IN THE CIRCUIT COURT OF DUPAGE COUNTY
EIGHTEENTH JUDICIAL CIRCUIT

SONYA JACKSON, JASON GOLDSTEIN, and TAMMY HUTTEMEYER, individually and on behalf of all others similarly situated, Plaintiffs, v. FANDANGO MEDIA, LLC, Defendant.	Case No. 2023LA000631 Hon. Timothy J. McJoynt

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Dated: October 13, 2023

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Pursuant to the Court's August 30, 2023 Preliminary Approval Order, Plaintiffs Sonya Jackson, Jason Goldstein, and Tammy Huttemeyer (collectively "Plaintiffs") respectfully move for final approval of the Class Action Settlement Agreement entered into between the Parties to this Action, a true and correct copy of which is attached as Exhibit 1 (the "Agreement") to the Declaration of Max S. Roberts ("Roberts Declaration") filed herewith.[1] Defendant does not oppose this motion.

INTRODUCTION

On August 30, 2023, the Court preliminarily approved the class action settlement between Plaintiffs and Defendant Fandango Media, LLC ("Defendant" or "Fandango") and directed that notice be sent to the Settlement Class. Roberts Decl. ¶ 8. As detailed in the accompanying declaration of Cameron R. Azari ("Azari Declaration"), the settlement administrator—Epiq Class Action & Claims Solutions, Inc. ("Epiq" or "Settlement Administrator")—has implemented the Court-approved notice plan and direct notice has reached approximately 97% of the Settlement Class. Azari Decl. ¶¶ 18, 25, 33. The reaction from the Settlement class has been positive. Specifically, as of October 12, 2023, of the approximately 327,094 Settlement Class Members, zero class members have objected, and only one has requested to be excluded. *Id.* ¶ 29. The Settlement is an excellent result for the Class and the court should grant final approval.

The Settlement's strength speaks for itself: it provides that Defendant shall fund a settlement of up to $6,000,000 from which every Settlement Class Member who submits a valid and timely Claim Form will receive either a $5.00 Cash Payment or a Movie Ticket Voucher worth $15.00 for use on Fandango's website. Agreement ¶¶ 2.1(a)-(b); Roberts Decl. ¶¶ 9-10. The

[1] Unless otherwise defined herein, all capitalized terms have the same force, meaning, and effect as ascribed in the Definitions section of the Settlement Agreement.

Settlement also provides meaningful prospective relief, as Defendant has stated it has suspended operations of the Facebook Pixel on any pages on its website that includes video content related to movies and has a URL that substantially identifies the video content viewed as of October 13, 2023, 45 days after the Preliminary Approval Order. Agreement ¶ 2.2.

This case presented substantial risk of non-recovery. While Plaintiffs believe they would likely prevail on their claims, they are also aware of the serious risks inherent in their claims. VPPA litigation is an evolving space, with many undecided issues related to the application of the VPPA to internet websites. Indeed, since the Parties reached the Agreement in this matter, at least three VPPA putative class actions related to video viewing information allegedly disclosed to Facebook on internet have been dismissed on grounds Defendant was likely to raise here. *See*, *e.g.*, *Lamb v. Forbes Media LLC*, 2023 WL 6318033 (S.D.N.Y. Sept. 28, 2023); *Golden v. NBCUniversal Media, LLC*, 2023 WL 5434378 (S.D.N.Y. Aug. 23, 2023); *Salazar v. National Basketball Association*, 2023 WL 5016968 (S.D.N.Y. Aug. 7, 2023). Unlike Settlement Class Members here, the putative class members in those cases will be receiving *nothing*. Taking these realities into account and recognizing the risks involved in any litigation, the relief available to each Settlement Class Member represents a truly excellent result for the Settlement Class.

For these reasons, and as explained further below, the Settlement is fair, reasonable, and adequate, and warrants this Court's final approval.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to filing this Action, Plaintiffs Goldstein and Huttemeyer filed a Federal Action in the Southern District of Florida. As part of the Federal Action, Plaintiffs Goldstein and Huttemeyer alleged that, when Fandango website users viewed a movie trailer or other video clip on Fandango's website, their PII—specifically, the names of the video clips they watched on

Fandango's website and their Facebook IDs—was disclosed by Fandango to Facebook (now Meta), in violation of the VPPA. Defendant denied Plaintiffs' allegations. Roberts Decl. ¶ 4.

