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2019CH04168

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

RICHARD ROGERS, individually and on behalf of similarly situated individuals,

Plaintiff,

v.

CSX INTERMODAL TERMINALS, INC., a Delaware corporation,

Defendant.

Case No. 2019-CH-04168

Hon. Allen P. Walker

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

Plaintiff, Richard Rogers, by and through his attorneys, and pursuant to 735 ILCS 5/2-801, hereby move for an award of attorneys' fees for Class Counsel, as well as an incentive award for Plaintiff as the Class Representative in connection with the class action settlement with Defendant CSX Intermodal Terminals, Inc. ("Defendant" or "CSX"). Defendant does not object to the relief sought herein. In support of this Motion, Plaintiff submits the following memorandum of law.

Dated: April 2, 2021

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I. INTRODUCTION

The Class Action Settlement[1] that Class Counsel have achieved in this case is an exceptional result for Settlement Class Members. It establishes a Settlement Fund of $5,250,000 to provide each Settlement Class Member who files a valid, timely claim with an equal, *pro rata* cash payment – estimated to be at least several hundred dollars each – for having their biometrics collected by Defendant in alleged violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"). In addition to the substantial financial benefit to the Settlement Class Members, the Settlement also includes terms that provide significant non-monetary relief designed to eliminate the allegedly unlawful biometric collection and use practices at issue in this case.

Direct Notice of the Settlement commenced on March 5, 2021. As of the filing of this Motion, nearly 3,000 claims have already been submitted, with over five weeks remaining before the Claims Deadline. Notably, no Settlement Class Member has objected to the proposed Settlement and only one Class Member has requested exclusion from the Settlement Class.

Both Class Counsel and the Class Representative have devoted significant time and effort on behalf of the Settlement Class Members' claims in the two years since this litigation first commenced, and their efforts have yielded an extraordinary benefit to the Class. With this Motion, Class Counsel request a fee of 38% of the total Settlement Fund obtained for the Settlement Class, amounting to $1,995,000.00 (inclusive of their costs and expenses), and an Incentive Award of $15,000 for the Class Representative, as provided for in the Settlement Agreement.[2] The requested

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[1] Unless otherwise indicated, capitalized terms have the same meaning as those terms are used in the Settlement Agreement ("Agreement"), which is attached as Exhibit A to Plaintiff's previously-filed Motion for Preliminary Approval.

[2] Although the Settlement Agreement permits Class Counsel to seek their reimbursable litigation expenses, and although Class Counsel have incurred substantial out-of-pocket expenses in this case, including filing fees and three mediations, Class Counsel will forego seeking additional reimbursement of these expenses above and beyond the fees being sought herein.

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attorneys' fees, 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 continued uncertainty over, and evolving nature of, the state of BIPA litigation. As explained in detail below, Class Counsel's requested fee award is consistent with Illinois law and fee awards granted in other cases in Illinois courts, including other BIPA class actions, and warrants Court approval.

II. BACKGROUND

A. BIPA

BIPA is an Illinois statute that provides individuals with certain protections for their biometric information. To effectuate its purpose, BIPA requires private entities that seek to use biometric identifiers (e.g., fingerprints and handprints) and biometric information (any information gathered from a biometric identifier which is used to identify an individual)[3] to:

(1) inform the person whose biometrics are to be collected in writing that his biometrics will be collected or stored;

(2) inform the person whose biometrics are to be collected in writing of the specific purpose and the length of term for which such biometrics are being collected, stored and used;

(3) receive a written release from the person whose biometrics are to be collected allowing the capture and collection of their biometrics; and

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

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

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

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B. Factual Background and Procedural History

1. *Defendant's business operations*

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

Specifically, Plaintiff alleges that Defendant failed to comply with BIPA by: (1) failing to inform individuals prior to capturing their biometrics that it will be capturing such information; (2) failing to receive a written release for the capture of biometrics prior to such capture; (3) failing to inform the person whose biometrics are being captured of the specific purpose and length of term for which such biometrics are captured; and (4) failing to publish a publicly available retention schedule and guidelines for permanently destroying biometrics. (*Id.*)

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

On March 29, 2019, Plaintiff filed his original Class Action Complaint against Defendant in the Circuit Court of Cook County, Illinois. Defendant thereafter removed Plaintiff's Class Action Complaint to the U.S. District Court for the Northern District of Illinois on May 1, 2019. See *Rogers v. CSX Intermodal Terminals*, Inc., No. 19-cv-02937, Dkt. 1-1 (N.D. Ill. 2019). The case was assigned to the Honorable Marvin E. Aspen. On June 7, 2019, Defendant filed a motion to dismiss and memorandum in support thereof. (Dkts. 16-18). Defendant's Motion to Dismiss was fully briefed, including a Reply by Defendant. (Dkts. 22-23). On September 5, 2019, Judge Aspen issued a ruling granting Defendant's Motion with respect to Plaintiff's allegations that

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CSX's actions were reckless but denying it in all other aspects. (Dkt. 24). On October 31, 2019, Defendant answered Plaintiff's Complaint. (Dkt. 28). Following Defendant's Answer, Plaintiff propounded written discovery on Defendant, which included both interrogatories and document requests.

