

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

FILED
ST. CLAIR COUNTY
FEB 28 2022
Marie P. Zim
CIRCUIT CLERK
44

REGINALD LARK, et al.,

Plaintiffs,

v.

McDONALD'S USA, LLC, et al.,

Defendants.

Case No. 17-L-559

Hon. Heinz Rudolf

ALLISON ARTHUR, et al.,

Plaintiffs,

v.

McDONALD'S USA, LLC, et al.,

Defendants.

Case No. 20-L-0891

Hon. Heinz Rudolf

Order

This matter comes before the Court on Plaintiffs' Motion for Attorneys' Fees, Expenses, and Incentive Award. The Court, having considered the materials submitted by Class Counsel in support of final approval of the Settlement Agreement and their request for attorneys' fees, costs and incentive awards, and in response to any timely filed objections thereto, finds the following:

The Settlement Agreement, reached after four years of contentious litigation, establishes a Settlement Fund of up to \$50,000,000 to provide each Settlement Class Member employed at any McDonald's-brand restaurant in Illinois who files a valid, timely claim with a cash payment of either \$190 or \$375-depending on their dates of employment as outlined in the Settlement Agreement-for having their biometrics collected by Defendants in alleged violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, et seq. ("BIPA"). The notice plan-which

includes direct notice by U.S. Mail and email (where available) to all Settlement Class Members, and the creation of the Settlement Website-commenced on December 2, 2021. By the response deadline of February 9, 2022, 33,241 claims were submitted.

Factual Background and Procedural History

Class counsel and the Class Representatives have devoted significant time, effort and resources on behalf of Settlement Class Members in the four-plus years since this litigation first commenced. The litigation of *Lark, et al v. McDonald's USA, LLC, et al.*, No. 17 L559 has been arduous in every respect. The presiding Court at that time appointed retired Magistrate Judge Stephen Williams as a Special Discovery Master. Year 2018 included numerous motions including but not limited to: Motions to Compel, Motion to Stay (pending the outcome of *Rosenbach v. Six Flags Entertainment Corp, et al.*, 2017 IL App (2d) 170317), Interlocutory Appeal, Supplemental Briefings regarding a recent decision in the matter of *Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175.

In January 2019, the Illinois Supreme Court issued its mandate in the *Rosenbach* matter. Over the course of the next two years the contentious litigation continued including but not limited to Plaintiffs filed Motion for Leave to Amend to Add Subclass and Allegations for Reckless Disregard Relating to Defendants' alleged Unlawful Capture and Use of their Minor Employees' Biometric Data. In November 2021, the Parties moved to consolidate the *Lark* and *Arthur* matters, and the Court granted the motion and consolidated the two cases.

The litigation of *Arthur, et al v. McDonald's USA, LLC, et al.*, No. 20 L 891 while not as lengthy, has been complicated in its own way. Over 200 additional Franchisee entities that were not named in the *Lark* matter were added in the *Arthur* litigation. Service of process required the

appointment of 218 Summonses and 73 Alias Summonses for service upon 57 registered agents located all throughout the State of Illinois over the course of several months.

This Court repeatedly granted extensions of Defendants' response deadlines to accommodate the Parties' as the Mediation efforts were moving in a more positive direction. Pending motions including Plaintiffs' filed Motion for Leave to Amend and Defendants' filed Joint Motion to Stay Proceedings were still looming. In September of 2021, this Court appointed and added to the mediator list, Judge Lloyd Cueto (Ret.) to assist the Parties with remaining issues regarding the settlement term sheet. In November 2021, this matter was consolidated with the *Lark* matter before this Court.

The mediation process started as early as year 2019, when the parties first attempted to resolve the *Lark* matter through mediation before Judge Morton Denlow (Ret.). In March of 2019, the mediation was conducted but was ultimately unsuccessful. The Parties continued with their contentious litigation. The Parties second attempt at mediation took place nearly two years later. In January 2021, the Parties retained former U.S. District Court Judge Layn Phillips (Ret.) to serve as the mediator of both the *Lark* and *Arthur* Litigations. The parties acknowledged Judge Phillips was and remains one of the most preeminent and experienced mediators in the country. Full day mediations were conducted with Judge Phillips in March 2021 and again in April 2021. Despite such efforts, the parties had not reached an agreement. The Court encouraged the parties to engage in further negotiations. The Parties continued to engage with the assistance of Judge Phillips over the course of the next few months.

In September 2021, this Court ordered the parties in the *Arthur* Litigation to engage Judge Lloyd Cueto (Ret.) to provide additional guidance on issues regarding potential settlement and the settlement term sheet. The Parties continued to have negotiations with Judges Phillips and Cueto

for several additional weeks. These efforts of the Parties and the mediators culminated in the Settlement Agreement before this Court resolving both the *Lark* and *Arthur* matters. Judge Phillips-widely recognized as one of the nation's foremost mediators-has provided a declaration endorsing this settlement (attached as exhibit 3 to Plaintiffs' Motion for Final Approval) which this Court has examined whereby he articulates the following:

*"The mediation process in these litigation matters, like the litigation matters themselves, was hard fought on both sides. In addition to two all-day virtual mediation sessions, mediation involved numerous teleconferences, emails, and written submissions by both sides for more than six months thereafter. The Settlement is the product of protracted arm's length negotiations among the parties in the litigation***."*

"The Parties were represented by highly skilled and experienced counsel, whose firms are nationally recognized for their work prosecuting and defending large, complex class actions such as this. All counsel were extremely knowledgeable and clearly had spent a considerable effort developing the law and facts in this complex litigation. I believe the Settlement reflects Lead Counsel's well-informed assessment of the interests of the Lead Plaintiffs and the Class."

