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

PAUL LUKIS, ERIC WADE, KRISTOPHER PACHECO, QUINN HAINE, and MARLON SIGUENZA, individually and on behalf of all others similarly situated, Plaintiffs, v. ONEPLUS USA CORP., Defendant.	Case No. 2023LA000573

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

INTRODUCTION

Plaintiffs Paul Lukis, Eric Wade, Kristopher Pacheco, Quinn Haine, and Marlon Siguenza ("Plaintiffs") individually and on behalf of all others similarly situated respectfully more this Court for entry of an Order (a) awarding Class Counsel's attorneys' fees, and reasonable and necessary litigation costs, and expenses in the about of $1,100,000; and (b) awarding Service Awards to Plaintiffs in the amount of $5,000 each for their efforts on behalf of the Settlement Class. As detailed below, the requested awards are appropriate under governing Illinois law, consistent with the amounts awarded in prior similar settlements, and fairly compensate Plaintiffs, Milberg, and B&F for the work they performed and commendable result they achieved in this high-risk litigation.

After extensive negotiations spanning over many months, including two mediations with separate mediators, the Parties have reached a proposed settlement wherein OnePlus will pay Settlement Class Members between $12.00 to $15.50 cash and a $15.00 to $20.50 voucher,[1] plus payment of attorneys' fees and expenses, service awards to the Plaintiffs and notice costs – constituting Settlement Fund worth $6.52 million, as memorialized in the 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.

I. FACTUAL AND PROCEDURAL BACKGROUND

For the purposes of efficiency and brevity, Plaintiffs refer the Court to the detailed factual and procedural background of the case outlined in their Motion for Preliminary Approval, filed on July 3,

[1] Pursuant to the Settlement Agreement, Settlement Class Members who purchased their OnePlus Device between March 23, 2021 through July 6, 2021 are eligible to receive a monetary payment of $15.50 and a voucher in the amount of $20.50. Settlement Class Members who purchased their OnePlus Device from July 7, 2021 through January 23, 2022 are eligible to receive a monetary payment of $12.00 and a voucher in the amount of $15.00. *See* Settlement Agreement ¶¶ 1.25-1.28, 1.41-1.42, 3.2, 4.7-4.8.

2023.

II. SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the class. Defendant will establish a Settlement Fund through which it will pay or cause to be paid for the following: (i) a monetary payment of $15.50 and a voucher in the amount of $20.50 for Settlement Class Members who purchased their OnePlus Device from March 23, 2021 through July 6, 2021, *see* Settlement Agreement ¶¶ 1.25, 1.27, 1.41, 3.2, 4.7-4.8; (ii) a monetary payment of $12.00 and a voucher in the amount of $15.00 for Settlement Class Members who purchased their OnePlus Device from July 7, 2021 through January 23, 2022, *see* Settlement Agreement ¶¶ 1.26, 1.28, 1.42, 3.2, 4.7-4.8; (iii) the Notice and Settlement Administrative Costs actually incurred by the Settlement Administrator as described in Sections 4.2 to 4.3 of the Settlement Agreement; (iv) the Fee Award, as may be provided by the Court and as described in Section 3.4 of the Settlement Agreement; and (v) a Service Award of $5,000 to each of the Plaintiffs, *see* Settlement Agreement ¶ 3.3. Altogether, Class Counsel estimates the total relief to be $6,528,267.

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

$1,100,000.[2] Agreement ¶ 3.4.

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

[2] *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"),

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 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).[3] And, it is also simpler to apply. *Id.*; *see also, e.g., Kolinek*, 311 F.R.D. at 501 ("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 16.8% 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 v. Exxon Mobil Corp.*, U.S.

[3] 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).

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. <u>The Total Value Of The Settlement Is $6,528,267</u>

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 $6,528,267. *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).

Here, the $6,528,267 value of the Settlement Fund amount was determined by tabulating: (i) the $15.50 in cash and $20.50 voucher for Settlement Class 1, (ii) the $12.00 in cash and $15.00 voucher for Settlement Class 2, (iii) the Notice and Settlement Administrative Costs actually incurred and anticipated going forward, (iv) the Fee Award, and (v) the Service Awards to each of the Plaintiffs. *See* Settlement Agreement ¶¶ 1.25-1.28, 1.41-1.42, 3.2-3.4, 4.2-4.3, 4.7-4.8.

