UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

MADISYN STAUFFER, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	Cause No. 3:20-cv-00046-MAB
v.	)	
INNOVATIVE HEIGHTS FAIRVIEW HEIGHTS, LLC, et al.	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARD FROM SETTLEMENT WITH DEFENDANT INNOVATIVE HEIGHTS FAIRVIEW HEIGHTS, LLC AND MEMORANDUM OF LAW IN SUPPORT

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Plaintiff Madisyn Stauffer hereby moves for an award of attorneys' fees of one-third of the Settlement Amount of $285,000 plus interest accrued at the time of distribution, along with litigation expenses in the amount of $1,962.15, and a service award to Plaintiff in the amount of $2,500. In support thereof, Plaintiff states as follows:

I. INTRODUCTION

Plaintiff Madisyn Stauffer brought this action against Defendant Innovative Heights Fairview Heights, LLC, ("Innovative Heights") in 2019, alleging that Innovative Heights violated her rights under Illinois' Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1, *et seq*. After over five years of litigation, including substantial discovery, and with the assistance of Mr. Frank Neuner, an approved third-party mediator under the Court's Mediation Plan, Plaintiff reached a settlement with Innovative Heights on behalf of the putative Class.[1] The resulting Settlement Agreement creates a common, non-reversionary, settlement fund in the amount of $285,000 and provides a *pro rata* share of the Net Settlement Fund automatically to the 244 Innovative Heights Class Members (unless they opt-out). The Settlement Agreement also preserves all claims class members may have against the other Defendants in this action.

The Settlement Amount is $285,000. The Settlement Amount is held in escrow and will continue to earn interest and pay taxes until disbursed. Class Counsel respectfully moves the Court for an attorneys' fee award of one-third of the Settlement Amount plus interest accrued at the time of distribution, plus litigation expenses related to pursuing the claims against Innovative Heights in the amount of $1,962.15. Further, Class Counsel moves for a service award for class representative Madisyn Stauffer in the amount of $2,500 for her work performed and time expended on behalf of the Innovative Heights Class.

[1] The parties' Settlement Agreement is Ex. 1 to Plaintiff's preliminary approval motion, Doc. No. 199-1. Unless otherwise stated, all defined terms used herein have the meanings set forth therein.

Class Counsel respectfully requests that the Court find the requested fees, expenses, and service award reasonable and direct the payment of such amounts from the Settlement Escrow.

II. BACKGROUND

A. Plaintiff's Claims Against Innovative Heights

Plaintiff was employed by Innovative Heights, a franchisee of Defendant Sky Zone Franchise Group, LLC ("Sky Zone"). Doc. No. 153, Third Am. Compl. ("TAC"), ¶¶ 2, 14, 39, 42, 46, 100. Sky Zone required franchisees to use a computer system provided by Defendant Pathfinder Software, LLC, d/b/a CenterEdge ("CenterEdge") which included a fingerprint scanner. *Id.* at ¶¶ 14-18, 100-110. Plaintiff scanned her fingerprints into the CenterEdge computer system to clock in and out of work during her employment. *Id.* at ¶¶ 66-72.

When a person scans a fingerprint using CenterEdge's computer system, a digital image of the fingerprint is captured and stored, along with additional data of unique characteristics used to identify the individual. Subsequent fingerprint scans repeat the process, then match the fingerprint data with the stored fingerprint data to identify the individual. All of the fingerprint data was stored in servers located at Innovative Heights' location in Fairview Heights. *Id.* at ¶¶ 143-149.

Plaintiff alleges Innovative Heights violated BIPA §§ 15(b) by collecting, capturing, and/or otherwise obtaining the biometric data of her and the Innovative Heights Class Members without: (1) informing her and the other Innovative Heights Class Members that their biometric data was being collected or stored; (2) informing her and the other Innovative Heights Class Members of the specific purpose and length of term for which the biometric data was being collected or stored; and (3) obtaining a written release from Plaintiff and the other Innovative Heights Class Members. *Id.* at ¶¶ 143-149, 160-167.

B. The Course of This Litigation

Plaintiff initially filed this Lawsuit in the Circuit Court for St. Clair County, Illinois, in April 2019 against Innovative Heights. She filed an amended state court complaint in November 2019, adding Defendant CenterEdge based on information learned during discovery. CenterEdge removed the amended complaint to this Court. Doc. No. 1. Plaintiff subsequently moved to remand on the ground that she did not allege injury in fact to support Article III standing because she only alleged procedural violations of BIPA. Doc. No. 27. In August 2020, this Court issued its Memorandum and Order, in which it retained jurisdiction over Plaintiff's § 15(b) claims but remanded her § 15(a) claims to state court. *See* Doc. No. 43, p. 14. In that same Order, the Court denied CenterEdge's motion to dismiss, which sought dismissal on several different grounds, including the statute of limitations and waiver. *Id.* at 17-31. In October 2020, the state court denied CenterEdge's motion to dismiss the § 15(a) claim, in which CenterEdge argued that Plaintiff lacked standing. In June 2021, this Court denied CenterEdge's motion to strike class allegations. Doc. No. 75.

