

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

CONNIE YUAN, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

HOMETRUST MORTGAGE CO.,

Defendant.

Case No. 1:22-cv-01355-DII

Judge David A. Ezra

PLAINTIFF'S MOTION TO APPROVE FEES, COSTS AND SERVICE AWARD

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Plaintiff Connie Yuan hereby moves this Court, pursuant to Fed. R. Civ. P. 23 for the entry of an Order: (i) awarding one-third of the Settlement Fund (or \$231,000) as attorneys' fees, (ii) approving the reimbursement of expenses incurred by counsel in successfully prosecuting and resolving this litigation in the amount of \$6,054.99, and (iii) approving a compensatory service award in the amount of \$5,000 to Plaintiff Yuan.

I. INTRODUCTION

The Court should grant Plaintiff Yuan's motion because Plaintiff accomplished what she set out to achieve with this lawsuit: reaching a resolution that offers significant benefits to victims of Hometrust's data breach.

On December 2022, Plaintiff filed suit against Defendant Hometrust Mortgage Company, ("Defendant" or "Hometrust") related to a July 2022 data breach involving Hometrust's systems that affected the personal identifying information ("PII") of Plaintiff and approximately 17,300 other individuals. After several weeks of arm's-length negotiations and an April 11, 2023, in-person mediation session with Mr. John DeGroote, the Plaintiff and Defendant Hometrust reached the Settlement Agreement (the "Settlement" or "S.A."). *See* D.E. 27-1. The Settlement provides excellent benefits to the Settlement Class. Under the Settlement, Hometrust has funded a \$700,000 *non-reversionary common fund* from which Settlement Class Members are eligible to recover either a) actual economic losses that were incurred as a result of the data breach, or b) a cash settlement payment of \$50 or c) up to \$40 per hour for up to ten hours of lost time for time spent responding to the data breach, and one year of credit monitoring protection. Moreover, if any funds remain after the payment of claims, plus attorneys' fees and expenses and settlement administration costs, such funds will be paid out to Settlement Class members on a pro rata basis.

In addition, Hometrust will provide additional anti-phishing training to its employees at its own expense, separate from the other settlement benefits provided to the Settlement Class

Given the tremendous result achieved on behalf of the class (achieved despite many of the obstacles data breach cases pose), the Court should grant Plaintiff Yuan's request for reasonable fees, costs, and a service award.

II. STATEMENT OF FACTS

A. Background on Litigation

Hometrust is a non-depository mortgage bank, providing its residential mortgage loan services to customers within Texas as well as nationwide. *See* D.E. 1 (Class Action Complaint) at ¶¶3, 23. As a result, it collects and stores its customers' PII in its systems, including names, addresses, dates of birth, Social Security, and other information. On July 15, 2022, Hometrust became aware that there was suspicious activity within its computer system. *Id.* at ¶4. On September 27, 2022, Hometrust determined that it had been a victim of a ransomware attack, and there had also been unauthorized access to the network. *Id.* ¶¶4-6 As a result of phishing emails or emails containing viruses or other malignant computer code, cybercriminals breached its systems and stole the PII of Hometrust's customers, including their first and last names, Social Security numbers, and addresses. *Id.* ¶28. Plaintiff, a former customer of Hometrust, is a victim of this Data Security Incident. *Id.* ¶¶70,72. Hometrust denies these allegations and denies that Plaintiff and the Settlement Class are entitled to any relief. S.A. § II. Following Hometrust's notification to those affected by the Data Security Incident and an investigation by Settlement Class Counsel, Plaintiff filed this class action lawsuit against Hometrust in this Court on December 22, 2022. *See* Compl. Plaintiff alleged that, as a result of the Data Incident, Hometrust was liable for negligence,

negligence *per se*, breach of implied contract, breach of fiduciary duty, intrusion upon seclusion/invasion of privacy, and unjust enrichment. *Id.*

B. Mediation and Settlement

Recognizing the benefits of early resolution, the parties agreed to mediate on April 11, 2023, with John DeGroote from DeGroote Partners. D.E 27-2 at ¶5 (Joint Declaration of Plaintiff’s Counsel, previously filed with Plaintiff’s Motion for Preliminary Approval). Prior to the mediation, the parties negotiated many preliminary terms. *Id.* ¶7. While the negotiations were always professional, they were adversarial in nature, with both parties forcefully advocating the positions of their respective clients. *Id.* It wasn’t until receiving the assistance of Mr. DeGroote that the parties were able to reach final agreement. *Id.* ¶8. A term sheet was agreed upon, and in the weeks that followed, the parties diligently negotiated and circulated drafts of the Settlement, along with accompanying notices, a Claim Form, and other exhibits, and agreed upon a Claims Administrator. *Id.* ¶8. The Settlement Agreement was finalized and executed on May 23, 2022. Settlement Class Counsel has successfully negotiated the Settlement of this matter to the benefit of Plaintiff and Settlement Class Members.

