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

LATONIA WILLIAMS, DEQURVIA WILLIAMS and DERRICK BARNES, individually and on behalf of all others similarly situated,	)	No. 1:20-cv-00025
	)	*Consolidated with: No. 1:20-cv-02232*
Plaintiff,	)	Judge Thomas M. Durkin
v.	)	
PERSONALIZATIONMALL.COM, LLC,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF THE PARTIES' CLASS ACTION SETTLEMENT

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I. Introduction

This case involves class action claims brought under the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq*. Plaintiffs allege that Defendant required them and other Illinois workers to provide Defendant with their finger scans and biometric information as a means of identifying them and tracking the time and hours they worked. Plaintiffs allege that Defendant violated BIPA by collecting and using their biometric information without first obtaining Plaintiffs' informed written consent and without making statute-mandated disclosures.

The Parties have reached a non-reversionary $4,500,000.00 class-wide settlement ("Settlement"). Each Settlement Class Member who files a valid Claim Form will be entitled to a *pro rata* share of the Settlement Fund which assuming a claims rate of 15 to 25% will amount to payments of approximately $569 to $952 each after costs and any fees and incentive awards are deducted. Because the Settlement is fair, reasonable, and adequate, this Court should grant preliminary approval and authorize notice to the proposed Settlement Class Members to inform them of their rights.

II. Procedural History

On November 21, 2019, Plaintiffs LaTonia Williams and Dequrvia Williams filed their class action lawsuit in the Circuit Court of Cook County, alleging BIPA violations. On January 2, 2020, Defendant removed the case to the Northern District of Illinois.

On January 6, 2020, Defendant filed a motion for extension of time to respond to the Complaint. (Doc. No. 8). During this time, the Parties met and conferred and exchanged information regarding Defendant's contention that Plaintiffs provided their consent to Defendant for the collection and use of any biometric information. The information shared by Defendant included screenshots of dates and times reflecting when, according to Defendant, the Williamses allegedly agreed to purported BIPA-compliant electronic consents authorizing the scanning of their fingers and when they allegedly reviewed Defendant's policy regarding the collection, use, and storage of their biometric information.

On January 17, 2020, Defendant filed a Motion for a Status Hearing for January 30, 2020 at which the Parties informed the Court of their differing views of whether the consent process alleged by Defendant satisfied BIPA requirements. (Doc. Nos. 16, 19). The Parties continued to meet and confer on the consent issue until an impasse occurred. The Parties reported their impasse to the Court on February 28, 2020, at which time the Court ordered a responsive pleading deadline. (Doc. No. 21).

On March 4, 2020, Plaintiff Derrick Barnes filed a BIPA class action against Defendant in Cook County, alleging the same fact pattern and claims as the instant action. Defendant removed the *Barnes* action to federal court and *Barnes* was subsequently consolidated with the instant action. (Doc. No. 69).

On June 4, 2020, Defendant moved to dismiss the Complaint, arguing i) a one-year or two-year statute of limitations applies to BIPA claims; ii) the Illinois Workers' Compensation Act ("IWCA") preempts Plaintiffs' BIPA claims; and iii) Plaintiffs failed to sufficiently allege negligent or reckless or intentional conduct. (Doc. 36). Alternatively, Defendant asked the Court to stay the case pending the resolution of the appeals in *McDonald v. Symphony Bronzeville*, No. 1-19-2398 (Ill. App. Ct. 1st Dist.) (addressing whether the IWCA preempts BIPA claims)[1] and *Tims v. Black Horse Carriers*, No. 1-20-0563 (Ill. App. Ct. 1st Dist.) (addressing whether the five-

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[1] The Illinois Supreme Court recently issued its opinion and held that the IWCA does not preempt BIPA claims. *McDonald v. Symphony Bronzeville*, 2022 IL 126511.

year "catch-all" limitations period under 735 ILCS 5/13-205 is applicable to BIPA claims where BIPA does not state or set forth a statute of limitations). (*Id*.)

On October 8, 2020, the Court denied Defendant's motion to dismiss and/or to stay and lifted the stay. The parties served written discovery requests. Defendant asserts, *inter alia*, that its finger vein scanning system is not subject to the requirements of BIPA. Defendant also asserts that workers provided their consent under BIPA before they had their veins scanned when clocking in and out each day.

Between mid-October and mid-December 2020, the Parties focused their efforts on settlement, agreeing on a mediator (Hon. Judge Morton Denlow (ret.) of JAMS), identifying information that Defendant would share with Plaintiffs' Counsel, setting a date for mediation (February 2, 2021), and participating in a pre-mediation conference with the mediator in mid-December. While Defendant committed to the mediation only after securing the commitment of its insurer representatives to attend and participate in the mediation, those insurer representatives subsequently reconsidered their positions. After Defendant communicated the changed circumstances in early January 2021 to Plaintiffs' Counsel and the mediator, the February 2, 2021 mediation was cancelled.