CenterEdge thereafter filed a second notice of removal regarding the § 15(a) claims, arguing that the previously remanded § 15(a) claims belonged in federal court in light of *Fox v. Dakkota Integrated Systems, LLC*, 980 F.3d 1146 (7th Cir. 2020), which it argued supported the existence of Article III standing. Doc. No. 8 (Case No. 3:20-CV-01332). This Court disagreed and remanded the § 15(a) claims. Doc. No. 44 (Case No. 3:20-CV-01332). CenterEdge then filed a Petition for Permission to Appeal in the United States Court of Appeals for the Seventh Circuit on July 8, 2021. Class Counsel filed the Answer to the Petition on July 23, 2021, and the Seventh Circuit denied the Petition on August 3, 2021. Doc. No. 48 (Case No. 3:20-CV-01332).

In September 2021, Plaintiff filed a second amended complaint in both state and federal court, adding Sky Zone as a party. *See* Doc. No. 99. In August 2022, Plaintiff filed the Third

Amended Complaint, which added allegations relating to Sky Zone, alleged Defendants violated BIPA § 15(b), and, for the first time, included allegations that Sky Zone and CenterEdge violated BIPA § 15(a) by failing to comply with a retention/destruction policy. Doc. No. 150. Plaintiff contended that these new § 15(a) allegations conferred Article III standing that was previously lacking under Seventh Circuit precedent. Doc. No. 145. Innovative Heights filed its Answer and fifteen affirmative defenses on August 31, 2023. Doc. No. 149.

In addition to the extensive motion practice set forth above, the parties have engaged in substantial discovery. Plaintiff propounded several sets of written discovery to Innovative Heights, engaged in multiple meet and confer correspondence and conferences with Innovative Heights, and produced/reviewed thousands of pages of documents.

After the Third Amended Complaint was filed, Class Counsel and counsel for Innovative Heights engaged in initial settlement dialogue and eventually agreed to mediation. This Settlement is the result of a voluntary mediation and continued negotiations between Plaintiff and Innovative Heights. The mediation between the parties took place on November 21, 2023, before Mr. Frank Neuner, an approved mediator under the Court's Mediation Plan. Mr. Neuner has experience mediating many complex cases, including class actions involving BIPA. Although the parties were unable to reach an agreement during the mediation, they continued to engage in settlement negotiations, including with Mr. Neuner, and reached an agreement on the material terms of a settlement on December 20, 2023.

The Settlement Agreement creates a common, non-reversionary, fund in the amount of $285,000 and provides for an automatic payment to the 244 Innovative Heights Class Members (unless they opt-out). Following the Court's Preliminary Approval Order, the Settlement Website

went live on April 30, 2024, and individual notices were sent by mail, email, and text message pursuant to the Settlement Agreement on May 14, 2024.

III. THE AMOUNT OF CLASS COUNSEL'S REQUESTED FEE IS REASONABLE

A. The Legal Standard

Under Rule 23, "the court may award reasonable attorney's fees . . . authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "[A] litigant or 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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This use of the common fund as a basis for fees "allows a court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit." *Id*. This common fund doctrine is based on the notion that not just one plaintiff, but all "'those who have benefitted from litigation should share its costs.'" *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 563 (7th Cir. 1994) (*quoting Skelton v. Gen. Motors Corp*., 860 F.2d 250, 252 (7th Cir. 1988) *cert. denied*, 493 U.S. 810 (1989)).

In determining a reasonable fee, the Court "must balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of the class members in the fund." *Skelton*, 860 F.2d at 258. To determine the reasonableness of the sought-after fee in a common-fund case such as this, "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." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*"). "The object in awarding a reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in arm's length negotiation,

had one been feasible." *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992).[2] Furthermore, "where, as here, 'the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate.'" *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 U.S. Dist. LEXIS 210368, *27 (S.D. Ill. Dec. 13, 2018) (quoting *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)).

B. Lodestar or Percentage Method

Class Counsel requests an attorneys' fee award based on a percentage of the common fund. "'[I]n common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court.'" *Americana Art China Co. v. Foxfire Printing & Packaging, Inc*., 743 F.3d 243, 247 (7th Cir. 2014) (*quoting Florin*, 34 F.3d at 566).

The percentage method appears to be the preferred method utilized in the Seventh Circuit. *See Chambers v. Together Credit Union*, No. 19-CV-00842-SPM, 2021 U.S. Dist. LEXIS 92151, *3-4 (S.D. Ill. May 14, 2021) ("[T]he percentage method is employed by the vast majority of courts in the Seventh Circuit (like other Circuits).") (citations omitted); *see also* Theodore Eisenberg and Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008,* 7 J. Empirical Legal Stud. 248, 269 (2010) (the "Eisenberg and Miller Study") (finding that 61% of Seventh Circuit cases in the study of class action common fund awards chose the percentage method, while 10% chose the lodestar method).

