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

BRADLEY ACALEY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

VIMEO.COM, INC., a Delaware corporation,

Defendant.

Case No. 2019CH10873

Judge: Hon. Clare J. Quish

MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND FOR A CLASS REPRESENTATIVE SERVICE AWARD

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Plaintiff Bradley Acaley ("Plaintiff") respectfully moves, pursuant to 735 ILCS 5/2-801 and the Court's Order Granting Preliminary Approval of Class Action Settlement dated January 20, 2023, for an award of attorneys' fees in the amount of 35% of the $2,250,000 Settlement Fund ($787,500), reimbursement of expenses incurred by Class Counsel in the amount of $23,019.31, and for a Service Award in the amount of $5,000 for the Class Representative in connection with the class action settlement which the Court preliminarily approved on January 20, 2023. Vimeo.com, Inc. ("Vimeo" or "Defendant") does not oppose this Motion. In support of this Motion for Attorneys' Fees, Reimbursement of Expenses, and for a Class Representative Service Award ("Motion"), Plaintiff submits the following Memorandum of Law.

I. INTRODUCTION

The Class Action Settlement,[1] reached after nearly three years of hard-fought litigation, is an exceptional result for Settlement Class Members. It establishes a Settlement Fund of $2,250,000 to provide cash to Class Members who file a valid and timely claim – for having their biometrics collected and stored by Defendant in alleged violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"). In addition to the substantial financial benefit to Class Members, the Settlement also provides meaningful prospective relief that requires Vimeo to delete all geometric measurement data derived and collected from a face appearing in a photo or video on its Magisto video editing application, to not sell such data, and to secure the informed and written consent that BIPA requires going forward. This relief ensures Vimeo's compliance with BIPA in the future and is the precise relief this litigation sought to obtain.

This is an outstanding result given the substantial risks that the Class faced in every phase of the litigation. Absent a settlement, this litigation would have been tied up in appeals for years and/or thousands of individual arbitrations.

Direct Notice of the Settlement commenced on March 21, 2023. As of April 19, 2023, 4,784 claims have already been submitted, with over six weeks remaining until the Claims

[1] Unless otherwise defined, all capitalized terms and phrases herein have the same meaning as ascribed in the Settlement Agreement.

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Deadline.[2] Notably, as of the filing of this Motion, no Settlement Class Member has objected to or requested exclusion from the proposed Settlement.

Class Counsel and the Class Representative have devoted significant time, effort, and resources on behalf of Class Members in the three years since this litigation commenced, and their efforts have yielded an extraordinary benefit to the Class. Class Counsel will continue to devote substantial time and resources to this Action—including by overseeing the Notice and Settlement Administration process and assisting Class Members with claims—and they will continue to do so through final approval, and until the Settlement administration process concludes and funds have been disbursed to the Settlement Class.

With this Motion, Class Counsel respectfully request a fee of 35% of the total Settlement Fund obtained for the Settlement Class, amounting to $787,500, plus litigation costs totaling $23,019.31, and a Service Award of $5,000 for the Class Representative. The requested Fee and Expense Award and Class Representative Service Award are amply justified in light of the investment, significant risks, and excellent results obtained on behalf of Class Members, particularly given the substantial uncertainty over the state of BIPA.

As set forth in detail below, Class Counsel's requested fee award is appropriate under governing Illinois law and consistent with the percentages of funds awarded in other settlements in Illinois courts, including other BIPA class actions, and warrants Court approval.

II. BACKGROUND

A. Factual Allegations and Procedural History

Plaintiff Bradley Acaley filed this Action in this Court on September 20, 2019, on behalf of Illinois Magisto users. Complaint ¶ 38. Mr. Acaley alleges that he has suffered harm as a result of Vimeo's violations of BIPA, and that he is entitled to statutory damages under the Act.

Class Counsel conducted significant pre-filing investigations, which included detailed

[2] Settlement Class Members have until June 5, 2023 to submit claims. *See* Order Granting Preliminary Approval of Class Action Settlement entered on January 20, 2023 ("Preliminary Approval Order") ¶ 10.

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review and evaluation of the facts, thorough and exhaustive investigation of issues related to Vimeo's violations of BIPA, and comprehensive research and analysis of the applicable law, including those related to an arbitration clause in the Magisto Terms of Service ("Magisto Terms"). *See* Affidavit of Bradley K. King filed concurrently herewith ("King Fee Aff.") ¶ 8. As a result of this thorough pre-filing investigation, Class Counsel were able to develop potentially viable theories of liability for BIPA claims against Vimeo, analyze the legal issues relevant to the merits of claims under each theory, assess the likelihood of Defendant successfully compelling Plaintiff's claims to arbitration, and to initiate this Action with the goal of certifying a class and recovering class-wide relief.

