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

VERNITA MIRACLE-POND and SAMANTHA PARAF, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SHUTTERFLY, INC.,

Defendant.

Case No. 2019-CH-07050

Judge: Raymond W. Mitchell

PLAINTIFFS' UNOPPOSED MOTION AND MEMORANDUM IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

I. INTRODUCTION

Plaintiffs Vernita Miracle-Pond and Samantha Paraf ("Plaintiffs") respectfully seek preliminary approval of a proposed class action settlement with Defendant, Shutterfly, Inc. ("Shutterfly"), the terms of which are set forth in the Settlement Agreement ("SA"), attached hereto as Exhibit A.[1] This class action results from Shutterfly's alleged illegal collection, storage, and use of the biometrics of all individuals (including those without Shutterfly accounts) who appear in photographs uploaded to Shutterfly, and in violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"). After years of hard-fought litigation, fraught with numerous litigation risks, including the granting of a motion to compel arbitration on an individual basis, the Parties reached a Settlement that provides substantial relief to the Class.

The proposed Settlement will establish a $6,750,000 non-reversionary cash Settlement Fund from which Class Members who file valid claims will be compensated. The Settlement calls for a *pro rata* distribution of the Settlement Fund to participating Class Members, after deduction of settlement administration costs and any Court-approved Service Awards and attorneys' fees and expenses. In addition, the Settlement provides meaningful prospective relief that requires Shutterfly to disable its "Face Grouping" feature for its users and to secure the informed and written consent that BIPA requires. This relief ensures Shutterfly's compliance with BIPA in the future and is the precise relief this litigation sought to obtain.

The terms of this Settlement are not only fair, reasonable, and in the best interests of the Class, but represent an achievement that most likely is better than any result Plaintiffs could hope to achieve through continued litigation of this Action, were they to certify a class and make it to

[1] Unless otherwise defined, all capitalized terms and phrases herein have the same meaning as ascribed in the Settlement Agreement.

trial before a court— no mean feat, given the substantial risks that the Class faced in every phase of the litigation, especially in light of Shutterfly prevailing on a motion to compel arbitration on an individual basis.

Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement; issue the proposed Preliminary Approval Order; find, solely for purposes of effectuating the proposed Settlement, that the prerequisites for class certification under Section 2-801 of the Illinois Code of Civil Procedure are likely to be found to be satisfied; and allow notice of the Settlement to issue to Class Members.

II. BACKGROUND

A. Factual Allegations and Procedural History

Plaintiff Miracle-Pond, a registered Shutterfly user since 2015, and Plaintiff Paraf, who has never registered for or used Shutterfly, filed this Action in Illinois Circuit Court on June 11, 2019, on behalf of "[a]ll Illinois citizens who had their biometric identifiers, including scans of face geometry and related biometric information, collected, captured, received, or otherwise obtained by Shutterfly from photographs uploaded to Shutterfly within the state of Illinois." (Complaint ¶ 34). Plaintiffs allege that they have suffered harm as a result of Shutterfly's violations of BIPA"), and that they are entitled to statutory damages under the Act.

After removing this case to federal court, Shutterfly moved to dismiss Plaintiffs' claims under Rule 12(b)(6) and also filed a motion to compel arbitration. (*Miracle Pond, et al. v. Shutterfly, Inc.*, No. 1:19-cv-04722 (N.D. Ill. July 12, 2019) (the "Federal Action"), Dkt. No. 16). On May 15, 2020, Shutterfly's motion to compel arbitration of Plaintiff Miracle-Pond's claims (based on arbitration clause in Shutterfly's Terms and Conditions) was granted. (*Id.*, Dkt. Nos. 19, 67). The District Court's May 15, 2020 Order also stayed its consideration of Shutterfly's

motion to dismiss, which applied to both Plaintiff Miracle-Pond's claims and Plaintiff Paraf's claims, though only Ms. Miracle-Pond's claims were ordered to arbitration. (*Id.*, Dkt. No. 67). Plaintiffs then filed a Motion to Clarify the Court's ruling on the motion to compel. (*Id.*, Dkt. No. 70). Thereafter, on September 17, 2020, the District Court denied Shutterfly's motion to dismiss without prejudice. (*Id.*, Dkt. No. 81). On November 9, 2020, Shutterfly re-filed its motion to dismiss (*id.*, Dkt. Nos. 85, 86), which Plaintiffs opposed (*id.*, Dkt No. 88).

