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

LEROY PAYTON and KYNDRA BYRD; on behalf of themselves and all others similarly situated, Plaintiff, v. AUTUMN RIDGE APARTMENTS I, LP; THE FERNDALE REALTY GROUP, LLC; THE FERNDALE PROPERTY MANAGEMENT GROUP, LLC; and ALON Z. YONATAN; Defendants.	Case No. 2021-CH-01769 Hon. Allen P. Walker Calendar 03

PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEYS' FEES AND COSTS AND INCENTIVE AWARDS

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I. INTRODUCTION

Plaintiffs Leroy Payton and Kyndra Byrd ("Plaintiffs") brought this class action lawsuit alleging Autumn Ridge Apartments I, LP; The Ferndale Realty Group, LLC; The Ferndale Property Management Group, LLC; and Alon Z. Yonatan ("Defendants") violated the Illinois' Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq.* Specifically, Plaintiffs alleged that through the use of a fingerprint-scanning timeclock, Defendants collected biometric identifiers and/or biometric information as defined by BIPA from their employees without complying with BIPA's requirements regarding retention and destruction policies, without providing the requisite notice and obtaining informed consent prior to the collection or dissemination of the biometric data, and by failing to adequately safeguard the biometric data. *See, e.g.,* First Amended Complaint at ¶¶ 19-26.

The Plaintiffs sought relief on behalf of themselves and a class of individuals in the form of injunctive relief, statutory damages, and attorneys' fees and costs, as well as certification of a class. *Id.* at ¶ 81. The putative class was defined as:

> All persons in the United States who are or were employed by any Defendant in Illinois, and whose fingerprints are or were collected, captured, or otherwise obtained by any Defendant, at any time from five years before the date of Plaintiff's original complaint to the date the class is certified.

Id. at ¶ 49.

The Parties reached a Settlement and the Court entered an order preliminarily approving the Settlement on December 29, 2022. Under the terms of the Settlement, Defendants or their insurers will create a cash fund consisting of $135,000, or just under $900 for each of the 150 class members on a gross basis. The fund will be used to pay administration costs, and, if

approved by the Court, incentive awards to the named Plaintiffs and attorney's fees and costs. The balance of the fund will then be distributed *pro rata* to each class member, without the need to file a claim form. Total recovery per class member will be just over $503. If any checks sent to class members remain uncashed after 90 days, those checks will be void and those funds will revert to Defendants or their designees.

This amount is in the top tier of settlements in leading employment BIPA class actions that, like this one, send checks directly to all class members. *E.g.*, *Torres v. Phoenix Converting, Inc.,* 2021-CH-00083 (Cir. Ct. Cook Cnty.) (fund constituting $1,100 per person with direct checks sent to all class members for approximately $525.00); *Brown v. Moran Foods, LLC*, 2019-CH-02576 (Cir. Ct. Cook Cnty.) (fund constituting $1,100 per person with direct checks sent to all class members for approximately $625.00); *Edmond v. DPI Specialty Foods*, 2018-CH-09573 (Cir. Ct. Cook Cty.) (fund constituting $1,000 per person with direct checks sent to all class members for $604.65); *Watts v. Aurora Chicago Lakeshore Hosp. LLC*, 2017-CH-12756 (Cir. Ct. Cook Cty.) (fund constituting $1,000 per person with direct checks sent to all class members for $612.13). This settlement—which provides a substantial, direct check to the entire class—is an excellent example of BIPA employer settlements that provide superior relief to the class.

Class Counsel and the Class Representatives have devoted significant time and effort over the last 21 months on behalf of the Settlement Class Members' claims, and their efforts have yielded an outstanding benefit to the Class. With this Motion, Class Counsel request a fee and expense award of $40,500 – 30% of the total Settlement Fund obtained for the Settlement Class and Incentive Awards of $5,000 for each of the two Class Representatives, as provided for in the Settlement Agreement. Defendant has agreed to not challenge either the fee request up to this amount nor the incentive awards.

