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

ERIC ZEPEDA, individually and on behalf of similarly situated individuals, *Plaintiff,* v. INTERCONTINENTAL HOTELS GROUP, INC, a Delaware corporation, and KIMPTON HOTEL & RESTAURANT GROUP, LLC, a Delaware limited liability company, *Defendants.*	)	No. 2018 CH 02140 Hon. David B. Atkins

PLAINTIFF'S MOTION & MEMORANDUM OF LAW IN SUPPORT OF APPROVAL OF ATTORNEYS' FEES, EXPENSES, & INCENTIVE AWARD

Plaintiff, Eric Zepeda, by and through his attorneys, and pursuant to 735 ILCS 5/2-801 and this Court's July 31, 2018 Preliminary Approval Order, hereby moves for an award of attorneys' fees and expenses for Class Counsel, as well as an incentive award for Plaintiff as the Class Representative in connection with the class action settlement with Defendants, Kimpton Hotel & Restaurant Group, LLC ("Kimpton") and Defendant Six Continents Hotels, Inc.'s (incorrectly sued as Intercontinental Hotels Group, Inc.) (collectively, "Defendants"). Defendants do not object to the relief sought herein. In support of this Motion, Plaintiff submits the following memorandum of law.

Dated: October 16, 2018

Respectfully submitted,

ERIC ZEPEDA, individually and on behalf of the Settlement Class

By: /s/ *David L. Gerbie*
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I. INTRODUCTION

The Class Action Settlement[1] that Class Counsel have achieved in this case is an exceptional result for Settlement Class Members. It establishes a *non-reversionary* Settlement Fund of $500,000.00 to provide each Settlement Class Member who files a valid, timely claim with a *pro rata* share of the Settlement Fund in cash for having their biometrics collected by Defendants in alleged violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* (the "BIPA"). In addition to the substantial financial benefit to the Settlement Class Members, the Settlement also includes terms that provide significant non-monetary relief designed to minimize or eliminate the allegedly unlawful biometric collection and use practices at issue in this case.

Direct Notice of the Settlement through U.S. mail and email commenced on September 21, 2018. As of the filing of this Motion, many claims have already been submitted, with more than seven weeks remaining before the Claims Deadline; no Settlement Class Member has objected to the proposed Settlement; and no Settlement Class Member has even sought exclusion from the Settlement.

With this Motion, Class Counsel request a fee of 40% of the total Settlement Fund obtained for the Settlement Class, amounting to $200,000, plus expenses. As explained in detail below, Class Counsel's requested fee award is justified given the exceptional monetary and non-monetary relief provided under the Settlement, is consistent with Illinois law and fee awards granted in other cases in Illinois courts, and is also reasonable given the time and costs Class Counsel have

[1] Unless otherwise indicated, capitalized terms have the same meaning as those terms are used in the Settlement Agreement, which is attached as Exhibit A.

committed to resolving this litigation for the benefit of the Settlement Class Members.

Both Class Counsel and the Class Representative devoted significant time and effort to the prosecution of the Settlement Class Members' claims, and their efforts have yielded an extraordinary benefit to the Class. The requested attorneys' fees and costs and Incentive Award are amply justified in light of the investment, risks, and excellent results obtained for the Settlement Class Members. Plaintiff and Class Counsel respectfully request that the Court approve attorneys' fees of $200,000, plus expenses, and the agreed-upon Incentive Award of $2,500 for Plaintiff as Class Representative.

II. BACKGROUND

A. The BIPA

The BIPA is an Illinois statute that provides individuals with a right to privacy in their biometric information. To effectuate its purpose, the BIPA requires private entities seeking to use biometric identifiers (e.g., fingerprints and handprints) and biometric information (any information gathered from a biometric identifier which is used to identify an individual)[2] to first:

(1) inform the person whose biometrics are to be collected in writing that biometric identifiers or biometric information will be collected or stored;

(2) inform the person whose biometrics are to be collected in writing of the specific purpose and the length of term for which such biometric identifiers or biometric information is being collected, stored and used;

(3) receive a written release from the person whose biometrics are to be collected allowing the capture and collection of their biometric identifiers or biometric information; and

[2] "Biometric identifiers" and "biometric information" are collectively referred to herein as "biometrics."

(4) publish a publicly available retention schedule and guidelines for permanently destroying biometrics. 740 ILCS 14/15.

The BIPA was enacted in a large part to protect the privacy rights of individuals, to provide them with a means of enforcing their rights, and to regulate the practice of collecting, using and disseminating such sensitive and irreplaceable information.

B. Factual Background and Procedural History

1. *Defendants' Business Operations*

Defendants are operators of hotel chains throughout the United States. As an ordinary part of their business practice, Defendants utilize biometric timekeeping devices at their Chicago-area hotels – Kimpton Hotel Palomar Chicago, Kimpton Hotel Burnham Chicago, Kimpton Hotel Monaco Chicago, The Kimpton Gray Hotel, and the Kimpton Allegro Hotel – where their employees are required to utilize the biometric timekeeping devices when clocking into and out of their shifts.

However, in carrying out their biometric timekeeping practices, Defendants have failed to comply with the BIPA's requirements, including: (1) failing to inform individuals prior to capturing their biometrics that they will be capturing such information; (2) failing to receive a written release for the capture of biometrics prior to such capture; (3) failing to inform the person whose biometrics are being captured of the specific purpose and length of term for which such biometrics are captured, and; (4) failing to publish a publicly available retention schedule and guidelines for permanently destroying biometrics.

2. *Plaintiff's Lawsuit and the Parties' Efforts at Settlement*

On June 27, 2017, Plaintiff filed his original Class Action Complaint against Defendants in the Circuit Court of Cook County, Illinois. Defendants thereafter hired competent and

experienced defense counsel who proceeded to remove Plaintiff's Class Action Complaint to the U.S. District Court for the Northern District of Illinois on July 31, 2017. *See Zepeda v. Kimpton Hotel & Restaurant Group, LLC et al*, No. 17-cv-05583, Dkt. 1, Ex. A (N.D. Ill. 2017). On August 30, 2017, Defendants answered Plaintiff's Complaint and raised twelve Affirmative Defenses. (Dkt. 9).

Thereafter, having filed their Answer, and facing significant discovery expenses and the possibility of incurring liability on a classwide basis, as well as due to the uncertainty of the state of the law, Defendants agreed to engage in a mediation to determine if a classwide settlement could be reached. To that end, counsel for Plaintiff and for Defendants expended significant efforts in exchanging information regarding Defendants' Time-Keeping System, the identification of potential Class Members, and the scope of the conduct at issue. In January 2018, after conducting sufficient discovery, Plaintiff's counsel met with Defendants' counsel, as well as their corporate representative, for a full-day mediation session with the Hon. Morton Denlow (Ret.) of JAMS, a former Magistrate Judge with the Northern District of Illinois, who has significant expertise in class settlements. After a full day of contentious negotiations, the Parties were finally able to reach an agreement in principle to resolve the case.

Following formal mediation, counsel for Plaintiff and for Defendants expended significant further efforts over the course of the next five months negotiating specific terms of the Settlement, including the forms of notice that were to be provided to Class Members, the scope of the release, and settlement benefits. Eventually, these extensive negotiations culminated in the class action Settlement Agreement that this Court previously preliminarily approved on July 31, 2018.[3]

[3] In light of ongoing challenges to a federal court's jurisdiction to hear BIPA cases due to questions surrounding a plaintiff's standing under the statute, and to avoid a situation where a ruling stripped the federal court of jurisdiction and, thus, required the Parties to then refile the action in state court only after incurring notice and administration costs, the Parties agreed as part of the Settlement that Plaintiff would

III. THE SETTLEMENT

A. Monetary And Non-Monetary Relief To The Settlement Class Members.

Class Counsel's prosecution of this litigation has culminated in this classwide Settlement that provides substantial monetary relief to the Settlement Class Members, as well as significant prospective relief through changes to Defendants' practices that will greatly reduce or eliminate further intrusions on the privacy of the Settlement Class Members and future employees of Defendants. The Settlement establishes a $500,000.00 cash Settlement Fund. (Ex. A, ¶ 50). Each Settlement Class Member who submits a valid, timely Claim will be entitled to a *pro rata* cash payment from the Settlement Fund to be paid from the Settlement Fund after payments for notice and administration costs, Court-approved attorneys' fees and expenses, and the Court-approved Incentive Award to the Class Representative. (*Id.*, ¶ 51).[4]

The Settlement also provides significant non-monetary relief of an injunctive nature to the Settlement Class and the public. Defendants have agreed to implement material changes to their business practices in order to become compliant with the BIPA. These changes will result in individuals such as Plaintiff either no longer having to provide their sensitive biometrics as part of their employment with Defendants, or else having the opportunity to provide informed consent only after first obtaining the information required under BIPA. (*Id.*, ¶ 54).

voluntarily dismiss the federal lawsuit and subsequently re-file his lawsuit in the Circuit Court of Cook County, Chancery Division, where it was originally filed. On February 16, 2018, Plaintiff re-filed the action now before the Court as *Zepeda v. Kimpton Hotel & Restaurant Group, LLC, et al.*, Case No. 18-CH-02140 (Cir. Ct. Cook Cnty.).

[4] The Settlement Fund is non-reversionary and will be fully paid out, but the total payment to each Settlement Class Member will ultimately depend on the number of valid claims submitted.

B. Pursuant To The Settlement Agreement's Notice Plan, Direct Notice Has Been Sent To The Class Members.

Under the Settlement Agreement's Notice Plan, which has already gone into effect, Direct Notice has been provided by U.S. Mail or email to the putative Class Members. (*See* Declaration of Evan M. Meyers, attached as Exhibit B, ¶ 18). In addition, the Settlement Website with the Claim Form, Long Form Notice, and all relevant case information is online and, to date, no Class Members have objected nor have any chosen to exclude themselves from the Settlement. (*Id.*)

IV. ARGUMENT

A. The Court Should Award Class Counsel's Requested Attorneys' Fees.

Pursuant to the Settlement, Class Counsel seek attorneys' fees in the amount of $200,000, which amounts to 40% of the Settlement Fund, plus expenses. (Ex. A, ¶¶ 80-81). Such a request is within the range of fees approved in other class actions and is fair and reasonable in light of the work performed by Class Counsel and the recovery secured on behalf of the Settlement Class Members. It is well settled that attorneys who, by their efforts, create a common fund for the benefit of a class are entitled to reasonable compensation for their services. *See Wendling v. S. Ill. Hosp. Servs.*, 242 Ill. 2d 261, 265 (2011) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)) ("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.").

In cases where, as here, a class action settlement results in the creation of a settlement fund, "[t]he Illinois Supreme Court has adopted the approach taken by the majority of Federal courts on the issue of attorney fees[.]" *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13 (1st Dist. 1992) (citing *Fiorito v. Jones*, 72 Ill.2d 73 (1978)). That is, where "an equitable fund has been created, attorneys for the successful plaintiff may directly petition the court for the reasonable value of those of their services which benefited the class." *Id.* at 14 (citing *Fiorito*, 72 Ill.2d 73).

This rule "is based on the equitable notion that those who have benefited from litigation should share in its costs." *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) (*citing Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988)).

