UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLENE FIGUEROA, and JERMAINE BURTON, individually and on behalf of all others similarly situated, Plaintiffs, v. KRONOS INCORPORATED, Defendant.	)	Case No.: 1:19-CV-01306 Judge Gary Feinerman

KRONOS INCORPORATED'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS

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INTRODUCTION

"[S]ometimes the complaint will make it clear that class certification is inappropriate." *Hill v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 817, 829 (N.D. Ill. 2013) (Feinerman, J.). At such times, "a ruling on class certification is appropriate at the pleading stage where the pleadings make clear that Rule 23 cannot be satisfied." *Pumputiena v. Deutsche Lufthansa, AG*, No. 16 C 4868, 2017 WL 66823, at *8 (N.D. Ill. Jan. 6, 2017) (Feinerman, J.). This is one of those times.

Plaintiffs brought separate lawsuits against their employers under the Illinois Biometric Information Privacy Act (BIPA). They seek to bring the same claims here against Kronos. They want to represent a massive, highly diverse class comprised of *all* Illinois employees working at "***thousands***" of other employers who purchased Kronos timekeeping devices. Compl. ¶¶ 1, 61. They ignore that these employers are not identifiable, let alone the employees using the timekeeping devices. They further ignore that these unidentified employers and employees have different policies and practices regarding finger scan data, which would exclude large numbers of them from BIPA's application and thus from any such "mega" class.

Plaintiffs' and the putative class' claims hinge upon specific employer and employee issues, many of which are already being litigated in ***fourteen*** other actions under BIPA,[1] which named Kronos as either a defendant, co-defendant, or respondent in discovery.

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[1] *See Battles v. Southwest Airlines Co.*, No. 2018-CH-09376 (Cook Cnty. Ill., July 25, 2018); *Crooms v. Southwest Airlines Co.*, No. 19-cv-02149 (N.D. Ill., Feb. 6, 2019); *Dixon v. Smith Senior Living*, No. 17-cv-08033 (N.D. Ill., Sept. 28, 2017); *Doporcyk v. Roundy's Supermarkets, Inc.*, No. 2017-CH-08092 (Cook Cnty. Ill., June 9, 2017); *Fields v. Abra Auto Body & Glass LP*, No. 2017-CH-12271 (Cook Cnty. Ill., Sept. 8, 2017); *Henderson v. ADP LLC,* No. 2018-CH-07139 (Cook Cnty. Ill., June 5, 2018); *Howe v. Speedway LLC*, No. 19-cv-01374 (N.D. Ill., Sept. 1, 2017); *Kane v. Conservation Tech. of Ill. LLC*, No. 2018-CH-12194 (Cook Cnty. Ill., Sept. 27, 2018); *Keene v. Plymouth Place Inc.*, No. 2019-CH-01953 (Cook Cnty. Ill., Feb. 14, 2019); *Marshall v. Kronos, Inc.*, No. 19-cv-01511 (N.D. Ill., Feb. 1, 2019); *Namuwonge v. Brookdale Senior Living*, No. 2019-CH-04411 (Cook Cnty. Ill., Apr. 5, 2019); *Stidwell v. NFI Indus.*, No. 16-cv-00770 (N.D. Ill., Oct. 31, 2018); *Watts v. Aurora Chic. Lakeshore Hosp., LLC*, No. 2017-CH-12756 (Cook Cnty. Ill., Sept. 20, 2017); *Taylor v. Sunrise Senior Living Mgmt.*, No. 2017-CH-15152 (Cook Cnty. Ill., dismissed by agreement Feb. 14, 2019).

Employees of each of the companies Plaintiffs' Complaint contends use Kronos timekeeping devices—Mariano's, Chicago Lakeshore Hospital, Smith Senior Living, Southwest Airlines, Speedway, NFI Industries and Con-Tech Lighting—are already being sued in employer-specific class actions. Compl. ¶ 1. These lawsuits also name(d) Kronos as a co-defendant. Plaintiffs' "mega suit" against Kronos makes no sense to adjudicate because these already-filed, partially litigated cases clearly provide the superior mechanism for addressing such disparate claims. For the reasons set forth below, Plaintiffs' class claims should be stricken.

