IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, CHANCERY DIVISION

BRADLEY ACALEY, individually and on behalf of all others similarly situated, *Plaintiff*, v. VIMEO.COM, INC., a Delaware corporation, *Defendant*.	Case No. 2019CH10873 Judge: Hon. Clare J. Quish

PLAINTIFF'S UNOPPOSED AMENDED MOTION AND MEMORANDUM IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiff Bradley Acaley ("Plaintiff") respectfully seeks preliminary approval of a proposed class action settlement with Defendant Vimeo.com, Inc. ("Vimeo" or "Defendant" and, collectively with Plaintiff, the "Parties"), the terms of which are set forth in the Settlement Agreement ("SA"), attached hereto as Exhibit A.[1] This class action results from Vimeo's alleged collection, storage, and use of the biometric face scans of all individuals who appear in photos and videos uploaded to Vimeo's Magisto software application in violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"). After nearly three years of hard-fought litigation, fraught with numerous litigation risks, the Parties reached a Settlement that provides substantial relief to the Class.

The proposed Settlement will establish a $2,250,000 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 award to the Class Representative and attorneys' fees and expenses. In addition, the Settlement provides meaningful prospective relief that requires Vimeo to delete all geometric measurement data derived and collected from a face appearing in a photo or video on Magisto, to not sell such data, and to secure the informed and written consent that BIPA requires going forward. This relief ensures Vimeo's compliance with BIPA in the future and is the precise relief this litigation sought to obtain.

[1] Unless otherwise defined, all capitalized terms and phrases herein have the same meaning as ascribed in the Settlement Agreement. The notice forms, attached as Exhibits 1-4 to the Settlement Agreement, have been amended per the Court's instruction at the August 2, 2022 hearing of Plaintiff's initial preliminary approval motion. Affidavit of Bradley K. King filed concurrently herewith ("King Aff.") ¶ 15. In addition, at the recommendation of the proposed settlement administrator, Postlethwaite & Netterville, Exhibit 1 (claim form) has been further amended to remove direct deposit bank information from the paper claim form, which will still be an option on the online claim form. Finally, Exhibit 2 (postcard notice) has been converted to a single postcard to minimize direct notice mail costs; claimants may still obtain a paper claim form via the settlement website or toll-free hotline. Both exhibits have been reformatted as well. Affidavit of Brandon Schwartz filed concurrently herewith ("Schwartz Aff.") ¶¶ 11, 14, 24-25.

The terms of this Settlement are fair, reasonable, and in the best interests of the Class, given the substantial risks that Plaintiff and the Class faced in every phase of this litigation. Plaintiff has further increased the benefit to the Class—per the Court's detailed guidance—by re-bidding the administration expenses and lowering the maximum amount of attorney fees to be sought over the course of hearings with the Court between August and December of 2022. King Aff. ¶¶ 14-21.

Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement; issue the proposed amended 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 Bradley Acaley filed this Action in Illinois Circuit Court on September 20, 2019, on behalf of Illinois Magisto users. Complaint ¶ 38. Mr. Acaley alleges that he has suffered harm as a result of Vimeo's violations of BIPA, and that he is entitled to statutory damages under the Act.

After removing this case to federal court, Defendant moved to stay and compel individual arbitration of Mr. Acaley's claims (*Acaley v. Vimeo, Inc*., Case No. 1:19-cv-07164 (N.D. Ill. Dec. 20, 2019) (the "*Federal Action*"), ECF No. 17 ("Arbitration Motion")). On June 1, 2020, after the Arbitration Motion was fully briefed, the District Court denied Defendant's Arbitration Motion (*Federal Action*, ECF No. 41). On June 18, 2020, Defendant filed a notice of appeal of the Court's order denying the Arbitration Motion (*Federal Action*, ECF No. 42; *Acaley v. Vimeo, Inc*., Case No. 20-2047 (7th Cir.) ("Appeal").

B. Settlement Negotiations

The Parties thereafter entered into the Seventh Circuit mediation program with the Chief Seventh Circuit Mediator, Joel Shapiro. With the supervision of Mr. Shapiro, the Parties engaged in extensive settlement discussions via telephone and in writing, which lasted approximately two

years and included a stipulated protective order between the Parties and signed by the District Court on limited remand (*Federal Action*, ECF No. 52). King Aff. ¶¶ 8-9.

Nonetheless, the Parties remained unable to reach a resolution in the months after this the commencement of negotiations supervised by Mr. Shapiro. The Parties then spent considerable time and resources briefing Vimeo's appeal of the order denying its motion to compel arbitration.

In December 2021, after the Parties had fully briefed Vimeo's appeal and the Seventh Circuit set oral argument for February 10, 2022, the Parties revisited settlement discussions, ultimately agreeing to a mediation with Mr. Shapiro on January 7, 2022. After a full-day mediation with Mr. Shapiro on January 7, 2022, the Parties reached a settlement in principle to resolve all claims asserted in this Action.

