IN THE CIRCUIT COURT OF NINETEENTH JUDICIAL DISTRICT
LAKE COUNTY, ILLINOIS

FLORENCIO LUNA, individually and on behalf of other persons similarly situated, Plaintiff, v. TERMAX COMPANY Defendant.	Case No.: 21CH00000356 Honorable Janelle K. Christensen

PLAINTIFF'S UNOPPOSED MOTION
FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT

On November 15, 2022, this Court preliminarily approved the Class Action Settlement between Plaintiff Florencio Luna and Defendant Termax Company ("Defendant") and further directed that notice be sent to the Settlement Class. The settlement administrator has implemented the Court-approved notice plan and notice has been issued. The reaction from the Settlement Class has been overwhelmingly positive. Specifically, of the 569 Settlement Class Members, zero have objected or opted-out of the Settlement. *See* ***Exhibit 1***, the Declaration of Roberto Costales ¶¶ 8, 14-15. Now, pursuant to the Court's Order, Plaintiff moves for final approval of the parties' Class Action Settlement.[1] Defendant does not oppose this motion.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff is a former employee of Defendant. *See* Plaintiff's Complaint ("Compl.") at ¶ 3. Plaintiff alleges that during his employment, Defendant required him and other employees to scan their fingerprints to clock in and out of work. Compl. ¶¶ 2-4. Plaintiff's lawsuit alleges that this

[1] A true and correct copy of the parties' Settlement Agreement has been appended to the Costales Declaration as ***Exhibit 1-A***. Unless otherwise defined herein, all capitalized terms have the same force, meaning and effect as ascribed in the "Definitions" section of the Settlement Agreement.

time tracking system is subject to the Illinois Biometrics Information Privacy Act ("BIPA") and that Defendant failed to obtain written consent in accordance with the statute before collecting biometric data to track workers' time. Compl. ¶¶ 1-9. Plaintiff further alleged, on a class basis, that Defendant violated the BIPA in its failure to obtain provide prior written notification of its biometric policies. Compl. ¶¶ 26-35. Defendant disputes these allegations and also disputes that any claims asserted by Plaintiff may proceed on a class action basis.

Recognizing the risk to both sides, as well as other potentially dispositive issues, the parties discussed the possibility of settling this case. Costales Decl. ¶ 3. After conducting numerous conferences between themselves, as well as exchanging papers and settlement discovery, the parties engaged in significant arms-length negotiations regarding resolution. *Id*. ¶¶ 3-6. Over the course of these lengthy negotiations, the parties were able to close a considerable distance in their respective positions on settlement and reach a deal in principle. *Id*.

While the negotiation was successful in that the parties executed a term sheet, there were still many remaining details regarding the specifics of the settlement. Costales Decl. ¶ 6. The extent of these additional considerations is demonstrated by the parties' time-consuming process of drafting the settlement paperwork, which underwent multiple revisions as the parties debated the details of the settlement. *Id*. This continued negotiation over the precise terms and features of the settlement culminated in a signed Settlement Agreement and Motion for Preliminary Approval submitted to this Court on September 27, 2022. On November 15, 2022, the Court granted preliminary approval of the Parties' Settlement.[2]

[2] A copy of the Court's Preliminary Approval Order is appended to the Costales Declaration as ***Exhibit 1-B***.

TERMS OF THE SETTLEMENT

A. Settlement Class Definition

The Settlement Class is defined as:

> All individuals who used their fingerprint, handprint and/or other biometric identifier or biometric information, as defined by applicable Illinois law, to clock in and out of work at one of Termax's Illinois facilities from September 30, 2016 through August 1, 2022.[3]

See Agreement ¶ 1.32; Preliminary Approval Order ¶ 6. The Settlement Class is comprised of 569 members.

