IN THE CIRCUIT COURT OF DUPAGE COUNTY
EIGHTEENTH JUDICIAL CIRCUIT

DAVID BAMBERG, *individually and on behalf of all others similarly situated*,

Plaintiff,

v.

DYNAMIC MANUFACTURING, INC.,

Defendant.

Case No. 2023LA000015

Judge: Hon. Timothy McJoynt

Candice Adams
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DuPage County
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MS

MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARD

Dated: May 8, 2023

BURSOR & FISHER, P.A.
Joseph I. Marchese*
Philip L. Fraietta (Attorney No. 6337165)
Max S. Roberts (*Pro Hac Vice*)
888 Seventh Avenue
New York, NY 10019
Tel: (646) 837-7150
Fax: (212) 989-9163
E-mail: jmarchese@bursor.com
pfraietta@bursor.com
mroberts@bursor.com

Class Counsel

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLC
Carl Malmstrom
Attorney No. 285105
111 W. Jackson Blvd., Suite 1700
Chicago, IL 60604
Tel: (312) 984-0000
Fax: (212) 686-0114
E-mail: malmstrom@whafh.com

Local Counsel for Plaintiff and the Class

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INTRODUCTION

In this putative class action, Plaintiff David Bamberg ("Plaintiff") alleges that Defendant Dynamic Manufacturing, Inc. ("Defendant") (Plaintiff and Defendant are collectively referred to as the "Parties") violated Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/15(a) and 14/15(b) by requiring him and its other Illinois workers to "clock" in and out using their fingerprints. Defendant denies Plaintiff's allegations. After extensive negotiations spanning over many months, the Parties have reached a proposed settlement of up to $1,826,400, memorialized in their Settlement Agreement and Release (the "Settlement" or "Agreement"), from which each of the approximately 2,283 Settlement Class Members who file a claim will receive an estimated cash payment of approximately $511. If approved, the Settlement will bring certainty, closure, and significant and valuable relief for individuals to what otherwise would likely be contentious and costly litigation regarding Defendant's alleged unlawful collection, use and storage of individuals' biometric identifiers and/or biometric information.

Critically, the Settlement was reached despite substantial risk of non-recovery. Indeed, the Settlement was reached before the Illinois Supreme Court issued decisions in two appeals pertaining to the length of the statute of limitations for BIPA claims, and when such claims accrue. *See Tims v. Black Horse Carriers, Inc.*, -- N.E.3d --, 2023 IL 127801 (Feb. 2, 2023) (concluding BIPA claims are subject to a five-year statute of limitations); *Cothron v. White Castle System, Inc.*, -- N.E.3d --, 2023 WL 128004 (Feb. 17, 2023) (concluding that BIPA claims accrue with each scan).[1] An adverse decision in either appeal would have deprived the Settlement Class, or at least a substantial portion thereof, of any recovery whatsoever.

[1] Indeed, numerous trial courts throughout Illinois had concluded that a BIPA claim accrues for purposes of calculating the statute of limitations upon the initial capture and use of a plaintiff's fingerprint or hand scan, thus potentially depriving some Settlement Class Members of any recovery whatsoever. *See Smith v. Top Die Casting Co.*, Case No. 2019-L-248 (Cir. Ct. Winnebago Cnty. Mar. 12, 2020); *Robertson v. Hostmark Hospitality Group, Inc.*, Case No. 18-

Plaintiff and Class Counsel respectfully request that the Court approve a Service Award of $5,000 to Plaintiff, and a Fee Award of thirty-five percent (35%) of the gross settlement fund or $639,240, inclusive of costs and expenses. As detailed below, the requested awards are appropriate under governing Illinois law, consistent with the amounts awarded in prior similar settlements, and fairly compensate Class Counsel and Representative Plaintiff for the work they performed and commendable result they achieved in this high-risk litigation.

I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to filing this Action, Plaintiff filed a similar putative class action against Defendant. The material allegations of that Complaint were that Defendant possessed, collected, stored, and used – without first providing notice, obtaining informed written consent, or publishing data retention policies – the fingerprints and associated personally identifying information of hundreds of its employees (and former employees), who were required to "clock in" with their fingerprints, in violation of the BIPA, 740 ILCS 14/1 *et seq*. *See* Declaration of Philip L. Fraietta ("Fraietta Decl.") ¶ 4.

