

**STATE OF ILLINOIS CIRCUIT COURT**  
**NINETEENTH JUDICIAL CIRCUIT**  
**LAKE COUNTY, ILLINOIS**

BRENNA STRUCK and TYLER JONES,  
*individually and on behalf of all others*  
*similarly situated,*

Plaintiffs,

v.

WOODMAN'S FOOD MARKET, INC.,

Defendant.

Case No.: 2021-CH-00000053

**PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS**

Plaintiffs Brenna Struck and Tyler Jones (collectively, "Plaintiffs"), hereby move this Court, pursuant to the Settlement Agreement and this Court's March 26, 2021 Order granting Plaintiffs' Motion for Preliminary Approval, to enter an Order approving this unopposed request for Class Counsel's attorneys' fees, costs, as well as a service award for Plaintiffs based on their efforts in representing the absent Class Members in this class action lawsuit.<sup>1</sup>

**I. INTRODUCTION**

On March 26, 2021, this Court preliminarily approved a proposed class action settlement between Plaintiffs and Defendant Woodman's Food Market, Inc. ("Woodman's" or "Defendant"). Class Counsel's efforts created a maximum benefit or "Cap" of \$3,058,400, payable to the Settlement Class at up to \$800 per Member. To receive their share, all that Settlement Class Members need to do is submit a claim for their portion.

---

<sup>1</sup> Capitalized terms not defined herein shall have the meaning set forth in the Settlement Agreement ("Agr."), which was filed in this action on March 15, 2021 with Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

Class Counsel have zealously prosecuted Plaintiffs' claims, achieving the Settlement Agreement only after extensive investigation, negotiations, and an all-day mediation with respected JAMS mediator Judge Morton Denlow (Ret.). After the mediation, Class Counsel worked for weeks to finalize the Settlement Agreement and associated exhibits pertaining to notice, preliminary approval, and final approval.

As compensation for the substantial benefit conferred upon the Settlement Class, Class Counsel respectfully move the Court for a combined award of attorneys' fees and costs totaling \$1,009,272—33% of the Settlement Cap. Higher fee requests have regularly been found reasonable and granted by Courts in BIPA cases providing *less* compensation to individual class members than the case at hand. *See Sekura v. L.A. Tan Enters., Inc.*, No. 2015-CH-16694 (Ill. Cir. Ct. Cook Cnty. 2016) (granting a 40% fee where class members stood to recover approximately \$40 per person); *Zepeda v. Intercontinental Hotels Grp., Inc.*, No. 2018-CH-02140 (Ill. Cir. Ct. Cook Cnty. 2018) (awarding a 40% fee where class members were expected to receive less than \$500 per person). Included in the \$1,009,272 sought by Class Counsel is a \$8,323.65 reimbursement of reasonable and necessary expenses incurred during litigation.

Class Counsel also respectfully move the Court for an award of \$5,000 to each of the two Plaintiffs for their work on behalf of the Class.<sup>2</sup>

---

<sup>2</sup> While Plaintiffs here move for attorneys' fees, costs, and service awards, they will move for final approval of the settlement by separate motion, which will be filed prior to the Final Fairness Hearing, and in accordance with the Court's Order granting Preliminary Approval.

## II. BACKGROUND

### A. Procedural History and Work Performed for the Settlement Class<sup>3</sup>

On March 10, 2020, Plaintiff and proposed Class Representative Brenna Struck commenced this class action lawsuit by filing a Complaint against Woodman's in the Circuit Court for Cook County. *See* No. 2020-CH-02897 (Ill. Cir. Ct. Cook Cnty. Mar. 10, 2020). As set forth in her Complaint, Plaintiff Struck alleges that during her employment, Woodman's collected her biometric information by capturing her fingerprints and requiring her to perform a finger scan each day to clock in and out of work. Compl. ¶ 9, Doc. No. 1-1 (stating that Plaintiff "left Defendant's employ in approximately December 2019 and was 'clocking in' using her fingerprints during her tenure of employment with [Woodman's]"). The Complaint further alleges that Woodman's—despite collecting the immutable biometric information from its employees in the State of Illinois—never informed Plaintiff Struck or the putative Class Members of its biometric collection practices, never obtained the requisite written consent and never provided any data retention or destruction policies to Plaintiff and/or the putative Class Members. *See id.* at ¶ 12.