In deciding an appropriate fee in such cases, "a trial judge has discretionary authority to choose a percentage[-of-the-fund] or a lodestar method[.]" *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d 235, 243–44 (1995)). Under the percentage-of-the-fund approach, the attorneys' fees awarded are "based upon a percentage of the amount recovered on behalf of the plaintiff class." *Brundidge*, 168 Ill. 2d at 238. Alternatively, when applying the lodestar approach, the attorneys' fees to be awarded are calculated by determining the total amount of hours spent by counsel in order to secure the relief obtained for the class at a reasonable hourly rate, multiplied by a "weighted" "risk multiplier" that takes into account various factors such as "the contingency nature of the proceeding, the complexity of the litigation, and the benefits that were conferred upon the class members." *Id.* at 240. Here, Plaintiff submits that the Court should apply the percentage-of-the-fund approach—the approach that is typically used in the vast majority of common fund class actions.

B. Class Counsel's Requested Fees Are Reasonable Under The Percentage-Of-The-Fund Method Of Calculating Attorneys' Fees.

The vast majority of courts presiding over class action settlements in suits brought for violations of law providing for statutory damages have adopted the percentage-of-the-fund method in determining the appropriate amount of attorneys' fees to award class counsel. *See, e.g., Willis v. iHeartMedia Inc.,* No. 2016-CH-02455, August 11, 2016 Final Judgment and Order of Dismissal (Ill. Cir. Ct. Cook Cnty.) (Atkins, J.) (granting final approval and awarding class counsel 40% of settlement fund in a TCPA class action); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F.

Supp. 3d 781, 794 (N.D. Ill. 2015) (finding that even though "in common fund cases like this one, district courts have discretion to choose either the lodestar or a percentage approach to calculating fees . . . [T]he court agrees with Class Counsel that the fee award . . . should be calculated as a percentage of the money recovered for the class"); *Sabon*, 2016 IL App (2d) 150236, at ¶ 59 (affirming trial court's award of attorneys' fees in TCPA suit based on a percentage-of-the-fund approach); *Sterk v. Path, Inc.*, No. 2015-CH-08609 (Cir. Ct. Cook Cnty, Ill.) (Mikva, J.) (granting final approval and awarding class counsel 35% of settlement fund in a TCPA class action); *Sawyer v. Stericycle, Inc.*, No. 2015-CH-07190 (Cir. Ct. Cook Cnty, Ill.) (Martin, Jr., J.) (granting final approval awarding class counsel attorneys' fees based on percentage-of-the-fund); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500 (N.D. Ill. 2015) ("[t]he Court agrees with [plaintiff's] counsel that the fee award in this case should be calculated based on a percentage-of-the-fund method").

The use of the percentage-of-the-fund approach in common fund class settlements likely flows from, and is supported by, the fact that the percentage-of-the-fund approach promotes early resolution of the matter, as it disincentivizes protracted litigation driven solely by counsel's efforts to increase their lodestar. *Brundidge*, 168 Ill.2d at 242. For this reason, a percentage-of-the-fund method best aligns the interests of the class and its counsel, as class counsel are encouraged to seek the greatest amount of relief possible for the class rather than simply seeking the greatest possible amount of attorney time regardless of the ultimate recovery obtained for the class.

By contrast, a lodestar approach encourages significant inefficiencies and further litigation as the parties and the court have to review the extensive billing records produced and determine the reasonableness of the time spent on any particular task and whether it actually furthered the litigation. *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 924 (1st Dist. 1995) ("Percentage analysis approach eliminates the need for additional major litigation . . . as a result of plaintiffs' request for

attorneys' fees . . . nearly half of the 11,000 page record in this case is devoted to fee litigation.").

Applying a percentage-of-the-fund approach is also generally more appropriate in cases like this one because it best reflects the fair market price for the legal services provided by the class counsel. *See Ryan*, 274 Ill. App. 3d at 923 (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases") (citing *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255–56 (3d. Cir. 1985)); *Sutton*, 504 F.3d at 693 (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered).

Here, the percentage-of-the-fund method would most fairly compensate Class Counsel for the significant time and resources expended in obtaining relief for the Settlement Class Members, while taking into account the magnitude of the recovery achieved for the Settlement Class Members and the substantial risk of non-payment in bringing this litigation, particularly in light of the uncertainty in the law surrounding BIPA. This approach also accurately reflects the contingent nature of the fees negotiated between Class Counsel and Plaintiff, who agreed *ex ante* that up to 40% of any settlement fund plus reimbursement of costs and expenses would represent a fair award of attorneys' fees from a fund recovered for the class. (Meyers Decl., ¶ 20); *see also In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d at 795 (applying the percentage-of-the-fund approach and noting that class members would typically negotiate fee arrangement based on percentage method rather than lodestar).

Accordingly, the Court should adopt and apply the percentage-of-the-fund approach here. Under this approach, Class Counsel's requested attorney fees are reasonable in light of the work performed and the recovery secured for the Settlement Class Members.

i. The requested attorneys' fees amount to 40% of the Settlement Fund—a percentage within the range found reasonable in other cases.

The requested fee award of $200,000 represents 40% of the Settlement Fund. This percentage is within the range of attorneys' fee awards that courts, including this Court, have found reasonable in other class action settlements. In *Willis v. iHeartMedia Inc.*, this Court recently awarded attorneys' fees and costs of 40% of an $8,500,000 common fund in a class settlement. *See Willis*, No. 16-CH-02455, August 11, 2016 Final Judgment and Order of Dismissal, at 5; *see also, e.g., Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (citing *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 599 (N.D. Ill. 2011) (same); *Sabon*, 2016 IL App (2d) 150263, at ¶¶ 59, 65 (affirming over objections an attorney fee award of 33% of the fund); *Sterk*, No. 2015-CH-08609 (approving attorneys' fee award in TCPA case of 35% of the fund); *Meyenburg v. Exxon Mobil Corp.*, No. 3:05-CV-15-DGW, 2006 WL 2191422, at *2 (S.D. Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation"); Herbert Newberg & Alba Conte, Newberg on Class Actions § 15.83 (William B. Rubenstein ed.; 5th ed.) (noting that fifty percent of the fund appears to be an approximate upper limit on fees and expenses).

ii. The requested percentage of attorneys' fees is appropriate given the significant risks involved in continued litigation.

The attorneys' fees sought in this case are particularly reasonable in light of the risks of bringing the litigation and the relief that Class Counsel have obtained for the Settlement Class. *See Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding fee award based on percentage-of-the-fund in light of the "substantial risk in prosecuting this case under a contingency fee agreement

given the vigorous defense of the case and defenses asserted by [the defendant]"); *Ryan*, 274 Ill. App. 3d at 924 (noting the trial court's fee award was reasonable given the funds recovered for the class and the contingency risk).

The Settlement in the instant case is groundbreaking, as Class Counsel have achieved one of the largest per-class member cash recoveries ever in a BIPA case. Moreover, this Settlement was reached at a time when case law was, at best, mixed, if not decidedly *against* the Class Members' interests. Specifically, at the time the Settlement Agreement was negotiated, the only appellate law on BIPA and the issue of "aggrievement" (and thus binding on the First District) was *Rosenbach v. Six Flags*, which held that a mere technical violation of the BIPA did *not* amount to sufficient injury as to constitute an "aggrieved" person under the BIPA, absent some other, extra-statutory harm. *Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App (2d) 170317 (Dec. 21, 2017); *cert. granted*, May 30, 2018. As such, the prosecution of this case was particularly risky given the numerous defenses presented by Defendants.

Specifically, Defendants have taken the position that Plaintiff was not an aggrieved person under the BIPA and therefore lacked standing to bring the case. As a result, this litigation presented multiple risks to Plaintiff's ultimate success and Defendants would have strenuously defended the claims asserted had this Settlement not been reached. Indeed, in light of the Illinois Supreme Court's upcoming decision in the *Rosenbach* matter, there still remains the distinct possibility that Defendants could succeed on any of their defenses to liability against Plaintiff's individual claims, which would result in Settlement Class Members recovering nothing. As a result, a settlement providing for such a significant cash benefit is an exceptional result.

iii. The substantial monetary and non-monetary relief obtained on behalf of the Settlement Class Members further justify the requested percentage of attorneys' fees.

Despite the significant risks inherent in any further litigation, Class Counsel were able to obtain an excellent result for the Settlement Class Members. As stated above, the Settlement Agreement provides for the creation of a $500,000.00 cash Settlement Fund, from which Settlement Class Members can submit claims for a *pro rata* share. Although the Claims Deadline is not for another seven weeks, the size of the Settlement Fund makes it very likely that Class Members will be entitled to hundreds, if not thousands, of dollars per valid, timely claim submitted.

In addition to the monetary compensation that Class Counsel have obtained for the Settlement Class Members, the Settlement also provides for substantial prospective relief. Under the terms of the Settlement Agreement negotiated by Class Counsel, Defendants have agreed to implement material changes to their business practices in order to become compliant with the BIPA. (Ex. A, ¶ 54). These changes will result in individuals such as Plaintiff either no longer having to provide their sensitive biometrics as part of their employment with Defendants, or else having the opportunity to provide informed consent only after first obtaining the information required under BIPA—a significant benefit vis-à-vis their privacy rights.

The non-monetary relief obtained by Class Counsel in this case further justifies the reasonableness of the attorneys' fee being sought here. *See Spano v. Boeing Co.*, No. 06-cv-743, 2016 WL 3791123, at *1 (S.D. Ill. Mar. 31, 2016) ("A court must also consider the overall benefit to the Class, including non-monetary benefits, when evaluating the fee request. . . . This is important so as to encourage attorneys to obtain meaningful affirmative relief") (citing *Beesley v. Int'l Paper Co.*, No. 06-cv-703, 2014 U.S. Dist. LEXIS 12037, at *5 (S.D. Ill. Jan 31, 2014)); Manual for Complex Litigation, Fourth, § 21.71, at 337 (2004)); *see also Hall v. Cole*, 412 U.S. 1,

5 n.7 (1973) (awarding attorneys' fees when relief is obtained for the class "must logically extend, not only to litigation that confers a monetary benefit to others, but also litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others.").

Given the significant monetary compensation obtained for the Settlement Class Members and the changes in Defendants' biometric collection and use practices implemented as a result of the Settlement, an attorneys' fee award of 40% of the Settlement Fund is reasonable and fair compensation—particularly, as discussed above, in light of the significant uncertainty in the relevant law, the "substantial risk in prosecuting this case under a contingency fee agreement" and the "defenses asserted by [Defendants]." *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59.

C. The Court Should Also Award Class Counsel's Requested Reimbursable Litigation Expenses.

Class Counsel have expended $21,850 in reimbursable expenses related to filing fees, mediation costs, copying, and case administration, with the potential of more expenses yet to come. (Meyers Decl., ¶ 21.) Courts regularly award reimbursement of the expenses counsel incurred in prosecuting the litigation. *See, e.g.*, *Kaplan v. Houlihan Smith & Co.*, No. 12 C 5134, 2014 WL 2808801, at *4 (N.D. Ill. June 20, 2014) (awarding expenses "for which a paying client would reimburse its lawyer"); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (detailing and awarding expenses incurred during litigation). Therefore, Class Counsel request the Court approve as reasonable the incurred expenses, a request which Defendant does not oppose. Accordingly, this Court should award a total fee and expense award to Class Counsel of $221,850.

D. The Agreed-Upon Incentive Award For Plaintiff Is Reasonable And Should Be Approved.

The requested $2,500 Incentive Award is reasonable and very modest compared to other incentive awards granted to class representatives in similar class actions. Because a named plaintiff is essential to any class action, "[i]ncentive awards are justified when necessary to induce individuals to become named representatives." *Spano*, 2016 WL 3791123, at *4 (approving incentive awards of $25,000 and $10,000 for class representatives) (internal citation omitted); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992) (noting that incentive awards "are not atypical in class action cases . . . and serve to encourage the filing of class actions suits.").

