No. 1-21-0011

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WILLIAM WALTON, individually and on behalf of others similarly situated, *Plaintiff-Appellee*, v. ROOSEVELT UNIVERSITY, *Defendant-Appellant*.	)	On Appeal from the Circuit Court of Cook County, Illinois, Cook County Circuit, No. 2019-CH-04176 The Honorable Anna H. Demacopoulos, Judge Presiding

MOTION OF THE ILLINOIS CHAMBER OF COMMERCE FOR LEAVE TO FILE A BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

The Illinois Chamber of Commerce ("Chamber"), pursuant to Rules 345 and 361 of the Illinois Supreme Court, respectfully moves this Court for leave to file the accompanying brief *Amicus Curiae* in support of Defendant-Appellant Roosevelt University. In support of its motion, *Amicus* Illinois Chamber of Commerce states the following:

Statement of Identity and Interest of the Proposed *Amicus Curiae*

1. *Amicus* Illinois Chamber of Commerce (the "Chamber") is the voice of the business community in Illinois. The Chamber is a statewide organization with more than 1,800 members in virtually every industry, including manufacturing, retail, insurance, construction, and finance. Unions

are also members of the Chamber and the Chamber has advocated on behalf of union-related issues in the past. Indeed, the Chamber advocates on behalf of both its business and union members to achieve an optimal business environment that enhances job creation, economic growth, and stable labor-management relations. As a result, the Chamber is uniquely situated to provide the Court with a balanced perspective regarding the important issue to be resolved in this appeal, and how resolution of this appeal may impact Illinois businesses and unions alike.

2. The Illinois Supreme Court has previously acknowledged that the Chamber's unique perspective may assist in explaining the potential impact its rulings may have on Illinois businesses by granting the Chamber leave to file *amicus* briefs in other cases. *See, e.g., Hertz Corp. v. City of Chicago*, 2017 IL 119945, ¶ 10 (2017) ("We allowed the Illinois Chamber of Commerce and the Taxpayers' Federation of Illinois to file briefs amici curiae pursuant to Illinois Supreme Court Rule 345."); *Carney v. Union Pac. R. Co.*, 2016 IL 118984, ¶ 15 (2017) ("We also allowed the following groups to file *amicus curiae* briefs in support of defendant's position: the Illinois Chamber of Commerce, Illinois Construction Industry Committee, and Associated Builders and Contractors; the Associated General Contractors of Illinois; and the Illinois Association of Defense Trial Counsel."); *Ready v. United/Goedecke Servs., Inc.,* 232 Ill. 2d 369, 374 (2008) ("We permitted the Illinois Trial Lawyers Association, the Illinois Association of Defense Trial Counsel, and the Illinois

Chamber of Commerce to file amicus curiae briefs."); *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 185 (2005) ("We have permitted the Chamber of Commerce of the United States and the Illinois Chamber of Commerce . . . to file briefs *amici curiae* on behalf of the defendants.").

Reasons to Allow the Proposed Amicus Brief

3. The Chamber respectfully submits that due to its role as the voice of the business community in Illinois, its unique perspective on these issues will assist the Court in answering the questions presented in this case by providing context regarding the current Illinois Biometric Information Privacy Act, 740 ILCS § 14/1, *et seq* ("BIPA"), litigation landscape, and the real-life consequences for Illinois businesses who have been (or will be) targeted in BIPA class actions, most of whom cannot withstand multi-million dollar judgments.

4. The answers to the questions raised in this appeal will have a direct and significant impact on the wellbeing of the Chamber's members, some of whom have been the target of the hundreds of cookie-cutter complaints that have been filed across Illinois and that seek to impose catastrophic damages on Illinois businesses for alleged technical violations of BIPA. To date, BIPA lawsuits have been brought against companies ranging in size from corporate giants like Facebook to Illinois day care centers, hotels, hospitals, tanning salons, senior living centers, and restaurant and food service companies.

5. The Chamber's brief discusses the rationale and real-world implications of the two key policy determinations driving federal labor law:

uniformity in labor-management relations and a strong preference for arbitration of labor disputes. The brief further discusses the importance of these policy objectives to both employers and unions alike. As explained in the brief, without uniformity in labor law, neither employers nor unions can effectively and meaningfully negotiate and enforce collective bargaining agreements.

6. Consistent with these principles, the brief further discusses how federal courts have uniformly applied labor law to hold that BIPA claims brought by unionized employees are preempted under the Labor Management Relations Act, and therefore should be resolved through the grievance and arbitration process negotiated by the union and employer. It also highlights how several circuit courts' departure from this precedent has created uncertainty in an otherwise uniform legal environment. Rather than fostering uniformity in labor law, circuit courts have potentially created an environment in which the plaintiff's choice of forum is outcome determinative.

7. Accordingly, the Chamber respectfully submits that the attached brief will be beneficial to assist the Court in understanding the significant impact that labor law preemption of BIPA claims has on union leaders and the Illinois business community with unionized workforces, and why it is important that the Court affirmatively determine that BIPA claims brought by unionized employees are preempted, and therefore should be resolved through

the grievance and arbitration process negotiated with the union, where the union was the legally authorized representative of the plaintiff.

For the foregoing reasons, the undersigned proposed *amicus* respectfully requests leave to file the attached amicus brief.

Dated: June 14, 2021

Respectfully submitted,

ILLINOIS CHAMBER OF COMMERCE

By: */s/ Matthew C. Wolfe*

Melissa A. Siebert
ARDC #6210154
Matthew C. Wolfe
ARDC #6307345
Elisabeth A. Hutchinson
(*pro hac vice* pending)
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive, Suite 4700
Chicago, Illinois 60606
(312) 704-7700
masiebert@shb.com
mwolfe@shb.com
ehutchinson@shb.com

Counsel for Amicus Curiae
Illinois Chamber of Commerce

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BRIEF OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLANT ROOSEVELT UNIVERSITY

Melissa A. Siebert
ARDC #6210154
Matthew C. Wolfe
ARDC #6307345
Elisabeth A. Hutchinson (*pro hac vice* pending)
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive, Suite 4700
Chicago, Illinois 60606
(312) 704-7700

Counsel for Amicus Curiae Illinois Chamber of Commerce

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INTEREST OF *AMICUS CURIAE*

Amicus Illinois Chamber of Commerce (the "Chamber") is the voice of the business community in Illinois. The Chamber is a statewide organization with more than 1,800 members in virtually every industry, including manufacturing, retail, insurance, construction, and finance. The Chamber advocates on behalf of its members to achieve an optimal business environment that enhances job creation and economic growth. Unions also belong to the Chamber, which has and continues to support and promote union-related issues.

As an organization representing both businesses with unionized workforces and unions, the Chamber's interest in this case is substantial. Employers with unionized workforces have long recognized that collective bargaining rights flow from federal law. As such, these businesses have worked hard to comply with federal labor law (enforced by the National Labor Relations Board) and negotiate meaningful collective bargaining agreements (enforced exclusively as a matter of federal law in Section 301 suits). For businesses to be able to continue to do so effectively and efficiently, it is critical that federal labor law be enforced consistently. The same is true for labor leaders with whom employers interact and negotiate. Neither side can meaningfully negotiate a collective bargaining agreement's terms or administer compliance with those terms in an uncertain legal environment. Settled expectations and uniform legal standards are crucial to the development of successful labor-management relationships.

The Chamber has members from both sides of these relationships. As such, it can say with certainty that both unions and the companies that employ unionized labor have a strong interest in the ongoing administration of their collective bargaining agreements, collective bargaining negotiations, and the legal precedent governing labor-management relations. It is critical that the agreements these parties have reached are respected, including the established grievance process. The Chamber, therefore, submits this brief in the interest of protecting uniform application of labor law for its members.

What the Illinois business community needs now more than ever is certainty and consistency in the application of law between federal and state courts. The COVID-19 pandemic has created unprecedented economic challenges, leaving many businesses struggling to survive. The inconsistent application of federal labor law to BIPA matters in state courts has only created more uncertainty for businesses and labor leaders. As it stands, federal courts have been uniform in holding that the Labor Management Relations Act preempts BIPA claims brought by unionized plaintiffs. In contrast, Illinois circuit courts have generally arrived at a different result. While at least one circuit court has applied federal law appropriately, no fewer than three others have chosen to adopt a non-uniform standard and have left businesses and unions wondering if the forum in which BIPA plaintiffs choose to pursue their claims will be outcome determinative.

The circuit courts' decision to interpret longstanding collective bargaining agreements, including the scope of their management rights clauses, outside of the established procedure for doing so – *i.e.*, the negotiated and agreed upon grievance process – deviates from long-established U.S. Supreme Court precedent and creates uncertainty in labor relations that both union and business members of the Chamber have worked diligently to stabilize. The present decision, as well as the decisions of like-minded circuit courts, have undermined the uniformity that exists in federal labor law, and have created precedent that is inconsistent with Congress's strong policy preference for labor disputes to be resolved in arbitration.

The Chamber's concern is not hypothetical or *ad hoc*. In recent years, Illinois businesses have endured hundreds of lawsuits filed under the Illinois Biometric Information Privacy Act ("BIPA"). The targets of BIPA lawsuits run the gamut of Illinois businesses, from large businesses that operate nationwide to smaller businesses that operate in multiple states to local employers, such as community hospitals, family-owned grocery stores, nursing homes and rehabilitation centers, restaurants, food-service companies, hotels, and local retailers. These businesses form the backbone of the Illinois economy and provide essential employment and services to Illinois citizens.

Numerous members of the Chamber have been sued in BIPA lawsuits over the last five years. Indeed, at least 23 members of the Chamber have been sued in BIPA lawsuits since 2016. This BIPA litigation surge continues and

shows no signs of slowing down. More than 1,100 BIPA lawsuits have been filed in state and federal courts since 2016. In the last six months alone, no fewer than 245 new BIPA lawsuits have been filed.

Most of these lawsuits seek millions of dollars on behalf of hundreds, if not thousands, of putative class members alleging technical violations of BIPA associated with the use of routine timekeeping systems that purportedly rely on finger, hand, or face scanners. With liquidated damages of up to $5,000 per violation, these lawsuits have the potential to impose devastating damages on businesses across the state.

In sum, overturning the circuit court's decision and securing consistent application of federal labor law in state courts is important to union and business Chamber members alike. This brief will assist the Court by addressing the implications of the circuit court's decision for the Illinois business community and unions, and will highlight why uniform application of federal labor law is crucial for both unions and businesses with unionized workforces.

INTRODUCTION

This case presents a question of the proper forum to resolve claims brought under the Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq.*, when the claim requires the interpretation or administration of a collective bargaining agreement. The resolution of that federal labor law issue has been uniformly decided by the Seventh Circuit and federal district courts: BIPA claims cannot exist independently of a collective bargaining agreement

where a union is the legally authorized representative of the BIPA plaintiff. BIPA claims, therefore, are completely preempted by the Labor Management Relations Act, 29 U.S.C. § 151 *et seq.*, and courts must enforce the grievance and arbitration process in the collective bargaining agreement by dismissing the lawsuits in favor of the grievance and arbitration process. Whether looking to binding U.S. Supreme Court precedent on which these opinions are based, or the "highly persuasive" opinions of the Seventh Circuit and federal district courts directly on point, *State Bank of Cherry v. CGB Enters.*, 2013 IL 113836, ¶ 35, the outcome here is clear. The Court should reverse the circuit court opinion, which held that BIPA claims are independent of collective bargaining agreements.

On the exact issue before this Court, the Seventh Circuit and federal courts have been uniform in analyzing how federal labor law interplays with BIPA claims brought by unionized plaintiffs. Here, however, the circuit court ignored this guidance and crafted its own approach to federal labor law preemption. Its analysis is inconsistent with federal labor law. Under well-settled law, the only relevant questions – which must be considered at the onset of the BIPA claim – are whether a union is the legally authorized representative of a BIPA plaintiff, and whether timekeeping is topic of negotiation that requires the interpretation or administration of a collective bargaining agreement. If there is a mere "nonfrivolous" argument that these questions are answered in the affirmative, the claim is preempted – the BIPA

claim cannot exist independently of a collective bargaining agreement, and it must be referred to the grievance and arbitration process in the collective bargaining agreement and dismissed from court. In other words, instead of pursuing a class action in court, the plaintiff must go through the grievance procedures agreed to and negotiated by the union in the collective bargaining agreement.

Courts, whether federal or state, need not, should not, and indeed, are prohibited from attempting to interpret the parties' collective bargaining agreement and history on their own accord to determine whether preemption applies. The circuit courts below, however, have not stayed within the confines of their authority. As the Seventh Circuit explained, the U.S. Supreme Court has made it clear that what the union agreed to, what the employer said, and the meaning and scope of the terms of a collective bargaining agreement, including the management-rights clause, are all questions that *must be saved for the arbitrator*.

Reversal here is not only the right legal outcome, but also necessary to ensure the uniform application of labor law. How labor law is applied should not depend on whether the BIPA plaintiff has elected to file suit in state or federal court. Any result to the contrary would lead to disarray and confusion, as well as undermine the foundation of union-employer relationships. The Court should reverse the opinion below.

ARGUMENT

I. Federal labor law exists to ensure uniformity in labor-management relations and has a strong preference for arbitration.

In direct response to years of labor-management strife, the Labor Management Relations Act ("LMRA"), and its predecessor, the National Labor Relations Act ("NLRA"), were enacted with a singular goal in mind: "to promote industrial peace." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). Collective bargaining agreements are the core product of labor-management negotiations that ensure this peace. But they are only effective when the law governing them is uniform. This is why, as explained below, Congress elected to set forth a clear policy preference for arbitration of labor disputes and to craft a federal labor law scheme that preempts state law.

A. The collective bargaining agreement and its dispute-resolution procedures are "the keystone" to labor-management relations.

As the U.S. Supreme Court has explained, the collective bargaining agreement is "the keystone of the federal scheme to promote industrial peace." *Lucas Flour*, 395 U.S. at 104. If individual terms of a collective bargaining agreement could be given "different meanings under state and federal law," it would "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Id.* at 103. Without uniformity and predictability in the law, all labor-management negotiations and the agreements they produce are at risk. If state and federal courts could freely apply different laws to the same agreement, neither labor nor management

"could be certain of the rights which it had obtained or conceded" in their agreement. *Id.* The "possibility of conflicting substantive interpretation under competing legal systems," in turn, "would tend to stimulate and prolong disputes as to its interpretation" and run contrary to the policy goals Congress had in mind when it enacted the LMRA. *Id.* at 104.

Similarly, if state courts were unrestricted and could apply the law to collective bargaining agreements differently than federal courts, "the process of negotiating an agreement would be made immeasurably more difficult" because both parties would need to craft terms that "contain the same meaning under two or more systems of law." *Id.* at 103. This possibility of "conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes" and would also fly in the face of Congress' intent in enacting the LMRA. *Id.* at 104.

Congress also made a clear choice of arbitration as the preferred forum to resolve labor-management disputes. *See id.* at 105 ("[T]he basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare."); *see also United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960) ("[F]ederal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."). As the U.S. Supreme

Court bluntly said in *United Steelworkers*, "arbitration is the substitute for industrial strife." *United Steelworkers*, 363 U.S. at 578. Indeed, "arbitration is part and parcel of the collective bargaining process itself." *Id.* ("Since arbitration of labor disputes has quite different functions for arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here.").

These policy goals are not just mere aspirations; they are rooted in lived experience. Stability and predictability matter in labor law, arguably more so than many areas of law. The United States (and Illinois) has a long history of labor disputes, and a governing body of federal labor law allows both businesses and labor organizers to effectively negotiate. Unions are the exclusive bargaining agent in labor-management relations, and employers must be able to rely on that fact to effectively negotiate with them. Likewise, unions' ability to serve as the exclusive representative of their members should be respected – state laws cannot undermine "the union's choices on behalf of the workers." *Miller v. Southwest Airlines Co.*, 926 F.3d 898, 904 (7th Cir. 2019). The proper role of collective bargaining must be respected in *all* courts, not just federal ones.

When federal labor law is properly enforced, unions and businesses alike know what to expect, in what forum (*i.e.*, arbitration) disputes will be resolved, and how questions of preempted state law will be handled. Unlike typical contract negotiations where the parties are merely determining whether to

enter a relationship, the choice involved in a collective bargaining agreement "is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces." *United Steelworkers*, 363 U.S. at 580. Once that choice has been made, it is the clear directive from Congress and the U.S. Supreme Court that it must be respected and enforced.

B. To promote "industrial peace," the preemptive effect of the LMRA is well established.

Section 301 of the LMRA grants federal courts jurisdiction over disputes concerning collective bargaining agreements. *See* 29 U.S.C. § 185(a). Specifically, § 301 provides: "Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." *Id.* A robust body of case law has developed interpreting the scope of § 301 and its preemptive effect.

The U.S. Supreme Court first analyzed the preemptive effect of § 301 in *Teamsters v. Lucas Flour Co.* In *Lucas Flour*, the Court explained that the "dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute," and "issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy." *Lucas Flour*, 369 U.S. at 103. The Court

thus concluded that through § 301, "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Id.* at 104. The Court also emphasized importance of determining terms of collective bargaining agreements by federal law, explaining that "the subject matter of [section] 301(a) 'is peculiarly one that calls for uniform law.'" *Id.* at 103 (quoting *Pa. R. Co. v. Pub. Serv. Comm.*, 250 U.S. 566, 569 (1919)).

Lucas Flour involved a state court improperly applying state law to an alleged violation of a collective bargaining agreement. But its import and application do not end there. As the U.S. Supreme Court explained twenty years later in *Lueck*, to give "the policies that animate § 301 . . . their proper range, . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985). The LMRA "require[s] that the relationships created by a collective-bargaining agreement be defined by the application of an evolving federal common law grounded in national labor policy." *Id.* at 211 (citations, brackets, and internal quotation marks omitted).

Thus, in the interest of "uniformity and predictability," *Lueck* held that any "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, *must* be resolved by reference to uniform federal law." *Id.* (emphasis added). The Court emphasized that uniform federal labor law applies regardless of "whether such questions arise in the context of a suit for

breach of contract or in a suit alleging liability in tort." *Id.* To hold otherwise, *Lueck* continued, "would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Id.* (quoting *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962)). In short, "principles of federal labor law must be paramount in the area covered by [the LMRA]." *Lingle v. Norgle Div. of Magic Chef, Inc.*, 486 U.S. 399, 404 (1988).

