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

JONATHAN SMITH, JOSEPH ROGERS, TAYLOR ARMIGER, RAMSEY GARDNER, individually and on behalf of themselves and others similarly situated, *Plaintiffs*, v. ASSURANCE IQ, LLC, *Defendant,* _____ Nicholas Chidiac, *Objector*.	Case No.: 2023-CH-09225 Honorable Allen P. Walker Hearing date: Sep. 3, 2024 Time: 11am

OBJECTION TO PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARD

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INTRODUCTION

Class attorneys "too often aim to solidify a fund via the settlement negotiations in order to satisfy their hefty fee petition rather than their fiduciary obligations towards safeguarding class members' interests." *First Mercury Ins. Co. v. Nationwide Sec. Servs.*, 2016 IL App (1st) 143924 ¶ 45, 403 Ill. Dec. 663, 676 (1st Dist. 2016). Plaintiffs' fee motion typifies this unfortunate pattern: In this Telephone Consumer Protection Act (TCPA) litigation, Plaintiffs request an exorbitant 46% net fee award for the work provided by class counsel in negotiating the settlement preliminarily approved by this Court.[1] The Court should not uncritically accept the fee request "in a case in which the court had no prior involvement." *Clark v. Gannett Co.*, 2018 IL App (1st) 172041, ¶ 98, 428 Ill. Dec. 367, 386 (1st Dist. 2018) (Mason, J., concurring). As occurred in *Clark*, Plaintiffs settled pending federal litigation, refiled the case before this Court, and now seek an excessive fee award without accounting for their hours. Such gamesmanship "encourages the skepticism, cynicism, and distrust of our judicial system so prevalent in society today." *Id*.

This fee award is neither fair nor reasonable. For one, Plaintiffs haven't submitted *any* attorney hours recounting work in this case, leaving the Court without the ability to adjudicate the reasonableness of the request—regardless of the methodology it chooses to employ. Moreover, class counsel has not performed substantial work to justify this request; TCPA litigation is not particularly complex, and the result obtained for the class amounts to less than 2% of class statutory

[1] The fee requested for class counsel is 46%, not 40% as Plaintiffs contend. Pl. Fee Mot. at 2. This is because the "ratio that is relevant" for calculating fees is comparing "(1) the fee to (2) the fee plus what the class members received." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014). Class counsel will receive, if their motion is granted, $8,750,000. The "fee plus what the class members received," *id.*, is roughly $18,875,000, because the strikingly high $3,000,000 payment to the claims administrator does not count as relief received by the class. Comparing these two sums (and ignoring the relatively negligible $64,000 in costs and service awards), the fee requested comes to slightly more than 46%.

damages; and, the typical TCPA fee is somewhere between twenty and thirty percent—considerably less than what class counsel seeks here. *Clark*, 2018 IL App (1st) 172041, ¶ 97 (Mason, J., concurring).

Separately, the fee request should be rejected because counsel flagrantly forum shopped the settlement out of jurisdictions where discovery occurred, evidently because binding precedent over the first-filed court prescribes a "benchmark" 25% attorneys' fee award. The fee award Plaintiffs seek is far more than class counsel would have received if Plaintiffs had moved to approve the settlement in *any* of the federal courts home to the litigation. The only benefit to filing in this Court instead of the first-filed pending suit (or any other court with parallel litigation) is so that class counsel can potentially secure more money for themselves at the expense of their clients. The Court should not play along because "[e]very dollar that goes to class counsel depletes the funds available to compensate class members." *Clark*, 2018 IL App (1st) 172041, ¶ 96 (Mason, J., concurring).

For either reason—class counsel's forum shopping or the unfairness and unreasonableness of the fee request—the Court should reject the requested fee award. Instead, the Court should stay its fee decision pending submission of a sworn hours log from class counsel, and it should—for the sake of jurisdictional comity—use the Ninth Circuit's 25% benchmark for fee awards here.