In *In re Synthroid Mktg. Litig*., 325 F.3d 974 (7th Cir. 2003) ("*Synthroid II*"), the Seventh Circuit explained:

[2] The Seventh Circuit has also disapproved of caps on fees, even in "megafund" cases. *See Synthroid I*, 264 F. 3d at 718 ("We have never suggested that a "megafund rule" trumps these market rates, or that as a matter of law no recovery can exceed 10% of a "megafund" even if counsel considering the representation in a hypothetical arms' length bargain at the outset of the case would decline the representation if offered only that prospective return.").

> One advantage of the contingent fee is that the client (or the judge as protector of the class's interests) need not monitor how many hours the lawyers prudently devoted to the case. The client cares about the outcome alone. Here, the district judge found (and we agree), the outcome is excellent from the class's perspective. Inefficient conduct of the litigation therefore does not afford any reason to reduce class counsel's percentage of the fund that their work produced.

325 F.3d at 979-80.

Furthermore, a lodestar cross-check is not required in the Seventh Circuit and is likely unproductive to determine an *ex-ante* market-rate fee. *See In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 573 (suggesting that determining a proper market-based percentage "might be quicker and easier . . . than it would be to hassle over every item or category of hours and expense and what multiple to fix and so forth."); *Beesley v. Int'l Paper Co.*, No. 3:06-cv-703-DRH-CJP, 2014 U.S. Dist. LEXIS 12037, *10 (S.D. Ill. Jan. 31, 2014) ("The use of a lodestar cross-check has fallen into disfavor."); Eisenberg and Miller Study at 279 (finding "no statistically significant difference between fees calculated by the percentage method alone and those calculated by the percentage method with the lodestar cross-check . . . [which] may raise questions about the utility of the lodestar cross-check, which can involve a time-consuming analysis of the reasonableness of the attorneys' hours and hourly rates"); *Will v. Gen. Dynamics Corp.*, NO. 06-698-GPM, 2010 U.S. Dist. LEXIS 123349, *10 (S.D. Ill. Nov. 22, 2010) ("The use of a lodestar cross-check in a common fund is unnecessary, arbitrary, and potentially counterproductive.") (*citing In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 948-49 (N.D. Ill. 2001) ("To view the matter through the lens of free market principles, [lodestar analysis] (with or without a multiplier) is truly unjustified as a matter of logical analysis.")). Accordingly, Plaintiff requests the percentage

method over the lodestar method.[3]

C. Benchmark Evidence

In calculating the reasonableness of class counsel's fees, the primary focus is to estimate the market price for legal services. *See Synthroid I*, 264 F.3d at 718. One factor highlighted by the Seventh Circuit is "the normal rate of compensation in the market at the time." *Id.* To recreate the market, Courts awarding attorneys' fees from a common fund look to objective benchmarks such as actual fee contracts that were privately negotiated, analysis of empirical studies of fee awards in similar litigation, and information from other cases in the Circuit. *See, e.g.*, *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig*., 792 F. Supp. 2d 1028 (N.D. Ill. 2011) ("*AT&T*"). Here, each benchmark supports the reasonableness of the requested 33.33% fee.

1. Actual Fee Agreements

The class representative in this case entered into a contingency fee agreement that provided for Class Counsel to receive up to one-third of any recovery plus costs and expenses. Exhibit 1, Decl. of Kevin P. Green ¶ 7. Thus, the actual fee agreement supports the requested one-third fee.

2. Data from Empirical Studies

[3] Given that a lodestar cross-check is not required and often deemed counterproductive by the Seventh Circuit, the undersigned has not submitted its lodestar. However, if the Court wishes to examine Class Counsel's billable hours to conduct a lodestar analysis or cross-check, Class Counsel will provide such records to the Court upon request. If the District Court in its discretion prefers to adopt the lodestar method, it may apply a similar *ex-ante* market-rate analysis set forth herein to determine the proper multiplier to apply. *See Florin*, 60 F.3d at 1247 ("In determining attorneys' fees in a common fund case, courts use a risk multiplier to compensate the attorneys for the risk that they will not be paid if the litigation is unsuccessful. The risk multiplier is an effort to mimic market forces."); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 569 ("The judge refused to award a risk multiplier—that is, to give the lawyers more than their ordinary billing rates in order to reflect the risky character of their undertaking. This was error in a case in which the lawyers had no sure source of compensation for their services. . . . The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent.").

"A number of empirical studies on class-action attorneys' fees are relevant to determining this market-compensation figure." *AT&T*, 792 F. Supp. 2d at 1033. *AT&T* referenced Eisenberg and Millier's 2004 study, *id.*, which noted that "one-third is the benchmark for privately-negotiated contingent fees" and recognized that "other factors might tend to increase fee awards":

> Because aggregating claims increases the litigation stakes, the parties can be expected to expend more resources to litigate a class action than an individual case. These increased expenditures may justify a higher fee. Class actions are also by their nature more complex than individual actions. Among other matters, the class certification question is added to the plaintiffs' attorneys' tasks. Internal class management, possible competition from other lawyers for class representation, and coordination of legal teams in large cases could require lawyer effort and expertise not required in the typical contingency fee cases.

Theodore Eisenberg and Geoffrey Miller, *Attorney's Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 35, 36 (2004).

