IN THE CIRCUIT COURT OF WILLIAMSON COUNTY, ILLINOIS
FIRST JUDICIAL CIRCUIT

STEPHANIE SAHLIN, individually and on behalf of all others similarly situated, Plaintiff, v. HOSPITAL HOUSEKEEPING SYSTEMS, LLC, Defendant.	Case No. 2021L28 The Honorable Jeffrey Goffinet

MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND INCENTIVE AWARD

Dated: July 9, 2021

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In this putative class action, Plaintiff Stephanie Sahlin ("Plaintiff") alleges that Defendant Hospital Housekeeping Systems, LLC ("HHS" or "Defendant") violated Illinois' Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/15(a) and 14/15(b) by requiring her and its other Illinois employees to "clock" in and out using their fingerprints. After a full-day mediation with The Honorable Wayne R. Andersen (Ret.) of JAMS Chicago, the Parties reached a settlement ("Settlement" or "Agreement") – which this Court preliminarily approved on May 21, 2021 – that provides each Active HHS Employee with an automatic $950 payment and provides each Former HHS Employee with the opportunity to file a claim to receive a $950 payment. In all, the Settlement establishes an all-cash, settlement fund of up to $801,800 that Defendant has agreed to make available for the benefit of the Settlement Class. The settlement fund will be used to pay all cash-awards to Settlement Class Members, notice and administration costs, an incentive award to Plaintiff, and attorneys' fees, costs, and expenses to Class Counsel. The Settlement also provides meaningful prospective relief, as HHS has represented that it is no longer using "biometric" time clocks in Illinois and agreed that if it reinstates them in Illinois, it will provide all notices and consents as required by BIPA.

Critically, the Settlement was reached despite substantial risk of non-recovery. Indeed, just a few weeks before the mediation, the Illinois Supreme Court agreed to hear *McDonald v. Symphony Bronzville Park, LLC*, Case No. 12651, which will determine whether the Illinois Workers' Compensation Act and its exclusivity provisions bar claims for statutory damages under BIPA. *McDonald* has not been decided yet, but an adverse decision could have deprived the Settlement Class of any recovery whatsoever. Furthermore, also pending at the time of mediation were *Tims v. Black Horse Carriers, Inc.*, Case No. 1-28-0563 (IL App. Ct. 1st Dist.) and *Marion v. Ring Container Technologies, LLC*, Case No. 3-20-0184 (IL App. Ct. 3d Dist.).

Both *Tims* and *Marion* will decide whether a one-, two-, or five-year statute of limitations applies to BIPA claims. *Tims* and *Marion* have also not yet been decided, but an adverse decision in either could have deprived a substantial portion of the Settlement Class of any recovery whatsoever.

In sum, Class Counsel reached an excellent result for the Settlement Class despite a substantial risk of non-recovery. In light of this excellent result, Plaintiff and Class Counsel respectfully request that the Court approve an incentive award of $5,000 to Plaintiff and an award of attorneys' fees, costs, and expenses equal to 37.5% of the settlement fund (or $300,675.00). As detailed below, the requested attorneys' fees, costs, and expenses are appropriate under governing Illinois law, consistent with the percentages of funds awarded in prior similar settlements in Illinois, and constitutes fair compensation to Class Counsel for achieving an excellent result.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff initially filed her Class Action Complaint November 30, 2020, in the Circuit Court of Williamson County, Illinois, First Judicial Circuit, alleging that Defendant utilizes biometric timekeeping devices and that those working at its facilities in Illinois used the devices when clocking into and out of work. Plaintiff brought causes of action alleging that Defendant failed to comply with BIPA by: (1) failing to inform individuals in writing that it will be capturing, collecting, storing, using, and disclosing biometric data (*i.e.*, statutorily-defined biometric identifiers and/or information) prior to doing so; (2) failing to inform individuals in writing of the specific purpose and length of time for which biometric data is collected or captured; (3) failing to obtain a written release for the capture of biometric data prior to such collection or capture; and (4) failing to publish or adhere to a publicly available retention schedule and guidelines for permanently destroying biometric data. *See* Declaration of Philip L.

Fraietta ("Fraietta Decl.") ¶ 4. On January 8, 2021, HHS filed a notice of removal and removed the case to the United States District Court for the Southern District of Illinois. *Id.* ¶ 5.