Even after reaching a settlement in principle, the Parties continued to negotiate the details of the Settlement for nearly five additional months. The Settlement Agreement was finalized and fully executed in early June 2022. On June 2, 2022, Vimeo voluntarily dismissed its appeal before the Seventh Circuit, sending the case back to the Federal District Court. *Federal Action*, ECF No. 68. On June 6, 2022, the Action was remanded from Federal Court to the Circuit Court by stipulation of the Parties. *Federal Action*, ECF No. 70.

Before and during all settlement discussions and mediation, the Parties exchanged documents and information on an arm's-length basis to enable Plaintiff and proposed Class Counsel to adequately evaluate the scope of the potential class-wide liability and thus engage in meaningful settlement discussions on behalf of the Class. King Aff. ¶ 13. In total, the Parties engaged in almost two years of settlement negotiations, which continued contemporaneously with their briefing of Vimeo's appeal, and included nearly five months of negotiation with respect to the Settlement Agreement and its exhibits after a settlement in principle was reached in January 2022. *Id*.

Plaintiff also requested bids from a number of settlement administrators, and the Notice Plan and each document comprising the Class Notice were negotiated and exhaustively refined, with input from experts, to ensure that these materials will be clear, straightforward, and

understandable by Class Members. *Id.* ¶ 14. After the initial August 2, 2022 hearing of Plaintiff's first unopposed preliminary approval motion, Plaintiff coordinated with Vimeo over the course of four months (based on the Court's instruction) to re-bid and ultimately select a new proposed administrator, Postlethwaite & Netterville ("P&N"); this process reduced the estimated amount of administration expenses that, along with Plaintiff's decision to reduce the maximum amount of attorney fees sought to 35% of the gross settlement fund ($787,500), will result in a significantly higher net settlement fund available to the Class if approved. *See id*. ¶¶ 15-21.

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 or video maintained on Magisto at any time or held a registered Magisto account on which a face was detected between September 20, 2014 and the date of the issuance of the Preliminary Approval Order. Excluded from the Class are: (a) any Judge, Magistrate, or mediator presiding over this action and members of their families; (b) Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest; (c) Class Counsel; and (d) the legal representatives, successors or assigns of any such excluded persons.

SA ¶ 1.8.

B. The Settlement Benefits

1. Monetary Benefits to the Class

The proposed Settlement requires Vimeo to pay $2,250,000.00 to create the Settlement Fund for the benefit of Class Members. SA ¶ 1.31. Settlement Administration Expenses, including the costs of providing notice to the Class, any Court-approved Service Award to the Class Representative and attorneys' fees and expenses to Class Counsel will be deducted from the Settlement Fund. SA ¶ 4.2(a). The remaining Net Settlement Fund will be used to pay Settlement Payments resulting from Approved Claims made by Class Members. SA ¶¶ 1.20, 1.34. No portion of the Settlement Fund will be returned to Vimeo. SA ¶ 4.2(b).

Each Class Member may submit a Claim Form to receive a *pro rata* share of the Net Settlement Fund. SA ¶ 4.3(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 10,000 Class Members submit valid Claims, and the Net Settlement Fund equals $1,277,226 based on P&N's current estimates, each Claimant will receive approximately $128.

2. Prospective Relief

A significant component of the Settlement involves changes to Vimeo's business practices. The Settlement requires Vimeo to take reasonable steps to ensure compliance with BIPA. Vimeo has agreed to provide a declaration confirming that Vimeo will delete (or has deleted) all geometric measurement data derived and collected from a face appearing in a photo or video on Magisto and will not sell such data within 30 days of the Preliminary Approval Order. SA ¶ 4.1. Going forward, Vimeo has agreed to comply with BIPA and any other law or provision of a law under which a claim relating to biometric identifiers or biometric information could be brought with respect to photographs or videos of faces that were uploaded onto Magisto. *Id.*

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. Defendant will provide the Settlement Administrator with the Class Member Information it possesses. SA ¶ 7.1(a). Direct Notice (SA Ex.3) will then be sent to each Class Member identified by Vimeo via email, with a link to a Spanish language version. SA ¶ 7. 1(d)(i). 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 ¶ 7.1(d)(i)(b). In addition, in the event that more than 10% of the Class Member emails are returned as undeliverable, Defendant will place notice of the Settlement and a hyperlink to the Settlement Website on Magisto's website. SA ¶ 7.1(d)(ii).

