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

RICHARD ROGERS, individually and on behalf of similarly situated individuals, *Plaintiff,* v. ILLINOIS CENTRAL RAILROAD COMPANY, an Illinois corporation, *Defendant.*	Case No. 2019-CH-05129 Hon. Cecilia A. Horan

PLAINTIFF'S MOTION & MEMORANDUM OF LAW IN SUPPORT OF APPROVAL OF ATTORNEYS' FEES AND SERVICE AWARD

Plaintiff, Richard Rogers, by and through his attorneys, and pursuant to 735 ILCS 5/2-801, hereby moves for an award of attorneys' fees for Class Counsel, as well as a service award for Plaintiff as the Class Representative in connection with the class action settlement with Defendant Illinois Central Railroad Company ("Defendant" or "ICRC"). In support of this Motion, Plaintiff submits the following memorandum of law.

Dated: August 19, 2022

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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 $3,800,000 to provide each Settlement Class Member who files a valid, timely claim with an equal, *pro rata* cash payment – estimated to be at least several hundred dollars each – for having their biometrics collected by 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 includes terms that provide significant prospective relief designed to eliminate the allegedly unlawful biometric collection and use practices at issue in this case.

Direct Notice of the Settlement commenced on July 27, 2022. As of the filing of this Motion, over 2,200 claims have already been submitted, with five weeks remaining before the Claims Deadline. Notably, no Settlement Class Member has objected to the proposed Settlement and no Class Member has requested exclusion from the Settlement Class.

Both Class Counsel and the Class Representative have devoted significant time and effort on behalf of the Settlement Class Members' claims in the over three years since this litigation first commenced, and their efforts have yielded an extraordinary benefit to the Class. With this Motion, Class Counsel request a fee of 38% of the total Settlement Fund obtained for the Settlement Class, amounting to $1,444,000.00 (inclusive of their costs and expenses), and a Service Award of $15,000 for the Class Representative, as provided for in the Settlement Agreement.[2] The requested

[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 A to Plaintiff's previously-filed Motion for Preliminary Approval.

[2] The Settlement Agreement permits Class Counsel to seek their reimbursable litigation expenses on top of their fee request, and such costs and expenses are independently compensable. *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.

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attorneys' fees and Service Award are amply justified in light of the investment, significant risks, and excellent results obtained for the Settlement Class Members, particularly given the substantial defenses available to Defendant and the continued uncertainty over, and evolving nature of, the state of BIPA litigation. As explained in detail below, Class Counsel's requested fee award is consistent with Illinois law and fee awards granted in other cases in Illinois courts, including other BIPA class actions, and warrants Court approval.

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)[3] to:

> (1) inform the person whose biometrics are to be collected in writing that his 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 the collected biometrics. 740 ICLS 14/15.

BIPA was enacted in 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

1226, 1256 (N.D. Ill. 1993) (detailing and awarding expenses incurred during litigation). However, despite the fact that Class Counsel have incurred substantial out-of-pocket expenses in this case, including filing fees and mediation expenses, Class Counsel will forego seeking additional reimbursement of these expenses above and beyond the fees being sought herein.

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

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disseminating such sensitive and irreplaceable information.

B. Factual Background and Procedural History

1. *Defendant's business operations*

Defendant is one of the largest intermodal rail carriers in the nation and provides transportation of rail freight through its facilities in Illinois. (*See* Second Amended Complaint.) Plaintiff has alleged that when he, a third-party truck driver, entered Defendant's facilities to drop off and pick up various loads of freight, Defendant collected and used Plaintiff's and the other Class Members' biometric data through an automatic gate system (the "SpeedGate System") in order to grant them access to ICRC's Illinois facilities. (*Id.*)

Specifically, Plaintiff alleges that Defendant failed to comply with BIPA by: (1) failing to inform individuals prior to capturing their biometrics that it 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. (*Id.*)

