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

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

Plaintiffs,

v.

SHUTTERFLY, INC.,

Defendant.

Case No. 2019-CH-07050

Judge: Raymond W. Mitchell

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND FOR CLASS REPRESENTATIVE SERVICE AWARDS

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Plaintiffs Vernita Miracle-Pond and Samantha Paraf ("Plaintiffs") respectfully move, pursuant to 735 ILCS 5/2-801 and the Court's Order Granting Preliminary Approval of Class Action Settlement dated June 9, 2021, for an award of attorneys' fees in the amount of 35% of the $6,750,000 Settlement Fund ($2,362,500), reimbursement of expenses incurred by Class Counsel in the amount of $51,440.78, and for Service Awards in the amount of $5,000 for each Class Representative in connection with the class action settlement which the Court preliminarily approved on June 9, 2021. Shutterfly, Inc. ("Defendant" or "Shutterfly") does not object to this relief. In support of this Motion, Plaintiffs submit the following Memorandum of Law.

MEMORANDUM OF LAW

I. INTRODUCTION

The Class Action Settlement[1], reached after almost two years of hard fought litigation, is an exceptional result for Settlement Class Members. It establishes a Settlement Fund of $6,750,000 to provide cash to Settlement Class Members who file a valid and timely claim– for having their biometrics collected by Defendant in alleged violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"). In addition to the substantial financial benefit to Settlement Class Members, the Settlement also provides significant non-monetary relief requiring Shutterfly to alter its practices going forward in order to prevent the allegedly unlawful collection, storage and use of biometric data that formed the basis of Plaintiffs' claims.

This is an outstanding result given the substantial risks that the Class faced in every phase of the litigation, especially since Shutterfly prevailed on its motion to compel arbitration, based on an arbitration provision that waived class action rights. Absent a settlement, this litigation would have been tied up in appeals for years and/or thousands of individual arbitrations.

Direct Notice of the Settlement commenced on July 1, 2021. As of the filing of this Motion for Attorneys' Fees, Reimbursement of Expenses, and for Class Representative Service Awards

[1] Unless otherwise indicated, capitalized terms have the same meaning as those terms in the Settlement Agreement ("SA," "Settlement," or "Settlement Agreement"), which is attached as Exhibit A to Plaintiffs' Motion for Preliminary Approval dated May 17, 2021.

("Motion"), 40,764 claims have already been submitted, with over seven weeks remaining until the Claims Deadline.[2] Notably, as of the filing of this Motion, no Settlement Class Member has objected to the proposed Settlement and only 5 Class Members have requested exclusion from the Settlement Class.

Class Counsel and the Class Representatives have devoted significant time, effort and resources on behalf of Settlement Class Members in the two years since this litigation first commenced, and their efforts have yielded an extraordinary benefit to the Class. Class Counsel continue to devote substantial time and resources to this Action – including by overseeing the Notice and Settlement Administration process, responding to Settlement Class Members' inquiries concerning the Settlement, and assisting Settlement Class Members with filing claims – and they will continue to do so through final approval, and until the Settlement administration process concludes and funds have been disbursed to the Settlement Class.

With this Motion,Class Counsel respectfully request a fee of 35% of the total Settlement Fund obtained for the Settlement Class, amounting to $2,362,500, plus litigation costs totaling $51,440.78, and Service Awards of $5,000 for each of the Class Representatives ($10,000 in total), as provided for in the Settlement Agreement. The requested Fee and Expense Award and Service Awards are amply justified given the investment, significant risks, and excellent results obtained for the Settlement Class Members, particularly given the continued uncertainty and evolving nature of BIPA litigation.

As set forth in detail below, Class Counsel's requested fee award is appropriate under governing Illinois law and consistent with the percentages of funds awarded in other settlement in Illinois courts, including other BIPA class actions, and warrants Court approval.

[2] Settlement Class Members have until September 14, 2021 to submit claims. *See* Order Regarding Motion for Preliminary Approval of Class Action Settlement ("Preliminary Approval Order") ¶ 10.

II. BACKGROUND

A. BIPA

BIPA is an Illinois statute that provides individuals with certain protections for their biometric identifiers and biometric information. To effectuate its purpose, BIPA requires private entities that seek to use biometric identifiers (e.g., scans of face geometry) and biometric information (any information derived from a biometric identifier which is used to identify an individual) to:

> (1) inform the person whose biometrics are to be collected in writing that his 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 beingcollected, 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 the collected biometrics. 740 ICLS 14/15.

BIPA was enacted to protect the privacy rights of individuals, to provide them with a means of enforcing their rights, and to regulate the practice of collecting and using such sensitive data.