The Parties conducted extensive discovery and worked diligently to develop the factual record throughout the litigation. The Parties exchanged Rule 26(a) initial disclosures, interrogatories, and requests for production of documents. Shutterfly produced approximately 100,000 pages of discovery. (*Id.*, Dkt. Nos. 50-1, 92). Plaintiffs reviewed many thousands of documents produced by Shutterfly and conducted an exhaustive analysis of the legal and factual issues surrounding the case and Shutterfly's facial recognition technology. (Ex. B, Affidavit of Robert Ahdoot filed concurrently herewith ("Ahdoot Aff.") ¶¶ 11-13; Ex. C, Affidavit of David Milian ("Milian Aff.") filed concurrently herewith ¶¶ 16-21). On February 19, 2021, the Action was remanded from Federal Court to the Circuit Court by stipulation of the Parties. (Federal Action, Dkt. No. 96).

B. Settlement Negotiations

Following extensive preliminary negotiations, the Parties participated in a mediation before the Hon. Peter D. Lichtman (Ret.) at Signature Resolutions in October 2020. (Ahdoot Aff. ¶ 12; Milian Aff. ¶ 18). Shutterfly provided substantial information in advance of mediation, sufficient to enable Plaintiffs' counsel to value the claims and understand the prospective Class's composition. (Ahdoot Aff. ¶ 12; Milian Aff. ¶¶ 16-17). The Settlement was not reached at the October 8, 2020 mediation. (Ahdoot Aff. ¶ 13; Milian Aff. ¶ 18). Nonetheless, the Parties continued to engage in settlement conferences on a regular basis, with the continued assistance of

Judge Lichtman, until a settlement in principle was reached. (Ahdoot Aff. ¶ 13-14; Milian Aff. ¶¶ 18-19).

Before and during all settlement discussions and mediation, the Parties exchanged documents and information on an arm's-length basis to enable Plaintiffs and proposed Class Counsel to adequately evaluate the scope of the potential class-wide liability and thus intelligently engage in meaningful settlement discussions on behalf of the Class. (Ahdoot Aff. ¶¶ 11-13; Milian Aff. ¶¶ 16-21). The Parties engaged in further months-long negotiations with respect to the Settlement Agreement and its exhibits. (Ahdoot Aff. ¶ 14-15; Milian Aff. ¶¶ 18-19). Plaintiffs also requested bids from a number of settlement administrators and based on such bids, the Parties agreed upon the firm of Postlethwaite & Netterville ("P&N") to serve as the Settlement Administrator (*see* pnclassaction.com; *see also* Ex. D, Affidavit of Brandon Schwartz ("Schwartz Aff.") filed concurrently herewith). The Notice Plan and each document comprising the Class Notice were negotiated and exhaustively refined, with input from experts at P&N, to ensure that these materials will be clear, straightforward, and understandable by Class Members. (Ahdoot Aff. ¶¶ 15-16; Milian Aff. ¶¶ 18-19; Schwartz Aff. ¶¶ 1, 7-8).

III. TERMS OF THE SETTLEMENT

The material terms of the Settlement are summarized as follows:

A. The Class Definition

The Settlement Class is defined as:

> All Illinois residents who appear in a photograph maintained on Shutterfly at any time between June 11, 2014 and the date of final approval. Excluded from the class are: (1) any Judge, Magistrate, or mediator presiding over this action and members of their families, (2) Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest, (3) Class Counsel, and (4) the legal representatives, successors or assigns of any such excluded persons.

(SA ¶ 2.2). Shutterfly's records indicate that there are approximately 954,000 Class Members who are Illinois resident Shutterfly users.

B. The Settlement Benefits

1. Monetary Benefits to the Class

The proposed Settlement requires Shutterfly to pay $6,750,000.00 to create the Settlement Fund for the benefit of Class Members. (SA ¶ 3.2). Settlement Administration Expenses, including the costs of providing notice to the Class, any Court-approved Service Awards to the Class Representatives and attorneys' fees and expenses to Class Counsel will be deducted from the Settlement Fund. *(Id*. ¶ 3.2(a)). The remaining Net Settlement Fund will be used to pay Settlement Payments resulting from Approved Claims made by Class Members. (*Id.* ¶ 1.20) No portion of the Settlement Fund will be returned to Shutterfly. (*Id.* ¶ 3.2(b))

Each Class Member may submit a Claim Form to receive a *pro rata* share of the Net Settlement Fund. (*Id.* ¶ 3.3(a)). Thus, the total payment to each Claimant Class Member will depend on the number of valid Claim Forms submitted. For example, in the event that 30,000 Class Members submit valid Claims, and the Net Settlement Fund equals $4,000,000, each Claimant will receive approximately $134.

