

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

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ROBIN RAPAI, individually and on  
behalf of all others similarly situated,

*Plaintiff,*

v.

HYATT CORPORATION,

*Defendant.*

15589569

No. 17-CH-14483

Hon. Anna H. Demacopoulos

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

Plaintiff Robin Rapai, by and through her attorneys, and pursuant to 735 ILCS 5/2-801, hereby moves for an award of attorneys' fees and expenses for Class Counsel, as well as an incentive award for Plaintiff as the Class Representative in connection with the class action settlement with Defendant Hyatt Corporation. In support of this Motion, Plaintiff submits the following memorandum of law.

Dated: November 12, 2021

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## I. INTRODUCTION

The Settlement<sup>1</sup> that Class Counsel have achieved in this case is an exceptional result for Settlement Class Members, as the estimated per-claimant amount recovered here is substantial and on the high end of BIPA settlements. The Parties' Agreement has established a non-reversionary Settlement Fund of \$1,068,300.00 to provide each Settlement Class Member who files a valid, timely claim with an equal, *pro rata* distribution of the Settlement Fund for having their biometrics collected by Defendant Hyatt Corporation ("Defendant") in alleged violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"). In addition to the substantial financial benefit to the Settlement Class Members, the Settlement also provides significant non-monetary relief designed to prevent the recurrence of the allegedly unlawful biometric collection and use practices at issue in this case.

The Court preliminarily approved the Settlement on July 14, 2021. Direct Notice of the Settlement commenced on October 22, 2021. As of the filing of this Motion, nearly two hundred claims have already been submitted, with six weeks remaining before the Claims Deadline. To date, no Settlement Class Member has objected to the Settlement and no Settlement Class Member has requested exclusion.

With this Motion, Class Counsel request a fee of 40% of the total Settlement Fund, amounting to \$427,320.00, plus their litigation 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

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<sup>1</sup> 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.

in Illinois courts, and is also reasonable given the time Class Counsel have committed to resolving this litigation for the benefit of the Settlement Class Members.

Both Class Counsel and the Class Representative devoted significant time and effort to the 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 regarding the state of BIPA when this Settlement was reached, and the continuous, ongoing shifts in the landscape of BIPA litigation. Plaintiff and Class Counsel respectfully request that the Court approve attorneys' fees and reasonable expenses of \$431,620.00 and the agreed-upon Incentive Award of \$12,500.00 for Plaintiff as Class Representative.

## **II. BACKGROUND**

### **A. BIPA**

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

- (1) Inform the person whose biometrics are to be collected in writing that their biometrics will be collected or stored;
- (2) Inform the person whose biometrics are to be collected in writing of the specific purpose and the length of term for which such biometrics are being collected, stored and used;
- (3) Receive a written release from the person whose biometrics are to be

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 individuals' biometrics, provide them with a means of enforcing those statutory rights, and regulate the practice of collecting, using and disseminating such sensitive biometric information.

## **B. The Case and Procedural History**

### *1. Plaintiff's Allegations*

Defendant is a leading hotel chain operating across the country, including numerous hotels in Illinois. Plaintiff worked as a server for Defendant at The Hyatt Lodge at McDonald's Campus, one of Defendant's hotels, from September 26, 2017 to October 30, 2017. Each time Plaintiff clocked in and clocked out of work, she was required to provide her biometrics, i.e. scans of her fingers, in order to authenticate her identity for timekeeping purposes. Plaintiff has further alleged that, in operating its timekeeping system, Defendant has failed to comply with BIPA because Defendant: (1) failed to inform individuals prior to capturing their biometrics that it would be capturing such information; (2) failed to receive a written release for the capture of biometrics prior to such capture; (3) failed to inform the person whose biometrics are being captured of the specific purpose and length of term for which such biometrics are captured; and (4) failed to establish a publicly available retention schedule and guidelines for permanently destroying biometrics. Defendant denies any violation of or liability under BIPA.

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

Plaintiff initiated this case in the Circuit Court of Cook County, Illinois on October 30, 2017. Plaintiff filed her operative First Amended Class Action Complaint on January 30, 2018.