Discovery commenced thereafter, and the Parties exchanged initial disclosures and written discovery requests. During discovery, the Parties continued to discuss the possibility of a mediation. On June 24, 2021, the Parties reported to the Court that they had once again agreed to mediate and had engaged Hon. Stuart E. Palmer (Ret.) of JAMS for a full-day Zoom mediation.

In advance of the mediation, Defendant provided Plaintiffs' counsel with information on the number of individuals registered to use Defendant's vein scan timeclock system. On October 26, 2021, the Parties participated in an all-day, eleven hour Zoom mediation with Judge Palmer.

The mediation and negotiations conducted with Judge Palmer resulted in the Parties reaching a settlement in principle. The Parties then memorialized their settlement in the Class Action Settlement Agreement ("Settlement Agreement") attached hereto as Exhibit 1.

III. Summary of Settlement Terms

A. The Proposed Settlement Class (Ex. 1, Settlement Agreement, § 1.25)

The named Plaintiffs ("Settlement Class Representatives") seek preliminary approval of the following class ("Settlement Class"):

> All individuals who registered to use the finger vein-based timekeeping system deployed by PMall within the state of Illinois at any time during the system's deployment (May 2016 through April 2020).

There are an estimated 20,393 Settlement Class Members.

B. Settlement Fund; Allocation of the Fund; Payments to Class Members (Ex. 1, Settlement Agreement, § 4)

While denying all liability and wrongdoing, Defendant has agreed to pay a non-reversionary "Gross Fund" of $4,500,000.00 to resolve the claims in this case on a class action basis. The Gross Fund is the maximum amount that Defendant shall pay under this Settlement.

The "Net Fund" is the Gross Fund minus the following deductions, which are subject to Court approval: Settlement Class Counsel's attorney fees and costs; the Settlement Administrator's costs; and the Settlement Class Representatives' Incentive Awards. Subject to the Court's approval, the Net Fund shall be distributed *pro rata* to Settlement Class Members who timely return valid claim forms ("Settlement Class Participants"). Because of this method of allocation to Settlement Class Participants, there will be no unclaimed funds in the Settlement and no portion of the Gross Fund shall revert to Defendant. If 1% of the 20,393 the Settlement Class Members (i.e., 203 individuals) submit valid requests for exclusion from the Settlement (*i.e.*, opt out), Defendant may elect to withdraw from and not be bound by the terms of this Agreement.

For the amount of individual settlement payments to those who participate in the settlement, it is estimated that if, for example, 40% (or 8,157 class members) of the Settlement Class Members submit claim forms, then the average net settlement payment would be approximately $357 per person.[2] If, for example, 30% (6,118 class members) of the Settlement Class Members submit claim forms, then the average net settlement payment would be approximately $476 per person; if 25% (5,098 class members) submit claims forms, the average net settlement payment would be $571 per person; if 20% (4,079 class members) submit claim forms, the average net settlement payment would be approximately $714 per person; if 15% (3,059 class members) submit claim forms, the average net settlement payment would be approximately $952 per person; and if 10% (2,032 class members) submit claim forms, the average net settlement payment would be $1,428. No portion of the Settlement Fund will revert back to the Defendant.

C. Uncashed Checks Will Be Distributed to the Unclaimed Property Division
(Ex. 1, Settlement Agreement, § 9.14)

Settlement Class Members who submit claim forms will have 180 days from issuance to cash their settlement checks. Funds from checks not cashed by the deadline will be distributed to the Unclaimed Property Division of the Illinois Treasurer's Office. This will enable Settlement

[2] Claims rates in similar BIPA class settlement typically range between 10-20%. *See e.g.*, *Baldwin v. Metrostaff*, No. 19 CH 04285 (Cir. Ct. Cook Co.)(approx. 11% claim rate in BIPA class-wide settlement involving approx. 19,863 class members); *Sykes v. Clearstaff*, 19 CH 03390 (Cir. Ct. Cook Co.)(14% claim rate in BIPA class-wide settlement involving approx. 8,510 class members); *In re Facebook Biometric Info. Priv. Litig.*, No. 15-cv-3747-JD, 2021 WL 757025, at *1 (N.D. Cal. Feb. 26, 2021) (22% claims rate in BIPA class action); *Sekura v. L.A. Tan Enters., Inc.*, 2015-CH-16694 (Cir. Ct. Cook Cnty. Dec. 1, 2016) (15% claims rate in BIPA class action); *Kusinski v. ADP LLC*, 2017-CH-12364 (Cir. Ct. Cook Cnty. Feb. 10, 2021) (13% claims rate in BIPA class action); *Thome*, No. 19-cv-6256, dkt. 90 (10% claims rate, class size of 62,000); *Prelipceanu*, 2018-CH-15883 (5% claims rate, class size of 260,000). The average claims rate in class settlements is approximately 9%. *See* Federal Trade Commission, Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns, p. 11 (Sept. 2019), available at https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf (median claims rate for settlements studied was 9%).

