IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: CAPITAL ONE FINANCIAL CORPORATION, AFFILIATE MARKETING LITIGATION	**Civil Action No. 1:25-cv-023 (AJT/WBP)**
THIS DOCUMENT RELATES TO: **ALL ACTIONS**	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL AND TO DIRECT NOTICE OF PROPOSED SETTLEMENT TO THE CLASS

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INTRODUCTION

After ten months of hard-fought and productive litigation, the Parties[1] have reached a Settlement to resolve Plaintiffs' claims regarding the Capital One Shopping Browser Extension (the "Extension"). If approved, the Settlement will provide significant relief to the proposed Settlement Class and require Capital One to implement and maintain certain business practice changes to ensure the Extension continues to comply with rules and policies designed to prevent the Extension from wrongfully diverting commissions. The Settlement also makes available cash benefits to Settlement Class Members: Settlement Class Members can either receive full cash compensation equal to the amount of commission received by Capital One if they qualify for a Proof Payment, or otherwise Alternative Payments of $20. Finally, Capital One will pay for an efficient notice and administration program, and, if approved by the Court, service awards to the Settlement Class Representatives and attorneys' fees and expenses.

The Settlement is an excellent result for the Settlement Class in light of the litigation risk that lays ahead, securing uncapped compensation for Settlement Class Members who can demonstrate based on agreed-upon parameters that commissions may have been diverted by Capital One, and ensuring that others who cannot make the same showing are still eligible for monetary relief. The Settlement is fair, reasonable, and adequate, and meets the requirements of Federal Rule of Civil Procedure 23(e). Accordingly, Plaintiffs move for an order preliminarily approving the Settlement, directing class notice, and scheduling a Final Approval Hearing. In

[1] The Parties to the Settlement are the Settlement Class Representatives (or "Plaintiffs"), on behalf of the proposed Settlement Class Members, and Defendants Capital One Financial Corporation, Wikibuy LLC, and Wikibuy Holdings, LLC (collectively, "Capital One" or "Defendants"). While the Action was pending, the names of entities Wikibuy LLC and Wikibuy Holdings, LLC were changed to Capital One Shopping LLC and Capital One Shopping Holdings, LLC, respectively. Unless otherwise defined, all capitalized terms used in this memorandum have the same meaning as in the Settlement Agreement.

support of their motion, Plaintiffs submit the Settlement Agreement (Ex. 1); a proposed Preliminary Approval Order (Ex. 2); the Declaration of Class Counsel (Ex. 3); the Declaration of Cameron R. Azari, Esq. on behalf of the proposed Notice Provider and Settlement Administrator (Epiq Class Action & Claims Solutions, Inc.), including the Notice Plan (Ex. 4); the proposed Notices (Ex. 5); and the proposed Claim Form (Ex. 6).

FACTUAL BACKGROUND

I. OVERVIEW OF THE LITIGATION

Plaintiffs and Capital One participate in a corner of the online shopping world known as "affiliate marketing," a type of performance-based marketing where merchants partner with content creators or "publishers" to promote products and services in exchange for commissions on resulting sales. *See* ECF No. 216, Pretrial Order #6 at 3. Publishers, including Plaintiffs and Settlement Class Members, post unique "affiliate links" on their websites, blogs, and social media platforms to promote the merchants' products to their online followers, and they are contractually entitled to a commission when they are the last publisher to refer a consumer to a merchant's online store (via an affiliate link) before the consumer completes a purchase. *Id.* at 3–4, 11. Merchants rely on unique identifiers embedded in affiliate links ("affiliate IDs") and tracking codes stored on consumers' browsers to identify which publishers are entitled to commissions. *Id.* at 3.

This case, which resulted from the consolidation of several cases filed against Capital One, ECF Nos. 9, 20, 24, 39, 52, 74, 78, 79, stems from Plaintiffs' allegations that the Capital One Shopping Browser Extension wrongfully diverts commissions earned by publishers pursuant to standardized agreements with online merchants. ECF No. 216 at 11.

On March 2, 2025, after reviewing nearly twenty applications for plaintiffs' leadership, the Court appointed the undersigned counsel as Plaintiffs' Interim Co-Lead Counsel ("Class Counsel"). ECF No. 112, Pretrial Order #2. Class Counsel immediately prepared a detailed

proposed discovery plan, exchanged initial written discovery with Capital One, negotiated an ESI protocol, crafted and negotiated search terms for ESI discovery, negotiated a protective order, and filed a motion to compel production of documents, interrogatory responses, and witnesses for 30(b)(6) testimony. ECF Nos. 123, 136, 137, 139, 140, 168.

On March 26, 2025, following additional factual investigation, legal research, and careful vetting, Plaintiffs filed an 86-page Amended Consolidated Class Action Complaint (the "Complaint") against Capital One. ECF No. 121. The Complaint asserted common law claims for unjust enrichment, tortious interference, and conversion, as well as statutory claims for violation of the Computer Fraud and Abuse Act ("CFAA"), the New York General Business Law § 349, California's Unfair Competition Law, California's Comprehensive Computer Data Access & Fraud Act, and Pennsylvania's Computer Offenses Law.

