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

RICHARD ROGERS and MICHAEL STEWART, individually and on behalf of similarly situated individuals, *Plaintiffs*, v. BNSF Railway Company, a Delaware corporation, *Defendant.*	No. 2019-CH-04393 Hon. Pamela McLean Meyerson

PLAINTIFFS' MOTION & MEMORANDUM OF LAW IN SUPPORT OF APPROVAL OF ATTORNEYS' FEES, EXPENSES, & SERVICE AWARD

Plaintiffs Richard Rogers and Michael Stewart, by and through their attorneys and pursuant to 735 ILCS 5/2-801, hereby move for an award of attorneys' fees and expenses for Class Counsel, as well as service awards for Plaintiffs as the Class Representatives in connection with the class action settlement with Defendant BNSF Railway Company. In support of this Motion, Plaintiffs submit the following memorandum of law.

Dated: April 16, 2024

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I. INTRODUCTION

The Settlement[1] that Class Counsel have achieved in this case is an exceptional result for Settlement Class Members, as it will provide them with meaningful, and indeed unprecedented, financial benefits in the form of cash payments with no need to submit a claim form. The Parties' Agreement establishes a non-reversionary Settlement Fund of $75,000,000 to provide each Settlement Class Member with an equal, *pro rata* distribution of the Settlement Fund for having their biometrics collected and used by BNSF Railway Company ("Defendant") in alleged violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA").

The Court preliminarily approved the Settlement on March 5, 2024, and as a result, the Settlement Fund was established, and direct notice of the Settlement was sent to the Class on March 26, 2024. As of the filing of this Motion, no Settlement Class Member has objected to the Settlement or requested to be excluded.

With this Motion, Class Counsel request a fee of 35% of the total Settlement Fund, amounting to $26,250,000, plus their incurred litigation expenses of $294,179.26. As explained in detail below, Class Counsel's requested fee award is justified given the excellent relief provided under the Settlement, is consistent with Illinois law and fee awards granted in other cases in Illinois courts, and is reasonable given the time and risks undertaken by Class Counsel in their prosecution and resolution of this case for the benefit of the Settlement Class Members. Indeed, this Litigation represents the most advanced proceedings ever under BIPA, spanning across two courts over five years and including the first ever trial of BIPA claims.

[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 1 to Plaintiffs' previously filed Motion for Preliminary Approval.

Class Counsel and the Class Representatives have devoted years of time and effort to the prosecution of the Settlement Class Members' claims,[2] and their efforts have yielded an excellent result for the Class. The requested attorneys' fees and costs and Service Awards are amply justified in light of the investment, significant risks, and excellent results obtained for the Settlement Class Members in this five-year-old litigation, particularly given the substantial uncertainty regarding the state of BIPA when this Settlement was reached, and the continuous, changes to the landscape of BIPA litigation. Plaintiffs and Class Counsel respectfully request that the Court approve attorneys' fees and reasonable expenses of $26,544,179.26 and Service Awards of $15,000.00 for each of the Plaintiffs as Class Representatives.

II. BACKGROUND

A. BIPA

BIPA requires private entities that seek to use biometric identifiers (e.g., fingerprints and handprints) and biometric information (any information gathered from a biometric identifier which is used to identify an individual) to:

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

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

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

(4) Make publicly available a retention schedule and guidelines for

[2] *See* Declaration of Evan M. Meyers ("Meyers Decl."), attached hereto as Exhibit 1, ¶¶ 11-16; Declaration of Jon Loevy ("Loevy Decl."), attached hereto as Exhibit 2, ¶¶ 5-8.

permanently destroying the collected biometrics. 740 ICLS 14/15.

BIPA was enacted in large part to protect individuals' biometrics, to provide them with a means of enforcing those statutory rights, and regulate the practice of collecting, using and disseminating such sensitive and immutable information.

B. The Case and Procedural History

The procedural history in this case is unique and lengthy. Unlike other BIPA cases that were filed at a similar time, this litigation has not been subject to any lengthy stay in connection with any pending appellate decisions that bear upon the BIPA space. The result has been lengthy, highly contested, and groundbreaking litigation in two separate courts over five years. Although the Motion for Preliminary Approval set forth the procedural history, it is set forth again below, so as to demonstrate the extensive efforts undertaken by Class Counsel and the Class Representatives to bring about the excellent results in this Settlement.

1. *Plaintiff Rogers's Allegations and Proceedings in the Federal Case*

On April 4, 2019, Plaintiff Richard Rogers filed a class action lawsuit against Defendant alleging violations of Sections 15(a), (b), and (d) of BIPA in the Circuit Court of Cook County, Illinois, where it was assigned to the Honorable Pamela McLean Meyerson. Plaintiff Rogers, a truck driver, alleged that BNSF utilized biometrically-enabled automated gate systems ("Auto-Gate System"), which contained identity verification devices that collected or obtained truck drivers' biometric information in the form of their fingerprints. Plaintiff Rogers alleged that the use of such devices in Illinois was regulated by BIPA and that Defendant violated BIPA Sections (a), (b) and (d). 740 ILCS 14/15 *et seq.*

On May 7, 2019, Defendant removed the case to the U.S. District Court for the Northern District of Illinois, where it was assigned to the Honorable Matthew F. Kennelly and captioned

Rogers v. BNSF Railway Co., No. 19-cv-03083. (Dkt. 1) (the "Federal Case"). In the Federal Case, the Parties fully briefed Defendant's Motion to Dismiss (Dkts. 19-20), and on October 31, 2019, Judge Kennelly issued a Memorandum Opinion and Order denying Defendant's Motion to Dismiss. (Dkt. 31.) The Parties then engaged in extensive written and oral discovery which included several rounds of written discovery; production and review of tens of thousands of documents; nine depositions including a Fed. R. Civ. P. 30(b)(6) deposition of Defendant; significant oral and written third-party discovery also resulting in review of tens of thousands of documents; and expert discovery including production of expert reports from both Parties and expert depositions.

Following expert discovery, Plaintiff Rogers moved to remand his claim made under Section 15(a) of BIPA to the Circuit Court of Cook County on the basis that the federal court lacked subject matter jurisdiction pursuant to the Seventh Circuit's decision in *Bryant v. Compass Group USA, Inc.,* 958 F.3d 617 (7th Cir. 2020). (Dkt. 85.) After full briefing, Plaintiff Rogers's Motion to Remand was granted, and his claims under Section 15(a) of BIPA were severed and remanded to this Court in August 2021. (Dkts. 97, 100.)

The litigation continued in the Federal Case and Plaintiff Rogers filed a contested Motion for Class Certification, which was fully briefed, and Defendant filed a Motion for Summary Judgment, which was also fully briefed. On March 15, 2022, Judge Kennelly issued a Memorandum Opinion and Order denying Defendant's Motion for Summary Judgment. (Dkt. 142.) On March 22, 2022, Judge Kennelly issued a Memorandum Opinion and Order granting Plaintiff Rogers's Motion for Class Certification and appointing Myles McGuire, Evan Meyers, David Gerbie, and Brendan Duffner of McGuire Law as Class Counsel. (Dkt. 143.) On April 5, 2022, Defendant filed a Petition for Permission to Appeal Judge Kennelly's Order granting class

certification under Fed. R. Civ. P. 23(f). (*See* Dkt. 145.) On April 11, 2022, Defendant's petition was summarily denied by a panel of the Seventh Circuit Court of Appeals. (Dkt. 145.) On April 26, 2022, Defendant filed a combined Motion for Certification of Interlocutory Appeal Under 28 U.S.C. Section 1292(b). (Dkt. 147.) On June 21, 2022, Judge Kennelly denied Defendant's Motion for Certification of Interlocutory Appeal Under 28 U.S.C. Section 1292(b). (Dkt. 158.) Subsequently, Loevy & Loevy were added to the litigation to assist with and bring Plaintiff Rogers's and the Certified Class's claims to trial.

