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

AUSTE SALKAUSKAITE, individually and on behalf of all others similarly situated, *Plaintiff,* v. SEPHORA USA, INC., a Delaware corporation, *Defendant.*	No. 18-CH-14379 Hon. Anna M. Loftus

PLAINTIFF'S *UNOPPOSED* MOTION AND MEMORANDUM
IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Dated: June 11, 2021

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I. INTRODUCTION

Class Representative Auste Salkauskaite ("Plaintiff" or "Class Representative") respectfully requests that the Court grant final approval of the Parties' Class Action Settlement Agreement ("The Settlement").[1] The Settlement achieved by the Class Representative and Class Counsel in this matter has been met with overwhelming approval by the Settlement Class Members. To date, after this Court preliminarily approved the Settlement, and following an exhaustive notice campaign consisting of direct U.S. Mail, 476 claims have been submitted, and no opposition has been received. Most importantly, *there have been no objections* and *no opt out requests*. Given the large number of "professional objectors" who seek out class settlements and the regularity with which class settlements are met with objection, the absence of any objections and any opt outs is a testament to the fairness and adequacy of this Settlement.

The overwhelmingly positive reaction from the Settlement Class Members is unsurprising given that the Settlement is an excellent result. The Settlement makes available a $1.25 million non-reversionary Settlement Fund to compensate Settlement Class Members who file valid claims, and each valid claimant will receive a check for a pro rata portion of the Settlement Fund after payment of settlement administration expenses, attorneys' fees and costs, and any incentive award, if approved by the Court.

Pursuant to the Court's Preliminary Approval Order, the multi-pronged notice plan was effectuated on April 9, 2021, directing notice to the approximately 6,500-member Settlement Class. The response has been one of overwhelming support: at the time of this filing, over 476 claims have been submitted, with no objections and no opt outs received. Settlement Class

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

Members who have filed a valid claim are each anticipated to receive approximately $1,600.00 from the Settlement Fund even after accounting for the Administrative Expenses incurred by the Settlement Administrator and an award of attorneys' fees, expenses and Plaintiff's incentive award.

Accordingly, this Court should grant final approval of the Settlement so that Class Members can receive their claimed benefits, and approve Plaintiff's unopposed request for attorneys' fees, expenses, and an incentive award sought in the April 30, 2021 motion previously filed by Plaintiff and Class Counsel.

II. BACKGROUND

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

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

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

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

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

(4) Publish a publicly available retention schedule and guidelines for permanently destroying the collected biometrics. 740 ICLS 14/15.

BIPA was enacted in large part to protect individuals' biometrics, provide them with a means of enforcing their statutory rights, and regulate the practice of collecting, using and disseminating such sensitive biometric information. While BIPA provides a prevailing plaintiff with the opportunity to recover liquidated damages for violations of its terms, the Illinois House Judiciary Committee recently proposed a bill that would amend BIPA to only permit the recovery of actual damages.[2]

B. The Case and Procedural History

1. *Plaintiff's Claims.*

Defendant operates one of the leading chains of cosmetics stores in the country, with hundreds of locations across America. To help sell its cosmetics products, Defendant installed "Sephora Virtual Artist" ("SVA") kiosks at a number of its stores, including in stores located in Illinois. Defendant's SVA kiosks used the camera function of an iPad to create the appearance of a digital "mirror" of the customer's face and allowed them to interact with it and virtually "try on" different cosmetics products without having to purchase them. In essence, Defendant's SVA kiosks were a form of augmented reality, similar to photo filters, that virtually applied different makeup products. Plaintiff has alleged that Defendant's SVA kiosks gathered and used individuals' facial biometrics when they interacted with Defendant's SVA kiosks in order to virtually apply the makeup products, including when Plaintiff interacted with one of Defendant's SVA kiosks at one of its stores located in Chicago in late 2018. Plaintiff has further alleged that in so doing Defendant failed to comply with BIPA because Defendant: (1) failed to inform individuals prior to capturing their biometrics that it will be capturing such information; (2) failed