2. *Plaintiff's lawsuit and the Parties' settlement efforts*

On April 22, 2019, Plaintiff filed his original Class Action Complaint against CN Transportation Limited, an affiliate of Defendant's parent company, in the Circuit Court of Cook County, Illinois. CN Transportation Limited thereafter removed Plaintiff's Class Action Complaint to the U.S. District Court for the Northern District of Illinois on May 31, 2019. *See Rogers v. CN Transportation Limited,* No. 19-cv-03467, Dkt. 1-1 (N.D. Ill. 2019). The case was assigned to the Honorable Rebecca R. Pallmeyer. On June 28, 2019, CN Transportation Limited filed a Motion to Dismiss Plaintiff's Complaint. (Dkt. 11). On July 26, 2019, Plaintiff filed his

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First Amended Complaint, dismissing CN Transportation Limited from this Litigation and naming Illinois Central Railroad Company, its parent company Canadian National Railway Company, and Remprex, LLC as defendants. (Dkt. 19). On September 30, 2019, Remprex, LLC and Illinois Central Railroad Company moved to dismiss Plaintiff's First Amended Complaint. (Dkts. 38, 41-42). On November 8, 2019, Canadian National Railway Company moved to dismiss Plaintiff's First Amended Complaint. (Dkts. 53-54). On November 14, 2019, pursuant to Fed. R. Civ. P. 14(a), Plaintiff dismissed Remprex, LLC and Canadian National Railway Company from this Litigation. (Dkt. 56). Following full briefing on Illinois Central Railroad Company's Motion to Dismiss (Dkts. 41-42, 59, 62), on February 25, 2020, Judge Pallmeyer issued an Order granting Defendant's Motion to Dismiss without prejudice, directing Plaintiff to file a Second Amended Complaint, and directing Defendant to file an Answer in response to Plaintiff's Second Amended Complaint. (Dkt. 65).

Following Defendant's Answer, the Parties began discovery. (Dkt. 90). Over the following months, each Party served interrogatories and requests for production upon the other, and the Parties exchanged numerous formal and informal correspondence related to each Party's written discovery responses. (Dkt. 106). On February 8, 2021, Defendant took the deposition of Plaintiff Richard Rogers. (*Id*.) Plaintiff noticed five party depositions, two non-party depositions, and a Fed. R. Civ. P. 30(b)(6) deposition of Defendant. (*Id*.)

On June 29, 2021, Defendant moved to stay this litigation pending the appeals of: *Cothron v. White Castle Sys., Inc.*, Case No. 20-3202; *Tims v. Black Horse Carriers, Inc.*, Case No. 1-28-0563; and *Marion v. Ring Container Technologies, LLC*, Case No. 3-20-0184. (Dkt. 94). The Parties fully briefed Defendant's Motion to Stay, which included three supplemental filings. (Dkts. 97-99, 101, 107). During the pendency of Defendant's Motion to Stay, Plaintiff conducted the

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remote depositions of two third-party individuals. (Dkt. 90). On October 26, 2021, Plaintiff moved to remand his claim made under Section 15(a) of BIPA to Cook County, Illinois on the basis that the district court lacked subject matter jurisdiction pursuant to the Seventh Circuit's decision in *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617 (7th Cir. 2020). (Dkt. 102).

Thereafter, prior to full briefing on Plaintiff's Motion to Remand, and in light of the significant forthcoming discovery expenses, uncertainty of the state of the law surrounding BIPA, and the possibility of incurring liability on a class-wide basis, the Parties agreed to engage in a private mediation overseen by the Honorable James R. Epstein (Ret.) of JAMS in Chicago, Illinois. All proceedings were stayed pending the Parties' engagement in settlement discussions. (Dkt. 105). On December 9, 2021, after conducting informal discovery related to the size of a potential settlement class, Plaintiff's counsel and Defendant's counsel engaged in full-day, arm's-length mediation session with Judge James R. Epstein of JAMS Chicago—a former justice of the Illinois Appellate Court and Circuit Court Judge in the Chancery Division of the Circuit Court of Cook County. While no final resolution was reached, the Parties did make significant progress and continued to discuss resolving the Litigation. Thereafter, on February 23, 2022, the Parties engaged in a second, arm's-length settlement conference whereby the Parties came to an agreement in principle to resolve this Litigation.

