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**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

BARB LHOTA, JORGE P. NEWBERY,
MONDUOUKPE SEYIVE BANI A MEDEGAN
FAGLA, CRISTINA HEER, MORGAN
STRUNSKY, QIXIN CHEN, BEICHEN SHI, and
RICHARD DELANO CORNELL, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

MICHIGAN AVENUE IMMEDIATE
CARE, S.C.

Defendant.

Case No. 2022-CH-06616

Judge: Hon. Pamela McLean Meyerson

**PLAINTIFFS' MOTION FOR AN AWARD OF
ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARDS**

I. INTRODUCTION

Pursuant to the Settlement Agreement, and the Court’s Order Granting Preliminary Approval of Class Action Settlement on April 5, 2023, Class Representatives Barb Lhota, Qixin Chen, Beichen Shi, Jorge Newbery, Mondoukpe Seyive Bani A Medegan Fagla, Cristina Heer, Morgan Strunsky and Richard Delano Cornell (collectively, “Plaintiffs”) respectfully file this Motion for an Award of Attorneys’ Fees, Costs, Expenses, and Service Awards (“Motion”).

II. CLASS COUNSEL’S WORK AND THE SETTLEMENT BENEFITS

A. Class Counsel’s Work

Defendant Michigan Avenue Immediate Care, S.C. (“Defendant”) publicly announced the Data Incident¹ in May 2022. Plaintiffs filed five separate lawsuits (the “Actions”) against Defendant on behalf of similarly situated individuals who, like Plaintiffs, had their sensitive personally identifiable and personal health information exposed in the Data Incident. *See* Settlement Agreement (“SA”) ¶ 1. The five Actions are:

- *Barb Lhota v. Michigan Avenue Immediate Care, S.C.*, Case No. 2022CH06616 (Cir. Ct. Cook Cty.)
- *Qixin Chen and Beichen Shi v. Michigan Avenue Immediate Care, S.C.*, Case No. 2022CH07101 (Cir. Ct. Cook Cty.)
- *Jorge Newberry v. Michigan Avenue Immediate Care, S.C.*, Case No. 2022CH07128 (Cir. Ct. Cook Cty.)
- *Mondoukpe Seyive Bani A Medegan Fagla, Cristina Heer, and Morgan Strunsky v. Michigan Avenue Immediate Care, S.C.*, Case No. 2022CH07692 (Cir. Ct. Cook Cty.)
- *Richard Delano Cornell v. Michigan Avenue Immediate Care, S.C.*, Case No. 1:22-cv-03885 (N.D. Ill.)

¹ Unless otherwise indicated, the defined terms herein shall have the same definitions as set forth in the Settlement Agreement, attached as Exhibit 1 to the Declaration of Raina Borrelli in Support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement, filed February 17, 2023.

Prior to the initiation of the Actions, Class Counsel conducted extensive investigations into the Data Incident to understand Defendant's business, its relationship with Settlement Class Members, the facts concerning the Data Incident, and Defendant's response to the Data Incident. *See* Decl. of Thomas A Zimmerman, Jr. in Supp. of this Motion ("Zimmerman Decl."), ¶ 4. Class Counsel analyzed Defendant's notices to determine the extent to which Defendant complied with applicable notice requirements. *Id.* Class Counsel conducted legal research and prepared complaints asserting several theories of liability, including the seven causes of action that ultimately were asserted in the consolidated First Amended Complaint ("FAC"). *Id.*

Class Counsel quickly and efficiently coordinated their efforts to streamline the litigation and put the Actions before this Court without significant contested procedural motions. *Id.* ¶ 5. Each of Class Counsel agreed to conduct a mediation with Defendant in Chicago, Illinois before the Honorable Stuart Palmer (ret.) of JAMS. *Id.* In light of the anticipated mediation, on September 15, 2022, the Parties filed a joint motion and agreed order to stay the litigation pending the mediation. *Id.* Prior to the mediation, Defendant provided informal discovery to Class Counsel, including information regarding the cause, length, information exposed, and scope of the Data Incident, and the number of individuals affected. *Id.* Class Counsel carefully reviewed the materials and, as a result, Class Counsel were well-informed prior to engaging in mediation. *Id.*

The Parties held the mediation on November 2, 2022. *Id.* ¶ 6. Although the Parties did not reach an agreement during the mediation, the discussions were productive, and the Parties were able to build on the progress made at the mediation to subsequently agree to broad terms of the Settlement Agreement. *Id.* Over the ensuing months, the Parties continued negotiating the finer points of the Settlement Agreement, drafting the Settlement Agreement, Notice, Claim Forms, and the motion for preliminary approval. *Id.*

