IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

LINDA BLOXOM, *individually and on behalf of all others similarly situated*, Plaintiff, v. HERFF JONES, LLC, Defendant.	Case No. 2:21-cv-02071-CSB-EIL Honorable Colin S. Bruce Magistrate Judge Eric I. Long

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM OF LAW

Dated: August 29, 2023

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MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORADUM OF LAW

Pursuant to Federal Rule of Civil Procedure 23(e), Plaintiff Linda Bloxom hereby moves the court for an Order which: (1) schedules a fairness hearing on the question of whether the proposed class action settlement should be approved as fair, reasonable, and adequate; (2) approves the form and content of the proposed Notice to the Settlement Class; (3) approves the proposed method of requesting exclusion from the Settlement; (4) directs the mailing of the Notice Form by first-class mail to the Settlement Class Members; (5) preliminarily approves the Settlement; (6) preliminarily certifies the Settlement Class for purposes of settlement only; (7) appoints Plaintiff Linda Bloxom as Class Representative; and (8) appoints Philip L. Fraietta, Joseph I. Marchese, and Christopher R. Reilly of Bursor & Fisher, P.A. as Class Counsel. This Motion is based on the Memorandum of Law herein; the Declaration of Philip L. Fraietta ("Fraietta Decl.") and the Exhibits attached thereto, including the Parties' Class Action Settlement Agreement; the pleadings and papers on file in this action; any argument and evidence to be presented at the hearing on this Motion, if any; and any other matters that may properly come before the Court.

INTRODUCTION

In this putative class action, Plaintiff Linda Bloxom ("Plaintiff") alleges that Defendant Herff Jones, LLC, ("Defendant" or "Herff Jones") (together with Plaintiff, the "Parties") violated the Illinois Biometric Information Privacy Act ("BIPA") Sections 740 ILCS 14/15(a) and 14/15(b) by requiring her and its other Illinois workers to "clock in" and "clock out" using their fingerprints and/or hand scans. After extensive negotiations, including a full-day mediation with The Honorable James F. Holderman (Ret.), formerly the Chief Judge of the Northern District of Illinois and now with JAMS Chicago, the Parties have reached a proposed settlement (the

"Settlement" or "Agreement") that creates a Settlement Fund of $645,000 and provides a substantial benefit to the 430 Settlement Class Members. Specifically, every Settlement Class Member who does not exclude him or herself from the Settlement will automatically receive a *pro rata* Cash Award via a direct payment by check, which Proposed Class Counsel estimates will be approximately $950. Additionally, the Settlement also provides meaningful prospective relief, as Defendant acknowledges that it will comply with BIPA for as long as it uses Biometric Data in Illinois and will provide all notices and consent as required by BIPA. If approved, the Settlement will bring certainty, closure, and significant and valuable relief for individuals to what otherwise would likely be contentious and costly litigation regarding Defendant's alleged unlawful collection or capture of individuals' biometric identifiers and/or biometric information.

The Court need not evaluate the Settlement in a vacuum, as it follows—and eclipses—numerous other BIPA settlements that came before it. *See, e.g.*, *Carroll v. Crème de la Crème, Inc.*, 2017-CH-01624 (Cir. Ct. Cook Cnty.) (providing only credit monitoring); *Meegan v. NFI Industries Inc.*, 1:21-cv-00465 (N.D. Ill. Feb. 17, 2023) (paying claimants approximately $570 each); *Burlinski v. Top Golf USA Inc*., 1:19-cv-06700 (N.D. Ill. Oct. 13, 2021) (paying claimants approximately $650 each).

Given the relief proposed by the Settlement, the Court should not hesitate to find that the Settlement is well within the range of possible approval. Accordingly, Plaintiff respectfully requests that the Court preliminarily approve the Settlement so that Settlement Class Members can receive notice of their rights and the claims administration process may begin.

FACTUAL AND PROCEDURAL BACKGROUND

On January 21, 2021, Plaintiff filed a putative class action in the Circuit Court of Douglas County against Defendant. *See* Declaration of Philip L. Fraietta ("Fraietta Decl.") ¶ 4. The material allegations of the Complaint were that Defendant collected or captured—without first

providing notice, obtaining informed written consent or publishing data retention policies—the finger and/or handprints and associated personally identifying information of hundreds of its employees (and former employees), who were required to "clock in" with their fingerprints and/or handprints, in violation of the BIPA, 740 ILCS 14/1 *et seq*. *Id.* On April 2, 2021, Herff Jones removed the Action to the United States District Court for the Central District of Illinois (the "District Court"), where it was assigned Case No. 2:21-cv-02071. *Id.* ¶ 5 (citing ECF No. 1).