After removing this case to federal court, Defendant moved to stay and compel individual arbitration of Mr. Acaley's claims (*Acaley v. Vimeo, Inc*., Case No. 1:19-cv-07164 (N.D. Ill. Dec. 20, 2019) (the "*Federal Action*"), ECF No. 17 ("Arbitration Motion")). On June 1, 2020, after the Arbitration Motion was fully briefed, the District Court denied Defendant's Arbitration Motion (*Federal Action*, ECF No. 41). On June 18, 2020, Defendant filed a notice of appeal of the Court's order denying the Arbitration Motion (*Federal Action*, ECF No. 42; *Acaley v. Vimeo, Inc*., Case No. 20-2047 (7th Cir.) ("Appeal"). On appeal, the Parties vigorously briefed their opening, response, and reply briefs, and Plaintiff prepared for oral argument of the appeal. King Fee Aff. ¶¶ 9-10.

B. Settlement Negotiations

After the appeal was docketed, the Parties entered into the Seventh Circuit mediation program with the Chief Seventh Circuit Mediator, Joel Shapiro. With the supervision and assistance of Mr. Shapiro, the Parties engaged in extensive, arm's-length negotiations where counsel for each Party zealously advocated its position. *Id.* ¶ 11. The Parties' extensive settlement discussions lasted approximately two years, during which the Parties overcame apparent impasses and went forward with fully briefing Defendant's Appeal while continuing to explore resolution. *Id.*. Class Counsel requested and received substantial discovery in the context of settlement discussions. King Fee Aff. ¶¶ 12-13. These efforts included an agreement and coinciding

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protective order negotiated by the Parties and approved by the Federal Court. *Id.* Class Counsel also consulted with and retained an expert consultant to assist with the analysis of the facts and information obtained. *Id.*

Nonetheless, the Parties remained unable to reach a resolution in the months after the commencement of negotiations supervised by Mr. Shapiro. *Id.* ¶ 14. In June 2021, Plaintiff notified Mr. Shapiro that the Parties still had not been successful achieving a settlement and asked him to set a briefing schedule for Defendant's appeal. *Id.* The Parties then spent considerable time and resources briefing Vimeo's appeal of the order denying its motion to compel arbitration. *Id.* In December 2021, after the Parties had fully briefed Vimeo's appeal and the Seventh Circuit set oral argument for February 10, 2022, the Parties revisited settlement discussions, ultimately agreeing to a mediation with Mr. Shapiro on January 7, 2022. *Id.* ¶ 15. After a full-day mediation with Mr. Shapiro on January 7, 2022, the Parties reached a settlement in principle to resolve all claims asserted in this Action. *Id.*

Even after reaching a settlement in principle, the Parties continued to negotiate the details of the Settlement for nearly five additional months. *Id.* ¶ 16. The Settlement Agreement was finalized and fully executed in early June 2022. *Id*. On June 2, 2022, Vimeo voluntarily dismissed its appeal before the Seventh Circuit, sending the case back to the Federal District Court. *Federal Action*, ECF No. 68. On June 6, 2022, the Action was remanded from Federal Court to this Circuit Court by stipulation of the Parties. *Federal Action*, ECF No. 70.

Before and during all settlement discussions and mediation, the Parties exchanged documents and information on an arm's length basis to enable Plaintiff and proposed Class Counsel to adequately evaluate the scope of the potential class-wide liability and thus engage in meaningful settlement discussions on behalf of the Class. King Fee Aff. ¶ 18. In total, the Parties engaged in almost two years of settlement negotiations, which continued contemporaneously with their briefing of Vimeo's appeal, and included nearly five months of hard-fought negotiation with respect to the Settlement Agreement and its exhibits after a settlement in principle was reached in January 2022. *Id.* ¶¶ 11-16.

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Plaintiff also requested bids from a number of settlement administrators, and the Notice Plan and each document comprising the Class Notice were negotiated and exhaustively refined, with input from experts, to ensure that these materials will be clear, straightforward, and understandable by Class Members. *Id.* ¶ 19. After the initial August 2, 2022 hearing of Plaintiff's first unopposed preliminary approval motion, Plaintiff coordinated with Vimeo over the course of four months (based on the Court's instruction) to re-bid and ultimately select a new proposed administrator, Postlethwaite & Netterville ("P&N"); this process reduced the estimated amount of administration expenses that, along with Plaintiff's decision to reduce the maximum amount of attorney fees sought to 35% of the gross settlement fund ($787,500), will result in a significantly higher net settlement fund available to the Class if approved. *See id*. ¶¶ 20-25.

