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

GERALDINE DONAHUE; SADIKI LAWRENCE; ONEEB REHMAN; MAT JESSOP; AARON HUFFMAN; RYAN ARTMAN; and SHANNON ALATALO, individually and on behalf of a class of other similarly situated individuals, Plaintiffs, v. EVERI PAYMENTS, INC.; and EVERI HOLDINGS, INC., Defendants.	Case No. 18-CH-15419 Hon. David B. Atkins

PLAINTIFFS' MOTION & MEMORANDUM IN SUPPORT OF
APPROVAL OF ATTORNEYS' FEES & SERVICE AWARDS

Dated: September 28, 2020

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Pursuant to 735 ILCS 5/2-801 and the Court's August 20, 2020 Order, Class Representatives Geraldine Donahue, Sadiki Lawrence, Oneeb Rehman, Mat Jessop, Aaron Huffman, Ryan Artman, and Shannon Alatalo and Class Counsel at Hedin Hall LLP and Scott D. Owens, P.A. respectfully move for the Court's approval of Service Awards and a Fee Award in connection with the Parties' preliminarily approved Settlement.[1]

INTRODUCTION

In this consumer class action, the Class Representatives allege that Defendants Everi Payments, Inc. ("Everi Payments") and Everi Holdings, Inc. ("Everi Holdings") (collectively, "Defendants" or "Everi" and collectively with Plaintiffs the "Parties") provided consumers at various casinos and other gaming establishments with point-of-sale receipts revealing the first four digits (in addition to the last four digits) of their debit and credit cards in violation of the Fair and Accurate Credit Transaction Act, 15 U.S.C. §1681c(g)(1) ("FACTA"). The operative Second Amended Class Action Complaint seeks statutory damages for Plaintiffs and the Settlement Class. Everi vigorously denies Plaintiffs' allegations.

After over two years of contentious litigation, involving multiple cases proceeding in various state and federal courts throughout the country[2], the Parties have reached a comprehensive class-wide resolution to this Action, subject to the Court's approval. The cornerstone of the Settlement is the all-cash, non-reversionary Settlement Fund that Everi has agreed to establish in

[1] Unless otherwise defined herein, all capitalized terms have the same force, meaning and effect as ascribed in Section 2 ("Definitions") of the Settlement Agreement.

[2] Specifically, this case is a continuation of numerous related actions previously pending in state courts in Nevada and Florida and in federal district courts sitting in the Southern District of Florida, the Middle District of Florida, and the Northern District of Illinois. As a negotiated term of the Settlement, the Parties agreed to effectuate the Settlement in the Circuit Court of Cook County, Illinois in light of questions concerning the existence of Plaintiffs' constitutional standing to bring these claims in those other jurisdictions. *See Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 728 (7th Cir. 2016) ("This case asks whether the violation of a statute, completely divorced from any potential real-world harm, is sufficient to satisfy Article III's injury-in-fact requirement. We hold that it is not."); *Muransky v. Godiva Chocolatier, Inc.*, 939 F.3d 1278, 1279 (11th Cir. 2019) (granting petition for rehearing to determine the issue of whether the plaintiff has standing to pursue his FACTA claim); *Kirchein v. Pet Supermarket, Inc*., 297 F. Supp. 3d 1354, 1360 (S.D. Fla. 2018) (dismissing the case without prejudice for lack of subject matter jurisdiction). By effectuating the Settlement in this Illinois state-court forum, which is unconstrained by the jurisdictional limitations of Article III of the U.S. Constitution or any similar analogue under the Illinois constitution, the interests of the Parties — and, most important, of the unnamed members of the Settlement Class — are no longer susceptible to the potential ramifications of the court presiding over the settlement determining that it lacks jurisdiction to approve the settlement. Thus, seeking approval of the Settlement in this forum will enable Settlement Class to obtain the substantial benefits provided by the Settlement as quickly as possible.

the amount of $14,000,000.00 (fourteen million and 00/100 dollars), from which each claiming Settlement Class member will receive a pro rata share (after all Settlement Administration Costs and any Fee Award and Service Awards approved by the Court are deducted). Each Settlement Share will be paid by check delivered to the Settlement Class Member's postal address. No portion of the $14 million Settlement Fund will revert back to Everi.

Additionally, the Settlement provides wide-ranging injunctive relief to all Settlement Class Members. The Settlement requires Everi Payments to make changes to its business practices with respect to the printing and providing of customer-copy cash-advance transaction receipts related to transactions involving Everi Payments' CashClub® technology, including to program its equipment to not print any digits of the bank identification number (BIN) in a field on the consumer receipts labeled "BIN".

The Settlement is the product of a robust pre-filing investigation, hard-fought litigation, and a comprehensive exchange of discovery concerning every aspect of this case. For over the past two years, Plaintiffs and their counsel have litigated 14 separate actions in six different state and federal courts throughout the country (against both Everi and many of its casino clients), taken and defended numerous depositions, exchanged and reviewed voluminous written and electronic discovery, retained and conferred with experts, participated in numerous court hearings, and briefed dozens of complex motions at every stage of litigation (including motions for summary judgment and class certification and various pretrial motions). The considerable time and resources that Plaintiffs and their counsel devoted to this litigation, in advance of ever discussing settlement with Everi, put them in a strong position to meaningfully assess the strengths and weaknesses of the Settlement Class's claims and the risks posed by continued litigation, and to ultimately negotiate a fair, reasonable, and adequate resolution on behalf of the Settlement Class.

Settlement negotiations were also lengthy and highly contentious, involving months of arms-length discussions between the Parties, three in-person mediations between Plaintiffs and Everi's clients before well-respected mediators, and most recently a 10-hour in-person session between Plaintiffs and Everi before Randall Wulff of Wulff Quinby Sochynsky in January of this

year. Although the Parties ultimately agreed on the principal terms of the Settlement Agreement shortly after mediating before Mr. Wulff, the formal Settlement Agreement was not executed until Class Counsel first obtained additional discovery to confirm the size and scope of the Settlement Class and selected a proposed Settlement Administrator to administer the settlement after procuring estimates from multiple class action administration companies.

The Settlement provides meaningful monetary and non-monetary relief to Settlement Class Members in a timely and efficient manner, while avoiding several substantial risks of non-recovery that continued litigation would have posed.

The Settlement's Notice Plan commenced on September 4, 2020 and Notice has been sent directly to all potential Settlement Class Members by postal mail and e-mail. To date, no Settlement Class Member has filed an objection to the Settlement, over 122,000 Settlement Class Members have already submitted claims, and many additional claims are expected to be submitted by Settlement Class Members between now and the February 1, 2021 claims-filing deadline.[3]

Over the past nearly three years, Class Counsel invested over five thousand hours of time and significant resources, monetary and otherwise, investigating, developing, and prosecuting these claims and negotiating the Settlement on behalf of the Settlement Class – a high-risk undertaking that no other attorneys were willing to take on and which ultimately produced an extraordinary result for numerous consumers across the country. The Class Representatives likewise played an invaluable role in this action by assisting their counsel at every stage of the proceedings, including by providing counsel with key documents and information regarding their claims, reviewing pleadings and other filings in the case, submitting declarations during the litigation and the settlement process, staying in regular contact with counsel and abreast of the proceedings, and taking an active role in negotiating the Settlement. Class Counsel continue to devote substantial time and resources to this action on a daily basis – including overseeing the notice and administration process, fielding Settlement Class Members' inquiries concerning the

[3] Settlement Class Members have until February 1, 2021 to submit claims, and Class Counsel has instructed the Settlement Administrator to send reminder e-mails to Settlement Class Members so that all Settlement Class Members who wish to submit claims are able to do so.

Settlement (dozens to date), and assisting Settlement Class Members file claims – and Class Counsel will continue to do so until the Settlement administration process concludes and all settlement proceeds have been paid to Settlement Class Members.

Based on the substantial amount of time and other resources that Class Counsel and the Class Representatives devoted to this matter, the significant and atypical risks faced at the outset of the case and for the duration of the litigation, and the excellent result ultimately obtained for the Settlement Class, the Class Representatives respectfully request that the Court award Service Awards of $2,000 to each of the seven (7) Class Representatives ($14,000 in total) and a Fee Award to Class Counsel of 40% of the Settlement Fund (or $5,600,000), inclusive of Class Counsel's over $80,000 in out-of-pocket litigation expenses.

As detailed below, the requested Service Awards and Fee Award are well supported under governing Illinois law, and the requested Fee Award would both fairly compensate and adequately reward Class Counsel for performing an enormous amount of work and achieving an excellent result in a case rife with risk.