[2] *See Illinois Bill Seeks to File Down Biometric Law's Sharp Teeth*, LAW360 (Mar. 22, 2021), https://www.law360.com/cybersecurity-privacy/articles/1367329/illinois-bill-seeks-to-file-down-biometric-law-s-sharp-teeth.

to receive a written release for the capture of biometrics prior to such capture; (3) failed to inform the person whose biometrics are being captured of the specific purpose and length of term for which such biometrics are captured; (4) failed to publish a publicly available retention schedule and guidelines for permanently destroying biometrics; and (5) failed to obtain informed consent to disclose or disseminate the biometrics. Defendant denies any violation of or liability under BIPA.

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

This action was initiated on November 18, 2018 in the Circuit Court of Cook County, Illinois by Plaintiff Auste Salkauskaite, alleging violations of BIPA against Defendant and Modiface, Inc. ("Modiface"). Defendant subsequently removed the case to the Northern District of Illinois. Thereafter, Modiface filed its motion to dismiss, asserting that the court lacked personal jurisdiction over Modiface, which is a Canadian company. While Modiface's motion to dismiss was ultimately granted after Plaintiff took jurisdictional discovery, Defendant Sephora answered Plaintiff's First Amended Complaint on May 24, 2019. Thereafter the Parties engaged in significant informal discovery regarding both the merits of Plaintiff's claims and class certification issues. In an effort to reach an early resolution to what would otherwise be highly-contested litigation involving dueling motions for summary judgment and class certification, on December 1, 2020, the Parties participated in a formal, full-day mediation session with the Honorable Morton Denlow (Ret.) of JAMS in Chicago, Illinois.

Counsel for Plaintiff and for Defendant expended significant efforts to reach a settlement, including but not limited to exchanging information regarding the technology used by Defendant's SVA kiosks and identification of potential class members, and participating in arm's-length negotiations. Evidencing the contentious nature of the Parties' negotiation efforts, despite attending a full-day mediation session the Parties were not able to reach a settlement in principle

until more than two weeks later, on December 16, 2020, and only after the mediator submitted a mediator's proposal for the Parties to accept or reject. Following months of additional negotiations regarding the final terms of the Settlement Agreement, the Court granted preliminary approval of the Settlement on March 12, 2020. Plaintiff now seeks final approval of the Settlement.

III. THE PROPOSED SETTLEMENT

The terms of the Settlement already preliminarily approved by the Court are contained in the Settlement Agreement, and are briefly summarized below:

A. The Settlement Class

The Settlement establishes a Settlement Class defined as follows:

> "All natural persons who pushed a button to interact with any Sephora Virtual Artist Kiosk within the state of Illinois from July 1, 2018 to the date of the Preliminary Approval Order."

(Ex. 1, ¶ 50).

B. The Settlement Fund

The proposed Settlement will establish a $1,250,000.00 (One Million Two Hundred Fifty Thousand Dollar) Settlement Fund. (Ex. 1, ¶ 55). No part of the Settlement Fund shall revert to Defendant. (Ex. 1, ¶ 55(e)). Each authorized claimant will be entitled to an equal share of the Settlement Fund after payment of Administrative Expenses to the Settlement Administrator, a Fee Award, and an Incentive Award to the Class Representative. (Ex. 1, ¶ 55).

C. Additional Relief

The Settlement also provides for significant prospective relief to the Settlement Class. Defendant has agreed that it will take significant steps to inform consumers how their information is being collected and stored. (Ex. 1, ¶ 72). Specifically, the Settlement provides that, so long as Defendant elects to operate SVA kiosks in the State of Illinois, it shall make an "SVA Privacy

Policy" publicly available that explains what information Defendant gathers from its SVA kiosks and how that information is handled and when it is destroyed. (Ex. 1, ¶ 72(a)). Defendant will also prevent any camera functionality on its SVA kiosks from operating until a customer affirmatively consents to interacting with it. (Ex. 1, ¶ 72(b)–(c)). This prospective relief benefits the Settlement Class Members, as well as the public at large.