Following these formal and substantial mediation efforts, and over the following weeks, counsel for Plaintiff and for Defendant continued to expend significant additional time and effort negotiating the specific terms of a Settlement, including: (i) the scope of the release; (ii) the form and content of class notice: (iii) the operative deadlines for notice, claims, objections and exclusions; (iv) the claims procedure; (v) the timing for submission of papers regarding a Fee Award, a Service Award, and final approval of the Settlement; and (vi) procedures for terminating

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the Settlement if necessary. Eventually, these extensive negotiations culminated in the Settlement Agreement and the attendant exhibits which this Court preliminarily approved on June 29, 2021.[4]

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 outstanding monetary relief to the Settlement Class Members. The Settlement has established a non-reversionary Settlement Fund of $3,800,000.00 (three million eight hundred thousand dollars). (Agreement at ¶ 53). Each valid claimant is entitled to an equal pro rata share of the Settlement Fund after payments are first deducted for notice and administration costs, attorneys' fees and costs, and a service award payment to Plaintiff. (*Id.* ¶ 65). Class Counsel estimates that every class member that files a valid claim will receive at least several hundred dollars, although the final per-person amount will depend on the total number of valid Claim Forms ultimately submitted by Settlement Class Members.

The Settlement also provides important prospective relief to the Settlement Class. Specifically, in response to this Litigation, Defendant has reviewed its biometric collection and handling practices and, going forward, Defendant agrees to comply with all BIPA requirements by: (a) disclosing to individuals who use its SpeedGate System that their finger-scan data is being collected or stored, (b) obtaining BIPA-compliant written releases from such individuals, including modification of its current consent form, and (c) establishing a publicly-available retention schedule and guidelines for permanently destroying the finger-scan data when the initial purpose for collecting or obtaining such alleged biometric identifiers or information has been satisfied or

[4] As set forth in more detail in the Declaration of Evan M. Meyers, attached hereto as Exhibit A, Class Counsel have substantial BIPA class litigation experience and have served as class counsel in numerous BIPA class action settlements approved by Illinois courts, including several of the earliest and the largest.

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within 3 years of the individual's last interaction with Defendant, whichever occurs first. (*Id*. ¶ 79). This prospective relief benefits each Settlement Class Member – regardless of whether the particular Settlement Class Member submits a claim – as well as future users of Defendant's SpeedGate System.

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 of the Settlement has been provided by U.S. Mail to the Settlement Class Members. (Meyers Decl., ¶ 18). In addition, the Settlement Website is operational and makes available the Second Amended Class Action Complaint, Settlement Agreement, Long Form Notice, Claim Form, the Court's Preliminary Approval Order, and provides for Settlement Class Members to submit claims online. (*Id.*) To date, with a full five weeks left in the claims period, over 2,200 claims have been submitted, no Class Member has objected, and no Class Member has requested exclusion. (*Id.*)

IV. ARGUMENT

A. The Court Should Assess Class Counsel's Requested Attorneys' Fees Using The Percentage-Of-The-Recovery Method.

Pursuant to the Settlement Agreement, Class Counsel seek attorneys' fees in the amount of $1,444,000, which is inclusive of their incurred litigation expenses, and amounts to 38% of the Settlement Fund. (Agreement, ¶ 105). 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

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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 common 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. Under 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.