On September 6, 2022, a final pretrial conference was held in which oral argument and rulings occurred on the Parties' numerous and extensive pretrial motions. In early October 2022, the Parties conducted a five-day jury trial presided over by Judge Kennelly. On October 12, 2022, the jury returned a verdict, finding that Defendant had recklessly violated Section 15(b) of BIPA 45,600 times. (Dkt. 223.) Judge Kennelly directed the Clerk to enter judgment in favor of the plaintiff class in the amount of $228,000,000. (Dkts. 223-225.)

On November 9, 2022, the Parties filed their post-trial motions. (Dkts. 235-236.) Defendant filed a Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial or to Alter or Amend Judgment. Plaintiff Rogers filed a Rule 59 Motion to Amend Judgment. The motions were fully briefed, and after oral argument, on June 30, 2023, Judge Kennelly granted Defendant's post-trial motion in part, relying on the then-recently issued Illinois Supreme Court opinion *Cothron v. White Castle Systems* 2023 IL 128004 (Feb. 17, 2023), vacating the damages award and ordering a new trial to determine the appropriateness and/or amount of damages to be awarded. (Dkt. 260.) Judge Kennelly also denied Plaintiff Rogers's post-trial motions. (*Id.*) On July 7, 2023, the Court set the retrial to begin on October 2, 2023. Just prior to the retrial, the instant Settlement was reached.

2. *Plaintiffs' Allegations and Proceedings in the State Case*

After Plaintiff Rogers's Section 15(a) claims were severed and remanded to this Court in August of 2021, Plaintiff Rogers was granted leave to file the operative Second Amended Complaint. Plaintiff Rogers did so on October 20, 2021, adding Michael Stewart as a named plaintiff. Defendant filed its Answer on December 6, 2021. The Parties agreed on the terms of a confidentiality order which operated to treat discovery conducted, and documents produced, in Federal Court as though they had been produced in this Court. The Parties thereafter conducted additional discovery tailored to Plaintiffs' claims under BIPA Section 15(a) and further class and expert discovery.

During discovery before this Court, the Parties conducted several additional depositions, including of Plaintiff Stewart, Defendant's employees, and four additional depositions of Defendant's service provider Remprex, LLC and its employees. On June 27, 2022, Defendant filed a Motion for Protective Order. This motion was briefed, but not ruled on. On July 18, 2022, Plaintiffs filed a Motion to Compel Production of Data in Discovery in order to identify any additional class members. Plaintiffs' Motion was fully briefed and ultimately granted on September 19, 2022.

On March 28, 2023, Plaintiffs filed a Motion for Class Certification. In response, Defendant filed a Motion to Stay briefing on Plaintiffs' Motion for Class Certification pending further discovery. Defendant's Motion received full briefing and oral argument. Defendant's Motion to Stay was ultimately denied, and Plaintiffs' Motion for Class Certification was then fully briefed. On June 12, 2023, Defendant filed a Motion for Judgment on the Pleadings, seeking dismissal of the State Case with prejudice. That Motion was also fully briefed. On September 1, 2023, Plaintiffs sought leave to file under seal certain exhibits to their soon-to-be-filed Motion for

Summary Judgment. The Court granted this relief. Prior to filing such motion, and on the eve of the Court hearing oral argument on Plaintiffs' Motion for Class Certification and Defendant's Motion for Judgment on the Pleadings, the Settlement was reached.

3. *The Parties' Settlement Negotiations*

Over the course of the many years of litigation outlined above, the Parties mediated seven times with the assistance of three separate experienced neutrals. On March 11, 2020, when the Parties were in the early stages of discovery, the Parties met for a private mediation before the Honorable James Holderman (Ret.) of JAMS Chicago. A year later, on April 7, 2021, the Parties participated in a second private mediation, this time overseen by the Honorable James Epstein (Ret.) of JAMS Chicago, a former Justice of the Illinois Appellate Court and former Judge in the Chancery Division of the Circuit Court of Cook County. A year after that, on June 6, 2022, the Parties participated in a third arm's-length mediation, again overseen by Judge Epstein, which again did not result in any settlement.

The Parties also engaged in numerous settlement conferences with Judge Kennelly in an effort to resolve the Litigation both before and after the trial in the Federal Case. On September 29, 2022, Judge Kennelly held a pretrial settlement conference. Following the jury verdict, on November 29, 2022, Judge Kennelly held another settlement conference. On December 23, 2022, Judge Kennelly held a second post-trial settlement conference. (Dkt. 240.) On September 8, 2023, just prior to the Federal Case retrial scheduled for October 2, 2023 and the State Court oral argument and ruling on Plaintiffs' Motion for Class Certification then scheduled to occur on September 29, 2023, Judge Kennelly held a fourth court-mediated settlement conference in an attempt to resolve the Litigation.

Following the Parties' fourth mediation with Judge Kennelly and seventh mediation

overall, and over the following months, counsel for Plaintiffs and for Defendant continued to expend significant further efforts negotiating specific terms of the Settlement, including, among other things: the scope of the release; the form and content of the Notice; settlement administration procedures, including development and deployment of the Settlement Website; and the process and deadlines for objections, exclusions, and other submissions to the Court. Eventually, these months-long further negotiations culminated in the Settlement Agreement and the attendant exhibits which the Court preliminarily approved on March 5, 2024. Thereafter, in accordance with the Settlement Agreement, the Settlement Website was published and direct notice was disseminated to the Settlement Class Members by U.S. Mail on March 26, 2024.

III. THE SETTLEMENT

A. The Settlement Class Members Will Receive Excellent Relief Under The Settlement.

Class Counsel's prosecution of this litigation has culminated in this class-wide Settlement that provides exceptional monetary relief to the Settlement Class Members. The Settlement establishes a $75,000,000 Settlement Fund (Agreement, ¶¶ 88, 93), and each class member will receive – without the need for a claims process – an equal share of the fund after deductions of administrative costs and the Court-approved attorneys' fees and Service Awards. Importantly, Defendant also represents that it no longer uses the technology at issue in the Litigation which is further meaningful relief to the Class. (*Id.* ¶ 52.)

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

Under the Settlement Agreement's plan for Class Notice, which has already gone into effect, direct notice has been provided by U.S. Mail to the Settlement Class Members. (Meyers

Decl., ¶ 17). In addition, the Settlement Website[3] is operational, makes available the detailed Notice and all relevant case information to Settlement Class Members, and permits the Settlement Class Members to submit a request for exclusion online if they so choose. Settlement Class Members can also submit their tax information to the Settlement Administrator through the Settlement Website so that taxes are not automatically withheld from their settlement award. To date, *no* Class Members have objected to the Settlement or elected to exclude themselves (*Id.*).