[2] Prior to mailing, the Administrator will use the USPS National Change of Address Database to update any address. SA ¶ 7.1; Schwartz Aff. ¶ 14. For any returned mail, the Administrator shall resend Notice to any forwarding address or perform a skip trace to identify an updated address. *Id.*

Notice will also include a robust print and digital media campaign, including digital advertising on various websites and Facebook, Instagram, and Google search, as well as print advertisements in several prominent Illinois newspapers. SA ¶ 7.1(d); Schwartz Aff. ¶¶ 15-23. The Settlement Administrator will also establish a Settlement Website (*www.MagistoBIPASettlement.com*), which will have information about the Settlement, including an electronic copy of the Long Form Class Notice, the Settlement Agreement, and all material Court filings related to the Settlement. SA ¶ 7.1(d)(iv). The Settlement 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 ¶¶ 8.1, 9.2, 10.1.

The Notice Plan thus provides the best practicable notice under the circumstances and fulfills all due process requirements, at a cost that maximizes the resulting net settlement fund for distribution to the Class. *See generally* Schwartz Aff. ¶¶ 10-25; King Aff. ¶¶ 19-20.

D. Proposed Class Representative Service Award and Attorneys' Fees and Expenses

The Settlement would not have been possible without the time and effort of the Class Representative, 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 him and so many others. Plaintiff has been actively involved with his counsel from the inception of this class action through execution of the Parties' Settlement and has fulfilled his obligations as Class Representative throughout the nearly three years this litigation has been pending. Class Counsel intend to seek a Service Award of $5,000 for the Class Representative. SA ¶ 13.1. In addition, Class Counsel now intend to seek an award of attorneys' fees not to exceed 35% of the Settlement Fund or $787,500, plus reasonable costs and expenses incurred by Class Counsel estimated at $20,000. King Aff. ¶ 20. Vimeo has agreed not to oppose such requests. SA ¶ 13.2. The Parties did not negotiate the maximum amount for the Service Award and for attorneys' fees to be sought until after they already reached an agreement in principle for the relief provided herein to the Settlement Class. SA ¶ 13.7; King Aff. ¶¶ 20, 29.

E. Narrowly Tailored Release

If the Settlement is approved, Plaintiff and only Class Members who do not opt out will release Defendant from all Claims "arising from or related to images in photographs or videos that were uploaded onto Magisto, alleged biometric identifiers, biometric information, or personal data that were obtained from documents and information uploaded onto Magisto, and including all claims that were brought or could have been brought in the Action arising from the use of Magisto and Plaintiff's allegations in the Action, including, but not limited to, claims for any violation of BIPA, including, without limitation, any claim that Released Parties do not comply with BIPA, or any other law or provision of a law under which a claim relating to biometric identifiers or biometric information could be brought with respect to photographs or videos of faces that were uploaded onto Magisto." SA ¶ 1.26. Thus, the release is limited and tailored to apply to allegations in this Action.

IV. CLASS ACTION SETTLEMENT APPROVAL PROCESS

Strong judicial and public policies favor the settlement of 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); *Lebanon Chiropractic Clinic, P.C. v. Liberty Mut. Ins. Co.*, 2016 IL App (5th) 150111-U, ¶ 41; *Isby v. Bayh*, 75 F.3d 1191, 1198-99 (7th Cir. 1996).

Courts review proposed class action settlements using a well-established two-step process. 4 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 11.25, at 38-39 (4th ed. 2002) ("NEWBERG"); *see e.g.*, *Kaufman v. Am. Express Travel Related Servs. Co.*, 264 F.R.D. 438, 447 (N.D. Ill. 2009); *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 by Felzen v. Andreas*, 134 F.3d 873 (2d Cir. 1998); *see e.g.*, *Lebanon*, 2016 IL App (5th) 150111-U, ¶ 11. The preliminary approval stage is an "initial evaluation" of the fairness of the

proposed settlement based on the written submissions and informal presentation from the settling parties. MANUAL FOR COMPLEX LITIGATION, § 21.632 (4th ed. 2004) ("MANUAL FOR COMPLEX LITIGATION"). 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. This procedure safeguards the due process rights of unnamed Class Members and allows the Court to fulfill its role as the guardian of their interests. NEWBERG § 11.25. The Proposed Class Representative is presently at the first step of this two-step process.

V. ARGUMENT

The Settlement is a fair, reasonable, and adequate resolution to this litigation, the Class satisfies each of the class certification requirements of Section 2-801, and the Notice Plan is the best practicable under the circumstances. Accordingly, the Court should (A) preliminarily approve the Settlement, (B) provisionally certify the Settlement Class, (C) approve the proposed Notice Plan, and (D) schedule the Final Approval Hearing.

A. The Settlement Should Be Preliminarily Approved

A court may approve a proposed class settlement on a finding that it is fair, reasonable, and adequate. 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 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. "Although this standard and the factors used to measure it are ultimately questions for the fairness hearing that comes after a court finds that a proposed settlement is within approval range, a more summary version of the same inquiry takes place at the preliminary phase." *Kessler v. Am. Resorts Int'l*, Nos. 05-cv-5944, 07-cv-2439, 2007 U.S. Dist. LEXIS 84450, at *17 (N.D. Ill. Nov.

