

**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

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Dated: March 15, 2023

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**Pro Hac Vice Application Forthcoming*

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INTRODUCTION

In this putative class action, Plaintiff David Bamberg (“Plaintiff”) alleges that Defendant Dynamic Manufacturing, Inc. (“Defendant”) (Plaintiff and Defendant are collectively referred to as the “Parties”) violated Illinois Biometric Information Privacy Act (“BIPA”), 740 ILCS 14/15(a) and 14/15(b) by requiring him and its other Illinois workers to “clock” in and out using their fingerprints. Defendant denies Plaintiff’s allegations. After extensive negotiations spanning over many months, the Parties have reached a proposed settlement of up to \$1,850,400, memorialized in their Settlement Agreement and Release (the “Settlement” or “Agreement”), from which each of the approximately 2,313 Settlement Class Members who file a claim will receive an estimated cash payment of approximately \$514. If approved, the Settlement will bring certainty, closure, and significant and valuable relief for individuals to what otherwise would likely be contentious and costly litigation regarding Defendant’s alleged unlawful collection, use and storage of individuals’ biometric identifiers and/or biometric information.

Plaintiff now seeks preliminary approval of the Settlement, certification of a settlement class, appointment of class counsel, and approval of the proposed form and method of class notice. This memorandum describes in detail the reasons why preliminary approval is in the best interest of the class and is consistent with 735 ILCS 5/2-801. As discussed in more detail below, the most important consideration in evaluating the fairness of a proposed class action settlement is the strength of Plaintiff’s case on the merits balanced against the relief obtained in the settlement. *See Steinberg v. 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); *see also Am. Intn’l Grp.*,

Inc., et al. v. ACE INA Holdings, et al., 2012 WL 651727 (N.D. Ill. Feb. 28, 2012).¹ While Plaintiff believes he could secure class certification and prevail on the merits at trial, success is not guaranteed, particularly given the uncertainty in the law surrounding BIPA, and Defendant is prepared to vigorously defend this case and oppose certification of a litigated class. The terms of the Settlement, which include a Gross Settlement Amount of up to \$1,850,400, providing Settlement Class Members with meaningful cash compensation, meet and exceed the applicable standards of fairness. Accordingly, the Court should preliminarily approve the Settlement so that Settlement Class Members can receive notice of their rights and the claims administration process may begin.

FACTUAL AND PROCEDURAL BACKGROUND

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.* See Declaration of Philip L. Fraietta (“Fraietta Decl.”) ¶ 4.

From the outset of that case, the Parties engaged in settlement discussions, including informally exchanging relevant information surrounding the alleged claims. See Fraietta Decl. ¶ 5. Over the next several months, counsel for the Parties negotiated this Settlement, reached agreement on all material terms of a class action settlement, and executed a term sheet. *Id.* ¶ 7.

¹ Section 2-801 is modeled after Rule 23 of the Federal Rules of Civil Procedure and, therefore, “federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois.” *Avery v. State Farm Mut. Ins. Co.*, 216 Ill. 2d 100, 125 (2005).

On January 6, 2023, Plaintiff dismissed his individual action against Defendant. Thereafter, Plaintiff filed this case in this Court, which both Parties agree is an appropriate venue for Plaintiff's and the Settlement Class's claims under the BIPA against Defendant. *Id.* ¶ 8. Thereafter, the Parties drafted and executed the Settlement Agreement and related documents which are submitted herewith. *Id.* ¶ 9. The Parties have conferred and have decided that given the parties' agreement to resolve the case, Defendant will not file a responsive pleading at this time unless the Court denies the preliminary approval motion for any reason.