On January 20, 2023, the Court preliminarily approved the Settlement and ordered that the Class be given notice. *See* Preliminary Approval Order ¶¶ 2, 5, 9. After the Court preliminarily approved the Settlement, the Parties continued to work with the Settlement Administrator to supervise dissemination of Notice to Class Members. King Fee Aff. ¶ 26. These efforts included review and drafting of the language and format of the Settlement Website, the language and format of the Settlement Class Notice forms, monitoring for exclusion requests and objections, and ensuring prompt response to each and every Class Member inquiry (whether by phone or e-mail) regarding the Settlement. *Id.*

III. THE SETTLEMENT

A. Monetary And Non-Monetary Relief to Settlement Class Members

Class Counsel's prosecution of this litigation has culminated in this class-wide Settlement that provides outstanding monetary relief to the Settlement Class Members. The Settlement Agreement established a non-reversionary Settlement Fund of $2,250,000.00. SA ¶ 1.31. Each claimant who files a valid and timely claim is entitled to an equal *pro rata* share of the Settlement Fund after payments are first deducted for Settlement Administration Expenses, including the costs of providing notice to the Class, any Court-approved Service Award to the Class Representative, and attorneys' fees and expenses to Class Counsel. SA ¶ 4.2(a). The total payment to each Class

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Member will depend on the number of valid Claim Forms submitted.

The Settlement Agreement also provides meaningful prospective relief. A significant component of the Settlement involves changes to Vimeo's business practices. To this end, the Settlement requires Vimeo to take reasonable steps to ensure compliance with BIPA. Vimeo has provided a declaration confirming that, as of February 15, 2023, Vimeo will delete (or has deleted) all geometric measurement data derived and collected from a face appearing in a photo or video on Magisto and will not sell such data. *See* SA ¶ 4.1; King Fee Aff. ¶ 4. Going forward, Vimeo has agreed to comply with BIPA and any other law or provision of a law under which a claim relating to biometric identifiers or biometric information could be brought with respect to photographs or videos of faces that were uploaded onto Magisto. *See* SA ¶ 4.1.

B. The Settlement's Notice Plan Was Implemented

Under the Settlement Agreement's Notice Plan, which has already gone into effect, direct, publication, and Internet Notice of the Settlement has been disseminated to the Settlement Class Members. King Fee Aff. ¶ 27. In addition, the Settlement Website, which has been fully operational since March 21, 2023, makes available the Claim Form, Long Form Notice, and all relevant case information. *Id.*

As of April 19, 2023, with over six weeks left in the claims period, 4,784 claims have been submitted. *Id.* ¶ 28. To date, no Class Member has objected to the proposed Settlement, and no Class Member has requested exclusion from the Settlement Class. *Id*. The Settlement Administrator will provide an Affidavit, along with Plaintiff's Motion for Final Approval, which will provide the specifics of the dissemination of notice and updated numbers regarding the volume of claims, exclusions, and objections (if any). *Id.*

IV. ARGUMENT

A. The Requested Service Award Is Reasonable and Should Be Approved

A service award is "justified when necessary to induce individuals to become named representatives." *Spano v. Boeing Co.*, No. 06-cv-743, 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016) (internal citation omitted) (approving incentive awards of $25,000 and $10,000 for class

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representatives); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992) (noting that incentive awards "are not atypical in class action cases . . . and serve to encourage the filing of class actions suits"). Also, by participating, the Class Representative opened himself up to "scrutiny and attention," which in and of itself "is certainly worth some remuneration. *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 600-01 (N.D. Ill. 2011).

The Class Representative here is well-deserving of a $5,000 Service Award given his vital role. He contributed time and effort in pursuing the claims on behalf of the Class—exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. King Fee Aff. ¶¶ 36-37. He participated in the ongoing investigation of the facts related to the Action, provided information for the complaint, reviewed case documents, stayed in regular contact with Class Counsel, responded to all inquiries he was called to answer, and participated in the settlement process. *Id*. But for his willingness to pursue this Action, and to remain actively involved, the Settlement and its substantial benefits would not have been possible.