LEGAL STANDARD

Under Rule 23, "[a]t an early practicable time," a district court "must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). This determination should be made at the pleading stage when Rule 23 requirements clearly cannot be met. *Pumputiena*, 2017 WL 66823 at *8; *Hill*, 946 F. Supp. 2d at 830. Under Rule 23(b)(3), class allegations can only be maintained if the "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Plaintiffs must also establish that "questions of law or fact common to class members predominate over any questions affecting only individual members." *Id*. Additionally, plaintiffs themselves must meet Rule 23(a)'s adequacy criterion, which requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). When Rule 23 requirements are not met, courts are authorized to enter orders to "require that the pleadings be amended to eliminate allegations about representations of absent persons, and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D).

ARGUMENT

I. PLAINTIFFS CANNOT MEET RULE 23(b)(3) SUPERIORITY REQUIREMENTS

This Court has "no need to reach the Rule 23(a) factors . . . if Rule 23(b)(3)'s criteria are not met." *Riffey v. Rauner*, 910 F.3d 314, 318 (7th Cir. 2018). Here, Plaintiffs' class allegations may be stricken outright because they cannot show that this class action is a superior method of adjudication. "Commonly referred to as 'manageability,' [superiority] encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Gordon v. Caribbean Cruise Line, Inc.*, No. 14 C 5848, 2019 WL 498937, at * 11 (N.D. Ill. Feb. 8, 2019) (citation omitted). Rule 23(b)(3) provides the following factors to consider with respect to superiority:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Id. Applying these factors, Plaintiffs' "mega suit" simply is not superior at all.

A. Putative Class Members are Individually Prosecuting Separate Actions

Plaintiffs assert that "there are no other class members who have an interest [in] individually controlling the prosecution of [their] individual claims." Compl. ¶ 68. Nothing could be further from the truth. This lawsuit is duplicative of ***fourteen*** BIPA class actions already filed against Kronos as a defendant, co-defendant, or respondent in discovery. *See supra* at n.1. The putative class Plaintiffs seek to certify here would include putative classes in ***twelve*** of these lawsuits, which have named Kronos as a co-defendant, and which have included or continue to

include BIPA claims against Kronos. Counsel for Plaintiffs has continued to name Kronos as a co-defendant in BIPA class actions even after filing this lawsuit. *See, e.g.*, *Namuwonge*, No. 2019-CH-04411 (filed Apr. 5, 2019); *Keene*, No. 2019-CH-01953 (filed Feb. 14, 2019); *Crooms*, No. 19-cv-02149 (filed Feb. 6, 2019).[2] Clearly, counsel's own clients, who are class members here, are demonstrating their continued desire to prosecute separate actions against Kronos. In other BIPA class actions filed by Plaintiffs' counsel, such as *Kane v. Con-Tech Lighting* and *Stidwell v. NFI Industries* (Exs. D-E), putative class members in this lawsuit are actively opposing dispositive motions and have sought to file amended complaints. Counsel here even has clients who have filed successive class actions against Kronos and the same employer. *See, e.g.*, *Crooms*, No. 19-cv-02149 (filed Feb. 6, 2019); *Battles*, No. 2018-CH-09376 (filed July 25, 2018) (Exs. C, F).

Given the myriad legal and factual differences that attend each employer-specific context, these putative class members have significant "interests in individually controlling the prosecution" of their "separate actions." Fed. R. Civ. P. 23(b)(3)(A). Con-Tech employees, for example, are best situated to control the prosecution of the BIPA claims against Kronos that they are already actively pursuing. (*See* Ex. D). There is no reason to believe that Plaintiffs Figueroa and Burton, who worked at different companies, and who filed this action after many of these employer-specific actions already were pending, would more effectively represent Con-Tech employees' interests. The same can be said for all of the other employer-specific BIPA class actions that name Kronos as a co-Defendant. *See supra* at n.1.