TERMS OF THE SETTLEMENT

The key terms of the Settlement, attached to the Fraietta Declaration as **Exhibit 1**, are briefly summarized as follows:

A. Class Definition

The "Settlement Class" is defined as:

All individuals who worked or are currently working for Defendant in the State of Illinois who allegedly had their alleged Biometric Identifiers and/or Biometric Information collected, captured, stored, possessed, received, transmitted, converted, or otherwise obtained or disclosed by Defendant, its agents, vendors, or payroll providers in connection with the Timekeeping System without first executing a written release from February 3, 2016 to December 27, 2022, and who do not timely opt-out of the settlement.²

Agreement ¶ 43-44. According to Defendant's records, there are approximately 2,313 people in the Settlement Class. Fraietta Decl. ¶ 10.

² Excluded from the Settlement Class are all persons who timely and validly elect to exclude themselves from the Settlement Class, the Court and staff to whom this case is assigned, and any member of the Court's or staff's immediate family.

B. Monetary And Prospective Relief

Defendant will agree to fund a settlement of up to \$1,850,400, from which each Settlement Class Member who submits a timely, simple, one page Claim Form approved by the Settlement Administrator, will receive a portion of the settlement fund. Agreement ¶¶ 47, 52. Each Settlement Class Participant (*i.e.*, each Settlement Class Member who does not timely and otherwise validly exclude himself or herself and who timely completes and submits a valid Claim Form) shall be entitled to a payment in the amount of 1/2,313 of the Net Settlement Amount, which proposed Class Counsel estimates is roughly \$514. *Id.* ¶¶ 27, 46-47, 52; *see also* Fraietta Decl. ¶ 11.

C. Release

In exchange for the relief described above, Defendant and each of its related and affiliated entities as well as all “Released Parties,” as defined at Agreement ¶ 35, will receive a full release of any and all claims related to the alleged capture, collection, storage, possession, transmission, conversion, disclosure, redisclosure, dissemination, transmittal, conversion, and/or other use of biometric identifiers and/or biometric information, including, but not limited to, any related statutory claims related to the use of the Timekeeping System (as defined in the Agreement). *See id.* ¶¶ 33, 54.

D. Notice And Administrative Expenses

The cost of sending the Notice set forth in the Agreement and any other notice as required by the Court, as well as all costs of administration of the Settlement will be paid from the Gross Settlement Amount. Agreement ¶ 25.

E. Incentive Award

In recognition of his efforts on behalf of the Settlement Class, Defendant has agreed that Plaintiff may receive, subject to Court approval, an incentive award of up to \$5,000 from the

settlement fund, as appropriate compensation for his time and effort serving as Class Representative and as a party to the Action, subject to Plaintiff's execution of a general release of claims. Defendant will not oppose any request limited to this amount. *Id.* ¶ 25, 77.

F. Attorneys' Fees, Costs, And Expenses

Defendant has agreed that an award of reasonable attorneys' fees and payment of costs and expenses to Class Counsel in this Action will be paid from the Gross Settlement Amount, in an amount to be approved by the Court. *Id.* ¶¶ 74-75. Class Counsel has agreed to petition the Court for attorneys' fees, costs, and expenses of no more than 35% of the Gross Settlement Amount. *Id.*

ARGUMENT

I. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

Courts review proposed class action settlements using a well-established two-step process. CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS § 11.25, at 38-39 (4th ed. 2002) ("NEWBERG"); *see also, e.g., Kaufman v. Am. Express Travel Related Servs. Co.*, 264 F.R.D. 438, 447 (N.D. Ill. 2009); *GMAC Mortgage Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 492 (1st Dist. 1992); *Shawn Fauley, Sabon, Inc. v. Metro Life Ins. Co.*, 2016 IL App (2d) 150236, ¶¶ 4, 7, 15. The first step is a preliminary pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." NEWBERG § 11.25, at 38-39; *Armstrong v. Board of Sch. Dirs. Of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds*; *Sabon*, 2016 IL App. (2d) 150236, ¶ 4. The preliminary approval hearing is not a fairness hearing, but rather a hearing to ascertain whether there is any reason to notify the class members of the proposed settlement based on the written submissions and informal presentation from the settling parties. MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2002). If the Court finds the settlement proposal "within the range of possible

approval,” the case proceeds to the second step in the review process: the final approval hearing. NEWBERG § 11.25, at 38-39.

