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

ALEX PRELIPCEANU, individually and on behalf of similarly situated individuals, *Plaintiff,* v. JUMIO CORPORATION, a Delaware corporation, *Defendant.*	Case No. 2018-CH-15883 Hon. Michael T. Mullen

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

Dated: December 13, 2019

Myles McGuire
Evan M. Meyers
David L. Gerbie
Andrew T. Heldut
MCGUIRE LAW, P.C.
55 West Wacker Drive, Suite 900
Chicago, Illinois 60601
Tel: (312) 893-7002
mmcguire@mcgpc.com
emeyers@mcgpc.com
dgerbie@mcgpc.com
aheldut@mcgpc.com

Counsel for Plaintiff
and Proposed Class Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

I. INTRODUCTION

The Parties to this putative class action brought under the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq*. ("BIPA"), have reached a proposed settlement that provides all Settlement Class Members[1] with the ability to receive a *pro-rata* share of the proposed non-reversionary Settlement Fund. (*See* "Settlement Agreement," attached hereto as Exhibit 1.) The Settlement Agreement provides significant relief to the class members and establishes a cash settlement fund in the amount of $7,000,000.00 (Seven Million Dollars), from which Settlement Class Members who file valid claims will be compensated. If approved, the Settlement Agreement will bring certainty and closure – and valuable relief – to what otherwise would be contentious and costly litigation regarding Defendant Jumio Corporation's ("Defendant") allegedly unlawful collection and possession of individuals' biometric identifiers and/or biometric information.

By this unopposed Motion, Plaintiff Alex Prelipceanu seeks, *inter alia*, preliminary approval of the Settlement, certification of the Settlement Class, appointment of class counsel, approval of a claims procedure, and approval of the proposed form and method of class notice. This Memorandum describes in detail the reasons why preliminary approval is in the best interests of the class and is consistent with 735 ILCS 5/2-801 and due process.

As discussed in more detail below, the most important consideration in evaluating the fairness of a proposed class action settlement is the strength of the plaintiff's case on the merits balanced against the relief obtained in the settlement. *See Steinberg v. Sys. Software Associates, Inc.*, 306 Ill. App. 3d 157, 170 (1st Dist. 1999); *City of Chicago v. Korshak*, 206 Ill. App. 3d 968,

[1] Unless otherwise defined, capitalized terms used herein have the same meaning given to them as in the Settlement Agreement attached hereto as Exhibit 1.

972 (1st Dist. 1990); *see also Am. Int'l Grp., Inc. et al., v. ACE INA Holdings, et al.*, Nos. 07-cv-2898, 09-cv-2026, 2012 U.S. Dist. LEXIS 25265, at *17 (N.D. Ill. Feb. 28, 2012).[2] While Plaintiff believes he would be able to secure class certification and prevail on the merits at trial, success is not assured, particularly given the uncertainty in the law surrounding BIPA, legislative efforts to limit BIPA's strength and scope, poor recent BIPA case law regarding third-party biometric technology vendors, and the fact that Defendant is prepared to vigorously defend this case at all levels and at all costs. The terms of the Settlement, which include a Settlement Fund providing Settlement Class Members the ability to receive cash compensation, along with prospective relief requiring Defendant's compliance with BIPA and Defendant's use of commercially reasonable methods to cause its clients to comply with BIPA, meet and exceed the applicable standards of fairness. Accordingly, the Court should preliminarily approve the Settlement so that Settlement Class Members can receive notice of their rights and the claims administration process may begin.

II. THE LAWSUIT

A. The Illinois Biometric Information Privacy Act ("BIPA")

BIPA is an Illinois statute that provides individuals with a right to privacy in their biometric information. To effectuate its purpose, BIPA requires private entities which seek to use biometric identifiers (e.g., fingerprints or facial geometry) or biometric information (any information gathered from a biometric identifier which is used to identify an individual)[3] to:

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

[3] "Biometric identifiers" and "biometric information" are collectively referred to herein as "biometrics."

(1) inform the person whose biometrics are to be collected in writing that biometrics will be collected or stored;

(2) inform the person whose biometrics are to be collected in writing of the specific purpose and the length of term for which such biometrics are being collected, stored and used;

(3) receive a written release from the person whose biometrics are to be collected allowing the capture and collection of their biometrics; and

(4) publish a publicly available retention schedule and guidelines for permanently destroying biometrics. 740 ILCS 14/15.

BIPA was enacted in large part to protect the privacy rights of persons in Illinois, to provide them with a means of enforcing their rights, and to regulate the practice of collecting, using and disseminating such sensitive and irreplaceable information.