STATEMENT OF FACTS

This class action litigation arises out of the TCPA, which prohibits pre-recorded phone calls without the express written consent of the call recipient. 47 U.S.C. § 227(b)(1)(A). It started in 2019 when class counsel sued Assurance for violating the TCPA in the Southern District of New York, in the case *James Everett Shelton et al. v. Lumico Life Insurance Company and Assurance IQ, Inc.*, No. 7:19-cv-6494 (S.D.N.Y. 2019), transferred to 2:21-cv-3045 (E.D. Pa.). In

response to that suit, Assurance filed a petition with the Federal Communications Commission—which interprets the TCPA—asking for declaratory relief that the sorts of calls at issue in *Shelton* (calls that begin with an automated message before switching to a live telemarketer) were permitted under the Act. While public comment and FCC consideration for that petition were pending, three different sets of counsel (now class counsel for the proposed settlement) filed additional lawsuits for the same conduct: First in the Western District of Washington, *Rogers v. Assurance*, No. 21-cv-823 (W.D. Wash. 2021), and then—after Assurance withdrew its FCC petition in May 2022—in the District of Arizona. *Smith v. Assurance*, No. 22-cv-1732 (D. Ariz. 2022). About a year later, in June 2023, a third unrelated putative class attorney filed yet another action in the Northern District of Illinois, *Gardner v. Assurance*, No. 23-cv-3665 (N.D. Ill. 2023).

The legwork preceding the proposed settlement occurred in the federal actions, not this Court. In *Rodgers*, the Western District ruled on and granted Defendants' motion to dismiss in part—finding only that the use of an automated voice or recording was not adequately pleaded, leading to an amended complaint before that court and another motion to dismiss. *See Rogers v. Assurance IQ, LLC*, 2023 WL 2646468, at *8, 2023 U.S. Dist. LEXIS 51955 (W.D. Wash. Mar. 27, 2023). As Plaintiffs describe it, "substantial discovery concerning the plaintiffs' claims" was conducted under the *Rogers* court's supervision while the court considered dismissal of the amended complaint. Pl. Fee Mot. at 4. Separately, the Plaintiffs claim to have conducted formal discovery while a motion to dismiss was under consideration in *Smith*—and the court there ruled in the Plaintiff's favor on that motion. *Smith v. Assurance IQ, LLC, d/b/a Mortgage.net*, 2023 WL 8076099, 2023 U.S. Dist. LEXIS 208238 (D. Ariz. Nov. 21, 2023). A motion to dismiss was filed but never adjudicated in *Gardner*. Pl. Fee Mot. at 4.

In addition to these three actions—*Rogers*, *Smith*, and *Gardner*—whose counsel jointly struck the proposed settlement, two other cases filed by two additional independent groups of counsel involved the same claims: *Blair v. Assurance IQ LLC*, No. 2:23-cv-16 (W.D. Wash.) and *Marsh v. Assurance IQ Services, LLC*, 4:23-cv-1361 (E.D. Mo.). The *Blair* court also issued a similar order as in the *Rogers* case, granting a motion to dismiss without prejudice, and simultaneously denying defendant's motion to stay or bifurcate discovery. *Blair v. Assurance IQ LLC*, 2023 WL 6622415, 2023 U.S. Dist. LEXIS 183095 (W.D. Wash. Oct. 11, 2023). Both of these actions were voluntarily dismissed by their plaintiffs without explanation, subsequent to the execution of the proposed settlement.

Alongside the litigation, the Parties also engaged in two mediation sessions with JAMS in New York City, in June and September 2023. These mediation sessions involved some modest preparation, such as authoring mediation briefs, employing an expert, and aggregating class-wide data on the phone calls at issue in this suit. Pl. Fee Mot. at 5. Though the Parties didn't agree to a settlement at either mediation session they continued to negotiate "a resolution of pending matters," Pl. Fee Mot. at 5. The Plaintiff's unqualified victory against dismissal in *Smith*, 2023 WL 8076099, on November 21, 2023, likely precipitated the global settlement of all three actions, which was executed December 23–28, 2023.

As the Parties closed in on a settlement, class counsel decided to file an *additional* lawsuit (this one) in this Court on November 3, 2023, *Smith, et. al. v. Assurance IQ LLC*, 2023-CH-092252 (Cir. Ct. Cook Cnty. 2023). According to Plaintiffs, the purpose of filing this case was "to choose a single jurisdiction in which to consolidate their claims and seek approval of the classwide settlement." Pl. Fee. Mot. at 5. But they offer no reason as to why the Western District of Washington, Northern District of Illinois, or District of Arizona—where the other earlier related

litigation remained pending, and where the Parties had actually litigated the case—could not serve this function.

The settlement itself creates a $21,875,000 non-reversionary common fund to pay damages to the class members. $3,000,000 of that money is earmarked for near-immediate distribution to the claims administrator, Settlement ¶ 9.1, and class counsel petitioned this court for $8,750,000 in fees from the common fund. Pl. Fee Mot. at 2. Plaintiffs also request $44,528.70 in costs and $5000 as service awards for each of the four named Plaintiffs. *Id.* Between attorneys' fees, costs, and the administrator's millions, less than half of the common fund will even be paid out to the class under the settlement's current structure. From this money, each class member who files a claim with the claims administrator is entitled to his *pro rata* share of the settlement, after fees and costs are paid out. Settlement ¶ 9.3. Any money not then paid to the class from the common fund due to uncashed settlement checks will be redistributed to the Chicago Bar Association, a third party lacking any legitimate nexus to this case. After its initial examination of the settlement, the Court preliminarily approved the settlement on March 6, 2024.