Because the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide complete victory, given that parties to a settlement “benefit by immediately resolving the litigation and receiving some measure of vindication for [their] position[s] while foregoing the opportunity to achieve an unmitigated victory.” *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (internal quotations and citation omitted); *GMAC*, 236 Ill. App. 3d at 493 (“The court in approving [a class action settlement] should not judge the legal and factual questions by the same criteria applied in a trial on the merits”). There is a strong judicial and public policy favoring the settlement of class action litigation, and such a settlement should be approved by the Court after inquiry into whether the settlement is “fair, reasonable, and adequate.” *Quick v. Shell Oil Co.*, 404 Ill. App. 3d 277, 282 (3d Dist. 2010); *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996). “Although this standard and the factors used to measure it are ultimately questions for the fairness hearing that comes after a court finds that a proposed settlement is within approval range, a more summary version of the same inquiry takes place at the preliminary phase.” *Kessler v. Am. Resorts Int’l.*, 2007 WL 4105204, at *5 (N.D. Ill. Nov. 14, 2007) (citing *Armstrong*, 616 F.2d at 314).

The Settlement represents a fair and reasonable resolution of this dispute and is worthy of Notice to and consideration by the individuals in the Settlement Class. It will provide significant financial relief to Settlement Class Members as compensation for their Released Claims and will relieve the Parties of the burden, uncertainty, and risk of continued litigation.

The factors ultimately to be considered by a court in determining the fairness, reasonableness, and adequacy of a settlement are: “(1) the strength of the case for the plaintiffs on the merits, balanced against the money or other relief offered in the 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.” *City of Chicago*, 206 Ill. App. 3d at 972; *see also Armstrong*, 616 F.2d at 314. Of these considerations, the first is the most important. *Steinberg*, 306 Ill. App. 3d at 170; *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).

A preliminary application of these factors to this case demonstrates that the proposed settlement is fair, reasonable, and adequate.

A. The Settlement Agreement Provides Substantial Relief To The Settlement Class, Particularly In Light Of The Uncertainty Of Prevailing On The Merits

As to the first factor, the Settlement in this case provides substantial material benefits to the Settlement Class: each Settlement Class Member will receive an estimated cash payment of approximately \$514 after submitting a timely, simple, one page Claim Form approved by the Settlement Administrator.³ Agreement ¶¶ 46-47, 52; *id.* Ex. B; Fraietta Decl. ¶ 11.

While Plaintiff believes he would likely prevail on his claims, he is also aware that Defendant denies the material allegations of the Complaint and intends to pursue several legal and factual defenses, including but not limited to whether Defendant actually possessed

³ The \$514 figure is based upon an estimate of the administrative expenses provided by the Settlement Administrator.

biometric information or biometric identifiers and or whether Plaintiff is entitled to damages for his BIPA claims. Fraietta Decl. ¶¶ 18-20; *see also Cothron v. White Castle System, Inc.*, 2023 IL 128004 ¶ 42 (noting damages under BIPA are “discretionary rather than mandatory”).⁴ If successful, these defenses would result in a substantial portion of, or all of, the proposed Settlement Class receiving no payment or relief whatsoever. Fraietta Decl. ¶ 19. Thus, the unsettled nature of several potentially dispositive threshold issues in this case poses a significant risk to Plaintiff’s claims and will add to the length and costs of continued litigation. Taking these realities into account and recognizing the risks involved in any litigation, the relief available to each Settlement Class Member in the Settlement represents a truly excellent result for the Settlement Class.

In addition to any defenses on the merits Defendant would raise, should litigation continue Plaintiff would also be required to prevail on a class certification motion, which would be highly contested and for which success is certainly not guaranteed. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) (“Settlement allows the class to avoid the inherent risk, complexity, time and cost associated with continued litigation”) (internal citations omitted). “If the Court approves the [Settlement], the present lawsuit will come to an end and

⁴ 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.

