UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

DELMA WARMACK-STILLWELL, on behalf of herself and all others similarly situated,

Plaintiffs

vs.

CHRISTIAN DIOR, INC.,

Defendant.

No. 1:22-cv-04633

Hon. Elaine E. Bucklo

MEMORANDUM IN SUPPORT OF DEFENDANT CHRISTIAN DIOR, INC.'S MOTION FOR ATTORNEYS' FEES

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PRELIMINARY STATEMENT

On February 10, 2023, the Court entered a Memorandum Opinion and Order dismissing at the very outset Plaintiff's Complaint asserting claims under Illinois's Biometric Information Privacy Act ("BIPA"). Without question, Defendant Christian Dior, Inc. ("Dior") is the "prevailing party." By this motion Dior seeks to recover its reasonable attorneys' fees incurred in this litigation under the prevailing party provision of BIPA.

BIPA's plain language is clear: "a prevailing party" may recover its fees. The Illinois Supreme Court itself has held that when a statute provides "a prevailing party" may recover its attorneys' fees, that includes prevailing defendants. *Krautsack v. Anderson*, 223 Ill.2d 541, 554 (2006). BIPA affirmed that intention by first using the term "any person aggrieved by a violation of this Act" to create a private right of action for plaintiffs. In the next sentence it uses a different and more general term – "a prevailing party" – to describe which parties could receive various remedies, including reimbursement of attorneys' fees.

An award of attorneys' fees is warranted by Plaintiff's conduct of this litigation. Plaintiff's claim was not the first to allege that virtual try-on ("VTO") tools for eyewear were subject to BIPA. In two decisions – one before this case was filed (*Vo*) and another approximately one week after filing (*Svoboda*) – Illinois federal courts dismissed cases exactly like this one under the health care exemption.

These decisions were dispositive of this case, such that pursuing these claims would necessarily be wasteful. In fact, in another eyewear VTO case filed at roughly the same time, Plaintiff's counsel sought and received a stay while the *Svoboda* appeal was pending, acknowledging that *Svoboda* addressed non-prescription eyewear. In this litigation, by contrast, they argued that *Svoboda* was limited to allegations "that defendant sold **prescription** glasses and

its VTO was available in connection with the purchase of glasses, not sunglasses." Plaintiff's counsel knew that was not true. Plaintiff's other arguments were no more availing.

Plaintiff does not challenge the reasonableness of the fee claim. Instead, to avoid fee-shifting, Plaintiff argues that BIPA's prevailing parties provision applies only to plaintiffs. But the statutory language proves otherwise. Indeed, the courts have rejected the approach to the statutory interpretation that Plaintiff would have the Court apply in this case.

Plaintiff filed and pursued a lawsuit premised on a repeatedly-rejected theory of liability and increased the costs of this lawsuit with wasteful discovery demands. Dior respectfully submits that Plaintiff should bear the costs she imposed upon Dior.

BACKGROUND

A. Plaintiff's Complaint and Other Eyewear VTO Decisions

On August 30, 2022, Plaintiff filed the Complaint alleging Dior violated BIPA based on the eyewear VTO on Dior's website. More than two years earlier Judge Kocoras had held that eyewear VTOs "fall within BIPA's health care exemption." *Vo v. VSP Retail Development Holding, Inc.*, No. 19-C-7187, 2020 WL 1445605, at *3 (N.D. Ill. Mar. 25, 2020). Also long before the Complaint was filed, Judge Chang agreed that *Vo*'s holding was "not surprising…because the eyewear company used the information to provide customers with the medical service of fitting eyewear to their faces." *Marsh v. CSL Plasma Inc.*, 503 F.Supp.3d 677, 684 (N.D. Ill. 2020) (distinguishing eyewear VTO context from blood plasma donations).

