IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSHUA LEWIS, JAMES CAVANAUGH, and NATHANIEL TIMMONS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

LYTX, INC.,

Defendant.

No. 3:22-cv-00046-NJR
Hon. Chief Judge Nancy J. Rosenstengel

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND SERVICE AWARDS

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I. INTRODUCTION[1]

Plaintiffs Joshua Lewis, James Cavanaugh, and Nathaniel Timmons (collectively, "Plaintiffs") hereby move the Court for an award of attorneys' fees, litigation costs, and service awards. The Settlement, preliminarily approved by this Court on January 17, 2025 (ECF No. 126), provides for a non-reversionary common fund of $4,250,000 for the benefit of Settlement Class Members, resolving all claims in the three underlying cases to this consolidated action.

As compensation for more than three years vigorously litigating this BIPA class action, including surviving a motion to dismiss and negotiating resolution of three related cases, Plaintiffs and Class Counsel respectfully request, pursuant to Federal Rule of Civil Procedure 23(h), that the Court approve their request for attorneys' fees of $1,416,666.67 (33.33% of the Settlement Fund), reimbursement of litigation expenses of $63,495.79, and service awards of $10,000 each to the three Plaintiffs ($30,000 total) for their service as Class Representatives.

The requested attorneys' fees, litigation expenses, and service awards are fair and reasonable under Seventh Circuit and Illinois case law, and comparable with numerous awards in similar cases. The requested fee is reasonable and awards 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." *Camp Drug Store, Inc. v. Cochran Wholesale Pharmaceutical, Inc.*, 897 F.3d 825, 832-33 (7th Cir. 2018) (quoting *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007)). Class Counsel's requests are supported by the risks undertaken in prosecuting this Action, the significant time and effort expended in investigating, prosecuting and settling the claims alleged in this Action, and the excellent benefit conferred to the Settlement Class. Plaintiffs and Class Counsel respectfully

[1] Unless otherwise noted, capitalized terms have the same meanings as in the Class Action Settlement Agreement (ECF No. 125) or the Amended Complaint (ECF No. 127).

request that the Court approve their requested attorneys' fees, litigation expenses, and service awards.

II. OVERVIEW OF THE LITIGATION

A. Summary of Plaintiffs' allegations.

This action (and two related actions detailed below) allege that Lytx, through its inward-facing dashboard cameras, collects the biometric identifiers and biometric information of its customers' drivers without complying with BIPA's requirements that it provide proper notice and written consent before doing so. Lytx's product that allegedly violates BIPA is known as the DriveCam and the technology it employs is known as machine vision and artificial intelligence ("MV+AI"). Lytx is a developer of DriveCam technology, and former defendant Maverick is a Lytx customer and interstate motor carrier.

B. The Litigation and Work Performed to Benefit The Class.

1. *Lewis v. Maverick Transportation, LLC, et al.*

This class action was filed on November 17, 2021 in the Circuit Court of Madison County, Illinois (Case No. 2021L001379) against Maverick and Lytx. On January 10, 2022, Defendants Lytx and Maverick removed this action from the Circuit Court of Madison County, Illinois to this Court. *See* ECF No. 1. Thereafter, the Parties engaged in informal discovery prior to Defendants' response to the complaint regarding the technology at issue, including a video conference with Lytx's Senior Manager of Applied Machine Learning. *See* Joint Decl. in support of Preliminary Approval ("Prelim. Approval Decl."), ECF No. 124, ¶31.

On December 19, 2022, Lytx filed a motion to dismiss,[2] with a supporting memorandum of law (*see* ECF Nos. 49-51), which Mr. Lewis opposed (*see* ECF No. 52). On June 26, 2023, the

[2] On May 19, 2022, Plaintiff Lewis and Maverick notified the Court they had reached an agreement on a class settlement for $56,800. *See* ECF No. 22. On March 9, 2023, the Court finally

Court denied Lytx's motion to dismiss in full. *See* ECF No. 68. It held that BIPA does not require biometric identifiers be used to identify a person. *Id.* Lytx filed its Answer on August 7, 2023 (*see* ECF No. 79), which it subsequently amended (*see* ECF No. 83).

