

**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

Hon. Timothy McJoynt  
Candice Adams  
e-filed in the 18th Judicial Circuit Court  
DuPage County  
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2023LA000015  
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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED  
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

Dated: June 6, 2023

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Pursuant to the Court’s March 22, 2023 Preliminary Approval Order, Plaintiff David Bamberg (collectively, “Plaintiff”) respectfully moves for final approval of the Class Action Settlement Agreement entered into between the Parties to this Action, a true and correct copy of which is attached as **Exhibit 1** (the “Agreement”) to the Declaration of Philip L. Fraietta (“Fraietta Decl.”) filed herewith.<sup>1</sup> Defendant does not oppose this Motion.

### **INTRODUCTION**

On March 22, 2023, the Court preliminarily approved the class action settlement between Plaintiff and Defendant Dynamic Manufacturing, Inc. (“Defendant”) and directed that notice be sent to the Settlement Class. *See* Fraietta Decl. ¶ 9; *id.* Ex. 2. The settlement administrator has implemented the Court-approved notice plan and direct notice has reached approximately 90% of the Settlement Class. Declaration of Caroline P. Barazesh (“Barazesh Decl.”) ¶ 10. The reaction from the Settlement Class has been overwhelmingly positive. Specifically, of the 2,283 class members, *zero* class members have objected, and *zero* have requested to be excluded. Barazesh Decl. ¶¶ 11-12. The Settlement is an excellent result for the Class and the Court should grant final approval.

The Settlement’s strength speaks for itself: it provides that Defendant shall fund a settlement of up to \$1,826,400 from which every Settlement Class Member who submits a valid and timely Claim Form will receive a cash payment of approximately \$510. Agreement ¶¶ 27, 46-47, 52; *see also* Fraietta Decl. ¶¶ 10-11. The Settlement also provides meaningful prospective relief, as Defendant has “state[d] that as of the date of its execution of this Agreement, it is in full compliance with BIPA. Agreement. ¶ 53.

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<sup>1</sup> Unless otherwise defined herein, all capitalized terms have the same force, meaning and effect as ascribed in the Definitions section of the Settlement Agreement.

Critically, the Settlement was reached despite substantial risk of non-recovery. In addition to the normal risks posed by complex litigation, the case was likely to rise or fall based on the merits of two defenses that were pending before the Illinois Supreme Court at the time the parties agreed to all material terms of the Settlement and executed the Term Sheet. *Id.* ¶ 14. Specifically, Defendant intended to argue that (i) a one-year statute of limitations applied to BIPA claims, and (ii) that BIPA § 15(b) claims accrue only once at the time of the first scan of a finger. *Id.* Although the Illinois Supreme Court ultimately ruled in Plaintiff’s favor on both of those defenses,<sup>2</sup> and adverse result was certainly possible and would have barred the claims of a substantial number of Settlement Class Members (including Plaintiff). *Id.* Further, even in victory, the Illinois Supreme Court ruled damages under BIPA are “discretionary rather than mandatory” (*Cothron v. White Castle System, Inc.*, 2023 IL 128004 ¶ 42), meaning even a trial victory would not have guaranteed that Settlement Class Members received a monetary payment. *Id.* 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.

For these reasons, and as explained further below, the Settlement is fair, reasonable, and adequate, and warrants this Court’s final approval.

### **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

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<sup>2</sup> *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801 (holding a five-year statute of limitations applies to all BIPA claims); *Cothron v. White Castle System, Inc.*, 2023 IL 128004 ¶ 1 (holding a separate claim accrues under BIPA § 15(b) “each time a private entity scans or transmits an individual’s biometric identifier or information”).

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 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.* ¶¶ 5-8.

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.* ¶ 7. The Parties then drafted and executed the Settlement Agreement and related documents, which are submitted herewith. *Id.*

On March 15, 2023, Plaintiff filed his Motion for Preliminary Approval of the Class Action Settlement. On March 22, 2023, the Court granted preliminary approval of the class action settlement. *Id.* ¶ 9; *see also id.* Ex. 2.

### **TERMS OF THE SETTLEMENT**

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

#### **I. 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.<sup>3</sup>

Agreement ¶ 43-44. According to Defendant's records, there are 2,283 people in the Settlement Class. Fraietta Decl. ¶ 10.

## **II. MONETARY AND PROSPECTIVE RELIEF**

Defendant has agreed to fund a settlement of up to \$1,826,400, 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 1/2,283 of the Net Settlement Amount, which proposed Class Counsel estimates is roughly \$510. *Id.* ¶¶ 27, 46-47, 52; *see also* Fraietta Decl. ¶ 11.

In addition, Defendant states it is in compliance with BIPA as of the date of the execution of the Agreement. Agreement ¶ 53.

## **III. 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.

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<sup>3</sup> 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.

#### **IV. NOTICE AND ADMINISTRATION 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. Ms. Barazesh estimates the cost of Administrative Expenses in this matter will be \$18,705. Barazesh Decl. ¶ 14.

#### **V. INCENTIVE AWARDS AND ATTORNEYS' FEES, COSTS, AND EXPENSES**

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. Agreement ¶¶ 25, 77. 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.*

#### **CLASS ACTION SETTLEMENT APPROVAL PROCESS**

Strong judicial and public policies favor the settlement of complex class action litigation, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Quick v. Shell Oil Co.*, 404 Ill. App. 3d 277, 282 (3rd Dist. 2010); *see also* ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 11.41 (4th ed. 2002) (hereinafter *NEWBERG*).

