IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

JANE DOE

Plaintiff, Case No. CV2022 0490

vs.

LIMA MEMORIAL HOSPITAL, et al.,

Defendants.

PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES, COSTS, AND SERVICE AWARD

Pursuant to Rule 23 of the Ohio Civil Rules of Procedure, the Settlement Agreement, and this Court's Order Granting Preliminary Approval, Class Counsel respectfully requests this Court grant, as part of its final approval of this class action settlement, the following:

(1) attorney's fees in the amount of $750,000.00,

(2) attorney's costs and expenses in the amount of $ 14,645.10, and

(3) a class representative service award of $2,500 for the named Plaintiff, Jane Doe. The supporting Memorandum is attached which includes an Affidavit from the undersigned counsel.

Respectfully submitted,

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MEMORANDUM OF LAW

I. INTRODUCTION

This litigation arises out of Lima Memorial Hospital and Lima Memorial Joint Operating Company d/b/a Lima Memorial Health System ("LMH" or "Defendants") alleged implementation and use of analytics tools on LMH's websites, during which Plaintiff alleges her web-usage data, containing personal health information ("personal information"), was shared with Facebook and other third parties allegedly resulting in the invasion of Plaintiff's and Settlement Class Members' privacy.[1] Specifically, Plaintiff alleges that LMH disclosed the personal information of Plaintiff and Settlement Class Members to Facebook and other third parties as a result of LMH's use of the Meta Pixel and other analytics tools on its websites (the "Website Usage Disclosure"). As a result, on December 22, 2022, Plaintiff Jane Doe filed a class action lawsuit alleging claims of breach of duty of medical confidentiality, conversion, bailment, violation of Ohio's wiretap act, breach of implied contract, and unjust enrichment in the Allen County Court of Common Pleas, captioned *Jane Doe v. Lime Memorial Hospital, et al.,* Case No. CV20220490.

II. FACTUAL BACKGROUND

LMH is a health care corporation operating health facilities in Ohio, including Lima Memorial Hospital and numerous outpatient care facilities. In administering and providing health care services, LMH maintains websites designed for interactive communications with patients, including scheduling appointments, searching for physicians, paying bills, requesting medical records, learning about medical issues and treatment options, and joining support groups.

1 Capitalized terms not defined herein have the definitions given to them in the Settlement Agreement.

Plaintiff alleged that LMH deployed source code, on the websites it operates, including http://www.limamemorial.org, that caused patients' personally identifiable information ("Private Information"), as well as the exact contents of their communications, to be transmitted to Facebook. *See* Plaintiff's Class Action Complaint ("CAC") ¶ 20. Specifically, Plaintiff alleged that, when operating and designed as implemented by LMH, the source code allowed the Private Information that Plaintiff and Class Members provided to LMH to be unlawfully disclosed to Facebook, alongside the individual's unique Facebook ID. CAC ¶¶ 20-30. And, as a result of Defendants' actions, the Private Information of as many as 211,595 patients who may have accessed LMH's websites since January 1, 2018 was transmitted to Facebook without the knowledge or permission of those individuals.

On February 23, 2023 Defendants filed a motion to dismiss pursuant to Civ. R. 12(B)(6). Plaintiff filed her memorandum in opposition on April 2, 2023, and Defendants filed their reply on April 24, 2023. On May 9, 2023 this Court issued its order granting Defendants' motion except as to the *Biddle* claim. Shortly thereafter the parties began to discuss the possibility of settlement.

Recognizing the risks and continued costs of litigation, Plaintiff and Defendants engaged in arm's-length negotiations to resolve all matters associated with the litigation. Declaration of Gary Klinger in Support of Plaintiff's Motion for Attorney's Fees, Costs, and Service Award ("Klinger Dec."), ¶¶ 16. The parties exchanged formal and informal discovery related to class size and information shared in the Website Usage Disclosure. Over the course of several months, and after an in-person mediation that did not result in a settlement, the Parties negotiated in hard-fought discussions to come to the settlement agreement resulting in the Settlement. This Court preliminarily approved it on April 11, 2023 after reviewing Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

The Settlement, which creates a $1,500,000 non-reversionary common fund, provides for broad relief to the Settlement Class. Notice has been sent to Settlement Class Members, and the settlement administration is currently ongoing, pursuant to the Notice Plan outlined in the Settlement Agreement.

