No. 18-3476

In the
United States Court of Appeals
for the Seventh Circuit

JENNIFER MILLER, et al.,

Plaintiffs-Appellants,

v.

SOUTHWEST AIRLINES COMPANY,
a Texas corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:18-cv-00086.
The Honorable **Marvin E. Aspen**, Judge Presiding.

BRIEF AND SHORT APPENDIX OF PLAINTIFFS-APPELLANTS JENNIFER MILLER, SCOTT POOLE and KEVIN ENGLUND

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3476

Short Caption: Miller, et al v. Southwest Airlines Co.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Jennifer Miller

Scott Poole

Kevin Englund

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Hart McLaughlin & Eldridge

Romanucci & Blandin

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: Steven A. Hart Date: 2/15/19

Attorney's Printed Name: Steven A. Hart

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Attorney's Signature: s/ John S. Marrese Date: 3/5/19

Attorney's Printed Name: John S. Marrese

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal from a final judgment of the District Court pursuant to 28 U.S.C. § 1291 and F.R.A.P. 4(a)(1)(A) and 4(a)(4)(A)(iv). The date of entry of judgment sought to be reviewed is October 22, 2018 (ECF No. 51) (as well as from a previous judgment of August 23, 2018 (ECF Nos. 44-45)).

On September 13, 2018, Plaintiffs-Appellants filed a Fed. R. Civ. P. 59(e) motion to alter the judgment entered on August 23, 2018. (ECF No. 46.) The Court denied that motion on October 22, 2018. (ECF No. 51.)

Plaintiffs-Appellants filed their notice of appeal on November 20, 2018, within 30 days of the District Court's denial of Plaintiffs-Appellants' Rule 59(e) motion to alter judgment on October 22, 2018. This case is not a direct appeal from the decision of a magistrate judge.

STATEMENT OF THE ISSUE

Did the district court err when it ruled that Plaintiffs-Appellants' claims under the Illinois Biometric Privacy Information Act, 740 ILCS 14/1, et seq., were preempted by the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, because they constitute a "minor" dispute?

STATEMENT OF CASE

I. Illinois Biometric Information Privacy Act

The Illinois Biometric Information Privacy Act, 740 ILCS 14/1, et seq. ("BIPA") regulates the collection, storage, use, and dissemination of "biometric identifiers" (such as fingerprints) and "biometric information." The Illinois General Assembly enacted BIPA in 2008 following the bankruptcy of a company specializing in the collection and use of biometric information, which risked the sale or transfer of millions of fingerprint records to the highest bidder. (ECF No. 22 ¶ 12.)[1]

In enacting BIPA, the Illinois General Assembly recognized that the sensitivity of biometric information was in a class of its own: "biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. [E]ven sensitive information like Social Security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to each individual and cannot be changed, and therefore, once compromised, such individual has no recourse, is at a heightened risk for identity theft, and is likely to withdraw from biometric facilitated transactions." (*Id.* ¶ 13 (quoting 740 ILCS 14/5).)

[1] Appellants are challenging the District Court's ruling dismissing both Appellants' Amended Complaint (ECF No. 22) and Appellants' proposed Second Amended Complaint (ECF No. 46-2). However, the pertinent allegations here are identical in both complaints and, therefore, Appellants only cite to one such complaint throughout this brief.

Accordingly, to effectuate persons' substantive privacy interest in their unique, immutable biometric information, BIPA provides that private entities may not obtain or possess an individual's biometrics unless they first:

> (1) inform the subject or the subject's legally authorized representative in writing that biometric identifiers or information will be collected or stored;
>
> (2) inform subject or the subject's legally authorized representative in writing of the specific purpose and the length of term for which such biometric identifiers or biometric information is being collected, stored and used;
>
> (3) receive a written release from the subject or the subject's legally authorized representative for the collection of her biometric identifiers or biometric information; and
>
> (4) publish a publicly available retention schedule and guidelines for permanently destroying biometric identifiers and biometric information.

740 ILCS 14/15(a), (b)(1)-(3). BIPA also prohibits a private entity, in pertinent part, from disclosing, redisclosing, or otherwise disseminating a subject's biometrics unless the subject or the subject's legally authorized representative consents. 740 ILCS 14/15(d)(1).

In order to secure the personal, state biometric privacy rights vested by BIPA, the Act provides a private right of action to "[a]ny person aggrieved by a violation of this Act[.]" 740 ILCS 14/20. Indeed, the Illinois Supreme Court held just last month that under BIPA "individuals possess a right to privacy in and control over their biometric identifiers and biometric information." *Rosenbach v. Six Flags Entertainment Corp.*, -- N.E.3d --, 2019 IL 123186, ¶ 33 (Ill. Jan. 25, 2019). As such, a person has been "aggrieved" under BIPA

when a private entity fails to comply with any of the requirements of Section 15 of the Act stated above. *Id.*

II. Factual and Procedural Background

A. Procedural Overview

On November 27, 2017, Plaintiffs-Appellants ("Appellants") filed their original putative class action complaint in Cook County Circuit Court, alleging a single claim for violation of BIPA. (ECF No. 1.) On January 5, 2018, Southwest removed the action to the U.S District Court for the Northern District of Illinois. (*Id.*) On April 2, 2018, Appellants filed their Amended Complaint against Southwest, alleging a claim for violation of BIPA as well as several common law claims. (ECF No. 22.) On August 23, 2018, the Court dismissed Plaintiffs' Amended Complaint under Fed. R. Civ. P. 12(b)(3). (A1-A14.[2]) On September 13, 2018, Appellants filed a Fed. R. Civ. P. 59(e) motion to alter or amend judgment and for leave to file their proposed Second Amended Complaint. (ECF Nos. 46, 46-1 & 46-2.) On October 22, 2018, the District Court denied Appellants' Rule 59(e) motion, finding that Appellants' proposed Second Amended Complaint was futile as it would be dismissed under Rule 12(b)(3) for the same reason as Appellants' Amended Complaint. (A16-A21.)

[2] The Appendix to this brief is referenced herein as "A__."

B. Factual Background

1. Plaintiffs' First Amended Complaint

a. Plaintiffs' Allegations of BIPA Injury

Appellants are ramp and operations agents who worked and/or work for Southwest at Chicago's Midway International Airport. (ECF No. 22 ¶¶ 6-8.) Appellants were required to provide Southwest with their biometric identifiers and biometric information, namely fingerprints, in conjunction with Southwest's biometric timekeeping system. (*Id.* ¶ 51.) Southwest required Plaintiffs and other employees to scan their finger into one of Southwest's biometric timekeeping devices each time they clocked-in and clocked-out of work. (*Id.* ¶ 52.)

Southwest's timekeeping system ensures that Plaintiffs and other workers can only verify their attendance and timeliness through scanning such biometric information into the timekeeping system. (*Id.*) Prior to collecting, storing, using, and disseminating Plaintiffs' and other workers' biometric information, Southwest did not provide the requisite written notice, did not obtain the requisite written consent, and did not publish a publicly available retention and destruction schedule. (*Id.* ¶¶ 55-57.)

Accordingly, in pertinent part in their First Amended Complaint, Appellants alleged that Southwest collected, stored, used, and/or disseminated Appellants' and other employees' biometric identifiers and biometric information in violation of BIPA. Specifically, Appellants alleged that Southwest violated Appellants' and putative class

members' BIPA rights by: (i) failing to inform Appellants in writing that their biometric information was being collected or stored; (ii) failing to inform Appellants in writing of the specific purpose and length of term of collection, storage, and use; (iii) failing to obtain signed, written releases from Appellants for collection and storage; (iv) failing to establish a written policy, made available to the public, relating to retention of biometrics and guidelines for destruction of biometrics; and (v) disclosing Appellants' biometric information without their consent. (*Id.* ¶¶ 55-57, 78-79.) In addition to Plaintiffs' allegations of injury as a result of Southwest's violation of Section 15 of BIPA alone, Plaintiffs also alleged that they lost compensation as a result of Southwest's actions as they "would not have agreed to work for [Southwest], at least not for the compensation they received, had they been informed pursuant to BIPA of the nature of Defendant's biometric timekeeping system." (*Id.*¶ 60.)

b. Southwest's Motion to Dismiss First Amended Complaint

Southwest moved to dismiss Appellants' First Amended Complaint on two grounds. (ECF No. 27-28.) First, under Fed. R. Civ. P. 12(b)(6), Southwest argued that Appellants failed to plead that that they were "aggrieved" under BIPA. (ECF No. 28 at 6-9.) Second, under Fed. R. Civ. 12(b)(3), Southwest argued in pertinent part that the portion of Appellants' BIPA claim seeking compensation presented a "minor" dispute under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"), and therefore was preempted. (ECF No. 28 at 13-14.)

In support of its RLA argument, Southwest submitted the Declaration of Michelle Jordan, Director of Labor for Ground Operations at Southwest. (ECF No. 28-1.) Ms. Jordan averred that Ramp and Operations Agents at Midway Airport, such as Appellants, "are represented for purposes of collective bargaining by the Transportation Workers Union of America, AFL-CIO Local 555 ('TWU 555')." (ECF No. 28-1¶ 6.) Ms. Jordan further averred that Appellants are (and have been) subject to collective bargaining agreements ("CBAs"). (*Id.* ¶ 7.) In conjunction, Ms. Jordan attached "relevant excerpts" of three successive CBAs, including agreements effective: (a) February 19, 2012 through February 18, 2016 (ECF No. 28-1, Ex. A); (b) July 1, 2008 through June 30, 2011 (ECF No. 28-1, Ex. B); and (c) June 14, 2001 through June 30, 2006 (ECF No. 28-1, Ex. C).

