IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re: The Home Depot, Inc., Customer Data Security Breach Litigation,	)	Case No.: 1:14-md-02583-TWT
This document relates to:	)	
CONSUMER CASES	)	

HOME DEPOT'S OBJECTION TO CONSUMER PLAINTIFFS' MOTION FOR SERVICE AWARDS, ATTORNEYS' FEES AND LITIGATION EXPENSE REIMBURSEMENT

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INTRODUCTION

Home Depot was the victim of a criminal data breach that it addressed as soon as it was discovered in September 2014. Almost immediately after the initial press reports of the breach, Plaintiffs began filing class action lawsuits. Home Depot already had begun taking immediate steps to investigate and remediate the breach and protect its customers. Home Depot took the same decisive action in responding to the litigation and agreed to settle the consumer lawsuits despite numerous deficiencies in Plaintiffs' claims, many of which they now acknowledge. As part of the settlement, Home Depot agreed to pay a reasonable attorneys' fee award. Plaintiffs' fee request, however, is excessive.

Plaintiffs move for an $8.475 million award that exceeds their purported lodestar by over $3 million, even though their work in the case was essentially limited to filing a complaint, responding to a motion to dismiss, and negotiating a settlement. To arrive at this enormous figure, Plaintiffs calculate their lodestar using redundant hours for duplicative tasks before Plaintiffs' leadership was appointed, as well as inefficient work on premature pre-discovery matters while a motion to dismiss was pending. Not only have Plaintiffs exaggerated their lodestar calculation, but they have also failed to achieve the type of exceptional result that would warrant an upward adjustment of fees.

This Court takes seriously the strong presumption that the lodestar is the reasonable fee counsel deserves. Indeed, Home Depot's research has not uncovered any similar cases where this Court has awarded a multiple of the lodestar. This case should not be the first given that Plaintiffs secured a settlement that is inherently limited by the weakness of the claims they brought. Such results are not exceptional and do not entitle Plaintiffs, or their counsel, to a windfall.

Home Depot respectfully submits that an award of reasonable fees in this case should not exceed $4 million. This calculation is based on: (a) the hourly rates suggested by Plaintiffs (which Home Depot does not dispute); multiplied by (b) approximately 75% of the hours Plaintiffs claim (which are unreasonable and duplicative); with (c) no upward adjustment of the fee given the circumstances of the settlement.

RELEVANT FACTUAL BACKGROUND

A. Home Depot's Initial Response to the Breach

On September 2, 2014, Home Depot received reports from its banking partners and law enforcement authorities that suggested unauthorized access to its payment data systems. Home Depot immediately began working around the clock with leading IT security firms, its banking partners, and the Secret Service to gather facts, resolve the problem, and provide information to its customers. On

September 8, 2014, Home Depot issued a press release confirming the data breach, informing its customers they would not be responsible for fraudulent charges to their accounts, and offering free identity protection services to any customer who used a payment card at a Home Depot store beginning in April 2014.[1] On September 18, 2014, Home Depot issued a press release confirming that the malware used in the breach had been eliminated and announcing the implementation of significant additional security measures. Home Depot also reported that it had completed the rollout of enhanced encryption of payment data to all U.S. stores – a project that began in January 2014 – and confirmed that the rollout of similar measures in Canadian stores would be completed in 2015.[2]

B. Consumer Cases Filed In Response to the Data Breach

On September 4, 2014, only two days after the initial reports of a possible breach and before it was even confirmed, plaintiffs began filing class actions against Home Depot. Other lawsuits asserting similar claims purportedly arising out of the breach soon followed. The twenty-six law firms that are seeking fees in

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1 The September 8, 2014 press release is available at: http://ir.homedepot.com/news-releases/2014/09-08-2014-014517970.

