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

ALEXANDER CLARKE, MILTON CITCHENS, ANDREW GARCIA, EBONY JONES, KYLE SWERDLOW, MARLA WALKER, and RYAN WEBB, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

LEMONADE, INC., LEMONADE INSURANCE COMPANY, LEMONADE INSURANCE AGENCY, LLC, LEMONDADE, LTD., AND LEMONADE LIFE INSURANCE AGENCY, LLC

Defendants.

Case No. 2022LA000308

PLAINTIFFS' UNOPPOSED MOTION AND MEMORANDUM IN SUPPORT FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARDS

Dated: July 25, 2022

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

In this putative class action, Plaintiffs Alexander Clarke, Milton Citchens, Andrew Garcia, Ebony Jones, Kyle Swerdlow, Marla Walker, and Ryan Webb (collectively, "Plaintiffs") allege that Lemonade, Inc., Lemonade Insurance Company, Lemonade Insurance Agency, LLC, Lemonade, Ltd., and Lemonade Life Insurance Agency, LLC ("Defendants") collected, captured, received, or otherwise obtained and/or stored the biometric information of Plaintiffs and all other members of the Settlement Classes[1] without obtaining informed written consent or providing the data retention and destruction policies to consumers, in violation of the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1, *et seq.* Plaintiffs also alleged that Defendants' conduct violated the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), the California Unfair Competition Law ("UCL"), California Business & Professions Code §§17200, *et seq.,* other state consumer protection statutes, and other common-law duties. After a full-day mediation with the Hon. James Epstein (Ret.) of JAMS and months of hard-fought, arm's-length negotiations, the Parties reached a settlement ("Settlement" or "Agreement") – which was preliminarily approved on May 25, 2022 – that will provide each of the Settlement Class Members who submit a timely, simple, one-page Claim Form, with a *pro rata* cash payment. In all, the Settlement establishes an all-cash, non-reversionary Settlement Fund of $4,000,000 plus valuable injunctive relief for a total settlement value of $9,011,000. The Settlement Fund will be used to pay all cash-awards to Settlement Class Members, notice and administration costs, incentive awards to Plaintiffs, and attorneys' fees, costs, and expenses to Class Counsel. The Settlement also provides meaningful injunctive relief, as Defendants have represented that they are no longer collecting biometric identifiers or information and agree that should they reinstate collection of

[1] Unless otherwise noted, all capitalized terms have the definition given them in the Class Action Settlement Agreement (the "Settlement" or "Agreement"), attached to the Declaration of Gary Klinger ("Klinger Decl.") as Exhibit A.

biometric information or identifiers, they will provide all notices and consents as required by BIPA and other applicable laws. Defendants have also agreed to delete all previously collected biometric information and/or biometric identifiers within seven (7) days of the Final Order and Judgment. If finally 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 Defendants' alleged unlawful collection, use and storage of individuals' biometric identifiers and/or biometric information.

Plaintiffs and Class Counsel respectfully request that the Court approve Service Awards of $2,500 to Plaintiffs, and a Fee Award of 28% of the settlement value, or $2,500,000. 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 Plaintiffs for the work they performed and commendable result they achieved in this high-risk litigation.

FACTUAL AND PROCEDURAL BACKGROUND

In 2021, Plaintiffs filed four related putative class actions in the Circuit Court of Cook County, Chancery Division—specifically, *Jones, et al. v. Lemonade, Inc.*, No. 2021CH03460; *Citchens v. Lemonade Inc.*, No. 2021CH03578; *Swerdlow v. Lemonade Ins. Agency, LLC*, No. 2021CH03583; and *Clarke v. Lemonade Inc.*, No. 2021CH03593 (the "Related Actions"). Klinger Decl. ¶ 4.

On August 9, 2021, Plaintiffs filed their Motion for Leave to File First Amended Complaint and for the Appointment of Interim Class Counsel in the Circuit Court of Cook County. On August 24, 2021, Judge Loftus granted Plaintiffs' Motion and entered an Order appointing interim class counsel and allowing Plaintiffs leave to file an amended complaint, which was to be

filed on August 27, 2021 (Plaintiffs intended to file their amended complaint in the first-filed *Jones* matter and at the same time dismiss their individual cases without prejudice). *Id.* ¶ 5.