On April 9, 2021, Herff Jones filed a motion to stay pending the outcome of several interlocutory appeals on potentially dispositive issues, including the applicable statutes of limitations and whether employee statutory damages claims are preempted by the exclusive remedy provisions of the Illinois Workers' Compensation Act ("IWCA"). *Id.* ¶ 6. On April 27, 2021, the Court granted Herff Jones' motion to stay and directed the Parties to submit status updates within 14 days of decisions of the several interlocutory appeals discussed above. *Id.* ¶ 7. The Parties submitted the first such status update on February 18, 2022, and on February 28, 2022, the Court issued an order continuing the stay. *Id.* ¶ 8. The Parties submitted a second status update on March 3, 2023, and on March 14, 2023, the Court issued an order continuing the stay again. *Id.*

While the case was stayed, the Parties engaged in settlement discussions, and as part of their obligations under Fed. R. Civ. P. 26, engaged in direct communications, which included the informal exchange of relevant information surrounding the alleged claims. *See id.* ¶ 9. Those discussions eventually led to an agreement to mediate with Judge Holderman. *See id.*

On June 13, 2023, the Parties participated in a full-day mediation with the Honorable James F. Holderman (Ret.) of JAMS Chicago. *See id.* ¶ 11. While the Parties participated in the

mediation in good faith, they were unable to reach an agreement to settle the case that day. *See id*. Over the next two weeks, the Parties continued to engage in settlement negotiations and on June 26, 2023, they reached agreement on all material terms of a class action settlement and executed a term sheet. *See id*. ¶ 12. Thereafter, the Parties drafted and executed the Settlement Agreement and related documents, which are submitted herewith. *See id*. ¶ 13.

TERMS OF THE SETTLEMENT

The key terms of the Settlement, attached to the Fraietta Declaration as Exhibit A, are briefly summarized as follows:

A. Class Definition

The "Settlement Class" is defined as:

> [A]ll individuals who worked or are currently working for Defendant in the State of Illinois who had their Biometric Identifiers and/or Biometric Information collected, captured, received, or otherwise obtained or disclosed by Defendant or its agent(s) without first signing a written consent form between January 21, 2016 and the date of the Preliminary Approval Order.

Agreement ¶ 1.33. According to Defendant's records, there are 430 persons in the Settlement Class. *See* Fraietta Decl. ¶ 14.

B. Monetary And Prospective Relief

Defendant will establish a non-reversionary Settlement Fund of up to $645,000 from which each Settlement Class Member who does not exclude him or herself will receive a payment estimated at approximately $950. Agreement ¶¶ 1.35, 2.1(b); Fraietta Decl. ¶ 15. The Settlement Fund will also be used to pay notice and administrative expenses, attorneys' fees, costs, and expenses, and an incentive award to the Class Representatives. Agreement ¶¶ 1.19, 2.1(b).

Additionally, Defendant represents that it has provided and will continue to provide all

notices and consents as required by BIPA. Defendant will continue to comply in good faith with BIPA as long as it uses Biometric Data in Illinois. *Id.* ¶ 2.2(a).

C. Release

In exchange for the relief described above, Defendant and each of its related and affiliated entities as well as all "Released Parties," as defined in ¶ 1.29 of the Settlement, will receive a full release of all claims arising out of or related to biometrics, finger scan data, or BIPA. *See also id.* ¶¶ 1.28-1.30, 3.1-3.2.

D. Notice And Administrative Expenses

The Settlement Fund will be used to pay the cost of sending the Notice set forth in the Agreement and any other notice as required by the Court, as well as all costs of administration of the Settlement. Agreement ¶¶ 1.19-1.20, 1.31-1.32.

E. Service Award

In recognition of her efforts on behalf of the Settlement Class, the Parties have agreed that Plaintiff may receive, subject to Court approval, a service award of up to $5,000 from the Settlement Fund, as appropriate compensation for her time and effort serving as Class Representative and as a party to the Action. *Id.* ¶ 8.3.

F. Attorneys' Fees, Costs, And Expenses

Defendant has agreed that the Settlement Fund may also be used to pay Class Counsel reasonable attorneys' fees and to reimburse costs and expenses in this Action, in an amount to be approved by the Court. *Id.* ¶ 8.1. Class Counsel has agreed – with no consideration from Defendant – to petition the Court for attorneys' fees, unreimbursed costs, and expenses to one-third of the Settlement Fund. *Id.*

ARGUMENT

I. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

Rule 23(e) governs approval of all proposed class action settlements. The procedure for review of a proposed class action settlement is a two-step process—preliminary approval and final approval. *See* Fed. R. Civ. P 23(e). The first step—preliminary approval—is a pre-notification inquiry to determine whether the court "will likely be able to approve the proposal under Rule 23(e)(2)." *Id*. A proposal is approvable if it is sufficiently fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e)(1)(B). Stated otherwise, at this stage the Court only needs to determine whether the proposed settlement is "within the range of possible approval" such that there is "reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Gautreaux v. Pierce*, 690 F.2d 616, 621 & n.3 (7th Cir. 1982). After preliminary approval is granted, class members are notified of the settlement, and the court and the parties proceed to the second and final step of the approval process: the final fairness determination. *See id.* at n.3 ("If the district court finds that a proposed settlement is 'within the range of possible approval,' the next step is the fairness hearing.")