14, 2007) (citing *Armstrong*, 616 F.2d at 314).[3]

Each of these factors confirms the fairness, reasonableness, and adequacy of the Settlement presently before the Court, warranting its preliminary approval.

B. The Settlement Provides Substantial Relief to the Settlement Class, While Avoiding Significant Risks of Non-Recovery Posed by Continued Litigation

The first factor in evaluating the fairness of a proposed settlement is the strength of the plaintiff's case on the merits balanced against the relief obtained in the settlement. *City of Chicago*, 206 Ill. App. 3d at 972; *Steinberg v. Sys. Software Associates, Inc.*, 306 Ill. App. 3d 157, 170 (1st Dist. 1999); *Am. Int'l Grp., Inc. v. ACE INA Holdings*, Nos. 07-cv-2898, 09-cv-2026, 2012 U.S. Dist. LEXIS 25265, at *17 (N.D. Ill. Feb. 28, 2012); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).

In this case, the amount offered by the Settlement—$2,250,000 on a non-reversionary basis—is substantial. For example, if 10,000 Approved Claims are ultimately submitted by the Claims Deadline, each claiming Class Member will receive a Settlement Payment of approximately $128. While the estimated recovery does represent a discount from full recovery in an individual case, 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 Defendant's compliance with BIPA going forward, and particularly in light of the significant risks of ongoing litigation.

The reasonableness of the Settlement's benefits is underscored by the many substantial risks of non-recovery that continued litigation would have posed absent the Settlement. *Smith v. CRST Van Expedited, Inc.*, No. 10-cv-1116, 2013 U.S. Dist. LEXIS 6049, at *9-10 (S.D. Cal. Jan. 14, 2013) (where "the settlement avoids the risks of extreme results on either end, *i.e.,* complete or no recovery . . . . it is plainly reasonable for the parties at this stage to find that the actual

[3] Because Section 2-801 is modeled after Federal Rule of Civil Procedure 23, "federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois." *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 125 (2005).

recovery realized and risks avoided here outweigh the opportunity to pursue potentially more favorable results through full adjudication," such that "[t]hese factors support approval").

Defendant has expressed a firm denial of the material allegations and the intent to raise numerous legal defenses including, *inter alia*: (i) claims asserted by Class Members are subject to mandatory individual arbitration; (ii) BIPA does not apply to the Magisto app software or to Vimeo's conduct in the circumstances alleged in the Complaint; and (iii) Plaintiff's BIPA claim is not appropriate for class treatment. Many of these defenses, if successful, would result in the Plaintiff and the proposed Class Members receiving little to no recovery.

Most, if not all, of the Class Members faced the very real possibility that the arbitration provision in the Magisto Terms would be found valid and enforceable against Class Members. Had the case continued in litigation, the Magisto Terms 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 strongly supports settlement approval.

Throughout this litigation, there has been a significant risk that the Illinois legislature would amend BIPA on a retroactive basis, in a manner that would effectively wipe away Plaintiff's and Class Members' claims for relief. In 2016, legislation was introduced in the Illinois House of Representatives that, if passed by both chambers and signed by the governor, would have retroactively amended BIPA to, *inter alia*, preclude its application to uploaded digital images regardless of the information collected or the process of its extraction. *See* HB 6074 (2016). Although the bill introduced in 2016 predates this litigation and did not pass, several more recent bills aimed at amending BIPA were introduced into both houses of the legislature during the pendency of this litigation.[4] Simply put: at the time the Settlement was negotiated, there remained

[4] *See* SB 2134 (2019) & SB 3592 (2020) (to eliminate the law's private right of action); SB 3591 (2020) (to permit the recovery of damages only for intentional violations, eliminating the ability to recover damages for negligent violations); SB 3776 (2020), SB 3593 (2020) & HB 5374 (2020)

a substantial risk that the Illinois legislature would amend BIPA in a manner that would prevent the Class from recovering any relief in this action, and that remains a risk with respect to any continued litigation.

Notably, the relief provided by this Settlement greatly exceeds the relief historically obtained through settlements in data-privacy class actions. *See, e.g.*, *Goldschmidt v. Rack Room Shoes, Inc.*, No. 1:18-cv-21220-KMW (S.D. Fla.) (ECF Nos. 82-1, 86); approving settlement that provided $5 cash and a $10 voucher to each claiming class member in action alleging violation of the Telephone Consumer Protection Act, which allows for statutory damages of $500 or $1,500 per violation); *In re Vizio, Inc., Consumer Privacy Litig.*, No. 16-ml-02693-JLS-KES (C.D. Cal.) (ECF Nos. 282-1, 337; approving settlement that provided between $13 and $31 to each claiming class member in action alleging violation of the Video Privacy Protection Act, 18 U.S.C. § 2710, which allows for statutory damages of $2,500 per violation); *Kinder v. Meredith Corp*., No. 1:14-cv-11284 (E.D. Mich.) (ECF Nos. 79, 81; approving settlement that estimated a $50 and provided reportedly $32.40 to each claiming class member in action alleging violation of Michigan's Preservation of Personal Privacy Act, which allowed for statutory damages of $5,000 per violation).

