IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DARRICK YOUNG, JEREMY LAM, and DAVID RAMIREZ, individually and on behalf of all others similarly situated, Plaintiff, v. MILITARY ADVANTAGE, INC. d/b/a MILITARY.COM, Defendant.	Case No. 2023LA000535

Candice Adams
e-filed in the 18th Judicial Circuit Court
DuPage County
ENVELOPE: 24513161
2023LA000535
FILEDATE: 9/25/2023 2:21 PM
Date Submitted: 9/25/2023 2:21 PM
Date Accepted: 9/26/2023 3:45 PM
JW

PLAINTIFFS' MEMORANDUM IN SUPPORT
OF PLAINTIFFS' UNOPPOSED MOTION FOR
ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARD

INTRODUCTION

In this putative class action, Plaintiffs Darrick Young, Jeremy Lam, and David Ramirez ("Plaintiffs") allege that Defendant Military Advantage, Inc. d/b/a Military.com ("Defendant" or "Military.com") (Plaintiffs and Defendant are collectively referred to as the "Parties") disclosed its subscribers' personally identifiable information to Facebook without permission in violation of the Video Privacy Protection Act,18 U.S.C. § 2710 et seq. (the "VPPA"). After extensive negotiations spanning over many months, the Parties have reached a proposed settlement wherein Military.com will establish a Settlement Fund of up to $7.35 million as memorialized in their Settlement Agreement and Release (the "Settlement" or "Agreement"). If approved, the Settlement will bring certainty, closure, and significant and valuable relief for individuals to what otherwise would likely be contentious and costly litigation.

Plaintiffs and Class Counsel respectfully request that the Court approve a Service Award of $5,000 to Plaintiff Ramirez, and Service Awards of $2,500 each to Plaintiff Young and Plaintiff Lam, and a Fee Award of one third of the gross settlement fund or $2,450,000, inclusive of costs and expenses. As detailed below, the requested awards are appropriate under governing Illinois law, consistent with the amounts awarded in prior similar settlements, and fairly compensate Class Counsel and Representative Plaintiffs for the work they performed and commendable result they achieved in this high-risk litigation.

I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to filing this action, the Parties engaged in settlement discussions, and, to that end, agreed to participating in a private mediation before Defendant formally answered the Complaint. The Parties agreed that the mediation would take place before The Honorable Frank Maas (Ret.) of JAMS New York, who is a former United States Magistrate Judge for the Southern District of New York and a neutral at JAMS New York. As part of the mediation, and in order to competently

assess their relative negotiating positions, the Parties exchanged informal discovery, including on issues such as the size and scope of the putative class, and certain facts related to the strength of Defendant's defenses. Given that the information exchanged was similar to the information that would have been provided in formal discovery related to the issues of class certification and summary judgment, the Parties had sufficient information to assess the strengths and weaknesses of the claims and defenses as well as the risks of continued litigation. See Declaration of Gary M. Klinger attached as Exhibit A ("Klinger Dec.") at ¶ 5. The mediation took place on April 14, 2023, and lasted the entire day. While the Parties engaged in good faith negotiations, which at all times were at arm's length, they failed to reach an agreement that day. Shortly after the mediation, Judge Maas made a mediator's proposal to resolve the Action, and, on May 5, 2023, the Parties accepted that proposal. Thereafter, on May 19, 2023, the Parties reached agreement on all material terms of a class action settlement and executed a term sheet.

On May 24, 2023, Plaintiffs commenced this action, and over the following weeks, the Parties drafted and executed the Settlement Agreement and related documents. Plaintiffs filed their Unopposed Motion for Preliminary Approval on July 21, 2023 and on July 26, 2023, the Court preliminarily approved the Settlement. Plaintiffs now submit their motion in support of their request for fees, costs, and service awards.

II. SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the class. Military.com will establish a Settlement Fund through which Defendant will pay or cause to be paid a total of up to $7,350,000 in cash for payment of the following: (i) up to a $30 cash payment to each Settlement Class Member who submits an Approved Claim for cash benefits pursuant to Section 2.3 of the Settlement Agreement; (ii) the Notice and Other Administrative Costs actually incurred by the Settlement Administrator as described in Section 4.3 of the Settlement Agreement; (iii) the Fee

Award, as may be provided by the Court and as described in Section 8.1 of the Settlement Agreement; and (iv) a Service Award of $5,000 to Plaintiff Ramirez, and Service Awards of $2,500 each to Plaintiff Young and Plaintiff Lam, or as may be ordered by the Court and as described in Section 8.4 of the Settlement Agreement. See S.A. ¶¶ 2.1.