Although "[f]ederal courts naturally favor the settlement of class action litigation," a multi-factor test must be used to determine whether the proposed settlement is likely to be found fair, reasonable, and adequate. *In re AT & T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 345 (N.D. Ill. 2010) (quoting *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996)) (internal quotation marks omitted). Rule 23(e)(2) directs courts to consider whether: (1) the class representative and class counsel have adequately represented the class; (2) the settlement was negotiated at arm's-length; (3) the settlement treats class members equitably relative to each

other; and (4) the relief provided for the class is adequate. *See* Fed. R. Civ. P. 23(e)(2).[1]

An application of these factors to this case demonstrates that the proposed settlement is fair, reasonable, and adequate.

A. Plaintiff And Proposed Class Counsel Have Adequately Represented The Class

The first Rule 23(e)(2) factor considers whether the class representative and class counsel have adequately represented the class. *See* Fed. R. Civ. P. 23(e)(2)(A). In considering this factor, courts are to examine whether plaintiff and class counsel had adequate information to negotiate a class-wide settlement, taking into account (i) the nature and amount of discovery completed, whether formally or informally, and (ii) the "actual outcomes" of other, similar cases. Fed. R. Civ. P. 23(e) Advisory Committee's Note to 2018 amendment. Ultimately, this factor is generally satisfied where the named plaintiff participated in the case diligently, and where class counsel fought hard on behalf of plaintiff and the class throughout the litigation. *See Snyder v. Ocwen Loan Servicing, LLC et al.,* 2019 WL 2103379, at *4 (N.D. Ill. Apr. 14, 2019).

Here, Plaintiff was extensively involved in the case, including helping her attorneys investigate her claims, preparing and reviewing the Class Action Complaint, and conferring with her counsel throughout the litigation, including the settlement process. *See* Fraietta Decl. ¶ 29.

[1] Notably, the factors to be considered under the amended Rule 23 "overlap with the factors previously articulated by the Seventh Circuit, which include: (1) the strength of the plaintiff's case compared to the terms of the settlement; (2) the complexity, length, and expense of continued litigation; (3) the amount of opposition to the settlement; (4) the presence of collusion in gaining a settlement; (5) the stage of the proceedings and the amount of discovery completed." *Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *2 (S.D. Ill. Dec. 16, 2018) (citing *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)); *see also* Fed. R. Civ. P. 23, Advisory Committee's Note to 2018 Amendment ("The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."). For this reason, decisions prior to the amendment can still provide guidance to the Court.

Without Plaintiff's involvement the relief secured for the Settlement Class would not have been possible.

Likewise, proposed Class Counsel performance in this case demonstrates that their representation has been beyond adequate. First, proposed Class Counsel thoroughly investigated the claims and drafted the Class Action Complaint. Proposed Class Counsel also spent months collecting the necessary information and engaging in arm's-length negotiations with Defendant, including a full-day mediation with Judge Holderman, ultimately leading to the Settlement.

Second, the monetary relief achieved by proposed Class Counsel in this Settlement excels in comparison to other BIPA settlements. As detailed above, many BIPA settlements have failed to provide any monetary recovery to class members, have capped the amount class members can recover, or simply have provided far less of a recovery than this one. *See, e.g.*, *See, e.g.*, *Carroll v. Crème de la Crème, Inc.*, 2017-CH-01624 (Cir. Ct. Cook Cnty.) (providing only credit monitoring); *Meegan v. NFI Industries Inc.*, 1:21-cv-00465 (N.D. Ill. Feb. 17, 2023) (paying claimants approximately $570 each); *Burlinski v. Top Golf USA Inc*., 1:19-cv-06700 (N.D. Ill. Oct. 13, 2021) (paying claimants approximately $630). Here each Settlement Class Member who does not exclude him or herself will automatically receive approximately $950, which is an exceptional result. *See* Fraietta Decl. ¶ 15.

Moreover, aside from the monetary relief, the non-monetary benefits also demonstrate Plaintiff's and proposed Class Counsel's superb representation of the class. Specifically, Defendant represents that it has provided and will continue to provide all notices and consents as required by BIPA. Defendant will continue to comply in good faith with BIPA as long as it uses Biometric Data in Illinois. *See* Agreement ¶ 2.2(a).

The result is more impressive when considering the risks presented. Although at the time

of settlement the Illinois Supreme Court had issued its decision in *Cothron v. White Castle System, Inc.*, -- N.E.3d --, 2023 IL 128004 (Feb. 17, 2023), wherein it held that "the plain language of section 15(b) and 15(d) shows that a claim accrues under the Act with every scan or transmission of biometric identifiers or biometric information without prior informed consent," that decision was issued over three dissents, and a petition to rehear was pending at the time of settlement, which was the basis for the Court's March 14, 2023 Order continuing the stay. *Id.* ¶ 45; 3/14/23 Text Order. An adverse decision in *Cothron* would have limited the class and the potential damages available.