On April 16, 2025, Capital One filed a Motion to Dismiss the Complaint in its entirety. ECF Nos. 142–43. Capital One challenged Plaintiffs' Article III standing, arguing that Plaintiffs failed to allege a cognizable injury fairly traceable to the Extension, and moved to dismiss each of Plaintiffs' common law and statutory claims, arguing that Plaintiffs were suing over lost commissions that were simply the result of being outcompeted in the marketplace. ECF No. 143 at 2. Plaintiffs opposed, ECF No. 180, and briefing concluded in less than a month, ECF No. 191.

On May 14, 2025, the Court heard extensive argument on the Motion to Dismiss, ECF No. 196, and on June 2, the Court denied Capital One's Motion in part, allowing Plaintiffs' unjust enrichment, tortious interference, and CFAA claims to advance, while dismissing the conversion claim and the other statutory claims, ECF No. 216 at 12–33.

Plaintiffs engaged in an intensive discovery effort to prepare this case for expedited class certification briefing. Plaintiffs served several rounds of written discovery, dozens of third-party

subpoenas, and reviewed over 20,000 documents produced by Defendants. *See* Class Counsel Decl., Ex. 3, ¶ 24. Plaintiffs also took eight depositions of Defendants' fact witnesses, several depositions of Defendants' Rule 30(b)(6) witnesses, and several third-party depositions. *Id.* Further, Plaintiffs obtained in discovery structured data and source code from Defendants, which was ultimately crucial to developing the evidence necessary to settle the case. *Id.* ¶ 25.

Plaintiffs also answered Defendants' written discovery requests, which required extensive collection and review of Plaintiffs' electronic documents. *Id.* ¶ 26. Plaintiffs produced roughly 107,000 documents totaling 1,025,000 pages after collecting and reviewing documents from five custodians and 80 overall ESI sources. *Id.* All but one of the five Plaintiffs also sat for depositions. *Id.* ¶ 27.

Plaintiffs also successfully litigated multiple motions to compel related to, *inter alia*, Capital One's production of source code and structured data. ECF Nos. 168, 171, 194, 195, 199, 212, 226, 283, 293.

Expert discovery was similarly difficult and hard-fought. Plaintiffs enlisted three experts, including two testifying experts, to analyze and opine on the Extension's source code, Defendants' structured data, and the affiliate marketing industry. Plaintiffs' experts spent dozens of hours reviewing Capital One's source code, and Plaintiffs' counsel and staff spent over a hundred hours identifying and analyzing contracts relevant to one of Plaintiffs' expert's proffered opinions regarding the affiliate marketing industry. Ex. 3, ¶ 28. Plaintiffs' consulting experts attended numerous depositions in the case to assist Plaintiffs' counsel on technical matters outside counsel's expertise. *Id.*

Less than three months after the Court's ruling on Capital One's Motion to Dismiss, Plaintiffs filed their Motion for Class Certification, seeking certification of a nationwide class of

affiliate marketers whose commissions were allegedly wrongfully diverted when the Extension performed a "redirect" without a consumer first manually activating the Extension. ECF No. 314. Plaintiffs' Motion for Class Certification was still pending when the Parties filed a Notice of Settlement on September 18, 2025, indicating they had reached an agreement in principle to settle the case. ECF No. 335.

II. MEDIATION AND SETTLEMENT

The Parties engaged in extensive arm's-length settlement negotiations, beginning in August 2025. The negotiations were overseen by former United States Magistrate Judge, the Hon. Jay C. Gandhi (Ret.). The negotiations included a full day, in-person mediation session on August 28, 2025, followed by weeks of extensive and hard-fought negotiations facilitated by Judge Gandhi. On or about September 18, 2025, the Parties executed a binding term sheet, which was later superseded by the Settlement Agreement. Ex. 3, ¶ 30.

The Parties' settlement negotiations demonstrated that there were significant factual and legal disputes that affected the value of the case. Throughout the entirety of the settlement process, the negotiations were made at arm's length, and were free of collusion of any kind. Attorneys' fees, expenses, and the subject of service awards were not discussed until the Parties had reached agreement on the material terms of the Settlement. *Id.* ¶ 31.

III. TERMS OF THE PROPOSED SETTLEMENT

A. The Settlement Class

The proposed Settlement Class is defined as follows:

> All persons (including entities) in the United States who participated in an affiliate commission program with an online merchant that also partnered with Capital One Shopping during the Class Period,[2] and who were involved in a transaction in which

[2] The Class Period is defined as "January 6, 2020 through the date on which the Court enters the Preliminary Approval Order." Settlement Agreement, Ex. 1, § 1.15.

> Capital One Shopping was also involved. Excluded from the Settlement Class are the entities listed in Exhibit H to the Settlement Agreement.

Settlement Agreement, Ex. 1, § 1.46.

Excluded from the Settlement Class are (i) Capital One, any entity in which Capital One has a controlling interest, and Capital One's officers, directors, legal representatives, Successors, Subsidiaries, and assigns; (ii) any judge, justice, or judicial officer presiding over the Action and the members of their immediate families and judicial staff; and (iii) any individual who timely and validly opts out of the Settlement Class.

