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Joseph B. Roesch
7th Judicial Circuit
Sangamon County, IL
2023CH000053

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL DISTRICT
SANGAMON COUNTY, ILLINOIS

CLARENCE SMITH, STARLA SMITH, ANTONIO ENRIQUEZ, MATT DEVINE, MELISSA JOHNSON and ANNIE PORTER, on behalf of themselves and all other persons similarly situated, known and unknown,	)	Case No. 2023 CH 00053
Plaintiffs,	)	Judge Gail L. Noll
v.	)	
KEDPLASMA USA,	)	
Defendant.	)	

PLAINTIFFS' UNOPPOSED MOTION AND MEMORANDUM OF LAW FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

I. Introduction

Plaintiffs Clarence Smith, Starla Smith, Antonio Enriquez, Matt Devine, Melissa Johnson and Annie Porter ("Plaintiffs" or "Settlement Class Representatives") are former plasma donors at one or more of Defendant KEDPlasma USA's ("KED" or "Defendant") Illinois plasma donation facilities. Plaintiffs allege that Defendant violated the Illinois Biometric Information Privacy Act ("BIPA") by utilizing a system which scanned plasma donors' finger(s) as part of a plasma donation process without complying with BIPA's requirements.

Through arm's-length negotiations, the Parties reached a $4,450,000 settlement on behalf of approximately 8,250 members of the proposed settlement class, which resolves all matters between them in the above-captioned Action ("Action"). The Parties have executed a Class Action Settlement Agreement, attached hereto as Exhibit 1 ("Settlement" or "Settlement Agreement"). Because the Settlement is fair, reasonable, and adequate, this Court should grant preliminary approval and authorize Notice to putative Settlement Class Members to inform them of their rights

in accordance with the Settlement Agreement.[1]

II. Legal Background and Procedural History (Ex. 1, Settlement Agreement, § I)[2]

In 2008, Illinois enacted BIPA to regulate "the collection, use, safeguarding, handling, storage, retention, and destruction" of individuals' biometric identifiers and biometric information (hereinafter, "biometric data"). 740 ILCS 14/5(g). The Illinois General Assembly found that the new legislation was necessary for several reasons. First, individuals cannot change their biologically unique identifiers, like fingerprints, and so they have no recourse when those identifiers are compromised. 740 ILCS 14/5(c). Second, an "overwhelming majority" of the public are concerned about use of biometric data tied to finances and other personal information. 740 ILCS 14/5(d). Third, the "full ramifications of biometric technology are not yet fully known." 740 ILCS 14/5(f). BIPA addresses these concerns, in part, by creating a privacy interest in a person's biometric data and giving individuals the right to control when a private entity collects that data. *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶¶ 34-35 (Ill. 2019).

Among other things, BIPA prohibits a private entity from collecting a person's biometric data unless the entity first informs the person, in writing: (1) that it is collecting biometric data; (2) the purpose of the collection; and (3) how long the private entity will keep the person's biometric data. 740 ILCS 14/15(b). The private entity must also obtain the individual's "written release" authorizing collection of the biometric data. *Id.* BIPA further regulates a private entity's possession, storage, and disclosure of biometric data. 740 ILCS 14/15(a), (c), (d), and (e). Private entities face liquidated or actual damages, whichever are higher, for negligent and reckless/intentional violations of the law. 740 ILCS 14/20.

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[1] Capitalized terms used and not otherwise defined herein shall have the meaning set forth in the Settlement Agreement.

[2] Where feasible, citations are in the headings of this Motion to avoid unnecessary multiplication of in-text citations.

On January 24, 2023, Plaintiffs Clarence Smith, Starla Smith, Antonio Enriquez, Matt Devine, and Melissa Johnson, on behalf of themselves and all others similarly situated, filed a Class Action Complaint against Defendant for alleged violations of BIPA (the "*Smith*" Action).

On January 26, 2023, Plaintiff Annie Porter, on behalf of herself and all others similarly situated, filed a Class Action Complaint against Defendant for alleged violations of BIPA (the "*Porter* Action"). The claims related to the alleged unauthorized collection and use of Plaintiff Porter's and other similarly situated plasma donors' fingerprint scans and/or data derived from those fingerprint scans through the alleged use of a donor finger scanning system.

