *et seq.*; and California’s Consumer Privacy Act, Cal. Civ. Code § 1798.100, *et seq.* (§ 1798.150(a)).

To bring the Complaint and the First Amended Complaint, Plaintiffs’ Counsel engaged in extensive research into the Security Incident and into security incidents like it, as well as into data

security practices and standards across e-Commerce platforms and industries. (Berry Decl. ¶ 11; Martin Decl. ¶ 6). As a result of the FAC and its well-supported allegations and the research Plaintiffs' Counsel performed, Defendants agreed to engage in mediation to seek an early resolution to the dispute. (Berry Decl. ¶ 12).

Following the February 3, 2021 mediation, on March 4, 2021, the Parties filed a Joint Motion advising the court of a mediated settlement between the Parties and requesting an order from the Court setting March 31, 2021 as the deadline for Plaintiffs to file their Motion for Preliminary Approval. (ECF No. 9). After the Court granted the request, the Parties requested an additional extension of 30 days, to April 30, 2021, to file the Motion for Preliminary Approval, which the Court also granted. (ECF Nos. 9-10). Judge Robert J. Conrad, Jr. granted Plaintiffs' Motion for Preliminary Approval on December 30, 2021. (ECF No. 12).

c. Settlement Negotiations

On February 3, 2021, the parties attended a full day mediation with experienced mediator Bennett G. Picker, Esq., of the law firm Stradley Ronon Stevens & Young, LLP. (Berry Decl. ¶ 13). Attorneys for both Parties participated in the mediation, as well as representatives for cbdMD and cbdMD's insurer. At the end of the full day mediation, the Parties were able to reach a settlement in principle. (Berry Decl. ¶ 13). Before and during the mediation, cbdMD provided sufficient information relevant to Plaintiffs' allegations, including details about the Security Incident occurred and data regarding the potential class, which required Plaintiffs' Counsel to review and analyze such information to best represent the potential class and Plaintiffs. (Berry Decl. ¶ 14). Counsel for Plaintiffs provided information detailing the impact the Security Incident had on Plaintiffs. (Berry Decl. ¶ 15). Moreover, counsel for Plaintiffs spent substantial time and resources crafting a proposed settlement matrix which would provide substantial and significant benefits to Plaintiffs and the proposed class and also be acceptable to Defendants. (Berry Decl. ¶

16). The parties reached an agreement in principle with regard to the material terms of the proposed settlement. (Berry Decl. ¶ 17). Counsel then took on the substantial task of memorializing those terms in the Settlement Agreement. (Berry Decl. ¶ 19). Plaintiffs' Counsel also drafted the Notice and Claim Forms, and the Motion for Preliminary Approval for presentment to this Court. (Berry Decl. ¶ 20). Plaintiffs' Motion for Preliminary Approval was granted on December 30, 2021. (ECF No. 12).

II. TERMS OF THE SETTLEMENT

The Settlement provides for significant monetary and equitable relief. (Berry Decl. ¶ 17 and ECF No. 11.2 (the "Settlement Agreement" of "SA")). Defendants have agreed to pay reimbursement awards to the Settlement Class up to a value of \$300,000.00. (SA, ¶ 2.3). In addition to this amount, cbdMD has agreed to pay any amounts approved by the Court for attorneys' fees, costs, and expenses up to \$135,000, and Service Awards, up to \$2,500 for each of the two Settlement Class Representatives, as well as the costs of class notice and claims administration, including the settlement referee; currently estimated by the claims administrator to be \$50,976.00. (SA, ¶¶ 2.6, 7.2-7.4; Berry Decl. ¶ 35).