The Settlement provides for the certification of a Settlement Class defined as “All persons whose personal information was exposed or potentially exposed to unauthorized access or acquisition as a result of an Incident affecting Hometrust’s computer network that occurred in or around July of 2022.” *See* D.E. 27-1, Settlement Agreement (hereafter referred to as “S.A.”) at ¶ 4.1.

The Settlement establishes a \$700,000 non-reversionary common fund (the “Settlement Fund”) from which Hometrust will provide Settlement Class Members with timely benefits targeted at remediating the specific harms they claim to have suffered as a result of the Incident.

The benefits of the Settlement are available to all Settlement Class Members. The Settlement provides the following benefits to all Settlement Class Members who submit a valid claim.

1. Cash Benefits

Settlement Class members may make claims, *with no dollar cap*, to recover for economic losses, defined as any out-of-pocket cost fairly traceable to the Data Security Incident. S.A. ¶1.9. This includes losses suffered as a result of identity theft. *Id.* ¶ 4.5.2. The Settlement also allows Settlement Class Members who have spent at least one full hour dealing with the Data Security Incident to claim up to ten hours of lost time at \$40 per hour by submitting a brief description of the actions taken in response to the Data Security Incident and the time associated with each action. S.A. ¶ 4.5.8. Claims for Attested Lost Time are capped at \$400 per individual. *Id.* In the alternative to claims for economic losses or attested time, Settlement Class Members are eligible to receive a cash settlement payment of \$50 as a result of the Data Security Incident through submission of a valid and timely claim and supporting documentation indicating they are members of the class. S.A. ¶ 4.5.10.

2. Credit Monitoring Protections

In addition to the financial and temporal loss reimbursements and benefits, Plaintiff negotiated for significant additional credit monitoring and identity restoration services for the Settlement Class. All Settlement Class Members will have the option to sign up for one year of credit monitoring provided by Equifax, at no cost if they elect to enroll. S.A. at 9. These services will come with fully managed identity theft protection, and identity restoration services. *Id.* at 10.

3. Equitable Relief

Separate from, and in addition to, the other Settlement Benefits described above, Hometrust will provide additional anti-phishing training to its employees. S.A. ¶ 4.5.19. The cost of the anti-phishing training will be paid by Hometrust, separate and apart from the Settlement Fund.

III. LEGAL STANDARD

Under Rule 23, the Court may award fees “authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). The Fifth Circuit has applied the “common fund” doctrine for decades. *See Barton v. Drummond Co.*, 636 F.2d 978, 982 (5th Cir. 1981) (“it is well settled that the ‘common benefit’ or ‘common fund’ equitable doctrine allows for the assessment of attorneys’ fees against a common fund created by the attorneys’ efforts”); *see also, e.g., Burford v. Cargill, Inc.*, No. 05-0283, 2012 U.S. Dist. LEXIS 161232, at *1-2 (W.D. La. Nov. 8, 2012).

In common fund cases such as this, courts typically use one of two methods for calculating attorneys’ fees: (1) the percentage method, in which the court awards fees as a reasonable percentage of the common fund; or (2) the lodestar method, in which the court computes fees by multiplying the number hour hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or downward multiplier.” *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642-43 (5th Cir. 2012).

While either method may be utilized, “[t]he percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund “in a manner that rewards counsel for success and penalizes it for failure.” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (quoting *In re Prudential Ins. Co.*, 148 F.3d 283, 333 (3d Cir. 1998)).

Indeed, numerous courts and commentators¹ have stated that the “percentage method is vastly superior to the lodestar method for a variety of reasons, including an incentive to ‘run up the bill’ and the heavy burden that calculation that the lodestar method places upon the court.” *Schwartz v. TXU Corp.*, 2005 U.S. Dist. LEXIS 27077 (N.D. Tex. Nov. 8, 2005).

