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No. 128004

IN THE SUPREME COURT OF ILLINOIS

LATRINA COTHRON,

Plaintiff-Appellee,

v.

WHITE CASTLE SYSTEM, INC.,

Defendant-Appellant.

On Certified Question from the
United States Court of Appeals for the Seventh Circuit (No. 20-3202).

There Heard on Appeal from the United States District Court for the
Northern District of Illinois (No. 19-0382),
The Honorable John J. Tharp Jr., Judge Presiding.

BRIEF OF RETAIL LITIGATION CENTER, INC., RESTAURANT LAW CENTER, AND NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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BRIEF FOR RETAIL LITIGATION CENTER, INC., RESTAURANT LAW CENTER, AND NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

The Retail Litigation Center, Inc., the Restaurant Law Center, and the National Retail Federation respectfully submit this brief as *amici curiae* in support of Defendant-Appellant.

INTEREST OF *AMICI CURIAE*

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 U.S. 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, 542–43 (2013).

The Restaurant Law Center ("Law Center") is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. 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 individuals 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 Law Center provides courts—including this Court—with perspectives on legal issues that have the potential to significantly impact its members and their industry. *See, e.g.*, *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 16, 129 N.E.3d 1197, 1202 (2019). The 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).

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. NRF's membership includes retailers of all sizes, formats, and channels of distribution, as well as restaurants and industry partners from the United States and more than forty-five countries abroad. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs. For over a century, NRF has been a voice for every retailer and every retail job, communicating the impact retail has on local communities and global economies. NRF's *amicus* briefs have been cited favorably by multiple courts. *See, e.g.*, *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 791 n.20 (2d Cir. 2016).

Through regular *amicus* participation, the RLC, Law Center, and NRF (collectively, "*Amici*") provide courts with perspectives on issues that impact their industries and the customers and employees they serve. This is one such case. *Amici* and their members have a significant interest in how this Court determines claims accrue under Sections 15(b) and 15(d) of the Illinois Biometric Information Privacy Act ("BIPA").

Some of *Amici*'s members have used employee biometric timekeeping and security systems to ensure accurate wage payments to employees, reduce operating costs, increase productivity, prevent time theft and unlawful "buddy punching," and secure confidential company and employee information, among other things. Employees—who knowingly and voluntarily provide their biometric information—also 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 BIPA.

This Court's decision 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 curative action when issues arise. Its

liquidated damages and injunctive relief provisions are intended to serve that corrective function. BIPA was not designed as a mechanism to expose businesses taking good faith measures to enhance the security of their employees' information to extraordinary damages—particularly where no one was harmed. Nor was BIPA designed to be a vehicle for entrepreneurial litigants to leverage windfall statutory damages exposure to extract massive settlements.

And yet several court decisions have disregarded the remedial aspects of BIPA's purpose, thereby creating an untenable litigation environment for companies of all sizes and scope. A decision from this Court that realigns BIPA with the statute's remedial goals is crucial. Such a ruling will ensure BIPA's fidelity to its goals through the continued availability of meaningful penalties while likewise ensuring that businesses operating in Illinois do not collapse under the weight of aggregate damages exposure for inadvertent, technical violations of the statute.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Illinois General Assembly long ago understood the "promise" of biometric technology to benefit Illinois residents and businesses by, among other things, "streamlin[ing] financial transactions and security screenings." 740 ILCS 14/5(a). Unique biometric information, such as a fingerprint, enables Illinois businesses to verify an individual's identity quickly and accurately, benefiting both businesses and the consumers and employees that rely on

them. The technology is faster, more reliable, and more secure than conventional identification and security measures.

Many Illinois businesses, including some restaurants and retailers, have recognized the advantages of user-friendly biometric technology and realized its "promise" to the benefit of employees, employers, and customers alike. For example, with full transparency to their employees, some restaurants and retailers have installed biometric timekeeping to protect employee information, manage access to facilities and files, simplify employee time tracking and payroll, and safeguard sensitive data. Among other benefits, biometric recordkeeping of all hours (and minutes) has increased the accuracy of wage payments by ensuring employees are correctly paid for time worked.

The Illinois General Assembly crafted BIPA both to foster the development of new technology and to protect sensitive biometric information and identifiers. *See* 740 ILCS 14/5(g). Toward this latter end, BIPA includes a private right of action designed to promote the responsible use and handling of biometric data and to prompt timely remediation of violations. *See* 740 ILCS 14/20; *Rosenbach*, 2019 IL 123186, ¶ 36, 129 N.E.3d at 1206–07 (describing the statute's intent to prevent and deter violations). BIPA's private right of action allows an individual who has been "aggrieved" by a violation of the statute to bring a claim for injunctive relief, as well as for monetary damages and attorneys' fees and costs. Negligent BIPA violations are subject to the greater of actual damages or liquidated damages of $1,000; reckless or intentional

BIPA violations are subject to liquidated damages of $5,000. *See* 740 ILCS 14/20(1)–(4). BIPA does not provide for criminal penalties. *See id.* Nor does it contemplate that good-faith violators should be forced out of business or otherwise lose the right to operate in Illinois. *See id.*

In light of BIPA's "preventative and deterrent purposes," this Court held in *Rosenbach* that a BIPA plaintiff need not prove *any* actual damage to have standing to bring suit under the statute, thereby ensuring that BIPA would be enforced. *See Rosenbach*, 2019 IL 123186, ¶¶ 37, 40, 129 N.E.3d at 1207.[1] Although this Court surely did not intend to thwart the statute's technology-promotion and remedial purposes, *Rosenbach* has been followed by a surge of threatened and filed class claims alleging no-harm technical violations that has slowed the adoption of beneficial technology and threatened to devastate businesses. Indeed, almost as many actions asserting BIPA claims were filed in the five months immediately following *Rosenbach* than had been filed in the preceding decade combined. And these filings have only increased. More than 900 BIPA cases were filed in the first nine months of 2021.[2] Today, Illinois

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[1] *Amici* respectfully submit that the inclusion of the term "aggrieved" in BIPA should require the demonstration of actual injury consistent with the interpretation of that same term in other statutory frameworks across the country. This Court's decision in *Rosenbach* prompted an unprecedented wave of no-injury putative class action filings in the Illinois state and federal courts. *See infra* Section II.B.

[2] Megan L. Brown et al., *A Bad Match: Illinois and the Biometric Information Privacy Act*, Institute for Legal Reform (Oct. 2021) at 5, https://instituteforlegalreform.com/wp-content/uploads/2021/10/ILR-BIPA-Briefly-FINAL.pdf.

state and federal courts are inundated with these no-harm actions—most of which target small Illinois companies.[3]

In this case, the Northern District of Illinois had to determine when a BIPA claim accrues so that it could identify the applicable statute of limitations period. The district court held that *each* separate finger scan constitutes a separate violation of Section 15(b), and that each attendant transmission constitutes a separate violation of Section 15(d). *Cothron v. White Castle Sys., Inc.* (*Cothron I*), 477 F. Supp. 3d 723, 733–34 (N.D. Ill. 2020). In so doing, the district court transformed BIPA into a tool for private plaintiffs' attorneys to profit at the expense of Illinois businesses, employees, and customers. The district court adopted this interpretation despite the court's acknowledgement that it could lead to "absurd" results. *Id.* at 733.

On appeal, the Seventh Circuit recognized that, if affirmed, the district court's order would result in "staggering damages awards" against businesses that have implemented biometric timekeeping in good faith. *Cothron v. White Castle Sys., Inc.* (*Cothron II*), 20 F.4th 1156, 1165 (7th Cir. 2021). The Seventh Circuit further recognized that, while the issue of damages was not expressly before it, the statute inextricably intertwines damages and claim accrual, and that an affirmance could expose businesses to "crippling financial liability." *Id.*

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[3] *See* 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-smallbusinesses/6944810002/.

Faced with these important and novel issues of state law, the Seventh Circuit certified the following question to this Court:

> Do section 15(b) and 15(d) claims accrue each time a private entity scans a person's biometric identifier and each time a private entity transmits such a scan to a third party, respectively, or only upon the first scan and first transmission?

Id. at 1167.

Amici respectfully encourage this Court to rule—consistent with the statutory language, common sense, due process, and BIPA's underlying purpose—that claims under Sections 15(b) and 15(d) accrue in their entirety when a biometric data point is first scanned or transmitted. There are no discrete "per scan" injuries that would give rise to or justify cumulative and uncontrolled statutory damages. Nor is there any "continuing violation" that would revive claims that fall outside the applicable statute of limitations. Rather, a BIPA violation is complete upon the initial scan or transmission without the requisite consent. To rule otherwise would dramatically expand BIPA's reach and engender results that raise significant due process concerns. In contrast and yet consistent with the statute's language and purpose, Defendant's approach would maintain BIPA's force and promote the prompt remediation of claims, while also protecting the interests of employees and good-faith businesses alike.

ARGUMENT

I. A BIPA Claim Is Complete Upon the First Scan or Transmission, as Mandated by BIPA's Plain Language and the Purpose Behind Its Enactment.

This Court has repeatedly observed that, "[w]hen interpreting a statute, this court's primary objective is to ascertain and give effect to the intent of the legislature." *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, ¶ 25, 67 N.E.3d 243, 251 (2016)). "[T]he 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." *Id.*

As evidenced by BIPA's plain language, an injury under the statute accrues when biometric information *is first* scanned or transmitted without adequate consent or disclosures. As this Court recently summarized, "[BIPA] mandates that, *before obtaining an individual's fingerprint*, a private entity must" provide certain disclosures. *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 21, --- N.E. 2nd --- (2022) (emphasis added). "The entity must also obtain a signed 'written release' from an individual *before collecting* her biometric identifier or biometric information." *Id.* (emphasis added); *see also* 740 ILCS 14/15(b) ("No private entity may collect . . . biometric information, *unless it first*" provides requisite disclosures and "receives a written release." (emphasis added)). "BIPA also requires a private entity to obtain consent *before* disclosing or disseminating an individual's biometric

identifier to a third party." *Symphony Bronzeville*, 2022 IL 126511, ¶ 22 (emphasis added); *see also* 740 ILCS 14/15(d)(1). Once a person's unique identifier is scanned or transmitted without the requisite consent, the violation is complete. As the Seventh Circuit recognized, this language is "consistent with White Castle's proposed first-time-only accrual rule." *Cothron II*, 20 F.4th at 1163; *see also id.* at 1165 (finding Defendant's theory had a "plausible hook in the statutory text").

This interpretation makes sense. As this Court explained in *Rosenbach*, BIPA protects the "right to privacy in and control over" one's biometric data. 2019 IL 123186, ¶ 33, 129 N.E.3d at 1206. Hence, *Rosenbach* 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. *Id.* Using this logic, the right to privacy and control is fully invaded and the individual can bring suit in the instant the biometric data is scanned or transmitted without proper consent. *Id.*; *see also Symphony Bronzeville*, 2022 IL 126511, ¶ 43 ("McDonald's claim seeks redress for the lost opportunity 'to say no by withholding consent.'" (quoting *Rosenbach*, 2019 IL 123186, ¶ 34, 129 N.E.3d at 1206)).

As the injury is complete upon the first violative scan or transmission, a "one-and-done theory [of accrual] makes sense." *Cothron II*, 20 F.4th at 1165. And as this Court has held, a cause of action for an alleged statutory privacy violation (like an alleged BIPA violation) accrues when a plaintiff's privacy

interest is first 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).

A first-scan interpretation of BIPA is also consistent with the statute's purpose—namely, "prevent[ion] and deterren[ce]." *Rosenbach*, 2019 IL 123186, ¶ 37, 129 N.E.3d at 1207. In enacting BIPA, the Illinois General Assembly sought to balance the benefits and "promise" of biometric technology with "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.* ¶ 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.* ¶ 36, 129 N.E.3d at 1206 (emphasis added). A first-scan theory of accrual best serves this purpose by encouraging claimants to act quickly to seek redress and enjoin ongoing violations. Illinois residents are best served by claimants surfacing issues immediately, rather than delaying to allow statutory damages and attorneys' fees to accrue.