B. The Case and Procedural History

1. *Plaintiff's Allegations*

In this case, Plaintiff alleges that Defendant utilizes biometric software that collects consumers' biometric information in the form of facial geometry scans for identity and/or age verification purposes. (First Amended Complaint "FAC" Dkt. 18, ¶ 3). Plaintiff alleges that use of such software in Illinois is subject to regulation by BIPA. (FAC, ¶ 5).

Plaintiff further alleges that Defendant has failed to comply with BIPA by: (1) failing to inform individuals prior to capturing their biometrics that it will be capturing such information; (2) failing to receive a written release for the capture of biometrics prior to such capture; (3) failing to inform the person whose biometrics are being captured of the specific purpose and length of

term for which such biometrics are captured, and; (4) failing to publish a publicly available retention schedule and guidelines for permanently destroying biometrics. (FAC, ¶ 59).

2. *Procedural History and the Parties' Settlement Negotiations*

On December 21, 2018, Plaintiff filed his original Class Action Complaint against Defendant in the Circuit Court of Cook County, Illinois. *Prelipceanu v. Jumio Corp.* No. 18-CH-15833. Defendant thereafter hired competent and experienced defense counsel who removed this action to the U.S. District Court for the Northern District of Illinois on January 28, 2019. *See Prelipceanu v. Jumio Corp.*, No. 19-cv-00561, Dkt. 1-1 (N.D. Ill. 2019). On March 29, 2019, Defendant filed a Motion to Dismiss and memorandum in support thereof. (Dkts. 14-16). In response, on April 15, 2019, Plaintiff filed his First Amended Complaint. (Dkt. 18). On May 17, 2019, Defendant filed its Answer and Affirmative Defenses to Plaintiff's Amended Complaint. (Dkt. 20).

Thereafter, in light of potentially significant discovery expenses, uncertainty of the state of the law surrounding BIPA, and the possibility of incurring liability on a class-wide basis, Defendant agreed to engage in a mediation. To that end, counsel for Plaintiff and for Defendant expended significant efforts to reach a settlement, including but not limited to exchanging documents and information regarding Defendant's biometric software and identifying potential class members.

After conducting investigation and discovery, Plaintiff's counsel met with Defendant's counsel, as well as Defendant's corporate representative, for a full-day, highly contentious mediation with the Hon. James F. Holderman (ret.) of JAMS Chicago, former Chief Judge for the U.S. District Court for the Northern District of Illinois, who possesses significant expertise in class

settlements, including BIPA settlements.

Following the full-day mediation with Judge Holderman, counsel for Plaintiff and for Defendant continued to expend significant further efforts over the course of the next four months negotiating specific terms of the Settlement, including the forms of notice that were to compose the Notice Program, the scope of the Release, the quality of prospective relief, and the distribution of monetary settlement benefits. These negotiations between Plaintiff's Counsel and Defense Counsel included multiple meetings conducted telephonically and required the further involvement of Judge Holderman on several occasions to resolve negotiations as to the specific terms of the Settlement. Eventually, these extensive negotiations culminated in the Settlement Agreement for which Plaintiff now seeks preliminary approval. In light of ongoing challenges and uncertainty surrounding a federal court's jurisdiction over BIPA cases – including whether a plaintiff has Article III standing and statutory standing under BIPA – and to avoid any potential derailing of the Settlement based on such Article III issues, the Parties stipulated to remand the federal lawsuit to the Circuit Court of Cook County, Chancery Division, where it was originally filed. On December 2, 2019, the case was remanded from federal court and appears on the docket as *Prelipceanu v. Jumio Corp.*, Case No. 18-CH-15883 (Cir. Ct. Cook Cnty.). (Dkt. 47).

III. THE PROPOSED SETTLEMENT

A. The Settlement Class

The proposed Settlement would establish a Settlement Class defined as follows:

> "All individuals in Illinois whose Biometrics or photos were collected, captured, purchased, received through trade, otherwise obtained or in the possession of Jumio and/or any of its parents, subsidiaries, or agents, or their technology, at any time between December 21, 2013 and [entry of the Preliminary Approval Order]."

(Ex. 1, ¶ 2.2).

B. The Settlement Fund

The proposed Settlement will establish a non-reversionary Settlement Fund of $7,000,000.00 (Seven Million Dollars). (Ex. 1, ¶ 3.2). Each valid claimant will be entitled to an equal *pro rata* share of the Settlement Fund after payments are first deducted for notice and administration costs, attorneys' fees and costs, and an incentive award payment to Plaintiff. (Ex. 1, ¶¶ 3.3, 6.1, 7.3). The total payment to each Settlement Class Member will depend on the number of valid Claim Forms submitted. Presently, Plaintiff's Counsel estimate a substantial cash recovery per valid claimant .