Ms. Jordan stated that the CBAs provide that TWU 555 is the "sole and exclusive bargaining agent" for Plaintiffs and that the CBAs provide for a four-step grievance and arbitration procedure. (ECF No. 28-1 ¶ 8.) Additionally Ms. Jordan averred that "Southwest began using the Kronos 4500 time clocks at Chicago Midway International Airport in early 2006." (*Id.* ¶ 9.) According to Ms. Jordan, "[i]n October 2005, Southwest provided TWU 555 notice that it would use Kronos 4500 time clocks and TWU 555 did not object or seek an amendment to the relevant labor agreement as a result." (*Id.* ¶ 10.)

Based on such evidence, Southwest argued that Appellants' allegations that they were not sufficiently compensated by Southwest presented a minor dispute under the

RLA. (ECF No. 28 at 13-14.) Southwest did not argue that Plaintiffs' allegations of privacy injury, i.e., violation of Section 15 of BIPA, presented a minor dispute.

c. The District Court Grants Southwest's Motion, Finding that Appellants' Entire BIPA Claim Presents a Minor Dispute Under the RLA

The District Court denied Southwest's Rule 12(b)(6) motion, finding that Plaintiffs properly alleged Article III injury. (A6-A7.) However, the District Court granted Southwest's Rule 12(b)(3) motion, ruling in pertinent part that Plaintiffs' entire BIPA claim was preempted as a minor dispute under the RLA. (A10-A12.) The District Court reasoned that:

> [W]ith respect to their BIPA claim, Plaintiffs assert compensation-related injuries as a result of Defendant's implementation and use of the biometric timekeeping system, alleging that . . . Defendant did not 'sufficiently compensate[]' Plaintiffs for the 'capture, collection, storage, retention, and/or use of their biometric information.' (Amd. Compl. ¶ 60.) Plaintiffs further allege they 'would not have agreed to work for Defendant, at least not for the compensation they received, had they been informed pursuant to BIPA of the nature of Defendant's biometric timekeeping system.' (*Id.*) Among the relief Plaintiffs seek is compensation for the commercial value of their biometric information. (*Id.* at PageID #235.)
>
> Because the CBAs govern the rates of pay, rules, and working conditions of Plaintiffs' employment, Plaintiffs' BIPA claim 'requires interpretation of the CBA to determine whether [Defendant] has the authority to use a particular timekeeping system for employees.' *Johnson*, 2018 WL 3636556, at *2. Specifically, the CBAs dictate employees' wage rules, rates of pay, and bonuses. (*See* CBA, Jordan Decl. Ex. A (Dkt. No. 28-1) at Art. 28.) Defendant and TWU 555 negotiated the wage

> scales applicable to Plaintiffs, as well as other pay provisions relating to premium pay. (Jordan Decl. Ex. A (Dkt. No. 28-1) ¶ 8.) Additionally, under the terms of the CBAs, TWU 555 is the sole and 'exclusive bargaining agent' for all of Defendant's Unites State-based ramp, operations, provisioning, and freight agents including Plaintiffs, and Defendant broadly retains the 'right to manage and direct the work force' subject to the labor agreements. (*Id.*; see also CBA at Art. 2(A).) The CBAs further establish a grievance system and arbitration procedure to resolve disputes concerning the interpretation or application of the agreements as required by the RLA. (CBA at Art. 20.) Plaintiffs' BIPA claim cannot be resolved without interpreting the wage provisions of the CBAs and the relevant bargaining history to determine whether the wages TWU 555 and Defendant negotiated were intended to compensate employees for all conditions of their employment, including use of the biometric timekeeping system. Likewise Plaintiffs' challenge to Defendant's decision to implement the biometric timekeeping system requires an interpretation as to whether the decision falls within the scope of Defendant's right to 'manage and direct the work force.'" *See Johnson*, 2018 WL 3636556, at *2.

(A11-A12.) Based on that rationale, the Court ruled that Plaintiffs' BIPA claim was completely preempted as a minor dispute. (*Id.* at 10 (citing *Johnson*, 2018 WL 3636566, at *2; *Brown*, 254 F. 3d at 658).) The Court dismissed Plaintiffs' case without prejudice (A13-A14), but entered judgment on the order (A15).

2. Appellants' Proposed Second Amended Complaint

a. Appellants' Motion to Alter Judgment and for Leave to File Second Amended Complaint

Appellants timely filed a motion to alter the District Court's judgment under Fed. R. Civ. P. 59(e) and for leave to file a Second Amended Complaint. (ECF No. 46.)

Appellants attached therewith a proposed Second Amended Complaint, alleging a single claim under BIPA for privacy injury only and removing any allegation of compensation injury. (ECF Nos. 46-1 (redlined version) & 46-2 (clean version).) Appellants argued that such claim did not present a minor dispute under the RLA, but rather sought to vindicate rights and obligations under BIPA independent of the collective bargaining agreements. (ECF No. 46 ¶ 15.) Appellants explained that, contrary to the District Court's earlier decision, Appellants' BIPA claim for privacy injury (in both their First and Second Amended Complaints) was not challenging Southwest's *decision* to implement a biometric timekeeping system, but rather Southwest's implementation of such a system in violation of Appellants' privacy rights under BIPA. (*Id.*)

In pertinent part, Southwest argued that the District Court should deny Appellants' motion as futile because the Second Amended Complaint still presented a minor dispute under the RLA on the grounds previously provided by the District Court. (ECF No. 49 at 5-6.) In addition, for the first time, Southwest argued that the Court would need to interpret the relevant CBAs to determine whether Appellants' collective bargaining agent was Appellants' "legally authorized representative" under BIPA, capable of consenting to the collection, storage, use, and dissemination of Appellants' biometrics on Appellants' and other union workers' behalf. (ECF No. 49 at 6-7.)

In reply, Appellants explained that there is no support for Southwest's argument that a collective bargaining agent is a "legally authorized representative" under BIPA.

(ECF No. 50 at 7.) Further, Plaintiffs argued that Southwest's inability to provide any evidence of written notice or written consent relating to Appellants' biometrics—through a collective bargaining agent or otherwise—rendered the CBAs irrelevant to Appellants' claim. (*Id.* at 7-10.)

b. The District Court Denies Appellants' Motion

The District Court denied Appellants' request for leave, finding that "[e]ven without the compensation injury allegations and the common law claims, Plaintiffs' proposed second amended complaint presents a minor dispute under the RLA that must be submitted to mandatory arbitration." (A19.) The District Court reasoned:

> [I]t cannot be determined whether Defendant collected or captured Plaintiffs' biometric identifiers without informing them or their legally authorized representative in writing that the information was being collected and stored without first assessing whether TWU 555 had the right or responsibility to accept notice and consent on Plaintiffs' behalf as their "sole and exclusive bargaining agent." *See Brown*, 254 F.3d at 658.
>
> Likewise, TWU 555 broadly granted Defendant the "right to manage and direct the work force" subject to the specific terms of the CBAs. . . . Determining whether the union acted as Plaintiffs' "legally authorized representative" as that term is defined under BIPA and whether Defendant complied with BIPA in light of the scope of its management rights requires consideration or interpretation of the CBAs.

(A20.) In turn, the District Court concluded, "Defendant has met its low burden of articulating an argument that is neither insubstantial or frivolous, nor made in bad faith,

showing that resolution of Plaintiffs' BIPA claim requires interpretation or application of the governing CBAs." (*Id.*)

3. Appellants Timely File Their Notice of Appeal

On November 20, 2018, Plaintiff timely filed notice of this appeal. (ECF No. 53.) Appellants now challenge the District Court's rulings that Appellants' BIPA claim for privacy injury, in their First Amended Complaint as well as their proposed Second Amended Complaint, presented a minor dispute under the RLA. *See Badger Pharmacal, Inc. v. Colgate Palmolive Co.*, 1 F.3d 621, 625 (7th Cir. 1993) ("By amending the complaint, WPC did not waive any challenge to the district court's dismissal of the misrepresentation claims [which WPC omitted from the amended complaint] for if a district court's dismissal leaves a plaintiff free to file an amended complaint, the dismissal is not considered a final, appealable order.").

SUMMARY OF ARGUMENT

The District Court erred when it found that Appellants' BIPA claim for privacy injury, in both their First Amended Complaint and proposed Second Amended Complaint, presented a "minor dispute" under the RLA. Specifically, the District Court ruled that such claims required the Court to interpret the CBAs to determine: (a) whether Appellants' collective bargaining agent, TWU 555 (hereinafter, the "Union"), was Appellants' "legally authorized representative" for purposes of BIPA; and (b) whether Southwest complied with BIPA "in light of the scope of its management rights." The

District Court's opinion should be reversed for two independent reasons, each of which demonstrates that Appellants' claims do not require the Court to interpret the CBAs.

First, as a matter of Illinois law, the Union cannot be a "legally authorized representative" under BIPA on the record here. The plain language of the BIPA, Illinois Supreme Court precedent interpreting BIPA, and Illinois statutes using the term "legally authorized representative" uniformly demonstrate that a legally authorized representative is one who, at the very least, is expressly authorized to perform a particular function, typically a power of attorney, legal guardian, or a similarly authorized representative. Southwest did not submit a shred of proof of such authorization here (because there is none). Because the Union is not a "legally authorized representative" under BIPA, the District Court erred when it found that it needed to interpret the CBA to determine whether the Union was in fact such a representative.