Plaintiff argued before the Seventh Circuit that Defendant's first-scan interpretation should be rejected because, "[o]nce a private entity has violated the Act, it would have little incentive to course correct and comply if subsequent violations carry no legal consequence." *Cothron II*, 20 F.4th at 1165. But Plaintiff ignores the fact that she can seek and obtain statutory relief without establishing any actual injury. The risk of aggregate statutory damages that businesses face in no-injury putative class actions under BIPA (either $1,000 or $5,000 per class member) presents meaningful incentives to encourage already compliance-oriented businesses like *Amici*'s members to comply with the statute.[4] In addition, as Justice Burke recently noted, "any risk of future injury is alleviated by the availability of permanent injunctive relief in the underlying action." *Symphony Bronzeville*, 2022 IL 126511, ¶ 57 (Burke, J., concurring). A plaintiff can enjoin future violations of BIPA by bringing suit promptly. *See* 740 ILCS 14/20.

In this case, Plaintiff alleges that Defendant violated BIPA when it scanned her fingerprint using a biometric time clock without first obtaining

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[4] The aggregate exposure businesses face in such no-injury class actions, along with the accompanying threat of litigation costs and windfall attorneys' fees, have destroyed businesses. Some companies, including restaurants and retailers, choose to enter into extortionate settlements rather than face the risk of cumulative statutory damages, regardless of the merits. This "*in terrorem*" character of no-injury, statutory class actions is well recognized. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276 (11th Cir. 2019).

her requisite consent. The alleged BIPA violation occurred and was complete at the time of that first scan. This interpretation will accomplish BIPA's prevention and deterrence goals by encouraging parties to bring claims promptly to businesses' attention so that any violations may be timely remediated. Respectfully, this Court should affirm the decisions of numerous courts in this state that have held that BIPA claims accrue when defendants fail to "first obtain [plaintiff's] written consent before collecting his biometric data." *Robertson v. Hostmark Hosp. Grp., Inc.*, No. 2018-CH-05194, slip op. at 4 (Ill. Cir. Ct. Cook Cnty. May 29, 2020) (A-4) (adopting first-scan interpretation of BIPA); *see also, e.g.*, *Smith v. Top Die Casting Co.*, 2019-L-248, slip op. at 3 (Ill. Cir. Ct. Winnebago Cnty. Mar. 12, 2020) (A-13) (same).

II. The "Per Scan" Theory of Liability Is Inconsistent with BIPA's Purpose and Basic Canons of Statutory Interpretation, and Would Cause Constitutional Problems.

A. The Intent Behind 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 more prevalent in everyday life, including business operations. Consider the workday of a hypothetical employee named Allie, a server at a popular fast-casual restaurant. She begins her shift by scanning her finger to clock in using a secure biometric time clock. As customers begin to arrive, the host seats a happy young couple in her section. Allie greets them, takes their drink orders, and then returns to the computer terminal and scans her finger to input the

orders. When she delivers their drinks, they are ready to order appetizers. Allie, again, scans her finger to input that order. Throughout her shift, Allie repeats this process multiple times. Each time she enters a drink, appetizer, entrée, or dessert order into the system, Allie scans her finger to log in. And any time she wants to check on an order's status, print a receipt, or close out an order, Allie scans her finger again.

As a career server, Allie 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 Allie's employer gave her a choice of using a passcode or biometric time clock, she elected to use the finger-scan process after reviewing and signing the disclosure forms her employer gave her. Finger scanning—which merely compares Allie's fingerprint to a record collected on her first day—enables her to spend less time at the computer terminal and provide better customer service, which she has seen translate into greater tips. When there is a lull in her day, Allie scans her finger again to clock out for a short break, and then scans again to clock back in. By the end of her shift, she has scanned her finger 95 times, including one final scan to clock out at the end of the day.

In a typical week, Allie works five shifts. By the end of the week, she may have scanned her finger nearly 500 times. In a month, she might scan her finger nearly 2,000 times. If a "per scan" theory of liability under BIPA were adopted, in just one month, Allie's employer could potentially be liable to

Allie alone for $2 million in liquidated damages for a negligent violation.[5] Allie could attempt to assert a claim if, for example, she alleged that the language in the disclosure she signed did not meet the technical requirements of BIPA, or that additional disclosures and consents were somehow required before 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. If the average restaurant chain has 70 employees at each location, and a particular restaurant chain has 600 locations in Illinois, the potential damages would be approximately *$84 billion* in a single month for an alleged negligent violation.[6] Such a result is patently absurd and inconsistent with the statute's purpose.

Even under Defendant's first-scan interpretation, businesses using biometric technology would still be subject to substantial aggregate damages. Assuming the same restaurant chain were accused of a BIPA violation, under a first-scan interpretation of the statute the company would still face $42

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[5] For an alleged intentional violation, Allie's employer could potentially be liable to Allie alone for $10 million in liquidated damages in just one month (2,000 scans per month x $5,000 per intentional violation = $10,000,000).

[6] 2,000 scans per month x 70 employees x 600 restaurants x $1,000 per negligent violation = $84,000,000,000. And if this restaurant chain were accused of *intentionally* violating the statute, the potential damages would be approximately *$420 billion* in a single month (2,000 scans per month x 70 employees x 600 restaurants x $5,000 per intentional violation = $420,000,000,000).

million in potential liability for an *unintentional* violation of BIPA[7] and up to $210 million in potential liability for an *intentional* violation of BIPA[8]—the definition of which is yet unsettled. Attorneys' fees and potential injunctive relief would also be available.

And it's not just Illinois restaurants that use biometric technology and are thus at grave risk from a "per scan" theory of liability. Daycare centers use finger scans of parents, guardians, and caretakers who pick up children. Schools use biometric tools to aid in remote learning. Transportation companies use biometrics to monitor driver wakefulness and keep roads safe. Retailers, hospitals, banks, laboratories, and hazardous material storage sites use biometric technology to secure their facilities and to protect sensitive health, employee, and financial information. Each of these situations and many more have generated putative class actions under BIPA.[9]

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[7] 70 employees x 600 restaurants x $1,000 per negligent violation = $42,000,000.

[8] 70 employees x 600 restaurants x $5,000 per intentional violation = $210,000,000.

[9] *See, e.g.*, 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/; Jason C. Gavejian,

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 biometric data. Despite their best efforts, and sometimes because of conflicting interpretations of BIPA, even responsible businesses operating in good faith can commit technical violations that subject them to substantial aggregate damages. These risks are not hypothetical but reflect the actual experiences of companies based in and doing business in Illinois. Respectfully, adoption by this Court of a "per scan" theory of liability would exponentially exacerbate these risks.

A series of BIPA decisions has created a minefield of litigation perils in Illinois and has made this state an outlier in terms of risk for national businesses. Companies concerned about potential litigation exposure for 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 when rolling out important new technology systems.[10] Both

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COVID-19 Screening Program Can Lead to Litigation Concerning Biometric Information, BIPA, Nat. L. Rev. (Oct. 15, 2020), https://www.natlawreview.com/article/covid-19-screening-program-can-lead-to-litigation-concerning-biometric-information; Erica Gunderson, *The Implications of Six Flags Biometrics Ruling on Silicon Valley*, WTTW (Jan. 29, 2019), https://news.wttw.com/2019/01/29/implications-six-flags-biometrics-ruling-silicon-valley.

[10] *See* Jake Holland, *As Biometric Lawsuits Pile Up, Companies Eye Adoption With Care*, Bloomberg Law (Feb. 9, 2022), https://www.bloomberglaw.com/bloomberglawnews/privacy-and-data-security/BNA%200000017ed4e8de63a7fffde92af10000.

scenarios would hurt employees and companies. Employees would be forced to use less efficient or less 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. Companies would also face the additional administrative burdens and costs of two separate systems, processes, procedures, training, compliance tracking, and reporting.

As discussed above, 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. To the contrary, BIPA is a remedial statute intended to encourage compliance. *See, e.g.*, *Quarles v. Pret A Manger (USA) Ltd.*, No. 20-7179, 2021 U.S. Dist. LEXIS 79053, at *12 n.8 (N.D. Ill. Apr. 26, 2021) (predicting this Court "would hold that BIPA is a remedial statute"); *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.")")). 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. But, if adopted by this Court, a "per scan" theory of liability would do just that.

B. A "Per Scan" Theory of Liability Would Promote Protracted Litigation Instead of Prompt Remedial Action.

Not only would a "per scan" theory of liability hinder innovation, it would promote delayed (and often 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. This punitive approach would be the antithesis to BIPA's goals of "prevent[ion] and deterren[ce]." *Rosenbach*, 2019 IL 123186, ¶ 37, 129 N.E.3d at 1207. 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 prompt a further expansion of opportunistic class action litigation. The increase in class action filings in Illinois federal and state courts following this Court's January 2019 *Rosenbach* decision is instructive. In the ten *years* before the decision, the plaintiffs' bar filed 173 BIPA cases; in just five *months* after the *Rosenbach* decision, 151 BIPA class actions were filed.[11] By October 2019, over 300 BIPA actions were

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[11] 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.

pending in Illinois state courts.[12] These BIPA filings have continued unabated, with an average of more than 100 BIPA cases filed *per month* between January and September 2021.[13] And the increased demand on judicial resources has begun to manifest: in 2021 at least 89 state and federal court rulings referenced BIPA—a four-fold increase from 2019.[14]

Litigation in this space is expected to grow given the increased use of contactless and remote technology during the pandemic. Over the past two years:

- 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;[15]

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12 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.

13 Brown, *supra* note 2.

14 Kristin L. Bryan et al., *2021 Year in Review: Biometric and AI Litigation*, 12 Nat'l L. Rev. 45 (Jan. 5, 2022), https://www.natlawreview.com/article/2021-year-review-biometric-and-ai-litigation; *see also* Tiffany Cheung et al., *Privacy Litigation 2021 Year in Review: Biometric Information Privacy Act (BIPA)*, Morrison & Foerster (Jan. 11, 2022) (finding more BIPA decisions were published in 2021 than 2020, and expecting even more will be published in 2022), https://www.mofo.com/resources/insights/220107-biometric-information-privacy-act.html.

15 Southwell, *supra* note 9 ("The COVID-19 pandemic also introduced new types of BIPA litigation associated with health screenings and remote work."); Blaney, *supra* note 9 ("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.").

- 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;[16] and
- Nursing homes, hospitals, the Salvation Army, and universities have also been targeted.[17]

BIPA's threat of unchecked aggregate damages has forced many businesses to settle even meritless claims, often for tens of millions of dollars.[18] Illinois's small businesses, often the hardest hit, have been coerced into extraordinarily large settlements when faced with the prospect of insolvency absent settlement.[19] This trend of sizeable settlements "persisted throughout 2020"[20] and "saw an uptick in 2021."[21]

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16 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/.

17 Barbic, *supra* note 3 (identifying BIPA litigation targets); Abrams, *supra* note 9 ("[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.").

18 Bryan, *supra* note 14; Cheung, *supra* note 14; Blaney, *supra* note 9.

19 Barbic, *supra* note 3 ("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)).

20 Southwell, *supra* note 9.

21 Cheung, *supra* note 14; *see also* Schaller, *supra* note 9.

Plaintiff's interpretation of the statute will only drive up settlement demands and create windfalls for plaintiffs' attorneys. This Court need look no further than the terms of a recent $50,000,000 settlement involving McDonald's. In that case, class members will receive either $375 or $190, but class counsel may seek up to $18,500,000 in attorneys' fees. Pls.' Unopposed Mot. Prelim. Approval at 12, 14, 17, *Lark v. McDonald's USA, LLC*, Nos. 17-L-559, 20-L-0891 (Ill. Cir. Ct. St. Clair. Cnty. Nov. 16, 2021) (A-26, A-28, A-31).

In holding that a BIPA plaintiff need not prove actual damage to have standing to bring suit, this Court ensured the statute would be enforced. *See Rosenbach*, 2019 IL 123186, ¶ 40, 129 N.E.3d at 1207. Unfortunately, the plaintiffs' bar has abused that standard to target well-intentioned businesses in an effort to extort *in terrorem* settlements. The increase in BIPA litigation since *Rosenbach* will seem small in comparison to the number of lawsuits that will be filed if this Court adopts a "per scan" theory of liability. *Amici* do not believe that the Illinois General Assembly sought to punish businesses acting in good faith, overburden the courts, or impede the development of innovative technologies when it enacted BIPA. Nor do *Amici* believe that this Court intended such consequences through its ruling in *Rosenbach*. This Court certainly should not create those consequences here.