From the outset of the case, the Parties engaged in settlement discussions and to that end, agreed to participate in a private mediation with Judge Andersen before HHS formally answered the Complaint. *Id.* ¶ 6. In preparation for the mediation, the Parties exchanged informal discovery, including the size of the putative class, a breakdown of which of those putative class members are Active HHS Employees versus Former HHS Employees, and the workings of the biometric timeclock at issue. *Id.* ¶ 7. The Parties also exchanged detailed mediation statements, airing their respective legal arguments. *Id.* ¶ 8. On February 25, 2021, the Parties participated in a full-day mediation with Judge Andersen. *Id.* ¶ 10. At the conclusion of the mediation session, the Parties agreed on all material terms of a class action settlement, and in the coming days executed a term sheet confirming the same. *Id.*

On March 8, 2021, Plaintiff dismissed the federal action and re-filed her case in this Court.[1] *Id.* ¶ 11. Thereafter the parties drafted and executed the Settlement Agreement and related documents. *Id.* ¶ 12. The Court preliminarily approved the Settlement on May 21, 2021. *Id.* ¶ 13, Ex. B.

SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the class by delivering immediate cash to approximately 844 individuals who worked or are currently working for HHS in Illinois and had their Biometric Identifiers and/or Biometric information collected, captured, received, or otherwise obtained or disclosed by HHS or its agent(s) between November 30, 2015 and

[1] The Parties agreed to process their class action settlement in the Circuit Court of Williamson County due to potential Article III standing issues concerning Plaintiff's claims under Section 15(a) of the BIPA in federal court. *See Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 619 (7th Cir. 2020) (holding that there is no Article III standing for a Section 15(a) claim that alleges the failure to publicly disclose a retention and destruction policy for biometric data).

November 30, 2020. *Id.* ¶ 14. The Settlement establishes an all-cash, settlement fund of up to $801,800, from which class members who are active HHS employees will automatically receive a $950 payment. *Id.* ¶¶ 14-15. Class members who are former HHS employees may file a claim to receive a $950 payment. *Id.* ¶ 16. Moreover, as part of the Settlement, HHS has represented that it is no longer using "biometric" time clocks in Illinois and has agreed that should it reinstate them in Illinois, it will provide all notices and consents are required by BIPA. *Id.* ¶ 17.

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES, COSTS, AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

"Illinois follows the 'American Rule,' which provides that absent statutory authority or a contractual agreement, each party must bear its own attorney fees and costs." *McNiff v. Mazda Motor of Am., Inc.*, 384 Ill. App. 3d 401, 405 (4th Dist. 2008) (quoting *Negro Nest, L.L.C. v. Mid-Northern Mgmt., Inc.*, 362 Ill. App. 3d 640, 641 – 2 (4th Dist. 2005)) (quotations omitted). "If a statute or contractual agreement expressly authorizes an award of attorney fees, the court may award fees 'so long as they are reasonable.'" *Id.* (citing and quoting *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 405 (1st Dist. 2007)). Here, the Parties have entered into a contractual agreement – the Settlement Agreement – expressly authorizing an award of attorney fees, costs, and expenses up to $300,675.[2] Settlement Agreement ¶ 8.1.

[2] *See* William B. Rubenstein, 5 NEWBERG ON CLASS ACTIONS § 15:12 (5th ed. 2019) (parties to suit may have private agreements concerning fees which may include agreement between class counsel and defendant whereby defendant agrees to pay a certain fee requested by class counsel); *see also Evans v. Jeff D.*, 475 U.S. 717, 738 n.30 (1986) (parties may simultaneously negotiate a "defendant's liability on the merits and his liability for his opponents' attorney's fees"); *In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App'x 53, 60 (3d Cir. 2014) (awarding $500,000 in fees for injunctive class settlement where defendant agreed to change its misleading labels); *Wing v. Asacro Inc.*, 114 F.3d 986, 988 (9th Cir. 1997) ("At the outset, we note that the fee dispute in this case arises [not from a statute or common fund, but] out of a contract: in the Settlement Agreement, Asacro agreed to pay the reasonable attorney fees and expenses as determined and awarded by the court."); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 523 (1st Cir. 1991) (holding that when parties to class actions have reached a "clear sailing" fee-shifting agreement as part of settlement, trial court may determine and award reasonable fees "even where no fee-shifting statute of common law exception thrives"); *Browne v. Am. Honda*