Thereafter, in light of the significant forthcoming discovery expenses, uncertainty of the state of the law surrounding BIPA, and the possibility of incurring liability on a class-wide basis, the Parties agreed to engage in a private mediation. To that end, counsel for Plaintiff and for Defendant expended significant efforts to reach a settlement, including but not limited to exchanging documents and information regarding Defendant's allegedly biometrically-enabled devices, and identifying potential class members.

On June 18, 2020, after conducting informal discovery related to the size of a potential settlement class, Plaintiff's counsel and Defendant's counsel engaged in full-day, arms-length mediation session with Judge James R. Epstein of JAMS Chicago—a former justice of the Illinois Appellate Court and Circuit Court Judge in the Chancery Division of the Circuit Court of Cook County. While no settlement was reached, the Parties did make significant progress and agreed to engage in a second mediation. On July 8, 2020, the Parties engaged in a second full-day mediation with Judge Epstein, but again did not reach a resolution. On August 25, 2020, the Parties met again with Judge Epstein, and engaged in a third and final full-day, arms-length mediation and were able to reach a settlement in principle.

Following these formal and substantial mediation efforts, and over the following four months, counsel for Plaintiff and for Defendant continued to expend significant additional time and effort negotiating the specific terms of a Settlement, including: (i) the scope of the release; (ii) the form and content of class notice: (iii) the operative deadlines for notice, claims, objections and

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exclusions; (iv) the claims procedure; (v) the timing for submission of papers regarding a Fee Award, an Incentive Award, and final approval of the Settlement; and (vi) procedures for terminating the Settlement if necessary. Eventually, these extensive negotiations culminated in the Settlement Agreement and the attendant exhibits which this Court preliminarily approved on January 29, 2021.

Counsel for Plaintiff has substantial BIPA class litigation experience, and have been involved in many of the earliest-filed BIPA cases, and have served as counsel of record in numerous BIPA class action settlements approved by Illinois courts – including several of the largest. (*See* Declaration of Evan M. Meyers, attached as Exhibit A, ¶ 5.)

III. THE SETTLEMENT

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

Class Counsel's prosecution of this litigation has culminated in this class-wide Settlement that provides outstanding monetary relief to the Settlement Class Members. The Settlement has established a non-reversionary Settlement Fund of $5,250,000.00 (Five Million Two Hundred Fifty Thousand Dollars). (Agreement at ¶ 59). Each valid claimant is entitled to an equal pro rata share of the Settlement Fund after payments are first deducted for notice and administration costs, attorneys' fees and costs, and an incentive award payment to Plaintiff. (*Id.* ¶¶ 59-60). The total payment to each Settlement Class Member will depend on the number of valid Claim Forms submitted. Plaintiff's Counsel estimates that every class member that files a valid claim will receive at least several hundred dollars, and potentially close to if not over $1,000.00, although that number may be higher or lower depending on the ultimate number of valid Claim Forms ultimately submitted by Settlement Class Members.

The Settlement also provides important prospective relief to the Settlement Class.

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Specifically, Defendant no longer uses finger scan technology at any of its intermodal terminals in Illinois. (*Id*. ¶ 74). Furthermore, should Defendant resume using such technology at any of its intermodal terminals in Illinois, Defendant has agreed to comply with all BIPA requirements going forward, including BIPA's consent and retention policy requirements. (*Id*.) This prospective relief benefits the Settlement Class Members, as well as future users of Defendant's biometric technology.

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

Under the Settlement Agreement's Notice Plan, which has already gone into effect, Direct Notice of the Settlement has been provided by U.S. Mail to the Settlement Class Members. (Meyers Decl., ¶ 18). In addition, the Settlement Website is operational and makes available the Claim Form, Long Form Notice, and all relevant case information. (*Id.*) To date, with a full five weeks left in the claims period, nearly 3,000 claims have been submitted, no Class Member has objected, and only one Class Member has requested exclusion. (*Id.*)

IV. ARGUMENT

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

Pursuant to the Settlement Agreement, Class Counsel seek attorneys' fees in the amount of $1,995,000, inclusive of their incurred litigation expenses, which amounts to 38% of the Settlement Fund. (Agreement, ¶ 99). It is well settled that attorneys who, by their efforts, create a common fund for the benefit of a class, are entitled to reasonable compensation for their services. *See Wendling v. S. Ill. Hosp. Servs.*, 242 Ill. 2d 261, 265 (2011) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)) ("a litigant or a lawyer who recovers a common fund for the benefit of

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persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.").

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

In deciding an appropriate fee in such cases, "a trial judge has discretionary authority to choose a percentage[-of-the-recovery] or a lodestar method[.]" *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d 235, 243–44 (1995)). Under the percentage-of-the-recovery approach, the attorneys' fees awarded are "based upon a percentage of the amount recovered on behalf of the plaintiff class." *Brundidge*, 168 Ill. 2d at 238. Under the lodestar approach, the attorneys' fees to be awarded are calculated by determining the total amount of hours spent by counsel in order to secure the relief obtained for the class at a reasonable hourly rate, multiplied by a "weighted" "risk multiplier" that takes into account various factors such as "the contingency nature of the proceeding, the complexity of the litigation, and the benefits that were conferred upon the class members." *Id.* at 240.

