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

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

Plaintiffs,

v.

SHUTTERFLY, INC.,

Defendant.

Case No. 2019-CH-07050

Judge: Raymond W. Mitchell

SHUTTERFLY, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

On behalf of a proposed class of Illinois citizens, Plaintiffs Vernita Miracle-Pond and Samantha Paraf seek approval of a proposed class action settlement with Shutterfly, Inc. ("Shutterfly"). The settlement would resolve long-running litigation claiming that Shutterfly violated the Illinois Biometric Information Privacy Act ("BIPA"). Although Shutterfly continues to believe that its factual and legal defenses in this case are very strong, it has entered into a hard-fought, arms-length settlement with Plaintiffs that will provide substantial monetary benefits to the proposed class and all of the non-monetary relief that Plaintiffs sought to obtain. Shutterfly agrees that the terms of the proposed settlement are fair, reasonable, and adequate and accordingly supports preliminary approval of the settlement by the Court.

Plaintiffs' motion addresses why the proposed settlement meets the criteria for preliminary approval under each relevant factor. *See* Pl. Mot. for Prelim. Approval at 8-23. Shutterfly submits this supplemental brief to address additional points that it, as the defendant, may be better positioned to discuss regarding the "balancing or comparison of the terms of the compromise with the likely rewards of litigation," which is the "princip[al] factor" in the approval analysis. *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990). As explained below, Plaintiffs would face significant obstacles at every stage of the litigation—at the motion to dismiss stage, summary judgment, and trial—if the case had not settled. The proposed settlement accounts for these risks and compares favorably to settlements approved in similar cases, including other BIPA litigation. For these additional reasons, the Court should grant Plaintiffs' motion and preliminarily approve the parties' proposed settlement.

BACKGROUND

A. Shutterfly's Face Grouping Technology

Shutterfly offers free, online services to users that help them store and organize their digital photo albums. This dispute involves "Face Grouping," a feature introduced by Shutterfly in 2016 that groups a given user's photos according to the faces that appear in them. If the feature is enabled, Face Grouping will display a gallery to the user of the faces that appear in his or her photos, and clicking on the icons in that gallery will show the user the set of photos in which that face appears. Importantly, Face Grouping is *anonymous*: Shutterfly does not attempt to *identify* any faces, nor does Shutterfly attempt to determine whether similar faces appear in multiple users' photo albums. It is simply a tool that gives users one way to find and organize their photos.

Face Grouping has always been clearly disclosed to users in Shutterfly's Online Privacy and Security Policy, which every user must affirmatively agree to as a condition of using Shutterfly's services. Moreover, any user can turn off Face Grouping at any time if they do not want the feature to be used on their photos for any reason.

B. Procedural History

Enacted in 2008, BIPA requires private entities to make certain disclosures and obtain consent before collecting "biometric identifiers," including "scan[s]" of "face geometry," and "biometric information." *See Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 619 (7th Cir. 2020); 740 ILCS 14/10; 740 ILCS 14/15(b). Plaintiffs claim that Shutterfly violated this requirement by using its Face Grouping feature to collect "scans of face geometry" from Illinois residents who appear in photos on Shutterfly without adequate notice and consent.

This lawsuit is the third BIPA class action brought against Shutterfly based on materially similar allegations. The first case was filed in 2015 by a plaintiff whose photos had been uploaded to Shutterfly by his spouse, a Shutterfly user. Shutterfly moved to compel arbitration based on

Shutterfly's Terms of Use, and the case was voluntarily dismissed shortly thereafter. *See Norberg v. Shutterfly, Inc.*, No. 15-cv-5351 (N.D. Ill. dismissed Apr. 15, 2016).