Defendant removed the *Smith* and *Porter* Actions to the United States District Court of the Central District of Illinois on April 5, 2023, and March 23, 2023, respectively. The Parties litigated the *Smith* and *Porter* Actions in federal court for nearly a year, until on December 19, 2023, after months of arm's-length negotiations, the Parties agreed to a term sheet that set forth the material terms of a settlement that resolved all matters between them in the Action. As part of the resolution of the Action, the parties in both the *Smith* and *Porter* Actions stipulated for voluntarily dismissal of the Plaintiffs' claims without prejudice and thereafter refiled their consolidated claims in the Action consisting of a single Class Action Complaint in this Court against KED and Kedrion Biopharma, Inc. ("Kedrion") for alleged violations of BIPA. On March 13, 2024, Plaintiffs filed an Amended Complaint removing Kedrion as a party-Defendant. The Parties fully executed a written Settlement Agreement, attached as Exhibit 1, on March 7, 2024.

The Parties have agreed to this Settlement in recognition that the outcome of the Action is uncertain and that achieving a final result through litigation would require substantial additional risk, discovery, time, and expense.

III. Summary of Settlement Terms

A. Definition of Class Members (Ex. 1, Settlement Agreement, § III)

This Settlement applies to the following proposed Settlement Class, defined as:

> All individuals who scanned their finger at a KEDPlasma donation facility in Illinois as part of a plasma donation process from January 25, 2018 through April 10, 2023 (the "Settlement Class" or "Settlement Class Members").

Defendant estimates there are approximately 8,250 Settlement Class Members. All Settlement Class Members who do not timely and validly exclude themselves from the Settlement shall be bound by the terms of the Settlement.

The Parties have agreed to certification of the Settlement Class for settlement purposes only. Defendant does not consent to certification of the Settlement Class for any purpose other than to effectuate the Settlement.

B. Settlement Fund; Allocation of the Fund; Payments to Settlement Class Members (Ex. 1, Settlement Agreement, § IV.2)

While denying all liability and wrongdoing, Defendant has agreed to pay a Gross Fund of four million, four hundred and fifty thousand dollars ($4,450,000) to settle the claims of Plaintiffs and Settlement Class Members in the Action which is approximately $539.39 per Settlement Class Member prior to deductions from the Gross Fund as contained in this Section. The Gross Fund represents the maximum total amount that Defendant (or any other Releasee/Released Party) shall be obligated to pay under this Settlement (including, but not limited to, all attorneys' fees and costs, service awards, and settlement administration fees), unless the number of Settlement Class Members is greater than 8,250 Settlement Class Members, in which case the Gross Fund shall increase by $539.39 for each additional Settlement Class Member above 8,250 persons.

The term "Net Fund" is the Gross Fund minus the following deductions, which are subject to Court approval: Settlement Class Counsel's attorneys' fees and costs; the Settlement

Administrator's costs; and the Settlement Class Representatives' Service Awards. The Net Fund shall be distributed equally to Settlement Class Members who do not timely and validly exclude themselves from the Settlement. Any Settlement Award Payment checks that remain uncashed after one hundred and twenty (120) days from the date they are issued by the Settlement Administrator shall be deemed void, remain in the Net Fund, and be distributed to Defendant by the Settlement Administrator. Settlement Class Members are not required to submit a claim form to receive payment.

C. Release of Claims (Ex. 1, Settlement Agreement, § IV.3)

Subject to Final Approval by the Court of the Settlement, Settlement Class Members will, upon the Effective Date, release all claims, suits, actions, controversies, demands, and/or causes of action, premised upon statute, contract, common law or otherwise, whether seeking liquidated or actual damages, penalties, specific performance, injunctive relief, attorneys' fees, costs, interest or any other relief, against Defendant KEDPlasma USA and Releasees/Released Parties, including but not limited to Kedrion Biopharma, Inc., that arise out of, relate to or are connected with alleged violations of, or non-compliance with BIPA, as set forth in the operative Class Action Complaint in the Action against Defendant, and/or the alleged scanning, capture, collection, storage, possession, transmission, purchase, receipt through trade and otherwise, sale, lease, trade, profit, disclosure, re-disclosure, dissemination, protection, conversion and/or use of biometric identifiers, biometric information or other biometric data, whether pursuant to BIPA or any other federal, state or local law, including common law, regardless of whether such causes of action or claims are known or unknown, filed or unfiled, asserted or unasserted, and/or existing or contingent

("Released Claims"). All Settlement Class Members are bound by the foregoing release, other than those who timely and validly exclude themselves from the Settlement.

D. Settlement Administration (Ex. 1, Settlement Agreement, § IV.4)

The Parties have selected Analytics Consulting, LLC as the third-party settlement administrator ("Settlement Administrator"). The Settlement Administrator shall be responsible for the establishment of an escrow account for the Gross Fund, providing notice to the Settlement Class, verifying addresses, skip tracing as necessary, communicating with Settlement Class Members, disbursing payments to Settlement Class Members, tax reporting, and other administrative activities contemplated in connection with the Settlement. The Settlement Administrator's costs shall be paid from the Gross Fund.