Further, $5,000 for the Class Representative is well within the range of reasonableness for such an award in a class action of this nature. *See, e.g.*, *Frederick v. Examsoft Worldwide, Inc.*, 2021L001116 (Ill. Cir. Ct. DuPage Cty.) (awarding $5,000 incentive award to each of the six class representatives); *Jenkins v. Charlies Industries, LLC*, 21L001047 (Ill. Cir. Ct. DuPage Cty.) (awarding $5,000 incentive award to each of the two class representatives); *Vega v. Mid-America Taping & Reeling, Inc.* 2019CH1136 (Ill. Cir. Ct. DuPage Cty.) (approving $5,000 incentive award to BIPA class representative); *Rapai v. Hyatt Corp.*, 17-CH-14483 (Ill. Cir. Ct. Cook Cty.) (awarding $12,500 incentive award to BIPA class representative); *Rogers v. CSX Intermodal Terminal, Inc.*, No. 19-CH-04168 (Ill. Cir. Ct. Cook Cty.) (awarding $15,000 incentive award in BIPA class action); *Vo v. Luxottica of America, Inc.*, 19-CH-10946 (Ill. Cir. Ct. Cook Cty.) (awarding $10,000 incentive award in BIPA class action).

In fact, the requested amount equates to just 0.002% of the total Settlement Fund—far less than the average service award granted to a class representative. *See, e.g.*, *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, 2015 U.S. Dist. LEXIS 35421, at *19 (N.D. Ill. Mar. 23,

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2015) (awarding $25,000 class incentive fee and reasoning that "a study on incentive awards for class action plaintiffs . . . found that . . . the mean incentive fee granted in class actions overall is .161% [of the total recovery]") (citing Theodore Eisenberg & Geoffrey P. Miller, *Incentive Award to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1339 (2006)). A Service Award of $5,000 to the Class Representative is fair and reasonable and should be approved.

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

Pursuant to the Settlement, Class Counsel seek a Fee and Expense Award equal to 35% of the Settlement Fund ($787,500) for the work expended in this litigation. King Fee Aff. ¶ 29. This request is within the range of fees approved in other class action settlements and is fair and reasonable in light of the substantial work performed and resources expended by Class Counsel, as well as the recovery secured on behalf of the Class. 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. *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")). Moreover, courts strongly encourage negotiated fee awards in class action settlements. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of the fee.").

"The Illinois Supreme Court has adopted the approach taken by the majority of Federal courts on the issue of attorney fees in equitable fund cases," which is to permit Class Counsel to petition the court for the value of the services which benefited the class. *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13 (1st Dist. 1992) (citations omitted); *see also Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d 235 (1995) (ruling in favor of the percentage-of-the-fund method in determining attorneys' fees). 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) (citations omitted).

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In deciding an appropriate fee, "a trial judge has discretionary authority to choose a percentage[-of-the-fund] or a lodestar method[.]" *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge*, 168 Ill. 2d at 243-44). Under the percentage-of-the-fund 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 239-40.

Here, Plaintiff submits that the Court should apply the percentage-of-the-fund approach—the approach that is typically used in most common fund class actions, including BIPA class action settlements as detailed below. *McCormick v. Adtalem Glob. Educ., Inc.*, 2022 IL App (1st) 201197-U, ¶ 26 (affirming award of attorneys' fees based on percentage method and noting that it is "favored in class actions").

1. Class Counsel's Requested Fees Are Reasonable Under the Percentage-of-the-Fund Method of Calculation

The vast majority of courts presiding over class action settlements in suits seeking statutory damages have adopted the percentage-of-the-fund method in determining the appropriate amount of attorneys' fees to award class counsel. *See, e.g.*, *Willis v. iHeartMedia Inc.,* No. 2016-CH-02455, Final Judgment and Order of Dismissal (Ill. Cir. Ct. Cook Cty. Aug. 11, 2016) (Atkins, J.) (granting final approval and awarding class counsel 40% of settlement fund in a TCPA class action); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) (finding that "in common fund cases like this one," "the court agrees with Class Counsel that the fee award . . . should be calculated as a percentage of the money recovered for the class"); *Shaun Fauley*, *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59 (affirming trial court's award of attorneys' fees in TCPA suit based on a percentage-of-the-fund approach); *Sterk v. Path, Inc.*, No. 2015-CH-

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08609 (Ill. Cir. Ct. Cook Cty. Sept. 21, 2015) (Mikva, J.) (awarding class counsel fees using percentage-of-the-fund method in a TCPA class action); *Sawyer v. Stericycle, Inc.*, No. 2015-CH-07190 (Ill. Cir. Ct. Cook Cty.) (Martin, Jr., J.) (same).