Second, even if the Union was Appellants' "legally authorized representative" for purposes of BIPA, Southwest submitted no evidence that it provided the statutorily required written notice to, or that it obtained the statutorily required written consent from, the Union. Southwest merely claimed that, in 2005, it provided notice that it would use a "Kronos 4500" time clock and that the Union did not object. Such evidence is insufficient as a matter of law to conclude, as the District Court did, that the Court must interpret the CBAs to determine whether Southwest complied with BIPA given Southwest's "management rights." First, Southwest's alleged notice was given *in 2005*,

three years before BIPA had even been enacted into law, and therefore had nothing to do with BIPA (or with the information required to be disclosed under BIPA). Second, Southwest produced no evidence that such notice was given in writing as required under BIPA. *See* 740 ILCS 14/15. Third, when it notes merely that the Union "did not object or seek an amendment" to the CBA in response (ECF No. 28-3 ¶ 10), Southwest conceded that it did not obtain written consent under BIPA to collect biometrics. In short, Southwest provided no evidence whatsoever of BIPA-compliant notice to, or BIPA-compliant consent from, anyone—be it the Union or otherwise. As such, interpretation of the CBAs is not required to resolve Appellants' BIPA claim. The District Court erred when it found otherwise.

The CBA clauses referenced by the District Court in dismissing Appellants' claims—namely, clauses making the Union the "sole and exclusive bargaining agent" for employees and giving Southwest the right to "manage and direct the work force"—are commonplace in collective bargaining agreements. Therefore, at bottom, the Seventh Circuit must decide here what rights baggage handlers and ramp agents relinquish when they take a union job. On this record, there is no sincere argument that they relinquished state law privacy rights vis-à-vis a collective bargaining agreement that does not even mention such rights. A contrary finding is a slippery slope, enabling CBA "management rights" clauses, untethered from vested state rights, to swallow those state rights. Just as the lower court's finding here, that goes too far.

For these reasons, the Seventh Circuit should reverse and remand.

STANDARD OF REVIEW

A district court's decision to dismiss a case for improper venue under Rule 12(b)(3) is reviewed *de novo*. *E.g.*, *Dr. Robert L. Meinders, D.C. v. UnitedHealthcare, Inc.*, 800 F.3d 853, 856 (7th Cir. 2015). The Seventh Circuit applies the "clearly erroneous" standard to any factual findings made by the district court in conjunction with such ruling. *Id.*

ARGUMENT

I. The District Court Erred in Ruling Appellants' BIPA Claim for Privacy Injury Presents a "Minor" Dispute under the RLA[3]

A. A Claim Presents a Minor Dispute Only When its Resolution is Dependent on Interpreting the CBA

Congress passed the RLA "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines v. Norris*, 512 U.S. 246, 252 (1994) (citing *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 562 (1987)). "To realize this goal, the RLA establishes a mandatory arbitral mechanism for the 'prompt and orderly settlement' of two classes of disputes, characterized as 'major' and 'minor' disputes." *Norris*, 512 U.S. at 252 (quoting 45 U.S.C. § 151a).

[3] Again, Appellants challenge both the District Court's ruling dismissing their BIPA claim for privacy injury in the Amended Complaint (ECF No. 44) as well as the District Court's ruling denying leave to file their Second Amended Complaint (ECF No. 51). As the rationale for both RLA rulings is similar, Appellants have argued against such rulings together in a single argument.

Major disputes are those "concerning rates of pay, rules, or working conditions[;]" they relate to "the formation of collective bargaining agreements or efforts to secure them." *Norris*, 512 U.S. at 252-53 (internal quotations, citations and alterations omitted). Minor disputes, on the other hand, "grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions[;]" they involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Id.* (internal quotations and citations omitted). Thus, "major disputes seek to create contractual rights, minor disputes to enforce them." *Id.*

However, the RLA does not preempt all claims brought by union employees against their employer. Indeed, "causes of action to enforce rights that are independent of the CBA" are not preempted under the RLA. *Id.* at 256. With respect to minor disputes in particular, it is only when a claim is "dependent on the interpretation of a CBA" that such a claim is preempted as a minor dispute. *Id.* at 262-63; *see also Carlson v. CSX Transp., Inc.*, 758 F. 3d 819, 832 (7th Cir. 2014) (noting that "a claim is independent [of a collective bargaining agreement and thus not preempted] if it cannot be 'conclusively resolved' by interpreting the collective bargaining agreement") (citations and internal quotations omitted); *Rabe v. United Air Lines*, 636 F.3d 866, 873 (7th Cir. 2011) (explaining that a claim is "preempted [as a minor dispute] only when it asserts rights or obligations arising under a collective bargaining agreement or when its resolution is substantially dependent on the terms of the collective bargaining agreement"); *Markham v. Wertin*, 861 F.3d 748, 757

(8th Cir. 2017) (finding claim not preempted because it was not "substantially dependent" on a CBA, even though "the claim may require a court to refer to or consult the CBA and related standards").

"Substantial dependence on a CBA is an inexact concept, turning on the specific facts of each case[.]" *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001). As the Ninth Circuit has explained:

> The plaintiff's claim is the touchstone for [the substantial dependence] analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim. If the claim is plainly based on state law . . . preemption is not mandated simply because the defendant refers to the CBA in mounting a defense.
>
> Moreover, alleging a hypothetical connection between the claim and the terms of the CBA is not enough to preempt the claim: adjudication of the claim must require interpretation of a provision of the CBA. A creative linkage between the subject matter of the claim and the wording of a CBA provision is insufficient; rather, the proffered interpretation argument must reach a reasonable level of credibility. The argument does not become credible simply because the court may have to consult the CBA to evaluate it; looking to the CBA merely to discern that none of its terms is reasonably in dispute does not require preemption.

Cramer, 255 F.3d at 691-692 (addressing preemption in analogous context of Labor Management Relations Act ("LMRA")) (internal citations and alterations omitted). Indeed, the Seventh Circuit has emphasized that "a claim is not barred simply because the action challenged by the plaintiff is arguably justified by the CBA." *Carlson*, 758 F. 3d at 833. "An employer cannot ensure the preclusion of a plaintiff's claim merely by

asserting certain CBA-based defenses to what is essentially a non-CBA-based claim. And the fact that a collective bargaining agreement might be consulted in resolving a plaintiff's claims is insufficient to trigger RLA preclusion. Claims are not precluded just because certain provisions of the CBA must be examined and weighed as a relevant but non-dispositive factor in deciding a claim or defense." *Id.* (internal quotations and citations omitted); *see also Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 584 (7th Cir. 1999) (explaining that "not all cases which tangentially touch collective bargaining agreements call for preemption."); *Saridakis v. United Airlines*, 166 F.3d 1272, 1277 (9th Cir. 1999) (rejecting airline's attempt characterize ADA and FEHA claims based on employee termination as minor dispute based on airline's defense that it had CBA-based, contractual right to terminate employee).

The Third Circuit Court of Appeals decision in *Kline v. Security Guards, Inc.* is particularly instructive for assessing whether a CBA preempts state law privacy claims. In *Kline*, the plaintiffs sued their employer for invasion of privacy as a result of their employer surreptitiously monitoring and recording them in the workplace. 386 F. 3d 246, 249-50 (3d Cir. 2004). The Third Circuit ruled that the plaintiffs' claims for invasion of privacy against their employer were not preempted under the LMRA because, even though the plaintiffs' "state claims related to conduct that Defendant engaged in at . . . the workplace, those claims. . . are nonetheless grounded in substantive rights granted under state law." *Id.* at 256. In so finding, the Third Circuit further emphasized that "the

CBA itself makes no mention of the use of video cameras, microphones or surveillance of any kind." *Id.* Furthermore, it rejected the employer's invocation of the governing CBA's management rights clause in an attempt to preempt the claim, finding that such clause did not need to be interpreted to resolve plaintiffs' privacy claims. *Id.*

In sum, in order to preclude a claim as a minor dispute under the RLA, a defendant must demonstrate with a reasonable degree of credibility that the resolution of plaintiff's claims is dependent on interpreting the CBA. Southwest failed to do so here in the lower court, and the District Court erred when it found otherwise.

B. Appellants' BIPA Claims are not Dependent on Interpreting the CBA

The District Court's rulings that Appellants' BIPA claim for privacy injury requires interpretation of the CBAs to resolve Appellants' claims was erroneous as a matter of law. (*See* A-11-12, A-19-20.) As an initial matter, the District Court applied the incorrect legal standard to the issue when it found that Defendant need only meet the "low burden of articulating an argument that is neither insubstantial or frivolous nor made in bad faith, showing that resolution of Plaintiffs' BIPA claim requires interpretation or application of the governing CBAs." (A-20.) That standard applies only where the parties agree, or the court has already found, that a dispute is subject to the RLA and the only remaining question is whether the dispute is major versus minor. *See Norris*, 512 U.S. at 265-66; *Saridakis*, 166 F.3d at 1277. That standard "sa[ys] nothing about the threshold question [here] whether the dispute [i]s subject to the RLA in the first place." *Norris*, 512 U.S. at

266. Instead, as discussed above, "the proffered interpretation argument must reach a reasonable level of credibility." *Cramer*, 255 F.3d at 692; *see also Kline*, 386 F.3d at 256 (quoting same).