Courts review proposed class action settlements using a well-established two-step process. *NEWBERG* § 11.25, at 38-39; *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 492 (1st Dist. 1992). 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. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). If the Court finds the settlement proposal is “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.

Plaintiff is presently at the second step of this two-step process.

### **ARGUMENT**

Upon final approval, the Settlement reached in this matter will provide Settlement Class Members with substantial financial compensation and prospective relief that they otherwise likely would have been unable to obtain. Because the Settlement reached by the Parties is fair, reasonable, and provides adequate compensation to the Settlement Class, and because the Notice Plan effectively notified class members of their rights under the Settlement Agreement, the Settlement warrants final approval by the Court.

#### **I. THE SETTLEMENT SHOULD BE FINALLY APPROVED**

Section 2-801 provides that a court may approve a proposed class settlement “on a finding that it is fair, reasonable, and adequate.” 735 ILCS 5/2-801; *see also* Fed. R. Civ. P. 23(e)(2).

In assessing the fairness, reasonableness, and adequacy of a proposed class settlement, Illinois courts consider the following factors: “(1) the strength of the case for the plaintiffs 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.” *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990); *see also Armstrong*, 616 F.2d at 314.

In this case, as the Court has already found in granting preliminary approval of the Settlement, all eight factors weigh in favor of finding the Settlement fair, reasonable, and adequate, warranting its final approval.

**A. The Settlement Provides Substantial Relief**

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 \$510 after submitting a timely, simple, one page Claim Form approved by the Settlement Administrator. Agreement ¶¶ 46-47, 52; *id.* Ex. B; Fraietta Decl. ¶ 11. In addition, Defendant states it is in compliance with BIPA as of the date of the execution of the Agreement. Agreement ¶ 53.

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 biometric information or biometric identifiers and or whether Plaintiff is entitled to damages for his BIPA claims. Fraietta Decl. ¶ 14; *see also Cothron*, 2023 IL 128004 ¶ 42 (noting damages under BIPA are “discretionary rather than mandatory”).<sup>4</sup> If successful, these defenses would result in a substantial portion of, or all of, the proposed Settlement Class receiving no payment or relief

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<sup>4</sup> On February 2, 2023—after the Parties agreed to all material terms of the Settlement and the Term 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*. *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 Parties agreed to all material terms of the Settlement and the Term 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.

whatsoever. Fraietta Decl. ¶ 14. 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, 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). By contrast, "[i]f the Court approves the [Settlement], the present lawsuit will come to an end and [Settlement Class Members] will realize both immediate and future benefits as a result." *Id.* Accordingly, 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 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 courts 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**

The third factor asks whether the settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation. *See Korshak*, 206 Ill. App. 3d at 972. 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 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**

The fourth and sixth factors consider the amount of opposition to the Settlement and the reaction of the Settlement Class to the Settlement. *See Korshak*, 206 Ill. App. 3d at 972.

Following the implementation of the Notice plan set forth in the Settlement Agreement, the Settlement Class's reaction to the Settlement has been overwhelmingly favorable. In accordance with the Notice plan, the Settlement Administrator successfully provided direct notice to approximately 90% of the Settlement Class. *See Barazesh Decl.* ¶ 10. Moreover, *zero* Settlement Class Members objected to the Settlement and *zero* have requested to be excluded from

the Settlement. *Id.* ¶¶ 11-12.<sup>5</sup> Accordingly, the fourth and sixth factors weigh in favor of granting final approval. *See, e.g., Young v. City of Chicago*, 2013 WL 9947387, at \*2 (N.D. Ill. Dec. 16, 2013) (“[T]he absence of any objections to the Settlement by Settlement Class Members supports approval of the Settlement.”).

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

The fifth factor considers the presence of any collusion by the Parties in reaching the proposed settlement. *Korshak*, 206 Ill. App. 3d at 972. 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. ¶¶ 5-8, 12, 25. Moreover, negotiations began only after an exchange of information regarding the size and composition of the Settlement Class. *Id.* ¶ 5. 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 final approval.

**F. The Settlement Agreement Has Support Of Experienced Class Counsel**

The seventh factor is the opinion of competent counsel as to the fairness, reasonableness, and adequacy of the proposed settlement. *See Korshak*, 206 Ill. App. 3d at 972. Courts rely on

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<sup>5</sup> The deadline for Settlement Class Members to object to or request to be excluded from the Settlement was May 22, 2023. 1/6/22 Preliminary Approval Order ¶ 21.

affidavits in assessing proposed class counsel's qualifications under this factor. *Id.* 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 final approval. *See* Fraietta Decl. ¶ 21; *id.* Ex. 3 (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).

**G. 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. *Korshak*, 206 Ill. App. 3d at 972. Here, the Parties exchanged information regarding the facts and size and composition of the class, and thoroughly investigated the facts and law relating to Plaintiff's allegations and Defendant's defenses. Fraietta Decl. ¶ 5. Accordingly, this factor also weighs in favor of final approval.

**CONCLUSION**

For the reasons stated above, Plaintiff respectfully requests that the Court enter an Order granting final approval of the Settlement. A proposed Final Order and Judgment is submitted herewith.

Dated: June 6, 2023

Respectfully submitted,

/s/ Carl V. Malmstrom

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*\* Pro Hac Vice Application Forthcoming*

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