In fact, and as discussed in more detail below, nearly all, if not all, BIPA class action settlements that have received final approval in the Circuit Court of Cook County have provided for attorneys' fee awards using a percentage-of-the-fund analysis. Judges in the Circuit Court of Cook County have entered final approval class action settlements, including final approval of 40% attorneys' fee award in the following BIPA settlements: *Sekura v. L.A. Tan Enters., Inc.,* No. 2015-CH-16694 (Ill. Cir. Ct. Cook Cty. Dec. 1, 2016) (Garcia, J.); *Zepeda v. Intercontinental Hotels Group, Inc.*, No. 2018-CH-02140 (Ill. Cir. Ct. Cook Cty. 2018) (Atkins, J.); *Svagdis v. Alro Steel Corp.,* No. 2017-CH-12566 (Ill. Cir. Ct. Cook Cty. 2018) (Larsen, J.); *Zhirovetskiy v. Zayo Group, LLC,* No. 2017-CH-09323 (Ill. Cir. Ct. Cook Cty. Apr. 8, 2019) (Flynn, J.); *McGee v. LSC Commc'ns, Inc*., No. 2017-CH-12818 (Ill. Cir. Ct. Cook Cty. Nov. 11, 2019) (Atkins, J.); *Smith v. Pineapple Hospitality Grp.*, No. 2018-CH-06589 (Ill. Cir. Ct. Cook Cty. Jan. 22, 2020) (Moreland, J.); *Prelipceanu v. Jumio Corp.*, No. 2018-CH-15883 (Ill. Cir. Ct. Cook Cty. July 21, 2020) (Mullen, J.); *Williams v. Swissport USA, Inc.*, No. 2019-CH-00973 (Ill. Cir. Ct. Cook Cty. Nov. 12, 2020) (Moreland, J.); *Glynn v. eDriving, LLC*, No. 2019-CH-08517 (Ill. Cir. Ct. Cook Cty. Dec. 14, 2020) (Walker, J.); *Fick v. Timeclock Plus, LLC*, No. 2019-CH-12769 (Ill. Cir. Ct. Cook Cty. Apr. 8, 2021) (Hall, J.); *Freeman-McKee v. Alliance Ground Int'l, LLC*, No. 2017-CH-13636 (Ill. Cir. Ct. Cook Cty. June 15, 2021) (Demacopoulos, J.); *Knobloch v. ABC Financial Services, LLC*, No. 2017-CH-12266 (Ill. Cir. Ct. Cook Cty. June 25, 2021) (Loftus, J.).

This Court likewise should use the percentage-of-the-fund method in determining an appropriate Fee and Expense Award. In "choosing between the percentage and lodestar approaches," courts "look to the calculation method most commonly used in the marketplace at the time such a negotiation would have occurred." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-01 (N.D. Ill. 2015) (citing *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998)); *see also McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 814-15 (E.D. Wis. 2009).

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In class action litigation, where "the normal practice . . . is to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery," *Kolinek*, 311 F.R.D. at 5001, state and federal courts in Illinois and throughout the country almost unanimously agree that "the percentage approach is likely what the class members and counsel would have negotiated when counsel agreed to take on the case." *McCormick*, 2022 IL App (1st) 201197-U, ¶ 26; *see also Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) ("When the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate.'"); *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 923 (1st Dist. 1995) (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases"); *In re Continental Illinois Securities Litig*., 962 F.2d 566, 572 (7th Cir. 1992) (market for legal services paid on a contingency basis shows the proper percentage to apply in a class action that creates a common fund for the benefit of the class)); *see also, e.g., 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). Thus, the percentage-of-the-recovery method has been used to determine a reasonable fee award in every BIPA class action settlement that has required a defendant to establish a non-reversionary common fund for the class's benefit. *See supra*, *Sekura*; *Zepeda*; *Svagdis*; *Zhirovetskiy*; *McGee*; *Smith*; *Prelipceanu*; *Williams*; *Glynn*; *Freeman-McKee*; *Knobloch.*

This Court likewise should calculate Class Counsel's award here using the percentage method. The percent-of-the-fund method best replicates the *ex-ante* market value of the services that Class Counsel provided to the Class. It is not just the typical method used in contingency-fee cases generally, *see Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998), but is also how an informed Class and Class Counsel would have established counsel's fee at the outset of the litigation. *See Kolinek*, 311 F.R.D. at 500-01 ("the normal practice . . . is to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery"). The percentage method also better aligns Class Counsel's interests with those of the Class, because it bases the fee on the results the lawyers achieve for their clients, rather than on the number of motions they file,

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documents they review, or hours they work, and it avoids some of the problems the lodestar-multiplier method can foster (such as encouraging counsel to delay resolution of the case when an early resolution may be in their clients' best interests). *See, e.g.*, *Brundidge*, 168 Ill. 2d at 242; *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 720-21 (7th Cir. 2001). The percentage approach also is simpler to apply. *Brundidge*, 168 Ill. 2d at 242; *Florin*, 34 F.3d at 566; *In re Synthroid Mktg. Litig.*, 264 F.3d at 720-21; *see also, e.g., Kolinek*, 311 F.R.D. at 501 (percentage of the recovery method appropriate for awarding fees in consumer-privacy class action "because fee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of nine million lightly-injured plaintiffs likely would not be interested in doing"); *Ryan*, 274 Ill. App. 3d at 924.

