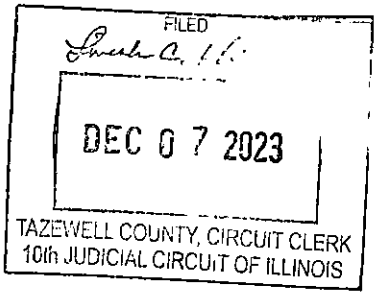
IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
TAZEWELL COUNTY, ILLINOIS

WILLIAM THOMPSON, on behalf of himself and all other persons similarly situated,	)	
Plaintiff,	)	Case No. 2020-CH-00132
v.	)	
MATCOR METAL FABRICATION (ILLINOIS) INC.,	)	
Defendant.	)	



OPINION AND ORDER

Plaintiff William Thompson represents a class of current and former employees ("Plaintiffs" or the "Class") of Defendant Matcor Metal Fabrication (Illinois) Inc. ("Matcor"). Plaintiffs claim Matcor violated the Illinois Biometric Information Privacy Act ("BIPA") by possessing, collecting, and disclosing their biometric data through its timekeeping system without complying with BIPA's notice and consent requirements. Both sides have moved for summary judgment, though Plaintiffs ask for summary judgment only on liability. Having considered the extensive record in this case, and having heard the arguments of counsel, the Court concludes that no genuine issues of material fact remain on liability. The Court will grant Plaintiff's motion and deny Matcor's motion.

I. BACKGROUND

A. The Illinois Biometric Information Privacy Act

The Illinois General Assembly ("General Assembly") enacted BIPA in 2008 to help regulate "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS § 14/5. "Biometric Identifiers" include information biologically unique to an individual, such as "fingerprint[s]." *Id.* § 14/10. "Biometric

Information" is "any information" that is "based on an individual's biometric identifier." *Id.*

The General Assembly articulated a reason to regulate the use of biometric data.[1] Biometrics are often used to access "finances or other sensitive information." *Id.* § 14/5. But they are "unlike other unique identifiers" used to access such information, such as passwords or identity cards. *Id.* An individual can change the password to their bank account if a hacker steals it. But one cannot change their fingerprints. This means that once a biometric identifier is "compromised," its owner "has no recourse" and "is at heightened risk for identity theft," among other things. *Id.*

Recognizing these risks, through BIPA, the General Assembly "codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information." *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 33, 129 N.E.3d 1197, 1206. Among other things, BIPA requires private entities that collect biometric data to first obtain written releases from the data subjects, obtain consent before transferring that data to third parties, and publish a written policy identifying when they will destroy the data they collect. 740 ILCS § 14/15.

B. Matcor's Collection and Use of Biometric Data

In June 2019, Matcor informed its employees in a PowerPoint presentation that they would soon be using "Biometric Scanners" for timekeeping purposes. Ex. 2, Plaintiff's Motion for Summary Judgment ("Mot." or "Motion") (Matcor Monthly Employee Communication Meeting PowerPoint (June 2019)). Roughly a month later, Matcor collected finger-scans from all its employees to prepare for its new timekeeping procedures. Deposition of William Thompson ("Thompson Dep.") at 11:15–16, 95:2–3 (Jan. 10, 2022).[2] Mr. Thompson testified in his

[1] Herein, the Court will occasionally refer to Biometric Identifiers and Biometric Information under umbrella terms, including "biometric data" and "biometrics."

[2] The deposition transcripts cited in this Memorandum Opinion and Order are available as exhibits to the

deposition that, in his case, this occurred when his shift supervisor, Adam Knoth, gathered Mr. Thompson and other employees at the front of Matcor's facility in Berkeley, Illinois. *Id.* Mr. Knoth directed the employees to scan their fingers in a machine. *Id.* at 49:16–19. After each employee scanned their fingers, Mr. Knoth wrote down their names. *Id.* Mr. Thompson testified that he did not have "any idea" of "what was happening" with the machine, nor did he know where the information it collected was going. *Id.* at 53:10–16.