On August 25, 2021, Defendants removed the Related Actions to the U.S. District Court for the Northern District of Illinois. On September 7, 2021, the Court consolidated the Related Actions (the "Federal Action"). *Id.* ¶ 6. The Court granted further Plaintiffs' motion to appoint interim class counsel and appointed Gary Klinger of Milberg Coleman Bryson Phillips Grossman (formerly of Mason Lietz & Klinger LLP), Katrina Carroll of Carlson Lynch, LLP, and Joseph Guglielmo of Scott+Scott Attorneys at Law LLP to serve as Interim Co−Lead Counsel; and Frederick Klorczyk of Bursor & Fisher P.A. and Jonathan Jagher of Freed Kanner London & Millen LLC to the Plaintiffs' Executive Committee. *Id.*

On October 7, 2021, Plaintiffs filed a Consolidated Amended Complaint. *Id.* ¶ 7. On October 12, 2021, the court in the Federal Action stayed the case to allow the parties to pursue private mediation. *Id.*

On January 25, 2022, the Parties participated in a full-day mediation before Hon. James R. Epstein (Ret.) of JAMS. *Id.* ¶ 8. The Parties were unable to resolve the matter at this mediation, however continued discussions regarding a potential resolution of the action. *Id.* On March 18, 2022, after further negotiations, the Parties executed a term sheet confirming the material terms of a class action settlement. *Id.* ¶ 12. On March 30, 2022, Plaintiffs voluntarily dismissed the Federal Action and filed the current Consolidated Class Action Complaint ("CCAC") in the Circuit Court of DuPage County, Illinois, 18th Judicial Circuit (the "Action"). *Id.* ¶ 13. Thereafter, the parties continued to engage in discussions to finalize a settlement agreement based off of the term sheet. *Id*. On May 11, 2022, the Parties finalized and executed the Settlement. *Id*. On May 25, 2022, the Court preliminarily approved the settlement. *Id.* ¶ 14.

SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the class by delivering immediate cash to all policyholders in the United States who, between June 25, 2019 and May 27, 2021, provided first notice of loss through a video claim submission from which Defendants could have collected, captured, received, or otherwise obtained or disclosed data or information that could be construed as biometric identifiers or information of any kind. Settlement ¶¶ 1.17, 1.18, 2.1(b) The Settlement establishes an all-cash, non-reversionary, Settlement Fund of $4,000,000, of which $3,000,000 will be allocated to the Illinois Sub-Class and the remainder will be allocated to the Nationwide Class. *Id.* ¶¶ 1.33

Moreover, the Settlement also provides significant meaningful injunctive relief. Defendants have stopped collecting biometric identifiers or information. *Id.* ¶ 2.2(a). In the future, if Defendants start collecting biometric identifiers or information, they have agreed to comply with BIPA and all other applicable laws. *Id.* Further, Defendants have agreed that within seven days after entry of the Final Order and Judgment, they shall delete all previously-collected biometric information and/or identifiers from all Class Members. *Id.* ¶ 2.2(b).

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, 405 (4th Dist. 2008) (quoting *Negro Nest, L.L.C. v. Mid-Northern Mgmt., Inc.*, 362 Ill. App. 3d 640, 641 – 2 (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 one-third of the Settlement Fund plus the value of injunctive relief.[2] Settlement Agreement ¶ 8.1. Class Counsel estimates that the injunctive relief provided in this cases is valued at approximately $5,011,000,[3] for a total settlement value of $9,011,000. *See* Klinger Decl. ¶ 17.

[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 2304907, 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.").

[3] This value is estimated based on the benefit conferred on the Illinois Subclass alone. The Illinois General Assembly established statutory damages in the amount of $1,000 for negligent violations and $5,000 for willful violations of BIPA. Here, there are 5,011 Illinois Sub-Class members whose biometric information will be deleted by Defendants as a result of this Settlement, and whose BIPA rights will be protected in the future. The Illinois General Assembly has assigned a value of at least $1,000 each to that relief, or $5,011,000. *See* Klinger Decl. ¶¶ 17, 19.