[2] *See* Exs. A–C. Copies of the fourteen BIPA class actions that name or named Kronos are included in the Appendix, which includes the cases cited in this brief.

B. Putative Class Members Have Engaged in Extensive BIPA Litigation

Plaintiffs seek to represent all Illinois employees, across all employers, who used Kronos timekeeping technology. Compl. ¶ 61. Many of these putative class members have litigated their separate claims extensively. Southwest Airlines Co. employees who used Kronos timekeeping devices had their BIPA class action dismissed on labor law preemption grounds, a decision that they appealed to the Seventh Circuit. *See Miller v. Southwest Airlines Co.*, No. 18 C 86, 2018 WL 4030590, at *5–6 (N.D. Ill. Aug. 23, 2018), *on appeal*, No.18-3476. Some putative class members have received substantive rulings. *See, e.g.*, *Howe v. Speedway LLC*, No. 17-cv-07303, 2018 WL 2445541, at *6–7 (N.D. Ill. May 31, 2018) (plaintiffs who knowingly and voluntarily used a Kronos finger-scan time clock cannot bring claims for technical BIPA violations). Other putative class members are opposing dispositive motions that could bar their claims. Mariano's and Abra Auto Body and Glass, for example, have filed dispositive motions asserting that the same Kronos finger-scan time clocks at issue here do not collect biometric identifiers or information and thus do not implicate BIPA. (*See* Ex. G at 8–13; Ex. H at 4–6). Still other putative class members have settled their claims. (*See* Ex. I, § 1.19 ("'Released Parties' means Sunrise, and all of its . . . agents . . . [and] vendors . . . .")).

C. Concentrating Litigation in This Court is Undesirable and Unmanageable

This lawsuit is Plaintiffs' attempt to grossly maximize their leverage against Kronos and override the plethora of BIPA class action lawsuits that already involve Kronos, pending before other state and federal judges. The claims of these Plaintiffs simply are not capable of being concentrated before, or managed by, this Court. Attempting to do so would lead to an "inevitable waste of judicial and party resources," *Pfizer Inc. v. Apotex Inc.*, 640 F. Supp. 2d 1006, 1010–11 (N.D. Ill. 2009), and "create an undue risk of conflicting final judgments on the merits." *Tyrer v. City of South Beloit, Ill.*, 456 F.3d 744, 756–57 (7th Cir. 2006).

Rule 23(b)(3) requires this Court to consider "the whole range of practical problems that may render the class action" inappropriate. *Gordon*, 2019 WL 498937 at *11. In this lawsuit, significant, duplicative third-party discovery would be required on many issues, including: employers' timekeeping conduct and policies; any BIPA-compliant "written releases" and other consent forms executed between plaintiffs and their employees which could include Kronos; the extent to which employees were aware that their data was being collected; collective bargaining agreements and standard employment contracts; employers' histories with other vendors and authentication methods; employers' government contract work and employee lists for such projects; and countless factual and legal bases that bear on Kronos' defenses.

Forcing Kronos to litigate these thousands of claims without each putative class members' employers, and without knowledge of or access to the employers' policies and BIPA compliance status, would infringe on Kronos' due process right to present a complete defense. *See, e.g.*, *Cent. Ill. Pub. Serv. Co. v. Allianz Underwriters Ins. Co.*, 633 N.E.2d 657, 678–79 (Ill. 1994) ("The due process clause requires, at a minimum, that a party have a full and fair opportunity to litigate an issue before he is bound by that issue's resolution."). These same employers already are taking positions in their ongoing litigation that could bear upon the viability of claims of the putative plaintiffs in this lawsuit. BWAY—Plaintiff Burton's employer—has filed an answer in its state court action, staking out positions about how Kronos products work. (*See* Ex. J, ¶ 22). Tony's Finer Foods, meanwhile, has moved to dismiss Plaintiff Figueroa's claims as time-barred. (*See* Ex. K at 8–12). A ruling on the statute of limitations in that suit could adversely affect Kronos' interest in a lesser statute of limitations here.

