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

JASMINE LOCKE, on behalf of herself and all others similarly situated,

Plaintiff,

v.

FIDELITONE INC.,
Defendant.

Case No.: 2021L000068

REPRESENTATIVE PLAINTIFF'S UNOPPOSED MOTION FOR SERVICE AWARD AND FEE AWARD & INCORPORATED MEMORANDUM OF LAW

Dated: November 15, 2024

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Pursuant to 735 ILCS 5/2-801 and the Court's Order dated February 29, 2024, Representative Plaintiff Jasmine Locke and Class Counsel at Hedin LLP respectfully move for the Court's approval of a Service Award and a Fee Award in connection with the Parties' preliminarily approved Settlement, in the amounts of $5,000 and $206,150.00 (35% of the fund) respectively. Defendant does not object to the requested Service Award or Fee Award amounts. [1]

INTRODUCTION

Plaintiff Jasmine Locke brought this putative class action lawsuit alleging that Fidelitone, Inc. ("Fidelitone" or "Defendant"), violated the Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq.*, by collecting employee fingerprints without providing the requisite disclosures or obtaining informed written consent.

Following investigation and extensive negotiation, the Parties have reached a class-wide settlement that provides meaningful relief for the Settlement Class. Defendants have agreed to create a non-reversionary Settlement Fund of $589,000.00, equaling **$1000.00 gross per Settlement Class Member.** After deductions from the Settlement Fund for Settlement administration expenses, attorneys' fees and costs and a service award (assuming those requests are granted), each Class Member will receive a cash payment of approximately $619.98.

This Settlement provides significant monetary relief to Settlement Class Members and does so via an efficient and equitable process: each Settlement Class Member will automatically receive a payment (unless the Settlement Class Member files a request for exclusion from the Settlement) with no need to file a claim. That is, payments to Settlement Class Members will occur automatically, and no amount of the Settlement Fund will revert to the Defendants (and any

[1] Unless otherwise defined herein, all capitalized terms have the same force, meaning and effect as ascribed in Section 2 ("Definitions") of the Settlement Agreement.

uncashed check funds remaining in the Settlement Fund once the checks expire will be paid to a Court-approved *cy pres* recipient in Illinois).

Per the approved Notice Plan, Notice of the Settlement was disseminated by US Postal mail and by email where available to the 589 members of the Settlement Class, and a Settlement Website has been established for Settlement Class Members to learn more about the Settlement, to review the relevant filings, orders, and other pertinent documents, to obtain instructions for objecting to or submitting requests for exclusion from the Settlement, and to submit requests for exclusion from the Settlement on a simple, web-based form. To date, none of the members of the Settlement Class have filed requests to be excluded from the Settlement or objected to the Settlement.

Class Counsel has invested significant time and resources, monetary and otherwise, investigating and litigating the claims and negotiating the Settlement on behalf of the Settlement Class – a high-risk undertaking that will result in each member of the Settlement Class receiving approximately $620 after all fees and expenses associated with the Settlement are deducted from the Settlement Fund. The Representative Plaintiff likewise played an invaluable role in this action by assisting counsel at every stage of the proceedings, including by providing counsel with information regarding Defendant's biometrics collection policies and practices, reviewing pleadings and other filings in the case, staying in regular contact with counsel and abreast of the proceedings, meeting in person with counsel, sitting for deposition, and taking an active role in negotiating, drafting, and executing the Settlement. Class Counsel devoted substantial time and resources to this action and will continue to do so until the Settlement administration process concludes and funds have been disbursed to Settlement Class Members.

Representative Plaintiff and Class Counsel respectfully request the Court's approval of a

Service Award of $5,000 and a Fee Award of 35% of the Settlement Fund (or $206,150.00). As detailed below, the requested awards are appropriate under governing Illinois law, consistent with the amounts awarded in prior similar settlements Illinois state and federal court, and constitute fair compensation for the significant amount of work performed by Class Counsel and the Representative Plaintiff in investigating, prosecuting, and resolving this litigation.