Additionally, *Cothron* noted that "[i]t also appears that the General Assembly chose to make damages discretionary rather than mandatory under the Act." *Cothron*, 2023 IL 128004, ¶ 42. That presented a risk that even had Plaintiff and the Settlement Class prevailed a trial, they would not be awarded statutory damages.[2] And indeed, just four days after signing the term sheet, a federal court vacated a jury's statutory damages award in a BIPA class action and ordered a new trial on damages pursuant to *Cothron*'s guidance. *See Rogers v. BNSF Railway Co.*, 2023 WL 4297654, at *8, 13 (N.D. Ill. June 30, 2023).

Looking beyond trial, Plaintiff is also keenly aware that Defendant could appeal the merits of any adverse decision, and that, in light of the statutory damages in play, it would argue—in both the trial and appellate courts—for a reduction of damages based on due process concerns. Three dissenting Justices on the Illinois Supreme Court were also concerned about defendants facing "crippling financial liability." *Cothron*, 2023 IL 128004, ¶ 61. The dissent reasoned that, "[i]f every scan is a separate, actionable violation, qualifying for an award of

[2] That risk was heighted in this case as while Defendant denies any liability, it alleges that, at most, it was not in compliance with BIPA for a mere three weeks. Agreement Recitals B.

liquidated damages," then damages "could easily lead to annihilative liability for businesses" with damages in the "billions." *Id*. ¶¶ 60-61; *see also Wakefield v. ViSalus, Inc.,* 51 F.4th 1109, 1125 (9th Cir. 2022), cert. denied, 143 S. Ct. 1756, 215 L. Ed. 2d 653 (2023) (remanding "so the [district] court may assess in the first instance, guided by these factors and this opinion, whether the aggregate award of $925,220,000 in this class action case is so severe and oppressive that it violates ViSalus's due process rights and, if so, by how much the cumulative award should be reduced"). Taking these realities into account and recognizing the risks involved in any litigation, the relief available to each Settlement Class Member in the Settlement represents a truly excellent result for the Settlement Class.

B. The Settlement Was Reached As A Result Of Arm's-Length Negotiations Between The Parties

The second Rule 23(e)(2) factor looks to whether the parties negotiated the settlement at arm's-length. *See* Fed. R. Civ. P. 23(e)(2)(B). Here, the Parties engaged in informal discovery and good-faith negotiations, which always were at arm's length, over the course of several months. *See* Fraietta Decl. ¶¶ 9-12. The Parties engaged in additional rounds of arm's-length negotiations facilitated by the Honorable James F. Holderman (Ret.) of JAMS Chicago, and, on June 26, 2023, they reached agreement on all material terms of a class action settlement and executed a term sheet. Fraietta Decl. ¶ 11-12. The Parties then took several weeks of additional negotiations to reach the detailed terms of the proposed Settlement now before the Court. *See id.* ¶ 12-13. The arm's-length nature of these negotiations is further confirmed by the Settlement itself: it provides significant cash payments to Settlement Class Members, and contains no provisions that might suggest fraud or collusion, such as "clear sailing" or "kicker" clauses regarding attorneys' fees. *See Snyder*, 2019 WL 2103379, at *4 (approving settlement where there is "no clear sailing clause regarding attorneys' fees, and none of the other types of

settlement terms that sometimes suggest something other than an arm's length negotiation").

In sum, here the Settlement reached was the result of the Parties' good faith, arm's-length negotiations lasting several months, and it is entirely free from fraud or collusion. *See Schulte v. Fifth Third Bank*, 2010 WL 8816289, at *4 n.5 (N.D. Ill. Sept. 10, 2010) (noting that courts "presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered").

C. The Settlement Treats All Settlement Class Members Equally

The next Rule 23(e)(2) factor considers whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Given that each Settlement Class Member has nearly identical BIPA claims the proposed Settlement treats each of them identically. In terms of monetary relief, each of the 430 Settlement Class Members who does not exclude him or herself will automatically receive a *pro rata* cash payment from the Net Settlement Fund, which the Parties currently estimate to be $950 per Settlement Class Member. *See* Fraietta Decl. ¶ 15; Agreement ¶ 2.1(b); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855 (1999) (where class members are similarly situated with similar claims, equitable treatment is "assured by straightforward pro rata distribution of the limited fund").

D. The Relief Secured For The Settlement Class Is Adequate And Warrants Approval

The final and most substantive factor under Rule 23(e)(2) examines whether the relief provided for the class is adequate. *See* Fed. R. Civ. P. 23(e)(2)(C); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 227 (N.D. Ill. 2016) ("'The most important factor' in determining whether a proposed settlement satisfies Rule 23 is the strength of plaintiffs' case on the merits balanced against the amount offered in the settlement. Specifically, the court must 'estimate the likely outcome of a trial' to determine the adequacy of a settlement.") (internal citations omitted). In

making this determination, Rule 23 instructs courts to consider: (i) the cost, risks, and delay of trial and appeal; (ii) the effectiveness of the proposed method of distributing relief to the class; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreements made in connection with the proposed settlement. *See Ortiz*, 527 U.S. at 855. As explained below, each of these sub-factors demonstrate that the Settlement in this case provides extraordinary relief to the proposed Class and should be approved.