2. The Requested 16.8% Of The Settlement Fund Is Reasonable

Here, the requested $1,100,000 fee, inclusive of $30,376.64 in costs and expenses, is only 16.8% 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 constitutes only a small portion of the total $6,528,267 Settlement Fund and 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 "smartphone throttling" 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 case which may make new law, [but] appropriately compensated for accepting the challenge."). Indeed, there is a dearth of "smartphone throttling" cases to serve as authority at class certification, summary judgment, or trial. Those later stages of the litigation would present additional risks, including, but not limited to, ascertaining the class and demonstrating predominance, given different phone configurations and app usage patterns. *See, e.g.*, *Ambrose*, 2022 WL 4329373, at *2 (noting that factual disputes that were inappropriate for disposition at the motion to dismiss stage could have resulted in summary judgment later on).

This case also involved factual complexities, including an analysis of source code involving both smartphone operating systems and relevant applications, software benchmarking, and performance testing. In this particular matter, expert work would be difficult, time-consuming, and costly. Plaintiffs expect that Defendant would present its own experts, and it is unclear on what the Court or jury would conclude based on such a "battle of the experts." 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. The

firms representing Plaintiffs, Milberg and B&F, are well-respected attorneys with significant experience litigating data privacy class action cases in federal and state courts across the country. *See* Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement Ex. 1 (firm resume of Milberg); *id.* Ex. 2 (firm resume of B&F).

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 responsibility of pursuing claims on behalf of a class of employees against their employer and experienced defense counsel. Class Counsel also undertook the responsibility of funding this case on behalf of Plaintiffs and the Settlement Class, without any assurance that they would recover those costs.

Class Counsel worked with Defendant's Counsel to gather critical information as part of their arm's length settlement negotiations, including on issues such as the size and scope of the putative class, sales data, facts related to the strength of Plaintiffs' claims and Defendant's defenses, and information on relevant dates and time periods Klinger Dec. ¶¶ 3-5. 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*

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 16.8% of the settlement fund is well within, and in fact is even below, 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").

C. The Requested Attorneys' Fees Are Also Reasonable Under A Lodestar Cross-Check

A "court is under no obligation to cross-check the requested fees against the lodestar." *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 849 (N.D. Ill. 2015); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) ("[C]onsideration of a lodestar check is not an issue of required methodology."). Nonetheless, should the Court opt to do so, a lodestar cross-check supports the requested fee.

To calculate lodestar, counsel's reasonable hours expended on the litigation are multiplied by counsel's reasonable rates. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886, 897 (1984). As part of this analysis, "courts 'may rely on summaries … and need not review actual billing records.'" *Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *13 (S.D. Ill. Dec. 16, 2018). Moreover, risk multipliers are "mandated" where, as here, counsel "had no sure source of compensation for their services." *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994); *accord City of Greenville v. Syngenta Crop Prot., Inc*., 904 F. Supp. 2d 902, 909 (S.D. Ill. 2012) ("[W]here counsel 'had no sure source of compensation for their services,' the Court must apply a risk multiplier to compensate the attorneys for the risk of nonpayment in the event the litigation were unsuccessful.").

Counsel's "reasonable hourly rate is based on the local market rate for the attorney's services …. The best evidence of the market rate is the amount the attorney actually bills for similar work, but if that rate can't be determined, then the [ ] court may rely on evidence of rates charged by similarly experienced attorneys in the community and evidence of rates set for the attorney in similar cases." *Montanez v. Simon*, 755 F.3d 547, 553 (7th Cir. 2014). Here, the hourly rates used by Class Counsel

are comparable to rates charged by attorneys with similar experience, skill, and reputation, for similar services in this jurisdiction. *See* Klinger Decl. ¶ 24.

Even under the lodestar method, Class Counsel's requested fees are reasonable. The litigation was conducted and an excellent settlement was obtained in an efficient manner by experienced and qualified counsel.

