No. 3-21-0190

In the

Appellate Court of Illinois

Third Judicial District

RICHARD McGINNIS, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

UNITED STATES COLD STORAGE, INC.,

Defendant-Appellant.

On Appeal from the Circuit Court of the Twelfth Judicial Circuit,
Will County, Illinois, No. 19 L 9.
The Honorable **John C. Anderson**, Judge Presiding.

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* RESTAURANT LAW CENTER and RETAIL LITIGATION CENTER, INC. IN SUPPORT OF DEFENDANT-APPELLANT

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The Restaurant Law Center and the Retail Litigation Center, Inc. (collectively "proposed *amici*") respectfully move, pursuant to Illinois Supreme Court Rules 345 and 361, for leave to submit the attached brief of *amici curiae* in support of the position of the Defendant. Counsel for proposed *amici* has conferred with counsel for the parties, and neither party opposes this motion. In support of this motion, proposed *amici* state the following:

STANDARD FOR GRANTING LEAVE TO FILE AMICUS BRIEFS

1. Pursuant to Illinois Supreme Court Rule 345, proposed *amici* state their interest and explain how the proposed brief of proposed *amici* will assist this Court. Ill. Sup. Ct. Rule 345. The brief will provide this Court with "ideas, arguments, or insights helpful to resolution of the case that were not addressed by the litigants themselves." *Kinkel v. Cingular Wireless, L.L.C.*, No. 100925, 2006 WL 8458036, at *1 (Ill. Jan. 11, 2006) (citing *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (chambers opinion by Posner, J.)).

THE INTEREST OF THE PROPOSED *AMICI*

2. Proposed *amicus*, the Restaurant Law Center, is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15 million people—approximately 10 percent of the U.S. workforce—including nearly 600,000 people in Illinois. Restaurants and other

foodservice providers are the largest private-sector employers in Illinois, and the second largest in the United States. Through *amicus* participation, the Restaurant Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Restaurant Law Center's *amicus* briefs have been cited favorably by state and federal courts. *See, e.g.*, *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1303 n.15 (11th Cir. 2019) (en banc).

3. Proposed *amicus*, the Retail Litigation Center, Inc. ("RLC"), is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers in Illinois and across the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an *amicus* in well over 150 cases. Its *amicus* briefs have been favorably cited by multiple courts, including the United States Supreme Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

4. This case is a putative class action pursuant to the Illinois Biometric Information Privacy Act ("BIPA") against Defendant in connection

with the use of a biometric finger- or hand-scanner timekeeping system to track its employees' hours of work. On November 4, 2020, the circuit court denied Defendant's motion to dismiss under Section 2-619, ruling that Plaintiff's BIPA claim was not time barred because "the alleged injuries . . . constitute a continuing injury" and "the limitation period is [therefore] held in abeyance." Mem. Op. & Order at 4 (Nov. 4, 2020). This ruling was contrary to BIPA's statutory language and the purposes behind its enactment.

5. This Court is being asked to decide a question that is unsettled under Illinois law, namely, when and how does a BIPA claim accrue for statute of limitations purposes. Specifically, the question presented to this Court is:

> If defendant allegedly violates either BIPA Section 15(b) by collecting plaintiff's biometric identifier or information or BIPA Section 15(d) by disclosing it to a third party, does plaintiff's claim accrue, and the statute of limitations begin to run, (1) from the first such collection and/or disclosure; (2) anew with each subsequent collection, scan or disclosure; or (3) upon the final collection, scan or disclosure, because the continuing injury doctrine applies to toll the statute of limitations?

Def.-Applicant's Appl. for Leave to Appeal at 2 (May 6, 2021).

6. The proposed *amici* and their members have a significant interest in the outcome of this case. Some of proposed *amici*'s members have used employee biometric timekeeping and security systems to, among other things, ensure accurate wage payments to employees, prevent time theft and unlawful "buddy punching," reduce operating costs, increase productivity, and secure confidential company and employee information. Employees likewise benefit

from the increased efficiencies, accurate recordkeeping, improved pay systems, and enhanced security that flow from the use of these systems.

7. But even as employers and employees alike benefit from the use of this highly secure and effective technology, restaurants and retailers are increasingly finding themselves prime targets for abusive lawsuits alleging technical violations of BIPA. This case will directly affect the number, scope, and potential consequences of BIPA lawsuits filed against proposed *amici*'s members. Sensible and consistent rulings that are aligned with the statute's remedial purpose are crucial and overdue. They will ensure that BIPA is applied as intended, promotes compliance, and protects against exploitative litigation that seeks wholly disproportionate aggregate damages from businesses, including restaurants and retailers with employees in Illinois.

THE BRIEF OF PROPOSED *AMICI* WILL ASSIST THIS COURT

8. The proposed *amici* respectfully submit that their brief will assist this Court by providing the perspective of their respective members. The brief of proposed *amici* encourages this Court to rule—consistent with the statutory language, common sense, and BIPA's underlying purpose—that a BIPA claim accrues in its entirety when a biometric datapoint is first collected and/or disclosed. There is no "continuing violation" that would enable claims that fall squarely outside the applicable statute of limitations to be revived and swept into litigation, or discrete "per scan" violations that would give rise to cumulative and uncontrolled statutory damages. To rule otherwise would

dramatically expand the reach of this remedial statute and lead to unjust results.

9. In enacting BIPA, the Illinois General Assembly recognized the benefits of biometric technology but sought to balance "the risks posed by the growing use of biometrics by businesses and the difficulty in providing meaningful recourse once a person's biometric identifiers or biometric information has been compromised." *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 35, 129 N.E.3d 1197, 1206 (2019). To this end, BIPA's aim "is to try to head off such problems *before they occur*." *Id.* at ¶ 36, 129 N.E.3d at 1206 (emphasis added).

10. To be sure, BIPA is a remedial statute designed to foster the development and use of innovative biometric technologies while deterring businesses from improperly handling biometric data and ensuring prompt correction when violations do occur. It was not designed as a mechanism to threaten extraordinary damages exposure on good-faith businesses seeking to *enhance* the security of their employees' information. The purpose is not to prevent employers from, or punish them for, utilizing biometric equipment in order to operate its business. Nor was BIPA intended to discourage innovation and the development of such technology. Allowing the circuit court's ruling to stand would have just such an impact.

11. The adoption of the commonsense approach offered by Defendant, and advocated for by the proposed *amici*, would maintain the force and effect

of BIPA while promoting the prompt adjudication of claims consistent with the statute's remedial purpose and protecting the interests of employees and good-faith businesses alike. Accordingly, the attached brief will assist this Court in deciding the issue presented in this case.

12. Counsel for proposed *amici* has conferred with counsel for the parties, and neither party opposes this motion.

CONCLUSION

For the foregoing reasons, the undersigned proposed *amici* have a strong interest in ensuring the proper application of the law of Illinois regarding the accrual of the statute of limitations for BIPA claims, and respectfully request leave to file the attached brief of proposed *amici*.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

The Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15 million people—approximately 10 percent of the U.S. workforce—including nearly 600,000 people in Illinois. Restaurants and other foodservice providers are the largest private-sector employers in Illinois, and the second largest in the United States. Through *amicus* participation, the Restaurant Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Restaurant Law Center's *amicus* briefs have been cited favorably by state and federal courts. *See, e.g.*, *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1303 n.15 (11th Cir. 2019) (en banc).

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The Restaurant Law Center and the RLC (together, "*amici*") and their members have a significant interest in the outcome of this case. Some of *amici*'s members have used employee biometric timekeeping and security systems to, among other things, ensure accurate wage payments to employees, prevent time theft and unlawful "buddy punching," reduce operating costs, increase productivity, and secure confidential company and employee information. Employees likewise benefit from the increased efficiencies, accurate recordkeeping, improved pay systems, and enhanced security that flow from the use of these systems. But even as employers and employees alike benefit from the use of this highly secure and effective technology, restaurants and retailers are increasingly finding themselves prime targets for abusive lawsuits alleging technical violations of the Illinois Biometric Information Privacy Act ("BIPA").

This case will directly affect the number, scope, and potential consequences of BIPA lawsuits filed against *amici*'s members. BIPA is a remedial statute designed to foster the development and use of innovative biometric technologies while deterring businesses from improperly handling biometric data and ensuring prompt correction when violations do occur. It was not designed to serve as the mechanism to threaten extraordinary damages exposure on good-faith businesses seeking to *enhance* the security of their employees' information, particularly where there has been no actual harm to anyone. And yet several court decisions have muddied the waters and opened the floodgates to widespread class action activity—including abusive litigation and pre-suit demand letters threatening lawsuits absent immediate settlement. Sensible and consistent rulings that are aligned with the statute's remedial purpose are crucial and overdue, including in this action. They will ensure that BIPA is applied as intended to promote compliance and protect against exploitative litigation that seeks wholly disproportionate aggregate damages from businesses, including restaurants and retailers with employees in Illinois. For these reasons, *amici* and their members have a strong interest in this Court's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

In enacting BIPA, the Illinois General Assembly recognized the "promise" of biometric technology to, among other things, streamline financial transactions and security screenings. 740 ILCS 14/5(a). Businesses, including some restaurants and retailers, are realizing that promise by using these innovative technologies to benefit employees, customers, and businesses alike. Biometric technology used by responsible employers allows for verification of an individual based on unique personal characteristics, such as a fingerprint. The technology is faster, more reliable, and more secure than conventional identification and security measures. Recognizing the numerous benefits of this user-friendly technology, some restaurants and retailers—with full transparency for their employees—have implemented it for a variety of purposes including, but not limited to: protecting employee information; managing access to facilities and files; tracking employee time; and safeguarding sensitive data.

The Illinois General Assembly crafted the provisions of BIPA to encourage the development of new technology, while building in safeguards for the collection, use, storage, and destruction of sensitive biometric information and identifiers. *See* 740 ILCS 14/5(g). To that end, lawmakers intended BIPA to be a remedial statute with a private right of action designed to promote the responsible use and handling of biometric data. *See* 740 ILCS 14/20; *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 36, 129 N.E.3d 1197, 1206–07 (2019) (describing the statute's intent to prevent and deter violations). BIPA's private right of action allows an individual "aggrieved" by a violation of the statute to bring a claim for injunctive relief, the greater of actual damages or liquidated damages of $1,000 for a negligent violation or $5,000 for a reckless or intentional violation, plus attorneys' fees and costs. *See* 740 ILCS 14/20(1)–(4). The Illinois Supreme Court has held that a BIPA plaintiff need not prove any actual damage to have standing to bring suit under the statute. *Rosenbach*, 2019 IL 123186, ¶ 40, 129 N.E.3d at 1207 ("[A]n individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an 'aggrieved' person and be entitled to seek liquidated damages and injunctive relief pursuant to the Act."). When it authorized individuals to assert claims and seek injunctive relief, even absent any actual harm, the Illinois Supreme Court merely sought to keep the doors of the courts open to ensure compliance with the statute—not to impede the development of innovative technologies or unfairly target and devastate well-intentioned businesses.

On November 4, 2020, the circuit court denied Defendant's motion to dismiss under Section 2-619, ruling that Plaintiff's BIPA claim was not time barred because "the alleged injuries . . . constitute a continuing violation" and "the limitation period is [therefore] held in abeyance." Mem. Op. & Order at 4 (Nov. 4, 2020). This ruling was contrary to BIPA's statutory language and the purposes behind its enactment.