FAIR AND ACCURATE CREDIT TRANSACTIONS ACT

FACTA was passed by Congress and signed into law in 2003, with the primary goals of reducing the risk of identity theft, *see Redman v. Radioshack Corp.*, 768 F.3d 622, 639 (7th Cir. 2014) ("identity theft is a serious problem, and FACTA is a serious congressional effort to combat it."), and protecting the privacy of cardholders' account information. *See Creative Hospitality Ventures v. U.S. Liab. Ins. Co.*, 655 F. Supp. 2d 1316, 1333-34 (S.D. Fla. 2009), *rev'd in part on other grounds*, 444 Fed. App'x 370 (11th Cir. 2011).

To accomplish its goals of reducing the risk of identity theft and protecting cardholder privacy, FACTA requires merchants to redact certain information an identity thief might otherwise find and use from debit and credit card transaction receipts. *Redman*, 768 F.3d at 626 ("the less information the receipt contains the less likely is an identity thief who happens to come upon the receipt to be able to figure out the cardholder's full account information."). Specifically, FACTA states in pertinent part:

> Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

15 U.S.C. §1681c(g)(1). This provision is commonly known as the "truncation requirement."

Thus, FACTA is aimed at reducing identity theft and protecting consumer financial privacy by requiring merchants to eliminate certain personal financial information from credit and debit card transaction receipts. *Redman*, 768 F.3d at 639 ("identity theft is a serious problem, and FACTA is a serious congressional effort to combat it"). And the statute is more important today than ever before: because consumers' use of debit and credit cards to make purchases has only steadily increased since FACTA's enactment in 2003, so too has the importance of the truncation provision in protecting consumers' identities and financial privacy.[4]

To encourage private litigants to enforce FACTA's requirements, Congress incorporated FACTA into the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"), which entitles a successful plaintiff to, *inter alia*, statutory damages for any "willful" violation of the law. *See Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1306 (11th Cir. 2009) (citing 15 U.S.C. § 1681n(a)(1)(A) and (2)).

BACKGROUND

I. Nature of the Action[5]

As alleged in the Complaint, Everi provides, among other things, debit and credit card cash advance transaction services to gamblers at thousands of casino, gaming and other wagering establishments across the country and the world. Everi is the principal merchant in each cash-access transaction that a patron performs at each establishment where Everi's services are

[4] "Credit Cards are the Preferred Payment Method: Survey", http://nypost.com/2015/07/12/credit-cards-are-the-preferred-payment-method-survey/ (last accessed Sept. 25, 2020) (stating that "when consumers pay for purchases today… 42 percent use debit cards and 38 percent use credit cards, while only 17 percent use cash and 3 percent use checks").

[5] This section includes allegations from Plaintiffs' Second Amended Complaint.

provided, and Everi's clients (the owners and operators of these underlying establishments) act as Everi's agent in providing such services to patrons.

Acting as the principal merchant, Everi provides – either directly or through its gaming establishment clients (with whom it contracts) acting as its agents – various cash-access services at thousands of points-of-sale located at its clients' gaming establishments across the country – including by dispensing cash withdrawn from its proprietary automated teller machines leased to its clients ("ATMs") and by processing credit and debit card cash-advance transactions on electronic terminals (also owned by Everi and leased to its clients) located at points-of-sale ("POS") in its clients' gaming establishments.

The Class Representatives allege that Everi and/or its subsidiaries or agents uniformly printed receipts for patrons in connection with cash-access transactions, and in connection with each such transaction uniformly mandated and required, pursuant to uniform policies and procedures, that each of its clients, as its agents, provide the printed receipt to the patron with whom Defendants performed the transaction at the point-of-sale transaction location – i.e., immediately upon receipt of credit card or debit card payment. Class Representatives further alleged that such printing of receipts was done in violation of FACTA, and that these violations were committed by Defendants willfully, and despite Defendants' knowledge of FACTA and their obligation to keep consumers safe from identity theft and other financial crimes in areas that are historically rife with such crimes.

Throughout the litigation Everi rejected this theory of liability, contending that its receipt printing practices did not violate FACTA, and that even if they did, the violations were not willful and that Class Representatives would not be entitled to statutory damages. Everi also contended that the Class Representatives lacked standing to proceed with their FACTA claims in federal court. Through its counsel, Everi further advised Class Counsel that it would exhaust all appeals as to any adverse findings or rulings on each of the defenses it raised to the Class Representatives' claims. Thus, absent the Settlement, the outcome of this litigation would turn on whether the Class Representatives had standing, whether Everi's receipt printing practices were both legally and

factually in violation of FACTA and if so, whether those violations were willful—and relief to the class (if any were ultimately obtained) would be delayed for years while this and the Related Cases worked their way through various appellate courts at the state and federal level throughout the country.

If any award were ultimately obtained and thereafter affirmed subsequent to lengthy appellate proceedings, any monetary relief to the Class would still depend on Everi's financial viability which is currently uncertain in light of the present pandemic-related circumstances; and logically its financial viability and ability to satisfy a judgment after years of appeals would be even more uncertain.

II. Pre-Filing Investigation

Beginning in early 2018, Plaintiffs' counsel conducted a comprehensive pre-filing investigation concerning every aspect of the factual and legal issues underlying the claims alleged in this matter. (Hedin Decl. ¶¶ 12-13; Hall Decl. ¶¶ 12-13; Owens Decl. ¶¶ 14-15.) These extensive pre-filing efforts included, among other things:

A. Researching the nature of Defendants' businesses and any relationship between them, including any subsidiaries or related entities;

B. Interviewing multiple consumers that utilized the quasi-cash or cash disbursement systems operated by Defendants; inspecting and analyzing copies of receipts provided to consumers incident to their utilization of the quasi-cash or cash disbursement systems; and meticulously reviewing records provided the Class Representatives;

C. Researching changes in Defendants' business practices over the statutory period and potential class period, including reviewing comments and public statements from Defendants' executives, employees and customers concerning the company's consumer privacy and security practices (and changes in those practices over the course of this period), as well as hundreds of historical postings from consumers on social media and online complaint websites concerning their experiences at locations which utilize point-of-sale systems provided by Defendants;

D. Researching the nature of Everi's business, including its transaction and receipt-printing practices that it conducts at its casino clients' gaming establishments;

E. Visiting numerous of the gaming establishments operated by Everi's clients to investigate the facts underlying these claims

F. Research regarding Everi's transaction-processing and receipt-generation systems, and the purposes for which the field labeled "BIN" would be included

by Everi on its printed consumer transaction receipts;

G. Performing an in-depth analysis of each of the many versions of the Defendants' privacy policies, and other publicly accessible documents available on Defendants' websites at various points in time throughout the statutory period;

H. Researching the relevant law, assessing the likely outcome of certain appeals pertaining to FACTA pending in state and federal courts throughout the country, and examining the pertinent facts to assess the merits of a potential FACTA claim against Defendants and the defenses Defendants could be expected to assert thereto, including standing to bring a claim under FACTA and whether Defendants' conduct was willful;

I. Reviewing numerous pending cases and opinions/rulings, in order to gauge the likelihood of such proceedings impacting any FACTA claims brought against Defendants;

J. Surveying federal court dockets to locate and review any prior actions filed against Defendants or their affiliates under FACTA, and carefully analyzing court filings in any similar cases to identify Defendants' expected defenses to any FACTA action brought by Class Counsel and to gauge Defendants' likelihood of success on each anticipated defense;

K. Investigating Defendants' financial conditions and assessing their ability to satisfy a judgment for class-wide statutory damages at trial; and

L. Exchanging extensive correspondence with the Class Representatives, meticulously reviewing various documents, communications, and ESI provided to Class Counsel by the Class Representatives concerning their potential claims against Defendants for violation of FACTA as well as their fitness and adequacy to serve as a class representatives, assessing the individual and class-wide viability of the Class Representatives' claims, and ultimately executing engagement agreements with the Class Representatives concerning the prosecution of FACTA claims against Defendants on their behalf and on behalf of a putative class.

(*See* Hedin Decl. ¶¶ 12-40.)

As a result of this thorough pre-filing investigation, Plaintiffs' counsel was able to develop a viable theory of liability for FACTA claims against Defendants, analyze the legal issues relevant to the merits of Plaintiffs' claims under that theory, assess the likelihood of Defendants successfully asserting multiple potential defenses in multiple jurisdictions, and ultimately prepare complaints against Defendants aimed at maximizing the likelihood of certifying a class and recovering meaningful class-wide relief. (*Id.* ¶ 13.)

