

**IN THE CIRCUIT COURT OF ILLINOIS FOR THE SEVENTH JUDICIAL CIRCUIT  
SANGAMON COUNTY, ILLINOIS**

MATTHEW R. HERMAN, individually and on )  
behalf of himself and all others similarly situated, ) Case No. 2024CH000020  
 )  
Plaintiff, )  
 )  
v. ) Hon. Gail L. Noll  
 ) Judge Presiding.  
 )  
Missouri Fiesta, Inc. and W&M Restaurants, Inc., )  
 )  
Defendants. )

**PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION SETTLEMENT**

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## I. INTRODUCTION

Plaintiff Matthew R. Herman (“Plaintiff”), individually and on behalf himself and all others similarly situated ( “Settlement Class”, “Class”, “Class Members”), respectfully seeks preliminary approval of a proposed class action settlement (“Proposed Settlement”) with Defendants Missouri Fiesta, Inc. (“Missouri Fiesta”) and W&M Restaurants, Inc. (“W&M”) (together with Missouri Fiesta, “Defendants”), the terms of which are set forth in the Class Action Settlement Agreement (the “Settlement Agreement,” “Agreement,” or “SA at ¶”), attached hereto as Exhibit A to Declaration of Gary S. Graifman in support of Preliminary Approval (“Graifman Decl.”).<sup>1</sup>

This class action results from Defendants’ alleged illegal collection, storage, and use of the fingerprints or biometrics of their employees during the period of March 21, 2019 and August 31, 2022, in violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, et seq. (“BIPA”) and their failure to issue a written biometric policy. Specifically, Plaintiff’s Class Action Complaint (“Complaint”, “Comp. at ¶”), alleges that during the relevant period (“Relevant Period”), Defendants, two franchisees of approximately 14 Taco Bell restaurants in Illinois, violated BIPA by collecting their employees’ fingerprints for use in a point of sale cash register system, without first issuing the requisite written biometric policy or a publicly available retention schedule concerning when they would delete the collected biometrics, and collecting and using biometric fingerprint scanners, without first obtaining the written consent of their employees. Comp. at ¶¶7, 11-12, 26-28. Defendants deny and continue to deny each and every allegation and all charges of wrongdoing or liability of any kind whatsoever. However, despite this belief and having good defenses to the claims alleged, soon after commencement of this

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<sup>1</sup> Unless otherwise defined, all capitalized terms and phrases herein have the same meaning as ascribed in the Settlement Agreement. This action is currently pending before the Hon. Gail L/ Noll in the Circuit Court of Illinois for the Seventh Judicial Circuit, Sagamon County, Illinois as *Herman v. Missouri Fiesta, Inc. et al.*, Case No. 2024CH000020.

litigation, the Parties began informal settlement discussions, given the burden, expense, risk, exposure, uncertainty, of continued litigation. The Parties' engaged in good faith, arm's-length settlement negotiations that continued through June 2025, including the exchange of necessary documents and information to facilitate these discussions, ultimately, reaching this Proposed Settlement.

The Proposed Settlement provides substantial relief for the Class including the establishment of: (1) a Settlement Fund of \$526,500 which will be placed in an Escrow Account, from which each participating Class Member will receive the gross amount of approximately eight hundred eight dollars and 75/100 (\$808.75), plus (2) significant and valuable injunctive relief. Settlement Payments are to be made from the Net Settlement Amount or the net amount of the Settlement Fund, after deduction of settlement administration costs, and a Court-approved Incentive Award and a Court approved fees and expenses award. Any check issued to a Settlement Class Member as a Settlement Payment that is not timely cashed within 120 calendar days after the date of issuance shall revert to the Defendants or their insurers.

In addition, the Settlement provides meaningful injunctive relief that requires: (1) Defendant to provide to Plaintiff's counsel with an affidavit representing that Defendants have deleted all biometric information of Settlement Class Members, and (2) no longer use the Par Tech Inc. Point-of-Sale System ("Par Tech"). This relief ensures Defendants' compliance with BIPA's deletion requirements, and assures Plaintiff that the biometric technology, Par Tech, and the concomitant collection of biometrics is no longer performed by Defendants. The terms of this Settlement are not only fair, reasonable, and adequate, and in the best interests of the Settlement Class, but represent an achievement that most likely is better than any result Plaintiffs could hope to achieve through continued litigation of this Action.

Accordingly, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed Settlement; issue the proposed Preliminary Approval Order; find, solely for purposes of effectuating the Proposed Settlement, that the prerequisites for class certification under Section 2-801 of the Illinois Code of Civil Procedure are likely to be found to be satisfied; and allow Notice of the Settlement to be issued to Class Members (Exhibit A to Settlement Agreement).

## **II. BACKGROUND**

### **A. Factual Allegations and Procedural History**

According to the allegations in the Complaint, Plaintiff Herman worked as a team member and cashier for Defendant Missouri Fiesta<sup>2</sup>, for various portions of 2020 through 2022 at a Missouri Fiesta owned Taco Bell restaurant in Jerseyville, Illinois. Comp. at ¶¶ 9, 31. During the Relevant Period, Plaintiffs allege that Defendants' employees used their fingerprints on a Par Tech System ("POS System") with a finger scanner, as a means of authentication, to clock in and out of Defendants' time keeping systems, which enabled them to use the cash registers. Comp. at ¶ 26, 32. During Plaintiff's employment, Plaintiff provided his fingerprints for use by this POS System and time keeping system, using his fingerprints to clock in and out, record his lunch breaks, and use the cash register. Comp. at ¶ 32.

It is alleged that during the Relevant Period, Defendants failed to maintain or institute a written biometric policy, much less a policy delineating when Defendants would delete the collected biometric information, as required by BIPA. Comp. at ¶¶ 27, 44-45, 51-52. Consequently, Defendants never informed Plaintiff or members of the proposed Settlement Class of the specific limited purposes or length of time for which they collected, stored, or used these biometric identifiers or biometric information, as required under BIPA. Comp. at ¶ 33. Similarly,

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<sup>2</sup> Missouri Fiesta and W&M are related Taco Bell franchisees.