Class member Nick Chidiac timely objects to the settlement, specifically the fee award. Mr. Chidiac is a patent examiner and attorney who lives in Pittsburgh, Pennsylvania. *See* Declaration Nicholas Chidiac Declaration (attached as Exhibit A), ¶ 2. He is part of the class as defined in the settlement, ¶ 2.15, and thus eligible to object to the settlement via this Objection. Chidiac Decl. ¶¶ 7-10. He believes that the proposed fee unfairly awards class counsel at the expense of the class and petitions this Court to reject the fee award for the following reasons.[2]

[2] Chidiac's objection applies to the entire class. *Id.* ¶ 6. He will appear at the fairness hearing through undersigned counsel. *Id.* ¶ 3. Chidiac does not intend to call witnesses, but reserves the right to cross-examine any witnesses Plaintiffs might present.

ARGUMENT

I. A 46% net fee award is neither fair nor reasonable in this case.

The settlement as currently structured should be rejected by this Court because the fee award is unwarranted. Illinois trial courts consider four factors in determining whether the fee requested for class counsel is fair and reasonable under Illinois law. *Board of Comm'rs v. County of Will*, 154 Ill. App. 3d 395, 398-99 (3rd Dist. 1987). These factors include (1) class counsel's qualifications; (2) the nature of class counsel's services; (3) the complexity of this case; and (4) the compensation charged for similar services by attorneys with similar qualifications. While Chidiac agrees that class counsel includes experienced and qualified attorneys, the other three factors for adjudicating attorneys' fees weigh *heavily* against the 46% net fee award requested.

A. As a threshold matter, Plaintiffs' fee motion lacks any detail as to the work done by class counsel to benefit the class.

Plaintiffs have not submitted any accounting of hours spent on this case by class counsel for the Court to consider in adjudicating a proper fee award—not even the total number of hours. This is bizarre, because it is "incumbent upon the petitioner to present detailed records maintained during the course of the litigation containing facts and computations upon which the charges are predicated." *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 984, 986 (1st Dist. 1987) (affirming the trial court's determination that the fee request was "inadequate"). This Court "is vested with the discretionary authority to choose the percentage-of-the-award method or the lodestar method to determine the amount of fees to be granted plaintiffs' counsel in common fund class action litigation." *Brundidge v. Glendale Fed. Bank*, 168 Ill. 2d 235, 243-44 (1995). Plaintiffs usurp the Court's discretion by not providing *any* information about the hours spent on this case.

See Steinfeld v. Discover Fin. Servs., 2013 U.S. Dist. LEXIS 91429, at *5 (N.D. Cal. 2013).[3] Even if the Court decides to award fees based on a percentage of the fund, it still considers the time spent on the case to evaluate the fairness of the fee award. Thus, it's standard practice for Plaintiffs to submit hours for class counsel even when a Court utilizes the common fund method to determine an appropriate fee. For example, courts in the Ninth Circuit—where the *Rogers* and *Smith* actions were filed—hold that "[c]alculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002).[4]

Instead, the Plaintiffs have implicitly staked their entire fee motion on the premise that by merely declaring *ipso facto* that the common fund method applies, Pl. Fee Mot. at 7, class counsel's hours are not relevant to the fee award. Not so. As *Brundidge* made clear, "[t]he judge who arrives at a percent of recovery fee is engaged in no higher degree of mysticism than the judge who

[3] "The Illinois Supreme Court has adopted the approach taken by the majority of Federal courts on the issue of attorney fees." *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13 (1st Dist. 1992).

