IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLENE FIGUEROA and JERMAINE BURTON, individually and on behalf of all others similarly situated, *Plaintiffs,* v. KRONOS INCORPORATED, a Delaware corporation, *Defendant.*	)	No. 19-cv-01306 Hon. Gary S. Feinerman
QUATISHA MARSHALL and ART ARCANGELO, individually and on behalf of similarly situated individuals, *Plaintiffs,* v. KRONOS INCORPORATED, a Massachusetts corporation, *Defendant.*	)	No. 19-cv-01511 Hon. Gary S. Feinerman

***MARSHALL* PLAINTIFFS' SURREPLY TO *FIGUEROA* PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO TRANSFER, CONSOLIDATE AND APPOINT INTERIM LEAD COUNSEL**

It is unfortunate that Figueroa Counsel would rather attack Marshall Counsel in an attempt to gain sole control of this litigation than work cooperatively for the benefit of Illinois workers affected by Defendant Kronos' conduct. However, Marshall Counsel will not remain silent to an assault which rests on false representations and factual inaccuracies. Marshall Counsel's intention in filing this Surreply is to correct the record distorted by Figueroa Counsel's Reply and provide the Court with a complete picture of the facts of the litigation before it. (Dkt. 82).

Figueroa Counsel accuse Marshall Counsel of contributing "nothing" to BIPA employment litigation. In fact, nothing could be further from the truth. Marshall Counsel pioneered the field's main legal underpinnings and established the viability of pursuing such claims on a class basis against employers and their timekeeping agents. In contrast, Figueroa Counsel ignored the BIPA employment field for *years* because of the perceived strength of employers' procedural defenses to these claims (namely in the form of employment arbitration clauses) and the perceived lack of significant damage awards common to cases with small class sizes. Unable to overcome these threshold hurdles which for years stymied most of the plaintiffs' bar, the Edelson Firm chose to confine its BIPA practice to a small handful of consumer class action cases and failed to even attempt to prosecute BIPA employment cases in earnest before others in the plaintiffs' bar—namely Marshall Counsel—had opened the field.

Marshall Counsel Pioneered BIPA Employment Litigation

Marshall Counsel have pursued the biometric rights of workers relentlessly since their initial involvement in BIPA litigation in 2017, filing many of the earliest BIPA employment cases and formulating theories and strategies of liability and damages which ultimately defeated BIPA defendants' front-line defenses for all Illinois workers and their clients. Indeed, Marshall Counsel was the first to demand BIPA defendants engage in multiple individual arbitrations where there

could be an adjudication on compelling damages theories resulting in substantial individual awards to workers. (*See, e.g.*, Marshall Counsel's 2017 letter in response to arbitration demand).[1] Soon thereafter, class settlements on behalf of workers were achieved in record amounts per class member.[2] Since Marshall Counsel sent the above letter and others like it, very few, if any, BIPA defendants have even attempted to defend BIPA litigation by compelling the enforcement of ostensibly valid arbitration agreements, and workers are now largely free to pursue their claims in a court of law, rather than in an arbitration forum. As a result, the total volume of BIPA litigation has skyrocketed from a small handful of cases pending in 2016 to hundreds of active lawsuits on-going today, the overwhelming majority of which are BIPA employment timekeeping matters like the instant cases.

Marshall Counsel Have Overcome Figueroa Counsel's Own Negative Rulings

Figueroa Counsel are the only attorneys that have had a BIPA class action claim against a biometric timekeeping vendor, such as Kronos, dismissed *with prejudice*. In *Cameron v. Polar Tech Indus., Inc., et al.*, No. 2019-CH-000013 (DeKalb Cty. Ill. Cir. Ct.), Figueroa Counsel was so careless in its attempt to state a claim under Section 15(b) of BIPA against the subject biometric vendor, ADP, LLC, that the court completely disposed of such claim with prejudice.[3] In stark contrast, Marshall Counsel, just two weeks later, were able to undo the negative ruling achieved by Figueroa Counsel. In *Bolds v. Arro Corporation, et al.*, No. 2018-CH-01811 (Cook Cty. Ill. Cir. Ct.), Marshall Counsel successfully stated a BIPA violation against a biometric timekeeping