Here, Plaintiff's efforts and participation in prosecuting this case justify the $2,500 Incentive Award sought. Even though no award of any sort was promised to Plaintiff prior to the commencement of the litigation or at any time thereafter (Meyers Decl., ¶ 25), Plaintiff nonetheless contributed his time and effort in pursuing his own BIPA claim, as well as in serving as a representative on behalf of the Settlement Class Members—exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (*Id.*, ¶¶ 22-24).

Plaintiff participated in the initial investigation of his claim and provided documents and information to Class Counsel to aid in preparing the initial pleadings, reviewed the pleadings prior to filing, consulted with Class Counsel on numerous occasions, and provided feedback on a number of other filings including, most importantly, the Settlement Agreement. (*Id.*).

Further, agreeing to serve as the Class Representative meant that Plaintiff publicly placed his name on this suit and opened himself to "scrutiny and attention" which, in and of itself, "is certainly worthy of some type of remuneration." *See Schulte*, 805 F. Supp. 2d at 600–01. Were it

not for Plaintiff's willingness to bring this action on a classwide basis, his efforts and contributions to the litigation by assisting Class Counsel with their investigation and filing of this suit, and his continued participation and monitoring of the case up through settlement, the substantial benefit to the Settlement Class Members afforded under the Settlement Agreement would not exist. (Meyers Decl., ¶ 24).

The $2,500 Incentive Award requested for Plaintiff is well in line with the average incentive award granted in class actions. Indeed, numerous courts that have granted final approval in similar class action settlements have awarded significantly larger incentive awards than the one sought here. *See, e.g., Seal v. RCN Telecom Services, LLC*, No. 2016-CH-07033, February 24, 2017 Final Order and Judgment, ¶ 20 (Cir. Ct. Cook Cnty., Ill.) (Atkins, J.) (awarding $10,000 incentive award to each of two named plaintiffs); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) (awarding $25,000 incentive award); *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2017 WL 1369741, at *10 (N.D. Ill. Apr. 10, 2017) (awarding $10,000 to each of the class representatives); *Spano*, 2016 WL 3791123, at *4 (approving $10,000 incentive awards).

Compensating Plaintiff for the risks and efforts he undertook to benefit the Settlement Class Members is reasonable under the circumstances of this case, especially in light of the exceptional results obtained. As shown above, courts have regularly approved incentive awards in similar class action litigation consistent with and greater than the agreed-upon $2,500 Incentive Award here. Moreover, no objection to the Incentive Award has been raised to date. Accordingly, an Incentive Award of $2,500 to Plaintiff is reasonable, justified by Plaintiff's time and effort in this case, and should be approved.

V. CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court enter an Order: (i) approving an award of attorneys' fees and costs of $221,850; and (ii) approving an Incentive Award in the amount of $2,500.00 to Plaintiff in recognition of his significant efforts on behalf of the Settlement Class Members.

Dated: October 16, 2018

Respectfully submitted,

ERIC ZEPEDA, individually and on behalf of the Settlement Class

By: /s/ *David L. Gerbie*
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on October 16, 2018, a copy of the foregoing *Plaintiff's Motion & Memorandum of Law in Support of Approval of Attorney Fees, Expenses, & Incentive Award* was filed electronically with the Clerk of Court, with a copy sent by Electronic Mail to all counsel of record

/s/ *David L. Gerbie*

Exhibit A

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement" or "Settlement Agreement") is entered into by and between Six Continents Hotels, Inc., incorrectly sued as "InterContinental Hotels Group" ("IHG"), and Kimpton Hotel & Restaurant Group, LLC ("Kimpton"), (each, a "Defendant", and collectively "Defendants"), and Eric Zepeda ("Plaintiff") both individually and on behalf of the Settlement Class, in the case of *Zepeda v. Kimpton Hotel & Restaurant Group, LLC, et al.*, Case No. 18-CH-02140 (Cir. Ct. Cook Cnty.) currently pending in the Circuit Court of Cook County, Illinois, Chancery Division. Defendants and Plaintiff are each referred to as a "Party" and are collectively referred to herein as the "Parties."

I. FACTUAL BACKGROUND AND RECITALS

1. On June 27, 2017, Plaintiff Eric Zepeda filed a class action lawsuit against Defendants alleging violations of the Illinois Biometric Information Privacy Act, 740 ILCS § 14/1, *et seq.* ("BIPA") in the Circuit Court of Cook County, Illinois. On July 31, 2017, Defendants removed the lawsuit to the United States District Court for the Northern District of Illinois, Eastern Division.

2. On August 30, 2017, Kimpton filed its Answer to Complaint and Affirmative Defenses in federal court. At the initial status conference, the Parties informed the Court that they agreed to engage in settlement discussions through a private mediation. The Court informally stayed discovery and the case pending settlement negotiations. In November 2017, Plaintiff agreed to voluntarily dismiss InterContinental Hotels Group from the federal court lawsuit.

3. On January 29, 2018, the Parties participated in a formal, full-day mediation session with the Honorable Morton Denlow (Ret.) of JAMS in Chicago, Illinois.

4. Following arms-length negotiations, the Parties have negotiated a settlement with the assistance of the Honorable Morton Denlow (Ret.) by which the Parties agree and hereby wish to resolve all matters pertaining to, arising from, or associated with the Litigation, and as set forth herein, all claims Plaintiff and members of the class action he seeks to represent for purposes of the Settlement, have or may have had against Defendants, their direct or indirect parents and subsidiaries, brands, owners, shareholders, directors, officers, agents, managers, employees, vendors, assignors, representatives, and all related and affiliated parent or subsidiary companies and divisions, through the date on which the Parties sign this Agreement. Defendants have represented that approximately 1,000 of Kimpton's employees utilized the Time-Keeping System, as defined herein, since January 1, 2012.

5. By agreement of the Parties, and as part of the Settlement, the federal lawsuit, *Zepeda v. Kimpton Hotel & Restaurant Group, LLC, et al.*, Case No. 17-cv-05583 (N.D. Ill.), which was removed to federal court from the Circuit Court of Cook County where it was filed, was voluntarily dismissed and subsequently re-filed in the Circuit Court of Cook County, Chancery Division on February 16, 2018 as

Zepeda v. Kimpton Hotel & Restaurant Group, LLC, et al., Case No. 18-CH-02140 (Cir. Ct. Cook Cnty.), where it is currently pending (the "Litigation").

6. The Parties have agreed to settle the Litigation on the terms and conditions set forth herein in recognition that the outcome of the Litigation is uncertain and that achieving a final result through litigation would require substantial additional risk, discovery, time, and expense.

7. Defendants deny and continue to deny each and every allegation and all charges of wrongdoing or liability of any kind whatsoever that Plaintiff or members of the Settlement Class presently have asserted in this Litigation or may in the future assert. Despite Defendants' belief that they are not liable for, and have good defenses to, the claims alleged in the Litigation, Defendants desire to settle the Litigation, and thus avoid the expense, risk, exposure, inconvenience, and distraction of continued litigation of any action or proceeding relating to the matters being fully settled and finally put to rest in this Settlement Agreement. Neither this Settlement Agreement, nor any negotiation or act performed or document created in relation to the Settlement Agreement or negotiation or discussion thereof is, or may be deemed to be, or may be used as, an admission of, or evidence of, any wrongdoing or liability.

8. Following arms-length negotiations, including mediation before an experienced mediator, the Parties now seek to enter into this Settlement Agreement. Plaintiff and Class Counsel have conducted an investigation into the facts and the law regarding the Litigation and have concluded that a settlement according to the terms set forth below is fair, reasonable, and adequate, and beneficial to and in the best interests of Plaintiff and the Settlement Class recognizing (1) the existence of complex and contested issues of law and fact, (2) the risks inherent in litigation, (3) the likelihood that future proceedings will be unduly protracted and expensive if the proceeding is not settled by voluntary agreement, (4) the magnitude of the benefits derived from the contemplated settlement in light of both the maximum potential and likely range of recovery to be obtained through further litigation and the expense thereof, as well as the potential of no recovery whatsoever, and (5) the Plaintiff's determination that the settlement is fair, reasonable, adequate, and will substantially benefit the Settlement Class Members.

9. Considering the risks and uncertainties of continued litigation and all factors bearing on the merits of settlement, the Parties are satisfied that the terms and conditions of this Settlement Agreement are fair, reasonable, adequate, and in their respective best interests

10. In consideration of the covenants, agreements, and releases set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed by and among the undersigned that the Litigation be settled and compromised, and that the Releasors release the Releasees of the Released Claims, without costs as to Releasees, Plaintiff, Class Counsel, or the

Settlement Class, except as explicitly provided for in this Agreement, subject to the approval of the Court, on the following terms and conditions

II. DEFINITIONS

The following terms, as used in this Agreement, have the following meanings:

11. "Administrative Expenses" shall mean expenses associated with the Settlement Administrator, including but not limited to costs in providing notice, communicating with Settlement Class Members, and disbursing payments to the proposed Settlement Class Members.

12. "Approved Claims" shall mean complete and timely claims, submitted by Settlement Class Members, that have been approved for payment by the Settlement Administrator.

13. "Time-Keeping System" shall mean the time-keeping technology used by Kimpton at Kimpton Hotel Palomar Chicago, Kimpton Hotel Burnham Chicago, Kimpton Hotel Monaco Chicago, The Kimpton Gray Hotel, and the Kimpton Allegro Hotel at any time from January 1, 2012 through the date of entry of the Preliminary Approval Order, which utilized a scan of a portion of Plaintiff's and the other Settlement Class Members' fingers or biometric information to record their time.

14. "Claim Form" shall mean the form that Settlement Class Members may submit to obtain compensation under this Settlement.

15. "Claims Deadline" shall mean the date by which all Claim Forms must be postmarked (if mailed) or submitted (if filed electronically) to be considered timely and shall be set as a date approximately 90 (ninety) days after the Court preliminarily approves the Settlement. The Claims Deadline shall be clearly set forth in the Preliminary Approval Order as well as in the Notice and the Claim Form.

16. "Class," "Settlement Class," "Class Member," or "Settlement Class Member" shall mean each member of the settlement class, as defined in Section III of this Agreement, who does not timely elect to be excluded from the Settlement Class, and includes, but is not limited to, Plaintiff.

17. "Class Counsel" shall mean Myles McGuire, Evan M. Meyers, William P. Kingston, and David Gerbie of McGuire Law, P.C.

18. "Counsel" or "Counsel for the Parties" means both Class Counsel and Defendants' Counsel, collectively.

19. "Court" shall mean the Circuit Court of Cook County, Illinois and the Honorable David B. Atkins, and his successors, if any.

20. "Defendants" shall mean Six Continents Hotels Inc., incorrectly sued as Intercontinental Hotels Group, and Kimpton Hotel & Restaurant Group, LLC.

21. "Defendants' Counsel" shall mean Michael J. Burns and Thomas E. Ahlering of Seyfarth Shaw LLP

22. "Effective Date" shall mean the date when the Settlement Agreement becomes Final.

23. "Fee and Expense Application" shall mean the motion to be filed by Class Counsel, in which they seek approval of an award of attorneys' fees, costs, and expenses.