[4] *See also In re TD Ameritrade Account Holder Litig.*, 2011 WL 4079226, 2011 U.S. Dist. LEXIS 103222, at *41 (N.D. Cal. Sep. 12, 2011) ("even when applying the percentage method, the lodestar method should be used as a cross-check to determine the fairness of the award."); *Felix v. WM Bolthouse Farms, Inc.*, 2019 U.S. Dist. LEXIS 157026, at *1 (E.D. Cal. Sep. 13, 2019) ("Requests for approval of attorneys' fees must include detailed lodestar information, even when the requested amount is based on a percentage of the common fund."); *Tommey v. Computer Scis. Corp.*, 2015 U.S. Dist. LEXIS 48011, *8-9 (D. Kan. 2015); *Flores v. Mamma Lombardi's of Holbrook, Inc.*, 2015 U.S. Dist. LEXIS 65197, *38 (E.D.N.Y. 2015); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 127-28 (8th Cir. 1975); *Burgos v. San Miguel Transp.*, 2016 U.S. Dist. LEXIS 166248, *9 (S.D.N.Y. 2016); *In re Sony PS3 "other OS" Litig.*, 2017 U.S. Dist. LEXIS 13459, *14-15 (N.D. Cal. 2017); *Teague v. Acxiom Corp.*, 2018 WL 3772865 (D. Colo. 2018); *Arango v. Scotts Co., LLC*, 2019 U.S. Dist. LEXIS 2660, *5 (S.D.N.Y. 2019) ("Even where attorney's fees are sought pursuant to the percentage of the fund method, counsel must submit evidence providing a factual basis for the award.").

satisfies the lodestar by guessing his way through the time and labor component and then subjectively justifies his multiplier. *Both* must guard against avarice depleting the common fund, *both* must reward the attorney for excellence, *both* must be concerned with the credibility of the award, and *both* must be perceived as having achieved a just result." 168 Ill. 2d at 244-45 (emphasis added). Plaintiffs thus *must* provide an hourly accounting, since this assists the Court in using *both* the common fund or lodestar method; its omission leaves the Court in the dark to determine what is fair to the class. "[W]hile a trial court certainly has discretion to dispense with a lodestar calculation under appropriate circumstances…, where, as here, the parties present the court with a *fait accompli* and the court has absolutely no familiarity with the background of the litigation, the court abdicates its role as the guardian of the interests of absent class members when it simply accepts counsel's word for it." *Clark*, 2018 IL App (1st) 172041, ¶ 95 (Mason, J., concurring).

Plaintiffs' failure to submit *any* hours doesn't make sense and compels only one logical inference: that the fee requested is wildly out of step with the work actually done. Accordingly, this Court should sustain this Objection and order Plaintiffs to produce sworn hours logs of class counsel's work on this case before determining fees.

B. The litigation is not substantially developed, and Plaintiffs' failure to submit billing records fails to substantiate the work they claim.

To request almost nine million dollars of money from the class, Plaintiffs spend a mere six pages of argument explaining to the Court why this reward is justified. But the price isn't right. For one, the Parties struck the global settlement prior to class certification—or *any* substantive proceedings before this Court. Much of the work performed by class counsel was duplicative, attributed to the unnecessary filing of three different versions of the same underlying suit in

different courts around the country by three different sets of attorneys. Pl. Fee Mot. at 2-5. Additional work occurred because the *Rogers* plaintiffs failed to write pleadings or incorporate FCC filings that proved Assurance used an automated voice in their calls. 2023 WL 2646468, at *8. Finally, to the extent class counsel "engaged in substantial discovery concerning the plaintiffs' claims," Plaintiffs' fee motion—particularly the absence of sworn hours (*supra* I.A)—leaves the Court unable to verify or scrutinize that argument. Pl. Fee Mot. at 4. This is because that assertion cites two paragraphs in two declarations, both of which circularly make the same claim as the motion. *See*, *e.g.*, Pl. Fee Mot. App. 2 ¶ 9 ("While these motions were being briefed, the parties engaged in substantial discovery concerning the plaintiffs' claims, with all parties serving discovery requests and producing responsive documents."); Pl. Fee Mot. App. 3 ¶ 10 ("propounding written discovery to Assurance in the earlier filed *Smith v. Assurance* matter"). Simply put, class counsel has not demonstrated the hours that might justify a more generous fee award—and certainly not enough to win almost half of the common fund.

C. TCPA litigation does not require extraordinary risk to justify a 46% award, and class counsel misrepresents recovery.

Plaintiffs overgeneralize and misapply the argument that class counsel's fee award is justified because "class actions are inherently risky in general." Pl. Fee Mot. at 11. Perhaps, but not in TCPA litigation, which is "neither challenging nor complex." *Brown v. Rita's Water Ice Franchise Co.*, 242 F.Supp.3d 356, 365 (E.D. Pa. 2017) (noting "the simplicity of these cases suggests that a one-third fee may not be appropriate"). Even class certification—which is the key inflection point for most class action cases—is "normal" in TCPA litigation, because "the main questions, such as whether a given fax is an advertisement, are common to all recipients." *Ira Holtzman, C.P.A., & Assocs. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013) (Easterbrook, C.J.).