III. THE SETTLEMENT

A. The Settlement Class

The Settlement Class is defined as "all persons who are, or have been, patients of Defendants and who visited Defendants' website(s) at least once between January 1, 2018 and up to and including May 12, 2023." Settlement Agreement ("Agr"). ¶ 9(jj). The Settlement Class specifically excludes: LMH and its affiliates, parents, subsidiaries, officers, and directors, as well as the judge(s) presiding over this matter and the clerks of said judge(s). The exclusion does not apply, and should not be read to apply, to those employees of LMH and its Related Entities who received notification regarding the Website Usage Disclosure. *Id.* The Settlement Class includes as many as 211,595 individuals who have been patients of Defendants since January 1, 2018.

B. Settlement Benefits

The Settlement requires LMH to establish, or cause to be established, a $1,500,000 non-reversionary Settlement Fund. Agr. ¶12. Settlement Class Members have an opportunity to submit a claim for a pro rata share of the settlement fund to compensate them for their losses, and for one year of Privacy Shield, a data protection and monitoring service. Agr. ¶ 22-23. The ability to claim a year of Privacy Shield is a significant benefit to Settlement Class Members, with a retail value of $240 per Settlement Class Member. With approximately 211,595 Settlement Class Members, this brings the value of the Settlement to approximately $50,782,800. As of June 24, 2024 the Settlement Administration has received 2,879 completed Claim forms. Klinger Dec. ¶ 4. This

brings the retail value of the claimed Privacy Sheild services to $690,960.2 In conjunction with the $1,500,000 non-reversionary Settlement Fund, Class Counsel has created a value of approximately $2,190,960 for Settlement Class Members, with the claims period still running for approximately another month, until August 24, 2024.

In addition to the Privacy Shield services, Settlement Class Members may make a claim for Cash Compensation. To calculate the amount of the Cash Compensation payment to be distributed, the Settlement Administrator will first utilize the Net Settlement Fund to purchase one year of Privacy Shield services for Settlement Class Members who made a valid claim for such services. The amount of each Cash Compensation payment shall be calculated by dividing the remaining amount by the number of valid claims for Cash Compensation. Agr. ¶35. This is an excellent result for the Settlement Class, and will provide meaningful relief to Settlement Class Members in the very near future, as opposed to years from now (or possibly never) had litigation continued in this matter.

Now, consistent with Rule 23 of the Ohio Rules of Civil Procedure, the Settlement Agreement, and this Court's Order Granting Preliminary Approval of the class settlement, Class Counsel respectfully requests that this Court award, as part of the final approval of this class action settlement (which hearing is scheduled for August 8, 2024 at 2:30 pm), $750,000 (approximately 35% of the value of the Settlement, which includes the non-reversionary Settlement Fund and the retail value of the presently claimed Privacy Shield benefit) as attorneys' fees, and costs and expenses of $14,645.10, and a $2,500 award to the named Plaintiff Jane Doe. This request is consistent with and well within the "typical range" of awards granted in class action litigation in

2 The Settlement Administrator's review of the claims received is ongoing and the claims period remains open until August 23, 2024, making the exact final value of the approved claims for Privacy Shield subject to change.

Ohio, and is reasonable considering the work performed, the risk assumed, and the experience of Class Counsel.

IV. CLASS COUNSEL'S ATTORNEY'S FEE REQUEST IS REASONABLE AND WELL WITHIN THE "TYPICAL RANGE" AWARDED IN OHIO FOR COMMON FUND SETTLEMENTS

A court's ability to award attorneys' fees stems from its "historic power of equity" which permits a party recovering a fund for the benefit of others to recover his costs, including his attorneys' fees, from the fund itself or from the other parties enjoying the benefit. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240,257 (1975). "'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.'" *Bowling v. Pfizer, Inc.*, 922 F.Supp. 1261, 1277 (S.D. Ohio 1996) (quoting *Boeing Co. v. Van Gernert*, 444 U.S. 472,478 (1980)). *See also Brotherton v. FrankP. Cleveland*, 141 F. Supp.2d 907,910 (S.D. Ohio 2001) (similar).[3]