[Settlement Class Members] will realize both immediate and future benefits as a result.” *Id.* Approval would allow Plaintiff and the Settlement Class Members to receive meaningful and significant payments now, instead of years from now or never. *See id.* at 582.

In addition, the fairness, reasonableness, and adequacy of the instant Settlement are supported by previously approved settlements, which provide less value than that achieved for the class here. *See, e.g., Prelipceanu v. Jumio Corp.*, Case No. 2018-CH-15883 (Ill. Cir. Ct. Cook County July 21, 2020) (approving BIPA settlement with expected payout of less than \$20 per class member); *Sekura v. L.A. Tan Enterprises, Inc.*, Case No. 2015-CH-16694 (Ill. Cir. Ct. Cook County Dec. 1, 2016) (approving BIPA settlement with expected payout of approximately \$40-150 per class member); *see also, e.g., Marshall v. Lifetime Fitness, Inc.*, 2017-CH-14262 (Cir. Ct. Cook Cty.) (paying claimants \$270 each in addition to credit monitoring).

This result is exceptional in comparison to other BIPA or data privacy cases—and is certainly fair, reasonable, and adequate and warrants Court approval.

B. Defendant’s Ability To Pay

The second factor that can be considered by the Court is the Defendant’s ability to pay the settlement sum. Defendant’s financial standing has not been placed at issue here.

C. Continued Litigation Is Likely To Be Complex, Lengthy, And Expensive

In absence of settlement, it is certain that the expense, duration, and complexity of the protracted litigation that would result would be substantial. Not only would the Parties have to undergo significant motion practice before any trial on the merits is even contemplated, but evidence and witnesses from throughout the State of Illinois and beyond would have to be assembled for any trial. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal both any decision on the merits as well as on

class certification. As such, the immediate and considerable relief provided to the Settlement Class under the Settlement Agreement weighs heavily in favor of its approval compared to the inherent risk and delay of a long and drawn-out litigation, trial, and appeal. Protracted and expensive litigation is not in the interest of any of the Parties or Settlement Class Members.

D. There Has Been No Opposition To The Settlement

While this factor is best examined after notice has been provided to the class, there is presently no known opposition to the Settlement. Thus, this factor weighs in favor of approval.

E. The Settlement Was The Result Of Arm's-Length Negotiations Between The Parties After A Significant Exchange Of Information

There is an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's-length negotiations. NEWBURG § 11.42; *see also Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 21 (finding no collusion where there was “no evidence that the proposed settlement was not the product of ‘good faith, arm's-length negotiations’”). Here, the Settlement was reached only after arm's-length negotiations between counsel for the Parties. Fraietta Decl. ¶¶ 6-7. Moreover, negotiations began only after an exchange of information regarding the size and composition of the Settlement Class. *Id.* ¶¶ 5-6. Such an involved process underscores the non-collusive nature of the proposed Settlement. Finally, given the fair result for the Settlement Class in terms of the monetary and prospective relief, it is clear that this Settlement was reached as a result of good-faith negotiations rather than any collusion between the Parties. Accordingly, this factor weighs in favor of preliminary approval.

F. The Reaction Of The Settlement Class

Like factor number four, undersigned counsel is aware of no opposition to the Settlement, and due to the strength of this Settlement and the amount of the award that each Settlement Class Member will receive, Plaintiff expects little to no opposition to the Settlement by any Settlement

Class Member in the future. Plaintiff approves of the Settlement and believes that it is a fair, reasonable, and adequate settlement in light of the defenses raised by Defendant and the potential risks involved with continued litigation.