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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, to Class Counsel's knowledge, every single BIPA class action that has settled thus far. 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,[5] it also 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 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

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

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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. (Meyers Decl., ¶ 20); *see also In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d at 795 (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 the Circuit Court of Cook County (where the majority of BIPA class actions are pending) where the settlement – as

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here – created a monetary common fund. *See, e.g., Taylor v. Sunrise Senior Living Mgmt., Inc.*, No. 17-CH-15152 (Cir. Ct. Cook Cnty., Ill. Feb. 14, 2018) (Loftus, J.); *Zepeda v. Kimpton Hotel & Rest.*, No. 18-CH-02140 (Cir. Ct. Cook Cnty., Ill. Dec. 5, 2018) (Atkins, J.); *Svagdis v. Alro Steel Corp.*, No. 17-CH-12566 (Cir. Ct. Cook Cnty., Ill. Jan. 14, 2019) (Larson, J.); *Kusinski et al. v. ADP, LLC*, No. 17-CH-12364 (Cir. Ct. Cook Cnty., Ill. Feb. 10, 2021) (Atkins, J.); *Harrison v. Fingercheck, LLC*, No. 20-CH-0633 (Cir. Ct. Lake Cnty., Ill. Apr. 9, 2021); *Freeman-McKee v. Alliance Ground Int'l, LLC*, No. 17-CH-13636 (Cir. Ct. Cook Cnty., Ill. June 15, 2021) (Demacopoulos, J.); *Roberts v. Paychex, Inc.*, No. 19-CH-00205 (Cir. Ct. Cook Cnty., Ill. Sept. 10, 2021) (Conlon, J.); *Vo v. Luxottica of America, Inc.* No. 19-CH-10946 (Cir. Ct. Cook Cnty., Ill. June 7, 2022) (Mullen, J.).

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). Additionally, the non-monetary benefits created by a class action settlement are also properly considered for purposes of determining fees. *See Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973) (noting that the common fund doctrine "must logically extend, not only to litigation that confers a monetary benefit on others, but also litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others").

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As set forth below, this Settlement's combination of substantial monetary relief and strong prospective relief constitutes an excellent benefit conferred upon the Settlement Class Members and future users of Defendant's SpeedGate System. In the context of such an excellent result, and weighed against the risk of continuing, protracted litigation, Class Counsel's fee request is exceptionally fair.

1. *The requested attorneys' fees of 38% of the Settlement Fund is a percentage well within the range found reasonable in other cases.*

The requested fee award of $1,444,000.00 – which is inclusive of Class Counsel's incurred litigation expenses – represents 38% of the Settlement Fund. Notably, Illinois circuit courts presiding over BIPA class action settlements have regularly awarded attorneys' fees amounting to 40% of the settlement fund. *See, e.g., G.M. Sign, Inc. v. Dodson Co., LLC, et al.*, No. 08-CH-4999 (Cir. Ct. Lake Cnty., Ill.); *Prelipceanu v. Jumio Corp.* No. 18-CH-15883 (Cir. Ct. Cook Cnty., Ill.) (Mullen, J.) (granting final approval to $7,000,000 BIPA class settlement and awarding class counsel 40% of the settlement fund based on a percentage-of-the-recovery analysis); *Zhirovetskiy v. Zayo Group, LLC,* No. 17-CH-09323 (Cir. Ct. Cook Cnty., Ill.) (Flynn, J.) (granting final approval to BIPA class settlement and awarding class counsel 40% of the settlement fund based on a percentage-of-the-recovery analysis); *Zepeda*, 2018-CH-02140 (Atkins, J.) (same); *Svagdis,* 2017-CH-12566 (Larson, J.) (same); *McGee v. LSC Commc's*, No. 17-CH-12818 (Cir. Ct. Cook Cnty., Ill.) (Atkins, J.) (same); *Vo,* No. 19-CH-10946 (Mullen, J.) (same); *Rapai v. Hyatt Corp.*, No. 17-CH-14483 (Demacopoulos, J.) (same); *see also, e.g., Willis v. iHeartMedia Inc.*, No. 16-CH-02455 (Cir. Ct. Cook Cnty., Ill.) (awarding attorneys' fees and costs of 40% of an $8,500,000 common fund in a TCPA class settlement); *Farag v. Kiip, Inc.*, 19-CH-01695 (Cir. Ct. Cook Cnty., Ill.) (Gamrath, J.) (awarding 38% of the fund in consumer privacy class settlement); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec.