Indeed, in recognizing that state courts could retain jurisdiction to address cases subject to the LMRA despite the language of Section 301, the Supreme Court "proceeded upon the hypothesis that the state courts would apply federal law in exercising jurisdiction over litigation within the purview of § 301(a)." *Lucas Flour*, 369 U.S. at 102 (discussing premise upon which the Court reached its holding in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), that § 301 of the LMRA did not deprive state courts of jurisdiction). Put simply, where there are inconsistencies between state and federal law, "incompatible doctrines of local law must give way to principles of federal labor law." *Id.*

To determine whether the substance of a state-law claim is preempted under § 301, the U.S. Supreme Court has set forth the following test: "when resolution of a state-law claim is substantially dependent upon analysis of the terms of the agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as pre-empted by

federal labor-contract law." *Lueck*, 471 U.S. at 220 (citation omitted). Time and again, the U.S. Supreme Court has applied this same test. *See, e.g.*, *Lingle*, 486 U.S. at 413 (A state-law claim is preempted if it "requires the interpretation of a collective-bargaining agreement."); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987) (Preemption applies to "claims substantially dependent on analysis of a collective-bargaining agreement.").

So too has the Seventh Circuit. *See, e.g.*, *Miller*, 926 F.3d at 904 ("[I]f a dispute necessarily entails the interpretation or administration of a collective bargaining agreement . . . state law is preempted to the extent that a state has tried to overrule the union's choices on behalf of the workers."); *Healy v. Metro. Pier & Exposition Authority*, 804 F.3d 836, 842 (7th Cir. 2015) (Where a state-law claim "requires interpretation of the collective bargaining agreement, § 301 preempts the claim and converts it into a § 301 claim."); *Crosby v. Cooper B-Line, Inc.*, 725 F.3d 795, 797 (7th Cir. 2013) (Section 301 preemption "covers not only obvious disputes over labor contracts, but also any claim masquerading as a state-law claim that nevertheless is deemed really to be a claim under a labor contract.").

Illinois courts have also routinely applied this test, as well as the reasoning of the U.S. Supreme Court, when adjudicating disputes that are subject to the LMRA. *See, e.g.*, *Gelb v. Air Con Refrigeration & Heating, Inc.*, 356 Ill. App. 3d 686, 692 (2005) ("In general, where a collective bargaining agreement exists between employers and employees who are parties to

litigation, their disputes fall within the exclusive purview of federal labor laws, not state laws, in order to ensure uniform interpretation of collective bargaining agreements." (citations omitted)).

For preemption to apply, the employer need only advance a "nonfrivolous argument" that the complained-of conduct was authorized by the collective bargaining agreement, like in a management-rights clause. *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1179 (7th Cir. 1993). If it can satisfy this very low standard, the claim cannot be resolved without interpretation of the agreement and is preempted. *See id.* The plaintiff must then follow the grievance procedures forth in the collective bargaining agreement. *See Brotherhood of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.*, 879 F.3d 754, 758 (7th Cir. 2017) ("If the [employer] can articulate an argument that is 'neither obviously insubstantial or frivolous, nor made in bad faith,' the court lacks jurisdiction to do anything but dismiss the case and allow arbitration to go forward.").

With this consistency, Congress's intent to foster uniformity in labor law has remained central: "§ 301 mandated resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements" because uniformity "promote[s] the peaceable, consistent resolution of labor-management disputes." *Lingle*, 486 U.S. at 403–04 (discussing holding of *Lucas Flour*).

Likewise reinforced by these uniform federal decisions is Congress's strong preference for arbitration of labor disputes: "[t]he need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding [regarding preemption] in *Lucas Flour*." *Lueck*, 471 U.S. at 219. If it were otherwise, "[a] rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenant of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract *in the first instance*." *Id.* at 220 (citation omitted and emphasis added). This, the Supreme Court noted, is "[p]erhaps the *most harmful* aspect" of a state court decision that "would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement." *Id.* at 219 (emphasis added).

Federal law on LMRA preemption is clear. Uniformity is a foundational tenant of federal labor law, and courts should not supplant the arbitration process created for and negotiated by the unions.

II. The Illinois courts defer to federal courts on questions of federal law.

The Illinois Supreme Court recognizes that Illinois courts should defer to federal courts on interpretation of federal statutes, particularly on settled issues of federal preemption. Not only are Illinois courts to give deference to federal decisions, but the Illinois Supreme Court has held that opinions from

the U.S. Supreme Court on questions of federal law, which include settled questions of federal labor law and the scope of § 301 preemption, are *binding* on all Illinois courts. *E.g.*, *Bowman v. Am. River Transp. Co.*, 217 Ill.2d 75, 91 (2005). Moreover, the Illinois Supreme Court has stated that "it is well settled that uniformity of decision is an important consideration when state courts interpret federal statutes, [and the Court] will give 'considerable weight' to the decisions of federal courts that have addressed preemption." *Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30, 40 (2010) (quoting *Sprietsma v. Mercury Marine*, 197 Ill. 2d 112, 120 (2001), *reversed on other grounds by* 537 U.S. 51 (2002)).

This makes sense. Particularly where uniformity is a goal of a federal statute, there should be uniformity in state courts applying federal law. As explained in *State Bank of Cherry*, "uniformity of the law continues to be an important factor in deciding how much deference to afford federal court interpretations of federal law." *State Bank of Cherry*, 2013 IL 113836, ¶ 35. To hold otherwise would only encourage forum shopping and create uncertainty for litigants facing an otherwise uniform body of law – whether the plaintiff files in state or federal courts should not dictate how federal law is applied. Thus, "[b]ecause [the Illinois Supreme Court] find[s] the goal of developing a uniform body of law to be important, [Illinois courts] *must* accord more deference to federal court interpretations when those interpretations are unanimous." *Id.* ¶ 54 (emphasis added).

This well-settled and sound principle, however, has been ignored by many circuit courts addressing labor law preemption of BIPA claims. For example, while addressing an employer's motion to dismiss a BIPA case based on LMRA preemption, at least one circuit court attempted to avoid *Carter* by suggesting *Carter* concerned only preemption under the Federal Arbitration Act ("FAA"), and was thus unpersuasive when considered in the context of the LMRA. *See Winters v. Aperion*, No. 2019 CH 06579 (Cir. Ct. Cook Cty. Dec. 10, 2020), at 8–9 (attached as Ex. 1). Based on this arbitrary FAA versus LMRA distinction, the circuit court reasoned that, "at a minimum, [the employer's] assertion that this rule applies generally to 'preemption under federal law' is questionable." *Id.* at 9. Not so. Although *Carter* involved the FAA, its rationale extends more broadly. In fact, the case that *Carter* cited for this proposition concerned the Federal Boat Safety Act of 1971.

The federal statutes have varied, but the deference Illinois state courts have given to federal courts in the interpretation of federal law has remained steadfast. As the Illinois Supreme Court itself has explained, the Court "has *consistently* recognized the importance of maintaining a uniform body of law in interpreting federal statutes if the federal courts are not split on an issue." *State Bank of Cherry*, 2013 IL 113836, ¶ 34 (emphasis added). The Illinois Supreme Court has thus deferred to the holdings of federal courts when it comes to interpreting federal statutes involving both criminal and civil law. *See, e.g.*, *id.* (federal Food Security Act of 1985); *Carr v. Gateway, Inc.*, 241 Ill.

2d 15, 21 (2011) (FAA); *People v. Williams*, 235 Ill. 2d 178, 187 (2009) (federal Copyright Act of 1976); *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 231 Ill. 2d 399, 414 (2008) (federal Cable Communications Policy Act of 1984); *U.S. Bank Nat'l Ass'n v. Clark*, 216 Ill. 2d 334, 352 (2005) (federal Depository Institutions Deregulation and Monetary Control Act of 1980); *Sprietsma*, 197 Ill. 2d at 120 (Federal Boat Safety Act of 1971). In each of these cases, the driving force was ensuring consistent application of the law – state courts defer to federal courts on questions of federal law because it is "in the interest of a *uniform body of precedent*." *Williams*, 235 Ill. 2d at 187 (emphasis added).

In sum, where "the lower federal courts are uniform on their interpretation of a federal statute, [Illinois courts], in the interest of preserving unity, will give *considerable weight* to those courts' interpretations of federal law and find them to be *highly persuasive*." *State Bank of Cherry*, 2013 IL 113836, ¶ 35 (second emphasis added) (citing *Carter*, 237 Ill. 2d at 40). Moreover, the Illinois Supreme Court has directed Illinois courts that they "may afford a Seventh Circuit decision more persuasive value than [they] would the decisions of other federal courts." *Id.* ¶ 53. As discussed below, this appeal has both, a uniform body of federal law from federal district courts and a Seventh Circuit decision on point. This body of precedent should control.

III. Federal law on LMRA preemption of BIPA claims is well settled and completely uniform.

Applying binding U.S. Supreme Court precedent on federal labor law preemption, the Seventh Circuit and federal district courts have uniformly

held that identical BIPA claims are preempted by federal labor law in view of the indistinguishable collective bargaining agreements. As outlined below, the test for preemption in the BIPA context is simple: where the union is the authorized representative of the BIPA plaintiff and where timekeeping is a topic of negotiation that requires the interpretation or administration of a collective bargaining agreement, resolution of the BIPA claim requires interpretation of the collective bargaining agreement, including the past practices between the parties, prior negotiations, grievances, and grievance resolution. As a result, federal courts have uniformly held that BIPA claims are preempted by § 301 of the LMRA. These cases should be given "*considerable weight*" and are to be considered "highly persuasive." *State Bank of Cherry*, 2013 IL 113836, ¶ 35 (emphasis in original).

A. BIPA claims by unionized employees are preempted under federal labor law.

The issue of federal labor law preemption of BIPA claims brought by union-represented plaintiffs was resolved by *Miller v. Southwest Airlines Co.* There, the Seventh Circuit held that resolution of BIPA claims required interpretation of a collective bargaining agreement. *Miller*, 926 F.3d at 903–04. BIPA claims are thus preempted, and they are preempted completely – dismissal is the only proper course of action by the courts. *Id.* Instead, the claim must proceed through the agreed upon grievance process and arbitration. *Id.*

To resolve this question, the Seventh Circuit asked two questions. The threshold question is whether the BIPA plaintiff is unionized, *i.e.*, whether the

union is the plaintiff's legally authorized representative. *Miller*, 926 F.3d at 903. There was no dispute on this. Thus, the court then asked whether timekeeping is a topic of negotiation that requires the interpretation or administration of a collective bargaining agreement. *Id.* To this point, the Seventh Circuit was unmistakably clear.

The Seventh Circuit explained that "there can be no doubt that how workers clock in and out is a proper subject of negotiation between unions and employers—is, indeed, a mandatory subject of bargaining." *Id.* (citation omitted). Thus, the union "may receive necessary notices and consent to the collection of [its members'] biometric information" as governed by BIPA Section 15(b). *Id.* Likewise, questions of "retention and destruction schedules" governed by BIPA Section 15(a) and questions of "third parties implementing timekeeping and identification systems" under BIPA Section 15(d) are also "topics for bargaining between unions and management." *Miller*, 926 F.3d at 903; *see also* 740 ILCS 14/15(a); *id.* § 15(d). As *Miller* explained, because BIPA implicates privacy interests and rights that are common to all employees, "[i]t is not possible *even in principle* to litigate a dispute about how an [an employer] acquires and uses fingerprint information for its whole workforce without asking whether the union has consented on the employees' collective behalf." *Id.* at 904 (emphasis added).

Thus, for routine bargaining issues like timekeeping and privacy in the workplace, the question of preemption is not answered by a deep examination

of the collective bargaining agreement at issue or consideration of the behavior of either the union or the employer. Those questions are resolved through the dispute resolution process set forth in the collective bargaining agreement, as discussed *supra*. The *only* meaningful issues when it comes to preemption of BIPA claims are whether the union is the plaintiff's authorized representative and whether the dispute concerns a topic of negotiation that requires the interpretation or administration of a collective bargaining agreement. *See Miller*, 926 F.3d at 903–04. For preemption to apply, the employer need offer only a nonfrivolous argument to this effect. *See Brazinski*, 6 F.3d at 1179; *Union Pac.*, 879 F.3d at 758.

This bar is "quite low." *Union Pac.*, 879 F.3d at 758. And the low bar has been uniformly enforced in federal courts, because having courts dive into the record to answer the question of preemption in these cases would undermine the U.S. Supreme Court's holding that "interpretation of collective-bargaining agreements remains firmly in the arbitral realm." *Lingle*, 468 U.S. at 411; *see also Lueck*, 471 U.S. at 219–20 (Courts must strive to "preserve the effectiveness of arbitration" when it comes assessing questions of LMRA preemption to avoid an outcome that could "eviscerate a central tenant of federal labor contract law.").

Indeed, this is precisely what happened in *Miller* – the employer needed to make only a nonfrivolous argument that preemption applied. And it did. *Miller*, 926 F.3d at 903 ("[The employer] asserts that the union assented to the

use of fingerprints, either expressly on being notified before the practice was instituted or through a management-rights clause."). The court did not dive any deeper because it did not need to. *See id.* ("Whether [the employers'] unions *did* consent to the collection and use of biometric data, or perhaps grant authority through a management-rights clause, is a question for an adjustment board."). Said differently, whether the union was notified or whether finger-scan timekeeping is covered by a management-rights clause are both questions reserved for arbitration. A court cannot substitute its judgment for that of the arbitrator.

Because timekeeping is a topic of negotiation, BIPA claims are preempted, and unless and until the unionized employee has followed the grievance process outlined in the collective bargaining agreement, courts must dismiss BIPA claims for lack of jurisdiction. *See id.*; *see also Lueck*, 471 U.S. at 220; *McCoy v. Maytag Corp.*, 495 F.3d 515, 524 (7th Cir. 2007) ("It is well settled that if a CBA establishes a grievance and arbitration procedure for the redress of employee complaints, employees wishing to assert claims based on a CBA must first exhaust the grievance procedure before resorting a judicial remedy."). *Miller*'s holding is consistent with U.S. Supreme Court precedent. Where unions and employers "have agreed that a neutral arbitrator will be responsible, in the first instance, for interpreting the meaning of their contract," that choice must be respected. *Lueck*, 471 U.S. at 219. If it were not so, "their federal right to decide who is to resolve contract disputes will be lost."

Id. The dispute resolution process negotiated by the union on behalf of its members must be respected by the courts. *See id.*

Thus, under *Miller*, when it comes to disputes about timekeeping and related privacy interests under BIPA, "there's no room for individual employees to sue under state law—in other words, state law is preempted to the extent that a state has tried to overrule the union's choices on behalf of the workers." *Miller*, 962 F.3d at 904 (citations omitted). BIPA claims brought by unionized plaintiffs must be dismissed to allow the claims to run their course through the agreed upon grievance process. *See id.*

B. Analysis of LMRA preemption is guided by *Miller* and has been uniformly enforced by federal courts.

To be sure, in *Miller*, the Seventh Circuit addressed preemption in the context of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* But as the Seventh Circuit recently clarified in *Fox v. Dakkota Integrated Sys., LLC*, 980 F.3d 1146, 1156 (7th Cir. 2020), when it comes to assessing the nature of BIPA claims brought by unionized plaintiffs in the context of the LMRA, "the answer appears to flow directly from *Miller*."

There is no meaningful distinction made by the U.S. Supreme Court and the Seventh Circuit in the preemption standard under the RLA and § 301 of the LMRA – both courts treat the preemption standard under either labor law statute as "virtually identical." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260 (1994); *see also Hughes v. United Air Lines, Inc.*, 634 F.3d 391, 393–94 (7th Cir. 2011) (finding *Lingle*'s procedural application of the LMRA applies to the

RLA as well); *Brown v. Ill. C. R.R. Co.*, 254 F.3d 654, 667 n.13 (7th Cir. 2001) ("In *Hawaiian Airlines*, the Court adopted *Lingle*'s standard for addressing LMRA preemption to resolve claims of RLA preemption. Thus *Lingle* is directly on point" to questions of RLA preemption.). Illinois circuit courts have overlooked this. *See, e.g.*, Ex. 1, *Winters*, Dec. 10, 2020 Order, at 8–9.

In short, whether in the context of the LMRA or the RLA, the overriding concern remains the same: maintaining and respecting union-employer negotiations and the collective bargaining agreements they have produced. Thus, the role of the union as its members' legally authorized representative must be respected in BIPA cases. To hold otherwise would undermine the uniform application of labor law and the very character of a union. State laws that do not recognize a union as the legally authorized representative of a union member are preempted, and they are preempted completely.

Accordingly, federal district courts have uniformly, and appropriately, relied on *Miller*, as well as the clear direction in *Fox*, to hold that under § 301 of the LMRA, BIPA claims cannot exist independently from a collective bargaining agreement when the union is a legally authorized representative and the relevant policy is a topic of union-employer negotiation. *See, e.g.*, *Barton v. Swan Surfaces, LLC*, No. 20-cv-499, 2021 WL 793983, at *7 (S.D. Ill. Mar. 2, 2021) ("This court cannot separate the BIPA claims without looking at the CBA. Because interpretation of the CBA is essential to this case and because they are so intertwined, [the plaintiff's] claims are preempted" by the

LMRA.); *Roberson v. Maestro Consulting Servs. LLC*, No. 20-CV-00895-NJR, 2020 WL 7342693, at *8–9 (S.D. Ill. Dec. 14, 2020) ("Plaintiffs' claims regarding union members are preempted by Section 301 of the LMRA under a straightforward application of *Miller*," noting that *Miller* "held that 'whether defendant's unions *did* consent to the collection and use of biometric data, or perhaps grant authority through a management-rights clause, is a question for an adjustment board." (brackets omitted) (quoting *Miller*, 926 F.3d at 903)); *see also, e.g.*, *Gil v. True World Foods Chi., LLC*, No. 20 C 2362, 2020 WL 7027727, at *3 (N.D. Ill. Nov. 30, 2020); *Fernandez v. Kerry, Inc.*, No. 17-cv-08971, 2020 WL 7027587, at *4–5 (N.D. Ill. Nov. 30, 2020); *Williams v. Jackson Park SLF, LLC*, No. 19-CV-8198, 2020 WL 5702294, at *3 & n.4 (N.D. Ill. Sept. 24, 2020); *Gray v. Univ. of Chi. Med. Ctr., Inc.*, No. 19-cv-04229, 2020 WL 1445608, at *3–4 (N.D. Ill. Mar. 26, 2020); *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19 C 2942, 2020 WL 919202, at *3 (N.D. Ill. Feb. 26, 2020); *cf. Young v. Integrity Healthcare Cmtys.*, No. 3:20-cv-00244-MAB, 2021 WL 148736, at *3 (S.D. Ill. Jan. 15, 2021) (noting that "[t]he Seventh Circuit has made it clear that BIPA claims are subject to complete federal preemption when the named plaintiffs are members of a union," but distinguishing holding in this case because named plaintiff was not a member of the union); *Darty v. Columbia Rehab. & Nursing Ctr., LLC*, 468 F. Supp. 3d 992, 995–96 (N.D. Ill. 2020) (same).