After denying Lytx's motion to dismiss, Mr. Lewis and Lytx engaged in targeted initial discovery. In particular, Mr. Lewis served 68 discovery requests, 22 interrogatories, and 30 requests for admission. Prelim. Approval Decl. ¶32. After Lytx made an initial production, Plaintiff deposed Vincent Nguyen, a key senior machine learning scientist on April 17, 2024. *Id.* ¶33. Further, the Parties met and conferred extensively over a number of discovery issues, including an ESI protocol, the completeness of Lytx's document productions, appropriate custodians, and scheduling depositions. *Id.* ¶34. These disputes were pending when the Parties agreed to mediation. *See* ECF Nos. 94 & 98.

2. **The *Cavanaugh* and *Timmons v. Lytx, Inc. et al.* Actions**

In parallel to this Action, there were two other related actions pending against Lytx also alleging that it collected biometric information and biometric identifiers in violation of BIPA.

a. The *Cavanaugh* Action

On October 13, 2021, Plaintiff James Cavanaugh filed a class action lawsuit against Lytx in the United States District Court for the Northern District of Illinois alleging that Lytx violated BIPA by not obtaining consent from Mr. Cavanaugh and Class members before collecting biometric information and biometric identifiers. *See Cavanaugh* Action, ECF No. 1.

approved the settlement between Plaintiff Lewis and Maverick, which resolved all claims against Maverick and dismissed it from the case. *See* ECF No. 63. This motion does not seek fees for time spent litigating against or settling claims with Maverick. Rather, the Court previously granted a fee request of one-third of the settlement fund with Maverick. *Id.* at ¶13 (fee, expense, and service award requests "are reasonable under applicable law and in line with awards in similar cases").

In early 2022, as it did in this Action, Lytx provided informal discovery explaining its DriveCam and MV+AI technology to Plaintiff Cavanaugh. Prelim. Approval Decl. ¶36. This informed Plaintiff Cavanaugh's understanding of the technology at issue.

b. The *Timmons* Action

On December 29, 2021, Plaintiff Nathaniel Timmons filed a class action lawsuit against his employer, Gemini Motor Transport L.P. ("GMT") and Lytx in the Circuit Court of Morgan County, Illinois, also alleging that they violated BIPA by collecting his biometric information and identifiers without obtaining his written consent. On February 11 2022, Defendants Lytx and GMT removed the action to the United States District Court for the Central District of Illinois. *See Timmons v. Lytx Inc., et al.*, No. 1:22-cv-05068 (N.D. Ill.) (the "*Timmons* Action"), ECF No. 1.

In early 2022, Lytx provided informal discovery to Plaintiff Timmons, explaining its technology. Prelim. Approval Decl. ¶39. This informed Plaintiff Timmons' understanding of the technology at issue. *Id.* ¶41.

3. The *Cavanaugh* and *Timmons* Actions are consolidated and proceed into litigation.

On June 28, 2022, Lytx moved to transfer the *Timmons* Action to the Northern District of Illinois or, alternatively, to stay the action. Mr. Timmons opposed this motion, but indicated he would not oppose transfer to the Northern District of Illinois if the *Timmons* Action was consolidated into the *Cavanaugh* Action. Thereafter, the *Timmons* Action was reassigned to the Hon. Edmond Chang and related to the *Cavanaugh* Action under Local Rule 40.4. *See Cavanaugh* Action, ECF No. 38.[3]

[3] Subsequent references to the *Cavanaugh* Action include claims brought by Plaintiff Timmons.

Subsequently, on November 10, 2022, after the Court appointed Co-Lead Counsel, Plaintiffs Cavanaugh and Timmons filed a Consolidated Amended Complaint against Lytx and GMT. *See id.*, ECF No. 49. On April 12, 2024, Lytx and GMT filed a joint motion to dismiss (*see id.*, ECF Nos. 92 & 93), which Plaintiffs Cavanaugh and Timmons opposed (*see id.*, ECF No. 100). On January 22, 2025, as part of the Settlement, the Court in the *Cavanaugh* Action dismissed claims against Lytx without prejudice. ECF No. 120. Further, on March 30, 2025, Judge Chang denied GMT's motion to dismiss in full.[4] ECF No. 125.

C. Joint Mediation and Settlement Agreement

In July 2024, the Parties in the Lewis and Cavanaugh Actions separately and independently agreed to mediate with Lytx. Prelim. Approval Decl. ¶48. Thereafter, at Lytx's request, Plaintiffs' Counsel in the two cases agreed to a joint mediation before the Honorable James Epstein (Ret.) of JAMS. *Id.* ¶49. As part of that mediation, Lytx provided further informal discovery pursuant to Federal Rule of Evidence 408. *Id.* ¶50.