[1] A redacted copy of Marshall Counsel's September 8, 2017, letter in response to arbitration demand is attached as Exhibit 1.
[2] *See*, e.g., *Svagdis v. Alro Steel Corp*., No. 2017-CH-12566 (Cook Cty. Ill. Cir. Ct.) ($300,000 recovered for class of 250 employees); *Zepeda v. Intercontinental Hotels Group, Inc.*, No. 2018-CH-02140 (Cook Cty. Ill. Cir. Ct.) ($500,000 recovered for class of 1000 employees).
[3] *See* Defendant Kronos' Motion for Leave to File Supplemental Authority, Ex. B (Dkt. 77-2).

vendor, Paycor, Inc., and defeated Paycor, Inc.'s motion to dismiss in its entirety.[4] The *Bolds* ruling achieved by Marshall Counsel constitutes the first – and currently only – ruling in the country in which a court sustained BIPA claims against a biometric timekeeping company (such as Kronos).[5]

With regard to the statute of limitations, Marshall Counsel advanced the ball when Figueroa Counsel dropped it by obtaining the longest period of recovery available under the law. From the outset, Marshall Counsel have insisted that the five-year statute of limitations provided by 735 ILCS 5/13-205 applies to BIPA employment claims. Marshall Counsel's five-year statute of limitations position has since been vindicated by multiple courts. Figueroa Counsel not only did not recognize the clear legal basis providing for such an expansive limitations period, but actively asserted much shorter limitations class periods (e.g., 3 years) in their settlements. (*See*, e.g., *Sekura v. LA Tan Enterprises, Inc.*, No. 2015-CH-16694 (Cook Cty. Ill. Cir. Ct.) (providing for a settlement class period of three years).[6] In comparison, the *Kimpton* settlement achieved by Marshall Counsel thereafter provided a *5-year* settlement period.[7]

Figueroa Counsel's Attacks on Marshall Counsel's Settlements are Disingenuous

Entirely ignoring the settlements reached by Marshall Counsel in *Kimpton* and *Arlo,* which provided then-unprecedented compensation for workers via "true funds" (as defined by Figueroa Counsel), Figueroa Counsel fixate a significant portion of their Reply on the reversionary element of certain of Marshall Counsel's BIPA settlements (Dkt. 82, pp. 3-7). However, these attacks are baseless and disingenuous at best. The McGuire Firm's cases which feature a reversion were filed, litigated, and settled in Illinois state court, where reversions are unquestionably appropriate,

[4] *See* Group Exhibit A to Marshall Plaintiffs' Notice of Supplemental Authority, (Dkt. 81-1).
[5] *Id*.
[6] The *Sekura* Settlement Agreement is attached as Exhibit 2.
[7] The *Kimpton* Settlement agreement is attached as Exhibit 3.

common and supported.[8] None of those settlements received a single objection, and all were finally approved by Circuit Court Judges based on applicable law.

But Figueroa Counsel already knew this, as the Edelson Firm regularly champions reversionary settlements in courts throughout the country, including in the Circuit Court of Cook County and in this Court, when it serves its own financial interest. *See, e.g., Sterk v. Path, Inc*., No. 2015-CH-08609 (Cook Cty. Ill. Cir. Ct. 2015) ($5 million reverting fund, $1.75 million attorneys' fee, minimal claims); *Van Tassell v. United Marketing Group, LLC*, 10-cv-02675 (N.D. Ill. 2014) ($2.9 million reverting fund, $500,000 attorneys' fee, minimal claims); *Jiffy Lube Text Spam Litigation*, 11-MD-02261 (S.D. Cal. 2013) ($34 million reverting fund, $4.75 million attorneys' fee, minimal claims); *Rojas v. Career Education Corp.*, 10-cv-05260 (N.D. Ill 2012) ($20 million reverting fund, $3.5 million attorneys' fee, minimal claims); *Lozano v. 20th Century Fox*, 09-cv-06344 (N.D. Ill. 2011) ($16 million reverting fund, $3.75 million attorneys' fees, minimal claims); *Satterfield v. Simon & Schuster, Inc*. C-06-2893 (N.D. Cal. 2010) ($10 million fully reverting fund, $2.5 million in attorneys' fees, minimal claims).[9]