Based on those allegations, Plaintiff Struck asserted causes of action alleging that Woodman's violated BIPA by: (i) failing to inform individuals in writing that it would be capturing, collecting, storing, using and disclosing biometric data (*i.e.*, statutorily-defined biometric identifiers and/or information) prior to doing so; (ii) failing to inform individuals in writing of the specific purpose and length of time for which biometric data is collected or captured; (iii) failing to obtain a written release for the capture of biometric data prior to such collection or capture; and (iv) failing to publish or adhere to a publicly available retention schedule and

---

<sup>3</sup> This section has been largely adopted from Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, filed on March 15, 2021.

guidelines for permanently destroying biometric data. *See generally, id.*<sup>4</sup> The same day she filed her Complaint, Plaintiff Struck filed her Motion for Class Certification, or Alternatively, for a Deferred Class Certification Ruling Pending Discovery.<sup>5</sup>

On April 10, 2020, Woodman's removed this case to the United States District Court for the Northern District of Illinois, whereupon it was assigned to the Honorable Martha Pacold and referred to the Honorable Maria Valdez. *See* No. 1:20-cv-02270, ECF Nos. 1 & 7. Despite concerns over subject matter jurisdiction and Article III standing, Struck did not initially seek remand. Agr. ¶ D. Woodman's filed an Answer and Affirmative Defenses to Plaintiff's Class Action Complaint on June 12, 2020. *Id.* at ECF No. 16. Thereafter, the Parties commenced discovery and the attorneys eventually began discussing the prospect of a class-wide mediation. On December 11, 2020 Woodman's and Plaintiff Struck agreed to participate in a formal mediation with Hon. Morton Denlow (Ret.) of JAMS, scheduled for February 4, 2021. Agr. ¶ J. Pursuant to the mediator's schedule, Plaintiff Struck submitted her mediation statement on January 14, 2021.

On January 15, 2021, Plaintiff Tyler Jones filed a putative class action Complaint against Woodman's in the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois. Agr. ¶ K; *see Jones v. Woodman's Food Mkt.*, No. 21-L-000032 (Ill. Cir. Ct. Kane Cnty. Jan. 15, 2021). Like Struck, Jones alleged a claim for damages and sought an injunction under BIPA, related to the alleged unauthorized collection, storage, and dissemination of his fingerprint data allegedly collected through Woodman's fingerprint-scanning time clocks. *Id.*

---

<sup>4</sup> BIPA defines "biometric identifier" to mean "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id.* § 14/10. "Biometric information" means "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." *Id.*

<sup>5</sup> *See* Plaintiff's Motion for Class Certification or, alternatively, for a Deferred Class Certification Ruling Pending Discovery, filed on March 12, 2020 at Doc. No. 1-2.

Woodman's and Struck continued forward with mediation. Pursuant to the mediator's schedule on January 18, 2021, Woodman's submitted its mediation statement, noting Jones' filing. Agr. ¶ M. On February 4, 2021, Struck and Woodman's participated in a full-day mediation session before The Honorable Morton Denlow (Ret.). Jones was advised of the mediation, and his lawsuit was included in settlement discussions. Agr. ¶ N. All Parties were able to reach a preliminary agreement to settle the cases on a class-wide basis subject to court approval.

Further to agreement of the Parties, and in light of the potential for Article III-standing problems to arise should the case remain in federal court, Woodman's activities in Lake County, and Struck's employment in Lake County, Plaintiff Struck filed a Class Action Complaint in this Court on February 9, 2021, which was assigned case number 21-CH-00000053. On February 17, 2021, Plaintiff Struck amended her Complaint to add Tyler Jones as an additional Plaintiff. Plaintiffs Struck and Jones (together "Plaintiffs") submitted their Motion for Preliminary Approval on March 15, 2021, which was granted on March 26, 2021.

**B. The Settlement Agreement Provides Excellent and Timely Relief to the Settlement Class.**

The proposed Settlement Class is defined as:

All current and former employees of Woodman's who used a finger scanner time clock at a facility owned or operated by Defendant in the State of Illinois between March 10, 2015 and the date of Preliminary Approval without first being provided BIPA disclosures and executing a written consent.

Excluded from the Settlement Class are (i) persons who executed a settlement agreement and release with Defendant releasing and/or waiving their BIPA claims; (ii) any Judge or Magistrate presiding over this action and members of their families; (iii) Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest; (iv) persons who properly execute and file a timely request for exclusion

from the Settlement Class; and (v) the legal representatives, successors, heirs or assignees of any such excluded persons. The Parties believe, based on information conveyed by defense counsel, that the Settlement Class is comprised of 3,823 individuals. Agr. ¶ 7.2.