Here, Plaintiffs submit 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,[4] it also misaligns the interests of Class Counsel and the Settlement Class Members. 5 Newberg on Class Actions § 15:65 (5th ed.) ("Under the percentage method, counsel have an interest in generating as large a recovery for the class as possible, as their fee increases with the class's take. By contrast, when class counsel's fee is set by an hourly rate, the lawyers have an incentive to run up as many hours as possible in the litigation so as to ensure a hefty fee, even if the additional hours are not serving the clients' interests in any way.").

The lodestar method has been long criticized by Illinois courts as "increas[ing] the workload of an already overtaxed judicial system, … creat[ing] a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law, … le[ading] to abuses such as lawyers billing excessive hours, … not provid[ing] the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered, … [and being] confusing and unpredictable in its administration." *Ryan v. City of Chicago,* 274 Ill. App. 3d 913, 923 (1st Dist. 1995).

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

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

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percentage-of-the-fund method best aligns the interests of the class and its counsel, as class counsel are encouraged to seek the greatest amount of relief possible for the class rather than simply seeking the greatest possible amount of attorney time regardless of the ultimate recovery obtained for the class. Applying a percentage-of-the-recovery approach is also generally more appropriate in cases like this one because it best reflects the fair market price for the legal services provided by the class counsel. *See Ryan*, 274 Ill. App. 3d at 923 (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases") (citing *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255–56 (3d. Cir. 1985)); *Sutton*, 504 F.3d at 693 (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered). This approach also accurately reflects the contingent nature of the fees negotiated between Class Counsel and Plaintiff, who agreed *ex ante* that up to 40% of any settlement fund plus reimbursement of costs and expenses would represent a fair award of attorneys' fees from a fund recovered for the Class. (Meyers Decl., ¶ 20); *see also In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d at 795 (applying the percentage-of-the-recovery approach and noting that class members would typically negotiate fee arrangement based on percentage method rather than lodestar).

Class Counsel are not aware of any BIPA class action settlements involving a monetary common settlement fund where a court relied on the lodestar method to determine attorneys' fees. In fact, to Class Counsel's knowledge, the percentage-of-the-recovery method has been used to determine a reasonable fee award in every BIPA class action settlement in the Circuit Court of Cook County (where the majority of BIPA class actions are pending) where the settlement – as here – created a monetary common fund. *See, e.g., Sekura v. L.A. Tan Enters., Inc.*, No. 2015-CH-

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16694 (Cir. Ct. Cook Cnty., Ill. Dec. 1, 2016) (Garcia, J.); *Zepeda v. Kimpton Hotel & Rest.*, 2018-CH-02140 (Cir. Ct. Cook Cnty., Ill. Dec. 5, 2018) (Atkins, J.); *Taylor v. Sunrise Senior Living Mgmt., Inc.*, 2017-CH-15152 (Cir. Ct. Cook Cnty., Ill. Feb. 14, 2018) (Loftus, J.); *Svagdis v. Alro Steel Corp.*, No. 2017-CH-12566 (Cir. Ct. Cook Cnty., Ill. Jan. 14, 2019) (Moreland, J.); *Williams v. Swissport USA, Inc.*, No. 2019-CH-00973 (Cir. Ct. Cook Cnty., Ill. Nov. 12, 2020); *Fluker*, 2017-CH-12993; *Collier, et. al. v. Pete's Fresh Market 2526 Corporation, et. al.*, No. 2019-CH05125 (Cir. Ct. Cook Cty., Ill. Dec. 8, 2020) (Atkins, J.); *Glynn v. eDriving, LLC et al.*, No. 19-CH-08517 (Cir. Ct. Cook Cnty., Ill. Dec. 14, 2020) (Walker, J.); *Kusinski et al. v. ADP, LLC* (Cir. Ct. Cook County, Ill. Feb. 10, 2021) (Atkins, J.).

Accordingly, the Court should adopt and apply the percentage-of-the-recovery approach here. Under this approach, as set forth more fully below, Class Counsel's requested attorneys' fees are eminently reasonable.

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

When assessing a fee request under the percentage-of-the-recovery method, courts often consider the magnitude of the recovery achieved for the Settlement Class Members and the risk of non-payment in bringing the litigation. *See Ryan*, 274 Ill. App. 3d at 924 (affirming district court's attorney fee award due to the contingency risk of pursuing the litigation, and the "hard cash benefit" obtained). Additionally, the non-monetary benefits created by a class action settlement are also properly considered for purposes of determining fees. *See Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973) (noting that the common fund doctrine "must logically extend, not only to litigation that confers a monetary benefit on others, but also litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others").