24. "Fee Award" means the amount of attorneys' fees and reimbursement of costs and expenses awarded by the Court to Class Counsel.

25. "Final" means the Final Approval Order has been entered on the docket, and (a) the time to appeal from such order has expired and no appeal has been timely filed; (b) if such an appeal has been filed, it has been finally resolved and has resulted in an affirmation of the Final Approval Order; or (c) the Court following the resolution of the appeal enters a further order or orders approving settlement on the material terms set forth herein, and either no further appeal is taken from such order(s) or any such appeal results in affirmation of such order(s).

26. "Final Approval Hearing" means the hearing before the Court where the Plaintiff will request a judgment to be entered by the Court approving the Settlement Agreement, approving the Fee Award, and approving an Incentive Award to the Class Representative.

27. "Final Approval Order" shall mean an order entered by the Court that:

    i. Certifies the Settlement Class pursuant to 735 ILCS 5/2-801;

    ii. Finds that the Settlement Agreement is fair, reasonable, and adequate, was entered into in good faith and without collusion, and approves and directs consummation of this Agreement;

    iii. Dismisses the Plaintiff's claims pending before it with prejudice and without costs, except as explicitly provided for in this Agreement;

    iv. Approves the Release provided in Section VII and orders that, as of the Effective Date, the Released Claims will be released as to Releasees;

    v. Reserves jurisdiction over the settlement and this Agreement; and

    vi. Finds that, pursuant to 735 ILCS 5/2-1301, there is no just reason for delay of entry of final judgment with respect to the foregoing.

28. "Incentive Award" shall have the meaning ascribed to it as set forth in Section XV of this Agreement.

29. "InterContinental," shall refer to Six Continents Hotels, Inc., its past and present parents, predecessors, successors, affiliates, holding companies, brands, subsidiaries, partners, employees, agents, assigns, and contractors.

30. "Kimpton" shall mean Kimpton Hotel & Restaurant Group, LLC, its past and present parents, predecessors, successors, affiliates, holding companies, subsidiaries, partners, employees, agents, assigns, board members, and contractors.

31. "Litigation" shall mean the both the action pending in the Circuit Court of Cook County, Illinois, captioned *Zepeda v. Kimpton Hotel & Restaurant Group, LLC, et al*., Case No. 18-CH-02140 (Cir. Ct. Cook Cnty.), and the action removed to the United States District Court for the Northern District of Illinois, Eastern Division

32. "Notice" means the direct notice of this proposed Settlement, which is to be provided substantially in the manner set forth in this Agreement and Exhibits B through D, and is consistent with the requirements of Due Process.

33. "Objection/Exclusion Deadline" means the date by which a written objection to this Settlement Agreement or a request for exclusion submitted by a person within the Settlement Class must be postmarked and/or filed with the Court, which shall be designated as a date approximately sixty (60) days after entry of the Preliminary Approval Order, or such other date as ordered by the Court.

34. "Parties" shall mean Defendants and Plaintiff, collectively.

35. "Plaintiff" or "Class Representative" shall mean the named class representative, Eric Zepeda.

36. "Preliminary Approval Order" shall mean the Court's Order preliminarily approving the Settlement Agreement, certifying the Settlement Class for settlement purposes, and directing notice of the Settlement to the Settlement Class substantially in the form of the Notice set forth in this Agreement.

37. "Related Actions" shall mean any proceedings, other than the Litigation, that allege that Defendants violated the BIPA or any related statutes or common law claims, that were or could have been brought by a plaintiff who would be a Class Member.

38. "Released Claims" shall mean any and all claims against Releasees whatsoever arising out of, related to, or connected with the alleged capture, collection, storage, possession, transmission, conversion, and/or other use of biometric identifiers and/or biometric information in connection with the Time-Keeping System used at a Kimpton hotel, including but not limited to claims brought under 740 ILCS § 14/10, *et seq*. ("BIPA"). "Released Claims" includes all claims that arise from and/or are reasonably related to the claims (whether common law and/or statutory) that were and/or could have been asserted in the Litigation or Related Actions, regardless of whether such claims are known or unknown, filed or unfiled, asserted or as yet unasserted, existing or contingent whether in contract, tort, or otherwise, including statutory, common law, property, employment related, and any additional constitutional, common law and/or statutory claims.

39. "Releasees" shall refer, jointly and severally, and individually and collectively, to Defendants, their past and present parents, predecessors, successors, affiliates, holding companies, brands, subsidiaries, employees, agents, board members, assigns, partners, contractors, joint venturers, vendors (including but not limited to ADP, LLC, its predecessors, and their respective parents, subsidiaries, affiliates, employees, and agents) of the Time-Keeping System, or third-party agents with which they have or had contracts or their affiliates.

40. "Releasors" shall refer, jointly and severally, and individually and collectively, to Plaintiff, the Settlement Class Members, and to each of their predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing, and anyone claiming by, through, or on behalf of them.

41. "Settlement Administrator" means, subject to Court approval, KCC, LLC, the entity mutually selected and supervised by the Parties to administer the settlement.

42. "Settlement Fund" means a non-reversionary cash settlement fund to be established by Defendants in the amount of Five Hundred Thousand Dollars ($500,000.00).

43. "Settlement Website" means a website established and administered by the Settlement Administrator, which shall contain information about the Settlement, including electronic copies of Exhibits B-D (or any forms of these notices that are approved by the Court), this Settlement Agreement, and all Court documents related to the Settlement. The URL of the Settlement Website shall be www.KimptonBIPASettlement.com or such other URL as Class Counsel and Defendants' Counsel may subsequently agree on in writing. Settlement Class Members shall be able to submit Claim Forms via the Settlement Website.

III. SETTLEMENT CLASS CERTIFICATION

44. For the purposes of the Settlement only, the Parties stipulate and agree that: (1) the Class shall be certified in accordance with the definition contained in Paragraph 46, below; (2) Plaintiff shall represent the Class for settlement purposes and shall be the Class representative; and (3) Plaintiff's Counsel shall be appointed as Class Counsel.

45. Defendants do not consent to certification of the Class for any purpose other than to effectuate the Settlement. If the Court does not enter Final Approval of the Settlement, or if for any other reason final approval of the Settlement does not occur, is successfully objected to, or challenged on appeal, any certification of any Class will be vacated and the Parties will be returned to their positions with respect to the Action as if the Agreement had not been entered into. In the event that Final Approval of the Settlement is not achieved: (a) any Court orders preliminarily or finally approving the certification of any class contemplated by this Agreement shall be null, void, and vacated, and shall not be used or cited thereafter by any person or entity; and (b) the fact of the settlement reflected in this Agreement, that Defendants did not oppose the certification of a Class under this Agreement, or that the Court preliminarily approved the certification of a Class, shall not be used or cited thereafter by any person or entity, including in any manner whatsoever, including without limitation any contested proceeding relating to the certification of any class.

46. Subject to Court approval, the following Settlement Class shall be certified for settlement purposes:

"All individuals who used the Time-Keeping System at a Kimpton hotel within the state of Illinois between January 1, 2012 and the date of entry of the Preliminary Approval Order."

47. Excluded from the Settlement Class are all persons who elect to exclude themselves from the Settlement Class, the Court and staff to whom this case is assigned, and any member of the Court's or staff's immediate family.

48. If for any reason the Settlement is not granted preliminary and/or final approval, Defendants' agreement to certification of the Settlement Class shall not be used for any purpose, including in any request for class certification in the Litigation or any other proceeding.

IV. SETTLEMENT OF LITIGATION AND ALL CLAIMS AGAINST RELEASEES

49. Final approval of this Settlement Agreement will settle and resolve with finality, on behalf of the Plaintiff and the Settlement Class, the Litigation, any Related Actions, and the Released Claims and any other claims that have been brought, could have been brought, or could be brought now or at any time in the future against the Releasees by the Releasors in the Litigation, Related Actions, or any other proceeding arising out of, in any manner related to, or connected in any way with the Released Claims.

V. SETTLEMENT FUND

50. **Establishment of Settlement Fund**

a. Within thirty (30) days of the entry of the Preliminary Approval Order, Defendants shall pay to the Settlement Administrator the total sum of Five Hundred Thousand Dollars ($500,000.00) to create a Settlement Fund. Provided that this Agreement is finally approved by the Court without material change, material amendment, or material modification, the Settlement Fund will be used to satisfy Approved Claims for Settlement Class Members in exchange for a comprehensive release and the covenants set forth in this Agreement, including, without limitation, a full, fair and complete release of all Releasees from Released Claims, and dismissal of the Litigation with prejudice.

b. The funds provided by Defendants to the Settlement Administrator will be maintained by an escrow agent as a Court-approved Qualified Settlement Fund pursuant to Section 1.468B-1 et seq. of the Treasury Regulations promulgated under Section 468B of the Internal Revenue Code of 1986, as amended, and shall be deposited in an interest-bearing account.

c. If the Settlement Agreement is not finally approved, the Settlement Fund belongs to Defendants, less any Administrative Expenses paid to date. Plaintiff shall have no financial responsibility for any Administrative Expenses paid out of the Settlement Fund in the event that the Settlement Agreement is not finally approved.

d. The Settlement Fund shall be used to pay (i) Approved Claims; (ii) an Incentive Award to the Class Representative; (iii) the Fee Award; and (iv) costs of administration of the Agreement to the Settlement Administrator, including without limitation payment of Administrative Expenses.

e. Administrative Expenses, and any award of attorneys' fees or any other fees, costs, or benefits otherwise awarded in connection with the Settlement Agreement, shall be payable solely out of the Settlement Fund.

f. The Settlement Fund represents the total extent of the Releasees' monetary obligations under the Settlement Agreement. Defendants' contribution to the Settlement Fund shall be fixed under this Section and be final. Releasees shall have no obligation to make further payments into the Settlement Fund, and shall have no financial responsibility or obligation relating to the settlement beyond the Settlement Fund.

g. The Court may require changes to the method of allocation to Settlement Class Members without invalidating this Settlement Agreement, provided that the other material terms of the Settlement Agreement are not altered, including but not limited to the scope of the Release, the scope of the Settlement Class, and the amount of the Settlement Fund.

51. A Settlement Class Member who timely submits a valid Claim Form shall be entitled to a payment of a *pro rata* share of the amount remaining in the Settlement Fund after payment of Administrative Expenses to the Settlement Administrator, a Fee Award to Class Counsel, and an Incentive Award to the Class Representative. Thus, each Settlement Class Member who timely submits a valid Claim Form shall receive the same amount of the Settlement Fund as each other Settlement Class Member who timely submits a valid Claim Form.

52. **Procedure for Approving Settlement.**

a. **Unopposed Motion for Preliminary Approval of the Settlement by the Court.**

i. Plaintiff will file an unopposed motion for an order conditionally certifying the Class, giving Preliminary Approval of the Settlement, setting a date for the Final Approval Hearing, and approving the Class Notice, and Claim Form (the "Unopposed Motion for Preliminary Approval").

ii. At the hearing on the Unopposed Motion for Preliminary Approval, the Parties will jointly appear, support the granting of the Unopposed Motion for Preliminary Approval, and submit a proposed order granting conditional certification of the Class and preliminary approval of the Settlement; appointing the Class Representative and Class Counsel; approving the Claim Form and the forms of notice to the Class of the Settlement; and setting the Final Approval Hearing.

iii. For the purposes of the Settlement and the proceedings contemplated herein only, the Parties stipulate and agree that the Class shall be conditionally certified in accordance with the definition contained above, that Plaintiff shall be conditionally appointed class representative for the Class, and that Plaintiff's Counsel shall be conditionally appointed as counsel for the Class.