From the outset of that case, the Parties engaged in settlement discussions, including informally exchanging relevant information surrounding the alleged claims. *See* Fraietta Decl. ¶ 5. Over the next several months, counsel for the Parties negotiated this Settlement, reached agreement on all material terms of a class action settlement, and executed a term sheet. *Id.* ¶ 7. On January 6, 2023, Plaintiff dismissed his individual action against Defendant. Thereafter, Plaintiff filed this case in this Court, which both Parties agree is an appropriate venue for Plaintiff's

CH-5194 (Cir. Ct. Cook Cnty. Jan. 27, 2020); *Robertson v. Hostmark Hospitality Group, Inc.*, Case No. 18-CH-5194 (Cir. Ct. Cook Cnty. May 29, 2020); *Watson v. Legacy Healthcare Financial Services, LLC*, Case No. 19-CH-3425 (Cir. Ct. Cook Cnty. June 10, 2020); *Mora v. J&M Plating Inc.*, Case No. 21-CH-0022 (Cir. Ct. Winnebago Cnty. July 13, 2021). *But see Watson v. Legacy Healthcare Financial Servs., LLC*, -- N.E.3d --, 2021 WL 5917935 (IL App. Ct. 1st Dist., Dec. 15, 2021) (holding otherwise).

and the Settlement Class's claims under the BIPA against Defendant. *Id.* ¶ 8. Thereafter, the Parties drafted and executed the Settlement Agreement and related documents which are submitted herewith. *Id.* ¶ 9. On March 22, 2023, the Court preliminarily approved the Settlement. *Id.* ¶ 22, Ex. 2.

II. SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the class by delivering cash payments to every individual who submits a timely, simple, one-page Claim Form and who worked or is currently working for Defendant in Illinois and had his alleged Biometric Identifiers and/or Biometric information collected, captured, received, or otherwise obtained or disclosed by Defendant or its agent(s) within the five-year period preceding the date of the Complaint. Fraietta Decl. ¶¶ 11-12. Specifically, Defendant will agree to fund a settlement of up to $1,826,400, from which each Settlement Class Member who submits a valid and timely Claim Form will receive a cash payment of approximately $511. Agreement ¶¶ 27, 46-47, 52. Defendant has agreed that an award of reasonable attorneys' fees and payment of costs and expenses to Class Counsel in this Action will be paid from the Gross Settlement Amount, in an amount to be approved by the Court. *Id.* ¶¶ 74-75. Defendant has also agreed that an incentive award to the Class Representative, subject to Court approval, and the cost of sending the Notice set forth in the Agreement and any other notice as required by the Court, as well as all costs of administration of the Settlement, will be paid from the Gross Settlement Amount. *Id.* ¶¶ 25, 77. Additionally, Defendant has represented that as of the date of its execution of the Agreement, it is in full compliance with BIPA. *Id.* ¶ 53.

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES, COSTS, AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

"Illinois follows the 'American Rule,' which provides that absent statutory authority or a

contractual agreement, each party must bear its own attorney fees and costs." *McNiff v. Mazda Motor of Am., Inc.*, 384 Ill. App. 3d 401, 404 (4th Dist. 2008) (quoting *Negro Nest, L.L.C. v. Mid-Northern Mgmt., Inc.*, 362 Ill. App. 3d 640, 641-42 (4th Dist. 2005)) (quotations omitted). "If a statute or contractual agreement expressly authorizes an award of attorney fees, the court may award fees 'so long as they are reasonable.'" *Id.* (citing and quoting *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 405 (1st Dist. 2007)). Here, the Parties have entered into a contractual agreement – the Settlement Agreement – expressly authorizing an award of attorney fees, costs, and expenses up to $639,240.[2] Agreement ¶¶ 74-75.