The Settlement Agreement provides for both monetary and equitable relief. First, the Settlement Agreement provides for a Settlement Cap of \$3,058,400. Agr. ¶ 1.3 That is, the maximum amount to be paid out by Woodman’s for all aspects of the settlement—namely, Class Member payments, any court-approved attorneys’ fees and/or class representative incentive award as well as any costs for settlement administration—is \$3,058,400 (the “Cap”), computed as the amount of Settlement Class Member relief (\$800) times the number of Settlement Class Members (3,823), in the event all Class Members submit timely and valid claims. Agr. ¶ 1.26. Taking into account average claim rates in BIPA cases, Plaintiffs anticipate that each Class Member who submits a timely and valid claim form will receive a payment of \$800. Decl. of Gary M. Klinger ¶ 19 (“Klinger Fees Decl.”), filed herewith. In the event Class Member payments, attorneys’ fees, class representative incentive award and settlement administration exceed the Cap, Class Member payments will be reduced on a pro rata basis such that Defendant’s maximum financial commitment does not exceed the Cap. Agr. ¶ 1.26

Further, Defendant has committed to future compliance with all provisions of BIPA, and acknowledges that this litigation has resulted in changes to its business practices. Agr. ¶ 2.2.

### **III. THE REQUESTED FEES, COSTS, AND SERVICE AWARD ARE REASONABLE.**

#### **A. The Requested Fees are Reasonable.**

The Settlement Agreement provides: “[t]he amount of the Fee Award (if any) shall be determined by the Court based on a petition from Class Counsel. Class Counsel has agreed, with no consideration from Defendant, to limit its request for attorneys’ fees and

unreimbursed costs to thirty-three percent (33%) of the Cap.” *See* Agr. ¶ 8.1. For the reasons that follow, Class Counsel’s request for \$1,009,272 is eminently fair and reasonable and should be approved.

**1. Percentage-of-the-Benefit is the Best Method for Calculating the Fee in BIPA Class Actions**

Under Illinois law, an attorney in a class action “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.” *Wendling v. S. Ill. Hosp. Servs.*, 242 Ill. 2d 261, 265 (2011) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (internal citations omitted)). The basis of the common fund doctrine is “the equitable concept that the beneficiaries of a fund will be unjustly enriched by the attorney’s services unless they contribute to the costs of the litigation.” *Wendling*, 242 Ill. 2d at 265.

In determining the amount of a reasonable fee award in a common fund case, the Court has discretionary authority to choose the percentage-of-the-recovery or lodestar method. *See, e.g., Brundidge v. Glendale Fed. Bank*, 168 Ill. 2d 235, 243–44 (1995). Under the percentage-of-the-recovery method, the Court would award “attorney fees to plaintiffs’ counsel based on a percentage of the fund held by the court.” *Id.* at 244. This method “is, overall, a fair and expeditious method that reflects the economics of legal practice and equitably compensates counsel for the time, effort, and risks associated with representing the plaintiff class.” *Id.* On the other hand, the lodestar method has been criticized for encouraging inefficiency and creating additional litigation. *See, e.g., Ryan v. City of Chi.*, 274 Ill. App. 3d 913, 924 (1995) (noting that “[p]ercentage analysis approach eliminates the need for additional major litigation” while detailing the inefficiencies of the lodestar method).

Applying the percentage-of-the-recovery approach, which Defendant agreed not to oppose,

makes the most sense for this case. It has been used to determine a reasonable fee award in many BIPA class action settlements in Illinois in recent years. *See, e.g., Zepeda v. Intercontinental Hotels Grp., Inc.*, No. 18-CH-02140 (Ill. Cir. Ct. Cook Cnty. 2018) (Atkins, J.); *Svagdis v. Alro Steel Corp.*, No. 17-CH-12566 (Ill. Cir. Ct. Cook Cnty. 2018) (Larsen, J.); *Zhirovetskiy v. Zayo Grp., LLC*, No. 17-CH-09323 (Ill. Cir. Ct. Cook Cnty. 2019) (Flynn, J.); *Stecker v. MAAC Mach. Co.*, No. 2020-L-000321 (Ill. Cir. Ct. DuPage Cnty. 2021) (Rohm, R.).

**2. A 33% Fee is Well Within the Normal Range for BIPA Class Action Settlements While the Settlement Agreement Delivers the More Value.**

The fee requested here is eminently reasonable when compared to the value of other similar settlements approved in Illinois courts. This Settlement provides significant, concrete value to the Settlement Class Members. The \$3,058,400 provided for in the Settlement is sufficient for *every* Settlement Class Member to receive \$800. Even with the payments for any approved fees, costs, settlement administration costs and incentive awards removed from the total, given typical claims rates in BIPA class actions, Class Counsel expects that each Settlement Class Member who makes a valid claim will receive their full \$800 allocation, without any *pro rata* reduction. Additionally, the non-monetary value of the Settlement—ensuring that Woodman’s will comply with BIPA in the future—provides additional value to the Settlement Class.