Class Members to request their settlement payments if they miss the check cashing deadline. *See* https://icash.illinoistreasurer.gov/app/faq-general (last visited November 4, 2021) (Illinois "serves as a custodian of the assets [of unclaimed property] and never takes ownership of them.").

D. Defendant's Representations of Compliance with BIPA (Ex. 1, Settlement Agreement, § 14)

Defendant represents that since April 2020, it has stopped using a finger vein scanner and has deleted and destroyed all finger scan data previously collected and stored for workers. Defendant has also represented that at no time did Defendant disclose or transfer finger scan data for workers to any third parties. Defendant further represents and warrants that it did not at any time disclose or transfer workers' finger vein data to any third parties.

E. Release of Claims (Ex. 1, Settlement Agreement, §§ 5.1, 5.2)

Subject to final approval by the Court of the Settlement, Settlement Class Members who do not timely and validly exclude themselves from the Settlement forever waive and release "all claims arising out of the allegations in the Consolidated Class Action Complaint in the Action, including claims that were litigated in the Action or that could have been brought in the Action, whether known or unknown, arising from or related to the same nucleus of facts, or that relate in any way to Plaintiffs' and the Settlement Class Members' Biometric Information or Biometric Identifiers (as those terms are defined in BIPA) or to data generated by measurements of their biological, physical, or behavioral patterns or characteristics, or to the possession, collection, capture, purchase, receipt, obtainment, sale, lease, trade, profit, disclosure, redisclosure, dissemination, use, storage, transmission, protection, or deletion of their Biometric Information, of their Biometric Identifiers, or of their biological, physical, or behavioral patterns or characteristics."

Subject to final approval by the Court of the Settlement, in exchange for their Incentive Awards, Plaintiffs LaTonia Williams, Dequrvia Williams and Derrick Barnes have agreed to a General Release contained in Section 5.2 of the Settlement Agreement.

F. Settlement Administrator (Ex. 1, Settlement Agreement, § 7)

The Parties have selected Analytics Consulting, LLC to act as the Settlement Administrator. Analytics has over 50 years of experience administering class action settlements involving antitrust, civil rights, consumer fraud, data breach, employment, insurance, product defect/liability, and securities litigation. (Ex. 2, Simmons Decl., ¶ 3). The Settlement Administrator estimates that its costs for administering the settlement to the 20,393 Settlement Class Members and performing its duties under the Settlement Agreement is $76,504.00, which is approximately $3.75 per putative class member. Analytics has agreed to cap its costs at $100,000.00, which shall be paid from the Gross Fund, subject to the Court's approval. The duties of the Settlement Administrator are summarized in Section III (H) below (and are set forth in Sections 7.2 and 7.3 of the Settlement Agreement).

G. Notice of Class Action Settlement and Claim Form (Ex. 1, Settlement Agreement, §§ 7.2, 7.3)

A copy of Plaintiffs' proposed Notice and Claim Form are attached hereto as Exhibit 3. Plaintiffs' proposed Notice of Class Action Settlement ("Notice") explains the following to Settlement Class Members: (1) what the Settlement is about; (2) how to receive payment, request exclusion, or submit an objection; (3) how to obtain more information about the Settlement; (4) the monetary terms of the Settlement and how individual payments will be calculated; (5) the release of claims for those who do not exclude themselves; (6) the maximum amounts to be requested for attorney fees, costs, settlement administration, and Incentive Awards; and (7) the

Final Approval Hearing details. The Settlement website, anticipated to be an address such as www.pmallfingerscansettlement.com[4], will also have the Notice, the Claim Form, the Settlement Agreement, the Preliminary Approval Order, the Motion for Attorney Fees, Costs, and Settlement Class Representatives' Incentive Awards (once available), the Motion for Final Approval (once available), and the Final Approval Order (once available).

The Claim Form will be provided with the Notice. The proposed Claim Form is simple and easy to complete. The Claim Form explains how individuals can also return a Claim Form through the Settlement Website.

H. Distribution of Notice (Ex. 1, Settlement Agreement, §§ 7.2, 7.3)

Of the 20,393 Settlement Class Members, last known mailing addresses have been identified for 16,738 class members (82% of the class) and partial contact information (primarily phone numbers and email address) is available for 3,062 Settlement Class Members (15% of the class). There are 593 registrations (2.9% of the class) for which there is no contact information apart from a name or a name and city or zip code. Defendant worked with various staffing agencies to collect and identify contact information and U.S. mailing addresses. It is Plaintiffs understanding that a small number of these names without contact information appear to be the product of tests (*e.g.*, the name of the registrant is "Test"), the product of errors (*e.g.*, the name of the registrant is a letter or number or series of random letters and/or numbers), or are fictitious (*e.g.*, the name of the registrant is "Mickey Mouse").