Should the Court decline to preliminarily approve any aspect of the Settlement, the Settlement will be null and void, and the Parties will have no further obligations under it, and the Parties will revert to their prior positions in the Action as if the Settlement had not occurred.

53. **Submission and Evaluation of Claims**

a. All claims must be submitted on a Claim Form. The Claim Form will require the Settlement Class Member to provide his or her full name, mailing address, and contact telephone number; an affirmation that he/she was subject to the Time-Keeping System at issue in the Litigation; and a signature and certification as to the accuracy of the information provided under penalty of perjury of the laws of the State of Illinois.

b. The Claim Form must be submitted (sent and/or postmarked) on or before the Claims Deadline. The Claim Form shall be substantially in the form attached hereto as Exhibit A.

c. Completed Claim Forms shall be submitted directly to the Settlement Administrator either electronically via the Settlement Website or via U.S. Mail for processing, assessment, and payment.

d. Any Claim Form that lacks the requisite information will be deemed to be incomplete and ineligible for payment. For any partially-completed Claim Forms, the Settlement Administrator shall attempt to contact the Settlement Class Member who submitted the Claim Form at least one time by e-mail or, if no e-mail address is available, by regular U.S. mail (i) to inform the Settlement Class Member of any error(s) and/or omission(s) in the Claim Form and (ii) to give the Settlement Class Member one opportunity to cure any errors and/or omissions in the Claim Form. The Settlement Class Member shall have until the Claims Deadline, or fourteen (14) days after the Settlement Administrator sends the e-mail or regular mail notice to the Settlement Class Member regarding the deficiencies in the Claim Form, whichever is later, to cure the error(s) and/or omission(s) in the Claim Form.

e. A Settlement Class Member is not entitled to any monetary compensation from the Settlement Fund if he/she submits a Claim Form after the Claims Deadline, and/or if the Claim Form is incomplete after an opportunity to cure any error(s) and/or omission(s) or contains false information.

f. Within fourteen (14) days after the Claims Deadline, the Settlement Administrator shall process all Claim Forms submitted by Settlement Class Members and shall determine which claims are valid and initially approved and which claims are initially rejected. The Settlement Administrator may accept or reject any Claim Form submitted, and may, upon its sole discretion, request additional information prior to initially rejecting or accepting any Claim Form submitted. The Settlement Administrator shall employ reasonable procedures to screen Claim Forms for abuse and/or fraud, and deny Claim Forms which are incomplete and/or where there is evidence of abuse and/or fraud.

g. Within fourteen (14) days of the Claims Deadline, the Settlement Administrator will submit to Counsel for the Parties a report listing all initially approved Claims ("Initially Approved Claims List"), and shall include an electronic pdf copy of all such initially approved Claim Forms. Within fourteen (14) days after the Claims Deadline, the Settlement Administrator will also submit to the Parties a report listing all initially rejected Claims ("Initially Rejected Claims List"), and shall include an electronic pdf copy of all such initially rejected Claim Forms.

h. Counsel for the Parties shall have fourteen (14) days after the date they receive the Initially Approved Claims List and related Claim Forms to audit and challenge any initially approved claims. Within fourteen (14) days after Counsel for the Parties receive the Initially Approved Claims List and related Claim Forms, they shall serve opposing counsel via email with a Notice of Claim Challenges identifying by claim number any initially approved claim they wish to challenge and the reasons for the challenge.

i. Similarly, Counsel for the Parties may challenge any claim initially rejected by the Settlement Administrator. Counsel for the Parties shall have fourteen (14) days after the date they receive the Initially Rejected Claims List and related Claim Forms to audit and challenge any initially rejected claims. Within fourteen (14) days after Counsel for the Parties receive the Initially Rejected Claims List and related Claim Forms, they shall serve opposing counsel via email with a Notice of Claim Challenges identifying by claim number any initially rejected claim they wish to challenge and the reasons for the challenge.

j. Counsel for the Parties shall meet and confer in an effort to resolve any disputes over any challenged claims. If the challenges are not withdrawn or resolved, the decision of the Settlement Administrator will be upheld. The date all claims are finalized without any further dispute shall be referred to as the "Claims Finalization Date." If neither Class counsel nor Defendants' Counsel have any challenges to the initial claims determination reached by the Settlement Administrator, then the Claims Finalization Date shall be the date both Class Counsel and Defendants' inform each other by email that the Parties do not have any objection to the claims determination made by the Settlement Administrator or the time for informing each other of such challenges has lapsed.

k. Within seven (7) days of the Claims Finalization Date, the Settlement Administrator shall provide Counsel for the Parties a spreadsheet setting forth the claim number, claimant name, and claimant address, and totaling the amount to be paid for each claimant, which shall be an equal amount for each approved claim (the "Final Claims List"). Within ten (10) days of the Claims Finalization Date, the Settlement Administrator shall send a check by First Class U.S. Mail to each Class Member on the Final Claims List.

l. The Settlement Administrator shall notify the Parties that all Approved Claims have been paid within five (5) business days of the last such payment.

m. In the event that checks sent to Settlement Class Members are not cashed within ninety (90) days after their date of issuance, whether because the checks were not received or otherwise, those checks will become null and void. The amount of the uncashed checks after the expiration date, less any funds necessary for settlement administration, will be distributed to a *cy pres* recipient(s) selected by the Parties and approved by the Court. The Court may revise this *cy pres* provision as necessary without terminating or otherwise impacting this Settlement Agreement, provided the Court's revision does not increase the amount that Defendants would otherwise pay under this Settlement Agreement.

VI. PROSPECTIVE RELIEF

54. Without admitting any liability or that it is required by law to do so, Kimpton agrees to undertake the following practices: Kimpton agrees that, on or before the Effective Date, it shall implement procedures to comply with BIPA should it continue to utilize the Time-Keeping System in Illinois. Alternatively, Kimpton agrees that, on or before the Effective Date, it shall discontinue the use of the Time-Keeping System in the state of Illinois.

VII. RELEASE

55. In addition to the effect of any final judgment entered in accordance with this Agreement, upon final approval of this Agreement, and for other valuable consideration as described herein, Releasees shall be completely released, acquitted, and forever discharged from any and all Released Claims.

56. As of the Effective Date, and with the approval of the Court, all Releasors hereby fully, finally, and forever release, waive, discharge, surrender, forego, give up, abandon, and cancel any and all Released Claims against Releasees. As of the Effective Date, all Releasors will be forever barred and enjoined from prosecuting any action against the Releasees asserting any and/or all Released Claims.

57. As of the Effective Date, Plaintiff and each Settlement Class Member hereby waives and relinquishes to the fullest extent permitted by law, the provisions, rights, and benefits of any law of the United States or any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code Section 1542. Each Releasor hereby certifies that he or she is aware of and has read and reviewed the following provision of California Civil Code Section 1542:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.**

58. The provisions of the Releasees' release shall apply according to their terms, regardless of any provision of law or legal authority similar to California Civil Code Section 1542.

59. Each Releasor waives any and all defenses, rights, and benefits that may be derived from the provisions of applicable law in any jurisdiction that, absent such waiver, may limit the extent or effect of the release contained in this Agreement.

VIII. PRELIMINARY APPROVAL ORDER AND FINAL APPROVAL ORDER

60. This Settlement shall be subject to approval of the Court. As set forth in Section XIV, Defendants shall have the right to withdraw from the Settlement if the Court does not approve the Settlement.

61. Plaintiff, through Class Counsel, shall submit this Agreement, together with its exhibits, to the Court and shall move the Court for Preliminary Approval of the settlement set forth in this Agreement, certification of the Settlement Class, appointment of Class Counsel and the Class Representative, and entry of the Preliminary Approval Order, substantially in the form of Exhibit E, which order shall seek a Final Approval Hearing date and approve the Notices and Claim Form for dissemination in accordance with the Notice Plan.

62. At the time of the submission of this Settlement Agreement to the Court as described above, the Parties shall request that, after Notice is given, the Court hold a Final Approval Hearing approximately ninety (90) days after entry of the Preliminary Approval Order and approve the settlement of the Litigation as set forth herein.

63. At least fourteen (14) days prior to the Final Approval Hearing, or by some other date if so directed by the Court, Plaintiff will move for (i) final approval of the Settlement; (ii) final appointment of the Class Representative and Class Counsel; and (iii) final certification of the Settlement Class, including for the entry of a Final Order and Judgment identical in all material respects to the proposed Final Order and Judgment attached hereto as Exhibit F, and file a memorandum in support of the motion for final approval.

IX. NOTICE TO PROPOSED SETTLEMENT CLASS MEMBERS

64. **Class List**

a. Defendants, with the assistance of the Settlement Administrator as appropriate, shall create a Class List, based on readily available information already within their possession ("Class List").

b. The Class List shall include the names, e-mail addresses, and last known mailing addresses of potential Settlement Class Members, to the extent such information is readily available. Defendants shall provide the Class List within seven (7) days after entry of the Preliminary Approval Order.

65. **Type of Notice Required**

a. The Notice, which shall be substantially in the form of Exhibits B through D attached hereto, shall be used for the purpose of informing proposed Settlement Class Members, prior to the Final Approval Hearing, that there is a pending settlement, and to further (a) inform Settlement Class Members as to how they may obtain a copy of the Claim Form; (b) protect their rights regarding the settlement; (c) request exclusion from the Settlement Class and the proposed settlement, if desired; (d) object to any aspect of the proposed settlement, if desired; and (e) participate in the Final Approval Hearing, if desired. The Notice shall make clear the binding effect of the settlement on all persons who do not timely request exclusion from the Settlement Class.

b. Dissemination of the Notice shall be the responsibility of the Settlement Administrator. The text of the Notice shall be agreed upon by the Parties and shall be substantially in the forms attached as Exhibits B–D hereto.

c. Individual notice (substantially in the form of Exhibit B) shall be sent via e-mail to the Class List where possible and via U.S. Mail (substantially in the form of Exhibit C) where e-mail delivery is not possible and where Defendants have a last-known mailing address or the address information can be determined by the Settlement Administrator.

d. Notice of the settlement (substantially in the form of Exhibit D) shall be posted on the Settlement Website.

66. **Notice Deadline**

a. Within fourteen (14) days of entry of the Preliminary Approval Order, the Settlement Administrator shall disseminate by email the Notice in the form of Exhibit B to Settlement Class Members identified on the Class List for whom an email address is known. Within fourteen (14) days of entry of the Preliminary Approval Order, the Settlement Administrator shall disseminate by U.S. Mail the Notice in the form of Exhibit C to Settlement Class Members identified on the Class List for whom there is no known email address.

X. EXCLUSIONS

67. **Exclusion Period**

a. Settlement Class Members will have up to and including sixty (60) days following the Preliminary Approval Order to exclude themselves from the Settlement in accordance with this Section. If the Settlement is finally approved by the Court, all Settlement Class Members who have not opted out by the end of the Objection/Exclusion Deadline will be bound by the Settlement and will be deemed a Releasor as defined herein, and the relief provided by the Settlement will be their sole and exclusive remedy for the claims alleged by the Settlement Class.