IV. ARGUMENT

A. The Court Should Award Class Counsel's Requested Attorneys' Fees.

Pursuant to the Settlement, Class Counsel seek attorneys' fees in the amount of $26,250,000, which amounts to 35% of the Settlement Fund, plus $294,179.26. in total reimbursable expenses. (Agreement, ¶¶ 94, 135; Meyers Decl., ¶ 19; Loevy Decl., ¶ 8). Such a request is well within the range of fees approved in comparable class actions and is fair and reasonable in light of the work performed by Class Counsel and the outstanding recovery secured on behalf of the Settlement Class Members. It is well settled that attorneys who, by their efforts, create a common fund for the benefit of a class are entitled to reasonable compensation for their services. *See Wendling v. S. Ill. Hosp. Servs.*, 242 Ill. 2d 261, 265 (2011) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.").

In cases where, as here, a class action settlement results in the creation of a settlement fund, "[t]he Illinois Supreme Court has adopted the approach taken by the majority of Federal courts on the issue of attorney fees[.]" *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13 (1st Dist.

[3] www.BNSFBIPAClassAction.com.

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. Alternatively, when applying the lodestar approach, the attorneys' fees to be awarded are calculated by determining the total amount of hours spent by counsel in order to secure the relief obtained for the class at a reasonable hourly rate, multiplied by a "weighted" "risk multiplier" that takes into account various factors such as "the contingency nature of the proceeding, the complexity of the litigation, and the benefits that were conferred upon the class members." *Id.* at 240.

Here, 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 all 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 misaligns the

[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.

interests of Class Counsel and the Settlement Class Members. Herbert Newberg & Alba Conte, 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-recovery approach promotes early resolution of the matter, as it disincentivizes protracted litigation driven solely by counsel's efforts to increase their lodestar. *Brundidge*, 168 Ill.2d at 242. For this reason, a percentage-of-the-recovery 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 Plaintiffs, 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 781, 795 (N.D. Ill. 2015) (applying the percentage-of-the-recovery approach and noting that class members would typically negotiate fee arrangement based on percentage method rather than lodestar).

Class Counsel are not aware of any BIPA class action settlements involving a monetary common settlement fund where a court relied on the lodestar method to determine attorneys' fees. In fact, to Class Counsel's knowledge, the percentage-of-the-recovery method has been used to determine a reasonable fee award in every BIPA class action settlement in the Circuit Court of Cook County where the defendant – as here – created a monetary common fund. *See, e.g., Sekura v. L.A. Tan Enters., Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Cnty., Ill. Dec. 1, 2016); *Zepeda v. Kimpton Hotel & Rest.*, No. 2018-CH-02140 (Cir. Ct. Cook Cnty., Ill. Dec. 5, 2018); *Taylor v. Sunrise Senior Living Mgmt., Inc.*, No. 2017-CH-15152 (Cir. Ct. Cook Cnty., Ill. Feb. 14, 2018); *Collier, et. al. v. Pete's Fresh Market 2526 Corporation, et. al.*, No. 2019-CH-05125 (Cir. Ct. Cook Cty., Ill. Dec. 8, 2020); *Draland v. Timeclock Plus, LLC, 2019-CH-12769* (Cir. Ct. Cook Cnty., Ill. Apr. 8, 2021); *Williams v. Inpax Shipping Solutions, Inc.*, No. 2018-CH-02307 (Cir. Ct.

Cook County, Ill. Sept. 1, 2021); *Rapai v. Hyatt Corp.*, No. 2017-CH-14483 (Cir Ct. Cook County, Ill. Jan. 26, 2022).

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

B. Class Counsel's Requested Fees Are Reasonable.

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

i. The requested attorneys' fees of 35% of the settlement fund is a percentage well within the range found reasonable in other BIPA cases.

The requested fee award represents 35% of the Settlement Fund. This percentage is well within the range of attorneys' fee awards that courts generally find reasonable in other class action settlements. *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)); 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). With respect to other high-dollar BIPA settlements in particular, Illinois state courts have regularly awarded 35% fee awards, even for recoveries that are far less than the recovery here. *See, e.g., Rivera, et*

al. v. Google, 2019-CH-00990 (Cir. Ct. Cook Cnty., Ill. Sept. 28, 2022) ($100 million fund for 5.8 million class members ($17.24/person gross recovery) (35% award)); *Kusinski v. ADP, LLC*., 2017-CH-12364 (Cir. Ct. Cook Cnty., Ill. Feb. 10, 2021) ($25 million fund for 320,000 class members, ($78.12/person gross recovery) (35% award)); *Boone, et al. v. Snap, Inc.* 2022LA000708 (Cir. Ct. DuPage Cnty., Ill. Nov. 22, 2022) ($35 million fund for 3.8 million class members ($9.21/person gross recovery) (35% award)). Importantly, the excellent result here, which amounts to a gross recovery of $1,612.90 per Settlement Class Member, required substantially more litigation and attorney time to reach such result, including a full jury trial.

Moreover, in BIPA settlements, Illinois state courts regularly award a *higher* percentage than is sought here. *See, e.g., Willoughby v. Lincoln Insurance Agency*, No. 22-CH-01917 (Cir. Ct. Cook Cnty., Ill. 2022) (awarding 40% of the BIPA class settlement fund in attorneys' fees); *Rapai v. Hyatt Corp.*, No. 17-CH-14483 (Cir. Ct. Cook Cnty., Ill. 2022) (same); *Knobloch v. ABC Financial Services, LLC et al.*, No. 17-CH-12266 (Cir. Ct. Cook Cnty., Ill. 2021) (same); *G.M. Sign, Inc. v. Dodson Co., LLC, et al.,* No. 08-CH-4999 (Cir. Ct. Lake Cnty., Ill.); *McGee v. LSC Commc's,* No. 17-CH-12818 (Cir. Ct. Cook Cnty., Ill.) (same) *Zhirovetskiy v. Zayo Group, LLC*, No. 17-CH-09323 (Cir. Ct. Cook Cnty., Ill.); *Prelipceanu v. Jumio Corp.*, No. 18-CH-15883 (Cir. Ct. Cook Cnty., Ill. 2020) (same); *Rogers v. CSX Intermodal Terminals, Inc.*, No. 19-CH-04168 (Cir. Ct. Cook Cnty., Ill. 2021) (attorneys' fee award of 38% of settlement fund in BIPA class settlement); *Vo v. Luxottica of America, Inc.*, No. 19-CH-10946 (Cir. Ct. Cook Cnty. 2022) (same); *Farag v. Kiip, Inc.,* 19-CH-01695 (Cir. Ct. Cook Cnty., Ill.) (same). Accordingly, Plaintiffs' request of 35% of the Settlement Fund is reasonable considering the fees recently approved by courts in BIPA class action settlements, and is especially reasonable given the size of the monetary awards achieved here through five years of groundbreaking litigation in multiple courts.

