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

IYANA HUMPHRIES, on behalf of herself and all others similarly situated,

Plaintiff,

v.

ONNI CONTRACTING LTD.,

Defendant.

Case No. 2020CH07544

Judge: Hon. Neil Cohen

REPRESENTATIVE PLAINTIFF'S UNOPPOSED MOTION FOR SERVICE AWARD AND FEE AWARD & INCORPORATED MEMORANDUM OF LAW

Dated: November 19, 2021

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Class Counsel

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Pursuant to 735 ILCS 5/2-801 and the Court's Order dated October 12, 2021, Representative Plaintiff Iyana Humphries and Class Counsel at Hedin Hall LLP respectfully move for the Court's approval of a Service Award and a Fee Award in connection with the Parties' preliminarily approved Settlement.[1] Defendant does not object to the requested Service Award or Fee Award amounts.

INTRODUCTION

In this consumer class action, Representative Plaintiff Iyana Humphries alleges that Defendant Onni Contracting, LTD. ("Defendant" or "Onni") violated the Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq.*, by collecting her and its other employees' fingerprints for timekeeping purposes without providing the requisite disclosures or obtaining informed written consent required by the statute.[2]

The Parties have reached a comprehensive class-wide resolution to this Action, which the Court preliminarily approved in its order dated October 12, 2021. The preliminarily approved Settlement establishes a non-reversionary Settlement Fund of $99,200 (ninety-nine thousand two hundred dollars) for the benefit of the Settlement Class, which consists of 124 people; the Settlement Fund will be used to automatically pay cash awards to all Settlement Class Members who have not excluded themselves (without requiring any of them to file a claim form), Settlement Administration Costs, and a Service Award to the Representative Plaintiff and Fee Award to Class Counsel as approved by the Court. The Settlement also provides meaningful prospective relief to the Settlement Class, requiring Defendant to destroy by November 12, 2021, all biometric data in

[1] Unless otherwise defined herein, all capitalized terms have the same force, meaning and effect as ascribed in Section 2 ("Definitions") of the Settlement Agreement.

[2] The parties have stipulated that the named Defendant "Onni Contracting LTD." was incorrectly sued. The correct entity, as reflected in the Settlement Agreement, is Onni Properties (Chicago) Inc.

its possession, custody, or control pertaining to individuals who have not signed BIPA-complaint consent documents and implement procedures and systems to obtain the requisite consent from employees in order to comply with BIPA should it continue to utilize the Time-Keeping System in Illinois.

Per the approved Notice Plan, Notice of the Settlement was disseminated by US Postal mail and/or email to each of the 124 members of the Settlement Class, and a Settlement Website has been established for Settlement Class Members to learn more about the Settlement, to review the relevant filings, orders, and other pertinent documents, to elect payment to an electronic wallet, to obtain instructions for objecting to or submitting requests for exclusion from the Settlement, and to submit requests for exclusion from the Settlement on a simple, web-based form. To date, none of the members of the Settlement Class have filed requests to be excluded from the Settlement or objected to the Settlement.

Class Counsel has invested significant time and resources, monetary and otherwise, investigating and litigating the claims and negotiating the Settlement on behalf of the Settlement Class – a high-risk undertaking that will result in each member of the Settlement Class receiving approximately $380 after all fees and expenses associated with the Settlement are deducted from the Settlement Fund. The Representative Plaintiff likewise played an invaluable role in this action by assisting counsel at every stage of the proceedings, including by providing counsel with information regarding Defendant's biometrics collection policies and practices, reviewing pleadings and other filings in the case, staying in regular contact with counsel and abreast of the proceedings, and taking an active role in negotiating, drafting, and executing the Settlement. Class Counsel devoted substantial time and resources to this action and will continue to do so until the Settlement administration process concludes and funds have been disbursed to Settlement Class

Members.

Representative Plaintiff and Class Counsel respectfully request the Court's approval of a Service Award of $2,000 and a Fee Award of 35% of the Settlement Fund (or $34,720). As detailed below, the requested awards are appropriate under governing Illinois law, consistent with the amounts awarded in prior similar settlements Illinois state and federal court, and constitute fair compensation for the significant amount of work performed by Class Counsel and the Representative Plaintiff in investigating, prosecuting, and resolving this litigation.