As set forth below, the Settlement Administrator will implement a robust class notice program, via 1) U.S. Mail; 2) email; 3) direct social media advertising; and 4) a website with the

[4] Or another website address agreed to by the Parties if this one is not available. This applies to all references to the Settlement website in this Motion.

Notice, Claim Form, case documents and the ability to submit a Claim Form. (Ex. 2, Simmons Decl., ¶ 12).

In an effort to discover U.S. mailing addresses for individuals with no mailing address, the claims administrator will take the dataset of 20,393 individuals and perform a "First Reverse Lookup Search" and "Second Reverse Lookup Search" for those individuals with no address. For the first lookup search, the claims administrator will cause a mailing address append to be performed to locate mailing addresses for Settlement Class Members for whom mailing addresses are not currently available. (Ex. 2, ¶ 18). This initial address append uses contact information provided by the Defendant (e.g., email address and/or phone number) and commercially available first-party and third-party data providers to identify email addresses for Settlement Class Members. (*Id.* at ¶ 18). The Settlement Administrator will update the Class List with the Settlement Class Member mailing address information it obtains via this append process. (*Id.*).

Then, the Settlement Administrator will cause a second mailing address append to be performed for any Settlement Class Member for whom a mailing address was not located after the first append (described in the preceding paragraph). (*Id.* at ¶ 19). To accomplish this, a different data partner[5] will be utilized in an effort to garner a mailing address for any Settlement Class Member that the Settlement Administrator could not successfully append a mailing address in the first search. The Settlement Administrator will update the Class List with the Settlement Class Member mailing address information it obtains via this second append process. (*Id.*).

In instances where a mailing address is available for a Settlement Class Member, the Settlement Administrator will cause the Notice to be sent, by first-class mail, postage prepaid, to the best available address of each Settlement Class Member. In preparation for mailing, mailing

[5] The Settlement Administrator's data partners typically include Acxiom, Data Axle, Dun & Bradstreet, Google, Melissa Data, Nielsen, Oracle, and Facebook. (Ex. 2, ¶ 4).

addresses will be updated using the National Change of Address ("NCOA") database maintained by the United States Postal Service ("USPS") and its certification and verification processes. (*Id.*, ¶ 21). The mailed Notice Packet shall include a pre-paid envelope for Settlement Class Members to return the Claim Form.

If the mailed Notice Packet is returned by the USPS with an undeliverable mailing address, the Settlement Administrator will perform an entry-level skip trace to locate an updated address. If an updated address is located, the Notice and Claim Form will be mailed to the updated address. Additionally, the Settlement Notice will be mailed to all persons/entities who request one via the toll-free phone number maintained by the Settlement Administrator.

Thirty (30) days after Notice is issued, the Settlement Administrator will cause a Reminder Postcard to be mailed (and emailed) to each Settlement Class Member who has not submitted a Claim Form as of that date.

For issuing the Notice Packet via email, the Settlement Administrator will email the Notice to Settlement Class Members who have an email address in the records provided by Defendant. Because attachments are often interpreted by various Internet Service Providers ("ISP") as spam, in accordance with industry best practices, the Settlement Administrator includes a link to all operative documents so that Settlement Class Members can easily access this information. (Ex. 2, ¶ 24-27).

The proposed notice process is supplemented by a targeted campaign on social media directly targeting Settlement Class Members. Using the Class List, the Settlement Administrator will develop a "Custom Audience" that relies upon existing contact information (name, mailing address, email address, or phone number) to directly target digital advertisements to known Settlement Class Members on Facebook, Instagram, and the WhatsApp messaging application.

(*Id.*, ¶¶ 29-31). Based upon the size of the class, the Settlement Administrator proposes targeting 100,000 digital advertisements at Settlement Class Members. (*Id.*, ¶ 30).

Lastly, the Settlement Administrator will launch a website which will include the pertinent documents and information mentioned above, and will include a secure mechanism for Settlement Class Members to submit Claim Forms.

I. **Incentive Awards** (Ex. 1, Settlement Agreement, § 1.11)

Under the Settlement Agreement, Class Counsel may request that the Court award the Settlement Class Representatives up to $7,500.00 each as Incentive Awards for their work in prosecuting this lawsuit on behalf of the Settlement Class, answering written discovery, and recovering money for the Settlement Class. Settlement Class Counsel will file the request for the Incentive Awards with their motion for attorney fees and costs, described below in the next section (§ III(J)).

J. **Attorney Fees and Costs** (Ex. 1, Settlement Agreement, § 11)

Under the Settlement Agreement, Settlement Class Counsel may request that the Court award them up to one-third of the Gross Fund (minus costs, claims administration expenses and incentive awards) as attorney fees plus their litigation expenses. Settlement Class Counsel will file their request for attorney fees and costs within 30 days of initial Notice distribution and the Settlement Administrator will make the filing available on the Settlement website 30 days before the close of the notice period. The Notice will advise Settlement Class Members about how to review the request for attorney fees and costs. This will enable Settlement Class Members to see the request when deciding whether to exclude themselves from the Settlement or object to it.