The Settlement also compares favorably with previously approved settlements in other BIPA cases alleging collection of "scan[s] of . . . face geometry" and related data. *See, e.g.*, *Miracle-Pond et al. v. Shutterfly, Inc.*, No. 2019-CH-07050 (Ill. Cir. Ct.) (granting final approval of $6.75 million settlement on behalf of at least 954,000 class members); *Kusinski v. ADP, LLC*,

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(to eliminate or reduce the ability of a plaintiff to recover liquidated damages); SB 3053 (2018) & HB 5103 (2018) (to eliminate protections regarding informed consent, collection, and storage of biometric information); SB 3593 (2020) & HB 5374 (2020) (to require pre-suit notice before any action for damages); HB 0559 (2021) & SB 0330 (2021) (to require an aggrieved person, before filing suit, to provide a private entity 30 days' written notice identifying the specific provisions of BIPA the aggrieved person believes the entity violated, and limit an aggrieved person's damages to their actual damages for negligent violations, or their actual damages plus liquidated damages up to the amount of actual damages for willful violations); HB 0560 (2021) (to remove private right of action and provide that any violation of BIPA would be actionable only by the Illinois Attorney General or appropriate State's Attorney).

No. 2017-CH-12364 (Ill. Cir. Ct.) (granting final approval of $25 million settlement on behalf of approximately 800,000 class members).

Based on the substantial monetary and non-monetary relief provided by the Settlement, and the significant risks posed by continued litigation (including loss at summary judgment, class certification or an appeal), the first and most important factor weighs heavily in favor of granting preliminary approval of the Settlement.

C. A Class-Wide Judgment Could Be Devastating to Defendant

The second factor considers Defendant's ability to satisfy a judgment at trial. *City of Chicago*, 206 Ill. App. 3d at 972. In Plaintiff's view, the amount potentially at stake on a class-wide basis at a trial in this case is in the billions of dollars if Defendant were ultimately held to have violated BIPA, and thus liable for statutory damages, every single time it collected a Class Member's biometric identifier absent a written release. *Cothron v. White Castle Sys., Inc.*, 20 F.4th 1156, 1166-67 (7th Cir. 2021) (certifying to the Illinois Supreme Court the question as to whether a BIPA claim accrues each time a person's biometric identifier is scanned and each time it is transmitted, or only upon the first scan and first transmission). While Defendant may be a profitable company, a verdict in this amount would almost certainly have a severe impact. Accordingly, the second factor weighs in favor of granting preliminary approval.

D. Continued Litigation Would Be Complex, Costly, and Lengthy

The third factor asks whether the settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation. *City of Chicago*, 206 Ill. App. 3d at 972; *see also Nat'l Rural Telecomms Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("The Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.").

This would be lengthy and very expensive litigation if it were to continue, involving extensive motion practice, including, *inter alia*, a motion for class certification (and possibly a motion for decertification), a motion to disseminate pretrial notice to the class, motions for

summary judgment, and various pretrial motions, as well as the retention of additional experts, preparation of expert reports, conducting expert depositions, and motions challenging the qualifications of retained experts. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("[C]lass action suits have a well-deserved reputation as being most complex."). The case would probably not go to trial for well over a year. And even if Class Members recovered a judgment at trial greater than the $2.25 million Settlement Fund in this proposed Settlement, post-trial motions and the appellate process would deprive them of any recovery for years, and possibly forever in the event of a reversal.

Rather than embarking on years of protracted and uncertain litigation, Plaintiff and proposed Class Counsel negotiated a Settlement that provides immediate, certain, and *meaningful* relief to all Class Members. *See DIRECTV, Inc*., 221 F.R.D. at 526. Accordingly, the third factor weighs in favor of finding the Settlement fair, reasonable, and adequate.

E. There is Presently no Opposition to the Settlement

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

Because the Settlement is presently at the preliminary approval stage, Notice has not yet been disseminated, and the Class has not yet had an opportunity to voice any support or opposition. If the Settlement is preliminarily approved, Plaintiff will address factors four and six in his motion for final approval of the Settlement, after dissemination of Notice and the expiration of the Objection Deadline. Nonetheless, Plaintiff and his Counsel strongly support the Settlement, which they believe is fair, reasonable, and adequate and in the best interest of the Settlement Class. *See infra* Section G (opinions of Class Counsel on Settlement's fairness).