1. The Cost, Risk, And Delay Of Further Litigation Compared To The Settlement's Benefits Favors Preliminary Approval

In evaluating the adequacy of the relief provided to the class, courts should first compare the cost, risks, and delay of pursing a litigated outcome to the settlement's immediate benefits. *See* Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note to 2018 amendment. The Settlement here warrants approval because it provides immediate relief to the Settlement Class while avoiding potentially years of complex litigation and appeals. *See Goldsmith v. Tech. Sols. Co.*, 1995 WL 17009594, at *4 (N.D. Ill. Oct. 10, 1995) ("As courts recognize, a dollar obtained in settlement today is worth more than a dollar obtained after a trial and appeals years later."). And, as aforementioned, the Settlement was reached despite legal uncertainties related to a statutory damages award. *See supra* § I.A.

Likewise, the Parties also would have been forced to litigate the issue of class certification. *See* Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note to 2018 Amendment (instructing courts to consider the likelihood of certifying the class for litigation in evaluating this sub-factor). Although Plaintiff believes this case is amenable to class certification given Defendant's uniform conduct, that process is by no means risk-free. And even if Plaintiff had succeeded at class certification, summary judgment, and/or trial, Plaintiff expected that Defendant would argue for a reduction in damages based on due process considering the

significant potential statutory damages at issue. *See, e.g., Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003). Protracted litigation would also consume significant resources, including the time and costs associated with discovery, securing expert testimony on complex biometric and data storage issues, and again, motion practice, trial and any appeals. It is possible that "this drawn-out, complex, and costly litigation process…would provide [Settlement] Class Members with either no in-court recovery or some recovery many years from now[.]" *In re AT & T Sales Tax Litig.,* 789 F. Supp. 2d 935, 964 (N.D. Ill. 2011). Because the proposed Settlement offers immediate—and substantial—monetary relief to the Settlement Class and a prompt end to Defendant's alleged misconduct while avoiding the need for extensive and drawn-out litigation, preliminary approval is appropriate. *See, e.g., Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) ("Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation.").

2. The Method Of Distributing Relief To The Settlement Class Members Is Effective And Supports Preliminary Approval

The next sub-factor evaluates whether the settlement's proposed method of distributing relief to the class is effective. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). An effective distribution method "get[s] as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible." 4 NEWBERG ON CLASS ACTIONS § 13:53. The Settlement easily accomplishes that by automatically providing cash payments—estimated to be $950—to every Settlement Class Member who does not opt-out of the Settlement. *See* Fraietta Decl. ¶ 15; Agreement ¶ 2.1(b).

3. The Terms Of The Requested Attorneys' Fees Are Reasonable

The third and final relevant sub-factor considers the adequacy of the relief provided to the class taking into account "the terms of the requested attorney's fees, including timing of

payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). If the Settlement is preliminarily approved, proposed Class Counsel plans to petition the Court for an award of reasonable attorneys' fees after the Settlement Class has received notice of the Settlement. The amount of the Fee Award (attorneys' fees and unreimbursed expenses) will be determined by the Court based on petition from Class Counsel and will be limited to no more than one-third of the Settlement Fund. *See* Agreement ¶ 8.1. This is a reasonable approach and predicated on the outstanding relief provided to the Settlement Class. A one-third fee award falls comfortably within the range of typical fee awards in BIPA cases. *See, e.g., Sekura v. LA Tan Enterprises, Inc.*, 2015-CH-16694 (awarding 40% of fund); *Zepeda v. Intercontinental Hotels Grp., Inc.*, 2018-CH-02140 (awarding 40% of fund); *Svagdis v. Alro Steel Corp.*, No. 2017-CH-12566 (awarding 40% of fund); *see also* 5 NEWBERG ON CLASS ACTIONS § 15:83 (noting that, generally, "50% of the fund is the upper limit on a reasonable fee award from any common fund"). Accordingly, that the Settlement permits the Court to award one-third of the fund in attorneys' fees is more than appropriate. These terms are reasonable and should be preliminarily approved.[3]

* * *

In sum, the relief provided by the Settlement weighs heavily in favor of a finding that it is fair, reasonable, and adequate, and well within the range of possible approval. The Court should grant preliminary approval.