The Supreme Court of Ohio has held that "the attorney who is eligible for attorney's fees is one 'who, at his own expense, has maintained a successful suit for the preservation, protection, and increase of a common fund or common property, or who has created at his own expense, or brought into a court a fund in which others may share with him.'" *State Ex Rel. Montrie Nursing Home, Inc. v. Creasy*, 5 Ohio St. 3d 124, 127 (1983) (quoting *Smith v. Kroeger*, 138 Ohio St. 508, 515 (1941)). *See also Hoeppner v. Jess Howard Elec. Co.*, 150 Ohio App. 3d 216, 2002-Ohio- 6167, 780 N.E.2d 290, 153 (10th Dist.) ("[O]ne who recovers a common fund for the benefit of others than himself should be entitled to payment for attorney fees from the fund on the theory that those benefited by

3 Federal authority is an appropriate aid to assist in interpreting Ohio Civil Rule 23. *See Cullen v. State Farm Mut. Auto. Ins. Co.*, 2013-Ohio-4733, 137 Ohio St. 3d 373,378, 999 N.E.2d 614,621 *reconsideration denied*, 2013-Ohio- 5678, 137 Ohio St. 3d 1444, 999 N.E.2d 698 (2013) (citing *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200,201, 509 N.E.2d 1249 (1987)). Accordingly, Plaintiff cites both federal and state law in support of this Motion.

the fund would otherwise be unjustly enriched."); *Nordquist v. Schwartz*, 7th Dist. Columbiana No. 1 ICO 21, 2012-Ohio-4571, 2012 WL 4555843, 142 ("The common fund doctrine allows a representative plaintiff who succeeds in creating or enlarging a fund to recover attorney fees from that fund.").

Here, Class Counsel's efforts created a non-reversionary common fund of $1,500,000. To calculate a reasonable attorney fee when a common fund has been created, Ohio courts follow the "percentage of the fund" approach. *See Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 789 (N.D. Ohio 2010) ("percentage of the fund has been the preferred method for common fund cases, where there is a single pool of money and each class member is entitled to a share (i.e., a 'common fund')"). In fact, the Sixth Circuit has noted that "the percentage of the fund method more accurately reflects the results achieved." *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 516 (6th Cir. 1993) ("The percentage of the fund method has a number of advantages: it is easy to calculate; it establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation."). *See also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (noting "the percentage method . .. 'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.' In contrast, the 'lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits.'") (internal citations and quotations omitted).

Class Counsel's request for a fee award of approximately 35% of the value of the Settlement Fund (plus the retail value of the claimed Privacy Shield services as of June 24, 2024) is well within the "typical range" awarded in the federal Sixth Circuit, and in Ohio, and is appropriate

here. *See In re Cincinnati Gas & Electric Company Securities Litigation*, 643 F.Supp. 148, 150 (S.D. Ohio 1986) ("typically the percentages range from 20% - 50%"); *Manners v. American General Life Ins. Co.*, M.D.Tenn No. 3-98-0266, 1999 WL 33581944, at *29 (Aug. 11, 1999) ("[T]hroughout the Sixth Circuit, attorneys' fees in class actions have ranged from 20%-50%."). The 20-50% range continues to be typical within the Sixth Circuit. *See, e.g., Dillworth v. Case Farms Processing, Inc.*, N.D. Ohio No. 5:08-cv-1694, 2010 WL 776933, at *7 (Mar. 8, 2010) (fee equal to 33% of settlement amount); *Brent v. Midland Funding, LLC*, N.D. Ohio No. 3:11 CV 1332, 2011 WL 3862363, at *19 (Sept. 1, 2011) (fee equal to 29% of the settlement amount); *Clevenger v. Dillards, Inc.*, S.D. Ohio No. C-1-02-558, 2007 WL 764291, at *1 (Mar. 9, 2007) (fee equal to 29% of settlement fund).[4] Indeed, multiple Ohio courts have also previously approved similar awards to Class Counsel in connection with similar settlements involving contingency fees. *See* Final Approval Order and Judgment of Dismissal with Prejudice, *Rosette v. Countrywide Home Loans, Inc.*, Cuyahoga C.P. No. CV-472898 (February 26, 2009) (awarding $2,950,000 in attorneys' fees (approximately 33% common fund) in addition to $65,000 in costs, and $5,000 award per plaintiff in connection with mortgage satisfaction case settlement); Final Approval Order and Judgment of Dismissal with Prejudice, *Piro v. National City Bank*, Cuyahoga C.P. No. CV-02-468015 (July 22, 2008) (awarding $3,068,950 in attorneys' fees (approximately 34% of