A. The Court Should Apply The Percentage-of-the-Benefit 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 v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 244 (1995). "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, (May 4, 2022) ¶ 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 common 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 that "the percentage approach is likely what the class members and counsel would have negotiated when counsel agreed to take on the case." *McCormick v. Adtalem Glob. Educ., Inc*, 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 Cont'l Ill. Sec. 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 v. Bernard*, 504 F.3d 693 (7th Cir. 2007) (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.").

The value of injunctive relief should also be included in this calculation. *See, e.g.*, *Meyenburg v. Exxon Mobil Corp.*, 2006 WL 5062697, at *8 (S.D. Ill. June 5, 2006) (considering value of injunctive relief and finding that "business practices relief inures a benefit to all class members" such that its value should be considered in the calculation of the total settlement value); *Meyenburg v. Exxon Mobil Corp.*, 2006 WL 2191422, at *2 (S.D. Ill. July 31, 2006) (Granting motion for attorneys' fees based on percentage of the total benefits conferred on the class, including cash, coupons, and equitable relief); *see also Principles of the Law of Aggregate Litigation, § 3.13(b) (American Law Institute, 2010)* ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and the nonmonetary value of the judgment or settlement."); *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773-74 (11th Cir. 1991) (instructing that courts should consider, among other factors, "any non-monetary benefits conferred upon the class by the settlement" in determining reasonable attorneys' fees to be paid from common fund recovery);*Ferron v. Kraft Heinz Foods Co.,* 2021 WL 2940240, at *19 (S.D. Fla. July 13, 2021) (In determining the value of the settlement fund, courts consider the value of any nonmonetary relief in addition to the monetary relief); *Lee v. Ocwen Loan Servicing, LLC*, 2015 WL 5449813, at *17 (S.D. Fla. Sept. 14, 2015) (considering value of injunctive relief when approving class counsel's fee request, even though no specific dollar amount was attributed to injunctive change and noting "courts consider the value of injunctive relief and monetary relief together in assessing whether a class action settlement provides sufficient relief to the class."); *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015 WL 758094, at *5 (N.D. Cal. Feb. 20, 2015) ("courts

consider both the monetary and nonmonetary benefits that the settlement confers"); *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *7 (N.D. Cal. Mar. 18, 2013) (settlement value "includes the size of the cash distribution, the *cy pres* method of distribution, and the injunctive relief").

This Court should likewise apply the percentage-of-the-benefit method taking into account the valuable injunctive relief obtained for the Class. The percentage-of-the-benefit 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 500-01 ("[T]he normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery"). The percentage-of-the-benefit 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). *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).[4] And it is also simpler to apply.

[4] 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. Indeed, Defendants were prepared to argue that dismissal was appropriate because Defendants are financial institutions pursuant to Title V of the federal Gramm-Leach Bliley Act of 1999 and therefore are expressly excluded under BIPA. And other courts have adopted that argument in similar circumstances. *See Duerr v. Bradley Univ.*, 2022 WL 1487747, at *5 (C.D. Ill. Mar. 10, 2022) (finding that GBLA exclusion applied to financial institutions); *Doe v. Nw. Univ.*, 2022 WL 1485905, at *2 (N.D. Ill. Feb. 22, 2022) ("The plain language of section 25(c) exempts

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 "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-benefit 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; *see Taubenfeld v. AON Corp.,* 415 F.3d 597, 600 (7th Cir. 2005) (approving fees of 33% of total settlement, noting "thirteen cases in the Northern District of Illinois where counsel was awarded fees amounting to 30-39% of the settlement fund").

An award to Class Counsel of 28% of the Settlement value is well within the range of fees typically awarded to class counsel by Illinois courts in comparable class action settlements.[5] *See,*

Northwestern as a financial institution subject to Title V of GLBA"); see also 740 ILCS 14/25(c) ("Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder"). Had the Court agreed with this position, class members would not have recovered *at all*.