IV. The Court Should Grant Preliminary Approval

A. Settlement of Class Action Litigation is Favored

Federal courts favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

The *Manual for Complex Litigation* describes a three-step procedure for approval of class action settlements:

(1) Preliminary approval of the proposed settlement at an informal hearing;
(2) Dissemination of mailed and/or published notice of the settlement to all affected class members; and
(3) A "formal fairness hearing" or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

Manual for Complex Lit., at § 21.632–34. This procedure, used by courts in this Circuit and endorsed by the leading class action treatise, safeguards the due process rights of absent class members and enables the Court to fulfill its role as the guardian of class interests. *See* 2 Newberg & Conte, at § 11.22, *et seq.*

With this Motion, Plaintiffs request that the Court take the first step in the process by granting preliminary approval of the proposed Settlement. Rule 23 was amended effective December 1, 2018. Before then, Rule 23 did not address standards for preliminary approval. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 359981, at *11 (E.D.N.Y. Jan. 28, 2019). At the preliminary approval stage, district courts decided whether the proposed settlement fell "within the range of possible approval." *Kou Thao Vang v. KeyTronicEMS*, 2019 WL 337589, at *1 (D. Minn. Jan. 28, 2019). "Under the new Rule 23(e), in weighing a grant of preliminary approval, district courts must determine whether 'giving notice is justified by the parties' showing that the court *will likely be able to*: (i) approve the proposal under

Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." *In re Payment Card*, 2019 WL 359981, at *12 (citing Fed. R. Civ. P. 23(e)(1)(B)(i–ii)) (emphasis in original). As shown below, the Settlement satisfies these criteria and preliminary approval is justified.

B. The Court Will Likely Be Able to Approve the Settlement Under Rule 23(e)(2)

1. The Class Representatives and Class Counsel have Adequately Represented the Proposed Settlement Class – Rule 23(e)(2)(A)

Settlement Class Counsel and the Settlement Class Representatives pursued this case vigorously on behalf of the potential class. Settlement Class Counsel briefed and defeated Defendant's motion to dismiss, served written discovery requests, briefed and defeated a motion to stay, and challenged Defendant's assertions regarding whether its timekeeping system is covered by BIPA, whether Plaintiffs and the class members provided consent under BIPA and whether biometric policy documents were sufficient under BIPA in the event the Court determined that BIPA covered Defendant's particular the timekeeping system and vein scanning process. The Settlement Class Representatives prepared written responses to written discovery on behalf of the proposed class action claims in the case. They have met with Settlement Class Counsel in person on several occasions and have conferred with their counsel throughout this case. The Parties exchanged mediation statements that laid out their factual and legal theories which were thoroughly addressed by the Parties during their day-long mediation session overseen by Judge Palmer. At mediation, Settlement Class Counsel negotiated a settlement that obtains meaningful non-reversionary monetary relief, with an appropriate release of claims. Accordingly, the Class Representatives and Class Counsel have adequately represented the proposed Settlement Class.

2. The Settlement Was Negotiated at Arm's Length – Rule 23(e)(2)(B)

The Settlement was the result of arm's-length negotiation between counsel, with the assistance of neutral mediator and retired Judge Stuart E. Palmer. The Settlement was not collusive.

3. The Settlement Provides Adequate Relief to the Class – Rule 23(e)(2)(C)

The Settlement Class Representatives claim that they and potential class members are entitled to $1,000 per violation if they are able to prove Defendant's alleged violations of BIPA were "negligent."[6] 740 ILCS 14/20(1). If the Court approves Class Counsel's attorney fees, costs, the Incentive Awards, and the settlement administration costs, the estimated net recovery for each Settlement Class Member will be approximately $714 to $952 per person if 15-20% of the Settlement Class submit Claim Forms. Other BIPA class settlements underscore the fairness, reasonableness, and adequacy of the instant Settlement. *See e.g., Burlinski v. Top Golf*, No. 1:19-cv-06700 (N.D. Ill. Oct. 6, 2021)(recovery of $650 net per class member); *Roach v. Walmart, Inc.*, 19-CH-1107 (Cook Cnty. June 16, 2021)(recovery of $645 net per claimant); *Jones v. CBC Rest. Corp.*, 1:19-cv-06736 (N.D. Ill. Oct. 22, 2020)(recovery of $532.28 net per person); *Hernandez v. Hooters, Inc.*, No. 17 CH 13593 (Cir. Ct. Cook Cnty., Oct. 31, 2019)(each participating class member being eligible to receive a *pro rata* share of a settlement fund that was worth approximately $265.00); *Gaca v. Transportation Repairs and Services, Inc.*, No. 17 CH 13914 (Cir. Ct. Cook. Cnty., Nov. 18, 2019) (each class member being eligible to receive a *pro rata* share of a settlement fund of approximately $250.00 per person); *Marshall v. Life Time Fitness*, No. 17 CH 14262 (Cir. Ct. Cook Cty., July 30, 2019)(each class member being eligible to receive