B. Procedural History

Plaintiff Miracle-Pond, a registered Shutterfly user since 2015, and Plaintiff Paraf, who has never registered for or used Shutterfly, filed this Action in this Court on June 11, 2019, on behalf of "[a]ll Illinois citizens who had their biometric identifiers, including scans of face geometry and related biometric information, collected, captured, received, or otherwise obtained by Shutterfly from photographs uploaded to Shutterfly within the state of Illinois." (Compl. ¶ 34.) Plaintiffs alleged that they were aggrieved by virtue of Shutterfly's violations of BIPA.

Class Counsel conducted significant pre-filing investigations, which included detailed review and evaluation of the facts, thorough and exhaustive investigation of issues related to Shutterfly's violations of BIPA, and comprehensive research and analysis of the applicable law, including those related to Shutterfly's arbitration provisions. (*See* Exhibit 1, Affidavit of Robert

Ahdoot ("Ahdoot Aff.") ¶ 6; Exhibit 2, Affidavit of David Milian ("Milian Aff.") ¶ 12, filed concurrently herewith.) As a result of this thorough pre-filing investigation, Class Counsel were able to develop potentially viable theories of liability for BIPA claims against Shutterfly, analyze the legal issues relevant to the merits of claims under each theory, assess the likelihood of Shutterfly successfully compelling Plaintiffs' claims to arbitration, and to initiate this Action with the goal of certifying a class and recovering class-wide relief.

After removing this case to federal court, Shutterfly moved to dismiss Plaintiffs' claims under Rule 12(b)(6) and also filed a motion to compel arbitration. (*Miracle Pond, et al. v. Shutterfly, Inc.*, No. 1:19-cv-04722 (N.D. Ill. July 12, 2019) (the "Federal Action"), Dkt. Nos. 16 to 24.) On November 8, 2019, Plaintiffs opposed both Motions to dismiss and to compel arbitration (*id.* Dkt. Nos. 36, 37), and Defendant filed its replies on December 15, 2019. (*Id.* Dkt. Nos. 45-46.) Also, on November 16, 2019, Plaintiffs filed a Curative Measures to Remediate Effects of Defendant's Improper Communications with Plaintiff and Putative Class Members (Dkt. Nos. 38-39), which was opposed and to which Plaintiffs filed a Reply. (*Id.* Dkt. Nos. 45-46, 47, 49.) On May 15, 2020, Shutterfly's motion to compel arbitration of Plaintiff Miracle-Pond's claims (based on arbitration clause in Shutterfly's Terms and Conditions) was granted. (*Id.* Dkt. Nos. 19, 67.) The District Court's May 15, 2020 Order also stayed its consideration of Shutterfly's motion to dismiss, which applied to both Plaintiff Miracle-Pond's claims and Plaintiff Paraf's claims, though only Ms. Miracle-Pond's claims were ordered to arbitration. (*Id.* Dkt. No. 67.) Plaintiffs then filed a Motion to Clarify the Court's ruling on the Motion to Compel Arbitration. (*Id.* Dkt. No. 70.) Thereafter, on September 17, 2020, the District Court denied Shutterfly's motion to dismiss without prejudice. (*Id.* Dkt. No. 81.) On November 9, 2020, Shutterfly re-filed its motion to dismiss (*id.* Dkt. Nos. 85, 86), which Plaintiffs opposed (*id.* Dkt. No. 88.)

The Parties conducted extensive discovery and worked diligently to develop the factual record throughout the litigation. The Parties exchanged Rule 26(a) initial disclosures, interrogatories, requests for production of documents, and negotiated a Protective Order and a Stipulation re: Discovery of Electronically Stored Information. (*Id.* Dkt. Nos. 55-56.) Shutterfly

produced approximately 100,000 pages of discovery. (*Id.* Dkt. Nos. 50-1, 92.) Plaintiffs reviewed many thousands of documents produced by Shutterfly and conducted an exhaustive analysis of the legal and factual issues surrounding the case and Shutterfly's facial recognition technology. (Ahdoot Aff. ¶ 12; Milian Aff. ¶¶ 8-9, 12.) On February 19, 2021, the Action was remanded from Federal Court to the Circuit Court by stipulation of the Parties. (Federal Action, Dkt. No. 96.)

The breadth of information gleaned from their extensive discovery and investigation efforts allowed Class Counsel to weigh the likely success of Plaintiffs' claims and estimate individual damages associated with Plaintiffs' claims. (Ahdoot Aff. ¶ 13; Milian Aff. ¶¶ 8-9, 12.) This necessary work also allowed Class Counsel to proceed forward in a collaborative manner and formulate a litigation strategy aimed at obtaining meaningful relief for the Settlement Class as efficiently as possible. (Ahdoot Aff. ¶ 13; Milian Aff. ¶¶ 8-9, 12.)

