

YES / NO
EXHIBITS

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Cook County, IL

Attorneys for Plaintiff and the Putative Class

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

STEVEN FONGARO individually and on behalf
of all others similarly situated,

Plaintiff,

v.

CAPITAL FITNESS, INC., an Illinois
corporation, and EXECUTIVE AFFILIATES,
INC., an Illinois corporation,

Defendants.

2020CH01555

Case No.

**CLASS ACTION COMPLAINT
AND DEMAND FOR JURY TRIAL**

Plaintiff Steven Fongaro (“Plaintiff”) brings this Class Action Complaint and Demand for Jury Trial (“Complaint”) against Defendants Capital Fitness, Inc., an Illinois corporation and Executive Affiliates, Inc., an Illinois corporation (“Defendants”) for violating the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq* (“BIPA”). Plaintiff alleges the following upon personal knowledge as to Plaintiff’s own acts and experiences and, as to all other matters, upon information and belief, including investigation conducted by Plaintiff’s attorneys:

NATURE OF THE ACTION

1. Defendant Capital Fitness, Inc. owns and operates fitness gymnasiums across the state of Illinois under the name XSport Fitness, including a facility at 81 N. Randall Road, Batavia, IL 60510.

2. Defendant Executive Affiliates, Inc. is a wholly owned subsidiary of Defendant Capital Fitness, Inc., and manages the timekeeping and payroll systems for XSport Fitness locations.

3. Since 2008, it has been illegal in Illinois to collect an individual's biometric information or identifiers—such as a fingerprint, voiceprint, or faceprint—without the individual's informed, written consent. 740 ILCS 14/15(b).

4. Despite the substantial privacy risks created by the collection and storage of biometric data, and the decade-old prohibition on collecting and retaining biometric data in Illinois without informed consent, Defendants use a biometric time-tracking system that requires workers at one of Defendants' locations to use their fingerprints as a means of authentication. When Defendants' Illinois workers begin their time with Defendants, Defendants require them to scan their fingerprints into a time management database.

5. Defendants' scanning and retention of their workers' fingerprints without informed consent is clearly unlawful in Illinois.

6. Plaintiff brings this Complaint seeking an order (i) declaring that Defendants' conduct violates BIPA, (ii) requiring that Defendants cease the unlawful activities described herein and destroy the biometric data they unlawfully collected, and (iii) awarding Plaintiff and the Class statutory damages of \$1,000 for each negligent violation of BIPA and \$5,000 for each violation found to be willful or reckless, plus attorneys' fees and costs.

PARTIES

7. Plaintiff Steven Fongaro is a natural person and a citizen of the State of Tennessee residing in Knox County.

8. Defendant Capital Fitness, Inc. is a corporation existing under the laws of the State of Illinois, with its headquarters and principal place of business located at 47W210 U.S. Highway 30, Big Rock, IL 60511. Defendant Capital Fitness, Inc. conducts business throughout Cook County and the State of Illinois.

9. Defendant Executive Affiliates, Inc. is a corporation existing under the laws of the State of Illinois, with its headquarters and principal place of business located at 47W210 U.S. Highway 30, Big Rock, IL 60511. Defendant Executive Affiliates, Inc. conducts business throughout Cook County and the State of Illinois.

JURISDICTION AND VENUE

10. This Court has personal jurisdiction over the Defendants because Defendants are registered to conduct and do conduct substantial business in Illinois, and this lawsuit arises out of acts and omissions which occurred in Illinois.

11. Venue is proper in Cook County because Defendants conduct business in Cook County. 735 ILCS 5/2-101.

COMMON FACTUAL ALLEGATIONS

The Biometric Information Privacy Act

12. Enacted in 2008, the Biometric Information Privacy Act regulates two types of biometric data. First, BIPA regulates any “biometric identifier,” which means “a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry,” and specifically excludes a lengthy list of specific identifiers. 740 ILCS 14/10. Second, it regulates any “biometric information,” which

“means any information, regardless of how it is captured, converted, stored, or shared, based on an individual’s biometric identifier used to identify an individual.” *Id.* Biometric information “does not include information derived from items or procedures excluded under the definition of biometric identifiers.” *Id.*

13. BIPA regulates the entire lifecycle of biometric data, from capture and collection to use and disclosure.

14. As to the origination of biometric data, BIPA provides that “[n]o private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person’s or a customer’s biometric identifier or biometric information, unless it first: (1) informs the subject or the subject’s legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the subject or the subject’s legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and (3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject’s legally authorized representative.” 714 ILCS 14/15(b).

