

EXHIBIT 2

Hearing Date: 4/19/2022 9:30 AM
Location: Court Room 2402
Judge: Price Walker, Allen

12-Person Jury

FILED
12/17/2021 5:10 PM
IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2021CH06295
Calendar, 3
16008439

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

CHRISTOPHER PECHO, individually)
and on behalf of similarly situated)
individuals,)

Plaintiff,)

v.)

1-800 CONTACTS, INC., a Delaware)
Corporation,)

Defendant.)

No.
2021CH06295

Hon.

JURY DEMAND

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CLASS ACTION COMPLAINT

Plaintiff Christopher Pecho (“Plaintiff”), individually and on behalf of other similarly situated individuals, brings this Class Action Complaint against Defendant 1-800 Contacts, Inc. (“1-800 Contacts”) for its violations of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* (“BIPA”), and to obtain redress for persons injured by Defendant’s conduct. Plaintiff alleges the following based on personal knowledge as to his own experiences, and as to all other matters, upon information and belief, including an investigation conducted by his attorneys.

INTRODUCTION

1. BIPA defines a “biometric identifier” as “a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.” “Biometric information” is any information based on a biometric identifier, regardless of how it is converted or stored. 740 ILCS § 14/10. Collectively, biometric identifiers and biometric information are known as “biometrics.”

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2. This case concerns the illegal acquisition of individuals' biometrics in the form of scans of their facial geometry by Defendant 1-800 Contacts. Defendant has collected, captured, purchased, received through trade, and/or otherwise obtained the biometrics of Plaintiff and other consumers throughout Illinois, without their informed written consent as required by law.

3. Facial geometry is a unique and permanent biometric identifier associated with each individual. The inappropriate handling of such sensitive information exposes consumers to serious and irreversible privacy risks. If for example, a database containing scans of face geometry or other sensitive biometric data is hacked, breached, or otherwise exposed, consumers cannot simply change their biometric identifiers like they could reset a password or cancel a credit card.

4. Having recognized that biometrics present unique security concerns, the Illinois Legislature enacted BIPA to regulate companies that collect and store Illinois citizens' biometrics. BIPA provides, *inter alia*, that private entities, such as Defendant, may not collect, capture, purchase, receive through trade or otherwise obtain an individual's biometrics unless they first:

- (1) inform the person whose biometrics are to be collected *in writing* that biometric identifiers or biometric information will be collected or stored, 740 ILCS 14/15(b)(1);
- (2) inform the person whose biometrics are to be collected *in writing* of the specific purpose and the length of term for which such biometric identifiers or biometric information is being collected, stored, and used, 740 ILCS 14/15(b)(2); and
- (3) receive a *written release* from the person whose biometrics are to be collected, allowing the capture and collection of their biometric identifiers or biometric information, 740 ILCS 14/15(b)(3).

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5. BIPA also requires a private entity in possession of biometric identifiers or biometric information to make publicly-available a written policy outlining its storage and destruction policies for such biometric identifiers, and/or any biometric information derived from such identifiers. 750 ILCS 14/15(a).

6. The deprivation of the statutory rights conferred by BIPA constitutes the actual injuries the Illinois Legislature sought to prevent.

7. In direct violation of the foregoing provisions, Defendant has actively collected, captured, purchased, or otherwise received through trade—without providing notice, obtaining informed written consent, or publishing data retention policies—the biometrics of thousands of individuals throughout Illinois through its acquisition of Ditto Technologies, Inc. (“Ditto”), a provider of facial geometry “virtual try-on” technology.

8. Specifically, Defendant has collected, captured, purchased, received through trade or otherwise obtained thousands of templates of facial geometry—highly detailed geometric maps of the face—from thousands of Illinois individuals including Illinois residents like Plaintiff. These templates of facial geometry have been created through sophisticated facial recognition technology that scans, extracts, and analyzes data from the points and contours of faces that appear in photos and videos taken from consumers’ mobile devices and computers. Each template of facial geometry that Defendant has obtained is unique to one person, in the same way that a fingerprint or voiceprint uniquely identify an individual.

9. Compliance with BIPA is straightforward and may be accomplished through a single, signed sheet of paper, or its electronic equivalent. BIPA’s requirements bestow a right to privacy in biometrics and a right to make an informed decision when electing whether to provide or withhold biometrics.

