

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

AUSTE SALKAUSKAITTE, individually and  
on behalf of similarly situated individuals,

Plaintiff,

v.

SEPHORA USA, INC., a Delaware  
corporation, and MODIFACE, INC., a  
Toronto corporation,

Defendants.

Case No.: 1:18-cv-08507

Judge Andrea R. Wood  
Magistrate Judge Michael T. Mason

**DEFENDANT SEPHORA USA, INC.’S ANSWER AND AFFIRMATIVE  
DEFENSES TO PLAINTIFF’S CLASS ACTION COMPLAINT**

Defendant, Sephora USA, Inc. (“**Sephora**”), by and through its undersigned attorneys, hereby answers and asserts affirmative defenses to the Complaint of Plaintiff, Auste Salkauskaite (“**Plaintiff**”) (ECF No. 1), filed on behalf of herself and her purported class. For ease of reference in this Answer, Sephora uses the section headings included in the Complaint, but specifically denies any allegations or inferences of wrongdoing that may be contained in those headings. Sephora states as follows:

**INTRODUCTION**

1. BIPA defines a “biometric identifier” as any personal feature that is unique to an individual, including fingerprints, palm scans and facial 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.”

**ANSWER:** Sephora denies all allegations in this paragraph, except that Sephora admits that the terms “biometric identifier” and “biometric information” are defined by BIPA at 740 ILCS 14/10, and the statute speaks for itself.

2. This case is about one of the nation's largest cosmetics retailers capturing, collecting, storing, and using Plaintiff's and other users' biometric identifiers and/or biometric information without regard to BIPA and the concrete privacy rights and pecuniary interests that BIPA protects. Defendants' collect their customers' biometric information in the form of their facial geometry through their Virtual Artist Kiosk. The Virtual Artist Kiosk works by extracting the biometric facial geometry of customers. Defendants then use this facial geometry data and proprietary software to digitally apply cosmetic products to images of the customers face. This allows customers to digitally see what various cosmetic products and colors would look like on their face (sic) without actually needing to apply such cosmetics to their faces.

**ANSWER:** Denied.

3. Using their Virtual Artist Kiosks, Defendants capture, upload, store, and disseminate customers' facial geometry and related biometric information without complying with BIPA's requirements.

**ANSWER:** Denied.

4. Defendant Sephora uses Defendant Modiface's biometric technology to capture, collect, and otherwise use biometrics, including face scans and facial geometry. Defendant Modiface offers such technology to its various corporate and business clients, which such clients in turn use the technology on customers and/or employees, such as Plaintiff – often without their consent and in violation of the BIPA.

**ANSWER:** Sephora denies the allegations of this paragraph except that it lacks information sufficient to affirm or deny what Modiface offers to its other clients, and therefore denies these allegations.

5. In recognition of the concern over the security of individuals' biometrics, the Illinois Legislature enacted BIPA, which provides, *inter alia*, that private entities, such as Defendants, may not obtain and/or possess an individual's biometrics unless they first:

(1) Inform that person in writing that biometric identifiers or biometric information will be collected or stored;

(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 collected, stored and used;

(3) Receive a written release from the person for the collection of their biometric identifiers or biometric information; and

(4) Publish a publicly available retention schedule and guidelines for permanently destroying biometric identifiers and biometric information.

740 ILCS 14/5.

**ANSWER:** Sephora denies the allegations of this paragraph except that it admits that the statutory requirements of BIPA are listed, *inter alia*, at 740 ILCS 14/5, and speak for themselves.

6. For companies wishing to comply with BIPA, such compliance is straightforward, and the necessary disclosures and a written release can be easily achieved through a single, signed sheet of paper. BIPA's requirements bestow upon consumers a right to privacy in their biometrics and a right to make an informed decision when electing to provide or withhold their most sensitive information and on what terms.

**ANSWER:** Sephora is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph and therefore denies them, except that Sephora admits that BIPA is concerned with the privacy of individuals' biometric information and that BIPA requires that a "private entity in possession of biometric identifiers or biometric information" comply with certain disclosure and written policy requirements, the details of which are listed in the statute, which speaks for itself.

7. BIPA's statutory scheme requires such specific disclosures prior to collecting biometrics, which in turn allows individuals the opportunity to make a truly informed choice when private entities request their biometrics. So, unlike other statutes that only create a right of action if there is a qualifying data breach, BIPA strictly regulates the manner in which entities may collect, store, and use biometrics and creates a private right of action for lack of statutory compliance.

**ANSWER:** Sephora objects to this allegation to the extent that it calls for a legal conclusion. To the extent a response is required, Sephora denies the allegations of this paragraph except that it admits that the rights and remedies in BIPA are listed in the statute, which speaks for itself.

8. In this case, Defendants elected to implement an invasive biometric face scanning program that relied on the illegal collection of consumers' biometrics, thereby invading their substantive privacy rights under BIPA.