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

a. The requested attorneys' fees of 35% of the Settlement Fund is well within the range courts have found reasonable in other cases

The requested fee award of $787,500 represents 35% of the Settlement Fund and is consistent with—or below—fees typically awarded in Illinois courts. Notably, Illinois circuit courts presiding over BIPA class action settlements have regularly awarded attorneys' fees of 35% or higher, including multiple 40% fee awards. *See, e.g., Prelipceanu v. Jumio Corp.* No. 18-CH-15883 (Ill. Cir. Ct. Cook Cty.) (Mullen, J.) (granting final approval to $7,000,000 BIPA class settlement and awarding class counsel 40% of the settlement fund based on a percentage analysis); *Zhirovetskiy v. Zayo Group, LLC,* 2017-CH-09323 (Ill. Cir. Ct. Cook Cty.) (Flynn, J.) (granting final approval to BIPA class settlement and awarding class counsel 40% of the settlement fund based on a percentage analysis); *Sekura*, 2016-CH-04945 (same); *Zepeda*, 2018- CH-02140 (Atkins, J.) (same); *Svagdis,* 2017-CH-12566 (same); *McGee v. LSC Commc's*, No. 2017-CH-12818 (Ill. Cir. Ct. Cook Cty.) (Atkins, J.) (same); *see also, e.g., Willis v. iHeartMediaInc.*, No. 16-CH-02455 (Ill. Cir. Ct. Cook Cty.) (awarding attorneys' fees and costs of 40% of an $8,500,000

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common fund in a TCPA class settlement); *Farag v. Kiip, Inc.*, 19-CH-01695 (Ill. Cir. Ct. Cook Cty.) (Gamrath, J.) (awarding 38% of the fund in consumer privacy class settlement); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP,* No. 97-cv-7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (citing *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Meyenburg v. Exxon Mobil Corp.,* No. 05-cv-15, 2006 WL 2191422, at *2 (S.D. Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentagesin this legal marketplace for comparable commercial litigation"); Herbert Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 15.83 (William B. Rubenstein ed.; 5th ed.) (noting that fifty percent appears to be an approximate upper limit on fees and expenses).

Class Counsel's instant fee request of 35% of the Settlement Fund is less than the maximum amount Class Counsel originally agreed to seek under the terms of the Settlement, and is fair and reasonable given the significant time and resources to finally achieve this great result for the Class. As this Court is aware, obtaining preliminary settlement approval was no mean feat. The Court held three hearings on Plaintiff's first unopposed motion for preliminary approval ("First Motion") on August 2, August 18, and September 15, 2022. King Fee Aff. ¶ 20.

Class Counsel—per the Court's detailed guidance—maximized the amount that would be available to the Class by re-bidding the notice and administration expenses and lowering the maximum amount of attorney fees to be sought over the course of hearings with the Court between August and December of 2022. *See id.* ¶¶ 20-25. Ultimately, Class Counsel's additional and extensive efforts to minimize administration costs, and their decision to reduce the maximum amount of attorney fees sought, resulted in a significant increase in the net amount for distribution to the Class**.** *Id.* ¶ 25.

In sum, Class Counsel's requested Fee and Expense Award would fairly and reasonably compensate Class Counsel for pursuing this Action in the face of substantial risk, achieving an excellent result for the Settlement Class, and investing substantial time and resources investigating, prosecuting, and resolving the Action.

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

The attorneys' fees sought in this case are particularly reasonable in light of the risks associated with this litigation at the time it was commenced and the relief that Class Counsel have obtained for the Settlement Class. *Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding fee award based on percentage-of-the-fund in light of the "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [the defendant]"); *Ryan*, 274 Ill. App. 3d at 924 (noting the trial court's fee award was reasonable given the monetary relief made available to the class and the contingency risk).

Defendant has expressed a firm denial of the material allegations and the intent to raise numerous legal defenses including, *inter alia*: (i) the claims asserted by Plaintiff and Class Members are subject to mandatory individual arbitration; (ii) BIPA does not apply to the Magisto app software or to Vimeo's conduct in the circumstances alleged in the Complaint; and (iii) Plaintiff's BIPA claim is not appropriate for class treatment. Many of these defenses, if successful, would result in the Plaintiff and the proposed Class Members receiving little to no recovery.