E. Notice of Class Action Settlement (Ex. 1, Settlement Agreement, Attach. A)

Among other things, Plaintiffs' proposed Notice of Class Action Settlement ("Notice") explains the following to Settlement Class Members: (1) what the Settlement is about; (2) how to receive a payment, request exclusion, or submit an objection; (3) the monetary terms of the Settlement and how individual Settlement Award Payments will be calculated; (4) the amounts to be requested for attorneys' fees, litigation costs, settlement administration, and Service Awards; (5) the Final Approval Hearing details; and (6) how to obtain more information about the Settlement.

F. The Notice Process (Ex. 1, Settlement Agreement, §§ IV.5.b-d, IV.10.b)

The Settlement Administrator will create and establish a Settlement website prior to the distribution of notice to Settlement Class Members. The Settlement website shall be maintained by the Settlement Administrator, provide access to relevant documents including the Court-approved Notice of Class Action Settlement ("Notice") and relevant Court filings, include the contact information for Settlement Class Counsel, and describe how Settlement Class Members

may obtain more information about the Settlement. The Settlement Administrator will thereafter notify Settlement Class Members of their rights by direct mail. Before mailing, the Settlement Administrator will update Settlement Class Members' addresses by running their names and addresses through the U.S. Postal Service's database of verifiable mailing addresses, the National Change of Address database or other comparable database. The front of the envelope containing the Notice will be marked with words identifying the contents as important and time-sensitive documents authorized by the Court. For Settlement Class Members whose Notices are returned as undeliverable without a forwarding address, the Settlement Administrator shall promptly perform a skip trace by running a search in Experian or a similar database to locate an updated address and shall promptly re-mail the Notice to the updated address, if available.

G. Service Awards (Ex. 1, Settlement, § IV.8)

Under the Settlement Agreement, Settlement Class Counsel will request that the Court award the Class Representatives up to $5,000 each as Service Awards for their work in conferring with Class Counsel, filing the lawsuit in their own names on behalf of the proposed Settlement Class, and recovering money for the Settlement Class Members. *See* Declaration of Douglas M. Werman ¶21 (hereafter "Ex. 2, Werman Decl., ¶ __").

H. Attorneys' Fees and Costs (Ex. 1, Settlement, § IV.7)

Under the Settlement Agreement, Settlement Class Counsel may request that the Court award them up to forty percent of the Gross Fund as attorneys' fees, plus their litigation costs.

IV. Preliminary Approval Is Warranted

A. The Proposed Settlement Is Fair, Reasonable, and Adequate

To approve a class settlement, the Court must find it "fair, reasonable, and adequate." *People ex rel. Wilcox v. Equity Funding Life Ins. Co.*, 61 Ill. 303, 316 (1975). In determining

whether a settlement is fair, reasonable, and adequate, courts consider the following factors: "(1) the strength of the case for Plaintiff on the merits, balanced against the money or other relief offered in settlement; (2) the Defendant's ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed." *GMAC Mrtg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 493 (1st Dist. 1992). As explained below, these factors support preliminary approval.

1. Strength of Case Against the Settlement Value

The most important factor in evaluating preliminary approval is confirming that the settlement value is adequate in light of the strength of the case. *Steinberg v. Sys. Software Associates, Inc.*, 306 Ill. App. 3d 157, 170 (1st Dist. 1999); *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990). Plaintiffs alleged that Defendant violated BIPA by collecting, using, and retaining Plaintiffs' and otherdonors' biometric information without first providing written notice or obtaining written consent. 740 ILCS 14/15(a), (b), and (d). The Act provides for $1,000 for each violation, provided Plaintiffs prove the violations were "negligent." 740 ILCS 14/20(1).