Matcor's new timekeeping procedures became fully operational in September 2019. Ex. 3, Motion (Matcor Monthly Employee Communication Meeting PowerPoint (August 2019)). From then on, all employees had to sign in and out of work using ADP InTouch 9100s ("ADP 9100s"), which scanned their fingers to record their time. *Id.* ("All Matcor Employees should be clocking in and out on OSI & ADP time clocks."); Thompson Dep at 82:21–83:4; Deposition of Pritesh Patel ("Patel Dep.") at 14:3–4 (Oct. 12, 2021). The ADP 9100s were connected to the servers for Matcor's timekeeping vendor—ADP—and they sent finger-scan data to ADP every time an employee clocked in or out of work. Patel Dep. at 27:24–28:7. Matcor did not require Plaintiffs to sign anything before enrolling them in, or having them use, the ADP 9100s. Deposition of Stacey Kapparis ("Kapparis Dep.") at 72:19–22 (Sept. 22, 2021). Nor did Matcor publish a policy regarding how it would retain or destroy data collected by the ADP 9100s before implementing them in its timekeeping procedures. *Id.* at 84:22–85:1.

C. Procedural History and Matcor's BIPA Compliance Efforts

Mr. Thompson brought this action against Matcor on May 13, 2020.[3] A year later, in June 2021, Matcor first implemented procedures designed to comply with BIPA. *Id.* At that time, it

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parties' summary judgment briefing.

[3] Mr. Thompson originally sued in the Circuit Court of Cook County, and the case was later transferred to this Court.

distributed a "Biometric Consent Form" to employees, which informed them that Matcor and its vendors "may collect, retain, and use biometric data for the purpose of verifying employee identity and recording time." Ex. 7, Motion (Email and Form from N. Butler (June 14, 2021)). The forms also described Matcor's policies for retaining and destroying biometric data. *Id.*

On June 28, 2022, the Court certified a class of all Matcor employees who enrolled in or used Matcor's finger-scan timekeeping system while working for Matcor in Illinois between May 13, 2015 and June 16, 2021. On August 9, 2023, following lengthy discovery between the parties, Plaintiffs moved for summary judgment. On September 15, 2023, Matcor filed a combined response and cross-motion for summary judgment. After both summary judgment motions were fully briefed, the Court heard argument on them on November 17, 2023.

II. LEGAL STANDARD

Summary judgment is warranted where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." 735 ILCS § 5/2-1005(c). A court evaluating a motion for summary judgment construes the record "in favor of" the non-moving party. *City of Belleville v. Illinois Fraternal Ord. of Police Lab. Council*, 312 Ill. App. 3d 561, 563, 732 N.E.2d 592, 593–94 (2000). But the non-moving party must offer more than "[m]ere speculation, conjecture, or guess[es]" to "withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328, 722 N.E.2d 227, 237 (1999).

The "use of the summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit." *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 518, 622 N.E.2d 788, 792 (1993). Summary judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." 735 ILCS § 5/2-1005(c). Cases like this one, which involve "a statutory construction question," are often "appropriate for

summary judgment." *Mora v. J&M Plating, Inc.*, 2022 IL App (2d) 210692, ¶ 27.

III. ANALYSIS

Plaintiffs seek summary judgment on liability for three separate claims. They include claims under Sections 15(a), (b), and (d) of BIPA. The Court has considered the extensive record in this case. For the following reasons, it concludes there is no genuine dispute of material fact remaining regarding any of Plaintiffs' claims, and Plaintiffs are entitled to judgment as a matter of law, as to liability, for each of those claims.

A. The record demonstrates that Matcor violated Section 15(a) of BIPA.

Section 15(a) of BIPA requires that a private entity "in possession of" biometric data publish a "written policy" describing how it will retain and destroy the data ("BIPA Policy"). 740 ILCS § 14/15(a). Here, the record shows that Matcor took "possession of" biometric data during the class period without establishing a BIPA policy.

1. Plaintiffs' finger-scan data counts as biometric information under BIPA.

There is no genuine dispute that the data collected by the ADP 9100s constitutes biometric information under BIPA. "'Biometric information' means any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier." 740 ILCS § 14/10. "Biometric identifiers" include "fingerprint[s]." *Id.* Thus, biometric information includes "*any* information" that is "based on" a fingerprint. *Id.* (emphasis added). It is undisputed that Mactor's ADP 9100s took scans of each "employee's fingertip" and used them to create "an encrypted mathematical representation of that scan." Kapparis Dep. at 37:5–8. Because these mathematical representations were "based on" class members' fingerprints, they were biometric information under BIPA.