2 The September 18, 2014 press release is available at: http://ir.homedepot.com/news-releases/2014/09-18-2014-014517752.

connection with the settlement filed twenty-six consumer cases before the cases were consolidated in this MDL proceeding. Several firms filed multiple lawsuits, and other firms filed lawsuits in jurisdictions in which cases were already pending. While the complaints varied slightly, all of these lawsuits alleged similar facts and pled similar claims on behalf of similar, and often identical, classes.[3]

C. Consolidation and Appointment of Leadership

On December 11, 2014, the Judicial Panel on Multi-District Litigation ("JPML") consolidated these cases for centralized pre-trial proceedings and transferred them to this Court. *See* Doc. No. 1. The JPML determined that "[c]entralization [would] eliminate duplicative discovery; prevent inconsistent pretrial rulings, particularly with respect to class certification; and conserve the resources of the parties, their counsel, and the judiciary." *Id*. at 2.

On February 13, 2015, this Court entered an order appointing the leadership for the Consumer Cases. Doc. No. 60. The Court charged Plaintiffs' counsel with ensuring that "plaintiffs' pretrial preparation is conducted effectively, efficiently,

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[3] *Compare, e.g*., *Stern v. The Home Depot, Inc*., No. 1:14-cv-03043 (N.D. Ga. Sept. 22, 2014), Doc. No. 1 ¶¶ 24–27, 32–33, 37–44, 46–106), *with Hill v. Home Depot U.S.A, Inc*., No. 1:14-cv-03845 (N.D. Ga. Dec. 2, 2014), Doc. No. 1 ¶¶ 30–33, 37–38, 42–50, 53–55, 61–107) (asserting *identical* allegations concerning breach and purported damages, *identical* common law claims, and substantially similar statutory claims).

and economically, that schedules are met, and that unnecessary expenditures of time and expense are avoided," and required Plaintiffs' counsel to keep daily time records and submit quarterly billing reports for *in camera* inspection. *Id*. at 3, 6. Plaintiffs did not provide those records to Home Depot.

D. Motion To Dismiss

On May 1, 2015, Plaintiffs filed their Consolidated Class Action Complaint (the "Complaint"). Doc. No. 93. The Complaint asserted eight counts on behalf of 88 named plaintiffs, consisting of statutory claims under consumer statutes in 51 jurisdictions and data breach notification statutes in 28 jurisdictions and common law claims under the laws of 53 jurisdictions. *See id*.

Home Depot moved to dismiss the Complaint on June 1, 2015. Doc. No. 105. Although Home Depot identified a number of deficiencies in Plaintiffs' claims, the most fundamental defect was Plaintiffs' failure to allege a cognizable injury sufficient to confer standing. Plaintiffs speculated that identity theft might occur as a result of the data breach, but none of the named plaintiffs experienced actual identity theft. The mere threat of potential future criminal conduct alleged in the Complaint did not constitute a concrete, actual injury sufficient to confer standing, as recognized by courts in numerous other data breach cases. *See* Doc. No. 105-1 at 12–15. Moreover, for this future identity theft to occur, criminals

would need to independently obtain personal information, such as the named plaintiffs' social security numbers or birth dates, that Plaintiffs did not allege was stolen from Home Depot. Thus, Plaintiffs failed to allege any injury fairly traceable to Home Depot's conduct. *See id*. In addition, the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (May 16, 2016), which was decided after the Settlement,[4] casts serious doubt on Plaintiffs' claims.

Plaintiffs opposed Home Depot's motion to dismiss, asserting that the named plaintiffs had alleged actual injuries. Doc. No. 117. As Plaintiffs now concede, however, even if they had survived the motion to dismiss, they would have faced serious obstacles in "establishing causation" and "proving damages." Doc. No. 227 ("Fee Request") at 27. This weakness is reflected in the Settlement, which provides payments to only those Settlement Class Members who can document actual losses. Moreover, Plaintiffs' counsel concedes they carefully selected named plaintiffs who, in counsel's estimate, had more concrete injuries, *see* Fee Request at 15, which would have raised substantial individualized questions sufficient to preclude class certification in light of *Spokeo* and other case law addressing certification in data breach cases.

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[4] Undefined capitalized terms have the meaning given to them in the Settlement Agreement and Fee Request.