The Gross Fund represents a gross recovery of $539.39 per Settlement Class Member prior to deductions for Settlement Class Counsel's attorneys' fees and costs; the Settlement Administrator's costs; and the Settlement Class Representatives' Service Awards. The recovery compares favorably with other BIPA cases that have settled in the plasma collection with typically much larger class sizes. *See Crumpton v. Octapharma Plasma. Inc.*, 19-cv-08402 (N.D. Ill.)($130 allocated per person in a $9.98 million fund for 76,826 class members); *Marsh v. CSL Plasma,*

Inc., 2019-CV-07606 (N.D. Ill.)($132 allocated per person in a $9.9 million fund for 74,821 class members); *Phillips, et al. v. Biolife Plasma, LLC*, 2020 CH 05658 (Cir. Ct. Cook Cty.)(average of $104 allocated per person in a $5.9 million fund for 57,525 people). Outside of the plasma collection context, the Settlement also represents a meaningful monetary recovery compared to other BIPA class settlements that have received final approval including: *Davis, et al., v. Heartland Employment Services, LLC*, No. 19-cv-00680, Dkt. 130 (N.D. Ill. Oct. 25, 2021) (Valderrama, J.) ($5.4 million fund for 11,048 class members for a gross recovery of $490.40 per class member); *Roach v. Walmart, Inc.*, No. 2019-CH-01107 (Cir. Ct. Cook Cnty., Ill. 2020) ($10 million fund for 21,677 class members for a gross recovery of $461.32 per class member); *Thome v. NovaTime Tech., Inc.*, No. 19-cv-06256 (March 8, 2021 N.D. Ill.) ($4.1 million fund for approximately 62,000 class members, for a $66.12 gross recovery); *Figueroa v. Kronos Incorporated*, No. 19-cv-01306, Dkt. 380 (N.D. Ill. Dec. 20, 2022) ($15.2 million fund for approximately 171,643 class members, for a $88.55 gross recovery); *Kusinski v. ADP, LLC*., No. 2017-CH-12364 (Cir. Ct. Cook Cnty. Feb. 10, 2021) ($25 million fund for approximately 320,000 class members, for a $78.12 gross recovery); *Boone, et al. v. Snap, Inc.* No. 2022LA000708 (Cir. Ct. DuPage Cnty. Nov. 22, 2022) ($35 million fund for 3.8 million class members, for a $9.21 gross recovery); *Rivera, et al. v. Google* No. 2019-CH-00990 (Cir. Ct. Cook Cnty. Sept. 28, 2022) ($100 million fund for 5.8 million class members, for a $17.24 gross recovery).

The recovery achieved here is particularly strong considering the significant risks faced by Plaintiffs. For example, Defendant maintained that Plaintiffs' claims are subject to an alternative dispute resolution program that would have subjected those claims to individual resolution in arbitration as opposed to class treatment. Ex. 2, Werman Decl., ¶ 22. Indeed, when this case was pending in federal court, the parties fully briefed Defendant's motion to compel arbitration. The

parties reached a settlement while the motion was pending. While Plaintiffs maintain that the arbitration agreement at issue does not require Plaintiffs to bring the claims at issue in arbitration or waive their right to bring class action claims, these issues were hotly contested and Defendant presented an array of counterarguments. *Id*. If Defendant's motion to compel arbitration had been granted, Plaintiffs would have been required to individually arbitrate their claims which would significantly reduce the likelihood of the parties reaching a class settlement.

Even if Plaintiffs had prevailed on the arbitration issue, Defendant likely would have appealed an order denying the motion to compel arbitration. Furthermore, Plaintiffs faced risk that they would not obtain class certification, which also would have precluded a class recovery. Likewise, Plaintiffs faced risk that Defendant would prevail on a motion for summary judgment. These and other risks informed Plaintiffs' assessment of the strength of the claims. Particularly given these risks, Plaintiffs submit that the settlement is adequate in light of the strength of the case.

2. Defendant's Ability to Pay

Defendant's ability to pay a judgment did not influence the Settlement amount. Ex. 2, Werman Decl., ¶ 26. As a result, this factor is of minimal relevance.

3. Complexity, Length and Expense of Further Litigation

If the litigation had continued, it would have been complex, expensive, and protracted. Defendant denies that it collected biometric information and denies that it violated BIPA. Ex. 2, Werman Decl., ¶ 24. Further, Defendant argued Plaintiffs' claims are subject to an alternative dispute resolution program that would have subjected those claims to individual resolution in arbitration as opposed to class treatment. The Parties would have engaged in lengthy discovery, after which Plaintiffs would have filed a motion for class certification while Defendant likely

would have moved for summary judgment. *Id.* Instead of expensive, complicated, and protracted litigation, this Settlement provides significant monetary relief to Settlement Class Members now. *Id*.

4. Amount of Opposition

The Court can evaluate any opposition to the Settlement at the Final Approval stage after the Notice process is complete. Settlement Class Counsel expects little to no opposition to the Settlement. Ex. 2, Werman Decl., ¶ 26.

5. The Presence of Collusion in Reaching a Settlement

The Parties negotiated the Settlement at arm's-length over months. Ex. 2, Werman Decl., ¶ 28. Counsel for the Parties are experienced in class action litigation. *Id.,* There is no collusion.