ILLINOIS' BIOMETRIC INFORMATION PRIVACY ACT

Recognizing the "very serious need" to protect Illinois citizens' biometric data—which includes retina scans, fingerprints, voiceprints, and scans of hand or face geometry—the Illinois legislature unanimously passed BIPA in 2008 to provide individuals recourse when companies fail to appropriately handle their biometric data in accordance with the statute. (*See* Comp., ¶ 11); 740 ILCS 14/5. Thus, 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 how companies must handle individuals' biometric data. For example, BIPA requires companies to develop a written policy establishing a retention schedule and guidelines for permanently destroying biometric data. 740 ILCS 14/15(a). To enforce the statute, BIPA provides a civil private right of action and allows for the recovery of statutory damages in the amount of $1,000 for negligent violations—or $5,000 for willful violations—plus costs and reasonable attorneys' fees. *See* 740 ILCS 14/20.

BACKGROUND

I. NATURE OF THE ACTION[3]

Onni is a property management company with a facility in Chicago, Illinois ("the Chicago Facility"). (Comp., ¶8). Onni employed Representative Plaintiff at the Chicago facility from approximately January 2019 through January 2020. (Comp. ¶ 17). Representative Plaintiff alleged in her Complaint that, during her employment at the Chicago facility, Onni required her to place her finger on a fingerprint scanner, at which point Onni scanned, collected, and stored in an electronic database, digital copies of Representative Plaintiff's fingerprints. (Comp., ¶18). Representative Plaintiff and other workers were required to use the fingerprint scanner every day, each time they wished to clock in and clock out of work. (Comp., ¶19). Representative Plaintiff further alleged that Defendant's sophisticated fingerprint matching technology compared her scanned fingerprint against the fingerprints previously stored in Defendant's fingerprint database, at which point she, and all others similarly situated, were able to clock in and clock out of work at Defendant's Chicago Facility. (*Id.*). Representative Plaintiff asserted that she never consented, agreed, or gave permission – written or otherwise – to Defendant for the collection or storage of her unique biometric identifiers or biometric information (Comp., ¶20), and further, that Defendant

[3] This section includes allegations from Plaintiffs' Complaint.

never provided her with, nor did she ever sign, a written release allowing Defendant to collect or store her unique biometric identifiers or biometric information. (Comp., ¶21). Additionally, Representative Plaintiff asserted that Defendant did not provide her with required statutory disclosures or an opportunity to prohibit or prevent the collection, storage or use of her unique biometric identifiers or biometric information. (Comp., ¶¶22-23).

Representative Plaintiff alleged that by collecting her and other Class members' unique biometric identifiers or biometric information without their consent, written or otherwise, Onni invaded their statutorily protected right to maintain control over their biometrics in violation of BIPA, and sought statutory damages as provided by BIPA. (Comp., ¶24).

II. PRE-FILING INVESTIGATION

Class Counsel conducted a comprehensive pre-filing investigation concerning every aspect of the factual and legal issues underlying the claims alleged in this matter. (Ravindran Decl. ¶ 9.) These pre-filing efforts included:

- Researching the nature of Defendant's business, size, number of employees, and location;
- Interviewing Representative Plaintiff to understand Defendant's timekeeping practices and whether such practices were BIPA compliant;
- Determining the appropriate measure of statutory damages;
- Assessing the factual and legal basis for any potential defenses to the claims alleged in the Complaint; and
- Reviewing Defendant's litigation history to determine whether Defendant had any pending claims on either an individual or class-wide basis.

(*Id.*, ¶ 9(A)-(E).)

As a result of this thorough pre-filing investigation, Class Counsel was able to develop multiple potentially viable theories of BIPA liability against Defendant, analyze the legal issues relevant to the merits of claims under each such theory, assess the likelihood of success of potential

defenses, and ultimately prepare a complaint against Defendant aimed at maximizing the likelihood of certifying a class and recovering meaningful class-wide relief. (Ravindran Decl. ¶ 10.) Following this pre-filing investigation and analysis, on December 31, 2020, Representative Plaintiff filed her Class Action Complaint in the Circuit Court of Cook County, Chancery Division.