III. Litigation in Multiple Courts

On December 12, 2018, Plaintiff Geraldine Donahue filed a Class Action Complaint in this Court to initiate the putative class action lawsuit entitled *Donahue v. MGM Resorts International,*

Inc., which was subsequently amended to substitute in Everi as the defendants and thereafter became entitled *Donahue v. Everi Holdings, Inc., et al.*, Case No. 18-CH-15419 (the "Action"). The operative Second Amended Class Action Complaint in the Action alleges claims against Defendants for printing customer transaction receipts bearing more than the last five (the maximum allowed) digits of credit and debit card numbers in violation of FACTA, on behalf of a nationwide class of individuals who engaged in cash access transactions processed by Everi Payments at a casino where Everi Payments's cash-access services are provided.

At the time Plaintiff Donahue commenced this Action, the issues in this Action had already been litigated for nearly a year in other actions pending in other jurisdictions. Beginning in 2018, Plaintiffs Sadiki Lawrence, Oneeb Rehman, Mat Jessop, Aaron Huffman aka Aaron Huff, Ryan Artman, and Shannon Alatalo also filed the following putative FACTA class actions against Everi and certain of Everi Payments' customers, in state and federal courts throughout the country (the "Related Actions"), including:

a. *Sadiki Lawrence v. South Florida Racing Association, LLC*, No. 2018-010657-CA-01, 11th Judicial Circuit, Miami-Dade County;
b. *Sadiki Lawrence v. South Florida Racing Association, LLC d/b/a "Hialeah Park"*, a Florida limited liability company, No. 1:18-cv-24264-RS, U.S.D.C. Southern District, Miami Division;
c. *Oneeb Rehman v. Dania Entertainment Center, LLC d/b/a "The Casino at Dania Beach"*, No. CACE-18-003760, 17th Judicial Circuit, Broward County;
d. *Oneeb Rehman v. Everi Holdings Inc., et al.*, No. 18-cv-62481-DPG, U.S.D.C. Southern District, Fort Lauderdale Division;
e. *Mat Jessop v. Penn National Gaming, Inc.*, No. 2018-CA-001520-16-K, 18th Judicial Circuit, Seminole County;
f. *Mat Jessop v. Penn National Gaming, Inc., et al.*, No. 6:18-CV-01741-RBD-DCI, U.S.D.C. Middle District, Orlando Division;
g. *Aaron Huff, et al. v. Marnell Gaming, LLC, et al.*, No. A-18-784363-B, 8th Judicial District

Court, Clark County, Nevada;

h. *Aaron Huff, et al. v. Affinity Gaming, Inc., et al.*, No. A-18-784366-B, 8th Judicial District Court, Clark County, Nevada;

i. *Shannon Alatalo v. MGM Resorts International, et al.*, No. A-19-793066-C, 8th Judicial District Court, Clark County, Nevada;

j. *Ryan Artman, et al. v. Eldorado Resorts, Inc., et al.*, No. CV18-02155, 2nd Judicial District Court, Washoe County, Nevada;

k. *Ryan Artman, et al. v. Monarch Casino & Resort, Inc., et al.*, No. CV18-02134, 2nd Judicial District Court, Washoe County, Nevada;

l. *Aaron Huff, et al. v. Truckee Gaming, LLC, et al.*, No. CV18-02257, 2nd Judicial District Court, Washoe County, Nevada; and

m. *Aaron Huff, et al. v. Sierra Development Company, Inc., et al.*, No. CV18-02258, 2nd Judicial District Court, Washoe County, Nevada.[6]

Over the two years that followed and continuing through to present, Class Counsel devoted substantial time and other resources vigorously litigating this matter on behalf of the Class Representatives and the Settlement Class. Class Counsel performed, *inter alia*, the following work during the litigation:

A. Prepared, filed, and served comprehensive Class Action Complaints in multiple jurisdictions for violations of FACTA against Defendants on behalf of Class Representatives and a putative class of others similarly situated;

B. Performed extensive post-filing investigative research and analysis regarding numerous issues affecting the claims asserted against the Defendants, and the defenses thereto;

C. Protected the interests of the Settlement Class by ensuring any claim were preserved and did not lapse as a result of any applicable statutes of limitation;

D. Prepared and filed joint case management statements after conducting lengthy meetings and conferrals with Defendants' counsel concerning the topics set forth in Rule 26(f) (and similar state rules of procedure), and prepared and served Class Representatives' initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) in multiple cases;

[6] The Related Actions in which Everi was not named as a defendant involved subsets of the nationwide class in this Action.

E. Prepared and served multiple rounds of third-party discovery;

F. Prepared and served Class Representatives' responses and objections and gathered documents from the Class Representatives to be produced in response to multiple sets of comprehensive discovery requests served on the Class Representatives by Defendants;

G. Participated in meet-and-confer conferences over the course of several months with Defendants' counsel concerning the sufficiency of Defendants' responses and objections to Class Representatives' discovery requests, which ultimately facilitated an exchange of detailed and comprehensive responsive documents, electronically-stored information, and information bearing on the merits of the claims and on issues of class certification;

H. Negotiated mutually agreeable terms to govern the Parties' exchange of certain confidential materials in discovery in the litigation, and thereafter prepared and submitted a detailed stipulated protective orders for entry by numerous courts;

I. Meticulously reviewed and analyzed the documents and other responsive information and materials produced by Everi in response to Class Representatives' discovery requests, and prepared follow-up discovery requests to Everi concerning every aspect of the merits of the Class Representatives' claims and class certification-related issues;

J. Researched, vetted and retained multiple experts, and extensively conferred with said experts regarding their opinions and findings on numerous issues bearing on the merits of asserted claims, defenses, and on issues of class certification;

K. Prepared for and attended dozens of hearings throughout the country including on case dispositive motions;

L. Prepared for and attended multiple mediations;

M. Researched, conferred with and retained local counsel to assist in many jurisdictions where cases brought by Class Representatives were pending;

N. Researched and briefed numerous motions including motions to dismiss, for summary judgment, for class certification, and for various other pretrial relief; and

O. Took and defended numerous depositions including depositions of the Plaintiffs, Everi, Everi's representatives, and many of Everi's clients and their respective representatives.

Thus, as described above, this litigation presented several complex technical and procedural issues from the outset not typically present in FACTA actions, which required significant investigative efforts to adequately address. Moreover, during the litigation, Everi and its capable counsel presented novel and fact-intensive defenses to the merits that are likewise not

typically seen in other FACTA suits, including issues regarding the placement of the excess card number digits on the receipts at issue which were allegedly printed in violation of FACTA.

IV. Settlement Negotiations

In early 2019, Plaintiff Lawrence and one of Everi's clients agreed to attend mediation on April 26, 2019 before Jeffrey L. Grubman, a well-respected JAMS mediator. On March 31, 2019, as the Parties were preparing for mediation before Mr. Grubman, the U.S. Supreme Court issued its decision in *Frank v. Gaos*, 139 S. Ct. 1041 (2019), which vacated a federal district court's approval of a class action settlement and remanded for the district court to consider the plaintiffs' standing under Article III of the U.S. Constitution and thus its own subject-matter jurisdiction.[7] Class Counsel carefully studied the decision in *Frank* and assessed its potential impact on Plaintiffs' claims, many of which were pending in federal courts at the time.

Mediation before Mr. Grubman was conducted over the course of a full day on April 26, 2019 in Boca Raton, Florida. Although this initial mediation was unsuccessful, it nonetheless proved valuable as it enabled the respective sides to candidly exchange their respective settlement positions, to discuss potential settlement structures worth exploring in greater depth at future mediations, and for Class Counsel to request from Everi's counsel certain class-size information in order to facilitate continued settlement discussions going forward. Thus, shortly thereafter, on July 17, 2019, a second full day of mediation was held, this time before Terrence M. White of Upchurch Watson White & Max in Maitland, Florida.

Although this mediation was also unsuccessful, substantial progress was made in the negotiations, including in terms of potential settlement structures and the scope of potential settlement classes. Notably, none of the Related Actions were stayed pending the completion of the first two mediations, and these cases were accordingly extensively litigated while the mediations occurred. This included taking and defending numerous depositions, briefing

[7] *See Frank*, 139 S. Ct. at 1046 ("We have an obligation to assure ourselves of litigants' standing under Article III. That obligation extends to court approval of proposed class action settlements. A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing.").

substantive motions and motions for class certification, attending oral arguments in courts throughout the country, and performing numerous other litigation-related tasks.