Southwest failed to satisfy that standard in the lower court, and the District Court erred for two independent reasons when it found otherwise. First, the District Court's ruling incorrectly assumed that, on the record here, the Union could be Appellants' "legally authorized representative" under BIPA as a matter of Illinois law. The Union could not fulfill that role under BIPA. Therefore, Appellants' BIPA claim is not dependent on interpretation of the CBAs.

Second, even if the Union could be Appellants' legally authorized representative under BIPA, Southwest submitted no evidence that it provided written notice to, or obtained written consent from, the Union. Without such proof, it is irrelevant whether the Union could receive notice and obtain consent on Appellants' behalf. As such, for this reason as well, the CBAs need not be interpreted to resolve Appellants' BIPA claims.

1. The Union is not a "Legally Authorized Representative" under BIPA

Southwest submitted no proof that it provided written notice to, or obtained written consent from, Appellants individually. Southwest's sole "proof" of notice and consent consisted of its employee's averment that in 2005, Southwest notified the Union that it would use "Kronos 4500" time clocks and the Union did not object. (ECF No. 28-3 ¶ 10.) Absent proof of individualized notice and consent, the District Court's decision

that Appellants' BIPA claim presented a minor dispute was premised upon the legal conclusion that the Union could be Plaintiffs' "legally authorized representative" for purposes of BIPA. (A19-A20.) The District Court assumed as much without any discussion of the matter. This assumption is incorrect as a matter of law.

BIPA does not define "legally authorized representative." *See* 740 ILCS 14/10. Furthermore, no judicial decision has addressed the meaning of the term under BIPA. However, the Union could not be Plaintiffs' "legally authorized representative" for purposes of BIPA on the record here, which includes no evidence that Union members expressly authorized the Union to act for them under BIPA. The plain language of BIPA, Illinois Supreme Court precedent, and Illinois statutes similarly employing the term "legally authorized representative" demonstrate that, at the very least, proof of such authorization would be required before persons relinquish personal privacy rights vested by state law.

The plain language of BIPA dictates that a collective bargaining agent is not a "legally authorized representative" under the Act. "When construing a statute, [the court's] primary objective is to ascertain and give effect to the legislature's intent. The intent is best determined from the plain an ordinary meaning of the language used in the statute." *Rosenbach*, 2019 IL 123186, ¶ 24 . BIPA was enacted to protect personal privacy. The statute expressly emphasizes the personal, unique nature of biometric information. As codified by the Illinois General Assembly, "biometrics are unlike other unique

identifiers that are used to access finances or other sensitive information;" they are "biologically unique to each individual and cannot be changed, and therefore, once compromised, such individual has no recourse[.]" 740 ILCS 14/5.

It is within the context of that statutory purpose of protecting personal, unique biometric information that the Illinois legislature prohibits a private entity from collecting, using, storing, and disseminating biometrics without first providing written notice and obtaining written consent from "the subject [of the biometric information] or the subject's legally authorized representative." 740 ILCS 14/15(a), (d). Such context is essential to determining the meaning of a legally authorized representative. *See Rosenbach*, 2019 IL 123186, ¶ 28 ("The same word may mean one thing in one statute and something different in another, dependent upon the connection in which the word is used, the object or purpose of the statute, and the consequences which probably will result from the proposed construction.") (citing *People v. Ligon*, 2016 IL 118023, ¶ 26) (additional citations and internal quotations omitted). The Illinois legislature intended to provide persons—citizens, customers and, as here, employees—an informed choice when relinquishing a degree of control over their biometrics. 740 ILCS 14/15. Accordingly, "legally authorized representative" in this context must be interpreted narrowly to include those expressly authorized by the subject of biometric information to obtain written notice and provide written consent under BIPA on Appellants' behalf.

The Illinois Supreme Court recently affirmed as much, when it discussed at length the personal nature of the privacy right under BIPA. *See Rosenbach*, 2019 IL 123186. In *Rosenbach*, the Illinois Supreme Court held that a violation of the written notice and consent provisions of BIPA, in and of itself and without more, renders a party "aggrieved" under BIPA with the right to sue for and recover statutory damages. *Id.* at ¶ 33. The Court's rationale emphasized the individual state right to privacy vested by BIPA, explaining that the Act "codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information." *Id.* The Court flatly rejected characterization of notice and consent violations as merely "technical," explaining that:

> Such a characterization . . . misapprehends the nature of the harm our legislature is attempting to combat through this legislation. The Act vests in individuals . . . the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent. *Patel*, 290 F. Supp. 3d at 953. 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." *Id.* at 954. When a private entity fails to adhere to the statutory procedures . . . "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." *Id.* This is no mere "technicality." The injury is real and significant.

Rosenbach, 2019 IL 123186, ¶ 34 (alterations in original). Accordingly, the Illinois Supreme Court has left no doubt regarding the importance of the individual privacy rights at stake. It would be inconsistent with the Illinois Supreme Court's interpretation of the statute to

find that an employee may relinquish vested statutory privacy rights merely by joining a union. *See Knoblauch v. DEF Exp. Corp.*, 86 F.3d 684, 687 (7th Cir. 1996) ("In deciding a question of state law before us on diversity jurisdiction, we must use our own best judgment to estimate how the state's Supreme Court would rule as to its law.") (alterations omitted); *see also Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1405 (7th Cir. 1994) ("Where areas of state law are not developed, we will resort to other persuasive authority in an attempt to determine what the Illinois Supreme Court would hold.") (citations omitted).

Other Illinois statutes which use the term "legally authorized representative" address areas of extreme personal privacy. This indicates that such a legally authorized representative is someone who is expressly authorized by the subject of the private information. *See* AIDS Confidentiality Act, 410 ILCS 305/9.5 (requiring healthcare providers to notify "the subject or the subject's legally authorized representative" of a positive HIV test result); HIV/AIDS Registry Act, 410 ILCS 310/7 (requiring the Illinois Department of Public Health to "first obtain authorization from the patient or the patient's legally authorized representative" before requesting additional medical information about that patient by name); Genetic Information Privacy Act, 410 ILCS 513/30 (permitting disclosure of a person's genetic test results only to the "subject of the test or the subject's legally authorized representative"); Nursing Home Grant Assistance Act, 305 ILCS 40/30 (requiring Nursing Home Grant Assistance payment for person who

dies prior to date of payment to be made to the person's "legally authorized representative" or returned to the issuing governmental department); Emergency Medical Services (EMS) Systems Act, 210 ILCS 50/3.125 (requiring consent of "patient or his or her legally authorized representative" before patient's medical records are made public); 735 ILCS 5/8-2001 (permitting release of medical records only to patient, patient's "legally authorized representative," or to "person, entity, or organization presenting a valid authorization for the release of records signed by the patient or the patient's legally authorized representative"); *see also* Abused & Neglected Child Reporting Act, 325 ILCS 5/5 (expressly identifying the "legally authorized representative" capable of consenting to an HIV test or obtaining and disclosing information concerning such test pursuant to the AIDS Confidentiality Act). Like BIPA, none of these statutes define "legally authorized representative." However, the context within which the term is used demonstrates that an appropriate representative is one expressly authorized by the subject in writing—personal representatives like parents, legal guardians, powers of attorney, administrators, executors, or the like.

Contrary to the clear dictates of Illinois law, the District Court assumed that the Union was Plaintiffs' legally authorized representative under BIPA, apparently based on language in the CBAs identifying the Union as Plaintiffs' "sole and exclusive bargaining agent." (A11, A19-A20.) Such an assumption eviscerates the plainly stated privacy guarantees in BIPA. Indeed, it assumes, without a shred of legal or evidentiary support,

that an entity representing an ever-changing body of hundreds, if not thousands, of employees might have authorization to relinquish individual privacy rights implied in its role as "bargaining agent" for those employees. (A-11, A-19.) This is antithetical to the plain language of BIPA, Illinois Supreme Court precedent, and the protections intended by mandating the consent of a legally authorized representative. In fact, the CBAs here contain no reference to BIPA, let alone Appellants' (or any employees') express authorization for the Union to act as their legally authorized representative for purposes of BIPA. (*See* ECF No. 28-3, Exs. A, B & C.) Moreover, it is nonsensical to read such legal authorization in language regarding the Union's "bargaining" power: BIPA is a state statutory right "vest[ed]" in Appellants per the Illinois Supreme Court. *Rosenbach*, 2019 IL 123186, ¶ 34. As such, it need not be bargained-for.

In short, the Union could not be Plaintiffs' "legally authorized representative" for purposes of BIPA as a matter of Illinois law. Therefore, Plaintiffs' claims do not require interpreting the CBA, and the District Court's decision should be reversed.

2. In Any Event, Southwest Submitted No Evidence That Statutorily Required Written Notice was Given to or Written Consent was Obtained from the Union

Southwest submitted no evidence that it provided written notice to, or obtained written consent from, the Union relating to BIPA. Nonetheless, the District Court found that "it cannot be determined whether Defendant collected or captured Plaintiffs' biometric identifiers without informing them or their legally authorized representative

in writing that the information was being collected and stored without first assessing whether [the Union] had the right or responsibility to accept notice and consent on Plaintiffs' behalf[.]" (A-19-A20 (citing *Brown*, 254 F.3d at 658).) However, without proof of written notice or written consent, as here, it is not necessary for the Court to determine whether the Union is Plaintiffs' legally authorized representative. Such a determination would not matter because Southwest would still have omitted notice and failed to obtain consent as required under BIPA. *See, e.g.*, *Norris*, 512 U.S. at 262 (holding that claim not preempted as minor dispute where it can be resolved without interpreting the CBA). Absent such proof, Appellants' state law privacy claims, independent of the CBAs, should be permitted to proceed. *See Carlson*, 758 F. 3d at 833 (ruling that plaintiff's Title VII discrimination and retaliation claims were independent of CBA despite defense that employer's decisions were appropriate under the CBA).