The Settlement will provide two distinct types of monetary relief to the Settlement Class: Ordinary Expense Reimbursement and Extraordinary Expense Reimbursement. (SA, ¶¶ 2.1-2.2). Upon final approval of the Settlement, all Settlement Class Members will be eligible to claim Ordinary Expense Reimbursements up to \$210 per Settlement Class Member for documented out-of-pocket losses plausibly caused by the Security Incident. (SA, ¶ 2.1) The claim for Ordinary Expense Reimbursement includes up to three (3) hours of documented lost time spent monitoring accounts, reversing fraudulent charges, or otherwise dealing with the aftermath/clean-up of the Data Security Incident (calculated at the rate of \$20 per hour for up to three (3) hours), an additional

payment of \$20 for each payment card on which a Class Member incurred one or more actual, documented fraudulent charges. (SA, ¶ 2.1). Additionally, each Settlement Class Member can submit a claim for Extraordinary Expense Reimbursement up to \$2,500.00 per claim, for out-of-pocket losses that occurred more likely than not as a result of the Security Incident, and that are actual, documented, and unreimbursed losses that occurred during the Claims Period and are not already reimbursable under the ordinary Expense Reimbursement provision of the Settlement. (SA, ¶2.2).

Based upon experience in other data breach settlements and the specifics of this case, Plaintiffs' Counsel believe that the \$300,000.00 cap on reimbursements will be sufficient to pay the claims of Settlement Class Members. However, if there are insufficient monies to pay all claims, claims for out-of-pocket losses and lost time will be reduced on a *pro rata* basis. (Berry Decl. ¶ 21).

Not only does the Settlement offer Class members the opportunity to be reimbursed for out-of-pocket expenses and time spent to date, but perhaps the biggest value to the Settlement Class is found in the substantial commitment cbdMD has made to changing its business practices so as to drastically reduce the likelihood of a recurrence of the Security Incident. cbdMD has committed to a series of business practice changes including: (1) Complete PCI Attestation of Compliance (AOC) in conjunction with a PCI-certified Qualified Security Assessor (QSA); (2) Implementation and maintenance of multifactor authentication for VPN access to the e-Commerce system; (3) Implementation and maintenance of 60-day password life limits for both e-Commerce systems and email accounts; (4) Implementation and adherence to a policy requiring that any changes to the e-Commerce system require digital concurrence of two lead system developers facilitated by an automated process that cannot be overridden; (5) Employment of a third-party

expert to conduct a risk assessment of cbdMD's data assets and environment consistent with the NIST Risk Management Framework, and to conduct phishing and penetration testing of the cbdMD enterprise environment and enterprise user base; (6) Implementation and maintenance of additional intrusion detection and prevention, malware and anti-virus, and monitoring applications within the cbdMD environment; (7) Designation of a cyber-security specialist to oversee IT security for the company, including the e-Commerce system; and (8) Implementation and following of a revised, nationwide and company-wide written information security program to replace the Massachusetts-based WISP that became effective on 11/11/2019. (SA, ¶¶ 2.4.1-2.4.8). These changes substantially reduce the risk of an additional Security Incident occurring and therefore provide substantial value to the Settlement Class, whose PII will be less likely to be further exposed to unauthorized third parties as a result, and to future cbdMD customers who can now expect adequate security from cbdMD. (Berry Decl. ¶ 22).

In all, the total settlement value is greater than \$490,976 and provides for current compensation as well as protection against future harm with commitment from the Defendant to implement significant business practice changes. Plaintiffs' Counsels' request for an award of \$135,000 for fees, costs and expenses represents less than 27.5 percent of the total settlement value, and does not include a separate request for reimbursement of costs and expenses reasonably incurred in the litigation. Such an award, which represents a negative multiplier of Plaintiffs' Counsels' lodestar is reasonable and consistent with awards in the District.

III. LEGAL ARGUMENT

a. Legal Standard

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. *See e.g.*

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980). Federal Rule of Civil Procedure 23(h) provides that courts may award “reasonable attorney’s fees and nontaxable costs that are authorized by law or the parties’ agreement.” Fed. R. Civ. P. 23(h). Here, under the Settlement Agreement, Defendants agreed not to oppose Plaintiffs’ fee and cost request so long as it did not exceed \$135,000. (SA, ¶ 7.2). Thus, the only question for the Court is whether the unopposed fee is “reasonable.” The Court has discretion to determine what is reasonable. *In re Hatteras Fin., Inc., Shareholder Litig.*, 286 F. Supp. 3d, 727, 735 (M.D.N.C. 2017).