On July 29, 2022, Defendant filed a Motion to Dismiss the Federal Action. *Id.* ¶ 5. On March 7, 2023, the judge overseeing the Federal Action denied Defendant's Motion to Dismiss. *Id*. Thereafter, the Parties agreed to proceed to mediation. *Id.*

On May 9, 2023, the Parties participated in a full-day mediation with the Honorable Diane M. Welsh (Ret.) of JAMS. *Id.* ¶ 6. Prior to that mediation, the Parties exchanged detailed mediation statements and provided discovery relevant to the size of the putative Class, potential damages in this matter, and the claims and defenses of the Parties. *Id*. Given this information was the same as what Plaintiffs would have received in discovery, Plaintiffs and their counsel were sufficiently apprised of the merits of their case at the time of the mediation. Roberts Decl. ¶ 6. And, although this matter was not resolved at the mediation, the Parties continued to negotiate over the next several weeks to iron out the terms of a potential settlement. *Id*. Ultimately, on June 2, 2023, the Parties came to an agreement on all material terms of the Settlement and executed a Term Sheet that day. *Id*.

Thereafter, on June 15, 2023, Plaintiffs commenced this action, which added Plaintiff Jackson. Roberts Decl. ¶ 7. Both Parties agree this Court is an appropriate venue for Plaintiffs' and the Settlement Class's claims under the VPPA against Defendant. *Id.* Following this, on June 29, 2023, the Parties executed the Settlement Agreement and related documents, which are submitted herewith. *Id*. On August 30, 2023, the Court granted preliminary approval of the Settlement. *Id.* ¶ 8.

TERMS OF THE SETTLEMENT

The key terms of the Settlement, attached to the Declaration of Max S. Roberts as Exhibit 1, are briefly summarized as follows:

I. CLASS DEFINITION

The "Settlement Class" is defined as:

> All Fandango Subscribers (individuals that created an account on Fandango) who: (i) watched any video content on the Fandango website from the same browser they used to access Facebook during the Class Period; and (ii) who were members of Facebook at the time they watched a video on the Fandango website.

Agreement ¶ 1.34. According to Defendant's records, there are as many as 327,094 people in the Settlement Class. Roberts Decl. ¶ 9.[2]

The "Class Period" is April 1, 2020, until June 1, 2022 (the date after which Defendant disabled all relevant Facebook technology from video view pages). Agreement ¶ 1.7.

II. MONETARY AND PROSPECTIVE RELIEF

Defendant has agreed to fund a settlement of up to $6,000,000, from which each Settlement Class Member who submits a timely, simple, one-page Claim Form approved by the Settlement Administrator, will receive a portion of the Settlement Benefit Cap. Agreement ¶¶ 2.1(a)–(g). Specifically, each Settlement Class Member shall be entitled to either a $5 Cash Payment or a $15.00 Movie Ticket Voucher. *Id.* ¶¶ 2.1(a); Roberts Decl. ¶ 10. The Movie Ticket Voucher covers the average price of a movie ticket in most of the United States. Roberts Decl. ¶ 10.

[2] This figure represents the number of people with a Fandango user account during the Class Period. Roberts Decl. ¶ 9. It is possible that some people who had a Fandango user account during the Class Period did not also have a Facebook account during the Class Period or did not watch video content on the Fandango website during the Class Period, and accordingly are not part of the Settlement Class. *Id*.

In addition, Defendant states that as of October 13, 2023, 45 days after the execution of the Agreement, Defendant suspended operation of the Facebook Pixel on its website for video content related to movies with URLs that substantially identify the video content viewed. Agreement ¶ 2.2.

III. RELEASE

In exchange for the relief described above, Defendant and each of its related and affiliated entities as well as all "Released Parties," as defined at Agreement ¶ 1.29, will receive a full release of any and all claims regarding alleged disclosure of the Settlement Class Members' Personal Information and/or Video Viewing Information of any sort to any third party, including all claims that were brought or could have been brought in the Action and Federal Action relating to the disclosure of such information belonging to any and all Releasing Parties. Agreement ¶¶ 1.28–1.30, 3.1–3.2.

IV. NOTICE AND ADMINISTRATION EXPENSES

The cost of sending the Notice set forth in the Agreement and any other notice as required by the Court, as well as all costs of administration of the Settlement will be paid from the Settlement Benefit Cap. Agreement ¶ 1.31, 1.33. The Settlement Administrator estimates the cost of Administrative Expenses in this matter will be $150,000. Declaration of Cameron R. Azari, Esq. ("Azari Decl.") ¶ 32.