Moreover, Eisenberg and Miller compiled Class Action Reports Data and found that, in non-securities cases where recovery is less than $1.4 million, the mean fee percent is 30.9% with a standard deviation of 8.2%. *Id.* at 73. The authors explained the standard deviation as follows:

> Our suggestion is that fee requests falling within one standard deviation above or below the mean should be viewed as generally reasonable and approved by the court unless reasons are shown to question the fee. Fee requests falling within one and two standard deviations above or below the mean should be viewed as potentially reasonable but in need of affirmative justification. Fee requests falling more than two standard deviations above or below the mean should be viewed as presumptively unreasonable; attorneys seeking fees above this amount should be required to come forward with compelling reasons to support their request.

Id. at 38.

Here, the requested 33.33% fee falls within this "generally reasonable" mean-plus-standard deviation (39.1%) determined for the cases with a recovery of less than $1.4 million, and is further

supported by the "other factors" referenced in the 2004 Eisenberg and Miller study above. Thus, analysis of empirical studies supports the requested fee.

3. Data from Seventh Circuit Common Fund Cases

The Seventh Circuit has noted that "the typical contingent fee is between 33 and 40 percent." *Gaskill v Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) (upholding the award of 38% of a $20 million settlement). *See also Goldsmith v. Tech. Sols. Co*., 1995 U.S. Dist. Court LEXIS 15093, *26 (N.D. Ill. 1995) ("Thirty-three percent appears to be in line with what attorneys are able to command on the open market in arms-length negotiations with their clients.").

Thus, "33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation." *Meyenburg v. Exxon Mobil Corp*., No. 3:05-cv-15-DGW, 2006 U.S. Dist. LEXIS 52962, *2 (S.D. Ill. July 31, 2006); *see also, e.g.*, *Teamsters Local Union No. 604 v. Inter-Rail Transp., Inc.*, No: 02-CV-1109-DRH, 2004 U.S. Dist. LEXIS 6363, *1 (S.D. Ill. Mar. 19, 2004) ("In this Circuit, a fee award of thirty-three and one-third (33 1/3%) in a class action in [sic] not uncommon"); *Borders v. Walmart Stores, Inc.*, No. 17-cv-506-SMY, 2020 U.S. Dist. LEXIS 263008, *7 (S.D. Ill. Apr. 29, 2020) (awarding class counsel one-third of $14 million fund); *Hale*, 2018 U.S. Dist. LEXIS 210368 at *53 (one-third of $250 million fund); *Ramsey v. Philips N. Am. LLC*, No. 18-CV-1099-NJR-RJD, 2018 U.S. Dist. LEXIS 226672, *13-14 (S.D. Ill. Oct. 15, 2018) (one-third of $17 million fund); *Coleman v. Sentry Ins. A Mut. Co.*, No. 15-CV-1411-SMY-SCW, 2016 U.S. Dist. LEXIS 149110, *5 (S.D. Ill. Oct. 27, 2016) (one-third of $5.72 million fund); *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 U.S. Dist. LEXIS 161078, *3 (S.D. Ill. Mar. 31, 2016) (one-third of $57 million fund); *Abbott v. Lockheed Martin Corp.*, No. 06-cv-701-MJR-DGW, 2015 U.S. Dist. LEXIS 93206, *3-4 (S.D. Ill. July 17, 2015) (one-third of $20.67 million fund); *In re Dairy*

Farmers of Am., Inc., Cheese Antitrust Litig., No. 09-cv-3690, 2015 U.S. Dist. LEXIS 20408, *58 (N.D. Ill. Feb. 20, 2015) (33.3% of $46,000,000 fund); *Beesley*, 2014 U.S. Dist. LEXIS 12037 at *7 (one-third of $30,000,000 fund); *City of Greenville v. Syngenta Crop Prot., Inc*., 904 F. Supp. 2d 902, 909 (S.D. Ill. 2012) (33.3% of $105,000,000 fund); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 597 (N.D. Ill. 2011) (33.3% of $9,500,000 fund).

Moreover, the percentage awarded may include interest that has accrued on the common fund. *See, e.g.*, *First Impressions Salon, Inc. v. Nat'l Milk Producers Fed'n*, No. 3:13-CV-00454-NJR, 2020 U.S. Dist. LEXIS 94880, *9 (S.D. Ill. Apr. 27, 2020) (awarding "attorney fees in the amount of thirty-three and one-third percent (33 1/3%) of the $220 million common fund, and of accrued interest."); *Hale*, 2018 U.S. Dist. LEXIS 210368 at *53 (awarding one-third of common fund "inclusive of interest accrued on the fund at the time of distribution").