**ANSWER:** Denied.

9. Defendants' system works by extracting biometric information from their customers facial geometry and subsequently transferring such information to third parties, where

such information is then stored and then transmitted to personally identifiable cell phone numbers of their customers.

**ANSWER:** Denied.

10. Defendants implemented this biometric face scanning regime collecting facial geometry of their customers without first obtaining the individuals' informed written consent, as required by law, and all while disregarding the relevant Illinois regulations and the privacy interests they seek to protect.

**ANSWER:** Denied.

11. Defendants' conduct is particularly unsettling considering the economic benefit and marketing advantages they obtain from the biometric face scanning system while wholly avoiding any costs associated with implementing such systems in compliance with the law. This cognizable benefit is not only to the detriment of consumers, but to the public and Defendants' competitors.

**ANSWER:** Denied.

12. The Illinois Legislature has found that "biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, even sensitive information like Social Security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to each individual and therefore, once compromised, such individual has no recourse, is at a heightened risk for identity theft in, and is likely to withdraw from biometric facilitated transactions." 740 ILCS 14/5. The risk is compounded when, like in the consumer context, a person's biometric information is also associated with their personally identifiable information, such as cell phone numbers and addresses. Here, Defendants' system even captures the biometrics of unintended bystanders not actively seeking Defendant Sephora's products.

**ANSWER:** Sephora denies all allegations in this paragraph, except that Sephora admits that the Illinois General Assembly included a Legislative Findings section in BIPA, 740 ILCS 14/5(c), which speaks for itself.

13. Plaintiff brings this action for damages and other legal and equitable remedies resulting from the illegal actions of Defendants in capturing, collecting, storing, using, and transmitting her biometrics, and those of thousands of consumers throughout the state of Illinois, without informed written consent, and without informing them through a publicly available written policy of how it was going to store and dispose of this irreplaceable information, in direct violation of the Illinois BIPA.

**ANSWER:** Sephora denies all allegations in this paragraph, except that Sephora admits that Plaintiff filed a complaint against Defendants, which speaks for itself.

14. Defendants failed to honestly inform their customers, including Plaintiff, the unlawful nature of the face scanning system in which they would be required to participate in or knowingly be subjected to, thus failing to obtain the necessary consent to disseminate their biometrics to third parties; failing to maintain a lawful biometric storage program which deletes biometric information in the proscribed period; failing to provide the required disclosures at the time of collection; and failing to provide a retention and destruction schedule.

**ANSWER:** Denied.

15. To the extent Defendants are still retaining Plaintiff's biometrics, such retention is unlawful and an ongoing infringement of her right to privacy regarding her biometrics as afforded by the BIPA. Plaintiff would not have provided her biometrics to Defendants had she known that Defendants would retain such information for an indefinite period without her consent or subject such information to unauthorized disclosure to unknown third parties.

**ANSWER:** Sephora denies the allegations of this paragraph except that Sephora is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's allegation about her decision-making and therefore denies the allegation.

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

**ANSWER:** Sephora denies all allegations in this paragraph, except that Sephora admits that Plaintiff filed a complaint against Defendants, which speaks for itself.

### **PARTIES**

17. Defendant Modiface, Inc. is a Toronto company that conducts business throughout the State of Illinois and in Cook County. Modiface's biometric technology captures the biometrics of Illinois residents while in Illinois.

**ANSWER:** Sephora is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph and therefore denies them, except that Sephora admits that Defendant Modiface is a Toronto-based company.

18. Defendant Sephora USA, Inc., is a Delaware corporation that conducts, and is licensed by the Illinois Secretary of State to conduct, business throughout Illinois and in Cook County. Sephora transacts business throughout the State and intentionally seeks to transact with Illinois residents.

**ANSWER:** Sephora denies all allegations in this paragraph, except that Sephora admits that it is a Delaware corporation and is licensed by the Illinois Secretary of State to conduct business in Illinois.

19. At all relevant times, Plaintiff has been a resident and citizen of the state of Illinois.

**ANSWER:** Sephora is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph and therefore denies them.

### **JURISDICTION AND VENUE**

20. This Court may assert personal jurisdiction over Defendants pursuant to 735 ILCS 5/2-209 in accordance with the Illinois Constitution and the Constitution of the United States, because Defendants are doing business within this state and because Plaintiff's claims arise out of Defendants' unlawful in-state actions.

**ANSWER:** Sephora asserts that the allegation of proper jurisdiction states a legal conclusion to which no response is required. To the extent that an answer is required, Sephora denies all allegations in this paragraph, except that it admits that Sephora does business in Illinois and that Sephora has not contested personal jurisdiction of the District Court of the Northern District of Illinois for purposes of this action.

21. Venue is proper in Cook County pursuant to 735 ILCS 5/2-101, because Defendants are doing business in Cook County and thus reside there under § 2-102, and because the transaction out of which this cause of action arises occurred in Cook County.