In addition to this payment, Class Counsel has secured an agreement from Military.com that, although they continue to deny the allegations and do not admit liability, they will suspend operation of the Facebook Tracking Pixel on any pages of their website that include video content for a Period of at least two years from the date they removed the Pixel.

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES, COSTS, AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

"Illinois follows the 'American Rule,' which provides that absent statutory authority or a contractual agreement, each party must bear its own attorney fees and costs." *McNiff v. Mazda Motor of Am., Inc.*, 384 Ill. App. 3d 401, 404 (4th Dist. 2008) (quoting *Negro Nest, L.L.C. v. Mid-Northern Mgmt., Inc.*, 362 Ill. App. 3d 640, 641-42 (4th Dist. 2005)) (quotations omitted). "If a statute or contractual agreement expressly authorizes an award of attorney fees, the court may award fees 'so long as they are reasonable.'" *Id.* (citing and quoting *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 405 (1st Dist. 2007)). Here, the Parties have entered into a contractual agreement – the Settlement Agreement – expressly authorizing an award of attorney fees, costs, and expenses up to $2,450,000.[1] Agreement ¶ 8.1.

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[1] *See* William B. Rubenstein, 5 NEWBERG ON CLASS ACTIONS § 15:12 (5th ed. 2019) (parties to suit may have private agreements concerning fees which may include agreement between class counsel and defendant whereby defendant agrees to pay a certain fee requested by class counsel); *see also Evans v. Jeff D.*, 475 U.S. 717, 738 n.30 (1986) (parties may simultaneously negotiate a "defendant's liability on the merits and his liability for his opponents' attorney's fees"); *In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App'x 53, 60 (3d Cir. 2014) (awarding $500,000 in fees for injunctive class settlement where defendant agreed to change its misleading labels); *Wing v. Asacro Inc.*, 114 F.3d 986, 988 (9th Cir. 1997) ("At the outset, we note that the fee

A. The Court Should Apply The Percentage-of-the-Fund Method In This Case

"When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 244 (1995) (quoting *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)). "The decision to award fees based on the lodestar or percentage method is a matter within the sound discretion of the trial court, considering the particular facts and circumstances of each case." *Id.* However, the Court is not required to perform a lodestar cross-check on Class Counsel's fees. *McCormick v. Adtalem Glob. Educ., Inc.*, 2022 IL App (1st) 201197-U, ¶ 24 (rejecting an objector's argument that failure to perform lodestar cross-check rendered class counsel's fee unreasonable and awarding class counsel fees totaling 35% of the fund, or $15,7000,00); *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.,* 2016 IL App (2d) 150236, ¶ 58, 52 N.E.3d 427, 441 (citing *Brundidge,* 168 Ill.2d at 246) (rejecting an objector's argument that the trial court was required to perform a lodestar cross-check on class counsel's fees and awarding class counsel fees totaling 33% of the common fund, or $7,600,000); *Perez v. Rash Curtis & Associates*, 2020 WL 1904533, at *18 (N.D. Cal. Apr. 17, 2020) ("Generally, a district