The requested attorneys' fees, costs and Incentive Awards are amply justified in light of the investment, significant risks, and excellent results obtained for the Settlement Class Members, particularly given the continued uncertainty over the state of BIPA litigation; are consistent with Illinois law and fee awards and incentive awards granted in other cases in Illinois courts, including other BIPA class actions; and warrant Court approval.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. ILLINOIS' BIOMETRIC INFORMATION PRIVACY ACT

When first enacted in 2008, BIPA was unique in the Nation—both for its prescience in identifying the inevitable increase in the use (and potential for abuse) of biometric technology as well as its strict requirements for private companies that chose to implement such technology. Recognizing the "very serious need" to protect Illinois citizens' biometric data—which includes retina scans, fingerprints, voiceprints, and scans of hand or face geometry—the Illinois legislature unanimously passed BIPA in 2008 to provide individuals recourse when companies fail to appropriately handle their biometric data in accordance with the statute. 740 ILCS 14/5. Thus, BIPA makes it unlawful for any private entity to "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:

> (1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored;
>
> (2) informs the subject . . . in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information . . . ."

740 ILCS 14/15(b). This is the "informed consent regime," that the Seventh Circuit has described as the "heart of BIPA." *Bryant v. Compass Grp. USA, Inc.,* 958 F.3d 617 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (June 30, 2020) (describing the Illinois Supreme Court's decision *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186).

BIPA also establishes standards for how private companies must handle Illinois consumers' biometric identifiers and biometric information. For example, BIPA requires companies to develop and comply with a written policy establishing a retention schedule and guidelines for permanently destroying biometric date. 740 ILCS 14/15(a). BIPA also requires entities in possession of biometric data to store and/or transmit that data using a "reasonable standard of care" in that entity's industry and with the same or greater level of care the entity uses with other confidential and sensitive information. 740 ILCS 14/15(e).

Moreover, to enforce the statute, BIPA provides a civil private right of action and allows for the recovery of statutory damages in the amount of $1,000 for negligent violations—or $5,000 for willful violations—plus costs and reasonable attorneys' fees. 740 ILCS 14/20. The private right of action and the statutory damages are "integral" to the implementation of the Act. *Rosenbach v. Six Flags Ent. Corp*., 2019 IL 123186, ¶ 37.

B. PLAINTIFFS' ALLEGATIONS AND DEFENDANT'S FACE-SCANNING SYSTEM.

Plaintiffs are former employees of a certain Defendant or Defendants and both worked at Defendants' Autumn Ridge Apartments location in or around 2017-2019. First Amended

Complaint at ¶¶ 19-20. According to Plaintiffs, at the start of their employment, Plaintiffs were required to scan their fingerprints into a time clock. *Id.* at ¶ 24. At the beginning and end of each workday, and before and after taking breaks, Plaintiffs aver they were required to clock in and out by having their fingerprints scanned on the same machine. *Id.* at ¶ 26.

Plaintiffs allege that they never received the requisite disclosures nor signed a consent form before having their face scanned in violation of 740 ILCS §14/15(b). *Id.* at ¶ 41. Plaintiffs allege they never received nor were made aware of any policy regarding the retention and destruction of their biometric date, and thus that Defendant(s) failed to create and comply with such a policy in violation of 740 ILCS §14/15(a). *Id.* at ¶ 38. Plaintiffs also allege, on information and belief, that Defendants transmitted their biometric data internally and externally, but failed to obtain written consent to do so in violation of 740 ILCS §14/15(d). *Id.* at ¶¶ 43-44. Finally, Plaintiffs allege, on information and belief, that Defendants did not protect or transmit their biometric data with the requisite level of care in violation of 740 ILCS §14/15(e). *Id.* at ¶ 47.

Defendant(s) denies that biometric identifiers or information was ever obtained by their time clock or that they have engaged in any wrongdoing or violated BIPA in any way.

C. LITIGATION, NEGOTIATION, AND SETTLEMENT.

On April 13, 2021, Plaintiffs filed a class action lawsuit in the Circuit Court of Cook County, Chancery Division, naming Autumn Ridge Apartments I, LP, The Ferndale Realty Group, LLC, and Alon Z. Yonatan as defendants. The case was assigned to Judge Allen P. Walker and captioned *Payton v. Autumn Ridge I, LP*, No. 2021-CH-01769.