C. Valuable Prospective Relief

The Settlement also provides a wide range of prospective relief to the Settlement Class. Specifically, Defendant has agreed that it will: (1) obtain informed consent from persons in Illinois to use their biometrics in full compliance with BIPA's requirements; (2) use commercially reasonable methods to cause its clients to obtain individuals' consent pursuant to BIPA; and (3) require in its standard contracts with its clients that are subject to BIPA that Defendant's products may be used only in compliance with all applicable laws and regulations. (Ex. 1, ¶ 3.1). Defendant has raised defenses arguing that BIPA does not apply to its actions at all, so there is substantial value to Defendant binding itself to these steps by this Settlement.

D. Notice and Settlement Administration

The claims at issue in this litigation primarily consist of Defendant's alleged violations of BIPA with respect to consumers in Illinois, including consumers of its commercial customers. Since Defendant's services are available exclusively online and accessed by consumers through laptops, smartphones and other mobile technology devices in various locations including outside

the state a broad outreach is required to reach all potential class members. To inform as many potential class members as possible, the proposed notice program consists of three parts spanning multiple forms of media: (i) direct individual notice by U.S. Mail to over 90% of the known Settlement Class Members (ii) notice by internet banner on Defendant's website *and* through a separate internet advertisement publication notice program; and (iii) publication of the Publication Notice in the online and offline versions of three widely-circulated newspapers in the state of Illinois for a specified time period. (Ex. 1, ¶ 6.1). The Settlement Agreement also provides for the establishment of a Settlement Website with downloadable case documents, including Claim Forms, the Settlement Agreement, and a detailed Notice. (Ex. 1, ¶¶ 6-7). The Settlement also allows Class Members to submit Claims Forms electronically. (Ex. 1, ¶ 6.1).

E. Exclusion and Objection Procedure

Settlement Class Members will have an opportunity to exclude themselves from the Settlement or object to its approval. The procedures and deadlines for filing exclusion requests and objections will be identified in the detailed Notice directly sent to Class Members and made available on the Settlement Website. (Ex. 1, ¶¶ 8-9). The notices inform Settlement Class Members that the Final Approval Hearing will be their opportunity to appear and have their objections heard. The notices also inform Settlement Class Members that they will be bound by the Release contained in the Settlement Agreement unless they exercise their right to exclusion in a timely manner.

F. Release

In exchange for the relief described above, and as set forth in more detail in the Settlement Agreement, Settlement Class Members who do not exclude themselves will provide Defendant

and its affiliated entities and other Released Parties a release of all claims, including BIPA claims, relating to Defendant's collection, capture, receipt, purchase, storage, dissemination, transfer, use, sale, lease, trade, or profit from biometric information, biometric identifiers, or any data derived from or relating to the images of faces in photographs or videos. (Ex. 1, ¶¶ 1.24-1.27, 10-11).

IV. ARGUMENT

A. The Terms of the Settlement are Fair and Reasonable and Warrant Preliminary Approval

The Settlement represents a fair and reasonable resolution of this dispute and is worthy of notice to, and consideration by, the Settlement Class Members. It will provide significant monetary relief to participating Settlement Class Members as compensation for the Released Claims, will result in material changes to Defendant's biometric software administration that will benefit all Settlement Class Members and future consumers, and will relieve the Parties of the burden, uncertainty, and risk of continued litigation.

Courts review proposed class action settlements using a well-established two-step process. Conte & Newberg, 4 *Newberg on Class Actions*, § 11.25, at 38–39 (4th ed. 2002); *see e.g.*, *Kaufman v. Am. Express Travel Related Servs. Co.*, 264 F.R.D. 438, 447 (N.D. Ill. 2009); *GMAC Mortgage Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 492 (1st Dist. 1992); *Lebanon Chiropractic Clinic, P.C. v. Liberty Mut. Ins. Co.*, 2016 IL App (5th) 150111-U, ¶¶ 11, 18; *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶¶ 4, 7, 15. The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." *Newberg*, § 11.25, at 38–39; *Armstrong v. Board of Sch. Dirs. of City*

of Milwaukee, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds*; *see e.g.*, *Lebanon*, 2016 IL App (5th) 150111-U, ¶ 11; *Sabon*, 2016 IL App (2d) 150236, ¶ 4. The preliminary approval hearing is not a fairness hearing, but rather a hearing to ascertain whether there is sufficient reason to notify the class members of the proposed settlement and to proceed with a fairness hearing. *Newberg*, § 11.25, at 38–39; *Armstrong*, 616 F.2d at 314. 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). If the Court finds the settlement proposal "within the range of possible approval," the case proceeds to the second step in the review process: the final approval hearing. *Newberg*, § 11.25, at 38–39.