On September 12, 2024, the Parties held a full-day mediation with Judge Epstein. *Id.* ¶51. The mediation concluded with a mediator's proposal, which the Parties accepted on September 20, 2024. *See* Prelim. Approval Decl. ¶51; ECF No. 113. Thereafter, Plaintiffs moved for preliminary approval of the Settlement on November 22, 2024. ECF Nos. 122-25.

III. SUMMARY OF THE SETTLEMENT

A. The Settlement Class

The Settlement Class is defined as "All individuals who, while present in the State of Illinois, operated a vehicle equipped with a DriveCam, and for whom MV+AI was used to predict

[4] Class Counsel are not seeking a fee for any of their time spent specifically litigating against GMT and Plaintiff Timmons' claims remain in litigation against GMT in the *Cavanaugh* Action.

distracted driving behaviors, between October 12, 2016 and the earlier of Preliminary Approval or January 1, 2025." *See* Agmt. ¶1.44.

B. Monetary Settlement Payment

The Settlement requires Lytx to establish a non-reversionary, cash settlement fund of $4,250,000 (the "Settlement Fund") for the benefit of the Settlement Class Members. Unless they submit a valid and timely request for exclusion, each Settlement Class Member that submits an Approved Claim will be entitled to a cash payment in an amount reflecting the pro rata portion of the Net Settlement Fund, 50% of which will be reserved for Illinois residents and 50% for non-Illinois residents, less any Court-approved attorneys' fees and costs, service awards, and costs of settlement administration upon timely submission of an Approved Claim. *See id*. ¶¶3.1-2. In no event will any of the Settlement Fund revert to Lytx.

C. Release

In exchange for the consideration from Lytx and in accord with Section XII of the Settlement Agreement, the Released Claims against the Released Parties will be dismissed with prejudice upon final approval of the Settlement. *See id*. at ¶¶1.38-1.40 & 12.1-12.5.

D. Attorneys' fees, litigation expenses, and service awards.

The Settlement Agreement permits Class Counsel to seek an award of attorneys' fees in an amount not to exceed one-third (1/3) of the Settlement Fund, or $1,416,666.67, and reimbursement of reasonable costs and expenses incurred in relation to the investigation and litigation of the three Actions not to exceed $125,000.00. *See id.* ¶4.1. Additionally, it provides that Plaintiffs may seek Service Awards, in an amount not to exceed $10,000 for each Class Representative, in recognition of their efforts in this litigation. *See id*. ¶4.2. Such amounts shall be paid exclusively from, and not in addition to, the Settlement Fund. *See id.* ¶4.1.1. In accord with the Settlement Agreement, Class Counsel is seeking (i) attorneys' fees of $1,416,666.67 (33.33%

of the Settlement Fund), litigation expenses of $63,495.79, and service awards of $10,000 for each of the three Class Representatives ($30,000 total).

E. Preliminary Approval of the Settlement

On November 22, 2024, Plaintiffs moved for preliminary approval of the Settlement. *See* ECF Nos. 122-25. On January 17, 2025, this Court granted preliminary approval of the Settlement (ECF No. 126), holding, *inter alia*:

- [T]hat, subject to the Final Approval Hearing, the Court will likely be able to approve the Settlement as fair, reasonable, adequate, and in the best interests of the Settlement Class. Order at ¶4;

- [T]hat the Settlement Agreement: (a) is the result of arm's-length negotiations involving experienced counsel, with the assistance of a mediator; (b) is sufficient to warrant notice of the Settlement and the Final Approval Hearing to the Settlement Class; (c) meets all applicable requirements of law, including Federal Rule of Civil Procedure 23 and the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715; and (d) is not a finding or admission of liability by Lytx. *Id*. at ¶9; and

- For purposes of settlement only … that it will likely be able to certify the Settlement Class under Federal Rules of Civil Procedure 23(a) and (b)(3), as the prerequisites thereunder appear to be met, including (1) that the Settlement Class is sufficiently numerous that joinder of all members is impracticable; (2) that there are questions of law and fact common to members of the Settlement Class that predominate over questions affecting only individual members (e.g., whether Lytx collected and stored Settlement Class Members' biometric data, without consent, through dash cam devices in a manner that violated BIPA, and whether Plaintiffs and the Settlement Class Members are entitled to uniform statutory damages under BIPA); (3) that Plaintiffs' claims are typical of the claims of the Settlement Class; (4) that Plaintiffs and Class Counsel will fairly and adequately protect the interests of the Settlement Class; and (5) that a settlement class action is a superior method of fairly and efficiently adjudicating this Action. *Id.* at ¶13.