C. A "Per Scan" Interpretation of BIPA Would Lead to Absurd Results and Should Be Rejected.

Illinois law disfavors statutory interpretations that lead to "absurd, inconvenient, or unjust" results. *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 absurd results that are contrary to the statute's legislative intent. For example, the theory will discourage the adoption of biometric technology and innovation because of a fear that a technical statutory violation could subject a business to devastating liability. 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 efforts, technical violations might still occur. Many Illinois employers—including restaurants and retailers—are beginning to forego the use of biometric technology, to the detriment of both

employer and employee, simply to avoid the *possibility* that a former employee may, after knowingly scanning her finger daily and for years, bring a meritless BIPA claim.[22] The Illinois General Assembly surely did not intend to inhibit advances in or the beneficial use of this technology.

Nor is a "per scan" interpretation consistent with BIPA's consent scheme. BIPA was designed to protect people from having their information scanned or transmitted without their consent. Hence, as discussed above, "[BIPA] mandates that, *before obtaining an individual's fingerprint*, a private entity must" provide certain disclosures and "obtain a signed 'written release.'" *Symphony Bronzeville*, 2022 IL 126511, ¶ 21 (emphasis added). Once the business has scanned a fingerprint without the requisite consent, the right to privacy is fully invaded and the violation is complete. *See id.* ¶ 43; *Rosenbach*, 2019 IL 123186, ¶ 33, 129 N.E.3d at 1206. Additional scans of the same biometric information do not compound this statutory injury. If that were the case, businesses would be required to obtain new consent with every scan or transmission. Such a requirement would not only be "absurd," it would run counter to the statute's text and purpose.

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. In *Rosenbach*, this Court held that plaintiffs need not have been harmed to sue for a technical violation of the statute. *See Rosenbach*, 2019 IL 123186, ¶ 40,

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[22] *See* Holland, *supra* note 10.

129 N.E.3d at 1207. Under this framework, a "per scan" theory of liability could enable a lone 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—including Plaintiff in this action—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), Dkt. 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), Dkt. 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").

While the question certified to this Court concerns the *accrual* of BIPA claims, not damages under the statute, the issues are necessarily intertwined. As the Seventh Circuit recognized:

> Cothron responds that the calculation of damages is separate from the question of claim accrual. True, but she does not explain how alternative theories of calculating damages might be reconciled with the text of section 20 [if a "per scan" interpretation were adopted].

Cothron II, 20 F.4th 1165. Because the "per scan" theory of accrual would result in "baseless and absurd" liability—even for businesses deploying biometric technology securely, openly, and in good faith—this Court, respectfully, should instead adopt the reasonable first-scan interpretation proposed by Defendant.

D. A "Per Scan" Interpretation of BIPA Would Yield Unconstitutional Outcomes.

Statutes should be construed to avoid due process violations. 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.).

Interpreting BIPA to engender staggeringly high and uncapped liquidated damages exposure for a BIPA defendant, even absent harm, would

not only raise due process concerns, it would be unconstitutional. The U.S. Supreme Court's direction is clear—purely punitive damages may not be unlimited, nor may they grossly exceed the actual damages suffered by the plaintiff:

> [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.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416–17 (2003) (internal quotation marks and citations omitted). The U.S. Supreme Court instructed "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)).

This Court has adopted the *Campbell* guideposts. *See Doe v. Parrillo*, 2021 IL 126577, ¶ 48, --- N.E.3d. --- (2021); *Int'l Union of Operating Eng'rs, Loc. 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 490, 870 N.E.2d 303, 324 (2006) (applying *Campbell*, holding a punitive damages award more than eleven times the plaintiff's compensatory damages improper where defendant's

conduct was intentional but "minimally reprehensible"). This Court has also 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); *see also St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919) (holding a statutory penalty which is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable" will run afoul of due process).

As discussed above, a "per scan" interpretation of BIPA, and the uncapped liquidated damages that would flow from this Court adopting such a theory, would render the remedial statute punitive in nature. The resulting penalty to Illinois businesses—including restaurants and retailers—cannot pass constitutional scrutiny.

First, even a business that engaged in reasonable, good-faith efforts to comply with BIPA could be subject to enterprise-threatening penalties under a "per scan" interpretation of the statute. A *negligent* violation of the statute will expose defendants to $1,000 "for each violation." 740 ILCS 14/20(1). As the Seventh Circuit observed:

> Because White Castle's employees scan their fingerprints frequently, perhaps even multiple times per shift, Cothron's [per scan] interpretation could yield staggering damages awards in this case and others like it. If a new claim accrues with each scan, as Cothron argues, violators face potentially crippling financial liability.

Cothron II, 20 F.4th 1165. Such a "staggering" and "crippling" penalty cannot be sustained by mere negligence. *See Lowe Excavating*, 225 Ill. 2d at 481–83, 870 N.E.2d at 319–20 (finding punitive damages award unconstitutionally disproportionate even though defendant acted with "intentional malice").

Second, exorbitant penalties could be awarded even without actual harm. 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 and others have 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*, 942 F.3d at 1276 (quoting *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677–78 (7th Cir. 2009)).

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 responsible use of biometric technology. Nor would it reduce the risk of biometric data being collected without the employee's knowledge, as employees in time-clock cases

acknowledge they knew that they were providing their finger or hand scans to their employers. Because a "per scan" theory of liability could impose devastating liability on employers with no countervailing benefit to employees—who already knowingly consent to providing their biometric information—adoption of that position would violate employers' due process rights. *See Bradley*, 79 Ill. 2d at 418, 403 N.E.2d at 1032 (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, 554 N.E.2d 235, 236–37 (1990) (holding statutory penalty unconstitutional where it did not advance legislature's stated purpose in enacting statute).

Fourth, the Seventh Circuit's recent decision in *Epic Systems Corp. v. Tata Consultancy Services Ltd.* underscores the constitutional challenges attendant to the excessive penalties that a "per scan" theory of liability would generate. 980 F.3d 1117 (7th Cir. 2020), *petition for cert. filed*, No. 20-1426 (U.S. 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. Respectfully, this Court should similarly avoid the excessive, purely punitive liquidated damages that flow from a "per scan" interpretation of BIPA, and instead adopt Defendant's first-scan interpretation.

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

In an effort to find middle ground, some courts have applied the "continuing violation" doctrine to toll the limitations period in BIPA actions until the plaintiff's last scan. *See McGinnis v. U.S. Cold Storage, Inc.*, No. 19-L-9, slip. op. at 4 (Ill. Cir. Ct. Will Cnty. Nov. 4, 2020), *appeal docketed*, No. 3-21-0190 (Ill. App. Ct.). As the district court recognized in this action, however, "BIPA claims do not fall within the limited purview of this exception." *Cothron I*, 477 F. Supp. 3d at 730. That is because 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 transmission.

Adopting the continuing violation doctrine ignores this reality and would unjustly encourage claimants to delay asserting their 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 (citation omitted)).

The Appellate Court's decision in *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 scanning or transmitting 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 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—fingerprint scanning or transmission of a fingerprint scan without *first* obtaining the requisite consent. Like the later publications of the plaintiff's photograph in *Blair*, any later scans or

attendant transmissions here were not separate statutory violations or an ongoing act; they were continual effects of the initial overt act.

Rather than preventing "unjust results," application of the continuing violation doctrine would permit BIPA claimants to "sit back and wait" to file their claims. *Cunningham*, 154 Ill. 2d at 405, 609 N.E.2d at 325. Such delay 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 serve the statute's remedial purpose. Respectfully, this Court should therefore decline to apply the continuing violation doctrine to BIPA claims.

CONCLUSION

For these reasons and those set forth in the Defendant's brief, *Amici* respectfully encourage this Court to answer the Certified Question by ruling that Section 15(b) and 15(d) claims under BIPA accrue only upon the first scan or first transmission.

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 34 pages and 9,203 words.

/s/ Anneliese Wermuth
Anneliese Wermuth

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

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]

---

[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

Judge Neil H. Cohen

STATE OF ILLINOIS
CIRCUIT COURT
SEVENTEENTH JUDICIAL CIRCUIT

DONNA R. HONZEL
Associate Judge

Winnebago County Courthouse
400 West State Street
Rockford, Illinois 61101
PHONE (815) 319-4804* FAX (815) 319-4809

March 12, 2020

David Fish
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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: _____
Hon. Judge Donna Honzel

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Kahalah A. Clay
Circuit Clerk
Ashley Doughty
17-L-559
St. Clair County
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IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

REGINALD LARK, et al., Plaintiffs, v. McDONALD'S USA, LLC, et al., Defendants.	Case No. 17-L-559 Hon. Heinz M. Rudolf
ALLISON ARTHUR, et al., Plaintiffs, v. McDONALD'S USA, LLC, et al., Defendants.	Case No. 20-L-0891 Hon. Heinz M. Rudolf

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT PURSUANT TO 735 ILCS 5/2-801 *et seq.*

The Parties have reached a settlement to resolve the above-captioned Illinois class actions after hard-fought litigation commencing in 2017.[1] The two class actions for money damages involve Defendants' alleged violations of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, et. seq., ("BIPA"). Plaintiffs allege that Defendants illegally collected, stored, and used

[1] The first matter, *Lark, et al. v. McDonalds, USA, et al.* (Case No. 17-L-559) (the "*Lark* Litigation"), was filed on September 27, 2017 in the Twentieth Judicial Circuit Court of Illinois, St. Clair County, Illinois. The second matter, *Arthur, et al. v. McDonalds, USA, et al.* (Case No. 20-L-891) (the "*Arthur* Litigation"), was filed in St. Clair County, Illinois on November 10, 2020.. Both cases—collectively referred to as "The Litigations"—have been consolidated before this Court for purposes of settlement and approval. The consolidated cases include McDonald's USA, LLC, McDonald's Corporation, and McDonald's Restaurants of Illinois, Inc. as well as a combined 237 franchisee entities ("Franchisee Defendants") who operated McDonald's-brand restaurant locations across Illinois during the relevant time period.

Plaintiffs' and other similarly situated individuals' biometric identifiers and biometric information ("biometrics") without informed written consent, in direct violation of BIPA. Defendants deny Plaintiffs' allegations and deny that they violated BIPA.

The settlement terms are reflected in the Settlement Agreement and Release, which is approved by both current and past putative class representative plaintiffs in the *Lark* and *Arthur* matters, respectively. Collectively, these agreements will be referred to as the "Agreement," the "Settlement," or the "Settlement Agreement," and are attached hereto as **Exhibit 1**.[2,3] Although all Parties have approved the Settlement Agreement, due to the sheer number of parties involved, the process of collecting final executed versions is ongoing, but will, in any event, be completed on or before the Preliminary Approval Hearing on November 23, 2021, at which point Plaintiffs will file the fully executed Agreement for the Court's consideration. Under the Agreement, the Defendants[4] agree to settle the claims brought by Plaintiffs in the Litigations for a settlement value up to $50,000,000 without an admission of fault. By any metric, this is a fair, adequate, and reasonable settlement—indeed, the total settlement amount ranks among the highest BIPA settlements ever achieved in Illinois. If approved, the Settlement Agreement will bring certainty and closure – and immediate and valuable relief – to what otherwise would be contentious and costly litigation regarding the Defendants' allegedly unlawful collection and possession of their employees' biometric identifiers and/or biometric information.

Both Plaintiffs and the Defendants believe in the merits of their cases and compromised to reach this result after multiple mediations and more than six months of protracted negotiations

[2] Capitalized terms shall have the same meaning as set forth in the Agreement, unless otherwise noted.

[3] Class representative Plaintiffs and the Defendants signed separate copies of the attached, final version.

[4] See Appendix A, which contains a complete list of all Named Defendants who are parties to the Agreement.

thereafter. Plaintiffs and Class Counsel have extensively investigated the facts and law relating to the class claims and the Defendants' defenses. While Plaintiffs and Class Counsel believe the class claims are meritorious, they also recognize the expense and effort that it would take to prosecute this case against the Defendants through trial and any subsequent appeals. Plaintiffs and Class Counsel have considered the uncertain outcome and risk involved in any litigation, especially complex actions such as this one, including the difficulties and delays inherent in the litigation process. With these factors in mind, Plaintiffs and Class Counsel are confident that the Settlement is fair, reasonable, adequate, and in the best interests of the Class. Significant risk existed as to both sides. This Settlement resolves that risk and provides immediate relief to Settlement Class Members, who will not have to deal with any uncertainty or wait through lengthy trials and appeals that might intervene or follow, all of which may take many months or years to conduct in light of COVID-19.