Because the essence of 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); *Lebanon*, 2016 IL App (5th) 150111-U, ¶ 41; *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996). "Although this standard and the factors used to measure it are ultimately questions

for the fairness hearing that comes after a court finds that a proposed settlement is within approval range, a more summary version of the same inquiry takes place at the preliminary phase." *Kessler v. Am. Resorts Int'l,* No. 05-cv-5944, 2007 WL 4105204, at *5 (N.D. Ill. Nov. 14, 2007) (citing *Armstrong*, 616 F.2d at 314).

The factors ultimately to be 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*, 206 Ill. App. 3d at 972; *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).

A preliminary application of these factors to this case demonstrates that the proposed settlement is certainly "fair, reasonable, and adequate." As to the first factor, the Settlement in this case provides substantial material benefits to the Settlement Class: every Settlement Class Member will be able to submit a claim for a monetary payment from the Settlement Fund. At the same time, while Plaintiff believes he would likely prevail on his BIPA claims against Defendant, he is also aware that Defendant has expressed a firm denial of his material allegations and the intent to raise numerous legal defenses including, among many others: the financial transaction exception to BIPA, a "photograph exception" to BIPA, substantial compliance, consent, the dormant commerce clause, limitation of liability, due process, ratification and acquiescence, statute of limitations,

standing, and the inapplicability of BIPA to service providers. Many of these defenses, if successful, would result in the Plaintiff and the proposed Settlement Class Members receiving no payment whatsoever.

In particular, the strong likelihood that a significant percentage of Settlement Class Members' claims are exempt from BIPA, either because an alleged disclosure or redisclosure by Jumio "complete[d] a financial transaction requested or authorized by the [Class Member]," which is specifically exempted by BIPA,[4] or because Defendant acted on behalf of "a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder," which is also exempted by BIPA.[5] Numerous Settlement Class Members' claims fall within either or both of these exceptions, and a judicial finding that either exemption applies to such claims could have very substantially reduced the Settlement Class. These two BIPA exceptions also worked to induce settlement on both sides due to the potential significant likelihood that a ruling could operate to deny a large percentage of the class any relief whatsoever. Also, the fluctuating state of BIPA claims is readily apparent, given recent opinions that cast doubt on the applicability of BIPA to third party vendors or technology providers. *See, e.g., Cameron v. Polar Tech Indus., Inc., et al,* No. 2019-CH-000013 (Dekalb Cnty. Ill. Cir. Ct.) (dismissing plaintiff's § 15(b) BIPA claims against a third-party technology vendor with prejudice); *Bernal v. ADP, LLC,* No. 17-CH-12364 (Cook Cnty. Cir. Ct.) (dismissing plaintiff's BIPA claims against a third-party technology provider); *Namuwonge v. Brookdale Sr. Living, Inc., et al,* No. 19-cv-03239 (N.D. Ill. Nov. 22, 2019) (dismissing plaintiff's §§ 15(b) and

[4] See 740 ILCS 14/15 § (d)(2)).
[5] See 740 ILCS 14/25(c).

15(d) claims against a third-party technology provider). Notably, even in light of *Cameron, Bernal* and *Namuwonge,* which limit the liability of third-party technology providers, the Settlement Agreement nonetheless causes Defendant to induce its commercial clients to comply with 740 ILCS 14/15 § 15(b) despite Defendant's strong argument that § 15(b) cannot be applied to it. Taking these realities into account, and recognizing the risks involved in any litigation, the wide range of relief afforded to each Settlement Class Member represents a truly excellent result for the Settlement Class where such Settlement Class Members could ultimately be found to have no valid claim against a biometric technology provider like Defendant.

The amount of the Settlement Fund and the payments to Settlement Class Members are particularly significant in light of the risks of ongoing litigation. If Defendant were to succeed on any of its defenses to liability against Plaintiff's individual claims, Settlement Class Members would recover nothing. In addition to any defenses on the merits Defendant would raise, Plaintiff 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. *See 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. Approval would allow Plaintiff and the Settlement Class Members to receive meaningful and significant payments now, instead

of years from now—or perhaps never. *See Id*. at 582.

A final consideration affecting the long-term viability of Plaintiff's claims is the uncertain existence and continued effectiveness of BIPA itself, as multiple bills have been introduced in the state legislature that could negatively affect BIPA plaintiffs.[6] Since BIPA's inception, hundreds of BIPA putative class actions have been filed and much has been written about the increase in BIPA litigation in recent years. If the Illinois Legislature were to amend, reduce or limit the rights made available to Illinois individuals under BIPA, Plaintiff and the Settlement Class Members could see their claims evaporate prior to any monetary recovery or meaningful injunctive relief.