6. Reaction of Class Members

The Court can evaluate the reaction of Settlement Class Members at the Final Approval stage after the Notice process is complete. Settlement Class Counsel expects that Settlement Class Members will overwhelmingly support the Settlement. Ex. 2, Werman Decl., ¶ 27.

7. Opinion of Competent Counsel

Settlement Class Counsel believes the Settlement is fair, reasonable, and adequate. Ex. 1, Settlement Agreement, § IV.28; Ex. 2, Werman Decl., ¶ 29. The opinion of counsel supports preliminary approval.

8. Stage of the Proceedings

The Action was resolved at an early stage, which supports preliminary approval. Given the other indicators supporting preliminary approval, this early Settlement is better than a later one because it provides actual relief to Settlement Class Members sooner rather than later. In addition, given that the Parties primarily disagree over legal issues, advancing through the discovery process

would have been unlikely to increase the value of Settlement Class Members' claims. *See AT & T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 350 (N.D. Ill. 2010) ("the focus of this litigation appears to be more on legal than factual issues, and there is no indication that formal discovery would have assisted the parties in devising the Proposed Settlement Agreement").

B. The Settlement Class Meets the Elements for Certification Under 735 ILCS 5/2-801

In Illinois, class certification is governed by statute. 735 ILCS 5/2-801. Under Section 2-801, a class action may be certified where: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interests of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. *Id.* The Settlement Class satisfies these factors and warrants preliminary certification for settlement purposes only.

Numerosity: There are an estimated 8,250 Settlement Class Members. Ex. 1, Settlement Agreement, § III. The Settlement Class is sufficiently large to satisfy the numerosity requirement in 735 ILCS 5/2-801(1). *Kim v. Sussman*, No. 03 CH 07663, 2004 WL 3135348, at *2 (Ill. Cir. Ct. Oct. 19, 2004) ("Although there is no bright line test to determine numerosity, the Illinois courts generally follow the reasoning that greater than 40 parties satisfies numerosity, but less than 25 people is insufficient.") (citation omitted).

Predominance: Common questions in this case include: (1) whether Defendant's plasma donors used a system implicating BIPA; (2) whether Defendant's system collected, stored, and retained plasma donors' "biometric identifiers" and information; (3) whether Defendant obtained informed written consent from Plaintiffs and Settlement Class Members before collecting

biometric identifiers and information; and (4) whether Defendant's alleged violations of BIPA were negligent or reckless. Plaintiffs contend that these uniform factual and legal determinations satisfy 735 ILCS 5/2-801(2). *See Ramirez v. Midway Moving & Storage, Inc.*, 378 Ill.App.3d 51, 55-56 (1st Dist. 2007) (common questions of law and fact predominate where the potential class challenged the defendant's uniform policy.).

Adequacy: The interests of the Class Representatives align with those of the putative Class Members and there is nothing that prevents the Class Representatives from adequately representing the Class Members. *See P.J.'s Concrete Pumping Serv., Inc. v. Nextel West Corp.,* 345 Ill.App.3d 992, 1004 (2d Dist. 2004) ("The test to determine the adequacy of representation is whether the interests of those who are parties are the same as those who are not joined"). In addition, Class Counsel from Werman Salas P.C., Fish Potter Bolanos, P.C., and Schneider Wallace Cottrell Konecky LLP are adequate to represent Settlement Class Members. Werman Salas P.C. has been appointed class counsel in numerous cases – including in contested class certification motions – in BIPA actions and in scores of other actions. Ex. 2, Werman Decl. ¶ 14 and accompanying Firm Resume; *See* Exhibit 3, Declaration of David Fish; *See* Exhibit 4, Declaration of Nathan B. Piller ¶ 7.

Appropriateness: Finally, a class action is an appropriate method for the fair and efficient adjudication of this controversy because the Action alleges that Defendant violated BIPA through its use of a finger scan access system. "Where the first three requirements for class certification have been satisfied, the fourth requirement may be considered fulfilled as well." *Walczak v. Onyx Acceptance Corp.*, 365 Ill.App.3d 664, 679.

V. Conclusion

Because the Settlement makes significant monetary relief available to Settlement Class Members who might have recovered nothing without the Settlement, the Court should grant preliminary approval and enter the proposed Preliminary Approval Order, attached hereto as Exhibit 5.

Dated: March 15, 2024

Respectfully submitted,

/s/ Douglas M. Werman
One of Plaintiffs' Attorneys

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