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

JAVIER VEGA, individually and on behalf of all others similarly situated, *Plaintiff*, v. MID-AMERICA TAPING & REELING, INC., an Illinois corporation, *Defendant*.	)	No. 2019-CH-1136 Hon. Angelo J. Kappas

PLAINTIFF'S MOTION & MEMORANDUM OF LAW IN SUPPORT OF APPROVAL OF ATTORNEYS' FEES, EXPENSES, & INCENTIVE AWARD

Plaintiff Javier Vega, by and through his attorneys, and pursuant to 735 ILCS 5/2-801, hereby moves for an award of attorneys' fees and expenses for Class Counsel, as well as an incentive award for Plaintiff as the Class Representative in connection with the class action settlement with Defendant Mid-America Taping & Reeling, Inc. In support of this Motion, Plaintiff submits the following memorandum of law.

Dated: October 28, 2022

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I. INTRODUCTION

The Settlement[1] that Class Counsel have achieved in this case is an exceptional result for Settlement Class Members, as it will provide them with hundreds of dollars in cash payments with no need to submit a claim form. The Parties' Agreement has established a Settlement Fund of $151,000.00 to provide each Settlement Class Member with an equal, *pro rata* distribution of the Settlement Fund for having their biometrics collected by Defendant Mid-America Taping & Reeling, Inc. ("Defendant") in alleged violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"). In addition to the substantial financial benefit to the Settlement Class Members, the Settlement also provides significant non-monetary relief designed to prevent the recurrence of the allegedly unlawful biometric collection and use practices at issue in this case.

The Court preliminarily approved the Settlement on September 7, 2022. Direct Notice of the Settlement commenced on October 7, 2022. As of the filing of this Motion, no Settlement Class Member has objected to the Settlement or requested to be excluded.

With this Motion, Class Counsel request a fee of 35% of the total Settlement Fund, amounting to $52,850.00, plus their litigation expenses. As explained in detail below, Class Counsel's requested fee award is justified given the excellent monetary and non-monetary relief provided under the Settlement, is consistent with Illinois law and fee awards granted in other cases in Illinois courts, and is also reasonable given the time Class Counsel have committed to resolving this litigation for the benefit of the Settlement Class Members.

[1] Unless otherwise indicated, capitalized terms have the same meaning as those terms are used in the Settlement Agreement ("Agreement"), which is attached as Exhibit 1 to Plaintiff's previously filed Motion for Preliminary Approval.

Both Class Counsel and the Class Representative devoted significant time and effort to the prosecution of the Settlement Class Members' claims,[2] and their efforts have yielded an excellent benefit to the Class. The requested attorneys' fees and costs and Incentive Award are amply justified in light of the investment, significant risks, and excellent results obtained for the Settlement Class Members in this four-year-old litigation, particularly given the substantial uncertainty regarding the state of BIPA when this Settlement was reached, and the continuous, ongoing shifts in the landscape of BIPA litigation. Plaintiff and Class Counsel respectfully request that the Court approve attorneys' fees and reasonable expenses of $53,456.02 and the agreed-upon Incentive Award of $5,000.00 for Plaintiff as Class Representative.

II. BACKGROUND

A. BIPA

BIPA is an Illinois statute that provides individuals with certain protections for their biometric information. To effectuate its purpose, BIPA requires private entities that seek to use biometric identifiers (e.g., fingerprints and handprints) and biometric information (any information gathered from a biometric identifier which is used to identify an individual) to:

(1) Inform the person whose biometrics are to be collected in writing that their biometrics will be collected or stored;

(2) Inform the person whose biometrics are to be collected in writing of the specific purpose and the length of term for which such biometrics are being collected, stored and used;

(3) Receive a written release from the person whose biometrics are to be

[2] (*See* Declaration of Evan M. Meyers ("Meyers Decl."), attached hereto as Exhibit 1, ¶ 14; Declaration of James X. Bomes ("Bormes Decl."), attached hereto as Exhibit 2, ¶¶ 9, 13-15; Declaration of Kasif Khowaja ("Khowaja Decl."), attached hereto as Exhibit 3, ¶ 6).

collected allowing the capture and collection of their biometrics; and

(4) Make publicly available a retention schedule and guidelines for permanently destroying the collected biometrics. 740 ICLS 14/15.