V. SERVICE AWARDS AND ATTORNEYS' FEES, COSTS, AND EXPENSES

In recognition of their efforts on behalf of the Settlement Class, Defendant has agreed that Plaintiffs may receive, subject to Court approval, an incentive award of up to $2,500 each ($7,500 total), paid from the Settlement Benefit Cap, as appropriate compensation for their time and effort serving as Class Representatives and as parties to the Action. Agreement ¶ 8.3.

Defendant has agreed that an award of reasonable attorneys' fees and payment of costs and expenses to Class Counsel in this Action will be paid from the Settlement Benefit Cap, in an amount to be approved by the Court. Agreement ¶ 8.1. Class Counsel will petition the Court for attorneys' fees, costs, and expenses of no more than 31.67% of the Settlement Benefit Cap. *Id.*

CLASS ACTION SETTLEMENT APPROVAL PROCESS

Strong judicial and public policies favor the settlement of complex class action litigation, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Quick v. Shell Oil Co.*, 404 Ill. App. 3d 277, 282 (3rd Dist. 2010); *see also* ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS§ 11.41 (4th ed. 2002) (hereinafter NEWBERG).

Courts review proposed class action settlements using a well-established two-step process. NEWBERG § 11.25, at 38–39; *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 492 (1st Dist. 1992). The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." NEWBERG § 11.25, at 38–39; *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). If the Court finds the settlement proposal is "within the range of possible approval," the case proceeds to the second step in the review process: the final approval hearing. NEWBERG § 11.25, at 38–39. Plaintiffs are presently at the second step of this two-step process.

ARGUMENT

Upon final approval, the Settlement reached in this matter will provide Settlement Class Members with substantial financial compensation and prospective relief that they otherwise likely would have been unable to obtain. Because the Settlement reached by the Parties is fair,

reasonable, and provides adequate compensation to the Settlement Class, and because the Notice Plan effectively notified Settlement Class Members of their rights under the Settlement Agreement, the Settlement warrants final approval by the Court.

I. LEGAL STANDARD

Section 2-801 provides that a court may approve a proposed class settlement "on a finding that it is fair, reasonable, and adequate." 735 ILCS 5/2-801; Fed. R. Civ. P. 23(e)(2).

In assessing the fairness, reasonableness, and adequacy of a proposed class settlement, Illinois courts consider the following factors: "(1) the strength of the case for the plaintiffs on the merits, balanced against the money or other relief offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed." *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990); *see also Armstrong*, 616 F.2d at 314.

In this case, as the Court has already found in granting preliminary approval of the Settlement, all eight factors weigh in favor of finding the Settlement fair, reasonable, and adequate, warranting its final approval.

II. THE SETTLEMENT PROVIDES SUBSTANTIAL RELIEF

As to the first factor, the Settlement in this case provides substantial material benefits to the Settlement Class: a $6 million Settlement Benefit Cap from which all Settlement Class Members may choose between a $5 Cash Payment of or a $15 Movie Ticket Voucher of $15, which covers the cost of a movie ticket in most of the country. Agreement ¶¶ 1.3, 1.18, 1.33, 2.1(a)–(b); Roberts Decl. ¶ 10. Further, Defendant agreed to, within 45 days of the Preliminary

Approval Order, suspend operation of the Facebook pixel on any pages on its website that include video content related to movies and have a URL that substantially identifies the video content viewed, unless and until the VPPA is amended, repealed, or otherwise invalidated by judicial decision as applied to the use of web site pixel technology, or until Fandango obtains VPPA-compliant consent for the disclosure of the video content viewed to Facebook. Agreement ¶ 2.2. This compares favorably with other privacy settlements under the VPPA or its state-law analogs. *See*, *e.g.*, *In re Vizio, Inc., Consumer Privacy Litig.*, 2019 WL 12966638, at *4 (C.D. Cal. July 31, 2019) ("*In re Vizio II*") (VPPA settlement where each class member was estimated to receive "$16.50 per claimed Smart TV"); *Florentino v. Flosports, Inc.*, Case No. 1:22-cv-11502, ECF No. 63 (D. Mass. Aug. 23, 2023) (VPPA settlement of $2.625 million for 639,000 class members, equating to $2.50 per class member after requested fees and costs).