B. Monetary Relief

Defendant will establish a Settlement Fund of $472,100.00, from which each Class Member is entitled to receive a *pro rata* share if they filled out and timely returned a simple, one-page Claim Form. Agreement ¶ 2.1(b). The Settlement Fund will also be used to pay Settlement Administration Expenses, a Fee Award to Class Counsel, and an Incentive Award to the Class Representative. Agreement ¶¶ 1.34; 8.1-8.4. The Settlement Fund is the maximum amount that Defendant shall be obligated to pay under the Settlement. Based on the number of claims that have been made by Settlement Class Members and the proposed deduction of fees and costs, each Participating Class Member is currently estimated to receive $1,236.59 on a net basis—even higher than initially expected. ***See Exhibit 2*** Declaration of Settlement Administrator Mary Butler ("Butler Decl.") ¶ 12. Given that the Settlement Class Members will receive checks while the country enters a period of unprecedented inflation, the payment comes at a particularly important time.

[3] Excluded from the Settlement Class are: (a) any Judge presiding over this action and members of their immediate families; and (b) persons who submits a Valid Exclusion Statement.

C. Release

In exchange for the relief described above, Defendant as well as all Released Parties as defined in ¶ 1.28 of the Agreement, will receive a full release of all Released Claims from Plaintiff and all Settlement Class Members who have not excluded themselves from the Settlement. Agreement ¶¶ 1.27-1.29.

D. Notice of Settlement and Settlement Administration Expenses

As described in the Motion for Preliminary Approval, the Settlement administration and Notice procedure were specifically tailored in order to provide every putative Settlement Class Member with direct written notice of the Settlement. The detailed notice paperwork fully described the Settlement terms and provided information allowing Settlement Class Members to opt out, object, or obtain additional information directly from Class Counsel, among other things. Following preliminary approval, Notice was sent via U.S. Mail to all 569 Settlement Class Members. Butler Decl. at ¶¶ 6-9. Per the Court's order, notice was sent in both English and Spanish. *Id*. ¶ 3. Where any notice was returned by the Post Office, the Settlement Administrator ran an advanced address search or "skip trace" of that individual to locate a new address. *Id*. ¶ 9. The Settlement Administrator thus took all reasonable steps to best ensure that all Settlement Class Members had the opportunity to receive Notice of the Settlement and their share of the Settlement Fund. This notice was designed to reach as many Settlement Class Members as possible. Ultimately, of the 569 Settlement Class Members, only 19 individuals' current mailing addresses were unable to be located. *Id*. This is a Notice rate of 97%. In addition, the Settlement Administrator made the Settlement documents in this case available on its website, tmxfingerprintsettlement.com, where Settlement Class Members could view them. Butler Decl. ¶ 10.

The Settlement Fund will be used to pay Settlement Administration Expenses. Agreement ¶ 1.34. The total cost of the Settlement Administrator's services (including all additional future work moving forward finalizing and administering the settlement funds) is $16,076.00. Butler Decl. ¶ 15.

E. Incentive Award and Fee Award

Defendant has agreed not to oppose a request that Plaintiff Luna may receive, subject to Court approval, an Incentive Award of up to $7,500 from the Settlement Fund as compensation for his time and effort serving as Class Representative in this Action. Agreement ¶ 8.4. The Settlement Fund will also be used to pay Class Counsel's Fee Award. The Settlement allows for the Court to award attorneys' fees and costs in an amount up to 40% of the Settlement Fund. Agreement ¶ 8.1. These awards are subject to this Court's approval, which Plaintiff moved for separately on January 27, 2023. That motion is unopposed.

CLASS ACTION SETTLEMENT APPROVAL PROCESS

Strong judicial and public policies favor the settlement of complex class action litigation, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Quick v. Shell Oil Co.*, 404 Ill. App. 3d 277, 282 (3rd Dist. 2010); *see also* 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11.41 (4th ed. 2002) (hereinafter Newberg).