Defendants never informed Plaintiff or Settlement Class members of any biometric identifier or biometric data retention policy, or whether they would ever permanently delete their biometric identifying information, as required by BIPA. *Id.* Plaintiff and the proposed Settlement Class were never asked to and therefore never signed, a written release or consent allowing Defendants to collect, store or use their biometric information prior to such collection and use, as required by BIPA. Comp. at ¶ 34. Thus, as the Complaint alleges, the Plaintiff and Settlement Class Members have continuously and repeatedly been exposed to the risks and harmful conditions created by Defendants' violations of BIPA, as alleged in the Complaint. Comp. at ¶ 35.

By way of the Action, Plaintiff Herman sought statutory damages and injunctive relief on behalf of himself and Class members, consisting of similarly situated Missouri Fiesta and W&M employees in Illinois. Comp. at ¶ 36, 37, 43-55.

## **B. Procedural History and Settlement Negotiations**

Shortly after Plaintiff filed the Complaint on March 21, 2024, Defendants appeared by counsel. Plaintiff filed a motion for class certification and Defendants each answered the operative Complaint (the "Answers"). Soon thereafter, the Parties explored preliminary settlement discussions, and subsequently exchanged relevant documents and information to facilitate those discussions. Specifically, Defendants provided Plaintiff with information about the Settlement Class and the number of employees potentially impacted by Defendants' purported BIPA violations. Plaintiff and Class Counsel analyzed and reviewed the documents produced, and conducted a comprehensive examination of the law and facts relating to the allegations in the Complaint and Defendants' potential defenses as set forth in the Answers, including the defenses of consent, good faith (e.g., non-willful) conduct, substantial compliance, statute of limitations bar, acquiescence, lack of standing, preemption and lack of damages.

Based upon Plaintiff's counsel review and analysis of the documents, Answers, and their continued investigation of the Action, Plaintiff made a settlement demand on about July 24, 2024. The Parties thereafter engaged in several more months of arm's length negotiations which eventually culminated in the execution of a detailed term sheet outlining the terms of the proposed Settlement. The Term Sheet was executed in late January 2025, and after further negotiation, the Settlement Agreement was executed in about June 26, 2025.

Plaintiff believes that the claims asserted in the Complaint have merit, that he would have ultimately succeeded in obtaining adversarial certification of the proposed Class, and that he would have prevailed on the merits at summary judgment or at trial. But, Plaintiff and Class Counsel recognize that Defendants raised factual and legal defenses to the Complaint that presented risks such that Plaintiff might not have prevailed, the Action might have been dismissed and/or that a Class might not have been certified for trial, and that Defendants' insurance carriers might have disclaimed coverage given Defendants' purported violations of BIPA.<sup>3</sup> Consequently, had Plaintiff not agreed to settle and was ultimately successful at trial, he might not have been able to secure compensation for Settlement Class members.

Class Counsel has also taken into account the uncertain outcome and risks of any litigation, especially in complex actions, as well as difficulty and delay inherent in such litigation. Plaintiff and Class Counsel believe that the Settlement Agreement presents a substantial and beneficial result for the Settlement Class, that will be provided to the Settlement Class without delay. Therefore, Plaintiff believes that it is desirable that the Released Claims against the Released Parties be fully and finally compromised, settled and resolved with prejudice, and

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<sup>3</sup> In fact, certain of Defendants' insurance carriers filed a declaratory judgment action seeking an order denying coverage. *Amco Insurance Company, Inc., et al. v. Missouri Fiesta, et al.*, Case No. 24 cv 3313 (C.D. Ill.)(the "Declaratory Judgment Action"). The Declaratory Judgment Action has been settled.

barred pursuant to the terms and conditions set forth in the Settlement Agreement on the terms and under the conditions set forth therein.

Defendants deny the material allegations in the Complaint, as well as all allegations of wrongdoing and liability, including that they violated BIPA. However, Defendants have similarly concluded that this Settlement Agreement is desirable to avoid the time, risk, and expense of defending protracted litigation, and to avoid the risk posed by the Settlement Class's claims for statutory damages under BIPA. Defendants thus desire to resolve finally and completely the pending and potential claims of Plaintiff and the Settlement Class.

### **The Settlement is Fair and Reasonable**

This Agreement presents a substantial benefit for the Settlement Class, that will be provided to the Settlement Class Members without delay, and that the Proposed Settlement is fair and reasonable. The amount to be received by each Class Member is consistent with the average amount paid to class members in other BIPA cases, particularly those involving workers.

Moreover, the Proposed Settlement provides substantial injunctive relief. As part of the Settlement, the Defendants agree to supply to Class Counsel with a declaration of a knowledgeable witness attesting that the Par Tech System is no longer in use in any of Defendants' restaurants, and that all biometric information or identifiers collected for use by that system have been properly deleted. By obtaining this declaration, Plaintiff and Class Counsel have assured themselves and Settlement Class Members, that Defendants have complied with BIPA and that they will not violate BIPA, at least with the regard to the Par Tech system, in the future.

Therefore, Plaintiff believes that it is desirable that the Released Claims be fully and finally compromised, settled and resolved with prejudice, and barred pursuant to the terms and conditions set forth in the Settlement Agreement on the terms and under the conditions set forth therein.

### **III. TERMS OF THE SETTLEMENT**

The material terms of the Settlement are summarized as follows:

#### **A. The Class Definition**

The Settlement Class is defined as:

“**Settlement Class**” means all individuals within the State of Illinois, who are current or former employees of either of the Defendants, and may have used Defendants’ Par Tech Inc. Point-of-Sale System with a finger scanner between the period of March 21, 2019 and August 31, 2022, inclusive. SA ¶ II.38.