D. Notice and Settlement Administration

The claims at issue in this litigation consist of Defendant's alleged violations of BIPA with respect to individuals who interacted with Defendant's SVA kiosks at any of its Illinois locations. To reach as many potential Class Members as possible the Settlement provided for an extensive direct notice campaign consisting of postcard mailings and email notice to every potential Settlement Class Member utilizing reverse lookup of associated telephone numbers and Defendant's loyalty account records. (Ex. 1, ¶¶ 83(a), 83(b)). In addition, the Settlement provided for an online publication notice campaign to reach all potential Settlement Class Members who might not be reached by direct notice. (Ex. 1, ¶¶ 84(f)). Following preliminary approval, Defendant provided the Settlement Administrator with the Class List consisting of 8,525 contact records including 1,897 email addresses for the potential Settlement Class Members. (Declaration of Susanna Webb ("Webb Decl."), attached hereto as Exhibit 2, ¶ 2). After conducting a reverse lookup on the records provided the Settlement Administrator thereafter sent the direct notice approved by the Court to the identified mail and email addresses by the April 9, 2021 notice date. (Webb Decl., ¶¶ 3, 5). In addition, pursuant to the Settlement Agreement, by April 9, 2021 the Settlement Administrator also launched an extensive publication notice campaign consisting of online banner ads targeted to consumers who were most likely to have visited Sephora's Illinois stores that resulted in over 5 million impressions. (*Id.*, ¶ 6). Finally, a Settlement Website was also

established, and Class Members have been able to visit the website to access and submit a Claim Form electronically, as well as view relevant case documents, including the Settlement Agreement, a detailed Long Form Notice, and Class Counsel's motion for attorneys' fees and incentive award. (Webb Decl., ¶ 7).

E. Exclusion and Objection Procedure

Settlement Class Members had an opportunity to exclude themselves from the Settlement or object to its approval. The procedures and deadlines for filing exclusion requests and objections (*see* Ex. 1, ¶¶ 87–90) were identified in the notices directly sent to Settlement Class Members, as well as in the Long Form Notice available on the Settlement Website. The notices informed Settlement Class Members that the Final Approval Hearing would be their opportunity to appear and have their objections heard. The notices also informed Settlement Class Members that they would be bound by the Release contained in the Settlement Agreement unless they exercise their right to exclusion in a timely manner. The deadline for Class Members to file objections or to exclude themselves was May 21, 2021. No objections or opt outs were filed or otherwise made known to Class Counsel. (Declaration of Eugene Y. Turin ("Turin Decl.") attached as Exhibit 3, ¶ 10); Webb Decl., ¶ 10).

F. Release

In exchange for the relief described above, the Settlement Class Members who did not exclude themselves will provide Defendant and its affiliated entities and other Released Parties a full release of all claims arising under BIPA or any similar laws related to Defendant's use of its SVA kiosks. (Ex. 1, ¶¶ 37–43, 53–54).

IV. THE SETTLEMENT WARRANTS FINAL APPROVAL

Upon final approval, the Settlement reached in this matter will provide Settlement Class

Members who submitted a timely, valid claim with likely at least $1,600.00 in benefits that they otherwise likely would not, or could not, have pursued. In addition, thanks to the extremely robust Notice Plan implemented by the Parties, which included direct notice to all potential Settlement Class Members, as well as an extensive publication notice campaign, the Settlement Class Members were informed of their rights under the Settlement and were able to claim their cash awards. Because the Settlement reached by the Parties is fair, reasonable, and provides adequate compensation to the Settlement Class Members, and because the Notice Plan effectively notified Class Members of their rights under the Settlement Agreement, this Settlement warrants final approval by the Court.