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

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

The requested fee award of $1,995,000.00 represents 38% of the Settlement Fund. Notably, Illinois circuit courts presiding over BIPA class action settlements have regularly awarded attorneys' fees amounting to 40%. *See, e.g., G.M. Sign, Inc. v. Dodson Co., LLC, et al.*, No. 08-CH-4999 (Cir. Ct. Lake Cnty., Ill.); *Prelipceanu v. Jumio Corp.* No. 18-CH-15883 (Cir. Ct. Cook Cnty., Ill.) (Mullen, J.) (granting final approval to $7,000,000 BIPA class settlement and awarding class counsel 40% of the settlement fund based on a percentage-of-the-recovery analysis); *Zhirovetskiy v. Zayo Group, LLC,* 2017-CH-09323 (Cir. Ct. Cook Cnty., Ill.) (Flynn, J.) (granting final approval to BIPA class settlement and awarding class counsel 40% of the settlement fund based on a percentage-of-the-recovery analysis); *Sekura*, 2016-CH-04945 (same); *Zepeda*, 2018-CH-02140 (Atkins, J.) (same); *Svagdis,* 2017-CH-12566 (same); *McGee v. LSC Commc's*, No. 2017-CH-12818 (Cir. Ct. Cook Cnty., Ill.) (Atkins, J.) (same); *see also, e.g., Willis v. iHeartMedia Inc.*, No. 16-CH-02455 (Cir. Ct. Cook Cnty., Ill.) (awarding attorneys' fees and costs of 40% of an $8,500,000 common fund in a TCPA class settlement); *Farag v. Kiip, Inc.*, 19-CH-01695 (Cir. Ct. Cook County, Ill.) (Gamrath, J.) (awarding 38% of the fund in consumer privacy class settlement); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP,* No. 97-cv-7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 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)); *Sterk*, No. 2015-CH-08609 (approving attorneys' fee award in TCPA case of 35% of the

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fund); *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).

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

The attorneys' fees sought in this case are particularly reasonable in light of the risks of bringing the litigation and the relief that Class Counsel have obtained for the Settlement Class, especially where claims against railroad operators like Defendant have many potential unique defenses, including federal preemption under the Federal Railway Safety Act and other federal statutes. *Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding fee award based on percentage-of-the-recovery in light of the "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [the defendant]"); *Ryan*, 274 Ill. App. 3d at 924 (noting the trial court's fee award was reasonable given the funds recovered for the class and the contingency risk).

In addition, while many courts have found that a five-year statute of limitations applies to BIPA claims, Illinois courts are not unanimous. Indeed, a court sitting in the Circuit Court of DuPage County recently held, in *Cannon v. FIC America Corp.,* No. 20-L-121 (Cir. Ct. DuPage Cnty., August 7, 2020), that a two-year statute of limitations applies to BIPA claims. Illustrating the potential for disagreement as to the appropriate statute of limitations, the First District Appellate Court is currently reviewing whether a five-year or one-year limitations period applies to BIPA claims. *See Tims v. Black Horse Carriers, Inc.,* No. 1-19-0563.

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In the face of these obstacles and unknowns, Class Counsel nevertheless succeeded in negotiating and securing a settlement on behalf of the Settlement Class defined according to a five-year statute of limitations, which creates a $5,250,000 Settlement Fund and provides valid claimants with the ability to claim at least a substantial amount of, if not an amount equal to, potential statutory damages under BIPA.

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

Despite the significant risks inherent in any further litigation, Class Counsel were able to obtain at least several hundred dollars, and potentially close to if not over $1,000.00, for each claimant, which represents a full statutory award for a negligent BIPA violation. Although the claims deadline is not for another five weeks, nearly 3,000 claims and no objections have been received thus far. This reflects the Settlement Class Members' overwhelmingly positive reaction to the Settlement.

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

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Here, under the terms of the Settlement Agreement negotiated by Class Counsel, Defendant has ceased using biometric technology altogether. In Class Counsel's estimation, the *most* effective way of ensuring such highly sensitive biometric information stays secure over the long term is to avoid collection in the first place, which is exactly the result achieved by Class Counsel here. Moreover, should Defendant restart the use of biometrics, Class Counsel also ensured that Defendant will comply with BIPA. (Agreement, ¶ 74). As a result of this negotiated prospective relief, individuals such as Plaintiff will have the opportunity to provide *informed* consent only after first obtaining the information required under BIPA—a significant benefit vis-à-vis their privacy rights.

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

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

The Settlement Agreement also provides for an Incentive Award of $15,000 to Plaintiff Rogers for serving as class representative and agreeing to prosecute this action in his own name despite the risk of retaliation by current or future employers, who are Defendant's customers. *Schulte v. Fifth Third Bank,* 805 F. Supp. 2d at 600–01 (noting that class representatives open themselves to "scrutiny and attention" by adding their name to public lawsuits, which, in and of itself, "is certainly worthy of some type of remuneration."). Because a named plaintiff is essential to any class action, "[i]ncentive awards are justified when necessary to induce individuals to

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become named representatives." *Spano*, 2016 WL 3791123, at *4 (approving incentive awards of $25,000 and $10,000 for class representatives) (internal citation omitted); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992) (noting that incentive awards "are not atypical in class action cases . . . and serve to encourage the filing of class actions suits.").