Critically, the Parties reached the Settlement despite a substantial risk of non-recovery in this matter. Indeed, during the Parties' multiple mediations and many months of subsequent negotiations, the Illinois Supreme Court agreed to hear *McDonald v. Symphony Bronzeville Park, LLC*, Case No. 12651—a case which will determine whether the exclusivity provisions of the Illinois Workers' Compensation Act bar claims for statutory damages under BIPA. An adverse decision in *McDonald* could deprive the Settlement Class of any recovery whatsoever. Balancing the risks against the substantial attendant benefits, the Court should grant Plaintiffs' Unopposed Motion for Preliminary Approval, find that the Settlement is fair, adequate, and reasonable, and enter an Order: (i) granting preliminary approval of the Settlement Agreement; (ii) provisionally certifying the Class for settlement purposes; (iii) appointing Class Representatives and Class Counsel; (iv) approving the form and manner of the Notice Plan, including the proposed Class

Notice attached hereto as Exhibit 2, and appointing a Settlement Administrator; (v) establishing deadlines for requests for exclusion and the filing of objections to the proposed settlement contemplated by the Settlement Agreement; and (vi) scheduling a final fairness hearing to take place on February 28, 2022, or as soon thereafter as the matter may be heard.

I. RELEVANT PROCEDURAL BACKGROUND

Lark Litigation

The litigation of *Lark, et al v. McDonald's USA, LLC, et al.*, No 17L559 has been arduous in every respect. On September 27, 2017, Plaintiffs Macy Koeneman and Krista Noell filed this putative class action lawsuit against Defendants McDonald's USA, LLC; McDonald's Corporation; and Doe Defendants 1-600. On November 2, 2017, the matter was assigned to the Honorable Judge Christopher Kolker. Defendants filed their Answer and Affirmative Defenses on December 13, 2017.

Discovery commenced on January 17, 2018 with Plaintiff's service of their First Interrogatories and Requests for Production of Documents upon both Defendants. Defendants responded in part on February 14, 2018 and indicated they would respond further upon entry of a Protective Order. Defendants' Motion for Protective Order was filed on February 23, 2018, taken under advisement at consecutive hearings, and ultimately resulted in the appointment of J. Williams (Ret.) as Special Discovery Master.

Defendants amended their discovery responses on March 2, 2018 and served their own discovery requests upon both Plaintiffs on March 5, 2018. On March 6, 2018, Plaintiffs filed a Motion to Compel Discovery Responses.

On April 2, 2018, Plaintiff Macy Koeneman filed a motion to voluntarily dismiss her claims and leave Krista Noell as the sole remaining Plaintiff on behalf of the putative class.

Plaintiffs' Motion to Compel Defendants' Discovery Responses was heard and granted on April 3, 2018, and Defendants amended their Discovery Responses again on April 27, 2018. However, discovery disputes remained. Plaintiffs filed a Supplemental Motion to Compel on June 18, 2018, and the Defendants filed their own Motion to Compel Discovery Responses on June 19, 2018. On that same day, Defendants filed a Motion to Stay this matter pending the outcome of *Rosenbach v. Six Flags Entertainment Corp, et al.*, 2017 IL App (2d) 170317.

On June 22, 2018, Defendants further amended their responses to Plaintiffs' first Discovery Requests.

On June 25, 2018, Defendants' Motion to Stay was granted. Plaintiffs filed a Motion to Reconsider that ruling on July 12, 2018, which was heard and granted, lifting the stay, on August 2, 2018. In response, on August 31, 2018, Defendants filed a Notice of Interlocutory Appeal from the Court's August 2nd order. The Supporting Record was filed in the Appellate Court on September 5, 2018. Appellants' Brief was filed on September 12, 2018, Appellees' Brief was filed on October 5, 2018, and Appellants' Reply was filed on October 12, 2018. On November 1, 2018, Plaintiff-Appellee filed a Motion to File Supplemental Authority and for Supplemental Briefing regarding a recent decision in the matter of *Sekura v. Krishna Schaumburg Tan, Inc.,* 2018 IL App (1st) 180175, which Defendants-Appellants opposed on November 6, 2018. The Court held oral argument on December 6, 2018.

On January 25, 2019, the Illinois Supreme Court issued its mandate in the *Rosenbach* matter. As a result, the Appellate Court issued an order on March 12, 2019 dismissing Defendants' appeal as moot and remanding the matter to the Circuit Court for further proceedings.

During the pendency of the Appeal, Discovery continued. Plaintiffs served a second set of Discovery Requests upon the Defendants on August 31, 2018. Defendants responded to Plaintiffs'

Second Discovery Requests on September 28, 2018. On October 8, 2018, Plaintiff filed a Motion to Compel Defendants' responses. Defendants amended their responses to Plaintiffs' second requests on October 15, 2018 and opposed the Motion to Compel on November 16, 2018. Defendants again amended their responses to Plaintiffs' First Discovery Requests on November 19, 2018. Plaintiffs' Motion to Compel was granted in part and continued on November 20, 2018. Defendants further amended their responses to Plaintiffs' First and Second Discovery Requests on February 20, 2019. In total, Defendants produced over 200,000 Bates numbered documents in response to Plaintiffs' requests.

On June 6, 2019, Plaintiff filed a Motion for Leave to Amend Pursuant to 735 ILCS 5/2-616. The Proposed First Amended Complaint named 40 Plaintiffs and 32 defendants (McDonald's Corporation, McDonald's USA, LLC, McDonald's Restaurants of Illinois, Inc. (collectively, "McDonald's"), and an additional 29 Franchisee Defendant entities). Plaintiff's Motion for Leave to Amend was heard and granted on June 17, 2019. On the same day, the Court issued its order appointing J. Williams (Ret.) as Special Discovery Master to resolve the outstanding disputes outlined in the Parties' Motions to Compel.

On August 8, 2019, Franchisee Defendant Luna, Inc. filed the first of many Motions for Substitution of Judge as a Matter of Right that have been filed in this matter. On August 14 and 16, 2019, McDonald's filed their Answers and Affirmative Defenses to Plaintiffs' First Amended Complaint.

On August 21, 2019, Plaintiffs filed a Motion for Partial Summary Judgment on the issue of whether any defendant is a State or local government agency. This motion was granted on September 5, 2019. On September 3, 2019, Plaintiffs moved for voluntary dismissal of their claims against Luna, Inc. prior to any ruling on their pending Motion for Substitution of Judge. The same

day, Franchisee Defendant McEssy Investment Company filed their own Motion for Substitution of Judge as a Matter of Right, and Plaintiffs filed a voluntary dismissal of their claims against McEssy.

On September 9, 2019, Franchisee Defendant Estel Foods, Inc. filed yet another Motion for Substitution of Judge as a Matter of Right. This motion was denied on September 18, 2019.

On September 11 and 12, 2019, fourteen Franchisee Defendants represented by the O'Hagan Meyer law firm filed Motions to Dismiss for Improper Venue, or in the Alternative, to Sever this Action. On September 16, 2019, ten Franchisee Defendants represented by the law firm Jackson Lewis filed Motions to Transfer Venue, or in the Alternative, Sever this Action. On October 2, 2019, Franchisee Defendant TDS Services, Inc. filed a Motion to Dismiss for Improper Venue, or in the Alternative, to Sever this Action, combined with a Motion to Strike Counts CCLIX, CCLX, and CCLXIII of the First Amended Complaint. Plaintiffs filed oppositions to each of these motions on October 25, 2019.

On October 10, 2019, Plaintiffs served its first set of Interrogatories and Requests for Production of Documents upon each of the twenty-seven (27) Franchisee Defendants. All 27 Franchisee Defendants served responses by December 13, 2019.

On October 22, 2019, Plaintiffs filed a Motion for Leave to Amend Pursuant to 735 ILCS 5/2-616, seeking leave to file a Second Amended Class Action Complaint naming 40 plaintiffs and 31 defendants. McDonald's USA and McDonald's Corporation, and Franchisee Defendant Estel Foods, Inc., submitted oppositions on October 28, 2019.

Plaintiffs' Motion for Leave to Amend and Defendants' various venue motions were heard on October 29, 2019. Plaintiffs' Motion was granted, and their proposed Second Amended Class Action Complaint deemed filed *instanter*. All of the Franchisee Defendants' motions were denied.

On October 29, 2019, Franchisee Defendant Casireon, LLC, newly added as a party in the Second Amended Class Action Complaint, submitted a Motion for Substitution of Judge as a Matter of Right. On November 5, 2019, Plaintiffs voluntarily dismissed their claims against Casireon, LLC. Also on November 5, 2019, Plaintiffs filed a Motion for Leave to Amend Pursuant to 735 ILCS 5/2-616, seeking leave to file a Third Amended Class Action Complaint naming 40 Plaintiffs and 31 Defendants. McDonald's and the Franchisee Defendants represented by O'Hagen Meyer filed oppositions to Plaintiffs' Motion on November 21 and 22, 2019, respectively. The Court heard and granted Plaintiffs' Motion on November 25, 2019, and the Third Amended Class Action Complaint (the current, operative complaint in this matter) was deemed filed instanter. The same day, newly named defendant JCTWILL, LLC filed a Motion for Substitution of Judge as a Matter of Right.

On December 10, 2019, the Court entered two Orders – one detailing its ruling denying the various venue motions from the October 29, 2019 hearing, and a second granting Defendant JCTWILL, LLC's Motion for Substitution of Judge. This matter was reassigned to the Honorable Judge Stephen McGlynn the same day.

McDonald's filed their Answers and Affirmative Defenses to Plaintiffs' Third Amended Complaint on December 26, 2019.

On January 9, 2020, Franchisee Defendants represented by O'Hagan Meyer filed a Motion to Reconsider the Court's December 10, 2019 Order regarding its venue motions. On January 10, 2020, they filed a Motion for Leave to File Motions to Dismiss in Excess of the Court's page limit, attaching sixteen (16) Motions to Dismiss under Rule 2-619. Also on January 10th, Franchisee Defendants represented by Jackson Lewis filed a Motion to Join the Motion to Reconsider, and Franchisee Defendant TDS Services, Inc. separately filed a Motion for Leave to File its Motions

to Dismiss, Sever, and Transfer Counts 233-240 of the Third Amended Class Action Complaint in excess of the Court's page limit.

On January 13, 2020, eleven (11) Franchisee Defendants filed Motions for Leave to Exceed Page Limits, attaching Motions to Dismiss under Rule 2-619. On January 14, 2020, Franchisee Defendant Amore Enterprises, Inc. filed a Motion to Sever and Transfer certain Counts of the Third Amended Class Action Complaint. All of the motions regarding page limitations were heard and granted on January 27, 2020, and the attached Motions to Dismiss, Sever, and/or Transfer were deemed filed *instanter*. On February 21, 2020, the Franchisee Defendants' Motion to Reconsider the Court's December 10, 2019 ruling on their venue motions was denied.

Between March 16 and 19, 2020, Plaintiffs filed 26 briefs in opposition to the Franchisee Defendants' Motions to Dismiss, Sever, and/or Transfer.

At this point the COVID-19 pandemic halted regular Court operations. On April 2, 2020, the Court ordered the parties to notify the Court within 10 days if either party wanted to present oral argument on the pending motions via teleconference or wait until the Court resumed its normal operation. The parties disagreed, and certain Franchisee Defendants filed a Motion to Request Video Hearing on June 25, 2020. Plaintiffs opposed on June 29, but ultimately, on July 6, 2020, the matter was set for a Zoom hearing on July 28.

On July 14 and 15, certain Franchisee Defendants filed Reply briefs on their Motions to Dismiss, Sever, and/or Transfer, and on August 24, 2020, additional Franchisee Defendants filed Replies in support of their Motions to Dismiss.

On July 17, 2020, the Court reassigned this matter from Judge Stephen McGlynn to Judge William D. Stiehl. Plaintiffs filed a Motion for Substitution of Judge as a Matter of Right, which was granted on July 22, 2020. The matter was reassigned to the Honorable Judge Andrew Gleeson

on July 23, 2020. On August 6, 2020, Franchisee Defendant Karavites Restaurant 6298, LLC filed yet another Motion for Substitution of Judge as a Matter of Right, and on August 18, 2020 they filed a brief in support.