Under Illinois law, “an attorney is entitled to an award from the fund for the reasonable value of his or her services.” *Ryan*, 274 Ill. App. 3d at 922. Here, the fees and costs requested are 33% of the Settlement Cap and will fairly and equitably compensate Class Counsel. Not only is the request in line with the market value of attorneys’ fees in contingency cases, but the request is also in the lower range of fee awards in BIPA and other class actions. Moreover, it also will compensate Class Counsel for their effort and the risk of bringing a BIPA class action at a time when decisions in BIPA class action cases are being appealed and hotly contested across Illinois.



Courts in Illinois have regularly awarded higher percentages than the 33% of the Settlement Cap requested here. *See Retsky Fam. Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at \*4 (N.D. Ill. Dec. 10, 2001) (“Courts try to approximate the market in determining reasonable attorney’s fees . . . A customary contingency fee would range from 33 1/3% to 40% of the amount recovered.”); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 599 (N.D. Ill. 2011) (“The Court is independently aware that 33 1/3% to 40% (*plus the cost of litigation*) is the standard contingent fee percentages [sic] in this legal marketplace[.]” (emphasis added)). Here, Plaintiffs’ requested fee of 33%, *including costs of litigation*, falls well within—and even below—the range of acceptable class action fees.

The fees and costs requested here also compare favorably with other BIPA cases. For example, in *Sekura v. L.A. Tan Enters., Inc.*, No. 2015-CH-16694 (Ill. Cir. Ct. Cook Cnty. 2016), the court awarded a 40% fee where the BIPA class settlement resulted in each class member being eligible to receive a *pro rata* share of a settlement fund that would have amounted to approximately \$40 per person if each class member had submitted a valid claim. Similarly, in *Zepeda v. Intercontinental Hotels Grp., Inc.*, No. 2018-CH-02140 (Ill. Cir. Ct. Cook Cnty. 2018), the court awarded a 40% fee where the settlement provided each class member being eligible to receive a *pro rata* share of a settlement fund that would amount to approximately \$500 per person *before* deductions for administrative expenses, attorneys’ fees and costs, and an incentive award. Plaintiffs here seek 33% of the Settlement Cap, while providing an estimated \$800 to every valid claimant. Thus, Plaintiffs here seek an award at a *lower* percent than other BIPA cases, even though they are delivering a *larger* benefit to individual Settlement Class Members. Accordingly, an award of 33% of the Settlement for both fees and reimbursable costs, is well within the existing market for fee awards in BIPA class actions, reasonable, and should be approved by this Court.

**3. The 33% Fee Award is Supported by Class Counsel’s Effort.**

The requested 33% fee award is also reasonable based on the work Class Counsel put into this case. In addition to its pre-suit investigation and preparation of the Class Action Complaints, the Motion for Class Certification, and Preliminary Class Certification Motion, Class Counsel had to grapple with a possible dispositive statute of limitations defense raised by Defendant’s counsel, which necessitated additional analysis of BIPA, multiple potentially applicable statutes of limitations, case law and the statute’s legislative history. *See* Klinger Fees Decl. ¶¶ 26–30.

Class Counsel also expended considerable time and resources discussing and negotiating a potential a resolution of the case. Class Counsel dedicated significant time to preparing for and attending mediation, negotiating the finer terms of the Settlement Agreement, drafting and revising related exhibits, and drafting and appearing for the hearing on the Motion for Preliminary Approval. And, Class Counsel will incur additional hours going forward in order to bring this case to final resolution. Specifically, Class Counsel still must continue to monitor the notice and claims administration, prepare the Motion for Final Approval, participate in the Final Approval Hearing, respond to any Class Members’ inquiries and even after Final Approval otherwise ensure that the Settlement is properly administered.

**4. The 33% Fee Award is Well-Supported by the Contingent Risk Assumed by Class Counsel**

The 33% fee award is also reasonable based on the contingent risk assumed by Class Counsel. Class Counsel accepted this litigation on a contingent fee basis, fronting costs and expenses, and accepting the risk that should they be ultimately unsuccessful they would receive no compensation for their work. Klinger Fees Decl. ¶¶ 20–25. Although these risks are inherent in any class action, there are additional unique risks in BIPA class actions.