2. Prospective Relief

A significant component of the Settlement involves changes to Shutterfly's business practices. The Settlement requires Shutterfly to take reasonable steps to ensure compliance with BIPA. Shutterfly has agreed to provide notice to Class Members whom Shutterfly can identify as Shutterfly account holders ("Class Member Users"), which will disclose the data collected for Face Grouping, the purpose(s) of collecting the data, and the length of term of the collection. (SA ¶ 3.1(a)(1)). The notice will provide a mechanism for Class Member Users to affirmatively consent

to the Face Grouping feature, but Class Member Users may also dismiss the notice without taking affirmative action. (SA ¶ 3.1(a)(1)). Shutterfly shall set the Face Grouping setting to "off," and will permanently delete any Face Grouping data, for Class Member Users who have not affirmatively consented to Face Grouping within 180 days of the Preliminary Approval Order. *(Id.* ¶ 3.1(a)(2)). In addition, Shutterfly will publish a supplemental retention schedule and guidelines for permanently destroying Face Grouping data created for Illinois Shutterfly users within three years of their last interaction with Shutterfly. (SA ¶ 3.1(a)(2)).

C. Notice and Right to Opt Out or Object to the Settlement

Notice of the Settlement includes direct notice to Class Members as well as a robust print and digital media campaign. Shutterfly will provide the Settlement Administrator with the Class Member Information it possesses. (SA ¶ 6.1(a)). Direct Notice (SA Ex.3) will then be sent to each Class Member identified by Shutterfly via email. For those Class Members for which the email notice is returned as undeliverable, the Notice will be sent via First Class U.S. Mail.[2] (SA ¶ 6.1(d)). In addition, in the event that more than 10% of the Class Member emails are returned as undeliverable, Shutterfly will place notice of the Settlement and a hyperlink to the Settlement Website on its website. *(Id.* ¶ 6.1(d)(ii)).

Notice will also include a robust print and digital media campaign, including digital advertising on the Google Network, Facebook, and Instagram, and in print publications, on the *Chicago Tribune*, *The Journal Star*, *News-Gazette*, *Rockford Register Star*, *The State Journal*, *The Quincy Herald-Whig*, and *The Southern Illinoisan*. (SA ¶ 6.1(d); Schwartz Aff. ¶¶ 13-19). The Settlement Administrator will also establish a Settlement Website

[2] Prior to mailing, the Administrator will use the USPS National Change of Address Database to update any address. (SA ¶ 6.1). For any returned mail, the Administrator shall resend Notice to any forwarding address or perform a skip trace to identify an updated address. *Id.*

(www.ShutterflyBIPASettlement.com), which will have the Class Notice (SA, Ex. 2-4), the Settlement Agreement, the Complaint, the Claim Form, and other relevant documents available. (SA ¶ 6.1(d)(iv)). This website will also contain instructions on how a Class Member can file a Claim Form electronically or via U.S. Mail, as well as instructions on how a Class Member can request exclusion or file an objection. (SA ¶¶ 6.1, 7.2).

The Notice Plan thus provides the best practicable notice under the circumstances and fulfills all due process requirements. (*See generally*, Schwartz Aff. ¶¶ 24-27).

D. Proposed Class Representative Service Awards and of Attorneys' Fees and Expenses

The Settlement would not have been possible without the time and effort of the Class Representatives, who stepped forward on behalf of other Class Members, accepting the responsibility of cooperating in the litigation and discovery in order to right the wrong that affected them and so many others. Class Counsel intend to seek a Service Award of $5,000 for each of the Class Representatives. (SA ¶ 12.1). In addition, Class Counsel intend to seek an award of attorneys' fees not to exceed 35% of the Settlement Fund or $2,362,500, plus reasonable costs and expenses incurred by Class Counsel. Shutterfly has agreed not to oppose such requests. (SA ¶ 12.2). The Parties negotiated the maximum amount of Service Awards and attorneys' fees to be sought only after reaching an agreement upon the relief provided herein to the Settlement Class. (SA ¶ 12.7; Ahdoot Aff. ¶ 14).

E. Narrowly Tailored Release

If the Settlement is approved, Plaintiffs and only Class Members who do not opt out, will release Shutterfly from all Claims "arising from or related to Plaintiffs' allegations or the alleged collection, storage, sale, monetization or derivation of revenue or profit from, or dissemination of alleged biometric or personal data, including all claims that were brought or could have been

brought in the Action including claims for any violation of BIPA, and further including, without limitation, any claim that Shutterfly does not comply with BIPA, or any other law or provision, with respect to the implementation of facial recognition technology." (SA ¶ 1.25). Thus, the release is limited and tailored to apply to allegations in this Action.