E. Discovery-Related Tasks

Plaintiffs insisted that the parties draft and negotiate a series of discovery orders while the motion to dismiss was pending. These orders included a scheduling order, ESI protocol, protective order, discovery protocol, and expert discovery protocol. Doc. Nos. 107, 109–11, 132, 155. At the time of the settlement, however, the parties had not yet reached agreement on an ESI preservation order, *see* Fee Request at 16–17. Plaintiffs also served 126 document requests and insisted on holding numerous calls to engage in premature negotiations concerning potential objections and responses notwithstanding the fact that a motion to dismiss was pending. *See id*. at 17. Finally, Plaintiffs served preservation notices to at least eleven third parties, prompting further unnecessary discussions. *See* Mar. 25, 2015 Hearing Tr. at 6.

F. The Settlement

While Home Depot's motion to dismiss was pending and before discovery had commenced, the parties agreed to settle the Consumer Cases on a class basis. In the Settlement Agreement, Home Depot agreed to: (1) establish a $13 million Settlement Fund to compensate any consumers who can document that they have suffered actual harm; (2) pay $6.5 million to provide consumers with access to additional identity theft protection services similar to those Home Depot already

provided; and (3) maintain or implement enhanced security measures. *See* Fee Request at 3–6. Home Depot also agreed to pay settlement administration costs and to pay Plaintiffs' reasonable attorneys' fees. *See id*. at 7–8. The Settlement included a "waterfall" provision that allows Home Depot to recoup the costs of credit monitoring and settlement administration from the fund if the claims submitted do not exceed $6.5 million. *See* Doc. No. 181-2, p. 8, § 36.

ARGUMENT

Where, as here, a fee request is based on the lodestar method, the Court should award a fee that consists of the number of hours reasonably expended multiplied by a reasonable rate, subject to an upward adjustment only in limited circumstances. Plaintiffs' fee request is based on a lodestar that includes an unreasonable number of hours and Plaintiffs have not achieved a result that justifies an upward adjustment. Similarly, Plaintiffs' common fund calculation does not support the fee requested. Consistent with its rulings concerning other lodestar fee requests, this Court should reject Plaintiffs' request for fees based on a multiple of their lodestar and instead award fees at a reasonable lodestar amount. *See, e.g*., *Frazier v. Absolute Collection Serv., Inc*., 767 F. Supp. 2d 1354, 1368 (N.D. Ga. 2011) ("[T]here is a strong presumption that the lodestar is the reasonable sum the attorneys deserve.") (quotation omitted); *Hunter v. Cook*, 2015

WL 4940900, at *2 (N.D. Ga. Aug. 19, 2015) (awarding fee based on discounted lodestar even where results were "excellent"). As explained below, Home Depot submits that a lodestar of no more than $4 million is appropriate in this case.

I. Plaintiffs' Fee Request Is Unreasonable Under the Lodestar Approach.

A. Legal Standards Governing Lodestar Awards

Under Supreme Court and Eleventh Circuit precedent, "the starting point in any determination for an objective estimate of the value of a lawyer's services is to multiply hours reasonably expended by a reasonable hourly rate." *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988). A court therefore must first determine "the prevailing market rate in the relevant legal community for similar services"[5] and then ascertain a reasonable number of hours by excluding "'excessive, redundant, or otherwise unnecessary' hours." *Id.* at 1299, 1301 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)).

"After the lodestar is determined by multiplication of a reasonable hourly rate times hours reasonably expended, the court must next consider the necessity of an adjustment for results obtained." *Id.* at 1302. Because the twelve factors

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[5] Plaintiffs have not provided Home Depot with any information that details how the hourly rates used in their lodestar calculation were applied in this case, *i.e.*, which lawyers worked on which tasks and what their rates were. Home Depot does not challenge those rates at this time.

adopted in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), are reflected in the lodestar, an upward adjustment is appropriate only "[i]f the results obtained are exceptional" or the contingent nature of the representation suggests that an "enhancement is necessary to assure the availability of counsel." *Norman*, 836 F.2d at 1299, 1302. Neither circumstance is present here.