Here, Plaintiff's efforts and participation in prosecuting this case justify the $15,000 Incentive Award sought. Even though no award of any sort was promised to Plaintiff prior to the commencement of the litigation or any time thereafter, Plaintiff nonetheless contributed significant time and effort over the course of two years in pursuing his own BIPA claims, as well as in serving as a class representative on behalf of the Settlement Class Members—exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (Meyers Decl., ¶¶ 22–24). Plaintiff participated in the initial investigation of his claims and provided documents and information to Class Counsel to aid in preparing the initial pleadings, reviewed the pleadings prior to filing, consulted with Class Counsel on a multitude of occasions, and provided feedback on various filings including, most importantly, the Settlement Agreement. (*Id.*) Relatedly, as to the origins of this case, Plaintiff was a class member in a previous BIPA case prosecuted and settled by McGuire Law, *Zhirovetskiy v. Zayo Group, LLC,* 2017-CH-09323 (Cir. Ct. Cook Cnty., Ill.). After submitting a claim in that case, Plaintiff Rogers reached out to Class Counsel to inform them of what he believed to be the illegal capture of his and others' biometrics by Defendant. Were it not for Plaintiff's astuteness and willingness to bring this action on a class-wide basis and his efforts and contributions to the litigation up through settlement, the substantial benefit to the Settlement Class Members afforded under the Settlement Agreement would likely not exist at all. (Meyers Decl., ¶ 23).

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Numerous courts that have granted final approval in similar class action settlements have awarded the same or similar incentive awards as the $15,000 award sought here. *See, e.g., Seal v. RCN Telecom Services, LLC*, 2016-CH-07033, February 24, 2017 Final Order and Judgment, ¶ 20 (Cir. Ct. Cook Cnty., Ill.) (awarding $10,000 incentive awards to each of two named plaintiffs); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) (awarding $25,000 incentive award); *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2017 WL 1369741, at *10 (N.D. Ill. Apr. 10, 2017) (awarding $10,000 to each class representative); *Spano*, 2016 WL 3791123, at *4 (approving $10,000 incentive awards); *Zhirovetskiy,* 2017-CH-09323 (April 18, 2019 Final Order and Judgment, ¶ 20) (awarding $10,000 incentive award in BIPA class action); *Glynn v. eDriving, LLC*, 2019-CH-08517, Final Order and Judgment, ¶ 20) (Walker, J.) (same).

Accordingly, the Incentive Award of $15,000 is eminently justified by Mr. Rogers' significant time and effort in this case and should be approved.

V. CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court enter an Order: (i) approving an award of attorneys' fees of $1,995,000.00, and (ii) approving an Incentive Award in the amount of $15,000.00 to Class Representative Rogers in recognition of his significant efforts on behalf of the Settlement Class Members.

Dated: April 2, 2021

Respectfully submitted,

RICHARD ROGERS, individually and on behalf of the Settlement Class

By: /s/ David L. Gerbie
One of Plaintiff's Attorneys

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on April 2, 2021, a copy of *Plaintiff's Motion & Memorandum of Law in Support of Approval of Attorneys' Fees And Incentive Award* was filed electronically with the Clerk of Court, with a copy sent to by electronic mail to all counsel of record.

/s/ David L. Gerbie

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Exhibit A

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

RICHARD ROGERS, individually and on behalf of similarly situated individuals,

Plaintiff,

v.

CSX INTERMODAL TERMINALS, INC., a Delaware corporation,

Defendant.

Case No. 2019-CH-04168

Hon. Allen P. Walker

DECLARATION OF EVAN M. MEYERS

I, Evan M. Meyers, hereby aver, pursuant to 735 ILCS 5/1-109, that I am fully competent to make this Declaration, have personal knowledge of all matters set forth herein unless otherwise indicated, and would testify to all such matters if called as a witness in this matter.

1. I am an adult over the age of 18 and a resident of the state of Illinois. I am fully competent to make this Declaration and do so in support of Plaintiff's Motion and Memorandum of Law in Support of Approval of Attorneys' Fees, Expenses, and Incentive Award.

2. I am an attorney licensed to practice law in the state of Illinois and am one of the attorneys representing Plaintiff Richard Rogers in this matter.

3. I am a partner at McGuire Law, P.C. and I, along with my colleagues, Myles McGuire, David Gerbie, and Brendan Duffner have been appointed as Class Counsel, representing Plaintiff and the Settlement Class.

4. McGuire Law, P.C. is a law firm based in Chicago, Illinois that focuses on class action litigation, representing clients in both state and federal trial and appellate courts throughout the country.