III. SETTLEMENT NEGOTIATIONS

The parties began their initial settlement negotiations in mid-March. (Ravindran Decl. ¶ 12.) To meaningfully advance those discussions, Defendant provided Class Counsel with discovery regarding the potential class size and availability of any insurance coverage. *Id.* The Parties negotiated at arm's length for several months concerning various aspects of the relief and notice and distribution plan. (*Id.* ¶ 13.) Following additional rounds of negotiations concerning the Notice Plan, prospective relief, and other details concerning the Settlement, the Parties executed the Settlement Agreement on September 29, 2021.

Additionally, the Parties procured estimates for the notice and distribution plan costs and ultimately agreed to engage JND Legal Administration ("JND"), a nationally recognized class-action settlement administration company with prior experience administering BIPA employee class settlements, to administer the Settlement. (Ravindran Decl. ¶ 14.) Class Counsel and Defendant's counsel reviewed the quote, and upon determining the quote was reasonable and in line with industry standards, agreed to engage JND as Settlement Administrator. (*Id.*) Class Counsel worked with Defendant's counsel to ensure that all notice-related materials comply with due process and applicable law and are easily understood by Settlement Class Members. (*Id.*)

TERMS OF THE SETTLEMENT

A copy of the Settlement Agreement is attached as Exhibit 1 to the Ravindran Decl. (filed concurrently herewith), the key terms of which are summarized as follows:

I. SETTLEMENT CLASS DEFINITION

The Settlement Class defined in the Settlement Agreement, and conditionally certified by the Court in its Order dated October 12, 2021, is as follows:

> "All individuals who had their fingerprints collected, captured, received, or otherwise obtained, and/or stored, by Defendant in Illinois between December 31, 2015 and the date of the Court's order preliminarily approving the Settlement."[4]

Settlement Agreement § 3.37.

II. SETTLEMENT PAYMENTS

The Settlement requires Defendant to automatically send checks directly to each Settlement Class Member who does not file a timely request for exclusion from the Settlement, without the need to submit a claim form. (Agreement §5.41.) Pursuant to the Settlement Agreement, Defendant is required to pay a gross amount $800 per member of the Settlement Class to establish the Settlement Fund; because there are 124 members of the Settlement Class, Defendant paid $99,200 to establish the Settlement Fund following the Court's entry of the Preliminary Approval Order. (*Id.* §5.40(a); Ravindran Decl. ¶ 20.) The Settlement Fund is non-reversionary, meaning that no amount of it will revert to Defendant, even if any Settlement Class Members do not cash the checks they receive. (*Id.* §5.40(f)). Each member of the Settlement Class who does not submit a request for exclusion will receive a pro rata share of the Settlement Fund that remains after Settlement

[4] Excluded from the Settlement Class are (1) any Judge presiding over this action, members of his or her family, and the Judge's assigned court staff; (2) Defendant, Defendant's subsidiaries, parents, successors, predecessors, and any entity in which Defendant or its parent has a controlling interest; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiff's counsel and Defendant's counsel; (6) and any individual whose fingerprints were collected, captured, received, or otherwise obtained, or stored, by Defendant only after executing Defendant's Biometric Information Privacy Employee Consent written release contained within Defendant's employment onboarding documents (attached as Exhibit D to the Settlement Agreement); and (7) the legal representatives, successors, and assigns of any such excluded persons." (Settlement Agreement §3.37)

Administration Expenses and any Fee Award and Service Award approved by the Court are first deducted. If the Fee Award and Service Award requested herein are approved, each Settlement Class Member is estimated to receive a check for approximately $380. (Ravindran Decl. ¶ 20). If any checks remain uncashed after ninety (90) days from their date of issuance, the uncashed funds will be distributed to a *cy pres* recipient, mutually selected by the parties and subject to Court approval. (Agreement, §5.43(d)). To the extent any uncashed funds remain in the Settlement Fund following the expiration date of the checks, the Parties will promptly file a motion jointly requesting the Court's approval of one or more *cy pres* recipients to receive the uncashed funds in accordance with Illinois law.

III. NON-MONETARY RELIEF

Before the Parties signed the Settlement Agreement, Defendant produced evidence to Class Counsel reflecting that it has implemented BIPA compliant procedures in connection with new worker onboarding. In the Settlement Agreement, Defendant has agreed to destroy all biometrics in its possession, custody, or control that pertain to individuals who have not signed BIPA-compliant consent documents and implement procedures and systems to obtain the requisite consent from employees in order to comply with BIPA should it continue to utilize the Time-Keeping System in Illinois. Pursuant to the Settlement Agreement, Defendant has destroyed all biometric data within its possession, custody, or control pertaining to any individuals who did not sign a BIPA-complaint consent document and otherwise complied with its prospective relief obligations under the Settlement Agreement. (Agreement, §6.45; Ravindran Decl. ¶ 17).