68. **Exclusion Process**

a. A member of the Settlement Class may request to be excluded from the Settlement Class in writing by a request postmarked, or submitted electronically via the Settlement Website, on or before the Objection/Exclusion Deadline approved by the Court and specified in the Notice.

b. In order to exercise the right to be excluded, a member of the Settlement Class must timely send a written request for exclusion substantially in the form of Exhibit G to the Settlement Administrator providing his/her name, address, and telephone number; the name and number of this case, a statement that he/she wishes to be excluded from the Settlement Class; and a signature. A request to be excluded that is sent to an address other than that designated in the Class Notice, or that is not electronically submitted or postmarked within the time specified shall be invalid and the person serving such a request shall be considered member of the Settlement Class and shall be bound as Settlement Class Members by the Agreement, if approved.

c. Any member of the Settlement Class who elects to be excluded shall not: (i) be bound by any order or the Judgment; (ii) be entitled to relief under this Settlement Agreement; (iii) gain any rights by virtue of this Settlement Agreement; or (iv) be entitled to object to any aspect of this Settlement Agreement. A member of the Settlement Class who requests to be excluded from the Settlement Class also cannot object to the Settlement.

d. The request for exclusion must be personally signed by the person requesting exclusion. So called "mass" or "class" exclusion requests shall not be allowed.

e. Within three (3) business days after the Objection/Exclusion Deadline, the Settlement Administrator shall provide Class Counsel and Defendants' Counsel a written list reflecting all timely and valid exclusions from the Settlement Class.

f. A list reflecting all individuals who timely and validly excluded themselves form the Settlement shall also be filed with the Court at the time of the motion for final approval of the settlement.

XI. OBJECTIONS

69. The Notices shall advise Settlement Class Members of their rights, including the right to be excluded from or object to the Settlement Agreement and its terms. The Notices shall specify that any objection to this Settlement Agreement, and any papers submitted in support of said objection, shall be received by the Court at the Final Approval Hearing, only if, on or before the Objection/Exclusion Deadline approved by the Court, the person making an objection shall file notice of his/her intention to do so and at the same time: (i) file copies of such papers he/she proposed to submit at the Final Approval Hearing with the Clerk of the Court; (ii) that any objection made by a Settlement Class Member represented by counsel must be filed with the Clerk of the Court; and (iii) send copies of such papers via United States mail, hand delivery, or overnight delivery to both Class Counsel and Defendants' Counsel. A copy of the objection must also be mailed to the Settlement Administrator at the address that the Settlement Administrator will establish to receive requests for exclusion or objections, Claim Forms, and any other communication relating to this Settlement.

70. Any Settlement Class Member who intends to object to this Settlement must include in any such objection: (i) his/her full name, address and current telephone number; (ii) the case name number of this Litigation; (iii) the date range during which he/she was employed by Defendants; (iv) all grounds for the objection, with factual and legal support for the stated objection, including any supporting materials; (v) the identification of any other objections he/she has filed, or has had filed on his/her behalf, in any other class action cases in the last four years; and (vi) 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. If the objecting Settlement Class Member intends to appear at the Final Approval Hearing, either with or without counsel, he/she must state as such in the written objection, and must also identify any witnesses he/she may call to testify at the Final Approval Hearing and all exhibits he/she intends to introduce into evidence at the Final Approval Hearing, which must also be attached to, or included with, the written objection.

71. Any Settlement Class Member who fails to timely file and serve a written objection and notice of intent to appear at the Final Approval Hearing pursuant to this Agreement, shall not be permitted to object to the approval of the Settlement at the Final Approval Hearing and shall be foreclosed from seeking any review of the Settlement or the terms of the Agreement by appeal or other means.

72. The Parties will request that the Court, within its discretion, exercise its right to deem any objection as frivolous and award appropriate costs and fees to the Parties opposing such objection(s).

XII. FINAL APPROVAL HEARING

73. The Parties will jointly request that the Court hold a Final Approval Hearing. At the Final Approval Hearing, the Parties will request that the Court consider whether the Settlement Class should be certified as a class pursuant to 735 ILCS § 5/2-801 for settlement and, if so, (i) consider any properly-filed objections, (ii) determine whether the Settlement is fair, reasonable and adequate, was entered into in good faith and without collusion, and should be approved, and shall provide findings in connections therewith, and (iii) enter the Final Approval Order, including final approval of the Settlement Class and the Settlement Agreement, and a Fee Award.

XIII. FINAL APPROVAL ORDER

74. The Parties shall jointly seek entry of a Final Approval Order, the text of which the Parties shall agree upon. The dismissal orders, motions or stipulation to implement this Section shall, among other things, seek or provide for a dismissal with prejudice and waiving any rights of appeal.

75. The Parties shall jointly submit to the Court a proposed order, substantially in the form attached hereto as Exhibit F, that, without limitation:

a. Approves finally this Agreement and its terms as being a fair, reasonable, and adequate settlement as to the Settlement Class Members within the meaning of 735 ILCS 5/2-801 and directing its consummation according to its terms;

b. Dismisses, with prejudice, all claims of the Settlement Class against Defendants in the Litigation, without costs and fees except as explicitly provided for in this Agreement; and

c. Reserves continuing and exclusive jurisdiction over the settlement and this Agreement, including but not limited to the Litigation, the Settlement Class, the Settlement Class Members, Defendants, and the settlement for the purposes of administering, consummating, supervising, construing and enforcing the Settlement Agreement and the Settlement Fund.

76. Class Counsel shall use their best efforts to assist Defendants in obtaining dismissal with prejudice of the Litigation and take all steps necessary and appropriate to otherwise effectuate all aspects of this Agreement.

XIV. TERMINATION OF THE SETTLEMENT

77. The Settlement is conditioned upon preliminary and final approval of the Parties' written Settlement Agreement, and all terms and conditions thereof without material change, material amendments, or material modifications by the Court (except to the extent such changes, amendments or modifications are agreed to in writing between the Parties). All Exhibits attached hereto are incorporated into this Settlement Agreement. Accordingly, this Settlement Agreement shall be terminated and cancelled within ten (10) days of any of the following events:

a. This Settlement Agreement is changed in any material respect to which the Parties have not agreed in writing.

b. The Court refuses to grant Preliminary Approval of this Agreement;

c. The Court refuses to grant final approval of this Agreement in any material respect;

d. The Court refuses to enter a final judgment in this Litigation in any material respect;

78. The Settlement Agreement may be terminated and cancelled, at the sole and exclusive discretion of Defendants, if more than 10% of the Settlement Class Members timely and validly exclude themselves from the Settlement.

79. In the event the Settlement Agreement is not approved or does not become final, or is terminated consistent with this Settlement Agreement, the Parties, pleadings, and proceedings will return to the *status quo ante* as if no settlement had been negotiated or entered into, and the Parties will negotiate in good faith to establish a new schedule for the Litigation.

XV. ATTORNEYS' FEES, COSTS AND EXPENSES AND INCENTIVE AWARD

80. At least twenty-one (21) days prior to the Objection/Exclusion Deadline, Class Counsel will move the Court for an award of attorneys' fees not to exceed 40% of the Settlement Fund, or two hundred thousand dollars ($200,000.00), plus costs and expenses.

81. Defendants agree not to oppose an application for attorneys' fees by Class Counsel in an amount not more than 40% of the Settlement Fund, or two hundred thousand dollars ($200,000.00). Class Counsel, in turn, agree not to seek or accept attorneys' fees in excess of this amount from the Court.

82. Notwithstanding any contrary provision of this Agreement, the Court's consideration of the Fee Award is to be conducted separately from the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement Agreement, and any award made by the Court with respect to Class Counsel's attorneys' fees or expenses, or any proceedings incident thereto, including any appeal thereof, shall not operate to terminate or cancel this Agreement or be deemed material thereto.

83. Class Counsel shall provide the Settlement Administrator with its completed W-9 before the payment of the Fee Award is due. Within three (3) business days after the Effective Date, the Settlement Administrator shall pay to Class Counsel from the Settlement Fund the amount awarded by the Court in the Fee Award. Any payment of the Fee Award shall be paid via electronic wire transfer to an account designated by Class Counsel.

84. Prior to or at the same time as Plaintiff seeks final approval of the Settlement Agreement, Class Counsel shall move the Court for an Incentive Award for the Class Representative in an amount not to exceed two thousand five hundred dollars ($2,500.00), and Defendants agree that they will not oppose such a request. The Incentive Award shall be paid solely from the Settlement Fund by check written by the Settlement Administrator within seven (7) days of the Effective Date.

85. In no event will Defendants' liability for attorney's fees, expenses, and costs, settlement administration costs, and/or an Incentive Award exceed their funding obligations set out this Agreement. Defendants shall have no financial responsibility for this Settlement Agreement outside of the Settlement Fund. Defendants shall have no further obligation for attorneys' fees or expenses to any counsel representing or working on behalf of either one or more individual Settlement Class Members or the Settlement Class. Defendants will have no responsibility, obligation or liability for allocation of fees and expenses among Class Counsel.

XVI. MISCELLANEOUS REPRESENTATIONS

86. The Parties agree that the Settlement Agreement provides fair, equitable and just compensation, and a fair, equitable, and just process for determining eligibility for compensation for any given Settlement Class Member related to the Released Claims.

87. The Parties (i) acknowledge that it is their intent to consummate this Settlement Agreement, and (ii) agree, subject to their fiduciary and other legal obligations, to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Agreement and to exercise their reasonable best efforts to accomplish the foregoing terms and conditions of this Agreement. Class Counsel and Defendants' Counsel agree to cooperate with each other in seeking Court approval of the Preliminary Approval Order, the Settlement Agreement, and the Final Approval Order, and promptly to agree upon and execute all such other documentation as may be reasonably required to obtain final approval of the Settlement.

88. The Parties intend this Settlement Agreement to be a final and complete resolution of all disputes between them with respect to the Released Claims by Plaintiff and the Settlement Class, and each or any of them, on the one hand, against the Releasees, and each or any of the Releasees, on the other hand. Accordingly, the Parties agree not to assert in any forum that the Litigation was brought by Plaintiff or defended by Defendants, or each or any of them, in bad faith or without a reasonable basis.

89. Nothing express or implied in this Agreement is intended or shall be construed to confer upon or give any person or entity other than the Parties, Releasees, and Settlement Class Members any right or remedy under or by reason of this Agreement. Each of the Releasees is an intended third-party beneficiary of this Agreement with respect to the Released Claims and shall have the right and power to enforce the release of the Released Claims in his, her or its favor against all Releasors.

90. The Parties have relied upon the advice and representation of counsel, selected by them, concerning their respective legal liability for the claims hereby released. The Parties have read and understand fully this Settlement Agreement, including its Exhibits, and have been fully advised as to the legal effect thereof by counsel of their own selection and intend to be legally bound by the same.

91. Any headings used herein are used for the purpose of convenience only and are not meant to have legal effect.

92. The waiver by one Party of any breach of this Agreement by any other Party shall not be deemed as a waiver of any prior or subsequent breach of this Agreement.

93. This Agreement and its Exhibits set forth the entire agreement and understanding of the Parties with respect to the matters set forth herein, and supersede all prior negotiations, agreements, arrangements and undertakings with respect to the matters set forth herein. No representations, warranties or inducements have been made to any Party concerning this Agreement or its Exhibits other than the representations, warranties and covenants contained and memorialized in such documents.

94. This Agreement may not be amended, modified, altered, or otherwise changed in any manner except by a written instrument signed by or on behalf of all Parties or their respective successors-in-interest.

95. The Parties agree that Exhibits A through G to this Settlement Agreement are material and integral parts thereof and are fully incorporated herein by this reference.

