CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF MCDONOUGH, STATE OF ILLINOIS

H.K. and J.C., through their father and legal guardian CLINTON FARWELL, AND M.W. through her mother and legal guardian ELIZABETH WHITEHEAD, individually and on behalf of all others similarly situated, Plaintiffs, v. GOOGLE LLC, Defendant.	Case No. 2020LL00017 Judge. Hon. Heidi A. Benson

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

I. INTRODUCTION

Plaintiffs H.K. and J.C., through their father and legal guardian Clinton Farwell, and M.W., through her mother and legal guardian Elizabeth Whitehead ("Plaintiffs" or "Class Representatives"), respectfully move on an unopposed basis for preliminary approval of the concurrently filed class-wide Settlement Agreement ("Settlement Agreement" or "SA") between the Parties to this Action.[1]

In this putative class action, Plaintiffs allege that Defendant Google LLC ("Defendant" or "Google") violated the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"), by collecting, storing, and using putative class members' biometric identifiers and biometric information (collectively, "Biometric Data") in connection with its "G Suite for Education" (later known as Google Workspace for Education (together, "GWFE")) product, without providing requisite notice, obtaining informed written consent, or publishing and complying with a publicly available retention and destruction policy. Through the Consolidated Class Action Complaint ("Complaint" or "Compl."), Plaintiffs seek statutory damages and equitable remedies for Settlement Class Members ("Class Members"), as well as reasonable attorneys' fees and costs.

After four years of active litigation, Plaintiffs achieved a Settlement that, if approved, will resolve this case on behalf of the Settlement Class ("Class"). The Settlement avoids numerous risks of non-recovery posed by continued litigation and provides meaningful monetary and non-monetary relief to Class Members.

Defendant agrees to pay $8,750,000.00 to establish a non-reversionary cash Settlement Fund for the benefit of the Class. Each Class Member who submits an Approved Claim via an easy-to-understand Claim Form will receive a *pro rata* cash payment from the Net Settlement Fund, which Proposed Class Counsel estimates will be from $30.00-$100.00.

[1] Unless otherwise defined herein, capitalized words and terms have the same meaning ascribed to them in the Settlement Agreement, Section 1 (Definitions).

The Settlement also includes robust prospective relief for the benefit of all Illinois GWFE users. It will require Defendant to do the following:

(1) provide notice to Illinois GWFE users during enrollment in Voice Match or Face Match features of Google Assistant that such features may involve the creation of voice models and/or face models, as applicable; the purposes for creating such models, as applicable; and, if Defendant will store such models on its servers more than temporarily, the estimated length of retention. Nothing will require Defendant to use specific wording or terminology, or to provide information that does not accurately describe what Defendant is doing;

(2) the notice presented when a user enrolls in Voice Match or Face Match will require the user to affirmatively consent to the feature before it is enabled;

(3) Defendant will not sell, lease, or trade voice models or face models associated with any Illinois GWFE user's use of Voice Match or Face Match to any third party outside of Google; and

(4) Defendant will store, transmit, and protect from disclosure voice models or face models using reasonable security measures and in a manner that is at least as protective as the manner in which Defendant stores, transmits, and protects other confidential and sensitive information.

The Settlement is the product of an in-depth pre-filing investigation that began in 2020, four years of hard-fought litigation, and discovery concerning the Parties' claims and defenses. The time and resources that Plaintiffs devoted to this litigation put them in a strong position to assess the strengths and weaknesses of the claims and the risks posed by continued litigation.

The Parties agreed to the principal terms of the Settlement only after engaging in extensive and zealous negotiations for over one year (which included a full-day mediation session and multiple follow-up negotiation calls with a well-respected neutral, Hon. Stuart E. Palmer (Ret.)). Thus, the Settlement represents the culmination of more than four years of litigation and extensive arm's-length negotiations.

By any measure, the Settlement is fair, reasonable, and adequate and warrants preliminary approval. Thus, Plaintiffs respectfully request that the Court (1) preliminarily approve the proposed Settlement; (2) provisionally certify the Settlement Class; (3) approve the Notice Plan; and (4) schedule a Final Approval Hearing.

II. BACKGROUND

A. Nature of the Action

Plaintiffs allege, *inter alia*, that Google created, collected, and stored Biometric Data (i.e., "face templates" or "scans of face geometry" as well as "voiceprints" and various other forms of personally identifying information) pertaining to Class Members when they used their GWFE accounts, and did so without providing sufficient notice and obtaining the required consent in violation of BIPA. Compl. ¶¶ 5-7, 9-11, 20, 25-46, 57-64. Specifically, Plaintiffs allege that Google extracts a "face template" or "voiceprint" from each Class Member who has the Voice Match or Face Match feature enabled through their GWFE account.

Plaintiffs allege Google collected and stored Class Members' Biometric Data without first obtaining the written releases required by 740 ILCS 14/15(b)(3). *Id.* ¶ 34. Plaintiffs further allege Google never informed Plaintiffs or Class Members in writing of the specific purpose and length of time for which their Biometric Data were being "collected, stored and used" as required by 740 ILCS 14/15(b)(1)-(2), nor did Google publish a publicly available retention schedule and guidelines for permanently destroying Plaintiffs' and Class Members' Biometric Data as required by 740 ILCS 14/15(a). *Id.* ¶¶ 34-35. Plaintiffs and Class Members are Illinois residents who, while they were enrolled in a school in the State of Illinois, at any time between March 26, 2015 and the date of Preliminary Approval, had a voice model or face model created or had the Voice Match or Face Match feature enabled in their GWFE account. *Id.* ¶ 47. On behalf of themselves and the Class, Plaintiffs seek statutory damages, injunctive relief, and reasonable attorneys' fees and expenses to redress Defendant's alleged violations of BIPA. *Id.* ¶ 64.