B. Proposed Injunctive Relief—Business Practice Commitments

Capital One has agreed to implement and maintain (for a period of at least two years) certain business practice changes ("Business Practice Commitments") designed to ensure the Extension continues to comply with stand-down rules and policies established by the affiliate networks and merchants Capital One partners with Capital One's Business Practice Commitments include establishing a formal and periodic review process to monitor the Extension's compliance with those rules and policies. *Id.* § 3.5. Capital One will evaluate whether any change made for a particular merchant or affiliate network should be implemented globally (i.e., across multiple merchants or affiliate networks, if consistent with those merchants' or networks' stand-down rules). *Id.* And Capital One will also identify an "ombudsman" to serve as a point of contact for merchants, affiliate networks, and publishers to raise concerns with Capital One about its compliance with the terms of the Settlement. *Id.* Moreover, these Commitments are enforceable in this Court, with the prevailing party in any such dispute being entitled to attorneys' fees and costs. *Id.*

In order to understand how the Extension operates, Class Counsel and Plaintiffs' experts expended significant time and resources to gain access to and analyze Capital One's structured

data and source code. Those efforts allowed Plaintiffs to successfully negotiate Capital One's Business Practice Commitments, which are discussed in full detail in § 3.5 of the Settlement Agreement (Ex. 1) and ¶ 32 of Class Counsel's Declaration (Ex. 3).

C. Monetary Relief

Settlement Class Members will have two alternative means of obtaining compensation: (1) "Proof Payment"; or (2) "Alternative Payment." Ex. 1, §§ 3.2, 4.4.

Proof Payment. Capital One agrees to pay a Proof Payment to each Settlement Class Member who submits a Proof Payment Claim Form with sufficient information to demonstrate that the Settlement Class Member has at least one (1) transaction in the Capital One Shopping Data[3] posted on or after November 1, 2023[4] that qualifies under the agreed-upon list of rules and parameters mutually developed by the Parties. These rules and parameters are formal queries designed to identify instances where Capital One received a commission in connection with a sale in which another affiliate's link was clicked prior to a click on Capital One's affiliate link.[5] *Id.* § 4.4.3.1. If a Settlement Class Member's affiliate data is associated only with transactions that were posted prior to November 1, 2023, they are not eligible for a Proof Payment. (However, they ***are***

[3] The Capital One Shopping Data includes data that has already been produced by Capital One, as well as a supplemental production that will include structured data through the date of the Preliminary Approval Order. *See* Ex. 1, §§ 1.8, 1.54.

[4] Capital One changed the way it maintained data about affiliate links preceding its own as of November 1, 2023. The parties disagree about the extent to which reliable information can be reconstructed for the period prior to November 1, 2023 but have agreed, for purposes of this Settlement, that only data from on or after November 1, 2023 will be used to determine eligible commissions for Proof Payments.

[5] The query that will used to identify eligible transactions in the data is reflected in Exhibit B to the Term Sheet. The Parties agree that Exhibit B to the Term Sheet reflects highly confidential information containing Capital One's trade secrets, and that it shall not be filed with the Court unless directed to be filed by the Court (and then, the Parties shall seek leave to file Exhibit B under seal).

still eligible for an Alternative Payment so long as they submit the information required for an Alternative Payment outlined below. *Id.* § 4.4.3.1.) For each qualifying transaction posted on or after November 1, 2023 identified in the Capital One Shopping Data, the Settlement Class Member will be entitled to receive 100% of the amount of any commission(s) received by Capital One Shopping. This amount shall not be capped in any way. To obtain a Proof Payment, Settlement Class Members are required to submit trade names, publisher IDs or affiliate IDs, affiliate links (both short- and long-form), or click IDs. In layperson's terms, in order to be eligible for a Proof Payment, there must be a sufficient indication in the data that Capital One received a commission in connection with a transaction where the consumer had clicked the Claimant's affiliate link prior to clicking on Capital One's affiliate link, and Capital One's receipt of that commission may have been inconsistent with industry standards.

Alternative Payment. Settlement Class Members who submit an Alternative Payment Claim Form, or who submit a Proof Payment Claim Form that is deemed invalid or insufficient, shall receive an Alternative Payment of $20, so long as the Settlement Class Member has submitted information with their Claim Form sufficient to demonstrate that an identifier of theirs is present in a URL within the page_view data (such as a publisher ID, affiliate ID, affiliate link, or trade name) of the Capital One Shopping Data, and evidence indicating that both Capital One and the Settlement Class Member both partner with the same merchant through affiliate networks that Capital One Shopping also partners with. *Id.* § 4.4.3.2. In layperson's terms, in order to be eligible for an Alternative Payment, there must be a sufficient indication of the Claimant's affiliate information Capital One's data.

Should a Settlement Class Member provide invalid or insufficient information in their initial claim submission, the administrator will send the Settlement Class Member a deficiency

notice, allowing them 14 days to submit additional information to establish their entitlement to a Proof Payment or Alternative Payment. *Id.* § 4.4.4.2.