The case was stayed pending the Illinois Supreme Court's decision in *Rosenbach v. Six Flags Entertainment Corp.* On January 25, 2019, the Illinois Supreme Court settled the threshold question as to the standing required to sustain a claim and recover statutory damages under BIPA, holding that an individual "need not allege some actual injury or adverse effect, beyond [the actual injury caused by the] violation of her or her rights under the Act[.]" *Rosenbach v. Six Flags Entertainment Corp., et al.*, 2019 IL 123186, ¶¶ 36–37, 40. After the Court lifted the stay on February 28, 2019, Defendant moved to dismiss Plaintiff's claims on May 29, 2019, arguing (1) that Plaintiff lacked common-law standing to assert her BIPA claims; (2) that her claims were preempted by the Illinois Workers' Compensation Act, and (3) that her claims were subject to ongoing litigation against Kronos, Inc., the entity who had supplied the biometric timekeeping system at issue to Defendant. On September 26, 2019, after full briefing and oral argument, the Court denied Defendant's motion in its entirety. Defendant filed its answer and affirmative defenses to Plaintiff's First Amended Complaint on November 25, 2019.

On February 13, 2020, the court stayed the lawsuit a second time pending the First District Appellate Court's ruling in *McDonald v. Symphony Bronzeville, LLC*, No. 1-19-2398. *McDonald* involved the issue of whether the Illinois Workers' Compensation Act bars the recovery of statutory damages under BIPA arising in the employment context. On March 9, 2020, Plaintiff filed a motion for class certification. Following the First District Appellate Court's ruling, issued on September 18, 2020, that the Illinois Workers' Compensation Act does not bar the recovery of statutory damages under BIPA, Plaintiff moved to lift the stay. The Court denied Plaintiff's motion after the Illinois Supreme Court agreed to review the First District's *McDonald* decision.

In an effort to reach an early resolution to what would otherwise be continued highly-contested litigation, on March 16, 2021, the Parties participated in a formal, full-day mediation

session with the Honorable Lynn M. Egan (Ret.), a former Judge of the Circuit Court of Cook County, of Webster Egan Mediations. Counsel for Plaintiff and for Defendant expended significant efforts to reach a settlement, including but not limited to exchanging formal mediation submissions, exchanging information regarding Defendant's use of a biometric timekeeping system, identifying potential class members, and participating in arm's-length negotiations. Following a day-long meeting overseen by Judge Egan and additional months of negotiation over the final form of the Settlement Agreement and notice plan, the Parties agreed upon and executed a final Settlement Agreement which the Court preliminarily approved on July 14, 2021. Following substantial confirmatory discovery regarding the number and identities of the Settlement Class Members, direct notice of the Settlement was sent to all Settlement Class Members by U.S. Mail on October 22, 2021.

### **III. THE SETTLEMENT**

#### **A. The Settlement Class Members Receive Exceptional Monetary And Non-Monetary Relief Under The Settlement.**

Class Counsel's prosecution of this litigation has culminated in this class-wide Settlement that provides exceptional monetary relief to the Settlement Class Members. The Settlement establishes a non-reversionary \$1,068,300.00<sup>2</sup> Settlement Fund (Agreement, ¶ 46), and each valid claimant will be entitled to an equal share of the fund after deductions of administration costs and the Court-approved attorneys' fees and incentive award. Although the per-claimant amount will necessarily depend on the number of valid claims ultimately filed, due to the size of the Settlement Class it is estimated that valid claimants will each receive approximately \$1,500.

The Settlement also provides valuable prospective relief to the Settlement Class. Defendant

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<sup>2</sup> Through confirmatory discovery, Class Counsel have confirmed that the Settlement Class is comprised of 1,187 individuals, resulting in a Settlement Fund of \$1,068,300.00 (Agreement, ¶ 55(a)).

has agreed that it shall remain compliant with all BIPA requirements going forward, including BIPA's consent and retention policy requirements. (*Id.*, ¶ 72). This prospective relief benefits both the Settlement Class Members and future employees of Defendant.