15. BIPA likewise restricts the disclosure of biometric data, providing that “[n]o private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person’s or a customer’s biometric identifier or biometric information unless: (1) the subject of the biometric identifier or biometric information or the subject’s legally authorized representative consents to the disclosure or redisclosure; (2) the disclosure or redisclosure completes a financial transaction requested or authorized by the subject of the biometric identifier or biometric information or the subject’s legally authorized representative; (3) the disclosure or redisclosure is required by State or federal law or municipal ordinance; or

(4) the disclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction.” 740 ILCS 14/15(d).

16. When it comes to exploiting biometric data, BIPA creates even stricter proscriptions. Reflecting an intent to preclude the formation of a market for biometric data, BIPA provides without exception that “[n]o private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person’s or a customer’s biometric identifier or biometric information.” 740 ILCS 14/15/(c).

17. To facilitate the informed notice and consent provisions described above, BIPA also requires that any private entity in possession of biometric identifiers or information must publish a written policy “establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual’s last interaction with the private entity, whichever occurs first.” 740 ILCS 14/15(a).

18. Finally, given the persistent nature of biometric data and the increased risks that accompany their misuse, BIPA requires that any entity possessing biometric identifiers or information “(1) store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity’s industry; and (2) store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.” 740 ILCS 14/15(e).

19. To remedy the serious but often intangible harms that accompany invasions of biometric privacy rights, BIPA creates a private right of action authorizing “[a]ny person aggrieved by a violation of” the statute to sue and recover for each violation liquidated damages of \$1,000,

or \$5,000 in the event of an intentional or reckless violation, plus attorneys' fees, costs, and appropriate injunctive relief. 740 ILCS 14/20.

Defendants' Disregard for Workers' Privacy

20. Despite the recognized danger of using biometric data, Defendants use a time-tracking system that requires their workers to use fingerprints as a means of authentication. Unlike a traditional timeclock, workers are required to use their fingerprints to "punch" in and out of work.

21. Defendants fail to inform their workers of the extent and purposes for which they collect the workers' biometric data and whether the data is disclosed to third parties.

22. Defendants similarly fail to maintain a written, publicly available policy identifying their retention schedule for biometric data or providing guidelines for permanently destroying their workers' fingerprints when the initial purpose for collecting or obtaining the workers' fingerprints is no longer relevant, as required by BIPA. Workers who cease to work at one of Defendants' facilities, as Plaintiff did, do so without any knowledge of when their biometric identifiers will be removed from Defendants' databases, if ever.

23. Defendants' workers are likewise never told what might happen to their biometric data were Defendants ever to go out of business.

24. Because Defendants neither publish a BIPA-mandated data-retention policy nor disclose the purposes for which they collect biometric data, Defendants' workers have no idea whether Defendants sell, disclose, or otherwise disseminate their biometric data. Nor are Plaintiff and the putative Class told to whom Defendants disclose their biometric data, or what might happen to their biometric data were Defendants to merge with another firm or go bankrupt.

25. On top of their failure to notify workers and the public of the basics of their collection, use, retention, and protection of biometric data, Defendants fail to obtain the written release required by BIPA before collecting their workers' biometric data.

26. Defendants' failure to publish a biometric data-retention policy or obtain written releases from their workers prior to the collection of the workers' fingerprints violates BIPA.

FACTUAL ALLEGATIONS SPECIFIC TO PLAINTIFF FONGARO

27. Plaintiff Steven Fongaro worked at Defendants' fitness center locations from on or about March 2014 to June 2017 including the Randall Road location in Batavia, Illinois.

28. Defendants required Plaintiff to use a fingerprint-based timekeeping system. Thus, every time Plaintiff clocked in or out of a shift, Defendants captured, collected, or otherwise obtained Plaintiff's biometric identifier.

29. Defendants never informed Plaintiff of the specific purposes or length of time for which Defendants collected, stored, and used Plaintiff' fingerprints.

30. Defendants did not obtain a written release authorizing the collection, capture, other obtainment, or subsequent disclosure of Plaintiff's biometric identifier.

31. Defendants do not make publicly available, and have not made publicly available, any biometric data-retention policy, nor have Defendants informed Plaintiff whether they will ever permanently delete Plaintiff's fingerprints.

32. Plaintiff has continuously and repeatedly been exposed to the harms and risks created by Defendants' violations of BIPA.

CLASS ALLEGATIONS

33. Plaintiff brings this action individually and on behalf of the following class ("the Class") pursuant to 735 ILCS 5/2-801:

All individuals who had their fingerprints collected, captured, received, or otherwise obtained by Defendants in Illinois.

The following people are excluded from the Class: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendants, Defendants' subsidiaries, parents, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former employees, officers, and directors; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiff's counsel and Defendants' counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

34. **Numerosity:** The exact number of Class members is unknown to Plaintiff at this time, but it is clear that individual joinder is impracticable. Defendants have collected, captured, received, or otherwise obtained biometric identifiers or biometric information from hundreds of individuals within the Class definition. The exact number of Class members can be easily determined from Defendants' records.