On August 25, 2020, Plaintiffs filed a brief in opposition to Franchisee Defendant Karavites Restaurant 6298's Motion for Substitution of Judge. Defendant Karavites Restaurant 6298 filed their Reply in support on September 8, 2020, and Plaintiffs filed a sur-reply on September 15. The Motion was taken under advisement on November 10, 2020, and the Court ordered the Parties to submit Proposed Orders by December 1.

On December 17, 2020, Plaintiffs filed a Motion for Leave to Amend to Add Subclass and Allegations for Reckless Disregard Relating to Defendants' alleged Unlawful Capture and Use of their Minor Employees' Biometric Data.

On June 7, 2021, the Court entered an Order terminating the appointment of Stephen C. Williams as Special Master. On June 14, 2021, the matter was set for status on October 25, 2021 to allow the Parties to continue settlement discussions, and status was again reset for November 8, 2021. On November 8, 2021, the Parties moved to consolidate the *Lark* and *Arthur* matters, and the Court granted the motion and consolidated the two cases.

Arthur Litigation

The litigation of *Arthur, et al v. McDonald's USA, LLC, et al.,* No. 20L0891 has been less lengthy, but is complicated in its own way. The Complaint was filed on November 10, 2020 by Plaintiffs Allison Arthur, Kyle Arthur, Ma-Kyeia Daniels, Tiffany Gomez, LaShunda Hicks, Ky'Aron Manning, Brett Prather, and David Truetner, naming as Defendants McDonald's USA, LLC, McDonald's Corporation, and over 200 additional Franchisee entities that were not named in *Lark*. The case was assigned to the Honorable Judge Heinz Rudolf and remains before him.

Service of process required the appointment of two Special Process Servers and the issuance of 218 Summonses and 73 Alias Summonses for service upon 57 registered agents spread throughout the entire State of Illinois over the course of more than two months.

Motion practice in this matter has been much more limited than in *Lark*, and the Court has repeatedly granted extensions of Defendants' response deadline to accommodate the Parties' Mediation efforts and to give the parties time to engage in settlement discussions.

Plaintiffs filed a Motion for Leave to Amend on January 28, 2021, which remains before the Court. On June 23, 2021, Defendants filed a Joint Motion to Stay Proceedings upon which the Court has declined to rule in light of the ongoing settlement talks.

On September 17, 2021, the Court appointed Judge Lloyd Cueto to assist the parties and the Court regarding issues with the settlement term sheet.

On October 11, 2021, Plaintiffs filed a Motion for Substitution of Judge as a Matter of Right, but withdrew the motion on October 12. On November 8, 2021, the cases were consolidated.

Mediation

In early 2019, the Parties first attempted to resolve the *Lark* matter through mediation before Judge Morton Denlow (Ret.). Plaintiffs submitted a Mediation Statement on February 22, 2019, and Defendants submitted theirs on March 1, 2019. Mediation took place on March 5, 2019, and was ultimately unsuccessful.

The Parties second attempt at mediation took place nearly two years later, when in 2021 the Parties retained former U.S. District Court Judge Layn Phillips (Ret.) to serve as mediator of both the *Lark* and *Arthur* Litigations. Both parties acknowledge that Judge Phillips is widely recognized as one of the most preeminent and experienced mediators in the country. The Parties submitted their mediation statements to the Honorable Judge Layn Phillips (Ret.) on January 21,

2021. Judge Phillips held full-day mediation sessions on March 11, 2021, and April 7, 2021. When those mediation sessions failed to result in an agreement, the Parties continued to engage in negotiations with the assistance of Judge Phillips for the next several months. In all, mediation and subsequent settlement negotiations totaled over nine months. On September 17, 2021, Judge Rudolf in the *Arthur* Litigation ordered to Parties to engage the Hon. Lloyd Cueto (Ret.) as an additional mediator. The Parties continued to have negotiations through both Judge Phillips and Judge Cueto for several additional weeks, and have continued settlement discussions until the present day, culminating in the instant Agreement, which (if approved) will resolve both the *Lark* and *Arthur* matters.

II. THE PROPOSED SETTLEMENT

A. The Settlement Class

The Settlement Class in this case is the defined as the following:

> All individuals employed by any "McDonald's Defendant" who logged onto, interfaced with, or used any software, systems, or devices that used the individual's finger, hand, face, retina, or any biometric identifier of any type ("Biometric Systems") in any McDonald's or McDonald's franchise restaurants in Illinois, including any employee of a McDonald's Defendant who has a claim under the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, et seq., at any time through the date of preliminary approval.

Each such individual is a "Settlement Class Member."

B. The Settlement Fund

Defendants and their insurers will jointly commit to fund up to $50,000,000, inclusive of attorneys' fees and costs, to resolve both Litigations. This amount is inclusive of all payments made to Plaintiffs; class members; Plaintiffs' attorney's fees and costs approved by the Court; any Court-approved Service Awards to named Plaintiffs; and costs and expenses associated with settlement administration (the "Gross Settlement Amount").

Within 30 days after the entry of the Preliminary Approval Order, the Defendants shall deposit into the Settlement Fund the first installment in the amount of Twenty-Two Million Five Hundred Thousand U.S. dollars ($22,500,000). Any amounts in addition to $22,500,000 shall be deposited by Defendants within 30 days after the Effective Date (as defined in the Agreement).

$5,000,000 out of the $50,000,000 Gross Settlement Amount consists of two reserves: Reserve A, consisting of $2,500,000, is available only in the event that more than 60% of the Settlement Class submit valid and timely claim forms. Reserve B, consisting of an additional $2,500,000, is available only in the event that more than 75% of the Settlement Class submit valid and timely claim forms.

Defendants will pay settlements amount into a Court-approved Qualified Settlement Fund pursuant to Section 1.468B-1 et seq. of the Treasury Regulations promulgated under Section 468B of the Internal Revenue Code of 1986, as amended, and will be maintained in an interest-bearing account.

If the Settlement Agreement does not receive final approval, the Gross Settlement Amount belongs to Defendants (or their insurers, as the case may be), less any administrative expenses paid to date. Plaintiff shall have no financial responsibility for any administrative expenses in the event that the Settlement Agreement does not receive final approval.

The Gross Settlement Amount shall be used to pay: (i) the Settlement Class Members in accordance with the terms of this Agreement; (ii) Incentive Awards to the Class Representatives; (iii) the Fee Award; and (iv) payment of Administrative Expenses to the Settlement Administrator. All of these amounts shall be payable solely out of the Gross Settlement Amount.

The Gross Settlement Amount and obligations outlined in the Settlement Agreement represent the total extent of Defendants' monetary obligations under the Settlement Agreement.

Defendants' contribution to the Gross Settlement Amount shall be fixed and be final.

C. Settlement Class Member Payments

Under the Settlement Agreement, Settlement Class Members will be eligible to receive a distribution from the Gross Settlement Amount less attorneys' fees and costs, incentive award payments and settlement administration costs and expenses through an allocation methodology and formula, set forth in the Parties' Settlement Agreement, based on the employment dates for each Settlement Class Member, set forth as follows:

> **Employment at McDonald's Defendants *ON OR BEFORE* December 31, 2018:** Each Settlement Class Member employed at any McDonald's-brand restaurant in Illinois on or before December 31, 2018, who provides a valid Claim Form will receive up to $375, in cash.
>
> **Employment at McDonald's Defendants *ON OR AFTER* January 1, 2019:** Each Settlement Class Member whose employment at any McDonald's-brand restaurant in Illinois on or after January 1, 2019, who provides a valid Claim Form will receive up to $190, in cash.

If a Claim Form is timely submitted by a Class Member but is deficient in one or more aspects, the Settlement Administrator shall, within 5 days of receipt of the deficient Claim Form, notify the Parties' counsel and return the form to the Class Member with a letter explaining the deficiencies and informing the Class Member that he or she shall have 14 days from the date of the deficiency notice to correct the deficiencies and resubmit the Claim Form. In consultation with the Settlement Administrator, McDonald's Defendants shall have the right to establish reasonable fraud control measures and standards to be applied, as appropriate.

Payment of Claims: Within sixty (60) days of the Effective Date, the Settlement Administrator shall send a check by First Class U.S. Mail to each Settlement Class Member that submitted an Approved Claim. These checks shall expire one-hundred and twenty days (120) after issuance.

Defendants, Defendants' Counsel, Plaintiffs, and Class Counsel will not have any liability

for lost or stolen checks, forged signatures on checks, unauthorized negotiation of checks, or failure to timely cash a check within the 120-day period.

Administrative Expenses: All Administrative Expenses shall be paid out of the Gross Settlement Amount, unless modified by agreement in writing by Class Counsel and Defendants' Counsel or by Court order.

Remaining Funds: All residual funds remaining from the Gross Settlement Amount after payments and expenses have been paid per the terms of this Agreement shall revert to the Defendants 180 days after the Effective Date (or such other date as may be set with Defendants' consent to allow sufficient time for processing of claims and payments from the Gross Settlement Amount) and may thereafter be retained by the Defendants as the Defendants' money.

Defendants' Counsel and Class Counsel will provide their best information to and cooperate with the Settlement Administrator to respond to any reasonable inquiries from the Settlement Administrator necessary to complete its responsibilities under this Agreement. Any and all information provided for the purpose of locating Settlement Class Members whose individual settlement check is returned as undeliverable provided by Defendants or their Counsel shall be held in confidence, retained in an electronically secure manner, and shall be used solely for purposes of effectuating the Settlement Agreement.

To provide timely relief to Class Members, the Parties' proposed Preliminary Approval Order provides that the Court will schedule the Final Approval Hearing on February 28, 2022, or as soon thereafter as the matter may be heard.

D. Notice and Settlement Administration

The Parties request that the Court approve their selection of Epiq to serve as the Settlement Administrator in this matter.

The Settlement Administrator will implement a robust class notice program to ensure that Settlement Class Members learn of their rights in the Settlement. The notice program will include multiple, targeted methods of notice distribution and the creation of a Settlement website.

Upon preliminary approval of the settlement, as the Court may direct, the Settlement Administrator shall disseminate Notice to the Settlement Class of the Settlement Agreement explaining the rights that will be extinguished under the Settlement Agreement and the rights and the processes by which Settlement Class Members may participate in, comment on, object to, or exclude themselves from the Settlement. Notice in the form approved by the Court shall be provided via (1) regular, first-class mail and (2) email for Settlement Class Members for whom postal and email addresses are available in McDonald's Defendants' employment records.

Settlement Class Members will be provided with postage pre-paid claims forms, which must be returned to the Settlement Administrator with a postmark no later than 50 days from mailing. Settlement Class Members will also have the option to submit a claim form on the settlement website. Among other things, Plaintiffs' proposed Notice of Class Action Settlement ("Class Notice") (*see* **Exhibit 2**) explains the following to Settlement Class Members: (1) what the Settlement is about; (2) how to receive payment, request exclusion, and submit an objection; (3) how to obtain more information about the Settlement; (4) the monetary terms of the Settlement and how individual payments will be calculated; (5) the maximum amounts to be requested for attorney fees, costs, settlement administration, and Service Awards; and (6) the Final Approval Hearing details.

Any Class Notices returned to the Settlement Administrator as non-deliverable with a forwarding address on or before the Response Deadline will be sent via regular First-Class mail to the forwarding address within 5 days of receipt of the forwarding address, and the Settlement

Administrator will state the date of such re-mailing on the Class Notice. For any Class Notice that is returned by the post office as undeliverable without a forwarding address or addressee unknown, the Settlement Administrator shall perform a skip trace that shall use such public and proprietary electronic resources as are available to the Settlement Administrator that lawfully collect address data from various sources such as utility records, property tax records, motor vehicle registration records, and credit bureaus. If the Settlement Administrator is successful in locating an alternate subsequent address or addresses, the Settlement Administrator shall perform a single re-mailing of the Class Notice to the new address(es) within 10 days of receipt of the undeliverable notice.

The Settlement Administrator will also create a Settlement website, anticipated to be www.ArthurLarkBIPASettlement.com, which will also have information on how to contact the Settlement Administrator, how to download and submit a Claim Form if needed, Notice, how to opt-out of the Settlement, the Settlement Agreement, the Preliminary Approval Order, the Motion for Attorney Fees, Costs, and Settlement Class Representatives' Service Awards (once available), the Motion for Final Approval (once available), and the Final Approval Order (once available).