The second factor, Defendant's ability to pay, further supports the Settlement. During the relevant class period, Defendant navigated a Chapter 11 bankruptcy, which complicates its ability both to satisfy a judgment, as well as to settle on a class-wide basis.[7] Defendant now operates a going concern, but any judgment finally entered against it in this case would likely be much larger than its exposure pursuant to the Settlement. Because BIPA provides for a minimum of statutory damages of $1,000 per violation, the application of such damages in the BIPA context could constitute a crippling loss to Defendant, which could foreclose the potential for any class-wide recovery. In contrast to a risky pursuit of Plaintiff's BIPA claims, the Settlement provides immediate and meaningful monetary and injunctive relief .

In the absence of settlement, it is certain that the expense, duration, and complexity of the protracted litigation that would result would be substantial, thus tilting factor number three in favor of resolving the case. Not only would the Parties have to undergo significant motion practice before

[6] *See* Illinois S.B. 2134 and H.B. 3024.
[7] *JMO Wind Down, Inc. aka Jumio Inc.*, No. 16-10682 (U.S. Bankruptcy Ct. Dist. of Delaware).

any trial on the merits could even be contemplated, but evidence and witnesses from across the country would have to be assembled, given that Defendant uses third-party vendors to process data who would likely be called as witnesses during any trial. The unique commercial setting in which the biometric information at issue in this case was collected adds further uncertainty as well, as it is distinguishable from the vast bulk of BIPA litigation ongoing elsewhere against employers and their agents in the timekeeping context. Indeed, unlike BIPA claims derived from timekeeping requirements in the workplace which rest on the repeated collection of worker biometrics at a particular worksite, Defendant's collection of biometrics from class members occurred in disparate locations frequently known only to class members, including out of state where BIPA does not apply extraterritorially to Illinois residents. Further, given the complexity of the issues, the size of the putative class, and the amount in controversy, the defeated party would likely appeal both 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 relief provided to the Class under the Settlement Agreement weighs heavily in favor of its approval compared to the inherent risk and delay of a long and drawn out litigation, trial, and appellate process.

With respect to factors four and six, and due to the strength of this Settlement and the significant monetary and injunctive relief benefiting the Settlement Class Members, Plaintiff expects little or no opposition to the Settlement. While it is difficult to ascertain the reaction of the Settlement Class Members to the Settlement prior to notice being disseminated, Plaintiff himself has approved of the Settlement and believes that it is a fair and reasonable settlement in light of the defenses raised by Defendant and the potential risks involved with continued litigation.

With respect to factor five, there is an initial presumption that a proposed settlement is fair

and reasonable when it was the result of arms-length negotiations. *Newberg*, § 11.42; *see also Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 21 (finding no collusion where there was "no evidence that the proposed settlement was not the product of 'good faith, arm's-length negotiations'"); *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 arms-length negotiation . . . entered into after years of litigation and discovery, resulting in a settlement with the aid of an experienced mediator.") Here, the Settlement was reached only after highly contested, arms-length negotiations that were overseen by Judge James F. Holderman – former Chief Judge of the Northern District of Illinois and mediator of numerous BIPA class settlements – 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. Finally, given the excellent result for the Settlement Class in terms of the significant monetary relief being made available, the substantive changes Defendant is making to its biometric software administration, and the willingness of Defendant to induce BIPA compliance from its commercial clients, it is clear that this Settlement was reached as a result of good-faith negotiations rather than any collusion between the Parties.

With respect to factor seven, Plaintiff's counsel believe that the proposed Settlement Agreement is in the best interest of Settlement Class Members because, upon submission of a valid Claim Form and approval of their claim, Settlement Class Members are each provided an immediate and significant payment and meaningful injunctive relief instead of having to wait for the litigation and any subsequent appeals to run their course. Further, due to the defenses that Defendant has indicated that it would raise should the case proceed through litigation – and the

resources that Defendant has committed to defend and litigate this matter through appeal – it is possible that the Settlement Class Members would receive no benefit whatsoever in the absence of this Settlement. Given Plaintiff's 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. *See 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).

Finally, as to factor number eight, and as stated above, this Settlement was reached only after discovery efforts by the Parties, including deposition testimony and document production. Had the Parties not reached this Settlement, this case would have proceeded to 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.

Although there is a dearth of analogous BIPA class settlements to which to compare the instant Settlement, the Court need not rule on a completely blank slate as to the fairness, reasonableness, and adequacy of the instant Settlement. A comparable consumer class action settlement involving BIPA which has received final court approval is the matter *Sekura v. L.A. Tan Enterprises, Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Cnty. 2016), which resulted in tens of thousands of class members each eligible to file a claim to receive a *pro rata* share of a $1.5 Million settlement fund. The expected per-claimant payout in that case, after notice to the class and as of the motion for final approval, was between $40 and $150. Accordingly, the proposed Settlement here, which creates a $7,000,000.00 Settlement Fund that will provide a *pro rata* share to each

valid claimant, is fair, reasonable, adequate and warrants Court approval.