This uniform precedent should be respected and enforced in state courts. To do otherwise would lead to the exact circumstance the U.S. Supreme Court highlighted in *Lucas Flour* – the law would be unpredictable, neither unions nor employers would know how to properly engage in negotiations concerning timekeeping procedures and privacy in the workplace, and the role of the union as the employee's legally authorized representative would be undermined.

C. BIPA's policy goals do not – and cannot – change the outcome.

That BIPA "concerns workers' privacy" is of no moment when it comes to question of preemption under § 301. *See Miller*, 926 F.3d at 903–04 ("That biometric information concerns workers' privacy does not distinguish it from many other subjects, such as drug testing, that are routinely covered by collective bargaining and on which unions give consent on behalf of the whole bargaining unit."). Section 301 can preempt a nonnegotiable state remedy where, as here, that remedy "turns on the interpretation of a collective bargaining agreement." *Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 501 (7th Cir. 1996); *see also, e.g.*, *Lingle*, 486 U.S. at 407 n.7 (discussing how nonnegotiable statutory rights may be preempted if interpretation of a collective bargaining agreement was required to resolve the statutory claims).

Federal courts have addressed this issue before. For instance, in *Matter of Amoco Petroleum Additives Co.,* 964 F.2d 706, 709–10 (7th Cir. 1992), union-represented employees alleged that their employer invaded their privacy by installing a video camera on the hallway ceiling outside the women's locker

room. The camera enabled the employer to record who entered and exited the locker room, but not anything happening inside. *Id.* at 707. The Seventh Circuit found that the state law privacy claims were preempted by the LMRA.

Even though the collective bargaining agreement at issue did not expressly mention video cameras, the court explained that it contained a broad management-rights clause. *Id.* at 709. Therefore, because "privacy in the workplace" is an "ordinary subject of bargaining" and "[t]he extent of privacy is a 'condition' of employment," the Seventh Circuit held that a "court could not award damages without first construing the collective bargaining agreement and rejecting [the employer's] interpretation of the management-rights clause." *Id.* at 710. Thus, the claims were preempted and subject to mandatory arbitration. *Id.*

BIPA cases involving unionized employees, such as this one, are like *Amoco* for at least two reasons. First, BIPA claims complain about a condition of employment, *i.e.*, the manner in which an employee records his or her work time, a core subject of collective bargaining. *See Miller*, 962 F.3d at 903. Second, the claims also focus on the extent of privacy in the workplace, another ordinary condition of employment. *See Amoco,* 964 F.2d at 709.

No matter how important a state perceives the privacy interest protected by a statute to be, a state cannot preempt federal labor law. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015) (The Supremacy Clause "creates a rule of decision" that courts "must not give effect

to state laws that conflict with federal laws."). Thus, even if the Court considers the privacy rights that BIPA protects to be nonnegotiable, § 301 still applies and BIPA claims by a unionized plaintiff must be dismissed. *See, e.g.*, *Williams*, 2020 WL 5702294, at *3 (rejecting the unionized BIPA plaintiff's contention "that his claim should not be preempted because the union cannot waive his statutory privacy rights under BIPA"); *Peatry*, 2020 WL 919202, at *4 (Unionized plaintiff's "BIPA claims require interpretation of the CBA, meaning that § 301 preempts her BIPA claims regardless of whether the Court treats her rights under BIPA as nonnegotiable.").

D. The plain meaning of "legally authorized representative" covers a labor union.

That federal courts have consistently treated BIPA claims as preempted by the LMRA also is consistent with BIPA itself. BIPA's plain language expressly provides that unions can negotiate on their members' behalf when it comes to their rights under BIPA Section 15. *E.g.*, 740 ILCS 14/15(b) (providing that a "legally authorized representative" may receive notice and give consent to the collection, use, and storage of an individual's biometric data).

Miller recognizes exactly this point. The Seventh Circuit "reject[ed] plaintiffs' contention that a union is not a 'legally authorized representative' for [BIPA purposes]." *Miller*, 926 F.3d at 903. In reaching this conclusion, the court reinforced a foundational principle of federal labor law: "A state cannot remove a topic from the union's purview and require direct bargaining between

individual workers and management." *Id.* But as the Seventh Circuit explained, with BIPA, "Illinois did not try." *Id.*

BIPA Section 15(b) "provides that a worker *or an authorized agent* may receive necessary notices and consent to the collection of biometric information." *Id.* (emphasis in original) (citing 740 ILCS 14/15(b)). Thus, "instead of *excluding* a union from acting on its members' behalf with respect to their privacy rights under BIPA, BIPA *explicitly allows* 'an authorized agent' to receive notices and consent to the collection of biometric information." *Peatry*, 2020 WL 919202, at *4 (emphasis added); *see also Gray*, 2020 WL 1445608, at *4 ("The [u]nion had a collective bargaining agreement with [the employer], and the union was the 'legally authorized representative' of Plaintiff for BIPA purposes.").

As the Seventh Circuit held in *Miller* and federal district courts have since uniformly enforced, any Section 15 claim implicates "topics for bargaining between unions and management." *Miller*, 926 F.3d at 903. Accordingly, if the union was the plaintiff's legally authorized representative and there is a nonfrivolous argument that the policy in question is a subject of negotiation, the BIPA claim is preempted and must go through the agreed upon grievance process in the collective bargaining agreement. *See, e.g.*, *Williams*, 2020 WL 5702294, at *3 (applying LMRA preemption and explaining that this was directly addressed in *Miller* "when it held that BIPA's text allows authorized agents, such as unions, to act on members' privacy rights" and "that

whether the CBA management rights clause gave rise to consent regarding biometric data is a question for an adjustment board").

Common sense, plain meaning, and established agency and labor law strongly suggest that a union can be a person's legally authorized representative for BIPA purposes. Illinois state courts cannot – and should not – supplant this role, which is dictated by years of precedent and the texts of BIPA and the LMRA themselves.

IV. Illinois circuit courts have misapplied the LMRA preemption analysis.

A. The circuit courts have usurped the role of arbitrator.

To determine whether a BIPA claim is preempted by federal labor law, circuit courts should not be considering evidence of what the union did or did not agree to – that is the exclusive role of the arbitrator. But that is what they have been doing.

In this case, for instance, the circuit court scoured the *entire* collective bargaining agreement "to see" if a "clear and unmistakable" provision exists that the union explicitly waived its members' rights under BIPA. *Walton v. Roosevelt Univ.*, No. 19 CH 04176 (Cir. Ct. Cook Cty. May 5, 2020), at 7 (attached as Ex. 2). So too in *Thomas v. KIK Custom Productions*, the circuit court examined the collective bargaining agreement searching for an explicit waiver. *Thomas v. KIK Custom Prods.*, No. 19-CH-2471 (Cir. Ct. Cook Cty. Dec. 19, 2019), at 4–5 (attached as Ex. 3). Similarly, in *Winters v. Aperion*, the circuit court improperly, and repeatedly, interpreted the collective bargaining

agreement and questioned whether the union and employer complied with BIPA's procedural requirements. *Winters v. Aperion Care Inc.*, No. 2019 CH 06579 (Cir. Ct. Cook Cty. Feb. 11, 2020), at 5–7 (attached as Ex. 4).

But as *Miller* made clear, evidence of what an employer told the union and what the union agreed to is "*properly* not in this record." *Miller*, 926 F.3d at 904. The correct analysis is only whether the dispute is about the interpretation or administration of a collective bargaining agreement. *Id.* at 903–04. That question is answered simply, in the affirmative. A collective bargaining agreement, by its very nature, "may include implied, as well as express terms," and an interpretation of those terms is reserved for the arbitrator. *Amoco*, 964 F.2d at 710 (quoting *Conrail v. Railway Labor Executives' Ass'ni*, 491 U.S. 299, 311 (1989)). The arbitration process is intended to define any limits to the agreement's terms, not the courts. *See id.* (LMRA case applying case law from RLA case because preemption principles hold steadfast under either source of labor law when it comes to "disputes about the interpretation or application of an existing agreement").

As discussed *supra*, to assert a preemption defense and have the claim redirected to the agreed upon grievance process, an employer need only present "a nonfrivolous argument" that the use of finger-scan timekeeping in the workplace is authorized, even if "implicitly, by the management-rights clause of the agreement." *Brazinski*, 6 F.3d at 1179. If the employer can satisfy this "quite low" threshold, *Union Pac.*, 879 F.3d at 758, the plaintiff's claim "cannot

be resolved without an interpretation of the agreement," *Brazinski*, 6 F.3d at 1179. It is improper to review the record or weigh competing evidence at this stage. *See, e.g.*, *Union Pac.*, 879 F.3d at 759 ("Wading through the competing declarations to determine the actual authority the [employer] had to modify the disciplinary policies, based on past practices, is a job for the arbitrator."); *cf. Evans v. Chi. Newspaper Guild-CWA*, 2020 IL App (1st) 200281, ¶ 14 ("Where a party seeks to compel arbitration, the sole issue before the circuit court is whether the parties agreed [to] arbitrate the dispute in question." (citing *Griffith v. Wilmette Harbor Ass'n, Inc.*, 378 Ill. App. 3d 173, 180 (2007)).

A court's attempt to infer whether a union did or did not agree to the timekeeping procedures at issue "necessarily comprehends the merits," and "the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement." *United Steelworkers*, 363 U.S. at 585.[1] Rather, these questions must, under uniform federal law, be resolved through the grievance procedures outlined in the collective bargaining agreement. Enforcing agreed upon arbitration is the only way to ensure federal labor law fulfills its fundamental purpose of promoting "industrial peace." *Lucas Flour*, 369 U.S. at 104.

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[1] Indeed, as one Illinois state court properly recognized in a BIPA matter, "to determine whether or not the union has weighed in on the CBA and weighed the rights of their members with regard to the provisions of BIPA, the Court would have to actually interpret the CBA." *See Soltisyk v. Parsec, Inc.*, No. 2019 L 00136 (Cir. Ct. DuPage Cty.), Transcript of May 20, 2020 Hearing at 33:10–13 (attached as Ex. 5). The court thus concluded the plaintiffs' claims were completely preempted and the plaintiffs had to pursue their claims in arbitration. *See Soltisyk v. Parsec, Inc.*, No. 2019 L 00136 (Cir. Ct. DuPage Cty. May 21, 2020) (attached as Ex. 6).

B. The Circuit Courts have crafted their own analyses to attempt to avoid *Miller*'s clear application.

Instead of following this straight-forward analysis as the federal courts have uniformly done, Illinois circuit courts have generally engaged in results-oriented attempts to avoid the reach of *Miller*. That they cannot do.

1. *Walton* is inconsistent with *Miller* and misapplied the preemption analysis.

To begin, in this case, instead of deferring to federal courts, the circuit court found it "significant that the [*Miller*] opinion was written without citation to the record before the court or decisional authority." Ex. 2, *Walton*, May 5, 2020 Order at 4. But as discussed in *Miller*, the Seventh Circuit properly deferred to the arbitrator to engage in the factual analysis of the record. *See Miller*, 926 F.3d at 903. On this faulty presumption that it must examine the record, the circuit court concluded preemption did not apply because "Roosevelt University has failed to present the Court with a 'clear and unmistakable' provision of the CBA that waives any BIPA rights." Ex. 2, *Walton*, May 5, 2020 Order at 7 (citations omitted). Absent this finding, the court concluded BIPA was independent from the collective bargaining agreement. *See id.* at 7–8.

The court below did exactly what the decades of precedent say it should *not* do – attempt to interpret the reach of the collective bargaining agreement. The court also improperly substituted a preemption analysis with a waiver analysis. *See id.* The issue here is not whether a union *waived* a plaintiff's rights under BIPA, even if that could be done. Rather, the questions are whether the union is the plaintiff's legal representative – as permitted by BIPA

itself – and whether there is a nonfrivolous argument that a timekeeping policy is a subject of negotiation. The remaining factual questions as to what the union agreed to are for arbitrator to decide.

2. *Winters* declined to apply federal labor law, instead arguing *all* of the federal courts are incorrect.

In *Winters v. Aperion*, the circuit court first, without the benefit of many of the federal district court cases applying *Miller* to the LMRA context or the Seventh Circuit's clear directive to apply *Miller* to LMRA cases as stated in *Fox*, improperly scoured the record, as discussed *supra*. Ex. 4, *Winters*, Feb. 11, 2020 Order, at 5–7. But even when given the chance to correct the error and follow the uniform directive from federal courts, rather than deferring to federal courts, the circuit court misapplied federal preemption law and argued that *all* federal courts who have addressed labor law preemption in BIPA cases have been incorrect. Ex. 1, *Winters*, Dec. 10, 2020 Order, at 5–9.

Specifically, the court reasoned that preemption does not apply if the state-law claim turns on "*an employer's conduct and motives*," suggesting that is the case here. *Id.* at 9 (emphasis in original). In so concluding, the court missed the mark. Preemption under the LMRA does not turn on what the employer did or did not do (*i.e.*, its conduct and motives). Rather, it concerns only whether the union was the legally authorized representative of the BIPA plaintiff and whether the dispute concerns a topic of negotiation that requires the interpretation or administration of a collective bargaining agreement. If so, the claim is preempted and the plaintiff must pursue the claim through the

agreed upon grievance process in the collective bargaining agreement. The employer's conduct and motives are irrelevant to the analysis.

3. The circuit court also misapplied federal labor law in *KIK Custom Products*.

The circuit court in *Thomas v. KIK Custom Products*, like its fellow circuit courts, also improperly focused on waiver. Ex. 3, *KIK Custom Prods.*, Dec. 19, 2019 Order, at 4–5. Waiver is the wrong analysis, and indeed, irrelevant to the question of preemption in this case. The correct analysis concerns only whether the union is the plaintiff's legally authorized representative and the employer presents a nonfrivolous argument that its timekeeping policy is a topic of negotiation requiring the interpretation or administration of the collective bargaining agreement. Questions of whether the union consented, of course, will come up. But not until arbitration; the claim must run its proper course as negotiated and agreed upon by the union and the employer in the collective bargaining agreement. Further troubling, the circuit court found *Miller*'s pronouncements "mere dicta and utterly unnecessary to the disposition of the case." *Id.* at 6. As the Seventh Circuit made quite clear in *Fox*, however, what the circuit court characterized as "mere dicta," answers the very question of LMRA preemption. *Fox*, 980 F.3d at 1156 (When it comes to assessing the nature of BIPA claims brought by unionized plaintiffs in the context of the LMRA, "the answer appears to flow directly from *Miller*.").

In each of these cases, the circuit courts were trying to usurp the role of the union and to take on the role of the arbitrator. The implication of the circuit courts' holdings that unions cannot negotiate how the procedural steps outlined by BIPA will be carried out for its members is incorrect. *Miller*, and every federal court addressing the issue since, made this clear. The circuit courts failed to defer to the uniform body of federal law deciding questions of LMRA preemption of BIPA claims seemingly making the plaintiff's choice of forum outcome determinative – a result this Court should not endorse. *See Fox v. Adams & Assocs.*, 2020 IL App (1st) 182470, ¶ 45 ("When interpreting a federal statute, Illinois courts *must* look to the decisions of the United States Supreme Court and lower federal courts." (emphasis added)).

V. This Court should apply the correct analysis and instruct the circuit courts on the right analysis going forward.

The circuit court's order on appeal should be corrected to protect the policies underlying nationwide labor law. Where, as here, the federal courts have uniformly decided a question of federal law, Illinois state courts must consider those opinions "highly persuasive" and give them "*considerable weight*." *State Bank of Cherry*, 2013 IL 113836, ¶ 35 (emphasis in original). The Court should stem the tide before the divide between federal and state courts deepens and further erodes Congress's policy objectives behind the LMRA.

This Court should begin by clarifying that the right preemption analysis is a simple, two-step process. There are only two questions before a court addressing LMRA preemption in a BIPA case: (i) was the union the legally

authorized representative of the plaintiff; and (ii) if so, is there a nonfrivolous argument that the policy in question was a subject of negotiation. That's it. If both are answered in the affirmative, the dispute is about the interpretation or administration of a collective bargaining agreement and it *must* be considered preempted under the LMRA.

As to whether a BIPA claim of a union-represented employee against his employer is preempted by the LMRA, the "answer flows directly from *Miller*." *Fox*, 980 F.3d at 1156. As *Miller* held, "there can be no doubt that how workers clock in and out is a proper subject of negotiation between unions and employers—is, indeed, a mandatory subject of bargaining." *Miller*, 926 F.3d at 903. *Miller* also held that questions of "retention and destruction schedules" governed by BIPA Section 15(a) and questions of "third parties implementing timekeeping and identification systems" under BIPA Section 15(d) are also "topics for bargaining between unions and management." *Id.*

The facts at issue in *Miller* are nearly identical to those before the Court here, so the same analysis and outcome should apply. Both cases involve employees claiming BIPA violations based on an employer's use of finger-scan time clocks. Both cases involve a broad management-rights clause included in the bargaining agreement. Both employers satisfied their low burden of presenting a nonfrivolous argument that the policy is covered by the management rights clause or was subject to negotiations between the union and employer. *See, e.g.*, *Brazinski*, 6 F.3d at 1179. Moreover, as is obvious from

BIPA's plain language, both unions were the plaintiffs' legally authorized representatives. But what these unions said, what the employers said, and what was agreed to in the collective bargaining agreements are issues for arbitration. Courts should not exhaustively review the record to properly assess preemption in BIPA cases. *See Miller*, 926 F.3d at 903–04.

The circuit court here erred, and this Court should say so. As is evident when comparing the circuit court cases addressing preemption of BIPA claims to those of federal courts, the circuit courts have crafted analyses to avoid the obvious reach of *Miller* to the LMRA context. In doing so, they have misapplied federal law and allowed (perhaps even encouraged) improper forum shopping. BIPA plaintiffs who are unionized are not without rights, nor is this a question of whether the unions have waived those rights. The issue is only whether the unions could have agreed to the use of finger-scan timekeeping. Whether the union actually did so agree, however, must be resolved in a different forum. The case belongs in arbitration.

VI. Any other result leads to confusion and disarray.

How questions of federal labor law preemption are resolved should not differ – especially *this* significantly – based on the forum of the plaintiff's choosing. As both Congress and the U.S. Supreme Court have made clear, when it comes to § 301 of the LMRA, Illinois employers and unions should be able to rely on Illinois state courts to apply and enforce the labor laws of the United States with fidelity and deference to federal courts. The Illinois Supreme Court has "consistently" emphasized the centrality of this deference

to create and ensure uniformity in the law. *State Bank of Cherry*, 2013 IL 113836, ¶ 34. Although this is important in all cases, as the U.S. Supreme Court has emphasized, "the subject matter of [section] 301(a) 'is *peculiarly* one that calls for uniform law.'" *Lucas Flour*, 369 U.S. at 103 (emphasis added) (quoting *Pa. R. Co.*, 250 U.S. at 569).