ILLINOIS' BIOMETRIC INFORMATION PRIVACY ACT

Recognizing the "very serious need" to protect Illinois citizens' biometric data—which includes retina scans, fingerprints, voiceprints, and scans of hand or face geometry—the Illinois legislature unanimously passed BIPA in 2008 to provide individuals recourse when companies fail to appropriately handle their biometric data in accordance with the statute. (*See* Comp., ¶ 11); 740 ILCS 14/5. Thus, BIPA makes it unlawful for any private entity to "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:

> (1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored;
>
> (2) informs the subject . . . in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
>
> (3) receives a written release executed by the subject of the biometric identifier or biometric information ....."

740 ILCS 14/15(b).

BIPA also establishes standards for how companies must handle individuals' biometric data. For example, BIPA requires companies to develop a written policy establishing a retention schedule and guidelines for permanently destroying biometric data. 740 ILCS 14/15(a). To enforce

the statute, BIPA provides a civil private right of action and allows for the recovery of statutory damages in the amount of $1,000 for negligent violations—or $5,000 for willful violations—plus costs and reasonable attorneys' fees. *See* 740 ILCS 14/20.

BACKGROUND

I. NATURE OF THE ACTION[2]

Defendant operated facilities in Illinois related to supply chain management including a facility in Bensenville, Illinois ("the Bensenville Facility"). (Comp., ¶10, ¶20). Defendant employed Plaintiff at the Bensenville Facility from approximately July 2020 through August 2020. (Comp., ¶20). Plaintiff alleges that during her employment at the Bensenville Facility, Defendant required her to place her fingers on a fingerprint scanner, at which point digital copies of Plaintiff's fingerprints were scanned, collected, and stored in an electronic database. (Comp., ¶21). Plaintiff and other workers were required to use the fingerprint scanner every day, each time they wished to clock in and clock out of work. (Comp., ¶ 22). Plaintiff further alleges that Defendant's sophisticated fingerprint matching technology compared Plaintiff's scanned fingerprint against the fingerprints previously stored in Defendant's fingerprint database, at which point Plaintiff, and all others similarly situated, were able to clock in and clock out of work at the Bensenville Facility. (*Id.*). Plaintiff asserts that she never consented, agreed, or gave permission – written or otherwise – to Defendant for the collection or storage of her unique biometric identifiers or biometric information (Comp., ¶22), and further, that Defendant never provided Plaintiff with, nor did she ever sign, a written release allowing Defendant to collect or store her unique biometric identifiers or biometric information. (Comp., ¶23). Additionally, Plaintiff asserts that Defendant did not provide her with required statutory disclosures or an opportunity to prohibit or prevent the

[2] This section includes allegations from Plaintiffs' Complaint.

collection, storage or use of her unique biometric identifiers or biometric information. (Comp., ¶¶24-26).

Plaintiff alleges that by collecting her unique biometric identifiers or biometric information without her consent, written or otherwise, Defendant invaded her statutorily protected right to maintain control over her biometrics. (Comp., ¶25). Defendant denies and continues to deny all charges of wrongdoing or liability of any kind whatsoever.

a. Pre-Filing Investigation and Settlement

Plaintiff's counsel conducted a comprehensive pre-filing investigation concerning every aspect of the factual and legal issues underlying the claims alleged in this matter. (Ravindran Decl. ¶ 6.) These pre-filing efforts included:

- Researching the nature of Defendant's business, size, number of employees, and location;
- Interviewing Plaintiff to understand Defendant's timekeeping practices and whether such practices were BIPA compliant;
- Determining the appropriate measure of statutory damages;
- Assessing the factual and legal basis for any potential defenses to the claims alleged in the Complaint; and
- Reviewing Defendant's litigation history to determine whether Defendant had any pending claims on either an individual or class-wide basis.

(*Id.*, ¶ 6(A)-(E).)