Under the percentage-of-recovery method, the Court first determines the benchmark percentage to be applied to the actual monetary value conferred to class members by the settlement. *Burford v. Cargill, Inc.*, No. 05- 0283, 2012 U.S. Dist. LEXIS 161232, at *1-2 (W.D. La. Nov. 8, 2012). After setting the benchmark, the Court then applies the *Johnson* factors to evaluate a settlement’s requested fee’s “reasonableness” of the percentage and to determine whether an adjustment is warranted. *Id.* These factors include: (i) the work required to reach settlement; (ii) the “novelty and difficulty of the issues;” (iii) the skill required to litigate the case; (iv) whether the attorney was precluded from working on other cases; (v) the “customary fee” for services; (vi) whether the fee is fixed or contingent; (vii) the time limits imposed by the client or circumstances; (viii) the amount at stake and the results; (ix) the attorneys’ experience and reputation; (x) whether the case was “undesirable;” (xi) counsel’s relationship with their client; and (xii) awards in “similar cases.” See *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

¹ See Report of Third Circuit Task Force: Court Awarded Attorney Fees, 108 F.R.D. 237, 246-49 (1986) (identifying a number of deficiencies with the lodestar method, including: (1) increasing the workload of the judicial system; (2) lack of objectivity; (3) a sense of mathematical precision unwarranted in terms of the realities of the practice of law; (4) ease of manipulation by judges who prefer to calculate the fees in terms of percentages of the settlement fund; (5) encouraging duplicative and unjustified work; (6) discouraging early settlement; (7) not providing judges with enough flexibility to award or deter lawyers so that desirable objectives, such as early settlement, will be fostered; (8) providing relatively less monetary reward to the public interest bar; and (9) confusion and unpredictability in administration).

IV. ARGUMENT

A. **The Court Should Approve Plaintiff Yuan’s Request for Reasonable Fees and Costs**

1. **One Third of the Common Fund Is an Appropriate Benchmark**

District courts in the Fifth Circuit routinely have awarded percentages of one-third. *See Celeste v. Intrusion Inc.*, No. 4:21-CV-307-SDJ, 2022 U.S. Dist. LEXIS 226841, at *35-36 (E.D. Tex. Dec. 16, 2022); *Marcus v. J.C. Penney Co. Inc.*, No. 6:13-CV-736, 2017 U.S. Dist. LEXIS 214427, 2017 WL 6590976, at *6 (E.D. Tex. Dec. 18, 2017) (“It is not unusual for attorneys' fees awarded under the percentage method to range between 25% to 30% of the [settlement] fund or more.”). That percentage is appropriate here.

2. **The *Johnson* Factors Support the Fee of One-Third of the Common Fund When Applied to this Case**

Counsel’s request is also “reasonable” under the *Johnson* factors.² First, counsel devoted “significant time and effort pursuing this case,” including by investigating the breach, detailing Plaintiff Yuan’s claims in her complaint, preparing her case for litigation, and engaging in informal discovery in advance of mediation. Borrelli Dec. ¶¶3-4, 7. These steps helped to ensure Class Counsel had sufficient facts and information to make an informed decision about resolution and mediate the dispute. *Id.* ¶7. Additionally, counsel reviewed “informal” discovery, drafted the settlement agreement and exhibits, prepared and submitted the Motion for Preliminary approval (which was granted), and implemented the Settlement by working with defendant and the claims

² Because not all factors apply, counsel evaluates only those that do. Indeed, “[t]he relevance of each of the Johnson factors will vary in any particular case, and, rather than requiring a rigid application of each factor, the Fifth Circuit has left it to the lower court’s discretion to apply those factors in view of the circumstances of a particular case.” *Schwartz v. TXU Corp.*, 2005 U.S. Dist. LEXIS 27077 at *28 (N.D. Tex. Nov. 8, 2005); *see also In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 502 (N.D. Miss. 1996) (“not every [*Johnson*] factor need be necessarily considered”).

administrator to effectuate notice. *Id.* ¶12. And although the case settled before conducting full blown formal discovery, counsel’s efforts maximized the Agreement’s value by redirecting resources from litigation to settlement. *Id.*³

Second, the “novelty and difficulty of the issues” at stake warrant awarding counsel’s fee request. *See, e.g., In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 U.S. Dist. LEXIS 135573, at *13 (N.D. Ohio Aug. 12, 2019) (“data breach litigation is complex and largely undeveloped.”); *Fulton-Green v. Accolade, Inc.*, 2019 U.S. Dist. LEXIS 164375, at *21 (E.D. Pa. Sep. 23, 2019) (“This is a complex case in a risky field of litigation because data breach class actions are uncertain and class certification is rare.”).

