

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

MORGAN KUKOVEC, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

L'ORÉAL USA PRODUCTS, INC.
D/B/A L'ORÉAL PARIS,

Defendant.

Case No. 1:22-cv-01453

DEFENDANT'S NOTICE OF REMOVAL

PLEASE TAKE NOTICE that Defendant L'Oréal USA Products, Inc. ("L'Oréal USA Products"),¹ by and through its undersigned counsel, hereby removes the above-captioned civil action from the Circuit Court of DeKalb County, Illinois, to the United States District Court for the Northern District of Illinois, Western Division, pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453. Removal of this action is proper under 28 U.S.C. § 1332(a) because complete diversity exists and the amount in controversy exceeds \$75,000. In support of removal, L'Oréal USA Products states as follows:

I. CLAIMS ASSERTED AND RELIEF SOUGHT

1. On February 15, 2022, Plaintiff Morgan Kukovec ("Plaintiff") commenced this action by filing a putative Class Action Complaint ("Complaint") against Defendant L'Oréal USA

¹ The Complaint conflates L'Oréal USA Products, Inc. with L'Oréal Paris. (See Compl. ¶ 1 ("Plaintiff . . . brings this Class Action Complaint . . . against Defendant L'Oréal USA Products, Inc., d/b/a/ L'Oréal Paris[.]").) Contrary to the allegations in the Complaint, L'Oréal USA Products does not do business as L'Oréal Paris. (See Declaration of Robert G. Kinnally, filed herewith ("Kinnally Decl.") ¶ 5.)

Products in the Circuit Court of DeKalb, Illinois, Twenty-Third Judicial Circuit. As required by 28 U.S.C. §1446(a), the Complaint, Summons and all other “process, pleadings, and orders” served to date on L’Oréal USA Products are attached hereto as Exhibit “A”.

2. In her Complaint, Plaintiff alleges that L’Oréal USA Products violated the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.* (“BIPA”), by scanning, collecting, storing, and using Plaintiff’s biometrics (in the form of alleged scans of facial geometry) without first obtaining a written executed release or making disclosures required by BIPA. (Compl. ¶¶ 25-27, 37-38, 50.) Plaintiff further alleges, upon information and belief, that L’Oréal USA Products lacks retention schedules and guidelines for permanently destroying biometric data, and/or has no written policy, made available to the public, that discloses its retention schedule and/or guidelines for retaining and then permanently destroying biometric identifiers and information that complies with the requirements of BIPA. (*Id.* ¶¶ 28-29, 38-39, 62.) Plaintiff also alleges, upon information and belief, that L’Oréal USA Products subsequently stored Plaintiff’s biometric data for an unspecified period of time. (*Id.* ¶ 35.)

3. Specifically, Plaintiff alleges that L’Oréal USA Products offers a “virtual try-on tool” on its website that allows users “to use their web or phone camera to display a real-time photograph of themselves or upload a photo previously saved to their device” in order to “try-on” products. (Compl. ¶¶ 18-21.) Plaintiff further alleges that the “Virtual Try-On tool . . . operates by capturing the facial geometry of users’ photos” and that “[t]hese facial-geometry scans are used to identify the shape and features of the user’s face in order to accurately overlay the virtual makeup product onto the image provided.” (*Id.* ¶ 23.)

4. Plaintiff alleges she received a pop-up notification “regarding the use of the tool” when she accessed the virtual try-on tool. (*Id.* ¶ 36.) She alleges that this pop-up notification failed

to inform her that the tool was “capturing, collecting, storing, or using scans of her facial geometry; did not inform her in writing of the specific purpose and length of time for which her facial geometry was being collected, stored, or used; and did not obtain a written release from Plaintiff authorizing Defendant to collect, store, or use her facial geometry.” (*Id.* ¶ 37.) Plaintiff further alleges that she “has never been informed of the specific purposes or length of time for which Defendant collected, stored, or used her facial geometry; any biometric data, retention policy developed by Defendant; or whether Defendant will ever permanently delete her biometrics” and that she “does not know whether Defendant has destroyed—or will destroy—the biometrics collected from her.” (*Id.* ¶¶ 38-39.)

5. Plaintiff therefore alleges that L’Oréal USA Products did not provide any of the required written disclosures under BIPA or obtain the required written release from Plaintiff or class members prior to “collecting, storing, or using their facial geometry data obtained through the use of the Virtual Try-On tool.” (*Id.* ¶ 50.) Plaintiff further alleges that L’Oréal USA Products denied Plaintiff and the class members “their right under BIPA to be made aware of Defendant’s retention and destruction policies as to their biometric identifiers.” (*Id.* ¶ 63.)

6. Plaintiff seeks to bring her BIPA claims on behalf of a putative class defined as:

All persons whose biometric identifiers were captured by Defendant through use of the Virtual Try-On tool on Defendant’s websites, including www.lorealparisusa.com, www.maybelline.com, www.nyxcosmetics.com, <http://www.yslbeautyus.com>, <https://www.shuueimura-usa.com>, <https://www.lancome-usa.com>, <https://www.urbandecay.com>, <https://www.giorgioarmanibeauty-usa.com>, and <https://www.garnierusa.com>, while residing in Illinois from five years preceding the date of the filing of this action to the present.

(*Id.* ¶ 40.)

7. On behalf of herself and each member of the putative class, Plaintiff seeks the following relief in addition to seeking class certification: (1) an award to Plaintiff and the class members of the greater of either liquidated damages of \$1,000 per negligent violation and \$5,000

for each willful or reckless violation, or actual damages, for each violation of BIPA; (2) attorneys' fees and costs incurred in litigating this action; and (3) injunctive relief in the form of an order requiring L'Oréal USA Products to (i) obtain a written release from any individual prior to the capture, collection, or storage of that individual's biometric identifiers or biometric information, (ii) disclose whether it has retained Plaintiff's and class members' biometrics, how it uses those biometrics, and the identities of any third parties with which it has shared those biometrics, (iii) publicly disclose a written policy establishing any specific purpose and length of term for which consumers' biometrics have been collected, captured, stored, obtained, or used, as well as guidelines for permanently destroying such biometrics, and (iv) disclose whether Defendant has retained Plaintiff's and class members' biometrics and if, when, and how Plaintiff's and class members' biometrics were destroyed. (*Id.* ¶¶ 52, 55-56, 57(f), 64, 67-68, 69(f).)