The Court also appointed Plaintiffs Joshua Lewis, James Cavanaugh, and Nathaniel Timmons as Class Representatives and Carney Bates & Pulliam PLLC; Lieff Cabraser Heimann & Bernstein LLP; Milberg Coleman Bryson Phillips Grossman PLLC; Workplace Partners, P.C.; Werman Salas P.C.; and Nick Larry Law LLC as Class Counsel. *Id.* at ¶14.

IV. THE SETTLEMENT CREATES A COMMON FUND FROM WHICH IT IS APPROPRIATE TO AWARD CLASS COUNSEL A PERCENTAGE-OF-THE-FUND AS ATTORNEYS' FEES.

Under Federal Rule of Civil Procedure 23(h), courts may award "reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). In accord with Rule 23, courts have long recognized that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970).

Here, Class Counsel and Plaintiffs request an attorney's fee award of $1,416,666.67, 33.33% of the Settlement Fund. This requested fee is consistent with both Seventh Circuit precedent and fee awards routinely approved in the district and the Seventh Circuit for similar class settlements, and should be approved as such.

A. The Seventh Circuit Favors the Percentage of the Fund Methodology in Common Fund Cases

The percentage-of-the-fund approach equitably apportions the costs of litigation, including attorneys' fees, among the class members who benefit from the common fund. *Boeing Co.*, 444 U.S. at 478; *see also Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500 (N.D. Ill. 2015) ("This is a common fund case, meaning that because the defendant is paying a specific sum in exchange for release of liability to all plaintiffs, equitable principles permit the Court to determine[ ] the amount of attorney's fees that plaintiffs' counsel may recover from the fund based on the notion that not one plaintiff, but all those who have benefitted from litigation should share its costs." (internal quotation marks omitted)).

The Seventh Circuit and courts in Illinois have strongly and historically endorsed the percentage-of-the-fund method as the best means for calculating attorneys' fees in common fund

cases. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (collecting cases) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund, in recognition of the fact that most suits for damages in this country are handled on the plaintiffs' side on a contingent-fee basis."); *Nellis v. Vivid Seats LLC*, No. 20-CV-2486, 2021 WL 12319464, at *3 (N.D. Ill. Nov. 1, 2021) ("In determining the appropriate fee under the Seventh Circuit's guidance in *Synthroid*, this Court has recognized that [t]he ... method—which has emerged as the favored method for calculating fees in common fund cases in this district—sets the fee award as a percentage of the recovered settlement fund, plus expenses and interest." (internal quotation marks omitted)); *Beesley v. Int'l Paper Co*., No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("When determining a reasonable fee, the Seventh Circuit Court of Appeals uses the percentage basis rather than a lodestar or other basis.").[5]

In *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992), the Seventh Circuit stated "[t]he object in awarding a reasonable attorney's fee, as we have been at pains to stress, is to give the lawyer what he would have gotten in the way of a fee in arm's length negotiation, had one been feasible." *Id*. at 572 ("[C]lass counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client."). In class action litigation, the normal fee arrangement is to compensate attorneys based on a percentage of the plaintiffs' ultimate recovery. *See Kolinek*, 311 F.R.D. at 501. Because the

[5] *See also In re Capital One Tel. Consumer Prot. Act Litig*., 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (percentage of the fund method is "more likely to yield an accurate approximation of the market rate"); *McCue v. MB Fin., Inc*., No. 15 CV 988, 2015 WL 4522564, at *3 (N.D. Ill. July 23, 2015) ("Awarding attorneys' fees through a percentage of a common fund is consistent with the need to incentivize lawyers to resolve cases early and to avoid over-litigating them in order to recover a larger fee."); *Williams v. Gen. Elec. Cap. Auto Lease*, No. 1:94-cv-07410, 1995 WL 765266, at *9 (N.D. Ill. Dec. 26, 1995) (collecting cases) ("The approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred on the class.").

percentage-of-the-fund approach best mirrors the contingency fee agreement, it is the preferred approach in the Seventh Circuit in common fund cases. *See Cooper v. IBM Pers. Pension Plan*, No. CIV. 99-829-GPM, 2005 WL 1981501, at *3 (S.D. Ill. Aug. 16, 2005), *rev'd and remanded on other grounds*, 457 F.3d 636 (7th Cir. 2006) ("[t]he approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred on the class," particularly where that percentage of the benefit approach replicates the market.").