Essentially, this Court would be required to regularly monitor all of the other BIPA class actions that name or involve Kronos, and all BIPA settlements that could involve Kronos, in order

to manage this class action. This Court would be forced to track the many BIPA actions currently pending, noting protective orders, discovery rulings, and potentially dispositive rulings or settlements as they occur and, if warranted, apply them to aspects of this class action. Given the many courts already considering issues related to Kronos time clocks, this Court also would need to track dozens of ongoing state and federal rulings and assess their impact on this case. On an ongoing basis, putative class members here could be excluded from this class by rulings and settlements in the other BIPA class actions, raising serious questions for this Court to consider regarding whether this putative class could ever be ascertained or certified.

D. The Lawsuit Presents Ascertainability Issues

The putative class presents practical ascertainability issues which warrant consideration in the Rule 23(b)(3) context. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657–58 (7th Cir. 2015). Plaintiffs purport to represent current and former workers of "thousands" of businesses. Plaintiffs identify only a handful of these businesses. Compl. ¶ 1. And even if these businesses were identified, it would be impossible to identify which of their employees were "enrolled" on finger-scan devices by their employers in Illinois without information about these businesses' internal operations that Kronos does not possess.[3]

In sum, striking Plaintiffs' class allegations "will ensure that materially identical . . . collective actions . . . will not proceed simultaneously in two separate forums, thus avoiding

[3] Beyond practical ascertainability, Plaintiffs also do not meet Rule 23's "implicit requirement" that a class "be defined clearly and that membership be defined by objective criteria . . . ." *Mullins*, 795 F.3d at 657. This "ascertainability" requirement bars certification where class membership is "defined in terms of success on the merits (so-called 'fail-safe' classes)." *Id.* Plaintiffs purport to represent "[a]ll individuals working in the State of Illinois who had their fingerprints collected, captured, received, or otherwise obtained or disclosed" by Kronos. Compl. ¶ 61. But whether Kronos "collected, captured, received, or otherwise obtained or disclosed" Plaintiffs' data is *the key question*—it is not an "objective criteri[on]." (*See* Kronos' Memorandum In Support of its Motion to Dismiss). Plaintiffs have defined the class by assuming the conclusion to a central legal question in this case, further justification to strike this class definition.

duplicative efforts . . . and the potential for inconsistent results." *Copello v. Boehringer Ingelheim Pharm. Inc.*, 812 F. Supp. 2d 886, 889 (N.D. Ill. 2011) (Feinerman, J.) (collecting cases "disapproving duplicative class actions"). Indeed, preventing Plaintiffs from pursuing duplicative BIPA claims here would constitute "wise judicial administration." *Id.* at 890.

II. PLAINTIFFS DO NOT MEET RULE 23(b)(3) PREDOMINANCE REQUIREMENTS

Plaintiffs also cannot meet Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The predominance inquiry tests whether the putative class is "sufficiently cohesive to warrant adjudication by representation." *Ocampo v. GC Servs. Ltd. P'ship*, No. 16-cv-9388, 2018 WL 6198464, at *5 (N.D. Ill. Nov. 28, 2018) (citation omitted). This lawsuit "presents a slew of legal and factual questions that are unique to each class member," such that individual issues will predominate, warranting striking the class allegations. *Hill*, 946 F. Supp. 2d at 832.

A. Individualized Questions of Fact Predominate

Central to Plaintiffs' claims is whether Kronos possessed, collected, captured, or otherwise obtained their biometric data without their consent and, if so, when. *See* Compl. ¶ 64. This question cannot be *answered* "with 'evidence that is common to the class.'" *Gordon*, 2019 WL 498937 at *9.

1. Each claim will turn on employer-specific evidence related to each employer's timekeeping policies, practices, and BIPA compliance

Prosecution of these claims would require discovery and consideration of employer-specific evidence. Whether an individual claimant knowingly and voluntarily used a finger-scan device at work bears upon the viability of their BIPA claim against *Kronos*. Countless employer-specific questions would require consideration, such as: (i) where, when, and for which employees each employer used Kronos devices; (ii) whether the employer's compliance with BIPA extends

to Kronos; (iii) whether each employee knew and understood that the devices were scanning their fingers; (iv) whether each employer allowed some or all of its employees to opt for other authentication methods, such as identification numbers, badges or key fobs; (v) when each employer used Kronos devices, and whether other devices also in use; and (vi) where each employer stored employee data, for how long, and with what security safeguards.