Nine days after the Complaint was filed, Judge Leinenweber issued a memorandum opinion and order in *Svoboda v. Frames for America, Inc.*, No. 21-civ-5509 (N.D. Ill. Sept. 8, 2022). Like Plaintiff here, the *Svoboda* plaintiff asserted BIPA claims arising out of the use of an eyewear VTO. The *Svoboda* decision again held that because "prescription lenses, non-prescription sunglasses, and frames" are "all Class 1 medical devices" that "maintain or

restore physical…well-being" by "correcting or protecting vision," they fall within BIPA's general health care exemption. *Id.* at *2. On October 6, the *Svoboda* plaintiff filed a notice of appeal, but on December 5, 2022, the parties filed a joint motion to hold appellate briefing in abeyance because of a settlement. *Svoboda v. Frames for Am., Inc*., No. 22-02781, ECF No. 12 (7th Cir. Dec. 5, 2022). The parties subsequently filed a joint stipulation of dismissal with prejudice (ECF No. 13, April 4, 2023), which the Seventh Circuit entered (ECF No. 14, April 5, 2023).

B. The *Clements* Litigation

Plaintiff's counsel also represents a separate plaintiff in another BIPA eyewear VTO litigation filed the same day as this one – *Clements v. Gunnar Optiks, LLC*, Case No. 1:22-cv-04634. The *Clements* plaintiff alleged the defendant violated BIPA by using an eyewear VTO for "computer glasses, reading glasses, and sunglasses to protect against digital eye strain." (Ex. 1 hereto, ECF No. 20 at 2.) There, Plaintiff's counsel responded to the *Svoboda* decision by filing a joint motion to stay proceedings pending its appellate resolution. (*See id.*) Plaintiff's counsel acknowledged that in *Svoboda* "the court found that 'prescription lenses, non-prescription glasses, and frames meant to hold prescription lenses are all Class 1 medical devices,' " and acknowledged that the Court's holding applied to both " 'prescription lenses and non-prescription sunglasses.' " (*Id.* at 3 (quoting *Svoboda* decision).) Plaintiff's counsel therefore argued that staying the *Clements* litigation until the *Svoboda* appeal is resolved would "preserve the resources of the Parties and of the Court, reducing the burden on both." (*Id.* at 4.) The court granted the joint motion. (*Clements*, Case No. 1:22-cv-04634, ECF No. 22.)

C. Plaintiff's Conduct of This Litigation

Plaintiff expressed none of the same concern for efficiency here. Plaintiff never proposed staying this litigation pending the resolution of the *Svoboda* appeal. Instead, Plaintiff responded

to Dior's motion to dismiss by trying to have the Court conclude that *Svoboda* had no potential relevance at all.

First, despite her counsel's representation in *Clements*, plaintiff denied *Svoboda*'s holding even applied to non-prescription sunglasses, arguing that "the court's holding is based on the plaintiff's allegations that defendant sold **prescription** glasses and its VTO was available in connection with the purchase of glasses, not sunglasses." (ECF No. 22, Opp. to Mot. to Dismiss at 15.) Not remotely true. Plaintiff's brief purported to cite page *2 of *Svoboda* as support, but every single reference to "prescription" glasses on page *2 also references "non-prescription" glasses. *See Svoboda*, 2022 WL 4109719 at *2. Dior was forced to retrieve and attach the actual pleading from the *Svoboda* docket to show what Plaintiff's counsel already knew: that the plaintiff in *Svoboda* expressly alleged the "Virtual Try-On Programs allow consumers to virtually try-on eyeglasses and sunglasses." (Reply in Support of Mot. to Dismiss, ECF No. 24 at 8, quoting *Svoboda* Am. Compl. ¶ 29.)

Second, Plaintiff argued that "the facts here," in a VTO eyewear case, were "more like those" in blood plasma sales cases rather than the prior eyewear VTO cases. (ECF No. 22, Opp. to Mot. to Dismiss at 15.) On its own terms, this argument is frivolous. But it is even worse in the context of the specific blood plasma cases cited, which expressly contrast the blood plasma context from eyewear VTO cases and affirm that exempting eyewear VTOs from BIPA is "not surprising[]." *Marsh*, 503 F. Supp. 3d at 684.