As a result of this thorough pre-filing investigation, Plaintiff's counsel was able to develop multiple theories of BIPA liability against Defendant, analyze the legal issues relevant to the merits of claims under each such theory, assess the likelihood of success of potential defenses, and ultimately prepare a complaint against Defendant aimed at maximizing the likelihood of certifying a class and recovering meaningful class-wide relief. (Ravindran Decl. ¶ 7.) Following this pre-filing investigation and analysis, on January 19, 2021, Plaintiff filed her Class Action Complaint

in the Circuit Court of DuPage County.

b. Settlement Negotiations

Upon the lifting of the stay, and following significant litigations concerning the pleadings and discovery, the parties attended a mediation before the Hon. Diane Larsen (Ret.) of JAMS. (Ravindran Decl. ¶ 9.) Defendant provided Plaintiff with discovery regarding the potential class size, availability of insurance coverage, and information relevant to Defendants' operating procedures in advance of the mediation. *Id.* Though the case did not settle at mediation the parties continued settlement dialogue and to negotiate at arm's length for several weeks thereafter. (*Id.* at ¶ 10.) Ultimately, the parties arrived at a proposed class-wide Settlement, memorialized in the Settlement Agreement. (*Id*.) The Parties executed the Settlement Agreement on September 27, 2024. (*Id.*)

Additionally, the Parties agreed to engage Analytics Consulting, LLC ("Analytics"), a nationally recognized class-action settlement administration company with prior experience administering BIPA employee class settlements, to administer the Settlement. (Ravindran Decl. ¶ 141). Plaintiff's counsel and Defendant's counsel reviewed the quote, and upon determining the quote was reasonable and in line with industry standards, agreed to engage Analytics as Settlement Administrator. (*Id*.) Plaintiff's counsel worked with Defendant's counsel to ensure that all notice-related materials comply with due process and applicable law and are easily understood by Settlement Class Members. (*Id.*)

II. TERMS OF THE SETTLEMENT

A copy of the Settlement Agreement is attached as Exhibit 1 to the Ravindran Declaration, the key terms of which are summarized as follows:

a. Settlement Class Definition

Pursuant to the Settlement Agreement, Plaintiff requested that the Court provisionally certify the following Settlement Class:

"All individuals who were enrolled in and/or used the Time-

> Keeping System at Defendant's facilities within the State of Illinois between January 19, 2016 and the date of entry of the Preliminary Approval Order who have not previously signed a waiver or release."

Settlement Agreement §2.29; §3.37.

b. Settlement Payments

The Settlement provides that a *pro rata* share of the Settlement Fund (after payment of administrative expenses, any approved fee award to class counsel and any approved service award to the class representative) will be sent directly to Settlement Class Members, without the need for them to submit claim forms. (Agreement §5.42.) Defendant has agreed to pay a gross amount of $1000 per member of the Settlement Class into the Settlement Fund; because there are 589 members of the Settlement Class, Defendant will pay $589,000 to the Settlement Fund within thirty days of the entry of the preliminary approval order. (*Id.* §5.41(a).) The settlement is non-reversionary. (*Id.* §2.31). Each member of the Settlement Class who does not request exclusion will receive a *pro rata* share of the net Settlement Fund after Settlement Administration Expenses and any attorneys' fees and service award approved by the Court are first deducted. Each Settlement Class Member is estimated to receive a check for approximately $619.98. (Declaration of Richard Simmons ("Simmons Decl.") ¶ 38) attached to Motion for Preliminary Approval). If any checks remain uncashed within ninety (90) days after the date of issuance, the check will be void, and such uncashed funds will be distributed to a *cy pres* recipient, mutually selected by the Parties and subject to Court approval. (Agreement, §5.44(d))

c. Release of Liability

In exchange for the relief described above, the Settlement Class Members will release Defendant and the Releasees from all claims related to the capture, collection, storage, possession, transmission, disclosure, re-disclosure, dissemination, protection, conversion and/or use of data

collected in connection with the finger-scan timekeeping system at Fidelitone prior to the date of the Preliminary Approval of the Class Action Settlement, including, but not limited to, causes of action or claims under BIPA or any related or similar statutes or common law. (Agreement, §§2.24; 7.46-47). Further, the Representative Plaintiff has also agreed to provide a General Release as a term of the Settlement Agreement. (*Id.*, §15.72).