A. The Court Should Apply The Percentage-of-the-Fund Method In This Case

"When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 244 (1995). "The decision to award fees based on the lodestar or percentage method is a matter within the sound discretion of the trial court, considering the particular facts and circumstances of each case." *Id.* However, the Court is not required to perform a lodestar cross-check on Class Counsel's fees. *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.,* 2016 IL App (2d) 150236, ¶ 58, 52 N.E.3d 427, 441 (citing *Brundidge,* 168 Ill.2d at 246) (rejecting an objector's argument that the trial court was required to perform a lodestar cross-check on class counsel's fees and awarding class counsel fees totaling 33% of the common fund, or $7,600,000); *Perez v. Rash Curtis & Associates*, 2020 WL 1904533, at *18 (N.D. Cal. Apr. 17, 2020) ("Generally, a district court is 'not required' to conduct a lodestar cross-check to assess the reasonableness of a fee award."). Indeed, the "[p]ercentage analysis approach eliminates the need for additional major litigation and further taxing of scarce judicial resources." *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 924–25 (1st Dist. 1995). "Accordingly, most federal circuits…have abandoned the lodestar in favor of a percentage fee in common fund cases." *Id.*

In "choosing between the percentage and lodestar approaches," courts "look to the calculation method most commonly used in the marketplace at the time such a negotiation would

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Motor Co., Inc., No. CV 09-06750 (C.D. Cal. Oct. 10, 2010) ("A settlement agreement is a binding contract" and "contractual provisions providing for the payment of attorneys' fees . . . provide a basis for awarding fees."); *In re TJX Cos. Retail Secs. Breach Litig.*, 584 F. Supp. 2d 395, 399 (D. Mass. 2008) (noting that basis for awarding fees was "part of the Agreement, [in which Defendant] agreed to pay court-approved attorneys' fees not to exceed $6,500,000"); *Deloach v. Philip Morris Cos.*, 2003 WL 2304907, at *4 n.2 (M.D.N.C. Dec. 19, 2003) ("the present petition [for attorney fees] was brought pursuant to a private [settlement] agreement among the parties") (citation omitted); *Neel v. Strong*, 114 S.W.3d 272, 273 (Mo. Ct. App. 2003) ("As part of the settlement, the Attorney General and the tobacco companies agreed that the tobacco companies would pay the fees of the outside counsel.").

have occurred." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-01 (N.D. Ill. 2015) (citing *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998)); *see also McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 814-15 (E.D. Wis. 2009). In class action litigation, where "the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery," *Kolinek*, 311 F.R.D. at 500-01, state and federal courts in Illinois and throughout the country are in near unanimous agreement that the percentage-of-the-fund approach best yields the fair market price for the services provided by counsel to the class. *See Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 2006) ("When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the 'market rate.'"); *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 923 (1st Dist. 1995) (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases") (citation omitted); *In re Continental Illinois Securities Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (market for legal services paid on a contingency basis shows the proper percentage to apply in a class action that creates a common fund for the benefit of the class)); *Williams v. Gen. Elec. Capital Auto Lease*, 94 C 7410, 1995 WL 765266, *9 (N.D. Ill. Dec. 26, 1995) (noting that "[t]he approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred upon the class"); *see also, e.g., Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (explaining that where "a class suit produces a fund for the class," as is the case here, "it is commonplace to award the lawyers for the class a percentage of the fund," and affirming fee award of 38% of $20 million recovery to class) (citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)); *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); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d

781, 794 (N.D. Ill. 2015) ("[T]he court agrees with Class Counsel that the fee award . . . should be calculated as a percentage of the money recovered for the class.").