8. L'Oréal USA Products denies any violation of BIPA. L'Oréal USA Products also denies that this matter is appropriate for certification as a class action. L'Oréal USA Products submits this Notice of Removal without waiving any defenses to the claims asserted by Plaintiff and without conceding the Complaint's allegations, or that Plaintiff has pled claims upon which relief can be granted.

II. THIS COURT HAS DIVERSITY JURISDICTION OVER THIS ACTION

9. Removal is proper under 28 U.S.C. § 1332(a) because all requirements for diversity jurisdiction have been met.

10. Under 28 U.S.C. § 1332(a)(1), federal "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different States."

A. Complete Diversity Exists In This Action

11. This is an action between citizens of different states, and complete diversity exists.

See 28 U.S.C. § 1332(a)(1). To be sure:

- Plaintiff alleges that she is a citizen of Illinois. (Compl. ¶ 1.)
- L'Oréal USA Products is a Delaware corporation with its principal place of business at 10 Hudson Yards, New York, NY 10001. (Kinnally Decl. ¶ 3.)

12. As a corporation, L'Oréal USA Products is deemed a citizen of the States where it has been incorporated (Delaware) and where it maintains its principal places of business (New York). 28 U.S.C. § 1332(c)(1); *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010); (see also Kinnally Decl. ¶ 3.)

13. Because L'Oréal USA Products is not a citizen of Illinois and thus there are not residents of the same state on both sides of the lawsuit, complete diversity exists in this action. See *Krueger v. Cartwright*, 996 F.2d 928, 931 (7th Cir. 1993).

B. The Matter In Controversy Exceeds the Sum or Value of \$75,000

14. The amount in controversy requirement of 28 U.S.C. § 1332(a) is also satisfied. For purposes of assessing the amount in controversy, Plaintiff's allegations are accepted as true. See, e.g., *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) (noting it does not matter, for purposes of the amount in controversy, that "the complaint discloses the existence of a valid defense to the claim").

15. In determining whether the amount in controversy requirement is met, "at least one named plaintiff must satisfy the jurisdictional amount." *Clement v. Lau*, No. 03 C 6179, 2003 WL 22948671, at *2 (N.D. Ill. Dec. 10, 2003). "[A] defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart*

Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 554 (2014). “[U]nless recovery of an amount exceeding the jurisdictional minimum is legally impossible, the case belongs in federal court.” *Grinnell Mut. Reinsurance Co. v. Haight*, 697 F.3d 582, 585 (7th Cir. 2012) (citing *Back Doctors Ltd. v. Metro. Prop. and Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011)).

16. Plaintiff’s claims satisfy the \$75,000 minimum threshold because Plaintiff seeks statutory damages of up to \$5,000 for each alleged BIPA violation—in addition to litigation expenses, attorneys’ fees, and other unspecified relief—for herself and a class in excess of 40 people. (See Compl., ¶¶ 40, 42, 57, 69.)

17. Although the Complaint does not allege a specific number of times that Plaintiff herself used the at-issue virtual try-on tool, her allegations suggest that she used it multiple times. (See Compl. ¶ 31 (“Plaintiff used the Virtual Try-On tool to see what *various products* would look like if she were to use them”) (emphasis added).) Illinois federal district courts have found it plausible—for removal purposes—“that a new violation [of BIPA] occurs each time [the defendant] acquires [the plaintiff’s] biometric information, which presumably happens with each scan.” See *Fox v. Dakkota Integrated Sys., LLC*, No. 19 C 2872, 2020 WL 8409683, at *3 (N.D. Ill. Jan. 24, 2020) (finding removal proper in BIPA case seeking \$5,000 in statutory damages for each alleged violation of BIPA because “[s]uch a plausible interpretation would entitle [plaintiff] to statutory damages on a per-scan basis”); see also *Peatry v. Bimbo Bakeries USA, Inc.*, 393 F. Supp. 3d 766, 769-70 (N.D. Ill. 2019) (same).

18. As it is not legally impossible for Plaintiff to recover \$5,000 per scan, Defendant has plausibly shown the amount in controversy exceeds the \$75,000 threshold under 28 U.S.C. § 1332(a)(1) based on Plaintiff’s allegation that she used the tool to see what “various products” would look like if she were to use them. See *Dart Cherokee Basin Operating Co.*, 574 U.S. at 89.

19. The Complaint also satisfies the \$75,000 minimum threshold because Plaintiff's Complaint seeks broad injunctive relief, compliance with which would necessitate incurrence of significant costs, estimated to exceed \$75,000. *See Tropp v. Western-Southern Life Ins. Co.*, 381 F.3d 591, 595 (7th Cir. 2004); *Rubel v. Pfizer Inc.*, 361 F.3d 1016, 1017 (7th Cir. 2004) (holding that "the cost a defendant incurs in complying with injunctive relief is a legitimate consideration in a jurisdictional inquiry"). Indeed, Plaintiff seeks an extensive and comprehensive injunction requiring Defendant to (1) obtain a written release from any individual prior to the capture, collection, or storage of that individual's biometric identifiers or biometric information, (2) disclose whether Defendant has retained Plaintiff's and class members' biometrics, how Defendant uses Plaintiff's and class members' biometrics, and the identities of any third parties with which Defendant shared those biometrics, (3) publicly disclose a written policy establishing any specific purpose and length of term for which consumers' biometrics have been collected, captured, stored, obtained, or used, as well as guidelines for permanently destroying such biometrics, and (4) disclose whether Defendant has retained Plaintiff's and class members' biometrics and if, when, and how those biometrics were destroyed. (Compl. ¶¶ 55-56, 57(e), 67-68, 69(e).) In the event that Plaintiff obtains injunctive relief, L'Oréal USA Products would have to spend considerable time, effort, and resources to comply with that injunction, and a reasonable estimate of the costs attendant to compliance with that injunction exceeds \$75,000. (*See* Kinnally Decl. ¶ 6.)

III. THE PROCEDURAL REQUIREMENTS FOR REMOVAL ARE SATISFIED

20. Plaintiff filed the above-captioned case on February 15, 2022, in the Circuit Court of DeKalb County, Illinois, under Case No. 2022-LA-000016.

21. L'Oréal USA Products received copies of the Summons and Complaint from its registered agent, CSC, on February 22, 2022, but the paperwork transmitted to L'Oréal USA Products reflects that CSC received service of the Summons and Complaint on February 18, 2022.