Matcor's counterarguments do not undermine the Court's conclusion. In its response in

opposition to Plaintiff's summary judgment motion ("Opp." or "Opposition"), Matcor contends BIPA does not apply due to the way its timeclocks work. Opp. at 13. It says that "for BIPA to apply at all," its timeclocks must "'collect' and store a 'fingerprint.'" *Id.* That is not true. As the Court has explained, BIPA also applies when timeclocks collect information "based on" a fingerprint. 740 ILCS § 14/10. Matcor admits, in its briefing, that the identifiers its timeclocks collected were based on employees' fingertip scans. Opp. at 13 (explaining "the Timeclocks scan a portion of the fingertip, identify prominent features on it, and immediately store those features as an alphanumeric code known as a Template," which is "an identifying number"). And the exhibits attached to Matcor's Opposition confirm the same.[4] Accordingly, BIPA applies.

Next, Matcor argues there is a difference between the "fingertip" scans it took and the type of "fingerprint" scans covered by BIPA. Opp. at 13. But Matcor's own authority shows there is no difference between a "fingerprint" scan and a "fingertip" scan. 2 CHAMBERS DICTIONARY (13th ed.) (a "fingerprint" is "an impression of the ridges of the fingertip"); BLACK'S LAW DICTIONARY (11th ed. 2019) (a fingerprint is the "distinctive pattern of lines on a human fingertip"); *United States v. Herrera*, 704 F.3d 480, 483 (7th Cir. 2013) ("[F]ingerprints are made by pressing a fingertip covered with ink on a white card or similar white surface."). The Merriam-Webster dictionary, likewise, defines a "fingerprint" as "the impression of a *fingertip* on any surface." www.merriam-webster.com/dictionary/fingerprint (emphasis added) (last visited November 21, 2023). There is no meaningful difference between a "fingerprint" scan and a "fingertip" scan, and BIPA covers both.

Finally, Matcor's argument that the Court "needs expert testimony" to assess what

[4] The ADP "Employer Toolkit" regarding Matcor's timeclocks, for instance, states that the clock "scans the employee's fingertip or hand, and stores and uses an encrypted mathematical representation of that scan."

Matcor's timeclocks collect is unavailing. Opp. at 16. "[E]xpert testimony is unnecessary where [a] matter is within the realm of lay understanding and common knowledge." *Lynch v. Ne. Reg'l Commuter R.R. Corp.*, 700 F.3d 906, 914 (7th Cir. 2012). It also is not necessary if the record before the Court establishes the fact about which an expert might provide an opinion. *See Georgia-Pac. Consumer Prod. LP v. Kimberly-Clark Corp.*, 647 F.3d 723, 729 (7th Cir. 2011) ("[T]o the extent that the experts' opinions on how to read a patent conflict with the actual language of the patent, that conflict 'does not create a question of fact nor can the expert opinion bind the court or relieve the court of its obligation to construe the claims according to the tenor of the patent.'"). Here, as discussed, there is no dispute that Matcor's timeclocks collect information based on employees' fingertips. No expert is needed to assist the Court in determining that such information falls within BIPA's definition of biometric information.

2. Matcor took possession of Plaintiffs' finger-scan data.

Having concluded that Plaintiffs' finger-scan data constitutes biometric information, the Court must next evaluate whether Matcor took "possession" of that data during the class period. 740 ILCS § 14/15(a). It did. An entity takes "possession" of data where it "has or takes control of [it] or holds [it] at his or her disposal." *Heard v. Becton, Dickinson & Co.*, 440 F. Supp. 3d 960, 968 (N.D. Ill. 2020). Matcor does not dispute that it purchased ADP 9100s and used them to collect class members' finger-scan data beginning in 2019. Deposition of Nicole Butler ("Butler Dep.") at 15:5–9 (Oct. 12, 2021) ("Q: Do you know a date at which employees started using the finger scan feature of the biometric timeclock in Illinois? A: Sometime in July as a practice run, July of 2019."); Ex. 2, Motion ("Biometric Scanners have arrived and have been installed in time for the July test runs. We will be scheduling dates in July to have all employees setup in the scanner prior to test payroll."). And the record shows that an ADP 9100 "stores" finger-scan data

after collecting it. Kapparis Dep. at 37:7. Accordingly, Matcor held class members' finger-scan data—and had that data at its disposal—in its ADP 9100s beginning in 2019.