As described above, Defendant has already informally raised—and Class Counsel already

had to grapple with—one of the unique risks in a BIPA class action: potential dismissal under a statute of limitations argument. Additionally, Woodman’s, like other BIPA class action defendants, was expected to argue that (i) Defendant had not collected “biometric identifiers” or “biometric information” as defined in BIPA; (ii) damage awards should be reduced for due process concerns; (iii) users were adequately informed and provided consent for any biometric collection; and/or (iv) Plaintiffs’ claims were preempted by the Workers Compensation Act. All of these additional arguments are used by other BIPA class action defendants and all could have ended this case or significantly reduced its value.

**B. The Expenses Are Reasonable and Warrant Reimbursement.**

The Parties agreed that Plaintiffs’ counsel would be reimbursed their litigation costs and expenses. Agr. ¶ 8.1. As with attorneys’ fees, Plaintiffs’ counsel who obtain a common fund for a class are entitled to reimbursement of expenses because class members receiving a common fund should contribute to the cost of litigation. *See, e.g., Wendling*, 242 Ill. 2d at 265.

Here, Class Counsel’s expenses were all reasonably incurred in pursuing this litigation. Class Counsel have expended \$8,323.65 in reimbursable litigation expenses related to filing fees, and mediation, with the potential of more expenses yet to come. Klinger Fees Decl. ¶ 33. Class Counsel have reviewed their expense records carefully and determined that the expenses were necessary to the successful prosecution of this case. *Id.* at ¶ 34. These expenses were necessary to prosecute litigation of this size and complexity on behalf of the Settlement Class, to drive resolution, and they are typical of expenses regularly awarded in consumer class actions. *See, id.* Accordingly, Plaintiffs request that the Court approve the reimbursement of Class Counsel’s reasonable litigation expenses.

### **C. The Incentive Award Is Reasonable.**

The Settlement Agreement also provides for an incentive award of \$5,000 each to Plaintiffs Brenna Struck and Tyler Jones for serving as Class Representatives. Agr. ¶ 8.2. Incentive awards “are not atypical in class action cases” as compensation for the class representative’s service to the class and to incentivize others to step forward as future named plaintiffs. *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1992).

Here, Plaintiffs’ participation was critical to the case’s ultimate resolution. Both Ms. Struck’s and Mr. Jones’s willingness to commit time to this litigation and undertake the responsibilities involved in representative litigation resulted in a substantial benefit to the Class and fully justifies the requested incentive award. *See* Klinger Fees Decl. ¶ 35. Moreover, the requested incentive award is consistent with other BIPA class action incentive awards. *See, e.g., Sekura v. L.A. Tan Enters.*, No. 2015-CH- 16694 (Ill. Cir. Ct. Cook Cnty. Dec. 1, 2016) (granting \$5,000 incentive award in BIPA case); *Svagdis*, No. 2017-CH-12566 (Ill. Cir. Ct. Cook Cnty. Jan. 14, 2019) (granting \$5,000 incentive award in BIPA case). Accordingly, Plaintiffs’ request should be granted.

### **VI. CONCLUSION**

Settlement Class Counsel, with the help of Plaintiffs, have made significant benefits—totaling up to \$800 in cash payments per person—available to Settlement Class Members. In return, they seek fees, costs, and service awards well within the range of those regularly approved by Illinois Courts. The fees, costs, and service awards are inherently reasonable, and as such Plaintiffs Brenna Struck and Tyler Jones respectfully request their approval.

Date: April 27, 2021

Respectfully Submitted,

/s/ Gary M. Klinger

Gary M. Klinger, *Esq.*

**MASON LIETZ & KLINGER LLP**

227 W. Monroe Street, Suite 2100

Chicago, IL 60606

Phone: (202) 429-2290

Facsimile: (202) 429-2294

[gklinger@masonllp.com](mailto:gklinger@masonllp.com)

*Attorneys for Plaintiffs & the Putative Class*

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, on oath states that on April 27, 2021, I filed the foregoing **PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS** with the Clerk of the Court using the Illinois E-Filing System, which should further distribute a true and accurate copy of the foregoing to all counsel of record. Additionally, I hereby certify that I served the foregoing document electronically by emailing copies to the below named attorneys at their respective email addresses:

Michael D. Hays, *Esq.*  
Scott J. Helfand, *Esq.*  
Anne Marie Mayette, *Esq.*  
**Husch Blackwell LLP**  
120 S. Riverside Plaza  
Suite 2200  
Chicago, Illinois 60606-4473  
(312) 655-1500  
[michael.hays@huschblackwell.com](mailto:michael.hays@huschblackwell.com)  
[scott.helfand@huschblackwell.com](mailto:scott.helfand@huschblackwell.com)  
[anne.mayette@huschblackwell.com](mailto:anne.mayette@huschblackwell.com)

*/s/ Gary M. Klinger*  
\_\_\_\_\_  
Gary M. Klinger, *Esq.*