IV. ARGUMENT

A. The Proposed Settlement Class Should Be Certified for Settlement Purposes

Before granting preliminary approval of the proposed Settlement, the Court must first determine whether the proposed Class can be certified for settlement purposes. Plaintiffs request that the Court certify, for settlement purposes only, the Settlement Class defined above under Section 2-801 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-801. Under Section 2-801, a class may be certified if the following four requirements are met:

> (1) the class is so numerous that a joinder of all members is impracticable;
> (2) there are questions of fact or law common to the class that 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.

Smith v. Illinois Cent. R.R. Co., 223 Ill. 2d 441, 447 (2006) (citing 735 ILCS 5/2-801). Notably, "[a] trial court has broad discretion in determining whether a proposed class meets the requirements for class certification." *CE Design Ltd. v. C & T Pizza, Inc*., 2015 IL App (1st) 131465, ¶ 9. Although not identical, Section 2-801 is modeled on Federal Rule of Civil Procedure 23, and federal cases interpreting that rule are persuasive authority in Illinois. *Avery v. State Farm Mut. Auto. Ins. Co*., 216 Ill. 2d 100, 125 (2005) (citations omitted). As shown below, the Settlement Class satisfies each of the requirements of Section 2-801 and can be certified for settlement purposes.

1. 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). Here, Shutterfly disclosed that it has approximately 954,000 users with billing addresses in Illinois who have uploaded at least one photo which includes a detected face. (Ahdoot Aff. ¶ 11). Joinder of at least 954,000 Class Members would be impractical, to say the least. Accordingly, the Settlement Class readily satisfies the numerosity requirement. *Kulins v. Malco, A Microdot Co., Inc*., 121 Ill. App. 3d 520, 530 (1st Dist. 1984) (finding that in Cook County, 47 class members was sufficient to satisfy numerosity); *Travel 100 Grp. v. Empire Cooler Serv., Inc.*, No. 03 CH 14510, 2004 WL 3105679, at *2 (Ill. Cir. Ct. Oct. 19, 2004) ("The potential class exceeds 3,000 members. The numerosity requirement is met").

2. 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). Common questions of law or fact exist when the members of the proposed class have been aggrieved by the same or similar misconduct. *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); *Ellerbrake v. Campbell-Hausfeld,* No. 01-L-540, 2003 WL 23409813, at *3 (Ill. Cir. Ct. July 2, 2003); *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 (2003)).

In this case, all members of the proposed Class share a common statutory BIPA claim arising out of standardized conduct. The alleged unauthorized collection, storage, and use of individuals' biometrics in violation of BIPA require the resolution of the same central factual and legal issues, including: (1) whether the information taken constituted biometric identifiers or biometric information as defined by BIPA; (2) whether such information was taken without the consent required under BIPA; (3) whether Shutterfly had a BIPA-compliant, publicly available written policy addressing retention and storage of biometrics; and; (4) whether Shutterfly's practices and policies violated BIPA. Predominance is satisfied "when there exists generalized evidence that proves or disproves an element on a simultaneous, class-wide basis … [since s]uch proof obviates the need to examine each class member's individual position." *Golon v. Ohio Savs. Bank*, No. 98-cv-7430, 1999 WL 965593, at *4 (N.D. Ill. Oct. 15, 1999); *see, e.g.*, *JT's Frames, Inc. v. Sunhill NIC Co.*, 2012 IL App (2d) 110676-U, at ¶ 23. Here, the common questions resulting from Shutterfly's alleged conduct predominate over individual issues that may exist and can be answered on a class-wide basis based on common evidence maintained by Shutterfly. Thus, this factor is satisfied.

3. Class Representatives and Class Counsel Adequately Represent Class Members

The third element of Section 2-801 requires that "[t]he representative parties will fairly and adequately protect the interest 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." *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 (2nd Dist. 2004)); *Purcell & Wardrope Chartered 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)).

Plaintiffs and their counsel are adequate. First, the proposed Class Representatives do not have any conflicts of interest with the absent Class Members, as their claims are coextensive with those of the Class Members. Plaintiffs' interests are entirely representative of and consistent with the interests of the proposed Class: all have allegedly had their biometrics taken and used by Shutterfly in a manner inconsistent with the legal protections provided by BIPA. Further, they have read and understood the allegations of the Complaint and are willing to and have prosecuted this matter on behalf of the Class. (*See generally,* Ex. E & F, Affidavits of Vernita Miracle-Pond and Samantha Paraf). The proposed Class Representatives have been consistently involved in this litigation, providing valuable insight and useful facts allowing Class Counsel to effectively litigate this action, perform discovery, and negotiate this Settlement. Further, the Class Representatives were advised of and understand their obligations as Class Representatives. Plaintiffs regularly communicated with Class Counsel regarding various issues pertaining to this case and will continue to do so until the Settlement is approved, and its administration completed. (*Id.*)