3. Matcor did not establish a BIPA policy before possessing Plaintiffs' finger-scan data.

Finally, there is no genuine dispute that Matcor did not establish a BIPA Policy during the class period. Matcor's HR Director, Stacey Kapparis, confirmed in her deposition that Matcor's "policy regarding the destruction of biometric information" was "first implemented" on "June 27th, 2021." Kapparis Dep. at 84:22–85:1; *see also* Ex. 7, Motion (email and form from June 2021 including Matcor's BIPA Policy). That is two years after Matcor first collected class members' biometric data. Butler Dep. at 15:5–9. And it is eleven days after the expiration of the class period in this matter.

Matcor argued at this Court's summary judgment hearing that certain "materials" in the record, from within the class period, count as a BIPA Policy. Matcor did not identify those materials. But the Court has reviewed the many documents Matcor attached to its summary judgment briefing. No documents from within the class period purport to be, or possess the characteristics of, a BIPA Policy. That is, there are no documents in the record, from before June 2021, that include Matcor's (1) "retention schedule" for biometric data or (2) Matcor's "guidelines for permanently destroying" biometric data, as is explicitly required for a Section 15(a) BIPA Policy. 740 ILCS § 14/15(a).

This is fatal to Matcor's opposition. Plaintiffs have the initial burden, at the summary judgment stage, of producing "evidence that, if uncontradicted, would entitle [them] to a directed verdict at trial." *Triple R Dev., LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶ 16. But once they meet that burden, "the burden of production shifts to the party opposing the motion." *Id.* Plaintiffs met their burden of initial production by demonstrating Matcor first

implemented its BIPA Policy after the class period (using deposition testimony and the BIPA Policy Matcor *eventually* implemented). Matcor has raised no contrary evidence. In these circumstances, the Court must grant summary judgment.

B. There is no genuine dispute that Matcor violated Section 15(b) of BIPA.

Plaintiffs are also entitled to summary judgment on their Section 15(b) claims. Under Section 15(b), before a private entity may "collect" biometric data from an individual, it must "first" obtain a "written release" from the individual. 740 ILCS § 14/15(b).

Here, Matcor "collect[ed]" Plaintiffs' biometric data during the class period. *Id.* To "collect" biometric data means "to gather or exact [it] from a number of persons or sources." *Watson v. Legacy Healthcare Fin. Servs., LLC*, 2021 IL App (1st) 210279, ¶ 59, 196 N.E.3d 571, 581. In *Watson*, the court explained that an employer "gathered or extracted" biometric data by requiring employees to use "fingerprints or hand scans" to sign in and out of work. *Id.* That is what Matcor did when it began using the ADP 9100s in 2019. So, Matcor "collected" Plaintiffs' biometric data within the meaning of BIPA.

That leaves one question remaining—did Matcor obtain written releases from Plaintiffs before collecting their biometric data? The answer is no. Ms. Kapparis confirmed employees were not required to "sign any documents prior to the use of the biometric timeclocks" in 2019. Kapparis Dep. at 72:19–22. In fact, email evidence indicates Matcor did not obtain BIPA releases until two years later, in June 2021. That month, Matcor's Illinois HR Manager, Nicole Butler, sent an email titled "Biometrics Sign Off" to a group of Matcor supervisors. Ex. 7, Motion (Email and Form from N. Butler (June 14, 2021)). The email stated: "By now you should have all received the instructions for the biometrics authorizations. If you can please have your direct reports read,

sign and return to you that would be great."[5] *Id.* According to both Ms. Butler and Ms. Kapparis, the June 2021 biometric authorizations were the first of their kind at Matcor. Kapparis Dep. at 77:22–78:1 (confirming that "[p]rior to the use of th[e] consent form[s] in 2021," Matcor had never "require[d] employees to sign a biometric consent form"); Butler Dep. at 36:3–6 ("Q: Before June 2021 did employees sign any written consent regarding Matcor's collection of finger scan data? A: Not that I recall.").