Plaintiffs' argument that certification presented a real risk in this case is thus not accurate. Pl. Fee Mot. at 12. Five different groups of attorneys independently filed similar actions around the country because they believed the prospect of recovery was strong—not risky. And anyhow, risk no longer matters when evaluating a putative settlement, which removes any risk borne by plaintiffs and their counsel. Under the *Board of Comm'rs* factors then, 154 Ill. App. 3d at 398-99, courts should guard *against* excess fees in TCPA litigation compared to other class action suits.

The results here are not as "exceptional" as class counsel pretend. Plaintiffs' "calculation of damages" is "disingenuous" because they compare hypothetical recovery to claimants rather than class members. *First Mercury Ins. Co*, 2016 IL App (1st) 143924 ¶ 45 (admonishing fee calculations in TCPA settlement). Plaintiffs claim that the "likely net recovery here per claimant of between $167 and $33 [*sic*] is an outstanding result" because "[t]he TCPA allows for $500 per non willful violation of the statute." Pl. Fee Mot. at 9. But that comparison isn't apples to apples, because the settlement recovery is *per claimant* while the TCPA damages are *per violation*. *Compare Maldonado v. VCA Animal Hospitals*, No. 2022-CH-02415 (Cir. Ct. Cook Cnty. 2022) (affirming a 30% fee award for class counsel where they negotiated a roughly $182 net recovery *per class member* without the class member having to even file a claim form). Class counsel is "acutely aware that only a handful of persons or entities who receive the offending [] transmissions will actually come forward to pursue a claim." *First Mercury*, 2016 IL App (1st) 143924 ¶ 45. The "calculated damages … do not correspond with the number of class members who are likely to … benefit from the litigation." *Id.* This asymmetry is how Plaintiffs claim an inflated damages result that *appears* to be 33–66% of the statutory damages, but in reality is much lower because more than 95% of the class receives $0. Adjusting for the fact that "in TCPA cases, less than 2% of the [] class members responded to notice of the settlement," *Clark*, 2018 IL App (1st) 172041 ¶ 95

(Mason, J., concurring), the actual relief won *per violation*—which is how the statutory damages are calculated—is, at best, less than two percent.[5]

Neither the case itself nor the damages won are particularly remarkable, and thus this factor similarly weighs against the requested fee.

D. The requested fee exceeds standard rates for TCPA litigation.

As Judge Mason observed in his *Clark* concurrence, "the traditional" fee "commonly awarded in TCPA cases" is somewhere between twenty and thirty percent. *Clark*, 2018 IL App (1st) 172041 ¶ 97 (Mason, J., concurring). Judge Mason drew this conclusion by relying on careful and thorough research from other judges into the average fee awards made in TCPA cases. *See*, *e.g.*, *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 798-99 (N.D. Ill. 2015) (analyzing 72 TCPA settlements approved since 2010 and finding median fees to be between 17.7 to 33.3% of the settlement); *Wilkins v. HSBC Bank Nevada, NA*, 2015 WL 890566, at *11, 2015 U.S. Dist. LEXIS 23869 (N.D. Ill. Feb. 27, 2015) (awarding fees of 23.75% in "average TCPA class action"). Many Illinois courts in this State have coalesced around one-third of the relief delivered to the class as a common fee award, *CE Design Ltd. v. Franklin Edison Corp.*, 2022 IL App (2d) 190130-U ¶ 47 (unpublished) (referring, in a TCPA class action, to a one-third attorney's fee as the "customary" and "standard" amount in a TCPA class action), although departure from this benchmark may be warranted. *See*, *e.g.*, *Girsch v. Hiffman*, No. 01CH21984, 2020 Ill. Cir. LEXIS 2697, *41 (Cir. Ct. Cook Cnty. July 30, 2020) (reducing the requested fees for a class action settlement from 30 to 20%).

[5] This estimate takes the 33–66% range of recovery claimed by Plaintiffs *per claimant* and divides it by fifty (since less than two percent of class members make claims) to convert the recovery to a *per violation* basis.