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

The Settlement in this case represents an excellent result for the Settlement Class given the risks of continued litigation. Throughout this case, Defendant has expressed a firm denial of Plaintiffs' material allegations and raised numerous defenses, including that the claims of Plaintiffs and the Settlement Class Members are preempted by several state and federal statutes, that damages under BIPA are "discretionary" under *Cothron*, and that any retrial would have resulted in rulings which could have materially altered the ability to achieve a large damages award. Similarly, the Settlement Class Members also faced a risk of the finding of liability itself in the Federal Case ultimately being undone upon appeal. Judge Kennelly, in granting Preliminary Approval of the Settlement, spoke to the risks faced to the Class as well as the appropriateness of the settlement even in light of the proposed 35% fee award, finding:

> Although the certified federal class achieved a judgment in the amount of $228 million following a jury trial, the Court vacated the damages award on a post-trial motion and ordered a new trial limited to damages. The amount of a damages award on retrial is subject to significant uncertainty, and the finding of liability is subject to non-frivolous arguments for reversal on appeal. The agreed-upon $75 million, which was negotiated with the assistance of this Court, represents a fair and reasonable award, considering the risks attendant to proceeding through a new damages trial and an appeal, as well as the delay that would result from continued litigation. The Court's determination on this point takes into account the proposed fee award, capped at 35 percent of the total; the proposed service awards; and the likely award of costs, including the costs of administering the settlement. (Dkt. 296).[5]

Absent the Settlement, it is possible that Plaintiffs and the proposed Settlement Class Members would receive no payment whatsoever. And notwithstanding Defendant's numerous defenses as to damages, and on appeal, the Settlement also obviates the need for the time, expense,

[5] Attached hereto as Exhibit 3.

and motion practice required to resolve Plaintiffs' individual claims as well as the significant resources that would be expended through continued litigation in two courts. In addition to the new damages trial in the Federal Case, Plaintiffs' Motion for Class Certification and Defendant's Motion for Judgment on the Pleadings were fully briefed in the State Case, and Plaintiffs had just obtained leave to file documents under seal in association with their then-forthcoming Motion for Summary Judgment. Clearly, significant, high-stakes motion practice and late-stage litigation was imminent absent the Settlement, with results far from certain for either side.

In the face of these obstacles and unknowns, Class Counsel succeeded in negotiating and securing a Settlement creating a $75,000,000 Settlement Fund and providing class members with substantial cash payments without the need for a claims process. Class members' receipt of significant monetary relief now, as opposed to years from now, or perhaps never, represents a truly excellent result.

iii. The substantial benefits obtained on behalf of the Settlement Class Members further justify the requested percentage of attorneys' fees.

Despite the significant risks inherent in any litigation, and the particular risks presented in this litigation as discussed above, Class Counsel were able to obtain an outstanding result for the Settlement Class. As stated above, the Settlement Agreement provides for the creation of a $75,000,000 Settlement Fund, which will be split equally among Settlement Class Members after Court-approved fees and costs. Class Members will receive more than a thousand dollars in cash benefits and, to date, there have been no objections to the Settlement and no exclusion requests. This reflects the Settlement Class Members' predictably overwhelmingly positive reaction to the Settlement. Indeed, such a reaction is warranted because, as set forth in Section IV(B)(1), the total and per person settlement benefits in this case materially outpace those in the vast majority of other BIPA cases.

Importantly, Defendant also represents that it no longer uses the technology at issue in the Litigation. (*Id.* ¶ 52.) This further justifies the reasonableness of the attorneys' fees being sought here. *See Spano v. Boeing Co.*, No. 06-cv-743, 2016 WL 3791123, at *1 (S.D. Ill. Mar. 31, 2016) ("A court must also consider the overall benefit to the Class, including non-monetary benefits, when evaluating the fee request. . . . This is important so as to encourage attorneys to obtain meaningful affirmative relief") (citing *Beesley v. Int'l Paper Co.*, No. 06-cv-703, 2014 U.S. Dist. LEXIS 12037, at *5 (S.D. Ill. Jan 31, 2014)); Manual for Complex Litigation, Fourth, § 21.71, at 337 (2004)); *see also Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973) (awarding attorneys' fees when relief is obtained for the class "must logically extend, not only to litigation that confers a monetary benefit to others, but also litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others.").

Given the significant relief obtained for the Settlement Class Members, an attorneys' fee award of 35% of the Settlement Fund, plus expenses, is reasonable and fair compensation—particularly, as discussed above, in light of the uncertainty and fluid nature of the relevant law, the "substantial risk in prosecuting this case under a contingency fee agreement" and the "defenses asserted by [Defendant]." *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59.[6]

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

Over the course of this five-year litigation, Class Counsel have expended $294,179.26 in reimbursable expenses related to filing fees, numerous mediations, expert witness fees and expenses, court reporters, digital forensics, dissemination of mailed notice in connection with class certification in the Federal Case (as required under Fed. R. Civ. P. 23 and as Ordered by Judge

[6] To the extent this Court nonetheless has any concerns as to the application of the percentage-of-the-recovery approach in awarding attorneys' fees and wishes to conduct a lodestar analysis, Class Counsel will submit their lodestars.

Kennelly), and trial preparation and exhibits. (Meyers Decl., ¶ 19; Loevy Decl. ¶ 8.) Courts regularly award reimbursement of the expenses counsel incurred in prosecuting the litigation. *See, e.g., Kaplan v. Houlihan Smith & Co.,* No. 12-cv-5134, 2014 WL 2808801, at *4 (N.D. Ill. June 20, 2014) (awarding expenses "for which a paying client would reimburse its lawyer"); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (detailing and awarding expenses incurred during litigation). Therefore, Class Counsel request the Court approve as reasonable the incurred expenses. Notably, numerous of these costs are several years old and thus effectively constitute an interest-free loan to the Settlement Class that, as set forth above, came with a significant risk of nonpayment given the risks associated with litigating Plaintiffs' and the Settlement Class Members' claims. Accordingly, this Court should award a total fee and expense award to Class Counsel of 26,544,179.26.

D. The Service Awards Sought For Plaintiffs Are Reasonable And Should Be Approved.

The requested $15,000.00 Service Awards are reasonable and appropriate compared to other service awards granted to class representatives in similar class actions. Because a named plaintiff is essential to any class action, "[i]ncentive awards are justified when necessary to induce individuals to become named representatives." *Spano*, 2016 WL 3791123, at *4 (approving service 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 service awards "are not atypical in class action cases . . . and serve to encourage the filing of class actions suits.").