Multiple employers, including NFI Industries (named by Plaintiffs, *see* Compl. ¶ 1), have argued that they in fact complied with BIPA and that their employees provided BIPA-compliant written consents. (*See* Ex. L). This Court cannot adjudicate the extent to which putative class members consented or otherwise knowingly and voluntarily used finger-scan devices, and whether these factors extend to Kronos, without performing "an exhaustive determination for every member of the proposed class." *Hylaszek v. Aetna Life Ins. Co.*, No. 94 C 5961, 1998 WL 381064, at *3 (N.D. Ill. July 1, 1998).

Moreover, "predominance is not satisfied where liability determinations are individual and fact-intensive." *Pumputiena*, 2017 WL 66823 at *9. Tony's Finer Foods' policies and practices, for example, have no bearing on putative plaintiffs who worked for Southwest Airlines, some of whom are union-represented or have individual arbitration agreements that otherwise impact their claims. This Court simply cannot aggregate and resolve these claims together. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) ("If, to make a *prima facie* showing . . . the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question." (citation omitted)).

2. Employers switch between timekeeping vendors and methods

As Plaintiffs acknowledge, employers use various timekeeping authentication methods, including "key fobs, identification numbers or [time] cards." Compl. ¶ 2. Kronos customers often switch between timekeeping vendors and try various authentication methods. For example, Con-

Tech—one of the employers Plaintiffs name in their Complaint (*id.* ¶ 1)—allegedly experimented with hand geometry before opting for the finger-scan method. (*See* Ex. D, ¶¶ 2, 62–63). It also switched between timekeeping vendors. (*Id.* ¶¶ 4, 64). These sorts of changes make ascertaining the class difficult even in employer-specific BIPA suits. This Court would need to consider employer- and employee-specific questions, such as whether the employer used finger-scanning while Kronos was its vendor and whether each employee used the finger-scanning method during that period. *See Hill*, 946 F. Supp. 2d at 832 (Predominance is not satisfied where "the lawsuit presents a slew of . . . factual questions that are unique to each class member."). If these questions could be answered at all, it "would be an immense task that would entail discovery . . . on each individual claim." *Hylaszek*, 1998 WL 381064 at *3. Put simply, Plaintiffs ask this Court to aggregate "thousands" of unidentified employers, ignoring critical differences in their practices, policies, and, importantly, timelines, and adjudicate them together, as if they were uniform. They are not.

B. Individualized Questions of Law Predominate

As with factual questions, individualized defenses and issues of law far outnumber those common to the putative class. "Predominance fails where 'affirmative defenses will require a person-by-person evaluation of conduct to determine whether [a defense] precludes individual recovery.'" *Pumputiena*, 2017 WL 66823 at *9. These legal defenses and issues render "the proposed class '[in]sufficiently cohesive to warrant adjudication'" via aggregation. *See Ocampo*, 2018 WL 6198464 at *5.

1. Federal labor law preempts many putative class members' claims

Labor law preemption issues affect portions of the putative class. Claimants working in the railroad and airline industries, for example, must bring their BIPA claims in arbitration pursuant to the Railway Labor Act, 45 U.S.C. § 181, *et seq.*, because their resolution requires interpretation

of and reference to collective bargaining agreements. *See Miller v. Southwest Airlines Co.*, No. 18 C 86, 2018 WL 4030590, at *5–6 (N.D. Ill. Aug. 23, 2018). The claims of other unionized putative class members likewise may be pre-empted by federal labor law, particularly because privacy matters are frequently the subject of collective bargaining agreements. *See Matter of Amoco Petroleum Additives Co.*, 964 F.2d 706, 709–10 (7th Cir. 1992) (noting that "[p]rivacy in the workplace . . . is an ordinary subject of bargaining" and that "[t]he extent of privacy is a 'condition' of employment" and that a court therefore "could not award damages without first construing the collective bargaining agreement . . . ."). Indeed, Smith Senior Living, another of the employers Plaintiffs expressly mention (Compl. ¶ 1), moved to partially strike class allegations based on union pre-emption arguments. (*See* Ex. M).