Moreover, to Class Counsel's knowledge, a percentage-of-the-fund approach is the method that has been employed by every district court in Illinois to award attorneys' fees in BIPA settlements. *See, e.g.*, *In re TikTok, Inc., Consumer Priv. Litig.*, 617 F. Supp. 3d 904, 940 (N.D. Ill. 2022) (Lee, J.) (awarding one-third of net common fund); *Crumpton v. Octapharma Plasma, Inc*., No. 19-cv-08402 (N.D. Ill. Feb. 16, 2022) (Kendall, J.) (awarding 33.33%); *Montgomery v. Peri Formwork Sys., Inc*., No. 20-cv-07771 (N.D. Ill. Nov. 9, 2021) (Pallmeyer, J.) (same); *Davis v. Heartland Emp. Servs., LLC*, No. 19-cv-00680 (N.D. Ill. Oct. 25, 2021) (Valderrama, J.) (same); *Burlinski v. Top Golf USA Inc*., No. 19-cv-06700 (N.D. Ill. Oct. 13, 2021) (Chang, J.) (same); *Bedford v. Lifespace Communities, Inc*., No. 20-cv-04574 (N.D. Ill. May 12, 2021) (Shah, J.) (same); *Roberson v. Maestro Consulting Services, LLC, et al.*. No. 20-cv-895 (S.D. Ill. Nov. 14, 2024) (Rosenstengel, C.J.) (awarding 40% of the gross common fund); *Stauffer v. Innovative Heights Fairview Heights, LLC, et al.*, No. 20-cv-46 (S.D. Ill. Aug. 22, 2024) (Beatty, M.J.) (awarding one-third of gross common fund, plus interest); *McClaine v. DX Enterprises, et al.*. No. 23-cv-1168 (S.D. Ill. Apr. 15, 2025) (Dugan, J.) (awarding 35% of the gross common fund). It was likewise the method employed by this Court in approving Class Counsel's requested fee in the class action settlement with Maverick. *See* ECF No. 63.

Thus, a fee award based on the percentage-of-the-fund approach is appropriate.

B. Class Counsel's Requested Fee of 33.33% Is an Appropriate Market-Based Fee and Should be Approved.

The Seventh Circuit has directed courts to award fees in a common fund settlement based on the "market rate," which must be determined by "approximating the terms that would have been agreed to *ex ante*, had negotiations occurred." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) (reversing district court's fee award in part where it imposed a lower fee percentage because the settlement fund was more than $100 million, holding that "[m]arkets would not tolerate that effect"). In other words, the Court must figure out what the Class Members would have agreed to pay Class Counsel in a negotiation at the beginning of this case, to create a fee structure that "emulate[s] the incentives a private client would put in place." *Id.* To determine the applicable market rate, courts in this Circuit may consider three factors: (1) actual fee contracts that were privately negotiated for similar litigation, (2) data from class-counsel auctions, and (3) information from other cases. *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635-36 (7th Cir. 2011). In effect, "the object is to simulate the market where a direct market determination is infeasible." *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992).

Here, Class Counsel moves the Court to award fees of 33.33% of the Settlement Fund. As explained below, the requested fee is fair and reasonable under the Seventh Circuit's market approach.

1. The Requested Fee Is Consistent With Fee Awards in Similar Cases, and Class Counsel Are Unaware of Any Auctions in Similar Litigation.

Class Counsel's requested fee award of 33.33% is consistent with the going market rate in the Seventh Circuit and in Illinois. *See In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 845 (N.D. Ill. 2015) (observing the "usual range for contingent fees is between 33 and 50 percent.") And, as noted above, Class Counsel's fee request is also consistent with fee awards made in similar cases in Illinois. As this Court held, "a one-third fee is consistent with the market rate in settlements