B. The Litigation and Plaintiffs' Counsels' Efforts on Behalf of the Class

1. Investigations

Plaintiffs' counsel conducted comprehensive pre- and post-filing investigations concerning the factual and legal issues underlying the case. These efforts included:

- Researching the nature of Defendant's business, technologies, consumer-privacy practices, and public statements, both in general and specifically in the context of GWFE;

- Interviewing dozens of individuals in Illinois who used or created a GWFE account, including any disclosures they received or agreed to during the process, and their experience using "G Suite for Education" platform;

- Inspecting and analyzing these consumers' ChromeBooks and GWFE accounts, and various records reflecting their use of GWFE, among other interactions with Defendant;

- Researching and analyzing Defendant's technology used in connection with GWFE, including registered patents, patent applications, various papers, and public statements by the company concerning the service and its technology;

- Performing an in-depth analysis of the various versions of Defendant's Privacy Policy, Terms of Service, and other publicly accessible documents available to ChromeBook users during the statutory period;

- Researching the relevant law and examining the pertinent facts to assess the merits of potential BIPA claims against Defendant and defenses that Defendant might assert thereto; and

- Reviewing pieces of proposed legislation and related legislative materials under consideration by the Illinois legislature during the statutory period, including Senate Bill 2979 (signed into law Aug. 2, 2024), as well as lobbying efforts related thereto, and assessing the likelihood that BIPA would be amended in a manner that would affect Plaintiffs' and putative class members' rights on a retroactive basis, including their ability to pursue claims or recover statutory damages.

See concurrently filed Affidavit of Robert R. Ahdoot ("Ahdoot Aff.') ¶ 6.

As a result of these investigations, Plaintiffs were able to prepare complaints, and to engage in motion practice and conduct discovery against Defendant aimed at maximizing the likelihood of class certification and recovering meaningful class-wide relief. Ahdoot Aff. ¶ 7.

2. Litigating the Google ChromeBook BIPA Case

Plaintiffs H.K. and J.C. through their father and legal guardian Clinton Farwell first filed this putative class action in the Circuit Court for the 9th Judicial District, McDonough County Circuit Court of the State of Illinois on November 19, 2020, alleging claims for damages and other

remedies based on alleged violations of BIPA, violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §17200, predicated on violation of the federal Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. § 501, *et seq.*, in connection with Google's ChromeBooks and its "G Suite for Education" platform (the "H.K. State Action") (ECF No. 1.) Google filed a Notice of Removal of the Action to federal court on April 20, 2021 (the "H.K. Federal Action") (ECF No. 1).

On May 27, 2021, Google filed a motion to dismiss the H.K. Federal Action (ECF No. 11); thereafter, on July 1, 2021 Plaintiffs filed a First Amended Class Action Complaint (ECF No. 14), which added Plaintiff, M.W., through her mother and legal guardian Elizabeth Whitehead to the H.K. Federal Action. On August 2, 2021, Google filed a motion to dismiss the First Amended Class Action Complaint, asserting the Plaintiffs failed to state a claim under BIPA and that their BIPA claims were preempted by COPPA and SOPPA. (ECF No. 16). Plaintiffs opposed the motion to dismiss (ECF No. 18), to which Google filed a Reply on April 1, 2022 (ECF No. 20). On March 31, 2022, the District Court in the H.K. Federal Action denied and granted, in part, the Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 20).

On May 3, 2022, after extensive meet and confer, the Parties filed a Joint Discovery Plan (ECF No. 24) and thereafter commenced discovery. On May 31, 2022, Google filed its Answer and Affirmative Defenses, and later amended it on June 21, 2022. (ECF Nos. 26, 30). Google submitted its Initial Disclosures on October 28, 2022.

On November 2, 2022, Plaintiffs filed a motion for partial remand (ECF No. 32), seeking to sever Plaintiffs' section 15(a) claim and remand it to the Circuit Court of the Ninth Judicial Circuit, McDonough Court, which Google opposed on November 16, 2022.

While the Plaintiffs' motion for remand was pending, the Parties continued discovery efforts. On January 10, 2023, Plaintiffs served detailed requests for production of documents and interrogatories, to which Defendant responded. Google also provided a partial production of documents but refused to produce further material in response to Plaintiffs' requests for production without entry of a protective order. The Parties were unable to reach agreement on the terms of a

protective order covering Defendant's technology and Plaintiffs' and class members' personally identifiable information. On May 26, 2023, Plaintiffs filed a Motion for Protective Order (ECF No. 35), which Google opposed on June 9, 2023 (ECF No. 36). The Court held a hearing on June 28, 2023 (ECF No. 38) giving direction to the Parties to resolve their differences. Again, the Parties could not do so and filed a joint motion to ask the Court to resolve their remaining differences (ECF No. 40). During this time, Plaintiffs continued their factual investigation of the claims.

On September 20, 2022, the Parties participated in an all-day mediation with the Honorable Stuart E. Palmer (Ret.), former Justice of the Illinois Appellate Court and Judge of the Circuit Court of Cook County, Illinois. Following the all-day mediation session, the Parties conducted extensive continued negotiations under the supervision of Judge Palmer. Judge Palmer has extensive experience in mediating class actions, including those alleging violations of BIPA. Ahdoot Aff. ¶ 13.

On August 21, 2023, the District Court in the H.K. Federal Action severed and remanded certain of Plaintiffs' causes of action to the Circuit Court of the Ninth Judicial Circuit, McDonough County. The Parties agreed after negotiation to stipulate to remand all remaining causes of action in the H.K. Federal Action to the Circuit Court of the Ninth Judicial Circuit, McDonough County, and consolidate with the cause of action that was remanded by the District Court in the H.K. Federal Action on August 21, 2023.

After extensive arm's-length negotiations, the Parties reached an agreement in principle to settle on the terms and conditions embodied in this Agreement. On October 31, 2023, the Parties informed the Court that they had reached an agreement in principle concerning a settlement of the Action and were in the process of finalizing a settlement agreement and requested that the Court stay deadlines, further discovery, and motion practice to allow those negotiations to continue. (ECF No. 46). The Court extended the stay several times.

3. Settlement Negotiations and Mediation

While the litigation was underway, the Parties engaged in extensive, arm's-length negotiations for more than one year, including a mediation session and numerous additional discussions facilitated by Judge Palmer. Ahdoot Aff. ¶ 16.