Matcor has raised no evidence contradicting the record-evidence showing it first collected biometric releases in June 2021. Despite the exhaustive discovery in this case, it has pointed to no written releases sent or executed before that date. This leaves the Court with no choice but to enter summary judgment on liability for Plaintiffs.

Matcor's argument that Plaintiffs impliedly waived their rights under Section 15(b) does not change the Court's mind. Opp. at 19. Matcor supports this argument by claiming Mr. Thompson "at least voluntarily scanned his finger [in Matcor's timeclocks] with the understanding that the timeclock would access something from his finger." *Id.* That is not a waiver. Waiver is the "voluntary and intentional relinquishment of a known right." *Gallagher v. Lenart*, 226 Ill. 2d 208, 224 (2007). "Although waiver may be implied, the act relied on to constitute the waiver must be clear, unequivocal and decisive." *Galesburg Clinic Ass'n v. West*, 302 Ill. App. 3d 1016, 1019–20 (1999). The record does not show Plaintiff knew of his statutory rights—much less knew he was waiving them—when he clocked in and out of work. And his decision to clock in and out of work is not a "clear" waiver of those rights.

Regardless, implied waiver is not available as a defense to Section 15(b) claims. Section

[5] These biometric authorizations did not cure any of Matcor's prior BIPA violations. BIPA requires a private entity to obtain a written release *prior to* collecting biometric data. 740 ILCS § 14/15 (private entities must "first" obtain a "written release" before collecting biometric data).

15(b) states the type of consent needed to defeat a claim: it must be "written," not implied. 740 ILCS § 14/15(b). Because courts cannot "read a common law defense into a statute that plainly appears to abrogate it," the implied waiver defense does not apply here. *Snider v. Heartland Beef, Inc.*, 479 F. Supp. 3d 762, 772 (C.D. Ill. 2020).

C. The record shows Matcor violated Section 15(d) of BIPA.

Under Section 15(d) of BIPA, "[n]o private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate" that data to a third party without consent from the data's subject. 740 ILCS § 14/15(d). The "transfer[] of biometric information" to a third party counts as a disclosure. *See Namuwonge v. Kronos, Inc.*, 418 F. Supp. 3d 279, 285 (N.D. Ill. 2019). This includes any such transfer to a "third-party vendor." *See Dixon v. Washington & Jane Smith Cmty.-Beverly*, No. 17 C 8033, 2018 WL 2445292, at *9 n.5 (N.D. Ill. May 31, 2018). Matcor's timekeeping system automatically gave its timekeeping vendor, ADP, employees' finger-scan data. Kapparis Dep. at 82:16–18 (testifying that "ADP would have access" to employees' finger-scan data through Matcor's payroll system); Patel Dep. at 27:24–28:7 (testifying that Matcor's timeclocks were "always live" and "connected to the server with ADP"). And Matcor did not obtain consent for these data transfers. Kapparis Dep. at 72:19–22 (confirming that employees did not sign consents before using the ADP 9100s). So, there is no genuine dispute that Matcor violated Section 15(d) of BIPA.

Matcor argues that Mr. Thompson's Section 15(d) claim fails because he has only shown a lack of *written* consent. Opp. at 21. This is not true. Mr. Thompson met his burden of production by showing a lack of written consent *and* by testifying, in his deposition, that he did not have "any idea" of "what was happening" with his finger-scan data when Matcor collected it. Thompson Dep. at 53:10–16. After all, Mr. Thompson could not have consented to a transfer he did not know was occurring. Because Mr. Thompson met his burden of production, the burden shifted to Matcor

to raise contrary evidence showing it *did* obtain Mr. Thompson's consent before transferring his biometric data. *Triple R Dev., LLC*, 2012 IL App (4th) 100956, ¶ 16.