A. The Court Should Apply The Percentage-of-the-Fund Method In This Case

"When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Brundidge*

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[2] *See* William B. Rubenstein, 5 NEWBERG ON CLASS ACTIONS § 15:12 (5th ed. 2019) (parties to suit may have private agreements concerning fees which may include agreement between class counsel and defendant whereby defendant agrees to pay a certain fee requested by class counsel); *see also Evans v. Jeff D.*, 475 U.S. 717, 738 n.30 (1986) (parties may simultaneously negotiate a "defendant's liability on the merits and his liability for his opponents' attorney's fees"); *In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App'x 53, 60 (3d Cir. 2014) (awarding $500,000 in fees for injunctive class settlement where defendant agreed to change its misleading labels); *Wing v. Asacro Inc.*, 114 F.3d 986, 988 (9th Cir. 1997) ("At the outset, we note that the fee dispute in this case arises [not from a statute or common fund, but] out of a contract: in the Settlement Agreement, Asacro agreed to pay the reasonable attorney fees and expenses as determined and awarded by the court."); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 523 (1st Cir. 1991) (holding that when parties to class actions have reached a "clear sailing" fee-shifting agreement as part of settlement, trial court may determine and award reasonable fees "even where no fee-shifting statute of common law exception thrives"); *Browne v. Am. Honda Motor Co., Inc.*, No. CV 09-06750 (C.D. Cal. Oct. 10, 2010) ("A settlement agreement is a binding contract" and "contractual provisions providing for the payment of attorneys' fees . . . provide a basis for awarding fees."); *In re TJX Cos. Retail Secs. Breach Litig.*, 584 F. Supp. 2d 395, 399 (D. Mass. 2008) (noting that basis for awarding fees was "part of the Agreement, [in which Defendant] agreed to pay court-approved attorneys' fees not to exceed $6,500,000"); *Deloach v. Philip Morris Cos.*, 2003 WL 23094907, at *4 n.2 (M.D.N.C. Dec. 19, 2003) ("the present petition [for attorney fees] was brought pursuant to a private [settlement] agreement among the parties") (citation omitted); *Neel v. Strong*, 114 S.W.3d 272, 273 (Mo. Ct. App. 2003) ("As part of the settlement, the Attorney General and the tobacco companies agreed that the tobacco companies would pay the fees of the outside counsel.").

v. Glendale Fed. Bank, F.S.B., 168 Ill. 2d 235, 244 (1995) (quoting *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)). "The decision to award fees based on the lodestar or percentage method is a matter within the sound discretion of the trial court, considering the particular facts and circumstances of each case." *Id.* However, the Court is not required to perform a lodestar cross-check on Class Counsel's fees. *McCormick v. Adtalem Glob. Educ., Inc.*, 2022 IL App (1st) 201197-U, ¶ 24 (rejecting an objector's argument that failure to perform lodestar cross-check rendered class counsel's fee unreasonable and awarding class counsel fees totaling 35% of the fund, or $15,7000,00); *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58, 52 N.E.3d 427, 441 (citing *Brundidge,* 168 Ill.2d at 246) (rejecting an objector's argument that the trial court was required to perform a lodestar cross-check on class counsel's fees and awarding class counsel fees totaling 33% of the common fund, or $7,600,000); *Perez v. Rash Curtis & Associates*, 2020 WL 1904533, at *18 (N.D. Cal. Apr. 17, 2020) ("Generally, a district court is 'not required' to conduct a lodestar cross-check to assess the reasonableness of a fee award."). Indeed, the "[p]ercentage analysis approach eliminates the need for additional major litigation and further taxing of scarce judicial resources." *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 924–25 (1st Dist. 1995). "Accordingly, most federal circuits … have abandoned the lodestar in favor of a percentage fee in common fund cases." *Id.*