Accordingly, even at this preliminary stage of the approval process, the fourth and sixth factors weigh in favor of finding the Settlement fair, reasonable, and adequate.

F. The Settlement Was Negotiated Free of any Collusion

The fifth factor considers the presence of any collusion by the Parties in reaching the proposed settlement. *City of Chicago*, 206 Ill. App. 3d at 972.

Where a proposed class settlement is the result of zealous, arm's-length negotiations before an experienced mediator, the settlement may be presumed fair and reasonable and entered into without any form of collusion. NEWBERG, § 11.42; *see also Coy v. CCN Managed Care, Inc.*, 2011 IL App (5th) 100068-U, ¶ 31 (no collusion where settlement agreement was reached as a result of "an arms-length negotiation between plaintiffs and defendants, entered into after years of litigation and discovery, resulting in a settlement with the aid of an experienced mediator"); *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 21 (approval warranted where there was "no evidence that the proposed settlement was not the product of 'good faith, arm's-length negotiations'").

Such is the case here. The Settlement was achieved after a robust pre-filing investigation, nearly three years of zealous litigation, and two years of arm's-length negotiations overseen by an experienced and well-respected mediator, that included a significant exchange of highly sensitive, proprietary information. King Aff. ¶¶ 5-11. In the five months post-dating their January 2022 achievement of a settlement in principle, the Parties engaged in intense back-and-forth negotiations regarding every detail of the Settlement. *Id.* ¶ 12.

Because the Settlement is the product of zealous, lengthy, and collusion-free negotiations between the Parties, the fifth factor weighs in favor of finding the Settlement fair, reasonable and adequate.

G. Competent Counsel Strongly Endorse the Settlement

The seventh factor is the opinion of competent counsel as to the fairness, reasonableness, and adequacy of the proposed settlement. *City of Chicago*, 206 Ill. App. 3d at 972. Courts rely on affidavits in assessing proposed class counsel's qualifications under this factor. *Id.* at 974.

Proposed Class Counsel at Ahdoot & Wolfson, PC have extensive experience litigating complex data-privacy class actions, including class actions alleging claims for violations of BIPA. King Aff. ¶¶ 30-42.

Proposed Class Counsel strongly endorse the Settlement, which they believe is in the best interest of the Settlement Class. *Id.* ¶ 22. As explained above, Defendant's defenses—and the

resources that Defendant had committed to defending the case through trial and appeal—present numerous risks of total non-recovery by the Class had the litigation continued. In light of the substantial benefits provided by the Settlement—including the $2.25 million Settlement Fund from which all Class Members are entitled to receive a *pro rata* share, without the need to wait for the litigation and subsequent appeals to run their course—Class Counsel consider the Settlement an excellent outcome for the Settlement Class. *Id.* ¶¶ 20, 24-26.

Accordingly, the seventh factor weighs in favor of finding the Settlement fair, reasonable and adequate. *GMAC*, 236 Ill. App. 3d at 497 (experienced and competent counsel's support for a proposed class settlement weighs in favor of approving the settlement).

H. The Settlement is the Product of Extensive Litigation and Discovery

The eighth and final factor considers the stage of the proceedings and the amount of discovery that has been completed at the time the settlement is reached. *City of Chicago*, 206 Ill. App. 3d at 972; *Lane v. Facebook, Inc.,* 696 F.3d 811, 819 (9th Cir. 2012).

Prior to commencing this litigation, Plaintiff's counsel conducted wide-ranging investigations into every aspect of the claims and potential defenses and crafted a well-pleaded complaint. King Aff. ¶ 5. During the litigation, the Parties vigorously briefed Defendant's motion to compel arbitration, and their opening, response, and reply briefs in the Appeal of the order denying that motion, among numerous other materials. *Id.* ¶ 6. Plaintiff's counsel requested and received substantial discovery in the context of settlement discussions. These efforts included an agreement and coinciding protective order negotiated by the Parties and approved by the Federal Court. Plaintiff's counsel also consulted with and retained an expert consultant to assist with the analysis of the facts and information obtained. *Id.* ¶ 9.

Armed with this information, Plaintiff and his counsel had "a clear view of the strengths and weaknesses" of the case, *see In re Warner Commc'ns Sec. Litig*., 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd* 798 F.2d 35 (2d Cir. 1986), and were in a strong position to negotiate a fair, reasonable, and adequate settlement on behalf of the Settlement Class, both prior to and after the Parties' successful mediation.