Here, Plaintiffs' efforts and participation in prosecuting this five-year-old case justify the $15,000.00 Service Awards sought. Even though no award of any sort was promised to Plaintiffs prior to the commencement of the litigation or any time thereafter, Plaintiffs nonetheless contributed their time and effort in agreeing to serve as the putative class representatives, including

providing documents and information to Class Counsel to aid in preparing the initial pleadings, participating in written discovery and document production, being deposed, attending and testifying at trial, and otherwise making themselves available to Plaintiffs' Counsel from this case's inception, including the rejection of numerous prior settlement offers. (*Id.*, ¶ 86.) Were it not for Plaintiffs' willingness to bring this action on a class-wide basis and their efforts and contributions to the litigation up through settlement, the substantial benefit to the Settlement Class Members afforded under the Settlement Agreement would not exist.[7]

Numerous Illinois courts that have granted final approval in similar class action settlements have awarded service awards that are greater to or similar to those sought here. *See, e.g.*, *Murray v. Bill Me Later, Inc.,* No. 12-cv-04789 Dkt. 79, November 20, 2014 Final Order and Judgment (N.D. Ill.) (awarding $30,000 service awards in TCPA class settlement); *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 service award in TCPA class settlement); *Diaz v. Greencore USA – CPG Partners, LLC,* No. 17-CH-13198 (Cir. Ct. Cook Cnty., Ill. Aug. 30, 2019) (awarding $15,000 service award in BIPA class settlement); *Rogers v. CSX Intermodal Terminal, Inc.*, No. 19-CH-04168 (Cir. Ct. Cook County, Ill.) (awarding $15,000 service award in BIPA class settlement); *Rapai v. Hyatt Corp.*, 17-CH-14483 (Cir. Ct. Cook County, Ill.) (awarding $12,500 service award in BIPA class settlement); *Vo v. Luxottica of America, Inc.*, 19-CH-10946 (Cir. Ct. Cook County, Ill.) (awarding $10,000 service award in BIPA class settlement); *Roach v. Wal-Mart, Inc.*, No. 19-CH-1107, June 16, 2021 Final Approval Order, ¶ 14 (Cir Ct. Cook Cnty, Ill.) (awarding $10,000 award in BIPA class settlement); *Gonzalez v. Silva Int'l, Inc.*, No. 2020-CH-03514, June 24, 2021 Final Order and Judgment, ¶ 19 (Cir. Ct. Cook Cnty., Ill.) (Conlon, J.) (awarding $10,000 award

[7] No clear sailing or "no-contest" agreement exists in relation to either the Fee Award or the Service Awards.

in BIPA class settlement). Importantly, none of the foregoing cases went to trial, so none of the class representatives in the foregoing settlements were required to take days *off of work* to attend or testify at trial, as both Plaintiffs here did. Moreover, at Defendant's insistence, Plaintiffs executed a broader general release of claims than the settlement class members. (Settlement Agreement ¶ 112.) Absent the approval of service awards, numerous of Plaintiffs' contributions would go uncompensated.

Accordingly, Service Awards of $15,000.00 are eminently justified by Plaintiffs' time and effort in this case and should be approved.

V. CONCLUSION

For the foregoing reasons, Plaintiffs and Class Counsel respectfully request that the Court enter an Order: (1) approving an award of attorneys' fees and expenses of $26,544,179.26; and (ii) approving Service Awards in the amount of $15,000.00 to each Plaintiff in recognition of their significant efforts on behalf of the Settlement Class Members.

Dated: April 16, 2024

Respectfully submitted,

RICHARD ROGERS AND MICHAEL STEWART, individually and on behalf of all others similarly situated

By: /s/ *Brendan Duffner*
One of Plaintiffs' Attorneys

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Counsel for Plaintiffs and Class Counsel

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on April 16, 2024, a copy of the foregoing *Plaintiffs' Motion & Memorandum of Law in Support of Approval of Attorneys' Fees, Expenses, & Service Awards* was filed electronically with the Clerk of Court, with a copy sent by electronic mail to all counsel of record.

/s/ *Brendan Duffner*

Exhibit 1

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

RICHARD ROGERS and MICHAEL STEWART, individually and on behalf of similarly situated individuals, *Plaintiffs*, v. BNSF RAILWAY COMPANY, a Delaware corporation, *Defendant.*	)	No. 2019-CH-04393 Hon. Pamela McLean Meyerson

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, that I have personal knowledge of all matters set forth herein unless otherwise indicated, and that I would testify to all such matters if called as a witness in this matter. I make this Declaration in support of Plaintiffs' Motion and Memorandum of Law in Support of Approval of Attorneys' Fees, Expenses, and Service Awards.[1]

1. I am an adult over the age of 18 and a resident of the state of Illinois. I am a partner with the law firm McGuire Law, P.C. ("McGuire Law"). I am licensed to practice law in the state of Illinois, and I, along with Myles McGuire, David L. Gerbie, and Brendan Duffner, am one of the attorneys who have been appointed Class Counsel to represent Plaintiffs Richard Rogers and Michael Stewart and the settlement class in this matter alongside Jon Loevy and Michael I. Kanovitz of Loevy & Loevy.

2. McGuire Law is a litigation firm based in Chicago that focuses its practice on class actions and complex litigation, representing clients in state and federal trial and appellate courts

[1] Unless otherwise defined, capitalized terms used herein have the same meaning given to them as in the Parties' Settlement Agreement.

throughout the country. Our firm resume was submitted as an attachment to my Declaration in support of Plaintiffs' Motion and Memorandum in Support of Preliminary Approval of Class Action Settlement.

3. The attorneys of McGuire Law and I 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 scores of BIPA class actions. McGuire Law attorneys and their firms have been appointed as class counsel in numerous class actions in state and federal courts across the country, including many BIPA class actions, and including in the Circuit Court of Cook County. *See, e.g, Paluzzi, et al. v. mBlox, Inc., et al.* (Cir. Ct. Cook Cnty., Ill. 2009); *Parone et al. v. m-Qube, Inc. et al.* (Cir. Ct. Cook Cnty., Ill. 2010); *Satterfield v. Simon & Schuster* (N.D. Cal. 2010); *Lozano v. Twentieth Century Fox Film Corp, et al.* (N.D. Ill. 2011)*; Schulken v. Washington Mutual Bank, et al.* (N.D. Cal. 2011)*; In re Citibank HELOC Reduction Litigation* (N.D. Cal. 2012); *Rojas v. Career Education Corp.* (N.D. Ill. 2012); *In re Jiffy Lube Int'l, Inc. Text Spam Litigation* (S.D. Cal. 2013); *Robles v. Lucky Brand Jeans* (N.D. Cal. 2013); *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); *Zepeda et al. v. Intercontinental Hotels Group, Inc.* (Cir. Ct. Cook Cnty., Ill. 2018); *Vergara et al. v. Uber Technologies, Inc.* (N.D. Ill. 2018); *Sheeley v. Wilson Sporting Goods Co.,* 18-CH-04770 (Ill. Cir. Ct. 2018); *Zhirovetskiy v. Zayo Group, LLC* (Cir. Ct. Cook Cnty., Ill. 2019); *McGee et al 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 et al v. Nissan North America, Inc.,* (M.D. Tenn. 2019); *Smith v. Pineapple Hospitality Co., et al.* (Cir. Ct. Cook Cnty., Ill. 2020); *Garcia v.*