BIPA was enacted in large part to protect individuals' biometrics, provide them with a means of enforcing those statutory rights, and regulate the practice of collecting, using and disseminating such sensitive biometric information.

B. The Case and Procedural History

1. *Plaintiff's Allegations*

Defendant is an electronics parts provider with operations in Illinois. Plaintiff worked for Defendant at its facility in Glendale Heights, Illinois, and alleges that each time he clocked in and clocked out of work, he was required to provide his biometrics, i.e. scans of his fingers, in order to authenticate his identity for timekeeping purposes. Plaintiff has further alleged that in operating its timekeeping system Defendant has failed to comply with BIPA because Defendant: (1) failed to inform individuals prior to capturing their biometrics that it would be capturing such information; (2) failed to receive a written release for the capture of biometrics prior to such capture; (3) failed to inform the person whose biometrics were being captured of the specific purpose and length of term for which such biometrics are captured; and (4) failed to establish a publicly available retention schedule and guidelines for permanently destroying biometrics. Defendant denies any violation of or liability under BIPA.

2. *Procedural History and the Parties' Settlement Negotiations*

Plaintiff initiated this case in the Circuit Court of Cook County, Illinois on October 23, 2018. On June 24, 2019, the case was transferred to the Circuit Court of DuPage County, Illinois, where it was assigned to the Honorable Paul Fullerton. On February 7, 2020, Defendant moved to

dismiss Plaintiff's claims, arguing: (1) that Plaintiff's claims and class allegations were inadequately plead; (2) that Plaintiff's claims were time-barred; and (3) that Plaintiff's claims were preempted by the Illinois Workers' Compensation Act. Defendant also moved to stay the case pending the Illinois First District Appellate Court's resolution of *McDonald v. Symphony Bronzeville Park, LLC*. On May 11, 2020, Judge Fullerton granted Defendant's Motion to Stay and entered and continued Defendant's Motion to Dismiss. On November 10, 2020, following the Illinois First District Appellate Court's decision in McDonald, the stay was lifted.

Thereafter, the case was reassigned to this Court. On February 9, 2021, the Court granted Defendant's Motion to Dismiss and dismissed Plaintiff's Complaint without prejudice. On March 2, 2021, Plaintiff filed his First Amended Class Action Complaint. On April 13, 2021, Defendant moved to dismiss Plaintiff's First Amended Class Action Complaint. On December 8, 2021, the Court granted Defendant's Motion in part, finding that Plaintiff's class definition was plead with insufficient particularity. Plaintiff filed his operative Second Amended Class Action Complaint on February 10, 2022

The Parties subsequently agreed to attempt to resolve this case, and over a period of months, expended significant efforts over many months to reach a settlement, including but not limited to exchanging information regarding Defendant's timekeeping system, identifying potential class members, and participating in arm's-length negotiations. The Parties were able to agree upon the terms of a settlement which the Court preliminarily approved on September 7, 2022. Direct notice was disseminated to the Settlement Class Members by U.S. Mail on October 7, 2022.

III. THE SETTLEMENT

A. The Settlement Class Members Receive Excellent Monetary And Non-Monetary Relief Under The Settlement.

Class Counsel's prosecution of this litigation has culminated in this class-wide Settlement that provides exceptional monetary relief to the Settlement Class Members. The Settlement establishes a $151,000.00 Settlement Fund (Agreement, ¶ 50(a)), and each class member will receive – without the need for a claims process – an equal share of the fund after deductions of administration costs and the Court-approved attorneys' fees and incentive award. After payment of those costs, it is estimated that each Settlement Class Member will receive approximately $500.00.