A. The Notice Plan Successfully Informed Settlement Class Members About Their Rights Under the Settlement Agreement

Because class actions by their nature involve a class representative acting on behalf of a larger class of consumers, critical to any class action settlement is that class members are effectively informed of the settlement and their rights and options thereunder. Accordingly, "[a]fter determining that a lawsuit may proceed on a class-wide basis, through settlement or otherwise, a court may order such notice as it deems necessary to protect the interests of the class." 735 ILCS 5/2-803.

Here, in preliminarily approving the Settlement, the Court approved the robust Notice Plan outlined in the Settlement Agreement, which provided for direct notice via U.S. Mail and email to all potential Settlement Class Members, as well as an extensive publication notice campaign. (Webb Decl. ¶¶ 2–6; Turin Decl., ¶ 9). Additionally, the Settlement Website, which was identified in the direct notice mailed, contains all of the information related to the Settlement, including key dates and deadlines (*e.g.*, claims deadline, objection deadline, final approval hearing date and time, etc.), all relevant court documents (*e.g.*, the Settlement Agreement, and the Motion for Attorneys'

Fees), contact information for Class Counsel, and most importantly, an easily accessible online Claim Form that Settlement Class Members were able to use to submit their claims by U.S. mail, email, and also directly through the Settlement Website. In addition, the Settlement Website includes the detailed Long Form Notice and specific instructions for opting out or filing objections.

As directed by the Court in its Preliminary Approval Order, the Notice Plan was implemented on April 9, 2021. (Webb Decl., ¶¶ 3–6). The Notice Plan was comprehensive, effectively implemented, and more than sufficient to notify the Settlement Class Members of the Settlement and their rights and options thereunder, and satisfied Due Process considerations.

B. All Factors Favor Final Approval

Final approval of the Settlement is warranted here, not only because the Settlement Class Members were sufficiently notified of their rights and options under the Settlement, but also because the Settlement itself meets all of the applicable criteria for final approval. There is a strong judicial and public policy favoring the settlement of class action litigation, and a settlement should be approved by the Court after determining that the settlement is "fair, reasonable, and adequate." *Quick v. Shell Oil Co.*, 404 Ill. App. 3d 277, 282 (3d Dist. 2010); *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996).

In determining whether a settlement is fair, reasonable, and adequate, Illinois courts consistently apply an eight-factor evaluation, also known as the "*Korshak* factors." *City of Chicago* v. *Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990). The factors ultimately to be considered by a court are: "(1) the strength of the case for the plaintiffs on the merits, balanced against the money or other relief offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7)

the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed." *Korshak*, 206 Ill. App. 3d at 972; *See also Armstrong v. Board of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980). Of these considerations, the first is most important. *Steinberg* v. *Sys. Software Assocs., Inc.*, 306 Ill. App. 3d 157, 170 (1st Dist. 1999); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). Because each of these factors supports a finding that the Settlement here is "fair, reasonable, and adequate," the Court should grant final approval of the Settlement.

1. *The Settlement provides significant benefits to the Settlement Class, particularly given the uncertain outcome of litigation.*

The first factor, the strength of the Class Representative's case on the merits, balanced against the relief obtained under the Settlement, "is the most important factor in determining whether a settlement should be approved." *Steinberg*, 306 Ill. App. 3d at 170. The Settlement in this case provides outstanding benefits to the Settlement Class. Based on the current claims rate and Plaintiff's pending requests for attorneys' fees and incentive award, it is estimated that claiming Class Members are going to get at least $1,600.00 in cash compensation if this Settlement is approved. Many finally-approved BIPA settlements have offered far less monetary relief to the class than that provided here. *See, e.g., Marshall v. Lifetime Fitness, Inc.*, 2017-CH-14262 (Cir. Ct. Cook Cty.) (in BIPA case paying claimants $270 in addition to credit monitoring); *Sekura v. LA Tan*, 2015-CH-16694 (Cir. Ct. Cook Cty.) (in BIPA case claimants split $1.5 million fund for a total of approximately $150 per claimant); *Rafidia v. KeyMe, Inc.*, 2018-CH-11240 (Cir. Ct. Cook Cty.) (providing $515 to claimants in consumer BIPA class settlement). As such, a recovery for claiming Class Members of approximately $1,600.00 is outstanding.