Data breach class actions are still new and can present novel and complex issues, making a successful outcome difficult to predict. Borrelli Decl. ¶15. Further, a successful outcome could only ensue, if at all, after prolonged and arduous litigation with an attendant risk of drawn-out appeals. *Id.* Among national consumer protection class action litigation, data breach cases are some of the most complex and involve a rapidly evolving area of law. *Id.* ¶17. As such, these cases are particularly risky for plaintiffs’ attorneys. *Id.* Class Counsel took on this case and zealously advocated on behalf of Settlement Class in spite of the risks and challenges posed, and devoted a substantial amount of time and money to the prosecution of this case and the Class, which ultimately resulted in a Settlement that is highly beneficial to the Class, weighing in favor of awarding the requested fee.

³ A party need not submit “documentation of the hours charged” when applying the *Johnson* factors under the “percentage method.” *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1082 (S.D. Tex. 2012) (The percentage method[...] does not account for billing judgment.”).

Third, Plaintiff Yuan would not have settled this case under these terms without her counsel's significant experience, skill and aptitude, qualities they detail by declaration. *See* D.E. 27-2 and previously submitted firm resumes, D.E. 27-3, 27-4, 27-5. Counsel exemplifies this factor where they "performed diligently and skillfully, achieving a speedy and fair settlement, distinguished by the use of informal discovery and cooperative investigation to provide the information necessary to analyze the case and reach a resolution." *King v. United SA Fed. Credit Union*, 744 F. Supp. 2d 607, 614 (W.D. Tex. 2010) (citing *DiGiacomo v. Plains All Am. Pipeline*, 2001 U.S. Dist. LEXIS 25532, at *36 (S.D. Tex. Dec. 18, 2001)). As detailed above, data breach cases are "novel and complex," and no two breaches are the same. To settle Plaintiff Yuan's claims, her counsel evaluated the class's makeup, the breach's size, and the type of information it exposed, e.g. social security numbers and dates of birth, key ingredients for identity theft, all to address the harm the breach may cause. Borrelli Dec. ¶7. Indeed, this factor overlaps with the factor considering her attorneys' "experience and reputation," both attributes that contributed to resolving this case at this stage. For these reasons, Counsel's request more than meets the third and ninth *Johnson* factors.

Fourth, counsel took this case on "contingency," risking that they may recover no fees at all. Even so, they committed to litigating this case through discovery, hiring experts, moving to certify the class, and trying the case—all without knowing whether they would even recover those costs. Borrelli Decl. ¶21. So too at settlement. Counsel agreed to settle this matter without tying their consent to whether the Court approves their fee request, meaning they ensured the class would recover the Agreement's benefits no matter how the Court rules on this petition. As a result, counsel have satisfied this factor.

Fifth, the amount at stake and the results realized warrant Plaintiff Yuan's fee request. Almost "all class actions involve a high level of risk, expense, and complexity[.]" *Desue v. 20/20 Eye Care Network, Inc.*, No. 21-CIV-61275-RAR, 2023 U.S. Dist. LEXIS 117355, at *24 (S.D. Fla. July 8, 2023). And this is not only a "complex" case, "it lies within an especially risky field of litigation: data breach." *Id.* This is why courts favor settling breach cases, as "proceeding through the litigation process[...] is unlikely to produce the plaintiffs' desired results." *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2010 U.S. Dist. LEXIS 87409, at *6 (W.D. Ky. Aug. 23, 2010). For that reason, these cases are not always "desirable" given the risk that counsel will recover nothing. Firms often swarm to represent plaintiffs in mammoth data breaches like Equifax and Capital One, but a 17,300-member breach like this will not attract the same attention, if any. Borrelli Dec. ¶16. Even so, counsel accepted the risk that comes with litigating a "small" case in this area—and attained significant relief for the Class, as detailed above.

Finally, the requested fee tracks with tracks with data breach settlements across the country. For example, the district court in *Fox v. Iowa Health Sys.* approved a settlement with around the same benefits achieved here, but with *ten times* the requested fees. *Yvonne Mart Fox v. Iowa Health Sys.*, No. 3:18-cv-00327-JDP, 2021 U.S. Dist. LEXIS 40640, at *12 (W.D. Wis. Mar. 4, 2021). In *Fox*, the district court awarded \$1.575 million in fees for a settlement that entitled members to claim up to \$1,000 for lost money and time, and up to \$6,000 when responding to "actual identity theft," one year for credit monitoring, and "improved security measures" from defendant. *Id.* And like the Agreement here, the *Fox* settlement did "not cap the total amount of monetary benefits available to the Class, meaning that all Class members who submit valid claims will be reimbursed for the full amount of their expenses up to the stated limits[.]" *Id.* When approving the settlement,

the Court described it as “particularly adequate given the costs, risks, and delay of trial and appeal.” *Id.* So too here. And despite attaining the benefits relief as the members in *Fox* received, counsel’s fee request here is 10% of what the court awarded in *Fox*. *Erica P. John*, 2018 U.S. Dist. LEXIS 69143, at *34 (approving 33 $\frac{1}{3}$ % fee as “within the range of percentage fees awarded in the Fifth Circuit in other complex cases” and noting that “numerous courts in this Circuit have awarded fees in the 30% to 36% range.”); *Al’s Pals Pet Care v. Woodforest Nat’l Bank*, No. 17-cv-3852, 2019 U.S. Dist. LEXIS 17652 (S.D. Tex. Jan. 30, 2019) (awarding 33% fee).

3. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

In addition to applying the percentage approach to determine attorneys’ fees in common fund cases like this one, courts in this Circuit sometimes apply the optional lodestar method as a rough cross-check to confirm that the fee determined under the percentage approach is reasonable. *See Burford v. Cargill, Inc.*, No. 05-0283, 2012 U.S. Dist. LEXIS 161232 at *6 n.1 (W.D. La. Nov. 8, 2012). The lodestar multiplier is calculated by dividing the attorneys’ fees that class counsel seeks by class counsel’s lodestar. *Id.* In performing an optional lodestar cross-check analysis, a district court may rely on summaries submitted by the attorneys and need not review actual billing records. *See Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 867 (E.D. La. 2007) (“The lodestar cross-check calculation need entail neither mathematical precision nor bean counting. For example, a court performing a lodestar cross-check need not scrutinize each time entry; reliance on representations by class counsel as to total hours may be sufficient”).

Here, the cumulative number of hours expended by Plaintiff’s Counsel is 237.8, and the resulting lodestar for the services performed is \$137,686.00. Borelli Decl. at ¶20. The requested fee of \$231,000 equates to a multiplier of approximately 1.7. This modest multiplier is comparable to or less than those typically awarded by this and other courts. Indeed, multipliers of 1 to 4 are

“typically approved by courts within [the Fifth] circuit.” *Burford*, 2012 U.S. Dist. LEXIS 161232, at *6 n.1; *Di Giacomo v. Plains All Am. Pipeline*, No. Civ.A. H-99-4137, 2001 U.S. Dist. LEXIS 25532 at *11 (S.D. Tex. Dec. 19, 2001) (stating same and approving 5.3 multiplier).

The lodestar cross check demonstrates that the requested fees are plainly reasonable.

B. Plaintiff’s Counsel’s Expenses Were Reasonably and Necessarily Incurred in Prosecution of this Litigation

Plaintiff’s Counsel also requests the reimbursement of \$6,054.99 in modest expenses reasonably and necessarily incurred while prosecuting this case. In addition to being entitled to reasonable attorneys’ fees, class counsel in common fund cases are also entitled to reasonable litigation expenses from that common fund. *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1089 (S.D. Tex. 2012). The majority of the expenses are attributable to the mediation. *See Borelli Decl.* at ¶23. Because these expenses were incurred with no guarantee of recovery, Plaintiff’s Counsel had a strong incentive to keep them at a reasonable level and did so. Plaintiff’s Counsel made a concerted effort to avoid unnecessary expenditures and economized wherever possible. All were essential to achieving the Settlement and should be reimbursed.

Consequently, Plaintiff’s Counsel respectfully requests the Court approve the expense reimbursement request to be paid from the common fund, in addition to the award of attorneys’ fees. *See Faircloth v. Certified Fin. Inc.*, No. Civ. A. 99-3097, 2001 WL 527489, at *9, 12 (E.D. La. May 16, 2001).

C. The Court Should Approve Plaintiff Yuan’s Service Award

Plaintiff Yuan has performed her duties as the lead (and only) class representative with attentiveness and diligent oversight. This diligent oversight included providing information, reviewing pleadings, and frequently communicating with counsel concerning the status of this case, strategy and settlement discussions. In light of the work done by Plaintiff, the modest amount

requested (\$5,000) is reasonable. Moreover, the award requested here is less than awards frequently granted in many other cases. *See Burford*, 2012 U.S. Dist. LEXIS 161232, at *6 (awarding named plaintiffs up to \$15,000); *In re Catfish Antitrust Litig.*, 939 F. Supp. at 504 (awarding each of the named plaintiffs \$10,000).

V. CONCLUSION

For all of the reasons stated above, in the Preliminary Approval Motion, in the forthcoming Final Approval Motion, and in any reply paper that may be filed in support of either motion, Plaintiff Yuan respectfully requests that this Court approve the request attorney's fees, reasonable costs, and service award.

Dated: August 28, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Raina C. Borrelli, hereby certify that on August 28, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record via the ECF system.

DATED this 28th day of August, 2023.

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