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

Candice Adams
e-filed in the 18th Judicial Circuit Court
DuPage County
ENVELOPE: 25916500
2023CH000053
FILEDATE: 1/10/2024 2:12 PM
Date Submitted: 1/10/2024 2:12 PM
Date Accepted: 1/11/2024 3:07 PM
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MANUEL MARTINEZ, individually and on behalf of themselves and all other similarly situated persons, known and unknown,

Plaintiffs,

v.

C STUDIO MANUFACTURING, LLC,

Defendant.

Case No. 2023CH000053

Honorable Bonnie M Wheaton

Plaintiffs' Amended Motion for Attorney's Fees, Litigation Costs, Settlement Administration Costs and Settlement Class Representative's Service Award

Plaintiff Manuel Martinez ("Plaintiff"), by counsels James M. Dore and Daniel I. Schlade from Justicia Laboral LLC, moves for the entry of an order granting Attorney's Fees, Litigation Costs, Settlement Administration Costs, and Settlement Class Representative's Service Award, and in support states as follows:

I. Introduction

On March 9, 2023, Plaintiff filed a putative class action complaint against C STUDIO MANUFACTURING, LLC in the Circuit Court of DuPage County, Illinois, alleging violations of the Biometric Information Privacy Act, 740 ILCS 14/1, et seq. ("BIPA"). On April 13, 2023, Defendant removed the action to the United States District Court for the Northern District of Illinois, Case No. 1:23-cv-2319. The Parties, however, have agreed to voluntarily remand the action from the Northern District of Illinois to the Circuit Court of DuPage County for the Settlement of the case.

On November 6, 2023, this Court granted preliminary approval of the Parties' $150,000.00 class action Settlement with a reverter under the Biometric Information Privacy Act ("BIPA"). *See*

attached Exhibit 1 – The Parties' Settlement Agreement; Ex. 1 is incorporated herein. Following final approval, the Settlement provides for the distribution of checks, to all Settlement Class Participants. To date, no Settlement Class Members have submitted objections to the Settlement or requested exclusion from it. The Settlement supports awarding Settlement Class Counsel thirty-three percent (33%) of the Gross Fund as attorney fees up to $50,000.00 and litigation costs of $878.50. The Settlement also supports awarding the Settlement Administrator its costs estimated of $10,155.00 (to be finalized at final approval hearing) and the Settlement Class Representative Service Award of $1,000.00. If the Court approves these requests from the Gross Fund, the remaining net settlement fund shall be distributed equally among Settlement Class Participants. The Net Fund would be sufficient to pay each Settlement Class Member $ 685.67. See attached Exhibit 2 – Settlement Account; Ex. 2 is incorporated herein.

II. Legal Background and Procedural History

In 2008, Illinois enacted BIPA to regulate "the collection, use, safeguarding, handling, storage, retention, and destruction" of individuals' biometric data. 740 ILCS 14/5(g). The General Assembly found that the new legislation was necessary for several reasons. First, individuals cannot change their biologically unique identifiers, like fingerprints, and so they have no recourse when those identifiers are compromised. 740 ILCS 14/5(c). Second, an "overwhelming majority" of the public are concerned about use of biometric data tied to finances and other personal information. 740 ILCS 14/5(d). Third, the "full ramifications of biometric technology are not yet fully known." 740 ILCS 14/5(f). BIPA addresses these concerns, in part, by creating a privacy interest in a person's biometric data and giving individuals the right to control when a private entity collects that data. *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶¶ 34-35 (Ill. 2019).

Among other things, BIPA prohibits a private entity from collecting a person's biometric data unless the entity first informs the person, in writing: (1) that it is collecting biometric data; (2) the purpose of the collection; and (3) how long the private entity will keep the person's biometric data. 740 ILCS 14/15(b). The private entity must also obtain the individual's "written release" authorizing collection of the biometric data. Id. BIPA further regulates a private entity's possession, storage, and disclosure of biometric data. 741 ILCS 14/15(a), (c), (d), and (e). Private entities face liquidated or actual damages, whichever are higher, for negligent and reckless/intentional violations of the law. 740 ILCS 14/20.