This is especially true given the significant legal obstacles that Plaintiff and the Class would undoubtedly have encountered in attempting to achieve a similar result through litigation,

and the significant likelihood of no recovery whatsoever. The amount of the Settlement Fund and the payments to Settlement Class Members are particularly outstanding in light of the risks of ongoing litigation and unique legal arguments raised by Plaintiff's claims. As Defendant has made clear, had this case not settled it would have challenged Plaintiff's allegations that Defendant's SVA kiosks were collecting any biometric identifiers or information. At the time this Settlement was reached Defendant had already contacted a biometric data expert who was prepared to testify that Defendant's SVA kiosks do not collect any information unique to an individual's face and only obtain limited data that allowed the kiosks to orient where the digital makeup products would go in relation to basic features such as the location of the user's eyes and the mouth. If this case had proceeded to summary judgment or trial, there could have been a real possibility that Sephora's defense prevailed and Plaintiff and the other Settlement Class Members would not have received anything. This is especially the case given that this case would be a case of first impression on this issue.

Further still, in addition to any defenses on the merits Defendant would raise, Plaintiff would also otherwise be required to prevail on a class certification motion, which would be highly contested and for which success would certainly not be guaranteed. *See Schulte v. Fifth Third Bank,* 805 F. Supp. 2d 560, 582 (N.D. Ill. 2011). "Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation." *Schulte,* 805 F. Supp. 2d at 586 (internal citations omitted); "If the Court approves the [Settlement], the present lawsuit will come to an end and [Settlement Class Members] will realize both immediate and future benefits as a result." *Id*. And given the complexity of the issues and the amount in controversy, the defeated party would likely appeal both any decision on the merits (at summary judgment and/or trial), as well as any decision on class certification, especially given the novel arguments Defendant is able

to present here regarding the technology utilized by its SVA kiosks. As such, the immediate and considerable relief provided to the Class under the Settlement Agreement weighs heavily in favor of its approval compared to the inherent risk and delay of a long and drawn-out litigation, trial, and appellate process. This entire process, with uncertain results and high risk to all involved, would likely take years to complete.

Weighing the strength of Plaintiff's claims and the potential risks inherent in continued litigation against the significant immediate benefit provided to the Settlement Class Members if this Settlement is finally approved, the first *Korshak* factor strongly supports granting final approval of the Settlement. The substantial and meaningful benefits made available to the Settlement Class Members, coupled with Defendant's business practice changes and obligation to maintain compliance with BIPA going forward, exceed the applicable standards of fairness. Therefore, given the amount of monetary and prospective relief provided by the Settlement, and the significant risk of not obtaining any recovery whatsoever if litigation were to proceed, the Court should find that this first factor is satisfied here.

2. *Defendant is able to satisfy its obligations under the Settlement Agreement.*

Absent settlement, Defendant would likely incur significant litigation expenses if this matter continued through trial. Although Defendant operates a successful nationwide business, any judgment finally entered against it in this case would likely be much larger than its exposure from the Settlement and could constitute a significant loss to Defendant, as BIPA provides for statutory damages of $1,000 per negligent violation, with the appropriate application of such damages in the BIPA context not having yet been addressed by a court. Resolving this matter now preserved these financial resources for notice and distribution to the Class Members, while also providing a very substantial and meaningful recovery for Class Members. Under the terms of the Settlement,

Defendant has made available $1,250,0000 that will be used to pay out all valid claims submitted, along with all other fees and expenses, including the Settlement Administrator's fees and expenses in implementing the Notice Plan and reviewing submitted claims. Accordingly, this factor also supports granting final approval.