[5] The requested award of fees to Class Counsel of 28% of the settlement fund plus the value of injunctive relief is inclusive of $11,774.67 in out-of-pocket litigation expenses incurred in the prosecution of this action to date, not including those that will continue to accrue as the Settlement process continues. Klinger Decl. ¶ 33; Ex. H. Although typically awarded in addition to the requested fee award, in this case Class Counsel do not seek reimbursement of these expenses on top of the requested Fee Award. *See, e.g., Kaplan v. Houlihan Smith & Co.*, No. 12-cv-5134, U.S. Dist. LEXIS 83936, at *12 (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).

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.*, 2006 WL 2191422, 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. The Total Value Of The Settlement Is $9,011,000

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, injunctive relief, agreed on attorneys' fees, costs, and expenses, cost of notice and claims administration, and the Plaintiffs' incentive award, amounting to a total value of $9,011,000.

2. The Requested 28% Of The Settlement Value Is Reasonable

Here, the requested $2,500,000 fee, inclusive of costs and expenses, is 28% of the $9,011,000 settlement value generated on behalf of the Settlement Class, which falls within the range awarded in class actions by courts throughout the country. Courts have recognized that fee awards as high as 50% of the gross settlement fund are reasonable. *See* NEWBURG 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 28% of the 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) Plaintiffs' Claims Carried Substantial Litigation Risk

This case presented substantial litigation risk. 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. In addition to attorney time spent on the case, Class Counsel also advanced a total of $11,744.67 in out-of-pocket expenses, again with no guarantee of repayment. Klinger Decl. ¶ 33, Ex. H. If the case had advanced through class certification, these expenses would have increased many-fold,

and Class Counsel would need to advance these expenses potentially for several years to litigate this action through judgment and appeals.

Moreover, Defendants would have contested class certification, and Plaintiffs would have faced serious risks even before getting to class certification. Indeed, Defendants were prepared to argue that dismissal was appropriate because Defendants are financial institutions pursuant to Title V of the federal Gramm-Leach Bliley Act of 1999 and therefore are expressly excluded under BIPA. And other courts have adopted that argument in similar circumstances. *See Duerr v. Bradley Univ.*, 2022 WL 1487747, at *5 (C.D. Ill. Mar. 10, 2022) (finding that GBLA exclusion applied to financial institutions); *Doe v. Nw. Univ.*, 2022 WL 1485905, at *2 (N.D. Ill. Feb. 22, 2022) ("The plain language of section 25(c) exempts Northwestern as a financial institution subject to Title V of GLBA"); *see also* 740 ILCS 14/25(c) ("Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder"). Had the Court agreed with this position, Class members would not have recovered *at all*. Further, Defendants 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 a simple Claim Form with a *pro rata* cash payment. This is an excellent result, particularly in comparison with other approved BIPA settlements. *See, e.g., Zepeda v. Intercontinental Hotels Group, Inc.*, No. 2018-CH-02140 (Cir. Ct. Cook Cnty., Ill. 2018) (Atkins, J.) (settlement provided each Illinois class member eligible to receive a *pro rata* share of a settlement fund that would amount to approximately $500 per person before deductions for administrative expenses, attorneys' fees and costs, and an incentive award); *Preplipceanu v. Jumio Corp.*, No. 2018-CH-15883 (Cir. Ct. Cook Cnty., Ill. 2020) (each Illinois class member eligible to

receive a payment of $262.28); *Sekura v. L.A. Tan Enterprises, Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Cnty., Ill. 2016) (each Illinois class member was eligible to receive a *pro rata* share of a settlement fund that would have amounted to approximately $40 per person if each class member had submitted a valid claim). Indeed, in *Sekura*, *Preplipceanu*, and *Zepeda*, Class Counsel were awarded a 40% fee.

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. Klinger Decl. ¶¶ 24-28, Exs. C-G (firm resumes of Class Counsel.). Indeed, Class Counsel has been recognized by courts across the country for their expertise. *See id*; *see also In re Peanut Farmers Antitrust Litig.,* 2:19-cv-00463, (E.D. Va. August 10, 2021) ("Class Counsel's [Freed Kanner London & Millen and another firm] effective and efficient prosecution of this case through fact and expert discovery, class certification, summary judgment (fully briefed) and trial (fully prepared) resulted in settlements [with defendants] and the creation of a $102,750,000 Settlement Fund …the settlement value here provides an exceptional result for the Class and supports Class Counsel's request for attorneys' fees."); *In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *5 (D. Conn. July 20, 2007)("The quality of representation here [by Scott+Scott] is demonstrated, in part, by the result achieved for the class. Further, it has been this court's experience, throughout the ongoing litigation of this matter, that counsel have conducted themselves with the utmost professionalism and respect for the court and the judicial process."); *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).