To effectuate the Settlement, Class Counsel worked together to draft the FAC, which was not opposed by Defendant, effectively consolidating the five Actions for purposes of resolution. Zimmerman Decl. ¶ 7. On January 25, 2023, Class Counsel filed their motion for leave to file the FAC. *Id.* On January 30, 2023, the Court entered the agreed order permitting the filing of the FAC. *Id.* ¶ 8. On February 6, 2023, Class Counsel filed the FAC. Shortly thereafter on February 17, 2023, Class Counsel filed Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. *Id.*

After the March 3, 2023 hearing on Plaintiffs' Motion for Preliminary Approval, during which the Court raised issues that it asked the Parties to address, the Parties met and conferred and revised the proposed class notices in response to the issues raised by the Court. *Id.* ¶ 9. Class Counsel prepared and finalized the amended class notices, which clarified how the number of claims can affect Settlement Class Members' recovery, identified a cap on the administration costs, and provided further details regarding the expected claims rate. These were submitted to the Court on March 24, 2023. *Id.*

Because of Class Counsel's considerable efforts to achieve the excellent benefits of the Settlement amicably, Class Counsel was able to avoid contested motion practice and save the Parties and Court time and expenses, all of which redounds to the benefit of the Settlement Class Members in the timely and excellent Settlement. *Id.* ¶ 10.

B. Settlement Benefits

Under the terms of the Settlement, Defendant will establish the Settlement Fund, totaling \$850,000. SA ¶ 46. After deducting Court-approved administrative costs, attorneys' fees, costs, expenses, and Service Awards, the non-reversionary Net Settlement Fund will be paid to Settlement Class Members who submit approved claims as follows: (1) All Settlement Class

Members may submit a claim for up to \$2,500 for reimbursement of Out-of-Pocket Losses; (2) all Settlement Class Members may submit a claim for reimbursement of Lost Time up to four hours at \$25 per hour; and (3) all Settlement Class Members who do not submit a claim for Out-of-Pocket Losses may submit a claim for the Alternative Cash Payment of \$50. SA ¶ 22; and Addendum A to SA ¶¶ 1-3, 14.

1. Alternative Cash Payment

Settlement Class Members may choose to make a claim for an Alternative Cash Payment of \$50.00 upon submission of a valid Claim Form. Settlement Class Members who are eligible for and choose the Alternative Cash Payment will not be eligible to claim any other monetary benefits under the Settlement. SA ¶¶ 3, 52.

2. Lost Time and Out-of-Pocket Losses Payment

In the alternative to the Alternative Cash Payment, Settlement Class Members may make a claim for compensation for unreimbursed Out-of-Pocket losses up to \$2,500.00 upon submission of a valid Claim Form and supporting documentation. SA ¶ 29. Out-of-Pocket losses may include, but are not limited to, the purchase of identity-protection services, credit-monitoring services, or ID-theft insurance that were purchased after receipt of the Data Incident Notice but no later than September 24, 2022 (approximately 90-days after the issuance of the Data Incident Notice). *Id.*

Additionally, Settlement Class Members may make a claim for up to four (4) hours of lost time, calculated at \$25/hour, or up to a total of \$100, for time spent responding to issues raised by the Data Incident (supporting documentation is not required for claims for lost time—an attestation shall suffice). *Id.* ¶ 21. The Settlement Administrator will have the discretion to determine whether any claimed loss is reasonably related to the Data Incident and whether the requirements have been met to make a claim for Lost Time. Addendum A to SA, ¶¶ 4-5.

3. Relevant Reductions or Increases

MAIC's total payment obligation for monetary claims under the Settlement Agreement is \$850,000, and payments to Settlement Class Members who make Valid Claims will be reduced on a *pro rata* basis according to the number of claims made if the total exceeds the Settlement Fund after payment of Court-approved attorneys' fees and litigation costs and expenses. In the event the Settlement Fund is not exhausted by the Settlement Class Members who make Valid Claims, the payments to Settlement Class Members will be increased on a *pro rata* basis so the entire Net Settlement Fund is depleted. Addendum A to SA ¶ 14.