Most, if not all, of the Class Members faced the very real possibility that the arbitration provision in the Magisto Terms would be found valid and enforceable against Class Members. Had the case continued in litigation, the Magisto Terms may have prevented Class Members from proceeding in court, or as a class action, effectively eliminating the possibility of any comparable result. Taking these realities into account, recognizing the risks involved in any litigation and given the prohibitive time and expense of pursuing individual arbitrations, the immediate relief afforded to each Class Member strongly supports settlement approval.

Throughout this litigation, there also has been a significant risk that the Illinois legislature would amend BIPA on a retroactive basis, in a manner that would effectively wipe away Plaintiff's and Class Members' claims for relief. In 2016, legislation was introduced in the Illinois House of Representatives that, if passed by both chambers and signed by the governor, would have retroactively amended BIPA to, *inter alia*, preclude its application to uploaded digital images

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regardless of the information collected or the process of its extraction. *See* HB 6074 (2016). Although the bill introduced in 2016 predates this litigation and did not pass, several more recent bills aimed at amending BIPA were introduced into both houses of the legislature during the pendency of this litigation.[3] Simply put: at the time the Settlement was negotiated, there remained a substantial risk that the Illinois legislature would amend BIPA in a manner that would prevent the Class from recovering any relief in this action, and that remains a risk with respect to any continued litigation.

c. In addition to the substantial monetary relief, the significant non-monetary relief obtained on behalf of Settlement Class Members further justifies the requested thirty-five percent

In contrast to zero, which is what Class Members well might receive had the case continued to litigation, Class Counsel were able to obtain $2,250,000 of monetary relief—from which Class Members can submit claims for a cash payment. The total payment to each Claimant Class Member will depend on the number of valid Claim Forms submitted. For example, in the event that 10,000 Class Members submit valid Claims, and the Net Settlement Fund equals $1,277,226 based on P&N's current estimates, each Claimant will receive approximately $127.[4] The Settlement also

[3] *See* SB 2134 (2019) & SB 3592 (2020) (to eliminate the law's private right of action); SB 3591 (2020) (to permit the recovery of damages only for intentional violations, eliminating the ability to recover damages for negligent violations); SB 3776 (2020), SB 3593 (2020) & HB 5374 (2020) (to eliminate or reduce the ability of a plaintiff to recover liquidated damages); SB 3053 (2018) & HB 5103 (2018) (to eliminate protections regarding informed consent, collection, and storage of biometric information); SB 3593 (2020) & HB 5374 (2020) (to require pre-suit notice before any action for damages); HB 0559 (2021) & SB 0330 (2021) (to require an aggrieved person, before filing suit, to provide a private entity 30 days' written notice identifying the specific provisions of BIPA the aggrieved person believes the entity violated, and limit an aggrieved person's damages to their actual damages for negligent violations, or their actual damages plus liquidated damages up to the amount of actual damages for willful violations); HB 0560 (2021) (to remove private right of action and provide that any violation of BIPA would be actionable only by the Illinois Attorney General or appropriate State's Attorney).

[4] If 10,000 class members submit valid claims at P&N's current estimate, the estimated net fund would be $1,274,206 ($2,250,000 gross – $160,274 admin – $787,500 fees – $23,020 expenses – $5,000 service award), resulting in a *pro rata* payment of $127.42. *See* King Fee Aff. ¶ 24.

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provides prospective relief that ensures Defendant will destroy its existing biometric data and prevent further BIPA violations on the Magisto software. SA ¶ 4.1.

While the estimated recovery does represent a discount from full recovery in an individual case, the discount to the monetary component is warranted in light of the *certain* and *immediate* payments to Class Members provided by the Settlement, the forward-looking relief designed to ensure Defendant's compliance with BIPA going forward, and particularly in light of the significant risks of ongoing litigation.