Settlement negotiations were thorough and lengthy. The Parties entered into the Seventh Circuit mediation program with the Chief Seventh Circuit Mediator, Joel Shapiro. With the supervision and assistance of Mr. Shapiro, the Parties engaged in extensive, arm's-length negotiations where counsel for each Party zealously advocated its position. The Parties' extensive settlement discussions lasted approximately two years, during which the Parties overcame apparent impasses and went forward with fully briefing Defendant's Appeal while continuing to explore resolution. King Aff. ¶ 8.

Where, as here, a proposed settlement is the product of arm's-length negotiations between experienced counsel after significant discovery has occurred, the Court may presume the settlement to be fair, adequate, and reasonable. *Rodriguez v. W. Publishing*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."); NEWBERG § 11.41 (proposed class settlement may be presumed fair if it "is the product of arm's length negotiations, sufficient discovery has been taken to allow the parties and the court to act intelligently, and counsel involved are competent and experienced.").

Accordingly, the eighth and final factor weighs in favor of finding the Settlement fair, reasonable and adequate, warranting its preliminary approval.

I. The Settlement Class Should Be Provisionally Certified

The Court should provisionally certify the Class for settlement purposes only. MANUAL FOR COMPLEX LITIGATION § 21.632; *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). A class may be certified under Section 2-801 of the Illinois Code of Civil Procedure if the following "prerequisites" are satisfied: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801; *CE Design Ltd. v. C & T Pizza, Inc.*, 2015 IL App (1st) 131465, ¶ 10, *reh'g denied* (June 4, 2015), *appeal*

denied, 39 N.E.3d 1001 (Ill. 2015). The proposed Class (SA ¶ 1.8) satisfies all prerequisites to certification under Section 801-2, as explained below.

1. The Class is Sufficiently Numerous, and Joinder is Impracticable

The first prerequisite to class certification is that "the class is so numerous that joinder of all members is impracticable." 735 ILCS 5/2-801(1). "Although there is no 'bright line' test for numerosity, a class of forty is generally sufficient[.]" *Hinman v. M & M Rental Center, Inc.*, 545 F. Supp. 2d 802, 805-06 (N.D. Ill. 2008); *Kulins v. Malco, A Microdot Co., Inc*., 121 Ill. App. 3d 520, 530 (1st Dist. 1984) (47 class members sufficient to satisfy numerosity). Defendant's estimate, based on the best available information, is that the Class includes approximately 250,000 Magisto users residing in Illinois, as well as Illinois non-users who appeared in photos in Magisto. King Aff. ¶ 25. Joinder of all Class Members is thus obviously impracticable. Accordingly, the numerosity requirement is satisfied.

2. Common Questions of Law and Fact Predominate

Predominance of common questions, the second prerequisite to class certification, is met where there are "questions of fact or law common to the class" and those questions "predominate over any questions affecting only individual members." 735 ILCS 5/2-801(2). Such common questions of law or fact generally exist where the members of a proposed class have been aggrieved by the same or similar misconduct. *Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 673–74 (2nd Dist. 2006).

In this case, Plaintiff alleges that all members of the proposed Class share a common statutory BIPA claim arising out of the same uniform conduct—the use of the same technology to collect and store the same type of data pertaining to the faces of persons depicted in photographs and videos uploaded to Magisto. That alleged uniform course of conduct presents numerous issues of law and fact common to the Class that predominate over any issues unique to individual Class Members, including whether the data Defendant collected and stored constituted "biometric identifiers" or "biometric information" within the meaning of BIPA; whether Defendant provided the requisite notices to, and obtained the requisite "signed written releases" from, Class Members;

whether Defendant published publicly available retention and deletion policies; and whether Defendant's alleged BIPA offenses were committed "negligently," "intentionally," or "recklessly."

3. Plaintiff and Class Counsel Adequately Represent Class Members

The third prerequisite to class certification under Section 2-801 is that "[t]he representative parties will fairly and adequately protect the interest of the class." 735 ILCS 5/2-801(3). "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)); *see also Purcell & Wardrope Chartered v. Hertz Corp*., 175 Ill. App. 3d 1069, 1078 (1st Dist. 1988). 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); *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶ 16 (citing *Miner*, 87 Ill. 2d at 14).

Both prongs of the adequacy requirement are satisfied in this case. *First*, Plaintiff's interests in the litigation are aligned with, and not antagonistic to, those of the Settlement Class. Plaintiff challenges the same alleged course of conduct that each Class Member challenges and seeks the same relief. Plaintiff has retained competent counsel, provided substantial assistance to his counsel in advance of and during the litigation, vigorously prosecuted the case on behalf of the Settlement Class, and worked closely with his counsel in reaching the proposed Settlement. King Aff. ¶¶ 27-28. Plaintiff supports the Settlement and believes that it constitutes a fair, reasonable, and adequate result for the Settlement Class. *Id.* ¶ 28. *Second*, Plaintiff's counsel have extensive experience in complex class action litigation. *Id.* ¶¶ 30-42. Accordingly, the Class Representative and his counsel are adequate representatives of the Settlement Class. *See, e.g.*, *CE Design v. Beaty Const., Inc.*, No. 07-cv-3340, 2009 U.S. Dist. LEXIS 5842, *13 (N.D. Ill. Jan. 26, 2009); *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶ 17.