Other litigation-related work performed by Class Counsel included, *inter alia*: meetings, emails, and phone calls between attorneys and staff at Class Counsel's law firms; numerous conference calls and correspondence between Class Counsel and defense counsel; regularly communicating with the Plaintiffs and scores of other clients regarding the progress of the case; and regularly communicating with Plaintiffs regarding case developments, discovery, settlement and litigation strategy. (Ahdoot Aff. ¶ 14; Milian Aff. ¶¶ 10, 12.) Class Counsel also expended considerable vetting efforts and preparing individual arbitration case files, including demands to commence arbitration for each client, in anticipation of potential individual arbitration proceedings. (Ahdoot Aff. ¶ 15; Milian Aff. ¶ 12.)

C. Settlement Negotiations

Following extensive preliminary negotiations, the Parties participated in a mediation before the Hon. Peter D. Lichtman (Ret.) at Signature Resolutions, LLC in October 2020. Plaintiffs conducted sufficient discovery and obtained substantial information from Shutterfly in advance of mediation, sufficient to enable Plaintiffs' counsel to value the claims and understand the prospective Class's composition. (Ahdoot Aff. ¶ 16; Milian Aff. ¶¶ 10-12.) The Settlement was not reached at the October 8, 2020 mediation. However, the Parties continued to engage in

settlement conferences on a regular basis, with the continued assistance of Judge Lichtman, until a settlement in principle was reached. (Ahdoot Aff. ¶ 17; Milian Aff. ¶ 11.) Like the litigation that fostered it, the Settlement Agreement was contentiously negotiated.

Before and during all settlement discussions and mediation, the Parties exchanged documents and information on an arms'-length basis to enable Plaintiffs and Class Counsel to adequately evaluate the scope of the potential class-wide liability and thus intelligently engage in meaningful settlement discussions on behalf of the Class. (Ahdoot Aff. ¶¶ 6, 12-13, 16; Milian Aff. ¶¶ 10-12.) The Parties engaged in further months long negotiations with respect to the Settlement Agreement and its exhibits. (Ahdoot Aff. ¶ 18; Milian Aff. ¶¶ 11-12.) Plaintiffs also requested bids from a number of settlement administrators and based on such bids and subsequent negotiations, the Parties agreed upon the firm of Postlethwaite & Netterville, APAC ("P&N") to serve as the Settlement Administrator. (Ahdoot Aff. ¶ 19; Milian Aff. ¶ 12.) The Notice Plan and each document comprising the Class Notice were negotiated and exhaustively refined, with input from experts at P&N, to ensure that these materials are clear, straightforward, and understandable by Class Members. (Ahdoot Aff. ¶ 20; Milian Aff. ¶ 12); *see also* Affidavit of Brandon Schwartz filed in support of Plaintiffs' Unopposed Motion for Preliminary Approval, ¶¶ 1, 7-8, filed on May 17, 2021.)

After the lengthy process that led to finalization of the Settlement Agreement and its many exhibits, Class Counsel prepared and filed Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement ("Motion for Preliminary Approval"), which included supporting documents, declarations, and exhibits. (Ahdoot Aff. ¶ 21; Milian Aff. ¶ 11.) As discussed therein, despite the risk and uncertainty of class certification and continued litigation, the Settlement is an outstanding result for the Settlement Class.

On June 9, 2021, the Court preliminarily approved the Settlement and ordered that the Class be given notice. (*See* Order Regarding Motion for Preliminary Approval of Class Action Settlement ("Preliminary Approval Order") ¶ 9, issued on June 9, 2021.) After the Court preliminarily approved the Settlement, the Parties continued to work with the Settlement

Administrator to supervise dissemination of Notice to Class Members. These efforts included review and drafting of the language and format of the Settlement Website, the language and format of the Settlement Class Notice forms, monitoring for exclusion requests and objections, and ensuring prompt response to each and every Class Member inquiry (whether by phone or e-mail) regarding the Settlement. (Ahdoot Aff. ¶ 24; Milian Aff. ¶ 12.)

III. THE SETTLEMENT

A. Monetary And Non-Monetary Relief to the Settlement Class Members

Class Counsel's prosecution of this litigation has culminated in this class-wide Settlement that provides outstanding monetary relief to the Settlement Class Members. The Settlement Agreement established a non-reversionary Settlement Fund of $6,750,000.00. (SA ¶ 3.2.) Each claimant who files a valid and timely claim is entitled to an equal *pro rata* share of the Settlement Fund after payments are first deducted for notice and administration costs, attorneys' fees and litigation costs, and Service Awards to Plaintiffs. (SA ¶ 3.3.) The total payment to each Settlement Class Member will depend on the number of valid Claim Forms submitted.

