

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

LAMONT DAVIS, NAKEA BLOUNT, and	)	
SHAMIKKAH SLAUGHTER, on behalf	)	
of themselves and all other persons	)	Case No. 1:19-cv-00680
similarly situated, known and unknown,	)	
	)	Judge Valderrama
Plaintiffs,	)	
	)	
v.	)	
	)	
HEARTLAND EMPLOYMENT SERVICES,	)	
LLC,	)	
	)	
Defendant.	)	

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR  
UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT<sup>1</sup>**

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<sup>1</sup> The Court granted Plaintiffs leave to file a Memorandum of Law not to exceed 20 pages. Dkt. 114.

## **I. Introduction**

Plaintiffs and proposed class representatives Lamont Davis, Nakea Blount, and Shamikkah Slaughter (“Plaintiffs” or “Settlement Class Representatives”) are former Illinois employees of Defendant Heartland Employment Services, LLC (“Defendant” or “Heartland”). Defendant is the employment arm of skilled nursing and rehabilitation care facilities that operate under the names HCR ManorCare, Arden Courts, and Heartland Healthcare. In this lawsuit, Plaintiffs allege that Defendant violated the Illinois Biometric Information Privacy Act (“BIPA”) by collecting, possessing, and disclosing its Illinois employees’ biometric data through a finger-scan timekeeping system without following BIPA’s written disclosure and consent requirements. After an unsuccessful private mediation and completion of extensive discovery, the Parties reached a \$5,418,000 class settlement for an estimated 10,836 Settlement Class Members. Because the settlement is fair, reasonable, adequate, and meets all requirements under Rule 23, the Court should grant preliminary approval and enter the Parties’ proposed order.<sup>2</sup>

## **II. Procedural History** (Ex. 1, Settlement Agreement, § I)<sup>3</sup>

On December 18, 2018, then-plaintiff Brenda Mason filed a Class Action Complaint in the Circuit Court of Cook County, Chancery Division, alleging that Heartland violated BIPA by requiring her and other employees to use a biometric timekeeping system as part of their jobs. In particular, then-plaintiff Mason alleged that Heartland violated BIPA in three ways: (1) collecting biometric fingerprint identifiers and information from her and other employees without following BIPA’s informed written consent procedures; (2) possessing biometric identifiers and information

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<sup>2</sup> Capitalized terms not defined herein shall have the meaning set forth in the Class Action Settlement Agreement (“Settlement” or “Settlement Agreement”), which is Exhibit 1.

<sup>3</sup> Citations to the Settlement Agreement are in the headings of this Memorandum to avoid unnecessary multiplication of in-text citations.

without a publicly available data retention schedule and destruction policy; and (3) disclosing biometric identifiers and information from her and other employees to Heartland's timekeeping vendor without consent.

On February 1, 2019, Heartland removed the lawsuit to the United States District Court for the Northern District of Illinois. On March 21, 2019, then-plaintiff Mason filed a First Amended Class Action Complaint to add a second proposed class representative, Lamont Davis. On June 17, 2019, Heartland filed its Answer and Defenses to the First Amended Complaint. Heartland denied violating BIPA and asserted eleven affirmative defenses, including that then-plaintiff Mason was subject to an agreement that required individual arbitration of her claims.

The Parties agreed to participate in early settlement discussions and scheduled a private mediation with experienced BIPA mediator and retired federal Magistrate Judge Morton Denlow. In advance of mediation, the Parties served and responded to written discovery requests, including producing responsive documents. Also in advance of mediation, the Parties exchanged mediation statements with the relevant legal and factual arguments for their respective positions in the case. On December 5, 2019, the Parties participated in a day-long mediation with Judge Denlow but were unable to reach a settlement.

On February 14, 2020, the Parties filed a Joint Motion to Dismiss Plaintiff Brenda Mason because she was subject to an individual arbitration agreement.

On July 13, 2020, after obtaining leave over Heartland's partial objection, Plaintiff Davis filed a Second Amended Class Action Complaint to add two additional proposed class representatives, Nakea Blount and Shamikkah Slaughter, and to assert a claim under Section 15(a) of BIPA for Heartland's alleged failure to timely destroy biometric data for Plaintiffs and other employees after they separated employment.

