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

JOHN KRAWIEC, individually and on behalf of all others similarly situated, *Plaintiff*, v. GOLD EAGLE CO., *Defendant*.	Case No. 2022CH07333 Calendar 8 Hon. Michael T. Mullen Courtroom 2510

PLAINTIFF'S MOTION FOR AND MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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1. INTRODUCTION

Plaintiff John Krawiec alleges that Defendant Gold Eagle Co. required him and a class of 90 workers to use a timeclock that scanned their fingerprints without providing proper notice or consent, in violation of the Biometric Information Privacy Act, 740 ILCS 14/1–99 ("BIPA").

In September, the Court granted preliminary approval of a class settlement (the "Settlement"), creating a settlement fund of $90,750 from which notice and administrative costs, litigation expenses, attorneys' fees, incentive awards, and settlement payments will be made. Since then, the Settlement Administrator has effectuated the Court-ordered Notice Plan, not a single Class member has objected, and only one Class member has requested exclusion from the Settlement. If finally approved, the Settlement will bring certainty, closure, and significant relief to the Class members without the cost and uncertainty of further litigation.

This memorandum describes why final approval is in the Class's best interest and consistent with 735 ILCS 5/2-801. Most importantly, the relief obtained in the Settlement compares favorably to the strength of Plaintiff's case and recognizes that Defendant has potential defenses to the same. *See Steinberg v. Sys. Software Assocs., Inc.*, 306 Ill. App. 3d 157, 170 (1st Dist. 1999). Had litigation continued, Plaintiff and the Class faced a substantial risk of nonrecovery, whether through risk of defeat or inability to collect a judgment. Given that risk, the Settlement, which includes meaningful cash compensation to class members without the need for them to complete any claims process, exceed the standards of fairness. Accordingly, the Court should finally approve the Settlement so that the Class members can receive their settlement payments.

2. BACKGROUND

2.1. The Biometric Information Privacy Act

Recognizing the "very serious need" to protect Illinoisans' biometrics—including fingerprints, voiceprints, retina scans, and scans of hand or face geometry—the Illinois legislature passed BIPA unanimously in 2008. 740 ILCS 14/5. BIPA makes it unlawful for any private entity to "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:

> (1) informs the subject … in writing that a biometric identifier or biometric information is being collected or stored;
>
> (2) informs the subject … in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
>
> (3) receives a written release executed by the subject of the biometric identifier or biometric information ….

740 ILCS 14/15(b). BIPA also establishes standards for handling biometric data. For example, BIPA requires companies to develop and comply with a written policy establishing a retention schedule and guidelines for permanently destroying biometric data. 740 ILCS 14/15(a).

2.2. Litigation, Negotiation, and Settlement

Plaintiff worked for Defendant from September 2, 2020 through May 11, 2021. *See* Defendant's Brief in Support of Motion to Dismiss, at 1. Throughout that time, Defendant required its hourly workers to clock in and out of shifts with a fingerprint scanner. Compl. ¶ 10. While Plaintiff worked for Defendant, Defendant did not obtain workers' informed, written consent prior to scanning their fingerprints, nor did it maintain a publicly available retention-and-destruction schedule for biometric data. *Id.* ¶¶ 14–17, 38. On November 1, 2021, Defendant began requiring its employees to execute a consent form prior to using the fingerprint scanner. Larry Decl. ¶ 21.

On July 28, 2022, Plaintiff sued Defendant, alleging that it violated: (1) BIPA § 15(a)'s requirement that entities in possession of biometrics publish and comply with a biometric retention and destruction policy; and (2) BIPA § 15(b)'s requirement that private companies obtain informed, written consent prior to collecting biometrics. Compl. ¶¶ 30–38. Plaintiff sought to certify a class of everyone who used Defendant's biometric timeclocks in Illinois on or after within the applicable limitations period, *id.* ¶ 22, and requested statutory damages of $5,000 per class member, per violation on their behalf. *Id.*, Prayer for Relief.

Defendant appeared on October 14, 2022, and shortly thereafter moved to dismiss, arguing that Plaintiff could not represent the alleged class because he only worked for Defendant for a portion of the class period, and that Plaintiff had failed to adequately allege that Defendant possessed his biometric information. Plaintiff filed his opposition brief on April 13, 2023, and Defendant replied on April 27, 2023.