Prior to finalizing the Settlement, Plaintiffs' counsel obtained and reviewed discovery regarding the merits of Plaintiffs' claims and Defendant's defenses, Google's business practices with respect to GWFE, issues of class certification, and the size and composition of a potential class. *Id.* ¶ 17. Thus, before entering the Settlement, Plaintiffs had a thorough understanding of the composition of the Settlement Class, the nature of Google's anticipated defenses on the merits, the likely nature of arguments that would be advanced at class certification, summary judgment, and trial, the complex technical issues surrounding the claims and defenses, and potential injunctive relief. *Id.*

On September 20, 2022, the Parties engaged in an all-day mediation session with Judge Palmer of JAMS,[2] with both sides represented by experienced counsel who fought hard for their clients. Ahdoot Aff. ¶ 18. After the mediation, the Parties had multiple extensive discussions mediated by Judge Palmer. *Id.* Over the course of many months, the Parties also participated in numerous phone conferences during which the myriad detailed terms of the Settlement were negotiated. *Id.* ¶ 19. This process extended for months, included several iterations and revisions of written proposals and counter proposals, and discussions with Google's in-house counsel and consultations with experts. *Id.* Numerous drafts and redlines of the Settlement Agreement and its many exhibits were exchanged, followed by lengthy discussions between the Parties and negotiations about a multitude of issues. *Id.* The Settlement was not finally consummated until June 14, 2024. *Id.*

[2] The Parties submitted and exchanged confidential mediation statements detailing their respective views of the case and positions on settlement prior to commencement of mediation. Ahdoot Aff. ¶ 18.

The Parties also negotiated the logistics and substance of the notice and administration plan. *Id.* ¶ 20. Plaintiffs' counsel obtained bids from well-established, experienced, and highly regarded class action notice and administration firms. *Id.* After reviewing and comparing costs among multiple proposals, and obtaining further follow-up information from each potential administrator, the Parties agreed to engage Postlethwaite & Netterville, APAC ("P&N") to serve as Settlement Administrator, subject to the Court's approval. *Id.* As a result, Plaintiffs maximized the amount that would be available to the Class by minimizing the notice and administration costs, while ensuring that the notice and administration plan complied with all rules, guidelines, and due process requirements. Ahdoot Aff. ¶ 21. Further, Plaintiffs worked closely with P&N to ensure that the content and form of all notice-related materials and other Settlement documents (as well as the Settlement Website) are consistent with the terms of the Settlement, comply with due process and applicable law, and are easily understood by Class Members. *Id.* ¶ 22; SA Exhibit 8, Affidavit of Brandon Schwartz (Director of Notice at P&N) ("Schwartz Aff.") ¶¶ 8-9, 21-25.

III. THE PROPOSED SETTLEMENT

The key terms of the Settlement are as follows:

A. The Settlement Class

Plaintiffs request that the Court provisionally certify the following Settlement Class: "all Illinois residents who, while they were enrolled in a school in the State of Illinois, at any time between March 26, 2015 and the date of Preliminary Approval, had a voice model or face model created or had the Voice Match or Face Match feature enabled in their GWFE account." SA ¶ 1.9.[3]

B. Monetary Relief

The Settlement provides for a non-reversionary cash Settlement Fund of $8,750,000.00, which will be funded by Google. *Id.* ¶ 3.2(a). Each Class Member is eligible to make one claim

[3] Excluded from the Settlement Class are: (a) any judge, magistrate, or mediator presiding over the Action and members of their families; (b) Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest; (c) Class Counsel; and (d) the legal representatives, successors or assigns of any such excluded persons. SA ¶ 1.9.

for payment. *Id.* ¶ 3.3(a). The Settlement Fund will be used to pay Settlement Payments to Class Members, Administration Expenses to the Settlement Administrator, any Taxes (for interest accrued on the Fund), and any Court-approved Fee and Expense Award to Class Counsel and Service Payments to the Class Representatives. *Id.* ¶ 3.2(a). The Settlement contemplates distribution of residual funds to Class Members in a second distribution, if economically feasible.[4] *Id.* ¶ 3.5. To the extent funds remain in the Settlement Fund after these efforts, subject to the Court's approval, such Residual Funds will be distributed to one or more 26 U.S.C. § 501(c)(3) non-profit organization(s) selected by the Parties. *Id.*

Within 90 days after the Effective Date, the Settlement Administrator shall send to each Class Member who submitted an Approved Claim a Settlement Payment constituting an equal *pro rata* share of the Net Settlement Fund (i.e., the amount remaining in the Settlement Fund after deductions are made to pay the Administration Expenses, Fee and Expense Award, and Service Payments). *Id.* ¶ 3.3(a)-(b). Settlement Payments will be sent via physical check, digital payment, or electronic deposit, as selected by each Claimant. *Id.* ¶ 3.3(b).

C. Significant Prospective Relief

The Settlement provides for significant prospective relief. Within 90 days after the Effective Date:

(1) Defendant will provide notice to Illinois GWFE users during enrollment in Voice Match or Face Match features that such features may involve the creation of voice models and/or face models, as applicable; the purposes for creating such models, as applicable; and, if Defendant will store such models on its servers more than temporarily, the estimated length of retention. Nothing will require Defendant to use

[4] To the extent that a check issued to a Class Member is not cashed within 180 days after the date of issuance, or a digital payment is unable to be processed within 180 days of the first attempt, such funds shall be apportioned in a second distribution, if practicable, on a *pro rata* basis, to Class Members with Approved Claims who, in the initial distribution, cashed their check or successfully received payment electronically. SA ¶ 3.5.

specific wording or terminology, or to provide information that does not accurately describe what Defendant is doing;

(2) The notice presented when a user enrolls in Voice Match or Face Match will require the user to affirmatively consent to the feature before it is enabled;

(3) Defendant will not sell, lease, or trade voice models or face models associated with any Illinois GWFE user's use of Voice Match or Face Match to any third party outside of Google; and

(4) Defendant store, transmit, and protect from disclosure voice models or face models using reasonable security measures and in a manner that is at least as protective as the manner in which Defendant stores, transmits, and protects other confidential and sensitive information.

D. The Notice Plan and Claims Process

The proposed Notice forms are attached to the Settlement as Exhibits 1 (Claim Form), 3 (Long Form Notice), 5 (Print Publication Notice), 6 (Summary Notice), 7 (Summary Notice – Postcard), and 8-9 (Targeted Media Online Notice). Notice will be sent to all individuals whom Google has determined, to the extent available in Defendant's records, are *potential* Class Members ("Class Data"). *Id.* ¶ 6.1; Schwartz Aff. ¶ 16. The Summary Notice will be delivered by U.S. Mail, in Postcard form, postage prepaid, where a mailing address can be identified by the Settlement Administrator from data provided by Google.