d. Payment of Settlement, Notice and Administrative Costs

The Parties have agreed that the Settlement Fund shall be used to pay all expenses incurred by the Settlement Administrator in, or relating to, administering the Settlement, providing Notice, mailing checks, and any other related expenses. (Agreement, §§2.32; 5.42) The Settlement Administrator has estimated that it will incur $12,681.00 in fees and costs in connection with providing these services. (Simmons Decl., ¶ 37).

e. Payment of Attorneys' Fees, Costs, and Service Award

Class Counsel has agreed to limit its request for fees to 35% of the Settlement Fund, and Defendant agrees not to challenge Class Counsel's fee request under that limit. (Agreement, §15.67-68.) The award of attorneys' fees shall include all work by Plaintiff's Counsel or any other attorney related to, and all costs and expenses incurred in connection with, the Litigation and their representation of Plaintiff in the Litigation, including, without limitation: (a) all work already performed related to the investigation, prosecution and settlement of the Litigation; (b) all work to be performed in fully and finally resolving the Litigation; and (c) all work in connection with administering the settlement. Defendant has also agreed not to oppose the payment of a $5,000 Service Award from the Settlement Fund, subject to Court approval, to Plaintiff in recognition of her efforts as Class Representative. (*Id.* §15.72.) Pursuant to the parties' agreement and the Court's order Plaintiff files the instant motion for attorneys' fees and costs and a Service Award no later

than 21 days prior to the Objection/Exclusion Deadline, which falls on December 13, 2024. (*Id.* §15.67); (Order Granting Preliminary Approval dated October 8, 2024).

f. Exclusion and Objection Rights

Any Settlement Class Member who wishes to exclude him or herself or object to the Settlement must do so on or before the Objection/Exclusion Deadline, which the Parties propose be set for 60 days after the date of the Court's entry of the Preliminary Approval Order. (Agreement, §§2.20; 10.56; 11.58). Requests for exclusion must comply with the requirements set forth in Section 10 of the Settlement Agreement. Any Settlement Class Member who wishes to object must comply with all requirements set forth in Section 11 of the Settlement Agreement. The Class Notice will contain language consistent with the provisions of Sections 10 and 11 of the Settlement Agreement concerning requests for exclusion and objections. *See* Settlement Agreement, Ex. A (proposed Class Notice).

g. Notice Plan

Within fourteen (14) days of entry of the Preliminary Approval Order, the Settlement Administrator shall disseminate by U.S. Postal Mail and email (where available) the Notice in the form of Exhibit A to all Settlement Class Members on the Class List. The Settlement administrator shall utilize all means, up through performing a "skip-trace" or equivalent level research, not to exceed 100 skip-traces, to locate in the first instance a mailing address for those individuals for whom the Class List does not include a mailing address. (Agreement §9.55; *See generally* Simmons Dec., ¶¶ 16-36.) The proposed Class Notice is attached as Exhibit "A" to the Settlement Agreement.

The Settlement Administrator will create and maintain the Settlement Website, to be activated in advance of the Notice Date, which will be located at the URL www.

www.fidelitonebiometricssettlement.com (Agreement, §2.33; Simmons Decl. ¶¶ 30-32). The Settlement Website will provide information about the Settlement and make case-related documents available for download, such as the Settlement Agreement, Notice, Preliminary Approval Order, and the Fee and Expense Application, and contain web based forms for exclusion, change of address, and requests for payment to an electronic wallet. *Id.* The Settlement Administrator estimates the cost of the Notice Plan, including fees and costs, to be $12,681.00 (Simmons Decl. ¶ 37).