The Parties began discussing the possibility of settlement shortly after Defendant appeared. Larry Decl. ¶ 18. Those discussions did not result in resolution, and the Parties decided to defer further settlement discussions until briefing on Defendant's motion to dismiss was complete. *Id.* The Parties resumed their negotiations after Defendant filed its reply, and negotiations intensified in advance of the hearing on Defendant's motion to dismiss, originally scheduled on July 11, 2023. *Id.* ¶ 19. The Parties made substantial progress on their negotiations, and the Court reset the hearing on the motion to dismiss to July 31, 2023, with a status hearing on July 27, 2023. *Id.* ¶ 20. The Parties reached an agreement in principle on July 26, 2023. Larry Decl. ¶ 20.

On September 18, 2023, the Parties appeared before the Court to seek preliminary approval of the Settlement, which provided for a settlement fund of $90,750, for class members to automatically receive payments based on their dates of employment, without any claim form, and

for any unclaimed funds to go to a *cy pres* recipient, rather than reverting to Defendant. The Court entered the preliminary approval order the next day, and on October 2, 2023, the Settlement Administrator disseminated notice via U.S. Mail and launched the Settlement Website. Ex. 2, Grayson Decl. ¶ 8. The deadline for objection and exclusion was November 27, 2023. To date, no Class member has objected to the Settlement and only one class member has requested exclusion. *Id.* ¶ 12; Larry Decl. ¶ 2

3. TERMS OF THE SETTLEMENT

3.1. Class Definition

The Settlement Class consists of all individuals who used a biometric timeclock while working for Defendant in the State of Illinois at any time from July 28, 2017, to the date of preliminary approval. Agreement, Ex. 1, ¶ 1.24. Excluded from the Class are (1) any Judge or Magistrate presiding over this action and members of their staff and families; (2) persons who properly execute and file a timely request for exclusion from the class; and (3) the legal representatives, successors, or assigns of any such excluded persons. *Id.* The Class contains 90 members. *Id*.

3.2. Settlement Payments

Defendant has agreed to pay $90,750, from which costs of notice and administration (estimated at $7,063), attorneys' fees and costs (up to $22,687.50), and Plaintiff's incentive award (up to $3,000) will be paid. Settlement Agreement, ¶¶ 8.1–8.3. The remaining amount ($57,999.50) will be distributed according to an allocation formula, whereby Settlement Class Members who used Defendant's fingerprint timeclock before November 1, 2021 receive payments four times those of Settlement Class Members who first used the timeclock on or after November 1, 2021. *Id.*, ¶ 2.2. It is anticipated that the initial checks will be $745.97 for each Settlement Class Member

who used the timeclock before November 1, 2021, and $208.63 for each Settlement Class Member who first used the timeclock on or after November 1, 2021. *Id.*

3.3. Prospective Relief

Under the Settlement, Gold Eagle will ensure deletion of any fingerprint or template data relating to any former employee within its possession. Settlement Agreement, ¶ 2.3. To the extent Gold Eagle continues to use biometric timeclocks in Illinois, it shall continue to implement policies and procedures sufficient to obtain informed, written consent from employees prior to the employees' use of the timeclock. *Id.*

3.4. Release of Liability

Upon the entry of a final approval order and the expiration of the time for appeal or the entry of an appellate decision, (i) Plaintiff and every Settlement Class Member who has not timely filed a request to be excluded from the Settlement Class will release and forever discharge the Released Parties as further explained in the Settlement Agreement, and (ii) the Court will be asked to enter a final judgment in favor of Defendant, dismissing with prejudice all claims asserted in, or that could have been asserted in, this action. Settlement Agreement ¶ 3.1.

3.5. Payment of Notice and Administration Costs

The Settlement Fund will be used to pay the costs of sending the Notice and any other notice the Court requires, as well as all costs of administration. *Id.* ¶ 2.1.1. The Settlement contemplates using best efforts to send direct notice to all Settlement Class Members. *Id.* ¶¶ 1.14; *id.* § 4.

3.6. Payment of Attorneys' Fees, Costs, and Incentive Award

Defendant has agreed that the Settlement Fund may be used to pay Plaintiff an incentive award. Settlement Agreement, ¶ 8.3. Class Counsel submitted to the Court an application seeking an incentive award to Plaintiff of $3,000 as compensation for his effort in bringing the claim and

achieving the benefits of the Settlement on behalf of the Settlement Class. *Id*. Courts routinely approve service awards to compensate named plaintiffs for the services they provide and the risks they incur during the course of class action litigation. *See Standards and Guidelines for Litigating and Settling Consumer Class Actions (3d ed., 2014)*, National Association of Consumer Advocates, 299 F.R.D. 160, Guideline 5 ("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 1005 (7th Cir. 1998) (affirming $25,000 incentive award to named plaintiff). Here, Plaintiff assisted counsel with the investigation of this action, reviewed and approved of the drafting of the complaint, and maintained regular contact with counsel regarding the status of the litigation and settlement. Larry Decl. ¶ 22.