IV. NOTICE PLAN

The Settlement Administrator disseminated the Class Notice, the form of which the Court preliminarily approved in its Order dated October 12, 2021, to all potential Settlement Class

Members by e-mail and U.S. Postal mail. (Agreement §9.53(b); Ravindran Decl. ¶ 26). The Class Notice approved by the Court is attached as Exhibit "B" to the Settlement Agreement.

Further, the Settlement Administrator has established and is currently maintaining the Settlement Website, located at the URL www.onnibiometricssettlement.com (Agreement, §2.33; Ravindran Decl. ¶ 27.) The Settlement Website provides information about the Settlement and makes case-related documents available for download, such as the Settlement Agreement, Notice, Preliminary Approval Order, and the Fee and Expense Application, contains a web-based form for Settlement Class Members to submit requests for exclusion, and allows Settlement Class Members to opt to receive payment by electronic wallet. *Id.*

V. SERVICE AWARDS AND FEE AWARD

Defendant does not oppose the Court's approval of a Service Award to the Representative Plaintiff of $2,000 and a Fee Award to Class Counsel of 35% of the Settlement Fund, which, if approved, will be paid from the Settlement Fund. *Id*. §§ 15.67-15.71. The Class Notice informed all Settlement Class Members of the amounts of the requested awards. *See* Settlement Agreement, Ex. B.

VI. OBJECTION AND OPT-OUT RIGHTS

Any Settlement Class Member who wishes to exclude herself or himself from, or object to, the Settlement must do so on or before the Opt-Out or Objection Deadline of December 11, 2021, and in compliance with the requirements set forth in Sections 10 and 11 of the Settlement Agreement. Settlement Agreement § 10.55, *et. seq;* § 11.57, *et. seq*.

VII. RELEASE

Upon the Court's entry of the Final Approval Order and Judgment, the Representative Plaintiff and Settlement Class Members who have not excluded themselves will have fully, finally,

and forever released, relinquished, and discharged Defendant and Released Parties from the Released Claims, i.e., all claims arising out of the alleged capture, collection, storage, possession, transmission, conversion, and/or other use of biometric identifiers and/or biometric information in connection with the Time-Keeping System used by Defendant, including but not limited to claims brought under 740 ILCS § 14/10, *et seq*. *See id.* § 2.24; § 7.46-7.47.

THE REQUESTED SERVICE AWARDS SHOULD BE APPROVED

Because a named plaintiff is essential to any class action, service awards, also known as incentive awards, "are "justified when necessary to induce individuals to become named representatives." *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016) (internal citation omitted) (approving incentive awards of $25,000 and $10,000); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992) (noting that incentive awards "are not atypical in class action cases . . . and serve to encourage the filing of class actions suits"). Additionally, by lending her name to this litigation, the Representative Plaintiffs opened herself up to "scrutiny and attention," which in and of itself "is certainly worthy of some type of remuneration." *See Schulte*, 805 F. Supp. 2d at 600-01.

In this case, the Representative Plaintiff is well-deserving of a modest $2,000 Service Award given the vital role that she played. Even though no award of any sort has been promised to the Representative Plaintiff, she nonetheless contributed time and effort pursuing these claims on behalf of the Settlement Class — exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (*See* Ravindran Decl. ¶ 33.) The Representative Plaintiff participated in Class Counsel's investigation and provided background information regarding Defendant's collection of biometric information in connection with timekeeping, reviewed pleadings and court filings, consulted with Class Counsel on numerous occasions, and provided feedback on a number of other filings, most importantly the

Settlement Agreement. (Ravindran Decl. ¶ 33.) But for the Representative Plaintiff's assistance and active involvement in the litigation, the Settlement would not have been possible. (*Id*.)