This lawsuit alleges that Defendant collected their employees' and/or staffers' biometric data through a fingerprint scan timekeeping system without informing them in writing that they were doing so, without identifying the purpose of the collection, without identifying how long they would retain their data, and without obtaining their informed written consent. 740 ILCS 14/15(b). The lawsuit further alleges that Defendants stored employees' biometric data without establishing and following a biometric data retention and destruction policy, which requires private entities like Defendants to destroy biometric data once the purpose for collection is complete. 740 ILCS 14/15(a). The lawsuit also alleges that Defendants disclosed employees' biometric data to their timekeeping vendor without consent. 740 ILCS 14/15(d).

Defendant denies all of Plaintiff's allegations in the Litigation and specifically denies that it has engaged in any wrongdoing whatsoever, that it has violated BIPA, that Plaintiff and the proposed class are entitled to any relief whatsoever, and that the action can properly or feasibly be maintained as a class action on a contested basis.

Finally, the parties reached the Settlement Agreement through arms-length negotiation, based on case value and the benefits/risks associated with litigation.

III. Settlement Class Counsel Negotiated a Highly Favorable Settlement Structure, Robust Notice Program, and Direct Checks Distribution

The structure that Settlement Class Counsel negotiated here is superior to alternatives approved in other BIPA class action settlements. It includes a comprehensive notice program to inform Settlement Class Members of their rights, including their right to object to the Settlement or request exclusion from it. Settlement Class Counsel negotiated two forms of notice: direct mail and email (where possible). See attached Exhibit 3 – Proposed Class Notices; Ex. 3 is incorporated herein.

IV. Class Counsel are Entitled to Payment of Their Reasonable Attorney Fees

A. The Court Should Award Attorney Fees as a Percentage of the Fund

The Court should award attorney fees as a percentage of the settlement fund made available to the class members. When counsel's efforts result in the creation of a common fund, counsel is "entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980); see *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 548 (7th Cir. 2003) (creation of common fund "entitles [counsel] to a share of that benefit as a fee"). This 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, 691-92 (7th Cir. 2007) (quoting Skelton v. G.M. Corp., 860 F.2d 250, 252 (7th Cir. 1988)); *Kaplan v. Houlihan Smith & Co.*, No. 12 Civ. 5134, 2014 WL 2808801, at *3 (N.D. Ill. June 20, 2014); see also *Boeing*, 444 U.S. at 478.

Although there are two ways to compensate attorneys for successful prosecution of statutory claims – the lodestar method and the percentage of the fund method, see *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565-66 (7th Cir. 1994) – the favored approach in the Seventh Circuit is to use the percentage of the fund method in common fund cases like this one. "[I]t provides the best hope of estimating what a willing seller and a willing buyer seeking the largest

recovery in the shortest time would have agreed to ex ante." *In re FedEx Ground Package System, Inc. Employment Practices Litig.*, 251 F. Supp. 3d 1225, 1236 (N.D. Ind. 2017) (citing *In re Synthoid Mktg. Litig.*, 325 F.3d 974, 979-80 (7th Cir. 2003)); see also *McDaniel v. Qwest Commc'ns Corp.*, No. 05 C 1008, 2011 WL 13257336, at *3 (N.D. Ill. Aug. 29, 2011) ("Many courts have found the percentage-of-recovery method provides a good emulation of the real-world market value of attorneys' services provided on a contingent basis.") (Pallmeyer, J.).[3]

It is especially appropriate to use a common fund approach in cases based on fee shifting statutes when the "settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorneys' fees." *Skelton*, 860 F.2d at 256; accord *Florin*, 34 F.3d at 564. Here, the Settlement releases Class Members' statutory claims to fees under BIPA. Ex. 1, Settlement Agreement.

There are several other reasons that courts favor the percentage of the fund method. First, the percentage of the fund method promotes early resolution and removes the incentive for plaintiffs' lawyers to engage in wasteful churning of the file to increase their billable hours. See *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 789-90 (7th Cir. 2001). Where attorney fees are limited to a percentage of the total, "courts can expect attorneys to make cost- efficient decisions about whether certain expenses are worth the win." *Gaskill v. Gordon*, 942 F. Supp. 382, 386 (N.D. Ill. 1996), aff'd, 160 F.3d 361 (7th Cir. 1998); see also *In re Amino Acid Lysine Antitrust Litig.*, No. 95 Civ. 7679, 1996 WL 197671, at *2 (N.D. Ill. Apr. 22, 1996) (explaining "growing recognition that in a common fund situation . . . a fee based on a percentage of recovery . . . tends to strike the best balance in favor of the clients' interests while at the same time preserving the lawyers' self-interest").