Defendant also agrees that the Settlement Fund may be used to pay Class Counsel reasonable attorneys' fees and costs, if approved by the Court. Settlement Agreement, ¶ 8.1. If, as here, "a statute or contractual agreement expressly authorizes an award of attorney fees, the court may award fees 'so long as they are reasonable.'" *McNiff v. Mazda Motor of Am., Inc.*, 384 Ill. App. 3d 401, 404 (4th Dist. 2008) (quoting *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 405 (1st Dist. 2007)). Class Counsel sought fees and costs of one-quarter of the settlement fund, or $22,687.50. Settlement, ¶ 8.1. Similar and larger requests are regularly approved. *See*, *e.g.*, *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, 2001 WL 1568856, *4 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (collecting cases); *Shaun Fauley, Sabon, Inc. v. Metro Life Ins. Co.*, 2016 IL App (2d) 150236 ¶ 24 (approving attorneys' fees of one-third of reversionary fund).

4. THE SETTLEMENT WARRANTS FINAL APPROVAL

Upon final approval, the Settlement will automatically provide Class Members with checks of either $745.97 or $208.63, depending on when they started their employment with Defendant,

a benefit they otherwise likely would not, or could not, have pursued. In addition, because of the Notice Plan, the Class Members were informed of their rights and options. Because the Settlement provides fair, reasonable, and adequate relief, and because the Notice Plan effectively informed Class Members of their rights, this Settlement warrants final approval.

4.1. The Notice Plan Successfully Informed Class Members About Their Rights Under the Settlement Agreement.

Because class actions by their nature involve a representative acting on behalf of absent members, critical to any class settlement is that class members are effectively informed of the settlement and their rights and options thereunder. Accordingly, prior to granting final approval to this Settlement, the Court must consider whether the Class Members received the best notice practicable under the circumstances. *Lee v. Buth-Na-Bodhaige, Inc.*, 2019 IL App (5th) 180033, ¶ 80. "[D]ue process does not require individual notice to every member of the class in all circumstances." *Currie v. Wisc. Cent. Ltd.*, 2011 IL App (1st) 103095, ¶ 53. In general, a notice plan that reaches at least 70% of class members is considered reasonable. *See* Federal Judicial Center, Judges' Class Action Notice & Claims Process Checklist & Plain Language Guide, 3 (2010), available at https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf.

Here, in preliminarily approving the Settlement, the Court approved the Settlement's robust Notice Plan, which provided for direct notice via U.S. Mail to all Class Members informing them of their rights and options under the Settlement, and establishment of a settlement website. Ex. 1, ¶ 1.14; *id.* § 4. The Settlement Administrator implemented the Notice Plan on October 2, 2023. Grayson Decl. ¶ 9. The Settlement Administrator updated the Class List through the NCOA, mailed notice to all 90 Class Members, ran skip traces on the six Class Members whose notices were initially returned as undeliverable, attempted redelivery on three of those notices, and successfully reached all three. *Id.* ¶ 11.

In total, the Notice Plan ultimately achieved direct notice to 87 of the 90 Class Members, or 96.7% of the Class. *Id.* Given that level of direct notice, the effectuation of the Court-approved Notice Plan satisfies due process. *See Carrao v. Health Care Serv. Corp.*, 118 Ill. App. 3d 417, 429–30 (1st Dist. 1983) (noting that while due process may require individual notice to class members whose identities and addresses can be readily obtained from defendant's files, it does not require individual notice in all circumstances).

4.2. All Relevant Factors Favor Final Approval.

"[T]here is an overriding public interest in favor of settlement of class action suits." *See Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 307 (7th Cir. 1985) (internal quotation omitted). Courts have wide discretion in deciding whether to approve a settlement as "fair, reasonable, and adequate." *People ex rel. Wilcox v. Equity Funding Life Ins. Co.*, 61 Ill.2d 303, 317 (1985). "Since the result is a compromise, the court in approving it should not judge the legal and factual questions by the same criteria applied in a trial on the merits. Nor should the court turn the settlement approval hearing into a trial. To do so would defeat the purposes of a compromise …." *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 493 (1992). In making a reasonableness determination, courts typically consider the following factors:

(1) the strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in settlement;

(2) the defendant's ability to pay;

(3) the complexity, length and expense of further litigation;

(4) the amount of opposition to the settlement;

(5) the presence of collusion in reaching a settlement;

(6) the reaction of members of the class to the settlement;

(7) the opinion of competent counsel; and

(8) the stage of proceedings and the amount of discovery completed.