The Parties engaged in additional written discovery and document production, including issuing subpoenas to third-parties involved in manufacturing or providing the timekeeping technology at issue. The Parties followed up on alleged deficiencies in each side's discovery responses. Heartland took depositions from the three Plaintiffs. Plaintiffs took Rule 30(b)(6) depositions from two Heartland witnesses.

The Parties agreed to engage in direct settlement negotiations between counsel. After exchanging numerous offers and counteroffers over a two-month period, the Parties reached a settlement in principle on February 3, 2021. The Parties then negotiated the Settlement Agreement.

### **III. Summary of Settlement Terms**

#### **A. The Proposed Settlement Class** (Ex. 1, Settlement Agreement, § III)

The Settlement Class Representatives seek preliminary approval of the following class:

All hourly employees of Defendant who enrolled in or used a finger-scan timekeeping system while working for Defendant in Illinois between December 18, 2013 and April 23, 2019, excluding those persons subject to individual arbitration agreements who did not opt-out of those arbitration agreements ("the Settlement Class" or "Settlement Class Members").

There are an estimated 10,836 Settlement Class Members.

#### **B. Settlement Fund; Allocation of the Fund; Payments to Class Members** (Ex. 1, Settlement Agreement, § IV.2)

While denying all liability and wrongdoing, Defendant has agreed to pay a Gross Fund of \$5,418,000.00 to resolve the claims in this case on a class action basis. The Gross Fund is the maximum amount that Defendant shall pay under this Settlement, unless the number of the Settlement Class Members increases by more than 2% over the current estimate of 10,836, in which case the Gross Fund shall be increased on a pro rata basis (*i.e.*, \$500 per person added over the current estimate of 10,836). None of the Gross Fund shall revert back to Defendant.

The “Net Fund” is the Gross Fund minus the following deductions, which are subject to Court approval: Settlement Class Counsel’s attorney fees and costs; the Settlement Administrator’s costs; and the Settlement Class Representatives’ Service Awards. The Net Fund shall be distributed pro rata to Settlement Class Members who timely return valid claim forms (“Settlement Class Participants”). Because of this method of allocation to Settlement Class Participants, there will be no unclaimed funds.

**C. Uncashed Checks Will Be Distributed to a *Cy Pres* Recipient**  
(Ex. 1, Agreement, § IV.9)

Settlement Class Participants will have 150 days to cash their settlement payments. Funds from checks not cashed by the deadline will be distributed to the Here to Help Fund (“the Fund”), a Section 501(c)(3) charity, as a *cy pres* recipient. The Fund provides financial assistance to ProMedica<sup>4</sup> employees who experience “an unexpected catastrophic event such as a natural or civil disaster or severe economic hardship beyond their control.”<sup>5</sup> Heartland contends that *Bowens v. EOS-USA, Inc.*, Case No. 1:18-cv-05407, Dkt. No. 116 (N.D. Ill. Apr. 8, 2021) (Valderrama, J.) is inapplicable because the Fund will provide assistance to employees similarly situated to Settlement Class Members and Defendant here has not controlled and does not control the Fund or benefit economically from it.<sup>6</sup> However, Plaintiffs expect few uncashed checks because Settlement Class Participants must first submit a claim form to receive payment and can elect to receive electronic payment, which obviates the need to cash a check.

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<sup>4</sup> ProMedica is a successor entity to HCR ManorCare, the entity that operated the healthcare facilities where Settlement Class Members currently or previously worked.

<sup>5</sup> <https://hugfund.org/about/> (last visited Apr. 13, 2021). Grants are done by the <https://columbusfoundation.org/> and finalized by an internal Grants Manager.

<sup>6</sup> If the Court does not approve this *cy pres* recipient, uncashed check funds will go to the Unclaimed Property Division of the Illinois Treasurer. Ex. 1, Agreement, § IV.9.