On June 3, 2021, the Court granted Plaintiffs leave to amend the complaint to add The Ferndale Property Management Group, LLC as a defendant. Plaintiffs filed their amended

complaint on June 4, 2021. On June 25, 2021, the three original Defendants filed an unopposed motion to stay the case pending the outcome of *Cothron v. White Castle* and *McDonald v. Symphony Bronzeville*.[1] The Court granted the motion and stayed the case.

Subsequently, the Parties began limited informal discovery and started exploring the possibility of settlement. In November 2021, Plaintiffs made an initial class settlement offer. The parties then engaged in several rounds of negotiation over the fund size and terms of the settlement between November 2021 and late August 2022. The Parties signed a preliminary term sheet reflecting the principal terms of the settlement on October 21, 2022. The Parties agreed that, based on a class size of approximately 150 individuals, Defendants or their insurers would create a settlement fund of $135,000.00 from which the costs of administration, Plaintiffs' attorneys' fees, and Plaintiff's incentive awards would be deducted, with the remainder divided *pro rata* between class members with no claims form required. Plaintiffs agreed to limit their fee request to no more than 30% of the full fund amount.

In lieu of injunctive relief, the Defendants have represented that they have either complied with BIPA's informed consent requirements and/or no longer use any biometric time-clock. Further, Defendants represent that they will not transfer or otherwise disseminate such any biometric information or identifiers without informed written consent and will ensure the permanent deletion of any biometric data as required by BIPA.

[1] *McDonald* was subsequently decided on February 3, 2022 and held that an injury under BIPA is not one that "categorically fits within the purview of the" Illinois Worker's Compensation Act, and so is not pre-empted by that Act. *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 50.

Cothron v. White Castle System, Inc., 128004, which will decide the issue of claim accrual, is currently before the Illinois Supreme Court, and was argued on May 17, 2022.

Defendants have provided, *inter alia*, documents regarding the time clock device at issue and an affidavit regarding the class size and method for determining the same.

III. RELIEF TO CLASS MEMBERS

The terms of the Settlement are set forth in the Stipulation of Class Action Settlement, and are briefly summarized here:

A. CLASS DEFINITION.

The Settlement Class includes:

> All persons in the United States whose fingerprint was collected, captured, or otherwise obtained by any Defendant, in Illinois, at any time during the Class Period.

The Class Period is August 11, 2016 through the date of preliminary approval of this Class Settlement.

The following people are excluded from the Class: (1) any judge presiding over the action and their families and staff; (2) Defendants and its owners, officers, directors, parents, subsidiaries, successors, predecessors; (3) Plaintiffs' and Defendants' counsel and their staffs; and (4) all persons who timely elect to exclude themselves from the Settlement Class..

B. SETTLEMENT PAYMENTS.

The Settlement provides that Defendants will satisfy their monetary obligations by paying into a Settlement Fund $135,000.00. Defendants have represented that there are 150 Settlement Class Members. From the Settlement Fund, payment of Settlement Administration Expenses, costs, attorneys' fees and any incentive award will be made. The Settlement Administrator will then distribute the fund *pro rata* directly to Class Members without the need for a claims

process. Assuming the Court grants a Fee and Cost award of $40,500 and two incentive awards of $5000, and with an estimated cost of administration of $9,000, the minimum amount class members will receive is approximately $503.

Any checks not cashed after 90 days will be void and those funds will revert to Defendants.

C. INJUNCTIVE AND PROSPECTIVE RELIEF.

Defendants have stopped using the face-scanning timeclocks at its Illinois locations. The device at issue only stores data locally and none of the data has been transmitted, copied, or otherwise disseminated. Defendants will comply with any and all requirements under BIPA for the destruction and retention of any biometric data that may be in their possession.