This Court should likewise apply the percentage-of-the-fund method. The percentage-of-the-fund method best replicates the *ex ante* market value of the services that Class Counsel provided to the Settlement Class. It is not just the typical method used in contingency-fee cases generally, *see Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998), but it is also the means by which an informed Settlement Class and Class Counsel would have established counsel's fee *ex ante*, at the outset of the litigation. *See Kolinek*, 311 F.R.D. at 500-01 ("[T]he normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery"). The percentage-of-the-fund method also better aligns Class Counsel's interests with those of the Settlement Class because it bases the fee on the results the lawyers achieve for their clients rather than on the number of motions they file, documents they review, or hours they work, and it avoids some of the problems the lodestar-times-multiplier method can foster (such as encouraging counsel to delay resolution of the case when an early resolution may be in their clients' best interests). *Brundidge*, 168 Ill.2d at 242; *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *In re Synthroid Mktg. Litig.*, 264 F.3d 712 at 720-21 (7th Cir. 2001).[3] And it is also simpler to apply. *Id.*; *see also, e.g., Kolinek*, 311 F.R.D. at 501 (percentage of the ultimate recovery method appropriate for awarding fees in TCPA class action "because fee arrangements based on the lodestar method require plaintiffs to monitor counsel

[3] In this case for example, a lodestar approach would have created a perverse incentive for Class Counsel to reject or delay entering into the Settlement offer set forth in the Settlement Agreement merely to bill more hours through more unnecessary, wasteful, and inefficient litigation—an approach that, had it been adopted by Class Counsel, may have resulted in no recovery for all or some of the Settlement Class Members based on ongoing appeals of potentially dispositive issues in BIPA cases. *See McDonald v. Symphony Bronzville Park, LLC*, Case No. 126511 (IL Sup. Ct.) (whether Worker's Compensation Act preempts employee BIPA claims); *Tims v. Black Horse Carriers, Inc.*, Case No. 1-28-0563 (IL App. Ct. 1st Dist.) (statute of limitations for BIPA); *Marion v. Ring Container Technologies, LLC*, Case No. 3-20-0184 (IL App. Ct. 3d Dist.) (statute of limitations for BIPA).

and ensure that counsel are working efficiently on an hourly basis, something a class of nine million lightly-injured plaintiffs likely would not be interested in doing"); *Ryan*, 274 Ill. App. 3d at 924.

Accordingly, the Court should apply the percentage-of-the-fund method.

B. The Requested Attorneys' Fees, Costs, And Expenses Are Reasonable As A Percentage Of The Class Benefit

In class action settlements, courts typically award attorneys' fees based on a percentage of the total settlement, which includes any litigation expenses incurred. *Brundidge*, 168 Ill. at 238. "[T]he percentage of the fund method…reflects the results achieved." *Id.* at 244; *see Taubenfeld v. AON Corp.,* 415 F.3d 597, 600 (7th Cir. 2005) (approving fees of 33% of total settlement, noting "thirteen cases in the Northern District of Illinois where counsel was awarded fees amounting to 30–39% of the settlement fund").

An award to Class Counsel of 37.5% of the Settlement Fund is well within the range of fees typically awarded to class counsel by Illinois courts in comparable all-cash class action settlements.[4] *See, e.g., Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (citing *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Schulte v. Fifth Third Bank*, 805 F.Supp.2d 560, 599 (N.D. Ill. 2011) (same); *Meyenburg v. Exxon Mobil Corp.*, No. 05-cv-15, U.S. Dist. LEXIS 52962, at *5 (S.D. Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee

[4] The requested award of fees to Class Counsel of 37.5% of the settlement fund is inclusive of $10,617.43 in out-of-pocket litigation expenses incurred in the prosecution of this action to date, not including those that will continue to accrue as the Settlement process continues. Fraietta Decl. ¶ 30; Ex. D. Although typically awarded in addition to the requested fee award, in this case Class Counsel do not seek reimbursement of these expenses on top of the requested Fee Award. *See, e.g., Kaplan v. Houlihan Smith & Co.*, No. 12-cv-5134, U.S. Dist. LEXIS 83936, at *12 (N.D. Ill. June 20, 2014) (awarding expenses "for which a paying client would reimburse its lawyer"); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (detailing and awarding expenses incurred during litigation).

percentages in this legal marketplace for comparable commercial litigation"); *see also, e.g., Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding an attorneys' fees award of one-third of a reversionary fund recovered in light of the "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [the defendant]").

1. The Total Value Of The Settlement Is $801,800

To calculate attorneys' fees based on the percentage of the benefit, the Court must first determine the value of the Settlement Fund. In doing so, the Court must include the value of the benefits conferred to the Class, including any attorneys' fee, expenses, service award and notice and claims administration payments to be made. *See*, *e.g.*, *Brundidge*, 168 Ill.2d at 238. Thus, the Court should consider the *entire benefit* conferred by the Settlement, including the benefit fund, agreed on attorneys' fees, costs, and expenses, cost of notice and claims administration, and the Plaintiff's incentive award, amounting to a total value of $801,800.