II. THE PROPOSED CLASS NOTICE SHOULD BE APPROVED

Rule 23 and due process require that for any "class proposed to be certified for purposes of settlement under Rule 23(b)(3)[,] the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be

[3] Rule 23(e)(3) requires disclosure of agreements made in connection with the proposal. There are no such agreements beyond the Settlement Agreement. Fraietta Decl. ¶ 29.

identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Rule 23(e)(1) similarly provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a [proposed settlement, voluntary dismissal, or compromise.]" Fed. R. Civ. P. 23(e)(1). Notice may be provided to the class via "United States mail, electronic means, or other appropriate means." Fed. R. Civ. P. 23(c)(2)(B) (eff. Dec. 1, 2018). The substance of the notice to the Settlement Class must describe in plain language the nature of the action, the definition of the class to be certified, the class claims and defenses at issue, that class members may enter an appearance through counsel if so desired, that class members may request to be excluded from the Settlement Class, and that the effect of a class judgment shall be binding on all class members. *See* Fed. R. Civ. P. 23(c)(2)(B).

Here, Defendant will provide the Settlement Administrator with a list of full names, last known mailing addresses, and to the extent available, email addresses, of all persons on the Settlement Class List. *See* Agreement ¶¶ 1.7, 4.1(a). The Settlement Administrator will run the Class Members' addresses through the U.S. Postal Service's National Change of Address database and send the Notice by mail using the most current mailing address information. *Id.* ¶ 4.1(b)(ii)-(iii). If a Notice is returned as undeliverable with a forwarding address, the Settlement Administrator shall resend the Notice by first class mail to that forwarding address. *Id.* ¶ 4.1(b)(v). If a mailing address is not available and Notice is returned as undeliverable without a forwarding address, the Settlement Administrator shall send the Notice by email, to the extent available. *Id.* Finally, the Settlement Administrator will also provide notice of the Settlement to the appropriate state and federal officials as required by CAFA, 28 U.S.C. § 1715. *Id.* ¶ 4.1(d).

In sum, the proposed method for providing notice to the Settlement Class comports with both Rule 23 and due process, and thus, should be approved.

III. THE COURT SHOULD CERTIFY THE CLASS FOR SETTLEMENT PURPOSES

For settlement purposes only, the Parties have agreed that the Court should make preliminary findings and enter an Order granting provisional certification of the Settlement Class and appoint Plaintiff and his counsel to represent the Settlement Class. The *Manual for Complex Litigation* explains the benefits of settlement classes:

> Settlement classes – cases certified as class actions solely for settlement – can provide significant benefits to class members and enable the defendants to achieve final resolution of multiple suits. Settlement classes also permit defendants to settle while preserving the right to contest the propriety and scope of the class allegations if the settlement is not approved[.] … An early settlement produces certainty for the plaintiffs and defendants and greatly reduces litigation expenses.

Manual for Complex Litigation (Fourth) § 21.612.

Before granting preliminary approval of a class action settlement, a court must determine that it "will likely be able to certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(ii); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). District courts are given broad discretion to determine whether class certification is appropriate. *See Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008).

To merit certification, the Settlement Class must first satisfy the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. *See* Fed. R. Civ. P. 23(a); *see also Amgen Inc. v. Conn. Ret. Plans and Tr. Funds*, 568 U.S. 455, 460 (2013). Additionally, because the Settlement provides for monetary relief, the Settlement Class must also satisfy the requirements of Rule 23(b)(3): that (i) common questions of law or fact predominate over individual issues and (ii) a class action is the superior device to resolve the claims. *See*

Amchem, 521 U.S. at 615-16. Finally, a certified class must be ascertainable; that is, "defined clearly and based on objective criteria." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015). As explained below, the proposed Settlement Class satisfies all of the Rule 23(a) and 23(b)(3) prerequisites and is ascertainable, and thus, should be certified for settlement purposes.

A. The Class Is Sufficiently Numerous And Joinder Is Impracticable

A class action may proceed when the proposed class is so numerous as to render joinder impractical. *See* Fed R. Civ. P. 23(a)(1). While there is no magic number at which joinder becomes unmanageable, courts have typically found that numerosity is satisfied when the class comprises forty (40) or more people. *See Barnes v. Air Line Pilots Ass'n, Int'l*, 310 F.R.D. 551, 557 (N.D. Ill. 2015) (citing collected Seventh Circuit cases). Here, the proposed Settlement Class is sufficiently numerous, as it is comprised of 430 persons. *See* Agreement ¶ 1.35. The numerosity requirement is therefore readily satisfied.