The second BIPA lawsuit was filed in 2016 by the same counsel who represent the Plaintiffs here. *See Monroy v. Shutterfly, Inc.*, No. 16-cv-10984 (N.D. Ill. dismissed Apr. 8, 2019). After discovery, the *Monroy* suit was also voluntarily dismissed. Among other things, discovery showed that the plaintiff would have been unable to prove that the photo of him on Shutterfly was uploaded from within Illinois, an essential element of the class definition in that case.

This third BIPA lawsuit was filed in June 2019 and removed to federal court weeks later. *See Miracle-Pond v. Shutterfly, Inc.*, No. 19-cv-04722 (N.D. Ill. filed July 12, 2019). The two named plaintiffs are Vernita Miracle-Pond and Samantha Paraf. Following removal, the district court granted Shutterfly's motion to compel arbitration, finding no "genuine dispute" that Ms. Miracle-Pond "entered into an enforceable agreement [to arbitrate] with Shutterfly." *Miracle-Pond v. Shutterfly, Inc.*, No. 19-cv-04722, 2020 WL 2513099, at *3-9 (N.D. Ill. May 15, 2020). Shutterfly then moved to dismiss Ms. Paraf's claims. *Miracle-Pond*, Dkt. 85. The Court stayed its consideration of that motion while the parties discussed a possible settlement. In February of this year, the parties stipulated to a remand of this action back to the court in which it was originally filed—this Court—to present their settlement for approval. *Id.*, Dkt. 96.

In short, although various plaintiffs have actively litigated BIPA claims against Shutterfly for over five years, they have been met with fierce opposition at every turn. They failed to build a viable case against Shutterfly in their first two attempts (*Norberg* and *Monroy*) and have already faced significant challenges, even at the pleading stage, in the current lawsuit.

As set out more fully in the Settlement Agreement and Plaintiffs' memorandum for preliminary approval, Shutterfly has agreed to pay $6.75 million to settle claims asserted by a class

of Illinois residents who have appeared in photographs maintained on Shutterfly between June 2014 and the settlement. Shutterfly has also agreed to make additional disclosures related to Face Grouping and to make certain changes to its policies and procedures related to Face Grouping that were requested by Plaintiffs. These changes amount to essentially all the non-monetary relief Plaintiffs were seeking from Shutterfly in the litigation.

ARGUMENT

A court should approve a class settlement if it finds that the settlement is "fair, reasonable, and in the best interest of the class." *Steinberg v. Sys. Software Assocs., Inc.*, 306 Ill. App. 3d 157, 169 (1st Dist. 1999); *Langendorf v. Irving Tr. Co.*, 244 Ill. App. 3d 70, 78 (1st Dist. 1992). In making this determination, the Court may consider federal class settlement decisions as persuasive authority. *See Smith v. Ill. Cent. R.R. Co.*, 223 Ill. 2d 441, 447-48 (2006) ("our section 2-801 is patterned after Rule 23 of the Federal Rules . . . and federal decisions interpreting Rule 23[] are persuasive authority with regard to the question of class certification in Illinois"); *Steinberg*, 306 Ill. App. 3d at 166-67 (addressing federal authority and affirming approval of settlement class).

The proposed settlement in this case gives the class a substantial monetary recovery and essentially all the injunctive relief Plaintiffs could have obtained if they prevailed on their claims. That result is not only fair and reasonable: it is excellent, especially in light of the results Plaintiffs have obtained so far in this and prior litigation, the obstacles Plaintiffs will face if this litigation proceeds, and other settlements resolving consumer privacy claims that courts have approved in in recent years. Thus, the Court should grant the motion for preliminary approval.

I. Plaintiffs Would Face Substantial Challenges On The Merits Of Their Claims.

As discussed below, Shutterfly would continue to press several strong defenses at every stage of the litigation, creating a significant risk that Plaintiffs would recover nothing, or that any

verdict Plaintiffs might obtain would be overturned on appeal. The settlement appropriately takes these risks into account while securing valuable relief for the class.