Amici address the following issue presented to this Court for review:

> If defendant allegedly violates either BIPA Section 15(b) by collecting plaintiff's biometric identifier or information or BIPA Section 15(d) by disclosing it to a third party, does plaintiff's claim accrue, and the statute of limitations begin to run, (1) from the first such collection and/or disclosure; (2) anew with each subsequent collection, scan or disclosure; or (3) upon the final collection, scan, or disclosure, because the continuing injury doctrine applies to toll the statute of limitations?

Def.-Applicant's Appl. for Leave to Appeal at 2 (May 6, 2021).

Amici encourage the Court to rule—consistent with the statutory language, common sense, and BIPA's underlying purpose—that a BIPA claim accrues in its entirety when a biometric datapoint is first collected and/or disclosed. There is no "continuing violation" that would enable claims that fall squarely outside the applicable statute of limitations[1] to be revived and swept into litigation, or discrete "per scan" violations that would give rise to cumulative and uncontrolled statutory damages. To rule otherwise would dramatically expand the reach of this remedial statute and lead to unjust results. The adoption of the commonsense approach offered by Defendant would maintain the force and effect of BIPA while promoting the prompt adjudication of claims consistent with the statute's remedial purpose and protecting the interests of employees and good-faith businesses alike.

[1] Although not at issue in this appeal, *amici* disagree with the circuit court's ruling that the applicable statute of limitations for BIPA claims is the five-year "catch all" period set forth in 735 ILCS 5/13-205. BIPA is silent, so courts must apply the most applicable statute of limitations period under Illinois law. *See Watseka First Nat'l Bank v. Horney*, 292 Ill. App. 3d 933, 937, 686 N.E.2d 1175, 1178 (1995) ("Where two statutes of limitations arguably apply to the same cause of action, the one which more specifically relates to the action must be applied."). *Amici* contend that the one-year statute of limitations for privacy claims set forth in 735 ILCS 5/13-201, which applies to "publication of matter violating the right of privacy," is the most specific, applicable statute of limitations. Indeed, BIPA was enacted to codify "that individuals possess a *right to privacy* in and control over their biometric identifiers and biometric information." *See Rosenbach*, 2019 IL 123186, ¶ 33, 129 N.E.2d at 1206 (emphasis added). Statutes should be read in a "consistent and harmonious" way with regards to the statute of limitations. *Uldrych v. VHS of Ill., Inc.*, 239 Ill. 2d 532, 540 (2011). The one-year period governing the disclosure of private information is the most applicable statute of limitations consistent with BIPA's purpose and objectives, and should therefore be applied to all claims under this statute.

ARGUMENT

I. BIPA Claims Accrue Upon the First Scan or Disclosure as Mandated by BIPA's Plain Language and the Purpose Behind its Enactment.

A statute must be construed in a manner consistent with its purpose. The Illinois Supreme Court has repeatedly commented that "[w]hen interpreting a statute, this court's primary objective is to ascertain and give effect to the intent of the legislature," and that "the court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute in one way or another." *City of Chicago v. City of Kankakee*, 2019 IL 122878, ¶ 28, 131 N.E.3d 112, 119 (2019) (quoting *J&J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 119870, ¶¶ 24–25, 67 N.E.3d 243, 250–51 (2016)).

The Illinois Supreme Court has made clear that the purpose of BIPA is "prevent[ion] and deterren[ce]." *Rosenbach*, 2019 IL 123186, ¶ 37, 129 N.E.3d at 1207. The Illinois General Assembly recognized the benefits of biometric technology but sought to balance "the risks posed by the growing use of biometrics by businesses and the difficulty in providing meaningful recourse once a person's biometric identifiers or biometric information has been compromised." *Id.* at ¶ 35, 129 N.E.3d at 1206. To this end, BIPA's aim "is to try to head off such problems *before they occur*." *Id.* at ¶ 36, 129 N.E.3d at 1206 (emphasis added). It is a remedial statute intended to encourage compliance—not a penal statute. *See, e.g.*, *Burlinski v. Top Golf USA Inc.*, No. 19-6700, 2020 U.S. Dist. LEXIS 161371, at *21–22 (N.D. Ill. Sept. 3, 2020) (discussing BIPA's "remedial scheme" (quoting *Meegan v. NFI Indus., Inc.*, No. 20-0465, 2020 U.S. Dist. LEXIS 99131, at *10 (N.D. Ill. June 4, 2020) ("BIPA's provision for actual damages and the regulatory intent of its enactment show that it is a remedial statute."))); *Watson v. Legacy Healthcare Fin. Servs., LLC*, No. 2019-CH-03425, slip op. at 2 (Ill. Cir. Ct., Cook Cnty. June 10, 2020) (A-2). Indeed, the plain language of the private cause of action, *including the availability of injunctive relief*, confirms that the statute seeks to prevent and deter, not to punish good-faith violations. *See* 740 ILCS 14/20. As a result, claims under BIPA should be deemed to accrue fully upon the first scan or disclosure without proper consent, and subsequent scans should not constitute separate or continuing violations. This approach would encourage the early resolution of claims and accomplish BIPA's remedial goal of ensuring prompt compliance with its statutory requirements.

This reading of BIPA is also consistent with the general rule that a cause of action for a statutory violation accrues when a plaintiff's interest is invaded. *Blair v. Nev. Landing P'ship*, 369 Ill. App. 3d 318, 323, 859 N.E.2d 1188, 1192 (2006). An "aggrieved" person is not entitled to "wait for someone to draw him or her a road map. At that time he or she must investigate whether a legal cause of action exists." *Nelson v. Jain*, 526 F. Supp. 1154, 1157 (N.D. Ill. 1981). "[W]here there is a single overt act from which subsequent damages may flow, the statute [of limitations] begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, *and this is so despite the continuing* *nature of the injury*." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 279, 798 N.E.2d 75, 85 (2003) (emphasis added). Furthermore, in the privacy context, a cause of action "usually accrues at the time [the plaintiff's] interest is invaded." *Blair*, 369 Ill. App. 3d at 323, 859 N.E.2d at 1192.

Under BIPA, "[n]o 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" provides certain disclosures and "receives a written release executed by the subject of the biometric identifier." 740 ILCS 14/15(b). Additionally, "[n]o private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless . . . the subject of the biometric identifier or biometric information . . . consents to the disclosure or redisclosure." 740 ILCS 14/15(d)(1).

In *Rosenbach*, the Illinois Supreme Court held that a mere technical violation of one of BIPA's requirements is itself sufficient to support a cause of action for statutory damages even if no actual injury resulted from the alleged violation. 2019 IL 123186, ¶ 33, 129 N.E.3d at 1206. In this case, Plaintiff alleges that Defendant violated BIPA when it used a biometric finger or hand scanner time clock to capture the amount of time he worked without a proper consent. The alleged BIPA violation occurred at the time of the first collection—"not the[] continuing" use of the scanner without alleged consent.

See Robertson v. Hostmark Hosp. Grp., Inc., No. 2018-CH-05194, slip op. at 4 (Ill. Cir. Ct., Cook Cnty. May 29, 2020) (A-11) (holding that the protected interest was violated by "Defendants' alleged failure to first obtain [plaintiff's] written consent before collecting his biometric data"); *Watson*, slip op. at 3 (A-3) ("While the Complaint alleges that Plaintiff had to scan his hand every day he worked, all his damages flowed from that initial act of collecting and storing Plaintiff's handprint in Defendants' computer system without first complying with the statute.").

II. The Continuing Violation Doctrine Does Not Apply to BIPA Claims.

The circuit court applied the continuing violation doctrine to effectively toll the limitations period in connection with Plaintiff's BIPA claim until his last scan. But that limited doctrine should not apply in this context. Even if BIPA's objectives were not "prevent[ion] and deterren[ce]," *Rosenbach*, 2019 IL 123186, ¶ 37, 129 N.E.3d at 1207, the doctrine applies only where "[a] continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation." *Feltmeier*, 207 Ill. 2d at 278, 798 N.E.2d at 85. Any effects of an alleged BIPA violation accrue immediately upon the initial scan or disclosure, and adopting the continuing violation doctrine ignores this fact and would unjustly encourage claimants to delay the assertion of any BIPA claims. *See Cunningham v. Huffman*, 154 Ill. 2d 398, 405, 609 N.E.2d 321, 325 (1993) (applying doctrine in medical malpractice action where "cumulative results of continued negligence [are] the cause of the injury," such that strict application of the statute of limitations would yield "unjust results"); *Feltmeier*, 207 Ill. 2d at 282, 798 N.E.2d at 86–87 (extending doctrine to intentional infliction of emotional distress claim, as the "pattern, course and accumulation of acts" together constituted the tortious behavior).

Blair is instructive. There, the plaintiff sought to recover under the Illinois Right of Publicity Act for the alleged wrongful use of his photograph in promotional materials. 369 Ill. App. 3d at 320–21, 859 N.E.2d at 1190. Just as BIPA requires an entity to obtain consent before collecting or disclosing biometric data, the Illinois Right of Publicity Act prohibits "us[ing] an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent from the appropriate person." *Id.* at 323, 859 N.E.2d at 1192 (quoting 765 ILCS 1075/30).

In *Blair*, the plaintiff's photograph was used in various media to promote the defendant's business from 1995 through 2004. *See id.* at 324, 859 N.E.2d at 1193. The plaintiff argued that his cause of action accrued in 2004 when his photograph was last used. *Id.* at 321, 859 N.E.2d at 1191. The Illinois Appellate Court rejected that position and concluded that the claim accrued on the date the photograph was first published in 1995. According to the court, "the plaintiff allege[d] one overt act"—the use of his likeness in violation of the statute—"with continual effects." *Id.* at 324, 859 N.E.2d at 1193 ("The fact that a single photo of the plaintiff appeared via several mediums between 1995 and 2004 evidences a continual effect."). The same conclusion is warranted here. Plaintiff has alleged one overt act—collection and disclosure of a finger or hand scan without the requisite consent. Like the subsequent publications of the plaintiff's photograph in *Blair*, any subsequent scans or attendant disclosures here were not separate statutory violations; they were continual effects of the initial overt act.

Rather than preventing "unjust results," *Cunningham*, 154 Ill. 2d at 405, 609 N.E.2d at 325, application of the continuing violation doctrine would permit BIPA claimants to "sit back and wait" to file their claims. Such delay plainly undercuts BIPA's objectives of "prevent[ion] and deterren[ce]." *Rosenbach*, 2019 IL 123186, ¶ 37, 129 N.E.3d at 1207. Instead, BIPA claimants should be encouraged to promptly seek redress to effectuate the statute's remedial purpose. This Court should therefore reverse the circuit court's decision and reject application of the continuing violation doctrine to BIPA claims.

III. The "Per Scan" Theory of Liability is Contrary to Basic Canons of Statutory Interpretation and Constitutional Principles.