concerning this particularly complex area of law." *Ramsey, et al. v. Philips N. Am., LLC*, 18-cv-01099, slip op., at *5 (S.D. Ill. Oct. 18, 2018) (Rosenstengel, C.J.) (citing *Spano v. Boeing Co.*, No. 06-743, 2016 U.S. Dist. LEXIS 161078, at *7 (S.D. Ill. Mar. 31, 2016)). *See also In re TikTok*, 617 F. Supp. 3d at 940 (awarding fee of one-third of $87,843.787.95 net common fund); *Crumpton*, No. 19-cv-08402 (N.D. Ill. Feb. 16, 2022) (awarding 33.33%); *Montgomery*, No. 20-cv-07771 (N.D. Ill. Nov. 9, 2021) (same); *Davis*, No. 19-cv-00680 (N.D. Ill. Oct. 25, 2021) (same); *Burlinski*, No. 19-cv-06700 (N.D. Ill. Oct. 13, 2021) (same); *Bedford*, No. 20-cv-04574 (N.D. Ill. May 12, 2021) (same); *Bryant v. Loews Chicago Hotel, Inc*., No. 19-cv-03195 (N.D. Ill. Oct. 30, 2020) (Norgle, J.) (same); *Stauffer*, No. 20-cv-46 (S.D. Ill. Aug. 22, 2024) (one-third of gross fund); *Roberson*, No. 20-cv-895 (S.D. Ill. Nov. 14, 2024) (awarding 40% of the gross common fund).

In awarding attorneys' fees of 33.33% in *Crumpton*, Chief Judge Kendall opined that such an award "is in line with fee awards provided in similar BIPA cases in this District and is reasonable in light of both the substantial risk that Class Counsel took on in accepting the case and the excellent relief Class Counsel ultimately obtained for the Settlement Class." *See Crumpton*, No. 19-cv-08402, slip op., (N.D. Ill. Feb. 16, 2022) (awarding class counsel 33.33% of $9,987,380 settlement). The fee award requested here is similarly justified because of the excellent results obtained by Class Counsel.[6]

[6] Class Counsel are unaware of any class-counsel auctions in similar litigation. Most auction data come from the securities context, and courts generally agree that data from those auctions has little bearing outside of the securities context. *See, e.g.*, *Heekin v. Anthem, Inc.*, No. 05-cv-1908, 2012 WL 5878032, at *4 n.2 (S.D. Ind. Nov. 20, 2012) (noting, in case involving insurer demutualization, that "auctions in securities actions have little bearing on this case"); *see also In re Cap. One*, 80 F. Supp. 3d at 796 (acknowledging that "data from pre-suit negotiations and auctions tend to be sparse" and declining to rely on any such data).

Accordingly, the requested fee is fair and reasonable under the Seventh Circuit's market approach.

2. The Risks of Nonpayment, the Quality of the Attorney's Performance, the Amount of Work Necessary to Resolve the Litigation, and the Stakes of the Case Support Class Counsel's Fee Request.

As the Seventh Circuit held, "[f]actors that bear on the market price for legal fees include the risk of nonpayment, the quality of the attorney's performance, the amount of work necessary to resolve the litigation, and the stakes of the case." *Camp Drug Store*, 897 F.3d at 833 (citing *Sutton*, 504 F.3d at 693). Each factor supports granting Class Counsel's requested fee.

Risk of Nonpayment. As detailed in Plaintiffs' Motion for Preliminary Approval, the risks of nonpayment were substantial. As Plaintiffs' motion explained, it would be a significant challenge and substantial burden to show that the data allegedly collected constitutes "biometric identifiers" or "biometric information" within the meaning of BIPA. Additionally, amendments to BIPA could limit Plaintiffs' recovery in a way that was not foreseeable when the underlying actions were filed: for example, Illinois just amended BIPA to limit future recovery under each prong of BIPA to one violation per individual. *See* 740 ILCS § 14/20(b)-(c) (as amended). Lytx would also argue, as other BIPA defendants have, that the recent amendments to BIPA mean that violations did not accrue each time Lytx collects or disseminates a Class Member's biometrics. Given the foregoing, Plaintiffs recognize that the questions of what constitutes biometric information under BIPA and consent, as well as new limits imposed by the Illinois legislature on recovery under BIPA, are novel and evolving issues and were risks of continued litigation. Thus, the risk of nonpayment to attorneys (and the Settlement Class) were significant and "the significant litigation risks…also increase the market value of Class Counsel's representation." *In re TikTok*, 617 F. Supp. 3d at 941.

The Attorney's Performance and Amount of Work Necessary. Notwithstanding these and other associated risks, such as establishing willful violations and securing and maintaining class certification, Class Counsel respectfully submit that they secured an excellent settlement for Settlement Class Members.