The Settlement Agreement also provides meaningful prospective relief. Indeed, a critical component of the Settlement includes changes to current and future business practices that require Shutterfly to take reasonable steps to ensure compliance with BIPA. To this end, Shutterfly has agreed to provide direct notice to Class Members whom Shutterfly can identify as Shutterfly account holders ("Class Member Users"), which notice will disclose the type of data collected for Face Grouping, the purpose of collecting the data, and the length of term of the collection. (SA ¶ 3.1.) The notice will provide a mechanism for Class Member Users to affirmatively consent to the Face Grouping feature, but Class Member Users may also dismiss the notice without taking affirmative action. (*Id*.) Shutterfly will set the Face Grouping setting to "off," and will permanently delete any Face Grouping data, for Class Member Users who have not affirmatively consented to Face Grouping within 180 days of the Preliminary Approval Order. (*Id.*) Moreover, in recognition of the BIPA rights conferred on Class Members who are non-users and minors, each Illinois user who chooses to have Face Grouping enabled, must represent that they "have obtained consent for

the feature from the people who appear in your photos or, if they are under the age of 18, from their parent or legal guardian." (SA ¶ 3.1.) In addition, Shutterfly will publish a supplemental retention schedule and guidelines for permanently destroying Face Grouping data created for Illinois Shutterfly users within three years of their last interaction with Shutterfly. (*Id*.)

B. The Notice Plan Was Implemented

Under the Settlement Agreement's Notice Plan, which has already gone into effect, direct, publication, and Internet Notice of the Settlement was disseminated to the Settlement Class Members. (Ahdoot Aff. ¶ 25; Milian Aff. ¶ 14.) In addition, the Settlement Website, which has been fully operational since July 1, 2021, makes available the Claim Form, Long Form Notice, and all relevant case information. (*Id.*) To date, with seven weeks left in the claims period, 40,764 claims have been submitted, no Class Member has objected, and 5 Class Members have requested exclusion. (Ahdoot Aff. ¶ 26; Milian Aff. ¶ 14.) The Settlement Administrator will provide an Affidavit, along with Plaintiffs' Motion for Final Approval, which will provide the specifics of the dissemination of notice and updated numbers regarding the volume of claims, exclusions, and objections (if any). (*Id.*)

IV. ARGUMENT

A. The Court Should Assess Class Counsel's Requested Attorneys' Fees Using the Percentage-Of-The-Fund Method

Pursuant to the Settlement Agreement, Class Counsel seek attorneys' fees in the amount of $2,362,500, which represents 35% of the Settlement Fund, plus reasonable litigation expenses totaling $51,440.78. (SA ¶ 12.2.) It is well settled that attorneys who, by their efforts, create a common fund for the benefit of a class, are entitled to reasonable compensation for their services. *See Wendling v. S. Ill. Hosp. Servs.*, 242 Ill. 2d 261, 265 (2011) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.").

In cases where, as here, a class action settlement results in the creation of a settlement fund, "[t]he Illinois Supreme Court has adopted the approach taken by the majority of Federal courts on the issue of attorney fees[.]" *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13 (1st Dist. 1992) (citing *Fiorito v. Jones*, 72 Ill.2d 73 (1978)). That is, where "an equitable fund has been created, attorneys for the successful plaintiff may directly petition the court for the reasonable value of those of their services which benefited the class." *Id.* at 14 (citing *Fiorito*, 72 Ill.2d 73). This rule "is based on the equitable notion that those who have benefited from litigation should share in its costs." *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) (citing *Skelton v. Gen. Motors Corp*., 860 F.2d 250, 252 (7th Cir. 1988)).

In deciding an appropriate fee in such cases, "a trial judge has discretionary authority to choose a percentage or a lodestar method[.]" *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge v. Glendale Federal Bank,F.S.B.*, 168 Ill. 2d 235, 243–44 (1995)). Under the percentage-of-the-fund approach, the attorneys' fees awarded are "based upon a percentage of the amount recovered on behalf of the plaintiff class." *Brundidge*, 168 Ill. 2d at 238.

Here, the Court should apply the percentage-of-the-fund approach—the approach used in in nearly every common fund class action, including every BIPA class action settlement in Illinois to date. It is settled law in Illinois that the Court need not employ the lodestar method in assessing a fee petition. *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59. This is because the lodestar method is disfavored, as it not only adds needless work for the Court and its staff, it also creates the potential for conflicts of interests between Class Counsel and the Settlement Class Members. 5 NEWBERG ON CLASS ACTIONS § 15:65 (5th ed.) ("Under the percentage method, counsel have an interest in generating as large a recovery for the class as possible, as their fee increases with the class's take.