No Collection Of Biometric Data. To establish a violation of BIPA, Plaintiffs must first demonstrate that Face Grouping results in the collection of "biometric identifiers" or "biometric information." Plaintiffs would face significant hurdles on this threshold element of their case.

First, there is a substantial legal question whether facial recognition technology applied to digital photographs is categorically excluded from regulation under BIPA. The statute expressly provides that the term "biometric identifiers" "do[es] not include . . . photographs," and the term "biometric information" does not include "information derived from items or procedures excluded under the definition of biometric identifiers." 740 ILCS 14/10. Therefore, by the plain text of BIPA, Shutterfly's Face Grouping feature is not regulated by the statute.

Shutterfly's motion to dismiss raised BIPA's "photographs" exception. Although some federal district courts have found the exception inapplicable to photograph-based technologies, Shutterfly argued that those decisions are non-binding and incorrect. *See Miracle-Pond*, Dkt. 86 at 10-14. Even if Plaintiffs would have prevailed on Shutterfly's motion dismiss, they would face a *de novo* review of this issue on appeal. To date, no appellate court has ever ruled on the meaning of BIPA's "photographs" exception, creating a serious risk for Plaintiffs that forthcoming appellate guidance on this issue could foreclose their claims as a matter of law.

Second, as explained above, Face Grouping does not *identify* anyone, and therefore, it does not create or use "biometric identifiers" within the meaning of BIPA. As the Illinois Attorney General has explained, "the phrase 'biometric identifier' is commonly understood to refer to the measurement and analysis of a unique physical or behavioral characteristic *that identifies a person*." State of Illinois, Office of the Attorney General, Public Access Op. No. 17-011, 2017

WL 10084298, at *3 (Ill. A.G. Aug. 14, 2017) (emphasis added). Similarly, BIPA defines "biometric information" as data "based on an individual's biometric identifier" that is "*used to identify* an individual." 740 ILCS 14/10 (emphasis added). The Illinois legislature's findings and the underlying purposes of BIPA—to protect people from the risks of identity theft and invasions of privacy—are consistent with this interpretation of the statute. *See* 740 ILCS 14/5.

Third, Shutterfly would also show through the testimony of its witnesses and technical experts that Face Grouping does not create or use "scans of face geometry." This is a hotly contested fact dispute in nearly every BIPA litigation involving photograph-based technologies. *See, e.g., Rivera v. Google Inc.*, 238 F. Supp. 3d 1088, 1110 (N.D. Ill. 2017) ("it remains possible that Google could prevail on its face-template arguments (that is, that what Google collects from the photos are not covered by the Act) once further factual development has occurred"); *In re Facebook Biometric Information Privacy Litig.*, 185 F. Supp. 3d 1155, 1172 (N.D. Cal. 2016) ("As the facts develop, it may be that 'scan' and 'photograph' with respect to Facebook's practices take on technological dimensions that might affect the BIPA claims.").

Consent. Regardless of whether BIPA applies to Face Grouping, it has always been disclosed in Shutterfly's Online Privacy and Security Policy ("Privacy Policy"), which every Shutterfly user must accept as a condition of using Shutterfly. *See Miracle-Pond*, 2020 WL 2513099, *4 ("Shutterfly's app contained a clear and conspicuous statement that . . . a user agreed to the Terms of Service *and Privacy Policy* by clicking a link or pressing a button.") (emphasis added; quotations omitted). The current Privacy Policy describes Face Grouping as follows:

> **Does Shutterfly collect information from my photos? If so, how do you use it?**
>
> . . . We may analyze your photo content and metadata to help you tag and organize your photos and to make personalized product suggestions to you based on those photos, such as showing you how your pictures may look in a collage or other Shutterfly project. **As you add new photos, we automatically associate similar faces, places and other image characteristics within your photo collection**. We

> only use this feature to help you organize, tag and create personalized products from your own photos. **We never attempt to determine whether any similar faces appear in photos uploaded by different Shutterfly users or otherwise identify the people in your photos. We do not sell or share this information with third parties**. And we won't suggest any tags for your own photos except the ones that you choose to create for your own face group. **You may disable this feature through your account settings at any time. If you do so, we will delete any facial grouping data associated with your photos and will not collect such information going forward**.[1]

Shutterfly also obtained "written" consent to Face Grouping (*see* 740 ILCS 14/15(b)) by requiring users to indicate their acceptance of the Privacy Policy by "clicking a link or pressing a button" during the account registration process. *Miracle-Pond*, 2020 WL 2513099, *4.