As L'Oréal USA Products caused this Notice of Removal to be filed within thirty (30) days after the date that it was served, this Notice of Removal is timely under 28 U.S.C. § 1446(b).

22. Removal to this Court is proper because the United States District Court for the Northern District of Illinois, Western Division, is the federal judicial district and division embracing the Circuit Court of DeKalb, Illinois, where this suit was originally filed. 28 U.S.C. § 1441(a); 28 U.S.C. § 93(b).

23. In accordance with 28 U.S.C. § 1446(d), a true and correct copy of this Notice of Removal will be filed with the Circuit Clerk of DeKalb County, Illinois.

24. As required by 28 U.S.C. § 1446(d), written notice of this Notice of Removal will be sent promptly to Plaintiff's counsel by email and by U.S. Mail, and promptly filed with the Circuit Clerk of DeKalb County, Twenty-Third Judicial Circuit.

25. For the foregoing reasons, this Court has jurisdiction over this matter.

WHEREFORE, Defendant L'Oréal USA Products hereby removes Case Number 2022-LA-000016 from the Circuit Court of DeKalb County, Illinois, Twenty-Third Judicial Circuit, to the United States District Court for the Northern District of Illinois, Western Division.

Dated: March 18, 2022

Respectfully submitted,

/s/ Aaron D. Charfoos

Aaron D. Charfoos (Bar No. 6277242)

Adam M. Reich (Bar No. 6329295)

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Counsel for Defendant,

L'ORÉAL USA PRODUCTS, INC.

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2022, a copy of the foregoing was served on the following parties by electronic mail and arrangements were made for courtesy copies to be sent out by pre-paid, first-class U.S. Mail at the addresses listed below:

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Counsel for the Plaintiff and the Putative Class

/s/ Heather Copeland

Heather Copeland

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

MORGAN KUKOVEC, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

L'ORÉAL USA PRODUCTS, INC.
D/B/A L'ORÉAL PARIS,

Defendant.

Case No.

**DECLARATION OF ROBERT G. KINNALLY
IN SUPPORT OF DEFENDANT'S NOTICE OF REMOVAL**

I, Robert G. Kinnally, declare and state as follows:

1. I am Vice President and Associate General Counsel for L'Oréal USA, Inc. ("L'Oréal USA"), the parent company of L'Oréal USA Products, Inc. ("L'Oréal USA Products"). I have been in that position since January 1, 2013. I have worked at L'Oréal USA since 2000. I reside in Yonkers, New York and work in New York, New York. I make this declaration in support of Defendant's Notice of Removal. The statements set forth in this declaration are based on my personal knowledge of the facts set forth herein, review of the books and records of L'Oréal USA Products that are kept in the ordinary course of business, and information provided to me by persons upon whom I have regularly relied in the course of my duties and, if called upon to testify under oath, I could and would competently testify thereto.

2. In my capacity as Vice President and Associate General Counsel for L'Oréal USA, and subject to paragraph 1 above, I am familiar with and have personal knowledge of the named

Defendant's current and historic corporate organization, the nature of its business operations, and the nature of its business relationships, and I am generally familiar with the "Virtual Try-On" technology that I understand this case to involve.

3. L'Oréal USA Products is a Delaware corporation with its principal place of business at 10 Hudson Yards, New York, NY 10001.

4. I have reviewed the underlying Complaint filed by Plaintiff Morgan Kukovec ("Plaintiff") against "L'Oréal USA Products, Inc. d/b/a L'Oréal Paris."

5. L'Oréal USA Products is a wholly-owned subsidiary of L'Oréal USA, which focuses on manufacturing. L'Oréal USA Products does not do business as "L'Oréal Paris."

6. Based on my review of the Complaint, I understand that, among other things, Plaintiff seeks injunctive relief, which, if granted, would likely require L'Oréal USA to spend considerable time, effort, and resources to fully comply. For example, L'Oréal USA would need to identify, contact and get consent from each Illinois resident who used the alleged technology available on the L'Oréal Paris USA website, potentially dating back five years from the Complaint, and also potentially multiple other L'Oréal USA brand websites, a time-consuming project. In addition, to the extent that the challenged current policies (including the affirmative consent requirement) are found to be insufficient, an injunction requiring revision of those policies would be a time-intensive process that would require significant organizational discussion and approvals. Based on my 21 years of experience at L'Oréal USA and my experience with its subsidiary L'Oréal USA Products, I estimate that the costs attendant to complying with the injunction requested by Plaintiff would exceed \$75,000.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 17th day of March, 2022 in New York, New York.

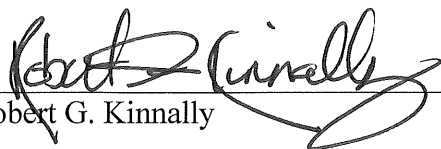

Robert G. Kinnally

Exhibit A

FILED2/15/2022 12:53 PM
2022LA000016**IN THE CIRCUIT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT
DEKALB COUNTY, ILLINOIS***Rori Grubbs*
Lori Grubbs
Clerk of the Circuit Court
DeKalb County, Illinois**MORGAN KUKOVEC, INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,*****Plaintiff,*****v.****L'ORÉAL USA PRODUCTS, INC. D/B/A
L'ORÉAL PARIS,*****Defendant.*****Case No.: 2022LA000016****Judge:****JURY TRIAL DEMANDED****CLASS ACTION COMPLAINT**

NOW COMES Plaintiff, Morgan Kukovec (hereinafter, "Plaintiff"), who brings this Class Action Complaint individually and on behalf of all other similarly situated individuals against Defendant L'ORÉAL USA PRODUCTS, INC., d/b/a L'ORÉAL PARIS (hereinafter, "Defendant"), pursuant to the Illinois Biometric Information Privacy Act, 740 ILCS § 14/1 *et seq.* Plaintiff files suit to remedy Defendant's unlawful collection, storage, and use of Plaintiff's and the proposed class's biometrics without their informed written consent through the Virtual Try-On tool offered on Defendant's websites.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Morgan Kukovec resides in West Chicago, Illinois.
2. Defendant **L'ORÉAL USA PRODUCTS, INC.**, is incorporated in the State of Delaware with its principal place of business in New York, New York.
3. Jurisdiction is proper in this Court because Plaintiff is a citizen of Illinois and Defendant purposefully availed itself of the laws, protections, and advantages of Illinois by conducting business in this State, and within every County in this State, with consumers like Plaintiff.