Second, the percentage method preserves judicial resources because it saves the Court from the cumbersome task of reviewing complicated and lengthy billing documents. *Florin*, 34

F.3d at 566 (noting "advantages" of percentage of the fund method's "relative simplicity of administration"); *Gaskill*, 942 F. Supp. at 386 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (fee requests "should not result in a second major litigation")). Courts in this district routinely apply the percentage method to common fund settlements and have noted the advantages of this approach. See, e.g., *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1040 (N.D. Ill. 2011) (using percentage method because it did "not need to resort to a lodestar calculation, which would be costly to conduct, to reinforce the same conclusion"); *Gaskill*, 942 F. Supp. at 386 (describing advantages of percentage method, including judicial efficiency and an "efficient check on the attorney's judgment" in economic decision-making). As the Second Circuit has explained, the "primary source of dissatisfaction [with the lodestar method] was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 48-49 (2nd Cir. 2000) (citation omitted).

Recognizing the above advantages of the percentage method, Illinois state and federal courts have consistently awarded attorney fees based on the percentage method in similar BIPA class action settlements. See attached Exhibit 4 - BIPA Settlement Chart; Ex. 4 is incorporated herein. Indeed, Settlement Class Counsel are unaware of any Court that has awarded attorney fees based on a lodestar method in a BIPA class action settlement that creates a common fund. Ex. 4.

B. Analysis of the Market for Legal Services Supports Plaintiff's Request

In deciding the fee to award in common fund cases, the Seventh Circuit has "consistently directed district courts to 'do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.'" *Sutton*, 504 F.3d at 692-94 (quoting *In re Synthroid Mktg. Litig.,* 264 F.3d at 718 (collecting cases)).

The Seventh Circuit has held that "[a]lthough it is impossible to know ex post exactly what terms would have resulted from arm's-length bargaining ex ante, courts must do their best to recreate the market by considering factors such as actual fee contracts that were privately negotiated for similar litigation, information from other cases, and data from class-counsel auctions." *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599 (7th Cir. 2005).

The percentage method is consistent with, and is intended to mirror, the private marketplace for negotiated contingent fee arrangements. *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) ("[w]hen the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee is the 'market rate.'") (emphasis in original). In the marketplace, the "contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains." *Kirchoff*, 786 F.2d at 325; see also *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998).

Here, prior to filing the Complaint, Settlement Class Counsel executed a fee agreement with the Settlement Class Representative for the receipt of up to 40% contingency fee as the attorney's fees in the matter. The Court, therefore, knows the amount that the Settlement Class Representative and Settlement Class Counsel negotiated for in the marketplace at the outset of the case. As the Parties negotiated an attorney fee arrangement at the start of the litigation, the presumption of market-rate reasonableness applies. See *Briggs v. PNC Financial Services Group, Inc.*, No. 1:15- cv-10447, 2016 WL 7018566, at *4 (N.D. Ill. Nov. 29, 2016). Even less than the negotiated fee agreement, Settlement Class Counsel are seeking one-third of the common fund, minus settlement administration costs and the Settlement Class Representative requested Service Awards of $1,000. *See* Ex. 2; *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014) (recognizing that settlement administration costs are not a benefit to the class and generally

should not be included when calculating class counsel's fee). "The typical contingent fee is between 33 and 40 percent." See *Gaskill v. Gordan*, 160 F.3d at 361, 362 (7th Cir. 1998); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (customary contingency fee ranges from 33 1/3% to 40% of the amount recovered); *In re Diary Famers of Am., Inc.*, 80 F. Supp. 3d 838, 845 (N.D. Ill. 2015) (the usual range of contingent fees is between 33 and 50 percent); *McDaniel*, 2011 WL 13257336, at *4 ("[T]he real-word market range for contingent fee cases is 33% to 40%.") (Pallmeyer, J.).