B. Plaintiffs' Lodestar Reflects Inefficiency and Duplication of Effort

In evaluating the number of hours reasonably expended, "'excessive, redundant or otherwise unnecessary' hours" should be excluded from the amount claimed." *Id.* at 1301 (quoting *Hensley*, 461 U.S. at 434); *see also Dekalb Med. Ctr., Inc. v. Specialties & Paper Products Union No. 572*, 2015 WL 4231774, at *3 (N.D. Ga. July 13, 2015) (discounting excessive hours). Hours must be excluded "that would be unreasonable to bill to a client and therefore to one's adversary *irrespective of the skill, reputation or experience of counsel*." *Norman*, 836 F.2d at 1301. For example, "the district court is charged with deducting for redundant hours," which "occur where more than one attorney represents a client." *Id.*; *see also American Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 433 (11th Cir. 1999) (finding error in failure to exclude hours where "billing records indicate that the plaintiffs threw five attorneys at the task of drafting the three briefs," and bills did not "reflect[] a distinct contribution on the part of [each] of those

attorneys to the task of drafting the briefs."). Courts also reduce hours where it appears the work performed was inefficient. *DeKalb Med. Ctr., Inc.*, 2015 WL 4231774, at *3 (reducing time spent on legal research).

Plaintiffs' Fee Request should be reduced to account for excessive and redundant work. It appears Plaintiffs seek fees for multiple attorneys working on the same submissions and issues, attending the same meetings, and for repeatedly consulting or conferring with one another. The major case activities were typically staffed by multiple Plaintiffs' counsel (presumably billing at "partner" rates), yet it appears Plaintiffs made no effort to reduce such redundancies in their Fee Request. Home Depot identifies below two areas where significant reductions are warranted, but scrutiny of Plaintiffs' billing records may reveal additional inefficiencies.

1. Plaintiffs' lodestar calculation includes hours for redundant and unnecessary pre-appointment work.

Plaintiffs' hours calculation should be discounted to reflect the inherent inefficiency in pre-appointment work in an MDL proceeding. As Plaintiffs concede, twenty-six different law firms filed twenty-six separate, but very similar, complaints shortly after the data breach was announced. These complaints contained substantially the same factual allegations and asserted nearly identical legal claims on behalf of essentially the same classes, reflecting unnecessary duplication. Two of the tasks Plaintiffs tout in support of their Fee Request are

"carefully identif[ying] and vet[ting] potential class representatives" and "focus[ing] the case on a core set of claims."[6] Fee Request at 15–16. This is a tacit admission that much of the pre-appointment work was inefficient and unnecessary. Similarly, any effort to organize, schedule, and coordinate the pre-appointment activities, s*ee id*. at 13, was an administrative task for which no fee is recoverable. Nor were 88 named plaintiffs necessary when each plaintiff alleged his claims were typical of the claims of the alleged class. *See* Doc. No. 93 ¶ 278.

2. Plaintiffs' lodestar calculation includes hours for inefficient and unnecessary post-appointment work.

Plaintiffs' hours calculation also should be discounted for inefficient and unnecessary post-appointment work, most notably during Plaintiffs' "pre-discovery" efforts. Local Rule 26.2(A) provides that discovery shall not commence until an answer is filed. Notwithstanding this rule, Plaintiffs insisted that the parties draft and negotiate a number of discovery-related orders and meet and confer concerning Plaintiffs' "preliminary" document requests. While Home Depot agreed to this process in an effort to advance the litigation if its motion to

[6] Home Depot disagrees that asserting claims under the statutory and common law of nearly every U.S. jurisdiction, including many where no named plaintiff resided, reflects a narrowing to a "core" set of claims.

dismiss were denied, it was inefficient and resulted in unnecessary fees that did not further the settlement the parties reached.

Plaintiffs fail to identify a single concrete benefit generated by their pre-discovery efforts. The ESI protocol, discovery protocol, and expert discovery protocol were premature and unnecessary in light of the Settlement. Home Depot should not be forced to pay attorneys' fees for activities that were unnecessary and premature. *See Hensley*, 461 U.S. at 434, 436, n.11 (fee should be based only on hours for which "the relief obtained justified that expenditure of attorney time").