Second, proposed Class Counsel are well qualified and experienced in complex class action litigation and have an established track record in litigating cases involving consumer protection and consumer privacy. (Ahdoot Aff. ¶¶ 18-39; Milian Aff. ¶¶ 4-11; Ex. G, Affidavit of Katrina Carroll ("Carroll Aff.") ¶¶ 2-6). Proposed Class Counsel have been appointed as class counsel in numerous complex class actions in courts throughout the country, including BIPA class action settlements, and each have decades of class action experience. Proposed Class Counsel vigorously prosecuted this action and will continue to do so through final approval. They identified and investigated the claims in this lawsuit and the underlying facts, and successfully negotiated this Settlement on behalf of the Settlement Class.

4. 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 & Wardrope Chartered*, 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" that the appropriateness requirement is satisfied as well.

Other considerations further support certification in this case. A "controlling factor in many cases is that the class action is the only practical means for class members to receive redress—

particularly where the claims are small." *Gordon*, 224 Ill. App. 3d at 203-04; *Eshaghi v. Hanley Dawson Cadillac Co.*, 214 Ill. App. 3d 995, 1004 (1st Dist.1991) ("In a large and impersonal society, class actions are often the last barricade of consumer protection."). A class action is superior to multiple individual actions where the "litigation costs are high, the likely recovery is limited" and individuals are unlikely to prosecute individual claims absent the cost-sharing efficiencies of a class action. *Maxwell v. Arrow Fin. Servs., LLC.*, No. 03-cv-1995, 2004 WL 719278, at *6 (N.D. Ill. Mar. 31, 2004). This is especially true in cases involving BIPA, which would otherwise result in many relatively small, individual claims. *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶¶ 27, 28 (finding that a class action is a superior vehicle for resolving the class members' TCPA claims and that "[t]here is no doubt that certifying the class in this case, where there are potentially thousands of claimants, is an efficient and economical way to proceed and will prevent multiple suits and inconsistent judgments.").

This case is particularly well-suited for class treatment because the claims of Plaintiffs and Class Members involve identical alleged violations of a state statute for the alleged unauthorized conduct. Absent a class action, most members of the Class would find the cost of litigating their claims—each of which is statutorily limited to $1,000 per negligent violation under BIPA—to be prohibitive. It is thus unlikely that individuals would invest the time and expense necessary to seek relief through individual litigation. 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 district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). 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. *GMAC Mortg. Corp. of Pa.*, 236 Ill. App. 3d 486, 493 (1st Dist. 1992).

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.

B. The Settlement is Fair and Reasonable, and Should Be Preliminarily Approved

Under Section 2-806 of the Illinois Code of Civil Procedure, class claims may be settled only with court approval. 735 ILCS 5/2-806. The purpose of the court's approval is to ensure that the proposed settlement agreement is "fair, reasonable, and in the best interest of the class." *Steinberg v. Sys. Software Associates, Inc*., 306 Ill. App. 3d 157, 169 (1st Dist. 1999). The approval of any proposed class action settlement is typically exercised in the two-step process of "preliminary" and "final" approval. MANUAL FOR COMPLEX LITIGATION § 30.41 (3d ed. 2000).

At the preliminary approval stage, the Court's task is to "determine whether the proposed settlement is within the range of possible approval." *Armstrong v. Bd. of Sch. Dirs. of Milwaukee,* 616 F.2d 305, 314 (7th Cir. 1980) (internal citation and quotation marks omitted); *see also* 4 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 11.25 (4th ed. 2002) ("NEWBERG") (noting that "[i]f the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness... and appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to class members) (citations omitted). "A trial court should not disapprove a settlement . . . unless, taken as a whole, the settlement appears on its face so unfair as to preclude judicial approval." *Gowdey v. Commonwealth Edison Co*., 37 Ill. App. 3d

140, 149-50 (1st Dist. 1976). The purpose of the initial hearing is to ascertain whether there is any reason to notify the class members of the proposed settlement and proceed with a fairness hearing. *Shaun Fauley, Sabon, Inc. v. Metropolitan Life Ins. Co*., 2016 IL App (2d) 150236, ¶ 35-37. Once the settlement is found to be "within the range of possible approval" at the preliminary approval hearing, the final approval hearing is scheduled, and notice is provided to the class.