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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 38% of the Settlement Fund, which is inclusive of Class Counsel's expenses, is well within the range of attorneys' fees recently approved by courts as reasonable in BIPA class action settlements.

2. *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, especially here, where Defendant's liability for the alleged BIPA violations was not clear and was hotly contested due to Defendant's assertion of strong defenses. Indeed, Defendant sought and obtained written consent from Plaintiff and the Settlement Class Members to collect their biometrics, though the Parties disagreed whether the form of consent obtained by Defendant satisfied the strictures of BIPA. (Defendant's Answer and Affirmative Defenses, Dkt. 77, at Exhibit A).

Moreover, railroad operators like Defendant have many potential unique BIPA defenses they can offer, including federal preemption under the Federal Railway Safety Act and several other federal statutes. *Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding fee award based on percentage-of-the-recovery in light of the "substantial risk in prosecuting this case under a

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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).

In addition, while many courts 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. 20-L-121 (Cir. Ct. DuPage Cnty., August 7, 2020), that a two-year statute of limitations applies to BIPA claims. Moreover, the First District Appellate Court found in *Tims v. Black Horse Carriers, Inc.*, No. 1-19-0563, that different statutes of limitations apply to different subsections of BIPA. 2021 IL App (1st) 200563, ¶¶ 28-33. *Tims* is now fully briefed before the Illinois Supreme Court.

In the face of the many obstacles to liability in this case, appellate risks that bear upon BIPA cases, and legislative risk to BIPA itself,[6] Class Counsel nevertheless succeeded in negotiating and securing a settlement on behalf of the Settlement Class defined according to a five-year statute of limitations which creates a $3,800,000 Settlement Fund and provides valid claimants with the ability to claim a substantial amount of their potential statutory damages under BIPA.

3. *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 further litigation, Class Counsel were able to obtain at least several hundred dollars for each claimant, which is in line with, if not greater than, the monetary compensation provided by many finally-approved BIPA settlements. Although the claims deadline is not for another five weeks, over 2,200 claims and no objections or exclusions

[6] Several bills designed to amend BIPA have been introduced in the Illinois Legislature. See Illinois S.B. 2134, H.B. 3024, 559, and 560.

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have been received thus far. This reflects the Settlement Class Members' overwhelmingly positive reaction to the Settlement.

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.").

Here, under the terms of the Settlement Agreement negotiated by Class Counsel, Defendant has agreed to amend its practices with respect to the operation of its SpeedGate System. Namely, Defendant has agreed to comply with all BIPA requirements by: (a) disclosing to individuals who use its SpeedGate System that their finger-scan data is being collected or stored, (b) obtaining BIPA-compliant written releases from such individuals, including modification of its current consent form, and (c) establishing a publicly-available retention schedule and guidelines for permanently destroying the finger-scan data when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with Defendant, whichever occurs first. As a result of this negotiated prospective relief, Settlement Class Members and future users of the SpeedGate System will have the opportunity to provide *informed* consent only after first obtaining the information required under BIPA—a

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significant benefit vis-à-vis their privacy rights. Notably, such individuals will benefit from Defendant's compliance with BIPA even if they do not submit a claim for monetary relief.

Given the significant monetary and non-monetary compensation obtained for the Settlement Class Members and the changes in Defendant's biometric collection and use practices, an attorneys' fee award of 38% of the Settlement Fund, which is inclusive of litigation expenses, is reasonable and fair compensation—particularly in light of the highly fluid nature of the BIPA landscape and the "substantial risk in prosecuting this case under a contingency fee agreement." *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59.