Class counsel anticipate the primary form of Notice will be a robust print and digital notice program in a manner specifically designed to reach Class Members. SA ¶¶ 6.3(b)(ii)-(vi); Schwartz Aff. ¶¶ 8-18. The Settlement Website (www.GoogleEducationBIPASettlement.com) will communicate all important information, deadlines, and the Long Form Notice. SA ¶ 1.41; Schwartz Aff. ¶ 18. The website will also allow for electric submission of Claim Forms and have the Long Form Notice (in both English and Spanish), Claim Form, and relevant Motions, Orders, and pleadings available for download. *Id*. Additionally, a toll-free number, email, and physical mailing address will be made available for Class Members to contact the Settlement Administrator

directly. SA ¶ 6.3(b)(v), and *see also* Exs. 3 (Long Form Notice), 5 (Publication Notice), and 6 (Summary Notice); Schwartz Aff. ¶ 24. The Notice Plan is robust, constitutes the best practicable notice under the circumstances, and meets all due process requirements. Schwartz Aff. ¶¶ 8-9, 23-25. Prior to the Final Approval Hearing, the Parties will file an affidavit from the Settlement Administrator attesting to its compliance with the Notice program. SA ¶ 6.3(b)(x).

Class Members will be able to submit Claim Forms electronically on the Settlement Website, or in traditional paper form by U.S. Mail, postmarked on or before the Claims Deadline. *Id.* ¶ 7.1. The entire claims process will be handled by the Settlement Administrator. *Id.* ¶ 5.1. Following the commencement of the Notice, Class Members will have 120 days after the Notice Date to submit their Claim Forms. *Id.* ¶ 1.8.

E. The Settlement Administrator

The Parties propose that Eisner Amper (formerly P&N; an experienced and reputable national class action administrator and ranked as one of the top 100 U.S. accounting firms) serve as Settlement Administrator to provide notice, administer the claims process, and provide other services necessary to implement the Settlement. SA ¶ 1.38; Ahdoot Aff. ¶¶ 20-22; Schwartz Aff. ¶¶ 3-5 & Exs. A-B. All Settlement Administration Expenses (including the costs of notice and administration of claims) will be paid out of the Settlement Fund. SA ¶¶ 3.2, 6.3(b)(ix).

F. Proposed Service Payments and Fee and Expense Award

Class Counsel must file any Applications for a Fee and Expense Award and for Service Payments to the proposed Class Representatives no later than 14 days before the Objection and Exclusion Deadline. *Id.* ¶¶ 12.1-12.2.

Class Counsel intends to request Service Payments of no more than $5,000 to each of the Class Representatives, and a Fee and Expense Award to Class Counsel of no more than 40% of the Settlement Fund in addition to reasonable out-of-pocket litigation expenses incurred by Class Counsel. *Id.* The Class Notice will inform Class Members of the maximum Service Payments and Fee and Expense Award that the Class Representatives and Class Counsel intend to request. SA ¶

6.3(a) & Ex. 3. These payments will be paid to Class Representatives and Class Counsel from the Settlement Fund. *Id.* ¶ 1.39.

G. Objection and Exclusion Deadline Rights

Any Class Member who wishes to opt out of or object to the Settlement must do so on or before the Objection and Exclusion Deadline, which shall be designated as a date no later than 75 days after the Notice Date. SA ¶¶ 1.28, 8.2. The Class Notice will contain language consistent with the provisions of Sections 8 and 9 of the Settlement Agreement concerning objections and requests for exclusion. *Id.* ¶ 9.1 & Ex. 3.

H. Release

Upon the Court's entry of the Final Order and Judgment, the Releasing Parties shall be deemed to have fully, finally, and forever released, relinquished, and discharged all Released Claims against all Released Parties. *Id.* ¶¶ 1.31-1.34 (defining release-related terms), 11.1-11.3 (setting forth scope of the released claims and those being released).

IV. CLASS ACTION SETTLEMENT APPROVAL PROCESS

Strong judicial and public policies favor the settlement of class action litigation, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *Quick v. Shell Oil Co.*, 404 Ill. App. 3d 277, 282 (3rd Dist. 2010); *Lebanon Chiropractic Clinic, P.C. v. Liberty Mut. Ins. Co.*, 2016 IL App (5th) 150111-U, ¶ 41; *Isby v. Bayh*, 75 F.3d 1191, 1198-99 (7th Cir. 1996).

Courts review proposed class action settlements using a well-established two-step process. 4 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 11.25, at 38-39 (4th ed. 2002) ("NEWBERG"); *see e.g., Kaufman v. Am. Express Travel Related Servs. Co.*, 264 F.R.D. 438, 447 (N.D. Ill. 2009); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 492 (1st Dist. 1992). The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." NEWBERG, § 11.25, at 38–39; *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (2d Cir. 1998); *Lebanon*, 2016 IL App (5th) 150111-

U, ¶ 11. The preliminary approval stage is an "initial evaluation" of the fairness of the proposed settlement based on the written submissions and informal presentation from the settling parties. MANUAL FOR COMPLEX LITIGATION, § 21.632 (4th ed. 2004) ("MANUAL"). If the Court finds the settlement proposal is "within the range of possible approval," the case proceeds to the second step in the review process: the final approval hearing. NEWBERG, § 11.25, at 38–39. This procedure safeguards the due process rights of unnamed Class Members and allows the Court to fulfill its role as the guardian of their interests. NEWBERG § 11.25. Class Representatives are presently at the first step of this two-step process.

V. ARGUMENT

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

A. The Settlement Should Be Preliminarily Approved

A court may approve a proposed class settlement on a finding that it is fair, reasonable, and adequate. 735 ILCS 5/2-801. In assessing the fairness, reasonableness, and adequacy of a proposed class settlement, Illinois courts consider the following factors: "(1) the strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed." *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990); *see also Armstrong*, 616 F.2d at 314. "Although this standard and the factors used to measure it are ultimately questions for the fairness hearing that comes after a court finds that a proposed settlement is within approval range, a more summary version of the same inquiry takes place at the preliminary phase." *Kessler v. Am. Resorts Int'l*,

Nos. 05-cv-5944, 07-cv-2439, 2007 U.S. Dist. LEXIS 84450, at *17 (N.D. Ill. Nov. 14, 2007) (citing *Armstrong*, 616 F.2d at 314).