E. Payment of Attorneys' Fees, Costs, and Service Awards

Class Counsel will seek reasonable attorneys' fees in an amount to be determined by the Court by petition. Proposed Class Counsel has agreed to limit its request for fees to 37% of the Gross Settlement Fund, plus reasonable costs and expenses with no consideration from Defendants and no "clear-sailing agreement," such that Defendants expressly reserve their right to object to the amount requested if they desire.

Defendants has also agreed to pay each Class Representative an incentive award in the amount of $2,500 from the Settlement Fund, subject to Court approval, in recognition of their

efforts as Class Representatives. Plaintiff will move for these payments via a separate request after Preliminary Approval.

F. Release

In exchange for the relief described above, and as set forth in more detail in the Settlement Agreement, Settlement Class Members who do not timely exclude themselves from the Settlement, will provide Defendants, their affiliated entities and other Released Parties a full and complete release of any and all claims, rights, demands, liabilities, and/or causes of action of every nature and description, whether known or unknown, which relate in any way to information that is or could be protected under the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 et seq., or any other similar state, local, or federal law, regulation, or ordinance, or common law, regarding the collection, capture, receipt, maintenance, storage, transmission, or disclosure of biometric identifiers or biometric information that Settlement Class Members claim, might claim, or could have claimed in any court or administrative proceeding.[5] Ex. 1 ¶ 54.

III. APPLICABLE LEGAL STANDARDS

"Certification of a class action in Illinois is governed by section 2-801 of the Code." *Lee v. Buth-Na-Bodhaige, Inc.*, 2019 IL App (5th) 180033 at ¶ 52 (Ill. App. Ct. 2019). Section 2-801 contains four prerequisites in order to maintain a class action: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of fact or law common to the class that predominate over any questions affecting only individual members, (3) the representative parties will fairly and adequately protect the interests of the class, and (4) the class action is an

[5] This Release includes, without limitation, statutory, constitutional, contractual, and/or common law claims for damages, unpaid costs, penalties, liquidated damages, punitive damages, interest, attorneys' fees, litigation costs, restitution, or equitable relief to the extent permitted by applicable law.

appropriate method for the fair and efficient adjudication of the controversy." *Lee*, 2019 IL App (5th) 180033 at ¶¶ 52–53.

For a class action settlement agreement to be approved, "[t]he proponents of a class settlement must show that the compromise is fair, reasonable, and in the best interest of all who will be affected by it, including absent class members." *Id.* at ¶ 54. "Class action settlements are reviewed on a case-by-case basis, with consideration of several factors, including the strength of plaintiffs' case balanced against the money and relief offered in the settlement; the defendant's ability to pay; the complexity, length, and expense of further litigation; the amount of opposition to the settlement; the presence of collusion in reaching the settlement; the class members' reaction to the settlement; the opinion of competent counsel; and the stage of proceedings and amount of discovery completed. [citation omitted]. In considering these factors, the circuit court should not turn the approval hearing into a trial on the merits. [citation omitted]." *Id.* at ¶ 56.

The Manual for Complex Litigation describes a three-step process for approving a class action settlement: (1) preliminary approval of the proposed settlement; (2) dissemination of notice of the settlement to class members; and (3) a final approval hearing. *See Manual for Complex Litigation* §21.63 (4th ed. 2004). "The initial examination is a bit less strenuous than the final fairness assessment—at the early stage, the Court need only determine whether the settlement is 'within the range of possible approval.'" *Wyms v. Staffing Sols. Se., Inc.*, 15-CV-0643-MJR-PMF, 2016 WL 6395740, at *4 (S.D. Ill. Oct. 28, 2016) (quoting *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982)). "The purpose of the initial hearing is to ascertain whether there is any reason to notify the class members of the proposed settlement and proceed with a fairness hearing." *Cook v. McCarron*, 92 C 7042, 1997 WL 47448, at *7 (N.D. Ill. Jan. 30, 1997) (citation omitted). Once

the settlement is found to be "within the range of possible approval" at the initial fairness hearing, the final approval hearing is scheduled and notice is provided to the class. *Id.*

IV. PROVISIONAL CLASS CERTIFICATION FOR THE PURPOSES OF SETTLEMENT SHOULD BE GRANTED

Deciding whether to grant class certification is soundly within the discretion of the circuit court, and "[i]n exercising its discretion, the court should err in favor of granting class certification." *Bueker v. Madison County*, 2016 IL App (5th) 150282, ¶ 22, 61 N.E.3d 237, 248. In deciding whether to certify a class, the trial court may consider any matters of fact or law properly presented by the record, including the pleadings, depositions, affidavits, answers to interrogatories, and any evidence that may have been adduced at the hearings. *Lee*, 2019 IL App (5th) 180033 at ¶ 53. In a class action, the trial court is the guardian of the interests of the absent class members. *Id.* at ¶ 54. When faced with a settlement-only class, in order to protect the absent members of the class, the trial judge must give heightened scrutiny required to apprise itself of all facts necessary to reach an intelligent and objective opinion of the probabilities of ultimate success if the case were to proceed, and to assess the complexity, expense, and likely duration of the case if it were to proceed, not to mention consideration of the general wisdom of the proposed compromise. *Id.* at ¶¶ 56-57. In this way, "a court asked to approve the settlement should not assume the passive role that is appropriate when there is genuine adverseness between the parties." *Id.* at ¶¶ 56 (citing *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014)).

To qualify for certification, an action must satisfy all of the provisions of 735 ILCS 5/2-801 *et seq.*, namely that, (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact ***or*** law common to the class, which predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interests of the class; and (4) a class action is an appropriate method for the fair and efficient

adjudication of the controversy. 735 ILCS 5/2-801. *See also e.g. Lee,* 2019 IL App (5th) 180033 at ¶¶ 52–53; *Bueker*, 2016 IL App (5th) 150282, ¶ 23; *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 545, 278 Ill. Dec. 276, 798 N.E.2d 123 (5th Dist. 2003).

A. NUMEROSITY IS SATISFIED.

Section 801(1) requires not only that the number of plaintiffs be numerous, but also that joinder of plaintiffs in one individual action be impractical. 735 ILCS 5/2-801(1). Where there are a number of potential claimants, and the individual amount claimed by each is relatively small, making redress on an individual level difficult, if not impossible, Illinois courts have been particularly receptive to proceeding on a class action basis. *Miner v. Gillette Co.*, 87 Ill.2d 7 (1981).[6]

The number of workers who may have been affected here is sufficiently numerous to make joinder of all such workers impractical. The Parties believe that the number of class members in this action, all of whom are current or former employees at of one of the McDonald's Defendants' hundreds of locations throughout the State of Illinois, will total more than 175,000 individuals. This is more than enough to satisfy the requirement of numerosity under section 2-801(1) consistent with binding precedent. *See Clark*, 343 Ill. App. 3d 538, 545 ("The plaintiff's complaint alleges thousands of plaintiffs nationwide, and the defendants do not dispute that the class is so numerous that the joinder of all members would be impractical. Accordingly, the [numerosity requirement] is met."); *Kulins v. Malco, A Microdot Co., Inc.*, 121 Ill. App. 3d 520, 530 (1st Dist. 1984) (finding that in Cook County, 47 class members was sufficient to satisfy numerosity);

[6] The disproportionate burden on plaintiffs having to bear the cost, time, and expense of pursuing individual small, duplicative cases is not the only consideration, either. The courts themselves have a legitimate interest in avoiding needless and wasteful litigation. "Affirming the trial court's class certification order will avoid the filing of numerous, repetitive cases placing a burden on the courts." *Fakhoury v. Pappas*, 395 Ill. App. 3d 302, 316 (1st Dist. 2009).

Carrao v. Health Care Serv. Corp., 118 Ill. App. 3d 417, 427 (1st Dist. 1983) (finding that allegations in the complaint that "the class consists of over 1,000 members provides an ample basis for the trial court's conclusion that joinder of all members is impracticable."); *see also Cruz v. Unilock Chicago*, 383 Ill. App. 3d 752, 322 Ill. Dec. 831, 892 N.E.2d 78 (2d Dist. 2008) (stating that plaintiffs need not demonstrate a precise figure for the class size, rather a good faith non-speculative estimate showing that that the class is sufficiently numerous to make the joinder of all the members impracticable). Therefore, this Court should find that the numerosity element is satisfied under section 801(1).

B. THERE ARE COMMON QUESTIONS OF LAW AND FACT.

Section 801(2) requires "questions of fact or law common to the class." 735 ILCS 5/2-801(2). "The statutory requirement [for section 801(2)] is met where (1) there are questions of fact or law common to the class and (2) these common questions predominate over questions affecting only individual members of the class." *Hall v. Sprint Spectrum, L.P.*, 376 Ill.App.3d 822, 831, 315 Ill.Dec. 446, 876 N.E.2d 1036 (2007). "In order to satisfy the second requirement of section 2–801 . . . it must be shown that successful adjudication of the purported class representatives individual claims will establish a right of recovery in other class members." *Hall*, 376 Ill. App. 3d at 831 (internal citations omitted).

A case presents common questions when defendants have engaged in the same or similar course of conduct. *See Clark*, 343 Ill. App. 3d at 548; *Hall*, 376 Ill. App. 3d at 831. This is particularly true where – as here – the claims are based predominantly upon the application of a single statute or statutory scheme. "A common question may be shown when the claims of the individual class members are based upon the common application of a statute . . . ." *Clark,* at 548; *see also Bueker*, 2016 IL App (5th) 150282, ¶ 27 ("With regard to the commonality requirement,

a common issue may be shown where the claims of the individual class members are based upon the common application of a statute or where the proposed class members are aggrieved by the same or similar conduct or pattern of conduct."); *Hall,* 376 Ill. App. 3d at 831 (same).

Here, this element is satisfied as the claims of individual class members are alleged to be based upon the common application of one Illinois statute, the Illinois Biometric Information Privacy Act ("BIPA), 740 ILCS 14/5 *et seq.* The Court should therefore find that the commonality element of section 801(2) is satisfied here. *See Clark*, 343 Ill. App. 3d at 548; *Bueker*, 2016 IL App (5th) 150282 at ¶ 27.

C. THE NAMED PLAINTIFFS AND THEIR COUNSEL ADEQUATELY REPRESENT THE INTERESTS OF THE PROPOSED SETTLEMENT CLASS.

Adequate representation has two components: (1) adequacy of the named Plaintiff; and (2) adequacy of the named plaintiff's attorneys. "In considering the adequacy of representation, the test is whether the interests of those who are parties are the same as those who are not joined and whether the litigating parties fairly represent those who are not joined." *Lee*, 2019 IL App (5th) 180033, ¶ 63 (citing *Miner*, 87 Ill. 2d at 14, 56 Ill.Dec. 886, 428 N.E.2d 478). In this consideration, a court must ensure that the "plaintiff's claim must not be antithetical to those of other class members, and plaintiff's interests must not appear collusive." *Id.* "The representation by the class representative must protect the due process rights of the class members, including the right to be represented by a lawyer who is qualified, experienced, and generally able to conduct the proposed litigation." *Id.*; *see also Retired Chicago Police Association, 7* F.3d 584, 598 (7th Cir. 1993).

These requirements are readily established in this case. The putative Class Representatives, all employees or former employees of the Franchisee Defendants and/or McDonald's Restaurants of Illinois, have a basic understanding of the nature of the claims against the Defendants, and are

sufficiently aware of the importance and responsibility of their individual role as Class Representatives as they maintain a genuine and substantial concern for the result of this litigation. Class Counsel is not aware of a conflict between the putative Class Representatives and the Class they seek to represent, nor is it believed that the relief sought is antagonistic to the interests of other Class members. Indeed, here the Class Representatives—all of whom are current or former employees of the Franchisee Defendants and/or McDonald's Restaurants of Illinois—share a common, complimentary goal of vindicating their rights under BIPA.

Additionally, Plaintiffs' counsel here is "qualified, experienced, and generally able to conduct the proposed litigation." *Steinberg v. Chicago Med. Sch.*, 69 Ill.2d 320, 339 (1977). Class Counsel has substantial experience in prosecuting complex litigation and class actions, including BIPA class actions specifically. Plaintiffs ask the court to take judicial notice that Plaintiffs' counsel has handled numerous other similar matters in this jurisdiction. Therefore, the Court should find that the adequacy element of section 801(3) is satisfied here. *Hall*, 376 Ill. App. 3d at 833.