A. The Intent Behind the Adoption of BIPA is to Promote, Not Hinder, the Proper Use of Biometric Technology.

From finger scans to unlock computers and eye scans to access airport security, the use of biometric technology is becoming prevalent in everyday life, including business operations. Consider the workday of a hypothetical employee named David, a server at a popular fast-casual restaurant. He begins his shift by scanning his finger to clock in using a secure biometric time clock. As customers begin to arrive, the host seats a happy young couple in his section. David greets them, takes their drink orders, and then returns to the computer terminal and scans his finger to input the orders. When he delivers their drinks, they are ready to order appetizers. David, again, scans his finger to input that order. Throughout his shift, David repeats this process several times. Each time he enters a drink, appetizer, entrée, or dessert order into the system, David scans his finger to log in. And any time he wants to check on an order's status, print a receipt, or close out an order, David scans his finger again.

As a career server, David has previously worked with passcode and card-swipe enabled systems and greatly prefers the speed and efficiency of using the biometric-based system. In fact, when David's employer gave him a choice of using a passcode or biometric clock, he elected to use the finger-scan process after reviewing and signing the disclosure forms his employer gave him. Finger scanning enables him to spend less time at the computer terminal and provide better customer service, which he has seen translate into greater tips. When there is a lull in his day, David scans his finger again to clock out for a short break and then scans again to clock back in. By the end of his shift, he has scanned his finger 95 times, including one final scan to clock out at the end of the day.

In a typical week, David works five shifts. By the end of the week, he may have scanned his finger nearly 500 times. In a month, he might scan his finger nearly 2,000 times. If a per scan theory of liability under BIPA were adopted, that means David's employer could potentially be liable for $2 million in liquidated damages for a single employee over the course of just one month. Such an allegation could arise if, for example, David claimed that the language in the disclosure he signed did not meet the technical requirements of BIPA, or that additional disclosures and consents were required prior to each scan. Multiply that by the number of employees at the average fast-casual restaurant, and the number of restaurant locations within the state, and the results are staggering. Indeed, if the average fast-food restaurant has 70 employees at each location, and a particular fast-food chain has 600 locations in Illinois, the potential damages would be approximately *$84 billion* in a single month. Such a result is patently inconsistent with the statute's purpose and would lead to absurd results.

Beyond the hospitality industry, other industries use biometric technology and would likewise be adversely impacted by adoption of a per scan theory of liability. For example, many companies, including retailers, hospitals, banks, laboratories, and hazardous material storage facilities, use biometric technology as a key component in their facility security protocols, as well as to protect sensitive health, employee, financial, and business information. Other examples include daycare centers that take finger scans of parents, guardians, or caretakers tasked with picking up children each day; and businesses that deploy contactless temperature scans during the COVID-

19 pandemic that implicate biometric technology.[2] Each of these situations has prompted the filing of putative class actions under BIPA.[3]

Acutely aware of the sensitive nature of the biometric information that is the cornerstone of the technologies described above, *amici*'s members dedicate significant time, energy, and resources to compliance and to the careful collection, use, storage, and destruction of any biometric data. Despite their best efforts, because of conflicting interpretations of BIPA's requirements or innocent transgressions, good-faith businesses could be deemed to have committed technical violations and be subject to substantial aggregate damages. This is not hypothetical. This reflects the actual experiences of a number of businesses—including companies based in Illinois and those doing business in the state—in the current BIPA litigation environment. Application of a per scan theory of liability exponentially exacerbates that risk.

As a result, companies concerned about potential litigation exposure for

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[2] *See* Alexander H. Southwell et al., *U.S. Cybersecurity and Data Privacy Outlook and Review—2021* § II.E, GIBSON DUNN (Jan. 28, 2021), https://www.gibsondunn.com/us-cybersecurity-and-data-privacy-outlook-and-review-2021/; Ryan Blaney et al., *Litigation Breeding Ground: Illinois' Biometric Information Privacy Act*, NAT'L L. REV. (Mar. 18, 2021), https://www.natlawreview.com/article/litigation-breeding-ground-illinois-biometric-information-privacy-act; Gregory Abrams et al., *Exam-Proctoring Software Targeted in New Wave of BIPA Class Action Litigation*, FAEGRE DRINKER BIDDLE & REATH LLP (Mar. 23, 2021), https://www.jdsupra.com/legalnews/exam-proctoring-software-targeted-in-4630299; Hannah Schaller et al., *BIPA Litigation in 2021: Where We've Been & Where We're Headed*, ZWILLGENBLOG (Aug. 18, 2021), https://www.zwillgen.com/litigation/bipa-litigation-2021/.

[3] *See id.*

innocent mistakes could decide not to use these tools, or national and large regional companies like *amici*'s members could choose to carve out their Illinois operations from a technology system roll out. Both scenarios would hurt employees and companies. Employees would be forced to use less efficient or secure technology, resulting in longer task time and reduced productivity. Employees in the same position or department but located in different states (e.g., Illinois and Indiana) would have to use different systems—one using biometric technology and the other not—creating operational inefficiencies. Additionally, companies would have the additional administrative burdens and costs of two separate systems, processes, procedures, training, compliance tracking, and reporting.

The Illinois General Assembly did not intend for BIPA to obstruct or hinder the development and implementation of new technology for use within the state. Nor was BIPA intended to impose catastrophic damages on companies acting in good faith. If adopted, a per scan theory of liability would do just that.

B. A "Per Scan" Theory of Liability Would Promote Litigation.

Not only would a "per scan" theory of liability hinder innovation, it would promote meritless litigation by permitting uncapped cumulative statutory damages (further aggregated in the class action context) that threaten extraordinary penalties on employers operating in good faith in Illinois. Like application of the continuing violation doctrine, this would be inconsistent with BIPA's goals of "prevent[ion] and deterren[ce]." *See Rosenbach*, 2019 IL 123186, ¶ 37, 129 N.E.3d at 1207. Here, it would be purely punitive. After all, a company forced to shutter its business cannot remediate its good-faith errors, and the employees forced out of work in the process are certainly not served by this outcome.

Such a construction of BIPA would also be contrary to the public interest and would prompt a further expansion of class action litigation. The litigation boom in Illinois federal and state courts following the January 2019 *Rosenbach* decision is instructive.

For the ten years prior to the decision, the plaintiffs' bar filed 173 BIPA cases; in just *the five months* after the *Rosenbach* decision, 151 BIPA class actions were filed.[4] By October 2019, over 300 BIPA actions were pending in Illinois state court,[5] and as of February 2021, more than 1,000 BIPA actions had been filed in the preceding two years in Illinois alone, representing more

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[4] Gerald L. Maatman, Jr. et al., *Biometric Privacy Class Actions By the Numbers: Analyzing Illinois' Hottest Class Action Trend*, SEYFARTH SHAW LLP (June 28, 2019), https://www.workplaceclassaction.com/2019/06/biometric-privacy-class-actions-by-the-numbers-analyzing-illinois-hottest-class-action-trend.

[5] Michael J. Bologna, *Law on Hiring Robots Could Trigger Litigation for Employers*, BLOOMBERG LAW (Oct. 11, 2019), https://news.bloomberglaw.com/daily-labor-report/law-on-hiring-robots-could-trigger-litigation-for-employers.

than a five-fold increase in BIPA litigation in one-fifth the time that the first cases were filed.[6]

The onslaught of opportunistic litigation in this space has continued unabated and is expected to grow given the need for increased use of contactless and remote technology during the pandemic. Over the past year alone:

- Numerous actions have been filed in connection with critical health screenings, as well as remote work and learning instituted as a result of the COVID-19 pandemic;[7]
- Employers, including many restaurants, retailers, and small businesses, remained the primary target, most often in connection with their transparent use of biometric-based timekeeping systems;[8]

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[6] Grace Barbic, *Lawmakers Revisit Data Collection Privacy Laws*, THE COURIER (Mar. 10, 2021), https://www.lincolncourier.com/story/news/politics/2021/03/10/biometric-information-privacy-act-protect-small-businesses/6944810002/.

[7] Southwell, *supra*, https://www.gibsondunn.com/us-cybersecurity-and-data-privacy-outlook-and-review-2021/ ("The COVID-19 pandemic also introduced new types of BIPA litigation associated with health screenings and remote work."); Blaney, *supra*, https://www.natlawreview.com/article/litigation-breeding-ground-illinois-biometric-information-privacy-act ("Due to the COVID-19 pandemic, many employers and schools have turned to remote work and learning, and some use facial recognition or other forms of biometric information as a contactless way to track employees' time or ensure secure access to information or buildings.").

[8] Indeed, "more than 90% of the BIPA cases on file are brought in the employment context (mostly involving the use of finger- and hand-scanning time clocks)." Lauren Capitini et al., *The Year To Come In U.S. Privacy & Cybersecurity Law (2021)*, JDSUPRA (Jan. 28, 2021), https://www.jdsupra.com/legalnews/the-year-to-come-in-u-s-privacy-9238400/.

- Nursing homes, hospitals, the Salvation Army, and universities have also been targeted;[9] and
- "The trend of sizeable settlements . . . has persisted throughout 2020"[10] and 2021.[11]

BIPA's threat of unchecked aggregate damages forces many businesses to settle even meritless claims. Settlements are often in the tens of millions of dollars,[12] and Illinois's small businesses are often hit the hardest and forced into extortionate settlements when faced with the prospect of insolvency absent settlement.[13]

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9 Barbic, *supra*, https://www.lincolncourier.com/story/news/politics/2021/03/10/biometric-information-privacy-act-protect-small-businesses/6944810002/ (identifying BIPA litigation targets); Abrams, *supra*, https://www.jdsupra.com/legalnews/exam-proctoring-software-targeted-in-4630299 ("[T]here have been multiple BIPA class action lawsuits brought against universities and other similar entities. These lawsuits have been brought on behalf of students who, while in Illinois, have used online, remote exam-proctoring software that allegedly captures their facial geometry and other data.").

10 Southwell, *supra*, https://www.gibsondunn.com/us-cybersecurity-and-data-privacy-outlook-and-review-2021/.

11 *See* Schaller, *supra*, https://www.zwillgen.com/litigation/bipa-litigation-2021/.

12 Blaney, *supra*, https://www.natlawreview.com/article/litigation-breeding-ground-illinois-biometric-information-privacy-act.

13 Barbic, *supra*, https://www.lincolncourier.com/story/news/politics/2021/03/10/biometric-information-privacy-act-protect-small-businesses/6944810002/ ("Clark Kaericher, Vice President of the Illinois Chamber of Commerce, said despite the fact that most of the headline-making cases are against big companies, it's mostly small companies in the state facing lawsuits. . . . 'It's enough to put any small business into insolvency'" (quoting Kaericher)).

The wave of BIPA litigation since *Rosenbach* will pale in comparison to the tsunami of lawsuits that will result if courts adopt a per scan theory of liability focused on employees' voluntary use of biometric timekeeping systems.

C. Adoption of a "Per Scan" Liability Interpretation Would Lead to "Absurd" Results.

Illinois law disfavors statutory interpretations that lead to absurd, inconvenient, or unjust results. *See People v. Raymer*, 2015 IL App (5th) 130255, ¶ 9, 28 N.E.3d 907, 911 (2015) ("In construing a statute, a court presumes that the legislature did not intend to create an absurd, inconvenient, or unjust result."); *Wade v. City of N. Chi. Police Pension Bd.*, 226 Ill. 2d 485, 510, 877 N.E.2d 1101, 1116 (2007) ("When a literal interpretation of a statutory term would lead to consequences that the legislature could not have contemplated and surely did not intend, this court will give the statutory language a reasonable interpretation." (citing *In re Marriage of Eltrevoog*, 92 Ill. 2d 66, 70–71, 440 N.E.2d 840, 842 (1982))); *Harshman v. DePhillips*, 218 Ill. 2d 482, 501, 844 N.E.2d 941, 953 (2006) ("However, when interpreting a statute, we must presume the legislature did not intend to produce an absurd or unjust result." (citing *Andrews v. Kowa Printing Corp.*, 217 Ill. 2d 101, 107–08, 838 N.E.2d 894, 899 (2005))).

Construing BIPA to impose liquidated damages absent injury on a per-scan basis would lead to the "absurd" results disfavored by Illinois law by, for example, discouraging the adoption of biometric technology and innovation. Given the ever-changing and ever-improving technology and the evolving legal landscape, compliance with BIPA's requirements has become a moving target, and despite an employer's good-faith best efforts, technical violations might still occur. The Illinois General Assembly surely did not intend to inhibit advances in technology.

The flaws in a "per scan" interpretation of the statute are compounded by the fact that a BIPA plaintiff need not prove any actual damages. The Illinois Supreme Court held that a BIPA plaintiff has standing to sue even for a minor technical violation of the statute without having ever been harmed. *See Rosenbach*, 2019 IL 123186, ¶ 40, 129 N.E.3d at 1207. Taken to its logical conclusion, a per scan theory of liability could enable a single BIPA plaintiff, who has suffered no actual injury, to singlehandedly put an employer out of business (and all of its employees out of jobs). Indeed, a plaintiff, having recognized its employer's technical violation, would have a perverse incentive to delay bringing suit and instead—with each new scan resetting the statute of limitations and constituting a new offense—allow the violations to accumulate to the plaintiff's financial gain and the employer's detriment. As plaintiffs have been forced to concede elsewhere, that would be absurd, at odds with the statutory purpose, and contrary to the "orderly administration of justice." *See Blair*, 369 Ill. App. 3d at 324, 859 N.E.2d at 1193 (explaining that "predictability and finality" of statutes of limitations "are desirable, indeed indispensable, elements of the orderly administration of justice"); *see also* Pl.-Resp't's Answer in Opp'n to Def.-Pet'r's Pet. for Permission to Appeal at 22, *White Castle Sys., Inc. v. Cothron*, No. 20-8029 (7th Cir. Oct. 29, 2020), ECF No. 8 (disclaiming per scan theory of damages as "baseless and absurd" and any claim to such recovery "wildly hyperbolic"); Pl.'s Mot. & Mem. Supp. Remand to State Ct. at 3–4, *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19-2942 (N.D. Ill. May 13, 2019), ECF No. 14 ("Plaintiff does not and could not allege that she is entitled to statutory damages for every instance that she and others similarly-situated scan a fingerprint to clock in to or out of work," which would be "outlandish" and "defy [] reality").

Numerous courts in Illinois have agreed that a BIPA violation occurs only upon the initial alleged breach of the statute's requirements. *See, e.g.*, *Robertson*, slip op. at 5–6 (A-12–A-13) (holding that arguments that BIPA is violated on a per-scan basis are "contrary to the unambiguous language of the statute" and would "lead to an absurd result" and affirming that a violation occurs only on the first time that biometric data is collected without proper consent); *Watson*, slip op. at 3 (A-3) (holding that the BIPA claims accrued only upon the first collection of the biometric information); *Smith v. Top Die Casting Co.*, 2019-L-248, slip op. at 3 (Ill. Cir. Ct., Winnebago Cnty. Mar. 12, 2020) (A-20) (holding that a BIPA claim accrues only on the initial collection of biometric information and finding that violations accruing on a per-scan basis, "would likely force out of business—in droves—violators who without any nefarious intent installed new technology"). As discussed above, these decisions follow the longstanding rule that "a plaintiff's cause of action . . . accrues at the time his or her interest is invaded" and follows the canon of interpretation that favors reasonable interpretations of laws duly enacted by the Illinois General Assembly. *See Blair*, 369 Ill. App. 3d at 323, 859 N.E.2d at 1192.

D. Adoption of a "Per Scan" Liability Interpretation Also Raises Due Process Concerns.

Statutes should be construed to avoid due process concerns. Indeed, "an interpretation under which the statute would be considered constitutional is preferable to one that would leave its constitutionality in doubt." *Oswald v. Hamer*, 2018 IL 122203, ¶ 38, 115 N.E.3d 181, 193 (2018) (quoting *Braun v. Ret. Bd. of Firemen's Annuity & Benefit Fund*, 108 Ill. 2d 119, 127, 483 N.E.2d 8, 12 (1985)) (collecting cases); *see also Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 564, 836 N.E.2d 640, 663 (2005) (courts will avoid any construction which would raise doubts as to the statute's constitutionality).

Adopting an interpretation of BIPA that would result in staggeringly high liquidated damages exposure for a BIPA defendant, even with no actual injury, would raise significant due process concerns. The U.S. Supreme Court's direction is clear that purely punitive damages may not be unlimited, nor may they grossly exceed the actual damages suffered by the plaintiff. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the U.S. Supreme Court held:

> [I]t is well established that there are procedural and substantive constitutional limitations on these awards. . . . The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. . . . The reason is that [e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair

> notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.

538 U.S. 408, 416–17 (2003) (internal quotation marks and citations omitted). The U.S. Supreme Court also reaffirmed its instructions to "courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996)). Illinois courts follow the rule laid out in *State Farm*. *See, e.g.*, *Blount v. Stroud*, 395 Ill. App. 3d 8, 24, 915 N.E.2d 925, 941 (2009); *Doe v. Parrillo*, 2020 IL App (1st) 191286, ¶ 77, --- N.E.3d --- (2020), *appeal allowed*, 163 N.E.3d 707 (Ill. 2021).

Furthermore, the Illinois Supreme Court has explained that a statute violates a defendant's due process rights under the Illinois Constitution when the statute is not "reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety and general welfare." *People v. Bradley*, 79 Ill. 2d 410, 417 (1980) (internal quotation marks and citation omitted).

Applying these principles to the potential liquidated damages that could flow from adopting a per scan theory of liability demonstrates that the statute could not withstand scrutiny, even under the heightened test for punitive damages, which BIPA never intended to impose. First, even a business that engaged in reasonable, good-faith efforts to comply with BIPA could be subject to enterprise-threatening penalties under such a reading of the statute.

Second, exorbitant penalties could be awarded even with no actual damages. Indeed, the near certainty of such an outcome is clear, given that no published opinions involving BIPA claims by employees have involved any actual harm since the *Rosenbach* opinion was issued. *See, e.g.*, *Rogers v. CSX Intermodal Terminals, Inc.*, 409 F. Supp. 3d 612, 615, 617 (N.D. Ill. 2019) (although the plaintiff "voluntarily provided his fingerprints," he still "qualifie[d] as an aggrieved person under BIPA because" of an alleged violation of the statute's requirements). As the Eleventh Circuit observed, "[g]iven the '*in terrorem* character of a class action,' [] a class defined so as to improperly include uninjured class members increases the potential liability for the defendant and induces more pressure to settle the case, regardless of the merits." *Cordoba v. DirecTV, LLC*, 942 F.3d 1259, 1276 (11th Cir. 2019) (citation omitted).

Third, adopting an interpretation of BIPA that would create massive liability exposure for Illinois employers without the presence of actual harm would not reasonably advance BIPA's goals of encouraging the use of biometric technology. Nor would it reduce the risk of any "compromise" of biometric data, as employees in the time-clock cases all acknowledge that they already knew they were providing their finger, hand, or facial scans to their employer for the purpose of tracking their work time. Because a per scan theory of liability could impose devastating liability on employers with no countervailing benefit to employees—who already knowingly consented to providing their finger, hand, or facial scans—adoption of that position would violate employers' due process rights. *See Bradley*, 79 Ill. 2d at 418 (holding statute violated due process where penalty was "not reasonably designed to remedy the evil" the legislature identified); *People v. Morris*, 136 Ill. 2d 157, 162 (1990) (holding statutory penalty unconstitutional where it did not advance legislature's stated purpose in enacting statute).

Fourth, the Seventh Circuit Court of Appeals' recent decision in *Epic Systems Corp. v. Tata Consultancy Services Ltd.* also highlights the meaningful concerns with the excessive penalties that would result from employing a per scan theory of liability. 980 F.3d 1117 (7th Cir. 2020), *petition for cert. filed*, No. 20-1426 (Apr. 6, 2021). In *Epic Systems*, a jury held that the defendant engaged in *intentional*, repeated wrongful conduct spanning years that caused financial harm to the plaintiff. *See id.* at 1142. Even on these facts, the Seventh Circuit found the punitive damages award—double the compensatory damages amount—exceeded the outermost limits of the due process guarantee. *See id.* at 1144.

This vast disconnect between a claim under BIPA for statutory damages that would impose exorbitant penalties without the need to demonstrate any actual injury threatens to exceed the boundaries of due process delineated by the U.S. Supreme Court in *State Farm* and *BMW*. This Court should reject such a reading of the statute.

CONCLUSION

For these reasons and those set forth in the Defendant's brief, this Court should reverse the circuit court's decision and rule that claims under BIPA fully accrue upon the first scan or disclosure without proper consent. Such a ruling would be consistent with the statutory language and effectuate BIPA's remedial goal of ensuring prompt compliance with its statutory requirements.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 27 pages and 7,348 words.

/s/ Anneliese Wermuth
Anneliese Wermuth

APPENDIX

TABLE OF CONTENTS TO SUPPLEMENTAL APPENDIX

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

BRANDON WATSON, individually and on behalf of all others similarly situated, Plaintiff, v. LEGACY HEALTHCARE FINANCIAL SERVICES, LLC d/b/a Legacy Healthcare; LINCOLN PARK SKILLED NURSING FACILITY, LLC d/b/a Warren Barr Lincoln Park a/k/a The Grove at Lincoln Park; and SOUTH LOOP SKILLED NURSING FACILITY, LLC d/b/a Warren Barr South Loop, Defendants.	CASE NO. 19 CH 3425 CALENDAR 11

ORDER

This matter came before the Court on Defendants' 2-619 motion to dismiss the putative Class Action Complaint of Plaintiff Brandon Watson. For the reasons explained below, the motion is granted.

BACKGROUND

Plaintiff was required to scan his hand to clock in and out of work at Defendants' nursing home facilities in Chicago.[1] Plaintiff worked as a Certified Nursing Assistant for Defendant Legacy Healthcare Financial Services, LLC ("Legacy"), which controls 26 nursing home facilities in Illinois. He worked at Defendant Lincoln Park Skilled Nursing Facility, LLC from December of 2012 through February of 2019, and at Defendant South Loop Skilled Nursing Facility, LLC from May through November of 2017.

Plaintiff filed his one-count Class Action Complaint on March 15, 2019, alleging that Defendants failed to properly disclose and obtain releases related to the collection, storage, and use of his biometric information, in violation of the Illinois Biometric Information Privacy Act ("BIPA"). He asks for statutory damages and an injunction under BIPA, individually and on behalf of a class of similarly-situated employees.