Indeed, in several VPPA settlements approved by courts, and unlike here, class members did not receive any monetary compensation, as the proceeds of the settlement predominately went to *cy pres* or charity recipients rather than individual class members. *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *1 (N.D. Cal. Mar. 18, 2013) (VPPA settlement where balance of settlement proceeds, after payment of attorneys' fees and settlement administration expenses, went to *cy pres* rather than to class members); *Lane v. Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012) (same).

While Plaintiffs believe they would likely prevail on their claims, they are also aware of the serious risks inherent in their claims. Notably, while numerous putative class actions have been brought under the VPPA, no plaintiff has prevailed on a contested class certification motion, and none have survived summary judgment. Roberts Decl. ¶ 13. On the contrary, the only VPPA case to ever reach that stage has lost on both motions. *See generally In re Hulu Privacy Litig.*, 2014 WL 2758598 (N.D. Cal. June 17, 2014) (denying class certification of VPPA claim); *In re*

Hulu Privacy Litig., 86 F. Supp. 3d 1090 (N.D. Cal. 2015) (granting summary judgment for defendant on VPPA claim); Roberts Decl. ¶ 13; *In re Vizio II*, 2019 WL 12966638, at *7 (noting the risks inherent in the VPPA claim). Indeed, even if Plaintiffs prevailed on their VPPA claim at trial, "Plaintiffs' ultimate recovery would be largely dependent on discretionary statutory damages, which the Court could wholly or partially decline to award." *In re Vizio II*, 2019 WL 12966638, at *7. In other words, Plaintiffs could win at every stage of this litigation and, after years of work, receive *nothing* because damages under the VPPA are discretionary. 18 U.S.C. § 2710(c)(2)(A) ("[t]he Court *may award*" damages) (emphasis added).

Further, after the Agreement in this matter was reached, several courts dismissed VPPA claims brought pursuant to the same "Facebook Pixel" theory at issue here because the plaintiffs could not allege they were "subscribers" or "consumers" of video-viewing material where they watched free videos on websites. *Lamb v. Forbes Media LLC*, 2023 WL 6318033, at *13 (S.D.N.Y. Sept. 28, 2023); *Golden v. NBCUniversal Media, LLC*, 2023 WL 5434378, at *11–12 (S.D.N.Y. Aug. 23, 2023); *Salazar v. National Basketball Association*, 2023 WL 5016968, at *9 (S.D.N.Y. Aug. 7, 2023).[3] The "subscriber" issue is a rapidly evolving area of VPPA law as applied to the instant facts. Roberts Decl. ¶ 14. As it stands, the plaintiffs in *Lamb*, *Golden*, and *Salazar* took a gamble on this unsettled area of the law, lost on the pleadings, and class members in these actions will now receive nothing. By contrast, Plaintiffs here chose to settle their claims in light of this risk, and Settlement Class Members will now receive substantial relief. *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) ("Settlement [will] allow[] the class to avoid the inherent risk, complexity, time and cost associated with continued litigation.") (internal citations omitted).

[3] Defense counsel in *Golden*, ZwillGen PLLC, is the same as defense counsel here.

Accordingly, to say Plaintiffs' claims carry risk is an understatement. The risk presented thus makes the results Plaintiffs achieved exceptional and worthy of Court approval.

III. DEFENDANT'S ABILITY TO PAY

The second factor that can be considered by the Court is the Defendant's ability to pay the settlement sum. Defendant's financial standing has not been placed at issue here.

IV. CONTINUED LITIGATION IS LIKELY TO BE COMPLEX, LENGTHY, AND EXPENSIVE

The third factor asks whether the settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation. *See Korshak*, 206 Ill. App. 3d at 972. In absence of settlement, it is certain that the expense, duration, and complexity of the protracted litigation that would result would be substantial.

As noted above, no VPPA claim has ever survived summary judgment or been certified as a class outside of the settlement context. Roberts Decl. ¶ 13. And, to even get to those stages, the Parties would have to undergo significant motion practice and expensive, expansive, and technologically intensive discovery. *Id*. ¶¶ 13–14. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal both any decision on the merits as well as on class certification. *Id*. As such, the immediate and considerable relief provided to the Settlement Class under the Agreement weighs heavily in favor of its approval compared to the inherent risk and delay of a long and drawn-out litigation, trial, and appeal. Protracted and expensive litigation is not in the interest of any of the Parties or Settlement Class members.