The factors considered by a court are: "(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. Of these considerations, the first is 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). Here, each relevant factor supports approval of the Settlement.

1. The Strength of Plaintiffs' Case Compared with the Relief Afforded Under the Settlement Supports Preliminary Approval

The most important factor in determining whether a settlement should be approved is "the strength of the plaintiff's case on the merits balanced against the amount offered in the settlement." *Steinberg*, 306 Ill. App. 3d at 170; *Synfuel*, 463 F.3d at 653. Because the essence of every settlement is compromise, courts should not reject a settlement solely because it does not provide a 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 Services Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (internal quotations and citations 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 (3rd Dist. 2010).

While Plaintiffs are confident in the strength of their claims, they also recognize that they would have to overcome significant obstacles to succeed. Given the heavy obstacles and inherent risks Plaintiffs face with respect to their claims—and even getting to trial—the substantial benefits the Settlement provides favors its approval.

Here, in the event the Net Settlement Fund is $4,000,000, and there are 30,000 Claims, Class Counsel estimate that claiming Class Members will receive approximately $134 (this amount will decrease as Claims increase, i.e. at $4,000,000 Net Settlement Fund and 40,000 claims, Class Members will receive approximately $100, at 50,000 $80, etc.). While the estimated recovery does represent a discount from full recovery in an individual case[3], the discount to the monetary component is warranted in light of the *certain* and *immediate* payments to Class Members provided by the Settlement, the forward-looking relief designed to ensure Shutterfly's compliance with BIPA going forward, and particularly in light of the significant risks of ongoing litigation.

Shutterfly has expressed a firm denial of the material allegations and the intent to raise numerous legal defenses including, *inter alia*: (i) Plaintiffs' claims are barred by BIPA's photo exception; (ii) Shutterfly does not obtain biometric data from photos downloaded on its platform;

[3] If Plaintiffs prove their claims and certify a class in this case, the class-wide statutory damages would be either $1,000 (if Shutterfly's conduct were found negligent), or $5,000 (if willful) for each violation. 740 ILCS 14/20(1)-(2).

(iii) BIPA does not apply to Shutterfly's technology or to its conduct in the circumstances alleged in the Complaint; (iv) Plaintiffs' BIPA claim is not appropriate for class treatment; and (v) claims asserted by Class Members are subject to mandatory individual arbitration. Many of these defenses, if successful, would result in the Plaintiffs and the proposed Class Members receiving little to no recovery.

In fact, most, if not all, of the Class Members faced the very real possibility that Shutterfly's arbitration agreement would be found valid and enforceable, as demonstrated by the district court's ruling that compelled Plaintiff Miracle-Pond's claims to individual arbitration under the terms of Shutterfly's Terms and Conditions. (Federal Action, Dkt No. 67). Had the case continued in litigation, Shutterfly's arbitration policy likely would have prevented Class Members from proceeding in court, or as a class action, effectively eliminating the possibility of any comparable result. Taking these realities into account, recognizing the risks involved in any litigation and given the prohibitive time and expense of pursuing individual arbitrations, the immediate relief afforded to each Class Member militates in favor of settlement approval.

In addition to Shutterfly's many defenses, Plaintiffs would also otherwise be required to prevail on a class certification motion, which would be highly contested and for which success would certainly not be guaranteed. *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 582 (N.D. Ill. 2011). "Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation." *Id*. at 586 (internal citations omitted); *see also Coy v. CCN Managed Care, Inc.*, 2011 IL App (5th) 100068-U, ¶ 25 (stating that settlement allows parties to "avoid[] a determination of sharply contested issues and dispens[es] with expensive and wasteful litigation."). "If 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." *Schulte*,

805 F. Supp. 2d at 586. The proposed Settlement provides all Class Members with the ability to receive a *pro rata* share of the proposed non-reversionary Settlement Fund and provides meaningful prospective relief that this litigation sought to obtain. Approval would allow Plaintiffs and the Class Members to receive meaningful and significant benefits now, instead of years from now—or perhaps never. *Id*. at 582.

2. The Complexity, Length, Expense of Further Litigation Are Significant

The Settlement here appropriately balances the costs, risks, and likely delay of further litigation, on the one hand, against the benefits provided, on the other hand. NEWBERG § 11:50 at 155 ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.").

In the absence of settlement, it is certain that the resulting expense, duration, and complexity of the protracted litigation would be substantial, thus tilting the third factor in favor of resolving the case. Not only would the Parties have to undergo significant motion practice before any trial on the merits could even be contemplated, but additional evidence and witnesses would have to be assembled. Continuing to litigate this action would incur additional expenses, coupled with considerable time to proceed through trial and post-trial motions.