[1] The facts recited here are based upon the allegations of Plaintiff's Complaint, which are taken as true for purposes of this motion.

Defendants move to dismiss the Complaint under Section 2-619 of the Illinois Code of Civil Procedure, arguing that (1) Plaintiff's claims are time-barred; (2) Plaintiff's claims are preempted by the Illinois Workers Compensation Act; and (3) Plaintiff's claims are preempted by Section 301 of the Labor Management Relations Act.

APPLICABLE LAW

The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003). Section 2-619(a)(5) provides for dismissal of a claim that "was not commenced within the time limited by law." Dismissal of a complaint pursuant to section 2-619(a)(9) is permitted where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." *Id.* The affirmative matter must negate the cause of action completely. *Id.* The trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party, and grant the motion only if the plaintiff can prove no set of facts that would support a cause of action. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997).

ANALYSIS

(1) Statute of Limitations

Defendants argue that Plaintiff's claim is barred by the statute of limitations. BIPA does not contain its own statute of limitations, so Defendants contend that the claim should be governed by the one-year statute applicable to what it calls the "most analogous common law claim"—invasion-of-privacy claims. That statute provides:

> Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued.

735 ILCS 5/13-201.

This is not the applicable statute of limitations. BIPA's Section 15(d) could be construed to address "publication of matter violating the right of privacy" in prohibiting private entities from "disclos[ing], redisclos[ing], or otherwise disseminat[ing] a person's or a customer's biometric identifier or biometric information . . . ." 740 ILCS 14/15(d). However, in this case Plaintiff did not include a claim under Section 15(d). Rather, he claimed violations only of Sections 15(a) and (b), which require private entities to publicly provide retention schedules and guidelines for permanently destroying biometric information, and to make disclosures and obtain releases before collecting, storing, and using that information. Sections (a) and (b) are violated even if there is no publication. Therefore, the one-year statute does not apply.

Nor does the two-year statute of limitations for a "statutory penalty" (735 ILCS 5/13-202) apply to this case. BIPA's liquidated damages provision is remedial, not penal. In *Rosenbach v. Six Flags Entertainment Corp.*, the Illinois Supreme Court explained that the General Assembly enacted BIPA "to try to head off such problems before they occur," by enacting safeguards and "by subjecting private entities who fail to follow the statute's requirements to substantial potential liability, including liquidated damages . . . ." 2019 IL 123186, ¶ 36. Like the Telephone Consumer Protection Act at issue in *Standard Mutual Ins. Co. v. Lay*, BIPA was "designed to grant remedies for the protection of rights, introduce regulation conducive to the public good, or cure public evils." 2013 IL 114617, ¶ 31.

The applicable statute of limitations is the five-year "catch-all" provision of 735 ILCS 5/13-205. It begins to run on the date the cause of action accrued. Defendants argue that, even if the five-year statute applies, Plaintiff's claim is time-barred because his cause of action accrued when Defendant scanned Plaintiff's hand on his *first* day of work—December 27, 2012. This suit was filed on March 15, 2019, more than six years later.

Plaintiff argues that each daily scan of his hand violated BIPA, so his *last* day of work—February 21, 2019—is the key date for limitations purposes. He argues that all scans in the five years before he filed the Complaint are actionable.

Generally, a cause of action accrues "when facts exist that authorize one party to maintain an action against another." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278 (2003). Plaintiff argues that his claims are most analogous to wage claims, where each inadequate paycheck gives rise to a separate cause of action. The same cannot be said for each of Plaintiff's hand scans. As the Court in *Feltmeier* stated:

> [W]here there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury.

Id. at 79. (emphasis added).

In wage claims, damages flow from each inadequate paycheck. Additional damages accrue every time a paycheck is short. By contrast, Plaintiff's damages flow from the "single overt act" of the initial collection and storage of his biometric data. According to the Complaint, "From the start of Plaintiff's employment with Defendants in 2012," Defendants required him to have his "fingerprint and/or handprint collected and/or captured so that Defendants could store it and use it moving forward as an authentication method." (Cplt ¶18). The Complaint alleges that, *before* collecting Plaintiff's biometric information, Defendants did not provide Plaintiff with the required written notices and did not get his required consent. (Cplt ¶¶ 22, 23). While the Complaint alleges that Plaintiff had to scan his hand every day he worked, all his damages flowed from that initial act of collecting and storing Plaintiff's handprint in Defendants' computer system without first complying with the statute. Plaintiff's handprint was scanned and stored in Defendants' system on Day 1, allowing for authentication every time he signed in.

Plaintiff's cause of action accrued when his handprint allegedly was collected in violation of BIPA on his first day of work on December 27, 2012. Therefore, because Plaintiff filed his case on March 15, 2019, Plaintiff's claim is time-barred under the five-year statute of limitations.

This holding disposes of the case, but the Court will address Defendants' other arguments for the record.

(2) Preemption by Workers Compensation Act

Defendant argues that Plaintiff's claims are preempted by the exclusive remedy provisions of the Illinois Workers Compensation Act (the "Act"), 820 ILCS 305/5(a) and 11.

The Act "generally provides the exclusive means by which an employee can recover against an employer for a work related injury." *Folta v. Ferro Eng'g*, 2015 IL 118070, ¶ 14. However, the employee can escape the Act's exclusivity provisions by establishing that the injury "(1) was not accidental; (2) did not arise from his [or her] employment; (3) was not received during the course of employment; or (4) was not compensable under the Act." *Id.*

Defendant argues that none of these exceptions apply in this case. In response, Plaintiff argues that exceptions (1) and (4) both apply—that the BIPA violations were not accidental and were not compensable under the Act.

To show that an injury was not accidental, "the employee must establish that his employer or co-employee acted deliberately and with specific intent to injure the employee." *Garland v. Morgan Stanley & Co.*, 2013 IL App (1st) 112121, ¶ 29. Plaintiff has made no such allegation in his Complaint, so he has not established that the injury was not accidental. To put it another way, the Complaint leaves open the possibility that the injury *was* accidental. Plaintiff implicitly acknowledges this when he alleges that he and the members of the class are entitled to recover "anywhere from $1,000 to $5,000 in statutory damages." (Cplt ¶ 57). Statutory damages of $1,000 may be recovered for *negligent* violations of BIPA (740 ILCS 14/20(1)), and caselaw has equated "negligent" with "accidental" under the Act. *See Senesac v. Employer's Vocational Res.*, 324 Ill. App. 3d 380, 392 (1st Dist. 2001).

Plaintiff also argues that exception (4) applies—the injury was not compensable under the Act. In *Folta,* the Illinois Supreme Court addressed how courts should analyze this exception.[2] Rejecting the argument that the plaintiff's mesothelioma was not compensable under the Act because recovery in his situation was barred by a statute of repose, the court focused on the *type of injury* alleged and whether the legislature intended such injuries to be within the scope of the Act. The court stated, "[W]hether an injury is compensable is related to whether the type of injury categorically fits within the purview of the Act." *Id.* at ¶ 23. Because the Act specifically addressed diseases caused by asbestos exposure (such as mesothelioma), the court found that the legislature contemplated that this type of disease would be within the scope of the Act, and it was therefore compensable under the Act. *Id.* at ¶¶ 25, 36.

The same cannot be said for injuries sustained from violations of BIPA. As the court stated in *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶ 30, BIPA "is a privacy rights law that applies inside and outside the workplace." By including in BIPA a provision for a private right of action in state or federal court (740 ILCS 14/20), the legislature showed it did not contemplate that BIPA claims would categorically fit within the purview of the Workers Compensation Act. Moreover, BIPA's definition of "written release" refers specifically to

[2] *Folta* was decided under both the Workers Compensation Act and the Workers' Occupational Diseases Act, 820 ILCS 310/5(a) and 11, which contain analogous exclusivity provisions.

releases executed by an employee as a condition of employment, further evidence that the legislature did not intend the Workers Compensation Act to preempt BIPA actions in the employment context. 740 ILCS 14/10.

The court holds that BIPA claims are not compensable under the Act. Therefore, BIPA claims fall within the fourth exception to the Act's exclusivity provisions. Plaintiff's BIPA claims are not preempted by the Act.

(3) Preemption by § 301 of Labor Management Relations Act

Finally, Defendant argues that this case should be dismissed because Section 301 of the Labor Management Relations Act (29 U.S.C. §185(a)) preempts Plaintiff's BIPA claim. That section provides:

> (a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In analyzing this provision, the U.S. Supreme Court stated:

> [I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute.

Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 405-06 (1988).

In Illinois, the First District Appellate Court explained the analysis as follows:

> Where a matter is purely a question of state law and is entirely independent of any understanding of the terms of a collective bargaining agreement, it may proceed as a state-law claim. By contrast, where the resolution of a state-law claim depends on an interpretation of the collective bargaining agreement, the claim will be preempted. Where claims are predicated on rights addressed by a collective bargaining agreement, and depend on the meaning of, or require interpretation of its terms, an action brought pursuant to state law will be preempted by federal labor laws. Defenses, as well as claims, must be considered in determining whether resolution of a state-law claim requires construing of the relevant collective bargaining agreement.

Gelb v. Air Con Refrigeration & Heating, Inc., 356 Ill. App. 3d 686, 692-93 (1st Dist. 2005) (internal citations omitted).

With their motion, Defendants submitted sworn declarations attaching copies of the collective bargaining agreements ("CBAs") in effect at the Lincoln Park and South Loop nursing facilities where Plaintiff worked. The Lincoln Park CBA with SEIU provided, in relevant part:[3]

> Management of the Home, the control of the premises and the direction of the working force are vested exclusively in the Employer subject to the provisions of this Agreement. The right to manage includes . . . to determine and change starting times, quitting times and shifts, and the number of hours to be worked . . . to determine or change the methods and means by which its operations ought to be carried on; to set reasonable work standards . . . .

(Dfts' Mot., Choi Dec., Exh. A, p. 7).

The South Loop CBA with Local 743 in effect when Plaintiff worked at the South Loop facility in 2017 provided, in relevant part:

> [South Loop] has, retains, and shall continue to possess and exercise all management rights, functions, powers, privileges and authority inherent in the right to manage includ[ing] . . . the right to determine and change schedules, starting times, quitting times, and shifts, and the number of hours to be worked . . . to determine, modify, and enforce reasonable work standards, rules of conduct and regulation (including reasonable rules regarding . . . attendance, and employee honesty and integrity) . . . .

(Dfts' Mot., James Dec., Exh. A, p. 5).

Under *Lingle* and *Gelb*, the question is whether resolution of the BIPA claim in this case depends on an interpretation of the CBAs quoted above. Defendants argue that Plaintiff's claim "cannot possibly be resolved" without interpreting the governing CBAs. The Court disagrees. Resolution of this case is purely a question of state law—whether or not Defendants complied with BIPA by making the required written disclosures and getting the required written release before collecting, storing, and using Plaintiff's biometric information. Even if the CBAs allowed Defendants to set a rule requiring Plaintiff to clock in with his handprint—as part of "determining reasonable work standards"—the Court does not need to interpret the CBAs to decide if Defendants complied with BIPA's requirements. This is so even though the unions may be Plaintiff's "legally authorized representatives" under Section 15(b)(3) for purposes of signing the required release. The Court does not need to interpret the CBA to determine if the release was signed or not.

The CBAs are only tangentially related to this dispute, if at all. As the U.S. Supreme Court stated in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985), "[N]ot every dispute

[3] Defendants attached the CBA in effect between May 1, 2017 and April 30, 2020. The relevant CBA would be the one in effect when Plaintiff began work at Lincoln Park on December 27, 2012. Even if Defendants had attached the correct CBA, though, Defendants' preemption argument fails for the other reasons described herein.

concerning employment, or *tangentially involving* a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." (emphasis added). Preemption promotes uniformity of federal labor law, but preemption is required only if resolution of the dispute is "substantially dependent" on analysis of the terms of the CBA. *Id.* at 220.

As the court in *Gelb* directed, this Court has considered the defenses as well as the claims in this case. The Court notes that Defendants have raised no defenses that require an interpretation of the CBAs. Defendants do not assert that the unions received the required BIPA disclosures or signed BIPA releases on behalf of employees. Instead, they only point out that the broad management rights provisions of the CBAs allow them to set work standards. Deciding this case does not require the Court to interpret the CBAs.

In making our holding, the Court respectfully declines to follow the nonbinding Seventh Circuit case of *Miller v. Southwest Airlines*, 926 F. 3d 898 (7th Cir. 2019) and the Northern District of Illinois cases that followed it, *Gray v. Univ. of Chi. Med. Ctr., Inc.*, No. 19-cv-04229, 2019 U.S. Dist. LEXIS 229536 (N.D. Ill. Mar. 26, 2019) and *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19 C 2942, 2020 U.S. Dist. LEXIS 32577 (N.D. Ill. Feb. 26, 2020). Our case involves a motion to dismiss under Section 2-619 of the Illinois Rules of Civil Procedure, which should be granted "only if the plaintiff can prove no set of facts that would support a cause of action." *In re Chicago Flood Litigation,* 176 Ill. 2d 179, 189 (1997). Here, Plaintiff *could* prove a set of facts under which his claim was not preempted. Defendants did not meet their burden of proof on their 2-619 motion to dismiss argument based on Section 301 preemption.

CONCLUSION

Defendants' Motion to Dismiss is granted under 2-619(a)(5) and Plaintiff's Complaint is dismissed with prejudice for failure to bring suit within five years after the cause of action accrued. This is a final order disposing of all matters.

ENTERED:

Judge Pamela McLean Meyerson

Judge Pamela McLean Meyerson

JUN 10 2020

Circuit Court – 2097

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

ENTERED
Judge Neil H. Cohen-2021
MAY 29 2020
CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL

THOMAS ROBERTSON, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**Case No. 18-CH-5194**
HOSTMARK HOSPITALITY GROUP, INC., et al,	)	
Defendants,	)	

MEMORANDUM AND ORDER

Plaintiff Thomas Robertson has filed a motion to reconsider this court's January 27, 2020 Memorandum and Order pursuant to 735 ILCS 5/2-1203(a).

I. Background

On April 20, 2018, Plaintiff Thomas Robertson ("Robertson") filed his original complaint alleging Defendants Hostmark Hospitality Group, Inc. ("Hostmark") and Raintree Enterprises Mart Plaza, Inc. ("Raintree") (collectively "Defendants") violated the Biometric Information Privacy Act ("BIPA").

On April 1, 2019, this court granted Robertson's motion for leave to file an amended class action complaint (the "Amended Complaint"). The Amended Complaint now alleges three counts, each alleging a violation of a different subsection of section 15 of BIPA. 740 ILCS 14/15.

Count I alleges a violation of subsection 15(a) based upon Defendants failure to institute, maintain, and adhere to a publicly available retention and deletion schedule for biometric data. 740 ILCS 14/15(a). Count II alleges a violation of subsection 15(b) based upon Defendants failure to obtain written consent prior to collecting and releasing biometric data. 740 ILCS 14/15(b). Count III alleges a violation of subsection 15(d) based upon Defendants failure to obtain consent before disclosing biometric data. 740 ILCS 14/15(d).

On July 31, 2019, this court issued its Memorandum and Order denying Defendants' motion to dismiss Robertson's Amended Complaint. In summary, this court held that: (1) Robertson's claim was not preempted by the Illinois Worker's Compensation Act; (2) the applicable statute of limitations was five years, as provided for in 735 ILCS 5/13-205; and (3) Robertson had adequately pled his claim.

As part of the court's July 31, 2019 ruling, this court addressed the parties' arguments regarding the date Defendants stopped collecting Robertson's biometric information but did not address their arguments regarding when Robertson's claims accrued.

On August 30, 2019, Defendants filed their motion to reconsider and certify questions to the appellate court. In their motion to reconsider, Defendants argued, *inter alia*, that this court erred in applying a five-year statute of limitations to Robertson's claim. On September 4, 2019, this court denied Defendants' motion, in part, but allowed further briefing on the issue of the application of the five-year statute of limitation.

On January 27, 2020, this court issued its Memorandum and Order granting in part and denying in part Defendants' motion to reconsider. The court held that Robertson's claims relating to Defendants' alleged violations of section 15(b) and 15(d) accrued in 2010. The court found that the continuing violation rule did not apply to Robertson's claims because the violations of sections 15(b) and 15(d) represented a single discrete act from which any damages flowed. Thus, it was held that Counts II and III were barred by the five statute of limitations.

Regarding Count I, the court viewed section 15(a) as imposing two distinct requirements: (1) requiring private entities to develop a publicly available retention schedule and deletion guidelines; and (2) requiring the permanent deletion of an individual's biometric data, either in accordance with the deletion guidelines or within 3 years of the individual's last interaction with the private entity, whichever is earlier.

The court held that since it was Defendants' stated position that they ceased collection of biometric data in 2013, the math dictated by section 15(a) results in the conclusion that Robertson's claim could not have started to accrue until, at the earliest, 2016. Accordingly, Robertson's claim was not barred by the five-year statute of limitations.

II. Motion to Reconsider

A. *Application of the Continuing Violation Rule*

"The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law." Chelkova v. Southland Corp., 331 Ill. App. 3d 716, 729-30 (1st Dist. 2002). A party may not raise a new legal or factual argument in a motion to reconsider. North River Ins. Co. v. Grinnell Mut. Reinsurance Co., 369 Ill. App. 3d 563, 572 (1st Dist. 2006).

Robertson's current Motion to Reconsider of this court's January 27, 2020 Memorandum and Order reiterates his previously stated position that his claim is well within the statute of limitations because he was a victim of a continuing violation of his rights under BIPA. Alternatively, he seeks to certify the question to the First District pursuant to Illinois Supreme Court Rule 304(a). [1]

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[1] Not surprisingly, Defendants argue this court properly applied the law surrounding continuing violations to Robertson's BIPA claims. Alternatively, Defendants suggest that if the question is to be certified it should be pursuant to Illinois Supreme Court Rule 308.

Robertson's most recent request suggests that the proper application of the continuing violation rule is illustrated by Cunningham v. Huffman, 154 Ill. 2d 398, 406 (1993).

Cunningham involved a matter of first impression, namely, "whether the Illinois four-year statute of repose is tolled until the date of last treatment when there is an ongoing patient/physician relationship." Cunningham v. Huffman, 154 Ill. 2d 398, 400 (1993). The trial court found that the plaintiff's claims were time-barred and the continuous course of treatment doctrine was not the law in Illinois. Id. at 401. The Appellate Court affirmed the dismissal stating that "in medical malpractice actions, the statute of repose is triggered only on the last day of treatment, and if the treatment is for the same condition, there is no requirement that the negligence be continuous throughout the treatment. Id. at 403.

The Illinois Supreme Court declined to adopt the continuous course of treatment doctrine. Id. at 403-04. Nonetheless, the court held that statutory scheme did not necessarily preclude the cause of action asserted by the plaintiff. Id. at 404. Specifically, the court held that the medical treatment statue of repose would not bar the plaintiff's action if he could demonstrate: (1) that there was a continuous and unbroken course of *negligent* treatment, and (2) that the treatment was so related as to constitute one continuing wrong." Id. at 406 (emphasis in original). The Illinois Supreme Court emphasized "that there must be a continuous course of *negligent* treatment as opposed to a mere continuous course of treatment." Id. at 407 (emphasis in original).

Robertson's assertion is that Cunningham stands for the proposition that "the continuing violation doctrine applies where a plaintiff demonstrates a continuous and unbroken course of conduct, so related as to constitute one continuous wrong." (Motion at 5).

But the Illinois Supreme Court has explicitly rejected Robertson's argument, stating **"[t]he Cunningham opinion did not adopt a continuing violation rule of general applicability in all tort cases or, as here, cases involving a statutory cause of action**. Rather, the result in Cunningham was based on interpretation of the language contained in the medical malpractice statute of repose." Belleville Toyota v. Toyota Motor Sales, U.S.A., 199 Ill. 2d 325, 347 (2002)(Fitzgerald, J)(emphasis ours).

Robertson ignores Belleville and replies that "[t]here is no binding authority to which the Court may turn for guidance on the exact issue regarding whether the continuing violation doctrine applies." (Reply at 4).

While Justice Fitzgerald's written opinion in Belleville is pretty solid authority to the contrary, as this court previously pointed out, the First District has considered "[w]hether a series of conversions of negotiable instruments over time can constitute a continuing violation under Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 199 Ill. 2d 325 (2002), for the purpose of determining when the statute of limitations runs." Kidney Cancer Assoc. V. North Shore Com. Bank, 373 Ill.App.3d 396, 397-98 (1st Dist. 2007). The court reasoned that where a complaint alleges a serial conversion of negotiable instruments by a defendant, it cannot be denied that a single unauthorized deposit of a check in an account opened by the defendant gives the plaintiff a right to file a conversion action. Id. at 405. The court rejected the plaintiff's claim that the defendant's repeated deposits (identical conversions) following the initial deposit served to toll the statute of limitations under the continuing violation rule. Id. Instead, according to the court, each discrete act (deposit) provided a basis for a cause of action and the court need not look to the defendant's conduct as a continuous whole for prescriptive purposes. Id.

In Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 33, the Illinois Supreme Court held when a private entity fails to comply with one of section 15's requirements, that violation is itself sufficient to support the individual's or customer's **statutory cause of action**. Id. (emphasis ours).

Robertson's Amended Complaint alleges that his statutory rights were invaded in 2010, when Defendants allegedly first collected and disseminated his biometric data without complying with section 15's requirements. (Amended Complaint at ¶42).

In our January 27, 2020 Memorandum and Order, this court explained that under the general rule a cause of action for a statutory violation accrues at the time a plaintiff's interest is invaded. Blair v. Nevada Landing Partnership, 369 Ill. App. 3d 318, 323 (2nd Dist. 2006) (citing Feltmeier v. Feltmeier, 207 Ill. 2d 263, 278-279 (2003)("where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury." Id, 207 Ill. 2d at 279); see also, Limestone Development Corp. v. Village of Lemont, 520 F.3d 797, 801 (7th Cir. 2008) ("The office of the misnamed doctrine is to allow suit to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought. [citations]. It is thus a doctrine not about a continuing, but about a cumulative, violation.").