D. Proposed Notice and Claims Program

Class Counsel have retained, and request that the Court appoint, Epiq Class Action & Claims Solutions, Inc. ("Epiq") as Settlement Administrator to provide notice to Settlement Class Members and to process claims. The Notice Plan designed by Epiq satisfies the "best notice practicable" standard pursuant to Rule 23 of the Federal Rules of Civil Procedure by drawing on the most up-to-date techniques used in commercial advertising to inform the Class and stimulate participation. Azari Decl., Ex. 4. The Notice Plan includes establishing a Settlement Website, substantial online advertising efforts to publicize the Settlement Website, a publication notice to be distributed directly into newsrooms, and a toll-free telephone hotline to which Settlement Class Members may refer for information about the Action and the Settlement Agreement, and which will stay active at least 120 days after all monetary payments have been distributed, as described further in Epiq's declaration, *Id.*, ¶ 23–37.

The total potential Settlement Class size numbers is in the thousands, all of whom are necessarily frequent Internet users given their participation in the affiliate marketing industry. Given the interest in the litigation from online publishers, Plaintiffs also have reason to believe the Settlement will be well-publicized. Based on Class Counsel's experience, and according to Epiq, the reach of the Notice Plan meets that of other court-approved notice programs, and has been designed to meet due process requirements, including the "desire to actually inform" requirement. The Notice Plan is thus the best notice practicable under the circumstances of this case. *Id.* ¶ 17; Ex. 3, ¶ 41–42.

The claims process similarly draws upon the most up-to-date techniques to facilitate participation, including: a link to a Settlement Website in all digital advertising; the ability to file

claims electronically; and a call-center via a toll-free number to assist Settlement Class Members in filing claims. Epiq, the proposed Settlement Administrator, is a widely regarded expert with the experience and capability to handle a case of this magnitude; Epiq was selected after a competitive bidding process among five leading providers of settlement notice and administration services. Ex. 4, ¶¶ 2–7; Ex. 3, ¶ 43.

E. Attorneys' Fees and Expenses and Service Awards

Class Counsel may separately move for a Settlement Class Counsel Attorneys' Fees and Costs Award of no greater than $3,950,000, to be paid by Capital One separately from the relief to the Settlement Class. Class Counsel may also request service awards of up to $10,000 each for the five Settlement Class Representatives. Capital One takes no position on these requests. Any such motions, if filed, must be filed within 90 days of the entry of the Preliminary Approval Order. Ex. 1, §§ 3.3–3.4

F. Releases

The Settlement Class will release Capital One from claims that were or could have been asserted in this case. The releases are detailed in the Settlement Agreement. Ex. 1, §§ 1.40–43, 3.6.

ARGUMENT

I. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

To determine whether a proposed settlement is "fair, adequate and reasonable to Class Members," Fed. R. Civ. P. 23(e)(2), courts in the Fourth Circuit "bifurcate[] the analysis into consideration of fairness, which focuses on whether the proposed settlement was negotiated at arm's length, and adequacy, which focuses on whether the consideration provided by the class members is sufficient." *Beaulieu v. EQ Indus. Servs., Inc.*, 2009 WL 2208131, at *23 (E.D.N.C. July 22, 2009) (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158–59 (4th Cir. 1991)); *see also In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 254 (E.D. Va. 2009) (explaining that "[t]he

Fourth Circuit in *Jiffy Lube* provided district courts with a two-level analysis applicable in evaluating a settlement's 'fairness' and 'adequacy'") (citing 927 F.2d at 158–59). Each of the factors considered by courts applying this "two-level analysis" weighs in favor of preliminary approval of the Settlement Agreement proposed by the Parties here. Accordingly, the Court should preliminarily approve the Settlement and order distribution of "notice in a reasonable manner to all [Settlement Class Members] who would be bound by the proposal[.]" Fed. R. Civ. P. 23(e).

A. Fairness

The fairness analysis aims "to ensure that a settlement is reached as a result of good-faith bargaining at arm's length, without collusion." *Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015) (cleaned up). To determine whether a proposed settlement is fair, courts consider four factors: "(1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the area of the class action litigation." *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 952 F.3d 471, 484 (4th Cir. 2020). Here, all four fairness factors support preliminary approval.

Prior to engaging in any settlement negotiations, the Parties vigorously represented their respective interests through dispositive motion briefing, significant written fact discovery, extensive expert analysis, and depositions of Plaintiffs, Defendants' corporate representatives, fact witnesses, and third parties. By the time the Parties reached an agreement in principle to settle the case, the Parties had fully briefed and argued Capital One's Motion to Dismiss, and Plaintiffs' Motion for Class Certification was pending. Accordingly, before any settlement terms were negotiated, Plaintiffs gained a thorough understanding of the nature of Capital One's anticipated defenses on the merits, the likely nature of arguments that would be advanced at class certification, summary judgment, and trial, and the complex technical issues surrounding the claims and

defenses in this case. Ex. 3, ¶¶ 16–29. The Parties conducted settlement negotiations at arm's length, with the assistance of a retired United States Magistrate Judge, and the proposed Settlement Class was represented by knowledgeable and respected litigators with significant experience in complex class actions. *See In re NeuStar, Inc. Sec. Litig.*, 2015 WL 5674798, at *10 (E.D. Va. Sep. 23, 2015) (adversarial encounters support a finding of arms' length negotiations); *Lumber Liquidators*, 952 F.3d at 485 (finding counsel's experience in complex civil litigation supported fairness of settlement). All four factors therefore support a finding that the proposed Settlement Agreement is fair.