Where, as here, the federal courts are *all* consistent, state courts should be too. The highest courts of both the United States and Illinois have recognized this foundational principle. To hold otherwise would be to undermine federal labor law itself. The LMRA was enacted to ensure predictability for unions and employers alike. The circuit courts have done little other than undermine this central policy goal. It is arbitration – not circuit courts – that remains the preferred forum to resolve labor disputes, including those concerning finger-scan timekeeping and related privacy interests. The circuit courts have lost sight of these fundamental tenets of federal labor law, which Illinois employers and unions should be able to rely upon.

CONCLUSION

The Court should reverse the decision below and, instead, apply the preemption analysis as set forth in *Miller* to BIPA claims brought by unionized plaintiffs in the LMRA context, just as federal courts have uniformly done.

Dated: June 14, 2021

Respectfully submitted,

ILLINOIS CHAMBER OF COMMERCE

By: */s/ Matthew C. Wolfe*

Melissa A. Siebert
ARDC #6210154
Matthew C. Wolfe
ARDC #6307345
Elisabeth A. Hutchinson
(*pro hac vice* pending)
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive, Suite 4700
Chicago, Illinois 60606
(312) 704-7700
masiebert@shb.com
mwolfe@shb.com
ehutchinson@shb.com

Counsel for Amicus Curiae
Illinois Chamber of Commerce

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) 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 39 pages or 9,869 words.

Dated: June 14, 2021 */s/ Matthew C. Wolfe*

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Matthew C. Wolfe, an attorney, hereby certify that on **June 14, 2021**, I caused a true and complete copy of the foregoing **BRIEF OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLANT ROOSEVELT UNIVERSITY** to be filed electronically with the Clerk's Office of the Illinois Appellate Court, First Judicial District, using e-filing provider **Odyssey eFileIL**, which sends notification and a copy of this filing by electronic mail to all counsel of record. I further certify I caused an additional courtesy copy of this filing to be served by electronic mail upon the following:

Ryan F. Stephan (rstephan@stephanzouras.com)
Haley R. Jenkins (hjenkins@stephanzouras.com)
STEPHAN ZOURAS, LLP
100 North Riverside Plaza, Suite 2150
Chicago, IL 60606
Attorneys for Appellee William Walton

David M. Schultz (dschultz@hinshawlaw.com)
John P. Ryan (jryan@hinshawlaw.com)
Adam R. Vaught (avaught@hinshawlaw.com)
HINSHAW & CULBERTSON LLP
151 North Franklin Street, Suite 2500
Chicago, Illinois 60606
Attorneys for Appellant Roosevelt University

Under penalties by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certified that the statements set forth in this notice of filing and certificate of service are true and correct.

/s/ Matthew C. Wolfe

EXHIBIT 1

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

KEAMBER WINTERS and DAWN MEEGAN, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**Case No. 19-CH-6579**
APERION CARE INC., et al.,	)	
Defendants,	)	

MEMORANDUM AND ORDER

Defendants Aperion Care, Inc., Aperion Care Morton Villa, LLC, Aperion Care Morton Terrace, LLC, Aperion Care Galesburg North, LLC, Island City Rehabilitation Center LLC, d/b/a Aperion Care Wilmington, and Doe Defendants 1-100 have filed a motion to reconsider this court's February 11, 2020 Memorandum and Order denying their motion to dismiss.

I. Background

On February 11, 2020, this court denied Defendants Aperion Care, Inc., Aperion Care Morton Villa, LLC, Aperion Care Morton Terrace, LLC, Aperion Care Galesburg North, LLC, Island City Rehabilitation Center LLC, d/b/a Aperion Care Wilmington, and Doe Defendants 1-100 (collectively "Defendants") motion to dismiss Plaintiffs Keamber Winters and Dawn Meegan's (collective "Plaintiffs") complaint and compel arbitration pursuant to 735 ILCS 5/2-619.1.

Among the arguments Defendants asserted was that Plaintiffs' claims were preempted by section 301 of the Labor Management Relations Act ("LMRA"). 29 U.S.C. § 141 *et seq*. This court rejected Defendants' argument, finding Plaintiffs' Biometric Information Privacy Act ("BIPA") claims did not require the court to interpret the collective bargaining agreements (the "CBAs") and that Miller v. Sw. Airlines Co., 926 F.3d 898 (7th Cir. 2019), was distinguishable.

Since then, several federal district court decisions (the "Subsequent Federal Decisions") have held that BIPA claims are preempted by the LMRA. *See*, Peatry v. Bimbo bakeries USA, Inc., No. 19 C 2942, 2020 WL 919202 (N.D. Ill. Feb 26, 2020; Gray v. Univ. of Chicago Med. Ctr., Inc., No. 19-cv-04229, 2020 WL 1445608 (N.D. Ill. Mar 26, 2020); Fernandez v. Kerry, Inc., No. 17 C 8971, 2020 WL 1820521 (N.D. Ill. Apr. 10, 2020); Fox[1] v. Dakkota Integrated

[1] The Fox decision does not appear to be reported in Lexis database. Defendants have attached a copy of Judge Charles P. Kocoras' May 26th Order as Exhibit F to their motion. The court will refer to Exhibit F of Defendants' motion when discussing the Fox case.

Systems, LLC, No. 19-cv-2872 (N.D. Ill. May 26, 2020); and Williams v. Jackson Park SLF, LLC, 2020 WL 5702294 (N.D. Ill. Sept. 24, 2020). Generally, those cases each state that the LMRA preemption standard is "virtually identical" to the Railroad Labor Act ("RLA") preemption standard, cite to the Miller opinion, and then conclude that for the reasons enunciated in Miller, the plaintiffs' BIPA claims would require interpretation of at least the "management rights" of the various CBAs.

II. Motion to Reconsider

Defendants argue this court should reconsider its February 11, 2020 Memorandum and Order based on the Subsequent Federal Decisions. Defendants assert that since uniformity of decision is an important consideration when state courts interpret federal law, this court should give great weight to the Subsequent Federal Decisions and reconsider its February 11, 2020 Memorandum and Order.

Plaintiffs respond that Defendants' motion is untimely. Plaintiffs argue that even if the court considers Defendants' motion, various state courts have held that BIPA claims are not preempted by the LMRA. *See*, Walton v. Roosevelt University, No. 19 CH 4176 (Cir. Ct. Cook Cty., May 5, 2020) (Demacopoulos, J.) and Watson v. Legacy Healthcare et al., No. 19 CH 3425 (Cir. Ct. Cook Cty., June 10, 2020) (Meyerson, J.). Plaintiffs argue that Defendants cannot meet the preemption standard of section 301 of the LMRA.

"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).

A. Whether the motion is untimely

Plaintiffs argue that Defendants' motion is untimely because it comes 199 days (six and a half months) after this court issued its February 11, 2020 Memorandum and Order. Plaintiffs primarily rely upon 735 ILCS 5/2-1203 ("section 2-1203") to support their argument that Defendants' motion to reconsider should have been filed with 30 days after the February 11, 2020 Memorandum and Order.[2] This argument is unpersuasive.

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[2] Plaintiffs also cite In re Marriage of Lasota and Luterek, 17 N.E. 3d 690, 694 (Ill. App. Ct. 1st Dist 2014) for the proposition that "the Illinois Appellate Court has applied 735 ILCS 5/2-1203 as the relevant rule when analyzing a motion to reconsider denial of a motion to dismiss." (Response at 2). The case is largely distinguishable. First, the movant in that case failed to cite the legal authority for his motion to reconsider, In re Marriage of Lasota, 17 N.E.3d 690, 693, nonetheless, *the trial court* opted to consider the motion under section 2-1203. In re Marriage of Lasota, 17 N.E.3d at 693. Second the case largely concerned the whether the trial court could consider a petition attached the motion to reconsider (i.e., newly discovered evidence) not the timeliness of the motion. Id. at 694, 697.

Section 2-1203(a) provides:

> (a) In all cases tried without a jury, any party may, within 30 days *after the entry of the judgment* or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief.

735 ILCS 5/2-1203(a) (emphasis added).

Here, the court's February 11, 2020 Memorandum and Order was a denial of motion to dismiss and was not an entry of a judgment.

"Generally, the denial of motion to dismiss is not, of itself, a final appealable order. [citation]. Rather, *it is merely an interlocutory order* which does not finally dispose of the proceeding in such a way as to give the appellate court jurisdiction on appeal. [citation]." Jursich v. Arlington Heights Federal Savings & Loan Asso., 83 Ill. App. 3d 352, 353 (2nd Dist. 1980) (citations omitted) (emphasis added).

The Illinois Supreme Court has held that "an interlocutory order may be reviewed, modified or vacated at any time before final judgment [. . .]." Balciunas v. Duff, 94 Ill. 2d 176, 185 (1983).

Therefore, Defendants' motion to reconsider is timely.

B. The Subsequent Federal Decisions

Defendants assert the Subsequent Federal Decisions, all issued after this court's February 11, 2020 Memorandum and Order, support reconsideration. Rather than discuss each case individually, and in the interest of brevity, the court will discuss the similarities among the cases and then note any relevant differences.

1. Similarity – The "virtually identical" statement

All of the Subsequent Federal Decisions cited by Defendants cite Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 260 (1994) for the proposition that the Railroad Labor Act ("RLA") preemption standard is "virtually identical" to the preemption standard of section 301 of the LMRA. *See*, Peatry v. Bimbo Bakeries USA, Inc., No. 19 C 2942, 2020 U.S. Dist. LEXIS 32577, at *9 (N.D. Ill. Feb. 26, 2020); Gray v. University of Chicago Medical Center, Inc., No. 19-cv-04229, 2019 U.S. Dist. LEXIS 229536, at *9 (N.D. Ill. Mar. 26, 2019); Fernandez v. Kerry, Inc., No. 17 C 8971, 2020 U.S. Dist. LEXIS 64070, at *15-16 (N.D. Ill. Apr. 10, 2020); Motion at Ex F at pg. 7; and Williams v. Jackson Park SLF, LLC, No. 19-CV-8198, 2020 U.S. Dist. LEXIS 175625, at *6 n.4 (N.D. Ill. Sep. 24, 2020).

But a review of the Hawaiian Airlines case reveals the court said the following:

> The pre-emption standard that emerges from the line of cases leading to [Atchison, T. & S. F. R. Co. v. Buell, 480 U.S. 557 (1987)] -- *that a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of the CBA* -- is virtually identical to the pre-emption standard the Court employs in cases involving § 301 of the LMRA, 29 U.S.C. § 185.

Hawaiian Airlines v. Norris, 512 U.S. 246, 260 (1994) (emphasis added).

The text of Hawaiian Airlines is clear that the RLA preemption standard "that a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of the CBA" is virtually identical to the preemption standard of section 301 of the LMRA. Hawaiian Airlines, 512 U.S. at 260.

Notably, the Miller court *did not* find that the plaintiffs' BIPA claims were not preempted because the BIPA claims are independent of the CBA. Rather the Miller court found that the plaintiffs' BIPA claims necessarily entailed the interpretation or administration of the collective bargaining agreements, thus the plaintiffs' state-law BIPA claims were preempted by the RLA. Miller, 926 F.3d at 904.

But, critically, none of the Subsequent Federal Decisions discussed what RLA preemption standard is "virtually identical" to the preemption standard of section 301 of LMRA.

It appears to this court, that Defendants are asserting that the Subsequent Federal Decisions use of the "virtually identical" language of Hawaiian Airlines means that the same outcome of Miller must be reached. However, this assertion is not supported by case law.

First, it is contrary to other federal case law, which suggests that LMRA preemption based on CBA interpretation is not to be rubber-stamped but must be considered on a case by case basis. *See*, Faehnrich v. Bentz Metal Products Co. (In re Bentz Metal Products Co.), 253 F.3d 283, 285 (7th Cir. 2001) ("First, our examination of the relevant cases shows that this issue requires case-by-case factual analysis to determine the extent to which a state law claim will require interpretation of a CBA.").

Second, and more importantly, this is *not* the import of the "virtually identical" language of the Hawaiian Airlines case.

Although the Hawaiian Airlines court ultimately adopted the preemption standard announced in Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) for RLA preemption, Hawaiian Airlines, 512 U.S. at 263, it engaged in a detailed discussion addressing situations when other state-law claims would not be preempted.

For example, in discussing the Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) case, the Hawaiian Airlines court noted that case cautioned that other state-law rights, which existed independent of the contract, would not be similarly preempted:

> Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law. . . . Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. . . . Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, *it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.* [citation]

Hawaiian Airlines v. Norris, 512 U.S. 246, 260-61 (1994) (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211-212 (1985)) (emphasis added) (citation omitted).

Furthermore, while discussing Lingle, the Hawaiian Airlines court noted that even the Lingle court observed, that "[']purely factual questions['] about an employee's conduct *or an employer's conduct and motives* do not [']require a court to interpret any term of a collective-bargaining agreement.[']" Hawaiian Airlines v. Norris, 512 U.S. 246, 261-62 (1994) (quoting Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407 (1988)) (emphasis added).

For our purposes, when the interested reader returns to Genesis and reads the actual context of the "virtually identical" language of Hawaiian Airlines, it is apparent that the court holds that its application means that a state-law cause of action is not preempted when it involves rights and obligations that exist independent of a collective bargaining agreement. In our context, this means that neither the LMRA nor the RLA will or can preempt a state law cause of action if the state-law cause of action exists independent of a collective bargaining agreement.

2. Similarity – The interpretation of the "management rights" clause

All the Subsequent Federal Decisions cited by Defendants found that the plaintiffs' BIPA claims would require the interpretation of the "management rights" clause of the various CBAs, thus their BIPA claims were preempted by section 301 of LMRA. *See*, Peatry v. Bimbo Bakeries USA, Inc., 2020 U.S. Dist. LEXIS 32577, *9 (N.D. Ill. February 26, 2020); Gray v. University of Chicago Medical Center, Inc., No. 19-cv-04229, 2019 U.S. Dist. LEXIS 229536, at *11 (N.D. Ill. Mar. 26, 2019); Fernandez v. Kerry, Inc., No. 17 C 8971, 2020 U.S. Dist. LEXIS 64070, at *16 (N.D. Ill. Apr. 10, 2020); Motion at Ex F at pg. 9; and Williams v. Jackson Park SLF, LLC, No. 19-CV-8198, 2020 U.S. Dist. LEXIS 175625, at *6 (N.D. Ill. Sep. 24, 2020).

Additionally, all the Subsequent Federal Decisions cited by Defendants cite to Miller's reasoning for support.

In summary, Miller's reasoning is based on two points. First, the Miller court cites 45 U.S.C.S. § 152 of the *RLA* to support its conclusion that "how workers clock in and out is a

proper subject of negotiation between unions and employers–is, indeed, a mandatory subject of bargaining." Miller, 926 F.3d at 903. Second, it concluded that because the plaintiffs' BIPA claims concerned a mandatory subject of bargaining it would require interpreting the CBAs at issue. Id. at 904. In effect, Miller stands for the proposition that RLA preemption can found solely[3] because the state-law claim is a mandatory subject of bargaining.

Notably, with the exception of Peatry, none of the Subsequent Federal Decisions cited by Defendants address this issue under the LMRA, i.e. whether section 301 preemption under the LMRA can be found solely because the state-law claim is a mandatory subject of bargaining. Rather it appears that the Subsequent Federal Decisions are relying on the "virtually identical" language of Hawaiian Airlines to support their conclusion that a court would be required to interpret the management rights clause of the CBAs. However, as explained above, this is not the import of the "virtually identical" language.

Other Federal circuits considering the issue of *section 301 preemption under the LMRA* have rejected the notion that section 301 preemption can be found based solely on "the mere possibility that the subject matter of the claim was a proper subject of the collective bargaining process, whether or not specifically discussed in the CBA, [. . .]. Cramer v. Consolidated Freightways, Inc., 255 F.3d 683, 693 (9th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002). Again, the court notes that Miller concerned preemption under the RLA not the LMRA.

3. Difference – Peatry and Implied Preemption

In Peatry v. Bimbo Bakeries USA, Inc., the defendant argued "that determining whether the CBA authorized Bimbo to use the timekeeping system at issue requires consideration of the scope of these management rights." Peatry v. Bimbo Bakeries USA, Inc., No. 19 C 2942, 2020 U.S. Dist. LEXIS 32577, at *6-7 (N.D. Ill. Feb. 26, 2020). The court analogized this argument to the argument in Miller. Id. at *8-9.

The Peatry court cited Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1179 (7th Cir. 1993) for the proposition that a "privacy violation suit arose under §301 because ['']the company has a nonfrivolous argument that the surveillance of which the plaintiffs complain is authorized, *albeit implicitly*, by the management-rights clause of the agreement, so that the plaintiffs' claim that the surveillance invaded their privacy cannot be resolved without an interpretation of the agreement.['']" Peatry v. Bimbo Bakeries USA, Inc., No. 19 C 2942, 2020 U.S. Dist. LEXIS 32577, at *7 (N.D. Ill. Feb. 26, 2020) (emphasis added). But the Brazinksi case cited the Schlacter-Jones v. General Telephone, 936 F.2d 435, 439 (9th Cir. 1991) case for support and the Schlacter-Jones case has been subsequently clarified by the Ninth Circuit in

[3] The court uses the word solely because the Miller decision does not contain any reference to the actual text of the CBAs. Furthermore, the Miller decision explicitly states that "[w]hat Southwest told the union, whether it furnished that information in writing, when these things happened, and what the union said or did in response, are matters not [properly] in this record." Miller v. Southwest Airlines Co., 926 F.3d 898, 904 (7th Cir. 2019)

Cramer v. Consolidated Freightways, Inc., 255 F.3d 683 (9th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002).

In Cramer, after discussing the evolution of LMRA preemption, the court concluded that "[. . .] several of our Circuit's opinions [including Schlacter-Jones] -- all of which were decided before *Livadas* -- state preemption principles that need to be clarified and corrected." Cramer v. Consolidated Freightways, Inc., 255 F.3d 683, 692 (9th Cir. 2001). Specifically, the Cramer court noted that the "several opinions" taken together "suggest that the preemptive force of § 301 is so strong that preemption must occur simply because the state right in question "[']is a properly negotiable subject for purposes of collective bargaining.[']" Cramer, 255 F.3d at 692 (quoting Utility Workers of America, Local No. 246 v. Southern California Edison Co., 852 F.2d 1083, 1086 (9th Cir. 1988)).

The Cramer court rejected this formulation of the preemption standard because it "would expand the scope of §301 preemption far beyond the limits established in *Lingle* and *Livadas*, both of which caution against such a sweeping interpretation." Cramer, 255 F.3d at 693. The Cramer court noted that "[r]egardless of whether drug testing is a [']properly negotiable subject of collective bargaining['] in the abstract, the relevant inquiry under *Livadas* and *Lingle* should have been whether the resolution of the employee's state law privacy challenge necessarily required interpretation of relevant provisions of the CBA." Id. Thus, the Cramer court held "[t]o the extent our prior cases held or implied that preemption was proper because of the mere possibility that the subject matter of the claim was a proper subject of the collective bargaining process, whether or not specifically discussed in the CBA, we today hold such statements to be an incorrect articulation of §301 preemption principles." Id.