Finally, attorney fee awards in similar cases also track Class Counsel's requested fee, as courts in numerous BIPA actions have awarded at least 33.33% of common funds. *See, e.g.*, *Crumpton v. Octapharma Plasma, LLC*, No. 19-cv-08402 (ECF No. 92) (N.D. Ill. Feb. 16, 2022) (one-third of common fund); *Burlinksi v. Top Golf USA Inc.*, No. 19-cv-06700 (ECF No. 103) (N.D. Ill. Oct. 13, 2021) (same); *Starts v. Little Caesar Enters. Inc.*, No. 1:19-cv-01575 (ECF No. 120) (N.D. Ill. 2023) (33.6% of common fund). Further, in several BIPA actions courts have awarded 35% of common funds. *See Lopez-McNear v. Superior Health Linens, LLC*, No. 19-cv-2390 (ECF No. 69) (N.D. Ill. Apr. 27, 2021); *Cornejo v. Amcor Rigid Plastics USA, LLC*, No. 18-cv-07018 (ECF No. 57) (N.D. Ill. Sept. 10, 2020); *Alvarado v. Int'l Laser Prods., Inc.*, No. 18-cv-7756 (ECF No. 70) (N.D. Ill. Jan. 24, 2020); and *Neals v. ParTech, Inc.*, No. 19-cv-05660, ECF No. 140 (N.D. Ill. July 20, 2022).

Accordingly, Class Counsel's request is within the market rate in this Circuit.

D. The *Synthroid I* Factors

Synthroid I held that the "market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Synthroid I*, 264 F.3d at 721. Based on these factors, Class Counsel's request is reasonable.

1. The Risk of Nonpayment a Firm Agrees to Bear

Class Counsel has handled this matter on a contingent basis since its inception over five years ago and faced significant risk of nonpayment. Recovery on behalf of the Innovative Heights Class was never certain and Class Counsel faced fierce resistance from Innovative Heights from the outset, including fifteen affirmative defenses, and first-rate defense counsel.

This litigation involved disputed legal and factual questions. Although Innovative Heights' co-defendants initiated the legal motions, the issues involved affected a case against Innovative Heights, including challenges to Article III standing, constitutional challenges to BIPA, statute of limitations issues, as well as the fundamental issue of whether Innovative Heights collected, captured, and/or otherwise obtained biometric data of Plaintiff and Innovative Heights Class Members. Throughout the pleadings and discovery Innovative Heights has denied that it collected, captured, and/or otherwise obtained biometric identifiers or biometric information of any Innovative Heights Class Members. Further, it is likely the class certification process would have been heavily contested. It is thus unclear how the Court and/or fact finder would have ultimately ruled on these key issues. Moreover, during the pendency of this action, BIPA case law was rapidly evolving, with both the Illinois Supreme Court and the Seventh Circuit deciding multiple cases involving the interpretation and application of BIPA. Innovative Heights also asserted it would be unable to pay a large judgment and whether it had insurance coverage was also questionable.

Class Counsel therefore faced a substantial risk of non-payment with respect to this complex and time-consuming litigation. Moreover, even if Class Counsel prevailed at class certification and trial, the likelihood of appeal would be high, adding further uncertainty and, in any event, delaying any payment to Class Counsel for its work in this litigation. Accordingly, the risk of non-payment undertaken by Class Counsel supports Class Counsel's request.

2. The Quality of Class Counsel's Performance

The Settlement Agreement provides class members with substantial cash payments despite the significant obstacles set forth above. Settlement Agreement, §§ C, A.32. All Innovative Heights Class Members will receive direct payment without the need to submit a claim. *Id*. at § C. As of June 18, 2024, no individuals have opted-out.[4] Each Innovative Heights Class member is expected to receive approximately $715. This is a favorable outcome that is in-line with, and potentially exceeds, other BIPA cases involving fingerprint scanning by employers. *See*, *e.g.*, *Martinez v. Nando's Restaurant Grp. Inc.*, No. 1:19-cv-07012 (N.D. Ill. 2020), ECF Dkt. 50-1 at 1-3 ($1,787,000 fund for 1,787 class members, amounting to approximately $652 for class members after deductions for fees and service award); *Burlinski et al. v. Topgolf USA Inc. et al.*, No. 1:19-cv-06700 (N.D. Ill. 2021), ECF Dkt. 94 at 1, 4, 11 ($2,633,400 fund for 2,600 class members, amounting to approximately $630 for class members after deducting for fees, service awards, and settlement administrator costs) *See also* Doc. No. 199, Pl. Mot. for Prelim. Approval, pp. 19-20 (citing other BIPA settlements). Furthermore, those who are also in the Sky Zone Class and CenterEdge Class will not receive discounted payments—rather, they will receive *additional* compensation from the settlements with the other defendants. The high quality of Class Counsel's performance therefore supports Class Counsel's request.

[4] The opt-out deadline ends on July 15, 2024.

3. The Amount of Work Necessary to Resolve the Litigation

A substantial amount of work has been required in this litigation, including regarding discovery. In bringing and prosecuting claims on behalf of the Innovative Heights Class, Class Counsel undertook the following to achieve favorable resolution of the Class's claims:

- Initial and continuing analysis of BIPA, including its applicability to Innovative Heights;
- Drafting responsive briefs and letters regarding supplemental authority to contest Defendants' removal efforts and multiple motions to dismiss involving interpretation and application of BIPA;
- Drafting and propounding several sets of written discovery requests;
- Preparing objections and responses to Innovative Heights' written discovery requests;
- Reviewing and analyzing thousands of pages of documents produced by Innovative Heights;
- Engaging in numerous meet-and-confer conferences with counsel for Innovative Heights to obtain supplemental discovery answers and productions;
- Reviewing Innovative Heights insurance policies and evolving case law involving insurance coverage for BIPA claims;
- Preparing for class certification, including working with consultants and potential class certification expert witnesses;
- Participating in settlement negotiations with Innovative Heights, including mediation commencing on November 21, 2023 with Mr. Frank Neuner;
- Negotiating the terms of the Settlement Agreement and drafting and revising the documents related thereto; and

- Monitoring the settlement administration process, including working with the settlement administrator and opposing counsel to address inquiries and issues that arise.