B. The Proposed Class Notice Should be Approved

Under 735 ILCS 5/2-803, the Court may provide class members notice of any proposed settlement so as to protect the interests of the class and the parties. *See Cavoto v. Chicago Nat. League Ball Club, Inc.,* 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. *Cavoto,* 2006 WL 2291181, at *15 (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 note) ("mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.") As explained by the United States Supreme Court, due process requires that the notice be the "best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'" as well as "'describe the action and the plaintiffs' rights in it.'" *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 36 (citing *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985)). However, "[t]his [best notice practicable] standard can be satisfied even though a particular class member never receives actual notice." *Medina v. Mfrs. & Traders Trust Co.*, No. 04-cv-2175, 2004 U.S. Dist. LEXIS 25305, at *10 (N.D. Ill. Dec. 14, 2004). "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"); *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 tripartite 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 § III(D), *supra*, the Settlement Agreement contemplates a multi-part notice plan designed to reach as many potential Settlement Class Members as possible. First, as noted above, direct notice of the Settlement will be sent via U.S. mail to all individuals who Defendant has identified as a potential Settlement Class Member and for whom the Settlement Administrator obtains a physical address. This direct notice process should be very effective at reaching the Class Members given the relationship between Defendant and the Class Members and given the contact information in Defendant's possession, which consists of physical addresses as listed on Class Members' identity documents. Additionally, the Settlement Administrator will establish a Settlement Website containing the relevant court documents, the Claim Form and the detailed Notice, including information regarding how Settlement Class Members can exclude themselves from the Settlement Agreement, and which will allow Class Members to easily submit their claims electronically. Additionally, and as set forth in § III(D), above, the Agreement also provides for notice by internet banner on Defendant's website *and* through a separate internet advertisement publication notice program, as well as publication of the Publication Notice in the online and offline versions of three widely-circulated newspapers in the state of Illinois for a specified time period. (Ex. 1, ¶ 6.1). As such, the proposed methods of notice comport with 735 ILCS 5/2-803 and the requirements of Due

Process. The proposed Claim Form, detailed Notice, and Publication Notice are attached as Exhibits 1 through 3 to the Settlement Agreement, respectively, and should be approved by the Court.

C. The Court Should Grant Class Certification for Settlement Purposes

For settlement purposes only, the Parties have agreed that the Court should make preliminary findings and enter an order granting provisional certification of the Settlement Class and appoint Plaintiff and his counsel to represent the class. "The validity of use of a temporary settlement class is not usually questioned." *Newberg*, § 11.22. The *Manual for Complex Litigation* explains the benefits of settlement classes:

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

Manual for Complex Litigation (Fourth) § 21.612. Prior to granting preliminary approval of a class action settlement, a court should determine that the proposed settlement class is a proper class for settlement purposes. *Manual for Complex Litigation* (Fourth) § 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); *Travel 100 Grp., Inc. v. Empire Cooler Serv. Inc.*, No. 03-CH-14510, 2004 WL 3105679, at *2 (Ill. Cir. Ct. Oct. 19, 2004); *Lebanon,* 2016 IL App (5th) 150111-U, ¶ 18. In this case, the Settlement Class meets all of the applicable certification requirements. For settlement purposes only, the Settlement Class is submitted for certification under Section 2-801 of the Illinois Code of Civil Procedure. The Class is defined in the Settlement Agreement and also appears in § III(A), *supra*.

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); *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.*, 2004 WL 3105679, at *2 ("The potential class exceeds 3,000 members. The numerosity requirement is met") (citing *Wood River Area Development Corp. v. Germania Federal Savings and Loan*, 198 Ill. App. 3d 445 (5th Dist. 1990)). Here the proposed settlement encompasses approximately two hundred sixty thousand potential class members dispersed around the country. Due to a variety of factors, including the inability to determine class members' geographic locations when accessing Defendant's services, the actual number of class members could be substantially less. The Class is nonetheless sufficiently numerous such that joinder would be impracticable, given the number of individuals in the Settlement Class, the disbursement of class

members throughout the state and beyond, and that absent a class action few members could afford to bring an individual lawsuit over the amounts at issue because each individual member's claim is relatively small. *See Gordon v. Boden*, 224 Ill. App. 3d 195, 200 (1st Dist. 1991) ("In cases where there is a substantial number of potential claimants and the individual amounts of their claims are relatively small, Illinois courts have tended to permit the claims to proceed as a class action"); *Carrao v. Health Care Serv. Corp.*, 118 Ill. App. 3d 417, 427 (1st Dist. 1983) (finding that allegations in the complaint that "the class consists of over 1,000 members provides an ample basis for the trial court's conclusion that joinder of all members is impracticable.")