Third, Plaintiff refused other opportunities to ensure the parties' resources were not wasted while she pursued her claims. During the parties' meet-and-confer regarding a case management plan Dior's counsel proposed delaying the initial disclosure deadline until after the motion to dismiss was decided. Plaintiff's counsel refused, forcing Dior to expend resources on investigating

those matters based on a pre-ruling deadline. (*See* ECF No. 23 at 3, identifying "compromise" including an initial disclosure deadline of January 20, 2023 (later extended by agreement to February 3, 2023).)

D. Dior's Attorneys' Fees

Pursuant to Local Rule 54.3, Dior's counsel sent a letter to Plaintiff's counsel on March 3, 2023, identifying the attorneys' fees it seeks to recover. Those amounts total $151,294.50. Attached hereto as Exhibit 2 is that letter, which sets forth the hourly rates of the relevant timekeepers; contains an Exhibit A identifying the time and work records invoiced; and contains an Exhibit B, providing totals of all amounts Dior seeks to recover, minus deductions for amounts Dior does not seek to recover by this Motion. Dior's letter further noted that Dior also seeks the recovery of "any additional fees incurred in connection with its fees' motion, the related meet-and-confer process, and any appeal that may be filed." (Ex. 2 at 1.)

Plaintiff's counsel initially responded to the letter by seeking to defer consideration of any fees' motion until after the appeal was heard. (Ex. 3 hereto.) Dior responded the next day that this approach was impermissible under the Local Rule and disfavored by the Seventh Circuit. (Ex. 4 hereto.) Ultimately, Plaintiff responded that they "are not challenging at this time the reasonableness of the hourly rates or the $151,294.50 figure for attorneys' fees and expenses" incurred prior to the entry of judgment, while disputing Dior's entitlement to fees under BIPA. (Ex. 5 hereto at 1.)

ARGUMENT

I. Prevailing Defendants May Recover their Reasonable Attorneys' Fees Under BIPA.

BIPA's attorneys' fees provision is found in Section 20. 740 ILCS 14/20. This section first provides that "any person aggrieved by a violation of this Act" shall have a private right of action. *Id.* It then provides that "a prevailing party may recover for each violation: … (3)

reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses…" 740 ILCS 14/20.

The Supreme Court of Illinois has held that "the term 'prevailing party' encompasses a prevailing defendant, as well as a prevailing plaintiff." *Krautsack v. Anderson*, 223 Ill.2d 541, 554 (2006); *see also Allen v. Woodfield Chevrolet, Inc.*, 208 Ill.2d 12, 33 (2003) ("prevailing party" term "applies to prevailing defendants, as well as prevailing plaintiffs."). Those cases addressed the Illinois Consumer Fraud Act, but the principle applies more broadly. As one Illinois intermediate appellate court explained, when the legislature "use[s] the term 'prevailing party' when addressing the award of attorney fees" in "statutes allowing the grant of attorneys fees," that has "been interpreted to include both plaintiffs and defendants." *Miller v. Bizzell*, 311 Ill. App. 3d 971, 974 (4th Dist. 2000) (addressing real estate statute referred to as the Disclosure Act).

This plain meaning is reinforced by Section 20's use of two different terms to grant various rights. First, the legislature uses the term "any person aggrieved by a violation of this Act" to create a private right of action. Second, it uses the term "a prevailing party" to describe who may recover various remedies including attorneys' fees. Illinois employs the canon of statutory interpretation that "the use of certain words in one instance by the legislature, and different words in another, indicate that different results were intended." *Clark v. Chi. Mun. Emp. Credit Union*, 119 F.3d 540, 547 (7th Cir. 1997) (quoting *Ill. State Toll Highway Auth. v. Karn*, 9 Ill. App. 3d 784, 787-88 (2d Dist. 1973)). The "different term" chosen here is one with a well-accepted meaning in Illinois law: "a prevailing party" includes a prevailing defendant.