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

Under the Settlement Agreement's Notice Plan, which has already gone into effect, direct notice has been provide by U.S. Mail to the Settlement Class Members. (*See* Declaration of Evan M. Meyers, attached as Exhibit 1, ¶ 16). Finally, the Settlement Website is operational and makes available the Claim Form, detailed Long Form Notice (in English and Spanish) and all relevant case information to Settlement Class Members, and permits Class members to submit claims online. To date, nearly two hundred claims have been submitted, and no Class Members have opted out or objected to 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 in the amount of \$427,320.00, which amounts to 40% of the Settlement Fund, plus \$4,300.00 in reimbursable expenses. (Agreement, ¶ 99). 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 outstanding recovery secured on behalf of the Settlement Class Members. It is well settled that attorneys who, by their efforts, create a common fund for the benefit of a class are entitled to reasonable compensation for their services. *See Wendling v. S. Ill. Hosp. Servs.*, 242 Ill. 2d 261, 265 (2011) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.").

In cases where, as here, a class action settlement results in the creation of a settlement fund, “[t]he Illinois Supreme Court has adopted the approach taken by the majority of Federal courts on the issue of attorney fees[.]” *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13 (1st Dist. 1992) (citing *Fiorito v. Jones*, 72 Ill.2d 73 (1978)). That is, where “an equitable fund has been created, attorneys for the successful plaintiff may directly petition the court for the reasonable value of those of their services which benefited the class.” *Id.* at 14 (citing *Fiorito*, 72 Ill.2d 73). This rule “is based on the equitable notion that those who have benefited from litigation should share in its costs.” *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) (citing *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988)).

In deciding an appropriate fee in such cases, “a trial judge has discretionary authority to choose a percentage[-of-the-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-recovery approach—the approach used in the vast majority of common fund class actions, including BIPA class actions. It is settled law in Illinois that the Court need not employ the lodestar method in

assessing a fee petition. *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59. This is because the lodestar method is disfavored, as it not only adds needless work for the Court and its staff,<sup>3</sup> it misaligns the interests of Class Counsel and the Settlement Class Members. 5 Newberg on Class Actions § 15:65 (5th ed.) (“Under the percentage method, counsel have an interest in generating as large a recovery for the class as possible, as their fee increases with the class’s take. By contrast, when class counsel’s fee is set by an hourly rate, the lawyers have an incentive to run up as many hours as possible in the litigation so as to ensure a hefty fee, even if the additional hours are not serving the clients’ interests in any way”).

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

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

for the class. Applying a percentage-of-the-recovery approach is also generally more appropriate in cases like this one because it best reflects the fair market price for the legal services provided by the class counsel. *See Ryan*, 274 Ill. App. 3d at 923 (noting that “a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases”) (citing *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255–56 (3d. Cir. 1985); *Sutton*, 504 F.3d at 693 (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered). This approach also accurately reflects the contingent nature of the fees negotiated between Class Counsel and Plaintiff, who agreed *ex ante* that up to 40% of any settlement fund plus reimbursement of costs and expenses would represent a fair award of attorneys’ fees from a fund recovered for the Class. (Bormes Decl., ¶ 11); *see also In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (applying the percentage-of-the-recovery approach and noting that class members would typically negotiate fee arrangement based on percentage method rather than lodestar).

Class Counsel are not aware of any BIPA class action settlements involving a monetary common settlement fund where a court relied on the lodestar method to determine attorneys’ fees. In fact, to Class Counsel’s knowledge, the percentage-of-the-recovery method has been used to determine a reasonable fee award in every BIPA class action settlement in the Circuit Court of Cook County (where the majority of BIPA class actions are pending) where the defendant – as here – created a monetary common fund. *See, e.g., Sekura v. L.A. Tan Enters., Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Cnty., Ill. Dec. 1, 2016); *Zepeda v. Kimpton Hotel & Rest.*, No. 2018-CH-02140 (Cir. Ct. Cook Cnty., Ill. Dec. 5, 2018); *Taylor v. Sunrise Senior Living Mgmt., Inc.*, No. 2017-CH-15152 (Cir. Ct. Cook Cnty., Ill. Feb. 14, 2018); *Svagdis v. Alro Steel Corp.*, No. 2017-