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dispute in this case arises [not from a statute or common fund, but] out of a contract: in the Settlement Agreement, Asacro agreed to pay the reasonable attorney fees and expenses as determined and awarded by the court."); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 523 (1st Cir. 1991) (holding that when parties to class actions have reached a "clear sailing" fee-shifting agreement as part of settlement, trial court may determine and award reasonable fees "even where no fee-shifting statute of common law exception thrives"); *Browne v. Am. Honda Motor Co., Inc.*, No. CV 09-06750 (C.D. Cal. Oct. 10, 2010) ("A settlement agreement is a binding contract" and "contractual provisions providing for the payment of attorneys' fees . . . provide a basis for awarding fees."); *In re TJX Cos. Retail Secs. Breach Litig.*, 584 F. Supp. 2d 395, 399 (D. Mass. 2008) (noting that basis for awarding fees was "part of the Agreement, [in which Defendant] agreed to pay court-approved attorneys' fees not to exceed $6,500,000"); *Deloach v. Philip Morris Cos.*, 2003 WL 23094907, at *4 n.2 (M.D.N.C. Dec. 19, 2003) ("the present petition [for attorney fees] was brought pursuant to a private [settlement] agreement among the parties") (citation omitted); *Neel v. Strong*, 114 S.W.3d 272, 273 (Mo. Ct. App. 2003) ("As part of the settlement, the Attorney General and the tobacco companies agreed that the tobacco companies would pay the fees of the outside counsel.").

court is ‘not required’ to conduct a lodestar cross-check to assess the reasonableness of a fee award.”). Indeed, the “[p]ercentage analysis approach eliminates the need for additional major litigation and further taxing of scarce judicial resources.” *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 924–25 (1st Dist. 1995). “Accordingly, most federal circuits … have abandoned the lodestar in favor of a percentage fee in common fund cases.” *Id.*

In “choosing between the percentage and lodestar approaches,” courts “look to the calculation method most commonly used in the marketplace at the time such a negotiation would have occurred.” *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-01 (N.D. Ill. 2015) (citing *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998)); *see also McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 814-15 (E.D. Wis. 2009). In class action litigation, where “the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs’ ultimate recovery,” *Kolinek*, 311 F.R.D. at 500-01, state and federal courts in Illinois and throughout the country are in near unanimous agreement “the percentage approach is likely what the class members and counsel would have negotiated when counsel agreed to take on the case.” *McCormick*, 2022 IL App (1st) 201197-U, ¶ 26; *see also Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 2006) (“When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the ‘market rate.’”); *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 923 (1st Dist. 1995) (noting that “a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases”) (citation omitted); *In re Continental Illinois Securities Litig*., 962 F.2d 566, 572 (7th Cir. 1992) (market for legal services paid on a contingency basis shows the proper percentage to apply in a class action that creates a common fund for the benefit of the class)); *Williams v. Gen. Elec. Capital Auto Lease*, 94 C 7410, 1995 WL 765266, *9 (N.D. Ill. Dec. 26, 1995) (noting that “[t]he approach favored in the Seventh Circuit is to compute attorney’s fees as a percentage of the benefit conferred upon the class”); *see*

also, e.g., Gaskill v. Gordon, 160 F.3d 361, 363 (7th Cir. 1998) (explaining that where "a class suit produces a fund for the class," as is the case here, "it is commonplace to award the lawyers for the class a percentage of the fund," and affirming fee award of 38% of $20 million recovery to class) (citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)); *Sutton*, 504 F.3d at 693 (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) ("[T]he court agrees with Class Counsel that the fee award . . . should be calculated as a percentage of the money recovered for the class.").

This Court should likewise apply the percentage-of-the-fund method. The percentage-of-the-fund method best replicates the *ex-ante* market value of the services that Class Counsel provided to the Settlement Class. It is not just the typical method used in contingency-fee cases generally, *see Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998), but it is also the means by which an informed Settlement Class and Class Counsel would have established counsel's fee *ex-ante*, at the outset of the litigation. *See Kolinek*, 311 F.R.D. at 500-501 ("[T]he normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery"). The percentage-of-the-fund method also better aligns Class Counsel's interests with those of the Settlement Class because it bases the fee on the results the lawyers achieve for their clients rather than on the number of motions they file, documents they review, or hours they work, and it avoids some of the problems the lodestar-times-multiplier method can foster (such as encouraging counsel to delay resolution of the case when an early resolution may be in their clients' best interests). *McCormick*, 2022 IL App (1st) 201197-U, ¶ 26 ("Peart's argument that a method that is disfavored in class actions should have been used at least for a cross-check of the fee award is an argument for inefficiency. He is proposing what the supreme court disapproved of in *Brundidge*: 'protracted satellite litigation involving the attorney fees award' as the trial court determines 'the reasonable

fees to be awarded based upon hourly rates and the reasonable number of hours expended.'"); *Brundidge*, 168 Ill.2d at 242; *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *In re Synthroid Mktg. Litig.*, 264 F.3d 712 at 720-21 (7th Cir. 2001).[2] And, it is also simpler to apply. *Id.*; *see also, e.g., Kolinek*, 311 F.R.D. at 501 (percentage of the ultimate recovery method appropriate for awarding fees in TCPA class action "because fee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of nine million lightly-injured plaintiffs likely would not be interested in doing"). Accordingly, the Court should apply the percentage-of-the-fund method.