This case settled more than five years after it was filed, and throughout the litigation Class Counsel invested significant resources in this case, engaging in substantial investigation, written discovery, document review, and extensive and adversarial negotiations with opposing counsel individually and with a mediator. Accordingly, the amount of work necessary to reach and effectuate the Settlement Agreement supports Class Counsel's request.

4. The Stakes of the Case

The stakes of this case are large given the hundreds of class members, rapidly-evolving law, complexity and costs of the legal proceedings, and the amount of time and money involved.

BIPA provides liquidated damages of $1,000 per negligent violation or $5,000 per intentional or reckless violation. 740 ILCS 14/20. The Innovative Heights Class includes hundreds of class members. For much of the litigation it was unclear if BIPA permitted liquidated damages for every time a person scanned a fingerprint, or one liquidated damage amount per person for all fingerprint scans. The Illinois Supreme Court answered this question in *Cothron v. White Castle Sys.*, 2023 IL 128004 (Feb. 17, 2023), holding that a party violates Section 15(b) of BIPA when it "collects, captures, or otherwise obtains a person's biometric information without prior informed consent" not only the "first time an entity scans a fingerprint or otherwise collects biometric information" but also "with each subsequent scan or collection." *Id.* ¶ 24. There remained uncertainty where, as here, a defendant may not be able to satisfy a "per violation" recovery, as the Court stated in *dicta* that the statutory damages are not intended to "result in the financial destruction of a business." *Id.* ¶ 42. Moreover, the Illinois legislature recently passed a bill amending BIPA to limit its liquidated damages to a per person amount, regardless of the number

of times a person scans a fingerprint into the same system.[5] Under either approach, however, the stakes of the case were high for Innovative Heights and for members of the Innovative Heights Class. Moreover, the Innovative Heights Class, Class Counsel, and Innovative Heights faced losing significant amounts of time and money should they have continued to litigate the case to judgment and not prevailed.

Ultimately, the recovery obtained through the Settlement is significant for Class Members and likely could not have been achieved without this high-stakes litigation.

E. Conclusion

In light of the above factors, Class Counsel's request for attorneys' fees consisting of one-third of the Settlement Amount plus interest accrued at the time of distribution is reasonable. The request is consistent with the above-cited studies and market rates prevalent in the Seventh Circuit based on recent fee awards within the Circuit, and highly supported by each of the *Synthroid I* factors: the significant risk of nonpayment borne by Class Counsel, the quality of Class Counsel's performance, the great amount of work necessary to resolve the litigation, and the high stakes of the case.

IV. THE AMOUNT OF CLASS COUNSEL'S REQUESTED COSTS AND EXPENSES IS REASONABLE

Rule 23(h) allows the award of "nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses, which includes such things as expert witness costs; computerized research; court reports; travel expense; copy,

[5] The bill, SB2979, which passed both Houses on May 16, 2024, was sent to the Governor on June 14, 2024, but has not yet been signed by the Governor. Whether the amendment is retroactive (it is silent on this point) has yet to be tested.

phone and facsimile expenses and mediation." *Beesley*, 2014 U.S. Dist. LEXIS 12037 at *12-13 (*citing* Fed. R. Civ. P. 23; *Boeing*, 444 U.S. at 478).

Here, the Settlement Agreement permits Class Counsel to request reimbursement of its litigation expenses. Settlement Agreement ¶ I.3. To avoid duplication, Class Counsel has allocated expenses to each defendant. If an expense was related to multiple defendants, Class Counsel has apportioned the expense equally to the relevant defendants. These expenses and allocations to Innovative Heights amount to $1,962.15, as shown in Exhibit 1-A attached hereto.

As noted by the Court in *Beesley*, "Class Counsel had a strong incentive to keep expenses at a reasonable level due to the high risk of no recovery when the fee is contingent." 2014 U.S. Dist. LEXIS 12037 at *13. Additionally, Class Counsel incurred these expenses over the course of over five years, and "[t]he fact that Class Counsel does not seek interest as compensation for the time value of money or costs associated with advancing these expenses to the Class makes this fee request all the more reasonable." *Id.* Finally, the Eisenberg and Miller Study found that the average costs and expenses recovered in the cases from 1993 to 2008 was approximately 2.8 percent of the recovery. The requested expenses here are significantly less than this average, representing less than one percent of the $285,000 recovery. Accordingly, Class Counsel's request for reimbursement of litigation costs and expenses is reasonable.