G. The Settlement Agreement Has Support Of Experienced Proposed Class Counsel

Proposed Class Counsel believes that the proposed Settlement is in the best interest of the Settlement Class Members because the Settlement Class Members will be provided an immediate payment instead of having to wait for lengthy litigation and any subsequent appeals to run their course. Further, due to the defenses that Defendant has indicated that it would raise should the case proceed through litigation—and the resources that Defendant has committed to defend and litigate this matter—it is possible that the Settlement Class Members would receive no benefit whatsoever in the absence of this Settlement. Given proposed Class Counsel’s extensive experience litigating similar class action cases in federal and state courts across the country, including other BIPA cases, this factor also weighs in favor of granting preliminary approval. *See Fraietta Decl.* ¶¶ 12-15, Ex. 2 (firm resume); *see also GMAC*, 236 Ill. App. 3d at 497 (finding that the court should give weight to the fact that class counsel supports the class settlement in light of its experience prosecuting similar cases).

H. The Parties Exchanged Information Sufficient To Assess The Adequacy Of The Settlement

The eighth factor is structured to permit the Court to consider the extent to which the court and counsel were able to evaluate the merits of the case and assess the reasonableness of the settlement. *City of Chicago*, 206 Ill. App. 3d at 972. Here, the Parties exchanged information regarding the facts and size of the class, and thoroughly investigated the facts and law relating to Plaintiff’s allegations and Defendant’s defenses. *Fraietta Decl.* ¶¶ 5-7. Accordingly, this factor also weighs in favor of preliminary approval.

II. THE PROPOSED CLASS NOTICE SHOULD BE APPROVED

Under 735 ILCS 5/2-803, the Court may provide class members notice of any proposed settlement so as to protect the interests of the class and the parties. *See Cavoto v. Chicago Nat. League Ball Club, Inc.*, 2006 WL 2291181, at *15 (1st Dist. 2006) (collecting authorities and noting that “section 2-803 makes it clear that the statutory requirement of notice is not mandatory”). Notice must be provided to absent class members to the extent necessary to satisfy requirements of due process. *Id.*, at *15 (citing *Frank v. Teachers Ins. & Annuity Assoc. of America*, 71 Ill. 2d 583, 593 (1978)); *see also* Fed. R. Civ. P. 23(d)(2) (advisory committee note) (“mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject”). As explained by the United States Supreme Court, due process requires that the notice be the “best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections’” as well as “‘describe the action and the plaintiffs’ rights in it.’” *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 36 (citing *Phillips Petroleum Co. v. Shuts*, 472 U.S. 797, 812 (1985)).

The proposed Notice in this case satisfies both the requirements of 735 ILCS 5/2-803 and due process. As set forth in detail above, the Settlement Agreement contemplates a notice plan that provides traditional individual direct mail notice, which is designed to reach as many potential individuals in the Settlement Class as possible. Agreement ¶¶ 49-51. The direct notice process should be very effective at reaching the Class Members given the relationship between Defendant and the Class Members (current or former workers for whom it possesses contact information and temporary workers for whom contact information has been obtained from the relevant agencies to the extent not already possessed). The proposed Notice and Claim Forms are attached to the Settlement Agreement as **Exhibits A and B** and should be approved by the

Court. The proposed method of notice comports with 735 ILCS 5/2-803 and due process.

III. THE COURT SHOULD CERTIFY THE CLASS FOR SETTLEMENT PURPOSES

For settlement purposes only, the Parties have agreed that the Court should make preliminary findings and enter an Order granting provisional certification of the Settlement Class and appoint Plaintiff and his counsel to represent the Settlement Class. “The validity of use of a temporary settlement class is not usually questioned.” NEWBERG §11.22. The MANUAL FOR COMPLEX LITIGATION explains the benefits of settlement classes:

Settlement classes – cases certified as class actions solely for settlement – can provide significant benefits to class members and enable the defendants to achieve final resolution of multiple suits. Settlement classes also permit defendants to settle while preserving the right to contest the propriety and scope of the class allegations if the settlement is not approved. ... An early settlement produces certainty for the plaintiffs and defendants and greatly reduces litigation expenses.

MANUAL FOR COMPLEX LITIGATION § 21.612.