Courts review proposed class action settlements using a well-established two-step process. Newberg § 11.25, at 38-39; *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 492 (1st Dist. 1992). The Court has already granted preliminary approval of the Settlement and this case is now before the Court for the second and final step of the approval process—a final approval hearing at which time the court determines whether the settlement is "fair and reasonable and in

the best interest of all those who will be affected by it." *GMAC Mortgage Corp. of PA v. Stapleton*, 236 Ill. App. 3d 486, 493 (1st Dist. 1992).

ARGUMENT

I. The Settlement Should be Finally Approved

Upon final approval, the Settlement reached in this matter will provide Settlement Class Members with substantial financial compensation that they otherwise would not have obtained. Because the Settlement reached by the parties is fair, reasonable, and provides adequate compensation to the Settlement Class, and because the Notice program effectively notified Settlement Class Members of their rights under the Settlement Agreement, the Settlement warrants final approval by the Court.

A. The Settlement Is Fair, Reasonable, and Adequate

Courts favor the settlement of class action litigation. Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (*"Newberg"*), § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). "In reviewing a proposed settlement, the court should consider the judgment of counsel and the presence of good faith bargaining." *Patterson v. Stovall*, 528 F.2d 108, 114 (7th Cir. 1976) *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Courts usually refuse to substitute their business judgment for that of counsel, absent fraud or overreaching. *Id*.

Section 2-801 provides that a court may approve a proposed class settlement "on a finding that it is fair, reasonable, and adequate." 735 ILCS 5/2-801. In assessing the fairness, reasonableness, and adequacy of a proposed class settlement, Illinois courts consider the following factors: "(1) the strength of the case for the 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." *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990); *see also Armstrong*, 616 F.2d at 314.

In this case, all eight factors weigh in favor of finding the Settlement fair, reasonable, and adequate, warranting its final approval.

B. The Settlement Provides Substantial Relief

As to the first factor, the Settlement in this case provides substantial material benefits to the Class: each Participating Class Member who has made a valid claim is projected to receive a payment of $1,236.59. Butler Decl. ¶ 12; Costales Decl. ¶ 8. While Plaintiff believes he would likely prevail on his claims, he is also aware that Defendant denies the material allegations of the Complaint and intends to pursue several legal and factual defenses, including but not limited to whether Defendant actually possessed biometric information or biometric identifiers, and whether Settlement Class Members' claims are barred by the applicable statute of limitations. Costales Decl. ¶ 11. The viability of the latter defense was the subject of at least three appellate cases that were pending when settlement between the Parties was reached. *See Marion v. Ring Container Technologies, LLC*, Case No. 3-20-0184 (IL App. Ct. 3d Dist.); *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563 (appeal accepted by the Illinois Supreme Court); and *Cothron v. White Castle Sys., Inc.*, 20 F.4th 1156, 1167 (7th Cir. 2021) (certifying the question of BIPA cause of action accrual to the Illinois Supreme Court). If successful, the statute of limitations defense would have resulted in a substantial portion of the proposed Settlement Class receiving no payment or relief whatsoever. Thus, the unsettled nature of several potentially dispositive threshold issues

in this case posed a significant risk to Plaintiff's claims. 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.

In addition to any defenses on the merits Defendant would raise, should litigation continue Plaintiff would also be required to prevail on a class certification motion, which would be highly contested and for which success is certainly not guaranteed. *See 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") (internal citations omitted). Defendant would likely be motivated to appeal any adverse decision on the merits and/or class certification. "If the Court approves the [Settlement], the present lawsuit will come to an end and [Class Members] will realize both immediate and future benefits as a result." *Id*. Approval would allow Plaintiff and Settlement Class Members to receive meaningful and significant payment now, instead of years from now or never. *Id*. at 582.