CH-12566 (Cir. Ct. Cook Cnty., Ill.); *Williams v. Swissport USA, Inc.*, No. 2019-CH-00973 (Cir. Ct. Cook Cnty., Ill.); *Collier, et. al. v. Pete's Fresh Market 2526 Corporation, et. al.*, No. 2019-CH-05125 (Cir. Ct. Cook Cnty., Ill. Dec. 8, 2020); *Glynn v. eDriving, LLC*, 2019-CH-08517 (Cir. Ct. Cook Cnty., Ill. Dec. 14, 2020); *Kusinski v. ADP, LLC*, 2017-CH-12364 (Cir. Ct. Cook Cnty., Ill. Feb. 10, 2021); *Draland v. Timeclock Plus, LLC*, No. 2019-CH-12769 (Cir. Ct. Cook Cnty., Ill. Apr. 8, 2021); *Rogers v. CSX Intermodal Terminal, Inc.*, No. 19-CH-04168 (Cir. Ct. Cook Cnty., Ill. May 13, 2021); *Freeman-McKee v. Alliance Ground Int'l, LLC*, 2017-CH-13636 (Cir. Ct. Cook County, Ill. June 15, 2021) (Demacopoulos, J.); *Salkauskaite v. Sephora USA, Inc.*, 2018-CH-14379 (Cir. Ct. Cook County, Ill. June 23, 2021); *Gonzalez v. Silva Int'l, Inc.*, 2020-CH-03514 (Cir. Ct. Cook County, Ill. June 24, 2021); *Williams v. Inpax Shipping Solutions, Inc.*, 2018-CH-02307 (Cir. Ct. Cook County, Ill. Sept. 1, 2021); *Roberts v. Paramount Staffing, Inc.*, 2017-CH-15522 (Cir. Ct. Cook County, Ill. Sept. 3, 2021); *Roberts v. Paychex, Inc.*, 2019-CH-00205 (Cir. Ct. Cook County, Ill. Sept 10, 2021).

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-Fund Method Of Calculating Attorneys' Fees.**

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

continuing, protracted litigation, Class Counsel's fee request is fair.

1. *The requested attorneys' fees amount to 40% of the Settlement Fund—a percentage within the range found reasonable in similar cases.*

The requested fee award of \$427,320.00 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. In fact, a 40% fee award was recently awarded in numerous separate BIPA class action settlements in the Circuit Court of Cook County. *See, e.g., Zepeda*, No. 18-CH-02140 (Cir. Ct. Cook Cnty. 2018) (attorneys' fee award of 40% of settlement fund in BIPA class settlement); *Svagdis*, No. 17-CH-12566 (Cir. Ct. Cook Cnty., Ill., 2018) (same); *Zhirovetskiy*, No. 17-CH-09323 (Cir. Ct. Cook Cnty., Ill., 2019) (same); *McGee v. LSC Commc's*, 17-CH-12818 (Cir. Ct. Cook Cnty., Ill. 2019) (same); *Smith v. Pineapple Hospitality Grp.*, No. 18-CH-06589 (Cir. Ct. Cook Cnty., Ill. 2020) (same); *Prelipceanu v. Jumio Corp.*, No. 18-CH-15883 (Cir. Ct. Cook Cnty. Ill. 2020) (same); *Freeman-McKee v. Alliance Ground Int'l, LLC*, No. 17-CH-13636 (Cir. Ct. Cook Cnty., Ill. 2021) (Demacopoulos, J.) (same); *Knobloch v. ABC Financial Services, LLC et al.*, No. 17-CH-12266 (Cir. Ct. Cook Cnty., Ill. 2021); *see also, e.g., Willis v. iHeartMedia Inc.*, No. 16-CH-02455, August 11, 2016 Final Judgment and Order of Dismissal, at 5 (awarding attorneys' fees and costs of 40% of an \$8,500,000 common fund in a TCPA class settlement); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, 2001 WL 1568856, at \*4 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (citing *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Meyenburg v. Exxon Mobil Corp.*, No. 05-cv-15, 2006 WL 2191422, at \*2 (S.D. Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation"); Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 15.83

(William B. Rubenstein ed.; 5th ed.) (noting that fifty percent of the fund appears to be an approximate upper limit on fees and expenses). Thus, Plaintiff's request of 40% of the Settlement Fund is reasonable considering the fees recently approved by courts in this Circuit, including this Court, in BIPA class action settlements.