Plaintiffs would face significant challenges arguing that these disclosures were insufficient, because in Illinois, a plaintiff alleging that the defendant failed to provide "informed consent" must point to "significant undisclosed information" that would "have changed the decision of a reasonable person." *Schiff v. Friberg*, 331 Ill. App. 3d 643, 657 (1st Dist. 2002).

Extraterritorial Application of BIPA. Another hurdle that Plaintiffs would have to confront is that "BIPA does not apply extraterritorially." *Monroy v. Shutterfly, Inc.*, No. 16 C 10984, 2017 WL 4099846, at *5 (N.D. Ill. Sept. 15, 2017) (quoting *Avery v. State Farm*, 216 Ill. 2d 100, 187 (2005)). Accordingly, Plaintiffs would need to prove that "the circumstances relating to their suit" occurred "primarily and substantially" in Illinois. *Id*. at *6. That would be difficult: Shutterfly is a California company; it neither drafted nor disseminated its disclosures about Face Grouping from Illinois; and all of the servers and computer software involved in the Face Grouping feature are maintained outside Illinois. The fact that Plaintiffs and the proposed class members

[1] https://www.shutterflyinc.com/privacy/ (emphasis added). Prior versions of the Privacy Policy included disclosures that Shutterfly "may use facial recognition technology to help you tag and organize your pictures. These tags are based on the information you have provided to us and your recognition of individuals in certain photos." Face Grouping was first disclosed in the Privacy Policy in 2014.

are Illinois residents is irrelevant: the extraterritoriality test is *not* "based on the residency of the plaintiff" but rather on whether the facts related to the alleged statutory violation "occur primarily and substantially within" Illinois. *Avery*, 216 Ill. 2d at 182, 186. Nor would it be sufficient for Plaintiffs to show that photos of them were uploaded to Shutterfly from Illinois. Shutterfly did not "need[] consent to upload the photographs"; "[i]t is only the collection of the biometric identifier (the scan) that requires consent [under BIPA]." *Rivera*, 238 F. Supp. 3d at 1102 n.11.

In *Monroy*, the district court denied Shutterfly's motion to dismiss on this ground, primarily because without discovery it was "unclear where the actual scan of Monroy's face geometry took place, and where the scan was stored once it was obtained." 2017 WL 4099846, at *6. At summary judgment in this case, Shutterfly would present uncontroverted evidence neither the alleged "scan" nor any storage of data in connection with Face Grouping occurs in Illinois.

Scienter Requirement. Yet another challenge for Plaintiffs and the class would be proving that Shutterfly acted with the requisite state of mind. Plaintiffs do not claim to have suffered any *actual* damages caused by Face Grouping, nor could they, and BIPA only permits a plaintiff to recover statutory damages if the defendant has violated the statute "negligently," "recklessly," or "intentionally." 740 ILCS 14/20. This requires proof that it was at least objectively unreasonable for Shutterfly to conclude that its conduct was lawful under BIPA. *See Landwer v. Scitex Am. Corp.*, 238 Ill. App. 3d 403, 409 (1st Dist. 1992) (where an Illinois statute requires a showing of scienter as to the "violation" of a statute, the question is whether the defendant "knew or showed reckless disregard for . . . *whether its conduct was prohibited*" (emphasis added)).