NOTICE	
BY ORDER OF COURT THIS CASE IS	
HEREBY SET FOR CASE MANAGEMENT	
CONFERENCE TO BE CONDUCTED AT	
THE DEKALB COUNTY COURTHOUSE,	
SYCAMORE, IL IN ACCORDANCE WITH	
SUPREME COURT ORDER 218 BEFORE	
JUDGE VALLE	
ON 03/03/2022	AT 9:00 AM
FAILURE TO APPEAR MAY RESULT IN	
THE CASE BEING DISMISSED OR AN	
ORDER OF DEFAULT BEING ENTERED	

4. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 because the transactions or some part thereof out of which this cause of action arose occurred in this county.

THE BIPA LEGAL FRAMEWORK

5. The Illinois General Assembly enacted BIPA to protect the privacy rights of consumers in Illinois.

6. In enacting BIPA, the General Assembly found that the sensitivity of biometric information and identifiers warrants heightened protection of this information when companies collect it from consumers like Plaintiff. Specifically, the General Assembly found that “[b]iometrics are unlike other unique identifiers” like social security numbers because they are “biologically unique to the individual” and cannot be changed if compromised. 740 ILCS 14/5(c). Thus, an individual whose biometrics are compromised “has no recourse” and “is at heightened risk for identify theft.” *Id.* Moreover, said the General Assembly, “[t]he full ramifications of biometric technology are not fully known.” *Id.* § 14/5(e). Therefore, “[t]he public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.” *Id.* § 14/5(f).

7. BIPA defines “biometric identifiers” as “a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.” *Id.* § 14/10.

8. “Biometric information” is identified as “any information, regardless of how it is captured, converted, stored, or shared, based on an individual’s biometric identifier used to identify an individual.” *Id.* Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers. *Id.*

9. Accordingly, BIPA requires “private entities” like corporations that collect certain biometric identifiers or biometric information to take a number of specific steps to safeguard

consumers' data; inform consumers of the entities' uses, retention of, and destruction of their biometrics; and obtain informed consent before collecting such data.

10. With respect to safeguarding biometrics, BIPA requires that private entities in possession of biometric identifiers or biometric information must:

[D]evelop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.

Id. § 14/15(a).

11. Further, BIPA requires that any private entity in possession of biometric identifiers or biometric information must safeguard such data "using the reasonable standard of care within the private entity's industry" and must "store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information." *Id.* § 14/15(e).

12. With respect to informed consent, BIPA provides:

No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first

(1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;

(2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

Id. § 14/15(6).

13. Further, BIPA provides: “No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person’s or a customer’s biometric identifier or biometric information.” *Id.* § 14/11(c).

14. Under BIPA, a private entity is prohibited from disclosing, redisclosing, or otherwise disseminating a consumer’s biometric identifier or biometric information unless the consumer has consented to the disclosure or redisclosure. *Id.* § 14/15(d).

15. BIPA provides for statutory damages, injunctive relief, reasonable attorney’s fees and costs, and other relief “as the State or federal court may deem appropriate” when a private entity violates a consumer’s rights under the statute. *Id.* § 14/20. Where a violation is the result of negligence, BIPA provides for the greater of actual damages or \$1,000 in liquidated damages per violation, and if the violation was intentional or reckless, the greater of actual damages and liquidated damages of \$5,000 per violation. *Id.*

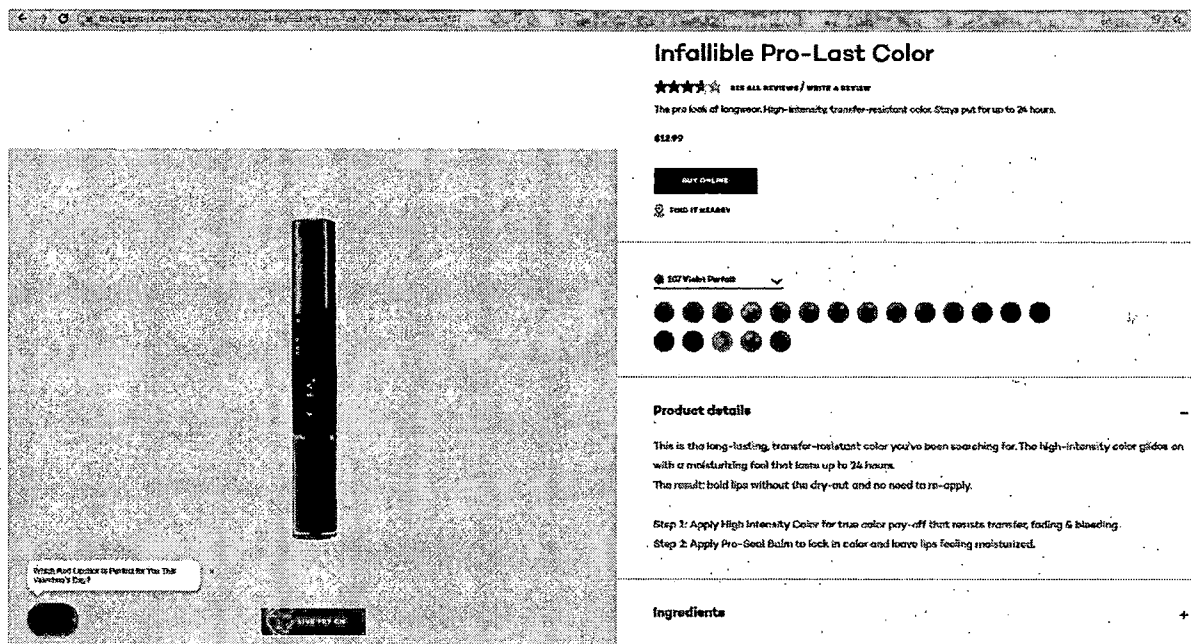
DEFENDANT COLLECTS BIOMETRICS THROUGH THE VIRTUAL TRY-ON TOOL

16. Defendant is a makeup company that markets a variety of products, alone and through its subsidiaries including, as relevant here, the “L’ORÉAL PARIS,” Maybelline, NYX Cosmetics, Yves Saint Laurent, Shu Uemura, Lancome, Urban Decay, Giorgio Armani, and Garnier brands.

17. Defendant sells its makeup products in brick-and-mortar retail shops and drugstores and through its many websites, including lorealparisusa.com, maybelline.com, nyxcosmetics.com, <http://www.yslbeautyus.com>, <http://www.shuuemura-usa.com>, <http://www.lancome-usa.com>, <http://www.urbandecay.com>, <http://www.giorgioarmanibeauty-usa.com>, and <http://www.garnierusa.com>.