B. The Requested Attorneys' Fees, Costs, And Expenses Are Reasonable As A Percentage Of The Class Benefit

In class action settlements, courts typically award attorneys' fees based on a percentage of the total settlement, which includes any litigation expenses incurred. *Brundidge*, 168 Ill. at 238. "[T]he percentage of the fund method…reflects the results achieved." *Id.* at 244.

An award to Class Counsel of one third of the Settlement Fund is well within the range of fees typically awarded to class counsel by Illinois courts in comparable all-cash class action settlements. *See, e.g., Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (citing *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 599 (N.D. Ill. 2011) (same); *Meyenburg*

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[2] In this case for example, a lodestar approach would have created a perverse incentive for Class Counsel to reject or delay entering into the Settlement offer set forth in the Settlement Agreement merely to bill more hours through more unnecessary, wasteful, and inefficient litigation—an approach that, had it been adopted by Class Counsel, may have resulted in no recovery for all or some of the Settlement Class Members*See Tims v. Black Horse Carriers, Inc.*, -- N.E.3d --, 2023 IL 127801 (Feb. 2, 2023) (length of statute of limitations); *Cothron v. White Castle System, Inc.*, -- N.E.3d --, 2023 WL 128004 (Feb. 17, 2023) (accrual of statute of limitations).

v. Exxon Mobil Corp., U.S. Dist. LEXIS 52962, at *5 (S.D. Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation"); *see also, e.g., Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding an attorneys' fees award of one-third of a reversionary fund recovered in light of the "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted").

1. The Total Value Of The Settlement Is $7,350,000

To calculate attorneys' fees based on the percentage of the benefit, the Court must first determine the value of the Settlement Fund. In doing so, the Court must include the value of the benefits conferred to the Class, including any attorneys' fee, expenses, service award and notice and claims administration payments to be made. *See*, *e.g.*, *Brundidge*, 168 Ill.2d at 238. Thus, the Court should consider the *entire benefit* conferred by the Settlement, including the benefit fund, agreed on attorneys' fees, costs, and expenses, cost of notice and claims administration, and the service awards to Plaintiffs, amounting to a total value of $7,350,000. *See, e.g.*, *Scholtens v. Schneider*, 173 Ill. 2d 375, 385 (1996) ("It is now well established that 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole.'") (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)); *Ryan v. City of Chi.*, 274 Ill. App. 3d 913, 924-25 (1st Dist. 1995) (approving one third fee award in $33 million settlement).

2. The Requested One Third Of The Settlement Fund Is Reasonable

Here, the requested $2,450,000 fee, inclusive of costs and expenses, is one third of the Settlement Fund generated on behalf of the Settlement Class, which falls within the range awarded in class actions by courts throughout the country. As noted above, Courts have recognized that fee awards as high as 50% of the gross settlement fund are reasonable. *See* NEWBERG ON CLASS

ACTIONS, *supra*, §15:83 (5th ed. Dec. 2016 update) ("Usually, 50 percent of the fund is the upper limit on a reasonable fee award from a common fund, . . . though somewhat larger percentages are not unprecedented."); *Wells v. Allstate Ins. Co.,* 557 F. Supp. 3d 1, 7-8 (D.D.C 2008) (noting that fee awards may range up to 45%, and approving fee request of 45% of the total gross recovery); *In re Ampicillin Antitrust Litig.,* 526 F. Supp. 494, 499 (D.D.C. 1981) (awarding 45% of $7.3 million gross settlement fund as attorneys' fees); *see also Martin v. AmeriPride Servs, Inc.,* 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) ("Other case law surveys suggest that 50% is the upper limit, with 30-50% commonly being awarded in cases in which the common fund is relatively small."). The requested fee of one third of the Settlement Fund is reasonable in light of the substantial monetary relief obtained by Class Counsel here – despite significant risk – and should be awarded.