Figueroa Counsel's Adequacy Issues

Figueroa Counsel take the opportunity in their Reply brief to misleadingly insinuate that a Marshall Counsel attorney engaged in unethical conduct in a hearing before the Seventh Circuit Court of Appeals in *Johnson v. UAL*, No. 19-1785 (7th Cir. 2019); No. 19-A-253 (U.S. Sup. Ct. 2019). This is not so. In reality, no ethical violation occurred, a conclusion reached by the former

[8] *See, e.g., Shaun Fauley, Sabon, Inc., v. Metro. Life Ins. Co.*, 2016 IL App 2d 15023 (Ill. App. 2nd 2016) (affirming final approval of class action settlement involving a reversionary fund).
[9] These settlement agreements are attached hereto as Group Exhibit 4.

head Administrator of the ARDC and corroborated by multiple former federal judges with whom Marshall Counsel consulted—and no order was ever issued to the contrary.[10] [11]

In reality, Figueroa Counsel's own dubious professional circumstances bear on this proceeding and require the Court's attention.[12] Most concerning is Mr. Edelson's representation in a February 2019 sworn declaration that his firm requires distributions from property ***that is encumbered in contentious active litigation*** to meet firm expenses and stay afloat financially:[13]

- "I did not take [a shareholder distribution] in 2018 . . . [and] the [Edelson] Firm experienced a cash shortage at year end[.]" (Ex. 8, Decl. of Jay Edelson, ¶ 6).
- "I not only declined to take a distribution, I had to put personal funds into the [Edelson] Firm to alleviate the cash flow issues." (*Id*.).
- "I cannot pinpoint an exact time when I will again be able to take a distribution and reimburse myself for monies put into the [Edelson] Firm." (*Id*.).
- "The ebbs and flow of my income have existed since the inception of the [Edelson] Firm and during our marriage, our family would often put money into the [Edelson] Firm as needed, and delay distributions." (*Id*.).
- "[In February 2019], I discovered that our joint [bank] account was almost completely depleted . . . the line of credit has been exhausted and . . . I am no longer able to pay my expenses with those funds." (*Id*., ¶ 10).

These recent sworn statements by Mr. Edelson in a proceeding which remains on-going, if true, compromise his firm's ability to adequately represent the class in this case because they cast doubt on the firm's ability to pay for the cost of notice should a class be adversarially certified, and further raise serious questions as to the firm's financial continuity and ability to manage the instant litigation. Moreover, such facts also indicate that the Edelson Firm could soon face financial pressure to reach an early settlement, thereby compromising its ability to genuinely

[10] *See* opinion letter by Mary T. Robinson, the former head Administrator of the Illinois Attorney Registration and Discipline Committee, engaged by Marshall Counsel to assess the ethics of the position taken by the young lawyer at the subject hearing, attached hereto as Exhibit 5, which absolves the young lawyer who was on the receiving end of Judge Easterbrook's comments.

[11] *See* Declaration of Myles McGuire, attached hereto as Exhibit 6, ¶¶ 6-7.

[12] *See* Disqualification Order, and the underlying motion, attached hereto as Exhibit 7.