B. Adequacy and Reasonableness

To determine whether a settlement is adequate, courts consider:

(1) the relative strength of the plaintiffs' case on the merits;

(2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial;

(3) the anticipated duration and expense of additional litigation;

(4) the solvency of the defendant[s] and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement.

Id. at 484.

The first three factors strongly support the adequacy and reasonableness of the settlement.

Plaintiffs are confident in the strength of their claims, but also acknowledge the significant risks and costs associated with continued litigation. First, while Plaintiffs overcame the Motion to Dismiss in this case, similar cases with similar facts and claims did not in the first instance. *See, e.g.*, *Wendover Productions, LLC v. PayPal Inc.*, 2025 WL 3251667, at *1–6 (N.D. Cal. Nov. 21, 2025) (dismissing complaint with leave to amend). Second, there was a risk that Plaintiffs' claims would not have survived, or survived in full, on a class-wide basis after a ruling on their Motion

for Class Certification. Third, Plaintiffs would almost certainly have faced *Daubert* motions challenging their damages and liability experts, summary judgment motions, and other pre-trial motions that could have led to dismissal of their claims or significant diminishment of their ability to recover. Finally, even if Plaintiffs had proceeded to trial, Plaintiffs still would have faced significant risk, cost, and delay, including likely interlocutory and post-judgment appeals.

In contrast to the risk, cost, and delay posed by continued litigation, the proposed Settlement provides certain, substantial, and immediate relief to the proposed Settlement Class. It ensures that Settlement Class Members with valid claims for Proof or Alternative Payments will receive guaranteed compensation promptly, requires Capital One to continue to adhere to affiliate marketing industry rules, and means the parties can continue to compete on a level playing field. There would be no guarantee that such benefits and injunctive relief would be available if the case proceeded further.

The substantial costs, risk, and delay of a trial and appeal support a finding that the proposed Settlement is adequate.

C. The Settlement Also Satisfies the Other Fed. R. Civ. P. 23(e)(2) Factors.

Looking beyond the Fourth Circuit's two-level analysis for (1) fairness and (2) adequacy and reasonableness, the other factors enumerated in Fed. R. Civ. P. 23(e)(2) support preliminary approval of the Settlement.

In determining whether a settlement is fair, reasonable, and adequate, the Court must consider whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

1. The Class Was Adequately Represented and the Proposed Settlement Was Negotiated at Arm's Length

"[T]he adequacy requirement is met when: (1) the named plaintiff does not have interests antagonistic to those of the class; and (2) plaintiff's attorneys are qualified, experienced, and generally able to conduct the litigation." *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 567 (E.D. Va. 2016) (citation omitted). Here, the Settlement Class Representatives have the same interests as other Class Members as they are asserting the same claims and share the same injuries. Further, the Court has already recognized Class Counsel's experience and qualifications in appointing them to lead this litigation, and the record shows Class Counsel worked diligently to litigate and ultimately bring this case to resolution. Ex. 3, ¶¶ 1–29; *see also Lumber Liquidators*, 952 F.3d at 485 (finding counsel's experience in complex civil litigation supported fairness of settlement).

As discussed previously, *see supra* at Factual Background, § I.A; Argument, § I.A, the settlement was vigorously negotiated at arm's length.

2. The Relief is Adequate.

In addition to the five factors supporting the adequacy of the Settlement discussed previously, *see supra* at Argument, § I.B, the other Rule 23(e)(2)(C) factors also support the Settlement.

Settlement Class Members are entitled to benefits that are tailored to the relief sought through the litigation, including: 100% of any commissions that Plaintiffs assert were wrongfully taken by Capital One, so long as Settlement Class Members can provide sufficient information to identify the relevant transactions within Capital One's data; or alternatively a payment of $20, which, as calculated by Plaintiffs' expert, is a significantly greater amount than the average commission at issue in this case, in the event the Settlement Class Member cannot specifically identify one of their transactions in Capital One's data but can demonstrate that one of their identifiers does appear in a broader set of Capital One's data. Capital One's Business Practice Commitments will also ensure that Capital One continues to comply with affiliate marketing industry rules designed to promote fair competition between publishers such as Settlement Class Members and browser extensions like the Extension, which will provide an important benefit to Settlement Class Members, who continue to participate in the affiliate marketing industry and will be able to do so on fairer grounds.

Class Counsel, a group with extraordinary experience in leading major class actions, strongly believe that the relief is fair, reasonable, and adequate. Ex. 3, ¶¶ 47–53. The Court may rely upon such experienced counsel's judgment. *See, e.g.*, *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 434 (11th Cir. 2012) ("Absent fraud, collusion, or the like, the district court should be hesitant to substitute its own judgment for that of counsel.") (internal quotation marks omitted).

a. The method of distributing relief is effective

The proposed distribution process will be efficient and effective. The available relief is detailed clearly in the Notice, which will be provided to all Settlement Class Members and lays out the benefits to which they are entitled.