**ANSWER:** Sephora asserts that the allegation of proper venue states a legal conclusion to which no response is required. To the extent that an answer is required, Sephora denies all allegations in this paragraph, except that it admits that Sephora does business in Illinois and that Sephora has not contested venue in the Northern District of Illinois for purposes of this action.

**FACTS SPECIFIC TO PLAINTIFF**

22. Defendants, using their Virtual Artist Kiosks, captured, collected, stored, and transferred the biometric facial geometry of Plaintiff and other Illinois residents and consumers. The Virtual Artist Kiosks provides customers with the ability to superimpose Defendant Sephora's products on a biometric recreation of their own face.

**ANSWER:** Denied.

23. Plaintiff visited one of Defendant Sephora's locations in Chicago, Illinois during the relevant period and was subjected to Defendants' Virtual Artist Kiosks. Defendants, using the Modiface biometric technology, captured, collected, stored, and transferred biometric scans of Plaintiff's face and facial geometry.

**ANSWER:** Sephora denies all allegations in this paragraph except that Sephora is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's allegation that she visited a Sephora store in Chicago, Illinois and therefore denies it.

24. After Plaintiff's biometrics were initially captured and collected, Plaintiff was required to give her cell phone number and other personal information. Plaintiff then received a text message with a biometric scan of her face depicting various Sephora products.

**ANSWER:** Denied.

25. Defendants then disseminated Plaintiff's biometrics in an attempt to sell her Sephora products.

**ANSWER:** Denied.

26. Prior to taking Plaintiff's biometrics, Defendants did not inform Plaintiff in writing that her biometrics were being collected, stored, used, or disseminated, or publish any policy specifically about the collection, retention, use, deletion, or dissemination of biometrics. Defendants did not seek, and Plaintiff was never provided, any written consent relating to the collection, use, storage, or dissemination of her biometrics.

**ANSWER:** Sephora denies that it took, collected, stored, used, or disseminated Plaintiff's biometrics, and on that basis denies all allegations in this paragraph.

27. Prior to taking Plaintiff's biometrics, Defendants did not make publicly available any written policy as to a biometric retention schedule and guidelines for permanently destroying the collected biometrics.

**ANSWER:** Sephora denies that it took, collected, stored, used, or disseminated Plaintiff's biometrics, and on that basis denies all allegations in this paragraph.

28. Additionally, Defendants did not obtain consent from Plaintiff for any dissemination and disclosure of her biometrics to third parties. Thus, Defendants have violated the BIPA on each occasion they disseminate such biometrics to third parties.

**ANSWER:** Denied.

29. To this day, Plaintiff is unaware of the status of her biometrics obtained by Defendants. Defendants have not informed Plaintiff whether they still retain her biometrics, and if they do, for how long they intend to retain such information without her consent.

**ANSWER:** Sephora denies that it obtained or retained Plaintiff's biometrics, and on that basis denies all allegations in this paragraph.

30. Plaintiff has suffered pecuniary damages in the form of diminution in the unique identifying value of her biometrics, and other costs associated with identity protection and account monitoring.

**ANSWER:** Denied.

31. Furthermore, Plaintiff's biometrics are economically valuable and such value will increase as the commercialization of biometrics continues to grow. Defendants' repeated use of Plaintiff's biometrics does and will continue to confer a benefit on Defendants for which Plaintiff was not sufficiently compensated.

**ANSWER:** Sephora denies that it used or benefitted from Plaintiff's biometrics, and on that basis, denies all allegations in this paragraph.

32. At the time Plaintiff's biometrics were captured, Defendants did not have a publicly available policy of informing their customers, including Plaintiff, of what happens to their biometrics after they are captured, whether the information is disseminated to a third party and, if so, which third party, and what would happen to the information if the Sephora or Modiface were to close, or if Defendants were to be acquired, sold, or file for bankruptcy.

**ANSWER:** Sephora denies that it captured Plaintiff's biometrics, and on that basis denies all allegations in this paragraph.

33. As a result of Defendants' conduct, Plaintiff experiences severe mental anguish, anxiety, and other physical and mental injury when she thinks about the status of her biometrics and who has, or could have, access to such private information; what would happen to her biometrics if Defendants or their vendors went bankrupt or otherwise sold their assets; whether



Defendants will ever delete her biometric information; what would happen if Defendants or their vendors were to experience a data breach; and how any such breach would result in irreparable harm to her identity. This harm is even more acute because an individual or entity with access to Plaintiff's biometrics could potentially access other financial accounts or health records which may currently, or at some time in the future, be secured through her biometrics.

**ANSWER:** Sephora denies the allegations in this paragraph except that Sephora lacks information sufficient to affirm or deny the allegations concerning Plaintiff's state of mind and therefore denies this.