The modest amount of the Service Award requested for the Representative Plaintiff – $2,000 – equates to just 2% of the total settlement fund, and which is significantly less than the average incentive award granted in a class settlement. *See* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1348 (2006) (finding that "[t]he average award per class representative was $15,992"). Service awards much larger than the amounts sought here are routinely approved. *See, e.g., Dixon v. Washington & Jane Smith Cmty.-Beverly*, No. 17-cv-8033 (N.D. Ill.) (granting $10,000 incentive award in BIPA case); *Brown v. Moran Foods, Inc*., No. 2019-CH-02576 (Cir. Ct. Cook Cnty.) ($5,000 award in BIPA case); *Barnes v. Aryz*ta, No. 2019-CH-02576 (Cir. Ct. Cook Cnty.) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, U.S. Dist. LEXIS 35421, at *20 (N.D. Ill. Mar. 23, 2015) (awarding $25,000 incentive award); *Satterfield v. Simon & Schuster*, No. 06-cv-2893, Dkt. 131, at 4 (awarding incentive awards totaling $30,000, including a $20,000 award to one class representatives). Accordingly, a Service Award of $2,000 to Representative Plaintiff is fair and reasonable and should be approved.

THE REQUESTED FEE AWARD SHOULD BE APPROVED

Class Counsel respectfully request the Court's approval of a Fee Award of 35% of the settlement fund (or $34,720).

I. CLASS COUNSEL SHOULD BE AWARDED THE *EX ANTE* MARKET RATE FOR THE LEGAL SERVICES PERFORMED FOR THE BENEFIT OF THE SETTLEMENT CLASS

Courts strongly encourage negotiated fee awards in class action settlements. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorneys' fees should not result in a second

major litigation. Ideally, of course, litigants will settle the amount of the fee."). "The Illinois Supreme Court has adopted the approach taken by the majority of federal courts on the issue of attorney fees in equitable fund cases," *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13 (1st Dist. 1992) (citing *Fiorito v. Jones*, 72 Ill.2d 73 (1978)), which is to permit "attorneys for the successful plaintiff [to] directly petition the court for the reasonable value of those of their services which benefited the class." *Id.* at 14 (citing *Fiorito*, 72 Ill.2d 73). This rule "is based on the equitable notion that those who have benefited from litigation should share in its costs." *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) (*citing Skelton v. Gen. Motors Corp*., 860 F.2d 250, 252 (7th Cir. 1988)); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole").

"In deciding fee levels in common fund cases" such as the instant matter, courts must "'do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.'" *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) (quotation omitted). In performing this inquiry, the Illinois Supreme Court has determined that courts may "choose a percentage[-of-the-fund] or a lodestar method[.]" *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d 235, 243–44 (1995)).

II. THE COURT SHOULD APPLY THE PERCENTAGE-OF-THE-FUND METHOD IN THIS CASE

In this case, the Court should use the percentage-of-the-fund method in determining an appropriate Fee Award to Class Counsel. In "choosing between the percentage and lodestar approaches," courts "look to the calculation method most commonly used in the marketplace at the time such a negotiation would have occurred." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-

01 (N.D. Ill. 2015) (citing *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998)). And in consumer cases such as the instant matter, where "the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery," *Kolinek*, 311 F.R.D. at 500-01, state and federal courts in Illinois and throughout the country are in near unanimous agreement that the percentage-of-the-fund approach best yields the fair market price for the services provided by counsel to the class. *See Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 2006) ("When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the 'market rate.'"); *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 923 (1st Dist. 1995) (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases") (citation omitted); *Williams v. Gen. Elec. Capital Auto Lease*, 94 C 7410, 1995 WL 765266, *9 (N.D. Ill. Dec. 26, 1995) (noting that "[t]he approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred upon the class"); *see also, e.g., Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (explaining that where "a class suit produces a fund for the class," as is the case here, "it is commonplace to award the lawyers for the class a percentage of the fund," and affirming fee award of 38% of $20 million recovery to class); *Sutton*, 504 F.3d at 693 (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) ("[T]he court agrees with Class Counsel that the fee award . . . should be calculated as a percentage of the money recovered for the class.").