The Settlement also provides valuable non-monetary relief to the Settlement Class. Defendant has represented that it no longer uses the finger scan timeclock that is the subject of the Litigation. (*Id*., ¶ 55). This additional relief benefits both the Settlement Class Members and future employees of Defendant.

B. Pursuant to the Settlement Agreement's Notice Plan, Direct Notice Has Been Sent To The Class Members.

Under the Settlement Agreement's Notice Plan, which has already gone into effect, direct notice has been provide by U.S. Mail to the Settlement Class Members. (Meyers Decl., ¶ 16). In addition, the Settlement Website is operational and makes available the detailed Long Form Notice and all relevant case information to Settlement Class Members, and permits the Settlement Class Members to submit a request for exclusion online if they so choose. To date, *no* Class Members have objected to the Settlement or elected to exclude themselves (*Id.*).

IV. ARGUMENT

A. The Court Should Award Class Counsel's Requested Attorneys' Fees.

Pursuant to the Settlement, Class Counsel seek attorneys' fees in the amount of $52,850.00, which amounts to 35% of the Settlement Fund, plus $606.02 in reimbursable expenses. (Agreement, ¶ 80). Such a request is well within the range of fees approved in other class actions and is fair and reasonable in light of the work performed by Class Counsel and the outstanding recovery secured on behalf of the Settlement Class Members. 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.").

In cases where, as here, a class action settlement results in the creation of a settlement fund, "[t]he 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) (citing *Fiorito v. Jones*, 72 Ill.2d 73 (1978)). That is, where "an equitable fund has been created, attorneys for the successful plaintiff may 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 an appropriate fee in such cases, "a trial judge has discretionary authority to choose a percentage[-of-the-recovery] 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-recovery 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. Alternatively, 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.

Here, Plaintiff submits that the Court should apply the percentage-of-the-recovery approach—the approach used in the vast majority of common fund class actions, including BIPA class actions. It is settled law in Illinois that the Court need not employ the lodestar method in assessing a fee petition. *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59. This is because the lodestar method is disfavored, as it not only adds needless work for the Court and its staff,[3] it misaligns the interests of Class Counsel and the Settlement Class Members. 5 Newberg on Class Actions § 15:65 (5th ed.) ("Under the percentage method, counsel have an interest in generating as large a recovery for the class as possible, as their fee increases with the class's take. By contrast, when class counsel's fee is set by an hourly rate, the lawyers have an incentive to run up as many hours as possible in the litigation so as to ensure a hefty fee, even if the additional hours are not serving the clients' interests in any way").

The lodestar method has been long criticized by Illinois courts as "increas[ing] the workload of an already overtaxed judicial system . . . creat[ing] a sense of mathematical precision

[3] *See Langendorf v. Irving Trust Co.*, 244 Ill. App. 3d 70, 80 (1st Dist. 1992), abrogated on other grounds by 168 Ill. 2d 235.

that is unwarranted in terms of the realities of the practice of law . . . le[ading] to abuses such as lawyers billing excessive hours … not provid[ing] the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered . . . [and being] confusing and unpredictable in its administration." *Ryan v. City of Chicago,* 274 Ill. App. 3d 913, 923 (1st Dist. 1995).