Plaintiffs' document requests were similarly inefficient and wasteful. The requests were incredibly expansive: the Consumer and Financial Institution Plaintiffs served 120 joint document requests, and the Consumer Plaintiffs served six additional requests. *See* Fee Request at 17. The parties held numerous calls concerning these requests. *See Id*. These calls, like the Court's status conferences,[7] were often overstaffed with multiple representatives of both Consumer Plaintiffs and the Financial Institution Plaintiffs. Despite the time and effort expended by both sides on this process, little progress was made on the

[7] The Barnes declaration concedes that time "for monitoring or non-substantive preparation in court proceedings" by multiple attorneys was inefficient, Doc. No. 227-2 ¶ 12, but does not suggest that counsel disallowed similarly inefficient hours spent on the pre-discovery process.

document requests. This needless effort could have been greatly reduced if Plaintiffs had waited to serve discovery requests until the Court ruled on Home Depot's motion to dismiss, allowed Home Depot to serve written objections, and then conducted meet and confer calls as the Local Rules contemplate.

3. Plaintiffs' lodestar calculation should be reduced by 25%.

In reviewing the hours submitted with a fee request, the Court can either "attempt to reduce the hours on a task-by-task-basis" or "simply add up the total number of hours expended and then reduce that amount on a percentage basis." *Webster Greenthumb Co. v. Fulton Cnty., Ga.*, 112 F. Supp. 2d 1339, 1350–51 (N.D. Ga. 2000). Because Home Depot does not have access to Plaintiffs' counsel's time records, Home Depot is not in a position to identify specific time entries that reflect inefficient work. Accordingly, Home Depot requests that the Court apply an across-the-board percentage reduction to Plaintiffs' total hours. Based on the plaintiffs' discounted fee request in the *Target* consumer data breach, which Plaintiffs have repeatedly argued is similar to this litigation and which involved many of the same lawyers, Home Depot suggests that a similar reduction of 25% would be appropriate. *See In re Target Corp. Customer Data Sec. Breach Litig.*, No. 14-2522 (D. Minn.) ("*Target*"), Doc. No. 483 at 2, 23–24 (seeking total fees of $6.6 million where lodestar was $8.9 million, reflecting a discount of

approximately 25%). Applying a discount of just over 25% across all hours submitted by Plaintiffs results in a revised lodestar of $4 million.

C. An Upward Adjustment Is Not Warranted

The Supreme Court has held that the *Johnson* factors generally are subsumed within the hourly rate component of the lodestar. *See Hensley*, 461 U.S. at 434 & n.9; *Norman*, 836 F.2d at 1299. To the extent those factors are relevant in considering an adjustment to the lodestar, courts generally award fees above the lodestar only "[i]f the results obtained are exceptional"[8] or where the contingent nature of the representation suggests that an "enhancement is necessary to assure the availability of counsel." *Norman*, 836 F.2d at 1302. Neither factors supports an upward adjustment here.

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[8] The opinion of Plaintiffs' fee award expert, Michael L. McGlamry, that the Fee Request is "immanently [sic] reasonable," Doc. No. 227-3 at 18, should be disregarded. McGlamry acknowledges that the "single most significant factor" is the "extent and degree of relief achieved," although he, like Plaintiffs, bases his analysis largely on common fund benefit cases. *See id.* at 15. The court should not give McGlamry's declaration any weight given that Home Depot does not challenge Plaintiffs' proposed hourly rate and the remainder of McGlamry's declaration is essentially a legal memorandum. *See Norman*, 836 F.2d at 1303 ("[t]he court . . . is itself an expert on the question [of attorney's fees] and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value.") (quotation omitted).

1. Plaintiffs' Counsel did not obtain an exceptional result that justifies upward adjustment of their fee.

"Exceptional results are results that are out of the ordinary, unusual, or rare." *Norman*, 836 F.2d at 1302. To that end, "'an outcome which is expected in the context of extant substantive law will not ordinarily qualify as outstanding.'" *Webster Greenthumb*, 112 F. Supp. 2d at 1377 (quoting *Carey v. Rudeseal*, 721 F. Supp. 294, 300 (N.D. Ga. 1989)). Accordingly, where a case creates "[n]o new substantive law" and does "not break new ground," it cannot be said that the result is exceptional. Moreover, "no enhancement is permissible unless there is specific evidence in the record to show that the quality of representation was superior to that which one would reasonably expect in light of the rates claimed." *Norman*, 836 F.2d at 1302. An upward adjustment to the lodestar is inappropriate absent specific grounds suggesting the result "was achieved with any special economies of time or despite unusually difficult circumstances that are not already reflected in the lodestar calculation." *Webster Greenthumb*, 112 F. Supp. 2d at 1377–78.