At a minimum, Cramer's clarification of Schlacter-Jones raises a serious question as to whether Brazinski's, and by extension Peatry's, reliance on it is good law. The U.S. Supreme Court denied *certiorari* of Cramer. *See*, Consolidated Freightways Inc. v. Cramer, 534 U.S. 1078 (2002). The U.S. Supreme Court's denial of *certiorari* at least impliedly endorses Cramer's recitation of §301 preemption principles namely: that the idea of implied preemption based on the mere possibility that the subject matter of the claim was a proper subject of the collective bargaining process, whether or not specifically discussed in the CBA, is an incorrect articulation of §301 preemption principles.

The court emphasizes that there is a substantive difference between the RLA and LMRA. As stated above, the RLA contains a specific statutory section defining the subjects of mandatory bargaining, 45 U.S.C. § 152. None of the Subsequent Federal Decisions cite any comparable section of LMRA. This difference may explain how Miller can reach its conclusion, but may also explain why the same conclusion cannot be reached under the LMRA.

4. Difference – Insufficient compensation for biometric data

In Gray v. University of Chicago Medical Center, Inc., the court relied upon Miller and Peatry in finding that the plaintiffs' claims would require, at the very least, interpretation of the CBA's management rights clause. Gray v. University of Chicago Medical Center, Inc., No. 19-cv-04229, 2019 U.S. Dist. LEXIS 229536, at *11 (N.D. Ill. Mar. 26, 2019). Furthermore, the Gray court found that "the amended complaint assert[ed] a claim for insufficient compensation [citation], which implicate[d] the CBA's wage provisions." Id. Thus the Gray court held that the plaintiff's BIPA claims were preempted by §301 of LMRA. Id.

As explained above, the reasoning of Miller is distinguishable and reasoning of Peatry is problematic. Additionally, the complaint before this court does not contain an allegation for insufficient compensation. Thus, Gray is entirely distinguishable.

C. The uniformity of decision argument and the weight of the new Federal decisions

Defendants argue this court should reconsider "its application of Illinois precedent" and taken into consideration "the recent changes in Illinois law on LMRA preemption." (Motion at 2). Defendants then cite Carter v. SSC Odin Operating Co., 237 Ill. 2d 30, 40 (2010), for the proposition that "it is well settled that uniformity of decision is an important consideration when state courts interpret federal statues, and we will give considerable weight to the decisions of federal courts that have addressed preemption" under federal law.

Initially, the court notes Defendants' arguments are somewhat disjointed. On the one hand, they appear to be arguing that the court erred in its application of Illinois law on LMRA preemption based on recent changes in Illinois law. On the other hand, Defendants appear to be arguing the court erred in its interpretation of the LMRA based on the Subsequent Federal Decisions. The court will address each argument in turn.

1. Uniformity of decision argument

Regarding Defendants' citation the Carter case, the court notes Defendants' quotation is somewhat misleading. Defendants' quotation omits the last few words of the sentence. The full sentence reads as follows:

> Moreover, it is well settled that uniformity of decision is an important consideration when state courts interpret federal statutes, and we will give "considerable weight" to the decisions of federal courts that have addressed preemption *under section 2 of the FAA.*

Carter v. SSC Odin Operating Co., LLC, 237 Ill. 2d 30, 40 (2010) (emphasis added). The inclusion of the omitted words makes clear that the Illinois Supreme Court was specifically

addressing the issue of preemption under the Federal Arbitration Act not preemption under the LMRA.

Additionally, the Carter case unambiguously involved the interpretation of the Federal Arbitration Act. "The narrow question presented in this case is whether the antiwaiver provisions of the Nursing Home Care Act [citation] are [']grounds as exist at law or in equity for the revocation of any contract['] within the meaning of section 2 of the Federal Arbitration Act (FAA) [citation]." Carter, 237 Ill. 2d at 32 (citations omitted).

Therefore, at a minimum, Defendants' assertion that this rule applies generally to "preemption under federal law" is questionable. Even assuming *arguendo* that the rule applies generally, Defendants have not clearly explained how this court's interpretation of the LMRA is contrary to the federal law.

Defendants have done nothing beyond pointing out that this court reached the opposite conclusion of the Subsequent Federal Decisions. It appears to this court that Defendants real argument concerns a perceived error in the application of law regarding preemption under LMRA.

2. Application of Federal Law

Applying the LMRA preemption standards announced by the U.S. Supreme Court shows this court did not err. Under the Lingle standard, a state-law claim will be preempted under section 301 of LMRA:

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

Lingle v. Norge Division of Magic Chef, 486 U.S. 399, 405-06 (1988). However, state-law claims which involve "[']purely factual questions[']about an employee's conduct *or an employer's conduct and motives* do not [']require a court to interpret any term of a collective-bargaining agreement.[']" Hawaiian Airlines v. Norris, 512 U.S. 246, 261-62 (1994) (quoting Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407 (1988)) (emphasis added). Furthermore, as cautioned by the Hawaiian Airlines court,

> In extending the pre-emptive effect of § 301 beyond suits for breach of contract, *it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.* [citation]

Hawaiian Airlines v. Norris, 512 U.S. 246, 260-61 (1994) (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211-212 (1985)) (emphasis added) (citation omitted).

Finally, as expressed by Justice Souter in Livadas v. Bradshaw, 512 U.S. 107 (1994), "it is the legal character of a claim, as [']independent['] of rights under the collective-bargaining agreement, [citation] (and not whether a grievance arising from [']precisely the same set of facts['] could be pursued, [citation]) that decides whether a state cause of action may go forward." Livadas v. Bradshaw, 512 U.S. 107, 123-24 (1994) (citation omitted). "[T]he bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." Livadas v. Bradshaw, 512 U.S. 107, 124 (1994).

Here, Plaintiffs' BIPA claims are plainly independent of the CBAs and do not require interpretation of the CBAs.

First, BIPA is unambiguously a state-law statute which *proscribes conduct*, 740 ILCS 14/15, and *establishes rights and obligations which exist independent of a labor contract*. See, Liu v. Four Seasons Hotel, Ltd., 2019 IL App (1st) 182645, ¶30, citing, Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶33 ("In short, the Act is a privacy rights law that applies inside and outside the workplace.").

Second, resolution of Plaintiffs' BIPA claims will turn on the purely factual question of whether Defendants' conduct complied with the requirements of BIPA and thus does not require the court to interpret the CBAs. Hawaiian Airlines, 512 U.S. at 261-62 (quoting Lingle, 486 U.S. at 407). While Defendants have argued that the Federal court decisions require this court to interpret: (1) the scope of the "management rights" clause of the CBA; or (2) whether the inclusion of the "management rights" clause amounts to consent or authorization by the union to collect its members' biometric data, this argument is unpersuasive.

Regarding the scope of any "management rights" clause, the U.S. Supreme Court has stated "[c]learly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." Hawaiian Airlines, 512 U.S. at 260-61 (quoting Allis-Chalmers Corp., 471 U.S. at 211-212). Therefore, the scope of any "management rights" clause cannot be construed or interpreted to be tantamount to an agreement to never comply with BIPA's dictates or an agreement to implement a biometric time keeping system in a manner inconsistent with the requirements of BIPA. Such an interpretation is simply implausible. See, Boogaard v. NHL, 126 F. Supp. 3d 1010, 1017 (N.D. Ill. 2015), citing, Baker v. Kingsley, 387 F.3d 649, 659 (7th Cir. 2004) ("preemption applies only where the parties' respective interpretations of the agreement are arguable or plausible."). In other words, even if the Union agreed, authorized, consented, or permitted the use of the biometric time keeping system, that acquiescence cannot be construed or interpreted as allowing Defendants to violate BIPA.

As to Defendants' arguments that the "management rights" clause can be interpreted as constituting the union's consent to collect its members' biometric data or in other words a waiver of its members' BIPA rights, section 14/15 of BIPA unambiguously requires "a written release" executed by the subject's legally authorized representative. 740 ILCS 14/15(b)(3) and 740 ILCS 14/10. Thus, at a minimum, it questionable whether the inclusion of a broad "management rights" clause could ever satisfy the "written release" requirement of BIPA. Even assuming *arguendo* that it could, the U.S. Supreme Court has stated that waiver under the LMRA must be "clear and unmistakable" before a court could even consider whether the waiver could be given effect. Livadas v. Bradshaw, 512 U.S. 107, 125 (1994) (citing Lingle v. Norge Division of Magic Chef, 486 U.S. 399, 409 n.9 (1988)). None of the Subsequent Federal Decisions cited by Defendants address the issue of waiver or the requirements for a waiver under the LMRA. Additionally, none of the Subsequent Federal Decisions cite any case law holding that a broad "management rights" clause can be found to be a "clear and unmistakable" waiver of a state-law right or claim under the LMRA.

Defendants' argument is implausible because it tries to "have it both ways." On the one hand Defendants assert that the "management rights" clause is ambiguous and would require the court interpret the clause because there must be differing plausible interpretations. But if that is the case, then the "management rights" clause cannot be a "clear and unmistakable" waiver. On the other hand, if the "management rights" clause is a "clear and unmistakable" waiver, then nothing remains for the court to interpret. The readings Defendants assert are mutually exclusive and equally implausible.

Finally, the mere fact that the court will need to reference or look to the CBA to determine the existence or absence of a waiver will not trigger section 301 preemption under the LMRA. Livadas v. Bradshaw, 512 U.S. 107, 124-25 (1994).

3. Application of Illinois Law

Defendants' argument concerning the application of Illinois law fares no better than their arguments based on Federal law.

First, Illinois law is in accord with the principles announced by U.S. Supreme Court. See, Gelb v. Air Con Refrigeration & Heating, Inc., 356 Ill. App. 3d 686, 692-93 (1st Dist. 2005); Byrne v. Hayes Beer Distrib. Co., 2018 IL App (1st) 172612, ¶ 24.

Second, as cited by Plaintiffs, at least two other state court decisions have reached the same conclusion as this court. See, Walton v. Roosevelt University, No. 19 CH 4176 (Cir. Ct. Cook Cty., May 5, 2020) (Demacopoulos, J.) and Watson v. Legacy Healthcare et al., No. 19 CH 3425 (Cir. Ct. Cook Cty., June 10, 2020) (Meyerson, J.). This court agrees with the well-reasoned opinions of its learned colleagues.

Notably, both decisions cite many of the same cases this court has relied upon in both the February 11, 2020 Memorandum and Order and this opinion. Therefore, the court need not discuss the same legal authority twice. Ultimately, the court finds the well-reasoned opinions of its learned colleagues persuasive.

4. Weight of new federal opinions

For the reasons enunciated, the court declines to give the Subsequent Federal Decisions any weight. The court did not err in its application of LMRA and applicable case law.

III. Conclusion

Defendants' motion for reconsideration is DENIED.

The status date of December 14, 2020 at 9:30 stands. In accordance with General Administrative Order 2020-07 of Chief Judge Evans of the Circuit Court of Cook County, the December 14th status date will be conducted remotely via Zoom.

The court's Zoom courtroom information is as follows:

Meeting ID: 940-2402-4757
Password: 739301
Dial-in Number: 312-626-6799

Entered: 12-10-20

Judge Neil H. Cohen

EXHIBIT 2

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

Walton, *individually and on behalf of all other similarly situated,*	)	No. 19 CH 04176
Plaintiff(s),	)	Calendar 13
v.	)	Judge Anna H. Demacopoulos
Roosevelt University	)	
Defendant(s).	)	

MEMORANDUM OPINION & ORDER

This matter comes before the Court on Defendant Roosevelt University's Motion to Dismiss, filed July 16, 2019. Having reviewed the complaint, motion, response, reply, supplemental authority, and heard argument on January 28, 2020 and on January 31, 2020, and thereby being fully informed in the premises, for the following reasons Defendant's Motion to Dismiss is denied.

This is a proposed class action against Roosevelt University based upon alleged violations of the Biometric Information Privacy Act (BIPA). 740 ILCS 14/1 (Lexis 2020). Walton worked for Roosevelt University from January 2018 through January 2019 in the Campus Safety Department. In order to clock in and out of work, his "hand geometry" was scanned by a biometric timekeeping device. Complaint ¶ 3. It is undisputed that after about a month on the job, Walton joined a union (SEIU, Local 1), although this fact is not pled in the complaint. Walton claims Roosevelt University violated BIPA by failing to (1) inform the subject in writing that the data was being collected and stored, and receive their written consent; (2) receive written consent to disclose the data; and (3) create a publically accessible policy about the retention and destruction of such data. 740 ILCS 14/15(a)(b)(d) (Lexis 2020).

Defendant brings this motion to dismiss under the Illinois Code of Civil Procedure Sections 735 ILCS 5/2-619(a)(1), lack of subject matter jurisdiction, and 2-619(a)(9), affirmative matter defeating the claim. Defendant argues that the Labor Management Relations Act, or Taft-Hartley Act (LMRA or Act), completely preempts BIPA because § 301 of the Act completely preempts disputes between employers, unions, and employees that are parties to a collective bargaining agreement (CBA). 29 U.S.C. §185(a) (LexisNexis 2020).

STANDARD OF REVIEW

A defendant may move for dismissal of a cause of action under Section 2-619(a)(1) if "the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having competent jurisdiction." Under Section 2-619(a)(9) a defendant moves for dismissal if "the claim asserted against Defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (Lexis 2016).

The term "affirmative matter" as used in section 2-619(a)(9) has been defined as a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. *Bloomingdale State Banks v. Woodland Sales Co.*, 186 Ill. App. 3d 227, 233 (Ill. 2nd Dist. 1989). The affirmative matter must be apparent on the face of the complaint or supported by affidavits or other evidentiary material. *Kedzie & 103rd Currency Exch. V. Hodge,* 619 N.E.2d 732, 735 (Ill. 1993). It is a defense other than a negation of the essential allegations of the plaintiff's cause of action; something more than evidence offered to refute a well-pleaded fact in the complaint. *Zahl v. Krupa,* 365 Ill. App. 3d 653, 659 (2006).

Initially, a defendant bears the burden of proof, and if the motion is based on facts not apparent from the face of the complaint, then the defendant must support its motion by affidavits or other evidence. *City of Springfield v. West Koke Mill Development Corp.*, 312 Ill. App. 3d 900, 908 (2000). If defendant meets this initial burden, the burden then shifts to the plaintiff, who must establish the affirmative defense is unfounded or requires the resolution of an essential element of material fact before it is proven. *Esptein v. Chicago Bd. of Educ.*, 178 Ill. 2d 370, 383 (1997). Section 2-619 is not a proper vehicle to contest factual allegations; nor does it authorize a fact-based 'mini-trial' on whether plaintiff can support his allegations." *Reynolds*, 2013 IL App (4th) 120139, ¶42.

DISCUSSION

Defendant bases the majority of its argument on the 7th Circuit Opinion of *Miller v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019). In that case, the Court decided whether persons who contend that air carriers have violated state law (BIPA) by using biometric identification in the workplace must present these contentions to an adjustment board under the Railway Labor Act (RLA), which applies to air carries and railroads. *Id.* at 900. The Court stated the answer was "yes, if the contentions amount to 'a minor dispute'- that is, a dispute about the interpretation or application of a collective bargaining agreement." *Id.* The Court emphasized that as a matter of federal law, unions in the air transportation business are the workers' exclusive bargaining agents. *Id.* at 903.

Because federal law governed the plaintiffs in *Southwest Airlines*, "[a] dispute about the interpretation or administration of a collective bargaining agreement must be resolved by an adjustment board under the Railway Labor Act." *Id.* Thus the Court reasoned that whether the

union "did consent to the collection and use of biometric data, or perhaps grant authority through a management-rights clause, is a question for the adjustment board." *Id.* at 903-04. Defendant points out that the RLA and LMRA share the same preemption analysis. *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 263 (1994).

This case is distinguishable. First, the Court notes that preemptive intent tends to be more readily inferred in aviation because it is an "area of the law where the federal interest is dominant." *Nat'l Fed'n of the Blind v. United Airlines*, 813 F.3d 718, 724 (9th Cir. 2016); see *US Airways v. O'Donnell*,627 F.3d 1318, 1325 (10th Cir. 2010). Even the Court in *Southwest Airlines* stated, "[i]f we are wrong about how the Railway Labor Act affects collective bargaining over fingerprinting in the workplace, then the doctrine of complete preemption would not authorize removal of the suit against United [back to State Court]." *Southwest Airlines Co.,* 926 F.3d at 905. This Court agrees with Judge Cohen's analysis of *Southwest Airlines*, who analyzed that case and found that the statement as to biometric information being indistinguishable from many subjects of collective bargaining, like drug testing, to be mere dicta and unnecessary to its disposition. *Winters v. Aperion Care, Inc.,* No. 2019-CH-06579 (Cir. Ct. Cook Cty., Feb. 11, 2019). This Court agrees with Judge Cohen that it is significant that the *Southwest Airlines* opinion was written without any citation to the record before the court or decisional authority. *Id.*

Moreover, the Illinois Appellate Court has recently held in an analogous case that BIPA claims did not fall under an employment arbitration agreement that specified mandatory arbitration for disputes based upon (a) employment discrimination; (b) harassment as it relates to employment; (c) a wage or hour violation; or (d) termination of my employment from the Hotel. *Liu v. Four Seasons Hotel, Ltd.,* 2019 IL App (1st) 182645 ¶ 7, 31. Specifically, the Court found that BIPA is not merely a "wage or hour violation," claim. *Id.* at ¶ 4. The Appellate Court

emphasized that BIPA is a privacy rights law that applies inside and outside the workplace. *Liu,* 2019 IL App (1st) 182645 ¶ 30.

Whether federal law preempts a state law establishing a cause of action is a question of congressional intent. Preemption of employment standards within the traditional police power of the state should not be lightly inferred. *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 252 (1994). Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C.S. § 185(a), may preempt a state claim in either of two ways. First, a state claim will be preempted if the claim is founded directly on rights created by collective-bargaining agreements. Second, where the right is created by state law and not the collective-bargaining agreement, a state claim is preempted if application of the law is substantially dependent on analysis of a collective-bargaining agreement. An application of state law is preempted by § 301 only if such application requires the interpretation of a collective-bargaining agreement. *Lopez v. Continental Can Co.,* 961 F.2d 147, 148-49 (9th Cir. 1992). It would be inconsistent with the congressional intent behind the act to preempt state rules that proscribe conduct, or establish rights and obligations independent of a labor contract. *Lingle v. Norge Div. of Magic Chef.,* 486 U.S. 399, 410 n.10 (1988).