By contrast, when class counsel's fee is set by an hourly rate, the lawyers have an incentive to run up as many hours as possible in the litigation so as to ensure a hefty fee, even if the additional hours are not serving the clients' interests in any way."). *See Langendorf v. Irving Trust Co.,* 244 Ill. App 3d 70, 80 (1st Dist. 1992), *abrogated on other grounds by Brundidge*, 168 Ill. 2d 235. The lodestar method has been fairly criticized by Illinois courts because it "increases the workload of an already overtaxed judicial system, … creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law, … leads to abuses such as lawyers billing excessive hours, …does not provide the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered, … [and is] confusing and unpredictable in its administration." *Ryan v. City of Chicago,* 274 Ill. App. 3d 913, 923 (1st Dist. 1995).

By contrast, the use of the percentage of the fund in a common fund class settlement is warranted because such an approach promotes early resolution of the matter, as it disincentivizes protracted litigation driven by counsel's efforts (conscious or otherwise) to increase their lodestar. *Brundidge,* 168 Ill. 2d at 242. For this reason, a percentage of the fund method more closely aligns the interests of the class and counsel, as counsel are encouraged to seek the greatest amount of relief possible for the class rather than simply seeking the greatest possible amount of attorney time regardless of the ultimate recovery obtained for the class. Applying a percentage-of-the-fund approach is also generally more appropriate in cases like this one because it best reflects the fair market price for the legal services provided by the class counsel. *See Ryan*, 274 Ill. App. 3d at 923 (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases") (citing *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255–56 (3d. Cir. 1985)); *Sutton*, 504 F.3d at 693 (directing district court on remand to consult the market for legal services so as to arrive at a reasonable

percentage of the common fund recovered). This approach also reflects the reality that most cases brought on behalf of consumers are taken on a contingency fee basis. *See In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (applying the percentage approach because class members would typically negotiate a contingency fee arrangement based on percentage method).

Class Counsel have surveyed the relevant landscape and are unaware of any BIPA class action settlements involving a monetary common fund settlement where a court used the lodestar method to determine attorneys' fees. Rather, the percentage of the fund method has been repeatedly used to determine a reasonable fee award in BIPA class action settlements in the Circuit Court of Cook County (where the majority of BIPA class actions are pending) where the settlement – as here – created a monetary common fund. *See, e.g., Sekura v. L.A. Tan Enters., Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Cnty., Ill. Dec. 1, 2016) (Garcia, J.); *Zepeda v. Kimpton Hotel & Rest.*, 2018-CH-02140 (Cir. Ct. Cook Cnty., Ill. Dec. 5, 2018) (Atkins, J.); *Taylor v. Sunrise Senior Living Mgmt., Inc.*, 2017-CH-15152 (Cir. Ct. Cook Cnty., Ill. Feb. 14, 2018) (Loftus, J.); *Svagdis v. Alro Steel Corp.*, No. 2017-CH-12566 (Cir. Ct. Cook Cnty., Ill. Jan. 14, 2019) (Moreland, J.); *Williams v. Swissport USA, Inc.*, No. 2019-CH-00973 (Cir. Ct. Cook Cnty., Ill. Nov. 12, 2020); *Fluker v. Glanbia, Inc.*, 2017-CH-12993 (Cir. Ct. Cook Cnty., Ill. Aug. 25, 2020); *Collier, et. al. v. Pete's Fresh Market 2526 Corporation, et. al.*, No. 2019- CH-05125 (Cir. Ct. Cook Cty., Ill. Dec. 8, 2020) (Atkins, J.); *Glynn v. eDriving, LLC et al.*, No. 19-CH-08517 (Cir. Ct. Cook Cnty., Ill. Dec. 14, 2020) (Walker, J.); *Kusinski et al. v. ADP, LLC* (Cir. Ct. Cook County, Ill. Feb. 10, 2021) (Atkins, J.).

Accordingly, Class Counsel respectfully requests that the Court apply the percentage approach and determine the Fee and Expense Award based on the benefits Class Counsel's efforts have made available to Class Members.

B. Class Counsel's Requested Fees Are Reasonable Under the Percentage Method

When assessing a fee request under the percentage method, courts often consider the magnitude of the recovery achieved for the Settlement Class Members and the risk of non-payment in bringing the litigation. *See Ryan*, 274 Ill. App. 3d at 924 (affirming district court's attorneys' fee award due to the contingency risk of pursuing the litigation, and the "hard cash benefit" obtained). Additionally, the non-monetary benefits created by a class action settlement are also properly considered for purposes of determining fees. *See Hall v. Cole*, 412 U.S. 1, 5 n.7(1973) (noting that the common fund doctrine "must logically extend, not only to litigation that confers a monetary benefit on others, but also litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others.").

As set forth below, this Settlement's combination of substantial monetary relief and significant prospective relief constitutes an excellent benefit conferred upon Settlement Class Members. In the context of such an excellent result, and weighed against the risks of continuing, protracted litigation, Class Counsel's fee request is fair and reasonable.