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5. I and the other attorneys of McGuire Law have regularly engaged in complex litigation on behalf of consumers and have extensive experience in class action lawsuits similar in size and complexity to the instant case, including dozens of BIPA class actions. The attorneys of McGuire Law have been appointed class counsel in many complex consumer class actions in state and federal courts across the country, including numerous cases in Illinois state courts and the Northern District of Illinois, and have been appointed class counsel in multiple BIPA class actions. *See, e.g., Gray et al. v. Mobile Messenger Americas, Inc. et al.* (S.D. Fla. 2008); *Gresham et al. v. Keppler & Associates, LLC et al.* (Sup. Ct. Los Angeles County, Cal. 2008); *Sims et al. v. Cellco Partnership et al.* (N.D. Cal. 2009); *Van Dyke et al. v. Media Breakaway, LLC* (S.D. Fla. 2009); *Paluzzi, et al. v. mBlox, Inc., et al*. (Cir. Ct. Cook Cnty., Ill. 2009); *Ryan et al. v. Snackable Media, LLC* (Cir. Ct. Cook Cnty., Ill. 2011); *Parone et al. v. m-Qube, Inc. et al.* (Cir. Ct. Cook Cnty., Ill. 2010); *Valdez et al. v. Sprint Nextel Corporation et al*. (N.D. Cal. 2010); *Lozano et al. v. Twentieth Century Fox* (N.D. Ill. 2011); *Kramer et al. v. Autobytel* (N.D. Cal. 2011); *Walker et al. v. OpenMarket, Inc. et al.* (Cir. Ct. Cook Cnty., Ill. 2011); *Schulken at al. v. Washington Mutual Bank* (N.D. Cal. 2011); *In re Citibank HELOC Reduction Litigation* (N.D. Cal 2012); *Murray et al. v. Bill Me Later, Inc.* (N.D. Ill. 2014); *Valladares et al. v. Blackboard, Inc. et al.* (Cir. Ct. Cook Cnty., Ill. 2016); *Hooker et al v. Sirius XM Radio, Inc.* (E.D. Va. 2017); *Flahive et al v. Inventurus Knowledge Solutions, Inc.* (Cir. Ct. Cook Cnty., Ill. 2017); *Serrano et al. v. A&M (2015) LLC* (N.D. Ill. 2017); *Seal et al. v. RCN Telecom Servs., LLC* (Cir. Ct. Cook Cnty., Ill. 2017); *Vergara et. al. v. Uber Technologies, Inc.* (N.D. Ill. 2018); *Zepeda v. International Hotels Group, Inc. et. al.* (Cir. Ct. Cook Cnty., Ill. 2018); *Kovach et al v. Compass Bank* (Cir. Ct. Jefferson County, AL 2018); *Svagdis v. Alro Steel Corp.* (Cir. Ct. Cook Cnty., Ill. 2018); *Zhirovetskiy v. Zayo Group, LLC,* (Cir. Ct. Cook Cnty., Ill. 2019); *Marshall v. Life Time Fitness, Inc., et al.* (Cir. Ct. Cook

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Cnty., Ill. 2019); *McGee v. LSC Communications, Inc., et al.* (Cir. Ct. Cook Cnty., Ill. 2019); *Prather et al. v. Wells Fargo Bank, N.A.* (N.D. Ill. 2019); *Nelson v. Nissan North America, Inc.* (M.D. Tenn. 2019); *Smith v. Pineapple Hospitality Grp.* (Cir. Ct. Cook Cnty., Ill. 2020); *Rafidia v. KeyMe, Inc.* (Cir. Ct. Cook County, Ill. 2020); *Burdette-Miller v. William & Fudge, Inc.* (Cir. Ct. Cook County, Ill 2020); *Farag v. Kiip, Inc.* (Cir. Ct. Cook County, Ill. 2020); *Lopez v. Multimedia Sales & Marketing, Inc.* (Cir. Ct. Cook County, Ill. 2020); *Prelipceanu v. Jumio Corp.* (Cir. Ct. Cook County, Ill. 2020); *Williams v. Swissport USA, Inc.* (Cir. Ct. Cook County, Ill. 2020); *Glynn v. eDriving, LLC* (Cir. Ct. Cook County, Ill. 2020); *Kusinski v. ADP, LLC* (Cir. Ct. Cook County, Ill. 2021).

6. The attorneys of McGuire Law have intimate knowledge of the law in the fields of technology and privacy. Recognized as pioneers in the field of privacy-based consumer class actions, including class actions involving the TCPA and BIPA, McGuire Law attorneys have served as counsel of record for groundbreaking rulings involving technology at the state and federal district and appellate court levels, including most recently at the U.S. Supreme Court. *See, e.g., Shen v. Distributive Networks, Inc.* (N.D. Ill. 2007); *Weinstein et al. v. The Timberland Co. et al.* (N.D. Ill. 2008); *Satterfield et al. v. Simon & Schuster, Inc.* (9th Cir. 2009); *Espinal et al. v. Burger King Corporation et al.* (S.D. Fla. 2010); *Abbas et al. v. Selling Source, LLC* (N.D. Ill. 2010); *Damasco et al. v. Clearwire Corp.* (7th Cir. 2011); *Ellison et al. v. Steven Madden, Ltd.* (C.D. Cal. 2013); *Robles et al. v. Lucky Brand Dungarees, Inc. et al.* (N.D. Cal. 2013); *In re Jiffy Lube Spam Text Litigation* (S.D. Cal. 2013); *Lee, et al. v. Stonebridge Life Ins. Co. et al*. (N.D. Cal. 2013); *Elikman et al. v. Sirius XM Radio, Inc.* (N.D. Ill. 2015); *Campbell-Ewald Co. v. Gomez et al.*, 136 S. Ct. 663 (2016); *Bolds v. Arro Corp., et al.* (Cir. Ct. Cook Cnty. Ill. 2019); *Rogers v. BNSF Railway Co*. (N.D. Ill. 2019); *Wordlaw v. Enterprise Holdings, Inc.* (N.D. Ill. 2020).