[6] While BIPA allows recovery of $5,000 per violation for "intentional" or "reckless" violations, 740 ILCS 14/20(2), Plaintiffs acknowledge they may not have prevailed on this theory. Defendant asserted and produced documents showing a purported consent process, a biometric information privacy policy and a biometric destruction policy. Further, Defendant has represented that it has destroyed all biometrics.

approximately $270 net each person); *Zhirovetskiy v. Zayo Group, LLC*, 17-CH-09323 (Cook Cnty. Apr. 8, 2019)($450 gross per class member); *Rosenbach v. Six Flags Ent. Corp.*, 2016 CH 00013 (Cir. Ct. Lake Cnty. May 14, 2021)(preliminarily approving $36 million fund for approximately 1,110,000 class members, and capping class member payments at $200 or $60 depending on date of finger scan). The Settlement also represents a meaningful recovery when compared against average recoveries in class action settlements. *See In re Ravisent Techs., Inc. Sec. Litig.*, 2005 WL 906361, at *9 (E.D. Pa. Apr. 18, 2005) (citing a study by Columbia University Law School, which determined that "since 1995, class action settlements have typically recovered between 5.5% and 6.2% of the class members' estimated losses.") (internal citations omitted).

The Court should further evaluate the adequacy of relief based on the sub-factors below, Fed. R. Civ. P. 23(e)(2)(C)(i)-(iv), each of which the Settlement satisfies.

a. Costs, risks, and delay of trial and appeal

If the litigation had continued, it would have been complex, expensive, and protracted. If the case had not settled, the Parties would have completed depositions and likely taken steps to engage in e-discovery and possibly issue subpoenas to various staffing agencies who provided workers to Defendant during the pertinent time period. After that, the Parties would have served expert witness reports about Defendant's timekeeping system and whether it collected biometric identifiers and/or biometric information. Following that additional discovery, Plaintiffs would have filed a motion for class certification. Additionally, Defendant would have likely moved for summary judgment against the Named Plaintiffs and/or decertification of any certified class.

After extensive litigation, Defendant could have obtained a victory or greatly reduced the potential class recovery based on its various defenses in the lawsuit, including its arguments that:

(1) Its timekeeping and vein-scanning system are not subject to or covered by BIPA;

(2) Defendant's on-boarding and alleged consent process satisfies BIPA's requirements;

(3) the statute of limitations under BIPA is one or two years instead of five years;[8]

(4) Defendant's biometric device did not collect biometric identifiers or biometric information as defined by BIPA;

(5) Defendant's alleged violations of BIPA were not negligent or reckless; and

(6) that any award of liquidated damages per class member would be excessive in light of the alleged absence of injury and thus the damages would violate Defendant's due process rights under the Illinois and/or United States Constitutions. [9]

Instead of expensive, complicated, and protracted litigation, this Settlement provides significant and guaranteed monetary relief to Settlement Class Members now.

b. Effectiveness of the proposed method of distributing relief to Settlement Class Members

As set forth above in Sections III(G) and (H), the Settlement Administrator will send Notice via direct mail and, where available, email. (Ex. 1, Settlement Agreement, §§ III(G) and (H)). Combined with a settlement website with the pertinent information and documents mentioned above, as well as a targeted social media advertising campaign, this comprehensive notice program satisfies due process and Rule 23.

An effective distribution method "get[s] as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible" while also ensuring that only "legitimate claims" are paid. 4 NEWBERG ON CLASS ACTIONS § 13:53 (5th ed.). Courts have held that requiring a claimant to fill out a short and simple claim form is an appropriate way

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[8] This Court disagreed with Defendant's statute of limitations arguments in denying the Motion to Dismiss, though on January 26, 2022, the Illinois Supreme Court accepted a Petition for Leave to Appeal in *Tims v. Black Horse Carriers, Inc.*, 127801 and will decide the issue of the whether BIPA has a five-, two- or one-year statute of limitations.

[9] At the time the Parties engaged in mediation and reached a settlement, the Illinois Supreme Court had not yet decided the issue of whether the IWCA preempts BIPA claims. On February 3, 2022, the Illinois Supreme Court ruled the IWCA does not preempt BIPA claims.

to balance these concerns, especially in settlements with non-reversionary funds. *See In re Toyota Motor Corp. Unintended Acceleration Mktg. Litig.*, 2013 WL 3224585, at *18 (C.D. Cal. June 17, 2013) ("The requirement that class members download a claim form or request in writing a claim form, complete the form, and mail it back to the settlement administrator is not onerous."); *Schulte*, 805 F. Supp. 2d at 591 ("[T]he Court has reviewed the claim form and concludes that it is not unduly burdensome, long, or complex. All information called for on the form is required of the claims administrator in order for it to process claims.").