Removal from state to federal court is proper where real nature of claim asserted in complaint is federal, and case will be remanded to state court where cause of action does not involve breach of collective bargaining contract in industry in interstate commerce, but is based upon state and common law theories of contract. *Jones v. General Tire & Rubber Co.,* 541 F.2d 660, 665 (7th Cir. 1976). In determining whether plaintiff employee's claims are preempted, courts first look to the complaint. But because plaintiffs often attempt to avoid federal jurisdiction by framing their complaints in terms of state law theories, a court may look beyond allegations of complaint to determine whether wrong complained of arose from breach of obligations under the

collective bargaining agreement. *Cisneros v. ABC Rail Corp.*, 217 F.3d 1299, 1302-03 (10th Cir. 2000). The party asserting federal preemption bears the burden of persuasion. *Chicago Housing Authority v. DeStefano & P'ners, Ltd.*, 2015 IL App (1st) 142870 *16.

Section 301 preempts any state law cause of action that is intertwined with or depends substantially upon consideration of terms of collective bargaining agreement. State law claims in the employment context are viable only if the alleged state law rights and duties exist independently of the CBA. *California Electric Co. v. Briley*, 939 F.2d 790, 792 (9th Cir. 1991), cert. denied, 503 U.S. 938 (1992). A plaintiff's state claim is not preempted by if the state law claim is neither founded directly upon rights conferred in a collective bargaining agreement (CBA) nor "substantially dependent upon" interpretation of the CBA terms. Where the claims at issue are not even arguably covered by the CBA, they are independent and not preempted. In contrast, where a plaintiff's claims are substantially dependent on the interpretation of a CBA provision, the claims are preempted. *Dahl v. Rosenfeld*, 316 F.3d 1074, 1078 (9th Cir. 2003).

Here, the complaint alleges violations of BIPA. An entity's duties under BIPA are not limited to interactions with employees, but extend to any individual with whom that entity collects biometric data. *See Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186 (non-employee plaintiff's claim arose out of the fingerprinting process related to repeat-entry passes into the amusement park). It is thus unquestionable that an entity's obligations and a person's rights under BIPA exist independently of both employment and any given CBA. *See California Electric Co. v. Briley*, 939 F.2d 790, 792 (9th Cir. 1991), cert. denied, 503 U.S. 938 (1992). A plaintiff's right to control their biometric information, as articulated by BIPA and the Illinois General Assembly, does not "substantially depend upon" interpretation of any CBA terms. A claim under BIPA is not dependent on a CBA provision. *See Dahl v. Rosenfeld*, 316 F.3d 1074, 1078 (9th Cir. 2003). It is

clear that BIPA is an articulation of the State of Illinois' police powers. *See Hawaiian Airlines*, 512 U.S. at 252.

A court should not infer from a general CBA provision that the parties intended to waive a statutorily protected right unless that waiver is "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). Courts may look to collective bargaining agreement to determine whether it contains clear and unmistakable waiver of state law rights without triggering preemption. *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 605 n.7 (9th Cir. 2001), cert. denied, *Consol. Freightways Inc. v. Cramer*, 534 U.S. 1078 (2002). Preemption is appropriate only when provisions of CBAs must be interpreted; reference to agreement is not same as interpretation of agreement. *Ramirez v. Fox Television Station*, 998 F.2d 743, 748-49 (9th Cir. 1993). The mere fact that collective bargaining agreement may be consulted in course of litigation does not trigger application of complete preemption doctrine. *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994). Section 301 cannot be read broadly to preempt non-negotiable rights conferred on individual employees as a matter of state law, it is the legal character of a claim, as "independent" of rights under the CBA that decides whether a state cause of action may be go forward. *Livadas v. Bradshaw*, 512 U.S. 107, 123-24 (1994).

Roosevelt University has failed to present the Court with a "clear and unmistakable" provision of the CBA that waives any BIPA rights. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). And merely because this court read through the CBA to see if such a provision exists does not trigger the preemption doctrine argued by Defendants. *See Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994).

A person's rights under BIPA exist independently of both employment and any given CBA. A claim under BIPA is not intertwined with or dependent substantially upon consideration of terms of collective bargaining agreement. No clear or unmistakable waiver of BIPA rights has been presented to the Court. Preemption is not appropriate in this matter. The allegations of the Complaint, are not defeated by a defect that defeats the claim, *e.g.*, BIPA is not federally preempted by the Taft-Hartley Act.

IT IS HEREBY ORDERED:

Defendant's Motion to Dismiss is DENIED.

This matter is set for status on 6-24-2020.

ENTERED:

Anna H. Demacopoulos

Judge Anna H. Demacopoulos, 2002

Judge Anna Helen Demacopoulos

MAY 05 2020

Circuit Court - 2002

EXHIBIT 3

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

JAMALA THOMAS, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**Case No. 19-CH-2471**
KIK CUSTOM PRODUCTIONS, INC.,	)	
Defendants,	)	

MEMORADUM AND ORDER

Defendant KIK Custom Products, Inc. has filed a motion to dismiss Plaintiff Jhamala Thomas's complaint and compel arbitration pursuant to 735 ILCS 5/2-619.1.

I. Background

The Biometric Information Privacy Act ("BIPA") requires private entities in possession of biometric information to develop a publicly available written policy establishing a retention schedule and guidelines for permanently destroying biometric information. 740 ILCS 14/15(a). BIPA also requires a private entity to obtain written consent from the individual before it can collect the individual's biometric information. 740 ILCS 14/15(b). Significantly, BIPA prevents a private entity from disseminating an individual's biometric information unless it has received the individual's consent. 740 ILCS 14/15(d).

Section 14/20 of BIPA grants any person aggrieved by a violation of BIPA a right of action. 740 ILCS 14/20. A prevailing party may recover actual damages or a statutory penalty whichever is greater for each violation. 740 ILCS 14/20 (1) and (2).

A. Plaintiff Jhamala Thomas

Plaintiff Jhamala Thomas ("Thomas") has filed a two-count class action complaint (the "Complaint") against Defendant KIK Custom Products, Inc., ("KIK Custom") for alleged violations of the BIPA statute.

Thomas worked for KIK Custom at their Illinois location beginning in or about 2013. (Compl. at ¶2). As an employee, Thomas was required to "clock-in" at the beginning of her work day and "clock-out" at the end of her work day using a timeclock which operated, at least in part, by scanning her fingerprints. (Id. at ¶¶11, 22, 25). Thomas alleges that KIK Custom used her biometric data as an identification and authentication method to track her time and stored her data in their database. (Id. at ¶¶24-25).

Thomas alleges that KIK Custom violated BIPA because: (1) she was never informed of the specific limited purposes or length of time for which KIK Custom collected, stored, and disseminated her biometric information; (2) she was never informed of any biometric data retention and deletion policy; (3) she never signed a written release allowing KIK Custom to collect, store, use, or disseminate her biometric data; and (4) upon information and belief, Defendants have disclosed his fingerprint data to at least one out-of-state third-party vendor. (Compl. at ¶¶18, 27-29, 33, 51-52, 57, 59. 63-65, 70-72, 85-92).

It is undisputed that Thomas is subject to the Collective Bargaining Agreement (the "CBA") entered into between KIK Custom and the United Steelworkers, ALF-CIO, CLC, Local Union 201B (the "Union").

B. The Collective Bargaining Agreement

On November 30, 2012, KIK Custom and the Union entered into the CBA. (Memo at Ex. 1, p.32). The CBA states that "[KIK Custom] recognizes the Union as the sole and exclusive collective bargaining representative for and behalf of [KIK Custom's] employees [. . .]. (Id. at Ex. 1, p. 2).

The CBA's stated purpose, among other things, is to provide "a fair and equitable method for the settlement of any grievances which may arise, as grievances are defined in the grievance article hereinafter set forth." (Id.).

Article 3, entitled "Grievance Procedures" defined "grievance" "as any difference of opinion with respect to the meaning, interpretation or application of any provision of this Agreement *and not otherwise*." (Id. at Ex. 1, p. 8) (emphasis added). Article 3 provides a four-step procedure of resolving a grievance.

Article 8 (the "management rights provision") provides that "[n]othing in this Agreement is intended nor shall be construed as denying or in any manner limiting the right of the Company to control and supervise all operations and direct all working forces." (Id. at Ex. 1, p. 18). "This will include, but shall not be deemed limited to, [. . .] promulgate and enforce reasonable rules and regulations for the conduct of employees [. . . and . . .] change or abolish reasonable policies and procedures [. . .]. (Id.). The "Company hereby retaining all rights not specifically restricted by this agreement including but not limited to managing the operation and establish the terms and conditions of employment." (Id.).

On February 10, 2015, KIK Custom and the Union entered into a substantially similar CBA. (Id. at Ex. 2).

C. Oral argument

On October 10, 2019, this court heard oral argument on KIK Custom's motion to dismiss. Following oral argument, this court ordered supplemental briefing on two additional issues: (1)

the implication of Miller v. Sw. Airlines Co., 926 F.3d 898 and (2) how Miller intersects with the Illinois Constitutional Right to Privacy. The parties have fully briefed these issues.

II. Motion to Dismiss

KIK Custom is seeking to dismiss the Complaint pursuant to 735 ILCS 5/2-619.1. Section 2-619.1 allows a party to bring a combined motion to dismiss under sections 2-615 and 2-619. 735 ILCS 5/2-619.1.

"A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint." Yoon Ja Kim v. Jh Song, 2016 IL App (1st) 150614-B, ¶41. "Such a motion does not raise affirmative factual defense but alleges only defects on the fact of the complaint." Id. "All well-pleaded facts and all reasonable inference from those facts are taken as true. Where unsupported by allegations of fact, legal and factual conclusions may be disregarded." Kagan v. Waldheim Cemetery Co., 2016 IL App (1st) 131274, ¶29. "In determining whether the allegations of the complaint are sufficient to state a cause of action, the court views the allegations of the complaint in the light most favorable to the plaintiff. Unless it is clearly apparent that the plaintiff could prove no set of facts that would entitle him to relief, a complaint should not be dismissed." Id.

A section 2-619 motion to dismiss "admits the legal sufficiency of the complaint and affirms all well-plead facts and their reasonable inferences, but raises defect or other matters either internal or external from the complaint that would defeat the cause of action." Cohen v. Compact Powers Sys., 382 Ill. App. 3d 104, 107 (1st Dist. 2008). A dismissal under §2-619 permits "the disposal of issues of law or easily proved facts early in the litigation process." Id. Section 2-619(a)(9) authorizes dismissal where "the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). "A motion to compel arbitration and dismiss the lawsuit is essentially a motion pursuant to section 2-619(a)(9) to dismiss based on the exclusive remedy of arbitration." Griffith v. Wilmette Harbor Ass'n, 378 Ill. App. 3d 173, 180 (1st Dist. 2007).

A. Illinois Constitutional Right to Privacy

Article 1 section 6 of the Illinois Constitution provides:

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

Illinois Const., Art. I, § 6.

The Illinois Supreme Court has held "that the due process and equal protection provisions of the Illinois Constitution, as well as section 6 of article I, which creates a right of freedom from invasion of privacy, *apply only to actions by government or public officials*." People v. DiGuida, 152 Ill. 2d 104, 121 (1992) (emphasis added). See also, Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 526-27 (1985).

As Thomas argues, Illinois strongly favors the privacy rights of its citizens. However, case law is clear that article 1 section 6 applies only to actions by government or public officials. Thomas does not allege that KIK Custom is a government or public official. The Illinois constitutional right to privacy is inapplicable to this case.

B. Section 2-619

KIK Custom raises two arguments for dismissal under section 2-619. First under the Illinois Uniform Arbitration Act and the Federal Arbitration Act, the CBA requires Thomas's claim to be arbitrated. Second, the Illinois Worker's Compensation Act (the "IWCA") preempts Thomas's claims.

1. Arbitration

The central issue presented by KIK Custom's motion is whether Thomas's claim is arbitrable, i.e., whether the Union, on behalf of Thomas and the putative class, agreed with KIK Custom to arbitrate BIPA claims. To answer this issue the court must first examine whether the Union could agree to arbitrate BIPA claims on behalf of its members and then, assuming the answer is in the affirmative, whether the Union actually agreed to arbitrate BIPA claims.

a. Whether a Union can agree to arbitrate BIPA claims on behalf of its members; the Miller opinion

Initially, Thomas argues that the Union could not agree to arbitrate BIPA claims[1] and did not explicitly waive its members' right to enforce BIPA claims. (Response at 13). According to KIK Custom, the Union could have agreed to arbitrate BIPA claims. (Reply at 1) (quoting Miller v. Sw. Airlines Co., 926 F.3d 898, 903 (7th Cir 2019).

i. Could the Union agree to arbitrate

Illinois case law establishes beyond peradventure that a Union can indeed waive the statutory rights of its members through a CBA. See, Matthews v. Chicago Transit Authority,

[1] Thomas primarily relies on Federal cases to support her argument, Pryner v. Tractor Supply Co. and Allen v. City of Chicago. Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir 1997); and Allen v. City of Chicago, No. 10 C 3183, 2011 U.S. Dist. LEXIS 27137 (N.D. Ill. Mar. 15, 2011). (Response at 13). However both of these cases involved federal statutes and thus are distinguishable on that ground alone. Pryner, 109 F.3d at 355; Allen, No. 10 C 3183, 2011 U.S. Dist. LEXIS 27137, at *1. Although a circuit court may look to federal court orders for guidance or persuasive authority, they are not binding authority. Reichert v. Board of Fire & Police Comm'rs of Collinsville, 388 Ill. App. 3d 834, 845 (5th Dist. 2009).

2016 IL 117638, ¶ 67-68 ("Constitutional rights can be waived or restricted by a union in a CBA." and "In addition, a union can waive statutory and economic rights on behalf of its members.").

The Illinois Supreme Court has described the rationale for these rules as follows:

> A union is allowed a great deal of flexibility in serving its bargaining unit during contract negotiations. It makes concessions and accepts advantages it believes are in the best interest of the employees it represents. [Citations.] This flexibility includes the right of the union to waive some employee rights, even the employee's individual statutory rights.

Ehlers v. Jackson County Sheriff's Merit Comm'n, 183 Ill. 2d 83, 93 (1998).

ii. Did the Union waive its members statutory rights

A waiver is a voluntary relinquishment of a known right. Gallagher v. Lenart, 226 Ill. 2d 208, 229 (2005). "Waiver can arise either expressly or by conduct inconsistent with an intent to enforce that right." Ciers v. O.L. Schmidt Barge Lines, Inc., 285 Ill. App. 3d 1046, 1050 (1st Dist. 1996).

In Cook County College Teachers Union, Local 1600, the CBA at issue contained the following provision:

> Outside employment. A full-time position in the Colleges is accepted with the understanding that the faculty member will not continue, or at a future date accept, a concurrent full-time position or positions equal to a full-time position with any other employer or employers while he is teaching full-time in the Colleges.

Cook County College Teachers Union, Local 1600, etc. v. Board of Trustees, 134 Ill. App. 3d 489, 490 (1st Dist. 1985). The court found that "[t]he union, by agreeing to a restriction against full-time outside employment, waived its constitutional rights to privacy and confidentiality [. . .]." Cook County College Teachers Union, Local 1600, etc. v. Board of Trustees, 134 Ill. App. 3d 489, 492 (1st Dist. 1985).

KIK Custom has not identified any clause or provision of the CBA which would constitute an express or explicit waiver of Thomas's and the putative class's statutory BIPA rights. Rather, KIK Custom argues that by granting it the management rights provision of the CBA, the Union waived Thomas' and the putative class's BIPA rights.

KIK Custom relies primarily on the Seventh Circuit opinion in Miller v. Southwest Airlines Co., 926 F.3d 898 (7th Cir. 2019) to support its argument.

In Miller, the Seventh Circuit considered "whether persons who contend that air carriers have violated state law by using biometric identification in the workplace must present these contentions to an adjustment board under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188, which applies to air carriers as well as railroads." Miller, 926 F.3d at 900. The Seventh Circuit held that "[t]he answer is yes if the contentions amount to a ['minor dispute']—that is, a dispute about the interpretation or application of a collective bargaining agreement." Id. The court noted that "[a]s a matter of federal law, unions in the air transportation business are the workers' exclusive bargaining agents." Miller, 926 F.3d at 903. Because federal law governed the plaintiffs in Miller, "[a] dispute about the interpretation or administration of a collective bargaining agreement must be resolved by an adjustment board under the Railway Labor Act." Id. Thus the Seventh Circuit reasoned, "[w]hether Southwest's or United's unions *did* consent to the collection and use of biometric data, or perhaps grant authority through a management-rights clause, is a question for an adjustment board." Id.

KIK Custom points to and relies upon Judge Easterbrook's statement that biometric information is indistinguishable from many other subjects of collective bargaining, such as drug testing, which unions routinely give consent for and thus are routinely covered by collective bargaining agreements. Miller, at 926 F. 3d at 904. In doing so, Judge Easterbrook lumped biometric data gathering into many other issues which are the subject of collectively bargaining, such as drug testing. Id. But that comment was mere dicta and utterly unnecessary to the disposition of the case.

Given that the CBA's at issue here were signed in 2012 and 2015 (Memo at Ex. 1, p.32; Ex. 2), and that BIPA was passed in 2008. Miller, 926 F. 3d 898, 900, it strains credulity to engage in a legal pronouncement that BIPA and biometric data gathering somehow obtained the same level of ubiquity as drug testing in the collective bargaining process a mere four years after the BIPA statute was enacted.

As significant, it was written without any citation to the record before the court or any decisional authority. Id.

In any event, no argument or evidence has been presented indicating that the Union's grant of the management right provision complied with section 14 (b)(3)'s requirements. 740 ILCS 14/15 (b)(3).

Section 15 (b)(3) of BIPA states:

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

Although the CBA recognizes the Union as the sole and exclusive collective bargaining representative for Thomas and the putative class, there has been no argument or evidence presented that KIK Custom received any written release executed by the Union.

* * *

In summary, Miller is distinguishable and inapplicable. There was no explicit waiver of Thomas's and the putative class's BIPA rights, and the Union's grant of the management rights provision did not amount to an explicit waiver.

b. Whether the Union agreed to arbitrate BIPA claims

"The Illinois Uniform Arbitration Act applies to all written agreements to arbitrate, even those appearing in collective bargaining agreements, unless a statute specifically provides for an exception to the application of the Illinois Uniform Arbitration Act." Chicago Transit Authority v. Amalgamated Transit Union Local 308, 244 Ill. App. 3d 854, 859 (1st Dist. 1993).