In "choosing between the percentage and lodestar approaches," courts "look to the calculation method most commonly used in the marketplace at the time such a negotiation would have occurred." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-01 (N.D. Ill. 2015) (citing *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998)); *see also McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 814-15 (E.D. Wis. 2009). In class action litigation, where "the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs'

ultimate recovery," *Kolinek*, 311 F.R.D. at 500-01, state and federal courts in Illinois and throughout the country are in near unanimous agreement "the percentage approach is likely what the class members and counsel would have negotiated when counsel agreed to take on the case." *McCormick*, 2022 IL App (1st) 201197-U, ¶ 26; *see also Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 2006) ("When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the 'market rate.'"); *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 923 (1st Dist. 1995) (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases") (citation omitted); *In re Continental Illinois Securities Litig*., 962 F.2d 566, 572 (7th Cir. 1992) (market for legal services paid on a contingency basis shows the proper percentage to apply in a class action that creates a common fund for the benefit of the class)); *Williams v. Gen. Elec. Capital Auto Lease*, 94 C 7410, 1995 WL 765266, *9 (N.D. Ill. Dec. 26, 1995) (noting that "[t]he approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred upon the class"); *see also, e.g., Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (explaining that where "a class suit produces a fund for the class," as is the case here, "it is commonplace to award the lawyers for the class a percentage of the fund," and affirming fee award of 38% of $20 million recovery to class) (citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)); *Sutton*, 504 F.3d at 693 (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) ("[T]he court agrees with Class Counsel that the fee award . . . should be calculated as a percentage of the money recovered for the class.").

This Court should likewise apply the percentage-of-the-fund method. The percentage-of-the-fund method best replicates the *ex-ante* market value of the services that Class Counsel

provided to the Settlement Class. It is not just the typical method used in contingency-fee cases generally, *see Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998), but it is also the means by which an informed Settlement Class and Class Counsel would have established counsel's fee *ex-ante*, at the outset of the litigation. *See Kolinek*, 311 F.R.D. at 500-501 ("[T]he normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery"). The percentage-of-the-fund method also better aligns Class Counsel's interests with those of the Settlement Class because it bases the fee on the results the lawyers achieve for their clients rather than on the number of motions they file, documents they review, or hours they work, and it avoids some of the problems the lodestar-times-multiplier method can foster (such as encouraging counsel to delay resolution of the case when an early resolution may be in their clients' best interests). *McCormick*, 2022 IL App (1st) 201197-U, ¶ 26 ("Peart's argument that a method that is disfavored in class actions should have been used at least for a cross-check of the fee award is an argument for inefficiency. He is proposing what the supreme court disapproved of in *Brundidge*: 'protracted satellite litigation involving the attorney fees award' as the trial court determines 'the reasonable fees to be awarded based upon hourly rates and the reasonable number of hours expended.'"); *Brundidge*, 168 Ill.2d at 242; *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *In re Synthroid Mktg. Litig.*, 264 F.3d 712 at 720-21 (7th Cir. 2001).[3] And, it is also simpler to apply. *Id.*; *see also, e.g., Kolinek*, 311 F.R.D. at 501 (percentage of the ultimate recovery method appropriate for awarding fees in TCPA class action

[3] In this case for example, a lodestar approach would have created a perverse incentive for Class Counsel to reject or delay entering into the Settlement offer set forth in the Settlement Agreement merely to bill more hours through more unnecessary, wasteful, and inefficient litigation—an approach that, had it been adopted by Class Counsel, may have resulted in no recovery for all or some of the Settlement Class Members based on then ongoing appeals of potentially dispositive issues in BIPA cases. *See Tims v. Black Horse Carriers, Inc.*, -- N.E.3d --, 2023 IL 127801 (Feb. 2, 2023) (length of statute of limitations); *Cothron v. White Castle System, Inc.*, -- N.E.3d --, 2023 WL 128004 (Feb. 17, 2023) (accrual of statute of limitations).

"because fee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of nine million lightly-injured plaintiffs likely would not be interested in doing"). Accordingly, the Court should apply the percentage-of-the-fund method.

B. The Requested Attorneys' Fees, Costs, And Expenses Are Reasonable As A Percentage Of The Class Benefit

In class action settlements, courts typically award attorneys' fees based on a percentage of the total settlement, which includes any litigation expenses incurred. *Brundidge*, 168 Ill. at 238. "[T]he percentage of the fund method…reflects the results achieved." *Id.* at 244.