V. THE REQUESTED SERVICE AWARD IS REASONABLE

Service awards[6] "are designed to compensate named plaintiffs for the costs incurred in performing their role as class representatives—costs above and beyond what they would bear as ordinary class members." *Scott v. Dart*, 2024 U.S. App. LEXIS 10305 (7th Cir. Apr. 29, 2024). Thus, such service awards are "appropriate to compensate a named plaintiff for the time and

[6] Courts sometimes refer to service awards as "incentive awards."

expense in bringing the suit and to reward the named plaintiff for the benefits achieved for other class members." *Coleman*, 2016 U.S. Dist. LEXIS 149110 at *5-6 (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 2009)). Further, in deciding the propriety and amount of a service award, "relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook*, 142 F.3d at 1016.

Here, Plaintiff Madisyn Stauffer assisted and participated in pre-suit investigation, responding to written interrogatories and documents requests, numerous telephone conferences with Class Counsel to discuss this litigation, and the mediation. Moreover, Ms. Stauffer assumed a reputational risk in pursuing litigation against her former employer. These facts support Class Counsel's request for a service award for Ms. Stauffer, and Class Counsel's request of $2,500 for Ms. Stauffer is reasonable. In fact, courts commonly award even higher amounts for named plaintiffs in class actions. *See, e.g.*, *Scott*, 2024 U.S. App. LEXIS 10305 at *23 (noting the "most recent empirical study on incentive awards reviewed approximately 1,200 class actions from 2006 to 2011 and found that the median incentive award per named plaintiff was $5,250 (or $7,125 in 2023 dollars)") (citing WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 17:8 (6th ed., Nov. 2023 update); *Chambers,* 2021 U.S. Dist. LEXIS 92151 at *7 ($7,500 service award appropriate where "Class Representative regularly consulted with Class Counsel in prosecuting the lawsuit, provided documents and information for the suit, and participated in the decision to accept the proposed settlement, overall taking his own valuable time to represent the interests of the Class, which ultimately resulted in the Settlement that is substantial and will benefit all Class Members."); *Coleman*, 2016 U.S. Dist. LEXIS 149110, at *6 ($3,000 service award to each class representative, which was "well within the range of class representative

fees in class action litigation"); *Koszyk v. Country Fin.*, No. 16 Civ. 3571, 2016 U.S. Dist. LEXIS 126893, *7 (N.D. Ill. Sep. 16, 2016) ($10,000 service awards to each named plaintiff); *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 205 (N.D. Ill. 2018) (same); *Kim Young v. Cty. of Cook*, No. 06 C 552, 2017 U.S. Dist. LEXIS 152466, *22 (N.D. Ill. Sep. 20, 2017) (same); *Will*, 2010 U.S. Dist. LEXIS 123349,at *12 (awarding $25,000 to named plaintiffs as service awards).

VI. CONCLUSION

Based on the foregoing, Class Counsel respectfully requests that the Court enter an Order directing the Settlement Administrator to pay the following sums from the Settlement Escrow: (1) Class Counsel's reasonable attorneys' fees in the amount of one-third of the Settlement Amount plus interest accrued at the time of distribution; (2) Class Counsel's litigation expenses related to Innovative Heights in the amount of $1,962.15; and (3) Plaintiff Stauffer's service award in the amount of $2,500.

Dated: June 24, 2024

Respectfully submitted,

GOLDENBERG HELLER & ANTOGNOLI, P.C.

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 24, 2024, the foregoing document was filed electronically with the Clerk of Court and served upon all counsel of record via the Court's electronic notification system.

By: */s/ Kevin P. Green*

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

MADISYN STAUFFER, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	Cause No. 3:20-cv-00046-MAB
v.	)	
INNOVATIVE HEIGHTS FAIRVIEW HEIGHTS, LLC, et al.	)	
Defendants.	)	

DECLARATION OF KEVIN P. GREEN

Pursuant to 28 U.S.C. § 1746, I, Kevin P. Green, hereby declare as follows:

1. I am a shareholder at the law firm of Goldenberg Heller & Antognoli, P.C. ("Goldenberg Heller"), which has been retained to represent Plaintiff Madisyn Stauffer in this matter. I have been appointed Class Counsel—along with Richard S. Cornfeld, Daniel S. Levy, and Thomas C. Horscroft of Goldenberg Heller—on behalf of the settlement class.[1] I am fully competent to make this declaration.[2]

2. I make this declaration in support of Plaintiff's Motion for Attorneys' Fees, Expenses, and Service Award (the "Fee Petition"), regarding Plaintiff's settlement with Defendant Innovative Heights Fairview Heights, LLC ("Innovative Heights"). This declaration is based upon personal knowledge unless otherwise indicated. If called to testify as to the matters stated herein, I could and would competently do so.

[1] Attorneys Cornfeld and Levy, previously of The Law Office of Richard S. Cornfeld, LLC, joined Goldenberg Heller in 2023.

[2] Unless otherwise stated, all defined terms used herein have the meanings set forth in the Settlement Agreement (Doc. No. 199-1).

3. I am a member in good standing of the Illinois and Missouri Bars. I am also a member in good standing of the United States District Court for the Southern District of Illinois.

4. Class Counsel has substantial experience representing plaintiffs as lead counsel in class actions, including in other cases arising under the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1.