THE REQUESTED SERVICE AWARDS SHOULD BE APPROVED

Because a named plaintiff is essential to any class action, service awards, also known as incentive awards, "are "justified when necessary to induce individuals to become named representatives." *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016) (internal citation omitted) (approving incentive awards of $25,000 and $10,000); *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"). Additionally, by lending her name to this litigation, the Representative Plaintiffs opened herself up to "scrutiny and attention," which in and of itself "is certainly worthy of some type of remuneration." *See Schulte*, 805 F. Supp. 2d at 600-01.

In this case, the Representative Plaintiff is well-deserving of a $5,000 Service Award given the vital role that she played. Even though no award of any sort has been promised to the Representative Plaintiff, she nonetheless contributed time and effort pursuing these claims on behalf of the Settlement Class — exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (*See* Ravindran Decl. ¶ 28.) The Representative Plaintiff participated in Class Counsel's investigation and provided background information regarding Defendant's collection of biometric information in connection

with timekeeping, reviewed pleadings and court filings, gathered and provided documents for discovery, consulted with Class Counsel on numerous occasions, and provided feedback on a number of other filings, most importantly the Settlement Agreement. (Ravindran Decl. ¶ 28.) In addition, Ms. Locke met in person multiple times with class counsel and underwent a deposition. But for the Representative Plaintiff's assistance and active involvement in the litigation, the Settlement would not have been possible. (*Id*.)

The modest amount of the Service Award requested for the Representative Plaintiff – $5,000 – equates to less than 1% of the total settlement fund, and which is significantly less than the average incentive award granted in a class settlement. *See* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1348 (2006) (finding that "[t]he average award per class representative was $15,992"). Service awards much larger than the amounts sought here are routinely approved. *See, e.g., Dixon v. Washington & Jane Smith Cmty.-Beverly*, No. 17-cv-8033 (N.D. Ill.) (granting $10,000 incentive award in BIPA case); *Brown v. Moran Foods, In*c., No. 2019-CH-02576 (Cir. Ct. Cook Cnty.) ($5,000 award in BIPA case); *Barnes v. Aryz*ta, No. 2019-CH-02576 (Cir. Ct. Cook Cnty.) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, U.S. Dist. LEXIS 35421, at *20 (N.D. Ill. Mar. 23, 2015) (awarding $25,000 incentive award); *Satterfield v. Simon & Schuster*, No. 06-cv-2893, Dkt. 131, at 4 (awarding incentive awards totaling $30,000, including a $20,000 award to one class representatives). Accordingly, a Service Award of $5,000 to Representative Plaintiff is fair and reasonable and should be approved.

THE REQUESTED FEE AWARD SHOULD BE APPROVED

Class Counsel respectfully request the Court's approval of a Fee Award of 35% of the settlement fund (or $206,150.00).

I. CLASS COUNSEL SHOULD BE AWARDED THE *EX ANTE* MARKET RATE FOR THE LEGAL SERVICES PERFORMED FOR THE BENEFIT OF THE SETTLEMENT CLASS

Courts strongly encourage negotiated fee awards in class action settlements. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of the fee."). "The Illinois Supreme Court has adopted the approach taken by the majority of federal courts on the issue of attorney fees in equitable fund cases," *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13 (1st Dist. 1992) (citing *Fiorito v. Jones*, 72 Ill.2d 73 (1978)), which is to permit "attorneys for the successful plaintiff [to] 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)); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole").

"In deciding fee levels in common fund cases" such as the instant matter, courts must "'do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.'" *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) (quotation omitted). In performing this inquiry, the Illinois Supreme Court has determined that courts may "choose a percentage[-of-the-fund] or a lodestar method[.]" *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d 235, 243–44 (1995)).