"When assessing the reasonableness of fees, a trial court may consider a variety of factors, including the nature of the case, the case's novelty and difficulty level, the skill and standing of the attorney, the degree of responsibility required, the usual and customary charges for similar work, and the connection between the litigation and the fees charged." *McNiff,* 384 Ill. App. 3d at 407 (quoting *Richardson v. Haddon*, 375 Ill. App. 3d 312, 314 – 5 (1st Dist. 2007)) (quotations omitted). Here, each of these factors shows the requested fee is reasonable.

a. *Plaintiffs' Claims Carried Substantial Litigation Risk*

This case presented substantial litigation risk. In addition to the typical risks associated with class action litigation, such as certifying a class, there have been very few Facebook Tracking Pixel-based VPPA cases filed, not only in this jurisdiction, but throughout the county. Nonetheless, despite knowing the risks, Class Counsel took on the case, worked on the case, and even undertook a significant financial risk, with no upfront payment, and no guarantee of payment absent a successful outcome. And "[c]ourts have recognized that the novelty,

difficulty and complexity of the issues involved are significant factors in determining a fee award." *In re Heritage Bond Litig.*, 2005 WL 1594403, at *20 (C.D. Cal. June 10, 2005) (awarding one-third of the $27.8 million fund where the class action "concerned relatively uncharted territory" and "cannot be considered a garden variety … class action" … "Cases of first impression generally require more time and effort on the attorney's part ... [counsel] should not be penalized for undertaking a casewhich may make new law, [but] appropriately compensated for accepting the challenge."). Indeed, other Facebook Tracking Pixel-based VPPA cases have failed at the motion to dismiss stage, and none have progressed to class certification, summary judgment, or trial.[3] Those later stages of the litigation would present additional risks, including, but not limited to, ascertaining the class and demonstrating predominance, given different browser settings that may be utilized to navigate Defendant's website, and even proving the elements of the underlying VPPA claim. *See, e.g.*, *Ambrose*, 2022 WL 4329373, at *2 (noting that factual disputes that were

[3] *See, e.g.*, *Gardener v. MeTV*, 2023 WL 4365901, at *5 (N.D. Ill. July 6, 2023) (granting the motion to dismiss and "find[ing] dispositive MeTV's argument that Plaintiffs are not consumers under the Act"); *Carter v. Scripps Networks, LLC*, 2023 WL 3061858, at *6 (S.D.N.Y. Apr. 24, 2023) (granting motion to dismiss because "[t]he Complaint describes plaintiffs as subscribers of hgtv.com newsletters, but does not plausibly allege that they were subscribers of hgtv.com video services"); *Martin v. Meredith Corp.*, 2023 WL 2118074, at *3 (S.D.N.Y. Feb. 17, 2023) ("The plaintiff's VPPA claim is dismissed because the complaint itself shows that the defendants do not disclose information showing that a person has 'requested or obtained specific video materials or services.'"); *Hunthausen v. Spine Media, LLC*, 2023 WL 4307163, at *3 (S.D. Cal. June 21, 2023) (granting motion to dismiss because "[r]enting, purchasing or subscribing for goods or services from a third party connected to a [video tape service provider] is insufficient to make someone a 'consumer' under the VPPA"); *Cantu v. Tapestry, Inc.*, 2023 WL 4440662, at *10 (S.D. Cal. July 10, 2023) ("[T]he Court finds Plaintiff has failed to state a claim on the basis that he has not properly alleged that Defendant is a 'video tape service provider.'"); *Carroll v. General Mills, Inc.*, 2023 WL 4361093, at *3 (C.D. Cal. June 26, 2023) (granting motion to dismiss because "[p]laintiffs do not allege any facts suggesting that the delivery of audiovisual material is General Mills' particular field of endeavor or that General Mills' products are specifically tailored to serve audiovisual material"). And while other Facebook Tracking Pixel-based VPPA cases have not reached class certification or summary judgment, similar Pixel and VPPA cases have failed at those stages of the litigation. *See, e.g.*, *Doe v. Medstar Health, Inc.*, 23-C-20-000591, Dkt. Nos. 70-71, at p. 1 (Md. Cir. Ct. 2023) (denying a motion for class certification in Pixel case); *In re Hulu Priv. Litig.*, 86 F. Supp. 3d 1090, 1097 (N.D. Cal. 2015) (denying a motion for summary judgment in VPPA Facebook cookie case because "there [was] no evidence that Hulu knew that Facebook might combine a Facebook user's identity (contained in the c_user cookie) with the watch-page address").

inappropriate for disposition at the motion to dismiss stage could have resulted in summary judgment later on).