IV. ARGUMENT & AUTHORITY

A. THE COURT SHOULD AWARD CLASS COUNSEL'S REQUESTED ATTORNEYS' FEES.

1. The Percentage-of-the-Fund Method Should be Used Instead of the Lodestar

Pursuant to the Settlement, Class Counsel seek attorneys' fees and expenses in the amount of $40,500, which amounts to 30% of the Settlement Fund. Such a request is well within the range of fees approved in other class actions and is fair and reasonable in light of the work performed by Class Counsel and the outstanding recovery secured on behalf of the Settlement Class Members.

Attorneys who, by their efforts, create a common fund for the benefit of a class, are entitled to reasonable compensation for their services. *See Wendling v. S. Ill. Hosp. Servs*., 242 Ill. 2d 261, 265 (2011) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)) ("a litigant or a

lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.").

In cases where, as here, a class action settlement results in the creation of a settlement fund, "[t]he Illinois Supreme Court has adopted the approach taken by the majority of Federal courts on the issue of attorney fees[.]" *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13 (1st Dist. 1992) (citing *Fiorito v. Jones*, 72 Ill.2d 73 (1978)). That is, where "an equitable fund has been created, attorneys for the successful plaintiff may directly petition the court for the reasonable value of those of their services which benefited the class." *Id*. at 14 (citing *Fiorito*, 72 Ill.2d 73). This rule "is based on the equitable notion that those who have benefited from litigation should share in its costs." *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) (citing *Skelton v. Gen. Motors Corp*., 860 F.2d 250 (7th Cir. 1988)).

In deciding an appropriate fee in such cases, "a trial judge has discretionary authority to choose a percentage[-of-the-recovery] or a lodestar method[.]" *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d 235 (1995)). Under the percentage-of-the-recovery approach, the attorneys' fees awarded are "based upon a percentage of the amount recovered on behalf of the plaintiff class." *Brundidge*, 168 Ill. 2d at 238. Under the lodestar approach, the attorneys' fees to be awarded are calculated by determining the total amount of hours spent by counsel in order to secure the relief obtained for the class at a reasonable hourly rate, multiplied by a "weighted" "risk multiplier" that takes into account various factors such as "the contingency nature of the proceeding, the complexity of the litigation, and the benefits that were conferred upon the class members." *Id.* at 240.

Here, Plaintiffs submits that the Court should apply the percentage-of-the-recovery approach—the approach used in the vast majority of common fund class actions, including BIPA class actions. It is settled law in Illinois that the Court need not employ the lodestar method in assessing a fee petition. *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59. This is because the lodestar method is disfavored, as it not only adds needless work for the Court and its staff, it misaligns the interests of Class Counsel and the Settlement Class Members. 5 Newberg on Class Actions (5th ed.) § 15:65 ("Under the percentage method, counsel have an interest in generating as large a recovery for the class as possible, as their fee increases with the class's take. By contrast, when class counsel's fee is set by an hourly rate, the lawyers have an incentive to run up as many hours as possible in the litigation so as to ensure a hefty fee, even if the additional hours are not serving the clients' interests in any way").

The lodestar method has been long criticized by Illinois courts as "increas[ing] the workload of an already overtaxed judicial system . . . creat[ing] a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law . . . le[ading] to abuses such as lawyers billing excessive hours … not provid[ing] the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered . . . [and being] confusing and unpredictable in its administration." *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 923 (1st Dist. 1995).

Conversely, the use of the percentage-of-the-recovery approach in common fund class settlements flows from, and is supported by, the fact that the percentage-of-the-fund approach promotes early resolution of the matter, as it disincentivizes protracted litigation driven solely by counsel's efforts to increase their lodestar. *Brundidge*, 168 Ill.2d at 242. For this reason, a percentage-of-the-fund method best aligns the interests of the class and its counsel, as class

counsel are encouraged to seek the greatest amount of relief possible for the class rather than simply seeking the greatest possible amount of attorney time regardless of the ultimate recovery obtained for the class. Applying a percentage-of-the-recovery approach is also generally more appropriate in cases like this one because it best reflects the fair market price for the legal services provided by the class counsel. *See Ryan*, 274 Ill. App. 3d at 923 (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases") (citing *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237 (3d. Cir. 1985); *Sutton*, 504 F.3d at 693 (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered).