96. The Parties may agree, subject to the approval of the Court where required, to reasonable extensions of time to carry out the provisions of the Agreement.

97. Except as otherwise provided herein, each Party shall bear its own costs.

98. Plaintiff represents and warrants that he has not assigned any claim or right or interest therein as against the Releasees to any other person or party.

99. The Parties represent that they have obtained the requisite authority to enter this Settlement Agreement in a manner that binds all Parties to its terms.

100. The Parties specifically acknowledge, agree and admit that this Settlement Agreement and its Exhibits, along with all related drafts, motions, pleadings, conversations, negotiations, correspondence, orders or other documents shall be considered a compromise within the meaning of Illinois Rules of Evidence Rule 408, and any other equivalent or similar rule of evidence, and shall not (1) constitute, be construed, be offered, or received into evidence as an admission of the validity of any claim or defense, or the truth of any fact alleged or other allegation in the Litigation or in any other pending or subsequently filed action, or of any wrongdoing, fault, violation of law, or liability of any kind on the part of any Party, or (2) be used to establish a waiver of any defense or right, or to establish or contest jurisdiction or venue.

101. The Parties also agree that this Settlement Agreement and its Exhibits, along with all related drafts, motions, pleadings, conversations, negotiations, correspondence, orders or other documents entered in furtherance of this Settlement Agreement, and any acts in the performance of this Settlement Agreement are not intended to establish grounds for certification of any class involving any Settlement Class Member other than for certification of the Settlement Class for settlement purposes.

102. This Settlement Agreement, whether approved or not approved, revoked, or made ineffective for any reason, and any proceedings related to this Settlement Agreement and any discussions relating thereto shall be inadmissible as evidence of any liability or wrongdoing whatsoever and shall not be offered as evidence of any liability or wrongdoing in any court or other tribunal in any state, territory, or jurisdiction, or in any manner whatsoever. Further, neither this Settlement Agreement, the Settlement contemplated by it, nor any proceedings taken under it, will be construed or offered or received into evidence as an admission, concession or presumption that class certification is appropriate, except to the extent necessary to consummate this Agreement and the binding effect of the Final Order and Judgment.

103. The provisions of this Settlement Agreement, and any orders, pleadings or other documents entered in furtherance of this Settlement Agreement, may be offered or received in evidence solely (1) to enforce the terms and provisions hereof or thereof, (2) as may be specifically authorized by a court of competent jurisdiction after an adversary hearing upon application of a Party hereto, (3) in order to establish payment, or an affirmative defense of preclusion or bar in a subsequent case, (4) in connection with any motion to enjoin, stay or dismiss any other action, or (5) to obtain Court approval of the Settlement Agreement.

104. Except as provided herein, there shall be no comments made to the press or any third party, or any other disclosure by or through the Parties or their attorneys or agents, comprising opinions as to the litigation. Plaintiff and Class Counsel shall not make any public statement, including any statement to the press, regarding the Settlement aside from the following agreed upon statement: "[The Parties] have reached a proposed agreement and look forward to the Court's review and decision." Similarly, Defendants and Defendants' Counsel shall not make any public statement, including any statement to the press, regarding the Settlement. This Section shall not be construed to limit or impede the notice requirements of Section IX above, nor shall this Section be construed to prevent Class Counsel or Defendants from notifying or explaining to potential Settlement Class Members or others that this case has settled and how to obtain settlement benefits, nor shall this Section limit the representations that the Parties or their attorneys may make to the Court to assist in its evaluation of the proposed Settlement. If a Party is required by a valid, enforceable subpoena or government information request to disclose information about the settlement, such Party shall provide reasonable prior notice (to the extent permitted by applicable law) to the other Parties to allow the other Parties to seek to prevent such disclosure. A Party may also provide necessary and accurate information about the Settlement to its shareholders and other persons or entities as required by securities laws or other applicable laws or regulations.

105. This Agreement may be executed in one or more counterparts exchanged by hand, messenger, facsimile, or PDF as an electronic mail attachment. All executed counterparts and each of them shall be deemed to be one and the same instrument, provided that counsel for the Parties to this Agreement all exchange signed counterparts.

106. This Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the Parties hereto and the Releasees.

107. The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of this Agreement, and the Parties hereby submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in this Agreement.

108. This Agreement shall be governed by and construed in accordance with the laws of the state of Illinois.

109. This Agreement is deemed to have been prepared by counsel for all Parties as a result of arms-length negotiations among the Parties. Whereas all Parties have contributed substantially and materially to the preparation of this Agreement and its Exhibits, it shall not be construed more strictly against one Party than another.

110. Unless otherwise stated herein, any notice required or provided for under this Agreement shall be in writing and shall be sent by electronic mail or hand delivery, postage prepaid, as follows:

<u>If to Class Counsel</u>:

Myles McGuire
Evan M. Meyers
David Gerbie
William P. Kingston
MCGUIRE LAW, P.C.
55 W. Wacker Drive, 9th Fl.
Chicago, IL 60601
Tel: (312) 893-7002
mmcgure@mcgpc.com
emeyers@mcgpc.com
dgerbie@mcgpc.com
wkingston@mcgpc.com

<u>If to Defendants' Counsel</u>:

Michael J. Burns
SEYFARTH SHAW LLP
560 Mission Street, 31st Floor
San Francisco, California 94105
Tel: (415) 397-2823
mburns@seyfarth.com

Thomas E. Ahlering
SEYFARTH SHAW LLP
233 South Wacker Drive
Chicago, Illinois 60606-6448
Tel: (312) 460-5000
tahlering@seyfarth.com

111. This Agreement shall be deemed executed as of the date that the last party signatory signs the Agreement.

[The remainder of this page is intentionally left blank.]

IN WITNESS HEREOF, the undersigned have caused this Settlement Agreement to be executed as of the dates set forth below.

ERIC ZEPEDA, individually and as the Class Representative

_____

Date: _____

MCGUIRE LAW, P.C., as Class Counsel

_____

Print Name: _____

Date: _____

KIMPTON HOTEL & RESTAURANT GROUP, LLC

_____

Jessica Madrigal, Vice President, Legal

Date: 7/10/18

SIX CONTINENTS HOTELS INC.

_____

Print Name: _____

Date: _____

SEYFARTH SHAW LLP, as Defendants' Counsel

By: _____

Print Name: _____

Date: _____

IN WITNESS HEREOF, the undersigned have caused this Settlement Agreement to be executed as of the dates set forth below.

ERIC ZEPEDA, individually and as the Class Representative

_____

Date: _____

MCGUIRE LAW, P.C., as Class Counsel

_____

Print Name: _____

Date: _____

KIMPTON HOTEL & RESTAURANT GROUP, LLC

_____

Date: _____

SIX CONTINENTS HOTELS INC.

Print Name: HOMERO M. TORRES

Date: 7-11-2018

SEYFARTH SHAW LLP, as Defendants' Counsel

By: _____

Print Name: _____

Date: _____

IN WITNESS HEREOF, the undersigned have caused this Settlement Agreement to be executed as of the dates set forth below.

ERIC ZEPEDA, individually and as the Class Representative

_____

Date: _____

MCGUIRE LAW, P.C., as Class Counsel

_____

Print Name: _____

Date: _____

KIMPTON HOTEL & RESTAURANT GROUP, LLC

_____

Date: _____

SIX CONTINENTS HOTELS INC.

_____

Print Name: _____

Date: _____

SEYFARTH SHAW LLP, as Defendants' Counsel

By: Michael J Bu

Print Name: Michael J Bu

Date: 7/10/18

IN WITNESS HEREOF, the undersigned have caused this Settlement Agreement to be executed as of the dates set forth below.

ERIC ZEPEDA, individually and as the Class Representative

_____

Date: _____

MCGUIRE LAW, P.C., as Class Counsel

Evan Meyers

Print Name: Evan Meyers

Date: 7/10/18

KIMPTON HOTEL & RESTAURANT GROUP, LLC

_____

Date: _____

SIX CONTINENTS HOTELS INC.

_____

Print Name: _____

Date: _____

SEYFARTH SHAW LLP, as Defendants' Counsel

By: _____

Print Name: _____

Date: _____

IN WITNESS HEREOF, the undersigned have caused this Settlement Agreement to be executed as of the dates set forth below.

ERIC ZEPEDA, individually and as the Class Representative

Date: 7/12/18

MCGUIRE LAW, P.C., as Class Counsel

_____

Print Name: _____

Date: _____

KIMPTON HOTEL & RESTAURANT GROUP, LLC

_____

Date: _____

SIX CONTINENTS HOTELS INC.

_____

Print Name: _____

Date: _____

SEYFARTH SHAW LLP, as Defendants' Counsel

By: _____

Print Name: _____

Date: _____

Exhibit B

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

ERIC ZEPEDA, individually and on behalf of similarly situated individuals, *Plaintiff,* v. INTERCONTINENTAL HOTELS GROUP, INC, a Delaware corporation, and KIMPTON HOTEL & RESTAURANT GROUP, LLC, a Delaware limited liability company, *Defendants.*	)	No. 2018 CH 02140 Hon. David B. Atkins

DECLARATION OF EVAN M. MEYERS IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARD

I, Evan M. Meyers, hereby aver, pursuant to 735 ILCS 5/1-109, that I am fully competent to make this Declaration, have personal knowledge of all matters set forth herein unless otherwise indicated, and would testify to all such matters if called as a witness in this matter.

1. I am an adult over the age of 18 and a resident of the state of Illinois. I am fully competent to make this Declaration and do so in support of Plaintiffs' Motion and Memorandum of Law in Support of Approval of Attorneys' Fees, Expenses, and Incentive Award.

2. I am an attorney licensed to practice law in the state of Illinois and am one of the attorneys representing the Plaintiff.

3. I am a partner at McGuire Law, P.C. and I, along with my colleagues Myles McGuire, David L. Gerbie, and William P. Kingston, have been appointed as Class Counsel, representing Plaintiff and the Settlement Class.

4. McGuire Law, P.C. is a law firm based in Chicago, Illinois that focuses on class action litigation, representing clients in both state and federal trial and appellate courts throughout the country.

5. I and the other attorneys of McGuire Law have regularly engaged in complex litigation on behalf of consumers and have extensive experience in class action lawsuits similar in size and complexity to the instant case, including dozens of BIPA class actions. The attorneys of McGuire Law have been appointed class counsel in many complex consumer class actions in state and federal courts across the country, including numerous cases in the Circuit Court of Cook County. *See, e.g., Gray et al. v. Mobile Messenger Americas, Inc. et al.* (S.D. Fla. 2008); *Gresham et al. v. Keppler & Associates, LLC et al.* (Sup. Ct. Los Angeles County, Cal. 2008); *Sims et al. v. Cellco Partnership et al.* (N.D. Cal. 2009); *Van Dyke et al. v. Media Breakaway, LLC*, (S.D. Fla. 2009); *Paluzzi, et al. v. mBlox, Inc., et al*. (Cir. Ct. Cook County, Ill. 2009); *Ryan et al. v. Snackable Media, LLC* (Cir. Ct. Cook County, Ill. 2011); *Parone et al. v. m-Qube, Inc. et al.* (Cir. Ct. Cook County, Ill. 2010); *Valdez et al. v. Sprint Nextel Corporation et al*. (N.D. Cal. 2010); *Lozano et al. v. Twentieth Century Fox* (N.D. Ill. 2011); *Kramer et al. v. Autobytel*, (N.D. Cal. 2011); *Walker et al. v. OpenMarket, Inc. et al.* (Cir. Ct. Cook County, Ill. 2011); *Schulken at al. v. Washington Mutual Bank* (N.D. Cal. 2011); *In re Citibank HELOC Reduction Litigation* (N.D. Cal 2012); *Murray et al. v. Bill Me Later, Inc.* (N.D. Ill. 2014); *Valladares et al. v. Blackboard, Inc*. *et al.* (Cir. Ct. Cook County, Ill. 2016); *Hooker et al v. Sirius XM Radio, Inc.* (E.D. Va. 2017); *Flahive et al v. Inventurus Knowledge Solutions, Inc.* (Cir. Ct. Cook County, Ill. 2017); *Serrano et al. v. A&M (2015) LLC* (N.D. Ill. 2017); *Seal et al. v. RCN Telecom Servs., LLC*, (Cir. Ct. Cook County, Ill. 2017); *Vergara et. al. v. Uber Technologies, Inc.* (N.D. Ill. 2018).