III. ARGUMENT

A. Standards for Attorneys' Fees

In determining the appropriate amount of attorneys' fees to award in a common-fund class action settlement such as this, Illinois courts have discretion to use one of two approaches: the percentage-of-the-benefit method or the lodestar method. *Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 243-44 (1995). Under the common-fund doctrine, "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Wendling v. S. Ill. Hosp. Servs.*, 242 Ill. 2d 261, 265 (2011) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Where, as here, such a Settlement Fund has been created, "attorneys for the successful plaintiff may directly petition the court for the reasonable value of those services which benefited the class." *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13-14 (1st Dist. 1992). Illinois courts have recognized that the percentage fee approach, as opposed to the lodestar method, is appropriate in common fund cases as "the best determinant of the reasonable value of services rendered by counsel." *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 923 (1st Dist. 1995).

B. The Agreed-Upon Attorneys' Fee Award Is Reasonable

Under the percentage method, the attorneys' fee award is calculated by using the gross amount of benefits provided to class members, including administrative expenses, and attorneys' fees and expenses. *See Ferris v. Sprint Comm'ns Co. L.P.*, No. 5:11-cv-667, 2012 U.S. Dist. LEXIS 198702, at *6-7 (E.D.N.C. Dec. 13, 2012) ("Under the percentage-of-the-fund method, it is appropriate to base the percentage on the gross cash benefits available for class members to claim, plus the additional benefits conferred on the class by the Settling Defendants' separate payment of attorney's fees and expenses, and the expenses of administration.").

"As a barometer for assessing the reasonableness of a fee award in common-fund cases, courts look to the going market rate for legal services in similar cases." *In re Dairy Farmers of Am., Inc., Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 845 (N.D. Ill.). The Seventh Circuit noted that the "usual range for contingent fees is between 33 and 50 percent." *Id.* (quoting *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992)). Illinois state and federal court cases have approved of attorney fees based on the percentage of recovery method in the 30-to-39% or higher range. *McCormick v. Adtalem Glob. Educ., Inc.*, 2022 IL App (1st) 201197-U, ¶ 29 (granting attorneys' fee award of 35% of the fund); *Ryan v. City of Chic.*, 274 Ill. App. 3d 913, 925 (1st Dist. 1995) (granting attorneys' fee award of one-third of the common fund).

Here, the requested attorneys' fee award of 35% of the Settlement Fund (SA ¶ 74) is well within the range typically awarded as attorneys' fees in common-fund cases. *See, e.g., McCormick*, 2022 IL App (1st) 201197-U, ¶ 29 (granting attorneys' fee award of 35% of the fund); *Dobbs v. DePuy Orthopaedics, Inc.*, 15 CV 8032, 2017 WL 4572497, at *4 (N.D. Ill. May 9, 2017) (awarding 35% of the plaintiff's recovery under quantum meruit); *Campos v. KCBX Terminals*, N.D. Ill. Case No. 13 CV 08376, ECF. Nos. 216, 239 (Order granting attorneys' fee award of 35%

of common fund created in class-action settlement); *see also Schulte v. Fifth Third Bank*, 805 F.Supp.2d 560, 599 (N.D. Ill. 2011) (“The Court is independently aware that 33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation.”); *Retsky Family Ltd. P’ship*, 2001 WL 1568856, at *4 (N.D. Ill. 2001) (“A customary contingency fee would range from 33 1/3% to 40% of the amount recovered.”).

When considering a reasonable percentage of a common fund to award, Illinois courts consider the risks of bringing the litigation, and the relief provided to the class via the settlement. *See Ryan*, 274 Ill. App. 3d at 924. Riskier litigation and better relief merit greater attorneys’ fees. *Id.*

1. Data Breach Class Actions Taken on a Contingent Basis Are Risky

Here, Class Counsel prosecuted the case on a contingent basis without any guarantee of recovery and have not been compensated for any time spent representing Plaintiffs or Class Members in the litigation, and Class Counsel have paid the unreimbursed expenses out of their own pockets with no assurance of recovery. Zimmerman Decl. ¶ 28. The severity of the financial risk Class Counsel assumed in taking on this case support the reasonableness of the fee request. *See In re Dairy Farmers of Am.*, 80 F. Supp. 3d at 847-48; *see also Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (“Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel.”); *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011) (“[I]f the market-determined fee for a sure winner were \$1 million, the market-determined fee for handling a similar suit with only a 50 percent chance of a favorable outcome should be \$2 million”).