This Court should likewise calculate Class Counsel's Fee Award using percentage-of-the-fund method. The percent-of-the-fund method best replicates the *ex ante* market value of the services that Class Counsel provided to the Settlement Class. It is not just the typical method used

in contingency-fee cases generally, *see Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998), but it is also the means by which an informed Settlement Class and Class Counsel would have established counsel's fee *ex ante*, at the outset of the litigation. *See e.g. Cornejo v. Amcor Rigid Plastics USA, LLC*, No. 18-cv-7018, dkt. 57 (N.D. Ill. 2018) (using percentage-of-the-fund method to calculate attorneys' fees in BIPA case); *Alvarado v. Int'l Laser Prods., Inc*., No. 18-cv-7756, dkt. 70 (N.D. Ill. Jan. 24, 2020) (same); *see also Kolinek*, 311 F.R.D. at 500-01 ("the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery"). The percentage-of-the-fund method also better aligns Class Counsel's interests with those of the Settlement Class because it bases the fee on the results the lawyers achieve for their clients rather than on the number of motions they file, documents they review, or hours they work, and it avoids some of the problems the lodestar-times-multiplier method can foster (such as encouraging counsel to delay resolution of the case when an early resolution may be in their clients' best interests). *Brundidge*, 168 Ill.2d at 242; *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *In re Synthroid Mktg. Litig.*, 264 F.3d 712 at 720-721 (7th Cir. 2001). And it is also simpler to apply. *Id*.; *see also, e.g., Kolinek*, 311 F.R.D. at 501; *Ryan*, 274 Ill. App. 3d at 924.

Accordingly, Class Counsel respectfully requests that the Court apply the percentage-of-the-fund approach in determining an appropriate Fee Award in this case.

III. THE COURT SHOULD APPROVE A FEE AWARD OF 35% OF THE SETTLEMENT FUND

In terms of the percentage to award, Class Counsel respectfully requests that the Court award a Fee Award of 35% of the settlement fund (or $34,720).

An award to Class Counsel of 35% of the settlement fund to Class Counsel is well within the range of fees typically awarded to class counsel by Illinois courts in comparable all-cash class

action settlements. *See, e.g., Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (*citing Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Meyenburg v. Exxon Mobil Corp.*, No. 05-cv-15, U.S. Dist. LEXIS 52962, at *5 (S.D. Ill. July 31, 2006); *see also Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding an attorneys' fees award of one-third of a reversionary fund recovered in light of the "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [the defendant]").

And in this case in particular, the requested Fee Award would fairly and reasonably compensate Class Counsel for (1) agreeing to take on this action in the face of substantial risk, (2) achieving an excellent result on behalf of the Settlement Class, and (3) investing substantial time and other resources investigating, prosecuting, and resolving this action. (*See* Ravindran Decl. ¶¶ 9-15, ¶¶ 28-29, ¶ 31).

A. This was High Risk and Undesirable Litigation at its Inception, and Class Counsel Should be Rewarded for Having Pursued it on Behalf of the Class

The requested Fee Award is particularly reasonable given the risks associated with this litigation at the time it was commenced. *See Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) ("Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel.").

Workplace BIPA claims implicate several potential defenses, the contours of which continue to work their way through the courts. For example, on just September 17, 2021, the First District Court of Appeals in *Tims v. Black Horse Carriers, Inc.*, No. 1-20-0562 (Ill. App. 1st Dist.) found the statute of limitations applicable to BIPA claims is five years, not one year as asserted by

defendant. Additionally, another appeal that remains pending will address whether workplace BIPA claims, such as those Representative Plaintiff asserted in this case, are preempted by the IWCA. *E.g., McDonald v. Symphony Bronzeville Park LLC*, 2020 IL App (1st) (considering issue of whether BIPA claims are preempted by Illinois's Workers Compensation Act ("IWCA")). Notably, the Parties' negotiations occurred while both *Tims* and *McDonald* were pending, the outcomes of which posed a significant risk of total non-recovery to the entire Settlement Class (in the case of *McDonald*) or at least a substantial portion of the Settlement Class (in the case of *Tims*). The Settlement Agreement that Class Counsel negotiated reflects those risks, among others, and yet nonetheless provides substantial, *meaningful* relief to the Settlement Class.

Further, Onni indicated that, if this case had not settled, it would have argued that the information captured by its handprint scanners were not actually "biometric identifiers" or "biometric information" subject to BIPA (Ravindran Decl. ¶ 19); although Plaintiff again puts little stock in this argument, resolving the issue would present novel issues of law and require significant and lengthy expert discovery concerning the relevant technology. *Cf. In re Facebook Biometric Info. Privacy Litig.*, No. 3:15-cv-03747-JD, 2018 WL 2197546, at *2-3 (N.D. Cal. May 14, 2018) (denying motion for summary judgment on whether facial scans were biometric data regulated by BIPA).

