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

RAY MCGEE, individually and on behalf of a class of similarly situated individuals,	)	
Plaintiff,	)	Case No. 17-CH-12818
v.	)	Hon. David B. Atkins
LSC COMMUNICATIONS, INC., a Delaware corporation, and FARRINGTON, LLC, a Delaware limited liability company,	)	
Defendants.	)	

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

Plaintiff, Ray McGee, by and through his attorneys, and pursuant to 735 ILCS 5/2-801 and this Court's April 30, 2019 Preliminary Approval Order, 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 Defendants LSC Communications, Inc, Inc. and Farrington, LLC ("LSC" or "Defendants"). Defendants do not object to the relief sought herein. In support of this Motion, Plaintiff submits the following memorandum of law.

Dated: June 10, 2019

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I. INTRODUCTION

The Class Action Settlement[1] that Class Counsel have achieved in this case is an exceptional result for Settlement Class Members. It establishes a Settlement Fund of $700,000 in value to provide each Settlement Class Member who files a valid, timely claim with a $750.00 cash payment for having their biometrics collected by Defendants 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 includes terms that provide significant non-monetary relief designed to minimize or eliminate the allegedly unlawful biometric collection and use practices at issue in this case.

Direct Notice of the Settlement commenced on May 10, 2019. As of the filing of this Motion, many claims have already been submitted, with ten weeks remaining before the Claims Deadline; no Settlement Class Member has objected to the proposed Settlement; and no Settlement Class Member has even sought exclusion from the Settlement.

With this Motion, Class Counsel request a fee of 40% of the total Settlement Fund obtained for the Settlement Class, amounting to $280,000, inclusive of expenses. As explained in detail below, Class Counsel's requested fee award is justified given the exceptional 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 and costs Class Counsel have committed to resolving this litigation for the benefit of the Settlement Class Members.

Both Class Counsel and the Class Representative devoted significant time and effort to the

[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.

prosecution of the Settlement Class Members' claims, and their efforts have yielded an extraordinary 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, particularly given the substantial uncertainty over the state of BIPA when this Settlement was reached. Plaintiff and Class Counsel respectfully request that the Court approve attorneys' fees and expenses of $280,000 and the agreed-upon Incentive Award of $5,000 for Plaintiff as Class Representative.

II. BACKGROUND

A. BIPA

BIPA is an Illinois statute that provides individuals with a right to privacy in their biometric information. To effectuate its purpose, BIPA requires private entities seeking 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)[2] to first:

(1) inform the person whose biometrics are to be collected in writing that his/her 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 collected allowing the capture and collection of their biometrics; and

(4) publish a publicly available retention schedule and guidelines for permanently destroying biometrics. 740 ILCS 14/15.

[2] "Biometric identifiers" and "biometric information" are collectively referred to herein as "biometrics."

BIPA was enacted in a large part to protect the privacy rights of individuals, to provide them with a means of enforcing their rights, and to regulate the practice of collecting, using and disseminating such sensitive and irreplaceable information.

B. Factual Background and Procedural History

1. *Defendants' Business Operations*

Defendants operate a large, multi-national commercial printing enterprise using various subsidiaries and entities, such as Fairrington. (*See* First Amended Complaint, ¶¶ 1, 20-21). As an ordinary part of its business practice, Defendants have utilized biometric timekeeping for the purpose of tracking the work time of their employees who work at facilities in Illinois. This practice allowed Defendants to track and identify all hours worked by their employees by requiring such persons to use finger and/or palm scanning devices at its Illinois locations.

However, in carrying out their biometric timekeeping practices, Defendants have failed to comply with BIPA's requirements, including: (1) failing to inform individuals prior to capturing their biometrics that they will be capturing such information; (2) failing to receive a written release for the capture of biometrics prior to such capture; (3) failing to inform the person whose biometrics are being captured of the specific purpose and length of term for which such biometrics are captured, and; (4) failing to publish a publicly available retention schedule and guidelines for permanently destroying biometrics.