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10. Defendant has obtained the facial geometry of users in Illinois without first receiving those individuals' informed written consent and informing them how long it intends to keep such biometric identifiers and information, as required by BIPA.

11. Defendant also stores those individuals' biometric data but has failed to publish a written policy specifying how long it retains such data and when it will be destroyed, as required by BIPA.

12. Plaintiff brings this action for damages and other legal and equitable remedies resulting from the illegal actions of Defendant in possessing, collecting, capturing, purchasing, receiving through trade, or otherwise obtaining his biometrics, and those of hundreds or thousands of other consumers throughout the state of Illinois, without their informed written consent, and without making publicly available a written policy detailing how it stores and disposes of this irreplaceable information, in direct violation of BIPA.

13. On behalf of himself and the proposed Class defined below, Plaintiff seeks an injunction requiring Defendant to comply with BIPA, as well as an award of statutory damages to the Class members, together with costs and reasonable attorneys' fees.

PARTIES

14. Defendant 1-800 Contacts, Inc. is a Delaware corporation that conducts substantial business in and markets its services throughout Illinois, including in Cook County.

15. At all relevant times, Plaintiff Christopher Pecho has been a resident and citizen of the State of Illinois, specifically of Cook County.

JURISDICTION AND VENUE

16. This Court may assert personal jurisdiction over 1-800 Contacts pursuant to 735 ILCS 5/2-209 in accordance with the Illinois Constitution and the Constitution of the United States,

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because 1-800 Contacts advertises, solicits, and conducts substantial business within this State, and because Plaintiff's claims arise out of 1-800 Contacts' unlawful in-state actions, as 1-800 Contacts collected, captured, purchased, received through trade, or otherwise obtained and used Plaintiff's biometric identifiers and/or biometric information in this State.

17. Venue is proper in Cook County pursuant to 735 ILCS 5/2-101, because 1-800 Contacts is doing business in Cook County and thus resides there under § 2-102, and because the biometric transactions out of which this cause of action arises occurred in Cook County.

FACTS SPECIFIC TO PLAINTIFF

18. Defendant 1-800 Contacts has received Plaintiff's biometrics through trade by its acquisition of Ditto, a "virtual try-on" technology provider.

19. Virtual try-on technology uses facial biometrics to allow consumers to virtually try on sunglasses and similar accessories by gathering face geometry scans through their computer or phone camera and using them to virtually display the item on the consumer's face.

20. Plaintiff has used the virtual try-on technology at issue during the applicable limitations period within Cook County.

21. Prior to obtaining Plaintiff's biometrics, Defendant did not inform Plaintiff and the other Class members in writing that their biometrics were being collected or stored, nor in any way did it receive their informed written consent as required by law.

22. Defendant has also failed to make publicly available any written policy as to its biometric retention and destruction schedule.

CLASS ALLEGATIONS

23. Plaintiff brings this action on behalf of himself and similarly situated individuals pursuant to 735 ILCS § 5/2-801. Plaintiff seeks to represent a Class defined as follows:

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The Class:

All individuals whose biometrics were collected, captured, purchased, received through trade, or otherwise obtained by Defendant within the state of Illinois any time within the applicable limitations period.

24. Excluded from the Class are any members of the judiciary assigned to preside over this matter; any officer or director of Defendant; and any immediate family member of such officers or directors.

25. Upon information and belief, there are at least thousands of members of the Class, making the members of the Class so numerous that joinder of all members is impracticable. Although the exact number of members of the Class is currently unknown to Plaintiff, the members can be easily identified through Defendant's records.

26. Plaintiff's claims are typical of the claims of the members of the Class he seeks to represent, because the factual and legal bases of Defendant's liability to Plaintiff and the other members are the same, and because Defendant's conduct has resulted in similar injuries to Plaintiff and to the Class. As alleged herein, Plaintiff and the Class have all suffered damages as a result of Defendant's BIPA violations.

27. There are many questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any questions that may affect individual members. Common questions for the Class include, but are not limited to, the following:

- a. Whether Defendant collected, captured, purchased, received through trade, or otherwise obtained the biometrics of the members of the Class;
- b. Whether Defendant made available to the public a written policy establishing a retention schedule and guidelines for permanently destroying biometrics;

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- c. Whether Defendant obtained a written release from the members of the Class before collecting, capturing, purchasing, receiving through trade, or otherwise obtaining their biometrics;
- d. Whether Defendant provided a written disclosure to the members of the Class that explains the specific purposes, and the length of time, for which their biometrics were collected, stored, and used before collecting such biometrics;
- e. Whether Defendant's conduct violates BIPA;
- f. Whether Defendant's violations of BIPA are willful or reckless;
- g. Whether Defendant's violations of BIPA are negligent; and
- h. Whether Plaintiff and other Class members are entitled to damages and injunctive relief.