D. THE CLASS ACTION PROCEDURE IS THE APPROPRIATE METHOD FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY

As Illinois Supreme Court indicated in *Steinberg*, satisfaction of the first three prerequisites largely fulfills the final requirement. *Steinberg*, 69 Ill.2d at 337-38; *see also Clark*, 343 Ill. App. 3d 538, 552 ("Initially, our holding that the first three prerequisites of section 2–801 of the Code of Civil Procedure have been established makes it evident that the fourth requirement has been fulfilled."); *Bueker*, 2016 IL App (5th) 150282, ¶ 48 ("Where the first three prerequisites for the maintenance of a class action are established, it is evident that the fourth requirement has been fulfilled as well."). Here, the Plaintiffs and Settlement Class Members are similar; the common claims share the same factual and/or legal foundation; and the class action mechanism is a superior

method for resolving this settlement class. Class certification ensures uniformity in resolving the same and similar claims. Moreover, judicial economy would suffer if court systems throughout the country and throughout Illinois were forced to hear hundreds or thousands of separate lawsuits, each presenting common factual and legal questions as to compliance with BIPA. See *Hall*, 376 Ill. App. 3d 822 at 834 ("In this case, litigating the individual lawsuits would be a waste of judicial resources, and addressing the common issues in one class action would aid judicial administration."); *see also Clark,* 343 Ill.App.3d at 552. The Court should therefore find that Plaintiffs' have satisfied their burden of establishing the final "appropriateness" element under section 801(4).

Plaintiffs have established that the facts and circumstances of this case satisfy the required factors of numerosity; commonality/predominance; adequacy of representation; and appropriateness. *See supra*. The Plaintiffs respectfully request that the Court certify the settlement class proposed.

V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. THE SETTLEMENT PROVIDES A FAIR, ADEQUATE AND REASONABLE RESULT FOR CLASS MEMBERS

"Class action settlements are reviewed on a case-by-case basis, with consideration of several factors, including [1] the strength of plaintiffs' case balanced against the money and relief offered in the settlement; [2] the defendant's ability to pay; [3] the complexity, length, and expense of further litigation; [4] the amount of opposition to the settlement; [5] the presence of collusion in reaching the settlement; [6] the class members' reaction to the settlement; [7] the opinion of competent counsel; and [8] the stage of proceedings and amount of discovery completed." *Lee,*

2019 IL App (5th) 180033, ¶ 56.[7] "In considering these factors, the circuit court should not turn the approval hearing into a trial on the merits." *Id.* "Where the procedural factors support approval of a class settlement, there is a presumption that the settlement is fair, reasonable, and adequate." *Lebanon Chiropractic Clinic, P.C. v. Liberty Mut. Ins. Co.*, 2016 IL App (5th) 150111-U, ¶ 42.

At the preliminary approval stage, the Court's task is merely to "determine whether the proposed settlement is within the range of possible approval." *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980) (internal citation and quotation marks omitted) (noting that at the final fairness hearing, the court will "adduce all information necessary to enable [it] intelligently to rule on whether the proposed settlement is fair, reasonable, and adequate"), *overruled on other grounds* by *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *see also* Newberg § 11.25 (noting that "[i]f the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to class members) (citations omitted). "The purpose of the initial hearing is to ascertain whether there is any reason to notify the class members of the proposed settlement and proceed with a fairness hearing." *Cook v. McCarron,* 92 C 7042, 1997 WL 47448, at *7 (N.D. Ill. Jan. 30, 1997) (citing *Armstrong*, 616 F.2d at 314). Once the settlement is found to be "within the range of possible approval" at the initial fairness hearing, the final approval hearing is scheduled and notice is provided to the class. *Id.*

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[7] These eight factors, commonly known as the *Korshak* factors, arise from the First District decision in *City of Chi. v. Korshak*, 206 Ill. App. 3d 968, 971–72 (1st Dist. 1990). In *Lee*, the Fifth District applied the *Korshak* factors, holding that "[w]hile we do not conclude that a determination of whether a settlement is fair and reasonable should be based on the inclusion of every factor identified by the *Korshak* court, we do agree that these factors are relevant, among other factors, when considering whether to grant final approval to a class settlement." 2019 IL App (5th) 180033, ¶ 99.

The first *Korshak* factor—the strength of Plaintiffs' case on the merits balanced against the relief offered in settlement—"is the most important factor in determining whether a settlement should be approved." *Steinberg v. Sys. Software Assocs., Inc.*, 306 Ill. App. 3d 157, 170 (1st Dist. 1999); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). Because each of these factors supports a finding that the Settlement here is "fair, reasonable, and adequate," the Court should grant preliminary approval of the Settlement Agreement.[8]

1. The Settlement Amount is Substantial Given the Strength of Plaintiffs' Claims and the Attendant Risks.

a. Settlement Amount is Substantial

The Settlement Amount providing for Defendants to contribute up to $50,000,000, represents a fair, adequate, and reasonable result for Class Members. "As explained by the Supreme Court, '[n]aturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation.'" *Capps v. Law Offices of Peter W. Singer*, No. 15-cv-02410-BAS(NLS), 2016 U.S. Dist. LEXIS 161137 (S.D. Cal. Nov. 21, 2016) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971)).

A settlement fund of up to $50,000,000.00 is clearly a substantial benefit to the Class and an extraordinary result in this matter. All eligible Settlement Class Members employed on or before December 18, 2018 will receive up to $375, while those eligible Class Members employed on or after January 1, 2019, will receive up to $190. In this way, the Settlement provides individual Class Members with real and immediate monetary recovery in this action.

[8] Because the Notices and have not yet been sent out, the Class Members' reactions are not yet known and, therefore, will be addressed by the Parties in the final approval papers.

By way of comparison, another recent BIPA case brought against a Wendy's franchisee recently received final approval on April 9, 2021. In *Pelka v. Saren Restaurants Inc.*, 2019 CH 14664, Judge Sophia Hall approved a settlement amount of $289 per person for a class of 1,644 Wendy's employees who (as here) alleged BIPA violations. *See also Sekura v. L.A. Tan Enterprises, Inc.* No. 2015-CH-16694 (Cir. Ct. Cook Cnty. 2016) (approving BIPA class settlement of $1.5 million where each claimant received between $40 and $150); *Kusinski v. ADP, LLC*, 17-CH-12364 (Cook Cnty. Feb. 10, 2021) ($250 net recovery for each BIPA claimant); *Prelipceanu v. Jumio Corp.*, 18- CH-15883 (Cir. Ct. Cook Cty.) ($262.58 net recovery per BIPA claimant); *Carroll v. Crème de la Crème, Inc.*, 2017-CH-01624 (Ill. Cir. Ct.) (BIPA settlement providing for no monetary relief, only credit monitoring).

Several other employer-BIPA settlements show this case falls squarely within an acceptable range:

Case	**Class Size**	**Per Person**
Zhirovetskiy v. Zayo Group, LLC, 17-CH09323 (Cook Cnty.)	2,475	$450
Sharrieff v. Raymond Mgmt. Co., Inc. d/b/a The Raymond Group, 18-CH-01496 (Cook Cnty.)	485	$500
Roach v. Walmart Inc., 2019-CH-01107 (Cook Cnty)	21,000	$476
Marshall v. Life Time Fitness, Inc., 17-CH14262 (Cook Cnty.)	6,000	$270 net recovery
Davis v. Heartland Employment Services 2019-CV-00680 (N.D. Ill)	10,836	$500
Sanchez v. Elite Labor Services d/b/a Elite Staffing, Inc. and Visual Pak Company, 2018CH02651 (Cook Cnty.)	13,088	$256 to $510.20

Sykes v. Clearstaff, Inc., 19-CH-03390 (Cook Cnty.)	8,150	$72.56 to $350

b. Recovery is Significant in Light Substantial Obstacles and Risks

Plaintiffs' Class Settlement Agreement, which provides for immediate monetary recovery of up to either $190 or $375 per-claimant, is even more significant considering the material risks of non-recovery, which Plaintiffs and the Class faced in this action.

At every stage of litigation, including throughout mediation, the Defendants raised a number of arguments that threatened to substantially or fully deprive the Class of relief. At class certification, the damages phase of a trial, or on appeal of the case, those risks would only multiply. Moreover, throughout the pendency of this case, there have been ongoing attempts to attack BIPA in the legislature. In light of those risks, the guaranteed monetary relief obtained for the Settlement Class is even more outstanding.

If the already-lengthy litigation had continued, it would have been complex, expensive, and protracted. Moreover, the recovery here is significant because Class Members would have received no compensation if Defendants prevailed on a number of their asserted defenses, or if the appellants prevail in any of the number of pending BIPA appeals on issues relevant to this action. The outcome of these appeals could gut or substantially limit Class Members' ability to recover under BIPA. In particular, Defendants' contention that Plaintiffs' damages claims are barred by the exclusivity provisions of the Illinois Workers' Compensation Act, is an issue which is currently on appeal before the Illinois Supreme Court in *McDonald v. Symphony Bronzeville Park, LLC*, Case No. 126511 (Ill.) (petition for leave to appeal accepted on January 26, 2021). An adverse ruling finding preemption in *McDonald* could entirely bar the class recovery achieved here. This reality weighs heavily in favor of the substantial Class settlement achieved here given the risks of

non-recovery. *See, e.g., In re Southwest Airlines Voucher Litig.*, No. 11-cv8176, 2013 WL 4510197, at *7 (N.D. Ill. Aug. 26, 2013) (noting that "legal uncertainties at the time of settlement favor approval").

Finally, even if Plaintiff had succeeded at summary judgment and/or trial, Plaintiff recognizes that Defendant would appeal the merits of any adverse decision. And, due to the aggregate statutory damages in play, Defendants made clear that they would argue for a reduction in damages based on due process concerns. *See, e.g., Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019) (statutory award in TCPA class action of $1.6 billion reduced to $32 million). Ultimately, failure at any one of these points could strip Plaintiff and the class of all recovery, making further litigation a risky endeavor. Accordingly, while Plaintiff believes that the arguments above could be defeated, the fact is that the legal questions posed by BIPA cases at every stage of litigation are novel. Plaintiff has thus factored in both the risks and delays that would necessarily accompany continued litigation. This Settlement provides an excellent result now and is highly beneficial for the Class. Consequently, the first and most important *Korshak* factor weighs strongly in favor of preliminarily approving the Class Settlement Agreement.

2. The Defendants' Ability to Pay

Defendants' ability to pay this settlement was a factor in the negotiation. In particular, the vast majority of the Defendants in these cases, which employ well over 90 percent of the Settlement Class, are franchisees, many of which are small business that own only 1-2 restaurants. These Defendants can pay the Settlement Amount to settle the lawsuit, but it is uncertain at best whether they could have paid the full value of Plaintiffs' claims and the claims of the Class if Plaintiffs had prevailed after the Parties litigated the cases to completion, including through likely

appeals, given BIPA's statutory penalties of up to $5,000 per violation. 740 ILCS 14/20. This factor also weighs in favor of approving the settlement.

3. Litigation Through Trial Would be Complex, Costly, and Long.

By reaching a favorable settlement prior to class certification briefing or trial, Plaintiffs seek to avoid significant expense and delay, and instead ensure recovery for the class. "[A]n integral part of the strength of a case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985). Although Class Counsel believes Plaintiffs' case is strong, it is subject to considerable risks and costs if the case is not settled. Continued litigation carries with it a decrease in the time value of money, for "[t]o most people, a dollar today is worth a great deal more than a dollar ten years from now." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002).

Plaintiffs acknowledge the risk that they would be unable to obtain a jury verdict against Defendants. Defendants also indicated to Class Counsel that, once fact and expert discovery were closed, Defendants intended to file motions for summary judgment and oppose any request for class certification on a number of grounds. Even if they prevailed, Class Members faced the risk, expense, and delay of a potentially lengthy appeal after trial, holding up any recovery for Class Members for several more years. Under these circumstances, the benefits of a guaranteed recovery today as opposed to an uncertain result in the future, are readily apparent. As one court noted, "[t]he bird in the hand is to be preferred to the flock in the bush and a poor settlement to a good litigation." *Rubenstein v. Republic Nat'l Life Ins. Co.*, 74 F.R.D. 337, 347 (N.D. Tex. 1976). This factor therefore weighs in favor of final approval.