2. *Plaintiff's Lawsuit and the Parties' Efforts at Settlement*

On September 21, 2017, Plaintiff filed his class action Complaint against Defendants before the Honorable David B. Atkins in the Circuit Court of Cook County, Illinois, Chancery Division. On February 1, 2018, Plaintiff filed his First Amended Complaint. On March 21, 2018, Defendants filed their Motion to Dismiss; on May 9, 2018, Plaintiff filed his Opposition to the

Motion to Dismiss; and on May 30, 2018, Defendants filed their Reply in support of their Motion. On October 25, 2018, the Court granted in part and denied in part Defendants' Motion to Dismiss. The Court dismissed Plaintiff's common law claims, but allowed Plaintiff to proceed on his BIPA claim, finding that Plaintiff sufficiently pled that he was aggrieved by Defendants' alleged BIPA violations.

Thereafter, in light of potentially significant discovery expenses, uncertainty in the state of the law surrounding BIPA and the then-impending decision in *Rosenbach*, and the possibility of incurring liability on a class-wide basis, Defendants agreed to engage in a mediation with Judge Stuart E. Palmer (Ret) of JAMS Chicago on January 10, 2019. Due to unforeseen circumstances impacting the Judge's availability, Judge Palmer continued the Parties' mediation to February 14, 2019. In the interim, however, and considering potentially significant discovery expenses and multiple legal uncertainties surrounding BIPA, including the then-forthcoming *Rosenbach* ruling, the Parties agreed to meet in formal in-person settlement negotiations on January 23, 2019. Following extensive arms-length negotiations, and 10 weeks of subsequent negotiations of specific terms of the settlement, the Parties were able to finalize the Settlement Agreement that this Court previously preliminarily approved on April 30, 2019.

III. THE SETTLEMENT

A. Monetary And Non-Monetary Relief To The Settlement Class Members.

Class Counsel's prosecution of this litigation has culminated in this class-wide Settlement that provides substantial monetary relief to the Settlement Class Members, as well as significant prospective relief through changes to Defendants' practices that will greatly reduce or eliminate further intrusions on the privacy of the Settlement Class Members and future employees of Defendants. The Settlement establishes a $700,000.00 Settlement Fund. (Agreement, ¶ 53). Each

valid claimant will be entitled to a payment of $750.00. (*Id*., ¶ 54).

The Settlement also provides significant non-monetary relief of an injunctive nature to the Settlement Class and the public. Defendants have agreed to implement material changes to their business practices in order to become compliant with BIPA. These changes will result in individuals such as Plaintiff either no longer having to provide their sensitive biometrics in order track the hours they worked or else having the opportunity to provide informed consent only after first obtaining the information required under BIPA. (*Id*., ¶ 57).

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 provided by U.S. Mail or email to the putative Class Members. (*See* Declaration of Evan M. Meyers, attached as Exhibit A, ¶ 21). In addition, the Settlement Website with the Claim Form, Long Form Notice, and all relevant case information is online and, to date, no Class Members have objected nor have any chosen to exclude themselves from the Settlement. (*Id*.)

IV. ARGUMENT

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

Pursuant to the Settlement, Class Counsel seek attorneys' fees and expenses in the amount of $280,000, which amounts to 40% of the Settlement Fund. (Agreement, ¶ 83). Such a request is 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 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-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. 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-fund approach—the approach used in the vast majority of common fund class actions.

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

The vast majority of courts presiding over class action settlements in suits brought for violations of law providing for statutory damages, including BIPA, have adopted the percentage-of-the-fund method in determining the appropriate amount of attorneys' fees to award class counsel. *See, e.g., Willis v. iHeartMedia Inc.,* No. 2016-CH-02455, August 11, 2016 Final Judgment and Order of Dismissal (Ill. Cir. Ct. Cook Cnty.) (Atkins, J.) (granting final approval and awarding class counsel 40% of settlement fund in a TCPA class action); *In re Capital One Tel. Consumer Prot. Act Litig.,* 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) (finding that even though "in common fund cases like this one, district courts have discretion to choose either the lodestar or a percentage approach to calculating fees . . . [T]he court agrees with Class Counsel that the fee award . . . should be calculated as a percentage of the money recovered for the class"); *Sabon,* 2016 IL App (2d) 150236, at ¶ 59 (affirming trial court's award of attorneys' fees in TCPA suit based on a percentage-of-the-fund approach); *Sterk v. Path, Inc.*, No. 2015-CH-08609 (Cir. Ct. Cook Cnty, Ill.) (Mikva, J.) (granting final approval and awarding class counsel 35% of settlement fund in a TCPA class action); *Sawyer v. Stericycle, Inc.,* No. 2015-CH-07190 (Cir. Ct. Cook Cnty, Ill.) (Martin, Jr., J.) (granting final approval awarding class counsel attorneys' fees based on percentage-of-the-fund); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500 (N.D. Ill. 2015) ("[t]he Court agrees with [plaintiff's] counsel that the fee award in this case should be calculated based on a percentage-of-the-fund method").