Courts generally recognize two methods for awarding attorneys’ fees in class actions in the Fourth Circuit: the percentage method, which awards fees as a percentage of the benefit secured for the Class, and the lodestar method, which awards fees based on the value of Counsels’ time spent litigating the claims. *Singleton v. Domino’s Pizza, LLC*, 976 F. Supp. 2d 665, 681 (D. Md. Oct. 13, 2013). “The Court must determine the best method of calculating attorneys’ fees to appropriately compensate Class Counsel.” *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 575 (E.D. Va. 2016). “With either method, the goal is to make sure that counsel is fairly compensated.” *Id.* The Fourth Circuit “has not decided which of the general approaches to adopt.” *Id.*

The combined value of monetary relief agreed to by Defendants in the Settlement Agreement has a monetary value of \$490,976. This amount is based on the amount available for reimbursement of the Class (\$300,000); the amount of class notice and claims administration (presently estimated at \$50,976); the amount Defendants have agreed to pay for attorneys’ fees and costs (\$135,000); and the amount Defendants have agreed to pay for service awards for the Settlement Class Representatives (\$5,000). (SA, ¶¶ 2.3, 7.2, 7.3; Berry Decl. ¶ 35). This valuation does not account for the substantial value of the non-monetary benefits conferred to the Settlement Class by the Settlement Agreement in the form of significant and ongoing business practice

changes. (SA, ¶¶ 2.4.1-2.4.8). As such, Plaintiffs' attorneys' fees request of \$135,000 represents less than 27.5 percent of the total settlement value.

Such an amount is a lower percentage than many fees awarded under the percentage method in this District, which often equal 33 percent of the settlement value. *See e.g. In re Cotton*, 3:18-cv-00499, 2019 WL 1233740, at *4 (W.D.N.C. Mar.15, 2019) (approving an award of 33 percent of the total settlement value); *Neal v. Wal-Mart Stores, Inc.*, 3:17-cv-00022, 2021 WL 1108602, at *2 (W.D.N.C. Mar. 19, 2021).

Under the lodestar method, the Court's analysis begins by calculating Counsels' lodestar, that is, Counsels' reasonable hourly rate multiplied by hours reasonably expended in the litigation. *Grissom v. The Mills Corp.*, 549 F.3d 313, 320 (4th Cir. 2008). In the Fourth Circuit, twelve factors guide the Court's "reasonableness" analysis:

(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).

As discussed below, all of the factors support the requested fee award.

Settlement Class Counsel request, and cbdMD does not oppose, a payment of \$135,000 for Counsels' attorneys' fees and expenses incurred in litigating this matter. (SA, ¶ 7.2). It is important to note that these fees and expenses will be paid separately by cbdMD and will not reduce the recovery available to the Class. (SA, ¶¶ 2.3, 7.2). Also noteworthy is the fact that, like the Service Awards, attorneys' fees and expenses were negotiated only after the substantive terms

of relief to the Class had been agreed upon, affording the protections of the adversary system to the fee-setting process. (SA, ¶ 7.1). The Settlement was in no way contingent upon an agreement as to the amount of attorneys' fees. (Berry Decl., ¶ 18).

b. Counsels' Lodestar Reflects the Time, Labor, and Skill Reasonably Required to Prosecute this Complex Action.

The Court's analysis begins by calculating Counsels' lodestar. *Grissom v. The Mills Corp.*, 549 F.3d at 320. Here, as Counsel attest, they reasonably expended 204 hours litigating this Action. (Berry Decl., ¶ 31; Martin Decl., ¶ 9). Cognizant of the need to work efficiently, Counsel for the two firms representing Plaintiffs and Class Members coordinated their work to avoid duplication of effort and assigned work to associated and paralegal personnel whenever possible and prudent to keep costs low. (Berry Decl., ¶¶ 11, 32).