To be sure, Plaintiffs provide examples where courts, including in this county, have awarded a 40% fee. Pl. Fee Mot. at 7-8. But the $8.75 million fee requested here is 46%—not 40% as Plaintiffs contend—because the "ratio that is relevant" for calculating fees is comparing "(1) the fee [$8,750,000] to (2) the fee plus what the class members received [$18,875,000 after the claims administrator is paid]." *Pearson*, 772 F.3d at 781. Moreover, all of the cases Plaintiffs cite to support their request appear to be "rubber stamps" of proposed orders that lack any substantive analysis of objections raised or the appropriateness and lawfulness of the fee award. Despite clear rules to the contrary, judges "continue to rubber stamp most settlements presented to them." Jessica Erickson, *The Market for Leadership in Corporate Litigation*, 2015 U. ILL. L. REV. 1479, 1526 (2015); *see*, *e.g.*, *Habberfield v. Boohoo.Com United States, Inc.*, 2023 U.S. Dist. LEXIS 209395, *10 (C.D. Cal. 2023); *Gregory v. Preferred Fin. Sols.*, 2019 U.S. Dist. LEXIS 46748 (M.D. Ga. 2019) (no objections made yet order included language denying and overruling objections). "By submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications, the class action bar is in fact creating its own caselaw on the fees it is entitled to... No wonder that 'caselaw' is so generous to Class attorneys." *Sakiko Fujiwara v. Sushi Yasuda Ltd*., 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014).

Plaintiffs—or rather their lawyers—are praying this Court does the same. It should not. *See In re Resistors Antitrust Litig.*, 2019 WL 5298143, 2019 U.S. Dist. LEXIS 174399, *11 (N.D. Cal. 2019) ("The proposed order submitted by DPPs contains self-congratulatory language that is unwarranted and unhelpful to the Court. … Statements like these are better suited for firm marketing materials than they are for orders proposed for the Court's issuance.").

Plaintiffs' picking of bad cherries—rubber-stamped cases with 40% fee awards—doesn't make for good pie: Illinois courts have developed an unfortunate reputation for rubber-stamping

outlandish fee awards. "Uncritical acceptance of an award of 39% of the settlement fund to class counsel in a case in which the court had no prior involvement"—*less* than Plaintiffs ask for here—"encourages the skepticism, cynicism, and distrust of our judicial system so prevalent in society today." *Clark*, 2018 IL App (1st) 172041, ¶ 98 (Mason, J., concurring) (describing settlement of federal TCPA litigation refiled in Cook Count that received a 39%, $5.38 million fee award without supporting record or analysis). In *Arkin v. Pressman*, the Eleventh Circuit affirmed zeroing out attorneys' fees to a firm that unsuccessfully attempted to win approval for a settlement of previously-pending federal TCPA litigation in DuPage County. 38 F.4th 1001 (11th Cir. 2022). While the firm provided a common benefit and would ordinarily be entitled to "a portion of the common fund as attorneys' fees," zeroing out the fee award was appropriate because the firm "subordinated the interests of the class to its own interests throughout the *Arkin* litigation." *Id.* at 1011. The panel found the firm's excuse for refiling the suit in Illinois implausible, noting that would have achieved millions more in fees from the less favorable settlement, but for an objection to the settlement. *Id*. at 1012. As academics have observed, busy state courts including Illinois often "attract class action litigation [] by their willingness to allow settlements that benefit plaintiffs' lawyers and defendants, but not" the class. Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 290 (2016).

Chidiac brings this objection to assist the Court and prove the cynics wrong. Class action settlements require special review on behalf of class members, even when objectors do not appear to oppose them. "In a class action, the court is the guardian of the interests of the absent class members" and thus has a fiduciary duty to the class to scrutinize the fee award for fairness and reasonableness. *Waters v. Chicago*, 95 Ill. App. 3d 919, 924 (1981). That duty entails rejecting overinflated fee agreements like the one proposed.

II. Class counsel forum shopped this settlement for their own benefit.

Plaintiffs filed suit only a month before executing the settlement, which serves as the Parties' forum even though other dockets in federal court were far more developed and overseen by judges more familiar with the litigation. Normally, a plaintiff may freely pursue a case in any lawful venue, but class actions deserve special scrutiny. Class counsel and defendants have shared incentives to negotiate a quick settlement that pays counsel more generously, with the unnamed class members drawing the short straw in such a scenario. *See*, *e.g.*, *Arkin*, 38 F.4th at 1011-12; *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 333 (3rd Cir. 1998); *Wayside Church v. Van Buren Cnty.*, 103 F.4th 1215, 2024 U.S. App. LEXIS 13791, *20 (6th Cir. 2024). In class actions, it is class counsel—not the named plaintiffs—who maintain functional control over the litigation. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991). As class counsel structured this settlement, every dollar that is awarded to class counsel is a dollar taken away from the class members. Thus, "the pattern of conduct engaged in" by class counsel here—to file and litigate the substantive claims in federal courts and then use this Court to win approval and fees—is for an "improper purpose of seeking [even more] attorneys' fees with the bare minimum of effort, expense, and time." *Clark v. Gannett Co.*, 2018 IL App (1st) 172041 ¶ 69.