[13] *See* Declaration of Jay Edelson in support of Emergency Petition for Restraining Order, Preliminary Injunction, to Compel Access to Marital Funds, for an Accounting, and for Other Relief, *In Re: The Marriage Of Edelson and Edelson*, 2018-D-9047 (Cook Cty. Ill. Cir. Ct.), attached hereto as Exhibit 8.

advocate for and protect the interests of the class. Just this summer, in an apparent effort to conserve resources, multiple lawyers from the Edelson Firm attempted to represent Mr. Edelson personally in a contested legal proceeding. Such lawyers were summarily disqualified by the court soon thereafter on ethical grounds.[14]

Likewise, other litigation against Mr. Edelson personally and his firm, adds further uncertainty to his firm's short and long-term ability to serve as adequate interim lead counsel. Mr. Edelson has again expressed concern over the continuity of his business operations in the wake of a defamation lawsuit filed against him and his firm by the law firm of Johnson & Bell, Ltd.—a lawsuit that remains pending years after the dismissal of a failed class action lawsuit filed by the Edelson Firm against Johnson & Bell, Ltd.[15]

In defense of the defamation lawsuit against him and his firm, Mr. Edelson asserted the following to the Circuit Court of Cook County earlier this month:

> "10. Subsequently, in March 2017, Johnson & Bell, Ltd., filed a defamation suit against Edelson PC and against Jay, personally, . . . [alleging that] Edelson PC and Jay have 'engaged in numerous violations of their ethical duties, have illegally abused the process of the courts to further their own self-aggrandizement and have engaged in a self-serving publicity tour spreading their lies and defamatory statements[.]'
>
> 12. [The suit] seeks a judgment for compensatory damages materially in excess of one million dollars, as well as punitive damages.
>
> 13. The potential liability which this suit threatens constitutes a potential *marital* liability which this Honorable Court would have to equitably apportion between [Mr. Edelson and his ex-wife] . . . in the event Johnson & Bell, Ltd., were to prevail."[16] (emphasis in original)

This Court should consider whether collateral litigation involving the Edelson Firm and/or Mr. Edelson personally could impact Figueroa Counsel's ability to, or judgment in, managing the

[14] *See* Exhibit 7.
[15] *See* Complaint by Johnson & Bell against Edelson PC for defamation, attached hereto as Exhibit 9.
[16] The Motion to Disqualify filed by Mr. Edelson's counsel in that matter is attached hereto as Exhibit 10.

instant litigation, particularly since, as Mr. Edelson has put forth in multiple public filings, the financial viability of his firm is contingent on at least two separate legal proceedings.

Ironically, Figueroa Counsel imply that the McGuire Firm is too "small" to prosecute the instant litigation (Dkt. 82, p. 12, FN 6), but both the McGuire and Hart Firms each employ more lawyers than the Zouras Firm proffered by Figueroa Counsel to lead this litigation and have more than sufficient resources to adequately represent the putative class here. And, contrary to Figueroa Counsel's false assertion (Dkt. 82, p. 14), Marshall Counsel and the McGuire Firm in particular have routinely been appointed lead counsel in complex class action litigation on-going in multiple in federal courts, including repeatedly by courts in this District.[17]

Figueroa Counsel's Self-Organization Narratives are Misleading

Only after seeing other firms, mainly Marshall Counsel, gain legal traction in prosecuting BIPA employment class actions did the Edelson Firm even attempt to enter the fray. But playing catch-up and finding clients was no easy task, so the Edelson Firm partnered with the Zouras Firm, an employment law boutique with little to no consumer class action experience but a wide cast of disgruntled workers as clients. Ultimately, the efforts to catch up to Marshall Counsel culminated in Figueroa Counsel's power grab in moving to consolidate the Kronos litigation and attempting to seize control of dozens of related cases through the instant Motion (Dkt. 37).

In response to the Motion, and in an attempt in good faith, Marshall Counsel proposed a leadership structure to Figueroa Counsel which would have permitted all involved Plaintiffs' firms to maintain their clients' economic interests in the BIPA cases that such firms had respectively

[17] *See, e.g., Prather v. Wells Fargo Bank, N.A.*, No. 17-cv-00481 (N.D. Ill. 2019) (McGuire Firm appointed co-lead counsel in litigation resolving class actions in multiple states); *Nelson et al. v. Nissan North Am., Inc.*, No. 17-cv-01114 (M.D. Tenn. 2019) (McGuire Firm appointed lead counsel in litigation resolving class actions on-going in multiple states); *Vergara et al. v. Uber Technologies, Inc.*, No. 15-cv-06942 (N.D. Ill. 2018) (McGuire Firm appointed co-lead counsel in litigation resolving class actions in multiple states).

prosecuted and also receive an equitable share of any settlements with large technology vendors, like Kronos.[18] It is Marshall Counsel's understanding that Figueroa Counsel originally met this proposal with optimism and intended to accept Marshall Counsel's leadership structure, and the parties were in the process of preparing a joint prosecution agreement to such end.[19] However, shortly before such agreement was to be executed, this Court inadvertently entered an order granting Figueroa Counsel's Motion for interim lead counsel. (Dkt. 55). Even though such order was rapidly corrected by this Court (Dkt. 56), Figueroa Counsel, emboldened by what they perceived as the Court "showing its hand," rejected Marshall Counsel's proposal immediately thereafter, which was seemingly agreeable to all counsel only days prior.[20]

Instead, Figueroa Counsel determined they would not be required to work with Marshall Counsel and proceeded to make unreasonable demands on Marshall Counsel, which effectively included complete surrender of control of all of Marshall Counsel's BIPA employment cases, including many cases which did not even involve Kronos. Figueroa Counsel knew their unreasonable counterproposal would be unacceptable to Marshall Counsel because it would have required Marshall Counsel and all other BIPA counsel to effectively abdicate their obligations to their clients and sacrifice all control and economic interest in their respective cases to Figueroa Counsel. In reality, all alleged efforts by Figueroa Counsel to work "cooperatively" with Marshall Counsel have been little more than a charade, as demonstrated by both the uncooperative tone and factual liberties taken in Figueroa Counsel's Reply Brief.

[18] *See* McGuire Declaration, Ex. 6, ¶ 2.
[19] *Id.*, ¶ 3.
[20] *Id.*, ¶¶ 4-5.

CONCLUSION

Marshall Counsel have the necessary judgment, experience and resources to vigorously prosecute this litigation and bring it to successful conclusion. Despite the negative and uncooperative tone taken by Figueroa Counsel, and the unfortunate need for Marshall Counsel to respond thereto, Marshall Counsel remain able – as they have been throughout this litigation – to work cooperatively with all plaintiffs' counsel to advocate for the best interests of the class. This Court should appoint Marshall Counsel as interim lead counsel or, alternatively, should appoint Myles McGuire or Steven Hart, on the one hand, and Jay Edelson or James Zouras, on the other hand, as co-lead counsel.

Dated: September 16, 2019

Respectfully Submitted,

QUATISHA MARSHALL and ART ARCANGELO, individually and on behalf of a class of similarly situated individuals

By: /s/ Myles McGuire
One of Plaintiffs' Attorneys

Myles McGuire
Evan M. Meyers
David L. Gerbie
Jad Sheikali
McGUIRE LAW, P.C.
55 West Wacker Drive, 9th Fl.
Chicago, Illinois 60601
Tel: (312) 893-7002
mmcguire@mcgpc.com
emeyers@mcgpc.com
dgerbie@mcgpc.com
jsheikali@mcgpc.com

Counsel for Plaintiffs Quatisha Marshall, Art Arcangelo, and the putative class members

CERTIFICATE OF SERVICE

I hereby certify that, on September 16, 2019, I caused the foregoing *Marshall Plaintiffs' Surreply to Figueroa Plaintiffs' Reply in Support of Motion To Transfer, Consolidate and Appoint Interim Lead Counsel* to be electronically filed with the Clerk of the Court using the CM/ECF system. A copy of said document will be electronically transmitted to all counsel of record.

/s/ Jad Sheikali