28. Absent a class action, most members of the Class would find the cost of litigating their claims to be prohibitively expensive and would thus have no effective remedy. The class treatment of common questions of law and fact is superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants and promotes consistency and efficiency of adjudication.

29. Plaintiff will fairly and adequately represent and protect the interests of the other members of the Class he seeks to represent. Plaintiff has retained counsel with substantial experience in prosecuting complex litigation and class actions. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the other members of the Class and have the financial resources to do so. Neither Plaintiff nor his counsel has any interest adverse to those of the other members of the Class.

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30. Defendant has acted and failed to act on grounds generally applicable to Plaintiff and the other members of the Class, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class and making injunctive or corresponding declaratory relief appropriate for the Class as a whole.

COUNT I

Violations of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.*,

31. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

32. Defendant is a private entity under BIPA.

33. BIPA requires private entities, such as Defendant, to obtain informed written consent from individuals before acquiring their biometric information. Specifically, BIPA makes it unlawful to “collect, capture, purchase, receive through trade, or otherwise obtain a person’s or customer’s biometric identifiers or biometric information unless [the entity] first: (1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the subject . . . in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being captured, collected, stored, and used; and (3) receives a written release executed by the subject of the biometric identifier or biometric information” 740 ILCS 14/15(b).

34. BIPA also requires that a private entity in possession of biometric identifiers and/or biometric information establish and maintain a publicly available retention policy. An entity which possesses biometric identifiers or information must make publicly available a written policy establishing a retention schedule and guidelines for permanent deletion of biometric information.

35. Plaintiff and the other Class members have had their “biometric identifiers,” namely their facial geometry and scans thereof, collected, captured, purchased, received through trade, or otherwise obtained by Defendant.

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36. Plaintiff and the Class members have been aggrieved by Defendant's failures to adhere to the following BIPA requirements, with each such failure constituting a separate and distinct violation of BIPA:

- a. Defendant failed to inform Plaintiff and the Class members in writing that their biometrics were being collected and stored, prior to such collection or storage, as required by 740 ILCS 14/15(b)(1);
- b. Defendant failed to inform Plaintiff and the Class members in writing of the specific purpose for which their biometrics were being captured, collected, stored, and used, as required by 740 ILCS 14/15(b)(2);
- c. Defendant failed to inform Plaintiff and the Class members in writing of the specific length of term their biometrics were being captured, collected, stored, and used, as required by 740 ILCS 14/15(b)(2);
- d. Defendant failed to obtain a written release from Plaintiff and the Class members, as required by 740 ILCS 14/15(b)(3); and
- e. Defendant failed to make publicly available a written retention schedule detailing the specific length of time the biometrics are stored and/or guidelines for permanently destroying the biometrics it stores, as required by 740 ILCS 14/15(a).

37. Defendant knew, or was reckless in not knowing, that the biometric information or biometric identifiers it collected, captured, purchased, received through trade, or otherwise obtained would be subject to BIPA and nevertheless wholly failed to comply with the statute.

38. By capturing, collecting, purchasing, receiving through trade or otherwise obtaining Plaintiff's and the Class members' biometrics as described herein, Defendant denied Plaintiff and

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the Class members their right to statutorily-required information, and violated their respective rights to biometric information privacy, as set forth in BIPA.

39. BIPA provides for statutory damages of \$5,000 for each willful and/or reckless violation of BIPA and, alternatively, damages of \$1,000 for each negligent violation of BIPA.

40. Defendant's violations of BIPA, as set forth herein, were knowing and willful, or were at least in reckless disregard of the statutory requirements, as BIPA has been in existence since 2008, and BIPA's minimally burdensome compliance regime may be satisfied with a single sheet of paper or a single webpage screen. Alternatively, Defendant negligently failed to comply with BIPA's disclosure, consent, and policy posting requirements.

41. Accordingly, Plaintiff, on behalf of himself and the proposed Class, prays for the relief set forth below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the proposed Class, respectfully requests that this Court enter an Order:

- a. Certifying the Class as defined above, appointing Plaintiff as class representative and the undersigned as class counsel;
- b. Declaring that Defendant's actions, as set forth herein, violate BIPA;
- c. Awarding injunctive and equitable relief as necessary to protect the interests of Plaintiff and the Class by requiring Defendant to comply with BIPA requirements for the capture, collection, storage, use, and dissemination of biometric identifiers and biometric information;
- d. Awarding statutory damages of \$5,000 for each willful and/or reckless violation of BIPA, pursuant to 740 ILCS 14/20(2);

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- e. Awarding statutory damages of \$1,000 for each negligent violation of BIPA, pursuant to 740 ILCS 14/20(1);
- f. Awarding reasonable attorneys' fees, costs, and other litigation expenses pursuant to 740 ILCS 14/20(3);
- g. Awarding pre- and post-judgment interest, as allowable by law; and
- h. Awarding such further and other relief as the Court deems just and equitable.

JURY DEMAND

Plaintiff requests trial by jury of all claims that can be so tried.

Dated: December 17, 2021

Respectfully Submitted,

CHRISTOPHER PECHO, individually and on behalf of a class of similarly situated individuals

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

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Brendan Duffner
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Attorneys for Plaintiff and the Putative Class



**Service of Process
Transmittal**

12/30/2021

CT Log Number 540815284

TO: Roy Montclair
1-800 Contacts, Inc.
261 W DATA DR
DRAPER, UT 84020-2315

RE: Process Served in Delaware

FOR: 1-800 Contacts, Inc. (Domestic State: DE)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION: CHRISTOPHER PECHO vs. 1-800 CONTACTS, INC.
DOCUMENT(S) SERVED: --
COURT/AGENCY: None Specified
Case # 2021CH06295
ON WHOM PROCESS WAS SERVED: The Corporation Trust Company, Wilmington, DE
DATE AND HOUR OF SERVICE: By Process Server on 12/30/2021 at 03:04
JURISDICTION SERVED : Delaware
APPEARANCE OR ANSWER DUE: None Specified
ATTORNEY(S) / SENDER(S): None Specified
ACTION ITEMS: CT will retain the current log
Image SOP
Email Notification, Roy Montclair rmontclair@1800contacts.com
Email Notification, DJ Walker djwalker@1800contacts.com
Email Notification, Karen Howse khowse@1800contacts.com
REGISTERED AGENT ADDRESS: The Corporation Trust Company
1209 Orange Street
Wilmington, DE 19801
866-539-8692
CorporationTeam@wolterskluwer.com

The information contained in this Transmittal is provided by CT for quick reference only. It does not constitute a legal opinion, and should not otherwise be relied on, as to the nature of action, the amount of damages, the answer date, or any other information contained in the included documents. The recipient(s) of this form is responsible for reviewing and interpreting the included documents and taking appropriate action, including consulting with its legal and other advisors as necessary. CT disclaims all liability for the information contained in this form, including for any omissions or inaccuracies that may be contained therein.



PROCESS SERVER DELIVERY DETAILS

Date: Thu, Dec 30, 2021

Server Name: Kevin Dunn

Entity Served	1-800 CONTACTS, INC.
Case Number	2021-CH-06295
Jurisdiction	DE



CT

Hearing Date: No hearing scheduled

Location: <<CourtRoomNumber>>

Judge: ~~2120~~ Served 2121 - Served
 2220 - Not Served 2221 - Not Served
 2320 - Served By Mail 2321 - Served By Mail
 2420 - Served By Publication 2421 - Served By Publication
 Summons - Alias Summons

(06/28/18) CCG 0001

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 IRIS Y. MARTINEZ
 CIRCUIT CLERK
 COOK COUNTY, IL
 2021CH06295
 Calendar, 3
 16043342

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CHRISTOPHER PECHO

(Name all parties)

v.

1-800 CONTACTS, INC.

Case No. 2021-CH-06295

1-800 CONTACTS, INC.
 c/o The Corporation Trust Company
 Corporation Trust Center
 1209 Orange Street
 Wilmington, DE 19801

SUMMONS ALIAS SUMMONS

To each Defendant:

YOU ARE SUMMONED and required to file an answer to the complaint in this case, a copy of which is hereto attached, or otherwise file your appearance and pay the required fee within thirty (30) days after service of this Summons, not counting the day of service. To file your answer or appearance you need access to the internet. Please visit www.cookcountyclerkofcourt.org to initiate this process. Kiosks with internet access are available at all Clerk's Office locations. Please refer to the last page of this document for location information.