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

The Settlement in this case, which has now been pending for four years, represents an excellent result for the Settlement Class given that Defendant has expressed a firm denial of Plaintiff's material allegations and demonstrated the intent to raise several defenses, including that Plaintiff's claims are preempted by the Illinois Workers' Compensation Act, that Plaintiff waived BIPA's protections by providing her biometric data, and that Plaintiff's and a significant number of the Settlement Class Members' claims are barred by the applicable statute of limitations. Any of these defenses, if successful, would likely result in Plaintiff and the proposed Settlement Class Members receiving no payment whatsoever.

The Illinois Supreme Court recently agreed to review the First District Appellate Court's *McDonald* decision, 2020 IL App (1st) 192398, which rejected Defendant's argument here that Plaintiff's and the Class Members' BIPA claims are preempted by the Illinois Workers' Compensation Act. If the Supreme Court were to reverse the First District, Plaintiff and the Class Members would likely be unable to recover any statutory damages under BIPA. And while in *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563, the First District Appellate Court confirmed that several BIPA subsections are subject to a five-year limitations period, the defendant-appellant recently filed a petition for leave to appeal with the Supreme Court. If the Supreme Court were to overrule the First District's decision in *Tims*, Plaintiff and many of the Settlement Class Members could recover nothing.

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

In the face of these obstacles and unknowns, Class Counsel succeeded in negotiating and securing a settlement on behalf of Settlement Class defined according to a five-year statute of limitations, which creates a \$1,068,300.00 Settlement Fund and provides valid claimants with the ability to receive what will likely be an amount greater than their expected statutory damages under BIPA. Thus, the Settlement's estimated provision of approximately \$1,500.00 to each valid claimant now, as opposed to years from now, or perhaps never, represents a truly extraordinary result.

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 any litigation, and the particular risks presented in this litigation as discussed above, Class Counsel were able to obtain an outstanding result for the Settlement Class. As stated above, the Settlement Agreement provides for the creation of a \$1,068,300.00 Settlement Fund, which will be split equally among valid claimants after Court-approved fees and costs. Although the Claims Deadline is not for another six weeks, the size of the Settlement Fund makes it very likely that Class Members who file valid claims will receive an amount well in excess of \$1,000, the statutory damages applicable to a negligent BIPA violation.

In addition to the monetary compensation that Class Counsel have obtained for the Settlement Class Members, the Settlement also provides for valuable prospective relief. Under the

terms of the Settlement Agreement negotiated by Class Counsel, Defendant represents that it agrees to comply or remain compliant with all BIPA requirements going forward, including BIPA’s consent and retention policy requirements. (Agreement, ¶ 72).

This non-monetary relief obtained by Class Counsel further justifies the reasonableness of the attorneys’ fees being sought here. *See Spano v. Boeing Co.*, No. 06-cv-743, 2016 WL 3791123, at \*1 (S.D. Ill. Mar. 31, 2016) (“A court must also consider the overall benefit to the Class, including non-monetary benefits, when evaluating the fee request. . . . This is important so as to encourage attorneys to obtain meaningful affirmative relief”) (citing *Beesley v. Int’l Paper Co.*, No. 06-cv-703, 2014 U.S. Dist. LEXIS 12037, at \*5 (S.D. Ill. Jan 31, 2014)); *Manual for Complex Litigation, Fourth*, § 21.71, at 337 (2004)); *see also Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973) (awarding attorneys’ fees when relief is obtained for the class “must logically extend, not only to litigation that confers a monetary benefit to others, but also litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others.”).