Target Corp. (D. Minn. 2020); *Burdette-Miller v. William & Fudge, Inc.* (Cir. Ct. Cook Cnty., Ill 2020); *Farag v. Kiip, Inc.* (Cir. Ct. Cook Cnty., Ill. 2020); *Lopez v. Multimedia Sales & Marketing, Inc.* (Cir. Ct. Cook Cnty., Ill. 2020); *Prelipceanu v. Jumio Corp.* (Cir. Ct. Cook Cnty., Ill. 2020); *Williams v. Swissport USA, Inc.* (Cir. Ct. Cook Cnty., Ill. 2020); *Glynn v. eDriving, LLC* (Cir. Ct. Cook Cnty., Ill. 2020); *Pearlstone v. Wal-Mart Stores, Inc.* (E.D. Mo. 2021); *Kusinski v. ADP, LLC* (Cir. Ct. Cook Cnty., Ill. 2021); *Draland v. Timeclock Plus, LLC* (Cir. Ct. Cook Cnty., Ill. 2021); *Harrison v. Fingercheck, LLC* (Cir. Ct. Lake Cnty., Ill. 2021); *Rogers v. CSX Intermodal Terminals, Inc.* (Cir. Ct. Cook Cnty., Ill. 2021); *Freeman-McKee v. Alliance Ground Int'l, LLC* (Cir. Ct. Cook Cnty., Ill. 2021); *Gonzalez v. Silva Int'l, Inc.* (Cir. Ct. Cook Cnty., Ill. 2021); *Salkauskaite v. Sephora USA, Inc.* (Cir. Ct. Cook Cnty., Ill. 2021); *Williams v. Inpax Shipping Solutions, Inc.* (Cir. Ct. Cook Cnty., Ill. 2021); *Roberts v. Paramount Staffing, Inc.* (Cir. Ct. Cook Cnty., Ill. 2021)*; Roberts v. Paychex, Inc.* (Cir. Ct. Cook Cnty., Ill. 2021)*; Zanca v. Epic Games, Inc.* (Superior Ct. Wake Cnty., N.C. 2021); *Rapai v. Hyatt Corp.* (Cir Ct. Cook Cnty., Ill. 2022); *Jackson v. UKG, Inc.* (Cir. Ct. McLean Cnty., Ill. 2022); *Vo v. Luxottica of America, Inc.* (Cir. Ct. Cook Cnty., Ill. 2022); *Rogers v. Illinois Central Railroad Co.* (Cir. Ct. Cook Cnty., Ill. 2022); *Stiles v. Specialty Promotions, Inc.* (Cir. Ct. Cook Cnty., Ill. 2022); *Fongers v. CareerBuilder LLC* (Cir. Ct. Cook Cnty., Ill. 2022); *Vega v. Mid-America Taping & Reeling, Inc.* (Cir. Ct. DuPage Cnty., Ill. 2022); *Wood et al. v. FCA US LLC* (E.D. Mich. 2022); *Marzec v. Reladyne, LLC* (Cir. Ct. Cook Cnty., Ill. 2022); *Komorski v. Polmax Logistics, LLC et al.* (Cir. Ct. Cook Cnty., Ill. 2022); *Wordlaw v. Enterprise Holdings, Inc. et al.* (N.D. Ill. 2023); *McGowan v. Veriff, Inc.* (Cir. Ct. DuPage Cnty., Ill. 2023); *Davis v. Cafeteria Alternatives, Inc.* (Cir. Ct. Cook Cnty., Ill. 2023); *Mahmood v. Berbix Inc.* (Cir. Ct. Lake Cnty., Ill. 2023); *King v. Peoplenet Corporation* (Cir. Ct. Cook Cnty., Ill. 2023); *McFarland v. SIU Physicians & Surgeons, Inc.* (Cir. Ct. Jackson Cnty., Ill.

2023); *Romero v. Mini Storage Maintenance, LLC* (Cir. Ct. Cook Cnty., Ill. 2023); *Grabowska v. The Millard Group, LLC* (Cir. Ct. Cook Cnty., Ill. 2023)*; Fregoso v. American Airlines, Inc.* (Cir. Ct. Cook Cnty., Ill. 2023).

4. 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 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); *Fleury v. Union Pacific. R.R. Co.* (N.D. Ill. 2021).

5. 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.

6. I received my B.A. from the University of Michigan and graduated from the University of Illinois College of Law in 2002. In addition to my experience with scores of class actions, I have extensive experience in complex commercial litigation, I have been appointed as class counsel in numerous BIPA class actions, and I 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 served as co-lead counsel in the *Campbell-Ewald Co. v. Gomez* matter cited above.

7. Myles McGuire is the Managing Partner of McGuire Law. Mr. McGuire has been recognized as a leader in class actions by his peers and courts around the country and has been appointed lead counsel in numerous state and federal class actions. Mr. McGuire has successfully prosecuted claims on behalf of his clients in trial and appellate courts at both the state and federal levels throughout the country involving consumer fraud, unfair competition, invasion of privacy, false advertising, and breach of contract, among others. Mr. McGuire is a graduate of Marquette University and Marquette University Law School and is admitted to practice in the Illinois Supreme Court, Wisconsin Supreme Court, and the U.S. Supreme Court, where he was co-lead counsel in the *Campbell-Ewald Co. v. Gomez* matter. Prior to founding McGuire Law, P.C. in 2013, Mr. McGuire was a managing member of Edelson McGuire, LLC.

8. My colleague David L. Gerbie is a partner at McGuire Law and represents the interests of Illinois residents and workers in dozens of BIPA class actions. Mr. Gerbie has been appointed class counsel in several BIPA class action settlements, including the first-ever BIPA settlement involving an employer's use of biometric timekeeping devices. *Zepeda v.*

Intercontinental Hotels Group, Inc., 18-CH-2140 (Cir. Ct. Cook Cnty., Ill.). Mr. Gerbie received his B.A. from Northern Illinois University and received his J.D. from the University of Wisconsin Law School.

9. My colleague Brendan Duffner is an associate attorney at McGuire Law with experience as class counsel in numerous consumer and employee class actions, including many BIPA cases, in state and federal courts in Illinois and throughout the country. 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.

10. In preparation for trial in the Federal Case, McGuire Law retained Loevy & Loevy, a premier trial firm. Loevy & Loevy's numerous contributions to the Litigation began in the summer of 2023 and continued through the trial in the Federal Case, post-trial briefing, preparation for the second trial, and the negotiation and execution of the Settlement Agreement and related documents. These contributions are set forth in more detail in the Declaration of Jon Loevy submitted as Exhibit 2 in connection with Plaintiffs' Motion and Memorandum of Law in Support of Approval of Attorneys' Fees, Expenses, and Service Awards.

McGuire Law's Contribution to the Case

11. From the outset of this litigation, the attorneys and support staff of McGuire Law 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 significant opposition from a defendant with substantial resources.

12. McGuire Law 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 and the vigorous and nuanced legal defenses that Defendant and its counsel were prepared to raise had this case proceeded further.

13. From the outset of the litigation, Defendant and its counsel indicated that they planned to present a strong defense to Plaintiffs' claims on the merits and their ability to represent a class of those whose biometrics were collected by Defendant. Over the following five years, this was borne out as detailed below and as is evident from the Court's docket in this case and Judge Kennelly's docket in the Federal Case.

14. The extensive procedural history of the Litigation is accurately reflected in Section II(B) of Plaintiffs' Motion for Preliminary Approval and Section II(B) of Plaintiffs' Motion and Memorandum of Law in Support of Approval of Attorneys' Fees, Expenses, and Service Awards.