Moreover, the Court must not consider the total monetary amount distributed to the Class; rather, the Court should only consider the amount *made available* to the Class. *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 816 (E.D. Wis. 2009) (citing *Boeing Co. v. Van Gemert,* 444 U.S. 472, 480 (1980)) ("The court will similarly base its award of attorneys' fees on the entire common fund amount in the instant case."); *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997) (ruling that a district court abused its discretion in basing attorney fee award on actual distribution to class instead of amount being made available).

2. The Requested 37.5% Of The Settlement Fund Is Reasonable

Here, the requested $300,675 fee, inclusive of costs and expenses, is 37.5% of the $801,800 Settlement Fund generated on behalf of the class, which falls within the range awarded

in class actions by courts throughout the country. As aforementioned, Courts have recognized that fee awards as high as 50% of the gross settlement fund are reasonable. *See* NEWBURG ON CLASS ACTIONS, *supra*, §15:83 (5th ed. Dec. 2016 update) ("Usually, 50 percent of the fund is the upper limit on a reasonable fee award from a common fund, . . . though somewhat larger percentages are not unprecedented."); *Wells v. Allstate Ins. Co.,* 557 F. Supp. 3d 1, 7-8 (D.D.C 2008) (noting that fee awards may range up to 45%, and approving fee request of 45% of the total gross recovery); *In re Ampicillin Antitrust Litig.,* 526 F. Supp. 494, 499 (D.D.C. 1981) (awarding 45% of $7.3 million gross settlement fund as attorneys' fees); *see also Martin v. AmeriPride Servs, Inc.,* 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) ("Other case law surveys suggest that 50% is the upper limit, with 30-50% commonly being awarded in cases in which the common fund is relatively small."). The requested fee of 37.5% of the Settlement Fund is reasonable in light of the substantial monetary relief obtained by Class Counsel here – despite significant risk – and should be awarded.

"When assessing the reasonableness of fees, a trial court may consider a variety of factors, including the nature of the case, the case's novelty and difficulty level, the skill and standing of the attorney, the degree of responsibility required, the usual and customary charges for similar work, and the connection between the litigation and the fees charged." *McNiff,* 384 Ill. App. 3d at 407 (quoting *Richardson v. Haddon*, 375 Ill. App. 3d 312, 314 – 5 (1st Dist. 2007)) (quotations omitted). Here, each of these factors shows the requested fee is reasonable.

a. *Plaintiff's Claims Carried Substantial Litigation Risk*

As detailed above, this case presented substantial litigation risk. *See supra* Introduction. In addition to the typical risks associated with class action litigation, such as certifying a class, this case was likely to rise or fall based on the outcome of appeals in cases pending before the Illinois Supreme Court and First and Third District Courts of Appeals. *See id.*; *see also* Fraietta

Decl. ¶ 20. Nonetheless, despite knowing the risks, Class Counsel took on the case, worked on the case, and even undertook a significant financial risk, with no upfront payment, and no guarantee of payment absent a successful outcome. In addition to attorney time spent on the case, Class Counsel also advanced $10,617.43 in out-of-pocket expenses, again with no guarantee of repayment. Fraietta Decl. ¶ 30, Ex. D. If the case had advanced through class certification, these expenses would have increased many-fold, and Class Counsel would have been required to advance these expenses potentially for several years to litigate this action through judgment and appeals.

Even if the claims survived after the pending appeals are decided, HHS would have contested class certification, and Plaintiff would have faced serious risks even before getting to class certification. HHS most certainly would have sought summary judgment, as well as engaged in extensive and protracted discovery. For example, HHS would have argued that its biometric timeclocks were optional for employees, including Plaintiff, and that the timeclock did not even collect "biometric identifiers" or "biometric information," but rather converted a fingerprint into an algorithm or 9-byte code. Fraietta Decl. ¶ 20. Despite these risks, the Settlement Agreement automatically provides Active HHS Employees with a $950 cash payment and allows Former HHS Employees to file a claim for a $950 cash payment. This is an excellent result, particularly in comparison with other approved BIPA settlements, that were reached prior to the current risky appellate landscape taking shape. *See, e.g.*, *Zepeda v. Intercontinental Hotels Group, Inc.*, No. 2018-CH-02140 (Cir. Ct. Cook Cnty., Ill. 2018) (settlement provided each class member eligible to receive a *pro rata* share of a settlement fund that would amount to approximately $500 per person *before* deductions for administrative expenses, attorneys' fees and costs, and an incentive award); *Sekura v. L.A. Tan Enterprises, Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Cnty., Ill. 2016) (each class member was eligible to receive a *pro rata* share of a