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). Such common questions of law or fact exist when the members of the proposed class have been aggrieved by the same or similar misconduct. *See Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 673–74 (2nd 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); *see also Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). Further, where "the defendant allegedly acted wrongfully in the same basic manner as to an entire class . . . the common class questions predominate the case[.]" *Walczak*, 365 Ill. App. 3d at 674 (citing *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 548 (2003)).

In this case, all members of the proposed Settlement Class share a common statutory BIPA claim arising out of standardized conduct: the alleged collection, use, and dissemination of

Settlement Class Members' biometrics without consent. Proving a BIPA violation would require the resolution of the same central factual and legal issues, including: (1) whether the information taken from Settlement Class Members constituted biometric identifiers or biometric information as defined by BIPA; (2) whether such information was taken without the consent required under BIPA; (3) whether Defendant had a BIPA-compliant publicly available written policy addressing retention and storage of biometrics; and; (4) whether such conduct violated BIPA. (FAC, ¶ 43). 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 U.S. Dist. LEXIS 16452, at *13 (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 Defendant'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 Defendant. Thus, this factor is satisfied.

3. *Adequate Representation*

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." *See Miner v. Gillette Co.,* 87 Ill. 2d 7, 14 (1981). "The purpose of the adequate representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim." *Walczak,* 365 Ill. App. 3d at 678 (citing *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 1004 (2nd Dist. 2004)); *Purcell*

& Wardrope Chtd. v. Hertz Corp., 175 Ill. App. 3d 1069, 1078 (1st Dist. 1988). The adequacy requirement is satisfied where "the interests of those who are parties are the same as those who are not joined" such that the "litigating parties fairly represent [them]" and where the "attorney for the representative party '[is] qualified, experienced and generally able to conduct the proposed litigation.'" *CE Design Ltd.,* 2015 IL App (1st) 131465, ¶ 16 (citing *Miner*, 87 Ill. 2d at 56)).

Here, Plaintiff's interests are entirely representative of and consistent with the interests of the proposed Settlement Class: all have allegedly had their biometrics taken and used by Defendant in a manner inconsistent with the legal protections provided by BIPA. Plaintiff's pursuit of this matter has demonstrated that he has been, and will remain, a zealous advocate for the Settlement Class. *See CE Design*, 2009 U.S. Dist. LEXIS 5842, at *13 (finding typicality where the defendant's practice of sending unsolicited advertisements to the named plaintiff and the proposed class gave rise to claims "based upon the same legal theory"). Thus, Plaintiff has the same interests as the Settlement Class.

Similarly, proposed Class Counsel have regularly engaged in major complex litigation and have extensive experience in class action lawsuits, including consumer class actions relating to privacy and emerging technologies. (*See* Declaration of Evan M. Meyers, attached hereto as Exhibit 2, at ¶¶ 6–10.) Plaintiff's counsel and their firms have been appointed as class counsel in numerous complex class actions in the Circuit Court of Cook County, the Northern District of Illinois, and in courts throughout the country, including multiple BIPA class action settlements. *See, e.g., Paluzzi, et al. v. mBlox, Inc., et al*. (Cir. Ct. Cook County, Ill. 2009); *Parone et al. v. m-Qube, Inc. et al.* (Cir. Ct. Cook County, Ill. 2010); *Williams et al. v. Motricity, Inc. et al.* (Cir. Ct. Cook County, Ill. 2011); *Walker et al. v. OpenMarket, Inc. et al.* (Cir. Ct. Cook County, Ill. 2011);