II. THE COURT SHOULD APPLY THE PERCENTAGE-OF-THE-FUND METHOD IN THIS CASE

In this case, the Court should use the percentage-of-the-fund method in determining an appropriate Fee Award to Class Counsel. 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)). And in consumer cases such as the instant matter, 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-of-the-fund approach best yields the fair market price for the services provided by counsel to the class. *See 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); *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); *Sutton*, 504 F.3d at 693 (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 794 (N.D. Ill.

2015) ("[T]he court agrees with Class Counsel that the fee award . . . should be calculated as a percentage of the money recovered for the class.").

This Court should likewise calculate Class Counsel's Fee Award using percentage-of-the-fund method. The percent-of-the-fund method best replicates the *ex ante* market value of the services that Class Counsel provided to the Settlement Class. It is not just the typical method used in contingency-fee cases generally, *see Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998), but it is also the means by which an informed Settlement Class and Class Counsel would have established counsel's fee *ex ante*, at the outset of the litigation. *See e.g. Cornejo v. Amcor Rigid Plastics USA, LLC*, No. 18-cv-7018, dkt. 57 (N.D. Ill. 2018) (using percentage-of-the-fund method to calculate attorneys' fees in BIPA case); *Alvarado v. Int'l Laser Prods., Inc*., No. 18-cv-7756, dkt. 70 (N.D. Ill. Jan. 24, 2020) (same); *see also Kolinek*, 311 F.R.D. at 500-01 ("the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery"). The percentage-of-the-fund method also better aligns Class Counsel's interests with those of the Settlement Class because it bases the fee on the results the lawyers achieve for their clients rather than on the number of motions they file, documents they review, or hours they work, and it avoids some of the problems the lodestar-times-multiplier method can foster (such as encouraging counsel to delay resolution of the case when an early resolution may be in their clients' best interests). *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 720-721 (7th Cir. 2001). And it is also simpler to apply. *Id*.; *see also, e.g., Kolinek*, 311 F.R.D. at 501; *Ryan*, 274 Ill. App. 3d at 924.

Accordingly, Class Counsel respectfully requests that the Court apply the percentage-of-the-fund approach in determining an appropriate Fee Award in this case.

III. THE COURT SHOULD APPROVE A FEE AWARD OF 40% OF THE SETTLEMENT FUND

In terms of the percentage to award, Class Counsel respectfully requests that the Court award a Fee Award of 35% of the settlement fund (or $206,150.00).

An award to Class Counsel of 35% of the settlement fund to Class Counsel is well within the range of fees typically awarded to class counsel by Illinois courts in comparable all-cash class action settlements and warranted given the very strong result of $1000 gross, $619.98 (estimated) direct payment to each class member. *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, 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)); *Meyenburg v. Exxon Mobil Corp.*, No. 05-cv-15, U.S. Dist. LEXIS 52962, at *5 (S.D. Ill. July 31, 2006); *See also, Willoughby v. Lincoln Insurance Agency*, No. 22-CH-01917 (Cir. Ct. Cook Cnty., Ill. 2022) (Cohen, J.) (attorneys' fee award of 40% of settlement fund in BIPA class settlement); *Bodie v. Capitol Wholesale Meats, Inc.*, 2022-CH-000020 (Cir. Ct. DuPage County, Ill. 2022) (same); *Rapai v. Hyatt Corp.*, No. 17-CH-14483 (Cir. Ct. Cook Cnty., Ill. 2022) (Demacopolous, J.) (same); *Knobloch v. ABC Financial Services, LLC et al.*, No. 17-CH-12266 (Cir. Ct. Cook Cnty., Ill. 2021) (Loftus, J.) (same); *Freeman- McKee v. Alliance Ground Int'l, LLC*, No. 17-CH-13636 (Cir. Ct. Cook Cnty., Ill. 2021) (Demacopoulos, J.); *Prelipceanu v. Jumio Corp.*, No. 18-CH-15883 (Cir. Ct. Cook Cnty. Ill. 2020) (Mullen, J.) (same); *Smith v. Pineapple Hospitality Grp.*, No. 18-CH-06589 (Cir. Ct. Cook Cnty., Ill. 2020) (Moreland, J.) (same); *McGee v. LSC Commc's*, 17-CH-12818 (Cir. Ct. Cook Cnty., Ill. 2019) (Atkins, J.) (same); *Zhirovetskiy,* No. 17-CH-09323 (Cir. Ct. Cook Cnty., Ill., 2019) (Flynn, J.) (same); *Svagdis*, No. 17-CH-12566 (Cir. Ct. Cook Cnty., Ill., 2018) (Larsen, J.) (same); *Zepeda*, No. 18-CH-02140 (Cir. Ct. Cook Cnty., Ill. 2018) (Atkins, J.) (same); *see also*; *Garcia v. Club*