Class Counsel accepted this litigation on a contingent-fee basis, forgoing other work, and accepting the risk they may receive no compensation for their work. Data breach litigation is a relatively new area of the law and many of the legal issues encountered in such cases are novel. Legal scholars have observed how data breach cases present a significant risk to plaintiffs' attorneys. Zimmerman Decl. ¶¶ 29-30. *See also, generally* Timothy H. Madden, Data Breach Class Action Litigation—A Tough Road for Plaintiffs, BOSTON BAR J., Fall 2011, at 27; Matthew J. Schwartz, Why so Many Data Breach Lawsuits Fail, Bank Info Security, 05/11/2015, <https://www.bankinfosecurity.com/data-breach-lawsuits-fail-a-8213> (last visited May 31, 2023). Few data breach class actions have gone to trial, and the outcome of such procedurally, legally, and factually complex cases are uncertain.

Further, any litigated judgment would require significant time and effort. Complex and technical discovery would be required to investigate the circumstances of the Data Incident, and expert testimony would likely be necessary to assist the jury regarding Defendant's liability and class damages. A motion for class certification would be complex, both procedurally and substantively. A trial would have required an even larger investment of time and resources on Class Counsels' part, and the outcome of any judgment would likely be appealed. As such, the risk here justifies the requested attorneys' fee award.

In short, this case was far from a certain victory. The potential litigation pitfalls confirm the reasonableness of Plaintiffs' fee request. Balancing the strength of the Settlement Class's claims against the otherwise looming legal, factual, and procedural obstacles, it is clear that, in the absence of Settlement, the Settlement Class and Class Counsel faced a significant risk of little or no recovery. Notwithstanding these risks, Class Counsel achieved a significant benefit for the Settlement Class. Zimmerman Decl. ¶ 31.

2. Class Counsel Achieved an Outstanding Result

Notwithstanding the serious risks presented by this litigation, the Settlement negotiated by Class Counsel provides the Settlement Class with substantial relief. Defendant agreed to pay \$850,000 into a non-reversionary Settlement Fund for payment of Attorneys' Fees, Costs, Expenses, and Service Awards, Settlement Class Members' Approved Claims, and Administrative Expenses. SA ¶¶ 22, 46-47. All Settlement Class Members may submit claims for up to \$2,500 for reimbursement of Out-of-Pocket Losses and Lost Time of up to four hours at \$25 per hour, or the Alternative Cash Payment of \$50. Addendum A to SA, ¶¶ 1-3.

The monetary relief provided by the Settlement is in line with, or greater than, what other data breach class actions have achieved. This will be more fully analyzed in Plaintiffs' motion for final approval of the Settlement. The relief recovered on behalf of the Class under this Settlement warrants approving the requested attorneys' fees as reasonable.

3. The Lodestar Method Confirms the Reasonableness of the Requested Award

Courts may, but need not, perform a cross-check under the lodestar method to confirm the reasonableness of a fee award under the percentage of recovery method. *See McCormick*, 2022 IL App (1st) 201197-U, ¶ 26 (“Peart has not persuasively argued that it was error to proceed solely under the percentage method that is favored in class actions.”)

The lodestar method is a computation that increases the reasonable value of services rendered by a weighted multiplier; this multiplier represents certain considerations, for example, “the contingency nature of the proceeding, the complexity of the litigation, and the benefits [to] ... the class.” *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58.

Most often this “lodestar” figure is adjusted upwards by the Court—often called a “multiplier”—to compensate counsel for the contingent nature of the case, the quality of work

performed, delay in payment and other factors. *Brundidge*, 168 Ill.2d at 240-42. Courts typically consider lodestar multipliers between 3 and 4 as the “middle” within the range of reasonable fees. *See Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 766 (S.D. W. Va. 2009) (approving a lodestar multiplier between 3.4 and 4.3 as “closer to the middle of the range considered reasonable by courts”). However, when Class Counsel achieve an extraordinary settlement for the class in an expeditious manner, this supports an increased lodestar multiplier above the 4.5 level. *See Nieman v. Duke Energy Corp.*, No. 3:12-cv-456, 2015 U.S. Dist. LEXIS 148260, at *3-5 (W.D.N.C. 2015) (awarding multiplier of 6.4—“the amount of the settlement and the efficiency of counsel in reaching such a resolution reinforce an upward variance from a 4.5 multiplier”); *In re Credit Default Swaps Antitrust Litig.*, No. 1:13-md-02476-DLC (S.D.N.Y. Apr. 26, 2016) (Dkt. No. 560 at 49-50) (multiplier of 6); *In re Cardinal Health, Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 767 (S.D. Ohio 2007) (5.9 multiplier); *Beckman v. KeyBank N.A.*, 293 F.R.D. 467, 481-82 (S.D.N.Y. 2013) (“Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some case, even higher multipliers.”).