2. Unionization creates highly-individualized legal issues

BIPA permits unions, as employees' "legally authorized representative," to receive notice and provide consent. *See* 740 ILCS 14/15(b)(3), (d)(1)–(2); *see Miller v. Southwest Airlines Co.*, No. 18 C 86, 2018 WL 5249230, at *2 (N.D. Ill. Oct. 22, 2018). Whether a union "had the right or responsibility to accept [BIPA] notice and consent on [claimants'] behalf" as their "sole and exclusive bargaining agent" requires consideration of each respective collective bargaining agreement. *Id.* In turn, each union notice and consent process will need to be reviewed to determine if Kronos is included. These issues could not even be addressed without determining first which of these thousands of employers were unionized, and then examining each individual collective bargaining agreement—an undertaking that would be "an immense task." *Hylaszek*, 1998 WL 381064 at *3.

3. Individual arbitration preempts putative class members' claims

Individual arbitration clauses preempt many of the claims at issue here. Such was the case in *Battles v. Southwest Airlines*, an employer-specific BIPA suit brought in Illinois state court. In

January 2019, the *Battles* court entered an order dismissing the claims against both Southwest *and* Kronos because "the Southwest Airlines Alternative Dispute Resolution Program" compelled individual arbitration. (*See* Ex. N). In contrast, *Liu v. Four Seasons Hotel, LTD*, 2019 IL App (1st) 182645, ¶¶ 2–4, recently held that employees were not obligated to individually arbitrate BIPA claims, after assessing the specific language of those parties' arbitration agreements.

Defenses related to arbitration clauses will require an examination of each employer's arbitration agreements. Kronos does not have access to its many clients' agreements. Even if it did, this Court cannot feasibly examine the agreements of "thousands" of Illinois employers (Compl. ¶ 1) to determine whether they compel arbitration. This determination is highly "individual and fact-intensive." *Pumputiena*, 2017 WL 66823 at *9 (affirmative defenses requiring individualized inquiries destroy predominance).

4. Certain employment environments result in waiver of privacy

Workers in certain industries may have a diminished expectation of privacy in their personal information. For example, one health care entity has argued that registered nurses cannot claim a violation of their right to privacy in their biometric data when they have voluntarily furnished their fingerprints to various entities as a condition of registration pursuant to the Nurse Practice Act (NPA), 225 ILCS 65/50-35. (*See* Ex. O). The Court will also have to examine each employer's work environment to assess whether a waiver defense is applicable to Kronos.

5. BIPA's "government contractor" exception creates individualized questions

BIPA does not apply to "a contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government." 740 ILCS 14/25(e). The alleged "thousands" of Illinois employers whose workers Plaintiffs seek to represent (Compl. ¶ 1), certainly may have performed work as a government contractor or subcontractor at

some point. Significant discovery would be required to determine which employers performed work as government contractors and when, and whether employees were engaging in finger-scan timekeeping while working as government contractors. Finally, this Court would need to determine the effect of this exemption as to a third-party vendor like Kronos. This defense "will require a person-by-person evaluation." *Pumputiena*, 2017 WL 66823 at *9. It is better left for employer-specific lawsuits.

6. Abstention creates individualized questions

Because this lawsuit duplicates the claims brought in multiple state court BIPA actions that name or named Kronos—the same putative class members are bringing the same BIPA claims against Kronos in connection with the same sets of facts—this Court would be forced to confront complex abstention questions. These state court actions would require the Court to perform the complex two-step and ten-factor *Colorado River* abstention inquiry. *See Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976); *Tyrer*, 456 F.3d at 754. The better course is to allow each employer-specific suit to resolve its claims in its respective forum. *See Lumen Constr., Inc. v. