

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LISA PEATRY, individually, and on behalf of)		
all others similarly situated,)		
Plaintiff,)		
v.)		No. 19 C 2942
BIMBO BAKERIES USA, INC.,)		Judge Sara L. Ellis
Defendant.)		

ORDER

The Court denies Plaintiff Lisa Peatry’s motion to remand to state court [14]. See Statement.

STATEMENT

Plaintiff Lisa Peatry, an employee of Defendant Bimbo Bakeries USA, Inc. (“Bimbo”), filed this putative class action lawsuit in state court alleging that Bimbo violates the Illinois Biometric Information Privacy Act (“BIPA”), 740 Ill. Comp. Stat. 14/1 *et seq.*, through its collection, storage, and use of Peatry’s biometric information. Specifically, Peatry brings claims for (1) Bimbo’s failure to institute, maintain, and adhere to a publicly available retention schedule in violation of BIPA § 15(a); (2) Bimbo’s failure to obtain informed, written consent before obtaining biometric information in violation of BIPA § 15(b); and (3) Bimbo’s disclosure of biometric information before obtaining consent in violation of BIPA § 15(d). Bimbo removed the case to federal court on the basis of diversity jurisdiction, 28 U.S.C. § 1332(a), and the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d). Peatry now moves to remand the case back to state court. The parties only contest whether the amount in controversy exceeds the jurisdictional threshold under either § 1332(a) or CAFA, with the remaining elements of diversity jurisdiction and Article III standing concededly met.

A defendant may remove a case filed in state court that a plaintiff could have filed originally in federal court. 28 U.S.C. § 1441; *Tylka v. Gerber Prods. Co.*, 211 F.3d 445, 448 (7th Cir. 2000). The removing party bears the burden of demonstrating the propriety of removal. Although any doubt regarding jurisdiction should be resolved in favor of remand in “mine-run diversity cases,” the same presumption against removal does not apply in CAFA cases. *See Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 135 S. Ct. 547, 554, 190 L. Ed. 2d 495 (2014) (declining to decide whether a presumption against removal applies in “mine-run diversity cases” but “point[ing] out that no antiremoval presumption attends cases invoking CAFA”); *cf. Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 758 (7th Cir. 2009) (“[F]ederal courts should interpret the removal statute narrowly, resolving any doubt in favor of the

plaintiff's choice of forum in state court."). The Court may remand a case for lack of subject matter jurisdiction. 28 U.S.C. §§ 1446, 1447(c); *GE Betz, Inc. v. Zee Co.*, 718 F.3d 615, 625–26 (7th Cir. 2013). Where the plaintiff challenges the defendant's amount in controversy allegations, the defendant must establish by the preponderance of the evidence that the amount in controversy exceeds the jurisdictional threshold. *Roppo v. Travelers Commercial Ins. Co.*, 869 F.3d 568, 579 (7th Cir. 2017). Once the defendant meets that burden, the Court may remand the case "only if the plaintiff can establish the claim is for less than the requisite amount to a 'legal certainty.'" *Id.*; see also *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008) ("Once the proponent of federal jurisdiction has explained plausibly how the stakes exceed \$5 million, then the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much.").

Bimbo submits two calculations of the amount in controversy, based on Peatry's allegations and BIPA's damages provision. BIPA provides:

Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. A prevailing party may recover for each violation:

(1) against a private entity that negligently violates a provision of this Act, liquidated damages of \$1,000 or actual damages, whichever is greater;

(2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of \$5,000 or actual damages, whichever is greater;

(3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and

(4) other relief, including an injunction, as the State or federal court may deem appropriate.

740 Ill. Comp. Stat. 14/20. Among other things, Peatry requests an award of "statutory damages of \$5,000 for *each* reckless violation of BIPA pursuant to 740 ILCS § 14/20(2) or, in the alternative, statutory damages of \$1,000 for *each* negligent violation of BIPA pursuant to 740 ILCS § 14/20(1)." Doc. 1-1 at 21, Prayer for Relief (C).

First, Bimbo contends that the amount in controversy for Peatry's individual claims exceeds \$75,000 because Peatry seeks a statutory penalty of up to \$5,000 for "each violation" and has alleged that she scanned her fingerprint each time she clocked in and out of work from September 2016 through February 2019. Treating each scan as a separate violation, Peatry would only need to have scanned her fingerprint sixteen times to exceed the \$75,000 threshold, which she plausibly did many more times over the course of her thirty months of employment. Alternatively, Bimbo claims that the Court has jurisdiction under CAFA, with a class of at least

300 members needing to only scan their fingerprints four times each to exceed CAFA's \$5 million amount in controversy requirement.