C. The Risk of Non-Payment Supports the Requested Attorney Fee Award

Settlement Class Counsel's decision to seek the market rate is also reasonable in light of the significant risks of nonpayment that Settlement Class Counsel faced. At the outset of the litigation, Settlement Class Counsel took "on a significant degree of risk of nonpayment" in agreeing to represent Settlement Class Representatives. *Taubenfeld*, 415 F.3d at 600 (approving of district court's reliance on this factor in evaluating attorneys' fees).

Settlement Class Counsel took this case on a contingent fee basis and assumed the risk that they would receive no fee for their services. Ex. 2; see *Sutton*, 504 F.3d at 693-94 (7th Cir. 2007) ("We recognized [in an earlier case] that there is generally some degree of risk that attorneys will receive no fee (or at least not the fee that reflects their efforts) when representing a class because their fee is linked to the success of the suit."). Here, Settlement Class Counsel faced a risk of no recovery. In particular, Defendants could have defeated liability based on several defenses: (1) that the Workers' Compensation Act preempts employment-based BIPA claims; (2) that Defendant's timekeeping system did not collect biometric data covered by BIPA (a likely subject of expert testimony); (3) that Defendants' alleged violations of BIPA were not "negligent" or "reckless," a prerequisite to recovery of monetary damages; (4) that Plaintiffs' claims were untimely based on when they accrued and the appropriate statute of limitations; and (5) that any

award of liquidated damages per class member would excessive in light of the alleged absence of injury and thus the damages would violate Defendants' due process rights under the Illinois and/or United States Constitutions. There is limited authority on any of these issues and so the litigation would have been protracted and expensive. Given these risks, Settlement Class Counsel "could have lost everything" they invested. *Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992) (Posner, J.).

D. The Benefits Conferred Upon Class Members Justify the Requested Award

The benefit the Settlement provides Settlement Class Members is good – estimated at $685.67 gross per Settlement Class Member. Ex. 2. The per-Settlement Class Member amount compares favorably to other BIPA settlements that have received final approval, each of which also awarded fees comparable to or exceeding those requested here. See Ex. 4.

E. The Attorney Fee Request Satisfies the Redman Ratio Test

In 2014, the Seventh Circuit considered class action settlements with very low class member participation that were negotiated under questionable circumstances, and where only the parties and lawyers (not class members) were to benefit from the proposed settlement ("the Consumer Cases"). *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), 781-82; *Redman*, 768 F.3d at 630; *Eubank v. Pella Corp.*, 753 F.3d 718, 726 (7th Cir. 2014). In each of the Consumer Cases, the class recovery was miniscule, the claims process was designed to discourage class participation, the claims rate was exceedingly low, and there were other indicia that class counsel had sold out the class in furtherance of class counsel's pecuniary interests. This Settlement stands in stark contrast to the Consumer Cases. It provides a good result to Settlement Class Members, as described *supra.*

Based on the facts of the Consumer Cases, the Seventh Circuit instructed courts when approving settlements to examine the ratio of the fee requested to the fee plus what class members

received (the "*Redman* Ratio test"). See *Redman*, 768 F.3d at 630; accord *Pearson*, 772 F.3d at 781-82. Under the *Redman* Ratio test, the "ratio that is relevant" in determining reasonable attorney's fees "... is the ratio of (1) the fee to (2) the fee plus what the class members received" and the "attorney's fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members." *Redman*, 768 F.3d at 630 (emphasis added); *Pearson*, 772 F.3d at 781-82. Settlement Class Counsel is seeking $50,000.00 in attorney fees. The Redman ratio here is 33.3% ($50,000 attorneys fees / $150,000 [$50,000 attorneys fees + $ 99,121.50 amount to class + litigation costs of $878.50]), which falls well within the permissible *Redman* ratio.

F. Class Counsel's Fee Request Is Reasonable and Should Be Approved Without a Cross-Check

Settlement Class Counsel's fee request should be approved because it is reasonable based on the market rate. No further showing or analysis is needed. *In re FedEx Ground Package Sys., Inc. Employment Practices Litig.*, 251 F. Supp. 3d at 1243 ("A lodestar cross-check … isn't encouraged in this circuit."); *Wright v. Nationstar Mortgage LLC*, No. 14 C 10457, 2016 WL 4505169, at *17 (N.D. Ill. Aug. 29, 2016) (courts can skip a lodestar check); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598 n.27 (N.D. Ill. 2011) ("use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive"). This is because the recovery for Settlement Class Members is proper, the entire Net Settlement Fund will be distributed to Settlement Class Members who do not request exclusion, and the settlement does not present indicia that it was the product of collusion between the Parties at the expense of Settlement Class Members. See *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) ("consideration of a lodestar check is not an issue of required methodology*"); In re Dairy Farmers of Am.*, 80 F. Supp. 3d 838, 850 (N.D. Ill. 2015) ("For attorneys who are arguing for a percentage-of-the-fund fee award, any delineation of hours is seemingly unnecessary").