Over the course of the litigation, Plaintiffs' Counsel diligently and creatively litigated, conducted extensive research and investigation as to the challenging and complex legal and factual claims; drafted both a voluminous and detailed initial complaint and a voluminous and detailed amended complaint; engaged in a full day mediation with mediator Bennett G. Picker, Esq. with substantial negotiations and exchange of legal and factual memoranda and information; and drafted the Settlement Agreement and Preliminary Approval Motion and its concomitant notices. (Berry Decl., ¶¶ 11-20; Martin Decl., ¶ 6). The hours Counsel spent litigating this matter reflect the reasonable and necessary effort required to achieve such a satisfactory result. (Berry Decl., ¶ 29; Martin Decl. ¶ 10.)

c. Plaintiffs' Counsel's Hourly Rates are Reasonable.

An "attorney's actual billing rate provides a starting point for purposes of establishing a prevailing market rate." *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994)

(internal quotation omitted). Here, Class Counsel includes some of the leading counsel in data breach class action litigation nationwide. (Berry Decl., ¶¶ 2-7; Martin Decl., ¶¶ 3-6). The attorneys' regular billing rates are based on the customary rates and these hourly rates are within the reasonable range of rates charged by attorneys with similar levels of experience and credentials in the data breach class action field. (Berry Decl., ¶¶ 26, 30; Martin Decl., ¶¶ 10-13).

Class Counsels' billing rates are within the range of rates approved in this District and others in this state as reasonable. *See e.g., Rehberg v. Flowers Baking Co. of Jamestown, LLC*, No. 3:12-cv-00596-MOC-DSC (W.D.N.C. June 30, 2017), ECF Nos. 250, 245-5, 245-1 (approving hourly rates of \$975 for an attorney practicing 23 years and \$590 for an attorney practicing 10 years); *McCoy v. North State Aviation, LLC, et al.*, No. 17-cv-346 (M.D.N.C. June 15, 2018) (Doc. 51) (approving attorney Jean Martin's rate and comparable rates of out-of-state attorneys); *Linnins v. HAECO Americas, Inc., et al.*, No. 16-cv-486 (M.D.N.C. Oct. 26, 2018), ECF No. 45 (same).

d. The Requested Fee is Reasonable in Light of Class Counsel's Lodestar

Plaintiffs seek an award of \$135,000 in attorneys' fees and costs and expenses. Multiplying the hours reasonably expended by each of Settlement Class Counsel by their hourly rates, Settlement Class Counsel's lodestar is \$143,104.50. Moreover, Settlement Class Counsel spent \$7,381.28 in costs and expenses litigating this case. The fee agreed to in the Settlement represents a negative multiplier of 0.94 based on Settlement Class Counsel's lodestar. This fee represents an eminently reasonable compromise by Plaintiffs in Settlement Class Counsel's lodestar and expenses incurred in the diligent and successful prosecution of this matter. *See e.g., Gaston v. LexisNexis Risk Solutions Inc.*, 5:16-cv-00009, 2021 WL 2077812, at * 7 (W.D.N.C. May 24, 2021) (finding a lodestar multiplier of 1.85 reasonable); *Nieman v. Duke Energy Corp.*, No. 3:12-cv-00456, 2015 WL 13609363, at *1 (W.D.N.C. Nov. 2, 2015) (approving a lodestar multiplier of

greater than 4.5 and discussing that a typical lodestar multiplier in class action matters ranges from 1.3 to 4.5). The requested fee is reasonable and should be awarded.