Given the significant monetary compensation obtained for the Settlement Class Members and the prospective relief, an attorneys’ fee award of 40% of the Settlement Fund plus expenses is reasonable and fair compensation—particularly, as discussed above, in light of the uncertainty and fluid nature of the relevant law, the “substantial risk in prosecuting this case under a contingency fee agreement” and the “defenses asserted by [Defendant].” *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59.<sup>4</sup>

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<sup>4</sup> To the extent this Court nonetheless has any concerns as to the application of the percentage-of-the-fund approach in awarding attorneys’ fees and wishes to conduct a lodestar analysis, Class Counsel will submit their respective lodestars.

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

Class Counsel have expended \$4,300.00 in reimbursable expenses related to filing fees, mediation fees, copying, and case administration. (Declaration of Kasif Khowaja, attached as Exhibit 2, ¶ 7; Declaration of James X. Bormes, attached as Exhibit 3, ¶ 10). 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 Defendant does not oppose. Accordingly, this Court should award a total fee and expense award to Class Counsel of \$431,620.00.

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

The requested \$12,500.00 Incentive Award is reasonable 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 four-year-old case justify the \$12,500.00 Incentive Award sought. Even though no award of any sort was promised to Plaintiff prior to the commencement of the litigation or any time thereafter, Plaintiff nonetheless

contributed her time and effort in pursuing her own BIPA claim, as well as in serving as a representative on behalf of the Settlement Class Members—exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (Bormes Decl., ¶¶ 11-15).

Plaintiff participated in the initial investigation of her 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 her name on this suit and opened herself to “scrutiny and attention” which, in and of itself, “is certainly worthy of some type of remuneration,” particularly in the context of a lawsuit against an employer. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 600–01 (N.D. Ill. 2011). Were it not for Plaintiff’s willingness to pursue this action on a class-wide basis, her efforts and contributions to the litigation by assisting Class Counsel with their investigation and prosecution of this suit, and her continued participation and monitoring of the case up through settlement, the substantial benefit to the Settlement Class Members afforded under the Settlement Agreement would simply not exist. (Bormes Decl., ¶ 14).

The \$12,500.00 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 BIPA class action settlements have awarded the same incentive payment sought here. *See, e.g., Rogers*, 19-CH-04168, May 13, 2021 Final Order and Judgment, ¶ 21 (Cir. Ct. Cook Cnty., Ill.) (Walker, J.) (awarding \$15,000 incentive award in BIPA class action settlement); *Seal v. RCN Telecom Services, LLC*, No. 2016-CH-07033, February 24, 2017 Final Order and Judgment, ¶ 20

(Cir. Ct. Cook Cnty., Ill.) (awarding \$20,000 in incentive award payments); *Gonzalez v. Silva Int'l, Inc.*, No. 2020-CH-03514, June 24, 2021 Final Order and Judgment, ¶ 19 (awarding \$10,000 incentive award in BIPA class action) (Conlon, J.); *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); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1348 (2006) (finding that “[t]he average award per class representative was \$15,992”).

Compensating Plaintiff for the risks and efforts she 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 similar to or in excess of the agreed-upon \$12,500.00 Incentive Award here. Moreover, no objection to the Incentive Award has been raised to date. Accordingly, an Incentive Award of \$12,500.00 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: (1) approving an award of attorneys’ fees and expenses of \$431,620.00; and (ii) approving an Incentive Award in the amount of \$12,500.00 to Plaintiff in recognition of her significant efforts on behalf of the Settlement Class Members.

Dated: November 12, 2021

Respectfully submitted,

ROBIN RAPAI, individually and on behalf  
of all others similarly situated

By: /s/ Timothy P. Kingsbury  
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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, hereby certifies that on November 12, 2021, a copy of the foregoing *Plaintiff's Motion & Memorandum of Law in Support of Approval of Attorneys' Fees, Expenses, & Incentive Award* was filed electronically with the Clerk of Court, with a copy sent by Electronic Mail to all counsel of record.

/s/ Timothy P. Kingsbury