Following the second mediation, the Parties engaged in another 6 months of hard-fought litigation across the 14 separate Related Actions, including by briefing class certification and summary judgment motions in the Florida actions, and motions to dismiss in the Nevada actions (which led to the initiation of multiple appeals). The Parties agreed to attend a third mediation on January 16, 2020 before Randall Wulff of Wulff Quinby Sochynsky, in an attempt to reach a global class-wide resolution of this Action between Plaintiffs and Everi that also would include the subset purported classes in the Related Actions. To focus their full attention on reaching a proposed settlement, the Parties stipulated to stays of the entire Litigation pending the outcome of the mediation before Mr. Wulff.

For several weeks leading up to the mediation, the Parties exchanged additional discovery pertaining to, *inter alia*, the contours and scope of potential settlement classes, electronically stored information pertaining to Defendants' records, and all potentially applicable policies of insurance providing coverage to Defendants for liability for the claims alleged. Additionally, leading up to mediation, the Parties exchanged comprehensive mediation statements outlining their respective settlement positions. Armed with these materials and the documents and information produced by Everi during discovery and at the prior mediations, as well as through the comprehensive pre- and post-filing investigations performed by Class Counsel, said counsel was able to intelligently assess the strengths and weaknesses of the Settlement Class's claims and Everi's defenses, the likelihood of prevailing at class certification, the size of the Settlement Class and the extent of potentially recoverable class-wide damages, and Everi's ability to satisfy a judgment.

On January 16, 2020, Class Counsel Frank S. Hedin and David W. Hall of Hedin Hall LLP, together with co-counsel Scott D. Owens of Scott D. Owens, P.A. and Keith Keogh of Keogh Law, Ltd., attended a full-day mediation session with Everi and its counsel in California, under the supervision of Mr. Wulff. After approximately ten (10) hours of contentious, arms'-length negotiations, the Parties were unable to reach a settlement but had made substantial progress in the

negotiations. Through the continued assistance of Mr. Wulff in the days following the mediation, the Parties ultimately reached an agreement on the principal terms of a proposed class-wide settlement in response to a mediator's proposal. The parties executed a binding term sheet setting forth the material terms of the proposed Settlement Agreement, the execution of which was conditioned upon Plaintiffs taking confirmatory discovery regarding, *inter alia*, the size and composition of the Settlement Class.

During the Parties' settlement discussions overseen by Mr. Wulff, the Parties and their respective counsel agreed that the most prudent course forward was to seek approval of the Settlement in the instant state-court forum unconstrained by the jurisdictional limitations of Article III of the U.S. Constitution, where it could be ensured that the presiding court has jurisdiction to approve the proposed Settlement and authorize the prompt disbursement of its substantial benefits to the members of the Settlement Class.[8]

Additionally, Class Counsel negotiated a tolling agreement in connection with the dismissal and refiling of Plaintiffs' claims that protects the Settlement Class Members' claims from any statute of limitations-based defenses that could potentially arise in the unlikely event the Settlement does not obtain final approval in the instant action pending in the Circuit Court of Cook County, Illinois.

In the weeks leading up to the multiple mediations in which the Parties participated, Class Counsel at Hedin Hall LLP, Keogh Law, Ltd., and Scott D. Owens, P.A., devoted nearly all of their time and resources preparing for the mediation, including by performing the following work:

> A. Thoroughly reviewed and analyzed Everi's production of key documents, electronically-stored information, and insurance coverage-related information that Class Counsel had required be produced by Everi in advance of the mediation, as well as continued to review the other sets of documents and information produced by Everi during discovery and obtained by Class Counsel in connection with their pre-filing and post-filing investigations;
>
> B. Performed extensive legal research and analysis concerning the merits of Everi's defenses, the likelihood of prevailing on a contested motion for class

[8] The Representative Plaintiff's counsel learned during their investigation that Everi printed and provided the allegedly FACTA-violative receipts to thousands of Illinois residents, including residents of Cook County, and including specifically Plaintiff Donahue.

certification, the size and scope of the Settlement Class, the damages potentially recoverable at trial, and Everi's ability to satisfy a class-wide judgment for those damages at trial;

C. Closely followed various appeals pending before the U.S. Courts of Appeals and the U.S. Supreme Court pertaining to FACTA and other legal issues capable of affecting this litigation or the Class Representatives' ability to recover damages from Everi on behalf of the Settlement Class; and

D. Communicated at length with the Class Representatives concerning the multiple mediations, their positions on settlement, and strategies to employ at the mediation.

Everi's counsel indicated to Class Counsel that given the financial resources at the company's disposal, any final decisions favorable to the Class Representatives or the Settlement Class would have been appealed by Everi. (*Id*.)

V. Confirmatory Discovery, Selecting a Settlement Administrator, and Preparing the Settlement Materials

After the mediations and in advance of formally executing the Settlement Agreement, Class Counsel continued negotiations with Everi's counsel over the remaining Settlement terms, prepared and executed a binding term sheet, initiated the proceedings in this Court to protect the interests of the Settlement Class in the wake of the Supreme Court's decision in *Frank v. Gaos*, and meticulously reviewed confirmatory discovery produced by Everi and devised and oversaw a competitive Settlement Administrator selection process. Specifically, between the mediations and the execution of the formal Settlement Agreement, Class Counsel performed the following work:

A. Engaged in comprehensive confirmatory discovery process;

B. Carefully confirmed other merits, class, and insurance-related details through careful analysis of materials produced by Everi in the litigation and in advance of and subsequent to the mediation;

C. Carefully studied the March 31, 2019 decision of the U.S. Supreme Court in *Frank v. Gaos*, 139 S. Ct. 1041 (2019) (vacating a federal district court's approval of a class action settlement and remanding for the district court to consider the plaintiffs' standing under Article III and thus the court's own subject-matter jurisdiction), and assessed the potential impact of the *Frank* decision on this litigation, including through lengthy discussions concerning the impact of *Frank*, by performing extensive research and analysis into the nature of the claims alleged in this litigation;

D. Negotiated a tolling agreement in connection with the dismissal and refiling of the Class Representatives' claims in order to protect the Settlement Class Members' claims from any statute of limitations-based defenses that could potentially arise in connection with the refiling of the case should final approval not be granted for any

reason;

E. Prepared, executed, and filed stipulations of dismissal without prejudice in multiple actions pending throughout the country, subject to the refiling of those claims in a consolidated complaint filed in a proper state court jurisdiction, pursuant to the term sheet executed between the Parties;

F. Coordinated a competitive bidding process to select a Settlement Administrator, in which four (4) nationally recognized and experienced class-action settlement administration companies submitted bids to administer the various components of the Settlement's Notice Plan, including the preparation of the Class Notices, Claim Form, and Settlement Website, overseeing the Settlement Fund, processing submitted claims, and disbursement of the Settlement Fund to the Settlement Class;

G. Reviewed and analyzed each of the estimates provided by potential Settlement Administrators, including by analyzing the costs and other differences between the detailed notice and disbursement plans devised by each potential administrator, and ultimately engaged Angeion Group to administer the Settlement;

H. Negotiated a maximum, not-to-exceed service fee for Angeion to charge to perform all of the work administering the Settlement through a number of discussions and negotiations;

I. Negotiated the remaining terms of the Settlement Agreement with Everi, including the non-monetary injunctive relief component of the Settlement, the duration of the claims-filing period, and the timing and procedure for Everi to deposit the Settlement Fund and for the Settlement Administrator to disburse the Settlement Fund to claiming Settlement Class Members upon final approval;

J. Separately negotiated each detail of the exhibits to the Settlement Agreement, and meticulously drafted and refined, through multiple rounds of revisions, the Class Notices, the Claim Form, the form and the specifications for the functionality of the interactive web-based claim submission page, the form of the Settlement Website, including the content of its various pages, and the script for the interactive IVR toll-free Settlement telephone number to ensure that each of these materials is easily understood by Settlement Class Members and fully comply with due process and all requirements of Section 2-801;

K. Drafted and executed the formal Settlement Agreement after several rounds of back-and-forth revisions by the Parties; and

L. Prepared and filed the operative consolidated Class Action Complaint on behalf of Class Representatives Geraldine Donahue, Sadiki Lawrence, Oneeb Rehman, Mat Jessop, Aaron Huffman, Ryan Artman, and Shannon Alatalo in the Circuit Court of Cook County, Illinois, County Department of the Chancery Division, and prepared and executed a waiver of service form for Everi to file in the Action pursuant to Illinois Code of Civil Procedure Section 2-213 in order to afford the Parties time to complete the confirmatory discovery process, select a Settlement Administrator, and prepare the formal Settlement Agreement.