Unable to provide proof of notice or consent, Southwest submitted the naked averment of one of its employees that, in 2005, it notified the Union that it would use a Kronos 4500 time clock and the Union did not object or seek an amendment to the CBA. (ECF No. 28-3 ¶ 10.). But a review of that averment shows that it is a red herring, carefully worded to hint at notice and consent but having nothing to do with BIPA or statutory compliance. As an initial matter, the "notice" was provided *in 2005* — three years before BIPA was even enacted into law. Accordingly, it is clear that such notice had nothing to do with BIPA. Moreover, two of the Appellants did not even begin working for

Southwest until 2007 and 2009, respectively. (ECF No. 22 (FAC) ¶¶ 6-8; ECF No. 46-2 (SAC) ¶¶ 6-8.) Accordingly, the District Court's decision presumes that the Union could consent to the release of biometric information on those Appellants' behalf before they even began working for Southwest. That assumption is improper.

Second, Southwest glaringly omits whether such "notice" was in writing and omits any document evidencing such "notice." (*See* ECF No. 28-3 ¶ 10.) This further underscores the fact that the notice had nothing to do with BIPA and, equally important, was not BIPA-compliant given that it was not in writing. *See* 740 ILCS 14/15(b), (d). Finally, the averment establishes that Southwest did not receive signed consent from the Union for collecting, storing, using, and disseminating employees' biometric information as it merely avers that Southwest "did not object" or "seek an amendment" to the CBAs. (*See* ECF No. 28-3 ¶ 10.) As an airline "may [not] lie its way to arbitration," *Brotherhood of Locomotive Engineers & Trainmen v. Union Pacific R.R. Co.*, 879 F.3d 754, 758 (7th Cir. 2017), the threadbare evidence submitted by Southwest here was insufficient to trigger any presumption that interpretation of the CBAs was required to resolve Appellants' claims. *See, e.g.*, *Cramer*, 255 F.3d at 692 (explaining that "the proffered interpretation argument must reach a reasonable level of credibility").

Additionally, despite no evidence of written notice or consent, the District Court found that determining whether Southwest complied with BIPA "in light of" its "right to manage and direct the work force" requires "consideration or interpretation of the

CBAs." (A12, A20.) As an initial matter, a Court's "consideration" of a CBA—as the District Court characterized the possibility—is insufficient to trigger a minor dispute. *E.g.*., *Carlson*, 758 F. 3d at 833 (explaining that the fact that a CBA "might be consulted in resolving a plaintiff's claims is insufficient to trigger RLA preclusion"). More squarely, given the absence of any proof of written notice or written consent pertaining to BIPA, the District Court necessarily found here that Southwest's management rights might exempt it from complying with BIPA. But that conclusion is also incorrect as a matter of law. Southwest did not even claim to be exempted from BIPA's requirements in the lower court. (*See* ECF Nos. 15 & 28.) Moreover, any such claim would be deficient here given that the CBAs do not contain any reference to Appellants' BIPA rights, let alone the "clear and unmistakable" language waiving those rights required for the Court to even consider whether such waiver should be given effect. *See Cramer*, 255 F.3d at 692 ("Where a party defends a state cause of action on the ground that the plaintiff's union has bargained away the state law right at issue, the CBA must include 'clear and unmistakable' language waiving the covered employees' state right 'for a court even to consider whether it could be given effect.'") (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994)); *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-12 (1985) (explaining that "the parties to a collective bargaining agreement [do not] have the ability to contract for what is illegal under state law"). Accordingly, the District Court's conclusion that Appellants' BIPA claims require interpretation of the management rights provision on this basis is also

incorrect as a matter of law. For these reasons, the Seventh Circuit should reverse the lower court's decision.

CONCLUSION

For the above reasons, the decision of the District Court should be reversed.

Date: March 5, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32, because this document contains 7,376 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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Dated: March 5, 2019

/s/ Steven A. Hart
Steven A. Hart
One of the Attorneys for Appellants

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

/s/ Steven A. Hart
Steven A. Hart

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2019, the Brief and Short Appendix of Appellants was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Steven A. Hart
Steven A. Hart

APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JENNIFER MILLER, SCOTT POOLE, and KEVIN ENGLUND,	)	
Plaintiffs,	)	
v.	)	18 C 86
	)	Hon. Marvin E. Aspen
SOUTHWEST AIRLINES CO.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Plaintiffs Jennifer Miller, Scott Poole, and Kevin Englund filed this lawsuit against Defendant Southwest Airlines Co. on behalf of themselves and a putative class of similarly situated individuals. Plaintiffs assert a claim for violations of the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1, *et seq.*, as well as various common law claims. (Am. Compl. (Dkt. No. 22).) Presently before us is Defendant's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(3) and 12(b)(6). (Dkt. No. 27.) For the reasons set forth below, we grant Defendant's motion to dismiss for improper venue pursuant to Rule 12(b)(3).

BACKGROUND

Plaintiffs have worked as ramp agents and operations agents for Defendant at Chicago Midway International Airport ("Midway") since at least 2005. (Am. Compl. ¶¶ 6–9.) All ramp and operations agents at Midway are represented for purposes of collective bargaining by the Transportation Workers Union of America, AFL-CIO Local 555 ("TWU 555"). (Jordan Decl. (Dkt. No. 28–1) ¶ 6.) Defendant and TWU 555 have entered into successive collective bargaining agreements ("CBAs") during the period of Plaintiffs' employment. (*Id.* ¶ 7.)

In 2006, Defendant implemented a biometric timekeeping system at Midway. (*Id.* ¶ 9; Am. Compl. ¶ 26.) The timekeeping system requires employees to scan their fingers to sign in and out of work every day and "captures, collects, stores, and uses" the finger scans "to identify [employees] in the future for timekeeping and payroll purposes." (Am. Compl. ¶ 26.) Plaintiffs allege Defendant (1) did not provide notice to employees regarding the biometric timekeeping program; (2) did not obtain written informed consent from the employees who are required to use the biometric timekeeping program; and (3) failed to publish data retention and deletion policies for its employees. (*Id.* ¶¶ 29, 55–56.) Plaintiffs further allege that "[t]o the extent Defendant utilizes out of state vendors to operate its biometrics program" in conformance with industry practice, Defendant failed to obtain consent for any transmission to third parties of Plaintiffs' biometric information. (*Id.* ¶ 57.) Likewise, Plaintiff asserts Defendant does not have a policy of informing workers as to how it uses their biometric information; whether the information is transmitted to third parties (and if so, which third parties); or what happens to the data when the worker's employment terminates, a facility closes, or if Defendant was to be acquired, sold, or file for bankruptcy. (*Id.* ¶ 59.)

Plaintiffs contend Defendant violated their substantive privacy rights under BIPA when it required them to scan their fingerprint, "a distinctive identifier [that] constitutes a biometric identifier and biometric information under BIPA." (*Id.* ¶¶ 28, 61–62.) They assert that the violations have resulted in monetary damages, because if they had received BIPA-compliant notice, they would not have agreed to work for Defendant without additional compensation. (*Id.* ¶ 60.) They further contend they have not been sufficiently compensated by Defendant for the capture, collection, storage, retention, and use of their biometric information. (*Id.*)

On November 27, 2017, Plaintiffs filed a class action lawsuit in the Circuit Court of Cook County, asserting a single claim for violation of their substantive privacy rights under BIPA. (Notice of Removal (Dkt. No. 1) ¶ 1.) Defendant removed the lawsuit to federal court on January 5, 2018 pursuant to 28 U.S.C. §§ 1331, 1332(a), 1332(d), 1441, and 1446, asserting federal subject matter jurisdiction existed based on diversity, the Class Action Fairness Act of 2005 ("CAFA"), and the Railway Labor Act, 45 U.S.C. § 181, *et seq.* ("RLA"). Plaintiffs filed an amended complaint on April 2, 2018, asserting class claims for: violation of BIPA (Count I); intrusion upon seclusion (Count II); conversion (Count III); negligence (Count IV); and fraud (Count V). (Am. Compl. ¶¶ 72–104.) In addition, Plaintiffs assert alternative class claims for breach of contract (Count VI) and breach of contract implied in law (Count VI). (*Id.* ¶¶ 105–114.) On behalf of the putative class, Plaintiffs seek an injunction requiring Defendant to destroy the class members' biometric data; to "cease all unlawful activity related to the capture, collection, storage, and use of their and other class member's biometrics"; statutory damages; costs; and reasonable attorneys' fees. (*Id.* ¶ 63.)

Defendant filed a motion to dismiss all counts in Plaintiffs' amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(3) and 12(b)(6) for improper venue and failure to state a claim. (Dkt. No. 27.) Defendant argues Plaintiffs' BIPA claim should be dismissed because Plaintiffs have not alleged an injury sufficient to make them "person[s] aggrieved" under BIPA. (Mem. in Support of Mot. to Dismiss ("Mem.") (Dkt. No. 28) at 6–12.) Defendant also contends Plaintiffs have failed to state a claim for any of their common law causes of action under Illinois law. (*Id.* at 15–25.) Additionally, Defendants argue all of Plaintiffs' claims are preempted by the RLA, and Plaintiffs' complaint must therefore be dismissed for improper venue. (*Id.* at 13–17, 19–20, 22, 25.)