15. During the course of the extensive litigation in this matter, I and the other Class Counsel diligently investigated the facts and claims and have dedicated substantial resources to this matter since it was commenced on April 4, 2019. Among other things, Class Counsel have:

- Investigated the nature of the biometrically-enabled automatic gate systems utilized by Defendant;
- Evaluated the facts giving rise to the claims asserted by Plaintiffs, including potential defenses thereto;
- Briefed Defendant's Motion to Dismiss;
- Engaged in extensive written and oral party and third-party discovery, including reviewing tens of thousands of documents, issuing and responding to discovery deficiency letters, conducting numerous meet-and-confers regarding the contours of discovery and potential custodian and keyword searches, and taking and defending over a dozen depositions;
- Briefed Plaintiff Rogers's Motion to Remand;
- Briefed Plaintiff Rogers's Motion for Class Certification in the Federal Case;

- Prepared notice to the Class in the Federal Case and worked with the Settlement Administrator to disseminate notice to tens of thousands of class members;
- Handled scores of telephone and email communications with class members regarding the status of the Litigation;
- Briefed Defendant's Motion for Summary Judgment in the Federal Case;
- Conducted additional discovery in the State Case, including reviewing additional documents and conducting additional depositions;
- Attended numerous court hearings in the Federal Case and State Case;
- Briefed and argued the Parties' pretrial motions in the Federal Case;
- Participated in the five-day trial in the Federal Case, including assisting with trial strategy and preparation;
- Briefed the Parties' post-trial motions in the Federal Case;
- Briefed Plaintiffs' Motion to Compel in the State Case;
- Briefed Plaintiffs' Motion for Class Certification in the State Case;
- Briefed Defendant's Motion for Judgment on the Pleadings in the State Case;
- Participated in seven rounds of mediation, including separate full-day mediations with three different private mediators and four mediations with Judge Kennelly; and
- Prepared the final executed settlement agreement and related documents, including participating in communications and negotiations involving, *inter alia*, the claims administration process, the scope of release, and the compensation provided to settlement class members.

16. 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.

17. Following the Court's entry of its Preliminary Approval Order, Defendant and the

Settlement Administrator, Epiq Class Actions and Claims Solutions, created a Class List pursuant to the Settlement Agreement, and since that time, the Settlement Administrator informed me that Direct Notice of this Settlement was sent out to Class Members on March 26, 2024. Additionally, the Settlement Website is active and features all relevant case documents in electronic format. Furthermore, the Settlement Administrator has advised me that, to date, there have been no objections or requests for exclusion.

18. 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, remaining involved with the Settlement through implementation, and responding to class member inquiries related to their awards.

19. In addition to attorney time expended in pursuit of this case, McGuire Law has incurred $277,379.07 in expenses related to this litigation, which is comprised primarily of: filing fees, copying costs, three separate private mediation fees, deposition costs, expert fees, legal consultants, data storage fees, notice costs associated with class certification in the Federal Case, and e-discovery vendor fees. Being responsible for advancing all expenses, Class Counsel had a strong incentive not to expend any funds unnecessarily.

20. Prior to the initiation of this litigation, Plaintiffs executed a fee agreement with my firm that was contingent in nature. Plaintiffs 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 themselves and a class. My colleagues and I would not have brought this action absent the prospect of obtaining a percentage of the fund to account for the risk inherent

in this type of class action.

The Class Representatives' Contributions to the Case

21. Plaintiffs have been significantly involved in this litigation that has been pending for more than five years, have willingly contributed their own time and efforts toward this litigation, and are deserving of the proposed Service Awards. Plaintiffs were instrumental in assisting Class Counsel's investigation at the outset of this case and have remained fully involved in its prosecution. Even though no award of any sort was promised to Plaintiffs prior to the commencement of the litigation or any time thereafter, Plaintiffs nonetheless contributed their time and effort in agreeing to serve as the putative class representatives, including: (i) providing documents and information to Class Counsel to aid in preparing the initial pleadings; (ii) participating in written discovery and document production; (iii) being deposed; (iv) attending and testifying at trial (Plaintiff Rogers attended the entire five-day trial and Plaintiff Stewart also attended and testified before the federal jury); (v) reviewing pleadings and settlement documents; and (vi) otherwise making themselves available to Plaintiffs' Counsel from this case's inception, including the rejection of numerous prior settlement offers.

22. Importantly, as part of the Settlement, Plaintiffs agreed to Defendant's insistence that they provide a broader release of claims than the release provided by the other Settlement Class Members, which was a material settlement term. (Settlement Agreement ¶ 112.)

23. Were it not for Plaintiffs' efforts and contributions to the litigation by assisting Class Counsel with the investigation, filing, and prosecution of the Litigation, their monitoring of the Litigation throughout, their testimony at their depositions and at trial, and their agreement to provide Defendant with a broad release of their personal claims, the substantial benefit to the class afforded under this Settlement Agreement would not have been achieved.

24. Plaintiffs have not received any payment in this matter, were never promised any payment, and were not promised that they would receive an award of any kind in this litigation. Rather, the requested Service Awards seek only to compensate Plaintiffs for their substantial time, effort, and contributions to this case.

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

Executed on April 16, 2024 in Chicago, Illinois.

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

Exhibit 2

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

RICHARD ROGERS and MICHAEL STEWART, individually and on behalf of similarly situated individuals, *Plaintiffs*, v. BNSF RAILWAY COMPANY, a Delaware corporation, *Defendant.*	)	No. 2019-CH-04393 Hon. Pamela McLean Meyerson

DECLARATION OF JON LOEVY

I, Jon Loevy, hereby aver, pursuant to 735 ILCS 5/1-109, that I am fully competent to make this Declaration, that I have personal knowledge of all matters set forth herein unless otherwise indicated, and that I would testify to all such matters if called as a witness in this matter. I make this Declaration in support of Plaintiffs' Motion and Memorandum of Law in Support of Approval of Attorneys' Fees, Expenses, and Service Awards.[1]

1. I am an adult over the age of 18 and a resident of the state of Illinois. I am the founding partner of Loevy & Loevy. I am licensed to practice law in the state of Illinois, and I, along with Michael I. Kanovitz am one of the attorneys representing Plaintiffs Richard Rogers and Michael Stewart and the putative class in this matter alongside Myles McGuire, Evan M. Meyers, David L. Gerbie, and Brendan Duffner of McGuire Law, P.C. (together, "Class Counsel.")

2. Loevy & Loevy is a plaintiff's firm that handles civil rights, class action, freedom of information act, and qui tam litigation cases throughout the United States. Our firm has won dozens of jury trials and has secured hundreds of millions of dollars for our clients. The attorneys

[1] Unless otherwise defined, capitalized terms used herein have the same meaning given to them as in the Parties' Settlement Agreement

at Loevy & Loevy, including myself, regularly handle complex litigation and have extensive experience in class action lawsuits similar in size and complexity to the instant case, including BIPA class actions. Loevy attorneys and their firms have been appointed as class counsel in class actions in state and federal courts across the country. Our firm resume submitted as an attachment to my Declaration in support of Plaintiffs' Motion and Memorandum in Support of Preliminary Approval Class Action Settlement.

3. I received my B.A. from the University of Michigan and graduated Columbia Law School in 1993. After graduating from law school, I clerked for Judge Milton I. Shadur of the Northern District of Illinois. I focus my practice on a wide variety of civil rights issues including wrongful convictions, police shootings, excessive force, prisoner rights, the First Amendment, freedom of information, electronic privacy, government fraud and whistleblower protection, environmental justice, and other constitutional claims. I have won jury verdicts of at least a million dollars at more than 20 separate jury trials, nearly all in cases involving extremely challenging fact patterns. More than a dozen of my jury verdicts exceeded $5 million, and I have won jury verdicts of at least $20 million six separate times.