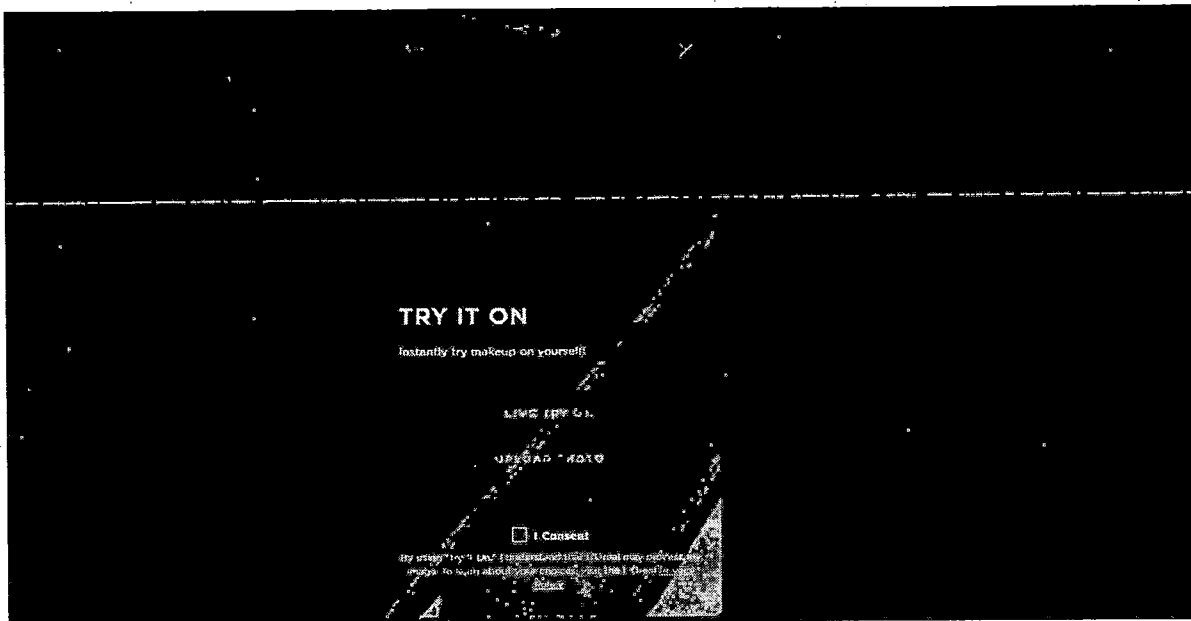
18. On its websites, Defendant offers a virtual try-on tool to consumers who visit the site.¹

19. When consumers view a product for which the virtual try-on tool is available, Defendant invites them to access the virtual try-on tool by presenting a “Try It On” button that appears under the photo of the product being viewed.



20. When consumers click “Try It On” from a specific product’s page, a pop-up appears in which they can use their web or phone camera to display a real-time photograph of themselves or upload a photo previously saved to their device.

¹ <https://www.lorealparisusa.com/virtual-try-on-makeup> (last visited Feb. 7, 2022)



21. If the user clicks “Live Camera,” the virtual try-on tool activates their webcam automatically, so that their real-time image appears immediately. Once the webcam is on, users have two ways to “try-on” the products. Users may allow the virtual try-on tool to overlay the product on the user’s entire face or, in the alternative, choose a split-screen option in which the product is shown on only half of the user’s face to see a before and after effect.

22. From there, consumers can download or post to social media websites the photo showing the product applied to their face.

23. The Virtual Try-On tool on Defendant’s website is powered by an application called “ModiFace.” This application operates by capturing the facial geometry of users’ photos, regardless of whether the photo is taken by web or phone camera while using the Virtual Try-On tool, uploaded to the tool, or captured via a live web or phone camera feed. These facial-geometry scans are used to identify the shape and features of the user’s face in order to accurately overlay the virtual makeup product onto the image provided. According to the developer of ModiFace, the

application uses “highly accurate 3D facial micro-feature tracking” and “is one of the most precise real-time facial micro-features video tracking and analysis technologies in the world.”²

24. The photo below, taken from the ModiFace developer’s website, illustrates the facial-geometry patterns that power the application.



25. Defendant does not inform consumers who use the Virtual Try-On tool in writing that it is capturing or collecting facial geometry or the specific purpose and length of term for which it is collecting, storing, or using such data, which is a biometric identifier specifically

² <https://modiface.com/#product> (last visited Feb. 7, 2022)

protected by BIPA, nor does Defendant obtain consumers' informed written consent before capturing or collecting such data.

26. Defendant's only attempt at providing any kind of disclosure to Plaintiff and the Class comes in the form of a link to Defendant's standard "privacy policy."³ The policy does not inform the user how the user's *facial geometry* (a biometric identifier protected by BIPA) is collected, used, or retained in order to allow the Virtual Try-On tool to operate or otherwise. Indeed, the policy only references "[p]hotographs that you upload or share with us" without discussing the company's capturing, collection, or use of biometrics at all.

27. Thus, Defendant's "consent" button fails to provide the proper and relevant disclosures as required by BIPA. Specifically, Defendant's pop-up notification does not:

- a. inform the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;
- b. inform the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
- c. provide a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

28. Further, Defendant does not make publicly available a written policy establishing a retention schedule and guidelines for permanently destroying biometric identifiers or biometric information obtained from consumers, as required by BIPA.

³ <https://www.lorealparisusa.com/privacy-policy> (last visited Feb. 7, 2022)

29. Upon information and belief, Defendant has not developed a written policy establishing retention schedules and guidelines for permanently destroying consumers' biometrics and does not destroy such data within the timeframes established by BIPA.

PLAINTIFF-SPECIFIC ALLEGATIONS

30. Plaintiff is a resident of West Chicago, Illinois.

31. On or around December 20, 2021 Plaintiff visited the "L'Oreal Paris" website. While on the website, Plaintiff used the Virtual Try-On tool to see what various products would look like if she were to use them.

32. Specifically, Plaintiff tested a lipstick—"Infallible Pro-Last Color, 107 Violet Parfait."

33. After trying on the product, Plaintiff decided not to purchase it. As such, Plaintiff did not set up an account on the website.