If you fail to do so, a judgment by default may be entered against you for the relief requested in the complaint.

To the Officer:

This Summons must be returned by the officer or other person to whom it was given for service, with endorsement of service and fees, if any, immediately after service. If service cannot be made, this Summons shall be returned so endorsed. This Summons may not be served later than thirty (30) days after its date.

E-filing is now mandatory for documents in civil cases with limited exemptions. To e-file, you must first create an account with an e-filing service provider. Visit <https://efile.illinoiscourts.gov/service-providers.htm> to learn more and to select a service provider. If you need additional help or have trouble e-filing, visit <http://www.illinoiscourts.gov/FAQ/gethelp.asp>.

Witness: 12/21/2021 5:05 PM IRIS Y. MARTINEZ

Atty. No.: 6323942

Atty Name: David L. Gerbie

Atty. for: Plaintiff

Address: 55 West Wacker Drive, 9th Fl.

City: Chicago State: IL

Zip: 60601

Telephone: 312-893-7002

Primary Email: dgerbie@mcgpc.com

Secondary Email: bduffner@mcgpc.com

Tertiary Email:

DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois



Date of Service:

(To be inserted by officer on copy left with Defendant or other person):

CLERK OF THE CIRCUIT COURT OF COOK COUNTY OFFICE LOCATIONS

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- Richard J Daley Center
50 W Washington
Chicago, IL 60602
 - District 2 - Skokie
5600 Old Orchard Rd
Skokie, IL 60077
 - District 3 - Rolling Meadows
2121 Euclid
Rolling Meadows, IL 60008
 - District 4 - Maywood
1500 Maybrook Ave
Maywood, IL 60153
 - District 5 - Bridgeview
10220 S 76th Ave
Bridgeview, IL 60455
 - District 6 - Markham
16501 S Kedzie Pkwy
Markham, IL 60428
 - Domestic Violence Court
555 W Harrison
Chicago, IL 60607
 - Juvenile Center Building
2245 W Ogden Ave, Rm 13
Chicago, IL 60602
 - Criminal Court Building
2650 S California Ave, Rm 526
Chicago, IL 60608
 - Domestic Relations Division
Richard J Daley Center
50 W Washington, Rm 802
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
 - Civil Appeals
Richard J Daley Center
50 W Washington, Rm 801
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
 - Criminal Department
Richard J Daley Center
50 W Washington, Rm 1006
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
 - County Division
Richard J Daley Center
50 W Washington, Rm 1202
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
 - Probate Division
Richard J Daley Center
50 W Washington, Rm 1202
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
 - Law Division
Richard J Daley Center
50 W Washington, Rm 801
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
 - Traffic Division
Richard J Daley Center
50 W Washington, Lower Level
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
- Daley Center Divisions/Departments**
- Civil Division
Richard J Daley Center
50 W Washington, Rm 601
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
 - Chancery Division
Richard J Daley Center
50 W Washington, Rm 802
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm

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Attorneys for Plaintiff and the Putative Class

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S
MOTION FOR CLASS CERTIFICATION OR, ALTERNATIVELY, FOR
A DEFERRED CLASS CERTIFICATION RULING PENDING DISCOVERY**

This Court should certify a class of Illinois residents whose biometrics were obtained by 1-800 Contacts, Inc. (“Defendant” or “1-800 Contacts”) in violation of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* (“BIPA”). Defendant 1-800 Contacts has purchased, received through trade, and/or otherwise obtained the biometrics of thousands of Illinois individuals in the form of their facial geometry scans. In doing so, Defendant has violated BIPA because it failed to obtain proper consent from Plaintiff and the members of the putative Class prior to collecting, capturing, purchasing, or receiving through trade the biometrics at issue. After Plaintiff learned of Defendant’s wrongful conduct, he brought suit on behalf of a class of similarly situated individuals to put a stop to Defendant’s collection and obtainment of Illinois residents’ facial geometry biometrics in violation of BIPA, and to obtain redress for all persons injured by its conduct.