Colors Buyer, LLC, 2020L001330 (Cir. Ct. DuPage Cnty., Ill. 2021) (same); *Freeman-McKee v. Alliance Ground Int'l, LLC*, No. 17-CH-13636 (Cir. Ct. Cook Cnty., Ill. 2021) (same); *Prelipceanu v. Jumio Corp.*, No. 18-CH-15883 (Cir. Ct. Cook Cnty., Ill. 2020) (same); *McGee v. LSC Commc's*, No. 17-CH-12818 (Cir. Ct. Cook Cnty., Ill. 2019) (same); Herbert Newberg & Alba Conte, *Newberg* on Class Actions § 15.83 (William B. Rubenstein ed.; 5th ed.) (noting that fifty percent of the fund appears to be an approximate upper limit on fees and expenses). Thus, Plaintiffs' request of 35% of the Settlement Fund has been deemed reasonable by other courts in BIPA class settlements.

And in this case in particular, the requested Fee Award would fairly and reasonably compensate Class Counsel for (1) agreeing to take on this action in the face of substantial risk, (2) achieving an excellent result on behalf of the Settlement Class, and (3) investing substantial time and other resources investigating, prosecuting, and resolving this action. (*See* Ravindran Decl. ¶¶ 6-20, ¶¶ 24- 29).

A. This was High Risk and Undesirable Litigation at its Inception, and Class Counsel Should be Rewarded for Having Pursued it on Behalf of the Class

The requested Fee Award is particularly reasonable given, among other factors, the risks associated with this litigation at the time it was commenced. *See Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) ("Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel.").

Workplace BIPA claims implicate several potential defenses, the contours of which worked their way through the courts during the pendency of this litigation. For example, on February 2, 2023, the Illinois Supreme Court in *Tims v. Black Horse Carriers, Inc.*, No. 12780 found the statute of limitations applicable to BIPA claims is five years, not one year as asserted by

defendant. Additionally, it was also uncertain for much of this case whether workplace BIPA claims, such as those Representative Plaintiff asserted in this case, are preempted by the Illinois Workmans Compensation Act. *McDonald v. Symphony Bronzeville Park LLC*, 2022 IL 126511 (February 3, 2022) (determining workplace BIPA claims are not preempted by Illinois's Workers Compensation Act ("IWCA")). Notably, the Parties' negotiations occurred while both *Tims* and *McDonald* were pending, the outcomes of which posed a significant risk of total non-recovery to the entire Settlement Class (in the case of *McDonald*) or at least a substantial portion of the Settlement Class (in the case of *Tims*). The Settlement Agreement that Class Counsel negotiated reflects those risks, among others, and yet nonetheless provides substantial, *meaningful* relief to the Settlement Class.[3]

Further, Fidelitone indicated that, if this case had not settled, it would have argued that the information captured by its fingerprint scanners were not actually "biometric identifiers" or "biometric information" subject to BIPA (Ravindran Decl. ¶ 16); although Plaintiff again puts little stock in this argument, resolving the issue would present novel issues of law and require significant and lengthy expert discovery concerning the relevant technology. *Cf. In re Facebook Biometric Info. Privacy Litig.*, No. 3:15-cv-03747-JD, 2018 WL 2197546, at *2-3 (N.D. Cal. May 14, 2018) (denying motion for summary judgment on whether facial scans were biometric data regulated by BIPA).