VI. Obtaining Settlement Approval and Implementing the Notice and Settlement Administration Plan

Following the Parties' execution of the Settlement Agreement and the Class Representatives' commencement of this action in Cook County, Illinois Circuit Court, Class Counsel has continued to devote a substantial amount of time and other resources towards securing approval of the Settlement, overseeing the administration of the Settlement together with the Settlement Administrator, and fielding Settlement Class Member inquiries concerning the Settlement and the claims-filing procedure. (Hedin Decl. ¶¶ 44-45.) The work performed by Class Counsel in connection with the Settlement-approval process has included:

A. Preparing and filing the Motion for Preliminary Approval of the Settlement, together with the supporting exhibits and declarations of Class Counsel and the proposed order granting the Motion, and participating in the hearing on the Motion for Preliminary Approval;

B. Reviewing and making important modifications to the proposed content and functionality of the online claims-filing portal built by the Settlement Administrator on the Settlement Website to ensure that the portal is consistent with the specifications agreed upon by the Parties and approved by the Court;

C. Meticulously testing and reporting all bugs that were identified with the functionality of the claims-filing portal on the Settlement Website built by the Settlement Administrator, including by submitting numerous test claims with each possible combination of selections that Settlement Class Members could choose once the Settlement Website became live and the claims period commenced;

D. Coordinating the production of the relevant database files to the Settlement Administrator;

E. Reviewing and approving the proposed e-mail notices including subject lines to be sent to Settlement Class Members, which was carefully drafted to reduce the number of e-mails sent to the "spam" folders in the inboxes of Settlement Class Members, and reviewing and approving the proposed content of reminder e-mail notices sent to Settlement Class Members, consistent with the language used in the original e-mail notice sent to all Settlement Class Members; and

F. Fielding dozens of Settlement Class Member inquiries concerning the Settlement by e-mail, telephone and postal mail. In response to these inquiries, pursuant to the terms of the Settlement and this Court's order preliminary approving the Settlement, Class Counsel has answered Settlement Class Members' questions concerning the Settlement, advised Settlement Class Members of their right to file a claim, objection, and a request for exclusion under the Settlement, directed Settlement Class Members to the Settlement Website for additional information concerning the Settlement, walked Settlement Class Members through the process of filing claims online, advised Settlement Class Members of the projected per-claimant recovery under the Settlement, and e-mailed and mailed copies of the Settlement Agreement and Class Notice to Settlement Class Members. Numerous Class Member inquires continue to be received, and Class Counsel

continues to respond to each of them, on a daily basis, and Class Counsel expects this will continue until the conclusion of the Settlement approval process.

Class Counsel anticipate that it will expend a substantial amount of additional time (at least $200,000 to $300,000 in additional lodestar in Class Counsel's best estimation) and other resources on behalf of the Settlement Class between now and the end of the Settlement-approval process in this case. (Hedin Decl. ¶ 58; Owens Decl. ¶ 23.) The future work that Class Counsel anticipate performing includes preparing a motion for final approval of the Settlement, preparing responses to any objections to the Settlement that may be filed, traveling to and attending the final approval hearing set November 30, 2020, responding to future Settlement Class Member inquiries that continue to be received on a daily basis, reviewing any claims rejected as invalid or incomplete by the Settlement Administrator, advocating on behalf of any Settlement Class Members who submit claims that Class Counsel believe have been wrongfully rejected, ensuring that all settlement checks are promptly paid to all claiming Settlement Class Members after the Settlement becomes final, and ensuring that Defendants implement all changes in business practices and oversight procedures to fully effectuate the injunctive relief component of the Settlement and that the company otherwise complies with all terms of the Settlement Agreement upon its final approval.

TERMS OF THE SETTLEMENT

A copy of the Settlement Agreement was previously attached as Exhibit 1 to the Hedin Decl. submitted together with the Motion for Preliminary Approval, the key terms of which are summarized again as follows:

I. Settlement Class Definition

In its preliminary approval order, the Court provisionally certified the following Settlement Class:

> All persons in the United States who, at any time between February 16, 2016 and December 31, 2019, (i) engaged in at least one quasi-cash or manual cash disbursement transaction using a debit card or credit card at a point-of-sale in the United States or tribal lands, (ii) where such transaction was processed using Everi's CashClub® technology; and (iii) for which Everi Payments' system was

> programmed to generate a printed customer receipt that displayed four digits in a field on said receipt labeled "BIN".[9]

Settlement Agreement § 2.1.51; Preliminary Approval Order at ¶ 2.

II. Monetary Relief

The Settlement Agreement provides that Everi shall pay fourteen million dollars ($14,000,000.00) to establish the non-revisionary Settlement Fund.

A Settlement Class Member who submits a timely claim form (i.e., a "Claimant") will receive a *pro rata* share (i.e., a "Settlement Share") of the Settlement Fund, after first deducting from the Settlement Fund the Court-approved Settlement Administration Costs to the Settlement Administrator, any Fee Award to Class Counsel approved by the Court, and any Service Awards to the Class Representatives. The amount of each Settlement Share shall be the amount of the net Settlement Fund divided by the number of Settlement Class Members who submit Approved Claims. Regardless of the number of Approved Claims submitted, no portion of the Settlement Fund will revert back to Everi. Settlement Agreement § 4.2.7.

III. Non-Monetary Relief

Finally, Everi has agreed to implement and maintain changes to its practices going forward, to ensure compliance with FACTA. Settlement Agreement § 13. Specifically, as a continuing and future benefit to all Settlement Class Members, Everi has agreed that it will not program its equipment to generate printed customer receipts displaying more than the last 5 digits of the credit or debit card number (in any location or locations on such receipt) used in connection with any transaction involving its CashClub® technology in the future, absent a change in the law or other regulations that requires the printing of more than the last 5 digits of the credit or debit card number, including any requirement that the first four digits of the BIN be separately printed on a customer copy receipt. *Id.*

[9] The phrase "in the United States" encompasses any casino or gaming establishment with a physical location that exists within the 50 states, its territories, and includes any tribal lands within the United States.

IV. Notice Plan and Claims Process

Everi has agreed to pay from the Settlement Fund all Settlement Administration Costs. *See* Settlement Agreement § 2.1.53. As directed by the Preliminary Approval Order, on September 4, 2020, Angeion completed sending notice by e-mail, and by U.S. postal mail to any Settlement Class Members for whom e-mail addresses are unavailable. Settlement Agreement §6.7.4; Preliminary Approval Order at ¶ 25. Angeion has also established the website, www.everifactasettlement.com. The Settlement Website provides information about the Settlement and makes case-related documents available for download, such as the Settlement Agreement, Long-Form Notice, Claim Form, Preliminary Approval Order, and the Fee and Cost Application and Application for Service Awards. Settlement Class Members are also able to file claims electronically on a straightforward, easy-to-understand web-based form on the Settlement Website; on this form, each Settlement Class Member is able to submit a claim and provide the address to which their settlement check should be sent.

Attesting to the quality of the notice program negotiated and developed by Class Counsel, to date 122,587 Settlement Class Members have already filed claims. (Hedin Decl. at ¶ 47.)

V. Service Awards and Fee Award

Everi has agreed to pay from the Settlement Fund, Court-approved Service Awards to the Class Representatives and Fee Award to Class Counsel. *Id.* §§ 5.1-5.5. The amounts of any Service and Fee Awards were not part of the Parties' negotiation of the terms of the Settlement or Settlement Agreement. *Id.* § 5.6. The Settlement Agreement provides for Class Counsel to request Service Awards to each of the Class Representatives of up to $2,000 and a Fee Award to Class Counsel of up to 40% of the Settlement Fund. The Class Notices all inform Settlement Class Members of the maximum Service Awards and Fee Award that the Class Representatives and Class Counsel may request. *See* Settlement Agreement, Exs. B-C.

VI. Release

Upon the Court's entry of the Final Approval Order and Judgment, the Class Representatives and all Settlement Class Members who have not excluded themselves will have

fully, finally, and forever released, relinquished, and discharged Defendants and the other Released Parties from the Released Claims, i.e., all claims arising from or relating to the printing of customer-copy transaction receipts that displayed a four-digit number in a field labeled "BIN" in connection with Everi Payments' quasi-cash or manual cash disbursement services. *See* Settlement Agreement § 8.

THE REQUESTED SERVICE AWARDS SHOULD BE APPROVED

Because a named plaintiff is essential to any class action, service awards, also known as incentive awards, "are "justified when necessary to induce individuals to become named representatives." *Spano v. Boeing Co.*, No. 06-cv-743, 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016) (internal citation omitted) (approving incentive awards of $25,000 and $10,000 for class representatives); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992) (noting that incentive awards "are not atypical in class action cases . . . and serve to encourage the filing of class actions suits"). Additionally, by lending their names to this litigation, the Class Representatives opened themselves up to "scrutiny and attention," which in and of itself "is certainly worthy of some type of remuneration." *See Schulte*, 805 F. Supp. 2d at 600-01.

