IN THE CIRCUIT COURT OF DUPAGE COUNTY
EIGHTEENTH JUDICIAL CIRCUIT

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DuPage County
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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 ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARDS

Dated: October 13, 2023

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Class Counsel

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INTRODUCTION

In this putative class action, plaintiffs Sonya Jackson, Jason Goldstein, and Tammy Huttemeyer ("Plaintiff") allege that Defendant Fandango Media, LLC ("Defendant" or "Fandango") (Plaintiffs and Defendant are collectively referred to as the "Parties") violated the Video Privacy Protection Act, 18 U.S.C. § 2710 ("VPPA") by disclosing their personally identifying information ("PII")—specifically, the names of the video clips they watched on Fandango's website and their Facebook IDs—to a third party, Facebook. Defendant denies these allegations. After extensive negotiations spanning over several months, the Parties have reached a proposed settlement of up to $6 million, memorialized in their Settlement Agreement and Release (the "Settlement" or "Agreement"),[1] from which each of the 327,094 potential Settlement Class Members who file a claim will have the option to receive either a $5 Cash Payment or a $15 Movie Ticket Voucher (essentially, a free movie ticket).[2]

Plaintiffs and Class Counsel respectfully request that the Court approve an Incentive Award of $2,500 to each Plaintiff ($7,500 total) and a Fee Award of no more than 31.67% of the Settlement Benefit Cap, or $1,900,00.00, inclusive of costs and expenses. Agreement ¶¶ 8.1, 8.3. 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 the Representative Plaintiffs for the work they performed and the result they achieved in this high-risk litigation.

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[1] All capitalized terms used herein have the same definitions as found in the Agreement (Exhibit 1 to the Declaration of Max S. Roberts).

[2] The Movie Ticket Voucher is sufficient to cover the price of a movie ticket in Chicago and most places in the United States. *See, e.g.*, Brooks Barnes, *Heads Up: A Better Movie Seat May Cost You*, THE NEW YORK TIMES (Mar. 5, 2023), https://www.nytimes.com/2023/03/05/business/media/movie-theaters-ticket-prices.html (noting the "average movie ticket cost $11.75 in 2022").

FACTUAL AND PROCEDURAL BACKGROUND

Prior to filing this Action, Plaintiffs Goldstein and Huttemeyer filed the 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 a third party, Facebook, in violation of the VPPA. Defendant denied Plaintiffs' allegations. Declaration of Max S. Roberts ("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. 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 and challenges to their case at the time of the mediation. *Id.* 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. Roberts Decl. ¶ 6. 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. *Id.* ¶ 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. Roberts Decl. ¶ 8.

<u>SUMMARY OF THE SETTLEMENT</u>

The Settlement provides an exceptional result for the class by delivering the choice of either a $5.00 Cash Payment or a $15.00 Movie Ticket Voucher (which covers the average price of a movie ticket in most of the United States) to every individual who submits a timely, simple, one-page Claim Form that is approved by the Settlement Administrator. Agreement ¶¶ 1.3, 1.33, 1.18, 2.1(a)–(b); Roberts Decl. ¶¶ 9–10. 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. Defendant has also agreed that an incentive award to the Class Representatives, subject to Court approval, and 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. *Id.* ¶ 8.3. In addition, Defendant has represented that as of October 13, 2023, 45 days after the Settlement Agreement, Defendant suspended operation of the Facebook Pixel on any pages on its website that includes video content related to movies and as 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. *Id.* ¶ 2.2.

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 31.67% of the Settlement Benefit Cap.[3] Agreement ¶ 8.1.

[3] *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 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

"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 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

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.").

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). 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.

II. 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 31.67% of the Settlement Benefit Cap is well within the range of fees typically awarded to class counsel by Illinois courts in comparable class action settlements. *See*, *e.g.*, *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *4 (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 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").

A. The Total Value Of The Settlement Is $6,000,000

To calculate attorneys' fees based on the percentage of the benefit, the Court must first determine the value of the Settlement Benefit Cap. 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 Plaintiff's incentive award, amounting to a total value of $6,000,000.

B. The Requested 31.67% Of The Settlement Fund Is Reasonable

Here, the requested $1,900,000 Fee Award, inclusive of costs and expenses, is 31.67% of the $6,000,000 Settlement Benefit Cap 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 §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."); *see also 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); *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 31.67% of the Settlement Benefit Cap 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, 314–15 (1st Dist. 2007)) (quotations omitted). Here, each of these factors shows the requested fee is reasonable.