Before granting preliminary approval of a class action settlement, a court should determine that the proposed settlement class is a proper class for settlement purposes. *Id.* § 21.632; *see also Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). A class may be certified under Section 2-801 of the Illinois Code of Civil Procedure if the following “prerequisites” are satisfied: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law 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 interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801; *CE Design Ltd. v. C & T Pizza, Inc.*, 2015 IL App (1st) 131465, ¶10. In this case,

the Settlement Class as defined in the Settlement Agreement and in *supra* at 3, meets all of the applicable certification requirements.

A. The Class Is Sufficiently Numerous And Joinder Is Impracticable

Numerosity is met where “the class is so numerous that joinder of all members is impracticable.” 735 ILCS 5/2-801(1). “Although there is no bright-line test for numerosity, a class of forty is generally sufficient.” *Hinman v. M & M Rental Center, Inc.*, 545 F. Supp. 2d 802, 805-06 (N.D. Ill. 2008); *Kulins v. Malco, A Microdot Co., Inc.*, 121 Ill. App. 3d 520, 530 (1st Dist. 1984) (finding that 47 class members was sufficient to satisfy numerosity). Here, the proposed Class encompasses approximately 2,313 individuals. Fraietta Decl. ¶ 10. There is no question numerosity is met.

B. Common Questions Of Law And Fact Predominate

Commonality, the second requirement for class certification, is met where there are “questions of fact or law common to the class” and those questions “predominate over any questions affecting only individual members.” 735 ILCS 5/2-801(2). Such common questions of law or fact exist when the members of the proposed class have been *aggrieved* by the same or similar misconduct. *See Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 673-74 (2d Dist. 2006); *Steinberg v. Chicago Med. Sch.*, 69 Ill. 2d 320, 340-42 (1977); *see also Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). Further, where “the defendant allegedly acted wrongfully in the same basic manner as to an entire class...the common class questions predominate the case.” *Walczak*, 365 Ill. App. 3d at 674 (citing *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 548 (5th Dist. 2003)).

In this case, all members of the proposed Class share a common statutory BIPA claim that raises many common issues regarding the alleged collection, storage, use, and disclosure of their biometric identifiers or information without consent. Proving a BIPA violation would

require the resolution of some of the same factual and legal issues, including: (1) whether the information allegedly collected from Settlement Class Members constituted biometric identifiers or biometric information as defined by BIPA; (2) whether such information was collected without the consent required under BIPA; (3) whether Defendant had a BIPA-compliant, publicly available, written policy addressing retention and storage of biometric identifiers and information; and (4) whether such conduct violated BIPA. Predominance is satisfied “when there exists generalized evidence that proves or disproves an element on a simultaneous, class-wide basis ... Such proof obviates the need to examine each class member’s individual position.” *Golon v. Ohio Savs. Bank*, 1999 WL 965593, at *4 (N.D. Ill. Oct. 15, 1999). Here, for purposes of settlement and in the context of the Settlement Class, the common questions resulting from Defendant’s alleged conduct predominate over any individual issues that may exist and can be answered on a class-wide basis based on common evidence maintained by Defendant. Accordingly, this factor is satisfied. *Rogers v. BNSF Railway Co.*, 2022 WL 854348, at *3 (N.D. Ill. Mar. 22, 2022) (“[T]he questions of law and fact underlying the class members’ BIPA claims are essentially identical and will be premised on common proof.”).

C. The Class Representative Will Provide Adequate Representation For Settlement Class Members

The third element of Section 2-801 requires that “[t]he representative parties will fairly and adequately protect the interests of the class.” 735 ILCS 5/2-801(3). The class representative’s interests must be generally aligned with those of the class members, and class counsel must be “qualified, experienced and generally able to conduct the proposed litigation.” *See Miner v. Gillette Co.*, 87 Ill. 2d 7, 14 (1981). “The purpose of the adequate representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim.” *Walczak*, 365 Ill. App. 3d at 678

(citing *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 1004 (2d Dist. 2004)); *Purcell & Wardrobe Chtd. V. Hertz Corp.*, 175 Ill. App. 3d 1069, 1078 (1st Dist. 1988). The adequacy requirement is satisfied where “the interests of those who are parties are the same as those who are not joined” such that the “litigating parties fairly represent [them],” and where the “attorney for the representative party ‘[is] qualified, experienced and generally able to conduct the proposed litigation.’” *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶ 16 (citing *Miner*, 87 Ill. 2d at 56)).