Importantly, three judges in the Circuit Court of Cook County just recently entered final approval of BIPA class action settlements, including final approval of a 40% attorneys' fee award based on a percentage-of-the-fund analysis. *See, e.g., Zepeda et al v. Intercontinental Hotels Group, Inc.*, 18-CH-02140 (Cir. Ct. Cook County, Ill. 2018) (Atkins, J.); *Svagdis v. Alro Steel*

Corp., 17-CH-12566 (Cir. Ct. Cook County, Ill., 2018) (Larsen, J.); *Zhirovetskiy v. Zayo Group, LLC*, 17-CH-09323 (Cir. Ct. Cook County, Ill., 2019) (Flynn, J.).

The use of the percentage-of-the-fund approach in common fund class settlements likely flows from, and is supported by, the fact that the percentage-of-the-fund 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-fund 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.

By contrast, a lodestar approach encourages significant inefficiencies and further litigation as the parties and the court have to review the extensive billing records produced and determine the reasonableness of the time spent on any particular task and whether it actually furthered the litigation. *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 924 (1st Dist. 1995) ("Percentage analysis approach eliminates the need for additional major litigation . . . as a result of plaintiffs' request for attorneys' fees . . . nearly half of the 11,000 page record in this case is devoted to fee litigation.").

Applying a percentage-of-the-fund 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).

Here, the percentage-of-the-fund method would most fairly compensate Class Counsel for

the significant time and resources expended in obtaining relief for the Settlement Class Members, while taking into account the magnitude of the recovery achieved for the Settlement Class Members and the substantial risk of non-payment in bringing this litigation, particularly in light of the uncertainty in the law surrounding BIPA.

The percentage-of-the-fund 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. (Meyers Decl., ¶ 23); *see also In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d at 795 (applying the percentage-of-the-fund approach and noting that class members would typically negotiate fee arrangement based on percentage method rather than lodestar).

Accordingly, the Court should adopt and apply the percentage-of-the-fund approach here. Under this approach, Class Counsel's requested attorney fees are reasonable in light of the work performed and the recovery secured for the Settlement Class Members.

i. The requested attorneys' fees and expenses amount to 40% of the Settlement Fund—a percentage within the range found reasonable in other cases.

The requested fee award of $280,000 represents 40% of the Settlement Fund. This percentage is within the range of attorneys' fee awards that courts, including numerous judges within the Circuit Court of Cook County, have found reasonable in other class action settlements. As set forth above, three judges in the Circuit Court of Cook County have very recently entered final approval of BIPA class action settlements, including final approval of a 40% attorneys' fee award, plus expenses. *See Zepeda*, 18-CH-02140 (Cir. Ct. Cook County, Ill. 2018); *Svagdis*, 17-CH-12566 (Cir. Ct. Cook County, Ill., 2018); *Zhirovetskiy*,, 17-CH-09323 (Cir. Ct. Cook County,

Ill., 2019).

Further, in *Willis v. iHeartMedia Inc.*, this Court recently awarded attorneys' fees and costs of 40% of an $8,500,000 common fund in a class settlement. *See Willis*, No. 16-CH-02455, August 11, 2016 Final Judgment and Order of Dismissal, at 5; *see also, e.g., Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 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)); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 599 (N.D. Ill. 2011) (same); *Sabon*, 2016 IL App (2d) 150263, at ¶¶ 59, 65 (affirming over objections an attorney fee award of 33% of the fund); *Sterk*, No. 2015-CH-08609 (approving attorneys' fee award in TCPA case of 35% of the fund); *Meyenburg v. Exxon Mobil Corp.*, No. 3:05-CV-15-DGW, 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).

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

The attorneys' fees sought in this case are particularly reasonable in light of the risks of bringing the litigation and the relief that Class Counsel have obtained for the Settlement Class. *See Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding fee award based on percentage-of-the-fund in light of the "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [the defendant]"); *Ryan*, 274 Ill. App. 3d at 924 (noting the trial court's fee award was reasonable given the funds recovered for the class and the contingency risk).