In this case, the Class Representatives are each well-deserving of a modest $2,000 Service Award given the vital and significant role that each of them played in this litigation. Even though no award of any sort was promised to any of the Class Representatives prior to the suit being filed or at any time thereafter, each of them nonetheless contributed their own time and effort in pursuing these claims on behalf of the Settlement Class—exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (*See* Hedin Decl. at ¶ 59; Hall Decl. at ¶ 57.) The Class Representatives participated in the investigation of the action and provided their personal information to Class Counsel to aid in their investigation and the preparation of the pleadings, participated in discovery and the litigation, reviewed pleadings and court filings, consulted with Class Counsel on numerous occasions, and provided feedback on a number of other filings including, most importantly, the Settlement Agreement. But for the Class Representatives' willingness to bring this action on a class-wide basis, to assist Class

Counsel with their investigation and the litigation, and to remain actively involved and engaged in the case up through settlement and beyond, the Settlement and the substantial benefits it provides to the Settlement Class would likely not have been possible. (*See* Hedin Decl. at ¶ 59; Hall Decl. at ¶ 57.)

Further, the modest amount of the Service Award requested by each Class Representative – $2,000 – is well within the range of reasonableness for such an award in a class action of this nature. In fact, the $2,000 Service Award requested for each Class Representative equates to just 0.01% of the total Settlement Fund—far less than the average incentive award granted in connection with class action settlements. *See, e.g., Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, U.S. Dist. LEXIS 35421, at *19 (N.D. Ill. Mar. 23, 2015) ("a study on incentive awards for class action plaintiffs (also conducted by Eisenberg and Miller) . . . found that the mean incentive fee granted in class actions overall is .161% [of the total recovery]") (citing Eisenberg & Miller, *Incentive Award to Class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A. L.Rev. 1303, 1339 (2006)). In fact, courts routinely approve service awards in amounts far exceeding the amount sought here. *See, e.g., Craftwood Lumber Co.*, U.S. Dist. LEXIS 35421, at *20 (awarding $25,000 incentive award); *Murray et al v. Bill Me Later, Inc.*, No. 12-cv-04789, Dkt. 78 (awarding $30,000 incentive awards to both class representatives).

Accordingly, a Service Award of $2,000 to each Class Representative (for a total of $14,000 for all 7 Class Representatives) is fair and reasonable and should be approved.

THE REQUESTED FEE AWARD SHOULD BE APPROVED

Class Counsel respectfully request the Court's approval of a Fee Award to Class Counsel of 40% of the Settlement Fund (or $5,600,000), inclusive of the $83,982.07 in out-of-pocket litigation expenses incurred by Class Counsel in prosecuting this litigation (for which no additional reimbursement is sought). (Hedin Decl. ¶ 56 & *id.*, Ex. B at 1.) As discussed below, the requested Fee Award is fair and reasonable in light of the work performed by Class Counsel and the recovery secured on behalf of the Settlement Class.

I. Class Counsel Should be Awarded the *Ex Ante* Market Rate for the Legal Services they Performed for the Benefit of the Settlement Class

Courts strongly encourage negotiated fee awards in class action settlements. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of the fee"). As such, it is well-settled that attorneys who, by their efforts, create a common fund for the benefit of a class are entitled to reasonable compensation for their services. *See Wendling v. S. Ill. Hosp. Servs.*, 242 Ill.2d 261, 265 (2011) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("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 attorney's fee from the fund as a whole")). "The Illinois Supreme Court has adopted the approach taken by the majority of federal courts on the issue of attorney fees in equitable fund cases," *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13 (1st Dist. 1992) (citing *Fiorito v. Jones*, 72 Ill.2d 73 (1978)), which is to permit "attorneys for the successful plaintiff [to] directly petition the court for the reasonable value of those of their services which benefited the class." *Id.* at 14 (citing *Fiorito*, 72 Ill.2d 73). This rule "is based on the equitable notion that those who have benefited from litigation should share in its costs." *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) (*citing Skelton v. Gen. Motors Corp*., 860 F.2d 250, 252 (7th Cir. 1988)).

"In deciding fee levels in common fund cases" such as the instant matter, courts must "'do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.'" *Sutton v.*, 504 F.3d at 692 (quotation omitted). In performing this inquiry, the Illinois Supreme Court has determined that "a trial judge has discretionary authority to choose a percentage[-of-the-fund] or a lodestar method[.]" *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d 235, 243–44 (1995)). Under the percentage-of-the-fund approach, the attorneys' fees awarded are "based upon a percentage of the amount recovered on behalf of the plaintiff class." *Brundidge*, 168 Ill.2d at 238. When applying the lodestar approach, the attorneys' fees to be awarded are calculated by determining the total amount of hours

spent by counsel in order to secure the relief obtained for the class at a reasonable hourly rate, multiplied by a "weighted" "risk multiplier" that takes into account various factors such as "the contingency nature of the proceeding, the complexity of the litigation, and the benefits that were conferred upon the class members." *Id.* at 240.

II. The Court Should Apply the Percentage-of-the-Fund Method in this Case

In this case, the Court should use the percentage of the fund method in determining an appropriate Fee Award to Class Counsel.

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); *see also McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 814–15 (E.D. Wis. 2009).

And in consumer 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 that the percentage-of-the-fund approach best yields the fair market price for the services provided by counsel to the class. *See 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 calculate Class Counsel's Fee Award using percentage-of-the-fund method. The percent-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*, 160 F.3d at 363, but it is also the means by which an informed Settlement Class and Class Counsel would have established counsels' fee *ex ante*, at the outset of the litigation. *See Kolinek*, 311 F.R.D. at 500–01 ("the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery"); *see also* Hedin Decl. ¶ 57 ("My firm devoted a significant portion of its total time and resources to this litigation over the past nearly three years and, as a result, was forced to forgo representing consumers in other matters that we otherwise would have taken on."). 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). *Brundidge*, 168 Ill.2d at 242; *Florin*, 34 F.3d at 566; *Synthroid*, 264 F.3d at 720-21.[10] And it is also simpler to apply. *Id.*; *see also, e.g., Kolinek*, 311 F.R.D. at 501 (percentage of the ultimate recovery method appropriate for awarding fees in Telephone Consumer Protection Act class action "because fee

[10] In this case for example, a lodestar approach would have encouraged 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, could have resulted in no recovery to the Settlement Class Members.

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"); *Ryan*, 275 Ill. App. 3d at 924.

Accordingly, Class Counsel respectfully requests that the Court adopt the percentage-of-the-fund approach in determining an appropriate Fee Award in this case.

III. The Court Should Approve a Fee Award to Class Counsel of 40% of the Settlement Fund (Inclusive of Costs Incurred)

In terms of the percentage to award, Class Counsel respectfully requests a Fee Award of 40% of the Settlement Fund (inclusive of all out-of-pocket costs incurred).

As a threshold matter, a fee award of 40% of the Settlement Fund is well within the range of fees typically approved by Illinois courts in consumer class action settlements generally. *See, e.g., Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, 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*, 786 F.2d at 324); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 599 (N.D. Ill. 2011) (same); *Meyenburg v. Exxon Mobil Corp.*, No. 05-cv-15, U.S. Dist. LEXIS 52962, at *5 (S.D. Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation"); *see also* Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 15.83 (William B. Rubenstein ed., 5th ed.) (noting that, generally, "50% of the fund is the upper limit on a reasonable fee award from any common fund").

In fact, in state and federal courts in Illinois, including in Cook County Circuit Court, 40% of the settlement fund has regularly been awarded to class counsel in consumer class action settlements. *See, e.g., Zepeda v. Intercontinental Hotels Group, Inc.*, No. 18-CH-2140 (Cir. Ct. Cook Cnty., Ill. 2018) (awarding 40% of common fund to class counsel as fee award in consumer class action settlement); *Svagdis v. Alro Steel Corp.* (Cir. Ct. Cook County, 17-CH-12566 (Cir. Ct. Cook County, Ill., 2018) (same); *Zhirovetskiy v. Zayo Group, LLC,* 17-CH-09323 (Cir. Ct. Cook County, Ill., 2019) (same); *McGee v. LSC Communications, Inc. et al.*, No. 17-CH-12818 (Cir. Ct.

Cook County, Ill., 2019) (same); *Sekura v. L.A. Tan Enters.*, No. 2015-CH-16694 (Cir. Ct. Cook Cty. Dec. 1, 2016) (same).