This approach also accurately reflects the contingent nature of the fees negotiated between Class Counsel and Plaintiffs, who agreed ex ante that up to 40% of any settlement fund plus reimbursement of costs and expenses would represent a fair award of attorneys' fees from a fund recovered for the Class. (Ex. A, Drew Dec. at ¶ 15); *see also In re Capital One Tel. Consumer Prot. Act Litig*., 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (applying the percentage-of-the-recovery approach and noting that class members would typically negotiate fee arrangement based on percentage method rather than lodestar).

Class Counsel are not aware of any BIPA class action settlements involving a monetary common settlement fund where a court relied on the lodestar method to determine attorneys' fees. In fact, to Class Counsel's knowledge, the percentage-of-the-recovery method has been used to determine a reasonable fee award in every BIPA class action settlement in the Circuit Court of Cook County (where the majority of BIPA class actions are pending) where the defendant – as here – created a monetary common fund. *See, e.g Collier, et. al. v. Pete's Fresh*

Market 2526 Corporation, et. al., No. 2019CH-05125 (Cir. Ct. Cook Cty., Ill. Dec. 8, 2020); *Glynn v. eDriving, LLC*, 2019-CH-08517 (Cir. Ct. Cook Cnty., Ill. Dec. 14, 2020); *Kusinski v. ADP, LLC,* 2017-CH-12364 (Cir. Ct. Cook Cnty., Ill. Feb. 10, 2021); *Draland v. Timeclock Plus, LLC*, No. 2019-CH-12769 (Cir. Ct. Cook Cnty., Ill. Apr. 8, 2021); *Rogers v. CSX Intermodal Terminal, Inc.*, No. 19-CH-04168 (Cir. Ct. Cook Cnty., Ill. May 13, 2021); *Freeman-McKee v. Alliance Ground Int'l, LLC*, 2017-CH-13636 (Cir. Ct. Cook County, Ill. June 15, 2021); *Salkauskaite v. Sephora USA, Inc*., 2018-CH-14379 (Cir. Ct. Cook County, Ill. June 23, 2021); *Gonzalez v. Silva Int'l, Inc*., 2020-CH-03514 (Cir. Ct. Cook County, Ill. June 24, 2021).

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

2. Class Counsel's Requested Fees Are Reasonable Under the Percentage-Of-The-Recovery Method of Calculating Attorneys' Fees.

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

a. The requested attorneys' fees of 30% of the settlement fund is in the range found in similar cases.

The requested fee award of $40,500 represents 30% of the Settlement Fund. As an absolute dollar amount, the requested fees are dwarfed by nearly every other award due to the small class size here (and thus smaller common fund size). While the amount of work certainly scales with the size of the class, there is nonetheless a baseline of required hours and costs no matter the size of the class. Regardless, this percentage is well within the range of attorneys' fee awards that courts, including numerous judges within the Circuit Court of Cook County, have found reasonable in other class action settlements. In fact, fee awards of 35% or higher – including multiple 40% fee awards – have been recently awarded in numerous BIPA class action settlements in the Circuit Court of Cook County. *See, e.g., Zepeda v. Kimpton Hotel & Restaurant Group, LLC et al*., No. 18-CH-02140 (Cir. Ct. Cook Cnty. 2018) (attorneys' fee award of 40% of settlement fund in BIPA class settlement); *Zhirovetskiy v. Zayo Group, LLC*, No. 17-CH09323 (Cir. Ct. Cook Cnty., Ill., 2019) (same); *McGee v. LSC Commc's*, 17-CH-12818 (Cir. Ct. Cook Cnty., Ill. 2019) (same); *Smith v. Pineapple Hospitality Grp.*, No. 18-CH-06589 (Cir. Ct. Cook Cnty., Ill. 2020) (same); *Prelipceanu v. Jumio Corp.*, No. 18-CH-15883 (Cir. Ct. Cook Cnty. Ill. 2020) (same); *Freeman-McKee v. Alliance Ground Int'l, LLC*, No. 17-CH-13636 (Cir. Ct. Cook Cnty., Ill. 2021) (same); *Knobloch v. ABC Financial Services, LLC et al*., No. 17-CH-12266 (Cir. Ct. Cook Cnty., Ill. 2021); *see also, e.g., Rogers v. CSX Intermodal Terminals, Inc*., 19-CH04168 (Cir. Ct. Cook Cnty. 2021) (attorneys' fee award of 38% of settlement fund in BIPA class settlement); *Gonzalez v. Silva Int'l, Inc.*, 20-CH-03514 (Cir. Ct. Cook Cnty., Ill. 2021) (attorneys' fee award of 35% of settlement fund in BIPA class settlement); *Draland v. Timeclock Plus, LLC*, No. 2019-CH-12769 (Cir. Ct. Cook County, Ill. 2021) (same);