Excluded from the Settlement Class are all persons who properly elect and timely request to exclude themselves from the Settlement Class and their legal representatives, successors, or assigns, Defendants, as defined in the Settlement Agreement, the Court and Court staff to whom this case is assigned, and any member of the Court’s or Court staff’s immediate family. *Id.*

#### **B. The Settlement Benefits**

##### **1. Monetary Benefits to the Class**

The proposed Settlement requires the Defendants to pay up to approximately \$526,500 to create the Settlement Fund for the benefit of Settlement Class Members. SA ¶ XIV.81. The Settlement Fund shall be used to pay all Settlement Class Member Payments, Settlement Administration Expenses, any Incentive Award to the Class Representative, any Fee and Expense Awards to Class Counsel, and any other costs, fees or expenses approved by the Court. SA ¶¶ XIV.81. Any checks disbursed to Authorized Payees from the Settlement Fund that remain uncashed for any reason for 120 calendar days after the date of issuance shall be deemed void and will not be re-issued for any reason. SA ¶ V.45. Any uncashed check funds shall revert to the Defendants or their insurers. *Id.*

Each Settlement Class Member who submits a Claim Form, thereby becoming an Authorized Payee, shall receive a Settlement Payment by digital means, or by check through First

Class U.S. Mail to their last known address which shall be mailed by the Settlement Administrator within forty-five (45) calendar days following the Effective Date. *Id.* ¶ V.43. The attorneys' fees and expenses to be paid under the Settlement Agreement, subject to the Court's approval at the final approval hearing after application by Class Counsel, is up to 40% of the total Settlement Fund, which shall include reimbursement for filing costs and service of process fees. SA ¶ XIV.81.

Additionally, within fourteen (14) days after the Court enters the Preliminary Approval Order, Defendants shall pay five thousand dollars (\$5,000) to the Settlement Administrator for Notice and Settlement Administration costs, which shall be credited against and come from the Settlement Fund. SA ¶ IV.38.G.A.

## **2. Injunctive Relief**

An important component of the Settlement involves Defendants' agreement to supply Class Counsel with a declaration from a knowledgeable witness attesting that all Settlement Class members' biometric information has been deleted and that Defendants no longer use the Par Tech biometric technology. By providing this declaration, Defendants are effectively agreeing to comport with BIPA now and in the future, foregoing the use of the Par Tech biometric system, and rectifying any prior breaches to the extent that they involved their failure to timely delete Settlement Class members' biometric information—some of the same relief that Plaintiff would have sought had he continued the Action to trial. Thus, this constitutes significant and valuable injunctive relief.

## **C. Notice and Right to Opt Out or Object to the Settlement**

Notice of the Settlement includes direct notice to the approximately 651 Class Members. The Defendants will provide the Settlement Administrator with the Settlement Class Members' information it possesses, including the Class List, Settlement Class members' names, last known mailing addresses and phone numbers (if available), and email addresses (if available). SA ¶ VIII.55.

The Notice shall advise the members of Settlement Class of their rights under the Proposed Settlement, including the right to be excluded from or object to the Settlement Agreement or its terms, to object to the Fee and Expense Petition and the Incentive Award, and the right to participate in the Final Approval Hearing. *Id.* ¶ VIII.56. *See also* Exhibit A. Any person in the Settlement Class who intends to object to this Settlement Agreement must present the objection in writing, which must be personally signed by the objector and must include: (a) the Settlement Class Member's full name, address and current telephone number; (b) the case name and number of this Lawsuit, (c) the date range during which he or she was employed by the Defendants, (c) all grounds for the objection with factual and legal support, (e) the identification of any other objections he/she has filed in the last five years, and (f) the objector's signature. If represented by counsel, the objecting Settlement Class Member must also provide the name and telephone number of his/her counsel. SA ¶ X. 68. All written objections must be filed with the Court, with copies mailed to Class Counsel and Defendant's Counsel via United States mail, hand delivery or overnight delivery. SA ¶ X.67.

Additionally, any person in the Settlement Class may submit to the Settlement Administrator a request for exclusion from the Settlement on or before the Objection/Exclusion Deadline. SA ¶ IX. A Settlement Class Member's request to be excluded from the Settlement Class shall be in writing and provide (i) the Settlement Class Member's name, address and

telephone number; (ii) the case name and case number of this Action; and (iii) a statement that he or she wishes to be excluded from the Settlement Class. SA ¶ IX.61. The request for exclusion from the Settlement Class must also be personally signed by the Settlement Class Member requesting exclusion. *Id.*

**D. Proposed Class Representative Incentive Award and of Fees and Expense Petition**

The Settlement would not have been possible without the time and effort of the Settlement Class Representative who stepped forward on behalf of other Settlement Class Members, accepting the responsibility of cooperating in the litigation and settlement negotiations in order to right the wrong that affected the Settlement Class. Class Counsel intend to seek an Incentive Award of \$2,500 for the Settlement Class Representative. SA ¶ XIV.84. In addition, Class Counsel intend to seek an award of attorneys' fees and expenses of up to forty (40%) percent of the total Settlement Fund amount which shall include reimbursement for filing costs, service of process fees, and out of pocket expenses incurred during the course of the litigation. SA ¶ XIV.81. Each of the Fee and Expense Petition and Incentive Award shall be paid by the Settlement Administrator from the Settlement Fund. SA ¶¶ XIV.82, 83. Defendants have agreed not to oppose a fee and expense award application up to 40% of the total Settlement Fund, or an incentive award up to \$2,500. SA XIV ¶81, 84.<sup>4</sup>

**E. Narrowly Tailored Release**

If the Settlement is approved, Plaintiff and all Settlement Class Members who do not opt out of the Settlement Class, will release the Defendants and all Released Parties from the Released Claims asserted or that could have been asserted by Plaintiff and the Settlement Class Members in the Action. SA ¶¶ I. 32, 33. Thus, the release is limited and tailored to apply to allegations in this

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<sup>4</sup>In the event that the proportionate share of the attorneys' fees and costs awarded and to be borne by each class member in the aggregate is below 40%, Defendants shall fund that remaining difference. SA ¶ 1.36.