I. INTRODUCTION: BIPA

The Illinois Biometric Information Protection Act is designed to protect individuals’ biometrics. “Biometrics” refers to a “biology-based set[s] of measurements.” *Rivera v. Google Inc.*, 238 F. Supp. 3d 1088, 1094 (N.D. Ill. 2017). Specifically, “biometrics” are “a set of measurements of a specified physical component (eye, finger, voice, hand, face).” *Id.* at 1096. Under BIPA, biometric identifiers include fingerprints, voiceprints, or scans of hand or face geometry; while biometric information can be defined as any information based on a biometric identifier, regardless of how it is converted or stored. (Complaint, “Compl.,” ¶ 1).

In recognition of the importance of the security of individuals’ biometrics, the Illinois Legislature enacted BIPA, which provides, *inter alia*, that private entities, such as Defendant, may

not obtain and/or possess an individual's biometrics unless they: (1) inform that person in writing that biometric identifiers or information will be captured, collected, stored, or used; (2) inform that person in writing of the specific purpose and the length of term for which such biometric identifiers or biometric information is being captured, collected, stored, and used; (3) receive a written release from the person for the collection of his or her biometric identifiers and/or information; and (4) publish publicly and make available a written retention schedule and guidelines for permanently destroying biometric identifiers and biometric information. 740 ILCS 14/15; Compl., ¶ 4.

II. FACTUAL BACKGROUND

A. The Underlying Misconduct.

Defendant 1-800 Contacts is an online retailer of eyewear products. In an effort to increase online sales of some of its products, 1-800 Contacts has acquired Ditto, a facial recognition and augmented reality technology provider that allows consumers to superimpose images of eyewear and other accessories on their face based on measurements of their facial geometry (Compl., ¶¶ 18–19). In acquiring Ditto, 1-800 Contacts obtained the facial geometry biometrics of consumers who had used its virtual try-on technology (*Id.* at ¶ 18).

Plaintiff interacted with the virtual try-on software while shopping online (*Id.* at ¶ 20). As he used the software, his facial geometry scan biometrics were obtained and utilized to create a detailed template of his unique facial geometry (*Id.* at ¶ 19-20). However, as with thousands of other Illinois consumers, Plaintiff was never informed that Defendant would be collecting, capturing, purchasing, receiving through trade, or otherwise obtaining his facial geometry biometrics nor did Defendant receive their consent to do so (*Id.* at ¶ 21).

B. The Proposed Class

Plaintiff brings this action on behalf of himself and similarly situated individuals pursuant to 735 ILCS § 5/2-801. Plaintiff seeks to represent a Class defined as follows:

The Class: All individuals whose biometrics were collected, captured, purchased, received through trade, or otherwise obtained by Defendant within the state of Illinois any time within the applicable limitations period.

(Compl., ¶ 23). As explained below, the proposed Class satisfies each of the four requirements for certification under Section 2-801 of the Illinois Code of Civil Procedure—numerosity, commonality, adequacy of representation, and fair and efficient adjudication. A class action is not just appropriate here, it is also the only way that the members of the putative Class can obtain appropriate redress for Defendant’s unlawful conduct.

III. ARGUMENT

A. Standards for Class Certification

To obtain class certification, it is not necessary for a plaintiff to establish that he will prevail on the merits of the action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (“[T]he question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” (internal quotation marks and citation omitted)). As such, in determining whether to certify a proposed class, the Court should accept the allegations of the complaint as true. *Ramirez v. Midway Moving & Storage, Inc.*, 378 Ill. App. 3d 51, 53 (1st Dist. 2007).

To proceed with a class action, the movant must satisfy the “prerequisites for the maintenance of a class action” set forth in Section 2-801 of the Illinois Code of Civil Procedure, which provides:

An action may be maintained as a class action in any court of this State and a party

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may sue or be sued as a representative party of the class only if the court finds:

- (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.
- (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

735 ILCS 5/2-801. As demonstrated below, each prerequisite is established for the Class, and the Court should therefore certify the proposed Class.

Section 2-801 is modeled after Rule 23 of the Federal Rules of Civil Procedure and “federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois.” *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 125 (Ill. 2005). Circuit courts have broad discretion in determining whether a proposed class meets the requirement for class certification and ought to err in favor of maintaining class certification. *Ramirez*, 378 Ill. App. 3d at 53. While a court may rule on class certification without requiring further discovery, *see* Manual for Complex Litigation (Fourth) § 21.14, at 255 (2004), courts have found that discovery is helpful prior to addressing a motion for class certification. *See, e.g., Ballard RN Center, Inc. v. Kohll’s Pharmacy & Homecare, Inc.*, 2015 IL 118644, at ¶ 42 (“If the parties have yet to fully develop the facts needed for certification, then they can also ask the district court to delay its ruling to provide time for additional discovery or investigation.”) (quoting *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011)).