It has not done so. Matcor states that Class members consented to disclosures of their biometric data at "a number of meetings where this was discussed." Opp. at 22. Matcor does not include any documents or testimony supporting this claim. *Id.* Nor does it explain what was discussed at these meetings or how an employee's attendance at such a meeting would constitute consent to disclosure of biometric data. *Id.* Matcor cannot prevent summary judgment through conclusory arguments unsupported by any record evidence.[6] *See Triple R Dev., LLC*, 2012 IL App (4th) 100956, ¶ 16

D. Matcor's remaining defenses and arguments do not prevent summary judgment for Plaintiffs.

Matcor raises various defenses, in its Opposition, that it contends prevent entry of summary judgment in this matter. The Court has considered all of them and, for the following reasons, rejects them.

1. The Court may grant summary judgment with respect to the Class as a whole.

Matcor argues Mr. Thompson cannot "obtain summary judgment across the board for all members" of the Class. Opp. at 11. That is not true. *See* 735 ILCS § 5/2-805 ("Any judgment entered in a class action . . . shall be binding on all class members."). Courts frequently grant summary judgment on a class-wide basis. *E.g.*, *Bobrowicz v. City of Chicago*, 168 Ill. App. 3d 227, 229 (1988) (affirming trial court order "granting summary judgment in favor of plaintiff . . . and all members of the class represented by plaintiff"); *Miller v. Ret. Bd. of Policemen's Annuity*,

[6] Matcor also suggests that *it* is entitled to summary judgment on Plaintiff's Section 15(d) claim. Opp. at 22. The Court rejects this argument for reasons already discussed.

329 Ill. App. 3d 589, 605 (May 20, 2002) (affirming "grant of summary judgment for 45 members of plaintiffs class"). The Court certified the Class precisely so that its claims could be litigated—and determined—collectively. *See* Order Granting Plaintiff's Motion for Class Certification, *Thompson v. Matcor*, Case No. 2020-CH-00132 (Tazewell Cnty. June 28, 2022).

2. BIPA's financial transaction exemption does not apply.

Matcor contends that BIPA's "financial transaction" exception bars Mr. Thompson's Section 15(d) claim. Under that exception, a private entity may disclose biometric data to "complete[] a financial transaction" in a set of limited circumstances. 740 ILCS § 14/15(d). Matcor claims its disclosures of Class members' biometric data to timekeeping vendors falls within this exception because the transactions assisted in providing paychecks to employees. Opp. at 23. Defendant provides no authority in support of this argument. The argument also ignores the plain text of the exception. To "complete" means to "to bring to an end." www.merriam-webster.com/dictionary/complete. The data transfers at issue did not bring any financial transactions to an end. It is not as if every (or any) data transfer triggered a deposit into employees' bank accounts.

3. Plaintiffs need not demonstrate negligent or reckless conduct to obtain summary judgment on liability.

Matcor also asks the Court to deny summary judgment because Mr. Thompson has not shown Matcor acted negligently. Opp. at 23. But BIPA is a strict liability statute which does not require litigants to demonstrate negligence or any other state of mind to succeed on liability. 740 ILCS § 14/20; *Snider*, 479 F. Supp. 3d at 772 ("BIPA imposes strict liability."); *Figueroa v. Tony's Finer Food's*, Case No. 18-CH-15728 (Cook Cnty. Dec. 10, 2019) (explaining there "is no requirement that a plaintiff pursuing a claim under BIPA plead any facts showing negligent, reckless, or intentional conduct on behalf of the defendant"). Defendants' states of mind become

relevant in BIPA cases only *after* a plaintiff has become a "prevailing party." 740 ILCS § 14/20. At that point, liquidated damages are available for negligent, reckless, or intentional violations. *Id.*

Even if Mr. Thompson were required to demonstrate negligence at this stage, he has done so. In *Rogers v. BNSF Ry. Co.*, the court found that "a claim of negligence" under BIPA was sufficiently pled where the plaintiff alleged "BIPA took effect more than ten years ago" and the defendant "made no effort to comply with its requirements." No. 19 C 3083, 2019 WL 5635180, at *5 (N.D. Ill. Oct. 31, 2019). Here, the record shows Matcor made no effort to comply with BIPA until June 2021, even though BIPA was passed in 2008. In fact, Matcor made no effort to comply with BIPA until more than a year had passed since the instant lawsuit was filed. The lawsuit, at least, should have put Matcor on notice regarding BIPA. The record is sufficient to show, at minimum, negligence on Matcor's part.