The results obtained in the Settlement are not out of the ordinary, unusual or rare. Plaintiffs argue the "Settlement compares favorably with settlements reached in other retailer data security breaches," but do not identify any specific case for comparison. Fee Request at 37. A comparison with the *Target* consumer settlement, however, illustrates that an upward adjustment is inappropriate.

Like this case, *Target* involved a data breach at a major retailer resulting in the compromise of millions of payment cards. Indeed Plaintiffs have argued that Target "dealt with facts and claims almost identical to this case." Doc. No. 117 at 10–11. Accordingly, the *Target* settlement provides the most appropriate point of comparison. The *Target* settlement established a $10 million settlement fund, provided similar injunctive relief, and required Target to pay $6.5 million in settlement administration costs. *See* Doc. No. 226-2, Ex. A. Under the *Target* settlement, consumers could recover for both documented and undocumented claims. *Target*, Doc. No. 358-1 at 35–37 of 97. The total value of validated documented claims in *Target* was only $442,722.42. *Target*, Doc. No. 633 at 3.

While the claims period has not closed in this case, Home Depot anticipates a similar result here. The Settlement Fund is limited to class members who can document an actual loss and both the allegations in the Complaint and the claims experience in *Target* show that few consumers suffered any actual monetary loss. Thus, the claims submitted are highly unlikely to exhaust the $13 million fund. Assuming the fund is not exhausted, Home Depot may use the remaining funds to pay the $6.5 million identity theft protection component of the Settlement[9] as well

[9] Plaintiffs also overstate the value of the identity protection component of the settlement. They claim that this service is worth "billions of dollars" given the retail price for the identity theft services offered under the Settlement. Fee

as the $750,000 cost of notice and settlement administration. *See* Doc. No. 181-2, p. 8, §36. If so, Home Depot's total monetary contribution to the Settlement would be limited to the $13 million Settlement Fund, which is less than the $16.5 million Target paid in claims and settlement administration costs. Moreover, in the unlikely event documented claims exhaust the Settlement Fund, Home Depot's total payment would be $20.25 million, which still could not be described as an exceptional result compared to *Target* given that roughly 10 million more payment cards were compromised in the Home Depot data breach.

Even if Plaintiffs had achieved an exceptional result distinguishable from other like data breach cases (and they have not), they have not met their burden to submit evidence showing counsel's representation was superior to that which one would expect in light of the rates charged. *See Norman*, 836 F.2d at 1302; *Grant v. Georgia Schumann Tire & Battery Co.*, 908 F.2d 874, 880 (11th Cir. 1990). The Fee Request shows only that Plaintiffs' counsel filed a complaint, responded to a motion to dismiss, and negotiated a settlement providing benefits similar to those Home Depot committed to provide to its customers in the days immediately following press reports of the breach. The Settlement merely reflects Home

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Request at 34, 41 n.10. This greatly exaggerates the true value of the benefit. Home Depot will pay $6.5 million to secure these benefits, Fee Request at 3–4, which provides the upward limit of their value.

Depot's willingness and intent to compensate and protect its customers, irrespective of any class actions and even if it had no legal obligation to do so.

2. The contingent nature of the fee does not warrant an upward adjustment here.

The Eleventh Circuit has repeatedly explained that "if enhancement for contingency is ever appropriate, it is in rare cases and only where it is shown that the enhancement is necessary to assure the availability of counsel." *Perkins v. Mobile Housing Bd.*, 847 F.2d 735, 738-39 (11th Cir. 1988). For example, the "high level of undesirability and risk that class action discrimination cases entail" may warrant an upward adjustment "since there is a corresponding public benefit in encouraging the private bar to devote resources to enforcing our nation's civil rights laws." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 696 (N.D. Ga. 2001). Given the race to file multiple similar class actions, no such encouragement was needed here.