ANALYSIS

I. ARTICLE III STANDING

Defendant argues Plaintiffs have not pled they are "aggrieved" under BIPA as they have not alleged any cognizable injury, and therefore, they are not entitled to a private right of action under the statute. (Mem. at 6–12.) The Illinois legislature passed BIPA in 2008 "in response to concerns about the growing use of biometric identifiers and information in financial transactions and security screening procedures." *Dixon v. Washington & Jane Smith Cmty.-Beverly*, No. 17 C 8033, 2018 WL 2445292, at *8 (N.D. Ill. May 31, 2018) (citing 740 ILCS 14/5). BIPA "regulat[es] the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information" and provides a private right of action to "[a]ny person aggrieved by a violation." *Aguilar v. Rexnord LLC*, No. 17 C 9019, 2018 WL 3239715, at *1 (N.D. Ill. July 3, 2018) (citing 740 ILCS 14/5(g); 740 ILCS 14/20).

Despite arguing Plaintiffs have not alleged an actual injury, as the party removing this action to federal court, Defendant predictably does not take the position that Plaintiffs have failed to meet the injury-in-fact requirement for Article III standing, a finding that would require remand to state court pursuant to 28 U.S.C. § 1447(c). (Reply (Dkt. No. 34) at 2.) *See Collier v. SP Plus Corp.*, 889 F.3d 894, 897 (7th Cir. 2018) (citing *McIntyre v. Fallahay*, 766 F.2d 1078, 1082 (7th Cir. 1985) (explaining "[i]f the case did not belong in federal court at all, it should be remanded rather than dismissed" under § 1447(c)); *Me. Ass'n of Interdependent Neighborhoods v. Comm'r, Me. Dep't of Human Res.*, 876 F.2d 1051, 1053–54 (1st Cir. 1989) (concluding § 1447(c) requires district court to remand, not dismiss, for lack of standing)). Similarly, Plaintiffs have not requested a remand to state court based on lack of standing, instead characterizing Defendant's no-injury argument as "a sham" and contending Plaintiffs have alleged a concrete injury sufficient to escape dismissal. (Resp. at 1.)

However, "[r]egardless of whether the defendant[] intended to cast doubt on [the plaintiffs'] Article III standing," as a court of limited jurisdiction, we must independently ensure we have subject matter jurisdiction, including that there is an actual case or controversy before us pursuant to Article III of the United States Constitution. *Dixon*, 2018 WL 2445292, at *8 (collecting cases examining whether a plaintiff is "aggrieved" under BIPA and also addressing standing issues); *see also Aguilar*, 2018 WL 3239715, at *2 (concluding the court has "an independent obligation to ensure subject-matter jurisdiction exists, even if no party raises the issue, and standing is an important component of subject-matter jurisdiction" (citing *United States v. $304,980.00 in U.S. Currency*, 732 F.3d 812, 817 (7th Cir. 2013)). Accordingly, we first address whether Plaintiffs have standing such that we have jurisdiction over their claims. *Collier*, 889 F.3d at 896.

As the party invoking federal jurisdiction, Defendant bears the burden of establishing federal jurisdiction existed at the time of removal. *Id.* (citing *Lujan v. Def. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136 (1992)); *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 352 (7th Cir. 2017) ("As the party seeking removal, [the defendant] bears the burden of establishing federal jurisdiction."). Plaintiffs have Article III standing to sue if they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136). A "bare procedural violation, divorced from any concrete harm" does not satisfy the injury-in-fact requirement of Article III.

Id. at 1549; *see also Collier*, 889 F.3d at 896 (stating the plaintiff must have "suffered an injury beyond a statutory violation").

A violation of BIPA's notice and consent provisions does not create a concrete risk of harm to a plaintiff's right of privacy in his or her biometric data unless the information is collected or disseminated without the plaintiff's knowledge or consent. *See Aguilar*, 2018 WL 3239715, at *3 ("A person's privacy may be invaded if her biometric information is obtained or disclosed without her consent or knowledge."). Thus, disclosure to a third party of information in which a person has a right of privacy constitutes "a sufficiently concrete injury for standing purposes" where the information is disclosed without the person's knowledge or consent. *Dixon*, 2018 WL 2445292, at *10 (concluding that the "alleged violation of the right to privacy in and control over one's biometric data, despite being an intangible injury, is sufficiently concrete to constitute an injury in fact that supports Article III standing" where plaintiff alleged defendant disclosed her fingerprint scan to a third party without informing her or obtaining consent); *cf. Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017) (finding a technical statutory violation insufficient to satisfy Article III standing in the absence of any allegation that defendant "has ever given away or leaked or lost any of his personal information or intends to give it away or is at risk of having the information stolen from it"); *Goings v. UGN, Inc.*, No. 17 C 9340, 2018 WL 2966970, at *4 (N.D. Ill. June 13, 2018) (granting motion to dismiss for lack of Article III standing, finding the alleged violation of BIPA notice and consent provisions insufficient to support federal jurisdiction absent allegations that defendants disclosed, purposefully or unwittingly, the information to any other entity without his consent); *Howe v. Speedway*, No. 17 C 7303, 2018 WL 2445541 (N.D. Ill. May 31, 2018)

(same); *McCollough v. Smarte Carte, Inc.*, No. 16 C 3777, 2016 WL 4077108, at *3–4 (N.D. Ill. Aug. 1, 2016) (same).

Here, Plaintiffs have alleged violations of BIPA's notice and consent provisions, but they have also alleged that Defendant disseminated their biometrics to unknown third parties, "such as payroll vendors or timekeeping vendors, without knowledge or consent." (Am. Compl. ¶¶ 57, 84, 92, 96, 99–102, 108.) We find that like *Dixon*, even if Plaintiffs voluntarily scanned their fingerprints to the biometric time clock Defendant required them to use, they still have alleged a concrete injury because there is no indication on the face of the complaint that they knew about or consented to the disclosure of their fingerprint scans to third parties. *Dixon*, 2018 WL 2445292, at *10. Because the alleged violation of Plaintiffs' right to privacy in their biometric data is a sufficiently concrete injury for Article III standing, we are satisfied have subject matter jurisdiction over this case and need not remand it to state court. *Id.*

II. RULE 12(B)(3) MOTION TO DISMISS FOR IMPROPER VENUE

Defendant also argues Plaintiffs' claims should be dismissed for lack of proper venue under Federal Rule of Civil Procedure 12(b)(3). (Mem. at 1–2, 13–14.) Defendants contend Plaintiffs' claims are subject to mandatory arbitration or collective bargaining negotiations under the relevant CBAs and the RLA, and therefore, this Court is an improper venue. (*Id.*) Because we agree the RLA preempts Plaintiffs' claims, we grant Defendant's motion to dismiss on this basis.

A. Legal Standard

Rule 12(b)(3) permits dismissal for improper venue. Fed. R. Civ. P. 12(b)(3). A motion to dismiss "based on a contractual arbitration clause is appropriately 'conceptualized as an objection to venue, and hence properly raised under Rule 12(b)(3).'" *Faulkenberg v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 807 (7th Cir. 2011) (quoting *Auto. Mechs. Local 701*

Welfare & Pension Funds v. Vanguard Car Rental USA, Inc., 502 F.3d 740, 746 (7th Cir. 2007)); *Everette v. Union Pac. R.R.*, No. 04 C 5428, 2006 WL 2587927, at *3 (N.D. Ill. Sept. 5, 2006) ("Where parties to a contract have agreed to arbitrate disputes arising from that contract, dismissal pursuant to Rule 12(b)(3) is appropriate."). "On a motion to dismiss for improper venue under Rule 12(b)(3), the plaintiff bears the burden of establishing that the venue it has chosen is proper." *Rotec Indus., Inc. v. Aecon Grp., Inc.*, 436 F. Supp. 2d 931, 933 (N.D. Ill. 2006). In determining whether venue is proper, a court is "not obligated to limit its consideration to the pleadings nor to convert the motion to one for summary judgment." *Cont'l Cas. Co. v. Am. Nat. Ins. Co.*, 417 F.3d 727, 733 (7th Cir. 2005); *see also Nagel v. ADM Investor Servs.*, 995 F. Supp. 837, 843 (N.D. Ill. 1998) (stating a court may examine facts outside the complaint in ruling on a motion to dismiss under Rule 12(b)(3)). In evaluating a motion to dismiss for improper venue, we view the allegations in the complaint in the light most favorable to the plaintiff and accept all well-pleaded facts as true, unless they are contradicted by the defendant's affidavits. *Nagel*, 995 F. Supp. at 843.; *Rotec*, 436 F. Supp. 2d at 933.

B. RLA Preemption

The RLA governs collective bargaining agreements in the railroad and airline industries. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 248, 114 S. Ct. 2239, 2241 (1994); *see also Tice v. Am. Airlines, Inc.*, 288 F.3d 313, 314 (7th Cir. 2002). "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines*, 512 U.S. at 252, 114 S. Ct. at 2243. The RLA "is designed to substitute bargaining, mediation, and arbitration for strikes"; therefore, "[e]mbedded in the Act is a strong preference for arbitration, as opposed to judicial resolution of

disputes." *Bhd. of Locomotive Eng'rs & Trainmen (Gen. Comm. of Adjustment, Cent. Region) v. Union Pac. R.R. Co.*, 879 F.3d 754, 755 (7th Cir. 2017).