4. Fair and Efficient Adjudication of the Controversy

The final prerequisite to class certification is that "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).

As a threshold matter, because the proposed Settlement satisfies the numerosity, commonality, and adequacy of representation requirements, discussed above, it is "evident" that a class action is the appropriate method for the fair and efficient adjudication of this controversy. *Id.* at 204 (explaining that a "holding that the first three prerequisites of section 2-801 are established makes it evident that the fourth requirement is fulfilled"); *Purcell & Wardrope Chartered*, 175 Ill. App. 3d at 1079.

Moreover, the U.S. Supreme Court has explained that a class action is the proper method for resolving a large-scale claim if the action 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. This is especially true in BIPA 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 U.S. Dist. LEXIS 5462, at *17 (N.D. Ill. Mar. 31, 2004); *see also Gordon*, 224 Ill. App. 3d at 203-04 (noting that 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"); *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."). Resolution of the Class Members' claims in a single proceeding promotes judicial efficiency and economies of scale and avoids inconsistent decisions. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982).

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*, 521 U.S. at 620. Nor should the Court "judge the legal and factual questions" regarding certification of the proposed Settlement Class by the same criteria as a proposed class being adversely certified. *GMAC*, 236 Ill. App. 3d at 493. Accordingly, the final requirement for class certification is satisfied and the Court should provisionally certify the Settlement Class.

J. The Proposed Class Notice Is Appropriate And Should be Approved

Upon provisionally certifying the Settlement Class, the Court may provide notice of the proposed Settlement to the Class pursuant to Section 2-803 and must provide notice to the Class to the extent necessary to comport with the constitutional requirements of due process. 735 ILCS 5/2-803; *Frank v. Tchr's Ins. & Annuity Ass'n. of Am.*, 71 Ill. 2d 583, 593 (1978). The Due Process clause to the U.S. Constitution mandates providing the "best practicable" notice to the Settlement Class, *Shaun Fauley*, 2016 IL App (2d) 150236, ¶ 36 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)), which means notice that is "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." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In this case, the Settlement Agreement contemplates a multi-part Notice Program designed to reach as many Class Members as possible. SA ¶ 7. The Class Notice will be provided directly by e-mail to all potential Class Members and, to the extent e-mails are undeliverable, the Class Notice will be sent to the Class Member by U.S. Mail where a physical address is available. SA ¶¶ 7.1(d)(i)(a)-(c); Schwartz Aff. ¶¶ 10-14. The Class Notice will also be published to potential Class Members in ads prominently displayed in a number of regional newspapers in Illinois, as well as on popular social media sites. SA ¶¶ 7.1(d)(ii)-(iii); Schwartz Aff. ¶¶ 15-22. The Settlement Administrator will establish a Settlement Website where Claim Forms may be submitted

electronically on a simple web-based form, where inquiries may be sent to the Settlement Administrator, and where copies of important court documents, including the Claim Form, Settlement Agreement, Class Notices, the Court's Orders, and the Applications for Fee and Expense Award and for a Service Award may be downloaded, as well as a toll-free number for Class Members to call for additional information about the Settlement. SA ¶ 7.1(d)(iv).

The proposed Claim Form and Class Notices (*id.*, Exs. 1, 2-4), and the methods by which the Class Notices will be disseminated, readily comport with Due Process and the procedural requisites of Section 2-803. Schwartz Aff. ¶ 9.

Accordingly, Plaintiff respectfully requests that the Court, as set forth in the proposed order accompanying this Motion, find that the notice provided by the Class Notice Program: (i) is the best practicable notice; (ii) is reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the Action and of their right to object to or to exclude themselves from the proposed Settlement; (iii) constitutes due, adequate and sufficient notice to all Persons entitled to receive notice; and (iv) meets all requirements of applicable law.

VI. PROPOSED SCHEDULE

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

Event	Date
Notice Date	60 days after entry of the Preliminary Approval Order
Deadline for Plaintiff to File Any Motion for Attorneys' Fees and Expenses and for a Service Award	14 days before the Objection/Exclusion Deadline
Objection/Exclusion Deadline	45 days after the Notice Date
Claims Deadline	75 days following the Notice Date
Deadline for Plaintiff to File Any Motion for of Final Approval of Settlement	14 days prior to the date of the Final Approval Hearing
Final Approval Hearing	120 days after entry of the Preliminary Approval Order, or such other date as ordered by the Court

VII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this unopposed amended 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 the Class Representative 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: December 12, 2022

By: */s/ Bradley K. King*

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