The Settlement in this case represents an extraordinary result for the Settlement Class. Moreover, this Settlement was reached at a time when case law was decidedly *against* the Class Members' interests. Specifically, at the time the Settlement Agreement was negotiated, the only appellate law on BIPA and the issue of "aggrievement" (and thus binding on the First District) was *Rosenbach v. Six Flags*, which held that a mere technical violation of the BIPA did *not* amount to sufficient injury as to constitute an "aggrieved" person under the BIPA, absent some other, extra-statutory harm. *Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App (2d) 170317 (Dec. 21, 2017); *cert. granted*, May 30, 2018. Here, Defendants had taken the position that Plaintiff was not an aggrieved person under the BIPA and therefore lacked standing to bring the case. Indeed, when the Parties negotiated this settlement, the Second District's *Rosenbach* decision was the binding authority, as such, there was a distinct possibility that the Class Members would recover nothing. As a result, this litigation presented multiple risks to Plaintiff's ultimate success and Defendants would have strenuously defended the claims asserted had this Settlement not been reached. As a result, a settlement providing for such a significant cash benefit is an exceptional result.

iii. The substantial monetary and non-monetary relief obtained on behalf of the Settlement Class Members further justify the requested percentage of attorneys' fees.

Despite the significant risks inherent in any further litigation, Class Counsel were able to obtain an excellent result for the Settlement Class Members. As stated above, the Settlement Agreement provides for the creation of a $700,000.00 Settlement Fund, from which Settlement Class Members can submit claims for a $750.00 cash payment. Although the Claims Deadline is not for another ten weeks, the size of the Settlement Fund makes it very likely that Class Members who file valid claims will receive the maximum payment.

In addition to the monetary compensation that Class Counsel have obtained for the

Settlement Class Members, the Settlement also provides for substantial prospective relief. Under the terms of the Settlement Agreement negotiated by Class Counsel, Defendants have agreed to implement material changes to their business practices in order to become compliant with the BIPA. (Agreement, ¶ 57). These changes will result in individuals such as Plaintiff either no longer having to provide their sensitive biometrics when they work at Defendants' facilities, or else having the opportunity to provide informed consent only after first obtaining the information required under BIPA—a significant benefit vis-à-vis their privacy rights.

The non-monetary relief obtained by Class Counsel in this case further justifies the reasonableness of the attorneys' fee 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 changes in Defendants' biometric collection and use practices implemented as a result of the Settlement, an attorneys' fee award of 40% of the Settlement Fund, inclusive of expenses, is reasonable and fair compensation—particularly, as discussed above, in light of the significant uncertainty in the relevant law, the "substantial risk in prosecuting this case under a contingency fee agreement" and the "defenses asserted by [Defendants]." *Sabon, Inc.*, 2016 IL App (2d)

150236, ¶ 59.

C. Class Counsel's Requested Fees are Also Appropriate Under the Lodestar Method.

To the extent this Court has any concerns as to the application of the percentage-of-the-fund approach in awarding attorneys' fees, the fees sought here are also reasonable and appropriate even when applying the lodestar method. In determining the amount of attorneys' fees to be awarded pursuant to the lodestar method the first step is to "multiply[] a reasonable hourly rate by the number of hours reasonably expended." *Gastineau v. Wright,* 592 F.3d 747, 748 (7th Cir. 2010) (citing *Hensley,* 461 U.S. at 433–37); *Brundidge,* 168 Ill. 2d at 239 (noting that under the lodestar method "the reasonable hours devoted by plaintiff's attorneys should be the starting point in assessing fees."). A reasonable hourly rate should be in line with the prevailing rate in the "community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Jeffboat, LLC v. Director, Office of Workers' Comp. Programs,* 553 F.3d 487, 489 (7th Cir. 2009). Once the base lodestar is computed, the Court must adjust the lodestar using a risk multiplier that takes into account "the contingency nature of the proceeding, the complexity of the litigation, and the benefits [to] . . . the class." *Sabon, Inc.,* 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge,* 168 Ill. 2d at 239–40); *see also Wright,* 2016 U.S. Dist. LEXIS 115729, at *57 ("[A] risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel had no sure source of compensation for their services") (citing *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994)); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975–76 (7th Cir. 1991) (remanding case for recalculation of attorneys' fees because the trial court failed to award a risk multiplier).