V. THERE HAS BEEN NO OPPOSITION TO THE SETTLEMENT

The fourth and sixth factors consider the amount of opposition to the Settlement and the reaction of the Settlement Class to the Settlement. *See Korshak*, 206 Ill. App. 3d at 972.

Following the implementation of the Notice plan set forth in the Agreement, the Settlement

Class's reaction to the Settlement has been overwhelmingly favorable. In accordance with the Notice plan, the Settlement Administrator successfully provided direct notice to approximately 97% of the Settlement Class. Azari Decl. ¶¶ 18, 25, 33. Moreover, zero Settlement Class Members objected to the Settlement and only one has requested to be excluded from the Settlement. *Id.* ¶ 29.[4] Accordingly, the fourth and sixth factors weigh in favor of granting final approval. *See*, *e.g.*, *Young v. City of Chicago*, 2013 WL 9947387, at *2 (N.D. Ill. Dec. 16, 2013) ("[T]he absence of any objections to the Settlement by Settlement Class Members supports approval of the Settlement.").

VI. THE SETTLEMENT WAS THE RESULT OF ARM'S-LENGTH NEGOTIATIONS BETWEEN THE PARTIES AFTER A SIGNIFICANT EXCHANGE OF INFORMATION

The fifth factor considers the presence of any collusion by the Parties in reaching the proposed settlement. *Korshak*, 206 Ill. App. 3d at 972. There is an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's-length negotiations. NEWBURG § 11.42; *see also Shaun Fauley, Sabon, Inc. v. Metropolitan Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 21 (finding no collusion where there was "no evidence that the proposed settlement was not the product of 'good faith, arm's-length negotiations'"). Here, the Settlement was reached only after arm's-length negotiations between counsel for the Parties. Roberts Decl. ¶¶ 11, 24. Moreover, negotiations began only after an exchange of information regarding the size and composition of the Settlement Class. *Id.* ¶ 6. Such an involved process underscores the non-collusive nature of the proposed Settlement. Finally, given the fair result for the Settlement Class in terms of the monetary and prospective relief, it is clear that this Settlement was reached as a

[4] The deadline for Settlement Class Members to object to or request to be excluded from the Settlement is October 30, 2023. Roberts Decl. Ex. 2 (Preliminary Approval Order) ¶ 17.

result of good-faith negotiations rather than any collusion between the Parties. Accordingly, this factor weighs in favor of final approval.

VII. THE SETTLEMENT AGREEMENT HAS SUPPORT OF EXPERIENCED CLASS COUNSEL

The seventh factor is the opinion of competent counsel as to the fairness, reasonableness, and adequacy of the proposed settlement. *See Korshak*, 206 Ill. App. 3d at 972. Courts rely on affidavits in assessing proposed class counsel's qualifications under this factor. *Id.* Class Counsel believes that the proposed Settlement is in the best interest of the Settlement Class Members because the Settlement Class Members will be provided an immediate payment instead of having to wait for lengthy litigation and any subsequent appeals to run their course. Further, due to the defenses Defendant has indicated that it would raise should the case proceed through litigation—and the resources that Defendant has committed to defend and litigate this matter—it is possible that the Settlement Class Members would receive no benefit whatsoever in the absence of this Settlement. Given proposed Class Counsel's extensive experience litigating similar class action cases in federal and state courts across the country, including other VPPA cases, this factor also weighs in favor of granting final approval. Roberts Decl. ¶ 19; *id.* Ex. 3 (firm resume); *see also GMAC*, 236 Ill. App. 3d at 497 (finding that the court should give weight to the fact that class counsel supports the class settlement in light of its experience prosecuting similar cases).

VIII. THE PARTIES EXCHANGED INFORMATION SUFFICIENT TO ASSESS THE ADEQUACY OF THE SETTLEMENT

The eighth factor is structured to permit the Court to consider the extent to which the court and counsel were able to evaluate the merits of the case and assess the reasonableness of the settlement. *See Korshak*, 206 Ill. App. 3d at 972. Here, the Parties exchanged information regarding the facts and size and composition of the class, and thoroughly investigated the facts and

law relating to Plaintiffs' allegations and Defendant's defenses. Roberts Decl. ¶ 6. Accordingly, this factor also weighs in favor of final approval.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court enter an Order granting final approval of the Settlement. A proposed Final Order and Judgment is submitted herewith.

Dated: October 13, 2023

Respectfully submitted,

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