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

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

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

In this case, the amount offered by the Settlement—$8,750,000 cash recovery on a non-reversionary basis—is substantial. The Settlement also includes robust prospective relief that will benefit all Illinois GWFE users, by requiring Defendant to provide additional disclosures to Illinois GWFE users during enrollment in Voice Match or Face Match features that such features may involve the creation of voice models and/or face models, obtain affirmative consent to the feature before it is enabled, and use reasonable security measures in a manner that is at least as protective as the manner in which Defendant stores, transmits, and protects other confidential and sensitive information. (*See supra* Section III.C, "The Proposed Settlement.")

The reasonableness of the Settlement's benefits is underscored by the many substantial risks of non-recovery that continued litigation would have posed absent settlement. *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), 2013 U.S. Dist. LEXIS 6049, at *9-10 (S.D. Cal. Jan. 14, 2013) (where "the settlement avoids the risks of extreme results on either end, *i.e.*, complete or no recovery . . . . it is plainly reasonable for the parties at this stage to find that the actual recovery realized and risks avoided here outweigh the opportunity to pursue potentially more favorable results through full adjudication," such that "[t]hese factors support approval").

Plaintiffs are confident in their case. However, there are significant risks and possible impediments to achieving a successful outcome should the case continue, principally Google's anticipated defenses to the merits of Plaintiffs' claims. Google denies Plaintiffs' allegations that it collected "biometric identifiers" or "biometric information," as those terms are defined in BIPA, and asserts at least 16 affirmative defenses to Plaintiffs' claims, including the defenses of consent, good faith, extraterritoriality (and, relatedly, the dormant Commerce Clause), statute of limitations, substantial compliance, and due process, among others (ECF No. 30 at 27-35). Moreover, Defendant maintains that the Illinois Student Online Personal Protections Act ("SOPPA") precludes Plaintiffs' claims because SOPPA, and not BIPA, governs the collection of biometric data in schools. Each of these defenses exposes Plaintiffs and the Class to significant risk that a verdict will be returned in Google's favor.

First, even if they survived Defendant's opposition to class certification or its SOPPA pre-emption challenge at the summary judgment stage, Plaintiffs would bear the burden at trial of proving that the data Defendant allegedly collected constituted "biometric identifiers" or "biometric information" within the meaning of BIPA. While Plaintiffs are confident that the data Defendant collected did in fact constitute "biometric identifiers" or "biometric information," there is significant risk that a jury would disagree and find in favor of Google. Absent the Settlement, at least some of these questions would have to be resolved through competing expert testimony and other complex evidence presented by the Parties. *See, e.g.*, *In re Facebook Biometric Info. Priv. Litig.*, No. 3:15-cv-03747-JD, 2018 U.S. Dist. LEXIS 81044, at *11 (N.D. Cal. May 14, 2018) ("The parties unleash volleys of other competing evidence, but this summary is enough to show that a jury will need to resolve the genuine factual disputes surrounding facial scanning and the recognition technology."). Plaintiffs are confident of their case, but a court or jury could side with the Defendant on these case-dispositive and highly technical questions.

Second, there is significant risk that Defendant could succeed in establishing consent to the alleged collection and storage of Plaintiffs' Biometric Data during their enrollment in GWFE and in the relevant features, disclosures made to schools and school administrators that required notice

to parents, and through Plaintiffs' agreement to Defendant's Terms of Service and Privacy Policy. Thus, there is a risk that the court or a jury could conclude that Plaintiffs consented to Google's conduct, or that Google adequately complied with BIPA's disclosure requirements, which would also result in a verdict in Google's favor.

Third, even if Plaintiffs were found not to have consented to Defendant's alleged collection of Biometric Data, Defendant would likely argue at summary judgment and at trial that Plaintiffs' claims are barred by the Illinois extraterritoriality doctrine because they seek to hold the company liable for violations of BIPA that occurred outside of Illinois. (ECF No. 30 at 27-28) (asserting extraterritoriality argument in its amended answer). And even if the violations alleged in the complaint are found to have occurred in Illinois, Defendant would argue that, to comply with BIPA in Illinois, it would be forced to change its practices nationwide (not just in Illinois), unduly burdening interstate commerce in violation of the dormant Commerce Clause. *Id.* (asserting dormant Commerce Clause argument). Defendant's extraterritoriality and dormant Commerce Clause defenses presented significant risks to Plaintiffs, both on the merits and at class certification. *See, e.g., Patel v. Facebook, Inc*., 932 F.3d 1264, 1276 (9th Cir. 2019) ("If the violation of BIPA occurred when Facebook's servers created a face template, the district court can determine whether Illinois extraterritoriality doctrine precludes the application of BIPA"); *id.* ("[I]f future decisions or circumstances lead to the conclusion that extraterritoriality must be evaluated on an individual basis, the district court can decertify the class"); *Nat'l Solid Waste Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 657 (7th Cir. 1995) (explaining how states cannot regulate conduct in neighboring states under the dormant Commerce Clause).

Fourth, Defendant argues that Plaintiffs do not state when Google allegedly first violated BIPA, but upon information and belief, Google contends that Plaintiffs' claims accrued outside of the five-year limitations period and are therefore barred. *See Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801, ¶ 42, 216 N.E.3d 845, 854 ("[W]e find that the five-year limitations period contained in section 13-205 of the Code controls claims under the Act."). Google could raise this issue in a motion for summary judgment, and there is a fair possibility that it would succeed.

Fifth, in support of its "good faith" defense, Defendant contended that "[it] is not liable because it relied in good faith upon a reasonable interpretation of BIPA's statutory language and any alleged violation was not negligent, intentional, or reckless." (ECF No.30 at 28-29). If Google were to successfully employ this defense, Class Members would be unable to recover even the minimum statutory damages of $1,000, which are only recoverable for violations committed "negligently"—much less the enhanced statutory damages of $5,000, which are only recoverable for violations committed "recklessly" or "intentionally." 740 ILCS 14/20(1)-(2).

Sixth, Google also raised a First Amendment defense in its Answer. (ECF 30 at 31-32). Specifically, Google argued "BIPA violates the First Amendment by unconstitutionally inhibiting Google's ability to collect, create, and share information with its users, and by inhibiting the collection of information necessary for Google to engage in expressive activity, without a sufficient governmental interest." *See, e.g., Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information [and "other 'upstream' activities that make expression possible"] are speech within the meaning of the First Amendment."). If accepted, this defense has the potential to completely eliminate Google's liability under BIPA.