Ryan et al. v. Snackable Media, LLC (Cir. Ct. Cook County, Ill. 2011); *Weinstein, et al. v. The Timberland Company* (N.D. Ill. 2008); *Satterfield v. Simon & Schuster* (N.D. Cal. 2010); *Lozano v. Twentieth Century Fox Film Corp, et al.* (N.D. Ill. 2011); *Kramer v. Autobytel et al.* (N.D. Cal. 2012); *Schulken v. Washington Mutual Bank, et al.* (N.D. Cal. 2011); *In re Citibank HELOC Reduction Litigation* (N.D. Cal. 2012); *Rojas v. Career Education Corp.* (N.D. Ill. 2012); *In re Jiffy Lube Int'l, Inc. Text Spam Litigation* (S.D. Cal. 2013); *Robles v. Lucky Brand Jeans* (N.D. Cal. 2013); *Murray et al v. Bill Me Later, Inc.* (N.D. Ill. 2014); *Valladares et al. v. Blackboard, Inc. et al.* (Cir. Ct. Cook County, Ill. 2016); *Hooker et al v. Sirius XM Radio, Inc.* (E.D. Va. 2017); *Flahive et al v. Inventurus Knowledge Solutions, Inc.* (Cir. Ct. Cook County, Ill. 2017); *Serrano et al v. A&M (2015) LLC* (N.D. Ill. 2017); *Oliver et al v. The Mens Wearhouse, Inc.* (C.D. Cal. 2018); *Zepeda et. al. v. Intercontinental Hotels Group, Inc.* (Cir. Ct. Cook County, Ill. 2018); *Vergara et al v. Uber Technologies, Inc.* (N.D. Ill. 2018); *Kovach et al v. Compass Bank* (Cir. Ct. Jefferson County, Ala. 2018); *Svagdis v. Alro Steel Corp.* (Cir. Ct. Cook County, Ill. 2018); *Zhirovetskiy v. Zayo Group, LLC,* (Cir. Ct. Cook County, Ill. 2019); *Prather et al v. Wells Fargo Bank, N.A.* (N.D. Ill. 2019); *Marshall et al v. Lifetime Fitness, Inc.* (Cir. Ct. Cook County, Ill. 2019); *McGee et al v. LSC Communications, Inc., et al* (Cir. Ct. Cook County, Ill. 2019). Accordingly, Plaintiff's counsel will adequately represent 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*, 224 Ill. App. 3d at 203. 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 Chtd*, 175 Ill. App. 3d at 1079 ("the predominance of common issues [may] make a class action . . . a fair and efficient method to resolve the dispute.") Thus, the fact that numerosity, commonality and predominance, and adequacy of representation have all been demonstrated in the instant case makes it "evident" 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 costs of litigation 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–*18 (N.D. Ill. Mar. 31, 2004). This is especially true in cases involving BIPA, which would otherwise result in many relatively small, individual claims. *See 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 Plaintiff and the proposed Settlement Class Members involve identical alleged violations of a state statute for the alleged unauthorized collection, use and dissemination of Class Members' biometrics while failing to comply with BIPA. Absent a class action, most members of the Settlement 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*, 521 U.S. at 620. Nor should the Court "judge the legal and factual questions" regarding certification of the proposed Settlement Class by the same criteria as a proposed class being adversely certified. *See GMAC*, 236 Ill. App. 3d at 493.

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

D. Proposed Schedule

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

1. **Notice Date:** Within thirty-five (35) days of entry of the Preliminary Approval Order, the Settlement Administrator shall disseminate by U.S. Mail the Notice in the form of Exhibit 2 of the Settlement Agreement to Settlement Class Members identified on the Class List for whom there is a known physical address.

2. **Deadline for Opt-Outs / Objections**: Each opt-out and/or objection must be submitted/postmarked or filed with the Court within sixty-five (65) days after the date of entry of the Preliminary Approval Order;

3. **Submission of Papers in Support of Attorneys' Fees and Expenses:** Must be filed no later than twenty-one (21) days before the exclusion/objection deadline;

4. **Submission of Papers in Support of Final Approval of Settlement**: Must be filed no later than fourteen (14) days prior to the date of the Final Approval Hearing;

5. **Claims Deadline:** Claim forms must be postmarked or submitted to the Settlement Administrator within ninety (90) days after entry of the Preliminary Approval Order.

6. **Final Approval Hearing**: Will occur approximately ninety (90) days after entry of the Preliminary Approval Order, or such other date as ordered by the Court.

V. CONCLUSION

For the foregoing reasons, Plaintiff Alex Prelipceanu respectfully requests that the Court enter an Order: (1) certifying the Settlement Class for settlement purposes, (2) appointing Alex Prelipceanu as the Settlement Class Representative; (3) appointing Myles McGuire, Evan M. Meyers, David L. Gerbie and Andrew T. Heldut of McGuire Law, P.C. as Class Counsel; (4) preliminarily approving the proposed Settlement Agreement; (5) approving the form and administration of the proposed Notice Program; (6) ordering the issuance of notice; and (7) granting such further relief as the Court deems reasonable and just.

Dated: December 13, 2019

Respectfully submitted,

ALEX PRELIPCEANU, individually and on behalf of a class of similarly situated individuals

By: /s/ David L. Gerbie
One of Plaintiff's Attorneys

Myles McGuire
Evan M. Meyers
David L. Gerbie
MCGUIRE LAW, P.C. (Firm ID No. 56618)
55 West Wacker Drive, Suite 900
Chicago, Illinois 60601
Tel: (312) 893-7002
mmcguire@mcgpc.com
emeyers@mcgpc.com
dgerbie@mcgpc.com

Counsel for Plaintiff Alex Prelipceanu and Proposed Class Counsel

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on December 13, 2019, a copy of *Plaintiff's Unopposed Motion & Memorandum in Support of Preliminary Approval of Class Action Settlement* was filed electronically with the Clerk of Court, with a copy sent by Electronic Mail to all counsel of record.

/s/David L. Gerbie