4. Michael I. Kanovitz is the co-Managing Partner of Loevy & Loevy. He graduated *cum laude* from both Brandeis University and the Cornell Law School. Mr. Kanovitz concentrates his practice on class actions, constitutional law, and whistleblower protection under the federal and state False Claims Acts. His cases have resulted in verdicts and settlements of over $125 million to his clients. On the national scene, Mr. Kanovitz recently handled several cases brought by whistleblowers against former Secretary of Defense Donald Rumsfeld. In *Vance et al. v. Rumsfeld*, Mr. Kanovitz is lead counsel for two whistleblowers who were detained and tortured by U.S. officials after they reported on contractor corruption in the Iraq war. In *Doe v. Rumsfeld*, Mr.

Kanovitz is working with the Government Accountability Project (GAP), a whistleblower advocacy organization in Washington, D.C., on a case involving an American contractor who was held incommunicado for over nine months. Both cases are the only ones of their type to have survived a motion to dismiss by Mr. Rumsfeld. Experts in constitutional law and legal educators have described these cases as groundbreaking. Mr. Kanovitz was recently recognized for his outstanding litigation and trial skills in the Law Bulletin's 40-under-40 attorneys to watch.

Loevy & Loevy's Contribution to the Case

5. The extensive procedural history of this Litigation is accurately reflected in Section II(B) of Plaintiffs' Motion for Preliminary Approval. In Summer 2023, Loevy & Loevy was retained as trial counsel in connection with the Federal Case and to assist with resolving the Litigation as a whole.

6. In order to take on such a demanding and novel case, Loevy & Loevy was required to forego other work and devote substantial resources to developing a trial strategy in a developing field (BIPA litigation) that had never seen a trial before. In particular, Loevy & Loevy tapped its two most experienced partners, including myself, the Managing Partner of the firm, and Michael Kanovitz to try the case in addition to an additional associate and multiple paralegals.

7. I and the other Class Counsel have diligently investigated the facts and claims in this matter and have dedicated substantial resources to this matter. Loevy & Loevy in particular has expended significant resources on diligently prosecuting this action. Among other things, Loevy & Loevy has: (i) investigated the nature of the biometrically-enabled automatic gate systems utilized by Defendant; (ii) evaluated the facts giving rise to the claims asserted by Plaintiffs, including potential defenses thereto; (iii) deposed individuals with knowledge related to Plaintiff's claims; (iv) conducted numerous meet-and-confers regarding trial in the Federal Case;

(v); briefed and argued the Parties' pretrial motions; (vi) prepared for and conducted the trial in the Federal Case; (vii); briefed and argued the Parties' post-trial motions; (viii) briefed Defendant's Motion for Judgment on the Pleadings; (ix) participated in multiple rounds of arm's-length negotiations; and (x) reviewed the final executed Settlement Agreement and related documents, and participated in communications and negotiations involving, *inter alia*, the claims administration process, the scope of release, and the compensation provided to the Settlement Class Members.

8. In addition to attorney time expended in pursuit of this case, Loevy & Loevy has incurred $16,800.19 in expenses related to this litigation, which is comprised primarily of: copying costs, court reporter costs, data analysis costs, digital forensics costs, electronic litigation support costs, and costs associated with presenting and conducting a jury trial. Being responsible for advancing all expenses, Class Counsel had a strong incentive not to expend any funds unnecessarily.

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

Executed on April 16, 2024 in Chicago, Illinois.

/s/ *Jon Loevy*
Jon Loevy, Esq.

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD ROGERS, individually and on behalf of a class,	)	
Plaintiff,	)	
vs.	)	**Case No. 19 C 3083**
BNSF RAILWAY CO.,	)	
Defendant.	)	

ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

The plaintiff class in this case has moved for preliminary approval of a settlement of the claims of the class. The proposed settlement would also resolve a putative class action brought on behalf of the same (or nearly the same) class in the Circuit Court of Cook County. That case, pending before Judge Pamela Meyerson, is called *Rogers v. BNSF Railway Co.*, Case No. 2019-CH-04393. The proposed settlement therefore requires the approval of both this Court and Judge Meyerson. This Court preliminarily approves the proposed settlement for the reasons stated below, but this is of course subject to Judge Meyerson's approval, which the Court understands will be requested at an upcoming hearing in the Circuit Court. As the Court has stated on previous occasions, however, because the proposed settlement involves a certified class, the Court believes it has a non-delegable duty under Federal Rule of Civil Procedure 23(e) to independently determine whether to approve the settlement.

The proposed settlement contemplates establishment of a settlement fund of $75 million, from which the approximately 46,500 members of the certified Class will be

compensated on an equal basis. This should amount to approximately $1,000 per person if the proposed awards of attorney's fees, litigation costs, and service awards for the class representatives are approved. Checks will be sent to the class members directly; they will not have to submit claims. The settlement agreement provides that checks not negotiated within a stated period will be void, and the total of all voided settlement checks will be redistributed in equal amounts to class members who negotiated their original checks. In other words, none of the $75 million will revert to the defendant. Any attorney's fees, litigation costs, and service awards will be paid from the $75 million and are subject to agreed-upon caps described in the parties' settlement agreement. The proposed settlement also includes an agreed upon notice and administration plan. In return for the payment, the claims of the certified federal court class and the putative state court class will be released.

The Court finds that final approval is likely. The class representatives and appointed class counsel have more than adequately represented the class throughout this litigation, including during the course of the negotiations that led to the proposed settlement. The Court, which participated in several pretrial settlement conferences and in the post-trial conferences that resulted in the settlement agreement, can confirm from first-hand knowledge that the settlement was negotiated at arm's length. Although the certified federal class achieved a judgment in the amount of $228 million following a jury trial, the Court vacated the damages award on a post-trial motion and ordered a new trial limited to damages. The amount of a damages award on retrial is subject to significant uncertainty, and the finding of liability is subject to non-frivolous arguments for reversal on appeal. The agreed-upon $75 million, which was negotiated with the

assistance of this Court, represents a fair and reasonable award, considering the risks attendant to proceeding through a new damages trial and an appeal, as well as the delay that would result from continued litigation. The Court's determination on this point takes into account the proposed fee award, capped at 35 percent of the total; the proposed service awards; and the likely award of costs, including the costs of administering the settlement. The settlement also treats all class members equitably with respect to each other. And the proposed distribution method is fair and equitable and is geared toward reaching as many class members as possible.

The Court notes that the parties' memorandum in support of preliminary approval also addresses the appropriateness of class certification, but for purposes of the federal case at least further analysis of that point is not needed, because the Court certified a class nearly two years ago, and the Seventh Circuit declined to hear an interlocutory appeal from that ruling.

For these reasons, the Court grants the motion for preliminary approval, subject to approval by Judge Meyerson in the related state court litigation. The Court will leave it to counsel to propose a final approval hearing date if and when Judge Meyerson grants preliminary approval.

Date: February 28, 2024

MATTHEW F. KENNELLY
United States District Judge