Conversely, the use of the percentage-of-the-recovery approach in common fund class settlements flows from, and is supported by, the fact that the percentage-of-the-recovery approach promotes early resolution of the matter, as it disincentivizes protracted litigation driven solely by counsel's efforts to increase their lodestar. *Brundidge*, 168 Ill.2d at 242. For this reason, a percentage-of-the-recovery method best aligns the interests of the class and its counsel, as class counsel are encouraged to seek the greatest amount of relief possible for the class rather than simply seeking the greatest possible amount of attorney time regardless of the ultimate recovery obtained for the class. Applying a percentage-of-the-recovery approach is also generally more appropriate in cases like this one because it best reflects the fair market price for the legal services provided by the class counsel. *See Ryan*, 274 Ill. App. 3d at 923 (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases") (citing *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255–56 (3d. Cir. 1985); *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). This approach also accurately reflects the contingent nature of the fees negotiated between Class Counsel and Plaintiff, who agreed *ex ante* that up to 40% of any settlement fund plus reimbursement of costs and expenses would represent a fair award of attorneys' fees from a fund recovered for the Class. (Bormes Decl., ¶ 11); *see also In re Capital One Tel. Consumer Prot.*

Act Litig., 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (applying the percentage-of-the-recovery approach and noting that class members would typically negotiate fee arrangement based on percentage method rather than lodestar).

Class Counsel are not aware of any BIPA class action settlements involving a monetary common settlement fund where a court relied on the lodestar method to determine attorneys' fees. In fact, to Class Counsel's knowledge, the percentage-of-the-recovery method has been used to determine a reasonable fee award in *every* BIPA class action settlement in Illinois state courts (where the vast majority of BIPA class actions are pending) where the defendant – as here – created a monetary common fund. *See, e.g., Clarke v. Lemonade, Inc. et al.*, 2022LA000308 (Cir. Ct. DuPage County, Ill. Aug. 25, 2022); *Bodie v. Capitol Wholesale Meats, Inc.*, 2022-CH-000020 (Cir. Ct. DuPage County, Ill. June 29, 2022); *Frederick v. Examsoft Worldwide, Inc.*, 2021L001116 (Cir. Ct. DuPage County, Ill. Apr. 7, 2022); *Jenkins v. Charlies Industries, LLC*, 21L001047 (Cir. Ct. DuPage Cnty., Ill. March 30, 2022); *Garcia v. Club Colors Buyer, LLC*, 2020L001330 (Cir. Ct. DuPage Cnty., Ill. March 25, 2021); *Roberts v. Paychex, Inc.*, 2019-CH-00205 (Cir. Ct. Cook County, Ill. Sept. 10, 2021); *O'Sullivan v. WAM Holdings, Inc. et al.*, 2019-CH-11575 (Cir. Ct. Cook County, Ill. Sept. 2, 2021); *Rapai v. Hyatt Corp.*, 17-CH-14483 (Cir. Ct. Cook County, Ill. Jan. 26, 2022); *Vo v. Luxottica of America, Inc.*, 19-CH-10946 (Cir. Ct. Cook County, Ill. June 7, 2022).

Accordingly, the Court should adopt and apply the percentage-of-the-recovery approach here. Under this approach, as set forth more fully below, Class Counsel's requested attorneys' fees are eminently reasonable.

B. Class Counsel's Requested Fees Are Reasonable Under The Percentage-Of-The-Recovery Method Of Calculating Attorneys' Fees.

When assessing a fee request under the percentage-of-the-recovery method, courts often consider the magnitude of the recovery achieved for the Settlement Class Members and the risk of non-payment in bringing the litigation. *See Ryan*, 274 Ill. App. 3d at 924 (affirming district court's attorney fee award due to the contingency risk of pursuing the litigation, and the "hard cash benefit" obtained). As set forth below, this Settlement provides excellent relief for the Settlement Class Members and in the context of such an excellent result, and weighed against the risk of continuing, protracted litigation, Class Counsel's fee request is fair.