A. Class counsel filed this case to win more fees from the settlement fund.

The complaint in this litigation was filed on November 3, 2023, years after the parallel litigation preceding it in federal courts and only a month before the settlement was executed. Officially, Plaintiffs sought "a single jurisdiction in which to consolidate their claims and seek approval of the classwide settlement." Pl. Fee. Mot. at 5.

Plaintiff's explanation doesn't make sense. There is no reason that the District of Arizona, Western District of Washington, or Northern District of Illinois couldn't have served to consolidate all claims for the purposes of settlement. Federal courts do this routinely. Rule 23 of the Federal Rules of Civil Procedure exists precisely so that nationwide class action claims can be consolidated and adjudicated for settlement in federal court. Thus, class counsel already had three viable options for consolidating claims available to them before they filed this suit, and filing a motion for settlement in an open action would be more economical than filing a new complaint.

Instead, class counsel wagered they could make more money filing in Illinois state court. *See*, *e.g.*, Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 775 (1998) ("In the class action context, however, forum shopping takes a different, and more sinister, form. It entails the ability of class counsel to commence an action in a forum that is most favorable to counsel's own (rather than the class members') interests, such as a forum in which judges are predisposed to exercising little scrutiny of class action settlements.").

Class counsel in *Arkin v. Pressman*—who also opened superfluous litigation in Illinois state courts to motion for class settlement—had a more facially plausible excuse soundly rejected: that filing in Illinois's DuPage County Court served the "convenience of the parties." 38 F.4th at 1011-12. But neither the Eleventh Circuit nor the district court below bought class counsel's *spiel* in *Arkin*, noting that "this rationale simply does not explain the terms of the Arkin Settlement" and that the parties could have satisfied their "convenience" rationale by simply moving to transfer the case to existing litigation in the Northern District of Illinois. *Id.* Like in *Arkin*, class counsel's inability to articulate a legitimate legal reason for opening a new suit in November 2023 suggests

self-interest. The gamesmanship is even more transparent here than it was in *Arkin* because the Defendant and one of the named Plaintiffs reside in Washington—not Cook County.

Class counsel does not name the only plausible explanation for their strategy, for good reason: by filing the settlement in this Court, class counsel hopes to secure significantly more money than the courts with parallel litigation. Plaintiffs' request for 46% fees would have been dead on arrival in the Ninth Circuit district courts, like those presiding over *Rogers* and *Smith*. Ninth Circuit court "typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *see also Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (rejecting a fee award of 30%). And in the Northern District of Illinois, the court "must do [its] best to recreate the market by considering factors such as actual fee contracts that were privately negotiated for similar litigation, information from other cases, and data from class-counsel auctions." *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599 (7th Cir. 2005). This approach would have required careful and intricate inquiry into this litigation to determine a fair fee, and the ceiling for such an award would likely have been 33% of the *net* fund. *See Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 502-03 (N.D. Ill. 2015) (listing cases and discussing 30–33% as typical for the first ten million dollars of recovery in class cases, with the overall percentage decreasing as recovery increases). There was virtually no chance class counsel would have absconded with 46% of the net common fund in federal court.

By filing a new suit in this Court, class counsel secured one material change—shifting recovery from class members to themselves. At worst, class counsel likely figured it would claim a 33% fee award under Illinois' "apparent benchmark" for class action settlements. *Arkin*, 38 F.4th at 1011. They likely reckoned that the possibility of a busy court—acting without the requirements

of Federal Rule 23 and the Class Action Fairness Act—would approve even more, as class counsel frequently has. *See* Pl. Fee. Mot. at 7-8; *see also Clark*, 2018 IL App (1st) 172041 ¶¶ 97-98 (Mason, J., concurring) (criticizing the trial court for its "uncritical acceptance of an award of 39%" for a TCPA settlement). As in *Arkin*, forum shopping here appears to be an "ethical violation" for "subordinating the interests of the class for … attorneys' fees." *Arkin*, 38 F.4th at 1012. This Court should recognize this litigation for what it is, refuse to enable such self-dealing acts, and preserve more of the settlement fund for where it belongs—in the hands of class members.

B. This Court may sustain the Objection for forum shopping alone.

Having satisfied an inference of improper forum shopping, this Court may sustain Chidiac's Objection on these grounds.