34. By failing to comply with BIPA, Defendants have violated Plaintiff's substantive state rights to biometric information privacy.

**ANSWER:** Denied.

### **CLASS ALLEGATIONS**

35. Plaintiff brings this action on behalf of herself and a class of similarly situated individuals pursuant to 735 ILCS § 5/2-801. Plaintiff seeks to represent a Class and Subclass ("Class" unless otherwise noted) as defined as follows:

**Class:** All individuals whose biometrics were captured, collected, stored, used, transmitted, or disseminated through the use of Defendant Modiface Inc.'s technology within the state of Illinois any time within the applicable limitations period.

**Subclass:** All individuals whose biometrics were captured, collected, stored, used, transmitted, or disseminated on or behalf of Defendant Sephora within the state of Illinois any time within the applicable limitations period.

**ANSWER:** Sephora denies all allegations in this paragraph, except that Sephora admits that Plaintiff filed a complaint against Defendants on behalf of herself and a purported class and subclass, which speaks for itself.

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

**ANSWER:** Sephora denies all allegations in this paragraph, except that Sephora admits that Plaintiff filed a complaint against Defendants on behalf of herself and a purported class and subclass, which speaks for itself.

37. Upon information and belief, there are 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 Defendants' records.

**ANSWER:** Sephora denies that this action may be properly maintained as a class action or that it otherwise meets the requirements of Federal Rule of Civil Procedure 23. Upon information and belief, Sephora denies that the identity and exact number of the members of the Class can be identified and denies all other allegations in this paragraph, except that Sephora admits that Plaintiff does not know the exact number of members of the Class, that Plaintiff alleges that there are "thousands of members of the Class" in her complaint, and that the persons identified in the complaint as purported class members exceed the number 1,000.

38. Plaintiff's claims are typical of the claims of the Class she seeks to represent, because the factual and legal bases of Defendants' liability to Plaintiff and the Class is the same, and because Defendants' 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 Defendants' BIPA violations and various common law transgressions.

**ANSWER:** Sephora denies that this action may be properly maintained as a class action or that it otherwise meets the requirements of Federal Rule of Civil Procedure 23. Sephora denies all allegations in this paragraph.

39. 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 of the Class. Common questions for the Class include, but are not limited to, the following:

a. Whether Defendants made available to the public a written policy that establishes a retention schedule and guidelines for destroying biometrics;

b. Whether Defendants obtained a written release from the Class before capturing, collecting, or otherwise obtaining their biometrics;

c. Whether Defendants provided a written disclosure that explains the specific purposes, and the length of time, for which their biometrics were being collected, stored and used before taking their biometrics;

d. Whether Defendants' conduct violates BIPA;

- e. Whether Defendants' conduct is fraudulent;
- f. Whether Defendants' conduct is negligent;
- g. Whether Defendants' conduct constitutes an invasion of privacy;
- h. Whether Defendants' violations of the BIPA are willful or reckless; and
- i. Whether Plaintiff and the Class are entitled to damages and injunctive relief.

**ANSWER:** Sephora denies that this action may be properly maintained as a class action or that it otherwise meets the requirements of Federal Rule of Civil Procedure 23. Sephora denies all allegations in this paragraph.

40. 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.

**ANSWER:** Sephora denies that Plaintiff's allegations meet the requirements of Federal Rule of Civil Procedure 23 and denies all remaining allegations in this paragraph. Sephora is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph regarding Plaintiff's purported class and subclass and therefore denies them.

41. Plaintiff will fairly and adequately represent and protect the interests of the other members of the Class she seeks to represent. Plaintiff has retained counsel with substantial experience in prosecuting complex litigation and class actions. Plaintiff and her 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 her counsel has any interest adverse to those of the other members of the Class.

**ANSWER:** Sephora denies that Plaintiff's allegations meet the requirements of Federal Rule of Civil Procedure 23 and denies all remaining allegations in this paragraph. Sephora is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph and therefore denies them.

42. Defendants have acted and failed to act on grounds generally applicable to the 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.

**ANSWER:** Sephora denies that this action may be properly maintained as a class action or that it otherwise meets the requirements of Federal Rule of Civil Procedure 23. Sephora denies all allegations in this paragraph.

### **COUNT I**

#### **Violations of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.*, (On behalf of Plaintiff and the Class)**

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

**ANSWER:** Sephora restates and incorporates its prior responses as if set forth herein.

44. Defendants are private entities under BIPA.

**ANSWER:** Admitted.

45. Plaintiff and the Class [sic] their biometric identifiers collected, captured, received or otherwise obtained and/or used by Defendants.

**ANSWER:** To the extent that Plaintiff is alleging that Plaintiff and the Class had their biometric identifiers collected, captured, received, or otherwise obtained and/or used by Defendants, Sephora denies that the Virtual Artist Kiosk collects, captures, receives, or otherwise obtains and/or uses customers' biometric identifiers under BIPA, and therefore denies the allegations in this paragraph.