An award to Class Counsel of 35% of the Gross Settlement Fund is well within the range of fees typically awarded to class counsel by Illinois courts in comparable all-cash class action settlements. *See, e.g., Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (citing *Kirchoff 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); *Meyenburg v. Exxon Mobil Corp.*, U.S. Dist. LEXIS 52962, at *5 (S.D. Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation"); *see also, e.g., Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding an attorneys' fees award of one-third of a reversionary fund recovered 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").

1. <u>The Total Value Of The Settlement Is $1,826,400</u>

To calculate attorneys' fees based on the percentage of the benefit, the Court must first determine the value of the Settlement Fund. In doing so, the Court must include the value of the benefits conferred to the Class, including any attorneys' fee, expenses, service award and notice

and claims administration payments to be made. *See*, *e.g.*, *Brundidge*, 168 Ill.2d at 238. Thus, the Court should consider the *entire benefit* conferred by the Settlement, including the benefit fund, agreed on attorneys' fees, costs, and expenses, cost of notice and claims administration, and the Plaintiff's incentive award, amounting to a total value of $1,826,400.

2. The Requested 35% Of The Settlement Fund Is Reasonable

Here, the requested $639,240 fee, inclusive of costs and expenses, is 35% of the $1,826,400 Gross Settlement Fund generated on behalf of the Settlement Class, which falls within the range awarded in class actions by courts throughout the country. As noted above, Courts have recognized that fee awards as high as 50% of the gross settlement fund are reasonable. *See* NEWBERG ON CLASS ACTIONS, *supra*, §15:83 (5th ed. Dec. 2016 update) ("Usually, 50 percent of the fund is the upper limit on a reasonable fee award from a common fund, . . . though somewhat larger percentages are not unprecedented."); *Wells v. Allstate Ins. Co.*, 557 F. Supp. 3d 1, 7-8 (D.D.C 2008) (noting that fee awards may range up to 45%, and approving fee request of 45% of the total gross recovery); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 499 (D.D.C. 1981) (awarding 45% of $7.3 million gross settlement fund as attorneys' fees); *see also Martin v. AmeriPride Servs, Inc.*, 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) ("Other case law surveys suggest that 50% is the upper limit, with 30-50% commonly being awarded in cases in which the common fund is relatively small."). The requested fee of 35% of the Gross Settlement Fund is reasonable in light of the substantial monetary relief obtained by Class Counsel here – despite significant risk – and should be awarded.

"When assessing the reasonableness of fees, a trial court may consider a variety of factors, including the nature of the case, the case's novelty and difficulty level, the skill and standing of the attorney, the degree of responsibility required, the usual and customary charges for similar work, and the connection between the litigation and the fees charged." *McNiff*, 384

Ill. App. 3d at 407 (quoting *Richardson v. Haddon*, 375 Ill. App. 3d 312, 314 – 5 (1st Dist. 2007)) (quotations omitted). Here, each of these factors shows the requested fee is reasonable.

a. *Plaintiff's Claims Carried Substantial Litigation Risk*

This case presented substantial litigation risk. In addition to the typical risks associated with class action litigation, such as certifying a class, this case was likely to rise or fall based on the outcome of appeals in cases pending before the Illinois Supreme Court. *See Tims v. Black Horse Carriers, Inc.*, -- N.E.3d --, 2023 IL 127801 (Feb. 2, 2023) (length of statute of limitations); *Cothron v. White Castle System, Inc.*, -- N.E.3d --, 2023 WL 128004 (Feb. 17, 2023) (accrual of statute of limitations); *see also* Fraietta Decl. ¶ 19. Nonetheless, despite knowing the risks, Class Counsel took on the case, worked on the case, and even undertook a significant financial risk, with no upfront payment, and no guarantee of payment absent a successful outcome.