Id. Based on these factors, approval is appropriate here.

4.2.1. The Settlement Reflects the Strength of the Case.

The size of the Settlement Fund and the automatic payments to Settlement Class members are significant in light of the risks of ongoing litigation. Although Plaintiff and Class Counsel believe they would prevail on their claims against Defendant, they are also aware that Defendant denies their allegations, had a pending motion to dismiss at the time the Parties reached the settlement, and would have asserted additional defenses even if Plaintiff had survived the motion to dismiss. Beyond its argument that its vendors, rather than Defendant itself, captured or possessed the Class members' biometrics, Defendant would likely raise a number of defenses, including that BIPA is unconstitutional special legislation; that Plaintiff and the Settlement Class consented to Defendant's conduct; and that BIPA's statutory damages regime violates due process. If Defendant were to succeed on any of its defenses, Settlement Class Members could recover nothing. Moreover, Plaintiff would have to prevail on a class certification motion, which would be contested. Further, even if Plaintiff was successful on the merits, under the Supreme Court's recent *Cothron* decision, Defendant would argue that Plaintiff and the Class members were entitled to a *de minimis* award of statutory damages. *See Cothron v. White Castle System, Inc.*, 2023 IL 128004.

In the face of these risks, the relief here justifies settlement. "Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation." *Schulte v. Fifth Third Bank,* 805 F. Supp. 2d 560, 582–86 (N.D. Ill. 2011). Approval would allow the Settlement Class Members to automatically receive significant payments now, instead of years from now, if ever. A final consideration affecting the long-term viability of Plaintiff's claims is the uncertain existence and continued effectiveness of BIPA. Multiple bills were introduced in the

recent legislative session that, if passed, could have negatively affected BIPA plaintiffs.[1] If the legislature were to amend, reduce, or limit the rights available under BIPA, Plaintiff and the Settlement Class Members could see their claims evaporate.

Negotiating under these risks, Plaintiff and Class Counsel have obtained a settlement fund providing an average gross recovery of $1,008.33 per class member with automatic payments, which compares favorably to other judicially approved BIPA settlements, which have often included settlement terms such as credit/dark web monitoring, claims processes, and caps on the amount that claiming class members can recover. *See*, *e.g.*, *Carroll v. Crème de la Crème, Inc.*, No. 2017-CH-01624 (Cir. Ct. Cook Cnty.) (credit monitoring only); *McGee v. LSC Commc'ns*, No. 2017-CH-12818 (Cir. Ct. Cook Cnty.) ($750 to claiming class members); *Marshall v. Lifetime Fitness, Inc.*, No. 2017-CH-14262 (Cir. Ct. Cook Cnty.) ($270 to claiming class members).

4.2.2. A Class-Wide Judgment Would be Difficult to Collect.

Defendant's ability to pay also supports settlement. Plaintiff's complaint seeks damages of $5,000 *per violation* from Defendant. Compl., Prayer for Relief. With a 90-person class, statutory damages could exceed $10,000,000 if the class members averaged even 12 working days each.[2] The maximum statutory damage award would likely be unrecoverable.

Any such judgment would be extremely difficult to recover. By contrast, the Settlement provides immediate and meaningful relief.

4.2.3. Further Litigation Would be Expensive, Lengthy, and Risky.

The expense, duration, and complexity of continued litigation would be substantial. Defendant's motion to dismiss was pending when the parties negotiated the settlement, and had

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1 *See*, *e.g.*, 2023 Ill. H.B. 2252 and 3199.

2 90 class members times 12 shifts times 2 scans per shift times $5,000 per scan equals $10,800,000.

litigation continued beyond the pleadings stage, the parties would have had to undergo significant motion practice before any trial, and evidence and witnesses would have to be assembled. The losing party also would likely appeal any merits or class certification decision. As such, the immediate, certain, and considerable relief to Settlement Class members under the Settlement Agreement weighs heavily in favor of its approval.

4.2.4. Plaintiff Expects Settlement Class Members to React Positively to the Settlement.

The fourth and sixth factors—opposition to the settlement and the reaction of class members—are "closely related." *Korshak*, 206 Ill. App. 3d at 973. As noted above, no Class Member has objected, and only one Class Member has opted out. Grayson Decl. ¶¶ 12–13; Larry Decl. ¶ 23. Given the comprehensive reach of the notice, the lack of any negative feedback suggests that the Class Members support the Settlement. *Am. Civil Liberties Union v. United States Gen. Servs. Admin*., 235 F. Supp. 2d 816, 819 (N.D. Ill. 2002) (lack of objections supported finding that settlement was "fair and reasonable"); *see also In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1021 (N.D. Ill. 2000) (finding that "99.9% of class members have neither opted out nor filed objections to the proposed settlements … is strong circumstantial evidence in favor of the settlements").