5. Class Counsel has represented Plaintiff in this action since its commencement, and, from the outset, has vigorously represented the best interests of Plaintiff and the Class.

6. Class Counsel conducted all of the legal and factual research; drafted and filed the original and amended complaints; conferred with Plaintiff on numerous occasions; engaged in extensive motion practice, including briefing multiple motions to dismiss; appeared at hearings and status conferences; and conducted extensive written discovery, meet-and confer conferences, and document review. Class Counsel also conducted settlement negotiations with Innovative Heights on behalf of Plaintiff and the Innovative Heights Class, including a mediation session with Mr. Frank Neuner, an approved mediator under the Court's Mediation Plan, and negotiated and prepared the settlement documents in this action.

7. Class Counsel's compensation for services rendered to the Class is wholly contingent. The class representative in this case entered into a contingency fee agreement that provided for Class Counsel to receive up to one-third of any recovery plus costs and expenses.

8. Class Counsel faced significant risk of nonpayment in this matter. The case involved complex legal and factual questions, including challenges to Article III standing, constitutional and statute of limitation challenges to BIPA, and vigorous arguments by Innovative Heights that it did not collect, capture, or otherwise obtain the alleged biometric identifiers and/or biometric information at issue, which Plaintiff must show to prove her claims under BIPA. Class

Counsel thus faced substantial resistance from Innovative Heights and its first-rate defense counsel since the outset of this matter. Further, there were risks associated with the changing landscape regarding the interpretation of BIPA. During the pendency of this action, both the Illinois Supreme Court and the Seventh Circuit decided multiple cases involving the interpretation and application of BIPA. Additional risks included the potential inability of Innovative Heights to satisfy a judgment and questions about insurance coverage, as well as risks with certifying a class. There was also a prospect of extensive delay from appeals, including interlocutory appeals relating to class certification.

9. The Fee Petition accurately sets forth the work performed by Class Counsel in this litigation and reflects the risks inherent in pursuing this action against Innovative Heights through trial and appeal. Despite these risks, Class Counsel has vigorously prosecuted this case for over five years, requiring a significant investment of time and out-of-pocket expenses by Class Counsel.

10. Class Counsel requests a fee in the amount of one-third of the Settlement Amount plus interest accrued at the time of distribution. As set forth in the Fee Petition, the request for attorneys' fees in this amount is reasonable, particularly in light of the significant risk of nonpayment borne by Class Counsel, the quality of counsel's performance, the great amount of work necessary to resolve the litigation, and the high stakes of the case.

11. Class Counsel continues to work with the Settlement Administrator and opposing counsel related to the administration of the settlement. As of June 18, 2024, no individuals have opted-out. The opt-out period does not end until July 15, 2024.

12. In addition, Goldenberg Heller has incurred $1,962.15 in out-of-pocket expenses for charges incurred in pursuing the claims against Innovative Heights. The expenses incurred in this action are reflected on Goldenberg Heller's books and records. A true and accurate summary

of these expenses incurred in connection with Plaintiff's claims against Innovative Heights are shown in Exhibit A attached hereto. These expenses do not include out-of-pocket expenses attributable to Plaintiff's claims against the other defendants in this action.[3] To avoid duplication, Class Counsel has allocated expenses to each defendant. If an expense was related to multiple defendants, Class Counsel has apportioned the expense equally to the relevant defendants.

13. Class Counsel also requests a Service Award for Plaintiff Madisyn Stauffer in the amount of $2,500. Ms. Stauffer has been an active, hands-on participant in the litigation, expending significant amounts of her own time to benefit the class. This includes time spent assisting with Class Counsel's pre-suit investigation; reviewing the Complaint before filing; conferring with Class Counsel; gathering and producing documents during discovery; monitoring the litigation; participating in the mediation; and reviewing, approving, and signing the Settlement Agreement.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 24, 2024

/s/ Kevin P. Green
Kevin P. Green

[3] These expenses are also supported by invoices, which Class Counsel can provide to the Court upon request if needed.

EXHIBIT A

Expenses Relating to Innovative Heights Fairview Heights

Date	Description	Total Amount	Allocate to	IHFH Amount
4/29/2019	Court filing fee and jury demand fee	$503.65	IHFH	$503.65
5/30/2019	Alias summons filing fee	$5.14	IHFH	$5.14
9/21/2020	Conference Call for Rule 16.2 conference	$12.18	CE/IHFH	$6.09
10/5/2021	Notice of Intent to Serve Subpoenas to Defendants mailing fee	$16.25	CE/SZFG/ IHFH	$5.42
7/27/2022	Conference call with co-counsel	$14.23	CE/IHFH	$7.11
8/25/2022	Conference call with consultant re: fingerprints	$36.59	CE/SZFG/ IHFH	$12.20
2/12/2024	Fee for Mediation Services to Neuner Mediation & Dispute Resolution for Mediation with Innovative Heights Fairview Heights	$1417.5	IHFH	$1417.5
2/12/2024	Certified Mailing Fee to mail payment to Neuner Mediation & Dispute Resolution	$5.04	IHFH	$5.04
TOTAL				**$1,962.15**