“When the lodestar method is used only as a cross-check, the ‘exhaustive scrutiny’ normally required by that method is not necessary.” *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 483 (D. Md. 2014). Courts “may accept as reasonable class counsel’s estimate of the hours they have spent working on the case.” *Id.* at 482-82; *see also Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756 (S.D.W. Va. 2009) (same); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3rd Cir. 2005) (“The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.”).

Class Counsels' reasonable time and rates are set forth in the Zimmerman Declaration. *See* Zimmerman Decl. ¶¶ 22-25. Their time—over 329 hours to date—was reasonably spent prosecuting the Actions and were necessary to win the benefits of the Settlement. Their rates are reasonable when considering their quality and experience. *See, e.g.,* Zimmerman Decl. ¶¶ 11-21. Here, the requested attorneys' fee would amount to a 1.5 multiplier of their collective \$197,763.50 lodestar.

This is well within the range accepted as reasonable by courts, especially when considering the risks Class Counsel assumed in taking on this case and the excellent Settlement benefits.

Thus, the lodestar cross-check method confirms the reasonableness of the Plaintiffs' request for attorneys' fees.

C. Class Counsel's Costs and Expenses Were Reasonable

The Settlement Agreement provides that Plaintiffs may recover from the Settlement Fund their reasonable costs and expenses incurred in prosecuting the litigation not to exceed \$20,000. SA ¶ 74. Attorneys who generate a benefit for the class are entitled to recover reasonable litigation expenses incurred to advance the matter. *See Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 412 (E.D. Wis. 2002). These costs include reasonable out-of-pocket expenses that are normally charged by an attorney to a fee-paying client for the provision of legal services. *Decohen*, 299 F.R.D. at 483.

Plaintiffs seek reimbursement of \$9,114.83 in costs and expenses incurred in furtherance of this litigation. *See* Zimmerman Decl., ¶¶ 26-27. These costs and expenses were incurred in furtherance of the litigation. The requested costs and expenses are reasonable and consistent with what the market would award in a private setting.

D. The Agreed-Upon Service Awards Are Reasonable

Service awards are appropriate in class actions because a class representative's efforts benefit absent class members and serve to encourage the future filing of beneficial litigation. *GMAC Mortg. Corp. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992). "Because a named plaintiff is an essential ingredient of any class action, the Court may authorize incentive awards when necessary to induce individuals to become named representatives." *In re TikTok, Inc., Consumer Privacy Litig.*, 617 F. Supp. 3d 904, 948 (N.D. Ill. 2022) (internal citations and quotations omitted).

Plaintiffs have been instrumental in their role as Class Representatives. Plaintiffs consulted with Class Counsel, assisted in initiating the Actions, and reviewed the complaints before they were filed. They also reviewed the FAC and other pleadings. Class Counsel reviewed and discussed the pleadings with Plaintiffs. Additionally, Plaintiffs and Class Counsel discussed the status of the case, and the terms of the Settlement as it was being negotiated, and Plaintiffs reviewed and approved the Settlement Agreement. Plaintiffs were committed to this litigation, and were prepared to participate in further discovery, sit for depositions, and testify at trial. Zimmerman Decl. ¶ 32.

Here, a Service Award of \$1,000 to each of the Plaintiffs (SA ¶ 72) is reasonable, and is well in line with service awards approved by courts in Illinois. "A study of approximately 1,200 class actions showed that the median incentive award per plaintiff was \$5,250." *In re TikTok, Inc., Consumer Privacy Litig.*, 617 F. Supp. 3d at 949; *see also Ryan*, 274 Ill. App. 3d at 917 (noting trial court had awarded \$10,000 service awards to plaintiffs); *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1041-42 (N.D. Ill. 2011) (collecting cases and

finding \$5,000-per-representative service awards reasonable). Therefore, the Court should grant Plaintiffs' requests for Service Awards in the amount of \$1,000 for each Plaintiff.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court enter an order (1) awarding attorneys' fees in the amount of \$297,500; (2) reimbursement of costs and expenses of \$9,114.83 to Class Counsel, (3) granting Plaintiffs' requests for Service Awards in the amount of \$1,000 each (\$8,000 in total), and (4) granting such other and further relief as this Court deems just and proper.

Dated: June 5, 2023

Respectfully submitted,

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