In addition to the legal complexities, the case also involved factual complexities, including identifying the Facebook Tracking Pixel, its operation on Defendant's website, and what data (if any) it was causing Facebook to receive. This factor favors the requested fee.

b. *The Skill And Standing Of The Attorneys Supports The Requested Fee*

The attorneys handling this case are in good standing in their respective jurisdictions. Class Counsel are well-respected attorneys with significant experience litigating data privacy class action cases in federal and state courts across the country. *See,* Declaration of Gary M. Klinger in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. ¶¶ 2-24, Ex. A (firm resume of Milberg), Declaration of Philip L. Fraietta in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement.

Furthermore, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re MetLife Demutalization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Here, Defendant was represented by a prominent and well-respected law firm. Class Counsel achieved an exceptional result in this case while facing well-resourced and experienced defense counsel. *See Marsh ERISA Litig.*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

c. *The Settlement Was The Result Of Arms'-Length Negotiations Between The Parties After A Significant Exchange Of Information*

This action required considerable skill and experience to bring it to such a successful conclusion. The case required investigation of factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. In taking on this case,

Class Counsel undertook the large responsibility of pursuing claims on behalf of a class of employees against their employer and experienced defense counsel. Class Counsel also undertook the large responsibility of funding this case, without any assurance that they would recover those costs. Class Counsel not only took on the obligation to act on behalf of the Plaintiffs, but also the class as a whole.

Class Counsel worked with Defendant's Counsel to gather critical information, including the size of the putative class and approximate time-period of the alleged VPPA violations, and engaged in months of arm's-length settlement negotiations. Klinger Dec. ¶¶ 4-5. Through the undertaking of a thorough investigation and substantial arm's-length negotiations, Class Counsel obtained a settlement that provides a real and significant monetary benefit to the Class. Since that time, Class Counsel has drafted and negotiated the Settlement Agreement, moved for and obtained preliminary approval, and diligently monitored the successful notice program and claims administration process.

Defendant is represented by highly experienced attorneys who have made clear that absent a settlement, they were prepared to continue their vigorous defense of this case and oppose class certification. Even assuming a class was certified, and summary judgment defeated, the case would then have moved on to pretrial briefing, a pretrial conference, and then a jury trial, which would have been costly, time-consuming, and very risky for Class Members and for counsel. Class Counsel undertook this representation understanding that the risk of losing on class certification, or summary judgment, or at trial was significant. But for this settlement, Defendant would have contested class certification and moved for summary judgement, resulting in rounds of briefing and risk to the Settlement Class.

d. *The Usual And Customary Charges For Similar Work*

When Class Counsel undertake major litigation such as this, it necessarily limits their ability to undertake other complex litigation cases. During the course of this litigation, Class Counsel devoted significant time and resources to succeed in this case. Further, as detailed above, the requested fees, costs, and expenses of one third of the settlement fund is well within the range of awards routinely granted in this jurisdiction, and in other privacy class actions throughout the county. *See supra* cases cited in Argument §§ I.A-B. *See, e.g.*, *Taylor v. Trusted Media Brands, Inc.*, No. 16-cv-01812-KMK, dkt. 87 (S.D.N.Y. Feb. 1, 2018) (awarding one-third of $8.225 million settlement under Michigan state analog to the VPPA where case settled before a decision on the motion to dismiss); *Moeller v. Am. Media, Inc.*, No. 16-cv-11367-JEL, dkt. 42 (E.D. Mich. Sept. 28, 2017) (awarding 35% of $7.6 million settlement under Michigan state analog to the VPPA where case settled shortly after a decision on the motion to dismiss); *Crumpton v. Octapharma Plasma, Inc.*, No. 19-cv-08402-VMK, dkt. 92 (N.D. Ill. Feb. 16, 2022) (awarding one-third of approximately $9.98 million settlement under Illinois biometric privacy law); *In re TikTok, Inc., Consumer Privacy Litig.*, 617 F. Supp. 3d 904, 941 (N.D. Ill. July 28, 2022) (awarding one-third of approximately $87.84 million settlement in data privacy class action and noting that "a flat percentage fee of one-third of the net common fund is typical in other data privacy settlements").