Noticing the Settlement Class of the available relief will also be efficient and effective. The Notice Plan agreed to by the Parties and approved by Epiq includes: the establishment of a Settlement Website and a toll-free telephone helpline; the publication of notice online through an appropriate programmatic network, which will include advertising on search engines and social media; and publication of notice of the proposed Settlement over a newsline for direct distribution into newsrooms. This constitutes the best notice practicable under the circumstances and will constitute due and sufficient notice to all persons entitled thereto. The precise potential Settlement Class size is indeterminate but numbers in the thousands[6], nearly all of whom have an online presence due to their participation in the affiliate marketing industry. The Settlement Administrator expects that the notice effort will reach approximately 70% of the Settlement Class. Ex. 4, ¶ 41

Settlement Class Members will therefore receive effective and efficient notice of their opportunity to claim relief, which will be distributed through digital means as elected by the Class Members. Class Members will be able to elect to receive direct payments (Paypal or Venmo) or digital prepaid Mastercards. Ex. 1, § 4.8.2.

Because Settlement Class Members may make claims through a simple online form or by mail—and also have the benefit of the Business Practice Commitments Capital One has agreed to—the method of distributing the relief is both efficient and effective, and the proposed Settlement is adequate under this factor.

[6] The Capital One Structured Data contains affiliate links, which include unique identifiers assigned to class members, such as Publisher IDs and Affiliate IDs. However, many class members are associated with multiple unique identifiers (because, for example, they work with multiple affiliate networks, each of which assigns its own IDs, or operate multiple brands or online properties, each of which may also have its own IDs).

b. The terms relating to attorneys' fees are reasonable

Class Counsel will request an award of attorneys' fees and reimbursement of expenses incurred in prosecuting and settling this case. *Id.* § 3.4. Under the Settlement Agreement, Plaintiffs' request for Attorneys' Fees and Expenses must be filed with the Court within ninety (90) days of the Court's entry of the Preliminary Approval Order. *Id.* § 1.27. During settlement negotiations, attorneys' fees were not discussed in any manner until the Parties had reached agreement on the material terms of the Settlement. Ex. 3, ¶ 44. Capital One has agreed not to oppose any request for fees and expenses not in excess of $3,950,000, Ex. 1, § 3.4, but the ultimate fee award will be determined in the discretion of the Court, based on Class Counsel's application to the Court and Fourth Circuit law, with the opportunity for comment from Settlement Class Members. Moreover, the ultimate fee award approved by the Court will be paid directly by Capital One and will not diminish the funds available to Settlement Class Members.

The Settlement Agreement is not conditioned upon the Court's approval of the fee award. *Id.* § 3.4.2. Accordingly, at this stage, the Court can and should conclude that it is likely to approve the Settlement for purposes of sending notice to the Settlement Class, even if it has not yet concluded whether and in what amount it would award attorneys' fees and expenses.[7] The proposed Settlement is adequate under this factor.

c. Any agreement required to be identified under Rule 23(e)(3)

[7] Similarly, Class Counsel will request service awards of $10,000 for each of the Settlement Class Representatives. Service awards of this size are reasonable. *See Goodlaxson v. Mayor & City Council of Baltimore*, 776 F. Supp. 3d 311, 326–27 (D. Md. 2025) (granting service awards of $10,000); *Kirkpatrick v. Cardinal Innovations Healthcare Sols.*, 352 F. Supp. 3d 499, 507 (M.D.N.C. 2018) (same). The Settlement Agreement is not conditioned on the Court's approval of this request. Ex. 1, § 3.3.2.

Rule 23(e) mandates that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal," and that the Court must then consider any such agreements when determining whether the relief provided in the settlement is adequate. *See* Fed. R. Civ. P. 23(e)(2)-(3). As is common in consumer class settlements, the Parties have entered into a confidential supplemental agreement establishing the opt-out threshold above which Capital One may terminate the Settlement Agreement. The Parties will submit *in camera* or seek leave to file under seal with the Court this confidential supplemental agreement with access limited to the Parties' counsel should the Court so direct.

This factor weighs in favor of finding that the Proposed Settlement is adequate.

3. The Proposed Settlement Treats Class Members Equitably.

Finally, the proposed Settlement treats all class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(D). All Settlement Class Members will have the same opportunity to file a claim for a Proof or Alternative Payment, which means that monetary compensation will be apportioned in accordance with each claimant's alleged injury. This factor likewise supports a finding that the Court will be able to approve the proposed Settlement, and that class notice is appropriate.

II. THE PROPOSED SETTLEMENT CLASS MEETS THE REQUIREMENTS FOR CERTIFICATION

To issue notice, the Court should decide it will "likely be able to . . . certify the class for purposes of judgment." Fed. R. Civ. P. 23(e)(1)(B); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The requirements of Rules 23(a) and (b)(3) are satisfied here, and the Settlement Class should therefore be certified for settlement purposes.[8]

[8] While currently withdrawn, Plaintiffs' Motion for Class Certification and supporting exhibits provides a fulsome record in support of class certification. *See* ECF Nos. 314–16.