Action and as set forth in the Settlement Agreement.

**IV. ARGUMENT**

**V. POINT I**

**VI. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES**

Before granting preliminary approval of the proposed Settlement, the Court must first determine whether the Proposed Settlement Class can be certified for settlement purposes. Plaintiff requests that the Court certify, for settlement purposes only, the Settlement Class defined above under Section 2-801 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-801. Under Section 2-801, a class may be certified if the following four requirements are met:

- (1) the class is so numerous that a joinder of all members is impracticable;
- (2) there are questions of fact or law common to the class that predominate over any questions affecting only individual members;
- (3) the representative parties will fairly and adequately protect the interest of the class; and
- (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801.

Notably, “[a] trial court has broad discretion in determining whether a proposed class meets the requirements for class certification.” *CE Design Ltd. v. C & T Pizza, Inc.*, 2015 IL App (1st) 131465, ¶ 9.

Although not identical, Section 2-801 is modeled on Federal Rule of Civil Procedure 23, and federal cases interpreting that rule are persuasive authority in Illinois. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 125 (2005) (citations omitted). As shown below, the Settlement Class satisfies each of the requirements of Section 2-801 and can be certified for settlement purposes.

**A. The Class is Sufficiently Numerous, and Joinder is Impracticable**

Numerosity is met where “the class is so numerous that joinder of all members is impracticable.” 735 ILCS 5/2-801(1). “Although there is no bright-line test for numerosity, a class of forty is generally sufficient[.]” *Hinman v. M & M Rental Center, Inc.*, 545 F. Supp. 2d 802, 805-06 (N.D. Ill. 2008). Here, the Defendants represented that the Settlement Class consists of approximately 651 current and former employees who provided biometric identifiers or biometric information during the Relevant Period. Joinder of 651 Settlement Class Members would be impractical, to say the least. Accordingly, the Settlement Class readily satisfies the numerosity requirement. *Travel 100 Grp. v. Empire Cooler Serv., Inc.*, No. 03 CH 14510, 2004 WL 3105679, at \*2 (Ill. Cir. Ct. Oct. 19, 2004) (“The potential class exceeds 3,000 members. The numerosity requirement is met”).

**B. Common Questions of Law and Fact Predominate**

Commonality, the second requirement for class certification, is met where there are “questions of fact or law common to the class” and those questions “predominate over any questions affecting only individual members.” 735 ILCS 5/2-801(2). Common questions of law or fact exist when the members of the proposed class have been aggrieved by the same or similar misconduct. *Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 673-74 (2d Dist. 2006); *Steinberg v. Chicago Med. Sch.*, 69 Ill. 2d 320, 340-42 (1977); *Ellerbrake v. Campbell-Hausfeld*, No. 01-L-540, 2003 WL 23409813, at \*3 (Ill. Cir. Ct. July 2, 2003); *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). Further, where “the defendant allegedly acted wrongfully in the same basic manner as to an entire class . . . the common class questions predominate the case[.]” *Walczak*, 365 Ill. App. 3d at 674 (citing *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 548 (2003)).

In this case, all members of the proposed Settlement Class share a common statutory BIPA

claim arising out of Defendants' identical conduct. The alleged unauthorized collection, storage, and use of individual's biometrics in violation of BIPA require the resolution of the same central factual and legal issues, including: (1) whether the fingerprints taken constitute biometric identifiers or biometric information as defined by BIPA and whether the POS System used biometric identifiers and technology; (2) whether such information was taken without the consent required under BIPA; (3) whether Defendants had a BIPA-compliant, publicly available written policy addressing retention and storage of biometrics; (4) whether, if BIPA applied to the conduct here, the Defendants timely deleted Plaintiff's and Settlement Class Members' biometric information and identifiers; and (5) whether Defendants' practices and policies violated BIPA. Predominance is satisfied "when there exists generalized evidence that proves or disproves an element on a simultaneous, class-wide basis ... [since s]uch proof obviates the need to examine each class member's individual position." *Golon v. Ohio Savs. Bank*, No. 98-cv-7430, 1999 WL 965593, at \*4 (N.D. Ill. Oct. 15, 1999); *see, e.g., JT's Frames, Inc. v. Sunhill NIC Co.*, 2012 IL App (2d) 110676-U, at ¶ 23. Here, the common questions resulting from the Defendants' alleged conduct predominate over individual issues that may exist and can be answered on a class-wide basis based on common evidence maintained by the Defendants. Thus, this factor is satisfied.

**C. Class Representative and Class Counsel Adequately Represent Class Members**

The third element of Section 2-801 requires that "[t]he representative parties will fairly and adequately protect the interest of the class." 735 ILCS 5/2-801(3). The class representative's interests must be generally aligned with those of the class members, and class counsel must be "qualified, experienced and generally able to conduct the proposed litigation." *Miner v. Gillette Co.*, 87 Ill. 2d 7, 14 (1981). "The purpose of the adequate representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in

the presentation of the claim.” *Walczak*, 365 Ill. App. 3d at 678 (citing *P.J.’s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 1004 (2nd Dist. 2004)); *Purcell & Wardrope Chartered v. Hertz Corp.*, 175 Ill. App. 3d 1069, 1078 (1st Dist. 1988). The adequacy requirement is satisfied where “the interests of those who are parties are the same as those who are not joined” such that the “litigating parties fairly represent [them]” and where the “attorney for the representative party ‘[is] qualified, experienced and generally able to conduct the proposed litigation.’” *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶ 16 (citing *Miner*, 87 Ill. 2d at 56).