Accordingly, "Plaintiffs' strong claims are balanced by the risk, expense, and complexity of their case, as well as the likely duration of further litigation." *In re Volkswagen "Clean Diesel"*

Mktg., Sales Practices, & Prods. Liab. Litig., MDL No. 2672 CRB (JSC), 2016 U.S. Dist. LEXIS 148374, at *748 (N.D. Cal. Oct. 25, 2016). "Settlement is favored in cases [such as this one] that are complex, expensive, and lengthy to try." *Id.* (citing *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009)). As such, the immediate and considerable relief provided to the Class under the Settlement Agreement weighs heavily in favor of its approval compared to the inherent risk and delay of a long and drawn out litigation, trial, and appellate process.

Continued litigation would have caused greater delay and expense with no guarantee of recovery for the Class, and thus, this factor strongly weighs in favor of approval. *See Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 19 (affirming trial court's finding that third factor was satisfied where further litigation would have "require[d] the parties to incur additional expense, substantial time, effort, and resources").

4. The Settlement Is the Result of Arm's Length Bargaining, Without Any Hint of Collusion

There is plainly no collusion or fraud with respect to this proposed Settlement as it was negotiated over the course of many months by counsel experienced in BIPA litigation with the assistance of Hon. Judge Layn Phillips—who is widely recognized as one of the nation's foremost mediators. The record clearly demonstrates the presence of arms-length negotiations between the Parties following years of adversarial litigation and extensive discovery involving hundreds of thousands of documents produced by the Defendants, culminating in a settlement achieved with the assistance of an experienced mediator. *See Coy v. CCN Managed Care, Inc.*, 2011 IL App (5th) 100068-U, ¶ 31 (affirming trial court's finding of no collusion where the record showed "an arms-length negotiation between plaintiffs and defendants, entered into after years of litigation and discovery, resulting in a settlement with the aid of an experienced mediator"). As a distinguished commentator on class actions has noted: "There is usually an initial presumption of fairness when

a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval." Newberg §11.41 at 11-88.

In this case, as explained above, the terms of the Settlement were reached during extensive arm's-length negotiations over many months, following multiple mediations overseen by a widely-regarded mediator, and after thorough investigation, discovery, analysis, and motion practice. Therefore, this Court should find that an initial presumption of fairness exists to support preliminary approval of the Settlement.

5. The Extent of Discovery Completed, and the Stage of the Proceedings

Where, as here, extensive written discovery was taken, and the Parties have thoroughly litigated the various issues, these facts "weigh[] in favor of the proposed settlement." *Cervantez v. Celestica Corp.*, No. EDCV 07-729-VAP (OPx), 2010 U.S. Dist. LEXIS 78342, at *13 (C.D. Cal. July 6, 2010).

As the Court can see from the Procedural History set forth above, this Action has been vigorously and intensely litigated for several years. Throughout the more than four years that this Action has been pending (*i.e.*, since September 27, 2017), the Parties have engaged in intensive litigation, before not only this Court, but also the Fifth District Appellate Court of Illinois. In total, the Parties briefed numerous motions, including motions to dismiss, motions to compel, motions to sever, motions to substitute judges, and motions to transfer for venue, a related appeal, and discovery motions. Prior to entering into this Settlement, the Parties engaged in several rounds of extensive fact discovery commencing on January 17, 2018. In total, in response to Plaintiffs' discovery requests, Defendants produced over 200,000 Bates-numbered documents.

Based on this extensive discovery, Class Counsel became well informed as to the data, equipment, policies, procedures and other critical information necessary to "evaluate the merits of

the case and assess the reasonableness of the settlement." *Korshak*, 206 Ill.App.3d at 974. Thus, the extent of discovery and stage of proceedings factor weighs strongly in favor of approving the proposed Settlement. *See Korshak*, 206 Ill.App.3d at 974; *Cervantez*, 2010 U.S. Dist. LEXIS 78342, at *13.

6. Competent Counsel for All Parties Endorse This Agreement

Courts are "entitled to rely heavily on the opinion of competent counsel." *Gautreaux v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982) (quoting *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 325 (7th Cir. 1980)). Further, as set forth above, there is no indication that the proposed Settlement Agreement is the result of collusion. *See Isby*, at 1200.

Class Counsel is competent and experienced in class actions, particularly complex class actions of this kind, and are intimately familiar with the strengths and weaknesses of the claims and defenses. Using that litigation experience and their intimate knowledge of the facts of the case and the legal issues facing the Class Members, Class Counsel is capable of making, and did make, well informed judgments about the value of the claims, the time, costs and expense of protracted litigation, discovery, and appeals, and the adequacy of the Settlement reached. This factor therefore weighs in favor of preliminary approval.

In sum, the Settlement, on its face, is imminently fair, reasonable, and adequate, and not the product of collusion. *See Isby*, 75 F.3d at 1198, 1200. In addition, "the proposed settlement is 'within the range of possible approval'" and should be submitted to the Class Members for their consideration. *Armstrong*, 616 F.2d at 314. The Court should grant preliminary approval.

B. THE PARTIES' PROPOSED NOTICE SATISFIES DUE PROCESS AND SECTION 2-803 OF THE ILLINOIS CODE OF CIVIL PROCEDURE

The second step of the approval process is to disseminate notice about the settlement to the class. *See Manual for Complex Litigation*, *supra*, at §21.63. Class members must receive notice

about the settlement that satisfies the requirements of Section 2-803 of the Illinois Code of Civil Procedure and Due Process, or notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). "[T]he mechanics of the notice process are left to the discretion of the court subject only to the broad 'reasonableness' standards imposed by due process." *Capps*, 2016 U.S. Dist. LEXIS 161137, at *26 (quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 120 (8th Cir. 1975)).

Here, the Settlement Agreement will provide direct notice to the Settlement Class Members, which provides the best possible opportunity for Class Members to see, review and understand the Notice. The McDonald's Defendants will provide the Settlement Administrator with the most current list of names, email addresses, and physical addresses of Class Members identified through their employment records. The Settlement Class Members identified through the McDonald's Defendants' employment records will be contacted directly based on this information via regular First-Class mail and by email where this information is available through employment records.

The Settlement Administrator will also establish a settlement website to which Settlement Class Members may refer for information about the Action and Settlement and submit online Claim Forms and inquiries. The Settlement Administrator shall post the Claim Form (*see* Exhibit 3) and Opt-Out Form (*see* Exhibit 4) on the website as well as other important documents and deadlines, in consultation with counsel for the Parties. Additionally, the Settlement Administrator shall disseminate the Notices and the Claim Form, shall establish a post-office box for the receipt of any Settlement-related correspondence; shall respond to inquiries or requests from Settlement

Class Members, in consultations with Class Counsel and Defendants' Counsel; and shall respond to inquiries or requests from Class Counsel, Defendants' Counsel, and the Court.

The Settlement Administrator shall be responsible for printing and mailing by regular, first-class mail the Class Notice, handling returned Notices and Claim Forms not delivered to Settlement Class Members, and may update any known Settlement Class Member address information using the National Change of Address (NCOA) system.

Further, the proposed Notices are plain and easily understood, consistent with the guidelines set forth by the Federal Judicial Center. *See* http://www.fjc.gov/. The Notices provide neutral, objective, and accurate information about the nature of the Actions and the Settlement. *See id.* The Notices describe the claims, the Class Members, the relief provided under the Settlement, and Class Member's rights and options, including the deadlines and means of submitting a Claim Form, objecting, and/or appearing at the Final Approval Hearing personally or through counsel. *See id.* The Parties submit that the Notices provide the best notice practicable under the circumstances and that the mode of dissemination will provide the most effective means to reach the Class Members.

Notice to the class shall also apprise class members that "the court will exclude from the class any member who requests exclusion [and] the time and manner for requesting exclusion." *See Low v. Trump University*, LLC, 246 F.Supp.3d 1295, 1307 (S.D.Cal., 2017). A notice of a class member's right to opt out of a class action settlement must be "of such nature as reasonably to convey the required information regarding the window for class members to opt out of or remain in the class." *Low v. Trump University, LLC*, 881 F.3d 1111, 1120 (9th Cir. (Cal.) 2018).

Clear instructions to Class Members regarding the procedures that must be followed to opt out of the Settlement Class will be provided to each of them, including the deadline by which Class

Members will be required to opt out. Not later than seven days before the date of the Final Approval Hearing, the Settlement Administrator will submit to Counsel for the Parties, a list of those Persons who have timely and validly excluded themselves from the Settlement. All Settlement Class Members who do not timely and validly opt out of the Settlement Class shall be bound by all terms of the Settlement.

C. ATTORNEYS' FEES

If the Court grants preliminary approval of the settlement, only thereafter will Class Counsel apply to the Court for an award of Attorneys' Fees and Expenses and for Incentive Awards for Plaintiffs in recognition of their time and service to the Settlement Class. The Illinois Biometric Information Privacy Act, 740 ILCS 14/20(3) provides, in pertinent part, that "reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses" are recoverable for prevailing parties for each violation of the act. Accordingly, Class Counsel plans to file an application for reasonable attorneys' fees and expenses within the deadline set by the Preliminary Approval Order.

The Parties' Settlement Agreement provides that any award of Attorneys' Fees and Expenses shall not increase the Settlement Amount. Incentive Awards shall be paid from the Settlement Fund and are in addition to any other payment that Plaintiff Class Representatives may be entitled to under this Agreement. In addition, any award of Attorneys' Fees and Expenses and any Service Award shall be separate from the Settlement, and approval of the Settlement shall not be contingent upon an award of Attorneys' Fees and Expenses or any Incentive Award at all or in any particular amount. If the Court reduces or disapproves Class Counsel's request for an award of Attorneys' Fees and Expenses and/or Incentive Awards, that shall not be grounds to terminate the Settlement.

VI. THE PARTIES' PROPOSED SCHEDULE OF EVENTS

The last step in the settlement approval process is to hold a Final Approval Hearing at which the Court will hear argument and make a final decision about whether to approve the Settlement pursuant to 735 ILCS 5/2-801, *et seq.* *See Manual for Complex Litigation, supra*, at §21.63. Specifically, the Parties propose the following schedule:

Date	Event
11/23/2021	Preliminary Approval Hearing/Order
12/7/2021	Defendants provide Class List to Settlement Administrator
12/21/2021	Notice mailed; Settlement Website established
12/23/2021	Defendants to Make First Deposit into QSF (30 days after Preliminary Approval)
2/8/2022	Plaintiffs to provide draft final approval motion (10 days before filing)
2/9/2022	Response Deadline (50 days after notice)
2/18/2022	Motion for Final Approval + Plaintiffs' Motion for Fees/Costs
2/28/2022	Final Approval Hearing/Order
3/20/2022	Defendants to Make Any Additional Deposits into QSF (30 days after Final Approval)
4/29/2022	Payment deadline (60 days after final approval)

The Parties respectfully submit that this proposed schedule complies with 735 ILCS 5/2-801, *et seq.*, and due process, all while securing the recoveries for Class Members in a timely fashion.

VII. CONCLUSION

The Plaintiffs respectfully request that the Court: (1) grant their unopposed motion for preliminary approval consistent with the Proposed Order attached hereto; (2) provisionally certify the Class for settlement purposes; (3) appoint Class Representatives and Class Counsel as requested in this motion; (4) approve the form and manner of the Notice Plan, including the proposed Class Notice, Claim Form, and Opt-Out Form (attached hereto as Exhibits 2, 3, and 4 respectively), and appoint a Settlement Administrator; (5) establish deadlines for requests for

exclusion and the filing of objections to the proposed settlement as contemplated by the Settlement Agreement; and (6) schedule a final fairness hearing.

Respectfully submitted,

DATED: November 16, 2021

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 16, 2021, the foregoing document was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all registered parties and served via e-mail on the following persons:

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

LATRINA COTHRON,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 128004
	)	
WHITE CASTLE SYSTEM, INC.,	)	
	)	
Defendant-Appellant.	)	

The undersigned, being first duly sworn, deposes and states that on March 3, 2022, there was electronically filed and served upon the Clerk of the above Court the Brief of Retail Litigation Center, Inc., Restaurant Law Center, and National Retail Federation as *Amici Curiae* in Support of Defendant-Appellant. On March 3, 2022, service of the Brief will be accomplished via the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the Court's file-stamp will be sent to the above Court.

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