Although courts occasionally review counsel's lodestar as "a cross-check to assist in determining the reasonableness of the fee award," *Heekin v. Anthem, Inc.*, No. 05 Civ. 1908, 2012 WL 5878032, at *2 (S.D. Ind. Nov. 20, 2012), the lodestar cross-check is of limited utility because "[u]ltimately…the market controls," *In re Trans Union Corp. Privacy Litig.*, No. 00 Civ. 4729, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009); Wright, 2016 WL 4505169, at *17 ("Nor is the lodestar an accurate representation of the hypothetical market agreement between the plaintiffs and their attorneys"). Because Settlement Class Counsel's substantial work produced a significant recovery for Settlement Class Members, the Court need not analyze Settlement Class Counsel's lodestar.

V. The Payment of Class Counsel's Litigation Expenses are Appropriate

The Settlement provides that Settlement Class Counsel may apply to the Court for payment of litigation costs. Settlement Class Counsel seek reimbursement of actual costs in the amount of $878.50, including for the filing fee, and service of process fees. Ex. 2. Settlement Class Counsel's request for these costs from the Gross Fund is appropriate, as these costs were necessarily incurred in order to litigate and settle this case. *Id.*

VI. Payment of the Settlement Administrator's Costs Are Appropriate

The Settlement provides that Settlement Class Counsel may apply to the Court for payment of Settlement Administration costs. Ex. 1. Given the size of the class, the appointed Settlement Class American Legal Claim Services LLC ("Settlement Administrator") will administer the Class Notice and administer the remainder of the settlement process. Plaintiffs request that the Court award the Settlement Administrator its estimated expenses of $10,155.00. This amount is to be finalized at the final approval hearing, after administration of the settlement has been completed.

VII. Payment of the Service Awards Are Appropriate

Consistent with the Settlement Agreement and Class Notice, the Settlement Class Representative requests a Service Award of $1,000.00 from the Gross Fund. "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming $25,000 incentive award). "In deciding whether such an award is warranted, relevant factors include [1] the actions the plaintiff has taken to protect the interests of the class, [2] the degree to which the class has benefitted from those actions, and [3] the amount of time and effort the plaintiff expended in pursuing the litigation." *Id.*

The Settlement Class Representative pursued this case in his own name and on behalf of the proposed class. In so doing, the Settlement Class Representative accepted a risk of retaliation from future potential employers who can easily identify them through an internet search as the lead plaintiff in this lawsuit. The Settlement Class Representative conferred with Settlement Class Counsel throughout the case; they were integral parts of the case's success. In addition, the Settlement Class Representative reviewed and accepted the settlement agreement. Finally, the Settlement Class Representative provided a general release as additional consideration for his Service Award, which is another reason to approve the award. Ex. 1, Settlement Agreement.

Service awards of $7,500 or more are regularly approved by Illinois state and federal courts in BIPA cases, often in smaller settlements than this one and without the named plaintiffs answering written discovery. The Court should award the Settlement Class Representative his $1,000 Service Award.

VI. Conclusion

Settlement Class Counsel's request for attorney fees of one-third of the common fund, minus Settlement Administration costs and the requested Service Award, is reasonable based

upon the negotiated fee agreements in this case, the normal rate of compensation in similar cases, the risk Settlement Class Counsel undertook in engaging in this litigation, and the strong result achieved for Settlement Class members. Plus, the *Redman* ratio is well-within the applicable range. Therefore, the Court should award Settlement Class Counsel attorney fees in the amount of $ 50,000, litigation costs of $878.50, Settlement Administrator's costs of $10,155.00 (to be finalized at the final approval hearing), and the Settlement Class Representative's Service award of $1,000.00.

Wherefore Plaintiff requests the Court all relief requested in this Motion, and for any relief deemed just.

s/ James M. Dore

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