Williams v. Swissport USA, Inc., No. 19-CH-00973 (Cir. Ct. Cook County, Ill. 2020) (same); *Glynn v. eDriving, LLC*, No. 2019-CH-08517 (Cir. Ct. Cook County, Ill. 2020) (same); *see also,* Herbert Newberg & Alba Conte, Newberg on Class Actions § 15.83 (William B. Rubenstein ed.; 5th ed.) (noting that fifty percent of the fund appears to be an approximate upper limit on fees and expenses).

Thus, Plaintiff's request of 30% of the Settlement Fund, $40,500, is well within the range of attorneys' fees recently approved by courts in this Circuit as reasonable in BIPA class action settlements, and in fact slightly lower than each of them.

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

The Settlement in this case also represents an excellent result for the Settlement Class given that Defendant has expressed a firm denial of Plaintiffs' material allegations and has raised several defenses, including: that the information and data collected by Defendant does not constitute biometric identifiers or biometric information under BIPA; and that Plaintiffs and a significant number of the Settlement Class Members' claims are barred by the applicable statute of limitations. Any of these defenses, if successful, would likely result in Plaintiff and a substantial majority or all of the proposed Settlement Class Members receiving no payment whatsoever.

Illustrating the potential for disagreement as to the appropriate statute of limitations, the Illinois Supreme Court took up an appeal of the First District Appellate Court's decision in *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563, ¶ 35 (5-year period applies to §§ 15(a), (b), and (e); 1-year period applies to §§ 15(c) and (d)). If the State Supreme Court were to rule that a one-year limitations period applies to *all* claims, Plaintiffs and many of the Settlement

Class Members could recover nothing. Moreover, Defendants intended to challenge Plaintiffs' assertion that Defendants' timeclocks collected *any* biometric data at all, which would likely necessitate highly technical and expensive expert discovery. If Defendants were to prevail on this point, Plaintiffs and the Settlement Class Members would recover nothing.

Even absent the risk posed to Plaintiffs' and the Settlement Class Members' claims by the pending *Tims* appeal, this Settlement obviates the need for the time, expense, and motion practice required to resolve Plaintiff's individual claims as well as the significant resources that would be expended through dispositive motion briefing, targeted class discovery, and adversarial class certification briefing.

In the face of these obstacles and unknowns, Class Counsel succeeded in negotiating and securing a settlement on behalf of Settlement Class defined according to a five-year statute of limitations, which creates a $135,000 Settlement Fund for 150 Class Members and does not require any claim forms – checks will be mailed directly to Class Members.

c. The substantial monetary relief obtained on behalf of the Settlement Class Members further justifies the requested percentage of attorneys' fees.

Despite the significant risks inherent in any further litigation, Class Counsel were able to obtain a Settlement Fund of $135,000 for the Settlement Class of 150 individuals – Members will receive a check for just over $500, without having to send in any claim form.

Given the significant monetary compensation obtained for the Settlement Class Members, an attorneys' fee award of 30% of the Settlement Fund plus expenses 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]." *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59. Moreover, the $40,500 requested *includes* all litigation expenses as well.