All the prerequisites for class certification are satisfied here, even though Plaintiff has not yet had an opportunity to engage in and complete discovery. However, in the interests of establishing a more fully developed record before ruling on class certification issues, the Court

should defer ruling on this Motion pending the completion of discovery and submission of supplemental briefing.

B. The Numerosity Requirement is Satisfied

The first step in certifying a class is a showing that “the class is so numerous that joinder of all members is impracticable.” 735 ILCS 5/2-801(1). This requirement is met when “join[ing] such a large number of plaintiffs in a single suit would render the suit unmanageable and, in contrast, multiple separate claims would be an imposition on the litigants and the courts.” *Gordon v. Boden*, 224 Ill. App. 3d 195, 200 (1st Dist. 1991) (citing *Steinberg v. Chicago Med. Sch.*, 69 Ill.2d 320, 337 (Ill. 1977)). To satisfy this requirement a plaintiff need not demonstrate the exact number of class members but, must offer a good faith estimate as to the size of the class. *Smith v. Nike Retail Servs., Inc.*, 234 F.R.D. 648, 659 (N.D. Ill. 2006).

Plaintiff alleges that there are thousands of members of the Class. (Compl., ¶ 25). Because definitive evidence of numerosity can only come from the records of Defendant and its agents, it is proper to rely upon the allegations of the Complaint in certifying the Class. *See* 2 A. Conte & H. Newberg, *Newberg on Class Actions* § 7.20, at 66 (stating that where numerosity information is in the sole possession of the party opposing the class, courts generally rely on the complaint as prima facie evidence or defer ruling).

Additionally, the members of the putative Class can be easily and objectively determined from Defendant’s records as virtual try-on software or other web analytics software tracks all customer interactions and the IP addresses and other identifying characteristics from which they originate, as well as the accompanying customer records associated with these interactions. Furthermore, it would be completely impracticable to join the claims of the members of the Class, because they are disbursed throughout Illinois, and because absent a class action, few members

could afford to bring an individual lawsuit over the amounts at issue in this case, because each individual member's claim is relatively small. *See Gordon*, 224 Ill. App. 3d at 200. Accordingly, the first prerequisite for class certification is met.

C. Common Questions of Law and Fact Predominate

The second requirement of Section 2-801(2) is met where there are “questions of fact or law common to the class” and those questions “predominate over any questions affecting only individual members.” 735 ILCS 5/2-801(2). Such common questions of law or fact exist when the members of the proposed class have been aggrieved by the same or similar misconduct. *See Miner v. Gillette Co.*, 87 Ill.2d 7, 19 (Ill. 1981); *Steinberg*, 69 Ill.2d at 342. These common questions must also predominate over any issues affecting individual class members. *See O-Kay Shoes, Inc. v. Rosewell*, 129 Ill. App. 3d 405, 408 (1st Dist. 1984). These common questions include: whether Defendant has collected, captured, purchased, received through trade, or otherwise obtained biometrics from Illinois residents through its acquisition of Ditto; whether Defendant obtained a written release from the Class members before acquiring their facial geometry scan biometrics; whether Defendant provided a written disclosure to the members of the Class that explains the specific purposes, and the length of time, for which their biometrics were collected, stored, and used before collecting such biometrics; whether Defendant's conduct violates BIPA; whether Defendant's BIPA violations are willful or reckless; and whether Plaintiff and the Class are entitled to damages and injunctive relief. (Compl., ¶ 27).

As alleged, and as will be shown through obtainable evidence, during the relevant time period Defendant engaged in a common course of conduct by collecting, capturing, purchasing, receiving through trade, or otherwise obtaining Class members' facial geometry biometrics without obtaining the proper consent required by BIPA. Given that BIPA requires a record of

consent to engage in such conduct, whether Defendant had valid consent is also a common issue subject to common resolution. Any potential individualized issues remaining after common issues are decided would be *de minimis*. Accordingly, common issues of fact and law predominate over any individual issues, and Plaintiff has satisfied this hurdle to certification.