II. The Court Should Award Dior Its Reasonable Attorneys' Fees.

It is true that the award of attorneys' fees under BIPA is discretionary (as is the award of damages as well). *See Cothron v. White Castle System, Inc.*, 2023 IL 128004 ¶ 42 (noting that because Section 20 provides that prevailing parties "may" obtain the specified remedies, it

"appears that the General Assembly chose to make damages discretionary rather than mandatory under the Act"); *see also Krautsack*, 223 Ill.2d at 554 (the word "may" leaves "attorney fee awards…to the sound discretion of the trial court"). In the context of other statutes, Illinois courts have identified non-exhaustive lists of factors including:

> (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing party would deter others from acting under similar circumstances; (4) whether the party requesting fees sought to benefit all consumers or businesses or to resolve a significant legal question regarding the Act; and (5) the relative merits of the parties' positions.

Id. While these factors may be considered, the Illinois Supreme Court's recent *Cothron* decision forbids treating any single factor a condition precedent to recovery. It explained that courts applying BIPA Section 20 remedies in a class action, "a creature of equity," would "certainly possess the discretion" to fashion appropriate awards that fairly compensate parties and deter future misconduct (in that case, damages). *Cothron*, 2023 IL 128004 ¶ 42. It further explained that BIPA must be read strictly, without "creat[ing] new elements or limitations not included by the legislature," even if those elements or limitations might be necessary to avoid "annihilative liability." *Id.* ¶¶ 39-40. Nevertheless, each of these factors, plus additional considerations, favors awarding Dior its attorneys' fees.

First, the "relative merits of the parties' positions" and Plaintiff's "degree of…culpability or bad faith" militate in favor of an award. At the moment Plaintiff filed her lawsuit, *Vo* had already addressed BIPA's exemption of eyewear VTOs. Another decision, *Marsh*, had already observed that *Vo*'s holding was "not surprising," and explained why eyewear VTOs (but not blood plasma sales) were exempted from BIPA. Just nine days later – and before Dior incurred the vast majority of the costs it seeks to recover by this Motion – *Svoboda* confirmed that eyewear VTOs are not subject to BIPA.

Notwithstanding the unanimous consensus of federal judges considering BIPA and eyewear VTOs, Plaintiff doubled down. This conduct warrants an award of attorneys' fees for three reasons. First, Plaintiff knew through her counsel that pursuing eyewear VTO cases while the *Svoboda* appeal was pending would be wasteful. That is exactly what her counsel told Judge Ellis in the *Clements* case, which also involved eyewear VTOs for non-prescription lenses. (Ex. 1 hereto.) But in this instance, she insisted on pressing forward. Second, Plaintiff chose to pursue this litigation in a particularly inefficient manner. Through her counsel, she insisted that initial disclosures be made before the Court ruled on the motion to dismiss, necessitating a wasteful investigation that could have been avoided if Plaintiff simply waited a few more weeks for the Court's scheduled decision.

Finally, Plaintiff pursued this litigation by advancing obviously meritless arguments regarding *Vo* and *Svoboda*. These include the complete misrepresentation that the plaintiff in *Svoboda* alleged the eyewear VTO "was available in connection with the purchase of glasses, not sunglasses." (Opp. to Mot. to Dismiss at 15.) Dior was forced to find the *Svoboda* complaint to demonstrate this was a pure invention. (Reply in Support of Mot. to Dismiss, ECF No. 24 at 8, quoting *Svoboda* Am. Compl. ¶ 29 (alleging the "Virtual Try-On Programs allow consumers to virtually try-on eyeglasses and sunglasses."). Similarly, Plaintiff's suggestion that "the facts" of this eyewear VTO case were "more like those" in blood plasma cases, rather than eyewear VTO cases, was frivolous. In fact, the blood plasma cases Plaintiff cited even explain why they eyewear VTO context is different, and observe it is "not surprising[]" the health care exemption applies in that context. *Marsh*, 503 F. Supp. 3d at 684.