BIPA is, at minimum, ambiguous about whether it applies to photograph-based technologies. No state or federal appellate court has ever addressed these issues. Shutterfly's

conclusion that BIPA did not apply—particularly at the time it introduced the Face Grouping feature several years ago—was objectively reasonable.[2]

Amendments to BIPA. Finally, a proposed amendment to BIPA (H.B. 559) is now pending before the Illinois House of Representatives. Among other things, the amendment would eliminate the availability of statutory damages for no-injury claims like those alleged by Plaintiffs here. If the amendment passes, it could foreclose Plaintiffs' claims as a matter of law.

* * *

In sum, Shutterfly is prepared to advance strong arguments for dismissal, summary judgment and, if necessary, at trial and on appeal, on every element of Plaintiffs' BIPA claims. Individually and collectively, these obstacles argue strongly in favor of a negotiated compromise rather than continued litigation. *See Korshak*, 206 Ill. App. 3d at 972 (court should consider "the complexity, length, and expense of further litigation" in assessing a settlement).

II. Plaintiffs Would Face Significant Challenges Certifying Any Non-Settlement Class.

Even if some class members had meritorious individual claims, Plaintiffs would face an entirely different set of obstacles in certifying and obtaining damages for a class. These obstacles include a valid arbitration agreement between Shutterfly and many class members, which at a minimum would require individual determinations about the arbitrability of each class member's claims. As Plaintiffs acknowledge, *see* Pls. Mot. for Prelim. Approval at 17, this issue alone could have foreclosed class treatment for a significant portion of the class.[3]

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[2] Plaintiffs would be free to offer "competing evidence" about the reasonableness of Shutterfly's "understanding of BIPA," but that would at most create an issue of fact for the jury. *See In re Facebook Biometric Info. Privacy Litig.*, No. 15-cv-03747, 2018 WL 2197546, at *5 (N.D. Cal. May 14, 2018).

[3] *E.g.*, *In re Checking Account Overdraft Litig.*, 780 F.3d 1031, 1039 n.10 (11th Cir. 2015) (whether defendant "can compel the unnamed putative class members to arbitrate their claims . . . may effectively decide the viability of th[is] class action as such"); *Pablo v. ServiceMaster Global Holdings Inc.*, No. C 08-03894, 2011 WL 3476473, at *2 (N.D. Cal. Aug. 9, 2011) (denying class certification where a "significant

While Shutterfly believes that these and other issues would pose serious challenges to certifying a class if litigation continues, they do not pose the same obstacles in settlement. "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." *Steinberg*, 306 Ill. App. 3d at 167 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). *See also In re Comcast Corp. Set–Top Cable Television Box Antitrust Litig.*, 656 F. App'x 8, 8-9 (3d Cir. 2016) ("[t]he concern that a defendant be 'able to test the reliability of the evidence submitted to prove class membership' is not implicated in cases of settlement"). The parties' decision to reach a compromise—for purposes of settlement only[4]—on what would otherwise be vigorously contested class certification issues is another factor that weighs strongly in favor of granting preliminary approval of the settlement.

III. The Proposed Settlement Is Fair, Adequate, And Reasonable.

In light of the issues discussed above, a $6.75 million settlement, with meaningful non-monetary relief in the form of additional notices and disclosures about Face Grouping, is an excellent outcome for the class. The terms of the parties' settlement compare favorably to class settlements involving consumer privacy claims seeking statutory (rather than actual) damages, including at least one prior BIPA settlement approved by this Court.

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number" of putative members had arbitration agreements and thus "a significant portion of this litigation would be devoted" to resolving arbitrability issues rather than the merits).

Moreover, even assuming that Plaintiffs could certify a litigation class and prevail on liability, due process concerns could significantly limit the class's ultimate recovery. In *Golan v. FreeEats.com, Inc.*, for example, the court reduced a "shockingly large" $1.6 billion statutory damages award by 95% (from $500 to $10 per violation) where the defendant "plausibly believed" it was complying with the statute. 930 F.3d 950, 962 (8th Cir. 2019). Plaintiffs here would face similar obstacles.