First, as the Illinois Supreme Court remarked in *Palos Cmty. Hosp. v. Humana Ins. Co., Inc.*, trial courts "may rely on [their] inherent authority to enter any orders necessary to prevent abuse or manipulation of the" legal system. 2021 IL 126008 ¶ 35, 183 N.E.3d 677, 685 (Ill. 2021). Forum shopping like class counsel did here—by filing this case to avoid federal court scrutiny of the settlement—"ought to be discouraged with all the vigor at a court's disposal." *Laine v. Morton Thiokol, Inc.*, 124 F.R.D. 625, 628 (N.D. Ill. 1989). This is especially so in class actions where such forum shopping benefits class counsel's pockets at the expense of the class they purport to represent, and otherwise serves no legitimate strategic benefit to the class. *See Arkin*, 38 F.4th at 1011-12.

Second, the Court may also sustain the Objection on forum shopping because of the self-dealing behavior between the Parties to evade federal scrutiny of the settlement and fee award. As the Illinois Supreme Court remarked in *Steinberg v. System Software Associates, Inc.*, the presence of collusion is a seminal factor in determining the propriety of a class settlement. 306 Ill. App. 3d

157, 163 (1999). "When parties are negotiating settlements, the court must always be mindful of the danger … that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees." *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d at 333 (citing *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)). Here the decision to file a complaint and near-instantaneous settlement in this Court suggests possible collusive behavior like that admonished by the Eleventh Circuit in *Arkin*, which also involved a refiling in Illinois state court to secure an outsized fee award.

The Court need not find that collusion or self-dealing occurred. It should simply ensure that gamesmanship not be rewarded, and it can do this by awarding the same attorneys' fee award class counsel would have likely gotten without refiling their suit: about 25%.

III. Comity suggests the court should employ a 25% benchmark, but the Court should stay its fee decision pending submission of hours.

Independently, the Court should apply Ninth Circuit caselaw when determining fees in this nationwide settlement and award approximately 25% in attorneys' fees for the sake of interstate comity. Illinois courts define comity as "giving respect to the laws and judicial decisions of other jurisdictions out of deference." *Combined Ins. Co. v. Certain Underwriters*, 356 Ill. App. 3d 749, 754 (Ill. 2005). It requires that a "state court stay its hand in favor of a federal case which ha[s] been filed first, involved the same parties and facts, and was making substantial progress toward a conclusion." *McClenney v. Winemaster*, 2019 IL App (1st) 190233-U ¶ 30 (unpublished).

Such a scenario exists here, because the parallel federal claims were all filed before this case, involve the same parties and facts, and those forums are where the litigation was actually pursued. The most appropriate forum to defer for comity is the Western District of Washington because *Rogers*, No. 21-cv-823, is the oldest case still pending on the date Plaintiffs filed their

redundant lawsuit in this Court to win more fees. Moreover, this court adjudicated two motions to dismiss and, as Plaintiffs admit, it was the site of the "substantial discovery." *Cf. Am. Home Assur. Co. v. Nat'l-Std., LLC*, 2016 IL App (1st) 151363-U ¶ 61 (1st Dist. Aug. 22, 2016) (unpublished).

All five federal actions have been dismissed, so the Court cannot dismiss the case in favor of those forums, but it should attempt to apply the law of the first-filed *Rogers* action when evaluating the attorneys' fee request. That court subscribes to the Ninth Circuit's "benchmark" of 25% fees in class action cases, which is the most likely outcome for class counsel had Plaintiffs motioned for settlement approval there. *Powers*, 229 F.3d at 1256. Accordingly, the appropriate fee award in this case—or at least the best initial benchmark, since the Court lacks any hourly accounting from class counsel—is 25%, about $4,718,750.[6]

CONCLUSION

Because this litigation was forum shopped and/or because the fee request is neither fair nor reasonable, this Court should SUSTAIN this Objection, ORDER Plaintiffs to submit a sworn hours log of class counsel's work on this case, and DENY IN PART Plaintiffs' motion for fees.

Dated: July 31, 2024

/s/ M. Frank Bednarz

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[6] Using the *Pearson* logic, after the $3,000,000 payment to the claims administrator there is $18,875,000 left to split between the class and class counsel. Awarding 25% of that to class counsel results in a fee of $4,718,750.

CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Objection via the ECF system for this Court and the contemporaneously-filed declarations of Nicholas Chidiac, and exhibits thereto, thus effecting service on all attorneys registered for electronic filing.

Additionally, he caused to be served via First-Class mail a copy of this Objection upon the following:

Keogh Law, Ltd., 55 W. Monroe, Ste. 3390 Chicago, Illinois 60603	Emily C. Eggman, Dentons US LLP 233 S. Wacker Dr. Ste. 5900 Chicago IL 60606

Dated: July 31, 2024

/s/ M. Frank Bednarz