Second, the interests of deterrence favor of an award of attorneys' fees. BIPA crowds this Court's docket because of the potential for large statutory damages awards, which the Illinois

Supreme Court recently acknowledged could even be "annihilative." *Cothron*, 2023 IL 128004 ¶ 40. The plaintiffs' bar leverages these risks into extracting massive settlements, even where no finding of liability is likely. That appears to be precisely what Plaintiff was counting on here – that she could pursue a legal theory expressly rejected by two Illinois federal judges, and implicitly rejected by a third, long enough to extract a settlement from Dior. To deter similar abuses of BIPA, the Court should award attorneys' fees to a defendant forced to litigate a repeatedly-rejected theory of liability.

Third, the lack of a "significant legal question regarding BIPA" militates in favor of an award of attorneys' fees. Again, before Plaintiff even filed this case, one federal judge had expressly rejected the application of BIPA to eyewear VTOs in *Vo* and another stated his agreement in *Marsh*. Nine days later another federal court expressly rejected this theory in *Svoboda*. This is not a case where Plaintiff attempted to apply BIPA to a novel technology; it was an effort to extract a settlement from a repeatedly-rejected theory of liability.

Finally, Plaintiff declined its opportunity under Local Rule 54.3 to question the "reasonableness of [Dior's counsel's] hourly rates or the $151,294.50 figure for attorneys' fees and expenses." (Ex. 5.)

III. Plaintiff's Re-Writing of BIPA Should Be Rejected.

To avoid paying fees, Plaintiff has argued that even though BIPA says "a prevailing party" may recover its fees, BIPA should be interpreted to only allow such a recovery "where the plaintiff prevails." (Ex. 5.) From the letter's usage of bolded emphasis, it appears the argument is that because "a prevailing party may recover" attorneys' fees "for each violation," this exclusively applies to plaintiffs. Illinois courts have repeatedly rejected this very kind of arguments.

First, Plaintiff's argument draws its entire force from a word that does not actually appear in the statute. Plaintiff essentially asks this Court to assume that when the statute says "for each

violation," it really means "for each violation ***proved***." But the statute contains no such limitation and there is no basis to assume it into existence; this phrase could just as easily be construed to mean "for each violation ***alleged***." Plaintiff has no argument unless this assumption is indulged, but the Illinois Supreme Court recently cautioned against courts rewriting BIPA to "create new elements or limitations not included by the legislature." *Cothron*, 2023 IL 128004 ¶ 39.

Second, Plaintiff's assumption is particularly ill-founded in the context of Section 20. This section uses the term "any person aggrieved by a violation of this Act" in another instance, but when it comes to authorizing an award of attorneys' fees, uses the term "a prevailing party" instead. Under basic statutory interpretation principles that the Seventh Circuit applies to Illinois law, the choice to use different terms "indicate[s] that different results were intended." *Clark*, 119 F.3d at 547.

Third, the "different term" chosen here was one with a well-accepted meaning in Illinois law: "a prevailing party" includes prevailing defendants. *Krautsack*, 223 Ill.2d at 554. And even if the statute were re-written to add the limitation Plaintiff demands, Illinois courts have still rejected efforts to construe "prevailing party" to mean "prevailing plaintiff" simply because some aspects of the same statutory section apply only to plaintiffs. For example, the Illinois Supreme Court's *Krautsack* opinion addressed a section of the Illinois Consumer Fraud Act that provided:

> [1] Except as provided in subsections (f), (g), and (h) of this Section, in any action brought by a person under this Section, the Court may grant injunctive relief where appropriate [2] **and may award, in addition to the relief provided in this Section**, reasonable attorney's fees and costs to the prevailing party.

8015 ILCS 505/10a(c) (brackets and emphasis added). There, the clause that allows for attorneys' fees contemplates that they may be awarded "in addition to" the damages and injunctive relief permitted by this section. If Plaintiff's argument were adopted in *Krautsack*, then prevailing defendants would necessarily be unable to recover their attorneys' fees. But the Illinois Supreme

Court rejected this argument, holding that "the term 'prevailing party' encompasses a prevailing defendant, as well as a prevailing plaintiff." *Krautsack*, 223 Ill.2d at 554.