4 In addition to being typical and appropriate in Ohio, Courts nation wide have likewise adopted the 20%-50% range as reasonable. *See* e.g., *Yanez v. HL Welding, Inc.*, No. 20cvl 789-MDD, 2022 WL 788703, at *11 (S.D. Cal., Mar. 15, 2022) ("case law surveys suggest" that "30- 50% is "commonly ... awarded in which the common fund is relatively small"); *In re TikTok, Inc., Consumer Privacy Litigation*, MDL No. 2948, 2022 WL 2982782, at *27 (N.D. Ill., July 28, 2022) (33% is typical fee award in data privacy settlements); *Baron v. Commercial & Industrial Bank of Memphis*, S.D.N.Y. No. 75 Civ. 1274, 1979 WL 1252, at *6 (Oct. 3, 1979) (36% award); and *Clarkv. Cameron-Brown Co.*, M.D.N.C. No. C-75-65G, 1981 WL 1637, at *1 (Apr. 6, 1981) (35% award).

common fund, in addition to $7,431 in costs, and $3,500-$5,000 award per plaintiff in connection with mortgage satisfaction case settlement); Final Approval Order and Judgment of Dismissal with Prejudice, *Pittman v. Chase Home Finance LLC*, Cuyahoga C.P. No. CV05 571902 (June 3, 2011) (awarding $197,600 in attorneys' fees (approximately 40% of common fund), $3,000 in costs, and $5,000 award to plaintiff in connection with mortgage satisfaction case settlement). Further, the requested fee represents less than 1% of the benefit that Settlement Class Counsel has *made available* to the Settlement Class.

In addition to being in line with the percentage of fees typically awarded in class action litigation such as this one, the requested fees are appropriate when analyzed in light of the factors considered by courts in Ohio, which are; (1) the time and labor involved in maintaining this litigation; (2) the novelty, complexity, and difficulty of the quests involved; (3) the professional skill required to perform the necessary legal services; (4) the experience, reputation, and ability of the attorneys; and (5) the miscellaneous expenses of this litigation. *See State Ex Rel. Montrie Nursing Home, Inc. v. Creasy*, 5 Ohio St. 3d 124, 449 N.E.2d 763 (1983).

Class Counsel in this matter are highly experienced in class action data privacy litigation, and in fact are national leaders in this area of law. *See* Declaration of Gary M. Klinger in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement. Data privacy litigation is an emerging area of law, and due at least in part to the cutting-edge nature of data protection technology and rapidly evolving law, data privacy cases like this one face substantial hurdles—even just to make it past the pleading stage. *See, e.g.*, *Hammond v. The Bank of N.Y. Mellon Corp*., 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage).

As one federal district court recently observed in the data breach context (which is analogous to pixel-related litigation):

> Data breach litigation is evolving; there is no guarantee of the ultimate result. *See Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases . . . are particularly risky, expensive, and complex.").

Fox v. Iowa Health Sys., No. 3:18-CV-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021) (approving attorneys' fees & costs in the amount of $1,575,000). Although this matter presented numerous risks associated with any litigation, and especially with novel and complex issues such as those faced here, Class Counsel confronted those risks head on and, through their significant expertise, ultimately achieved an excellent result for the Settlement Class.

Class Counsel has expended substantial time and resources advancing this litigation and resolving the matter with broad relief offered to the Settlement Class. Class Counsel dedicated a significant amount of work to this litigation, which could have otherwise been spent on other fee-generating matters. This work included exchanging, reviewing, and analyzing information involving complex issues of data privacy and the evolving area of the use of tracking technologies to share information with third parties, and briefed novel issues of law. After this extensive briefing, and the exchange of information, the parties participated in mediation, which did not result in a settlement, and months of subsequent negotiations before finally reaching an agreement in principle. Class Counsel then drafted a Settlement Agreement and negotiated the finer points of the Settlement, drafted and filed a motion seeking preliminary approval of that settlement, and has since worked with Counsel for the Defendant and the Settlement Administrator to facilitate the Notice Program.