1. The requested attorneys' fees of 35% of the Settlement Fund is well within the range courts have found reasonable in other cases

The requested fee award of $2,362,500.00 represents 35% of the Settlement Fund. Notably, Illinois circuit courts presiding over BIPA class action settlements have regularly awarded attorneys' fees amounting to 40%. *See, e.g., Prelipceanu v. Jumio Corp.* No. 18-CH-15883 (Cir. Ct. CookCnty., Ill.) (Mullen, J.) (granting final approval to $7,000,000 BIPA class settlement and awarding class counsel 40% of the settlement fund based on a percentage analysis); *Zhirovetskiy*

v. Zayo Group, LLC, 2017-CH-09323 (Cir. Ct. Cook Cnty., Ill.) (Flynn, J.) (granting final approval to BIPA class settlement and awarding class counsel 40% of the settlement fund based on a percentage analysis); *Sekura*, 2016-CH-04945 (same); *Zepeda*, 2018- CH-02140 (Atkins, J.) (same); *Svagdis,* 2017-CH-12566 (same); *McGee v. LSC Commc's*, No. 2017-CH-12818 (Cir. Ct. Cook Cnty., Ill.) (Atkins, J.) (same); *see also, e.g., Willis v. iHeartMediaInc.*, No. 16-CH-02455 (Cir. Ct. Cook Cnty., Ill.) (awarding attorneys' fees and costs of 40% of an $8,500,000 common fund in a TCPA class settlement); *Farag v. Kiip, Inc.*, 19-CH-01695 (Cir.Ct. Cook County, Ill.) (Gamrath, J.) (awarding 38% of the fund in consumer privacy class settlement); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP,* No. 97-cv-7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (citing *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Meyenburg v. Exxon Mobil Corp.,* No. 05-cv-15, 2006 WL 2191422, at *2 (S.D. Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentagesin this legal marketplace for comparable commercial litigation"); Herbert Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 15.83 (William B. Rubenstein ed.; 5th ed.) (noting that fifty percent appears to be an approximate upper limit on fees and expenses).

Class Counsel's requested Fee and Expense Award would fairly and reasonably compensate Class Counsel for pursuing this Action in the face of substantial risk, achieving an excellent result for the Settlement Class, and investing substantial time and resources investigating, prosecuting and resolving this action.

2. The requested percentage of attorneys' fees is appropriate given the risks involved in continued litigation

The attorneys' fees sought in this case are particularly reasonable in light of the risks associated with this litigation at the time it was commenced and the relief that Class Counsel have

obtained for the Settlement Class. *Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding fee award based on percentage-of-the-fund in light of the "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [the defendant]"); *Ryan*, 274 Ill. App. 3d at 924 (noting the trial court's fee award was reasonable given the monetary relief made available to the class and the contingency risk).

The risks in litigation were apparent given Shutterfly's numerous potentially meritorious defenses and the shifting legal landscape with respect to BIPA that existed at the outset of the case. Shutterfly firmly denied the material allegations and raised numerous legal defenses including, *inter alia*: (i) Plaintiffs' claims are barred by BIPA's photo exception, (ii) Shutterfly does not obtain biometric data from photos downloaded on its platform, (iii) BIPA does not apply to Shutterfly's technology or to its conduct in the circumstances alleged in the Complaint, (iv) Plaintiffs' BIPA claim is not appropriate for class treatment, and (v) claims asserted by Class Members are subject to mandatory individual arbitration. Class Counsel undertook this action knowing full well that if any one of these defenses was successful, it would result in Class Counsel expending significant resources and receiving no fee whatsoever.

Class Members faced the very real possibility that Shutterfly's arbitration agreement would be found valid and enforceable, as demonstrated by the district court's ruling that compelled Plaintiff Miracle-Pond's claims to individual arbitration under the terms of Shutterfly's Terms and Conditions. (Federal Action, Dkt. No. 67.) Despite the substantial risk that Shutterfly's arbitration policy likely would have prevented Class Members from proceeding in court, or as a class action, Class Counsel moved forward, ultimately securing a $6.75 million Settlement for the benefit of the Settlement Class.

In addition, while most courts have found that a five-year statute of limitations applies to BIPA claims, Illinois courts are not unanimous. Indeed, the court in *Cannon v. FIC America Corp.,* No. 20-L-121 (Cir. Ct. DuPage Cnty., August 7, 2020), recently held that a two-year statute of limitations applies to BIPA claims. Illustrating the potential for disagreement as to the appropriate statute of limitations, the First District Appellate Court is reviewing whether a five-year or one-year limitations period applies to BIPA claims. *See Tims v. Black Horse Carriers, Inc.,* No. 1-19-0563. In the face of these risks, Class Counsel took on the case and succeeded in negotiating and securing a Settlement on behalf of the Settlement Class defined according to a five-year statute of limitations.