Pursuant to the Settlement, Class Counsel seek attorneys' fees in the amount of \$18,500,000, which amounts to 37% of the Settlement Fund, plus litigation expenses in the amount of \$173,867.91 (See Affidavit of John J. Driscoll and final approval hearing presentation by Class Counsel). Such a request is within the range of fees approved in other class actions. The Court inquired of Defendants' counsel at the final approval hearing regarding their respective input on whether the fees requested by Class Counsel is fair and reasonable given the work performed

by Class Counsel and the recovery secured on behalf of the Settlement Class Members. Defendants' counsel indicated the request of said fees was fair and reasonable.

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 services which benefitted 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)).

Under the “common fund doctrine” when a party who creates, preserves, or increases the value of a fund in which others have an interest, the party can be reimbursed from that fund for litigation costs, including attorney’s fees. *Scholtens v. Schneider*, 173 Ill. 2d 375, 385, 671 N.E. 2d 657, 662 (1996). 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, Par. 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.

Here, this Court determines that Plaintiffs' attorneys are entitled to fees. Further, the Court should apply the percentage-of-the-fund approach. Said approach has been used in nearly every common fund class action, including every BIPA class action settlement in Illinois to date. The percentage-of-fund approach method in a common fund class settlement (as is the case here) is warranted because such an approach promotes early resolution in the matter, and more closely aligns the interests of the Class Settlement Members and counsel, as counsel are encouraged to seek the greatest amount of relief possible for the class. This approach also reflects the reality that most cases brought on behalf of consumers are taken on a contingency fee basis. *See In re Capital One Tel. Consumer Pro. Act Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (applying the percentage approach because class members would typically negotiate a contingency fee arrangement based on percentage method).

Here, the percentage-of-fund method would most fairly compensate Class Counsel for the vast 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, the substantial risk of non-payment in bringing this litigation, particularly in light of the uncertainty in the law surrounding BIPA outlined earlier in this order, and the significant additional resources that will be dedicated to implementation of this Settlement.

The requested fee award of \$18,500,000 represents 37% of the Settlement Fund. Notably, Illinois circuit courts presiding over BIPA class action settlements have regularly awarded attorneys' fees amounting to 40% of the settlement funds. *See, e.g., Prelipceanu v. Jumio Corp.* No. 18-CH-15883 (Cir. Ct. Cook Cnty., Ill.) (Mullen, J)(granting final approval to 7,000,000 BIPA

class settlement and awarding class counsel 40% of the settlement fund based on a percentage analysis); *Zhirovetskiy v. Zayo Group, LLC*, 2017-CH-09323 (Cir. Ct. Cook Cnty., Ill.) (Flynn, J.) (granting final approval to BIPA class settlement and awarding class counsel 40% of the settlement fund based on a percentage analysis); *Smith v. Pineapple Hospitality Co. et al.*, 18-CH-06589 (Cir. Ct. Cook County, Ill. 2020) (Moreland, J.) (same); *Sekura*, 2016-CH-04945 (same); *McGee v. LSC Commc's*, No. 2017-CH-12818 (Cir. Ct. Cook Cnty., Ill.) (Atkins, J.) (same); *see also, e.g., Willis v. iHeartMediaInc.*, No. 16-CH-02455 (Cir. Ct. Cook Cnty., Ill.) (awarding attorneys' fees and costs of 40% of an \$8,500,000 common fund in a TCPA class settlement).


First, this Court finds that the settlement provides substantial benefits to the Settlement Class, particularly cognizant of the substantial ongoing risk of non-recovery that could result from, among other things, those multiple BIPA appeals currently pending. Second, the Court and Defendants' counsel find the payment fair and reasonable in light of the work performed by Class Counsel throughout the lengthy litigation of this consolidated matter. Specifically, based on the enumerated cases cited here, the Court finds the award of attorneys' fees, costs, and expenses, to be firmly in line with fee requests in similar matters approved by Illinois courts using the percentage-of-fund method as the Court utilizes here.

Third, the Court concludes that the Settlement Agreement was negotiated at arms' length without collusion, and that the negotiation of the attorneys' fees only followed agreement on the settlement benefits for the Settlement Class Members. Fourth, the Court notes that the percentage requested for attorneys' fees here (i.e., 37%), was materially less than the percentage that the Named Plaintiffs agreed to ex ante when retaining Class Counsel (i.e., 45%). Finally, the Court notes that the Class Notice specifically and clearly advised the Settlement Class that Class Counsel

could seek an award in the amount sought. Except as otherwise provided in the Settlement Agreement or herein, the settling parties are to bear their own attorneys' fees and costs.

The Court hereby grants the motion. It is ordered that the forty-three (43) Class Representatives described in Plaintiffs' Motion for Attorneys' Fees, Expenses, and Incentive Award are each awarded (\$2,500); Class Counsel is awarded attorneys' fees in the amount of (\$18,500,000) and reimbursement of expenses in the amount of (\$173,867.91). The fund or settlement administrator, Epiq, is ordered to pay the class settlement representatives by issuing and sending a check by federal express overnight within the next seven (7) days, and to wire the fees and expenses to The Driscoll Firm, LLC within the next seven (7) days of the entry of this order, but no later than 12 noon central time March 7, 2022, using the wiring information previously provided to Epiq. So ordered.

Dated: Monday, February 28, 2022



Circuit Judge Heinz Rudolf