Further, given the complexity of the issues, the size of the putative class, and the amount in controversy, the defeated party would likely appeal any decision on the merits (at summary judgment and/or trial), as well as any decision on class certification. As such, the immediate and considerable monetary and prospective relief provided to the Class under the Settlement weighs heavily in favor of its approval compared to the inherent risk and delay of a long and drawn out litigation, trial, and appellate process.

3. The Amount of Opposition to the Settlement and Reaction of the Class

The Class has yet to be notified of the Settlement and given an opportunity to object. While it is difficult to ascertain the reaction of the Class Members to the Settlement prior to notice being disseminated, Plaintiffs have approved of the Settlement and believe that it is a fair and reasonable settlement in light of the defenses raised by Shutterfly and the potential risks involved with continued litigation. Before the Final Approval Hearing, the Court will receive and be able to review all objections or other comments received from Class Members, along with a full accounting of all requests for exclusion.

4. The Proposed Settlement Was Achieved Through Highly Contested, Arm's-Length Negotiations Between Experienced Counsel

There is an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's-length negotiations. NEWBERG § 11.42; *see also Shaun Fauley, 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'"); *Coy*, 2011 IL App (5th) 100068-U, ¶ 31 (finding that there was no collusion where the settlement agreement was reached as a result of "an arm's-length negotiation . . . entered into after years of litigation and discovery, resulting in a settlement with the aid of an experienced mediator.").

When negotiations began, Plaintiffs had a clear view of the strengths and weaknesses of their case and were in a strong position to make an informed decision regarding the reasonableness of a potential settlement. Plaintiffs' counsel reviewed tens of thousands of pages of documents produced in discovery. The Parties engaged in extensive arm's-length negotiations, including a full-day mediation session and extensive negotiations after that, with the assistance of Hon. Peter D. Lichtman, an experienced mediator—with such negotiations followed by multiple months of further communications and negotiations before finalization of the Settlement. Such an extensive

and formal process underscores the non-collusive nature of the proposed Settlement. There is no indication of collusion or fraud in the settlement negotiations, and none exists.

5. The Experience and Views of Counsel Support Preliminary Approval

With respect to factor seven, Plaintiff's counsel believe that the proposed Settlement Agreement is in the best interest of Class Members because, upon submission of a valid Claim Form and approval of their claim, Class Members are each provided an immediate and significant payment and meaningful relief instead of having to wait for the litigation and any subsequent appeals to run their course. Further, due to the defenses that Shutterfly has indicated that it would raise should the case proceed through litigation—and the resources that Shutterfly has committed to defend and litigate this matter through appeal—it is possible that the Class Members would receive no benefit whatsoever in the absence of this Settlement. Given Plaintiffs' counsel's extensive experience litigating similar class action cases in federal and state courts across the country, including litigating and settling multiple BIPA cases, this factor also weighs in favor of granting preliminary approval. *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).

6. The Stage of the Proceedings and the Amount of Discovery Completed

This Action was intensely litigated, and the Settlement was reached only after extensive discovery efforts and substantial motion practice by both Parties. Plaintiffs and Class Counsel devoted substantial time, effort and resources to this litigation, beginning with their initial investigation of Plaintiffs' allegations, continuing through a series of discovery demands and responses and several meet and confers regarding potential discovery disputes, and ending with hard-fought settlement negotiations. Ultimately, Shutterfly disclosed substantial evidence and

information under mediation privilege, and the extent of discovery completed is more extensive than the stage of proceedings alone might suggest.

Had the Parties not reached this Settlement, this case would have proceeded to additional dispositive motions and/or class certification, with the Parties being required to expend substantial resources to go forward with their respective claims and defenses while facing a significant risk regarding any decision on the merits of the case and whether a class should be certified.

The Court need not rule on a completely blank slate as to the fairness, reasonableness, and adequacy because this Settlement falls within the same range of settlements involving privacy claims that are redressable by statutory damages. In one finally approved consumer BIPA settlement involving fingerprints, class members received $125. *Sekura v. L.A. Tan Enters., Inc*., No. 2015 CH 16694 (Ill. Cir. Ct.). Another approved consumer settlement is *Prelipceanu v. Jumio Corp*., 2018 CH 15883 (Ill. Cir. Ct.). The settlement fund in *Jumio* is $7 million, although the parties provide no estimate of class size or likely recovery.

Accordingly, the proposed Settlement here, which was achieved after the Federal Action was ordered to arbitration as to one Plaintiff, and before any ruling on class certification or liability, creates a $6,750,000.00 non-reversionary Settlement Fund is fair, reasonable, adequate and warrants Court approval.