3. *Continued litigation would necessitate the resolution of complex and novel legal issues, as well as extensive and lengthy discovery.*

The third factor, the "complexity, length and expense of further litigation," *Korshak*, 206 Ill. App. 3d at 972, also weighs heavily in favor of final approval of the Settlement. As the *Korshak* court observed, a "fair and reasonable settlement" is preferred over continued litigation which would leave any potential recovery "in limbo." 206 Ill. App. 3d at 973; *see also Isby*, 75 F.3d at 1199–1200 (affirming the final approval of a settlement where continued litigation "would require the resolution of many . . . complex issues" and "entail considerable additional expense"). Indeed, when comparing the "significance of immediate recovery" versus the "mere possibility of relief in the future, after protracted and expensive litigation . . . [i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush." *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1323 (S.D. Fla. 2005).

As explained above, litigating this matter would involve significant expense and prolonged discovery. Any decision on the merits favorable to Defendant would be appealed by Plaintiff, and vice versa, further delaying any final resolution of the matter and significantly increasing expenses for the Parties. Even if Plaintiff were to ultimately succeed in defeating any dispositive motions brought by Defendant, she would still have to prevail on her motion for class certification. And any such motion for class certification would not only be heavily contested, but would also require additional, extensive discovery efforts by the Parties, including the gathering of consumers' personal records in addition to other data concerning individuals whose contact information may

have changed multiple times since their last contact with Defendant.

Given the complexity of the claims at issue and the scope of the class, and the significant expenses that would result from having this case proceed with class discovery, dispositive motion briefing, adverse class certification, trial, and any potential appeals, this factor heavily favors granting final approval. In contrast to how long litigation would take, final approval will permit the Settlement Class Members to promptly receive their significant cash benefits and allow the Parties to avoid any further expenses and reach a final resolution of their dispute.

4. *The Settlement Class Members have overwhelmingly supported the Settlement: there are no objections to the Settlement and no exclusions.*

Looking at the fourth and sixth *Korshak* factors – as they are "closely related," *Korshak*, 206 Ill.App.3d at 973 – it is clear that final approval of the Settlement is not only in the best interest of the Parties, but is also overwhelmingly supported by the Settlement Class Members. No Settlement Class Members have filed an objection to the Settlement or have even chosen to opt out of it, and no Settlement Class Members have voiced even so much as an informal complaint to Class Counsel about the relief provided by the Settlement or Class Counsel's Motion for award of attorneys' fees and incentive award. (Turin Decl., ¶ 12). The comprehensive scope of the notice provided to the Class, the hundreds of claims submitted, and the fact that there is not a single objection to the Settlement, demonstrate that the Settlement Class Members overwhelmingly support this Settlement.

The lack of objectors challenging the Settlement is particularly noteworthy and strongly supports a finding that the Settlement is "fair and reasonable." *Am. Civil Liberties Union v. United States Gen. Servs. Admin*., 235 F. Supp. 2d 816, 819 (N.D. Ill. 2002); *see also In re Mexico Money Transfer Litig.*, 164 F.Supp.2d 1002, 1021 (N.D. Ill. 2000) (granting final approval of settlements and finding the fact that "99.9% of class members have neither opted out nor filed objections to

the proposed settlements . . . is strong circumstantial evidence in favor of the settlements"). This is especially the case given the frequency with which "professional objectors" seek out such settlements and file generic objections even where there is no legitimate basis. *See In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 n.37 (S.D.N.Y. 2010) (collecting authorities and noting that "[r]epeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements" and that "courts are increasingly weary of professional objectors: some of [which are] obviously canned objections filed by professional objectors") (internal citations omitted).

5. *The Settlement was a result of formal, arm's-length negotiations involving counsel for all Parties.*

With respect to the fifth factor, this Settlement was not reached as a result of any "collusion" between the Parties. There is an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's-length negotiations. A. Conte & H. Newberg, *Newberg on Class Actions*, § 11.42 (4th ed. 2002); *see also Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 21 (finding no collusion where there was "no evidence that the proposed settlement was not the product of 'good faith, arm's-length negotiations'").