Plaintiff and his counsel are adequate. First, the proposed Class Representative does not have any conflicts of interest with the absent Class Members, as his claims are coextensive with those of the Settlement Class Members. Plaintiff’s interests are entirely representative of and consistent with the interests of the proposed Settlement Class: all have allegedly had their biometrics taken and used by the Defendants in a manner inconsistent with the legal protections provided by BIPA and without their consent as required under the statute. Further, Plaintiff has read and understood the allegations of the Complaint and is willing to prosecute this matter on behalf of the Class. The proposed Class Representative has been involved in this litigation since its inception, providing valuable insight and useful facts allowing Class Counsel to effectively finalize the litigation and settlement negotiations of this Action. Plaintiff has regularly communicated with Class Counsel regarding various issues pertaining to this case and will continue to do so until the Settlement is finally approved, and its administration completed. He further reviewed and executed the Term Sheet and the Settlement Agreement, and spoke to counsel about assisting in facilitating the finality of the Proposed Settlement. If the matter should not settle, he is also prepared to continue the litigation in the capacity of class representative.

Second, all three firms comprising the proposed Class Counsel are well qualified and

experienced in complex class action litigation and have an established track record in litigating cases involving consumer protection, consumer privacy and BIPA actions. *See Graifman Decl.*, ¶¶ 12-34.<sup>5</sup> Proposed Class Counsel have been appointed as class counsel and/or involved in numerous complex class actions in courts throughout the country, and each has decades of class action experience. Proposed Class Counsel will vigorously prosecute this Action and will continue to do so through final approval. They identified and investigated the claims in this lawsuit and the underlying facts and successfully negotiated this Settlement on behalf of the Settlement Class.

As part of this motion, proposed Class Counsel request that the Court appoint KGG, the Grant Firm and Carroll Shamburg as Class Counsel. The discussion of each firm's respective experience and qualifications are set forth in the Graifman Decl. submitted herewith, and the firm resumes attached thereto.

#### **D. Fair and Efficient Adjudication of the Controversy**

The final prerequisite to class certification is met where “the class action is an appropriate method for the fair and efficient adjudication of the controversy.” 735 ILCS 5/2-801(4). “In applying this prerequisite, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain.” *Gordon v. Boden*, 224 Ill. App. 3d 195, 203 (1st Dist. 1991). In practice, a “holding that the first three prerequisites of section 2-801 are established makes it evident that the fourth requirement is fulfilled.” *Id.* at 204; *Purcell & Wardrope Chartered*, 175 Ill. App. 3d at 1079 (“the predominance of common issues [may] make a class action . . . a fair and efficient method to resolve the dispute.”). Thus, the fact that

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<sup>5</sup> During the course of the litigation, Katrina Carroll and Kyle Shamberg, formerly of Lynch Carpenter, LLC, formed a new firm, Carroll Shamberg LLC, who is now one of the Class Counsel here.

numerosity, commonality and predominance, and adequacy of representation have all been demonstrated in the instant case makes it “evident” that the appropriateness requirement is satisfied as well.

Other considerations further support certification in this case. A “controlling factor in many cases is that the class action is the only practical means for class members to receive redress - particularly where the claims are small.” *Gordon*, 224 Ill. App. 3d at 203-04; *Eshaghi v. Hanley Dawson Cadillac Co.*, 214 Ill. App. 3d 995, 1004 (1st Dist.1991) (“In a large and impersonal society, class actions are often the last barricade of consumer protection.”). A class action is superior to multiple individual actions where the “litigation costs are high, the likely recovery is limited” and individuals are unlikely to prosecute individual claims absent the cost-sharing efficiencies of a class action. *Maxwell v. Arrow Fin. Servs., LLC.*, No. 03-cv-1995, 2004 WL 719278, at \*6 (N.D. Ill. Mar. 31, 2004). This is especially true in cases involving statutes like BIPA, which carry statutory penalties but would otherwise result in many relatively small, individual claims, particularly as here when the Defendants have potential defenses. *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶¶ 27, 28 (finding that a class action is a superior vehicle for resolving the class members’ TCPA claims and that “[t]here is no doubt that certifying the class in this case, where there are potentially thousands of claimants, is an efficient and economical way to proceed and will prevent multiple suits and inconsistent judgments.”).

This case is particularly well-suited for class treatment because the claims of Plaintiff and Settlement Class Members involve identical alleged violations of a state statute. Absent a class action, most members of the Settlement Class would find the cost of litigating their claims - each of which is statutorily limited to \$1,000 per negligent violation under BIPA, and \$5,000 per intentional violation - to be cost prohibitive. It is thus unlikely that individuals would invest the

time and expense necessary to seek relief through individual litigation. Moreover, because the Action will now settle, the Court need not be concerned with issues of manageability relating to trial. When “confronted with a request for settlement only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Nor should the Court “judge the legal and factual questions” regarding certification of the proposed Settlement Class by the same criteria as a proposed class being adversely certified. *GMAC Mortg. Corp. of Pa.*, 236 Ill. App. 3d 486, 493 (1st Dist. 1992). A class action is the superior method of resolving large scale claims if it will “achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” *Amchem*, 521 U.S. at 615. Accordingly, a class action is the superior method of adjudicating this action, and the proposed Settlement Class should be certified.

## **VII. POINT II**

### **VIII. THE SETTLEMENT IS FAIR AND REASONABLE, AND SHOULD BE PRELIMINARILY APPROVED**

Under Section 2-806 of the Illinois Code of Civil Procedure, class claims may be settled only with court approval. 735 ILCS 5/2-806. The purpose of the court’s approval is to ensure that the proposed settlement agreement is “fair, reasonable, and in the best interest of the class.” *Steinberg v. Sys. Software Associates, Inc.*, 306 Ill. App. 3d 157, 169 (1st Dist. 1999). The approval of any proposed class action settlement is typically exercised in the two-step process of “preliminary” and “final” approval. Manual For Complex Litigation § 30.41 (3d ed. 2000).