[4] The parties' Settlement Agreement provides that in the event the settlement is terminated, their agreement to certify a class for settlement purposes only shall have no bearing or effect on any future determinations of class certification issues, and the parties "will be returned to their positions with respect to the Action as if the Agreement had not been entered into." Pls. Mot. for Prelim. Approval, Ex. A § 2.3.

For example, in *Harris v. comScore, Inc.*, a class of 10 million consumers alleged that comScore had obtained "personally identifiable information" from their computers. No. 11-cv-5807 (N.D. Ill. 2014), Dkt. 363 at 2-3, 16. The statute authorized class members to recover between $1,000 and $10,000 in statutory damages—a theoretical $110 billion aggregate award. *Id.* at 7, 13 n.10. After the class was certified and the Seventh Circuit denied the defendant's Rule 23(f) petition, the parties settled for $14 million—just over $1 per class member. *Id.*, Dkt. 345 at 1. In approving the settlement, the court explained that the settlement was "reasonable[] and in the best interests of the" class in light of "the disputed factual and legal" issues "and the potential risks . . . of pursuing litigation." *Id.*, Dkt. 369 at 2-3.

In *Perkins v. Linkedln Corp.*, No. 13-cv-04303, 2016 WL 613255 (N.D. Cal. Feb. 16, 2016), a class of 20.8 million alleged that LinkedIn had harvested their contact lists for marketing purposes. Class members sought $750 each in statutory damages. *See id.* at *5. The court approved the parties' settlement for $13 million—about 62 cents per class member. *Id.* at *2. The court reasoned that although a billion-dollar "recovery may theoretically have been possible, the Settlement represents a fair and adequate compromise in light of significant risks faced by the class." *Id.* at *5. As here, "the Settlement provide[d] the class with a timely, certain, and meaningful cash recovery, while further litigation and any subsequent appeal are uncertain, would entail significant additional costs, and in any event would substantially delay any recovery achieved." *Id.*

Likewise, in *Fraley v. Facebook*, 966 F. Supp. 2d 939 (N.D. Cal. 2013), a class of 150 million alleged that their names and likeness were misappropriated. *Id.* at 940. Class members stood to recover $750 each in statutory damages—a total of $112 billion. *Id.* at 940, 944 & n.4. The court approved the parties' settlement for $20 million—about 13 *cents* per class member. *Id.*

at 943-44. The court explained that "the adequacy of th[e] settlement should not be evaluated against some theoretically available judgment, but against what plaintiffs could reasonably expect to recover." *Id.* at 944. It was "not plausible that class members could [have] recover[ed] the full amount of the statutory penalties in any event, as such a judgment would pose due process concerns." *Id.* And the fact that the settlement would result in payment of a relatively "modest per-claimant sum d[id] not undermine the fairness, reasonableness, and adequacy of the settlement." *Id.* The decision was affirmed on appeal. 638 F. App'x 594 (9th Cir. 2016).

By any measure of comparison, the monetary terms of the parties' settlement in this case are clearly favorable to these and similar cases.[5]

Focusing specifically on BIPA settlements yields fewer relevant comparisons. Most BIPA settlements to date have involved relatively smaller classes comprising a few hundred individuals who used a fingerprint-based identification system. In those cases, there were few questions about whether BIPA applied to the technology at issue, no defenses based on the enforcement of a user agreement, and no dispute that the defendant's records were readily capable of identifying class members. Other BIPA settlements have been reached on the eve of trial, after the plaintiffs had prevailed on motions to dismiss, summary judgment, and had successfully certified a class. However, one BIPA settlement recently approved by Judge Mullen in 2020—*Prelipceanu v. Jumio*