Here, Plaintiff’s interests are entirely representative of and consistent with the interests of the proposed Settlement Class. Plaintiff, like all members of the Settlement Class, has allegedly had his biometric information or identifiers collected and used by Defendant in a manner that Plaintiff argues is inconsistent with the legal protections provided by BIPA. Plaintiff’s pursuit of this matter has demonstrated that he has been, and will remain, a zealous advocate for the Settlement Class. Thus, Plaintiff has the same interests as the Settlement Class, and is a suitable representative. Similarly, proposed Class Counsel has extensive experience in class action lawsuits and BIPA lawsuits in particular. *See Fraietta Decl.* ¶¶ 12-16. Accordingly, Plaintiff’s counsel will adequately represent the Settlement Class.

D. Certifying The Settlement Class Will Allow For A Fair And Efficient Adjudication Of The Controversy

The final prerequisite to class certification is met where “the class action is an appropriate method for the fair and efficient adjudication of the controversy.” 735 ILCS 5/2-801(4). “In applying this prerequisite, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain.” *Gordon v. Boden*, 224 Ill. App. 3d 195, 203 (1st Dist. 1991). In practice, a “holding that the first three prerequisites of section 2-801 are

established makes it evident that the fourth requirement is fulfilled.” *Id.* at 204; *Purcell & Wardrobe Chtd.*, 175 Ill. App. 3d at 1079 (the predominance of common issues [may] make a class action ... a fair and efficient method to resolve the dispute”). Thus, the fact that numerosity, commonality and predominance, and adequacy of representation have all been demonstrated in the instant case makes it “evident” the appropriateness requirement is satisfied.

This case is particularly well-suited for class treatment because the claims of Plaintiff and proposed Settlement Class Members involve alleged violations of a state statute for the alleged unauthorized collection, storage, use, and disclosure of Settlement Class Members’ alleged biometric information or identifiers. Moreover, because the action will now settle, the Court need not be concerned with issues of manageability relating to trial. When “confronted with a request for settlement only class certification,” a “court need not inquire whether the case, if tried, would present intractable management problems...for the proposal is that there be no trial.” *Amchem*, 521 U.S. at 620. Nor should the Court “judge the legal and factual questions” regarding certification of the proposed Settlement Class by the same criteria as a proposed class being adversely certified. *See GMAC*, 236 Ill. App. 3d at 493.

A class action is the superior method of resolving large-scale claims if it will “achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” *Amchem*, 521 U.S. at 615. Accordingly, a class action is the superior method of adjudicating this action and the proposed Settlement Class should be certified.

CONCLUSION

For the reasons described above, Plaintiff respectfully requests that the Court grant this motion and enter the Proposed Order Granting Preliminary Approval of Class Action Settlement Agreement, Certifying Settlement Class, Appointing Class Representative, Appointing Class

Counsel, and Approving Notice Plan submitted herewith, which (1) schedules a fairness hearing on the question of whether the proposed class action settlement should be approved as fair, reasonable, and adequate; (2) approves the form and content of the proposed Notice to the Settlement Class; (3) approves the proposed method of requesting exclusion from the Settlement and objecting to the Settlement; (4) directs the mailing of the Notice Form and Claim Form by first-class mail to the Settlement Class Members; (5) preliminarily approves the Settlement; and (6) preliminarily certifies the Settlement Class for purposes of settlement only.

Dated: March 15, 2023

Respectfully submitted,

By: /s/ Carl V. Malmstrom

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**Pro Hac Vice Application Forthcoming*

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