D. Adequate Representation

The third prong of Section 2-801 requires that “[t]he representative parties will fairly and adequately protect the interest of the class.” 735 ILCS 5/2-801(3). The class representative’s interests must be generally aligned with those of the class members, and class counsel must be “qualified, experienced and generally able to conduct the proposed litigation.” *See Miner*, 87 Ill.2d at 14; *see also Eshaghi v. Hanley Dawson Cadillac Co., Inc.*, 214 Ill. App. 3d 995, 1000 (1st Dist. 1991). The purpose of this adequacy of representation requirement is “to insure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim.” *Purcell & Wardrope Chtd. v. Hertz Corp.*, 175 Ill. App. 3d 1069, 1078 (1st Dist. 1988).

In this case, Plaintiff has the exact same interest as the members of the proposed Class. Plaintiff has alleged that, like the other members of the Class, his facial geometry biometrics were acquired by Defendant without his consent. (Compl., ¶¶ 18–22). Plaintiff’s pursuit of this matter against Defendant demonstrates that he will be a zealous advocate for the Class. Further, proposed class counsel has regularly engaged in major complex and class action litigation in state and federal courts and has been appointed as class counsel in several complex consumer class actions. Accordingly, the proposed class representative and proposed class counsel will adequately protect the interests of the members of the Class, thus satisfying Section 2-801(3).

E. Fair and Efficient Adjudication of the Controversy

The final requirement for class certification under 5/2-801 is met where “the class action is an appropriate method for the fair and efficient adjudication of the controversy.” 735 ILCS 5/2-801(4). “In applying this prerequisite, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain.” *Gordon*, 224 Ill. App. 3d at 203. In practice, a “holding that the first three prerequisites of section 2-801 are established makes it evident that the fourth requirement is fulfilled.” *Gordon*, 224 Ill. App. 3d at 204; *Purcell & Wardrope Chtd.*, 175 Ill. App. 3d at 1079 (“The predominance of common issues [may] make a class action . . . a fair and efficient method to resolve the dispute.”). Because numerosity, commonality and predominance, and adequacy of representation have been satisfied in the instant case, it is “evident” that the appropriateness requirement is met as well.

Other considerations further support certification in this case. A “controlling factor in many cases is that the class action is the only practical means for class members to receive redress.” *Gordon*, 586 N.E.2d at 467; *Eshaghi*, 574 N.E.2d at 766 (“In a large and impersonal society, class actions are often the last barricade of...protection.”). A class action is superior to multiple individual actions “where the costs of litigation are high, the likely recovery is limited” and individuals are unlikely to prosecute individual claims absent the cost-sharing efficiencies of a class action. *Maxwell*, 2004 WL 719278, at *6. This is especially true in cases involving data privacy violations and data breaches, which can involve significant injury to the those affected, but result in many small, individual claims. Here, absent a class action, most members of the Class would find the cost of litigating their statutorily-limited claims to be prohibitive, and multiple individual actions would be judicially inefficient. *Id.*

Certification of the proposed Class is necessary to ensure that Defendant’s conduct

becomes compliant with BIPA, to ensure that the class members' privacy rights in their biometrics are sufficiently protected, and to compensate those individuals who have had their statutorily-protected privacy rights violated. Were this case not to proceed on a class-wide basis, it is unlikely that any significant number of class members would be able to obtain redress, or that Defendant would willingly implement the procedures necessary to comply with the statute. Thus, proceeding as a class action here is an appropriate method to fairly and efficiently adjudicate the controversy.

IV. CONCLUSION

For the foregoing reasons, the requirements of 735 ILCS 5/2-801 are satisfied. Plaintiff respectfully requests that the Court enter an Order certifying the proposed Class, appointing Plaintiff as Class Representative, appointing McGuire Law, P.C. as Class Counsel, and awarding such additional relief as the Court deems reasonable. Alternatively, the Court should defer ruling on this Motion pending the completion of appropriate discovery and supplemental briefing.

Dated: December 21, 2021

Respectfully Submitted,

CHRISTOPHER PECHO, individually and on behalf of a class of similarly situated individuals

By: /s/ David L. Gerbie
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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2021, I caused the foregoing *Plaintiff's Motion for Class Certification, or in the Alternative for a Deferred Class Certification Ruling Pending Discovery* to be served by electronic mail all counsel of record.

/s/ David L. Gerbie

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