This result was the culmination of intensive litigation and negotiations between Class Counsel and Defendant's Counsel. First, Class Counsel survived a motion to dismiss in this Action and fully briefed a motion to dismiss in the *Cavanaugh* Action. Additionally, in this Action, Class Counsel obtained informal discovery in the underlying actions prior to the Court's ruling on the motions to dismiss, and formal discovery propounded following the motion to dismiss order. This formal discovery included the deposition of Vincent Nguyen, a key senior machine learning scientist on April 17, 2024. Further, Class Counsel evaluated their claims through a video conference with Lytx's Senior Manager of Applied Machine Learning, work by technical experts, and additional discovery materials in preparation for the joint mediation. *See* Prelim. Approval Decl. ¶¶31-34, 36, 39-41, 50.

Given the risks involved and the amount of work necessary to litigate and resolve this action, Class Counsel's performance and the amount of work done support the fee request.

The Stakes of the Case. Here, the stakes of the case were large, given the technical complexity of proving Plaintiffs' case, the costs of bringing this case to trial, and the potential loss to Class Counsel should they have not prevailed. *See, e.g.*, *T.K. through LeShore v. Bytedance Tech. Co., Ltd.*, 19-cv-7915, 2022 WL 888943, at *25 (N.D. Ill. Mar. 25, 2022) (Blakey, J.).

C. <u>A Lodestar Crosscheck Is Not Warranted.</u>

The Seventh Circuit has made clear that when the Settlement provides a common fund, as here, a lodestar crosscheck is unnecessary. *Ramsey*, 18-cv-01099, slip op., *pg.5 ("When determining a reasonable fee in common fund cases, the Seventh Circuit Court of Appeals uses

the percentage basis rather than a lodestar or other basis."); *Williams*, 658 F.3d at 635-36 ("consideration of a lodestar check is not an issue of required methodology"); *see also Gress v. Premier Healthcare Exchange, Inc.*, No. 14-cv-501, ECF No. 94 (N.D. Ill. Sept. 11, 2015) (Gilbert, J.) (granting final approval and awarding fees under the percentage method, without requiring a lodestar cross-check); *Will v. Gen. Dynamics Corp*., No. CIV. 06-698-GPM, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) (Murphy, J.) ("The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive."). Accordingly, Class Counsel's fee request of 33.33% is appropriate and should be approved. *See In Re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2021 WL 5709250, at *4 (N.D. Ill. Dec. 1, 2021) (Durkin, J.) ("There is simply little to no precedent recommending anything other than an award of 33 percent. With the only real evidence of the "market rate" being one-third, that is what the Court will award.").

V. THE LITIGATION EXPENSES WERE REASONABLY INCURRED AND SHOULD BE APPROVED.

Under the common fund doctrine, class counsel customarily are entitled to reimbursement of reasonable expenses incurred in the litigation. Fed. R. Civ. P. 23(h); *Mills*, 396 U.S. at 392 (recognizing the right to reimbursement of expenses where a common fund has been produced or preserved for the benefit of a class). Reimbursable expenses are those "that are consistent with market rates and practices." *In re Ready-Mixed Concrete Antitrust Litig.*, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010); *see also In re Synthroid*, 264 F.3d at 722 ("Reducing litigation expenses because they are higher than the private market would permit is fine; reducing them because the district judge thinks costs too high in general is not.").

Here, in notifying Class Members of the Settlement, Class Counsel informed Class Members that they would seek repayment of such litigation expenses not to exceed $125,000.

Class Counsel are now seeking reimbursement of out-of-pocket litigation expenses of $63,495.79. These expenses are itemized in the attached Joint Declaration of Class Counsel and include filing fees, process server fees, *pro hac vice* fees, mediation fees, and other customary litigation expenses. *See* Joint Declaration of Class Counsel ("Joint Decl."). at ¶35. As such, they were reasonably incurred in furtherance of the investigation, prosecution, and settlement of this Action and were necessary to advance the interests of the Class and to obtain the favorable result. *See id*. Due to the risk that they might never be recovered, Class Counsel endeavored to keep expenses to a minimum. *See id.* at ¶36.

Accordingly, Class Counsel respectfully request that the Court approve reimbursement of out-of-pocket litigation expenses in the amount of $63,495.79.