Consumer data breach cases are not the type of matter where it is difficult to locate plaintiffs' counsel. Indeed, twenty-six different firms filed consumer cases following the Home Depot data breach. Doc. No. 60. Notably, Plaintiffs' counsel chose to participate in this litigation even though many of the same firms were awarded fees *below* their lodestar in the *Target* case. *See Target*, Doc No. 645. The same lawyers also chose to file lawsuits in connection with other data breaches

announced after this lawsuit was filed and before they submitted their Fee Request here. *See, e.g., In re: U.S. Office of Personnel Mgmt. Data Security Breach Litig.*, Case No. 1:15-mc-01394 (D.D.C.); *In re Anthem, Inc. Data Breach Litigation*, Case No. 5:15-md-02617 (N.D. Cal.). An upward adjustment to Plaintiffs' lodestar therefore is unnecessary to assure the availability of counsel.

3. The remaining *Johnson* factors do not support an upward adjustment here.

Plaintiffs cite seven *Johnson* factors in their Fee Request: (1) the time and labor required; (2) the novelty and the difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) whether the fee is fixed or contingent; (6) the amount involved and the results obtained; and (7) awards in similar cases. The time and labor involved is subsumed within the hours component of the lodestar, and the novelty and difficulty of the questions involved and the skill requisite to perform the legal service are subsumed within the hourly rate component. As discussed above, the results achieved and contingent fee do not support an upward adjustment here. The only two remaining *Johnson* factors that are arguably relevant, preclusion of other employment and awards in similar cases, do not support an upward adjustment either.

First, Plaintiffs have submitted no evidence they have declined other employment as a result of this case. To the contrary, many of the same firms who seek fees here have filed other data breach lawsuits since this case was filed. *See supra* at 20. This factor does not support an upward adjustment. Just the opposite, it suggests Plaintiffs' counsel's fees should be less because they are repeatedly dealing with the same legal issues in multiple cases.

Second, awards in similar cases actually support a downward adjustment to Plaintiffs' lodestar. In *Target*, where the plaintiffs defeated a motion to dismiss and extensive discovery occurred, counsel sought and received a fee award that represented roughly 75% of their total lodestar. *See Target*, Doc. No. 483 at 2, 23–24 (seeking fees of $6.6 million where lodestar was $8.9 million). Plaintiffs offer no persuasive justification why they should receive a multiplier of their lodestar in this case where significantly less work has been done.

4. The cases relied upon by Plaintiffs for the upward adjustment of the lodestar are inapposite.

Plaintiffs cite several cases in support of their requested multiplier. Fee Request at 23. In most of these cases however, the fee award was calculated not by the lodestar method but by the common fund approach. *See Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334 (S.D. Fla. 2007) (awarding attorney fee of 30% of common fund); *Ingram*, 200 F.R.D. 685 (parties agreed to fee of

approximately 20% of cash fund); *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 702 (M.D. Ala. 1988) (awarded fee "measured as a percentage of the $17,425,000 fund created for the class by their efforts"); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 2012 WL 12540344, at *1 (N.D. Ga. Oct. 26, 2012) (proper approach to determining "attorneys' fees in common fund cases . . . [is] the percentage-of-the-fund approach"). And in *Poertner v. Gillette Co.*, 2014 WL 4162771, at *4-5 (M.D. Fla. Aug. 21, 2014), the Court held the fees agreed to in the settlement were reasonable "whether viewed as a percentage of a common fund or by lodestar analysis," but "Class Counsel relie[d] primarily on fee awards in common fund cases."

Plaintiffs made the decision to "move[] for a fee under the lodestar approach," Fee Request at 40, and therefore cannot rely on common fund cases that merely calculated a lodestar multiplier as a check on the reasonableness of the common fund percentage. Instead, Plaintiffs must demonstrate that their requested multiplier is warranted under the standards laid out by the Eleventh Circuit for an upward adjustment to the lodestar. This they have failed to do.