Here, the Parties agreed to engage in a formal mediation in December 2020 with the Hon. Morton Denlow (Ret.), a respected mediator and former Magistrate Judge of the U.S. District Court for the Northern District of Illinois. The Settlement was only reached after a contentious, day-long mediation involving counsel for all Parties, which failed to produce a settlement until weeks later.

Further evidencing the non-collusive nature of the proposed Settlement is the significant confirmatory discovery that took place as part of the settlement process and the numerous weeks of negotiations regarding the final form of the Settlement Agreement and attendant documents,

even after an agreement in principle had been reached. Moreover, the significant monetary relief to be provided to Settlement Class Members following final approval also demonstrates the absence of collusion. It cannot be said that the Parties colluded in reaching this Settlement when each Class Member who submitted a valid claim will likely receive at least $1,600.00 dollars in cash. This Settlement was in no way the product of collusion and, as such, this factor weighs in favor of granting final approval.

6. *Class Counsel have significant experience in prosecuting similar class actions and believe that the Settlement is fair, reasonable, and adequate.*

Class Counsel have regularly engaged in complex litigation on behalf of consumers and have regularly been appointed as class counsel in numerous complex consumer class actions, including similar class actions involving violations of BIPA and other data privacy-related statutes, in state and federal courts across the country, including many cases in the Circuit Court of Cook County. (Turin Decl., ¶¶ 5–6). Accordingly, given their extensive experience litigating and settling similar class actions across the country, Class Counsel are competent and qualified to provide their opinion as to the strength of the Settlement achieved.

In light of their experience in having settled numerous similar cases, Class Counsel strongly believe that final approval of the Settlement is in the best interests of Settlement Class Members. (Turin Decl., ¶ 11). Final approval of the Settlement will avoid any risks and delays associated with allowing the litigation to move forward and will provide the Settlement Class Members with immediate relief. Moreover, the benefits provided under the Settlement are significant among consumer-based BIPA settlements like this one, providing an outstanding recovery in cash benefits for each valid claim. Equally important, the Settlement also provides for meaningful prospective relief that will help ensure there is no unlawful capture, collection or use of biometrics of the Settlement Class Members and other similarly situated individuals going

forward.

Given the defenses that Defendant would raise, and the resources that Defendant has committed to defending and litigating this matter through appeal, Class Counsel are confident that the Settlement is fair, reasonable, adequate, and in the best interests of the Settlement Class Members. (Turin Decl., ¶ 11). This factor also strongly favors granting final approval of the Settlement.

7. *The stage of litigation and amount of discovery completed has ensured that the Settlement is fair, reasonable, and adequate.*

Finally, the last factor also supports final approval because this Settlement was reached after two years of litigation and discovery regarding the underlying facts and contentious negotiations between the Parties. Only after these significant pre-trial efforts did the Parties agree to exchange information and participate in a full-day mediation with Judge Denlow. Both before and after the Parties entered into the Settlement Agreement, the Parties exchanged copious information regarding Defendant's SVA kiosks and their allegedly biometric technologies, continuing through the mediation and in the weeks thereafter while the Settlement was being negotiated and finalized. Class Counsel became well informed as to the data, equipment, policies, procedures and other critical information necessary to "evaluate the merits of the case and assess the reasonableness of the settlement." *Korshak*, 206 Ill.App.3d at 974. In short, the final executed Settlement was only reached after sufficient discovery and negotiations involving the nature and scope of Defendant's subject kiosks, further favoring final approval.

V. THE ATTORNEYS' FEE AWARD AND INCENTIVE AWARD SHOULD BE APPROVED

Because no objections were filed in opposition to Class Counsel's Motion for Approval of Attorneys' Fees, Expenses & Incentive Award, and because all factors favor granting final approval of the Settlement, the Court should also approve an award of attorneys' fees and expenses to Class Counsel in the requested amount and the incentive award requested by Plaintiff.