e. The *Barber* Factors Support the Fee Award

As discussed above, the reasonableness determination of Plaintiffs' Counsels' lodestar is further informed by the factors set out in *Barber v. Kimbrell's, Inc.*: (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 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' fee awards in similar case. 577 F.2d at 226, n. 28. The Court does not need to address all twelve factors independently, "because such considerations are usually subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *MTU Am. Inc. v. Swiftships Shipbuilders LLC*, No. 1:14-cv-773, 2015 WL 4139176, at *3 (E.D. Va. July 8, 2015) (internal quotation omitted). Of the factors, "the results obtained" factor is typically considered the most important. *Imaginary Images, Inc. v. Evans*, No. 3:08-cv-398, 2009 WL 2488004, at *2 (E.D. Va. Aug. 12, 2009); *see also Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 478 F.3d 183, 190 (4th Cir. 2007). Settlement Class Counsel here expended large amounts of time and labor, demonstrated skill commensurate with their preeminent reputations, and achieved a positive result in this novel and complex action.

1. The Results Obtained Strongly Weigh in Favor of the Requested Fee Award

Particularly salient here is the 8th *Barber* factor—the amount in controversy and the results obtained. *See 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.”). Despite a substantial set of legal challenges, Plaintiffs have achieved relief that provides substantial benefits for tens of thousands of cbdMD’s customers, making the requested fee more than reasonable.

The Settlement provides significant benefits to the Class, both in the form of retrospective relief for those who make claims—in the form of cash payments—and prospective relief (even if a class member does not make a claim) in the form of significant business practice changes that will reduce or eliminate many of the practices that allegedly lead to the theft of Settlement Class Members’ sensitive PII that formed the basis for Plaintiffs’ allegations. Monetarily, the SA provides for a settlement in which cbdMD agrees to provide up to \$300,000 collectively in reimbursements for out-of-pocket expenses and losses to Class Members who made claims. Individuals who suffered the most as a result of the Security Incident (those who suffered fraud on the impacted payment cards and bank accounts) can receive up to \$2,500 in reimbursements for those losses. Individuals who suffered more modest losses, in the form of lost time, late fees, card replacement fees, and the costs of credit and identity theft monitoring, can receive up to \$210 in reimbursements for those expenses. (*See SA*, ¶¶ 2.1-2.3).

Additionally, the Settlement provides for significant business practice changes that will benefit members of the Settlement Class, as detailed above in Section II. Such changes in cbdMD’s business practices will substantially reduce the risk of future Security Incidents and will provide real protection from further exposure of Settlement Class Members’ PII, and will provide the same benefits to all current and future customers of cbdMD as well. While the monetary value

of these changes cannot readily be calculated, tens of thousands of cbdMD's customers will benefit from these business practice changes. Considering all of the benefits together, the value of these business practices changes is many multiples of the requested fee award, confirming the reasonableness of the requested fee.

In sum, Settlement Class Counsel have achieved a favorable result in a legally complex and novel case. Counsel should be reasonably compensated for creating this value for the Settlement Class. Particularly in light of the positive result achieved, the requested fee is a reasonable, appropriate award for this case.

2. The Requested Fee Award is Lower Than Attorneys' Fees Awarded in Similar Cases

The fee requested here is well within the range of awards in similar cases. In the Fourth Circuit, courts have awarded positive multipliers of up to greater than 4.5. *See e.g., Gaston*, 2021 WL 2077812, at * 7 (multiplier of 1.85); *Nieman*, 2015 WL 13609363, at *1 (approving a lodestar multiplier of greater than 4.5 and discussing that a typical lodestar multiplier in class action matters ranges from 1.3 to 4.5); *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 790 (E.D. Va. 2001) (multiplier of 2.6); *Berry v. Schulman*, 807 F.3d 600 (4th Cir. 2015) (multiplier of 1.99).

Moreover, other courts nationwide have—many times over—approved fee awards much larger than the one requested here, often with much larger 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 considering the “outstanding settlement” and “noticeable skill of counsel.”); *In re MI Windows & Doors Inc. Prod. Liab. Litig.*, No. 2:12-MN-00001, 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); *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, and 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 litigation); *In re WorldCom, Inc., Sec. Litig.*, 388 F. Supp.2d 319, 353 (S.D.N.Y. 2005) (awarding multiplier of 4); *Decohen*, 299 F.R.D. at 483 (multiplier of 3.9); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 387 (D. Md. 2006) (multiplier of 2.57).