35. **Commonality and Predominance:** Questions of law and fact common to the claims of Plaintiff and the Class predominate over any questions that may affect individual members. Those common questions include:

- a. Whether Defendants collected or captured the Class members' biometric identifiers or information;
- b. Whether Defendants maintained a publicly available retention schedule for biometric identifiers or information;
- c. Whether Defendants informed the Class members that they would collect or capture the Class members' biometric identifiers or information;
- d. Whether Defendants informed the Class members of the purpose for which they would collect their biometric identifiers or information, or the duration for which they would retain that data; and

- e. Whether Defendants obtained the written release required by BIPA to collect or capture, use, and store the Class members' biometric identifiers or information.

36. **Fair and Adequate Representation:** Plaintiff will fairly and adequately represent and protect the interests of the Class and have retained competent counsel experienced in complex litigation and class actions under BIPA specifically. Plaintiff has no interests antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiff. Plaintiff and proposed Class Counsel are committed to vigorously prosecuting this action on behalf of the Class members and have the resources to do so.

37. **Appropriateness:** This class action is appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy, and joinder of the Class members is otherwise impracticable. The damages suffered by the individual Class members are small relative to the burden and cost of individual litigation, and individual litigation is therefore infeasible. Even if Class members could sustain individual litigation, it would increase the delay and expense to all parties relative to a class action because of the factual issues raised by the Complaint. A class action presents fewer manageability difficulties and provides economies of scale and uniformity of decisions.

FIRST CAUSE OF ACTION
Violation of 740 ILCS 14/15
On Behalf of Plaintiff and the Class

38. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

39. Defendants are Illinois corporations and are therefore "private entities" under 740 ILCS 14/10.

40. Every time Plaintiff and the Class clock in or out of a shift, Defendants obtain a scan of their fingerprints. Those scans map the geometry of Plaintiff's and the Class members' fingers, and Defendants use that geometry to identify them as they clock in and out of work.

Defendants therefore collect, capture, receive through trade, or otherwise obtain Plaintiff's and the Class members' biometric identifiers and biometric information.

41. Prior to collecting, capturing, receiving through trade, or otherwise obtaining Plaintiff's and the Class members' biometric identifiers and biometric information, Defendants did not inform Plaintiff or the Class members or their legally authorized representatives that their biometric identifiers and information would be collected or stored.

42. Prior to collecting, capturing, receiving through trade, or otherwise obtaining Plaintiff's and the Class members' biometric identifiers and biometric information, Defendants did not inform Plaintiff or the Class members or their legally authorized representatives of the specific purpose and length of time for which their biometric identifiers and information were being collected, stored, and used.

43. Prior to collecting, capturing, receiving through trade, or otherwise obtaining Plaintiff's and the Class members' biometric identifiers and biometric information, Defendants did not receive a written release from Plaintiff and the Class members or their legally authorized representatives authorizing the collection, capture, receipt through trade, or other obtainment and use of their biometric identifiers or information.

44. Despite collecting Plaintiff's and the Class members' biometric identifiers and biometric information, Defendants failed and continue to fail to maintain a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within three years of the individual's last interaction with the private entity, whichever comes first.

45. By capturing and collecting, storing, using, and/or disclosing Plaintiff's and the Class members' biometric identifiers and information as described herein, Defendants violated Plaintiff's and the Class members' rights to privacy and property in their biometric data under BIPA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, respectfully requests that this Court enter an order:

- A. Certifying this case as a class action on behalf of the Class defined above, appointing Plaintiff as representative of the Class, and appointing Plaintiff's lawyers as Class Counsel;
- B. Declaring that Defendants' actions, as described above, violate 740 ILCS 14/15;
- C. Awarding liquidated damages under 740 ILCS 14/20 of \$1,000 for each negligent violation of BIPA and \$5,000 for each violation found to be willful or reckless;
- D. Awarding injunctive and other equitable relief as necessary to protect the Class, including an order requiring Defendants to stop their unlawful collection of biometric data and to delete any such data that was unlawfully obtained;
- E. Awarding Plaintiff and the Class their reasonable litigation expenses and attorneys' fees;
- F. Awarding Plaintiff and the Class pre- and post-judgment interest; and
- G. Awarding such other and further relief as equity and justice may require.

JURY TRIAL

Plaintiff demands a trial by jury for all issues so triable.

Date: February 6, 2020

STEVEN FONGORO, individually and on behalf
of all others similarly situated,

s/ Alex J. Dravillas

One of Plaintiff's Attorneys

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Firm No.: 63925

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Class Action: XSport Fitness Owner-Operators Collected Employees' Fingerprints Without Permission](#)