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7. The McGuire Law firm has successfully prosecuted claims on behalf of our clients in both state and federal trial and appellate courts throughout the country, including claims involving allegations of consumer fraud; unfair competition; invasion of privacy; data breach; false advertising; breach of contract; and various statutory violations, including BIPA and TCPA violations.

8. I am a graduate of the University of Michigan, and I graduated from the University of Illinois College of Law in 2002. I have been admitted to practice by the Illinois Supreme Court and in several federal courts throughout the country. In addition to my class action experience, which includes being appointed class counsel in numerous BIPA cases, I have extensive experience in complex commercial litigation and have regularly litigated cases in state and federal trial and appellate courts across the nation, including in the Circuit Court of Cook County, the Circuit Court of Lake County, the U.S. District Court for the Northern District of Illinois, the U.S. District Court for the Eastern District of Michigan, the Ninth Circuit Court of Appeals, the Judicial Panel on Multidistrict Litigation, and the U.S. Supreme Court, where I recently served as co-lead counsel in a case of seminal importance to class action jurisprudence nationwide. *See Campbell-Ewald Co. v. Jose Gomez*, 136 S. Ct. 663 (2016).

9. Myles McGuire is the Managing Partner of McGuire Law. Mr. McGuire has been recognized as a leader in class actions and technology law by his peers and courts around the country and has been appointed lead counsel in numerous state and federal class actions. Mr. McGuire is a graduate of Marquette University and Marquette University Law School and has been admitted to practice in the Illinois Supreme Court and Wisconsin Supreme Court and in several federal courts throughout the country, including the U.S. Supreme Court, where he was co-lead counsel in the aforementioned *Campbell-Ewald Co. v. Gomez* matter. Prior to founding

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McGuire Law, P.C. in 2013, Mr. McGuire was a managing member of Edelson McGuire, LLC.

10. My colleague, David L. Gerbie, also has experience in litigating class action cases in state and federal courts; has been significantly involved, if not the primary lead attorney, in numerous class action suits in state and federal courts across the country; and has been appointed as class counsel in multiple BIPA class actions in the Circuit Court of Cook County. Mr. Gerbie received his B.A. from Northern Illinois University and graduated from the University of Wisconsin Law School.

11. My colleague, Brendan Duffner, is an associate attorney at McGuire Law who has been named class counsel in several consumer and employee class actions in Illinois state and federal courts, as well as in the Eastern District of Missouri. Mr. Duffner received his B.A. from the University of Wisconsin-Madison and his J.D. from the Saint Louis University of School of Law.

Class Counsel's Contribution to the Case

12. From the outset of this litigation, the attorneys and support staff of McGuire Law, P.C. anticipated spending hundreds of hours litigating the claims in this matter with no guarantee of success. Class Counsel understood that prosecution of this case would require that other work be foregone, that there was significant uncertainty surrounding the applicable legal and factual issues, and that there would be substantial opposition from a defendant with substantial resources.

13. McGuire Law, P.C. assumed a significant risk of non-payment in prosecuting this litigation given the novelty of legal issues involved and the uncertainty in the development of BIPA caselaw; the technical issues involving Defendant's use of biometrics and the system utilized to collect them; the legal issues unique to Defendant being a railroad operator and mover of hazardous materials; and the vigorous and nuanced legal defenses that Defendant and its skilled

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counsel were prepared to raise had this case proceeded further.

14. From the outset of the litigation, Defendant and its counsel indicated that they planned to present a strong defense to Plaintiff's claims on the merits and their ability to represent a class of those whose biometrics were collected by Defendant. Had this case not settled, the Parties would have engaged in further lengthy motion practice at the summary judgment stage, preceded by a lengthy period of discovery. Defendant would have also aggressively contested class certification. Given the financial resources at its disposal, any final decisions favorable to Plaintiff would have also likely been appealed by Defendant.

15. Class Counsel were able to obtain the substantial benefit provided to the Settlement Class Members through the Settlement, despite the significant risks, only as a result of their efforts in investigating Defendant's operations, including Defendant's biometric capture, collection and use practices and, most importantly, playing a central role in the careful and extended negotiations that resulted in the final Settlement Agreement, including the drafting and preparation of the Settlement Agreement, all related exhibits, and the Motion for Preliminary Approval.