C. The Proposed Class Notice Is Appropriate And 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. *Cavoto v. Chicago Nat'l League Ball Club, Inc.,* No. 1-03-3749, 2006 WL 2291181, at *15 (Ill. App. 1st Dist. 2006) (collecting authorities and noting that "section 2-803 makes it clear that the statutory requirement of notice is not mandatory"). However, notice must be provided to absent class members to the extent

necessary to satisfy requirements of Due Process. *Id.* (citing *Frank v. Teachers Insurance & Annuity Association of America*, 71 Ill. 2d 583, 593 (1978)); *see also* Fed. R. Civ. P. 23(d)(2) advisory committee's note to 1966 amendment ("mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject."). 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.'" *Shaun Fauley, Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 36 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). "When individual notice is infeasible, notice by publication in a newspaper of national circulation . . . is an acceptable substitute." *Mirfasihi v. Fleet Mortg. Corp.,* 356 F.3d 781, 786 (7th Cir. 2004) (finding that while "[individual] notice is preferable to newspaper or other collective notice" such notice "was impossible here because [Defendant] has no record of those customers whose financial information it gave the telemarketers but who did not buy anything from the latter"); *Shaun Fauley, Sabon, Inc.,* 2016 IL App (2d) 150236, ¶ 38 ("In *Mirfasihi*, the court of appeals held that, where individual notice is impossible, notice by publication in a national newspaper and a settlement website maintained by the settlement administrator are 'acceptable.'").

The Notice Program set forth in the Settlement Agreement more than satisfies both the requirements of 735 ILCS 5/2-803 and Due Process. As set forth in Section III.C, *supra*, the multi-part Notice plan is designed to reach as many potential Class Members as possible and is the best notice practicable. (SA ¶ 6.1 & Schwartz Aff. ¶¶ 24-27). As such, the proposed methods of notice comport with 735 ILCS 5/2-803 and exceeds the requirements of Due Process. (SA ¶ 6.1 &

Schwartz Aff. ¶¶ 26-27). The proposed Claim Form and detailed Notices are attached as Exhibits 1 through 4 to the Settlement Agreement, respectively, and should be approved by the Court.

V. PROPOSED SCHEDULE

The Parties propose the following schedule leading to the hearing on final approval of the settlement:

Event	Date
Notice Date	30 days after entry of the Preliminary Approval Order
Deadline for Plaintiffs to File Any Motion for Attorneys' Fees and Expenses and for Service Awards	14 days before the Objection/Exclusion Deadline
Objection/Exclusion Deadline	45 days after the Notice Date
Claims Deadline	60 days following the Notice Date
Deadline for Plaintiffs to File Any Motion for of Final Approval of Settlement	14 days prior to the date of the Final Approval Hearing
Final Approval Hearing	90 days after entry of the Preliminary Approval Order, or such other date as ordered by the Court

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this unopposed Motion be granted and the Court enter an order substantially in the form accompanying this Motion: (1)

notifying Class Members that the Court is likely to certify the proposed Settlement Class; (2) preliminarily approving the proposed class action Settlement; (3) appointing Class Representatives and Class Counsel; (4) appointing the notice and Settlement Administrator; (5) approving the Class Notice and related Settlement administration documents; and (6) approving the proposed class settlement administrative deadlines and procedures, including the proposed Final Approval Hearing date and procedures regarding objections, exclusions and submitting Claim Forms.

Respectfully submitted,

DATED: May 17, 2021

CARLSON LYNCH, LLP

By: */s/ Katrina Carroll*

Katrina Carroll
kcarroll@carlsonlynch.com
Nicholas Lange
nlange@carlsonlynch.com
111 West Washington Street, Suite 1240
Chicago, IL 60602
Tel: (312) 750-1265
Firm Code: 63746

AHDOOT & WOLFSON, PC
Tina Wolfson*
twolfson@ahdootwolfson.com
Robert Ahdoot*
rahdoot@ahdootwolfson.com
Bradley K. King*
bking@ahdootwolfson.com
Henry J. Kelston*
hkelston@ahdootwolfson.com
2600 West Olive Avenue, Suite 500
Burbank, California 91505
Tel: (310) 474-9111; Fax: (310) 474-8585

CAREY RODRIGUEZ MILIAN, LLP
David P. Milian*
dmilian@careyrodriguez.com
1395 Brickell Ave. Suite 700
Miami, FL 33131
Tel: (305) 372-7474

* *pro hac vice* app. pending

Counsel for Plaintiffs and Proposed Class Counsel