II. Plaintiffs' Fee Request Is Not Reasonable As A Percentage Of The Benefit Conferred On The Class

Plaintiffs argue that their $8.475 million fee request represents 29.33% of the $28,888,581.93 "benefit" conferred on the Settlement Class. Fee Request at

41–42. To arrive at this figure, Plaintiffs improperly include attorneys' fees in their $28.8 million common fund calculation and further overstate the value of the fund by including costs for identity theft protection services and settlement administration costs. After correcting these errors in Plaintiffs' common fund calculation, it is clear that the percentage of the common fund they seek in fees is well in excess of the Eleventh Circuit's benchmark range.

A. Legal Standards Governing Common Fund Awards

When fees are awarded based on a percentage of the common fund established for the benefit of the class, "class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed." *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291, 1297 (11th Cir. 1999). The "majority of common fund fee awards fall between 20% to 30% of the fund." *Id.* at 1294; *see also Faught v. American Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011) ("majority of fees in these cases are reasonable where they fall between 20-25% of the claims"). This range is a "benchmark which may be adjusted in accordance with the individual circumstances of each case" using the *Johnson* factors. *Waters*, 190 F.3d at 1294.

B. Plaintiffs Understate the True Percentage of the Common Fund Represented by their Fee Request

1. Attorneys' fees should not be included in the common fund.

Plaintiffs' inclusion of attorneys' fees in their common fund calculation artificially minimizes the percentage of the fund they actually seek in fees. Courts in the Eleventh Circuit regularly exclude fees from the common fund calculation and award fees as a percentage of the fund actually available to the settlement class separate from the fee award. *See, e.g., In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 323, 351 (N.D. Ga. 1993) (calculating the value of the settlement as the estimated value of travel certificates plus the cash contribution, and calculating fees based on percentage of that amount); *Faught*, 668 F. 3d at 1243 (affirming award of attorney's fees based on percent of "the monetary compensation received by class members through the Review Desk process"); *In re Sunbeam Secs. Litig.*, 176 F. Supp. 2d 1323 (S.D. Fla. 2001) (awarding attorneys' fees based on percent of $110 million common fund, without adding the requested fees to the calculation). Removing attorneys' fees and expenses reduces Plaintiffs' benefit calculation to $20,250,000. Plaintiffs' requested fee is approximately 42% of this amount, well above the top end of the Eleventh Circuit's benchmark range.

2. The common fund should be valued at $13 million.

As explained above, based on the claims history in the *Target*, it is unlikely that Settlement Class Members with documented losses will submit $6.5 million in claims and therefore Home Depot likely will receive reimbursement from the Settlement Fund for both the $6.5 million cost of identity protection services and the $750,000 cost of administering the Settlement. Removing both of these items reduces Plaintiffs' benefit calculation to $13,000,000. Plaintiffs' requested fee is 65% of this amount, which is clearly unreasonable.

C. The *Johnson* Factors Do Not Support the Award of a Multiplier.

As explained above, the Johnson factors do not support an upward adjustment in this case, whether viewed in the context of an adjustment to the lodestar or under the common fund approach.

CONCLUSION

For all of the foregoing reasons, the Court should award fees under the lodestar approach of no more than $4 million, or the lodestar the Court calculates after scrutinizing Plaintiffs' billing reports and applying discounts for the inefficiencies identified above and any other inefficiencies reflected in the reports.

Respectfully submitted, this 18th day of July, 2016.

/s/ Phyllis B. Sumner
Phyllis B. Sumner
Georgia Bar No. 692165
S. Stewart Haskins II
Georgia Bar No. 336104
J. Andrew Pratt
Georgia Bar No. 465311
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100
psumner@kslaw.com
shaskins@kslaw.com
apratt@kslaw.com

Counsel for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1D, the undersigned certifies that the foregoing complies with the font and point selections permitted by L.R. 5.1B. This Motion was prepared on a computer using the Times New Roman font (14 point).

Respectfully submitted, this 18th day of July, 2016.

/s/ Phyllis B. Sumner
Phyllis B. Sumner
Georgia Bar No. 692165

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed on July 18, 2016 with the Court and served electronically through the CM-ECF (electronic case filing) system to all counsel of record registered to receive a Notice of Electronic Filing for this case.

/s/ Phyllis B. Sumner
Phyllis B. Sumner
Georgia Bar No. 692165