In total, through October 16, 2023, Counsel for Plaintiffs billed 594.9 hours through themselves or at their direction, which at their hourly rates amounts to a lodestar of $382,474.60. *See* Klinger Decl. ¶ 24., Declaration of Neal J. Deckant, attached hereto as Exhibit B, ¶ 6, Therefore, the requested fee award reflects a 2.87 multiplier on Class Counsel's regular hourly rates. This multiplier is well within the accepted range. *See, e.g., Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59 (noting that a survey of multipliers showed ranged up to 19.6); *Wilkins v. HSBC Bank Nevada, N.A.*, 2015 WL 890566 (N.D. Ill. Feb. 27, 2015) (approving 11.03 lodestar multiplier in a TCPA case); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524 (S.D.N.Y. Apr. 26, 2016) (lodestar multiplier of 6.0); *In re Cardinal Health Inc. Sec. Litig.*, 528 F.Supp.2d 752, 767 (S.D.Ohio 2007) (lodestar multiplier of six); *In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706, 736 n. 44 (E.D.Pa.2001) (finding fee award equivalent to 4 .5 to 8.5 lodestar multiplier "unquestionably reasonable*"); In re Rite Aid Corp. Secs. Litig.*, 362 F.Supp.2d 587, 589 (E.D.Pa.2005) (lodestar multiplier on the fee ultimately awarded was 6.96); *In re RJR Nabisco*, 1992 WL 210138, at *5–6 (S.D.N.Y. Aug.24, 1992) (6 multiplier); *Cosgrove v. Sullivan*, 759 F.Supp. 166, 167 n. 1 (S.D.N.Y.1991) (fee represented a multiplier of 8.74); *Boston & Maine Corn. v. Sheehan. Phinney, Bass & Green, P.A.*, 778 F.2d 890, 894 (1st Cir.1985) (multiplier of six); *Stop & Shop Supermarket Co. v. Smithkline Beecham Corp.*, 2005 WL 1213926 (E.D.Pa. May 20, 2005) (awarding 15.6 multiplier).

Moreover, as courts have noted, a high multiplier "should not result in penalizing plaintiffs' counsel for achieving an early settlement, particularly where, as here, the settlement amount was

substantial." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 482 (S.D.N.Y. 2013); *Hyun v. Ippudo USA Holdings*, 2016 WL 1222347, at *3 (S.D.N.Y. Mar. 24, 2016) ("In this case, where the parties were able to settle relatively early and before any depositions occurred … the Court finds that the percentage method, which avoids the lodestar method's potential to 'create a disincentive to early settlement' … is appropriate."); *see also Perez*, 2020 WL 1904533, at *21 ("The benefit obtained for the class is an extraordinary result, while there was and still is significant risk of nonpayment for class counsel. Moreover, the general quality of the representation and the complexity and novelty of the issues presented weigh in favor of a higher lodestar multiplier.").

Class Counsel's lodestar multiplier is also reasonable because it will decrease over time. "[A]s class counsel is likely to expend significant effort in the future implementing the complex procedure agreed upon for collecting and distributing the settlement funds, the multiplier will diminish over time." *Parker v. Jekyll & Hyde Entm't Holdings, LLC*, 2010 WL 532960, at *2 (S.D.N.Y. Fed. 9, 2010). Here, "[t]he fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward, also supports their fee request." *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *11 (S.D.N.Y. October 2, 2013); *see also McNiff*, 384 Ill. App. 3d at 408 (finding "the trial court should have awarded additional fees for time spent" after judgment); *Perez*, 2020 WL 1904533, at *19-20 (concluding that expected future hours should be counted towards lodestar cross-check and applying same).

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

Service Awards of $5,000.00 for Plaintiffs Paul Lukis, Eric Wade, Kristopher Pacheco, Quinn Haine, and Marlon Siguenza are appropriate here. 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. ¶¶ 25-27.

CONCLUSION

For the foregoing reasons, Plaintiffs and the lawyers representing them, at Milberg and B&F, respectfully request that the Court approve the requested service awards to Plaintiffs in the amount of $5,000 each and approve an award of attorneys' fees, costs, and expenses in the amount of $1,100,000 to Milberg and B&F.

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Respectfully submitted,

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