Additionally, the fairness, reasonableness, and adequacy of the instant Settlement are supported by previously approved settlements. For example, in *Zepeda v. Intercontinental Hotels Group, Inc.*, No. 2018-CH- 02140 (Cir. Ct. Cook Cnty., Ill. 2018), the settlement provided each class member eligible to receive a pro rata share of a settlement fund that amounted to an gross approximate payout of $500 per person. Similarly, recent settlements in *Lopez v. Multimedia Marketing & Sales, Inc.*, No. 17- CH-15750 (Cir. Ct. Cook Cnty., 2020), *McGee v. LSC Comm'ns, Inc.*, No. 17-CH-12818 (Cir. Ct. Cook Cnty., 2019), and *Wydra v. Midwest Can Co.*, No. 19-CH-08185 (Cir. Ct. Cook Cnty., 2020) provided settlement class members with gross payments of $565 per person, $750 per person, and $626.70 per person, respectively. Here, the pro rata payment to each Participating Class Member is a net amount of $1,236.59 dollars. Butler Decl. ¶ 12;

Costales Decl. ¶ 8. This result is certainly fair, reasonable, and adequate and warrants Court approval.

C. Defendant's Ability to Pay

The second factor that can be considered by courts is the Defendant's ability to pay the settlement sum. Defendant's financial standing has not been placed at issue here.

D. Continued Litigation is Likely to be Complex, Lengthy, and Expensive

The third factor asks whether the settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation. *See City of Chicago*, 206 Ill. App. 3d at 972. In absence of settlement, it is certain that the expense, duration, and complexity of the protracted litigation that would result would be substantial. Not only would the parties have to undergo significant motion practice before any trial on the merits is even contemplated, but evidence and witnesses from throughout the State of Illinois and beyond would have to be assembled for any trial. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal both any decision on the merits as well as on class certification. As such, the immediate and considerable relief provided to the Class under the Settlement Agreement weighs heavily in favor of its approval compared to the inherent risk and delay of a long and drawn-out litigation, trial, and appeal. Protracted and expensive litigation is not in the interest of any of the parties or Settlement Class Members.

E. There Has Been No Opposition to the Settlement and the Claims Rate to date has been substantial.

The fourth and sixth factors consider the amount of opposition to the Settlement and the reaction of the Settlement Class to the Settlement. *See City of Chicago*, 206 Ill. App. 3d at 972.

Following the implementation of the Notice plan set forth in the Settlement Agreement, the Settlement Class's reaction to the Settlement has been overwhelmingly favorable. In

accordance with the Notice plan, the Settlement Administrator successfully provided direct notice to the Settlement Class. Zero Class Members have objected to the settlement and zero Settlement Class Members have requested to be excluded from the Settlement.[4] Butler Decl. ¶¶ 13-14; Costales Decl. ¶¶ 14-15.

Additionally, to date, there have been 210 claims made under the Settlement. Butler Decl. 12. This is effectively a 37% claims rate—and significantly higher than the typical claims rate in consumer class actions. *See IN RE: TIKTOK, INC*., at *11 n. 6 (finding a claims rate of 22% in a BIPA case "impressive" and noting that claims rates in consumer class actions rarely exceed 7%); *In re Facebook Biometric Info. Priv. Litig*., 522 F. Supp. 3d 617, 622 (N.D. Cal. 2021), appeal dismissed, No. 21-15555, 2021 WL 2660668 (9th Cir. June 22, 2021) (citing an FTC report on consumer class actions that found the average claims rate to be between 4 and 9%); *Ferrington v. McAfee, Inc*., 2012 WL 1156399 * (N.D. Cal. Apr. 6, 2012) (observing that "the prevailing rule of thumb with respect to consumer class actions is [a claims rate of] 3–5 percent."

Accordingly, the fourth and sixth factors weigh in favor of granting final approval.