Seventh, even if Class Representatives successfully certified the Class, they could still lose at trial. And even assuming they prevailed at trial, Google still could argue that Plaintiffs should not recover statutory damages, since statutory damages under BIPA are discretionary, not mandatory. 740 ILCS 14/20 ("A prevailing party may recover for each violation [statutory damages]"); *Watson v. Legacy Healthcare Fin. Servs., LLC*, 2021 IL App (1st) 210279, ¶ 9 n.4 ("[W]e observe that damages [under BIPA] are discretionary not mandatory.").

Finally, any judgment (or order granting class certification) that the Class did obtain could be reversed on appeal, or reduced on due process grounds. *See, e.g., In re Capital One Tel. Consumer Protection Act Litig.*, 80 F. Supp. 3d 781, 792 (N.D. Ill. 2015). Indeed, the risk of a class-wide judgment being reduced on due process grounds is significant. The Illinois Supreme Court noted that "[i]t also appears that the General Assembly chose to make damages discretionary rather than mandatory under the Act." *Cothron*, 2023 IL 128004, ¶45. And in *Rogers v. BNSF*

Railway Co., for example, a federal court vacated a jury's statutory damage award in a BIPA class action and ordered a new trial on damages pursuant to *Cothron*'s guidance. 2023 WL 4297654, at *8, 13 (N.D. Ill. June 30, 2023). In *Golan v. Veritas Entm't, LLC*, No. 14-cv-00069 ERW, 2017 U.S. Dist. LEXIS 144501, at *7-8 (E.D. Mo. Sep. 7, 2017), a class of TCPA plaintiffs won a judgment at trial for $1.6 billion ($500.00 for each of approximately 3.2 million violations), only to have the trial court remit the award to $32 million—or approximately $10.00 per violation—on the grounds that the $1.6 billion awarded by the jury was so annihilative as to violate the Due Process clause of the U.S. Constitution. The trial court's decision in *Golan* was recently affirmed, in its entirety, by the U.S. Court of Appeals for the Eight Circuit. *Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019). The possibility of a similar outcome here, even if the Class were to prevail at trial years from now, further underscores the reasonableness of the immediate, certain, and meaningful relief provided by the Settlement.

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

The Settlement also compares favorably with previously approved settlements in other BIPA cases alleging collection of "scan[s] of . . . face geometry" and related data. *See e.g.*, *Miracle-Pond et al. v. Shutterfly, Inc.*, No. 2019-CH-07050 (Ill. Cir. Ct.) (on September 9, 2021, Judge

Raymond W. Mitchell granted final approval to a $6.75 million settlement in a BIPA class action on behalf of at least 954,000 class members); *In re Facebook Biometric Information Privacy Litig*., No. 3:15-cv-03747-JD (N.D. Cal.) (ECF No. 445-2 (copy of settlement agreement), 511-2 at 3 (size of the class) (finally approved $650 million settlement for a class size of at least 7 million settled after class certification, resolution of appeals, and on the eve of trial).

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

C. A Class-Wide Judgment Could Be Severe

The second factor considers Defendant's ability to satisfy a judgment at trial. *City of Chicago*, 206 Ill. App. 3d at 972. In Plaintiffs' view, if Defendant were ultimately held to have violated BIPA and Plaintiffs were able to secure $1,000 statutory damages per class member, then damages would exceed $650 millionThis figure could reach into the billions if Plaintiffs were able to prove that Defendant obtained multiple "biometric identifiers" from each class member, or that Defendant's violations were reckless or intentional. 740 ILCS 14/20(a)(2) & (b); *see also Cothron v. White Castle Sys., Inc.*, 2023 IL 128004 (2023) (finding that a BIPA claim accrues each time a person's biometric identifier is scanned and each time it is transmitted). While there is little doubt that Defendant is a very profitable company, a verdict in this amount could have a severe impact. Accordingly, the second factor weighs in favor of granting preliminary approval.

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

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

This would be lengthy and very expensive litigation if it were to continue, involving extensive motion practice, including, *inter alia*, motion for class certification (and possibly a motion for decertification), a motion to disseminate pre-trial notice to the class, motions for summary judgment, and various pretrial motions, as well as the retention of additional experts, preparation of expert reports, conducting expert depositions, and motions challenging the qualifications of retained experts. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("[C]lass action suits have a well-deserved reputation as being most complex."). The case would probably not go to trial for well over a year. And even if Class Members recovered a judgment at trial greater than the $8,750,000.00 Settlement Fund in this proposed Settlement, post-trial motions and the appellate process would deprive them of any recovery for years, and possibly forever in the event of a reversal.

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

E. There Presently is No Opposition to the Settlement

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

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

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

F. The Settlement Was Negotiated Free of any Collusion

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

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

Such is the case here. The Settlement was achieved after a robust pre-filing investigation, four years of zealous litigation, a comprehensive exchange of discovery, and over a year of arm's-length negotiations overseen by a highly-experienced and well-respected mediator. Ahdoot Aff. ¶¶ 3-4, 6-7, 16-18. Right up to the time of filing of this Motion, the Parties engaged in intense back-and-forth negotiations regarding every detail of the Settlement. Ahdoot Aff. ¶¶ 19-20.

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

G. Competent Counsel Strongly Endorse the Settlement

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

Plaintiffs' counsel and proposed Class Counsel (at the law firms Ahdoot & Wolfson, PC, Carey Rodriguez, LLP, Hedin LLP and Bursor & Fisher, P.A.) have extensive experience litigating complex data-privacy class actions, including class actions alleging claims for violation of BIPA.

Ahdoot Aff. ¶¶ 27-31 & Ex. 1; Affidavit of Philip L. Fraietta ¶¶ 4-7 & Ex. 1; Affidavit of Frank S. Hedin ¶¶ 4-6_& Ex. 1; Affidavit of John C. Carey ¶¶ 5-6.

Plaintiffs' counsel strongly endorse the Settlement, which they believe is in the best interest of the Settlement Class. Ahdoot Aff. ¶¶ 23-25. As explained above, Defendant's defenses—and the resources that Defendant had committed to defending the case through trial and appeal—present numerous risks of total non-recovery by the Class had the litigation continued. Considering the substantial benefits provided by the Settlement—including the $8,750,000.00 non-reversionary cash Settlement Fund from which all Class Members are entitled to receive a pro rata share, without the need to wait for the litigation and subsequent appeals to run their course—Class Counsel consider the Settlement an excellent outcome for the Settlement Class. Ahdoot Aff. ¶ 25.