The proposed Settlement here satisfies this factor by relying on well-established, effective methods for processing Settlement Class Members' Claim Forms and distributing the proceeds of the Settlement. The Settlement Fund will be distributed to Settlement Class Members who submit a short and simple approved Claim Form, by mail, email or online, to the Settlement Administrator—an independent third party with extensive experience handling the administration of settlement funds. Each person in the Settlement Class for whom the Settlement Administrator has a mailing address will be sent a paper Claim Form in the mail, attached to the direct notice, and will have the option to alternatively file their claim online through the settlement website. The Settlement Administrator will also email the Notice Packet to individuals for whom it has an email address and will engage in a targeted social media advertising campaign to further issue notice of the settlement. The Settlement Administrator will provide Settlement Class Members with resources (including a website, mailing address, and toll-free phone number) to contact the Settlement Administrator or Class Counsel directly, review and process the Claim Forms, and then disperse to participating Class Members their *pro rata* share of the Settlement Fund upon approval of the Court. This distribution method is effective and supports approval.

c. The terms of the proposed attorney fee award, including timing of payment

Settlement Class Counsel will seek an award of attorney fees of up to one-third of the Gross Fund (but after expenses, administration costs and incentive awards are first deducted from the fund). (Ex. 1, Agreement § 11). The maximum fee that Settlement Class Counsel may request is equal to or below the fees awarded in BIPA class settlements. *Burlinski v. Top Golf*, No. 1:19-cv-06700 (N.D. Ill. Oct. 13, 2021)(awarding one-third of settlement fund of $2,633,400); *Kusinski v. ADP, LLP*, 17-CH-12364 (Cook Cnty. Feb. 10, 2021)(35% of net settlement fund of $25,000,000); *Prelipceanu v. Jumio Corp.*, 18-CH-15883 (Cook Cnty. July 21, 2020)(awarding $2,800,000/40% of settlement fund); *Miracle-Pond v./ Shutterfly, Inc.*, 19-CH-07050 (Cook Cnty. Sept. 9, 2021)($2,362,500/35% of total settlement fund); *Thome v. NovaTime Tech., Inc.*, 1:19-cv-06256 (N.D. Ill. March 8, 2021)(awarding $1,365,300/33.3% of total settlement fund); *Roach v. Walmart, Inc.*, 19-CH-1107 (Cook Cnty., June 16, 2021)(one-third of total settlement fund of $10,000,000); *Jones v. CBC Rest. Corp.*, 1:19-cv-06736 (N.D. Ill. Oct. 22, 2020) (granting 32.5% of total settlement of $3,242,400); *Dixon v. The Wash. & Jane Smith Home*, 1:17-cv-8033 (N.D. Ill. Aug. 20, 2019)(granting one-third of total settlement fund of $1,356,000;)*Marshall v. Life Time Fitness, Inc.*, 17-CH-14262 (Cook Cnty. July 30, 2019)(one-third of $2,400,000 settlement fund).

The Settlement provides for payment of any attorney fees awarded at the same time as payments to Settlement Class Members; there is no priority for Settlement Class Counsel. (Ex. 1, Agreement §§ 9.3, 9.4). A motion and memorandum in support of the proposed attorney fee award will be filed prior to a final approval hearing and will be posted to the settlement website 30 days prior to the closing of the notice period.

d. Any agreement required to be identified under Rule 23(e)(3)

The Settlement Agreement is Exhibit 1 to this Memorandum. There are no side agreements regarding the Settlement Class or attorney fees related to this Settlement.

4. The Settlement Treats Settlement Class Members Equitably Relative to Each Other – Rule 23(e)(2)(D)

The Settlement treats Class Members equally by distributing awards to Settlement Class Members from the Net Settlement Fund on a *pro rata* basis. (Ex. 1, Agreement, § 4.2).

C. The Court Will Likely Be Able to Certify the Settlement Class for Purposes of Judgment on the Settlement – Rule 23(e)(1)(B)(ii)

1. Certification Will Be Appropriate Under Rule 23(a)

To obtain class certification, Plaintiffs must demonstrate that their claims meet the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). As shown below, each element of Rule 23(a) and (b)(3) is met here.

a. Numerosity

Courts consistently hold that if there are more than 40 class members, numerosity is satisfied. *See, e.g., Gaspar v. Linvatec Corp*., 167 F.R.D. 51, 56 (N.D. Ill. 1996). The estimated class size here is 20,393, which satisfies numerosity.

b. Commonality

For a class to be certified, questions of law or fact must exist common to the class. Fed. R. Civ. P. 23(a)(2). Those common issues must be susceptible to common answers. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court summarized the Rule 23(a)(2) requirement as follows:

> What matters to class certification…is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

564 U.S. 338, 350 (2011). The claims of Settlement Class Members can be resolved by answering the following common question: did Defendant collect biometric data of Settlement Class Members without following BIPA's notice and consent requirements? Answering this common

question resolves the question of liability for all Settlement Class Members. Commonality will be met here.

c. Typicality

A claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and…[the] claims are based on the same legal theory." *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (citation omitted). The requirement is meant to ensure that the named representative's claims "have the same essential characteristics as the claims of the class at large." *Id.* (quotations and citation omitted)).