3. In addition to the substantial monetary relief, the significant non-monetary relief obtained on behalf of Settlement Class Members further justifies the requested thirty-five percent

In contrast to zero, which is what Settlement Class Members well might receive had the case continued to litigation, Class Counsel were able to obtain $6,750,000 for the Settlement Class Members. Although the claims, objection, and exclusion deadlines have not yet occurred, Class Counsel can report that the Settlement Administrator has received 40,764 claims and 5 requests for exclusion as of the date of this pleading. Moreover, to date there have been no objections to the Settlement. (Ahdoot Aff. ¶ 26; Milian Aff. ¶ 14.) This reflects the Settlement Class Members' overwhelmingly positive reaction to the Settlement. The non-monetary relief obtained by Class Counsel in this case further justifies the reasonableness of the attorneys' fees being sought here. *See Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *1 (S.D. Ill. Mar. 31, 2016) ("A court must also consider the overall benefit to the Class, including non-monetary benefits, when evaluating the fee request. . . . This is important so as to encourage attorneys to obtain meaningful affirmative relief") (citing *Beesley v.Int'l Paper Co.*, 2014 U.S. Dist. LEXIS 12037,

at *5 (S.D. Ill. Jan 31, 2014)); MANUAL FOR COMPLEX LITIGATION § 21.71, at 337 (4th ed. 2004)); *see also Hall v. Cole*, 412 U.S. 1,5 n.7 (1973) (awarding attorneys' fees when relief is obtained for the class "must logically extend, not only to litigation that confers a monetary benefit to others, but also litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others.").

Under the terms of the Settlement Agreement negotiated by Class Counsel, Shutterfly will take reasonable steps to ensure compliance with BIPA by providing written disclosures to Class Members describing the data collected by Shutterfly's Face Grouping feature, the purpose of collecting the data, and the length of term of the collections. The notice will also provide Class Members with a clear and conspicuous mechanism to affirmatively consent to the Face Grouping feature while also providing that any Class Member who has not affirmatively consented to Face Grouping within 180 days, will have the feature turned "off" and all Face Grouping data associated with the non-consenting Class Member permanently deleted. In addition, in recognition of the BIPA rights conferred on Class Members who are non-users and minors, each Illinois user who chooses to have Face Grouping enabled, must represent that they "have obtained consent for the feature from the people who appear in your photos or, if they are under the age of 18, from their parent or legal guardian." Ahdoot Aff. ¶ 22; Milian Aff. ¶ 13. In addition, as mandated under Section 15(a) of BIPA, Shutterfly will publish a retention schedule and guidelines for permanently destroying Face Grouping data created for Illinois residents within three (3) years of their last interaction with Shutterfly. (SA ¶ 3.1.) As a result of Class Counsel's efforts, Illinois residents will have the opportunity to provide *informed* consent after first obtaining the information required under BIPA—a significant benefit which advances each Class Member's privacy rights.

Given the significant monetary benefits obtained for Settlement Class Members and the meaningful changes to Defendant's practices with respect to biometric data Class Counsel was able to secure, an attorneys' fee award of 35% of the Settlement Fund is reasonable and fair compensation—particularly in light of the novelty and unsettled nature of the legal issues Class Counsel confronted and the inherent "substantial risk in prosecuting this case under a contingency fee agreement." *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59.

C. Class Counsel's Litigation Costs And Expenses Are Reasonable And Were Necessarily Incurred To Achieve The Benefits Obtained On Behalf Of The Class

Despite the risks of non-recovery to the Settlement Class and non-payment to Class Counsel described above, both at the outset and for the duration of the litigation, Class Counsel nevertheless expended substantial attorney time and out-of-pocket costs and expenses investigating, prosecuting, and resolving the claims alleged in this case without any guarantee of reimbursement. (Milian Aff. ¶ 15; Ahdoot Aff. ¶ 28.)

To date, Class Counsel have expended reimbursable costs and expenses of $51,440.78. (*See* Milian Aff. ¶ 15 ($20,883.81 expended by Carey Rodriguez Milian, LLP; Ahdoot Aff. ¶¶ 30-32 ($29,941.69 expended by Ahdoot & Wolfson, PC; Exhibit 3, Affidavit of Katrina Carroll ("Carroll Aff.") ¶ 2 ($615.28 expended by Carlson Lynch, LLP). These expenses are categorized in the Milian, Ahdoot, and Carrol Affidavits submitted herewith. (Milian Aff. ¶ 15; Carroll Aff. ¶ 2; Ahdoot Aff. ¶ 31.) These costs include court fees, mediation fees, legal research, electronic document storage and expert fees, postage, duplication costs, travel, and other related costs. (*Id.*)

Courts typically allow counsel to recover their reasonable expenses incurred in prosecuting the litigation. *Kaplan v. Houlihan Smith & Co.,* No. 12 C 5134, 2014 WL 2808801, at *4 (N.D. Ill. June 20, 2014) (awarding expenses "for which a paying client would reimburse its lawyer");

Spicer v. Chicago Bd. Options Exch., Inc., 844 F. Supp 1226, 1256 (N.D. Ill. 1993) (detailing and awarding expenses incurred during litigation).