Section 5/2(a) of the Illinois Uniform Arbitration Act provides:

> (a) On application of a party showing an agreement described in Section 1 [710 ILCS 5/1], and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

710 ILCS 5/2 (a).

It is undisputed that: (1) the CBA contains an arbitration clause; and that (2) Thomas and the putative class' employment was governed by the CBA. The parties dispute whether there was an agreement to arbitrate BIPA claims. The parties also disagree as to whether the arbitration clause should be interpreted broadly or narrowly.

i. The proper for interpretation and the forum arbitrability

"Generally, *where the interpretation of a collective bargaining contract is involved*, there is a presumption of arbitration." Jupiter Mechanical Industries v. Sprinkler Fitters & Apprentices

Local Union No. 281, 281 Ill. App. 3d 217, 221 (1st Dist. 1996) (citing United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)) (emphasis added). This is so because:

> In the commercial case, arbitration is the substitute for litigation. [In the labor disputes context] arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility envinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

Board of Education v. Faculty Ass'n of District 205, 120 Ill. App. 3d 930, 933 (1st Dist. 1983) (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960)).

However, despite the presumption in favor of abitrability, Illinois courts still recognize that "arbitration remains a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Board of Education v. Faculty Ass'n of District 205, 120 Ill. App. 3d 930, 934 (1st Dist. 1983) (citing United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) and Croom v. De Kalb, 71 Ill. App. 3d 370, 375 (2nd Dist. 1979)). Thus under Illinois law, "the initial decision as to arbitrability is for the courts." Id.

ii. No agreement to arbitrate BIPA claims

Here, the court finds that the arbitration clause at issue is not susceptible to an interpretation that it covers BIPA claims.

First, Article 3 of the CBA provides that "[n]o arbitration shall be processed unless the grievance involves a difference of opinion as to the interpretation or application of a provision the Agreement." (Memo at Ex. 1, p. 9). Article 3 defines a "grievance" as "as any difference of opinion with respect to the meaning, interpretation or application of any provision of this Agreement *and not otherwise*." (Id. at Ex. 1, p. 8) (emphasis added). The plain and unambiguous language of the CBA is clear that the arbitration clause is not generalized, but limited and it is equally clear that not all grievances are subject to arbitration.

Second, the court notes that the CBA is utterly silent and makes no reference to the BIPA statute or the collection and use of biometric data.

Finally, the court notes that "the mere existence of a dispute between an employee and an employer is insufficient to make the disputed matter subject to arbitration procedures of the collective bargaining agreement." Gelb v. Air Con Refrigeration & Heating, Inc., 356 Ill. App.

3d 686, 695 (1st Dist. 2005) (citing Daniels v. Board of Education, 277 Ill. App. 3d 968, 972 (1st Dist. 1996)). Simply put, "[t]he court must consider whether the claim is one which, on its face, is governed by the contract. If it is, the exclusive remedy is to follow the grievance procedures. If not, the complainant may seek judicial relief." Id. (citing Daniels, 277 Ill. App. 3d at 972).

Comparing the allegations of Thomas's Complaint to the provisions of the CBA, it is clear that Thomas's BIPA claim is not, on its face, governed by the CBA. While the company rules prohibit an employee from fraudulently clocking-in or clocking-out herself or another employee, Thomas's Complaint is devoid of any allegations indicating that she was accused of fraudulently clocking-in or out herself or another employee. Similarly, while the CBA unambiguously grants KIK Custom the right to set Thomas's work shifts and breaks, Thomas's Complaint is devoid of any allegations challenging her work shifts and breaks. None of these provisions can be interpreted to include BIPA claims.

KIK Custom's reliance on the CBA's provisions which allow it to set reasonable rules and regulations in the workplace is inapplicable. A fair reading of Thomas's Complaint indicates that she alleging that KIK Custom never adopted or promulgated *any* rules or regulations as required by the BIPA statute. (Compl. at ¶¶17, 19, 27-29). Thomas is not challenging any particular rule or regulation KIK Custom promulgated, rather she is challenging KIK Custom's alleged total failure to adopt any rules or regulations, as required by the BIPA statute.

Also unpersuasive is KIK Custom's argument that by alleging she was required to clock-in and out, Thomas's claim would require interpreting the CBA. Thomas's Complaint does not contain any allegations challenging KIK Custom's decision to use a biometric fingerprint scanner as a time-tracking or challenging KIK Custom's requirement that employees use a biometric fingerprint scanner. Thomas's Complaint is clear that she is challenging KIK Custom's alleged failure to comply with any of BIPA's statutory requirements.

Therefore, there is no agreement to arbitrate BIPA claims.

2. Preemption

KIK Custom has argued that Thomas's complaint should be dismissed pursuant to 735 ILCS 5/2-615 because it barred by the Illinois Workers' Compensation Act (the "IWCA"). This argument is not properly raised under section 2-615. KIK Custom's argument should have been raised under section 2-619(a)(9).

"A proper section 2-619 motion is a 'yes but' motion that admits both that the complaint's allegations are true and that the complaint states a cause of action, but argues that some other defense exists that defeats the claim nevertheless." Doe v. Univ. of Chicago Med. Ctr., 2015 IL App (1st) 133735, ¶40.

Despite this pleading problem, Thomas has responded to KIK Custom's argument. Because the parties have fully briefed the issue, the court will proceed to the merits of KIK Custom's argument, but will analyze the arguments under section 2-619(a)(9).

KIK Custom argues the IWCA provides the exclusive remedy for employment related injuries except under very limited circumstances, which KIK Custom argues are not present in Thomas's complaint. (Memo at 13). The court disagrees.

Section 305/5(a) of the IWCA (the "exclusivity provision") provides:

> [. . .] no common law or statutory right to recover damages from the employer [...] for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act [. . .].

820 ILCS 305/5(a).

"The purpose of the [IWCA] is to protect employees against risks and hazards which are peculiar to the nature of the work they are employed to do." Mytnik v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152116WC, ¶ 36.

In order to avoid the exclusivity provision an employee must establish "that the injury (1) was not accidental; (2) did not arise from his employment; (3) was not received during the course of employment; or (4) was not compensable under the [IWCA]." Folta v. Ferro Engineering, 2015 IL 118070, ¶ 14; See also, Meerbrey v. Marshall Field & Co., 139 Ill. 2d 455, 463 (1990).

Even assuming *arguendo* that KIK Custom is correct that the alleged violation of BIPA was accidental, KIK Custom has not cited any binding authority indicating that Thomas's alleged injury is compensable under the IWCA.

The Illinois Supreme Court has held that "[t]o be compensable under the Workers' Compensation Act, an employee's injury must arise out of and in the course of his employment. [citation]." Brady v. Louis Ruffolo & Sons Construction Co., 143 Ill. 2d 542, 547-48 (1991) (citation omitted).

> The mere fact that claimant was present at the place of injury because of his employment duties will not by itself suffice to establish that the injury arose out of the employment. [citations] Rather, a claimant must demonstrate that his risk of the injury sustained is peculiar to his employment, or that it is increased as a consequence of the work. [citations] If an industrial accident is caused by a risk unrelated to the nature of the employment, or is not fairly traceable to the workplace environment, but results instead from a hazard to which the claimant would have been equally exposed apart from his work, the injury cannot be said to arise out of the employment. [citation]

Brady v. Louis Ruffolo & Sons Construction Co., 143 Ill. 2d 542, 550 (1991) (citations omitted).

Thomas's statutory right to maintain her privacy in her biometric data is not an injury particular to her employment. The mere fact that her employer, KIK Custom, chose to use a biometric fingerprint scanner as a time-keeping device does not mean that Thomas's alleged injury "arose out of her employment." Brady, 143 Ill. 2d at 550. Furthermore, KIK Custom's alleged failure to comply with BIPA does not increase the risk of harm concerning Thomas's biometric data "beyond that to which the general public is exposed." Brady, 143 Ill. 2d at 548. BIPA's requirements apply to any private entity in possession of biometric data. 740 ILCS 14/15. Thus, the risk of harm to Thomas's biometric data is the same whether a grocery store, tanning salon, or hotel fails to comply with BIPA's requirements.

Finally, this court finds persuasive Judge Raymond W. Mitchell's well-considered opinion in McDonald v. Symphony Bronzeville Park, LLC, et al., No. 2017-CH-11311 (Cir. Ct. Cook Cty. June 17, 2019). In McDonald, Judge Mitchell held that the plaintiff's loss of her ability to maintain her privacy rights under BIPA was neither a psychological nor a physical injury and thus was not compensable under the IWCA.

Therefore, the IWCA does not preempt or bar Thomas's claim.

C. Section 2-615

KIK Custom argues that Thomas has failed to state a claim because Thomas has failed to allege either a negligent or intentional or reckless violation of the BIPA statute. (Memo at 9). The court disagrees.

Section 14/20 of BIPA provides:

> Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. A prevailing party may recover for each violation:
>
> (1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater;
>
> (2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater;
>
> * * * * *

740 ILCS 14/20.

In Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, the Illinois Supreme Court held that "[t]he violation [of section 15], in itself, is sufficient to support the individual's or customer's statutory cause of action." Rosenbach, 2019 IL 123186, ¶ 33; 740 ILCS 14/15.

KIK Custom argues that a statute's words should not be read as to render any words or phrases meaningless, redundant, or superfluous. (Memo at 12). However, it is also well-settled that a court is "limited by the rules of statutory construction and cannot add words to a statute to change its meaning." Wolf v. Toolie, 2014 IL App (1st) 132243, ¶ 24.

If the court were to accept KIK Custom's argument, it would require this court to add the words "negligently" and "intentionally or recklessly" to the word "violation" in the sentence "Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court [. . .]," which is something this court cannot do. 740 ILCS 14/20; Wolf, 2014 IL App (1st) 132243, ¶ 24.

KIK Custom's argument also fails to recognize that the words "negligently" and "intentionally or recklessly" appear in the part of section 20 which explains what a prevailing party may recover. 740 ILCS 14/20 (1) and (2). Therefore, contrary to KIK Custom's argument, the words *do* have a meaning and are not rendered superfluous.

Therefore, Thomas has sufficiently pled her BIPA claim.

III. Conclusion

KIK Custom's motion to dismiss pursuant to 735 ILCS 5/2-619 is DENIED.

KIK Custom's motion to dismiss pursuant to 735 ILCS 5/2-615 is DENIED.

The status date of December 20, 2019 stands.

Entered: ENTERED Judge Neil H. Cohen-2021 DEC 19 2019 DOROTHY BROWN CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL DEPUTY CLERK

Judge Neil H. Cohen

EXHIBIT 4

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

KEAMBER WINTERS and DAWN MEEGAN, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**Case No. 19-CH-6579**
APERION CARE INC., et al.,	)	
Defendants,	)	

MEMORANDUM AND ORDER

Defendants Aperion Care, Inc., Aperion Care Morton Villa, LLC, Aperion Care Morton Terrace, LLC, Aperion Care Galesburg North, LLC, Island City Rehabilitation Center LLC, d/b/a Aperion Care Wilmington, and Doe Defendants 1-100 have filed a motion to dismiss Plaintiffs Keamber Winters and Dawn Meegan's complaint and compel arbitration pursuant to 735 ILCS 5/2-619.1.

I. Background

The Biometric Information Privacy Act ("BIPA") requires private entities in possession of biometric information to develop a publicly available written policy establishing a retention schedule and guidelines for permanently destroying biometric information. 740 ILCS 14/15(a). BIPA also requires a private entity to obtain written consent from the individual before it can collect the individual's biometric information. 740 ILCS 14/15(b). Significantly, BIPA prevents a private entity from disseminating an individual's biometric information unless it has received the individual's consent. 740 ILCS 14/15(d).

Section 14/20 of BIPA grants any person aggrieved by a violation of BIPA a right of action. 740 ILCS 14/20. A prevailing party may recover actual damages or a statutory penalty whichever is greater for each violation. 740 ILCS 14/20 (1) and (2).

A. Plaintiff Keamber Winters

Plaintiff Keamber Winters ("Winters") alleges she formerly "performed work" for Defendants Aperion Care, Inc. ("Aperion Care"), Aperion Care Morton Villa, LLC ("Morton Villa"), Aperion Care Morton Terrace, LLC ("Morton Terrace"), and Aperion Care Galesburg North, LLC ("Galesburg North") but not defendant Island City Rehabilitation Center LLC, d/b/a Aperion Care Wilmington ("Wilmington") (collectively "Defendants"). (First Amended Complaint at ¶¶3, 26-27).

Winters alleges that each of the Defendants required her submit her fingerprint for time keeping purposes. (FAC at ¶¶3, 30, 32, 34). Winters alleges that Defendants violated BIPA because: (1) she was never informed of the specific limited purposes or length of time for which Defendants collected and stored her biometric information; (2) she was never informed of any biometric data retention and deletion policy; and (3) she never signed a written release allowing Defendants to collect, store, and use her biometric data. (FAC. at ¶¶3, 31, 50, 54-57).

B. Plaintiff Dawn Meegan

Plaintiff Dawn Meegan ("Meegan") alleges she formerly "performed work" for defendants Aperion Care and Wilmington. (FAC at ¶¶4, 28). Meegan alleges that defendants Aperion Care and Wilmington required her submit her fingerprint for time keeping purposes. (FAC at ¶¶ 4, 30, 32-33). Meegan alleges that defendants Aperion Care and Wilmington violated BIPA because: (1) she was never informed of the specific limited purposes or length of time for which defendants collected and stored her biometric information; (2) she was never informed of any biometric data retention and deletion policy; and (3) she never signed a written release allowing defendants to collect, store, and use her biometric data. (FAC. at ¶¶4, 31, 50, 54-57).

C. The Collective Bargaining Agreements

Defendants' motion to dismiss asserts that Winters and Meegan (collectively "Plaintiffs") were respectively represented by Local 536 United Food and Commercial Workers International Union, CLC ("Local 536) and Local 1546 United Food and Commercial Workers International Union ("Local 1546") (collectively the "Unions") and that the Unions executed different collective bargaining agreements (collectively the "CBAs") with defendants Wilmington and Morton Villa and Morton Terrace.

On May 23, 2018, Wilmington and Local 1546 entered into a collective bargaining agreement (the "Wilmington CBA"). (Motion at Ex. D1). Article Two, section 2.2 of the Wilmington CBA states that Local 1546 is the exclusive bargaining agent for all employees of Wilmington with respect to, among other things, "other terms and conditions of employment." (Id.). Article Six, section 6.1 of the Wilmington CBA grants Wilmington management rights including the right to determine procedures and the equipment to be utilized by employees. (Id.). Article Thirteen, section 13.1 states that any grievance by an employee against Wilmington "with respect to the interpretation or application of, or compliance with" the Wilmington CBA shall be settled pursuant to the grievance procedure. (Id.). Section 13.2 grants either party the right to invoke the arbitration provisions of the Wilmington CBA. (Id.).

On January 28, 2014 Local 536 signed a collective bargaining agreement with defendants Morton Villa and Morton Terrace (the "Morton CBA"). (Motion at Ex. E1). Article Two, section 2.1 recognizes Local 536 as the exclusive bargaining agent with respect to "other terms and conditions of employment." (Id.). Article Six, section 6.1 grants defendants Morton Villa and Morton Terrace management rights. (Id.). Article Twelve section 12.1 provides "[a]ny grievance that may be asserted by the Union or any Employee, and any other difference or dispute relating directly or indirectly to the interpretation or application of, or compliance with this Agreement, [. . .] shall be resolved in accordance with" the procedure in the Morton CBA. (Id.). If Local 536 is

not satisfied with step three of the grievance procedure, Local 536 may submit the grievance to arbitration. (Id.). Article Twelve section 12.7 explains the requirements that must be followed for arbitration. (Id.).

II. Motion to Dismiss

Defendants are seeking to dismiss the Complaint pursuant to 735 ILCS 5/2-619.1. Section 2-619.1 allows a party to bring a combined motion to dismiss under sections 2-615 and 2-619. 735 ILCS 5/2-619.1.

"A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint." Yoon Ja Kim v. Jh Song, 2016 IL App (1st) 150614-B, ¶41. "Such a motion does not raise affirmative factual defense but alleges only defects on the fact of the complaint." Id. "All well-pleaded facts and all reasonable inference from those facts are taken as true. Where unsupported by allegations of fact, legal and factual conclusions may be disregarded." Kagan v. Waldheim Cemetery Co., 2016 IL App (1st) 131274, ¶29. "In determining whether the allegations of the complaint are sufficient to state a cause of action, the court views the allegations of the complaint in the light most favorable to the plaintiff. Unless it is clearly apparent that the plaintiff could prove no set of facts that would entitle him to relief, a complaint should not be dismissed." Id.

A section 2-619 motion to dismiss "admits the legal sufficiency of the complaint and affirms all well-plead facts and their reasonable inferences, but raises defect or other matters either internal or external from the complaint that would defeat the cause of action." Cohen v. Compact Powers Sys., 382 Ill. App. 3d 104, 107 (1st Dist. 2008). A dismissal under §2-619 permits "the disposal of issues of law or easily proved facts early in the litigation process." Id. Section 2-619(a)(9) authorizes dismissal where "the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). "A motion to compel arbitration and dismiss the lawsuit is essentially a motion pursuant to section 2-619(a)(9) to dismiss based on the exclusive remedy of arbitration." Griffith v. Wilmette Harbor Ass'n, 378 Ill. App. 3d 173, 180 (1st Dist. 2007).

A. Section 2-619

Defendants argue Plaintiffs' Complaint should be dismissed because: (1) Plaintiffs were never employed by Aperion Care and Galesburg North; (2) Plaintiffs claims are preempted by the Labor Management Relations Act; (3) Plaintiffs' claims must be resolved through arbitration per the CBAs; and (4) Plaintiffs claims are precluded by the HIPAA exemption of BIPA.

1. Employment by Aperion Care and Galesburg North

"[T]he difference between proper section 2-619 motions and improper ones [is] the difference between 'yes but' and 'not true' motions." Doe v. Univ. of Chicago Med. Ctr., 2015 IL App (1st) 133735, ¶40. "A proper section 2-619 motion is a 'yes but' motion that admits both that the complaint's allegations are true and that the complaint states a cause of action, but argues that some other defense exists that defeats the claim nevertheless." Id.

"On the other hand, a motion that attempts to merely refute a well-plead allegation in the complaint is a 'not true' motion that is inappropriate for Section2-619." Id.at ¶41. "A 'not true' motion at the pleading stage, in essence, serves as nothing more than an answer that denies a factual allegation and is not a basis for dismissal. Such a fact-based motion is appropriate for a summary judgment motion or for resolution at trial." Id.

Defendants' section 2-619 argument on this point is an improper "not true" motion.

Here, Defendants are merely attempting to refute the well-pled allegations of the Complaint which alleges that Winters "performed work" for all of the Defendants except Wilmington and that Meegan "performed work" for Aperion Care and Wilmington (FAC at ¶¶ 3, 26-27; 4, 28). The fact that Defendants have attached affidavits to support their assertion does not change the fact they are really advancing an improper "not true" motion. Such a motion is not a basis for dismissal. Doe v. Univ. of Chicago Med. Ctr., 2015 IL App (1st) 133735, ¶41.

