

**IN THE CIRCUIT COURT OF DUPAGE COUNTY
EIGHTEENTH JUDICIAL CIRCUIT**

DAVID BAMBERG, *individually and on
behalf of all others similarly situated,*

Plaintiff,

v.

DYNAMIC MANUFACTURING, INC.,

Defendant.

Case No. 2023LA000015

Judge: Hon. Timothy McJoynt

**DECLARATION OF PHILIP L. FRAIETTA IN SUPPORT OF PLAINTIFF'S
UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

I, Philip L. Fraietta, declare as follows:

1. I am a Partner at Bursor & Fisher, P.A., counsel of record for Plaintiff in this action. I make this declaration in support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement, filed herewith. I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, could and would competently testify thereto under oath.

2. I am a member in good standing of the bar of this Court and a member of the bar in good standing of the New York, New Jersey, Illinois, and Michigan Bars; the United States District Courts for the Southern District of New York, Eastern District of New York, Northern District of New York, Western District of New York, Central District of Illinois, District of New Jersey, Eastern District of Michigan, and Western District of Michigan; and the United States Court of Appeals for the Second, Third, Sixth, and Ninth Circuits.

3. Attached hereto as **Exhibit 1** is a true and correct copy of the Parties' Class Action Settlement Agreement, and the exhibits attached thereto.

4. Prior to filing this Action, Plaintiff filed a similar putative class action against

Defendant. The material allegations of that Complaint were that Defendant possessed, collected, stored, and used – without first providing notice, obtaining informed written consent or publishing data retention policies – the fingerprints and associated personally identifying information of hundreds of its employees (and former employees), who were required to “clock in” with their fingerprints, in violation of the BIPA, 740 ILCS 14/1 *et seq.* Defendant has denied Plaintiff’s allegations.

5. From the outset of the case, the Parties engaged in settlement discussions, including informally exchanging relevant information surrounding the alleged claims.

6. Given that the information exchanged would have been, in large part, the same information produced in formal discovery related to issues of class certification and summary judgment, the Parties had sufficient information to assess the strengths and weaknesses of the claims and defenses.

7. On December 27, 2022, the Parties agreed on all material terms of a class action settlement and executed a term sheet.

8. On January 6, 2023, Plaintiff dismissed his individual action against Defendant. Thereafter, he filed this case in this Court, which the Parties agree is an appropriate venue for Plaintiff’s and the Settlement Class’s claims under the BIPA against Defendant.

9. Thereafter, the Parties drafted and executed the Settlement Agreement and related documents. The Settlement Agreement was fully executed on February 27, 2023.

10. The resulting Proposed Settlement of up to \$1,850,400 secures extraordinary relief for the class. Based on Defendant’s records the proposed Settlement Class includes 2,313 individuals used a finger scan timekeeping system in connection with their employment with or assignment to Defendant from February 3, 2016 through December 27, 2022, and who do not

timely opt-out of the settlement.

11. Pursuant to the terms of the Proposed Settlement, every Settlement Class Member who submits a timely, simple, one page Claim Form approved by the Settlement Administrator, will receive a portion of the Gross Settlement Amount – which proposed Class Counsel estimates will be approximately \$514 – unless he or she excludes him or herself from the Settlement Agreement ¶¶ 46-47, 52.

12. A copy of the firm resume of Bursor & Fisher, P.A. is attached hereto as **Exhibit 2**. Bursor & Fisher, P.A. is well suited to continue to represent Plaintiff and Settlement Class in this matter

13. My firm, Bursor & Fisher, P.A., has extensive experience litigating class actions of similar size, scope, and complexity to the instant action. We were appointed Class Counsel in similar employee fingerprint BIPA actions such as *Jenkins, et al. v. Charles Industries, LLC*, Case No. 2021L001047 (Cir. Ct. DuPage Cnty.); *Suren, et al. v. DSV Solutions, LLC*, Case No. 2021CH000037 (Cir. Ct. DuPage Cnty.); *Landreth v. Verano Holdings LLC, et al.*, Case No. 2020CH06633 (Cir. Ct. Cook Cnty.); *Isaacson v. Liqui-Box Flexibles, LLC, et al.*, Case No. 2021CH000099 (Cir. Ct. Will Cnty.); and *Sahlin v. Hospital Housekeeping Systems, LLC*, Case No. 2021L28 (Cir. Ct. Williamson Cnty.). We were also appointed Class Counsel in other BIPA action concerning face scanning, including *Frederick v. ExamSoft Worldwide, Inc.*, Case No. 2021L001116 (Cir. Ct. DuPage Cnty.); and *Rivera v. Google LLC*, Case No. 2019CH00990 (Cir. Ct. Cook Cnty.). We are also lead counsel in over 20 BIPA putative class actions currently pending in Illinois, where we have achieved seminal victories regarding the interpretation of the BIPA. *See, e.g., Mora v. J&M Plating, Inc.*, 2022 IL App (2d) 210692 (holding BIPA § 15(a) requires establishment of retention schedule at first moment of possession in case of first

impression).