The expenses categorized in the attorney declarations submitted herewith reflect commonly reimbursed expenses. (*See* Milian Aff. ¶ 15; Carroll Aff. ¶ 2; Ahdoot Aff. ¶ 31.) Each of these costs and expenses was necessarily and reasonably incurred to bring this case to a successful conclusion. The Court should therefore approve the reimbursement of costs and expenses in the amount of $51,440.78.

D. The Agreed-Upon Service Awards for Plaintiffs Are Reasonable And Should Be Approved

The Settlement Agreement also provides for a Service Award of $5,000 each to Plaintiffs Miracle-Pond and Paraf for serving as class representatives and agreeing to prosecute this action in their own names despite the unwanted notoriety. *Schulte v. Fifth Third Bank,* 805 F. Supp. 2d 560, 600–01 (N.D. Ill. 2011) (noting that class representatives open themselves to "scrutiny and attention" by adding their name to public lawsuits, which, in and of itself, "is certainly worthy of some type of remuneration."). Because a named plaintiff is essential to any class action, "[i]ncentive awards are justified when necessary to induce individuals to become named representatives." *Spano*, 2016 WL 3791123, at *4 (approving service awards of $25,000 and $10,000 for class representatives) (internal citation omitted); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992) (noting that service awards "are not atypical in class action cases . . . and serve to encourage the filing of class actions suits.").

Here, Plaintiffs' efforts and participation in prosecuting this case justify the $5,000 Service Awards sought. Even though no award of any sort was promised to Plaintiffs prior to the commencement of the litigation or any time thereafter, Plaintiffs nonetheless contributed significant time and effort over the course of two years in pursuing their own BIPA claims, as well as in serving

as a class representatives on behalf of the Settlement Class Members—exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (*See generally*, Affidavits of Vernita Miracle-Pond and Samantha Paraf, filed on May 17, 2021.) Plaintiffs participated in the initial investigation of their claims and provided documents and information to Class Counsel to aid in preparing the initial pleadings, reviewed the pleadings prior to filing, consulted with Class Counsel on a multitude of occasions, and provided feedback on various filings including, most importantly, the Settlement Agreement. (*Id*.)

Numerous courts that have granted final approval in similar class action settlements have awarded the larger service awards as the $5,000 award sought here. *See, e.g., Seal v.RCN Telecom Services, LLC*, 2016-CH-07033, February 24, 2017 Final Order and Judgment, ¶ 20 (Cir. Ct. Cook Cnty., Ill.) (awarding $10,000 awards to each of two named plaintiffs); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) (awarding $25,000 award); *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2017 WL 1369741, at *10 (N.D. Ill. Apr. 10, 2017) (awarding $10,000 to each class representative); *Spano*, 2016 WL 3791123, at *4 (approving $10,000 service awards to each class representative); *Zhirovetskiy,* 2017-CH-09323 (April 18, 2019 Final Order and Judgment, ¶ 20) (awarding $10,000 service award in BIPA class action); *Glynn v. eDriving, LLC*, 2019-CH-08517, Final Order and Judgment, ¶ 20) (Walker, J.) (same).

Accordingly, the Service Award of $5,000 for each Plaintiff is justified by the valuable time and effort both Plaintiffs invested in this case and should be approved.

V. CONCLUSION

For the foregoing reasons, Plaintiffs and Class Counsel respectfully request that the Court enter an Order: (i) approving an award of attorneys' fees of 35% of the Settlement Fund, which amount to $2,362,500; (ii) approving an award of costs and expenses in the amount of $51,440.78;

and (iii) approving Service Awards in the amount of $5,000.00 each to Class Representatives Miracle-Pond and Paraf ($10,000 in total) in recognition of their efforts on behalf of the Settlement Class.

Respectfully submitted,

DATED: July 26, 2021

CARLSON LYNCH, LLP

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

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

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

* *admitted pro hac vice*

Class Counsel

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on July 26, 2021, a copy of *Plaintiffs' Motion For Attorneys' Fees, Reimbursement of Expenses, And for Class Representative Service Awards and Memorandum of Law* was filed electronically with the Clerk of Court, with a copy sent to counsel of record by electronic mail to all counselof record.

DATED: July 26, 2021

CARLSON LYNCH, LLP

By: */s/ Katrina Carroll*
Katrina Carroll