settlement fund that would have amounted to approximately $40 per person if each class member had submitted a valid claim). Indeed, in *Sekura* and *Zepeda*, Class Counsel were awarded a 40% fee despite that class members were expected to receive $40 and $500 per person, respectively, rather than the $950 awards that are available in this case.

b. *The Skill And Standing Of The Attorneys Supports The Requested Fee*

The attorneys handling this case are in good standing in their respective jurisdictions. Class Counsel are well-respected attorneys with significant experience litigating similar class action cases in federal and state courts across the country, including other BIPA cases. Fraietta Decl. ¶¶ 22-25, Ex. C (firm resume of Bursor & Fisher, P.A.). Indeed, Class Counsel has been recognized by courts across the country for their expertise. *See id*; *see also Famular v. Whirlpool Corp.*, 2019 WL 1254882, at *4 (S.D.N.Y. Mar. 19, 2019) ("Class counsel are experienced and qualified class action lawyers. Bursor & Fisher, P.A., has been appointed class counsel in dozens of cases in both federal and state courts, and has won several multi-million dollar verdicts or recoveries.") (internal quotation omitted); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 2014) (Rakoff, J.) ("Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. … The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in [six] class action jury trials since 2008.").

Furthermore, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re MetLife Demutalization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Here, Defendant was represented by the prominent and well-respected law firm of Lewis Brisbois Bisgaard & Smith LLP. Class Counsel achieved an exceptional result in this case while facing well-resourced and experienced defense counsel. *See Marsh ERISA Litig.*, 265 F.R.D. at 148 ("The high quality of defense counsel

opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

c. *The Settlement Was The Result Of Arms'-Length Negotiations Between The Parties After A Significant Exchange Of Information*

This action required considerable skill and experience to bring it to such a successful conclusion. The case required investigation of factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. In taking on this case, Class Counsel undertook the large responsibility of pursuing claims on behalf of a class of employees against their employer and experienced defense counsel. Class Counsel also undertook the large responsibility of funding this case, without any assurance that they would recover those costs. Class Counsel not only took on the obligation to act on behalf of the Plaintiff, but also the class as a whole.

Class Counsel worked with Defendant's Counsel to gather critical information in advance of the mediation, including the size of the putative class, a breakdown of which of those putative class members are Active HHS Employees versus Former HHS Employees, and the workings of the biometric timeclock at issue. Fraietta Decl. ¶ 7. Class Counsel also prepared for and participated in a full-day mediation with Judge Andersen, where, the Parties executed a binding term sheet setting out the material terms of this Settlement Agreement. *Id.* ¶¶ 8, 10. Through the undertaking of a thorough investigation, informal discovery, and substantial arm's-length negotiations, Class Counsel obtained a settlement that provides a real and significant monetary benefit to the Class. Since that time, Class Counsel has moved for preliminary approval, applied for attorneys' fees, and diligently monitored the successful notice program and claims administration process.

Defendant is represented by highly experienced attorneys who have made clear that absent a settlement, they were prepared to continue their vigorous defense of this case and oppose class certification. Even assuming a class was certified, and summary judgment defeated, the case would then have moved on to pretrial briefing, a pretrial conference, and then a jury trial, which would have been costly, time-consuming, and very risky for Class Members and for counsel. Class Counsel undertook this representation understanding that the risk of losing on class certification, or summary judgment, or at trial were significant. But for this settlement, Defendant likely would have moved to dismiss and/or stay the case, resulting in rounds of briefing and a risk of dismissal or substantial delay.