At the preliminary approval stage, the Court’s task is to “determine whether the proposed settlement is within the range of possible approval.” *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*,

616 F.2d 305, 314 (7th Cir. 1980) (internal citation and quotation marks omitted); *see also*, 4 Alba Conte & Herbert B. Newberg, *Newberg On Class Actions* § 11.25 (4th ed. 2002) (“Newberg”) (noting that “[i]f the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness... and appears to fall within the range of possible approval,” the court should permit notice of the settlement to be sent to class members) (citations omitted). “A trial court should not disapprove a settlement . . . unless, taken as a whole, the settlement appears on its face so unfair as to preclude judicial approval.” *Gowdey v. Commonwealth Edison Co.*, 37 Ill. App. 3d 140, 149-50 (1st Dist. 1976). The purpose of the initial hearing is to ascertain whether there is any reason to notify the class members of the proposed settlement and proceed with a fairness hearing. *Shaun Fauley, Sabon, Inc. v. Metropolitan Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 35-37. Once the settlement is found to be “within the range of possible approval” at the preliminary approval hearing, the final approval hearing is scheduled, and notice is provided to the class.

The factors considered by a court are: “(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. Of these considerations, the first is most important. *Steinberg*, 306 Ill. App. 3d at 170; *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). Here, each relevant factor supports approval of the Settlement.

**A. The Strength of Plaintiff's Case Compared with the Relief Afforded Under the Proposed Settlement Supports Preliminary Approval**

The most important factor in determining whether a settlement should be approved is “the strength of the plaintiff’s case on the merits balanced against the amount offered in the settlement.” *Steinberg*, 306 Ill. App. 3d at 170; *Synfuel*, 463 F.3d at 653. Because the essence of every settlement is compromise, courts should not reject a settlement solely because it does not provide a complete victory, given that parties to a settlement “benefit by immediately resolving the litigation and receiving some measure of vindication for [their] position[s] while foregoing the opportunity to achieve an unmitigated victory.” *In re AT&T Mobility Wireless Data Services Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (internal quotations and citations omitted); *GMAC*, 236 Ill. App. 3d at 493 (“The court in approving [a class action settlement] should not judge the legal and factual questions by the same criteria applied in a trial on the merits.”). There is a strong judicial and public policy favoring the settlement of class action litigation, and such a settlement should be approved by the court after inquiry into whether the settlement is “fair, reasonable, and adequate.” *Quick v. Shell Oil Co.*, 404 Ill. App. 3d 277, 282 (3rd Dist. 2010).

While Plaintiff and Class Counsel are confident in the strength of their claims, they also recognize that they would have to overcome significant obstacles to succeed. Given the heavy obstacles and inherent risks Plaintiff faced with respect to his claims - and even getting to trial - the substantial benefits the Proposed Settlement provides favors its approval.

While the estimated recovery does not represent the full amount per Class Member that theoretically was recoverable under BIPA if Plaintiff could have overcome all obstacles and could have proven that the Defendants intentionally violated BIPA, the discount is warranted in light of the certain and immediate payments to Class Members provided by the Settlement, the injunctive relief designed to ensure the Defendants’ compliance with BIPA, and particularly in light

of the significant risks of ongoing litigation as noted above.

The Defendants expressed a firm denial of the material allegations and raised numerous legal defenses in their answers filed in this Action. Those affirmative defenses included, *inter alia*: that they did not collect the biometric identifiers at issue, that Plaintiff and Class Members provided either explicit or implicit consent to have their fingerprints collected and used, that the claims were barred either by unclean hands or statute of limitations issues, and that the third party technology vendor was an indispensable party to the Action. These and other defenses, if successful, could have resulted in the Plaintiff and the proposed Class Members receiving no recovery, and would have required extensive time and costs to litigate that could have impacted the amount available to distribute to Settlement Class Members.

Recognizing the risks involved in any litigation, the immediate relief afforded to each Class Member militates in favor of settlement approval. In addition to the Defendants' many defenses, Plaintiff would also otherwise be required to prevail on a class certification motion, which would be highly contested. *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 582 (N.D. Ill. 2011). "Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation." *Id.* at 586 (internal citations omitted); *see also Coy v. CCN Managed Care, Inc.*, 2011 IL App (5th) 100068-U, ¶ 25 (stating that settlement allows parties to "avoid[] a determination of sharply contested issues and dispens[es] with expensive and wasteful litigation."). "If the Court approves the [Settlement], the present lawsuit will come to an end and [Settlement Class Members] will realize both immediate and future benefits as a result." *Schulte*, 805 F. Supp. 2d at 586. The proposed Settlement provides all Class Members with the ability to receive the Settlement Payment from the proposed Settlement Fund and provides meaningful injunctive relief that this litigation sought to obtain. Approval allows Plaintiff and the Class Members to receive

meaningful and significant benefits now, instead of years from now - or perhaps never.

**B. The Complexity, Length, and Expense of Further Litigation are Significant**

The Settlement here appropriately balances the costs, risks, and likely delay of further litigation, on the one hand, against the benefits provided, on the other hand. Newberg § 11:50 at 155 (“In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.”).

In the absence of settlement, it is certain that the resulting expense, duration, and complexity of the protracted litigation would be substantial, thus tilting the third factor in favor of resolving the case. Not only would the Parties have to undergo significant motion practice before any trial on the merits could even be contemplated, but additional evidence, witnesses and expert testimony and reports would have to be obtained and assembled. Continuing to litigate this Action would result in additional expenses, including extensive expert fees, coupled with considerable time to proceed through trial and post-trial motions.

As such, the immediate and considerable monetary and prospective relief provided to the Class under the Proposed Settlement weighs heavily in favor of its approval compared to the inherent risk and delay of a long and drawn-out litigation, trial, and appellate process.