B. Common Questions Of Law And Fact Predominate

Rule 23(a)(2) instructs that a class may be certified only if there exist "questions of law or fact common to the class." Where, as here, the class seeks monetary relief, the common questions must "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); *see also Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 374 (7th Cir. 2015) ("The question of commonality and predominance overlap in ways that make them difficult to analyze separately."). Common questions are those "capable of class-wide resolution" such "that determining the truth or falsity of the common contention will resolve an issue that is central to the validity of each claim." *Id.* (citing *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011)). "What matters to class certification … [is] the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of this litigation." *Wal-Mart*, 564 U.S. at 350 (internal quotation marks omitted). As such, "the critical point is the need for conduct common to

members of the class." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (quotation marks omitted). When "the defendant's allegedly injurious conduct differs from plaintiff to plaintiff … no common answers are likely to be found." *Id.* (quotation marks omitted). But when "the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members," class treatment is appropriate. *Id.*

In this case, all members of the proposed Class share a common statutory BIPA claim that raises many common issues regarding the alleged collection, storage, use, and disclosure of their biometric identifiers or information without consent. Proving a BIPA violation would require the resolution of some of the same factual and legal issues, including: (1) whether the information taken from Settlement Class Members constituted biometric identifiers or biometric information as defined by BIPA; (2) whether such information was taken without the consent required under BIPA; (3) whether Defendant had a BIPA-compliant, publicly available, written policy addressing retention and storage of biometric identifiers and information; and (4) whether such conduct violated BIPA. Predominance is satisfied "when there exists generalized evidence that proves or disproves an element on a simultaneous, class-wide basis … . [S]uch proof obviates the need to examine each class member's individual position." *Golon v. Ohio Savs. Bank*, 1999 WL 965593, at *4 (N.D. Ill. Oct. 15, 1999) (internal quotations and citations omitted). Here, for purposes of settlement and in the context of the Settlement Class, the common questions resulting from Defendant's alleged conduct predominate over any individual issues that may exist and can be answered on a class-wide basis based on common evidence maintained by Defendant. Accordingly, this factor is satisfied.

C. Plaintiff's Claims Are Typical Of The Class

Typicality is closely related to commonality. A claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members

and ... [the] claims are based on the same legal theory." *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (citation omitted); *see also Arreola v. Godinez*, 546 F.3d 788, 798 (7th Cir. 2008). The requirement is meant to ensure that the named representative's claims "'have the same essential characteristics as the claims of the class at large.'" *Oshana*, 472 F.3d at 514 (citing *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 597 (7th Cir. 1993)).

Here, the claims of the Plaintiff and the Settlement Class arise from the same conduct: Defendant's use of finger scan timekeeping and point of sale systems for its Illinois employees allegedly without following BIPA's requirements. Therefore, typicality is met.

Similarly, proposed Class Counsel has regularly engaged in major complex litigation and has extensive experience in class action lawsuits, including BIPA lawsuits. *See* Fraietta Decl. ¶¶ 18-20; *see also id*. Ex. B (Firm Resume). Accordingly, Plaintiff's counsel will adequately represent the Settlement Class.

D. Plaintiff And Proposed Class Counsel Will Adequately Protect The Interests Of The Settlement Class

The final Rule 23(a) prerequisite—adequacy—requires a finding that the class representative has and will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is twofold: "adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interests of the class members." *Starr v. Chi. Cut Steakhouse*, 75 F. Supp. 3d 859, 874 (N.D. Ill. 2014) (quoting *Retired Chi. Police Ass'n*, 7 F.3d at 598)). To assess adequacy, courts examine whether "the named plaintiff has [(1)] antagonistic or conflicting claims with other members of the class; or (2) has a sufficient interest in the outcome of the case to ensure vigorous advocacy; and (3) has counsel that is competent, qualified, experienced and able to vigorously conduct the litigation." *Osada v. Experian Info. Sols., Inc.*, 290 F.R.D. 485, 490 (N.D. Ill. 2012) (quoting

Quiroz v. Revenue Prod. Mgmt., Inc., 252 F.R.D. 438, 442 (N.D. Ill. 2008)) (internal quotation marks omitted).

Here, Plaintiff's interests are entirely representative of and consistent with the interests of the proposed Settlement Class: all have allegedly had their biometric information or identifiers collected and used by Defendant in a manner that Plaintiff argues is inconsistent with the legal protections provided by BIPA. Plaintiff's pursuit of this matter has demonstrated that she has been, and will remain, a zealous advocate for the Settlement Class. Thus, Plaintiff has the same interests as the Settlement Class, and is a suitable representative.

Likewise, proposed Class Counsel will fairly and adequately represent and protect the interests of the Settlement Class. Proposed Class Counsel has substantial experience litigating complex consumer class actions, including BIPA class actions. *See* Fraietta Decl. Ex. B (Firm Resume). Plaintiff and her counsel are committed to vigorously prosecuting this action on behalf of the Class and have the financial resources to do so.

Accordingly, because Plaintiff will fairly and adequately protect the interests of the class, and because she and the Settlement Class are amply represented by qualified counsel, the adequacy requirement is satisfied.

E. A Class Action Is The Superior Method Of Resolving This Controversy

In addition to its predominance requirement, addressed above at Section III.B, Rule 23(b)(3) requires that "a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The rule sets forth four criteria germane to this requirement: (1) class members' interests in individually controlling individual actions, (2) extent and nature of litigation concerning this controversy already begun by class members, (3) desirability of concentrating litigation in a particular forum, and (4) likely difficulties in managing a class action. *Id*.