Peatry contends that Bimbo has falsely characterized her allegations as seeking damages for each instance in which she scanned her fingerprint. Instead, she now argues that the complaint only alleges three violations, one for each section of BIPA § 15 that Peatry contends Bimbo violated.¹ Using three as the number of violations per putative class member, at \$15,000, Peatry individually comes nowhere near the jurisdictional threshold, and the proposed class also falls short, with the amount in controversy at most \$4,500,000.²

For jurisdictional purposes, the parties' positions are reversed, with Peatry seeking to limit the potential damages and Bimbo arguing that the complaint provides the possibility of almost unlimited damages against it.³ Neither side provides any authority for the scope of damages available under BIPA, and the Court has not found any guidance on the interpretation of the phrase "each violation" as used in that statute. Nor do the parties discuss whether each scan amounts to the collection of new biometric identifiers or information so as to allow for repeat violations. But the Court agrees with Bimbo that Peatry's complaint and BIPA together can plausibly be read to suggest that a violation of at least some of the BIPA provisions at issue allegedly occurred every time Peatry and the putative class members clocked in and out of work. *See* Doc. 1-1 ¶ 43 ("Plaintiff was required to scan her fingerprint each time she clocked in for work and clocked out of work."); *id.* ¶ 47 ("Plaintiff has continuously and repeatedly been exposed to the risks and harmful conditions created by Defendant's multiple violations of BIPA alleged herein."); *id.* ¶¶ 76, 86, 95 (seeking recovery for "each violation" of BIPA's requirements under § 15(a), (b), and (d), and underlining the word "each" with respect to § 15(d)). Specifically, § 15(d) makes it a violation to "disclose, redisclose, or otherwise disseminate" biometric information, 740 Ill. Comp. Stat. 14/15(d), which suggests that each time Bimbo allegedly disclosed Peatry's biometric information by sharing it with a third-party vendor, a new violation occurred, *see* Doc. 1-1 ¶¶ 31, 32, 41, 43, 93, 94. Therefore, the Court finds that Bimbo has plausibly alleged the requisite amount in controversy for Peatry both individually under § 1332(a) and on a class-wide basis under CAFA. Although Peatry tries to now limit the amount of damages she seeks on her own behalf and the class, her complaint does not include any such limitation and instead suggests the frequent and repeated occurrence of BIPA violations. *See* Doc. 1-1 ¶ 83 ("Defendant *systematically* and *automatically* collected, used, and stored Plaintiff's biometric identifiers and/or biometric information[.]" (emphasis added)); *id.* ¶ 93 ("Defendant *systematically* and *automatically* disclosed, redisclosed, or otherwise disseminated Plaintiff's biometric identifiers and/or biometric information[.]" (emphasis added)).

¹ Peatry does not dispute Bimbo's claim that, if each scan amounts to a separate violation, the complaint meets the jurisdictional threshold under either § 1332(a) or CAFA.

² This does not include Peatry's request for injunctive relief and attorney's fees, but Peatry argues that the amount continues to fall short even when including these aspects of Peatry's damages. The Court does not need to resolve the potential value of this other relief.

³ Bimbo acknowledges that it does not endorse this method of calculating damages but instead contends that the complaint suggests such a theory. Peatry does not rule out a theory of damages awarded on a clock-in-clock-out basis, instead only arguing that her complaint does not make such allegations.

Her post-removal attempt to cabin her damages so as to avoid federal court does not deprive the Court of jurisdiction.⁴ *See Hunt v. DaVita, Inc.*, 680 F.3d 775, 777–78 (7th Cir. 2012) (“[P]ost-removal disclaimer of damages exceeding \$75,000 could not defeat federal jurisdiction after a proper removal based on the complaint.”); *see also Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593, 133 S. Ct. 1345, 185 L. Ed. 2d 439 (2013) (prior to class certification, a plaintiff’s stipulation on damages does not bind the class for CAFA purposes). And because Peatry has not shown that it is *legally impossible* for her to recover \$5,000 per fingerprint scan, a position a plaintiff should be loath to take in light of the undecided interpretation of BIPA’s damages provision, the Court leaves that determination to another day. At this stage, such recovery, although uncertain, remains plausible based on Peatry’s allegations and an expansive reading of BIPA’s damages provision. *See Spivey*, 528 F.3d at 986 (refusing to reject recovery estimates based on the uncertainty of recovery, noting that “[u]ncertainty differs from impossibility”). Therefore, the Court finds Bimbo has demonstrated the required amount in controversy. And because this case meets the remaining requirements for diversity jurisdiction under § 1332(a) and CAFA, the Court finds Bimbo’s removal of the case proper and denies Peatry’s motion to remand.

Date: August 7, 2019

/s/ Sara L. Ellis

⁴ Peatry states in her reply that her remand motion does not disclaim damages but only attempts to clarify the proper scope of the damages she seeks in the complaint. But, as explained above, the Court finds that Peatry’s arguments for remand effectively seek to rewrite the complaint and narrow the scope of her claims in response to Bimbo’s removal of the case to federal court.