46. Each instance when Plaintiff and the Class scanned their faces into Defendants' biometric technology devices, *i.e.* the Virtual Artist Kiosks, Defendants captured, collected, stored, and/or used Plaintiff's and the Class's biometrics without valid consent and without complying with BIPA.

**ANSWER:** Denied.

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

a. Defendants failed to inform Plaintiff and the members of the Class 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. Defendants failed to inform Plaintiff and Class 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. Defendants failed to inform Plaintiff and the Class in writing the specific length of term their biometrics were being captured, collected, stored, and used, as required by 740 ILCS 14/15(b)(2);

d. Defendants failed to obtain a written release, as required by 740 ILCS 14/15(b)(3);

e. Defendants failed to provide a publicly available retention schedule detailing the length of time the biometrics are stored and/or guidelines for permanently destroying the biometrics they store, as required by 740 ILCS 14/15(a); and

f. Defendants failed to obtain informed consent to disclose or disseminate the Class's biometrics, as required by 740 ILCS 14/15(d)(1).

**ANSWER:** Sephora denies all allegations in this paragraph, except that Sephora is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph with respect to Modiface and therefore denies them.

48. By capturing, collecting, storing, using, and disseminating Plaintiff's and the Class's biometrics as described herein, Defendants denied Plaintiff and the Class their right to statutorily-required information and violated their respective rights to biometric information privacy, as set forth in the BIPA.

**ANSWER:** Sephora denies that the Virtual Artist Kiosk captures, collects, stores, uses, or disseminates customers' "biometrics" under BIPA, and therefore denies the allegations in this paragraph.

49. Had Defendants informed Plaintiff that she was not being provided with the required information regarding her biometrics and the biometric face scanning program as required by law, she would not have provided her facial biometrics with Defendants or would have sampled products by actually physically applying sample products.

**ANSWER:** Sephora denies that the Virtual Artist Kiosk involves “biometrics” or a “biometric face scanning program” under BIPA, and therefore denies the allegations in this paragraph.

50. Had Defendants informed Plaintiff that she would be asked to participate in an illegal biometric face scanning program, Plaintiff would not have used Defendants’ biometric face scanning devices, or she at least would have been able to make an informed decision concerning material facts of her use of the Virtual Artist Kiosk, including whether the benefit justifies the increased risk in participating in Defendants’ unlawful biometric program.

**ANSWER:** Sephora denies that the Virtual Artist Kiosk involves “biometrics” or a “biometric face scanning program” under BIPA, and therefore denies the allegations in this paragraph.

51. 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 the BIPA.

**ANSWER:** Sephora denies all allegations in this paragraph, except that Sephora admits that BIPA provides for certain damages for certain violations of BIPA, 740 ILCS 14/20, and that the statute speaks for itself.

52. Defendants’ violations of BIPA, as set forth herein, were knowing and willful, or were at least in reckless disregard of the statutory requirements. Alternatively, Defendants negligently failed to comply with the BIPA disclosure, consent, and policy posting requirements.

**ANSWER:** Sephora denies all allegations in this paragraph except that Sephora lacks information sufficient to affirm or deny allegations regarding the actions of persons other than itself and therefore denies them.

53. Accordingly, with respect to Count I, Plaintiff, on behalf of herself and the proposed Class, prays for the relief set forth below.

**ANSWER:** Sephora denies all allegations in this paragraph, except that it admits that Plaintiff purports to seek certain relief in relation to Count I of its complaint, which speaks for itself.

**COUNT II**  
**Negligence**  
**(On behalf of Plaintiff and the Class)**

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

**ANSWER:** Sephora restates and incorporates its prior responses as if set forth herein.

55. To the extent that a finder of fact concludes that Defendants did not intentionally withhold information from Plaintiff and the Class relating to their biometric facial geometry scans program, Defendants were nonetheless careless and negligent in their failure to act reasonably with regards to their biometric program.

**ANSWER:** Sephora denies all allegations in this paragraph except that Sephora lacks information sufficient to affirm or deny allegations regarding the actions of persons other than itself and therefore denies them.

56. Special relationships existed between Plaintiff and the Class and Defendants which gave rise to various duties and obligations concerning the biometric face scans and biometric data at issue because Defendants had full control over such biometric program, policies, and procedures relative to Plaintiff's limited knowledge and power.

**ANSWER:** Sephora denies all allegations in this paragraph except that Sephora lacks information sufficient to affirm or deny allegations regarding the actions of persons other than itself and therefore denies them.

57. Indeed, Defendants' position relative to Plaintiff in terms of access to information regarding the technology at issue, and their conduct in handling Plaintiff's biometrics, gave rise to a duty for Defendants to act reasonably in the circumstances.