In addition to these uncertainties, other risks threatened to eliminate, reduce, or delay recovery to the Settlement Class, even if the Representative Plaintiff prevailed at summary judgment and/or trial on the Settlement Class's behalf. Given the damages at issue, Fidelitone

[3] Another significant unknown was the issue of when BIPA claims accrue. This issue too was only just recently resolved by the Illinois Supreme Court. *See Cothron v. White Castle System, Inc.*, No. 128004 (issued February 17, 2023, finding that BIPA claims accrue on a per scan basis). Further there was a risk that BIPA could have been repealed or severely limited as there were legislative initiatives to do that throughout.

would have likely appealed any adverse decision and—even if not winning outright— likely would have sought a reduction in statutory damages on, *inter alia*, due process grounds. *See, e.g.*, *Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019) (statutory award in TCPA class action of $1.6 billion reduced to $32 million).

Class Counsel agreed to represent the Representative Plaintiff and the Settlement Class in the face of these risks, in addition to many others (including the possibility of legislative action to retroactively change the law in Defendant's favor, absolving it of liability). The high-risk nature of this litigation at the outset firmly supports the reasonableness of the requested Fee Award. *See Ryan*, 274 Ill. App. 3d at 924

B. The Exceptional Result that Class Counsel Achieved for the Settlement Class Further Supports the Requested Fee Award

Despite the many serious risks of non-recovery to the Settlement Class and thus non-payment to Class Counsel described above, both at the outset and for the duration of the proceedings, Class Counsel nevertheless achieved an excellent result for the Settlement Class.

Pursuant to the Settlement Agreement, Fidelitone has agreed to establish a Settlement Fund of $589,000.00 in cash – a gross recovery of $1000 per Settlement Class Member –from which each Settlement Class Member will automatically receive a check for approximately $620 (provided the Court approves the Service Award and fee). This is a strong result at the top end of BIPA settlements. Given the enormous risks presented in this case, both at the commencement of the litigation and when the Settlement was negotiated, the relief provided by the Settlement in this case well exceeds with per-Class Member recoveries in prior BIPA settlements. *See, e.g., Jones v. CBC Rest. Corp.*, 19-cv-06736 (N.D. Ill. Oct. 22, 2020) (fund equating to gross amount of $800 per person); *Johnson v. Rest Haven Illiana Christian*, 2019-CH-01813 (Cir. Ct. Cook Cty.) (fund equating to gross amount of $900 per person); *Marshall v. Life Time Fitness, Inc.*, 17-CH- 14262

(Cook Cnty. July 30, 2019) (non-employment case with fund equating to net amount of $270 with credit monitoring).

And to achieve this result, Class Counsel expended a substantial amount of attorney time and out-of-pocket costs and expenses investigating, prosecuting, and negotiating the terms of the Settlement, without any guarantee of recovery (Ravindran Decl. ¶¶ 24-29). Accordingly, the result achieved for the Settlement Class further confirms that an award of35% of the Settlement Fund (or $206,150.00) inclusive of all out-of-pocket costs expended is fair and reasonable and should be approved.

CONCLUSION

For the foregoing reasons, the Court should approve a Service Award of $5,000 to the Representative Plaintiff and a Fee Award (inclusive of all out-of-pocket costs expended) of 35% of the Settlement Fund, or $206,150.00 to Class Counsel. The requested Fee Award and Service Award would both adequately reward and reasonably compensate Class Counsel and the Representative Plaintiff for assuming the significant risks that this case presented at the outset and nonetheless expending a substantial amount of time and other resources investigating, litigating, and negotiating a resolution to the case for the benefit of the Settlement Class.

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Respectfully submitted,

By: /s/ Carl Malmstrom

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