34. When Plaintiff used the Virtual Try-On tool, Defendant captured and collected her facial geometry. The Virtual Try-On tool could not have provided the advertised experience if Defendant did not capture and collect Plaintiff's facial geometry.

35. Upon information and belief, Defendant also stored her facial geometry for an unspecified period of time after Plaintiff used the Virtual Try-On tool.

36. When Plaintiff accessed the Virtual Try-On tool on Defendant's website, she received the pop-up notification described above regarding the use of the tool.

37. As discussed above, Defendant's pop-up notification failed to meet the requirements of BIPA, as it did not inform Plaintiff in writing that it was capturing, collecting, storing, or using scans of her facial geometry; did not inform her in writing of the specific purpose and length of time for which her facial geometry was being collected, stored, or used; and did not

obtain a written release from Plaintiff authorizing Defendant to collect, store, or use her facial geometry.

38. Plaintiff has never been informed of the specific purposes or length of time for which Defendant collected, stored, or used her facial geometry; any biometric data retention policy developed by Defendant; or whether Defendant will ever permanently delete her biometrics. Defendant has not made any of this information available to the public.

39. Plaintiff does not know whether Defendant has destroyed—or will destroy—the biometrics collected from her.

CLASS ALLEGATIONS

40. Plaintiff brings this action on behalf of himself and, pursuant to 735 ILCS 5/2-801, on behalf of a class of similarly situated individuals (hereinafter “the Class”) defined as follows:

All persons whose biometric identifiers were captured by Defendant through use of the Virtual Try-On tool on Defendant’s websites, including www.lorealparisusa.com, www.maybelline.com, www.nyxcosmetics.com, <https://www.yslbeautyus.com>, <https://www.shuueemura-usa.com>, <https://www.lancome-usa.com>, <https://www.urbandecay.com>, <https://www.giorgioarmanibeauty-usa.com>, and <https://www.garnierusa.com>, while residing in Illinois from five years preceding the date of the filing of this action to the present.

41. Excluded from the class are Defendant’s officers and directors, Plaintiff’s counsel, and any member of the judiciary presiding over this action.

42. Numerosity: Upon information and belief, there are more than forty class members, and individual joinder in this case is impracticable.

43. Commonality and predominance: Multiple questions of law and fact are common to the class and predominate over any individualized questions. Common questions include, but are not limited to, whether Defendant has a practice of capturing, collecting, storing, or distributing consumer biometrics obtained through consumers’ use of the Virtual Try-On tool on Defendant’s

websites; whether Defendant has developed and made publicly available a written policy establishing a retention schedule and guidelines for destroying consumer biometrics; whether Defendant obtained an executed written release from consumers whose faces were scanned using the Virtual Try-On tool on Defendant's websites before capturing their biometrics; whether Defendant's practices violate BIPA; and whether Defendant's conduct was willful, reckless, or negligent.

44. Adequacy of Representation: Plaintiff will fairly and adequately represent and protect the interests of all Class members. She has retained counsel with significant experience and achievements in complex class action litigation, she has no interests that are antagonistic to those of any Class members, and Defendant has no unique defenses unique to her.

45. Appropriateness: A class action is an appropriate method for the fair and efficient adjudication of the controversy because it will resolve multiple issues common to the Class in a single stroke. Moreover, a class action would reduce the time and expense of litigation and promote judicial economy by jointly resolving a large number of individual claims that would otherwise be litigated separately in duplicative proceedings.

COUNT 1
VIOLATION OF 740 ILCS 14/15(b)
Failure to Inform in Writing and Obtain Written Release from Consumers Prior to
Capturing, Collecting, or Storing Biometric Identifiers
Damages and Injunctive Relief
Alleged on Behalf of Plaintiff Individually and on Behalf of the Class

46. Plaintiff re-alleges and incorporates the allegations in the preceding paragraphs.

47. The Virtual Try-On tool operates by capturing the facial geometry of consumers like Plaintiff and Class members.

48. Facial geometry is a biometric identifier protected by BIPA.

49. BIPA prohibits private entities like Defendant from collecting, capturing, purchasing, receiving through trade, or otherwise obtaining consumers' biometric identifiers or biometric information without first informing them in writing of such activities; informing them in writing of the specific purpose and length of term for which biometric identifiers or biometric information are being collected, stored, and used; and obtaining a written release executed by consumers whose biometric identifiers or biometric information is being collected.

50. Defendant did not provide any of these required written disclosures or obtain the required written release from Plaintiff or Class members prior to collecting, storing, or using their facial geometry data obtained through use of the Virtual Try-On tool.

51. As a result, Defendant has invaded the privacy of Plaintiff and Class members and unlawfully collected, used, and benefitted from their biometric identifiers while failing to provide them with the lawfully required notice of such collection and use.

52. Accordingly, Defendant has violated BIPA. These violations have harmed Plaintiff and Class members; accordingly, Plaintiff and Class members are entitled to liquidated damages of \$1,000 per negligent violation, \$5,000 per willful or reckless violation, or actual damages if greater than the liquidated damages provided for by BIPA.

53. Moreover, an injunction is warranted pursuant to 740 ILCS 14/20(4). Upon information and belief, Defendant currently possesses Plaintiff's and Class members' biometrics and may be using or distributing them to third parties without Plaintiff's or Class members' permission. Such a violation of privacy constitutes irreparable harm for which there is no adequate remedy at law.

54. Absent injunctive relief, Defendant is likely to continue storing Plaintiff's and Class members' biometrics.

55. Accordingly, Plaintiff seeks an order requiring Defendant to obtain a written release from any individual prior to the capture, collection, or storage of that individual's biometric identifiers or biometric information.

56. Further, Plaintiff seeks an order requiring Defendant to disclose whether Defendant has retained Plaintiff's and Class members' biometrics, how Defendant uses Plaintiff's and Class members' biometrics, and the identities of any third parties with which Defendant shared those biometrics.

57. WHEREFORE, Plaintiff, individually and on behalf of the Putative Class, requests an order granting the following relief:

- a. Finding that this action satisfies the requirements for maintenance as a class action as set forth in 735 ILCS 5/2-801, et seq. and certifying the class defined herein;
- b. Appointing Plaintiff as representative of the Class and the undersigned counsel as class counsel;
- c. Entering judgment in favor of Plaintiff and the Class against Defendant;
- d. Awarding Plaintiff and the Class liquidated damages of \$1,000 per negligent violation, \$5,000 per willful or reckless violation, or actual damages, whichever is greater, for: each violation of BIPA;
- e. Issuing an injunction ordering Defendant to comply with BIPA going forward and disclose to Plaintiff and Class members whether Defendant possesses their biometrics, Defendant's uses of their biometrics; and Defendant's retention and destruction policies regarding their biometrics;
- f. Awarding reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, as provided for in 740 ILCS 14/20; and
- g. Granting further relief as the Court deems appropriate.