VI. THE REQUESTED SERVICE AWARDS ARE PROPER AND SHOULD BE APPROVED.

As a matter of public policy, 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 v. The Boeing Co.*, No. 06-cv-743, 2016 WL 3791123, *4 (S.D. Ill. Mar. 31, 2016) (approving incentive awards of $25,000 and $10,000 for class representatives) (internal citation omitted); *see also Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (upholding award of service awards to class representatives as they "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general"); *Clements v. WP Operations, LLC*, No. 19-CV-1051-WMC, 2023 WL 315511, at *4 (W.D. Wis. Jan. 19, 2023) (approving a service award of $5,000); *In re Sw. Airlines Voucher Litig.*, 2013 WL 5497275, at *1 (N.D. Ill. Oct. 3, 2013) (Kennelly, J.) (approving service award of $15,000) *amended on other grounds*, 2014 WL 2809016 (N.D. Ill. June 20, 2014).

Moreover, courts in this district have regularly granted service awards to class representatives in BIPA cases in recognition of the time and effort they invested in the case. *See In re TikTok*, 617 F. Supp. 3d 904, 949 (N.D. Ill. 2022) (approving $2,500 for each of the thirty-five named Plaintiffs); *Davis*, No. 19-cv-00680 (N.D. Ill. Oct. 25, 2021) (service awards of $10,000 to three class representatives); *Bedford*, No. 20-cv-04574 (N.D. Ill. May 12, 2021) (service award of $10,000); *Bryant*, No. 19-cv-03195 (N.D. Ill. Oct. 30, 2020) (Norgle, J.) (service awards of $10,000).

Throughout this litigation, Plaintiffs have contributed substantially to this litigation and have invested considerable time, at their own expense, to do so. Plaintiffs advised Class Counsel and approved pleadings; searched for, gathered, preserved, and produced documents to aid in investigation and litigation of the case; kept up to date on the progress of the case as well as the scope of the Settlement eventually achieved; and performed other similar activities. *See* Joint Declaration of Class Counsel at ¶39. Plaintiffs devoted their time and efforts solely to address the Lytx's alleged misconduct. *Id*. Their help has been instrumental to the success of this litigation and, Class Counsel respectfully submit, they are deserving of the requested service awards. *See Williams v. Rohm & Haas Pension Plan*, No. 4:04-cv-00078, 2010 WL 4723725, at *2 (S.D. Ind. Nov. 12, 2010), *aff'd*, 658 F.3d 629 (7th Cir. 2011) ("Because a named plaintiff plays a significant role in a class action, an incentive award is appropriate as a means of inducing that individual to participate in the expanded litigation on behalf of himself and others.").

VII. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully requests that the Court enter an order awarding Class Counsel attorneys' fees of 33.33% of the Settlement Fund, or $1,416,666.67, awarding Class Counsel reimbursement of litigation expenses of $63,405.79 and awarding each Plaintiff a service award in the amount of $10,000.

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Respectfully submitted,

/s/ Randall K. Pulliam
Randall K. Pulliam

Randall K. Pulliam, (admitted *pro hac vice*)
rpulliam@cbplaw.com
Samuel R. Jackson (admitted *pro hac vice*)
sjackson@cbplaw.com
CARNEY BATES AND PULLIAM, PLLC
One Allied Drive, Suite 1400
Little Rock, AR 72202
Telephone: (501) 312-8500
Facsimile: (501) 312-8505

J. Dominick Larry
nick@nicklarry.law
NICK LARRY LAW LLC
1720 W. Division St.
Chicago, IL 60622
Telephone: (773) 694-4669
Facsimile: (773) 694-4691

Attorneys for Plaintiffs and the Class

Jason L. Lichtman (admitted *pro hac vice*)
jlichtman@lchb.com
Sean A. Petterson (admitted *pro hac vice*)
spetterson@lchb.com
LIEFF CABRASER HEIMANN & BERNSTEIN LLP
250 Hudson St., 8th Floor
New York, NY 10013
Telephone: (212) 355-9500

Douglas M. Werman
dwerman@flsalaw.com
WERMAN SALAS P.C.
77 W. Washington Street, Suite 1402
Chicago, IL 60602
Telephone: (312) 419-1008

David Fish
dfish@fishlawfirm.com
WORKPLACE LAW PARTNERS, P.C.
111 E. Wacker Dr., Suite 2300
Chicago, IL 60601
Telephone: (312) 861-1800

Gary M. Klinger
gklinger@milberg.com
MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC
227 W. Monroe Street,Suite 2100
Chicago, IL 60606
Telephone: (866) 252-0878

Attorneys for Plaintiffs and the Class