In addition to these uncertainties, other risks threatened to eliminate, reduce, or delay recovery to the Settlement Class, even if the Representative Plaintiff prevailed at summary judgment and/or trial on the Settlement Class's behalf. Given the damages at issue, Onni would have likely appealed any adverse decision and—even if not winning outright— likely would have sought a reduction in statutory damages on, *inter alia*, due process grounds. *See, e.g.*, *Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019) (statutory award in TCPA class action of $1.6

billion reduced to $32 million).

Class Counsel agreed to represent the Representative Plaintiff and the Settlement Class in the face of these risks, in addition to many others (including the possibility of legislative action to retroactively change the law in Defendant's favor, absolving it of liability). The high-risk nature of this litigation at the outset firmly supports the reasonableness of the requested Fee Award. *See Ryan*, 274 Ill. App. 3d at 924

B. The Outstanding Result that Class Counsel Achieved for the Settlement Class Further Supports the Requested Fee Award

Despite the many serious risks of non-recovery to the Settlement Class and thus non-payment to Class Counsel described above, both at the outset and for the duration of the proceedings, Class Counsel nevertheless achieved an excellent result for the Settlement Class.

Pursuant to the Settlement Agreement, Onni has agreed to establish a Settlement Fund of $99,200 in cash – a gross recovery of $800 per Settlement Class Member –from which each Settlement Class Member will automatically receive a check or electronic payment of approximately $380 (provided the Court approves the Service Award and fee). Given the enormous risks presented in this case, both at the commencement of the litigation and when the Settlement was negotiated, the relief provided by the Settlement in this case compares favorably with per-Class Member recoveries in prior BIPA settlements. *See, e.g., Jones v. CBC Rest. Corp.*, 19-cv-06736 (N.D. Ill. Oct. 22, 2020) (fund equating to gross amount of $800 per person); *Johnson v. Rest Haven Illiana Christian*, 2019-CH-01813 (Cir. Ct. Cook Cty.) (fund equating to gross amount of $900 per person); *Marshall v. Life Time Fitness, Inc.*, 17-CH- 14262 (Cook Cnty. July 30, 2019) (non-employment case with fund equating to net amount of $270 with credit monitoring).

In addition to the monetary compensation that Class Counsel negotiated for the Settlement

Class, the Settlement also provides meaningful prospective relief, including by requiring Onni to obtain BIPA-compliant consent in the future whenever the company collects or stores biometric data, and also to destroy (which occurred in advance of the November 12, 2021 deadline set forth in the Settlement Agreement) all biometric data in its possession, custody, or control pertaining to individuals who did not sign BIPA-complaint consent documents. The presence of meaningful nonmonetary prospective relief such as this is also useful in determining whether the fee award being sought is reasonable. *See Spano*, 2016 WL 3791123, at *1 ("A court must also consider the overall benefit to the Class, including non-monetary benefits, when evaluating the fee request").

And to achieve this result, Class Counsel expended a substantial amount of attorney time and out-of-pocket costs and expenses investigating, prosecuting, and negotiating the terms of the Settlement, without any guarantee of recovery (Ravindran Decl. ¶¶ 28-31). Accordingly, the result achieved for the Settlement Class further confirms that an award of 35% of the Settlement Fund (or $34,720), inclusive of all out-of-pocket costs expended (which to date total $994.31 (Ravindran Decl. ¶ 30) is fair and reasonable and should be approved.

CONCLUSION

For the foregoing reasons, the Court should approve a Service Award of $2,000 to the Representative Plaintiff and a Fee Award (inclusive of all out-of-pocket costs expended) of 35% of the Settlement Fund, or $34,720, to Class Counsel. The requested Fee Award and Service Award would both adequately reward and reasonably compensate Class Counsel and the Representative Plaintiff for assuming the significant risks that this case presented at the outset and nonetheless expending a substantial amount of time and other resources investigating, litigating, and negotiating a resolution to the case for the benefit of the Settlement Class.

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Respectfully submitted,

By: /s/ Carl Malmstrom

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