The direct notice sent to the Settlement Class Members as well as the detailed Long Form Notice posted to the Settlement Website informed the Settlement Class Members of the amount of attorneys' fees and the incentive award that Class Counsel and the Class Representative would seek. (*See generally* Exs. C, D to the Settlement Agreement). Further, the Motion for Attorneys' Fees was filed on April 30, 2021, a full twenty-one (21) days before the May 21, 2021 deadline for objections and exclusion requests. Accordingly, the Settlement Class Members had ample opportunity to consider the merits of the Motion for Attorneys' Fees. However, no objections to the Motion for Attorneys' Fees were brought, and no Settlement Class Members have even informally expressed any dissatisfaction with the fees, expenses or incentive award sought by Class Counsel and the Class Representative. (Turin Decl., ¶ 12). The lack of any opposition is unsurprising, since, as discussed above, Class Counsel's fees are reasonable in light of the substantial relief to the Settlement Class Members, and are in line with fees sought in similar BIPA actions. In fact, and as set forth in the Motion for Attorneys' Fees, at least eight different judges in the Circuit Court of Cook County have recently approved an attorneys' fee award amounting to 35% percent or more of a common fund, including in BIPA class settlements. S*ee Zepeda v. Intercontinental Hotels Group, Inc.*, No. 18-CH-02140, (Cir. Ct. Cook County, Ill. 2018) (Atkins, J.) (awarding 40% of the common fund in BIPA class settlement); *Svagdis v. Alro Steel Corp.*, No. 17-CH-12566 (Cir. Ct. Cook County, Ill. 2018) (Larsen, J.) (same); *Zhirovetskiy v. Zayo Group,*

LLC., No-17-CH-14262 (Cir. Ct. Cook County, Ill. 2019) (Flynn, J.) (same); *Prelipceanu v. Jumio Corp.*, No. 18-CH-15883 (Cir. Ct. Cook County, Ill. 2020) (Mullen, J.) (same); *Smith v. Pineapple Hospitality Co. et al*, No. 18-CH-06589 (Cir. Ct. Cook County, Ill. 2020) (Moreland, J.) (same); *Rogers v. CSX Intermodal Terminals, Inc.*, No. 2019-CH-04168 (Cir. Ct. Cook County, Ill. 2021) (Walker, J.) (awarding 38% of the common fund in BIPA class settlement); *Farag v. Kiip, Inc.*, 19-CH-01695 (Cir. Ct. Cook County, Ill. 2019) (Gamrath, J.) (awarding 38% of the fund in consumer privacy class settlement); *Draland v. Timeclock Plus, LLC*, No. 19-CH-12769 (Cir. Ct. Cook County, Ill. 2021) (awarding 35% of the common fund in BIPA class settlement). Here, Plaintiff's counsel is requesting only 35% of the common fund, plus reasonable costs and expenses.

For the reasons stated in the Motion for Attorneys' Fees, and because no Settlement Class Member has voiced any opposition or objection to the attorneys' fees and incentive award sought, and because Defendant does not oppose the attorneys' fees being sought, Plaintiff and Class Counsel respectfully request that in finally approving this Settlement, the Court also approve the requested and agreed-upon incentive award and attorneys' fees and expenses sought in Plaintiff's Motion for Attorneys' Fees.

VI. CONCLUSION

For the reasons stated above and in Plaintiff's Motion for Approval of Attorneys' Fees, Expenses & Incentive Award, Plaintiff respectfully requests that this Court enter an Order granting final approval of this Settlement and approving Plaintiff's request for attorneys' fees, expenses, and an incentive award. A proposed Final Approval Order is attached hereto as Exhibit 4.

Dated: June 11, 2021

Respectfully submitted,

AUSTE SALKAUSKAITE, individually
and on behalf of all others similarly situated

By: /s/ Eugene Y. Turin
One of Plaintiff's Attorneys

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on June 11, 2021, a copy of *Plaintiff's Unopposed Motion and Memorandum in Support of Final Approval of Class Action Settlement* was filed electronically with the Clerk of Court, with a copy sent by electronic mail to all counsel of record.

/s/ Eugene Y. Turin