It also bears noting that this Settlement vastly outperforms the VPPA settlements and many other privacy settlements that came before it. *See, e.g.*, *Lane v. Facebook, Inc.*, 2010 WL 9013059 (N.D. Cal. Mar. 17, 2010), *aff'd* 696 F.3d 811 (9th Cir. 2012) (approving settlement in VPPA case that only provided *cy pres* relief with no monetary relief to Settlement Class Members); *In re: Vizio, Inc., Consumer Privacy Litig.*, 2019 WL 12966638, at *4 (C.D. Cal. July 31, 2019) (approving settlement in VPPA case that provided each claimant with an estimated $16.50 at a claims rate of 4.1%); *In re Google LLC Street View Elec. Commc'ns Litig.*, 2020 WL 1288377, at

*11–14 (N.D. Cal. Mar. 18, 2020) (approving, over objections of class members and state attorney general, a settlement providing only *cy pres* relief for violations of Electronic Communications Privacy Act); *Adkins v. Facebook, Inc.*, No. 18-cv-05982-WHA, dkts. 350, 369 (N.D. Cal. May 6, 2021) (approving settlement for injunctive relief only, in class action arising out of Facebook data breach).

II. THE REQUESTED SERVICE AWARD IS REASONABLE AND SHOULD BE APPROVED

Service Awards of $5,000.00 for Plaintiff Ramirez and $2,500 each to Plaintiff Young and Plaintiff Lam are appropriate here. "In some cases, the amount requested as an incentive award, given the court's knowledge about the advanced stage of the case or other procedural facts, will be so obviously reasonable that only minimal scrutiny will be required for approval, at least in the absence of any objection from class member." 299 F.R.D. 160 at NACA Guideline 5. Defendant has agreed not to object to service awards to Plaintiffs in these amounts. Settlement Agreement ¶ 8.4. Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during the course of class action litigation. *See* 299 F.R.D. 160, NACA Guideline 5 (West 2014) ("Consumers who represent an entire class should be compensated reasonably when their efforts are successful and compensation would not present a conflict of interest."); *see also Cook v. Niedert,* 142 F.3d 1004 (7th Cir. 1998) (value of settlement was $ 14 million; incentive award to class representative of $25,000); *see also In re Remeron End-Payor Antitrust Litig*., No. Civ. 02-2007 FSH, 2005 WL 2230314 (D.N.J. Sept. 13, 2005) (value of settlement was $36 million; incentive payments totaling $75,000 for six named plaintiffs). "Many cases note the public policy reasons for encouraging individuals with small personal stakes to serve as class plaintiffs in meritorious cases." 299 F.R.D. 160, Guideline 5 Discussion (citing cases).

This case is no different. Plaintiffs' participation has been instrumental in the prosecution

and ultimate settlement of this action. Here, Plaintiffs spent substantial time on this action, including by: (i) assisting with the investigation of this action and the drafting of the complaint, (ii) being in contact with counsel frequently, (iii) and staying informed of the status of the action, including settlement. *See* Klinger Dec. ¶ 22;

CONCLUSION

For the foregoing reasons, Plaintiffs and Class Counsel respectfully request that the Court approve the requested service awards to Plaintiffs and approve an award of attorneys' fees, costs, and expenses of one third of the Settlement Fund, $2,450,000 to Class Counsel. The requested awards would both adequately reward and reasonably compensate Class Counsel and Plaintiffs for assuming the significant risks that this case presented at the outset and nonetheless expending a substantial amount of time and other resources investigating, litigating, and negotiating a resolution to the case for the benefit of the Settlement Class.

Dated: September 25, 2023

Respectfully submitted,

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