4.2.5. The Settlement Was Non-Collusive.

The fifth factor—potential collusion in reaching the settlement—likewise favors approval. A settlement is presumed fair and reasonable when it is the result of arm's-length negotiations. *Sabon*, 2016 IL App (2d) 150236, ¶ 21 (finding no collusion where there was "no evidence that the proposed settlement was not the product of 'good-faith, arm's-length negotiations'"). Here, the Settlement was only reached after months of negotiations between experienced counsel, resulting

in substantial relief given the likelihood of success on the claims. That excellent result makes clear that this Settlement was the result of good-faith negotiations, not collusion.

4.2.6. Experienced Counsel Favor Settlement.

The seventh factor—the views of experienced counsel—further supports approval. J. Dominick Larry has litigated dozens of BIPA class actions at his own firm and, prior to hanging his own shingle, litigated seminal BIPA cases, including the first (and to date, largest to settle), and the first to settle on a class-basis, *In re Facebook Biometric Info. Privacy Litig.*, No. 15-cv-3747 (N.D. Cal.); *Sekura v. L.A. Tan Enterps., Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Cnty.). Larry Decl. ¶¶ 6–14. That experience allowed Class Counsel to evaluate the risks and benefits throughout the negotiation process, ultimately resulting in the substantial relief obtained. Accordingly, this factor favors final approval.

4.2.7. Settlement is Appropriate at this Stage in the Proceedings.

Finally, the eighth factor, the stage of proceedings and amount of discovery completed, supports approval. The core facts necessary to value Plaintiff's and the Settlement Class's claims—whether Defendant used a biometric scanner, and whether it provided notice and obtained consent as required by statute—were confirmable through informal discovery. Moreover, the parties spent months negotiating based on those material facts. Had the parties not reached a settlement, this litigation would have proceeded to dispositive motions and class certification, with the parties being required to expend substantial resources proving the material facts through formal discovery and then briefing their import, with the accompanying risk to each party. Accordingly, the eighth settlement factor—like the seven before it—favors approval.

5. THE ATTORNEYS' FEES AND INCENTIVE AWARD SHOULD BE APPROVED

Because neither Defendant nor any Class Member chose to object to Class Counsel's Motion for Approval of Attorneys' Fees & Incentive Award, and because all factors favor final approval, the Court should also approve Plaintiff's requested attorneys' fees and incentive award.

The Class Notice stated the attorneys' fees and the Incentive Award that Class Counsel and the Class Representative would seek. *See generally* Ex. 1-B. Further, the Motion for Attorneys' Fees was filed on November 13, 2023, two weeks prior to the objection and exclusion deadline.[3] Accordingly, the Settlement Class Members had ample opportunity to consider the fee petition. However, no objections to were lodged. Grayson Decl. ¶ 13. The lack of any opposition is unsurprising, since, as discussed above, Class Counsel's fees are reasonable in light of the substantial relief to the Settlement Class Members and are in line with fees sought in similar BIPA actions. In fact, and as set forth in the Motion for Attorneys' Fees, while Plaintiff seeks attorneys' fees of one-quarter of the fund, judges have regularly approved larger awards in BIPA settlements. *See* Pltf.'s Mtn. for Attorneys' Fees and Incentive Award at 8–9 (collecting cases). Similarly, Plaintiff's requested incentive award is well within the range approved in similar cases. *Id.* at 12.

For the reasons stated in the fee petition, and because neither Defendant nor any Class Member objected, Plaintiff and Class Counsel respectfully request that in finally approving this Settlement, the Court also approve Plaintiff's requested Incentive Award and attorneys' fees.

6. CONCLUSION

For the reasons stated above and in Plaintiff's Motion for Attorneys' Fees and Incentive Award, Plaintiff respectfully requests that this Court finally approve the Settlement and award Plaintiff and Class Counsel the requested attorneys' fees and Incentive Award.

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[3] The fee petition was uploaded to the Settlement Website the following day. Grayson Decl. ¶ 9.

Dated: December 4, 2023

Respectfully submitted,

JOHN KRAWIEC, individually and on behalf of all others similarly situated,

s/ J. Dominick Larry
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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on December 4, 2023, I e-filed the foregoing through an approved e-filing vendor, with courtesy copies sent by email to the following counsel for Defendant:

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Dated: December 4, 2023

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