Typical multipliers awarded in comparable class action litigation average around 3–4 but are often much higher. *See Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59 (noting that a multiplier of

"2.97" was "well within the range of multipliers used in other common-fund cases" and that some courts have awarded multipliers as high as "19.6"); *Spano*, 2016 WL 3791123, at *3 ("Courts have generally held that a lodestar multiplier falling between 2 and 4.5 demonstrate a reasonable attorney's fees") (internal citations omitted); *Beverly Bank*, 193 Ill. App. 3d at 137, 142 (upholding trial court's decision to award a 2.5 multiplier "to account for the substantial contingent risk inherent in th[e] case.").

Here, as detailed in the attached Declaration, the base lodestar of Class Counsel is $128,029 (Meyers Decl., ¶ 18).[3] Class Counsel's hourly rates are comparable to rates charged by attorneys with similar experience, skill, and reputation for similar services in the Chicago legal market. (*Id.*); *see, e.g., Vergara et al. v. Uber Technologies, Inc.*, No. 15-cv-6942, Order Granting Final Approval of Class Action Settlement, Dkt. 112, (N.D. Ill. Mar. 1, 2018) (approving attorneys' fees of between $655 and $864 for partners, $365 and $440 for associates, and $225 for law clerks); *In re: Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig.*, No. 06-cv-7023, U.S. Dist. LEXIS 124235, at *50 (N.D. Ill. Sept. 13, 2016) (evaluating attorneys' fees petition and finding that hourly rates of $800 per hour for class counsel with 23 years of experience and $515 per hour for class counsel with 9 years of experience "in line with those prevailing in the community"); *Payton v. Kale Realty, LLC*, No. 13-cv-8002, U.S. Dist. LEXIS 176454, at *24 (N.D. Ill. Aug. 20, 2015) (approving in a TCPA class action suit a "partner rate of $550 per hour" and an "associate rate of $400 per hour"); *Murray et al. v. Bill Me Later, Inc.*, No. 12-cv-04789, Dkt. 78 (N.D. Ill. Nov. 20, 2014) (approving 2014 billable rates in TCPA class action settlement of $650, $625, and $595 for Chicago-based partners and $220 for law clerks).

Further, several state and federal courts have previously approved the then-current hourly

[3] Prior to submission, Class Counsel reviewed the hours expended by the attorneys and staff on this case and reduced any hours deemed duplicative or excessive. (Meyers Decl., ¶ 18).

rates of Class Counsel as reasonable, and, importantly, multiple judges in the Circuit Court of Cook County in 2019 – including this Court – have approved Class Counsel's current hourly rates. (Meyers Decl., ¶ 17). The fact that multiple courts have approved the hourly rates submitted by Class Counsel is indicative that they are reasonable and correspond to the market rate. *See People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1312 (7th Cir. 1996) ("rates awarded in similar cases are clearly evidence of an attorney's market rate.").

It is also readily apparent that a multiplier to the base lodestar is warranted in this case. Class Counsel undertook significant risk in proceeding with this litigation. Defendants' liability to Plaintiff was far from clear, and Class Counsel agreed to commence this litigation knowing they would assuredly face significant opposition from a defendant with the financial resources of Defendants. (Meyers Decl., ¶¶ 13-14). Indeed, shortly after filing their initial appearance, Defendants promptly moved for dismissal and indicated that they would further challenge Plaintiff's claims on the merits and at the class certification stage. (*Id*.). Had this case not settled, there would have been significant discovery, and Defendants would have proceeded not only with further motion practice but also would have vigorously opposed Plaintiff's efforts to certify his proposed class.

Had Defendants prevailed either on the merits or in defeating class certification, the Settlement Class Members would have received *nothing*. Class Counsel achieved an excellent result for the Settlement Class Members in obtaining $700,000.00 in relief and the ability to receive up to $750.00 in cash compensation for valid claims. Class Counsel were also able to obtain significant prospective relief to materially alter Defendants' biometric collection practices.

Class Counsel were able to achieve these results solely due to their extensive efforts in prosecuting this litigation through filing multiple pleadings; fully briefing a motion to dismiss;

engaging in significant settlement communications; identifying potential Settlement Class Members; and productively mediating this case and negotiating the final Settlement Agreement. (*Id*. ¶ 15). Given the significant efforts needed to secure the Settlement in this litigation, a multiplier of Class Counsel's actual fees is amply justified to account for the risk inherent in this type of class action. (*Id*. ¶ 23).