B. THE INCENTIVE AWARD FOR PLAINTIFFS IS REASONABLE AND SHOULD BE APPROVED.

The Settlement Agreement also provides for an Incentive Award of $5,000 to each Plaintiff, Leroy Payton and Kyndra Byrd, for serving as the class representatives and agreeing to prosecute this action in their own name despite the risk and stigma associated with commencing a lawsuit in the employment context, which includes inherent reputational risks vis-à-vis current and future employers and coworkers. *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 600–01 (N.D. Ill. 2011) (noting that class representatives open themselves to "scrutiny and attention" by adding their name to public lawsuits, which, in and of itself, "is certainly worthy of some type of remuneration"). Because a named plaintiff is essential to any class action, "[i]ncentive awards are justified when necessary to induce individuals to become named representatives." *Spano v. Boeing Co*., No. 06cv-743, 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016) (approving incentive awards of $25,000 and $10,000 for class representatives) (internal citation omitted); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486 (1st Dist. 1992) (noting that incentive awards "are not atypical in class action cases . . . and serve to encourage the filing of class actions suits.").

Here, both Plaintiffs' efforts and participation in prosecuting this case justify the $5,000 Incentive Awards sought. Even though no award of any sort was promised to Plaintiffs prior to the commencement of the litigation or any time thereafter, Plaintiffs nonetheless contributed their time and effort in pursuing their own BIPA claims and served as representatives on behalf of the Settlement Class Members, exhibiting a willingness to participate and undertake the

responsibilities and risks attendant with bringing a representative action. (Drew Dec. at ¶¶ 16–19). Plaintiffs participated in the initial investigation of their claims and provided documents and information to Class Counsel to aid in preparing the initial pleadings, reviewed the pleadings prior to filing, consulted with Class Counsel on numerous occasions, and provided feedback on various filings including, most importantly, the Settlement Agreement. *Id.* Both Plaintiffs made themselves readily available for numerous phone calls to discuss the case and responded promptly to requests to review and sign documents. Were it not for Plaintiffs' willingness to bring this action on a class-wide basis and their efforts and contributions to the litigation up through settlement, the substantial benefit to the Settlement Class Members afforded under the Settlement Agreement would not exist. *Id.* at ¶ 18.

Numerous courts that have granted final approval in similar class action settlements have awarded the same or significantly higher incentive awards than the $5,000 award per representative sought here. *See, e.g., Gonzalez v. Silva Int'l, Inc*., No. 2020-CH-03514 (June 24, 2021 Final Order and Judgment, ¶ 19 (awarding $10,000 incentive award in BIPA class action); *Rogers v. CSX Intermodal Terminals, Inc.*, No. 2019-CH-04168, May 13, 2021 Final Order and Judgment, ¶ 21 (awarding $15,000 incentive award in BIPA class action); *Glynn v. eDriving, LLC*, No. 2019-CH-08517, Dec. 11, 2020 Final Order and Judgment, ¶ 20 (same); *Williams v. Swissport USA Inc.*, 2019-CH-00973, Final Order and Judgment, ¶ 19 (same); *Zhirovetskiy*, No. 2017-CH-09323, April 18, 2019 Final Order and Judgment, ¶ 20 (awarding $10,000 incentive award in BIPA class action); *Seal v. RCN Telecom Services, LLC,* 2016-CH-07033, February 24, 2017 Final Order and Judgment, ¶ 20 (Cir. Ct. Cook Cnty., Ill.) (awarding $10,000 incentive awards to each of two named plaintiffs); *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2017 WL 1369741, at *10 (N.D. Ill. Apr. 10, 2017) (awarding $10,000 to each class

representative); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) (awarding $25,000 incentive award). Accordingly, an Incentive Award of $5,000 for each of the two named Plaintiffs is well justified by the time and effort they have expended in this case and should be approved.

V. CONCLUSION

For the foregoing reasons, Plaintiffs Leroy Payton and Kyndra Byrd, and Class Counsel respectfully request that this Court enter an order:

(i) approving an award of attorneys' fees and expenses of $40,500;

(ii) approving Incentive Awards in the amount of $5,000 to each Class Representative in recognition of their significant efforts on behalf of the Settlement Class Members, and;

(iii) any other relief the Court finds proper or necessary.

Submitted: January 23, 2023

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