6. The attorneys of McGuire Law have intimate knowledge of the law in the fields of technology and privacy. Recognized as pioneers in the field of consumer class actions involving the TCPA, as well as claims brought under the BIPA, McGuire Law attorneys have served as counsel of record for groundbreaking rulings involving technology at the state and federal district

and appellate court levels, including most recently at the U.S. Supreme Court. *See, e.g., Shen v. Distributive Networks, Inc.*, (N.D. Ill. 2007); *Weinstein et al. v. The Timberland Co. et al.* (N.D. Ill. 2008); *Satterfield et al. v. Simon & Schuster, Inc.* (9th Cir. 2009); *Espinal et al. v. Burger King Corporation et al.* (S.D. Fla. 2010); *Abbas et al. v. Selling Source, LLC* (N.D. Ill. 2010); *Damasco et al. v. Clearwire Corp.* (7th Cir. 2011); *Ellison et al. v. Steven Madden, Ltd.* (C.D. Cal. 2013); *Robles et al. v. Lucky Brand Dungarees, Inc. et al.* (N.D. Cal. 2013); *In re Jiffy Lube Spam Text Litigation* (S.D. Cal. 2013); *Lee, et al. v. Stonebridge Life Ins. Co. et al*., (N.D. Cal. 2013); *Elikman et al. v. Sirius XM Radio, Inc.* (N.D. Ill. 2015); *Campbell-Ewald Co. v. Gomez et al.*, 136 S. Ct. 663 (2016).

7. The McGuire Law firm has successfully prosecuted claims on behalf of our clients in both state and federal trial and appellate courts throughout the country, including claims involving allegations of consumer fraud; unfair competition; invasion of privacy; data breach; false advertising; breach of contract; and various statutory violations, including BIPA and TCPA violations.

8. I am a graduate of the University of Michigan, and I graduated from the University of Illinois College of Law in 2002. I have been admitted to practice by the Illinois Supreme Court and in several federal courts throughout the country. In addition to my class action experience, which includes numerous BIPA cases, I have extensive experience in complex commercial litigation and have regularly litigated cases in state and federal trial and appellate courts across the nation, including in the Circuit Court of Cook County, the U.S. District Court for the Northern District of Illinois, the Ninth Circuit Court of Appeals, the Judicial Panel on Multidistrict Litigation, and the U.S. Supreme Court, where I recently served as co-lead counsel in a case of seminal importance to class action jurisprudence nationwide. *See Campbell-Ewald Co. v. Jose*

Gomez, 136 S. Ct. 663 (2016).

9. Myles McGuire is the Managing Partner of McGuire Law. Mr. McGuire has been recognized as a leader in class actions and technology law by his peers and courts around the country and has been appointed lead counsel in numerous state and federal class actions. Mr. McGuire is a graduate of Marquette University and Marquette University Law School, and has been admitted to practice in the Illinois Supreme Court and Wisconsin Supreme Court and in several federal courts throughout the country, including the U.S. Supreme Court, where he was co-lead counsel in the *Campbell-Ewald Co. v. Gomez* matter. Prior to founding McGuire Law, P.C. in 2013, Mr. McGuire was a managing member of Edelson McGuire, LLC.

10. My colleague, David L. Gerbie, also has experience in litigating class action cases in state and federal courts, and has been significantly involved, if not the primary lead attorney, in several class action suits across the country, including many BIPA class actions in the Circuit Court of Cook County and in the Northern District of Illinois. *See, e.g., Zhirovetskiy v. Zayo Group, LLC*, 17-CH-09323 (Cir. Ct. Cook County, Ill., 2017); *Knobloch v. Chicago Fit Ventures, LLC, et al.*, 17-CH-12266 (Cir. Ct. Cook. County, Ill. 2017); *Anglin v. Nissan North America, Inc.*, 17-cv-04240 (N.D. Ill. 2017). Mr. Gerbie received his B.A. from Northern Illinois University and graduated from the University of Wisconsin Law School.

11. My colleague, William P. Kingston, is an associate at McGuire Law and has been involved in dozens of cases in state and federal courts throughout the country, including numerous BIPA class actions. *See, e.g.*, *Smith v. Pineapple Hospitality Co.*, 18-CH-06589 (Cir. Ct. Cook County, Ill. 2018); *Norman v. SVF Fulton Chicago, LLC*, 18-CH-06588 (Cir. Ct. Cook County, Ill. 2018); *Alvarado v. Caesars Entertainment Corp.*, 18-CH-06931 (Cir. Ct. Cook County, Ill. 2018). Mr. Kingston received his B.A. from Dalhoussie University and his J.D. from The John

Marshall Law School.

Class Counsel's Contribution to the Case

12. From the outset of this litigation, the attorneys and support staff of McGuire Law, P.C. anticipated spending hundreds of hours litigating the claims in this matter with no guarantee of success. Class Counsel understood that prosecution of this case would require that other work be foregone, that there was significant uncertainty surrounding the applicable legal and factual issues, and that there would be significant opposition from a defendant with substantial resources.

13. McGuire Law, P.C. assumed a significant risk of non-payment in prosecuting this litigation given the novelty of legal issues involved, the scope of Defendants' biometric time-keeping program, and the vigorous and nuanced legal defenses that Defendants and their skilled counsel raised or were prepared to raise had this case proceeded further.

14. Throughout the litigation, Defendants and their counsel indicated that they planned to present a strong defense, challenging Plaintiff's claim on the merits and his ability to represent a class of those whose fingerprints and related biometric information were collected by Defendants. Had this case not settled, Defendants undoubtedly would have proceeded with motion practice in an effort to dismiss the suit in its entirety, particularly given that the Second District's *Rosenbach* decision was binding authority up through preliminary approval of this case, and Defendants would have also aggressively contested class certification. Given the financial resources at their disposal, any final decisions favorable to Plaintiff would have also likely been appealed by Defendants.

15. Class Counsel were able to obtain the substantial benefit provided to the Settlement Class Members through the Settlement, despite the significant risks and defenses raised by Defendants, only as a result of their efforts in investigating Defendants' biometric capture,

collection and use practices, engaging in further discovery relating to Defendants' employment operations, and, most importantly, playing a central role in the careful and extended negotiations that resulted in the final Settlement Agreement.

16. The work that the attorneys and staff of McGuire Law, P.C. have committed to this case has been substantial. Among other things, the attorneys of McGuire Law have:

a. Investigated Plaintiff's claims;

b. Drafted and filed the Class Action Complaint, one of the first employment-based BIPA lawsuits ever filed;

c. Reviewed and analyzed records and information provided by Defendants;

d. Coordinated settlement proceedings and negotiations;

e. Drafted a comprehensive mediation statement and attended a full-day mediation session with the Hon. Morton Denlow (Ret.) of JAMS;

f. Engaged in months of continued communication, negotiations, and the exchange of settlement drafts with Defendants' counsel, which resulted in the drafting and execution of the finalized Settlement Agreement and related documents, including class notice and claim form documents;

g. Successfully moved for preliminary approval of the Settlement; and

h. Oversaw the implementation of the Settlement, including multiple telephone and email communications with the Settlement Administrator about class notice, the settlement website, and claim submission.

17. In addition to the above efforts taken by Class Counsel to secure the Settlement reached here for the Settlement Class Members, pursuant to the terms of the Settlement and this Court's Preliminary Approval Order, McGuire Law has also been primarily responsible for

effectuating notice to Class Members and responding to Class Member inquiries.

18. The Settlement Administrator, KCC, LLC, was provided by Defendants with mailing addresses and/or e-mail addresses for all potential class members, and the Settlement Administrator has informed me that Direct Notice of this Settlement has been sent out to all such mailing addresses and email addresses. The Settlement Administrator has advised me that, as of the date of this Declaration, the Settlement Website is active; Claim Forms have already been received; there have been no objections to date; and no Class Members have chosen to exclude themselves from the Settlement. Given the size of the Settlement Fund, we believe that Settlement Class Members will be able to receive hundreds, if not thousands, of dollars each.

19. Based on my experience in other class action settlements, I anticipate that our firm will expend significant additional time and resources over the pendency of this action relating to briefing and filing a motion for final approval of the Settlement, attending the final approval hearing, responding to Class Members' inquiries regarding the Settlement and advising them how to proceed, responding to any objectors, reviewing submitted claims rejected by Defendants and/or the Settlement Administrator, and remaining involved with the Settlement through implementation.

20. Prior to the initiation of this litigation, Plaintiff Zepeda executed a fee agreement with my firm that was contingent in nature. Mr. Zepeda agreed *ex ante* that up to 40% of any settlement fund, plus reimbursement of all costs and expenses, would represent a fair award of attorneys' fees from a fund recovered on behalf of himself and a class.

21. In addition to attorney time, McGuire Law, P.C. has incurred $21,850 in expenses related to this litigation, which includes costs for filing fees, mediation fees, large copying jobs and case administration. Every effort was made to keep these expenses at a minimum. Being

responsible for advancing all expenses, Class Counsel had a strong incentive not to expend any funds unnecessarily.

Class Representative's Contribution to the Case

22. Plaintiff Eric Zepeda has been heavily involved in this litigation, has willingly contributed his own time and efforts toward this litigation, and is deserving of the proposed Incentive Award. Mr. Zepeda was instrumental in assisting Class Counsel's investigation at the outset of this case and has remained fully involved in its prosecution. Moreover, Mr. Zepeda had his biometrics captured and used by Defendants on numerous occasions but chose to proceed with his claims on behalf of a class, despite having financial incentive to pursue his claims on an individual basis, and has succeeded in obtaining non-monetary, as well as financial relief, on behalf of the class.

23. Mr. Zepeda was consistently available to consult with Class Counsel in person, over the phone, and by email and did so on numerous occasions. Mr. Zepeda also reviewed pleadings and settlement documents, produced documents and information, and committed multiple hours of time for the benefit of the class.

24. Were it not for Mr. Zepeda's efforts and contributions to the litigation by assisting Class Counsel with their investigation and filing of this suit and his monitoring of the case throughout its litigation, the substantial benefit to the class afforded under this Settlement Agreement would not have resulted.

25. Mr. Zepeda has not received any payments in this matter, was never promised any payments, and was not promised that he would receive an award of any kind in this litigation. Rather, the requested Incentive Award seeks only to compensate Mr. Zepeda for his time, effort, and contributions to this case.

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

Executed on October 16, 2018 in Chicago, Illinois.

/s/ Evan M. Meyers
Evan M. Meyers, Esq.