1. *The requested attorneys' fees of 35% of the settlement fund is a percentage well within the range found reasonable in similar cases.*

The requested fee award of $52,850.00 represents 35% of the Settlement Fund. This percentage is well within the range of attorneys' fee awards that courts, including in the Circuit Court of DuPage County, have found reasonable in other class action settlements. In fact, fee awards of 35% or higher – including multiple 40% fee awards – have been recently awarded in numerous BIPA class action settlements. *See, e.g., Bodie v. Capitol Wholesale Meats, Inc.*, 2022-CH-000020 (Cir. Ct. DuPage County, Ill. 2022) (attorneys' fee award of 40% of settlement fund in BIPA class settlement); *Garcia v. Club Colors Buyer, LLC*, 2020L001330 (Cir. Ct. DuPage Cnty., Ill. 2021) (same); *Freeman-McKee v. Alliance Ground Int'l, LLC*, No. 17-CH-13636 (Cir. Ct. Cook Cnty., Ill. 2021) (same); *Prelipceanu v. Jumio Corp.*, No. 18-CH-15883 (Cir. Ct. Cook Cnty., Ill. 2020) (same); *McGee v. LSC Commc's*, No. 17-CH-12818 (Cir. Ct. Cook Cnty., Ill. 2019) (same); *see also, e.g., Rogers v. CSX Intermodal Terminals, Inc.*, No. 19-CH-04168 (Cir. Ct. Cook Cnty., Ill. 2021) (attorneys' fee award of 38% of settlement fund in BIPA class settlement); *Vo v. Luxottica of America, Inc.*, No. 19-CH-10946 (Cir. Ct. Cook Cnty., Ill. 2022) (same); *Frederick v. Examsoft Worldwide, Inc.*, 2021L001116 (Cir. Ct. DuPage County, Ill. 2022)

(attorneys' fee award of 37.5% of settlement fund in BIPA class settlement); *Jenkins v. Charlies Industries, LLC*, 21L001047 (Cir. Ct. DuPage Cnty., Ill. 2022) (attorneys' fee award of 35% of settlement fund in BIPA class settlement); *Gonzalez v. Silva Int'l, Inc.*, 20-CH-03514 (Cir. Ct. Cook Cnty., Ill. 2021) (same); *Draland v. Timeclock Plus, LLC*, No. 2019-CH-12769 (Cir. Ct. Cook Cnty., Ill. 2021) (same); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (citing *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Meyenburg v. Exxon Mobil Corp.*, No. 05-cv-15, 2006 WL 2191422, at *2 (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"); Herbert Newberg & Alba Conte, *Newberg* on Class Actions § 15.83 (William B. Rubenstein ed.; 5th ed.) (noting that fifty percent of the fund appears to be an approximate upper limit on fees and expenses). Thus, Plaintiff's request of 35% of the Settlement Fund is well within the range of attorneys' fees recently approved by numerous courts as reasonable in BIPA class settlements.

2. *The requested percentage of attorneys' fees is appropriate given the significant risks involved in continued litigation.*

The Settlement in this case, which has now been pending for more than four years, represents an excellent result for the Settlement Class given that Defendant has expressed a firm denial of Plaintiff's material allegations and demonstrated the intent to raise several defenses, including that Plaintiff's and a significant number of the Settlement Class Members' claims are barred by the applicable statute of limitations and that its timekeeping system did not otherwise violate BIPA. Any of these defenses, if successful, would likely result in Plaintiff and the proposed Settlement Class Members receiving no payment whatsoever.

With respect to BIPA's limitations period, while many courts in this Circuit have found

that a five-year statute of limitations applies to BIPA claims, Illinois courts are not unanimous. Indeed, a court sitting in the Circuit Court of DuPage County held, in *Cannon v. FIC America Corp.,* No. 2020L000121 (Cir. Ct. DuPage Cnty., August 7, 2020), that a two-year statute of limitations applies to BIPA claims. Indeed, a court sitting in the Circuit Court of DuPage County held, in *Cannon v. FIC America Corp.,* No. 20-L-121 (Cir. Ct. DuPage Cnty., August 7, 2020), that a two-year statute of limitations applies to BIPA claims. While in *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563, the First District Appellate Court recently determined that some BIPA claims are subject to a five-year limitations period, the defendant-appellant in that case has petitioned for the Illinois Supreme Court's review. In addition, the Illinois Supreme Court is currently reviewing whether BIPA claims accrue, for limitations purposes, only upon a worker's first scan into a defendant's timekeeping system, or upon each subsequent scan as well. *See Cothron v. White Castle System, Inc.*, No. 128004. If the Supreme Court were to rule in *Tims* that a one-year limitations period applies to all BIPA claims, or rule in *Cothron* that BIPA claims accrue only upon the first scan, Plaintiff and many, if not all, of the Settlement Class Members could recover nothing.