Significantly, in class action settlements arising under consumer protection statutes in Cook County Circuit Court in particular, class counsel who secures a non-reversionary settlement fund is typically awarded a fee of around 40% of the settlement fund, whereas class counsel who secures a reversionary settlement fund is typically awarded a fee of between 33% and 35% of the total settlement fund "made available" to the class. *Compare, e.g., Willis v. iHeartMedia In*c., No. 2016-CH-02455, August 11, 2016 (Ill. Cir. Ct. Cook Cnty.) (awarding class counsel fee of 40% of non-reversionary settlement fund in a consumer class action), *and Clark v. Gannett Co., Inc.*, No. 16 CH 06603 (Cir. Ct. Cook Cty. Nov. 14, 2016) (approving a 39% of non-reversionary $13.8 million common fund consumer class action settlement), *with Sterk v. Path, Inc*., No. 2015-CH-08609 (Cir. Ct. Cook Cnty, Ill.) (awarding class counsel 35% of reversionary settlement fund in a consumer class action), *and Sawyer et al. v. Stericycle, Inc. et al.*, No. 2015-CH-07190 (Cir. Ct. Cook County) (awarding class counsel 33% of reversionary settlement fund in a consumer class action).

Thus, in a case such as this, where counsel secured a $14 million non-reversionary common fund for the Settlement Class, expending thousands of hours in the process, a fee of 40% of the Settlement Fund aligns well with prior fee awards in similar cases in Cook County Circuit Court.[11]

Moreover, further underscoring the reasonableness of the requested 40% Fee Award in this case is the fact that here, unlike in many FACTA class action settlements, Class Counsel (1) faced numerous significant risks at the outset of the case, and nonetheless assumed those risks by expending substantial time and other resources investigating, prosecuting, and resolving the case; and (2) achieved an excellent result that will provide *meaningful* relief ($14 million on a non-reversionary basis) to the Settlement Class Members.

[11] Although not required, a lodestar cross check confirms that the requested fee award of 40% of the Settlement Fund is reasonable, as discussed in greater detail below (*see supra*, pp. 30-31). *See Brundidge*, 168 Ill.2d at 243–44 (explaining that a lodestar cross check is not required in Illinois, where the fee award sought is a percentage of the common fund).

A. This was High Risk and Undesirable Litigation, and Class Counsel Should be Rewarded for Having Devoted Substantial Time and Other Resources to it on Behalf of the Settlement Class

First, the requested Fee Award is particularly reasonable in this case given the atypical risks associated with the case at the time it was commenced.

At the time Class Counsel commenced the first of the Related Actions in 2018, numerous courts throughout the country had interpreted the United States Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) as depriving FACTA plaintiffs of Article III standing to pursue bare violations of the statute in federal court (i.e., the provision of a receipt with too many card digits), absent additional allegations of actual damage (e.g., identity theft). *See*, *e.g.*, *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016); *Bassett v. ABM Parking Services, Inc.*, 883, F.3d 776 (9th Cir. 2018). Additionally, in the midst of the litigation, one of the few federal appellate decisions in which Article III standing had been found to exist for such claims was reheard en banc and vacated, and replaced by a decision finding no Article III standing. *See Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019), *reh'g en banc granted, opinion vacated*, 939 F.3d 1278 (11th Cir. 2019). Thus, as this litigation progressed, it became increasingly clear that the federal courts presiding over many of the Related Cases lacked subject-matter jurisdiction to hear this dispute based on the reasoning of the Seventh, Ninth, and Eleventh Circuit Courts of Appeals. (Hedin Decl. ¶¶ 19, 39.)

In addition to challenging the Class Representatives' standing, Everi also asserted challenges to willfulness, and further indicated they would be challenging (and did in fact challenge) class certification wherever it was sought, while also seeking to decertify any classes in the Related Cases that were certified. (*Id*. ¶ 39.) And in fact, in one of the Related Cases against one of Everi's casino clients, the presiding federal district court denied plaintiff's motion for class certification. (Hedin Decl. ¶ 17.) Thus, from the outset of the litigation and continuing up until the Parties reached the Settlement, there existed a substantial risk that Everi could prevail on any of these challenges in any of the Related Cases, leaving Class members in any such case without a cause of action and no entitlement to relief—and consequently leaving Class Counsel unpaid for

their work and without reimbursement for their costs.

Moreover, Defendants' counsel indicated during the course of the litigation that, had the case progressed, Defendants would have committed the substantial resources at its disposal to defending and litigating this matter at every stage of the proceedings, including through trial and appeal if necessary. (Hedin Decl. ¶ 39; Hall Decl. ¶ 39.)

In considering the reasonableness of a fee request in a contingency class action settlement, courts consider how the legal market would have assessed the case's risk and at its inception and, in turn, how the market's risk assessment would have affected a hypothetical *ex ante* fee negotiation between counsel and potential client. *See Goodell v. Charter Communications, LLC*, No. 08-cv-512-bbc, 2010 WL 3259349, at *1 (W.D. Wis. Aug. 17, 2010) ("The question is not how risky the case looks when it is at an end but how the market would have assessed the risks at the outset"). Here, both at the time Class Counsel began their pre-filing investigation into this matter and when they initiated the first action against Defendants nearly three years ago (Owens Decl. ¶ 14-16; Hedin Decl. ¶¶ 12-13), there were no other FACTA claims being prosecuted against Defendants by any other counsel, suggesting that this litigation was viewed as simply too risky to pursue by other counsel. And although Class Counsel and the Class Representatives plowed forward nonetheless – briefing and defeating numerous motions filed by Defendants seeking dismissal, taking and defending scores of depositions, traveling regularly cross country for hearings, mediations, and other proceedings, initiating and defending multiple appeals, and ultimately negotiating the $14 million non-reversionary Settlement presently before the Court – in determining whether to meet Class Counsel's fee at the outset of this case, the Settlement Class would have known that no other firms had come forward to offer their services in this matter to the class or individual participants. Moreover, after Class Counsel commenced the litigation, no other counsel came forward to compete with Class Counsel for control of the litigation, to propose to the Court that it be appointed lead counsel at a lower fee structure, or to offer to share in the case's risk and expense with Class Counsel.

The market thus judged this to be a high-risk case. Competition for control is brisk when

lawyers think cases have significant potential to generate large recoveries and significant attorney's fees. *See In re Synthroid Marketing Litig.*, 325 F.3d 974, 979 (7th Cir. 2003). Thus, as Judge Easterbrook once observed: "Lack of competition not only implies a higher fee but also suggests that most members of the . . . bar saw this litigation as too risky for their practices." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013). That is exactly the case here. Other attorneys and firms chose to pass on offering representation to Settlement Class members in this case because they found it not worth the risk, firmly establishing that Class Counsel would have been able to obtain the requested fee of 40% of the Settlement Fund in an *ex ante* negotiation with the Settlement Class.

Moreover, despite the many serious risks of non-recovery to the Settlement Class and thus non-payment to Class Counsel described above, both at the outset and for the duration of the adversarial proceedings, Class Counsel nevertheless expended over five thousand hours of attorney time – valued at over $3.6 million using counsel's reasonable hourly rates[12] – investigating, prosecuting, and resolving the claims alleged in this case without any guarantee of reimbursement. (*See* Hedin Decl. ¶¶ 51-52 & *id.*, Ex. B at 1; Hall Decl. ¶¶ 51-52; Owens Decl. ¶¶ 18-21; Keogh Decl. ¶ 6; O'Mara Decl. ¶ 4; Rubel Decl. ¶ 8.) In fact, Class Counsel devoted a significant portion of their total time and resources to this litigation over the past nearly three years and, as a result, were forced to forgo representing consumers in other matters that they otherwise would have taken on. (Hedin Decl. ¶ 57; Owens Decl. ¶¶ 16, 20.)