The claims of the Settlement Class Representatives and Settlement Class Members arise from the same conduct: Defendant's use of a finger vein scan system for its workers allegedly without following BIPA's notice and consent requirements. Typicality will be met.

d. Adequacy of the Class Representative

The adequacy of representation component has three elements: (1) the claims of the class representative cannot conflict with the claims of the other class members; (2) the class representative's interest in the litigation outcome must be sufficiently strong to ensure that she is a vigorous advocate for the class; and (3) counsel for the class representative must be competent, experienced, and able to conduct the litigation with that necessary vigor. *Gammon v. G.C. Servs., L.P.*, 162 F.R.D. 313, 317 (N.D. Ill. 1995).

i. The Class Representatives have an interest in the litigation and have no conflict with the Settlement Class Members

The Settlement Class Representatives allege the same claims as Settlement Class Members and have no interests antagonistic to them. Thus, the Class Representatives have "a clear stake in a successful outcome – [] damages for [themselves] and the class – that raises no specter of antagonistic interests." *Pierre v. Midland Credit Mgmt., Inc.*, 2017 WL 1427070, at *8-9 (N.D. Ill. Apr. 21, 2017). The Settlement Class Representatives exhibited competence throughout the case, including answering written discovery in support of the class claims in the case.

ii. Settlement Class Counsel is experienced and qualified

Settlement Class Counsel will also fairly and adequately protect the interests of the Settlement Class Members. A court considers the following four factors when appointing class counsel: (1) the work counsel has performed in identifying the potential class claims; (2) class counsel's experience in handling complex litigation and class actions; (3) counsel's knowledge of the applicable law; and (4) the resources that class counsel will commit to representing the class. Fed. R. Civ. P. 23(g).

Settlement Class Counsel are highly experienced class action attorneys and have been lead or co-lead counsel in numerous actions in federal and state courts, including BIPA class actions. (Ex. 4, Ryan Decl. at ¶ 7; Ex. 5, Bormes Decl. at ¶ 5; Ex. 6, Caffarelli Decl. at ¶ 11). In this case, Settlement Class Counsel demonstrated their commitment to the class by briefing and defeating Defendant's Motion to Dismiss, by briefing and defeating Defendant's Motion to Stay, by serving written discovery to Defendant, by challenging Defendant's factual and legal positions regarding the purported consent process and the timekeeping system, and by negotiating a favorable resolution at the mediation. By their actions in this case and relevant experience, Settlement Class Counsel are well-positioned to protect the interests of Class Members.

2. Certification Will Be Appropriate Under Rule 23(b)

Class certification is appropriate under Rule 23(b)(3) if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and…a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). As set forth below, these prerequisites are satisfied.

a. Common questions predominate

The Rule 23(b) predominance requirement looks to whether the proposed class is sufficiently cohesive to warrant adjudication by representation. *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). Satisfaction of this criterion normally turns on the answer to one basic question: is there an essential common factual link between all class members and the Defendant for which the law provides a remedy? The common question predominating in this case is whether Defendant collected Settlement Class Members' biometric data without following the requirements of BIPA. The answer to this question determines Defendant's liability under BIPA for all potential persons in the Settlement Class and therefore predominates over any individual questions.

b. A class action is a superior mechanism

The superiority inquiry requires a court to compare alternatives to class treatment and determine if any alternative is superior. "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation." *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982). This is particularly true in actions like this one, where numerous individual claimants each suffer a relatively small harm. "Rule 23(b)(3) was designed for situations…in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006). Here, the alternative to class resolution is 20,393 individual lawsuits for recoveries possibly as low as $1,000, plus attorneys' fees and costs. As each case would require resolution of identical factual and legal issues, the resulting efficiencies achieved by class-wide resolution are clear and recognizable.

D. Plaintiffs' Notice Program and Class Notice Form Merit Approval

The proposed Notice complies with due process and the Federal Rule of Civil Procedure 23. Pursuant to Rule 23(c)(2)(B), notice must provide:

> the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). The proposed Notice exceeds this bare minimum and complies with the requirements of Rule 23(c)(2)(B). And the plan for the Settlement Administrator to distribute individual Notices directly to Settlement Class Members via U.S. Mailing, emailing, a website and social media advertising, is reasonable.

V. Conclusion

Because the Settlement makes significant monetary relief available to Settlement Class Members who might have recovered nothing without the Settlement, the Court should grant preliminary approval. A proposed Preliminary Approval Order is attached hereto as Exhibit 7.

Dated: March 15, 2022

Respectfully Submitted,

/s/ Thomas M. Ryan
One of Plaintiffs' Attorneys

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