The lodestar of $128,029.00 submitted by Class Counsel here reflects the significant efforts taken by Class Counsel to obtain the compensation made available for Settlement Class Members who submit valid claims. The lack of any opposition to date demonstrates that the Settlement Class Members overwhelmingly support that result. Furthermore, Class Counsel anticipate expending additional time and effort through Final Approval and beyond in order to respond to inquiries from Settlement Class Members, respond to any potential objectors, prepare Final Approval papers, review any claims rejected by Defendant and/or the Settlement Administrator, and advocate on behalf of the Settlement Class Members if a claim is wrongfully denied. (Meyers Decl., ¶ 22). Class Counsel conservatively estimate that the additional lodestar for such efforts will, collectively, be approximately $30,000–$50,000. (*Id.*, ¶ 22). In short, Class Counsel's current lodestar of $128,029.00—not even including this future additional time that will undoubtedly be required—requires a multiplier of less than 2.17 to reach the attorneys' fees requested. This amount is reasonable given the efforts expended, the results obtained, and the relief made available to the Settlement Class. In short, Class Counsel's base lodestar is reasonable, and the risk taken in prosecuting this case coupled with the success obtained for the Settlement Class amply justifies the modest lodestar and multiplier requested.

As such, regardless of whether this Court uses the percentage-of-the-fund method or the lodestar method, the attorney's fee award sought by Class Counsel is reasonable and justified. The

requested fee award is consistent with the market rate and well within the range of attorneys' fees awarded by numerous other Illinois state and federal courts, including in BIPA settlements in the Circuit Court of Cook County.

D. The Attorneys' Fees Sought By Class Counsel Include Class Counsel's Reimbursable Litigation Expenses.

Class Counsel have expended $2,236.87 in reimbursable expenses related to filing fees, copying, and case administration, with the potential of more expenses yet to come. (Meyers Decl., ¶ 24.) Courts regularly award reimbursement of the expenses counsel incurred in prosecuting the litigation. *See, e.g., Kaplan v. Houlihan Smith & Co.*, No. 12 C 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 Defendants do not oppose. Accordingly, this Court should award a total fee and expense award to Class Counsel of $280,000.00.

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

The requested $5,000 Incentive Award is reasonable and modest compared to other incentive awards granted to class representatives in similar class actions. Because a named plaintiff is 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 case justify the $5,000 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. (*Id*., ¶¶ 25-28).

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*.).

Further, agreeing to serve as the Class Representative meant that Plaintiff publicly placed his name on this suit and opened himself 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. This is particularly the case here where Plaintiff, Defendants and the Settlement Class Members are all part of the same employment community. Were it not for Plaintiff's willingness to bring this action on a class-wide basis, his efforts and contributions to the litigation by assisting Class Counsel with their investigation and filing of this suit, and his continued participation and monitoring of the case up through settlement, the substantial benefit to the Settlement Class Members afforded under the Settlement Agreement would not exist. (Meyers Decl., ¶ 27).

The $5,000 Incentive Award requested for Plaintiff is well in line with the average incentive award granted in class actions. Indeed, numerous courts that have granted final approval

in similar class action settlements have awarded significantly larger incentive awards than the one sought here. *See, e.g., Seal v. RCN Telecom Services, LLC*, No. 2016-CH-07033, February 24, 2017 Final Order and Judgment, ¶ 20 (Cir. Ct. Cook Cnty., Ill.) (Atkins, J.) (awarding $10,000 incentive award to each of two named plaintiffs); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) (awarding $25,000 incentive award); *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2017 WL 1369741, at *10 (N.D. Ill. Apr. 10, 2017) (awarding $10,000 to each of the class representatives); *Spano*, 2016 WL 3791123, at *4 (approving $10,000 incentive awards).

Compensating Plaintiff for the risks and efforts he undertook to benefit the Settlement Class Members is reasonable under the circumstances of this case, especially in light of the exceptional results obtained. As shown above, courts have regularly approved incentive awards in similar class action litigation consistent with and greater than the agreed-upon $5,000 Incentive Award here. Moreover, no objection to the Incentive Award has been raised to date. Accordingly, an Incentive Award of $5,000 to Plaintiff is reasonable, justified by Plaintiff'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: (i) approving an award of attorneys' fees and expenses of $280,000.00; 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: June 10, 2019

Respectfully submitted,

RAY MCGEE, individually and on behalf of the Settlement Class

By: /s/ Jad Sheikali
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on June 10, 2019 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/ Jad Sheikali