A. The Rule 23(a) Requirements Are Satisfied

***Numerosity*:** Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, the proposed Settlement Class consists of thousands of individuals and/or entities, indisputably rendering individual joinder impracticable. *See Jeffreys v. Commc'ns Workers of Am. AFL–CIO*, 212 F.R.D. 320, 322 (E.D. Va. 2003) (noting that "where the class numbers twenty-five or more, joinder is generally presumed to be impracticable"). Numerosity is therefore satisfied.

***Commonality*:** Rule 23(a)(2) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury" such that all their claims "can productively be litigated at once." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350 (2011) (internal citations omitted). This requires that the determination of the common question "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350 "Even a single common question will do." *Id.* at 359 (internal quotations omitted).

When, as here, there is a question of whether the defendant's standardized procedures violate the law, the commonality requirement is readily satisfied. *Manuel v. Wells Fargo Bank, Nat. Ass'n*, 2015 WL 4994549, at *12 (E.D. Va. Aug. 19, 2015) (finding commonality satisfied because the question of whether defendant's standardized practice violated the law "will be answered through one analysis of the practice a[t] issue").

All Settlement Class Members suffered the same alleged injury—diversion of their commissions—and are asserting the same legal claims. Accordingly, common questions of law and fact abound. *See, e.g.*, *Milbourne v. JRK Residential Am., LLC*, 2014 WL 5529731, at *5 (E.D. Va. Oct. 31, 2014); *Clark v. Trans Union, LLC*, 2017 WL 814252, at *10 (E.D. Va. Mar. 1, 2017).

***Typicality*:** Typicality under Rule 23(a)(3) requires an inquiry into the "representative parties' ability to represent a class[.]" *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (citation and quotations omitted). In other words, the "plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Deiter*, 436 F.3d at 466–67.

Here, the Settlement Class Representatives' claims are typical of other Settlement Class Members because they arise from the same course of alleged conduct by Capital One and involve the same legal theories of tortious interference, unjust enrichment, and alleged violations of the CFAA. Moreover, Settlement Class Representatives, like every other Settlement Class Member, directed consumers to merchants' online stores to earn commissions that were allegedly diverted by the Capital One Shopping Browser Extension. The technology behind the Extension worked the same for each Class Member. Therefore, the typicality requirement is satisfied.

***Adequacy of Representation*:** "The adequacy inquiry . . . serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Settlement Class Representatives do not have any interests antagonistic to other Class Members and have retained lawyers who are abundantly qualified and experienced, satisfying the adequacy requirement. Ex. 3, ¶¶ 2–15, 47–53.

B. The Rule 23(b)(3) Requirements Are Satisfied

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members," and that class treatment is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.

R. Civ. P. 23(b)(3). One part of the superiority analysis—manageability—is irrelevant for purposes of certifying a settlement class. *Transurban*, 318 F.R.D. at 569.

***Predominance*:** Rule 23(b)(3)'s predominance requirement tests whether a proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The predominance inquiry measures the relative weight of the common questions as against individual ones. *Amchem*, 521 U.S. at 624. "If the 'qualitatively overarching issue' in the litigation is common, a class may be certified notwithstanding the need to resolve individualized issues." *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D 183, 214 (E.D. Va. 2015) (citing *Ealy v. Pinkerton Gov't Servs.*, 514 F. App'x 299, 305 (4th Cir. 2013)). Common liability issues predominate where class members "all assert injury from the same action." *Gray v. Hearst Commc'ns, Inc.*, 444 F. App'x 698, 701–02 (4th Cir. 2011).

Here, the qualitatively overarching allegation in the litigation is common to all Settlement Class Members: Plaintiffs contend the Extension's uniform, automated functionality diverts commissions away from Settlement Class Members and to Capital One in violation of industry norms. Similarly, whether Settlement Class Members are entitled to those commissions—or, inversely, whether Capital One is—turns upon standardized agreements between Settlement Class Members on the one hand, and merchants and affiliate networks with whom Capital One also partners, on the other. Furthermore, while his report was filed under seal and subsequently withdrawn, Plaintiffs' expert opined that he can mechanically determine alleged damages for each Class member by using Capital One's data, further supporting certification.

Thus, common questions predominate as to Capital One's liability and damages for all of Settlement Class Members' claims—namely, whether Settlement Class Members, rather than

Capital One, are entitled to commissions—based on agreements common to all Settlement Class Members.

***Superiority*:** "[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy[.]" 7AA Charles Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1779 (3d ed. 2005). Litigating the same claims of thousands of individuals and businesses through individual litigation would obviously be inefficient, particularly where Plaintiffs' expert has calculated the average commission at issue is worth less than $10. The superiority requirement is therefore satisfied. *See In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136, 162 (D.S.C. 2018).