**D. Defendant's Representations of Compliance with BIPA**  
(Ex. 1, Settlement Agreement, § IV.16)

Defendant represents that since April 24, 2019, it has maintained BIPA consents and policies and has deleted finger scan data for separated Illinois employees.<sup>7</sup>

**E. Release of Claims** (Ex. 1, Settlement Agreement, § IV.3)

Settlement Class Members who do not exclude themselves from this Settlement will release the Released Parties<sup>8</sup> from all claims reasonably arising out of allegations in the Second Amended Class Action Complaint in this lawsuit, including allegations that Heartland improperly collected, stored, disclosed, or used Illinois employees' biometric identifiers and information obtained from its time clocks, including but not limited to claims arising under BIPA, and all other related federal, state, and local laws, including the common law, as well as related claims for liquidated damages, penalties, attorneys' fees and costs, expenses, and interest.

In exchange for their Service Awards, the Class Representatives will provide a general release of claims.

**F. Settlement Administration** (Ex. 1, Settlement Agreement, § IV.4.)

The Parties have selected Analytics Consulting LLC to act as the Settlement Administrator. The Settlement Administrator's costs are capped at \$75,000.

**G. Notice of Class Action Settlement and Claim Form**  
(Ex. 1, Settlement Agreement, § IV.5.c and Attach. A)

Among other things, Plaintiffs' proposed Notice of Class Action Settlement ("Notice")

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<sup>7</sup> To comply with its legal obligations to preserve evidence, Heartland deleted finger scan data for separated Illinois employees from its main server and has segregated and maintained such data on a separate server which is not connected to the internet. Heartland will fully delete such finger scan data for separated Illinois employees upon the Effective Date of this settlement.

<sup>8</sup> The term "Released Parties" means Heartland and its current and former owners, affiliates, parents, subsidiaries, divisions, officers, directors, shareholders, agents, employees, attorneys, insurers, benefit plans, predecessors, and successors. Kronos Incorporated, the vendor of the timekeeping technology, is excluded from this release. *Id.* at § IV.3.a.

explains the following to Settlement Class Members: (1) what the Settlement is about; (2) how to request payment, exclusion, or submit an objection; (3) how to obtain more information about the Settlement; (4) the monetary terms of the Settlement and how individual payments will be calculated; (5) the maximum amounts to be requested for attorney fees, costs, settlement administration, and Service Awards; and (6) the Final Approval Hearing details.

The proposed Claim Form is simple and easy to complete. The Claim Form explains how individuals can also return a Claim Form through the Settlement website.

The Settlement website, anticipated to be [www.HeartlandFingerScanSettlement.com](http://www.HeartlandFingerScanSettlement.com), will also have the Notice and Claim Form, the Settlement Agreement, the Preliminary Approval Order, the Motion for Attorney Fees, Costs, and Settlement Class Representatives' Service Awards (once available), the Motion for Final Approval (once available), and the Final Approval Order (once available).

**H. Distribution of Notice** (Ex. 1, Settlement Agreement, §§ IV.5, IV.11.b)

The Settlement Administrator will implement a robust class notice program to ensure that Settlement Class Members learn of their rights in the Settlement. As explained below, the notice program will include a Settlement website and three methods of notice distribution.

First, the Settlement Administrator will provide the Notice and Claim Form by direct mail. Before mailing, the Settlement Administrator will update Settlement Class Members' addresses by running their names and addresses through the National Change of Address database. The mailing shall include a pre-paid envelope for Settlement Class Members to return a Claim Form. For Settlement Class Members whose notices are returned as undeliverable without a forwarding address, the Settlement Administrator shall promptly run a database search to locate an updated address and shall promptly mail the Notice and Claim Form to the updated address.

Second, where email addresses are available for Settlement Class Members, the Settlement Administrator shall send the following email:

- Email subject: “Legal Notice: Heartland Finger Scan Lawsuit Settlement.”
- Email body: “Heartland Employment Services, LLC has settled a class action lawsuit that claims Heartland violated Illinois law by collecting fingerprint scan data from Illinois employees through a biometric timekeeping system without written notice and consent. The Settlement includes Heartland’s employees who worked at HCR ManorCare, Arden Courts, and Heartland Healthcare facilities and who used Heartland’s finger scan timekeeping system between December 18, 2013 and April 23, 2019, excluding those persons subject to individual arbitration agreements who did not opt-out. To review the Notice of Class Action Settlement and submit a Claim Form to receive a settlement payment, please visit the settlement website: [www.HeartlandFingerScanSettlement.com](http://www.HeartlandFingerScanSettlement.com).”<sup>9</sup>

Third, where cell phone numbers are available for Settlement Class Members, the Settlement Administrator shall send the following text message:

- “You may be entitled to payment in a class action settlement for Illinois employees of Heartland Employment Services, LLC who worked at an HCR ManorCare, Arden Courts, or Heartland Healthcare facility. To learn more, click **here**.”