Here, Settlement Class Counsel’s requested fee represents a negative multiplier of 0.94. This is on the low end of the multipliers discussed above.

3. The Skill of the Attorneys and the Difficulty of the Case Also Support Approval of the Fee Award

The expertise of the attorneys involved in this matter combined with the complexity of the case likewise support the requested fee award. Settlement Class Counsel have demonstrated skill commensurate with their reputations and prosecuted a tough case on behalf of the Plaintiffs and the Settlement Class. (*See generally* Mot. for Prelim. Approval at pp. 19-20). Two of the leading class action firms in the field of Data Security litigation cooperated to bring and prosecute this action. Each invested substantial hours of both attorney and paralegal time. (*See* Berry Decl., ¶ 31; Martin Decl., ¶ 9). And, each firm is highly experienced and well-regarded in the Data Security class-action litigation field. (Berry Decl., ¶¶ 2-7; Martin Decl., ¶¶ 3-6).

Settlement Class Counsels’ expertise is important because this was a case with substantial hurdles to be faced by Plaintiffs. While Class Counsel were optimistic that Plaintiffs’ claims would prevail, they recognize that success in this case was not assured. The risk of nonpayment was

substantial. *See, e.g., In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) (“Data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts. And of course, juries are always unpredictable.”); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (noting that “many of the legal issues presented in [] data-breach case[s] are novel”). While Plaintiffs believe they would have ultimately prevailed on the merits at trial or summary judgment, the risk of nonpayment was substantial. Moreover, the fact that Class Counsel was able to resolve this difficult case within only a few months of initiating it is further indicative of their skill and efficiency in litigating this matter. *See In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 262-63 (E.D. Va. 2009) (finding that Counsel’s ability to resolve the case within one year of the Court’s denial of Defendant’s Motion to Dismiss to be indicative of Counsel’s “skill and efficiency.”). In other words, Plaintiffs did not run up the bill in order to seek addition fees.

4. The Reaction of Class Members Also Favors Granting the Requested Fee

No Settlement Class Member has objected or excluded themselves from the settlement, which includes details concerning the requested fee award. (Berry Decl., ¶ 36.) This indicates that the Class overwhelmingly supports the Settlement. (*Id.*) Settlement Class Members were informed of the amount of attorneys’ fees that Settlement Class Counsel would request through the notice program, so there was adequate opportunity for any Settlement Class Member to object to the fee request in advance of the deadline for objections. (*Id.*, ¶ 37.) The lack of any Class Member’s objection to the requested fee award weighs heavily in favor of granting it. *See Decohen*, 299 F.R.D. at 481 (“[T]he absence of objections by the class to the settlement, indicate that class counsel have achieved a superior result for the class and weighs in favor of their requested award.”); *In re The Mills Corp., Sec. Litig.*, 265 F.R.D. at 262 ([T]he dearth of legitimate objections

to the requested fee...enforces the reasonableness of that request in the Court's eyes."); *Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 763 (S.D. W. Va. 2009) (approving award of attorneys' fees where one class member objected to settlement, and finding "the Class Members to have demonstrated approval of the instant fee request and agreement to pay such an amount."). In short, Class Member reaction to the Settlement, including the fee request, has been positive, further confirming the reasonableness of the requested fee.