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

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

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

Prior to commencing this litigation, Plaintiffs' counsel conducted wide-ranging investigations into every aspect of the claims and potential defenses. Ahdoot Aff. ¶¶ 4, 6-7 . During the litigation, the Parties collectively prepared and filed multiple complaints, motions, and comprehensive pre-mediation briefs, among numerous other materials. Ahdoot Aff. ¶¶ 8-11, 18. Plaintiffs' counsel served comprehensive discovery requests to Defendant; obtained and reviewed Defendant's documents and ESI concerning every aspect of Plaintiffs' claims, Defendant's defenses, and issues pertaining to class certification. Ahdoot Aff. ¶¶ 12, 17. Armed with this information, Plaintiffs and their counsel had "a clear view of the strengths and weaknesses" of the case, *see In re Warner Commc'ns Sec. Litig*., 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd* 798 F.2d 35 (2d Cir. 1986), and were in a strong position to negotiate a fair, reasonable, and adequate

settlement on behalf of the Settlement Class, at mediation and beyond. Defendants also directed significant written discovery to plaintiffs J.C. and M.W., through their legal guardians, and reviewed their document productions.

Settlement negotiations also were thorough, and lengthy. The parties engaged in extensive, arm's-length negotiations over the course of more than one year, including during an all-day session of mediation overseen by a well-respected mediator, Judge Palmer, where counsel for each Party zealously advocated its position. Ahdoot Aff. ¶¶ 16-18. With the supervision and assistance of Judge Palmer, negotiations continued on numerous settlement terms until just before the filing of this Motion. Ahdoot Aff. ¶¶ 18-19.

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

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

I. The Settlement Class Should Be Provisionally Certified

The Court should provisionally certify the Class for settlement purposes only. MANUAL § 21.632; *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). A class may be certified under Section 2-801 of the Illinois Code of Civil Procedure if the following "prerequisites" are satisfied: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801; *CE Design Ltd. v. C & T Pizza, Inc.*, 2015 IL

App (1st) 131465, ¶ 10, *reh'g denied* (June 4, 2015), *appeal denied*, 39 N.E.3d 1001 (Ill. 2015). The proposed Class (SA ¶¶ 1.9, 2.2) satisfies all prerequisites to certification under Section 2-801, as explained below.

1. The Settlement Class Is So Numerous that Joinder Is Impracticable

The first prerequisite to class certification is that "the class is so numerous that joinder of all members is impracticable." 735 ILCS 5/2-801(1). "Although there is no 'bright line' test for numerosity, a class of forty is generally sufficient[.]" *Hinman v. M & M Rental Center, Inc.*, 545 F. Supp. 2d 802, 805-06 (N.D. Ill. 2008); *Kulins v. Malco, A Microdot Co., Inc*., 121 Ill. App. 3d 520, 530 (1st Dist. 1984) (47 class members sufficient to satisfy numerosity). Google's estimates that the Class includes 658,836 Illinois residents who, while they were enrolled in a school in the State of Illinois, between March 2015 and April 2024, had a voice model or face model created or had the Voice Match or Face Match feature enabled in their GWFE account. Ahdoot Aff. ¶ 24. The parties expect that number to rise by tens of thousands by the time the Court issues an order on preliminary approval —the cut-off date for the Settlement Class. Joinder of all Class Members is thus impracticable. Accordingly, the numerosity requirement is satisfied.

2. Common Questions of Law and Fact Predominate

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

In this case, Plaintiffs allege that all members of the proposed Class share a common statutory BIPA claim arising out of the same uniform conduct—namely that Google collected, captured, or otherwise obtained Plaintiffs' and other Class Members' "biometric identifiers" or "biometric information" in connection with their use of their GWFE accounts at primary and secondary schools in Illinois from March 26, 2015. That alleged uniform course of conduct

presents numerous issues of law and fact common to the Class that, Plaintiffs contend, predominate over issues unique to individual Class Members, including whether the data Defendant collected and stored constituted "biometric identifiers" or "biometric information" within the meaning of BIPA; whether Defendant provided the requisite notices to, and obtained the requisite "signed written releases" from, Class Members; whether Defendant published publicly available retention and deletion policies; and whether Defendant's alleged BIPA offenses were committed "negligently," "intentionally," or "recklessly."

Accordingly, the commonality and predominance requirements are satisfied, at least for purposes of provisional class certification at settlement. 735 ILCS 5/2-801(2).

3. Plaintiffs Adequately Represent the Settlement Class

The third prerequisite to class certification under Section 2-801 is that "[t]he representative parties will fairly and adequately protect the interest of the class." 735 ILCS 5/2-801(3). "The purpose of the adequate representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim." *Walczak*, 365 Ill. App. 3d at 678 (citing *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 1004 (2nd Dist. 2004)); *see also Purcell & Wardrope Chartered v. Hertz Corp*., 175 Ill. App. 3d 1069, 1078 (1st Dist. 1988). The class representative's interests must be generally aligned with those of the class members, and class counsel must be "qualified, experienced and generally able to conduct the proposed litigation." *Miner v. Gillette Co.*, 87 Ill. 2d 7, 14 (1981); *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶ 16 (citing *Miner*, 87 Ill. 2d at 14).

Both prongs of the adequacy requirement are satisfied in this case. *First*, Plaintiffs' interests in the litigation are aligned with, and not antagonistic to, those of the Settlement Class. Plaintiffs challenge the same alleged course of conduct that each Class Member challenges and seek the same relief. Plaintiffs have retained competent counsel, provided substantial assistance to their counsel in advance of and during the litigation, vigorously prosecuted the case on behalf of the Settlement Class, and worked closely with their counsel in reaching the proposed Settlement. Ahdoot Aff. ¶ 26. Each of the Class Representatives supports the Settlement and believes that it

constitutes a fair, reasonable, and adequate result for the Settlement Class. *Second*, Plaintiffs' counsel have extensive experience in complex class action litigation. Ahdoot Aff. ¶¶ 27-31 & Ex. 1; Hedin Aff.; Fraietta Aff.; Carey Aff. Accordingly, the Class Representatives and their counsel are adequate representatives of the Settlement Class. *See, e.g., CE Design v. Beaty Const., Inc.*, No. 07-cv-3340, 2009 U.S. Dist. LEXIS 5842, *13 (N.D. Ill. Jan. 26, 2009); *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶ 17.