The first factor favors certification. There does not appear to be any individual BIPA suits against Defendant, and while BIPA provides for liquidated damages, the relatively modest recovery for each violation ($1,000 or $5,000, depending on whether a violation is negligent or reckless) compared to the high costs of retaining adequate counsel "is not likely to provide sufficient incentive for members of the proposed class to bring their own claims." *Jackson v. Nat'l Action Fin. Servs., Inc.*, 227 F.R.D. 284, 290 (N.D. Ill. 2005) (discussing the FDCPA's $1,000 statutory damages provision); *see also In re Facebook Biometric Info. Privacy Litig.*, 326 F.R.D. 535, 548 (N.D. Cal. 2018) ("While not trivial, BIPA's statutory damages are also not enough to incentivize individual plaintiffs given the high costs of pursuing discovery on Facebook's software and code base and Facebook's willingness to litigate the case.").

The second factor also weighs in favor of certification. There are no pending other known actions that have progressed to any extent addressing the conduct alleged here against Defendant. Thus, "'the extent and nature of any litigation concerning the controversy already begun by or against class members' is not a factor" counseling against certification. *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 (N.D. Ill. 2012) (quoting Fed. R. Civ. P. 23(b)(3)(B)).

Third, this forum is desirable given that this case concerns a proposed class of Illinoisians seeking relief from Defendant for Illinois-based alleged conduct. *See Barnes*, 310 F.R.D. at 562 (third factor met where defendant conducted business and the events giving rise to plaintiffs' claims occurred within the court's district).

Finally, the fourth factor favors certification as no management problems ought to arise here. As explained above, there is a clear predominance of common issues and Settlement Class Members are readily identifiable from Defendant's records. *See* 2 NEWBERG ON CLASS ACTIONS

§ 4:72 (5th ed. 2011) ("Courts generally hold that if the predominance requirement is met, then the manageability requirement is met, as well."). Thus, consolidating class members' claims in one proceeding will generate economies of time and expense and promote legal uniformity.

More generally, Rule 23's superiority standard requires that the court recognize "the costs *and benefits* of the class device." *Mullins*, 795 F.3d at 663 (emphasis in original). Here, requiring individual cases "would make no sense," because "each class member here would entail the same discovery and require multiple courts to weigh the same factual and legal bases for recovery." *Bernal v. NRA Group, LLC*, 318 F.R.D. 64, 76 (N.D. Ill. 2016). Rule 23's superiority requirement is therefore satisfied.

F. The Class Is Ascertainable

Finally, the proposed Settlement Class definition meets Rule 23's implicit requirement of "ascertainability," which "requires that a class … be defined clearly and based on objective criteria." *Mullins*, 795 F.3d at 659. "Whether a class is ascertainable depends on 'the adequacy of the class definition itself,' not 'whether, given an adequate class definition, it would be difficult to identify particular members of the class,'" although Plaintiff here would meet both standards. *Toney v. Quality Res., Inc.*, 323 F.R.D. 567, 581 (N.D. Ill. 2018) (citing *Mullins*, 795 F.3d at 658). Here, the Settlement Class definition is based solely on objective criteria: either an Illinois-based employee had his or her fingerprint(s) and/or palmprint scanned by Defendant's biometric equipment during the relevant time period, or did not. Because the Class is "defined clearly [and] membership [is] defined by objective criteria," it is ascertainable. *Mullins*, 795 F.3d at 657. Indeed, Defendant has already ascertained the class and represents that it contains 430 members.

For all these reasons, maintenance of this action as a class action is appropriate. The Court should therefore certify the Settlement Class for settlement purposes.

CONCLUSION

For the reasons described above, Plaintiff respectfully requests that the Court enter the Preliminary Approval Order,[4] which (1) schedules a fairness hearing on the question of whether the proposed class action settlement should be approved as fair, reasonable, and adequate; (2) approves the form and content of the proposed Notice to the Settlement Class; (3) approves the proposed method of requesting exclusion from the Settlement; (4) directs the mailing of the Notice Form by first-class mail to the Settlement Class Members; (5) preliminarily approves the Settlement; (6) preliminarily certifies the Settlement Class for purposes of settlement only; (7) appoints Plaintiff Linda Bloxom as Class Representative; and (8) appoints Philip L. Fraietta, Joseph I. Marchese, and Christopher R. Reilly of Bursor & Fisher, P.A. as Class Counsel.

Dated: August 29, 2023

Respectfully submitted,

/s/ *Philip L. Fraietta*
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Proposed Class Counsel

[4] A proposed Preliminary Approval Order is filed herewith.

**Pro Hac Vice Application Forthcoming*

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Local Counsel for Class Representative and the Settlement Class

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing **Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement** was filed this 29th day of August 2023 via the electronic filing system of the Central District of Illinois, which will automatically serve all counsel of record.

/s/ Philip L. Fraietta
Philip L. Fraietta