2. Plaintiffs' Argument re: "performed work" versus employment

Plaintiffs' argument that they were not employed by defendants Aperion Care and Galesburg North and are therefore not subject to the CBAs is unpersuasive and unsupported by any citation to legal authority. Plaintiffs have not cited any legal authority supporting their argument that placement by a staffing agency somehow exempts a union member from a CBA. Nor have Plaintiffs cited any legal authority that a union member may avoid the terms of a CBA based upon a short duration "performing work" for an employer.

3. The Exhibits and Illinois Supreme Court Rule 138

Defendants' exhibits attached to their affidavits violate Illinois Supreme Court Rule 138 ("Rule 138"). Rule 138 provides that personal identity information, such as social security numbers, "shall not be included in documents or exhibits filed with the court except as provided in paragraph (c)." Ill. Sup. Ct., R 138 (b)(1) and (a)(1). Rule 138 allows for the redacted filing of the last four digits of a social security number. Ill. Sup. Ct., R 138 (c)(1). Rule 138 also provides the procedure to be followed if an exhibit or document containing personal identity information has been filed with the court. Ill. Sup. Ct., R 138 (f).

Exhibits attached to the affidavits of Jodi Jude and Erica Otto, respectively, both contain the full unredacted social security numbers of Meegan and Winters. (Affidavit of Jodi Jude at Ex. 2; Affidavit of Erica Otto at Ex. 2). The inclusion of unredacted social security numbers is a violation of Rule 138. Those exhibits are stricken. Defendants shall submit to this court an order requiring the Clerk of Court to seal said exhibits.

4. Preemption by the Labor Management Relations Act

Section 185 (a) of the LMRA provides:

> (a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties,

> without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C.S. § 185 (a).

The United States Supreme Court has held "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law [. . .] is pre-empted and federal labor-law principles [. . .] must be employed to resolve the dispute." Lingle v. Norge Division of Magic Chef, 486 U.S. 399, 405-06 (1988).

Thus, whether the LMRA preempts Plaintiffs' claim turns on whether their BIPA claims require interpretation of the CBAs.

i. Whether resolution of Plaintiffs' BIPA claims require interpretation of the CBAs

Defendants argue the Wilmington CBA applies to Meegan's BIPA claims because its grievance and arbitration procedure applies to all disputes with respect to the interpretation, or application of, or compliance with the Wilmington CBA. Defendants also argue that the Morton CBA applies to Winters' BIPA claims because it "directly contemplates timekeeping procedures, methods, and equipment to be utilized by Wilmington employees." (Motion at 7). Finally, Defendants argue that by granting them a management rights clause the court would need to interpret the CBAs. The court disagrees.

In Gelb v. Air Con Refrigeration & Heating, Inc., 356 Ill. App. 3d 686, 692-93 (1st Dist. 2005), the First District held:

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

Id. 356 Ill App 3d at 692-93.

Here, Defendants' argument that Plaintiffs' BIPA claims would require interpretation of the CBAs or are predicated on rights addresses in the CBAs is unpersuasive. First, no evidence has been presented that the Unions' grant of a management rights clause complied with section 15 (b)(3) of BIPA. Section 15 (b)(3) of BIPA provides that no private entity may collect biometric information unless it first, among other things, receives a written release executed by the subject's legally authorized representative. 740 ILCS 14/15 (b)(3). While the Unions are Plaintiffs exclusive collective bargaining representative, Defendants have produced no evidence

indicating that the Unions provided them with a written release as required by section 15 (b)(3) of BIPA.

Second, Defendants reliance on Miller v. Sw. Airlines Co., 926 F.3d 898 (7th Cir. 2019) is misplaced. In Miller, the Seventh Circuit considered "whether persons who contend that air carriers have violated state law by using biometric identification in the workplace must present these contentions to an adjustment board under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188, which applies to air carriers as well as railroads." Miller, 926 F.3d at 900. The Seventh Circuit held that "[t]he answer is yes if the contentions amount to a ['] minor dispute[']—that is, a dispute about the interpretation or application of a collective bargaining agreement." Id. The court noted that "[a]s a matter of federal law, unions in the air transportation business are the workers' exclusive bargaining agents." Miller, 926 F.3d at 903. Because federal law governed the plaintiffs in Miller, "[a] dispute about the interpretation or administration of a collective bargaining agreement must be resolved by an adjustment board under the Railway Labor Act." Id. Thus, the Seventh Circuit reasoned, "[w]hether Southwest's or United's unions *did* consent to the collection and use of biometric data, or perhaps grant authority through a management-rights clause, is a question for an adjustment board." Id.

Defendants raise two arguments under Miller: (1) an employee may not bypass their union and deal directly with their employer regarding BIPA compliance; and (2) when the issue of a Union's consent is disputed, it is a matter for the arbitrator because Plaintiffs are asserting a right in common with all employees which deals with a mandatory subject of collective bargaining.

The Defendants first argument is largely irrelevant because section 15(b)(3) of BIPA unambiguously provides that an individual's legally authorized representative may provide the written release. 740 ILCS 14/15 (b)(3). As mentioned above, the Defendants have not provided any evidence that the Union actually *did* provide the written release as contemplated by section 15 (b)(3). See, *supra*. The Defendants' speculation that the Unions could have provided the written release is largely irrelevant. (Memo at 9-10).

Defendants' second argument is unpersuasive and distinguishable. The Seven Circuit's statement that BIPA is a mandatory subject of collective bargaining, Miller, 926 F.3d at 903-904, is rooted in 45 U.S.C.S. § 152 of the Railway Labor Act, which governs air carriers as well as railroads. Miller, 926 F.3d at 900. Section 152 lists the general duties of employers, unions, and employees to come to an agreement concerning the conditions of employment, among other things. 45 U.S.C.S. § 152. Thus, it is clear that Miller's statement about the mandatory nature of BIPA and collective bargaining is limited to employers governed by the Railway Labor Act. Defendants' have not argued, nor could they, that the Railway Labor Act applies to them.

Turning to the actual terms of the CBAs at issue, it is clear that none can be interpreted to include BIPA claims.

First, Defendants' argument that the CBAs contemplate timekeeping is unpersuasive. The Wilmington CBA's provisions related to "timekeeping" are not broad enough to include BIPA claims or an agreement to arbitrate BIPA claims. Rather, the provisions related to

"timekeeping" are narrow in scope and address issues like the definitions of full-time and part-time employees, the basis for calculating overtime, and vacation payout. (Motion at Ex. D1, p. 2, 5, 14). Similarly, the Morton CBA's management rights clause provides the employer with the right to determine starting time, quitting times, shifts, and the number of hours to be worked. None of these terms can be interpreted as encompassing BIPA claims, let alone an agreement to arbitrate BIPA claims. (Motion at Ex. E, p. 4).

Second, Defendants' argument that the Morton CBA's management rights clause provided them with the right to determine the "equipment to be utilized by employees" is separate and distinct from BIPA compliance. (Id.). Permitting an employer to choose the method an employee uses to clock-in, for example with a biometric fingerprint scanner, is distinct from whether an employer who decides to use a biometric fingerprint scanner is exempt from compliance with BIPA. Plaintiffs' Complaint does not contain any allegations challenging Defendants' decision to use a biometric fingerprint scanner. Rather Plaintiffs' Complaint is best understood as alleging that Defendants, having decided to use a biometric fingerprint scanner, failed to ensure their use of biometric fingerprint scanner complied with BIPA.

For these reasons, there is no agreement to arbitrate BIPA claims.

5. HIPAA preclusion

Section 14/10 of BIPA states:

> Biometric identifiers do not include information captured *from a patient* in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996.

740 ILCS 14/10 (emphasis added).

Defendants argue the use of "or operations" in section 10 excludes Plaintiffs' claims because Plaintiffs used the biometric fingerprint scanner to clock-in and out of work as part of Defendants' operations. According to the Defendants since they are healthcare providers as defined by section 160.103 of the Code of Federal Regulations and since Plaintiffs provided treatment as defined by section 164.501 of the Code of federal Regulations, Plaintiffs' claims are barred by the HIPAA exclusion of BIPA. 45 CFR § 160.103; 45 CFR § 164.501. Plaintiffs' argue that Defendants' argument is contrary to the plain unambiguous language of the statute. The court agrees with Plaintiffs.

First, Defendants have not argued that section 14/10 of BIPA is ambiguous. "When the language of a statute is clear and unambiguous, a court must give effect to the plain and ordinary meaning of the language without resort to other tools of statutory construction." Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 255 (2004). Defendants' failure to argue that section 14/10 is ambiguous prevents this court from looking to the Code of Federal Regulations since the plain and unambiguous language of section14/10 is clear that it applies to information collected *from a patient* and not information collected from healthcare workers or providers. 740 ILCS 14/10.

Furthermore, even if Defendants had argued section 14/10 was ambiguous, they have failed to explain how their reading of section 14/10 does not lead to absurd result of excluding all members of the healthcare industry. Section 14/10 clearly shows that the legislature knows how to explicitly exclude a class from BIPA's requirements. See, 740 ILCS 14/10 ("A private entity does not include a State or local government agency"). Defendants offer no argument nor cite any case law explaining how and why this court should read section 14/10 to *imply* the exclusion of all members of the healthcare industry from BIPA. Accepting Defendants' argument would lead to an absurd result.

Third, even assuming *arguendo*, that HIPAA and BIPA related the same subject matter it is clear that both statutes refer to patient data, not employee data. HIPAA's exclusion of BIPA unambiguously refers to information *from a patient*. 740 ILCS 14/10.

Section 160.103 of the Code of Federal Regulations, the section replied upon by the Defendants, defines health information as "any information, [. . .], that: (1) Is created or received by a health care provider, [. . .], employer, [. . .]; ***and*** (2) Relates to the past, present, or future physical or mental health or condition ***of an individual***; the provision of health care **to *an individual***; or the past, present, or future payment for the provision of health care ***to an individual***." 45 C.F.R. § 160.103 (emphasis added). Section 160.103 unambiguously defines "health information" as information created by a health care provider or employer *and* related to the health condition *of an individual*. The Defendants offer no explanation as to how the Plaintiffs' fingerprint scans, allegedly used to clock-in and out, are related to health conditions of individual patients.

The HIPAA exclusion does not preempt Plaintiffs' claims.

B. Section 2-615

Defendants argue Plaintiffs have failed to state a claim because: (1) section 15(a) of BIPA does not contain the word "provide," therefore, according to Defendants they have no obligation to "provide" Plaintiffs with anything pursuant to section 15(a); and (2) because Plaintiffs were never employed by Aperion Care and Wilmington, section 15 (b) releases were not required.

1. Section 15 (a)

Section 15 (a) of BIPA provides:

> (a) 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.

740 ILCS 14/15 (a).

Defendants' argument is contrary to the purpose of BIPA. In Rosenbach, our Supreme Court noted that:

> [BIPA] vests in individuals and customers the right to control their biometric information by *requiring notice before collection* and giving them the power to say no by withholding consent. [citation]. These procedural protections "are particularly crucial in our digital world because technology now permits the wholesale collection and storage of an individual's unique biometric identifiers—identifiers that cannot be changed if compromised or misused." [citation]. When a private entity fails to adhere to the statutory procedures, as defendants are alleged to have done here, "the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized." [citation]

Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 34 (quoting Patel v. Facebook Inc., 290 F. Supp. 3d 948, 953-954 (N.D. Cal. 2018)) (citations omitted) (emphasis added).

Defendants' argument that section 15 (a) does not require them to "provide anything at all" is contrary to the stated purpose of BIPA, and the holding of Rosenbach.

2. Section 15 (b)

Section 15 (b) of BIPA states that a private entity may not collect an individual's biometric data unless it first, among other things, obtain a written release. 740 ILCS 14/15 (b). Section 10 of BIPA defines "written release" in the context of employment as a "release executed by an employee as a condition of employment." 740 ILCS 14/10.

Defendants argue that Plaintiffs were never employees of Aperion Care or Wilmington, and therefore there was no obligation to obtain a written release as required by section 15 (b). 740 ILCS 14/15 (b).

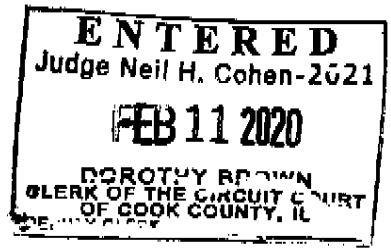
Rather, on a section 2-615 motion, a defendant accepts as true all well pled allegations. Kagan, 2016 IL App (1st) 131274, ¶29. The Complaint specifically alleges Winters and Meegan "performed work" for Apieron Care and that Meegan "performed work for" Wilmington. (FAC at ¶¶ 3, 26-27; 4, 28). The purpose of a section 2-615 motion is not to raise affirmative factual defenses. Yoon Ja Kim, 2016 IL App (1st) 150614-B, ¶41. As a matter of law, Defendants cannot bring a section 2-615 to argue that Aperion Care and Wilmington never employed Plaintiffs.

Defendants' motion is not a proper section 2-615 motion and is not a proper basis for dismissal.

III. Conclusion

Defendants' motion to dismiss is DENIED.

The status date of February 13, 2020 stands.



Entered: _____

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Judge Neil H. Cohen

EXHIBIT 5

STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

ROBERT SOLTYSIK and VESMO HANKS, Individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	No. 19 L 136 HEARING
-vs-	)	
PARSEC, INC.,	)	
Defendant.	)	

REPORT OF PROCEEDINGS had at the online Zoom hearing of the above-entitled cause, before the HONORABLE DOROTHY FRENCH MALLEN, Judge of said court, on the 20th day of May, 2020.

PRESENT:

MR. DAVID FISH and
MR. BRANDON WISE,

appeared on behalf of the Plaintiffs;

MR. JASON SELVEY,

appeared on behalf of defendant.

about appellate court or Supreme Court -- it is the precedent in this matter. And in Miller, the -- somebody talked about the fact that the claim by the defendant was that the issue of BIPA was addressed in the CBA and in Peatry and Gray, they didn't address that fact. But, obviously, Miller is very persuasive to this Court. Peatry and Gray are very persuasive to this Court. And the cases cited by the plaintiff are, I think, very interesting and makes this decision very hard. In order to determine whether or not the union has weighed in on the CBA and weighed the rights of their members with regard to the provisions of BIPA, the Court would have to actually interpret the CBA.

And I suppose I should first address the question of whether by consecutive motions to dismiss the defendant waived its right to attack subject matter jurisdiction, and this Court is of the opinion you cannot ever waive subject matter jurisdiction. If the Court doesn't have subject matter jurisdiction then whatever the Court does is ineffectual, has no bearing, no weight. So as far as the plaintiff's position that the defendant waives subject matter jurisdiction by consecutive motions to dismiss, that position is not well taken. And the subject matter jurisdiction issue

STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

I, SUZANNE AUSTIN, hereby certify the foregoing to be a true and accurate transcript of the computer based digitally recorded proceedings of the above-entitled cause to the best of my ability to hear and understand, based upon the quality of the audio recording, pursuant to Local Rule 1.03(c).

Official Court Reporter
Eighteenth Judicial Circuit of Illinois
DuPage County

EXHIBIT 6

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ORDER - BLANK

2116 (Rev. 2/16)

STATE OF ILLINOIS **UNITED STATES OF AMERICA** **COUNTY OF DU PAGE**

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

Robert Soltisyk and Vesmo Hanks, Individually and on behalf of all others similarly situated,

vs

Parsec, Inc.

2019 L 00136

CASE NUMBER

FILED
MAY 21, 2020 02:25 PM
Chris Kachiroubas
CLERK OF THE
18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

File Stamp Here

ORDER

This cause coming before the Court; the Court being fully advised in the premises, and having jurisdiction of the subject matter, **IT IS HEREBY ORDERED:**

1. For the reasons stated on the record during the hearing held on this date, Defendant Parsec, Inc.'s Motion to Dismiss Plaintiffs' Amended Class Action Complaint for Lack of Subject Matter Jurisdiction or, in the Alternative, Because Plaintiffs' Claims Are Preempted, Pursuant to 735 ILCS 5/2-619.1 is GRANTED;

2. Pursuant to 735 ILCS 5/2-619(a)(1), Plaintiffs' Amended Class Action Complaint and this action are DISMISSED in their entirety because the Court lacks subject matter jurisdiction;

3. Plaintiffs' request for leave to amend their amended complaint is DENIED; and

4. The dismissal is without prejudice to Plaintiffs bringing the claims asserted in this action in a proper forum.

Name: Jason Selvey / Jackson Lewis P☐ ☐ PRO SE

DuPage Attorney Number: 26718

Attorney for: Defendant Parsec, Inc.

Address: 150 N. Michigan Ave., Suite 2500

City/State/Zip: Chicago, IL 60601

Telephone Number: 312-787-4949

Email: Jason.Selvey@jacksonlewis.com

ENTER:

Judge

Date: 5/21/2020

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Matthew C. Wolfe, an attorney, hereby certify that on **June 14, 2021**, I caused a true and complete copy of the foregoing **MOTION OF THE ILLINOIS CHAMBER OF COMMERCE FOR LEAVE TO FILE A BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT** to be filed electronically with the Clerk's Office of the Illinois Appellate Court, First Judicial District, using e-filing provider **Odyssey eFileIL**, which sends notification and a copy of this filing by electronic mail to all counsel of record. I further certify that I caused an additional courtesy copy of this filing to be served by electronic mail upon the following:

Ryan F. Stephan (rstephan@stephanzouras.com)
Haley R. Jenkins (hjenkins@stephanzouras.com)
STEPHAN ZOURAS, LLP
100 North Riverside Plaza, Suite 2150
Chicago, IL 60606
Attorneys for Appellee William Walton

David M. Schultz (dschultz@hinshawlaw.com)
John P. Ryan (jryan@hinshawlaw.com)
Adam R. Vaught (avaught@hinshawlaw.com)
HINSHAW & CULBERTSON LLP
151 North Franklin Street, Suite 2500
Chicago, Illinois 60606
Attorneys for Appellant Roosevelt University

Under penalties by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certified that the statements set forth in this notice of filing and certificate of service are true and correct.

/s/ Matthew C. Wolfe

No. 1-21-0011

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WILLIAM WALTON, individually and on behalf of others similarly situated, *Plaintiff-Appellee*, v. ROOSEVELT UNIVERSITY, *Defendant-Appellant*.	)	On Appeal from the Circuit Court of Cook County, Illinois, Cook County Circuit, No. 2019-CH-04176 The Honorable Anna H. Demacopoulos, Judge Presiding

ORDER REGARDING MOTION OF THE ILLINOIS CHAMBER OF COMMERCE FOR LEAVE TO FILE A BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

This matter coming to be heard on Motion of the Illinois Chamber of Commerce for Leave to File a Brief of *Amicus Curiae* in Support of Defendant-Appellant, due notice having been given and the Court being fully advised in the premises, **IT IS HEREBY ORDERED** that the Motion of the Illinois Chamber of Commerce is granted / denied.

Dated: _____

_____
Justice

_____
Justice

_____
Justice