The link will take Settlement Class Members to the Settlement website.

Fourth, 60 days into the 90-day Notice period, the Settlement Administrator shall send the following reminder via email and text message to all Settlement Class Members who have not returned Claim Forms and for whom the Settlement Administrator has email addresses and cell phone numbers:

- Reminder email subject: “Reminder: Deadline to Submit Claim in Heartland Finger Scan Lawsuit Settlement.”
- Reminder email body: “You previously received an email about the settlement of a class action lawsuit that claims Heartland Employment Services, LLC violated Illinois law by allegedly collecting fingerprint scan data from Illinois employees through a biometric timekeeping system without written notice and consent. The deadline for you to return a Claim Form and request a settlement

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<sup>9</sup> Or another website address agreed to by the Parties if this one is not available. This applies to all references to the Settlement website in this Motion.



payment is [insert date 30 days from email distribution]. You can return a Claim Form through the settlement website [www.HeartlandFingerScanSettlement.com](http://www.HeartlandFingerScanSettlement.com). **If you do not fill out a Claim Form by the deadline, you will not get money.**”

- Reminder text message: “You were sent notice of a lawsuit settlement for certain Illinois employees of Heartland Employment Services, LLC who worked at an HCR ManorCare, Arden Courts, or Heartland Healthcare facility. To request payment, you must complete a **Claim Form** by [insert date 30 days from text distribution].”

The **Claim Form** link will take Settlement Class Members to the portion of the Settlement website where they can complete and return an electronic Claim Form.

**I. Service Awards** (Ex. 1, Settlement Agreement, § IV.8)

Under the Settlement Agreement, Class Counsel may request that the Court award the Settlement Class Representatives up to \$10,000 each as Service Awards for their work in prosecuting this lawsuit on behalf of the Settlement Class, answering written discovery, giving depositions, and recovering money for the Settlement Class. Settlement Class Counsel will file the request for the Service Awards with their motion for attorney fees and costs, described below.

**J. Attorney Fees and Costs** (Ex. 1, Settlement Agreement, § IV.7)

Under the Settlement Agreement, Settlement Class Counsel may request that the Court award them up to one-third of the Gross Fund as attorney fees plus their litigation expenses. Settlement Class Counsel will file their request for attorney fees and costs within 60 days of initial Notice distribution and the Settlement Administrator will make the filing available on the Settlement website. The Notice will advise Settlement Class Members about how to review the request for attorney fees and costs. This will enable Settlement Class Members to see the request when deciding whether to exclude themselves from the Settlement or object to it.

#### **IV. The Court Should Grant Preliminary Approval**

##### **A. Settlement of Class Action Litigation is Favored**

Federal courts favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *see also* 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.41 (3d ed. 1992) (collecting cases).

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

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

*Manual for Complex Lit.*, at § 21.632–34. This procedure, used by courts in this Circuit and endorsed by the leading class action treatise, safeguards the due process rights of absent class members and enables the Court to fulfill its role as the guardian of class interests. *See* 2 Newberg & Conte, at § 11.22, *et seq.* With this Motion, Plaintiffs request that the Court take the first step in the process by granting preliminary approval of the proposed Settlement.

Rule 23 was amended effective December 1, 2018. Before then, Rule 23 did not address standards for preliminary approval. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 359981, at \*11 (E.D.N.Y. Jan. 28, 2019). At the preliminary approval stage, district courts decided whether the proposed settlement fell “within the range of possible approval.” *Kou Thao Vang v. KeyTronicEMS*, 2019 WL 337589, at \*1 (D. Minn. Jan. 28, 2019); “Under the new Rule 23(e), in weighing a grant of preliminary approval, district courts must

determine whether ‘giving notice is justified by the parties’ showing that the court *will likely be able to*: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.” *In re Payment Card*, 2019 WL 359981, at \*12 (citing Fed. R. Civ. P. 23(e)(1)(B)(i–ii)) (emphasis in original). As shown below, the Settlement satisfies these criteria and preliminary approval is justified.

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

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

Settlement Class Counsel and the Settlement Class Representatives pursued this case vigorously on behalf of a potential class. Settlement Class Counsel served multiple sets of written discovery requests and obtained all of the relevant documents in Defendant’s possession. Class Counsel took depositions from Defendant’s two Rule 30(b)(6) witnesses. All three Settlement Class Representatives gave depositions and testified on behalf of the class claims. Settlement Class Counsel also subpoenaed critical documents from Kronos, the provider of Defendant’s biometric technology. While an early mediation was unsuccessful, as a result of Settlement Class Counsel’s and the Settlement Class Representatives’ sustained effort the parties reached a Settlement that makes meaningful monetary relief available to Settlement Class Members, with an appropriately tailored release of claims.

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

The Settlement was the result of arm’s-length negotiation between counsel after an unsuccessful mediation and years of litigation.

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

The Settlement Class Representatives claim that they and potential class members are entitled to \$1,000 per violation if they are able to prove Defendant’s alleged violations of BIPA

were “negligent.”<sup>10</sup> 740 ILCS 14/20(1). The \$5,418,000 Gross Fund represents a gross recovery of \$500 per Settlement Class Member. But because the Net Fund will be distributed pro rata to Settlement Class Participants who submit timely claims, the net recovery for each Settlement Class Participant will be higher than \$500 per person. Settlement Class Counsel recently completed the claims process in a BIPA settlement with an Illinois grocery store chain where approximately 40 percent of the 4,680 former employee class members submitted claim forms. Based on the more robust Notice program in this case, Settlement Class Counsel expects the claims rate may approach 50 percent, which would result in Settlement Class Participants receiving approximately \$640.00 per person. Notably, these potential claims rates far exceed the average in class settlements. *See* Federal Trade Commission, Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns, p. 11 (Sept. 2019), available at [https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class\\_action\\_fairness\\_report\\_0.pdf](https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf) (median claims rate for settlements studied was 9%).

This Settlement here exceeds other BIPA class settlements where courts have granted preliminary and final approval:

**BIPA Settlement Chart**

Case	Judge	Date	Class Size Estimate	Per Class Member	Attorney Fees
<i>Kusinski v. ADP, LLC</i> , 17-CH-12364 (Cir. Ct. Cook Cty.)	Atkins	Feb. 10, 2021	320,000	\$250 net (assuming a 20% claims rate) <sup>11</sup>	35% of total settlement
<i>Zhirovetskiy v. Zayo Group, LLC</i> , 17-CH-09323 (Cir. Ct. Cook Cty.)	Flynn	Apr. 8, 2019	2,475	\$450 gross	40% of total settlement

<sup>10</sup> While BIPA allows recovery of \$5,000 per violation for “intentional” or “reckless” violations, 740 ILCS 14/20(2), in discovery Defendant testified that it was not aware of BIPA’s obligations until after this lawsuit was filed. The documents obtained were consistent with this testimony.

<sup>11</sup> While Plaintiffs estimated this claims rate in their filings, the Final Approval Motion stated the claims rate was 12.5 percent.

Case	Judge	Date	Class Size Estimate	Per Class Member	Attorney Fees
<i>Marshall v. Life Time Fitness, Inc.</i> , 17-CH-14262 (Cir. Ct. Cook Cty.)	Tailor	Aug. 7, 2019	6,000	\$270 net <sup>12</sup>	One-third of total settlement
<i>Prelipceanu v. Jumio Corp.</i> , 18-CH-15883 (Cir. Ct. Cook Cty.)	Mullen	July 21, 2020)	Thousands	\$262.28 net <sup>13</sup>	40% of total settlement

The Settlement also represents a meaningful recovery when compared against average recoveries in class action settlements. *See In re Ravisent Techs., Inc. Sec. Litig.*, 2005 WL 906361, at \*9 (E.D. Pa. Apr. 18, 2005) (approving settlement, which amounted to 12.2% of damages, and citing a study by Columbia University Law School, which determined that “since 1995, class action settlements have typically recovered between 5.5% and 6.2% of the class members’ estimated losses.”) (internal citations omitted).

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

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

If the litigation had continued, it would have been complex, expensive, and protracted. The Parties both intended to obtain documents and take depositions of Idemia, the company that manufactured the fingerprint reader in Defendant’s biometric time clock, and likely Kronos, the company that manufactured Defendant’s time clock. After that, Plaintiffs would have served an expert witness report about how Defendant’s timekeeping system collected biometric identifiers

<sup>12</sup> The settlement also included dark web monitoring that the parties valued at \$130 per class member.

<sup>13</sup> The Parties’ settlement agreement and filings did not disclose the number of class members in this \$7 million settlement or the ultimate net per person recovery. Class Counsel’s fee petition represented that “thousands” of class members had filed claims. Legal websites state that class members who submitted claims received up to \$262.28 per person. *See* <https://topclassactions.com/lawsuit-settlements/lawsuit-news/illinois-jumio-biometric-class-action-settlement/> (last visited Apr. 12, 2021).

and/or biometric information covered by BIPA. This likely would have resulted in Defendant hiring its own expert witness. Following that additional discovery, Plaintiffs would have filed a motion for class certification, which they had prepared and were ready to file absent settlement.

Apart from the discovery issues, Defendant could have obtained a victory or greatly reduced the potential class recovery based on its defenses in the lawsuit, including:

- (1) that Plaintiffs' damages claims were barred by the exclusivity provisions of the Workers' Compensation Act, an issue which is currently on appeal before the Illinois Supreme Court;<sup>14</sup>
- (2) that Defendant's biometric timekeeping system does not collect biometric identifiers or biometric information as defined by BIPA;
- (3) that the statute of limitations under BIPA is one year instead of five years, an issue currently on appeal before the First District Appellate Court;<sup>15</sup> and
- (4) that damages under BIPA are discretionary based on the word "may" in the remedies section of the statute, 740 ILCS 14/20, and that the Court would decline to award damages (or greatly reduce them) because Defendant's biometric technology allegedly posed no risk of harm to Settlement Class Members.

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

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

The Settlement Administrator will send Notice via direct mail and, where available, email and text message. Ex. 1, Agreement, § IV.11.b.(2). Combined with a Settlement website, this is a

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<sup>14</sup> *McDonald v. Symphony Bronzeville Park, LLC*, Case No. 126511 (Ill.) (petition for leave to appeal accepted on January 26, 2021).

<sup>15</sup> *Tims v. Black Horse Carriers, Inc.*, Case No. 1-20-0563 (1st Dist).

comprehensive notice program that rivals those implemented in similar settlements. The Settlement Administrator will distribute funds to Settlement Class Participants via check or electronic payment, depending on the Settlement Class Participants' preference.

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

Settlement Class Counsel will seek an award of attorney fees of up to one-third of the Gross Fund plus litigation costs. Ex. 1, Agreement § IV.7. The requested fee is equal to or below the fees awarded in similar BIPA class settlements. *See* BIPA Settlement Chart, at 11-12, *supra*. And the Settlement provides for payment of any attorney fees awarded at the same time as payments to Settlement Class Members; there is no priority for Settlement Class Counsel. Ex. 1, Agreement § IV.5.m.

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

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

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

The Settlement treats Class Members equally by distributing awards to Settlement Class Participants from the Net Settlement Fund on a *pro rata* basis. Ex. 1, Agreement, § IV.2.

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

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

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

**a. Numerosity**

Courts consistently hold that if there are more than 40 class members, numerosity is satisfied. *See, e.g., Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 56 (N.D. Ill. 1996). The estimated class size here is 10,836, Ex. 1, Agreement, § II, which satisfies numerosity.

**b. Commonality**

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

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

564 U.S. 338, 350 (2011). The claims of Class Members can be resolved in a “single stroke” by answering the following common question: did Defendant collect, possess, or disclose the biometric data of Class Members without following BIPA’s notice and consent requirements? Answering this common question resolves the question of liability for all class members. Thus, commonality will be met here.