Notably, the relief provided by this Settlement greatly exceeds the relief historically obtained through settlements in data-privacy class actions. *See, e.g., Miracle-Pond v. Shutterfly, Inc.*, No. 2019-CH-07050 (Ill. Cir. Ct.) (Sept. 9, 2021) (Judge Raymond W. Mitchell granted final approval to a $6.75 million settlement in a BIPA class action on behalf of at least 954,000 class members, which resulted in a pro rata distribution of $78.29 to the 52,516 class members with approved claims); *Goldschmidt v. Rack Room Shoes, Inc.*, No. 1:18-cv-21220-KMW (S.D. Fla.) (ECF Nos. 82-1, 86; approving settlement that provided $5 cash and a $10 voucher to each claiming class member in action alleging violation of the Telephone Consumer Protection Act, which allows for statutory damages of $500 or $1,500 per violation); *In re Vizio, Inc., Consumer Privacy Litig.*, No. 16-ml-02693-JLS-KES (C.D. Cal.) (ECF Nos. 282-1, 337; approving settlement that provided between $13 and $31 to each claiming class member in action alleging violation of the Video Privacy Protection Act, 18 U.S.C. § 2710, which allows for statutory damages of $2,500 per violation); *Kinder v. Meredith Corp.*, No. 1:14-cv-11284 (E.D. Mich.) (ECF Nos. 79, 81; approving settlement that estimated $50 and provided reportedly $32.40 to each claiming class member in action alleging violation of Michigan's Preservation of Personal Privacy Act, which allowed for statutory damages of $5,000 per violation).

The Settlement also compares favorably with previously approved settlements in other BIPA cases alleging collection of "scan[s] of . . . face geometry" and related data. *See, e.g.*, *Miracle-Pond*, *supra*; *Kusinski v. ADP, LLC*, No. 2017-CH-12364 (Ill. Cir. Ct.) ($25 million settlement on behalf of approximately 800,000 class members); *Prelipceanu v. Jumio Corp.*, 2018

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CH 15883 (Ill. Cir. Ct. Cook Cty.) ($7 million fund for approximately 260,000 class members); *Zhirovetskiy v. Zayo Group, LLC,* 2017-CH-09323 (Ill. Cir. Ct. Cook Cty.) ($990,000 fund for approximately 2,475 class members); *In re Facebook Biometric Information Privacy Litig*., No. 3:15-cv-3747 (N.D. Cal.) (ECF No. 445-2: settlement agreement); *In re Facebook Biometric Info. Privacy Litig*., 522 F. Supp. 3d 617, 629 (N.D. Cal. 2022) ($650 million settlement for a class size of at least 6.9 million, settled after class certification, appeal, and on the eve of trial).

Although the claims, objection, and exclusion deadlines have not yet occurred, the Settlement Administrator has received 4,784 claims as of April 19, 2023. King Fee Aff. ¶ 28. Moreover, to date there have been no objections to the Settlement and no requests for exclusion. *Id*. This reflects the Settlement Class Members' overwhelmingly positive reaction to the Settlement.

The non-monetary relief obtained by Class Counsel in this case further justifies the reasonableness of the attorneys' 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 § 21.71, at 337 (4th ed. 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 monetary benefits obtained for Class Members and the meaningful changes to Defendant's practices with respect to biometric data Class Counsel was able to secure, an attorneys' fee award of 35% of the Settlement Fund is reasonable and fair compensation—particularly, as discussed above, in light of the significant uncertainty in the relevant law, the "substantial risk in prosecuting this case under a contingency fee agreement" and the "defenses asserted by [Defendant]." *Shaun Fauley*, *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59.

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C. Class Counsel's Litigation Costs And Expenses Are Reasonable And Were Necessarily Incurred To Achieve The Benefits Obtained On Behalf Of The Class

Despite the risks of non-recovery to the Settlement Class and non-payment to Class Counsel described above, both at the outset and for the duration of the litigation, Class Counsel nevertheless expended substantial attorney time and out-of-pocket costs and expenses investigating, prosecuting, and resolving the claims alleged in this case without any guarantee of reimbursement. King Fee Aff. ¶ 31.

To date, Class Counsel have incurred a total of $23,019.31 in unreimbursed costs and expenses that were necessarily incurred in connection with the investigation, prosecution, and settlement of this litigation. King Fee Aff. ¶ 33. These costs include court fees, electronic research fees, attorney service fees, expert fees, postage, duplication costs, court reporting and transcript fees, travel, and other related costs. *See id.*¶¶ 33-34.

Courts typically allow counsel to recover their reasonable expenses incurred in prosecuting the litigation. *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).

The expenses categorized in Class Counsel's affidavit submitted herewith reflect commonly reimbursed expenses. *See* King Fee Aff. ¶¶ 33-34. Each of these costs and expenses are fully documented and was necessarily and reasonably incurred to bring this case to a successful conclusion. *Id.* ¶ 34. The Court should therefore approve the reimbursement of costs and expenses in the amount of $23,019.31.

V. CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court enter an Order: (i) approving an award of attorneys' fees of 35% of the Settlement Fund, which amounts to $787,500; (ii) approving an award of costs and expenses in the amount of $23,019.31; and (iii) approving a Service Award in the amount of $5,000.00 to the Class Representative in

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recognition of his efforts on behalf of the Settlement Class.

Respectfully submitted,

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