**ANSWER:** Sephora denies all allegations in this paragraph except that Sephora lacks information sufficient to affirm or deny allegations regarding the actions of persons other than itself and therefore denies them.

58. Defendants knew, or should have known, of the risks inherent in collecting, storing, using, and disseminating biometrics and owed duties of reasonable care to Plaintiff and the Class whose biometrics were obtained by Defendants.

**ANSWER:** Sephora denies all allegations in this paragraph except that Sephora lacks information sufficient to affirm or deny allegations regarding the actions of persons other than itself and therefore denies them.

59. Defendants breached their duties to Plaintiff and the Class with regards to biometric privacy by, among other things, failing to implement a BIPA-compliant biometric system with reasonable data security policies.

**ANSWER:** Sephora denies all allegations in this paragraph except that Sephora lacks information sufficient to affirm or deny allegations regarding the actions of persons other than itself and therefore denies them.

60. As a direct and proximate result of Defendants' conduct in failing to act reasonably with regards to their biometric program, Plaintiff and the Class have suffered a diminution in the value of their biometrics caused by Defendants' exposure of such information to third-parties.

**ANSWER:** Sephora denies all allegations in this paragraph except that Sephora lacks information sufficient to affirm or deny allegations regarding the actions of persons other than itself and therefore denies them.

61. Accordingly, with respect to Count II, Plaintiff, on behalf of herself and the proposed Class, prays for the relief set forth below.

**ANSWER:** Sephora denies all allegations in this paragraph except that Sephora lacks information sufficient to affirm or deny allegations regarding the actions of persons other than itself and therefore denies them.



**DEFENDANT SEPHORA'S AFFIRMATIVE DEFENSES**

Sephora hereby states the following affirmative and additional defenses to the Complaint, but it does not assume the burden of proof on any such defenses except as required by law with respect to the particular defense asserted. Sephora reserves the right to assert other affirmative or additional defenses, modify the defenses below, and/or otherwise supplement this Answer upon discovery of facts or evidence rendering such action appropriate.

**FIRST AFFIRMATIVE DEFENSE:  
CONSENT**

1. Upon information and belief, Plaintiff and the putative class, or individuals authorized to act on their behalf, were aware of and consented to Sephora Virtual Artist using technology to allow them to see what certain cosmetics might look like on their faces without their having to physically try on the cosmetics. To the extent that the Virtual Artist Kiosk took a photograph or “gif” (i.e. very short animation) of the Plaintiff or any of the putative class members, the Plaintiff and the putative class members (or individuals with authority to act on their behalf) consented to such photograph or gif by specifically requesting that or permitting the Virtual Artist Kiosk to take their photograph or record their image, by posing in front of the Virtual Artist Kiosk’s camera while the screen counted down before the photograph or gif was taken, and by then selecting an option for the photograph or gif to be sent to a phone number of their choice.

2. Sephora makes its privacy policy publicly available to all customers, including the Plaintiff and the putative class members. Plaintiff and the putative class members, or individuals with authority to act on their behalf, authorized Sephora to use an automatic telephone dialing system to send such photograph or gif via text message to the phone number of the Plaintiff’s and/or putative class member’s choosing.

3. The alleged claims are barred in whole or in part because Plaintiff and the putative class members, or individuals with authority to act on their behalf, consented to the conduct alleged to violate BIPA and/or alleged to have been negligent.

**SECOND AFFIRMATIVE DEFENSE:  
RELEASE**

4. Sephora makes its privacy policy publicly available to all customers, including the Plaintiff and the putative class members. Furthermore, Plaintiff and/or certain members of the putative class downloaded and used the Sephora mobile application or used the Sephora website. By using Sephora's mobile application and/or website, users agree to accept Sephora's terms of service. Therefore, such putative class members have accepted, and are bound by, provisions releasing Sephora from liability for the conduct alleged in the complaint.

**THIRD AFFIRMATIVE DEFENSE:  
ESTOPPEL, WAIVER, RATIFICATION, AND ACQUIESCENCE**

5. Upon information and belief, Plaintiff and members of the putative class knew of, consented to, and/or participated in the conduct alleged in the Complaint, including, but not limited to, consenting to or permitting the Virtual Artist Kiosk showing images of their faces with certain cosmetics applied virtually, requesting that the Virtual Artist Kiosk take photographs or gifs of themselves, and agreeing that Sephora could use an automated service to enable the Plaintiff and putative class members to send text messages of the photographs or gifs to a phone number of their choosing. The claims are therefore barred in whole or in part by the doctrine of waiver, estoppel, ratification, and/or acquiescence.