**C. The Amount of Opposition to the Proposed Settlement and Reaction of the Class**

The Class has yet to be notified of the Proposed Settlement and given an opportunity to object. While it is difficult to ascertain the reaction of the Class Members to the Settlement prior to Notice being disseminated, Plaintiff has approved of the Settlement and believes that it is a fair and reasonable settlement in light of the defenses raised by the Defendants and the potential risks involved with continued litigation. Before the Final Approval Hearing, the Court will receive and be able to review objections, if any, or other comments received from Class Members, along with

a full accounting of all requests for exclusion.

**D. The Proposed Settlement was Achieved Through Arm's-Length Negotiations Between Experienced Counsel**

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 Shaun Fauley, Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 21 (finding no collusion where there was “no evidence that the proposed settlement was not the product of ‘good faith, arm's-length negotiations’”); *Coy*, 2011 IL App (5th) 100068-U, ¶ 31 (finding that there was no collusion where the settlement agreement was reached as a result of “an arm's-length negotiation . . . entered into after years of litigation and discovery, resulting in a settlement with the aid of an experienced mediator.”). When negotiations began, Plaintiff's counsel had engaged in an extensive analysis of the strengths and weaknesses of the case. Thereafter, with Defendants' production of information, Class Counsel determined the size and other relevant issues regarding the putative Class and the insurance coverage available and the position of Defendants' insurers. The Parties engaged in extensive arm's-length negotiations after Plaintiff's service of a settlement demand, which resulted in a detailed Term Sheet, and then continued with negotiations that resulted in a detailed Settlement Agreement. Such an extensive, formal and arms' length process underscores the non-collusive nature of the proposed Settlement. There is no indication of collusion or fraud in the settlement negotiations, and none exists.

**E. The Experience and Views of Class Counsel Support Preliminary Approval**

With respect to factor seven, Class Counsel believes that the proposed Settlement Agreement is in the best interests of Class Members because those who do not opt out are each provided an immediate and significant payment and meaningful relief instead of having to wait for the litigation and any subsequent appeals to run their course. Moreover, they are provided with non-monetary relief including the deletion of their biometric information, and as to those who

continue to work for Defendants, the foregoing of Defendants' collection of their biometric information.

Further, due to the defenses that the Defendants have indicated that they would raise should the case proceed through litigation - and the resources that the Defendants have committed to defend, fight and litigate this matter through appeal - it is possible that the Class Members would receive no benefit whatsoever in the absence of this Settlement. Given Class Counsel's extensive experience litigating similar class action cases in federal and state courts, this factor also weighs in favor of granting preliminary approval. *GMAC*, 236 Ill. App. 3d at 497 (finding that the court should give weight to the fact that class counsel supports the class settlement in light of its experience prosecuting similar cases).

**F. The Stage of the Proceedings and the Amount of Discovery Completed**

The Proposed Settlement was reached after an investigation by Class Counsel, based upon, among other things, Defendants' informal production of documents and information, assertion of extensive affirmative defenses, Plaintiff's filing of a class certification motion, months of negotiations with Defendants' counsel and with counsel for certain of their insurance carriers, and involvement in the related Declaratory Judgment Action (defined below) with certain of Defendants' insurance carriers.

Given the size of the Class, it is beneficial that the Proposed Settlement is taking place now, rather than after additional substantial resources are expended on litigation. Had the Parties not reached this Settlement, this case would have proceeded to plenary discovery, and expert and third-party discovery and additional dispositive motions which would have increased the costs expended on the litigation.

The Court need not rule on a completely blank slate as to the fairness, reasonableness, and adequacy because this Settlement falls within the same range of settlements as other BIPA cases.

On average, workplace BIPA cases settle for approximately \$900 per class member, and non work place BIPA cases settle for only \$250 per class member. See Michael Kheyfets, Edgworth Economics, Analyzing Biometric Data Privacy Class Action Settlements, Bloomberg Law, Aril 12, 2024, <https://www.edgwortheconomics.com/insight-Analyzing-Biometric-Data-Privacy-Class-Action-Settlements#:~:text=In%20addition%20to%20being%20generally,of%20the%20typical%20workplace%20settlement>; See also J. Thomas Richie, Erin Jane Illman & Caroline Dare Spore, What to Expect When You're Expecting a Biometric Class Action: Settlements, Bradley, April 25, 2022, <https://www.classactiondeclassified.com/2022/04/what-to-expect-when-youre-expecting-a-biometric-class-action-settlements/> (noting that the average BIPA settlement is about \$440 per class member and the recoveries range from \$21 to \$1,000 per class member).

Judge Angelo J. Kappas, for instance, recently approved a BIPA settlement in *Harris v. Walmart Inc.*, Case No. 2023CH000117 (Cir. Ct. DuPage Cty., Ill. 2024), on behalf of approximately 9,200 Walmart warehouse workers, that provided for a recovery of approximately \$304 per class member on a gross basis, and approximately \$212 per class member on a net basis. Judge Frank Valderrama recently approved a BIPA settlement providing for approximately \$500 per class member, in a worker BIPA action. See *Davis, et al. v. Heartland Employment Services, LLC*, No. 19-cv-00680 (N.D. Ill. October 25, 2021).

Non-worker BIPA cases settle for far less. In *Williams v. Personalizationmall.com, LLC*, No. 1:20-cv-00025 (N.D. Ill. July 6, 2022), the Court approved a BIPA settlement of approximately \$518 per class member. In *Sekura v. L.A. Tan Enterprises, Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Co., Ill. 2016), the BIPA class settlement resulted in each class member being eligible to receive a *pro rata* share