4. Matcor's assumption of the risk defense does not prevent summary judgment.

Finally, Matcor argues "Plaintiff's claims are barred by the doctrine of primary assumption of risk." Opp. at 26. Assumption of the risk is available as a defense—in some cases—where a "plaintiff's conduct indicates that he has implicitly consented to encounter an inherent and known risk, thereby excusing another from a legal duty which would otherwise exist." *Edwards v. Lombardi*, 376 Ill. Dec. 929 (Ill. App. 2013) (quotation marks omitted). But assumption of the risk "is not an available defense when a statute calls for strict liability." *Olle v. C House Corp.*, 967 N.E.2d 886, 890 (Ill. App. 2012). As noted, "BIPA is a strict liability statute." *Brandenberg v. Meridian Senior Living, LLC*, 564 F. Supp. 3d 627, 635 (C.D. Ill. 2021). Therefore, the "assumption of the risk defense is not available to BIPA defendants," like Matcor. *Id.*; *Snider*, 479 F. Supp. 3d at 772 ("BIPA imposes strict liability."); *Vaughan v. Biomat USA, Inc.*, No. 20-CV-

4241, 2022 WL 4329094, at *12 (N.D. Ill. Sept. 19, 2022) (same).

E. Matcor has not established that BIPA is unconstitutional or that a stay is appropriate in this matter.

Matcor asks the Court to grant summary judgment in its favor because BIPA's damages provision "violates substantive due process" by allowing potentially excessive "per scan" damages. Opp. at 9. Under Illinois Supreme Court Rule 218, a court "shall not find unconstitutional a statute" unless it states "whether the statute . . . is being found unconstitutional on its face, as applied to the case *sub judice*, or both." Ill. Sup. Ct. R. 218. Here, the Court cannot find BIPA's damages provision unconstitutional "as applied" because that provision has not been applied in this case (there is no damages award before the Court and Plaintiffs are not asking for summary judgment on damages anyway). So, to succeed on summary judgment, Matcor must show BIPA is unconstitutional "on its face."

Matcor has not done so. A statute is only facially unconstitutional if "the statute is unconstitutional under *any* set of facts." *People v. Rizzo*, 2016 IL 118599, ¶ 24 (emphasis added); *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 33 (the "fact that [a] statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid"). There are certainly facts under which BIPA's damages provision would not violate due process. Indeed, the Supreme Court of Illinois recently indicated BIPA is *not* "unconstitutional" even though it may produce "astronomical damage awards." *See Cothron v. White Castle Sys., Inc.*, 2023 IL 128004, ¶ 40 (quotation marks omitted). The only authority Matcor cites for its constitutional argument is the *dissent* from the very same case. Opp. at 7–11. Of course, the "dissent has no precedential value." *People v. Smythe*, 352 Ill. App. 3d 1056, 1061 (2004).

Relatedly, no stay is needed in this case. Matcor asks for a stay until there are "rulings in

cases involving large companies and numbers of scans dwarfing the absolute most that could ever be involved in the case at bar." Opp. at 10. But even if a court found an award in such a case unconstitutional, that would not mean BIPA as a whole (or any future award in this case) is unconstitutional. *See Rizzo*, 2016 IL 118599, ¶ 24; *Flores*, 2013 IL 112673, ¶ 33. And it would not serve the interests of justice for the Court to indefinitely stay cases on the off chance that unknown, future cases *might* provide additional guidance regarding BIPA. The Court is perfectly capable of interpreting BIPA itself, in accordance with the numerous precedents already established since the General Assembly passed BIPA fifteen years ago.

IV. CONCLUSION

Viewing the record in the light most favorable to Matcor, and drawing all reasonable inferences in its favor, there are no genuine disputes of material fact remaining on liability and Plaintiffs are entitled to judgment as a matter of law. The Court grants summary judgment on liability in favor of Plaintiffs regarding their claims under Sections 15(a), (b), and (d) of BIPA. The Court denies Matcor's requests for summary judgment and for a stay.

Dated: 12/8/2023