Here, this court respectfully disagrees with Robertson concerning the application of continuing violation rule. It was Defendants' alleged failure to first obtain Robertson's written consent before collecting his biometric data which is the essence of and gave rise to the cause of action, not their continuing failure to do so. Robertson's statutory rights were violated in 2010 when Defendants allegedly first collected and disseminated his biometric data without complying with section 15's requirements.

Per Feltmeier, "where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury." Id., 207 Ill. 2d at 279. That Defendants lacked the written release to collect and consent to disseminate Robertson's biometric data from 2010 until they ceased collection, does not change the fact Robertson's statutory rights were violated in 2010 nor does it serve to delay or toll the statute of limitations. Id; see also, Bank of Ravenswood v. City of Chicago, 307 Ill. App. 3d 161, 168 (1st Dist. 1999) (holding that the action for trespass began accruing when the defendant invaded plaintiff's interest and the fact that subway was present below the ground was a continual ill effect from the initial violation but not a continual violation.).

The court did not err in holding that the continuing violation rule did not apply to Robertson's claims.

B. *Single vs. Multiple Violations*

Robertson argues that this court erred in holding that his claims for violation of sections 15 (b) and (d) amount to single violations which occurred in 2010. Instead, according to Robertson, each time Defendants collected or disseminated his biometric data without a written release constitutes a single actionable violation.

Robertson's argument is contrary to the unambiguous language of the statute and taken to its logical conclusion would inexorably lead to an absurd result.

* * *

Section 10 of BIPA defines "written release" as: "[. . .] informed written consent or, *in the context of employment, a release executed by an employee as a condition of employment*." 740 ILCS 14/10 (emphasis added).

And, Section 15 (b)(3) of BIPA provides:

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

740 ILCS 14/15 (b)(3).

Reading section 10 and 15 of BIPA together makes clear that the "written release" contemplated by section 15 (b)(3) in the context of employment is to be executed as a condition of employment. 740 ILCS 14/10 and 15(b)(3).

As explained by the court in its January 27, 2020 Memorandum and Order, "[t]he most reasonable and practical reading of section 15 (b) requires an employer to obtain a single written release as a condition of employment from an employee or his or her legally authorized representative to allow the collection of his or her biometric data for timekeeping purposes for the duration of his or her employment. Such a release need not be executed before every instance an employee clocks-in and out, rather a single release should suffice to allow the collection of an employee's biometric data." January 27, 2020 Memorandum and Order at 4.

Robertson admits that this is a reasonable reading, (Motion at 7), but argues that Defendants, having failed to obtain a written release or his consent, had to obtain his written release before collecting his biometric data. Since Defendants failed to do, Robertson argues, each time Defendants' collected Robertson's biometric is independently actionable.

But, taken to its logical conclusion Robertson's construction would lead employers to potentially face ruinous liability.

Section 20 of BIPA provides any individual aggrieved by a violation of BIPA with a right of action and further provides that said individual may recover liquidated statutory damages for *each violation* in the amount of either $1,000 for negligent violations or $5,000 for intentional or reckless violations. 740 ILCS 14/20.

Robertson alleges that he was required to scan his fingerprints each time he clocked in and out. (Amended Complaint at ¶44). Therefore, at minimum, there exists at least two potentially recoverable violations for *each day* Robertson worked. Extending this to its logical conclusion, a plaintiff like Robertson could potentially seek a total of $500,000 for negligent violations or $2,500,000 for intentional or reckless violations *for each year*[2] Defendants allegedly violated BIPA.

It is a well-settled legal principle that statutes should not be construed to reach absurd or impracticable results, Nowak v. City of Country Club Hills, 2011 IL 111838, ¶ 21, which is where Robertson's argument would take us. This court finds nothing in the statute as it is written or as it was enacted to indicate it was the considered intent of legislature in passing BIPA to impose fines so extreme as to threaten the existence of any business, regardless of its size.

C. *Section 15 (d)(1) – Consent for Dissemination*

Section 15 (d)(1) of BIPA provides:

> (d) No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:
>
> (1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure;

* * * * *

740 ILCS 14/15 (d)(1).

Robertson's main contention here is that: (1) he never alleged when Defendants actually disseminated his biometric data; and (2) a defendant can potentially violate section 15(d) multiple times by disseminating an individual's biometric to additional third-parties.

But this court did not rule that section 15(d)(1) can only be violated a single time by a defendant. Rather, it ruled that based on the allegations as pled, Robertson's claim accrued in 2010.

The court recognizes that "a plaintiff is not required to plead facts with precision when the information needed to plead those facts is within the knowledge and control of defendant rather than plaintiff." Lozman v. Putnam, 328 Ill. App. 3d 761, 769-70 (1st Dist. 2002). However, even under this standard a plaintiff may not simply plead the elements of a claim, Holton v. Resurrection Hospital, 88 Ill. App. 3d 655, 658 (1st Dist. 1980), nor does this rule excuse a plaintiff from alleging sufficient facts. Holton, 88 Ill. App. 3d at 658-59.

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[2] Two violations a day multiplied five days multiplied fifty weeks a year multiplied either 1,000 or 5,000.

If Robertson was actually trying to allege that Defendants violated section 15(d)(1) multiple times by disseminating his biometric data to multiple third parties on many occasions between 2010 and whenever Defendants ceased collection, this allegation is not well-pled and Robertson has not stated a claim for this factual scenario. To be sure, Robertson's Amended Complaint plainly alleges that any dissemination occurred systematically and automatically, but Robertson does not allege any underlying facts which support this assertion.

Robertson also argues that it is possible for a private entity to violate section 15(d) multiple times and that therefore the court erred in holding that Defendants violated Robertson's section 15(d)(1) statutory rights only in 2010. ("Defendants, at any point in time, could have disseminated [his] biometric data to any number of other entities, any number of times, over any period of time," (Motion at 13)).

Robertson alleges Defendants "disclose or disclosed [his] fingerprint data to at least one out-of-state third-party vendor, and likely others," (Id. at ¶33), but the allegation relating to "likely others" is not well pled. The Amended Complaint contains no allegations alleging Defendants disseminated Robertson's biometric data to additional third parties at some undetermined point between 2010 and the date Defendants ceased collection.

The Amended Complaint plainly alleges that any disseminations were, on information and belief, done "systematically or automatically." (Id. at ¶¶ 33, 97). "[A]an allegation made on information and belief is not equivalent to an allegation of relevant fact [citation]." Golly v. Eastman (In re Estate of DiMatteo), 2013 IL App (1st) 122948, ¶ 83 (citation omitted).

Without alleging the supporting underlying facts which lead Robertson to believe that his biometric data was being systemically and automatically disseminated, his allegation regarding additional dissemination to additional third parties remains an unsupported conclusion. The same is true for the allegations Robertson pleads on information and belief. Defendants are not required to admit unsupported conclusions on a motion dismiss.

The court did not err.

III. Motions to Certify Questions and/or Motions Leave to Appeal

Robertson seeks leave to immediately appeal this court's orders pursuant to Illinois Supreme Court Rule 304(a). Defendants assert that Illinois Supreme Court Rule 308 is the better procedural vehicle and seeks certification of three questions:

1. Whether exclusivity provisions of the Illinois Worker's Compensation Act bar BIPA claims?

2. Whether BIPA claims are subject to the one-year statute of limitations pursuant to 735 ILCS 5/13-201 or the two-year statute of limitations pursuant to 735 ILCS 5/13-202?

3. Whether a claim for a violation of section 15(a) accrues when a private entity first comes into possession of biometric data?

The questions Defendants seek to certify have been either directly addressed or are closely related to questions other judges have certified.

Judge Raymond W. Mittchell in McDonald v. Symphony Bronzeville Park, LLC, Case No. 17 CH 11311 has already certified a similar question to Defendants' first question in an appeal is pending under Marquita McDonald v. Symphony Bronzeville Park, LLC, No. 1-19-2398.

Similarly, in Juan Cortez v. Headly Manufacturing Co., Case No. 19 CH 4935, Judge Anna H. Demacopoulos has certified the second question concerning of what statute of limitations appropriately applies BIPA claims. This court is informed that the First District has accepted the matter and it is currently being briefed.

The third proposed question – as to whether a violation of section 15(a) begins accruing when a private entity first comes into possession of biometric data – is not yet pending on appeal.

A. Rule 308?

Rule 308(a) provides as follows:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved.

ILL. SUP. CT., R. 308(a).

Rule 308(a) "should be strictly construed and sparingly exercised." Kincaid v. Smith, 252 Ill. App. 3d 618, 622 (1st Dist. 1993). "Appeals under this rule should be available only in the exceptional case where there are compelling reasons for rendering an early determination of a critical question of law and where a determination of the issue would materially advance the litigation." Id.

Because Rule 308 should be strictly construed and sparingly exercised, the court will not certify a question already accepted by the Appellate Court. Accordingly, in the interests of efficiency and of not burdening the First District with issue in cases which echo one another, the court declines to certify questions regarding the applicability of the Illinois Worker's Compensation Act, or questions concerning the appropriate statute of limitations under BIPA. Answers to those questions should be forthcoming through the certifications by Judges Mitchell and Demacopoulos.

Regarding the third question concerning the accrual of section 15(a) claims, the court is willing to certify a question regarding section 15(a) but is not willing to certify the question as currently phrased by Defendants.

As explained by the court in its January 27, 2020 Memorandum and Order, section 15(a) contains two distinct requirements: (1) private entities in possession of biometric data must develop a publicly available retention schedule and deletion guidelines; and (2) those guidelines must provide for the permanent destruction of biometric data when the initial purpose for collecting the biometric data has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first.

Contrary to Defendants' phrasing of their question regarding section 15(a), the court did not rule that a section 15(a) violation could only accrue once. Rather the court interpreted section 15(a) as imposing two distinct requirements on private entities each with separate accrual dates. The pure legal question is not simply when does the action for a violation of section 15(a) accrue but rather whether the court's interpretation of the statutory language of section 15(a) is correct.

Defendants motion is therefore denied, as written. If they wish, Defendants may resubmit the request to reflect this court's ruling and it will be reconsidered.

B. Rule 304(a)?

Rule 304(a) provides as follows:

> If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both.

ILL. SUP. CT., R. 304(a).

Rule 304(a) creates "an exception to [the] general rule of appellate procedural law by permitting appeals from trial court orders that only dispose of a portion of the controversy between parties." Mostardi-Platt Associates, Inc. v. American Toxic Disposal, Inc., 182 Ill. App. 3d 17, 19 (1st Dist. 1989). Rule 304(a)'s exception "arises when a trial judge [. . .] makes an express finding that there is no just reason to delay the enforcement or appeal of the otherwise nonfinal order." Id.

Here, the court did issue a final judgment as to fewer than all of the claims on January 27, 2020 when it granted Defendants' motion to reconsider and dismissed Counts II and III of Robertson's Amended Complaint with prejudice because they were barred by the applicable statute of limitations.

However, as explained many issues Robertson would seek review of under Rule 304(a) will be disposed of by the Appellate Court's answers to Judge Demacopoulos' certified question. Therefore, the court declines to make the necessary finding to allow Robertson to appeal pursuant to Rule 304(a).