[5] *See also In re Vizio, Inc. Consumer Privacy Litig.*, No. 16-ml-02693, Dkt. 337 at 4, 13 (C.D. Cal. July 31, 2019) (approving $17,000,000 settlement with class of 16,000,000 individuals; "the harm of having one's personal information surreptitiously collected is largely psychological and difficult to monetarily quantify"); *Wilkins v. HSBC Bank Nevada, N.A.*, No. 14 C 190, 2015 WL 890566, at *3, *5 (N.D. Ill. Feb. 27, 2015) (approving $39,975,000 settlement with class of 9,065,262 individuals who "have suffered no actual damages"); *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017) (affirming approval of an $8.5 million *cy pres* settlement, where the 129 million class members stood to recover $1,000 each in statutory damages), *vacated on other grounds sub nom., Frank v. Gaos*, 139 S. Ct. 1041 (2019); *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012) (affirming approval of a $9.5 million *cy pres* settlement where some of the 3.6 million class members stood to recover $2,500 each in statutory damages).

Corp., 2018 CH 15883 (Ill. Ch. Ct. Cook Cnty.)—had several parallels to this case and provides another data point that supports the Court's approval of the parties' settlement.

In *Jumio*, the plaintiffs alleged that the defendant's technology, which analyzed digital photos of consumers' faces to verify their identity before making age-restricted purchases online, violated BIPA. Shortly after the defendant had answered the complaint, the parties settled for $7 million.[6] The parties' settlement papers indicate that the defendant had raised some of the same defenses discussed above, including extraterritoriality, BIPA's "photographs" exception, and arbitration of some class members' claims, but had not actually litigated or prevailed on any of its defenses. Judge Mullen granted both preliminary and final approval of the settlement, finding that "the Settlement is fair, adequate, reasonable, and in the best interests of the settlement class." *Jumio*, Final Order and Judgment ¶ 6 (July 21, 2020).

The monetary component of the settlement reached by the parties in *Jumio* ($7 million) and the monetary component of the parties' settlement in this case ($6.75 million) are quite similar. However, the result obtained for the class in this settlement actually compares favorably to *Jumio* because unlike the defendant in *Jumio*, Shutterfly had already *prevailed* on its arbitration defense as to the user Plaintiff, and it had previously defeated two prior iterations of non-user BIPA litigation before the plaintiffs had even reached the class certification stage. *See supra* pp. 2-3. The litigation risks that Plaintiffs faced in this case are, if anything, greater.

Finally, as explained in Plaintiffs' motion (at 5-6, 18), the significance of the non-monetary relief that Shutterfly has agreed to provide as part of the proposed settlement cannot be overlooked. The changes to Shutterfly's procedures for Face Grouping and the additional disclosures that Shutterfly will be providing represent essentially all of the injunctive relief that Plaintiffs could

[6] Direct information on the estimated class size was not available, but the parties reported that over 14,000 valid claims were submitted, which offers limited insight into a possible class size.

hope to obtain through further litigation. *See Campbell v. Facebook Inc.*, No. 13-cv-059996, 2017 WL 3581179, at *4 (N.D. Cal. Aug. 18, 2017) (approving settlement because "the class has obtained essentially all of the declaratory and injunctive relief that they sought"); *Perkins*, 2016 WL 613255, at *2 (concluding that "non-monetary relief" in the form of "revised [ ] disclosures" and other changes to defendant's website would "benefit[] millions of Class Members" and "weighs in favor of final approval"). Combined with substantial monetary relief, this non-monetary relief further supports finding that the settlement is fair, reasonable, and adequate.

CONCLUSION

For the additional reasons set forth above, the Court should grant Plaintiffs' motion for preliminary approval of the parties' proposed settlement.

Dated: May 19, 2021

Respectfully submitted,

By: */s/ Matthew D. Provance*

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2021, a copy of the foregoing **SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** was caused to be filed electronically with the Clerk of Court, with a copy sent by electronic mail to all counsel of record.

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