f. THE REQUESTED FEE AWARD INCLUDES CLASS COUNSEL'S REASONABLY INCURRED EXPENSES

The requested fee award also includes Settlement Class Counsel's reasonably incurred expenses. Counsel has incurred \$7,381.28 in costs litigating this case. (Berry Decl., ¶ 33; Martin Decl., ¶ 16). Courts regularly award litigation expenses in addition to attorneys' fees in class action cases. *See, e.g., Kabore v. Anchor Staffing, Inc.*, No. L-10-3204, 2012 WL 5077636, at *10 (D. Md. Oct. 17, 2012) (It is well-established that plaintiffs who are entitled to recover attorneys' fees are also entitled to recover reasonable litigation-related expenses as part of their overall award."). The Fourth Circuit has explained that such costs and expenses may include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (internal quotations omitted). Fourth Circuit courts have awarded costs such as reasonable expenses including mediation fees. *In re NeuStar, Inc. Sec. Litig.*, No. 14-cv-00885, 2015 WL 8484438, at *10 (E.D. Va. Dec. 5, 2015). Counsel's expenses here, totaling \$7,318.28, all fall into these categories and were all reasonably incurred in pursuing this litigation. (Berry Decl., ¶ 33; Martin Decl., ¶ 16). Counsel's expenses were reasonable and necessary to litigate this case, and the Court should therefore include them in any fee award. *Singleton*, 976 F. Supp. 2d at 689 (awarding expenses that the court deemed were "reasonable and typical").

In sum, because Settlement Class Counsel's requested fee award of \$135,000 includes the \$7,318.28 in expenses Settlement Class Counsel incurred in this litigation, this is yet another factor counseling towards the reasonableness of the fee award.

g. THE REQUESTED SERVICE AWARDS ARE REASONABLE

Courts recognize the purpose and appropriateness of service awards to class representatives. *See e.g., Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 WL 2285972, at *6–7 (S.D.W. Va. May 23, 2013) (approving award \$7,500 per lead Plaintiff); *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14CV238 (DJN), 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016) (approving a \$10,000 service award); *Berry v. LexisNexis Risk & Info. Analytics Grp., Inc.*, No. 3:11-CV-754, 2014 WL 4403524, at *16 (E.D. Va. Sept. 5, 2014), *aff'd sub nom. Berry v. Schulman*, 807 F.3d 600 (4th Cir. 2015) (approving a \$5,000 service award) “A fairly typical practice, incentive awards are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Manuel*, 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016) (internal quotations omitted).

Here, Plaintiffs' unopposed request is a modest award to be distributed amongst the two Class Representatives. The Service Awards, like the fee award, were negotiated only after the substantive terms of relief to the Class had been agreed, and will not diminish the recovery of other Class Members in any way. (Berry Decl., ¶ 18.) Moreover, the Service Award of \$2,500 to each Class Representative is reasonable.

In this litigation, the Class Representatives put themselves forward in litigating this case, kept abreast of the case's status, reviewed documents provided to them by counsel, and discussed with counsel various aspects of the case. Warshawsky Decl., ¶¶ 5, 8-12; Steinhauser Decl., ¶¶ 5,

8-12; *see Burke v. Shapiro, Brown & Alt, LLP*, No. 3:14-cv-201 (DJN), 2016 WL 2894914, at *6 (E.D. Va. May 17, 2016). Much larger service awards have been regularly approved by judges in this District. *See e.g., Neal*, 2021 WL 1108602, at *2 (approving service awards of \$10,000 to each Settlement Class Representative); *In re Cotton*, 2019 WL 1233740, at *4 (approving service awards of \$10,000 to each Settlement Class Representative).

The Class Representatives amply fulfilled their duties, making the Service Awards requested appropriate. While they did not have to undergo extensive discovery or depositions, they did gather documents and materials in support of their claims that were used in drafting the Complaint and the First Amended Complaint. Warshawsky Decl., ¶¶ 5, 9, 13; Steinhauser Decl., ¶¶ 5, 9, 13.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court find that \$135,000 in attorneys' fees and costs to Settlement Class Counsel, and \$2,500, each, as service awards to the Class Representatives, are reasonable and should be approved.

Dated: May 19, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jean Sutton Martin, certify that I caused the foregoing to be electronically filed in this case on May 19, 2022 using the Court's CM/ECF System, thereby serving it upon all counsel of record in this case.

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