A similar result was reached in *Miller*, addressing the Illinois Disclosure Act. Its Section 55 provides:

> [1] A person who knowingly violates or fails to perform any duty prescribed by any provision of this Act or who discloses any information on the Residential Real Property Disclosure Report that he knows to be false shall be liable in the amount of actual damages and court costs, [2] and the court may award reasonable attorney fees incurred by the prevailing party.

765 ILCS 77/55 (brackets added). The entire first clause addresses a knowing violator's liability under the statute. The second clause, appended by an "and," authorizes a "prevailing party" to recover attorneys' fees. If Plaintiff's argument were accepted, the fact that only a plaintiff can obtain damages under the first clause would negate any possibility of a prevailing defendant recovering their attorneys' fees. But that was not *Miller*'s holding. Instead it interpreted this language to allow for prevailing defendants to recover their fees. It observed that the same statute elsewhere separately defined "sellers" and "prospective buyers," but here choose to allow the grant of attorneys' fees to "a person" and "the prevailing party." *Miller*, 311 Ill. App. 3d at 974. It further surveyed other Illinois statutes with fee-shifting provisions and found that "when the legislature intends that certain parties can or cannot receive attorney fees, it has been specific." *Id.* Because the legislature did not "limit the award of attorney fees to a specific party," any prevailing party may recover. *Id.* at 975.

Fundamentally, Plaintiff cannot avoid BIPA's plain language. "A prevailing party" may recover its attorneys' fees, and Illinois courts have repeatedly held that "a prevailing party" means exactly what it says. Plaintiffs' last gasp is to argue that because no BIPA defendant ever appears to have moved for their fees before, such an award is impossible. But this novelty cuts both ways: just as no court has awarded a BIPA defendant their fees, no court has rejected it either. Given

that the Illinois Supreme Court has expressly held that the phrase "prevailing party" includes defendants, there is no basis to assume it would reverse itself in the context of BIPA specifically. Indeed, it has expressly affirmed that BIPA should be interpreted as it is written, with no special "conditions" or "limitations" read into its text. *Cothron*, 2023 IL 128004 ¶ 39. Prevailing defendants may recover their reasonable attorneys' fees under BIPA.

IV. The Court Should Not Wait for the Appeal to Resolve This Motion.

Dior respectfully submits that if Plaintiff again suggests deferring consideration of this motion until the appeal is resolved, that suggestion should be rejected. The Seventh Circuit has held that such an approach is disfavored. In *Terket v. Lund*, 623 F.2d 29, 34 (7th Cir. 1980), the Seventh Circuit explained that waiting on a pending appeal before deciding motions for attorneys' fees is "more likely to cause delay and wasted effort than prevent it" due to the threat of piecemeal appeals. As a result, it urged that "district courts in this circuit should proceed with attorneys' fees motions, even after an appeal is filed, as expeditiously as possible." *Id.; see also Anheuser-Busch, Inc. v. Schnorf*, No. 10-cv-1601, 2011 WL 9798, at *2 (N.D. Ill. Jan. 3, 2011) ("Even in cases where an appeal could affect or moot some questions at issue in the district court, the Seventh Circuit has expressed a clear preference for timely adjudication of attorneys' fee motions.").

CONCLUSION

For the reasons set forth herein, Dior requests that this Court enter an order: (1) awarding Dior $151,294.50 for attorneys' fees incurred prior to the entry of judgment; (2) awarding Dior its reasonable attorneys' fees and costs incurred in preparing this motion and following the Local Rule 54.3 meet-and-confer process, in an amount to be determined by future motion if the parties are unable to resolve it by agreement; and (3) reserving jurisdiction to address a subsequent motion for Dior's reasonable attorneys' fees and costs incurred during the appeal of this matter.

Dated: May 11, 2023

Respectfully submitted,

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