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 Demutualization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Here, Defendants were represented by the prominent and well-respected law firm of BakerHostetler. 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. 148 (2010) ("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 Plaintiffs, but also the class as a whole.

Class Counsel worked with Defendants' Counsel to gather critical information in advance of the mediation, including the size of the putative class, and approximate time-period of the alleged BIPA violations. Klinger Decl. ¶ 9. Class Counsel also prepared for and participated in a full-day mediation with Judge Epstein of JAMS and executed a binding term sheet setting out the material terms of this Settlement Agreement at the conclusion of subsequent negotiations. *Id.* ¶¶ 8-

13. Through the undertaking of a thorough investigation, informal discovery, 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 and related notice documents, moved for and obtained preliminary approval, and diligently monitored the successful notice program and claims administration process.

Defendants are 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 were significant. But for this settlement, Defendants likely would have moved to dismiss and/or stay the case, resulting in rounds of briefing and a risk of dismissal or substantial delay.

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. To date, Class Counsel incurred out-of-pocket costs and expenses in the amount of $11,774.67 in prosecuting this litigation on behalf of the Class. Klinger Decl. ¶ 33, Ex. H. Each of these expenses was necessarily and reasonably incurred to bring this case to a successful conclusion, and they reflect market rates for various categories of expenses incurred. *See id*. Class Counsel had to make this commitment at the outset of this case without knowing how long the case would take to resolve, if ever. Therefore, Class Counsel's willingness to prosecute this action on a contingent fee basis and to

advance costs diverted the time and resources expended on this action from other cases. *See id.* ¶ 31.

Further, as detailed above, the requested fees, costs, and expenses of 28% of the settlement fund is well within the market range. *See supra* cases cited in Argument §§ I.A-B. And, 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); *Zepeda v. Intercontinental Hotels Group, Inc.*, No. 2018-CH-02140 (Cir. Ct. Cook Cnty., Ill. 2018) (awarding a 40% fee where the settlement provided each class member being eligible to receive a *pro rata* share of a settlement fund that would amount to approximately $500 per person *before* deductions for administrative expenses, attorneys' fees and costs, and an incentive award).

II. THE REQUESTED INCENTIVE AWARDS ARE REASONABLE AND SHOULD BE APPROVED

Incentive awards of $2,500.00 for each Plaintiff are 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. Defendants have agreed to pay incentive awards to Plaintiffs in the amount of $2,500 each. Settlement Agreement ¶ 8.4. 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. Plaintiffs' participation has been instrumental in the prosecution and ultimate settlement of this action. Here, Plaintiffs 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* Klinger Decl. ¶¶ 35-37, Declaration of Alexander Clarke ¶¶ 4-10; Declaration of Milton Citchens ¶¶ 4-10; Declaration of Andrew Garcia ¶¶ 4-10, Declaration of Ebony Jones ¶¶ 4-10; Declaration of Kyle Swerdlow ¶¶ 4-10; Declaration of Marla Walker ¶¶ 4-10; and Declaration of Ryan Webb ¶¶ 4-10. Moreover, the requested incentive award of $2,500 is consistent with Plaintiffs' 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, Plaintiffs and Class Counsel respectfully request that the Court approve incentive awards of $2,500 each to Plaintiffs and approve an award of attorneys' fees, costs, and expenses of 28% of the Settlement Fund and the value of injunctive relief in the amount of $2,500,000 to Class Counsel. The requested awards would both adequately reward and

reasonably compensate Class Counsel and Plaintiffs 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: July 25, 2022

Respectfully submitted,

By: */s/ Gary M. Klinger*

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** Pro hac vice forthcoming*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 25, 2022, the foregoing document was filed via the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record.

/s/ Gary M. Klinger
Gary M. Klinger