COUNT II
VIOLATION OF 740 ILCS 14/15(a)
Failure to Develop and Make Publicly Available a Written Policy for Retention and
Destruction of Biometric Identifiers
Damages and Injunctive Relief

Alleged on Behalf of Plaintiff Individually and on Behalf of the Class

58. Plaintiff re-alleges and incorporates the allegations in the paragraphs above.

59. The Virtual Try-On tool operates by capturing the facial geometry of consumers like Plaintiff and Class members.

60. Facial geometry is a biometric identifier protected by BIPA.

61. BIPA requires private entities, like Defendant, in possession of biometric identifiers or biometric information to develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first.

62. Upon information and belief, Defendant did not develop or possess such a written policy at any time during its collection, storage, and use of Plaintiff's and Class members' facial geometry data obtained through use of the Virtual Try-On tool on Defendant's websites.

63. As a result, Defendant denied Plaintiff and Class members their right under BIPA to be made aware of Defendant's retention and destruction policies as to their biometric identifiers. Additionally, Defendant's failure to develop the required retention and destruction policies placed Plaintiff and Class members' sensitive biometric identifiers at risk of compromise or illicit use.

64. Accordingly, Defendant has violated BIPA. These violations have harmed Plaintiff and Class members; accordingly, Plaintiff and Class members are entitled to liquidated damages of \$1,000 per negligent violation, \$5,000 per willful or reckless violation, or actual damages if greater than the liquidated damages provided for by BIPA.

65. Moreover, an injunction is warranted pursuant to 740 ILCS 14/20(4). Upon information and belief, Defendant currently possesses Plaintiff's and Class members' biometrics

and have not developed a BIPA-compliant policy for the retention and destruction of those biometrics. This failure to maintain a proper policy could place Plaintiff's and Class members' sensitive biometric identifiers at risk of compromise or illicit use on a continuing basis. It also deprives Plaintiff's and Class members' right under BIPA to be apprised of Defendant's policy for retaining and destroying biometrics.

66. Absent injunctive relief, Defendant is likely to continue storing Plaintiff's and Class members' biometrics without implementing a retention and destruction policy for those biometrics that satisfies BIPA's requirements.

67. Accordingly, Plaintiff seeks an order requiring Defendant to publicly disclose a written policy establishing any specific purpose and length of term for which consumers' biometrics have been collected, captured, stored, obtained, or used, as well as guidelines for permanently destroying such biometrics when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first.

68. Plaintiff further seeks an order requiring Defendant to disclose whether Defendant has retained Plaintiff's and Class members' biometrics and if, when, and how those biometrics were destroyed.

69. WHEREFORE, Plaintiff, individually and on behalf of the Putative Class, requests an order granting the following relief:

- a. Finding that this action satisfies the requirements for maintenance as a class action as set forth in 735 ILCS 5/2-801, et seq. and certifying the class defined herein;
- b. Appointing Plaintiff as representative of the Class and the undersigned counsel as class counsel;
- c. Entering judgment in favor of Plaintiff and the Class against Defendant;

- d. Awarding Plaintiff and the Class liquidated damages of \$1,000 per negligent violation, \$5,000 per willful or reckless violation, or actual damages, whichever is greater, for each violation of BIPA;
- e. Issuing an injunction ordering Defendant to comply with BIPA going forward and disclose to Plaintiff and Class members whether Defendant possesses their biometrics, Defendant's uses of their biometrics; and Defendant's retention and destruction policies regarding their biometrics;
- f. Awarding reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, as provided for in 740 ILCS 14/20; and
- g. Granting further relief as the Court deems appropriate.

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial on all claims so triable.

Respectfully submitted,

Dated: February 15, 2022

By: Elizabeth C. Chavez, Esq.
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Bret K. Pufahl, Esq. (6325814)
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(202) 973-0950 (*facsimile*)

COUNSEL FOR THE PLAINTIFF AND THE
PUTATIVE CLASS

This form is approved by the Illinois Supreme Court and is required to be accepted in all Illinois Circuit Courts.

STATE OF ILLINOIS, CIRCUIT COURT DeKalb <input checked="" type="checkbox"/> COUNTY		SUMMONS	For Court Use Only
Instructions ▼ Enter above the county name where the case was filed.	Morgan Kukovec, et. al. Plaintiff / Petitioner (First, middle, last name)		2022LA000016 Case Number
Enter your name as Plaintiff/Petitioner.	v. L'Oréal USA Products, Inc. d/b/a L'Oréal Paris Defendant / Respondent (First, middle, last name)		
Enter the names of all people you are suing as Defendants/ Respondents.	<input type="checkbox"/> Alias Summons (Check this box if this is not the 1 st Summons issued for this Defendant.)		
Enter the Case Number given by the Circuit Clerk.			

IMPORTANT INFORMATION:

There may be court fees to start or respond to a case. If you are unable to pay your court fees, you can apply for a fee waiver. You can find the fee waiver application at: illinoiscourts.gov/documents-and-forms/approved-forms/.

E-filing is now mandatory with limited exemptions. To e-file, you must first create an account with an e-filing service provider. Visit 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 illinoiscourts.gov/faq/gethelp.asp or talk with your local circuit clerk's office. If you cannot e-file, you may be able to get an exemption that allows you to file in-person or by mail. Ask your circuit clerk for more information or visit illinoislegalaid.org.

Call or text Illinois Court Help at 833-411-1121 for information about how to go to court including how to fill out and file forms. You can also get free legal information and legal referrals at illinoislegalaid.org.

Plaintiff/Petitioner:

Do not use this form in an eviction, small claims, detinue, divorce, or replevin case. Use the *Eviction Summons*, *Small Claims Summons*, or *Summons Petition for Dissolution of Marriage / Civil Union* available at illinoiscourts.gov/documents-and-forms/approved-forms. If your case is a detinue or replevin, visit illinoislegalaid.org for help.

If you are suing more than 1 Defendant/Respondent, fill out a *Summons* form for each Defendant/Respondent.