III. THE COURT SHOULD APPROVE THE NOTICE PLAN, NOTICES, AND CLAIM FORM, AND SHOULD APPOINT THE SETTLEMENT ADMINISTRATOR

To satisfy the requirements of both Rule 23 and due process, Rule 23(c)(2)(B) provides that, "[f]or any class certified under Rule 23(b)(3) . . . the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Rule 23(e)(1) similarly requires that notice be reasonably disseminated to those who would be bound by the court's judgment. Fed. R. Civ. P. 23(e)(1). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Plaintiffs request that the Court appoint Epiq as the Settlement Administrator and approve the Notice Plan submitted by Epiq. *See* Ex. 4. The Notice Plan is straightforward. Epiq will carry out a Digital Notice Campaign (including targeted advertising and social media advertising), acquire sponsored search listing on the major internet search engines, issue a nationwide

informational release to over 600 media outlets, and create and maintain a Settlement Website and a Toll-Free Telephone Number for Settlement Class Members to learn more about the Settlement. *Id.* ¶¶ 24–37. Epiq expects the notice to reach approximately 70% of the Settlement Class, meeting the requirements of Rule 23 and due process. *Id.* ¶ 18; Federal Judicial Center, "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide" (2010) (recognizing the effectiveness of notice that reaches between 70 and 95 percent of the class). When implemented, the Notice Plan will provide the best notice practicable under the circumstances. Ex. 4, ¶ 17–44; Ex. 3, ¶¶ 41–43.

The Court should also approve the proposed forms of notice attached as Exhibit 5 ("Notices"), which satisfy all of the criteria of Rule 23. The Notices are clear, straightforward, and provide persons in the proposed Settlement Class with enough information to evaluate whether to participate in the Settlement. Ex. 4, ¶ 38. The Notices also explain how Settlement Class Members can exclude themselves from the Settlement, and how to object to the Settlement, including the requested attorney fees and costs. Ex. 5. Thus, the Notices satisfy the requirements of Rule 23. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (explaining a settlement notice must provide settlement class members with an opportunity to present their objections to the settlement).

Finally, the Court should approve the Claim Form attached as Exhibit 6. The Claim Form is written in plain language and can be submitted online or printed and submitted in hard copy upon request to the Settlement Administrator. Ex. 4, ¶ 38.[9]

[9] The information requested in the Claim Form is necessary to identify class members in the Structured Data. The Structured Data contains affiliate links which, themselves, contain various pieces of identifying information (such as Affiliate and Publisher IDs) but which vary as between publishers and affiliate networks. The Claim Form provides Class Members with the ability to submit these identifiers, as well as other data points that can identify Class Members' presence in the Structured Data, such as Click IDs or specific URLs. Other information required by the claim

IV. THE COURT SHOULD APPOINT CLASS COUNSEL

When certifying a class, Rule 23 requires a court to appoint class counsel that will fairly and adequately represent the class members. Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the Court considers counsel's work in identifying or investigating potential claims; experience in handling class actions or other complex litigation and the types of claims asserted in the case; knowledge of the applicable law; and resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i–iv).

The Court previously appointed James J. Pizzirusso, E. Michelle Drake, Douglas J. McNamara, and Norman E. Siegel as Plaintiffs' Interim Co-Lead Counsel. ECF No. 112, Pretrial Order #2; *see also* ECF No. 63 (Pizzirusso application and qualifications); ECF No. 70 (Drake); ECF No. 53 (McNamara); ECF Nos. 67–68 (Siegel). Throughout this case, Class Counsel have demonstrated the hard work, legal scholarship, experience, and resources they bring to bear, ultimately resulting in the Settlement now before the Court. The Court should thus appoint them as Class Counsel under Rule 23(g).

CONCLUSION

For the reasons set forth set forth above, Plaintiffs request the Court enter the order proposed by the Parties directing the Settlement Class be notified of the proposed Settlement in the manner set forth in the Notice Plan and schedule a Final Approval Hearing.

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form, such as the identification of at least one merchant with whom both the affiliate and Capital One worked is necessary because, for an Alternative Payment Claim, the identification of a specific transaction is not required, but, for there to have even been the prospect that Capital One collected a commission in connection with a transaction involving the Class Member, Capital One and the Class Member must have at least worked with *one* of the same merchants.

APPENDIX A – TIMELINE OF SETTLEMENT EVENTS

For convenience, proposed dates and deadlines leading to a Final Approval Hearing are provided below and in the proposed order separately submitted to the Court.

Notice Date	**No later than 60 days after entry of the Preliminary Approval Order**
Last day for Settlement Class Counsel to file Motion for Attorney's Fees and Settlement Class Representative Service Awards	**90 days after entry of the Preliminary Approval Order**
Claims Submission Deadline	**120 days after entry of the Preliminary Approval Order**
Exclusion/Objection Deadline	**120 days after entry of the Preliminary Approval Order**
Last day for Settlement Class Counsel to file motion for final approval of the Settlement	**35 days before Final Approval Hearing**
Last day to file oppositions (if any) to the motion for final approval of the Settlement	**21 days before Final Approval Hearing**
Last day to file any replies in further support of the motion for final approval of the Settlement	**7 days before Final Approval Hearing**
Final Approval Hearing	**_____, 2026, which is 174 days after entry of the Preliminary Approval Order**

DATED: December 9, 2025

Respectfully submitted,

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Plaintiffs' Co-Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2025, I caused the foregoing to be filed with the Clerk of the Court using the CM/ECF system, which will then send notification of such filing (NEF) to all counsel of record.

By: */s/ Steven T. Webster*
Steven T. Webster