Even absent the risk posed to Plaintiff's and the Settlement Class Members' claims by the pending *Tims* and *Cothron* appeals, this Settlement obviates the need for the time, expense, and motion practice required to resolve Plaintiff's individual claims as well as the significant resources that would be expended through targeted class discovery and adversarial class certification briefing.

In the face of these obstacles and unknowns, Class Counsel succeeded in negotiating and securing a settlement on behalf of Settlement Class defined according to a five-year statute of limitations, which creates a $151,000.00 Settlement Fund and provides all Settlement Class

Members with several hundred dollars in cash benefits—without the need for a claims process.

3. *The substantial benefits obtained on behalf of the Settlement Class Members further justify the requested percentage of attorneys' fees.*

Despite the significant risks inherent in any litigation, and the particular risks presented in this litigation as discussed above, Class Counsel were able to obtain an outstanding result for the Settlement Class. As stated above, the Settlement Agreement provides for the creation of a $151,000.00 Settlement Fund, which will be split equally among Settlement Class Members after Court-approved fees and costs. Class Members will receive hundreds of dollars in cash benefits and, to date, there have been no objections to the Settlement and no exclusion requests. This reflects the Settlement Class Members' predictably overwhelmingly positive reaction to the Settlement.

In addition to the monetary compensation that Class Counsel have obtained for the Settlement Class Members, the Settlement also provides for valuable non-monetary relief. Under the terms of the Settlement Agreement negotiated by Class Counsel, Defendant represents that that it no longer uses the finger scan timeclock that is the subject of the Litigation. (Agreement, ¶ 55).

This non-monetary relief obtained by Class Counsel further justifies the reasonableness of the attorneys' fees being sought here. *See Spano v. Boeing Co.*, No. 06-cv-743, 2016 WL 3791123, at *1 (S.D. Ill. Mar. 31, 2016) ("A court must also consider the overall benefit to the Class, including non-monetary benefits, when evaluating the fee request. . . . This is important so as to encourage attorneys to obtain meaningful affirmative relief") (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)); Manual for Complex Litigation, Fourth, § 21.71, at 337 (2004)); *see also Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973) (awarding attorneys' fees when relief is obtained for the class "must logically extend, not only to litigation that confers a monetary benefit to others, but also litigation which corrects or prevents

an abuse which would be prejudicial to the rights and interests of those others.").

Given the significant monetary compensation obtained for the Settlement Class Members and the non-monetary relief, an attorneys' fee award of 35% of the Settlement Fund, plus expenses, is reasonable and fair compensation—particularly, as discussed above, in light of the uncertainty and fluid nature of the relevant law, the "substantial risk in prosecuting this case under a contingency fee agreement" and the "defenses asserted by [Defendant]." *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59.[4]

C. The Court Should Also Award Class Counsel's Requested Reimbursable Litigation Expenses.

Class Counsel have expended $606.02 in reimbursable expenses related to filing fees, copying, and case administration. (Meyers Decl., ¶ 15; Bormes, Decl. ¶ 10). Courts regularly award reimbursement of the expenses counsel incurred in prosecuting the litigation. *See, e.g., Kaplan v. Houlihan Smith & Co.,* No. 12-cv-5134, 2014 WL 2808801, at *4 (N.D. Ill. June 20, 2014) (awarding expenses "for which a paying client would reimburse its lawyer"); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (detailing and awarding expenses incurred during litigation). Therefore, Class Counsel request the Court approve as reasonable the incurred expenses, a request which Defendant does not oppose. Accordingly, this Court should award a total fee and expense award to Class Counsel of $53,456.02.