Even if the claims survived after the pending appeals are decided, Defendant would have contested class certification, and Plaintiff would have faced serious risks even before getting to class certification. Defendant most certainly would have sought summary judgment, as well as engaged in extensive and protracted discovery. Despite these risks, the Settlement Agreement provides every Settlement Class Member who completes an approved Claim Form with a cash payment of approximately $511. This is an excellent result, particularly in comparison with other approved BIPA settlements that were reached prior to the current risky appellate landscape taking shape. *See e.g.*, *Carroll v. Crème de la Crème, Inc.*, No. 2017-CH-01624 (Cir. Ct. Cook Cnty., Ill. 2018) (each class member eligible to enroll in credit and identity monitoring services free of charge without further monetary relief); *Marshall v. Lifetime Fitness, Inc.*, 2017-CH-14262 (Cir. Ct. Cook Cty.) (paying claimants $270 each in addition to credit monitoring); S*ekura v. LA Tan*, 2015-CH-16694 (Cir. Ct. Cook Cty.) (paying claimants approximately $150 each);

Prelipceanu v. Jumio Corp., 2018-CH-15883 (Cir. Ct. Cook Cty.) (paying claimants approximately $260 each).

b. *The Skill And Standing Of The Attorneys Supports The Requested Fee*

The attorneys handling this case are in good standing in their respective jurisdictions. Class Counsel are well-respected attorneys with significant experience litigating similar class action cases in federal and state courts across the country, including other BIPA cases. Fraietta Decl. ¶¶ 23-26, Ex. 3 (firm resume of Bursor & Fisher, P.A.). Indeed, Class Counsel has been recognized by courts across the country for their expertise. *See id*; *see also Famular v. Whirlpool Corp.*, 2019 WL 1254882, at *4 (S.D.N.Y. Mar. 19, 2019) ("Class counsel are experienced and qualified class action lawyers. Bursor & Fisher, P.A., has been appointed class counsel in dozens of cases in both federal and state courts, and has won several multi-million dollar verdicts or recoveries.") (internal quotation omitted); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 2014) (Rakoff, J.) ("Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. … The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in [six] class action jury trials since 2008.").

Furthermore, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re MetLife Demutalization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Here, Defendant was represented by a prominent and well-respected Chicago law firm. Class Counsel achieved an exceptional result in this case while facing well-resourced and experienced defense counsel. *See Marsh ERISA Litig.*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

c. *The Settlement Was The Result Of Arms'-Length Negotiations Between The Parties After A Significant Exchange Of Information*

This action required considerable skill and experience to bring it to such a successful conclusion. The case required investigation of factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. In taking on this case, Class Counsel undertook the large responsibility of pursuing claims on behalf of a class of employees against their employer and experienced defense counsel. Class Counsel also undertook the large responsibility of funding this case, without any assurance that they would recover those costs. Class Counsel not only took on the obligation to act on behalf of the Plaintiff, but also the class as a whole.

Class Counsel worked with Defendant's Counsel to gather critical information, including the size of the putative class and approximate time-period of the alleged BIPA violations, and engaged in months of arm's-length settlement negotiations. Fraietta Decl. ¶¶ 5-6. Through the undertaking of a thorough investigation and substantial arm's-length negotiations, Class Counsel obtained a settlement that provides a real and significant monetary benefit to the Class. Since that time, Class Counsel has drafted and negotiated the Settlement Agreement, moved for and obtained preliminary approval, and diligently monitored the successful notice program and claims administration process.

Defendant is represented by highly experienced attorneys who have made clear that absent a settlement, they were prepared to continue their vigorous defense of this case and oppose class certification. Even assuming a class was certified, and summary judgment defeated, the case would then have moved on to pretrial briefing, a pretrial conference, and then a jury trial, which would have been costly, time-consuming, and very risky for Class Members and for counsel. Class Counsel undertook this representation understanding that the risk of

losing on class certification, or summary judgment, or at trial was significant. But for this settlement, Defendant would have contested class certification and moved for summary judgement, resulting in rounds of briefing and risk to the Settlement Class.