C. The Agreed-Upon Service Award For Plaintiff Is Reasonable And Should Be Approved.

The Settlement Agreement also provides for a Service Award of $15,000 to Plaintiff Rogers for serving as class representative and agreeing to prosecute this action in his own name despite the risk of retaliation by current or future employers, who are Defendant's customers, and despite the stigma that comes with perceived litigiousness. *Schulte v. Fifth Third Bank,* 805 F. Supp. 2d at 600–01 (noting that class representatives open themselves to "scrutiny and attention" by adding their name to public lawsuits, which, in and of itself, "is certainly worthy of some type of remuneration."). Because a named plaintiff is essential to any class action, service awards are "justified when necessary to induce individuals to become named representatives." *Spano,* 2016 WL 3791123, at *4 (approving service 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 service 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 $15,000 Service Award sought. Even though no award of any sort was promised to Plaintiff prior to the

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commencement of the litigation or at any time thereafter, Plaintiff nonetheless contributed significant time and effort over the course of three years in pursuing his own BIPA claims, as well as in serving as a class representative on behalf of the Settlement Class Members—exhibiting a willingness to undertake the responsibilities and risks attendant with bringing a representative action. (Meyers Decl., ¶¶ 22–24). Plaintiff participated in the initial investigation of his claims 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 a multitude of occasions, and provided feedback on various filings including, most importantly, the Settlement Agreement. (*Id*.) Moreover, Plaintiff was deposed in this case and thus gave up even more of his time in order to prepare for his deposition with Class Counsel, be deposed under oath, and review his deposition transcript for accuracy. (*Id.*) Regarding the origins of this case, Plaintiff was a class member in a previous BIPA case prosecuted and settled by McGuire Law, *Zhirovetskiy v. Zayo Group, LLC,* 2017-CH-09323 (Cir. Ct. Cook Cnty., Ill.). After submitting a claim in that case, Plaintiff Rogers reached out to Class Counsel to inform them of what he believed to be the illegal capture of his and others' biometrics by Defendant. Were it not for Plaintiff's astuteness and 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 likely not exist at all. (Meyers Decl., ¶ 23).

Numerous courts that have granted final approval in similar class action settlements have awarded the same or similar service awards as the $15,000 award sought here. *See, e.g.*, *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 service award); *Diaz v. Greencore USA – CPG Partners, LLC,* No. 17-CH-13198 (Cook Cnty. Aug. 30, 2019) (awarding $15,000 service award in BIPA class action);

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Seal v. RCN Telecom Services, LLC, 2016-CH-07033, February 24, 2017 Final Order and Judgment, ¶ 20 (Cir. Ct. Cook Cnty., Ill.) (awarding $10,000 service awards to each of two named plaintiffs); *Aranda v. Caribbean Cruise Line, Inc.*, No. 12-cv-4069, 2017 WL 1369741, at *10 (N.D. Ill. Apr. 10, 2017) (awarding $10,000 to each class representative); *Spano*, 2016 WL 3791123, at *4 (approving $10,000 service awards); *Zhirovetskiy*, No. 17-CH-09323 (April 18, 2019 Final Order and Judgment, ¶ 20) (awarding $10,000 service award in BIPA class action); *Glynn v. eDriving, LLC*, No. 19-CH-08517, Final Order and Judgment, ¶ 20) (Walker, J.) (same).

Accordingly, the Service Award of $15,000 is eminently justified by Mr. Rogers' significant 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 of $1,444,000.00, and (ii) approving a Service Award in the amount of $15,000.00 to Class Representative Rogers in recognition of his significant efforts on behalf of the Settlement Class Members.

Dated: August 19, 2022

Respectfully submitted,

RICHARD ROGERS, individually and on behalf of the Settlement Class

By: /s/ *Brendan Duffner*
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on August 19, 2022, a copy of *Plaintiff's Motion & Memorandum of Law in Support of Approval of Attorneys' Fees and Service Award* was filed electronically with the Clerk of Court, with a copy sent electronically to all counsel of record.

/s/ *Brendan Duffner*