4. A Class Action Promotes Fairness and Efficiency

The final prerequisite to class certification is that "the class action is an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801(4). "In applying this prerequisite, . . . a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain." *Gordon v. Boden*, 224 Ill. App. 3d 195, 203 (1st Dist. 1991).

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

The U.S. Supreme Court has explained that a class action is the proper method for resolving a large-scale claim if the action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615. This is especially true in BIPA actions, where the "litigation costs are high, the likely recovery is limited," and individuals are unlikely to prosecute individual claims absent the cost-sharing efficiencies of a class action. *Maxwell v. Arrow Fin. Servs., LLC*, No. 03-cv-1995, 2004 U.S. Dist. LEXIS 5462, at *17 (N.D. Ill. Mar. 31, 2004); *see also Gordon*, 224 Ill. App. 3d at 203-04 (noting that a

"controlling factor in many cases is that the class action is the only practical means for class members to receive redress—particularly where the claims are small"); *Eshaghi v. Hanley Dawson Cadillac Co.*, 214 Ill. App. 3d 995, 1004 (1st Dist. 1991) ("In a large and impersonal society, class actions are often the last barricade of consumer protection."). Resolution of the Class Members' claims in a single proceeding promotes judicial efficiency and economies of scale and avoids inconsistent decisions. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982).

Moreover, because the action will now settle, the Court need not be concerned with issues of manageability relating to trial. When "confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. Nor should the Court "judge the legal and factual questions" regarding certification of the proposed Settlement Class by the same criteria as a proposed class being adversely certified. *GMAC*, 236 Ill. App. 3d at 493. Accordingly, the final requirement for class certification is satisfied and the Court should provisionally certify the Settlement Class.

J. The Notice Plan Should Be Approved

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

In this case, the Settlement Agreement contemplates a multi-part Notice Plan designed to reach as many Class Members as possible. SA ¶ 6.3. The Class Notice will be provided directly

by U.S. mail to all potential Class Members. *Id.* ¶ 6.3(b)(i). The Class Notice will also be published to potential Class Members in ads prominently displayed in a number of regional newspapers in Illinois, as well as on popular social media sites. Schwartz Aff. ¶¶ 7-8, 10-15; SA ¶¶ 6.3(b)(ii)-(iii). The Settlement Administrator will establish a Settlement Website where Claim Forms may be submitted electronically on a simple web-based form, where inquiries may be sent to the Settlement Administrator, and where copies of important court documents, including the Claim Form, Settlement Agreement, Class Notices, the Court's Orders, and the Applications for Fee and Expense Award and for Service Payments may be downloaded, as well as a toll-free number for Class Members to call for additional information about the Settlement. Schwartz Aff. ¶¶ 18-19; SA ¶¶ 6.3(b)(vi)-(viii).

The proposed Claim Form and Class Notices (*id.*, Exs. 1, 3, 5-6, 8-9), and the methods by which the Class Notices will be disseminated, readily comport with Due Process and the procedural requisites of Section 2-803. Schwartz Aff. ¶¶ 8-9, 21-25.

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

K. The Court Should Set a Final Approval Schedule

The last step in the approval process, after completion of the Notice Plan, is the Final Approval Hearing, where the Court will consider the fairness, reasonableness, and adequacy of the Settlement and the requested Fee and Service Payments. Plaintiffs respectfully request that the Court schedule the Final Approval Hearing and the other Settlement-related deadlines consistent with the following timetable, which can be adjusted depending on the date of preliminary approval:

1. **Notice Date:** The notice plan outlined above shall commence no later than 35 days from the Preliminary Approval Order [Proposed date: January 13, 2025];

2. **Submission of Papers in Support of Attorneys' Fees and Expenses & Service Payments:** To be filed no later than 14 days before the Objection and Exclusion Deadline [Proposed date: March 14, 2025];

3. **Objection and Exclusion Deadline**: Requests to opt-out or object must be submitted/postmarked no later than 75 days after the Notice Date [Proposed date: March 28, 2025];

4. **Submission of Papers in Support of Final Approval of Settlement**: To be filed no later than 14 days after the Objection and Exclusion Deadline [Proposed date: April 11, 2025];

5. **Final Approval Hearing**: To occur approximately 125 days after the Preliminary Approval Order [Proposed date: May 19, 2025]; and

6. **Claims Deadline:** Claim forms must be postmarked or submitted to the Settlement Administrator within 120 days after the Notice Date [Proposed date: May 13, 2025].

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion and enter an order (in the form of the concurrently filed proposed order) that: (1) preliminarily approves the Settlement; (2) provisionally certifies the Settlement Class; (3) approves the Class Notice and the notice plan, appoints P&N as Settlement Administrator, and orders that Notice be disseminated by the Notice Date; (4) establishes a procedure and timetable, consistent with the procedure set forth in the Settlement Agreement, for Class Members to object to the Settlement, exclude themselves from the Settlement Class, and file Claims in the Settlement; and (5) sets the Final Fairness Hearing.

Dated: October 25, 2024

Respectfully submitted,

By: *<u>/s/ Robert Ahdoot</u>*

AHDOOT & WOLFSON, PC
Robert R. Ahdoot
Tina Wolfson
Theodore Walter Maya
2600 W. Olive Avenue, Suite 500
Burbank, CA 91505

(310) 474-9111
rahdoot@ahdootwolfson.com
twolfson@ahdootwolfson.com
tmaya@ahdootwolfson.com

BURSOR & FISHER, P.A.
Joseph I. Marchese
Joshua D. Arisohn
Philip L. Fraietta
1330 Avenue of the Americas, 32nd Floor
New York, NY 10019
Tel: (646) 837-7150
Fax: (212) 989-9163
jmarchese@bursor.com
jarisohn@bursor.com
pfraietta@bursor.com

HEDIN LLP
Frank S. Hedin
1395 Brickell Avenue, Suite 1140
Miami, Florida 33131
Tel: (305) 357-2107
Fax: (305) 200-8801
fhedin@hedinllp.com

CAREY RODRIGUEZ LLP
John C. Carey
1395 Brickell Avenue, Suite 700
Miami, Florida 33131
Telephone: (305) 372-7474
Facsimile: (305) 372-7475
jcarey@careyrodriguez.com

BOUGHER, KRISHER & ASSOCIATES
Andrew John Stuckart
202 N. Lafayette St.
Macomb, IL 61455
Tel.: (309) 833-1702
Fax.: (309) 833-1701
andrew@lucielaw.com

Attorneys for Plaintiffs