6. Sephora makes its privacy policy publicly available to all customers, including the Plaintiff and the putative class members. Additionally, certain members of Plaintiff's putative class have waived and are estopped from enforcing their rights to (1) bring claims as part of a

class action or consolidated arbitration, or (2) have a trial by jury. This waiver is provided for in Sephora's mobile application and/or online terms of service. By using Sephora's mobile application and/or website, users agree to accept Sephora's terms of service. Therefore, such putative class members are equitably estopped from and have waived their rights to bring a class action or have their claims heard by a jury. Currently, Sephora does not have sufficient knowledge or information to identify which, if any, putative class members are bound by these terms. Sephora reserves its right to seek individual arbitration where appropriate based on information and evidence obtained in discovery.

**FOURTH AFFIRMATIVE DEFENSE:  
FAILURE TO MITIGATE DAMAGES**

7. Upon information and belief, Plaintiff and/or members of the putative class failed to mitigate their alleged damages. Plaintiff and/or members of the putative class consented to Sephora's allegedly improper conduct and then failed to seek to learn from Sephora the status of their alleged biometrics (or indeed, whether biometrics were being collected in the first place), request that such alleged biometrics be destroyed, or engage in any other mitigating conduct, before bringing this lawsuit. To the extent that Plaintiff and/or members of the putative class failed to mitigate their damages, any damages awarded should be limited or reduced accordingly.

**FIFTH AFFIRMATIVE DEFENSE:  
GOOD FAITH AND REASONABLE RELIANCE**

8. The claims are barred in whole or in part by Sephora's good faith, and its absence of negligent, reckless, or intentional conduct. To the extent that BIPA applies to Sephora's conduct as alleged in the Complaint, Sephora is not liable because it relied in good faith upon a reasonable interpretation of BIPA's statutory language, and because of Sephora's belief that it

was not capturing, collecting, storing, retaining, disseminating, or otherwise using consumers' biometrics in connection with Virtual Artist.

9. Additionally, to Sephora's understanding, Modiface's technology does not capture, collect, store, retain, disseminate, or otherwise use Sephora's consumers' biometrics. Sephora has relied upon this understanding.

**SIXTH AFFIRMATIVE DEFENSE:  
TRACEABILITY AND REDRESSABILITY**

10. The claims are barred in whole or in part to the extent that any purported injury, if any, is not fairly traceable to the alleged conduct of Sephora, and so the relief sought would not redress any such injury. Plaintiff alleges that Sephora's alleged noncompliance with BIPA caused Plaintiff's and the putative class's biometrics to be disseminated to third parties and caused Plaintiff mental anguish. Yet, strict compliance with BIPA (including, for example, a written notice of a data retention policy) would not have stopped Plaintiff or the putative class members from knowingly and voluntarily using Sephora's Virtual Artist to view cosmetics on their faces and/or from transmitting photographs and/or gifs of themselves to a phone number of their choosing. Therefore, the relief sought would not redress any alleged injury or otherwise mitigate against alleged injuries.

**SEVENTH AFFIRMATIVE DEFENSE:  
SUPERSEDING/INTERVENING ACTS AND/OR OMISSIONS**

11. All or part of the damages alleged in the Complaint were caused by the acts and/or omissions of other persons or entities, including, without limitation, acts or omissions by the Plaintiff and/or members of the putative class in interacting with Sephora's Virtual Artist Kiosks or Sephora's platforms online or via mobile applications or by Modiface.

12. Sephora is not legally responsible for these actions or omissions, which intervened between the alleged acts or omissions of Sephora and the alleged damages of Plaintiff and members of the putative class. The alleged damages, if any, are therefore not recoverable in whole or in part from Sephora.

**EIGHTH AFFIRMATIVE DEFENSE:  
LACK OF CAUSATION, COMPARATIVE FAULT, AND/OR OFFSET**

13. The Complaint and each purported cause of action alleged therein is barred in whole or in part because Sephora's conduct was not the actual or proximate cause of any injury or loss suffered by Plaintiff and/or members of the putative class, and the alleged damages were caused in whole or in part by the acts and/or omissions of persons or entities for whom Sephora is not legally responsible. Therefore, any damages awarded must be apportioned or reduced to the extent that such damages are attributable to or caused by persons or entities other than Sephora.

**NINTH AFFIRMATIVE DEFENSE:  
UNENFORCEABLE PENALTY**

14. Plaintiff and the putative class seek statutory liquidated damages in the amount of \$5,000 for each willful or reckless violation of BIPA and \$1,000 for each negligent violation. Plaintiff also claims that the Court should award six separate liquidated damage awards per person and that these six separate liquidated damage awards should be made to each of thousands of putative class members. Additionally, to arrive at six alleged violations per putative class member, Plaintiff's complaint dissects single provisions of BIPA to artificially inflate the number of alleged violations. Such a windfall would bear no relation to the alleged actual damages sustained and is inconsistent with the text of BIPA.

15. Accordingly, the requested relief would not be a reasonable estimate of actual damages, but instead, would amount to a disparate penalty more akin to punitive damages for strict liability, given that the alleged injury suffered by Plaintiff and the putative class members does not warrant such relief (particularly if it is found that Sephora did not improperly disseminate biometric information to third parties and/or mental anguish was not suffered), the text of BIPA does not warrant such an award, and that Defendants acted in good faith. Such relief should therefore be barred in whole or in part.