F. The Settlement was the Result of Arms'-Length Negotiations Between the Parties After a Significant Exchange of Information

The fifth factor considers the presence of any collusion by the parties in reaching the proposed Settlement. *City of Chicago*, 206 Ill. App. 3d at 972. There is an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's-length negotiations. Newberg, § 11.42; see also *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 21 (finding no collusion

[4] The deadline for Settlement Class Members to object to or request to be excluded from the Settlement was February 13, 2023. *See* 11/15/22 Preliminary Approval Order, Costales Decl. Ex. 1-B.

where there was "no evidence that the proposed settlement was not the product of 'good faith, arm's-length negotiations'"). Here, the Settlement was reached only after arm's-length negotiations between counsel for the parties over the course of many months. Costales Decl. ¶¶ 3-6. Moreover, negotiations began only after an exchange of information regarding the size and composition of the Settlement Class. *Id*. Such an involved process underscores the non-collusive nature of the Settlement. Finally, given the fair result for the Class in terms of the monetary relief, it is clear that this Settlement was reached as a result of good-faith negotiations rather than any collusion between the parties. Accordingly, this factor weighs in favor of final approval.

G. The Settlement Agreement Has Support of Experienced Class Counsel

The seventh factor is the opinion of competent counsel as to the fairness, reasonableness, and adequacy of the proposed settlement. *See City of Chicago*, 206 Ill. App. 3d at 972. Class Counsel believes that the Settlement is in the best interest of settlement Class Members because they are entitled to an immediate payment instead of having to wait for lengthy litigation and any subsequent appeals to run their course. Costales Decl. ¶¶ 10-12. Further, due to the defenses that Defendant has indicated that it would raise should the case proceed through litigation—and the resources that Defendant has committed to defend and litigate this matter—it is possible that Settlement Class Members would receive no benefit whatsoever in the absence of this Settlement. *Id*. Given Class Counsel's experience litigating similar class action cases, this factor also weighs in favor of granting final approval. *See* Costales Decl. ¶¶ 17-21; *see also GMAC*, 236 Ill. App. 3d at 497.

H. The Parties Exchanged Information Sufficient to Assess the Adequacy of the Settlement

The eighth factor is structured to permit the Court to consider the extent to which the court and counsel were able to evaluate the merits of the case and assess the reasonableness of the

settlement. *City of Chicago*, 206 Ill. App. 3d at 972. Here, the parties exchanged information regarding the facts and size of the class, and thoroughly investigated the facts and law relating to Plaintiff's allegations and Defendant's defenses. Costales Decl. ¶¶ 3-4. Accordingly, this factor also weighs in favor of final approval.

II. The Unopposed Motion for an Incentive Award and Fee Award Should Be Approved.

Because no objections were filed in opposition to Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (the "Fee and Expense Application"), and because all factors in favor of granting final approval of the Settlement have been met, the Court should also approve the requested Incentive Award to Plaintiff, and the Fee Award to Class Counsel.

The Fee and Expense Application was filed on January 27, 2023 and was made available on the Settlement Administrator's website that same day. In addition, the Notice Package was sent to all Class Members even before the Fee and Expense Application was filed and fully informed Settlement Class Members of the maximum amount of the Incentive Award and Fee Award that Class Counsel and Plaintiff would seek. Accordingly, Settlement Class Members had ample opportunity to consider the merits of the Fee and Expense Application. However, no objections to the Fee and Expense Application were filed, and no Settlement Class Members even informally expressed any dissatisfaction with the requested Incentive Award or Fee Award. The lack of any opposition is not surprising because, as discussed above, the Settlement provides substantial cash benefits to the Settlement Class.

For the reasons stated in the unopposed Fee and Expense Application, and because no Settlement Class Member has voiced any opposition or objection to the requested Fee Award or Incentive Award, Plaintiff and Class Counsel respectfully request that the Court approve the requested Incentive Award and Fee Award.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court enter an Order granting final approval of the Settlement. A proposed Final Approval Order is submitted herewith as ***Exhibit 3***.

Respectfully submitted,

/s/ Roberto Costales

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CERTIFICATION

I hereby certifying that the foregoing has been served on all counsel of record via the Odyssey e-file system on today's date, March 8, 2023. I further certify that a copy of this motion will be uploaded to the Claims Administrator's website.

/s/ Roberto Costales