**c. Typicality**

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



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

**d. Adequacy of the Class Representative**

The adequacy of representation component has three elements: (1) the claims of the class representative cannot conflict with the claims of the other class members; (2) the class representative's interest in the litigation outcome must be sufficiently strong to ensure that she is a vigorous advocate for the class; and, (3) counsel for the class representative must be competent, experienced, and able to conduct the litigation with that necessary vigor. *Gammon v. G.C. Servs., L.P.*, 162 F.R.D. 313, 317 (N.D. Ill. 1995). "The burden of demonstrating adequacy under this standard, nevertheless, is not a heavy one." *Nielsen v. Greenwood*, No. 91 C 6537, 1996 WL 563539, at \*5 (N.D. Ill. Oct. 1, 1996).

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

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

**ii. Class Counsel is experienced and qualified**

Settlement Class Counsel will also fairly and adequately protect the interests of the Settlement Class Members. A court considers the following four factors when appointing class counsel: (1) the work counsel has performed in identifying the potential class claims; (2) class

counsel's experience in handling complex litigation and class actions; (3) counsel's knowledge of the applicable law; and (4) the resources that class counsel will commit to representing the class. Fed. R. Civ. P. 23(g).

Class Counsel are highly experienced class action attorneys and have been appointed class counsel in numerous actions in federal and state courts, including numerous other BIPA class actions. Ex. 2, Flowerree Declaration and accompanying Firm Resume; Ex. 3, Fish Declaration and accompanying Firm Resume. In this case, Settlement Class Counsel demonstrated their commitment to the class by completing extensive written and oral discovery, including third-party discovery, and preparing and being ready to file a motion for class certification if the case did not settle. By their actions in this case and relevant experience, Class Counsel are well-positioned to protect the interests of Class Members.

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

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

### **a. Common questions predominate**

The Rule 23(b) predominance requirement looks to whether the proposed class is sufficiently cohesive to warrant adjudication by representation. *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). “Thus, the Plaintiffs bear the burden of demonstrating ‘that the elements of liability are capable of proof at trial through evidence that is common to the class rather than individual to the members.’” *Kernats, et al. v. Comcast Corp.*, Case Nos. 09 C 3368 and 09 C 4305, 2010 WL 4193219, at \*7 (N.D. Ill. Oct. 20, 2010). Satisfaction of this criterion normally

turns on the answer to one basic question: is there an essential common factual link between all class members and the defendant for which the law provides a remedy? The common question predominating in this case is whether Defendant collected, possessed, or disclosed Settlement Class Members' biometric data without following the requirements of BIPA. The answer to this question determines Defendant's liability under BIPA for all potential persons in the Settlement Class and therefore predominates over any individual questions.

**b. A class action is a superior mechanism**

The superiority inquiry requires a court to compare alternatives to class treatment and determine if any alternative is superior. "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation." *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982). This is particularly true in actions like this one, where numerous individual claimants each suffer a relatively small harm. "Rule 23(b)(3) was designed for situations . . . in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006). Here, the alternative to class resolution is over 10,836 individual lawsuits for recoveries possibly as low as \$1,000, plus attorneys' fees and costs. As each case would require resolution of identical factual and legal issues, the resulting efficiencies achieved by class-wide resolution are obvious.

**D. Plaintiffs' Notice Program and Class Notice Form Merit Approval**  
(Ex. 1, Settlement Agreement, § IV.5.c and Attach. A)

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

the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the

action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). The proposed Notice exceeds this bare minimum and fully complies with the requirements of Rule 23(c)(2)(B). In addition, the plan for the Settlement Administrator to distribute individual Notices directly to Settlement Class Members by U.S. mail and, when possible, via email and text message, is reasonable.

## **V. Conclusion**

Because the Settlement makes significant monetary relief available to Settlement Class Members who might have recovered nothing without the Settlement, the Court should grant preliminary approval and enter the proposed Preliminary Approval Order, which will be submitted to the Court via its proposed order email address.

Dated: April 16, 2021

Respectfully submitted,

/s/Zachary C. Flowerree  
One of Plaintiffs' Attorneys

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**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was filed with the Court's CM/ECF filing system on April 16, 2021, which will serve a copy on all counsel of record.

/s/ Zachary C. Flowerree  
*One of the Attorneys for Plaintiffs*