**TENTH AFFIRMATIVE DEFENSE:  
VIOLATION OF DUE PROCESS**

16. The claims for damages are barred in whole or in part by the Due Process Clause of the United States Constitution. Plaintiff alleges that she and the putative class are entitled to liquidated statutory damages in the amount of \$5,000 for each willful or reckless violation of BIPA and \$1,000 for each negligent violation. Plaintiff also claims that the Court should award six separate liquidated damage awards per person and that these six separate liquidated damage awards should be made to each of thousands of putative class members.

17. The disparity between the alleged injury and damage (or lack of injury/damage, if it is determined that Sephora did not disseminate biometric information to third parties and/or that Plaintiff or putative class members did not suffer mental anguish), on the one hand, and the statutory damages available under BIPA, on the other hand, is so grossly excessive and disproportionate as to constitute a violation of Sephora's due process rights.

**ELEVENTH AFFIRMATIVE DEFENSE:  
LACHES**

18. Plaintiff does not allege when she visited the Chicago, Illinois Sephora store and used the Virtual Artist Kiosk. Furthermore, Sephora currently lacks sufficient knowledge or

information to identify when each putative class member's claims may have arisen. The claims are barred in whole or in part, by the doctrine of laches if, for example, Plaintiff and/or members of the putative class unreasonably delayed pursuing their purported rights.

**TWELFTH AFFIRMATIVE DEFENSE:  
STATUTE OF LIMITATIONS**

19. Although Plaintiff purports to limit the putative class to those individuals whose “biometrics were captured, collected, stored, used, transmitted, or disseminated...within the applicable limitations period,” Sephora currently lacks sufficient knowledge or information to identify when each putative class member's claims may have arisen. The claims of the putative class are barred in whole or in part to the extent that they failed to bring their causes of action within the time period required by the statutes of limitations. *See, e.g.*, 735 ILCS 5/13-202 (two-year statute of limitations for an alleged injury to a person or statutory penalty).

**THIRTEENTH AFFIRMATIVE DEFENSE:  
ARBITRATION**

20. The claims of certain members of Plaintiff's putative class may be bound by a mandatory arbitration provision provided for in Sephora's mobile application and/or online terms of service. By using Sephora's mobile application and/or website, users agree to accept Sephora's terms of service. Therefore, such putative class members have accepted, and are bound by, a provision that all disputes arising out of his or her use of such services must be submitted to individual arbitration and cannot be resolved via class actions or class arbitrations. Currently, Sephora does not have sufficient knowledge or information to identify which, if any, putative class members are bound by these terms. Sephora reserves its right to seek individual arbitration where appropriate based on information and evidence obtained in discovery.

**FIFTEENTH AFFIRMATIVE DEFENSE:  
CHOICE OF LAW**

21. The claims of certain members of Plaintiff’s putative class may be bound by a choice of law provision provided for in Sephora’s mobile application and/or online terms of service. By using Sephora’s mobile application and/or website, users agree to accept Sephora’s terms of service. Such users have accepted, and are bound by, a provision that all disputes arising out of his or her use of such services shall be governed by and construed in accordance with the laws of the State of California. Therefore, each of the BIPA claims asserted by such putative class members is barred because such members may not bring claims under Illinois law. Currently, Sephora does not have sufficient knowledge or information to identify which, if any, putative class members are bound by these terms. Sephora reserves its right to move to dismiss such putative class members’ BIPA claims based on information and evidence obtained in discovery.

**SIXTEENTH AFFIRMATIVE DEFENSE:  
“AGGRIEVED” UNDER THE STATUTE**

22. Plaintiff alleges both mental anguish and improper disclosure of her biometrics by Sephora to unnamed third parties. If, however, it is determined that Plaintiff and/or the members of the putative class did not suffer mental anguish and that Sephora did not improperly disclose Plaintiff’s or the putative class’s biometrics to a third party, the claims alleged in the Complaint will be barred, in whole or in part, because Plaintiff and the putative class are not “aggrieved” within the meaning of BIPA, 740 ILCS 14/20, and may not seek relief under the statute.



WHEREFORE, Sephora respectfully requests that this Court deny class certification, dismiss with prejudice the claims against Sephora, and grant Sephora such other relief as is just and appropriate.

Dated: January 17, 2019

Respectfully submitted,

SEPHORA USA, INC.

By: s/ Hannah Y. Jurowicz  
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**CERTIFICATE OF SERVICE**

I, Hannah Jurowicz, an attorney, hereby certify that on this 17th day of January, 2019, a true and correct copy of the foregoing Answer and Affirmative Defenses to Plaintiff's Class Action Complaint was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record and via e-mail to the following:

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One of its attorneys