Class Counsel performed all of this work, and advanced substantial expenses to benefit the Class, at the risk of non-repayment if the litigation was not successful. Class Counsel agreed to

undertake this litigation and advance the time and expenses purely on a contingent basis.[8] Class Counsel has not received any compensation or reimbursement for expenses during the pendency of this action, and Plaintiff would not be responsible for any fees or costs to Class Counsel in the event that none are awarded by this Court. "In a contingent-fee agreement, the lawyer takes on a large part of the financial risk of a case because if the case is resolved against the client, the lawyer will not receive any compensation for his or her work on the case." *Faieta v. World Harvest Church*, 147 Ohio Misc.2d 51, 2008-Ohio-3140, 11147, 153 (C.P.), *ajf'd* 10th Dist. No. 08AP- 527, 2008-Ohio-6959 (Dec. 31, 2008).

The expenses incurred in this litigation are discussed in more detail below. And, finally, the specific fee amount has been fully disclosed in the Motion for Preliminary Approval, and in the Long Form Notice. To date, no objections have been raised about the amount of attorneys' fees requested.

For all of these reasons, Class Counsel requests that the Court award $750,000 as attorneys' fees, and $ 14,645.10 in costs and expenses.

V. CLASS COUNSEL'S REQUEST FOR COST REIMBURSEMENT SHOULD BE APPROVED

"Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket expenses and costs in the prosecution of claims, and in obtaining settlement, including but not limited to expenses incurred in connection with document productions, consulting with and deposing experts, travel and other litigation-related expenses." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508,535 (E.D. Mich. 2003). "[T]he categories of expenses for which Plaintiffs' counsel seek reimbursement are the type routinely charged to hourly fee-paying clients and thus should be reimbursed out of the settlement fund ... [including] the cost of experts and consultants ... computerized research; travel and lodging expenses; photocopying

cost; filing and witness fees; postage and overnight delivery; and the cost of court reporters and depositions." *New Eng. Health Care Emples. Pension Fund v. Fruit of the Loom, Inc.,* 234 F.R.D. 627, 635 (W.D. Ky. 2006) (approving expenses submitted pursuant to these categories).

Class Counsel has incurred, to date, $14,645.10 in costs. Each expense was necessary and directly related to this litigation, including the costs for the mediator and filing fees. Klinger Dec. ¶¶ 13-14. Accordingly, Class Counsel respectfully requests that the Court award reimbursement of these modest and reasonable expenses, as provided for in the Settlement Fund.

VI. CLASS REPRESENTATIVES HAVE EARNED A SERVICE AWARD

The Settlement Agreement also provides that Class Counsel will apply to the Court for a $2,500 service award for the Class Representative. Class Counsel now moves for the approval of this award under principles of equity and prior practice in Ohio Courts. *See, e.g., Bertv. AK Steel Corp*., S.D. Ohio No. l:02-CV-467, 2008 WL 4693747, at *1 (Oct. 23, 2008) (approving $10,000 incentive award to each class representative); *Birr v. Amica Mut. Ins. Co.*, S.D. Ohio No. 1:08cv124, 2011 WL 1429171, at* 1 (April 14, 2011) (adopting magistrate's Report and Recommendation approving incentive payment to the Class Representative of $5,000). At the inception of this action, Plaintiff indicated her desire and willingness to undertake the responsibilities and fiduciary duties on behalf of the class. This is a voluntary obligation that goes well beyond the pursuit of her individual claims, and Plaintiff has fulfilled her duties to the Class. Moreover, Plaintiff was actively involved in the litigation. She reviewed and approved the complaint, gathered relevant documents and provided them to Class Counsel, followed the litigation process, and communicated with Class Counsel on a regular basis. Without her willingness to undertake these obligations on behalf of the Class, the recovery in this case for the benefit of hundreds of thousands of Settlement Class Members would not have occurred.

Accordingly, Class Counsel respectfully requests that the Court award $2,500 to class

representative, Jane Doe, for her time and effort on behalf of all Class Members.

VII. CONCLUSION

Based upon the foregoing, Class Counsel respectfully requests that this Court award: (1) $750,000 as fair and reasonable attorneys' fees, and $ 14,645.10 in reimbursement for expenses reasonable and necessary to the Litigation; and (3) a $2,500 service award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2024 the foregoing was served via electronic mail to all parties' counsel of record.

/s/ Gary M. Klingr
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