d. *The Usual And Customary Charges For Similar Work*

When Class Counsel undertake major litigation such as this, it necessarily limits their ability to undertake other complex litigation cases. During the course of this litigation, Class Counsel devoted significant time and resources to succeed in this case. To date, Class Counsel incurred out-of-pocket costs and expenses in the amount of $10,617.43 in prosecuting this litigation on behalf of the Class. Fraietta Decl. ¶ 30, Ex. D. Each of these expenses was necessarily and reasonably incurred to bring this case to a successful conclusion, and they reflect market rates for various categories of expenses incurred. *See id*. Class Counsel had to make this commitment at the outset of this case without knowing how long the case would take to resolve, if ever. Therefore, Class Counsel's willingness to prosecute this action on a contingent fee basis and to advance costs diverted the time and resources expended on this action from other cases. *See id.* ¶ 29.

Further, as detailed above, the requested fees, costs, and expenses of 37.5% of the settlement fund is well within the market range. *See supra* cases cited in Argument §§ I.A-B. And, indeed, courts have awarded 40% in fees in similar BIPA settlements where the class

member recoveries were substantially smaller than in this case. *See Sekura v. L.A. Tan Enterprises, Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Cnty., Ill. 2016) (awarding a 40% fee where the BIPA class settlement resulted in each class member being eligible to receive a *pro rata* share of a settlement fund that would have amounted to approximately $40); *Zepeda v. Intercontinental Hotels Group, Inc.*, No. 2018-CH-02140 (Cir. Ct. Cook Cnty., Ill. 2018) (awarding a 40% fee where the settlement provided each class member being eligible to receive a *pro rata* share of a settlement fund that would amount to approximately $500 per person *before* deductions for administrative expenses, attorneys' fees and costs, and an incentive award).

II. THE REQUESTED INCENTIVE AWARD IS REASONABLE AND SHOULD BE APPROVED

An incentive award of $5,000.00 for Plaintiff is appropriate here. "In some cases, the amount requested as an incentive award, given the court's knowledge about the advanced stage of the case or other procedural facts, will be so obviously reasonable that only minimal scrutiny will be required for approval, at least in the absence of any objection from class member." 299 F.R.D. 160 at NACA Guideline 5. Defendant has agreed to pay an incentive award to Plaintiff in the amount of $5,000. Settlement Agreement ¶ 8.3. Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during the course of class action litigation. *See* 299 F.R.D. 160, NACA Guideline 5 (West 2014) ("Consumers who represent an entire class should be compensated reasonably when their efforts are successful and compensation would not present a conflict of interest."); *see also Cook v. Niedert,* 142 F.3d 1004 (7th Cir. 1998) (value of settlement was $ 14 million; incentive award to class representative of $25,000); *see also In re Remeron End-Payor Antitrust Litig*., No. Civ. 02-2007 FSH, 2005 WL 2230314 (D.N.J. Sept. 13, 2005) (value of settlement was $36 million; incentive payments totaling $75,000 for six named plaintiffs). "Many cases note the public

policy reasons for encouraging individuals with small personal stakes to serve as class plaintiffs in meritorious cases." 299 F.R.D. 160, Guideline 5 Discussion (citing cases).

This case is no different. Plaintiff's participation has been instrumental in the prosecution and ultimate settlement of this action. Here, Plaintiff spent substantial time on this action, including by: (i) assisting with the investigation of this action and the drafting of the complaint, (ii) being in contact with counsel frequently, (iii) and staying informed of the status of the action, including settlement. *See* Fraietta Decl. ¶¶ 32-34, Declaration of Stephanie Sahlin ¶¶ 4-10. Moreover, the requested incentive award of $5,000 is consistent with Plaintiff's potential recovery under BIPA. *See* 740 ILCS 14/20(2) (providing recovery of up to $5,000 in a private action).

CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court approve an incentive award to Plaintiff of $5,000 and approve an award of attorneys' fees, costs, and expenses of 37.5% of the Settlement Fund, $300,675 to Class Counsel. The requested awards would both adequately reward and reasonably compensate Class Counsel and Plaintiff for assuming the significant risks that this case presented at the outset and nonetheless expending a substantial amount of time and other resources investigating, litigating, and negotiating a resolution to the case for the benefit of the Settlement Class.

Dated: July 9, 2021

Respectfully submitted,

By: */s/ Carl V. Malmstrom*
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**Pro Hac Vice* Application Forthcoming

Class Counsel