16. The work that the attorneys of McGuire Law, P.C. have committed to this case has been substantial. Among other things, the attorneys of McGuire Law have:

a. Investigated Plaintiff's claims;

b. Drafted and filed the Class Action Complaint;

c. Draftd and filed an accompanying Motion for Class Certification;

d. Researched and reviewed grounds to remand this case immediately after its removal;

e. Defeated Defendant's Motion to Dismiss after full briefing in the Northern District of Illinois;

f. Drafted and served formal written discovery;

g. Prepared numerous mediation briefs;

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h. Engaged in three separate day-long mediations with a private mediator;

i. Engaged in over four months of continued communication, negotiations, and the exchange of settlement drafts with Defendant's counsel, which resulted in the drafting and execution of the finalized Settlement Agreement and related documents, including class notice and claim form documents;

j. Conducted informal discovery related to records and information provided by Defendant related to the Class;

k. Attended multiple court hearings in state and federal court;

l. Successfully moved for preliminary approval of the Settlement;

m. Oversaw the implementation of the Settlement, including many telephone and email communications with the Settlement Administrator and Defendant's counsel about class notice, the settlement website, and claims submission;

n. Monitored the dissemination of notice and the ongoing claims process; and

o. Corresponded with Plaintiff repeatedly throughout the duration of the case, including through initial investigation and drafting of the pleadings and regularly through settlement negotiations.

17. In addition to the above efforts taken by Class Counsel to secure the Settlement reached here for the Settlement Class Members, pursuant to the terms of the Settlement and this Court's Preliminary Approval Order, McGuire Law has been primarily responsible for monitoring the effectuation of notice to Class Members and responding to Class Member inquiries.

18. Following the Court's entry of its Preliminary Approval Order, Defendant and the Settlement Administrator, Epiq Systems, LLC, created a Class List pursuant to the Settlement Agreement, and since that time, the Settlement Administrator has informed me that Direct Notice of this Settlement has been sent out. Additionally, the Settlement Website is active and features all relevant case documents in electronic format. Furthermore, the Settlement Admninistrator has advised me that approximately 2,800 Claim Forms have already been received; there have been no objections to date; and only one Settlement Class Member has requested exclusion to date.

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Although the total cash amount that each Class Member will receive is currently unknown and will depend on the total number of valid Claim Forms submitted, it is estimated that Settlement Class Members will each be able to receive at least hundreds of dollars and potentially close to or over $1,000 in cash under the Settlement—even after the deduction of the attorneys fees sought herein.

19. Based on my experience in other class action settlements, I anticipate that our firm will expend substantial additional time and resources over the pendency of this action relating to briefing and filing a motion for final approval of the Settlement, attending the final approval hearing, responding to Class Members' inquiries regarding the Settlement and advising them how to proceed, responding to any objectors, reviewing submitted claims rejected by Defendant and/or the Settlement Administrator, and remaining involved with the Settlement through implementation.

20. Prior to the initiation of this litigation, Plaintiff Richard Rogers executed a fee agreement with my firm that was contingent in nature. Mr. Rogers agreed *ex ante* that up to 40% of any settlement fund, plus reimbursement of all costs and expenses, would represent a fair award of attorneys' fees from a fund recovered on behalf of himself and a class. My colleagues and I would not have brought this action absent the prospect of obtaining a percentage of the fund or a multiplier on our actual fees expended to account for the risk inherent in this type of class action.

The Class Representative's Contributions to the Case

21. Plaintiff Rogers has been significantly involved in this litigation, has willingly contributed his own time and efforts toward this litigation, and is deserving of the proposed Incentive Award. Mr. Rogers was instrumental in assisting Class Counsel's investigation at the outset of this case and have remained fully involved in its prosecution. But for Mr. Rogers' astuteness in discovering these alleged BIPA violations and bringing them to the attention of Class

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Counsel, it is possible this case would have never been prosecuted by anyone during the applicable limitations period. Moreover, Mr. Rogers had his biometrics captured and used by Defendant but chose to proceed with his claims on behalf of a class, despite having the financial incentive to pursue his claims on an individual basis. Only through such dedication from Mr. Rogers were Class Counsel able to succeed in obtaining such significant financial and prospective relief on behalf of the class.

22. Mr. Rogers was consistently available to consult with Class Counsel in person, over the phone, and by email and did so regularly. Mr. Rogers also reviewed all relevant pleadings and settlement documents, produced documents and information, and devoted significant additional time for the benefit of the class above and beyond of what is, in my experience, typically required or expected from a class representative.

23. Were it not for Plaintiff's efforts and contributions to the litigation by assisting Class Counsel with the investigation and filing of this suit and their monitoring of the case throughout its litigation, the substantial benefit to the class afforded under this Settlement Agreement would not have been achieved at all.

24. Mr. Rogers has not received any payments in this matter, was never promised any payments, and was not promised that he would receive an award of any kind in this litigation. Rather, the requested Incentive Award seeks only to compensate Mr. Rogers for his significant time, effort, and contributions to this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 1, 2021 in Deerfield, Illinois.

/s/ Evan M. Meyers
Evan M. Meyers, Esq.