Pursuant to this goal, the RLA establishes "a mandatory arbitral mechanism for 'the prompt and orderly settlement'" of two classes of disputes: major and minor disputes. *Hawaiian Airlines*, 512 U.S. at 252, 114 S. Ct. at 2243–44 (quoting 45 U.S.C. § 151a). Major disputes arise over the formation or amendment of a collective bargaining agreement and concern rates of pay, rules, or working conditions. *Id.*; *Bhd. of Locomotive Eng'rs*, 879 F.3d at 755–56. Minor disputes "grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." *Hawaiian Airlines*, 512 U.S. at 252–53, 114 S. Ct. at 2244 (citation and alteration omitted). "The key difference is that major disputes relate to disagreement over the creation of new contractual rights, while minor disputes concern the enforcement of existing ones." *Ill. Cent. R.R. Co. v. Bhd. of Maint. of Way Emps., Div. of Int'l Bhd. of Teamsters*, 79 F. Supp. 3d 846, 850 (N.D. Ill. 2015) (explaining that if the parties' disagreement may be conclusively resolved by interpreting the existing agreement, it is a minor dispute). Minor disputes must be submitted to binding arbitration and major disputes "are settled through the lengthy bargaining process outlined by the RLA, after which, if no agreement has been reached, 'the parties may resort to the use of economic force.'" *Id.* (quoting *Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 303, 109 S. Ct. 2477, 2480 (1989)); *see also Brown v. Ill. Cent. R.R. Co.*, 254 F.3d 654, 658 (7th Cir. 2001) ("All minor disputes must be adjudicated under RLA mechanisms, which include an employer's internal dispute-resolution procedures and an adjustment board established by the unions and the employer." (quotations omitted)).

Defendant contends the CBAs contain several provisions that are central to Plaintiffs' claims, and pursuant to the CBAs and the RLA, the claims must therefore be addressed exclusively through arbitration, or alternatively, collective bargaining. (Mem. at 3.) Defendant primarily argues that all of Plaintiffs' state-law claims constitute "minor" disputes as they are dependent on an interpretation of the CBAs governing Plaintiffs' conditions of employment. (*Id.* at 13, 15–16, 17–18, 19–20, 22, 24–25.) In the alternative, Defendant argues Plaintiffs' claims constitute "major" disputes under the RLA because they attempt to alter the working conditions governed by the CBAs—changes that can only be initiated and negotiated by the union. (*Id.* at 14.)

To succeed on its theory that Plaintiffs' claims raise "minor" disputes under the RLA and are therefore subject to mandatory and exclusive arbitration, Defendant may show that the resolution of Plaintiffs' claims requires interpretation of the CBAs. *Johnson v. United Air Lines, Inc.*, No. 17 C 8858, 2018 WL 3636556, at *2 (N.D. Ill. July 31, 2018) (citing *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 583 (7th Cir. 1999)). Here, we agree with Defendant that Plaintiffs' claims are minor disputes preempted by the RLA because the claims require interpretation of the CBAs negotiated by Defendant and TWU 555 governing Plaintiffs' terms of employment. *Johnson*, 2018 WL 3636556, at *2 (granting motion to dismiss and finding the RLA preempted BIPA claims related to airline's implementation and use of a biometric timekeeping system, finding "whether the use of fingerprint technology for timekeeping purposes violates BIPA inherently requires interpretation of the permissible scope of use within the CBA entered into" between the plaintiffs' union and the airline); *see also Brown*, 254 F.3d at 658 ("[E]ven if [plaintiff]'s claim is grounded upon rights which stem from some source other than the CBA (such as state law), the claim will be preempted if it cannot be

adjudicated without interpreting the CBA, or if it can be conclusively resolved by interpreting the CBA." (internal quotations omitted)).

First, with respect to their BIPA claim, Plaintiffs assert compensation-related injuries as a result of Defendant's implementation and use of the biometric timekeeping system, alleging that given the "invasive nature" of the finger scans and the risks associated with providing and storing biometric information, Defendant did not "sufficiently compensate[]" Plaintiffs for the "capture, collection, storage, retention, and/or use of their biometric information." (Am. Compl. ¶ 60.) Plaintiffs further allege they "would not have agreed to work for Defendant, at least not for the compensation they received, had they been informed pursuant to BIPA of the nature of Defendant's biometric timekeeping system." (*Id.*) Among the relief Plaintiffs seek is compensation for the commercial value of their biometric information. (*Id.* at PageID #:235.)

Because the CBAs govern the rates of pay, rules, and working conditions of Plaintiffs' employment, Plaintiffs' BIPA claim "requires interpretation of the CBA to determine whether [Defendant] has the authority to use a particular timekeeping system for employees." *Johnson*, 2018 WL 3636556, at *2. Specifically, the CBAs dictate employees' wage rules, rates of pay, and bonuses. (*See* CBA, Jordan Decl. Ex. A (Dkt. No. 28–1) at Art. 28.) Defendant and TWU 555 negotiated the wage scales applicable to Plaintiffs, as well as other pay provisions relating to premium pay. (Jordan Decl. (Dkt. No. 28–1) ¶ 8.) Additionally, under the terms of the CBAs, TWU 555 is the "sole and exclusive bargaining agent" for all of Defendant's United States-based ramp, operations, provisioning, and freight agents including Plaintiffs, and Defendant broadly retains the "right to manage and direct the work force" subject to the labor agreements. (*Id.*; *see also* CBA at Art. 2(A).) The CBAs further establish a grievance system and arbitration procedure to resolve disputes concerning the interpretation or application of the

agreements as required by the RLA. (CBA at Art. 20.) Plaintiffs' BIPA claim cannot be resolved without interpreting the wage provisions of the CBAs and the relevant bargaining history to determine whether the wages TWU 555 and Defendant negotiated were intended to compensate employees for all conditions of their employment, including use of the biometric timekeeping system. Likewise, Plaintiffs' challenge to Defendant's decision to implement the biometric timekeeping system requires an interpretation as to whether the decision falls within the scope of Defendant's right to "manage and direct the work force." *See Johnson*, 2018 WL 3636556, at *2.

Defendant similarly argues Counts II through VII for intrusion upon seclusion, conversion, negligence, fraud, and breach of contract must be dismissed pursuant to Rule 12(b)(3) because the claims also constitute minor disputes that are preempted by the RLA. (Mem. at 13–17, 19–20, 22, 25.) As with the BIPA claim, to decide each of Plaintiffs' common law claims, we need to interpret the scope of the union's authority as the "sole and exclusive bargaining agent" to consent to the implementation and use of timekeeping system on Plaintiffs' behalf. Such a determination necessarily requires an interpretation of the governing CBAs and consideration of the parties' bargaining history with respect to working conditions. Resolving Plaintiffs' claims also necessitates a determination as to whether Defendant's actions conformed to the rights and duties created under the CBAs and whether it acted within its authority under the negotiated terms of the CBAs in implementing the timekeeping system.

Moreover, the CBAs provide that covered employees "shall be governed by all reasonable Company rules and regulations previously or hereafter issued by proper authority of the Company which are not in conflict with the terms and conditions of this Agreement . . . ." (CBA at Art. 2(C).) Insofar as Defendant decided to implement the biometric timekeeping

system, resolution of Plaintiffs' claims requires determining whether such a decision is in conflict with the terms and conditions of the CBA, whether Defendant acted within its authority in doing so, and whether the decision was reasonable under the CBA. (*Id.*) Finally, Plaintiffs' challenge to the decision would also require interpretation of the CBAs' grievance process set forth in Article 22. *Johnson*, 2018 WL 3636556, at *2.

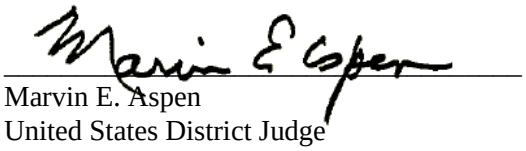
As the CBAs govern the rules and working conditions of Plaintiffs' employment, their state-law claims regarding the biometric timekeeping system all require interpretation of and reference to the CBAs' terms. *See, e.g.*, *Monroe v. Mo. Pac. R. Co.*, 115 F.3d 514, 519 (7th Cir. 1997) (finding claims for wrongful discharge were preempted by the RLA because they necessarily involved interpretation of the governing CBA); *Johnson*, 2018 WL 3636556, at *2. Accordingly, because Plaintiffs may not pursue their claims without interpreting the CBAs between Defendant and TWU 555, their claims are preempted by the RLA and must be submitted to the arbitral framework established under the RLA. *Hawaiian Airlines*, 512 U.S. at 261, 114 S. Ct. at 2248; *Johnson*, 2018 WL 3636556, at *2; *see also Bhd. of Locomotive Eng'rs*, 879 F.3d at 758 ("The burden on a railroad to convince the court that its changes are only an interpretation or application of an existing CBA is quite low. If the railroad 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." (quoting *Consolidated Rail*, 491 U.S. at 310, 109 S. Ct. at 2484)).

CONCLUSION

For the reasons set forth above, Defendant's motion to dismiss for improper venue under Rule 12(b)(3) is granted, and Plaintiffs' complaint is dismissed without prejudice. *Johnson v. W. & S. Life Ins. Co.*, 598 F. App'x 454, 456 (7th Cir. 2015) ("[A] dismissal for

improper venue is without prejudice because it is not an adjudication on the merits.");

Farmer v. Levenson, 79 F. App'x 918, 922 (7th Cir. 2003) ("[A] dismissal for improper venue should be without prejudice."). It is so ordered.