14. We have also been appointed Class Counsel in a number of state-law based privacy class actions in the past few years. *See, e.g., Fischer v. Instant Checkmate LLC*, 2022 WL 971479 (N.D. Ill. Mar. 31, 2022) (certifying class for claims pursuant to the Illinois Right of Publicity Act); *Edwards v. Hearst Communications, Inc.*, Case No. 15-cv-03934 (S.D.N.Y.) (\$50 million class wide settlement); *Ruppel v. Consumers Union of United States Inc.*, Case No. 16-cv-02444 (S.D.N.Y.) (\$16.375 million class wide settlement); *Moeller v. Advance Magazine Publishers, Inc. d/b/a Condé Nast*, Case No. 15-cv-05671 (S.D.N.Y.) (\$13.75 million class wide settlement); *Taylor v. Trusted Media Brands, Inc.*, Case No. 16-cv-01812 (S.D.N.Y.) (\$8.225 million class wide settlement); *Moeller v. American Media, Inc.*, Case No. 16-cv-11367 (E.D. Mich.) (\$7.6 million class wide settlement); *Kokoszki v. Playboy Enterprises, Inc.*, Case No. 19-cv-10302 (E.D. Mich.) (\$3.85 million class wide settlement). Notably, in *Hearst*, we secured a victory on summary judgment for the named plaintiff. *See Boelter v. Hearst Commc'ns, Inc.*, 269 F. Supp. 3d 172 (S.D.N.Y. 2017).

15. In addition, my firm has also been recognized by courts across the country for its expertise. (*See Ex. B*); *see also Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. 2014) (Rakoff, J.) (“Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. . . . The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in five [now six] class action jury trials since 2008.”); *Williams v. Facebook, Inc.*, Case No. 3:18-cv-01881, ECF No. 51 (N.D. Cal June 26, 2018) (appointing Bursor & Fisher class counsel to represent a putative nationwide class of all persons who installed Facebook Messenger applications and granted Facebook permission to access their contact list).

16. Moreover, my firm has served as trial counsel for class action plaintiffs in six jury trials and has won all six, with recoveries ranging from \$21 million to \$299 million. Most recently, in May 2019, we secured a jury verdict for over \$267 million in a Telephone Consumer Protection Act (“TCPA”) case in the Northern District of California. *See Perez v. Rash Curtis & Associates*, 2020 WL 1904533 (N.D. Cal. Apr. 17, 2020). During the defendant’s appeal of the verdict, the case was settled for \$75.6 million, the largest settlement in the history of the TCPA.

17. The Parties agreed to the terms of the Settlement through experienced counsel who possessed all the information necessary to evaluate the case, determine all the contours of the proposed class, and reach a fair and reasonable compromise after negotiating the terms of the Settlement at arm’s-length.

18. Plaintiff and proposed Class Counsel recognize that despite our belief in the strength of Plaintiff’s claims, and Plaintiff’s and the Class’s ability to ultimately secure a favorable judgment at trial, the expense, duration, and complexity of protracted litigation would be substantial and the outcome of trial uncertain.

19. Plaintiff and proposed Class Counsel are also mindful that absent a settlement, the success of Defendant’s various defenses in this case could deprive the Plaintiff and the Settlement Class Members of any potential relief whatsoever. Defendant is represented by highly experienced attorneys who have made clear that absent a settlement, they were prepared to continue their vigorous defense of this case, including by moving for summary judgment after discovery. Plaintiff and Class Counsel are also aware that Defendant would have continued to challenge liability, as well as assert a number of defenses, including but not limited to whether Defendant actually possessed biometric information or biometric identifiers or whether Plaintiff is entitled to damages for his BIPA claims. *Cothron v. White Castle System, Inc.*, 2023 IL

128004 ¶ 42 (noting damages under BIPA are “discretionary rather than mandatory”).¹ If successful, these defenses would result in a substantial portion of the proposed Settlement Class Members receiving no payment or relief whatsoever.

20. Looking beyond trial, Plaintiff is also keenly aware that Defendant could appeal the merits of any adverse decision, and that in light of the statutory damages in play it would argue – in both the trial and appellate courts – for a reduction of damages based on due process concerns.

21. Plaintiff and proposed Class Counsel believe that the relief provided by the settlement weighs heavily in favor of a finding that the settlement is fair, reasonable, and adequate, and well within the range of approval.

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

Executed March 15, 2023 in New York, New York.



Philip L. Fraietta

Filed by : Carl Malmstrom, Wolf Haldenstein Adler Freeman & Herz LLC, Attorney No. 285105 ; 111 W. Jackson Blvd., Suite 1700, Chicago, IL 60604

¹ On February 2, 2023—after the Terms Sheet was signed by the Parties but before the filing of this Motion and the execution of the full Settlement Agreement—the Illinois Supreme Court decided *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801. *Tims* held a five-year statute of limitations applies to all BIPA claims. Although this decision turned out favorably for Plaintiff and the putative Class, the risk that this decision would be averse to Plaintiff and the putative Class factored heavily into the Parties’ settlement negotiations.

Similarly, on February 17, 2023—after the Terms Sheet was signed by the Parties but before the filing of this Motion and the execution of the full Settlement Agreement— the Illinois Supreme Court decided *Cothron*. *Cothron* held a separate claim accrues under BIPA § 15(b) “each time a private entity scans or transmits an individual’s biometric identifier or information.” *Cothron*, 2023 IL 128004 ¶ 1. Again, although this decision turned out favorably for Plaintiff and the putative Class, the risk that this decision would be averse to Plaintiff and the putative Class factored heavily into the Parties’ settlement negotiations.