III. Conclusion

Robertson's motion for reconsideration is DENIED.

Robertson's request for a Rule 304(a) finding is DENIED.

Defendants' request for to certify questions pursuant to Rule 308(a) is GRANTED IN PART and DENIED IN PART. The court denies Defendants' questions relating to the application of the Illinois Worker's Compensation Act and the two-year statute of limitations.

The court grants Defendants' request in so far as it seeks to certify a question relating to section 15(a) but denies Defendants' question as currently written.

The court orders the parties to confer and to attempt to reach an agreement regarding the phrasing of a question relating to the section 15(a).

The court set the next status date for this matter as June 16, 2020 at 9:30 a.m.

Entered: 5-29-20

Neil H. Cohen #2021

Judge Neil H. Cohen

STATE OF ILLINOIS
CIRCUIT COURT
SEVENTEENTH JUDICIAL CIRCUIT

DONNA R. HONZEL
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March 12, 2020

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Marcia Smith vs. Top Die Casting Co.
2019-L-248

MEMORANDUM OF DECISION AND ORDER

Plaintiff has filed suit alleging defendant violated sections 15 (a) and (b) of the Biometric Information Privacy Act (BIPA), 740 ILCS 14/1 *et seq.* Defendant has filed a 2-619 Motion to Dismiss the complaint on the basis that defendant believes suit has been brought outside the statute of limitations. The matter has been fully briefed and argued. The court finds and orders as follows:

I. Violation of section 15(a)

740 ILCS 14/15 deals with "Retention; collection; disclosure; destruction" Section (a) states,

"A private entity in possession of biometric identifiers or biometric information must 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**. 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." (Emphasis added.)

The parties agree that the plaintiff began working for the defendant in August of 2017. It also appears without dispute that the plaintiff's last day on the job was February 28, 2019. Her assignment "officially" ended March 5, 2019. It also appears uncontroverted that when the plaintiff began working for the defendant and defendant acquired her biometric information, there was no written policy in place for the retention and destruction of that data. Under the wording of the statute, and the use of the "or" connector, either there are written guidelines for permanently destroying the biometric information once the purpose for having it/using it have been satisfied or in the absence of written guidelines, destruction must take place within 3 years of the individual's last interaction with the entity. The latter applies here.

The United States Supreme Court has said, "a cause of action does not become 'complete and present' until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v Febar Corp. of California, Inc.*, 522 U.S. 192 at 193. In *Blair v Nevada Landing Partnership*, 369 Ill.App.3d 318, 323 our Second District Appellate Court stated, "Generally, in tort, a cause of action accrues and the limitations period begins to run when facts exist that authorize one party to maintain an action against another [citing *Feltmeier*, infra." At this point, only approximately 1 year after the plaintiff's last interaction with the defendant, the plaintiff's claim has not ripened as there is still a considerable time (at minimum until February 28, 2022), for the defendant to comply with the statute, regardless of what the statute of limitations is.

Defendant's motion to dismiss is granted as it pertains to paragraph 47 as well as any other paragraphs alleging a violation of section 15(a).

II. Violation of section 15(b)

740 ILCS 14/15(b) states, "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."

The plain language of the statute indicates when a claim accrues for violating this section. The offense, and thus the cause of action for the offense, occurs the first time the biometric information is collected without meeting the requirements of paragraphs (1) – (3).

The Illinois Supreme Court has said, "At this juncture, we believe it important to note what does *not* constitute a continuing tort. A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. See *Pavlik,* 326 Ill.App.3d at 745, 260 Ill.Dec. 331, 761 N.E.2d 175; *Bank of Ravenswood,* 307 Ill.App.3d at 167, 240 Ill.Dec. 385, 717 N.E.2d 478; *279 *Hyon,* 214 Ill.App.3d at 763, 158 Ill.Dec. 335, 574 N.E.2d 129. Thus, where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury. See *Bank of Ravenswood,* 307 Ill.App.3d at 167–68, 240 Ill.Dec. 385, 717 N.E.2d 478; *Hyon,* 214 Ill.App.3d at 763, 158

Ill.Dec. 335, 574 N.E.2d 129; *Austin v. House of Vision, Inc.*, 101 Ill.App.2d 251, 255, 243 N.E.2d 297 (1968). For example, in *Bank of Ravenswood*, the appellate court rejected the plaintiffs' contention that the defendant city's construction of a subway tunnel under the plaintiff's property constituted a continuing trespass violation. The plaintiffs' cause of action arose at the time its interest was invaded, *i.e.*, during the period of the subway's construction, and the fact that the subway was present below ground would be a continual effect from the initial violation, but not a continual violation. *Feltmeier v Feltmeier*, 207 Ill.2d 263 at 278-279." (Emphasis in original) See also *Blair*, supra at 324 -325.

In this matter, it is undisputed that the plaintiff first began using the timeclock in question in August of 2017. Plaintiff's argument that each time the plaintiff clocked in constituted an independent and separate violation is not well taken. The biometric information is collected the one time, at the beginning of the plaintiff's employment, and thereafter the original print, or coordinates from the print, are used to verify the identity of the individual clocking in. Thus, the offending act is the initial collection of the print and at that time the cause of action accrues. To hold otherwise is contrary to the plain wording of the statute and common sense as to the manner the initially collected biometric information is utilized. Additionally, as a matter of public policy, the interpretation plaintiff desires would likely force out of business – in droves - violators who without any nefarious intent installed new technology and began using it without complying with section (b) and had its employees clocking in at the start of the shift, out for lunch, in for the afternoon and out for the end of the shift. Over a period of 50 weeks (assuming a two week vacation) at $1000 for each violation it adds up to $1,000,000 *per employee* in a year's time. This would appear to be contrary to 14/5 (b) and (g) – Legislative findings; intent. It also appears to be contrary to how these time clocks purportedly work.

Given the violation occurs at the first instance of collection of biometric data that does not conform to the requirements set forth, the question becomes what the statute of limitations is given the Act's silence. Defendant argues that because BIPA clearly concerns matters of privacy as well as concerns itself with the dissemination of uniquely personal information and preventing that from occurring, the one year statute of limitations set forth in 13-201 applies, supporting its motion to dismiss.

The parties agree that the Illinois Supreme Court (in *Rosenbach v Six Flags Entm't Corp.* 2019 IL 123186) as well as other cases addressing BIPA have made it clear that BIPA involves an invasion of privacy but they disagree as to what that means. BIPA's structure is designed to prevent compromise of an individual's biometric data. Indeed, the common law right to privacy as it relates to modern technology is at the core of BIPA. The United States Supreme Court has noted that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." *U.S. Dep't of Justice v Reporters Comm.for Freedom of the Press*, 489 U.S. 749, 763. Defendant relies heavily on *Blair* and its application of 13-201's one year limitation period and the fact the Right of Publicity Act (765 ILCS 1075) involved in *Blair*, like BIPA, sets forth no statute of limitations period.

However, the Court noted in *Blair* that at common law there was a tort of appropriation of likeness, for which a plaintiff needed to set forth elements of appropriation of a person's name or likeness, without consent, done for another's commercial benefit. The statute of limitations for doing so was the one year statute set forth in 13-201. The Right to Publicity Act went into effect January 1, 1999 and completely replaced the common law tort. The legislature specifically said it was meant to supplant the common-law. As such, the *Blair* court held the one year statute of limitations would remain applicable for the Act. BIPA is not an act which completely supplants a specific common law cause of action, so is distinguishable from the Right to Publicity Act in this regard. Additionally, *Blair* clearly involved publication as an essential element. That further distinguishes it from BIPA to the extent that publication is not a necessary element of every BIPA claim. Notably, the case at hand contains no allegation of publication.

The Second District's decision and language in *Benitez v KFC Nat. Management Co.*, 305 Ill.App.3d 1027 is informative. There, while the matter involved intrusion upon seclusion and the voyeuristic nature of the affront to privacy which is not present here, the court stated, at page 1034, "The fact that publication is not an element of intrusion upon seclusion is crucial, since the plain language of section 13-201 indicates that the one-year statute of limitations governs only libel, slander and privacy torts involving publication. (see 735 ILCS 5/13-201 (West 1994); *McDonald's Corp. v. Levine,* 108 Ill.App.3d, 737, 64 Ill.Dec. 224, 439 N.E.2d 475(1982) (even if eavesdropping claim was actually a claim for intrusion upon seclusion, the one-year statute of limitations of what is now section 13-201 would not apply…)). Accordingly, since the statute does not refer to a cause of action for intrusion upon seclusion, we decline to read the statute as such." The court went on to note two cases which disagreed with its decision and held that 13-201 applied to intrusion upon seclusion and sexual harassment cases. The court commented, at pages 1007-8, "Nonetheless, we are not persuaded by those cases, since neither case provides any explanation whatsoever of why section 13-201 applies to a cause of action for intrusion upon seclusion. Instead, we find the plain language of the statute controlling."

It is also noteworthy that inclusion upon seclusion is a relatively new, statutorily created violation of the right to privacy and it is an extension of the common law's four distinct types of privacy breaches. While BIPA claims are not claims which can be characterized as intrusion upon seclusion cases, BIPA also is a statutorily created violation of the right to privacy which extends common law privacy protections, as opposed to supplanting a common law right. For those reasons also, as well as the Second District's logic and analysis of 13-201 in *Benitez* (which this court must follow) 13-201 does not apply.

Therefore, for all the foregoing reasons, the court finds that section 5/13-205's Five year limitations period applies to BIPA violations. Given the lack of an express limitations period in the Act, and the finding 13-201 does not apply, BIPA falls into the category of "civil actions not otherwise provided for" and plaintiff has clearly brought her claim prior to August, 2022.

The defendant's motion to dismiss section (b) allegations of BIPA violations is denied.

So ordered:

Date: 3/12/2020

Enter: [signature]
Hon. Judge Donna Honzel

NOTICE OF FILING and PROOF OF SERVICE

In the Appellate Court of Illinois
Third Judicial District

RICHARD McGINNIS, *Plaintiff-Appellee,* v. UNITED STATES COLD STORAGE, INC., *Defendant-Appellant.*	)	No. 3-21-0190

The undersigned, being first duly sworn, deposes and states that on September 20, 2021, the Unopposed Motion for Leave to File Brief of *Amici Curiae* Restaurant Law Center and Retail Litigation Center, Inc. in Support of Defendant-Appellant was electronically filed and served upon the Clerk of the above court. Service of the Motion will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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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.

/s/ Anneliese Wermuth
Anneliese Wermuth

No. 3-21-0190

IN THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

RICHARD McGINNIS, individually and on behalf of all others similarly situated, Plaintiff-Appellee, v. UNITED STATES COLD STORAGE, INC., Defendant-Appellant.	)	On Appeal from the Circuit Court for the 12th Judicial District, Will County, Illinois Circuit Case No.: 19 L 9 Hon. John C. Anderson, Judge Presiding

[PROPOSED] ORDER

IT IS HEREBY ORDERED that the Unopposed Motion for Leave to File Brief of *Amici Curiae* Restaurant Law Center and Retail Litigation Center, Inc. in Support of Defendant-Appellant is:

Granted: ___ / Denied: ___

Entered:

____
Justice