Notably, Class Counsel's requested fee award of 40% of the Settlement Fund ($5,600,000) represents a multiplier of just 1.5 of their current lodestar ($3,665,865.00), firmly confirming the reasonableness of the requested Fee Award. Indeed, circuit courts in Cook County, Illinois

[12] The hourly rates used to compute Class Counsel's respective lodestars are the current hourly rates for these attorneys. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (recognizing "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise"); *LeBlanc-Sternberg v. Fletcher,* 143 F. 3d 748, 764 (2d Cir. 1998) ("The lodestar should be based on 'prevailing market rates' … and current rates, rather than historical rates, should be applied in order to compensate for the delay in payment.") (citation omitted). These rates are consistent with prevailing market rates for attorneys of comparable skill and experience practicing in this area of law, including in the Chicago legal market. Numerous courts have deemed Class Counsel's hourly rates to be reasonable in the course of approving fee awards in connection with prior class action settlements. *See, e.g., Kokoszki v. Playboy Enterpises, Inc*., No. 19-cv-10302-BAF (E.D. Mich.); *Liggio v. Apple Federal Credit Union*, No. 18-cv-1059-LO (E.D. Va.); *Farnham v. Caribou Coffee Co., Inc.*, No. 16-cv-295-WMC (W.D. Wisc.).

routinely grant fee requests that equate to lodestar multipliers several times greater than the 1.5 multiplier sought here, in recognition of the substantial risk assumed by counsel in taking on the matter at the outset. *See, e.g., Willis*, No. 2016-CH-02455; *Clark*, No. 16 CH 06603; *Sterk*, No. 2015-CH-08609; *Sawyer*, No. 2015-CH-07190. As the court in *Fauley v Metropolitan Life*, 2016 IL App. 2d 150236 (2016) explained in affirming a trial court's award of attorneys' fees in a class action settlement where the requested fee equated to slightly less than three times counsel's lodestar:

> [H]ad the trial court used the lodestar method, the effective multiplier would have been approximately 2.97, well within the range of multipliers used in other common-fund cases. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 (9th Cir. 2002) (a survey of multipliers showed a range from 0.6 to 19.6, with most ranging from 1 to 4, and a "bare majority" ranging from 1.5 to 3.0). We note that the multiplier here was also justified in light of the trial court's finding that class counsel accepted "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [MetLife]." *See Brundidge*, 168 Ill. 2d at 239-40 (to determine the proper multiplier, a court may consider "the contingency nature of the proceeding" and the complexity of the litigation).

Fauley v Metropolitan Life, 2016 IL App. 2d 150236, ¶59 (2016).

The instant litigation was likewise rife with risk from the outset, and yet Class Counsel's requested Fee Award is just 1.5 times their lodestar – further establishing the reasonableness of the requested fee. *See Shaun Fauley, Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59 (noting that in Illinois, lodestar multipliers of 3 are routinely approved as being "well within the range of multipliers used in other common-fund cases"); *Gambino v. Boulevard Mortg. Corp.*, 398 Ill. App. 3d 21, 68 (1st Dist. 2009) (finding a risk multiplier of 3 to be "eminently reasonable"); *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7 (1st Dist. 1992) (finding that a multiplier of three times the lodestar amount is reasonable); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052–54 (9th Cir. 2002) (surveying class actions nationwide and finding the average multiplier to be 3.32).

Additionally, Class Counsel expended $83,982.07 in out-of-pocket costs prosecuting this litigation, also without any guarantee of reimbursement. (Hedin Decl. ¶ 56 & *id.*, Ex. B at 1-2; Hall Decl. ¶ 55; Owens Decl. ¶ 22 & Hedin Decl., Ex. B at 3; Keogh Decl. ¶ 6 & Hedin Decl.,

Ex. B at 4; O'Mara Decl. ¶ 5 & Hedin Decl., Ex. B at 5; Rubel Decl. ¶ 8 & Hedin Decl., Ex. B at 6.) Class Counsel do not seek any additional reimbursement for these costs; in other words, the requested Fee Award of 40% of the Settlement Fund is inclusive of all expenses incurred.

Class Counsel should be rewarded for accepting the Class Representatives' cases and devoting such a substantial amount of time and resources investigating and prosecuting their claims on a class-wide basis in the face of the foregoing risks, many of which are not typically present in FACTA litigation. (*See* Hedin Decl. ¶ 39.)

B. The Outstanding Result that Class Counsel Achieved for the Settlement Class Further Supports the Requested Fee Award

Although this matter presented numerous atypical risks of non-recovery to the Settlement Class and thus non-payment to Class Counsel at the outset, Class Counsel confronted those risks head-on, ultimately achieving an excellent result for the Settlement Class.

As set forth above, pursuant to the Settlement Agreement, Everi has agreed to establish a $14,000,000 cash Settlement Fund from which each claiming Settlement Class Member will receive a pro rata share (after first deducting all Settlement Administration Expenses, Service Awards and a Fee Award). Settlement Agreement § 2.1.53. Regardless of the number of claims submitted, none of the $14 million Settlement Fund will revert back to Defendants. *Id.*

Although the Claims Deadline is not until February 1, 2021, as of today's date, Settlement Class Members have already submitted 122,587 claims. (Hedin Decl. ¶ 47.) Based on the current number of claims and Class Counsel's experience in prior similar cases, and assuming the requested Fee Award is approved, the per-claimant award is projected to be approximately $40 to $60), which will greatly exceed the per-claimant relief provided in many prior similar FACTA settlements. *See*, *e.g.*, *Katz v. ABP Corp.*, 2014 U.S. Dist. LEXIS 141223 at *2 (E.D.N.Y. Oct. 3, 2014) (FACTA class settlement that gives class members a choice to make a claim for $9.60 in cash or a coupon for $15 off of future purchases from defendant); *Hanlon v. Palace Entm't Holdings*, LLC, 2012 U.S. Dist. LEXIS 364 at *14-*15 (W.D. Pa. Jan. 3, 2012) (FACTA class settlement that provides the class with admission tickets to defendant's amusement park); *Todd v.*

Retail Concepts Inc., 2008 U.S. Dist. LEXIS 117126 at *16 (M.D. Tenn. Aug. 22, 2008) (FACTA class settlement providing a $15 credit on class members' next purchase of $125 or more); *Palamara v. Kings Family Restaurants*, 2008 U.S. Dist. LEXIS 33087 at *9-*10 (W.D. Pa. Apr. 22, 2008) (FACTA class settlement providing vouchers worth an average of $4.38 each to get appetizers, soup, desserts and other small menu items when visiting the defendant's restaurants in future); *Long v. Joseph-Beth Grp., Inc.,* No. 07- cv-00443 (W.D. Pa. May 5, 2007) (A class of 400,000 members could claim a $5 voucher). Thus, by any measure, the Settlement provides meaningful compensation to numerous consumers nationwide and is an excellent outcome for the Settlement Class.

Finally, Class Counsel note that, in addition to the monetary compensation that Class Counsel have obtained for the Settlement Class Members, the Settlement also provides meaningful injunctive relief to the Settlement Class, requiring Everi to implement and maintain changes to its practices going forward, to ensure compliance with FACTA. Specifically, as a continuing and future benefit to all Settlement Class Members, Everi has agreed that it will not program its equipment to generate printed customer receipts displaying more than the last 5 digits of the credit or debit card number (in any location or locations on such receipt) used in connection with any transaction involving its CashClub® technology in the future, absent a change in the law or other regulations that requires the printing of more than the last 5 digits of the credit or debit card number, including any requirement that the first four digits of the BIN be separately printed on a customer copy receipt. Settlement Agreement § 13.1. Given the scope of Everi's business and number of customers that it has across the country and the number of consumers that utilize its services, the injunctive relief provided by the Settlement will have an especially meaningful impact on the privacy of American consumers and should drastically reduce the amount of private financial data available to criminals and identity thieves. The presence of such robust non-monetary injunctive in a settlement is also useful in determining whether the fee award being sought is reasonable. *See Spano*, 2016 WL 3791123, at *1 ("A court must also consider the overall benefit to the Class, including non-monetary benefits, when evaluating the fee request") (citing

Beesley v. Int'l Paper Co., No. 06-cv-703, 2014 U.S. Dist. LEXIS 12037, at *5 (S.D. Ill. Jan 31, 2014)).

Class Counsel respectfully request that the Court approve a Fee Award of 40% of the Settlement Fund. For the reasons set forth above, the requested 40% Fee Award would both adequately reward and reasonably compensate Class Counsel for assuming the significant risks that this case presented at the outset and for nonetheless expending a substantial amount of time and other resources investigating, litigating, and negotiating a resolution to the case for the benefit of the Settlement Class over the course of nearly three years. *See, e.g., Willis*, No. 2016-CH-02455 (awarding class counsel fee of 40% of non-reversionary settlement fund in a consumer class action in Cook County Circuit Court); *Clark*, No. 16-CH-06603 (approving a 39% of non-reversionary $13.8 million common fund consumer class action settlement in Cook County Circuit Court); *see also* Herbert Newberg & Alba Conte, Newberg on Class Actions § 15.83 (William B. Rubenstein ed., 5th ed.) (noting that, generally, "50% of the fund is the upper limit on a reasonable fee award from any common fund").

CONCLUSION

For the foregoing reasons, Class Representatives and Class Counsel respectfully request that the Court approve Service Awards to the Class Representatives of $2,000 each (totaling $14,000) and approve a Fee Award of 40% of the Settlement Fund (or $5,600,000) to Class Counsel, inclusive of all out-of-pocket litigation expenses incurred.

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Respectfully submitted,

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