Marvin E. Aspen
United States District Judge

Dated: August 23, 2018
Chicago, Illinois

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Jennifer Miller, et al.,

Plaintiffs,

v.

Southwest Airlines Co.,

Defendant.

Case No. 18 C 86
Judge Marvin E. Aspen

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Case is dismissed.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Marvin E. Aspen on a motion to dismiss.

Date: 8/23/2018

Thomas G. Bruton, Clerk of Court

Amanda Scherer, Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JENNIFER MILLER, SCOTT POOLE, and KEVIN ENGLUND,	)	
Plaintiffs,	)	
v.	)	18 C 86
	)	Hon. Marvin E. Aspen
SOUTHWEST AIRLINES CO.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Presently before us is Plaintiffs Jennifer Miller, Scott Poole, and Kevin Englund's motion to alter judgment pursuant to Federal Rule of Civil Procedure 59(e) and for leave to file a second amended complaint pursuant to Rule 15(a)(2). (Mot. (Dkt. No. 46).) On September 13, 2018, we dismissed Plaintiffs' claims pursuant to Rule 12(b)(3) for improper venue and entered judgment. (Dkt. Nos. 44–45.) For the following reasons, we deny Plaintiffs' motion.

BACKGROUND

The relevant background as set forth in our September 13, 2018 Memorandum Opinion and Order dismissing the case remains the same and need not be restated here. (*See* Dkt. No. 44.) Plaintiffs, ramp agents and operations agents employed by Defendant at Chicago Midway International Airport, filed this action seeking to recover on behalf of themselves and a putative class of similarly situated individuals for alleged privacy violations after Defendant implemented a biometric timekeeping system at Midway. We dismissed Plaintiffs' amended complaint, which asserted class claims for violation of the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1, *et seq.*, as well as several common law

claims. (*Id.*) In granting Defendant's motion to dismiss pursuant to Rule 12(b)(3), we determined Plaintiffs' claims were preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 181, *et seq.*, requiring submission to the RLA's arbitral framework and rendering venue in federal court improper. Specifically, we found that Plaintiffs' BIPA and common law claims presented a "minor dispute" subject to mandatory arbitration under the RLA because resolution of the claims required reference to and interpretation of the collective bargaining agreements ("CBAs") governing Plaintiffs' employment with Defendant. *See Brown v. Ill. Cent. R.R. Co.*, 254 F.3d 654, 658 (7th Cir. 2001).

Plaintiffs now ask us to reopen the judgment to allow them to amend their complaint to vindicate "rights and obligations [under BIPA] that exist independent of a [collective bargaining agreement]," and which are therefore not preempted by the RLA. (Mot. at 1.) Plaintiffs argue that because we dismissed their amended complaint without prejudice under Rule 12(b)(3), judgment should not have been entered. (*Id.* at 4–5.) They further argue that leave to amend under Rule 15(a)(2) should be given here because their proposed second amended complaint, which includes a single claim under BIPA "for substantive Privacy Injury for Southwest's failure to comply with the notice and written consent provisions of BIPA," does not present a minor dispute under the RLA and is not preempted. (*Id.* at 5–6.) The proposed second amended complaint removes all common law counts and solely asserts a claim for relief under BIPA. (*See* Proposed 2d Am. Compl. (Dkt. No. 46–2) ¶¶ 71–80.)

LEGAL STANDARD

Rule 59(e) permits parties to file a motion to alter or amend the judgment within twenty-eight days of the entry of judgment. Fed. R. Civ. P. 59(e). A motion to alter or amend the judgment "will be successful only where the movant clearly establishes: '(1) that the court

committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment.'" *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 954 (7th Cir. 2013) (quoting *Blue v. Hartford Life & Accident Ins. Co.*, 698 F.3d 587, 598 (7th Cir. 2012)). "A 'manifest error' occurs when the district court commits a 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Burritt v. Ditlefsen*, 807 F.3d 239, 253 (7th Cir. 2015) (quoting *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)). Relief under Rule 59(e) is ordinarily an "extraordinary" remedy "reserved for the exceptional case." *Gonzalez-Koeneke v. West*, 791 F.3d 801, 807 (7th Cir. 2015). "However, once the requirements of [Rule 59(e)] have been met, a plaintiff does not lose the ability to amend a complaint under the liberal standard articulated in Rule 15 simply because the court entered judgment . . . ." *Id.* (citing *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 521 (7th Cir. 2015)). "A district court acts within its discretion in denying leave to amend, either by dismissing a complaint with prejudice or by denying a post-judgment motion, when the plaintiff fails to demonstrate how the proposed amendment would cure the deficiencies in the prior complaint." *Gonzalez-Koeneke*, 791 F.3d at 808.

ANALYSIS

Plaintiffs argue we erred in entering judgment without granting them leave to file a second amended complaint, and therefore, relief under Rule 59(e) is warranted. (Mot. at 4.) They further contend that leave to amend under Rule 15(a)(2) should be granted as their proposed amendment would not be futile. (*Id.* at 4–6.) Plaintiffs' second amended complaint asserts a single BIPA claim seeking to recover for alleged privacy injury caused by Defendant's failure to comply with the written notice and consent provisions of BIPA. (*Id.* at 5–6.) Plaintiffs emphasize that resolution of their amended BIPA claim does not require reference to or

interpretation of the CBAs and does not present a minor dispute under the RLA rendering venue improper because: (1) they are no longer asserting any alleged compensation injury in support of their BIPA claim, nor are they asserting any common law claims; and (2) they are not challenging Defendant's implementation or use of a biometric timekeeping system, but rather the lack of written notice and written consent prior to implementation. (*Id.* at 3–4.)

Even without the compensation injury allegations and the common law claims, Plaintiffs' proposed second amended complaint presents a minor dispute under the RLA that must be submitted to mandatory arbitration. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252–53, 114 S. Ct. 2239, 2244 (1994) (explaining "minor" disputes under the RLA "grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" (citation and alteration omitted)). Therefore, the amendment would not cure the deficiencies in the prior complaint and venue remains improper in this court. Plaintiffs contend the proposed complaint makes clear their claim centers on whether Defendant provided the necessary *individual* written notice and written consent in order to protect employees' "right to individually make an informed decision when electing to provide or withhold their most sensitive information and on what terms." (Proposed 2d Am. Compl. ¶ 22.) However, as we previously explained, Plaintiffs are represented by the Transportation Workers Union of America, AFL-CIO Local 555 ("TWU 555"), and the union acts as the "sole and exclusive bargaining agent" for all of Defendant's United States-based ramp, operations, provisioning, and freight agents, including Plaintiffs. (Jordan Decl. (Dkt. No. 28–1) ¶¶ 6, 8.) Thus, it cannot be determined whether Defendant collected or captured Plaintiffs' biometric identifiers without informing them or their legally authorized representative in writing that the information was being collected and stored without first assessing whether TWU 555 had the right or

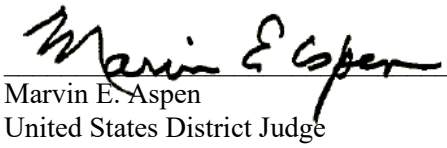
responsibility to accept notice and consent on Plaintiffs' behalf as their "sole and exclusive bargaining agent." *See Brown*, 254 F.3d at 658.

Likewise, TWU 555 broadly granted Defendant the "right to manage and direct the work force" subject to the specific terms of the CBAs. (CBA, Jordan Decl. Ex. A (Dkt. No. 28–1) at Art. 2(D).) Determining whether the union acted as Plaintiffs' "legally authorized representative" as that term is defined under BIPA and whether Defendant complied with BIPA in light of the scope of its management rights requires consideration or interpretation of the CBAs. Defendant has met its low burden of "articulat[ing] an argument that is 'neither obviously insubstantial or frivolous, nor made in bad faith,'" showing that resolution of Plaintiffs' BIPA claim requires interpretation or application of the governing CBAs. *Bhd. of Locomotive Eng'rs & Trainmen (Gen. Comm. of Adjustment, Cent. Region) v. Union Pac. R.R. Co.*, 879 F.3d 754, 758 (7th Cir. 2017) (quoting *Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 310, 109 S. Ct. 2477, 2484 (1989)). Because the interpretation of these provisions of the CBAs may bear on Plaintiffs' BIPA claim, we cannot resolve the parties' dispute in federal court. *See Grimes v. CSX Transp., Inc.*, 338 F. App'x 522, 524 (7th Cir. 2009) ("[T]he Railway Labor Act broadly encompasses all disagreements bearing on the labor agreement and precludes a district court from adjudicating even a dispute ostensibly based on an independent source of federal or state law if 'the interpretation of some provision(s)' of the labor agreement 'could be dispositive of the plaintiff's claim.'" (quoting *Brown*, 254 F.3d at 664)). Plaintiffs' amended claim cannot be decided without referring to or interpreting the CBAs between Defendant and TWU 555, and their proposed second amended complaint is therefore preempted by the RLA. Accordingly, we deny Plaintiffs leave to amend their complaint because venue in

this court remains improper. Plaintiffs' BIPA claim must be submitted to the arbitral framework established under the RLA.

CONCLUSION

For the reasons set forth above, Plaintiff's motion to alter the judgment and for leave to file a second amended complaint is denied. It is so ordered.



Marvin E. Aspen
United States District Judge

Dated: October 22, 2018
Chicago, Illinois