In 1a, enter the name and address of a Defendant/ Respondent. If you are serving a Registered Agent, include the Registered Agent's name and address here.

In 1b, enter a second address for Defendant/ Respondent, if you have one.

In 1c, check how you are sending your documents to Defendant/ Respondent.

1. Defendant/Respondent's address and service information:**a. Defendant/Respondent's primary address/information for service:**

Name (First, Middle, Last): L'Oreal USA Products, Inc.

Registered Agent's name, if any: Illinois Corporation Service Company

Street Address, Unit #: 801 Adlai Stevenson Drive

City, State, ZIP: Springfield, IL 62703

Telephone: _____ Email: _____

b. If you have more than one address where Defendant/Respondent might be found, list that here:

Name (First, Middle, Last): _____

Street Address, Unit #: _____

City, State, ZIP: _____

Telephone: _____ Email: _____

c. Method of service on Defendant/Respondent:

☐ Sheriff

☐ Sheriff outside Illinois:

County & State

☒ Special process server

☐ Licensed private detective

(06/21)

****Stop. Do not complete the form. The sheriff or special process server will fill in the form.****

City, State, ZIP: _____

Enter the Case Number given by the Circuit Clerk: _____

☐ I was not able to serve the **Summons** and **Complaint/Petition** on Defendant/Respondent:_____
First, Middle, LastI made the following attempts to serve the *Summons* and Complaint/Petition on the Defendant/Respondent:

1. On this date: _____ at this time: _____
- ☐
- a.m.
- ☐
- p.m.

Address: _____

City, State, ZIP: _____

Other information about service attempt: _____

2. On this date: _____ at this time: _____
- ☐
- a.m.
- ☐
- p.m.

Address: _____

City, State, ZIP: _____

Other information about service attempt: _____

3. On this date: _____ at this time: _____
- ☐
- a.m.
- ☐
- p.m.

Address: _____

City, State, ZIP: _____

Other information about service attempt: _____

DO NOT complete this section. The sheriff or private process server will complete it.

If you are a special process server, sheriff outside Illinois, or licensed private detective, your signature certifies that everything on the ***Proof of Service of Summons*** is true and correct to the best of your knowledge. You understand that making a false statement on this form could be perjury.

By:

FEES

Service and Return: \$ _____

Miles _____ \$ _____

Total \$ 0.00

Signature by: ☐ Sheriff
☐ Sheriff outside Illinois:_____
County and State

- ☐
- Special process server
-
- ☐
- Licensed private detective

Under the Code of Civil Procedure, 735 ILCS 5/1-109, making a statement on this form that you know to be false is perjury, a Class 3 Felony.

Print NameIf *Summons* is served by licensed private detective or private detective agency:

License Number: _____

2/15/2022 12:53 PM
2022LA000016

**IN THE CIRCUIT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT
DEKALB COUNTY, ILLINOIS**

Lori Grubbs
Lori Grubbs
Clerk of the Circuit Court
DeKalb County, Illinois

**MORGAN KUKOVEC, INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,**

Plaintiff,

v.

**L'ORÉAL USA PRODUCTS, INC. D/B/A
L'ORÉAL PARIS,**

Defendant.

Case No.: 2022LA000016

Judge:

JURY TRIAL DEMANDED

AFFIDAVIT PURSUANT TO SUPREME COURT RULE 222 (b)

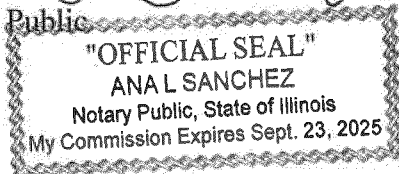
The undersigned, one of the attorneys for the Plaintiff herein, being first duly sworn upon oath, states that to the best of his knowledge, information and belief formed after a reasonable inquiry, to the extent such inquiry is possible based upon current facts and circumstances, that the total money damages sought herein exceed Fifty Thousand Dollars (\$50,000.00).

FOOTE, MIELKE, CHAVEZ & O'NEIL, LLC

Bret K. Pufahl
Bret K. Pufahl, Esq., One of Plaintiffs' Attorneys

Subscribed and Sworn to before me
on February 15, 2022.

Ana L. Sanchez
Notary Public



Bret K. Pufahl, Esq. (6325814)
FOOTE, MIELKE, CHAVEZ & O'NEIL, LLC
10 W. State Street, Suite 200
Geneva, IL 60134
Tel. No.: (630) 232-7450
Fax No.: (630) 232-7452
Email: bkp@fmcclaw.com

2/18/2022 1:51 PM
2022LA000016**CERTIFICATE OF SERVICE**

IN THE CIRCUIT COURT OF DEKALB COUNTY, ILLINOIS

Case #: 2022LA000016



Lori Grubbs

Clerk of the Circuit Court

Plaintiff DeKalb County, Illinois

Morgan Kukovec, Individually and on Behalf of all others similarly situated

vs.

L'Oreal USA Products, Inc. d/b/a L'Oreal Paris


Defendant

The undersigned, being first duly sworn, on oath deposes and says: That s(he) is now and at all the times herein mentioned was a citizen of the United States, over the age of 18, not a party to nor interested in the above entitled action, is competent to be witness therein, and that I served copies of the:

Summons & Class Action Complaint; Exhibit(s)PARTY SERVED: **L'OREAL USA PRODUCTS, INC. D/B/A L'OREAL PARIS C/O ILLINOIS CORPORATION SERVICE COMPANY**PERSON SERVED: **ETHAN SMITH, DOCUMENT PROCESSOR**METHOD OF SERVICE: **Corporate** - By leaving copies with the person identified above, apparently in charge at the office or usual place of business. I informed him/her of the general nature of the papers.DATE & TIME OF DELIVERY: **02/18/2022 at 12:01 PM**ADDRESS, CITY AND STATE: **801 ADLAI STEVENSON DR, SPRINGFIELD, IL 62703**DESCRIPTION: Race: **White** Sex: **Male** Age: **19**
Height: **5'7"** Weight: **170** Hair: **Brown** Glasses: **No**

Judicial Attorney Services, Inc.
2100 Manchester Rd., Ste 503-2
Wheaton, IL 60187
(630) 221-9007

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true. Executed on 2/18/2022.

Signature: 

Barbara A West

Registration No: 117-001119

ClassAction.org

This complaint is part of ClassAction.org's searchable [class action lawsuit database](#)