D. The Agreed-Upon Incentive Award For Plaintiff Is Reasonable And Should Be Approved.

The requested $5,000.00 Incentive Award is reasonable compared to other incentive awards granted to class representatives in similar class actions. Because a named plaintiff is

[4] To the extent this Court nonetheless has any concerns as to the application of the percentage-of-the-recovery approach in awarding attorneys' fees and wishes to conduct a lodestar analysis, Class Counsel will submit their lodestars.

essential to any class action, "[i]ncentive awards are justified when necessary to induce individuals to become named representatives." *Spano*, 2016 WL 3791123, at *4 (approving incentive awards of $25,000 and $10,000 for class representatives) (internal citation omitted); *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.").

Here, Plaintiff's efforts and participation in prosecuting this four-year-old case justify the $5,000.00 Incentive Award sought. Even though no award of any sort was promised to Plaintiff prior to the commencement of the litigation or any time thereafter, Plaintiff nonetheless contributed his time and effort in pursuing his own BIPA claim, as well as in serving as a representative on behalf of the Settlement Class Members—exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (Bormes Decl., ¶¶ 11-15). Plaintiff participated in the initial investigation of his claim and provided documents and information to Class Counsel to aid in preparing the initial pleadings, reviewed the pleadings prior to filing, consulted with Class Counsel on numerous occasions, and provided feedback on a number of other filings including, most importantly, the Settlement Agreement. (*Id*., ¶ 13). Were it not for Plaintiff's willingness to bring this action on a class-wide basis and his efforts and contributions to the litigation up through settlement, the substantial benefit to the Settlement Class Members afforded under the Settlement Agreement would not exist. (*Id.*, ¶ 14).

Numerous courts that have granted final approval in similar class action settlements have awarded the same or significantly higher incentive awards than the $5,000 award sought here. *See, e.g.*, *Rapai v. Hyatt Corp.*, 17-CH-14483 (Cir. Ct. Cook County, Ill.) (awarding $12,500 incentive award to BIPA class representative); *Rogers v. CSX Intermodal Terminal, Inc.*, No. 19-CH-04168 (Cir. Ct. Cook County, Ill.) (awarding $15,000 incentive award in BIPA class action); *Vo v.*

Luxottica of America, Inc., 19-CH-10946 (Cir. Ct. Cook County, Ill.) (awarding $10,000 incentive award in BIPA class action); *Frederick v. Examsoft Worldwide, Inc.*, 2021L001116 (Cir. Ct. DuPage County, Ill.) (awarding $5,000 incentive award to each of the six class representatives); *Jenkins v. Charlies Industries, LLC*, 21L001047 (Cir. Ct. DuPage Cnty., Ill.) (awarding $5,000 incentive award to each of the two class representatives).

Accordingly, an Incentive Award of $5,000.00 is eminently justified by Mr. Vega's time and effort in this case and should be approved.

V. CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court enter an Order: (1) approving an award of attorneys' fees and expenses of $53,456.02; and (ii) approving an Incentive Award in the amount of $5,000.00 to Plaintiff in recognition of his significant efforts on behalf of the Settlement Class Members.

Dated: October 28, 2022

Respectfully submitted,

JAVIER VEGA, individually and on behalf of all others similarly situated

By: /s/ Timothy P. Kingsbury
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Counsel for Plaintiff and Class Counsel

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on October 28, 2022, a copy of the foregoing *Plaintiff's Motion & Memorandum of Law in Support of Approval of Attorneys' Fees, Expenses, & Incentive Award* was filed electronically with the Clerk of Court, with a copy sent by electronic mail to all counsel of record.

/s/ Timothy P. Kingsbury