1. Plaintiffs' Claims Carried Substantial Litigation Risk

This case presented substantial litigation risk. 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.

While Plaintiffs believe they would likely prevail on their claims, they are also aware of the serious risks inherent in their claims. Without the Agreement, the Parties would have had to undergo significant motion practice and expensive, expansive, and technologically intensive discovery. Roberts Decl. ¶ 13. Further, given the complexity of the data privacy 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.*

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. *Id*. 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); *see also* Roberts Decl. ¶ 20; *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).[4] 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).

Despite these risks, the Settlement Agreement provides every Settlement Class Member who completes an approved Claim Form with the choice between a cash payment of $5.00 or a Movie Ticket Voucher of $15.00, which covers the average price of a movie ticket in most of the United States. This is an excellent result. Indeed, in several VPPA settlements approved by courts,

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

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). Notably, in both of these cases, the courts nonetheless awarded comparable attorneys' fees to the fees requested here. *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *9, *15 (awarding $2.25 million in attorneys' fees, or 25% of $9 million *cy pres* fund); *Lane*, 696 F.3d at 817 (affirming award of $3 million in attorneys' fees, or 31.58% of $9.5 million *cy pres* fund).

2. 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 similar class action cases in federal and state courts across the country, including other VPPA cases and their state-law analogs. Roberts Decl. ¶¶ 19–20; *id.* Ex. 3 (firm resume of Bursor & Fisher, P.A.). Indeed, Class Counsel has been recognized by courts across the country for their expertise. Roberts Decl. ¶¶ 19–20; *see also Famular v. Whirlpool Corp.*, 2019 WL 1254882, at *4 (S.D.N.Y. Mar. 19, 2019) ("Class counsel are experienced and qualified class action lawyers. Bursor & Fisher, P.A., has been appointed class counsel in dozens of cases in both federal and state courts, and has won several multi-million dollar verdicts or recoveries.") (internal quotations omitted); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 2014) ("Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. … The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in [six] class action jury trials since 2008.").

Further, "[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 one of the leading privacy and data security law firms in the United States according to the legal industry researcher Chambers and Partners. *See* ZWILLGEN PLLC, PRIVACY AND DATA SECURITY, CHAMBERS AND PARTNERS.[5] Class Counsel achieved an exceptional result in this case while facing well-resourced and experienced defense counsel. *See In re 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.").

3. The Settlement Was The Result Of Arm's-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.

[5] Available at https://chambers.com/department/zwillgen-pllc-privacy-data-security-the-elite-global-2:3220:225:1:237870 (last accessed Oct. 5, 2023).

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 BIPA violations, and engaged in months of arm's-length settlement negotiations. Roberts Decl. ¶¶ 5–7. 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.

In addition, as noted above, 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.

4. The Usual And Customary Charges For Similar Work

When Class Counsel undertakes 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 31.67% of the settlement fund is well within the market range. *See*, *e.g.*, *Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59; *In re Netflix Privacy Litig.*, 2013

WL 1120801, at *9, *15; *Lane*, 696 F.3d at 817. Indeed, Illinois courts have awarded 40% in fees in similar data privacy settlements. *See Sekura v. L.A. Tan Enters., Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Cnty., Ill. 2016) (awarding a 40% fee in BIPA class settlement); *Preplipceanu v. Jumio Corp.*, No. 2018-CH-15883 (Cir. Ct. Cook Cnty., Ill. 2020) (same).

III. THE REQUESTED INCENTIVE AWARD IS REASONABLE AND SHOULD BE APPROVED

An incentive award of $2,500.00 for each Plaintiff is 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, NACA Guideline 5 (West 2014). Defendant has agreed to pay an incentive award to Plaintiffs in the total amount of $7,500, with $2,500 to each Plaintiff. Agreement ¶ 8.3. 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). Further, the service award requested here is equal to the statutory damages provided for by the VPPA. 18 U.S.C. § 2710(c)(2)(A).

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; and (iii) staying informed of the status of the action, including settlement. *See* Roberts Decl. ¶¶ 28–30.

CONCLUSION

For the foregoing reasons, Plaintiffs and Class Counsel respectfully request that the Court approve an incentive award of $2,500 to each of the three Plaintiffs (a total of $7,500 to the Plaintiffs) and approve an award of attorneys' fees, costs, and expenses of 31.67% of the Settlement Benefit Cap, $1,900,000, 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: October 13, 2023

Respectfully submitted,

By: */s/ Carl V. Malmstrom*

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**Pro Hac Vice Application Forthcoming*

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