of a settlement fund that would have amounted to approximately \$40 per person if each class member had submitted a valid claim. The court in *Rivera v. Google LLC*, No. 2019-CH-00990 (Cir. Ct. Cook Co., Ill. 2022) approved a settlement where each BIPA class member who submitted a valid claim will receive a *pro rata* share of the settlement fund amounting to approximately \$95 per person. In *Carroll v. Crème de la Crème, Inc.*, No. 2017-CH-01624 (Cir. Ct. Cook Co., Ill. 2018), the settlement resulted in each class member being eligible to enroll in credit and identity monitoring services free of charge without further monetary relief. See also, e.g., *Marshall v. Lifetime Fitness, Inc.*, No. 2017-CH-14262 (Cir. Ct. Cook Co., Ill. 2019) (paying \$270 to individuals who filed claims in addition to credit monitoring). When compared to other BIPA settlements with large class sizes in the tens of thousands of claimants, the per-person relief provided by this Settlement is as good as, or exceeds many of the previously approved BIPA resolutions. See *Prelipceanu v. Jumio Corp.*, No. 2018-CH-15883 (Cir. Ct. Cook Cty., Ill. 2020) (paying claimants approximately \$260 each); *Miracle-Pond v. Shutterfly*, 2019-C-07050 (\$6.75 million fund for potentially millions of class members); *Thome v. Novatime Tech., Inc.*, No. 19-cv-6256 (N.D. Ill. Mar. 8, 2021), dkt. 90 (\$4.1 million fund for approximately 62,000 class members and assignment of insurance policy); *Rosenbach v. Six Flags Ent. Corp.*, 2016-C-00013 (Cir. Ct. Lake Co. May 14, 2021) (preliminarily approving \$36 million fund for approximately 1,100,000 class members, and capping class member payments at \$60 or \$200 depending on date of finger scan).

Here, because the Settlement Fund is \$526,500 and there are approximately 651 claimants, and even assuming one hundred percent participation, Plaintiff estimates that each Settlement Class Member will receive approximately \$808.75 per person before deductions for administrative expenses, attorneys' fees and costs, and an incentive award (unless there are opt outs).

Moreover, in addition to the monetary relief, the injunctive relief found in the Settlement is valuable and assures Settlement Class Members that their fingerprints will or have been deleted, and, to the extent that they are currently employed by Defendants, will not be collected again. This presents valuable injunctive relief that aligns with both the goals of BIPA and those of this Action. *See, e.g., In re Equifax Customer Data Sec. Breach Litig.*, MDL No. 2800, 2020 U.S. Dist. LEXIS 118209, at \*256 (N.D. Ga. Mar. 17, 2020) (“The Court specifically finds that the injunctive relief class counsel obtained here is a valuable benefit to the class because it reduces the risk that their personal data will be compromised in a future breach.”); *In re Target Corp. Customer Data Sec. Breach Litig.*, 892 F.3d 968, 974 n.6 (8th Cir. 2018) (security measures implemented after a data breach have “value to all class members”). *Beasley v. Int’l Paper Co.*, No. 06-cv-703, 2014 WL 375432, at \*1 (S.D. Ill. Jan. 31, 2014) (“A court must also consider the substantial affirmative relief when evaluating the overall benefit to the class.”) (citing Manual For Complex Litigation § 21.71, at 337 (4d ed. 2004)); *cf. Spano v. Boeing Co.*, No. 06-cv-743, 2016 WL 3791123, at \*2 (S.D. Ill. Mar. 31, 2016) (courts must consider the overall benefit to the Class, including the value of non-monetary benefits).

Accordingly, the proposed Settlement here, which was achieved before any ruling on class certification or liability, will enable Settlement Class Members to reap the proposed Settlement’s valuable benefits thanks to Plaintiff’s and proposed Class Counsel’s hard work pursuing this case and representing their interests. Thus, the proposed Settlement warrants the Court’s preliminary approval.

### **IX. POINT III**

### **X. THE PROPOSED CLASS NOTICE IS APPROPRIATE AND SHOULD BE APPROVED**

Under 735 ILCS 5/2-803, the Court may provide class members notice of any proposed

settlement so as to protect the interests of the class and the parties. *Cavoto v. Chicago Nat'l League Ball Club, Inc.*, No. 1-03-3749, 2006 WL 2291181, at \*15 (Ill. App. 1st Dist. 2006) (collecting authorities and noting that “section 2-803 makes it clear that the statutory requirement of notice is not mandatory”). However, notice must be provided to absent class members to the extent necessary to satisfy requirements of Due Process. *Id.* (citing *Frank v. Teachers Insurance & Annuity Association of America*, 71 Ill. 2d 583, 593 (1978)); *see also* Fed. R. Civ. P. 23(d)(2) advisory committee’s note to 1966 amendment (“mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.”). Due process requires that the notice be the “best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections’” as well as “‘describe the action and the plaintiffs’ rights in it.’” *Shaun Fauley, Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 36 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). The Notice and distribution plan set forth in the Settlement Agreement more than satisfies both the requirements of 735 ILCS 5/2-803 and Due Process. As set forth above, the Notice plan is designed to reach as many potential Settlement Class Members as possible and is the best notice practicable. SA ¶ V. As such, the proposed method of notice comports with 735 ILCS 5/2-803 and exceeds the requirements of Due Process. *Id.*

## **XI. PROPOSED SCHEDULE**

The Parties propose the following schedule leading to the hearing on final approval of the settlement:

- Class List: within 14 days after entry of the Preliminary Approval Order;
- Notice Date: no later than 14 days of receipt of the Class List;
- Objection/Exclusion Deadline: 45 days from the Notice Date; and

- Final Approval Hearing: no later than 90 days from entry of Preliminary Approval Order.

### **CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that this unopposed Motion be granted and the Court enter an order substantially in the form accompanying this Motion: (1) conditionally certifying the Class for notice purposes; (2) notifying the Class Members that the Court is likely to certify the proposed Settlement Class and providing instructions for objecting and/or opting out; (3) preliminarily approving the Proposed Settlement; (4) appointing the Class Representative and Class Counsel; (5) appointing the notice and Settlement Administrator; (6) approving the Class Notice and related Settlement administration documents; and, (7) approving the proposed class settlement deadlines and procedures, including the proposed Final Approval Hearing date and procedures regarding objections, exclusions and submitting Claim Forms.

Date: July 1, 2025

/s/ Katrina Carroll

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