d. *The Usual And Customary Charges For Similar Work*

When Class Counsel undertake major litigation such as this, it necessarily limits their ability to undertake other complex litigation cases. During the course of this litigation, Class Counsel devoted significant time and resources to succeed in this case. Further, as detailed above, the requested fees, costs, and expenses of 35% of the settlement fund is well within the market range. *See supra* cases cited in Argument §§ I.A-B. Indeed, Illinois courts have awarded 40% in fees in similar BIPA settlements, including where the class member recoveries were smaller than in this case. *See Sekura v. L.A. Tan Enterprises, Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Cnty., Ill. 2016) (awarding a 40% fee where the BIPA class settlement resulted in each class member being eligible to receive a *pro rata* share of a settlement fund that would have amounted to approximately $40); *Preplipceanu v. Jumio Corp.*, No. 2018-CH-15883 (Cir. Ct. Cook Cnty., Ill. 2020) (awarding a 40% fee where each class member was eligible to receive a payment of $262.28).

II. THE REQUESTED INCENTIVE AWARD IS REASONABLE AND SHOULD BE APPROVED

An incentive award of $5,000.00 for Plaintiff is appropriate here. "In some cases, the amount requested as an incentive award, given the court's knowledge about the advanced stage of the case or other procedural facts, will be so obviously reasonable that only minimal scrutiny will be required for approval, at least in the absence of any objection from class member." 299 F.R.D. 160 at NACA Guideline 5. Defendant has agreed to pay an incentive award to Plaintiff in the amount of $5,000. Settlement Agreement ¶ 77. Courts routinely approve incentive awards to

compensate named plaintiffs for the services they provide and the risks they incur during the course of class action litigation. *See* 299 F.R.D. 160, NACA Guideline 5 (West 2014) ("Consumers who represent an entire class should be compensated reasonably when their efforts are successful and compensation would not present a conflict of interest."); *see also Cook v. Niedert,* 142 F.3d 1004 (7th Cir. 1998) (value of settlement was $ 14 million; incentive award to class representative of $25,000); *see also In re Remeron End-Payor Antitrust Litig*., No. Civ. 02-2007 FSH, 2005 WL 2230314 (D.N.J. Sept. 13, 2005) (value of settlement was $36 million; incentive payments totaling $75,000 for six named plaintiffs). "Many cases note the public policy reasons for encouraging individuals with small personal stakes to serve as class plaintiffs in meritorious cases." 299 F.R.D. 160, Guideline 5 Discussion (citing cases).

This case is no different. Plaintiff's participation has been instrumental in the prosecution and ultimate settlement of this action. Here, Plaintiff spent substantial time on this action, including by: (i) assisting with the investigation of this action and the drafting of the complaint, (ii) being in contact with counsel frequently, (iii) and staying informed of the status of the action, including settlement. *See* Fraietta Decl. ¶¶ 31-33; *see also* Declaration of David Bamberg ¶¶ 4-10. Moreover, the requested incentive award of $5,000 is commensurate to Plaintiff's potential recovery under BIPA. *See* 740 ILCS 14/20(2) (providing recovery of up to $5,000 in a private action).

CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court approve an incentive award of $5,000 to Plaintiff and approve an award of attorneys' fees, costs, and expenses of 35% of the Settlement Fund, $639,240 to Class Counsel. The requested awards would both adequately reward and reasonably compensate Class Counsel and Plaintiff for assuming the significant risks that this case presented at the outset and nonetheless expending a

substantial amount of time and other resources investigating, litigating, and negotiating a resolution to the case for the benefit of the Settlement Class.

Dated: May 8, 2023

Respectfully submitted,

/s/ Carl V. Malmstrom

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLC
Attorney No. 285105
Carl V. Malmstrom
111 W. Jackson Blvd., Suite 1700
Chicago, IL 60604
Tel: (312) 984-0000
Fax: (212) 686-0114
E-mail: malmstrom@whafh.com

Local Counsel for Plaintiff and the Class

BURSOR & FISHER, P.A.
Joseph I. Marchese*
Philip L. Fraietta (Attorney No. 6337165)
Max S. Roberts (*Pro Hac Vice*)
888 Seventh Avenue
New York, NY 10019
Tel: (646) 837-7150
Fax: (212) 989-9163
E-mail: jmarchese@bursor.com
pfraietta@bursor.com
mroberts@bursor.com

* *Pro Hac Vice Application Forthcoming*

Class Counsel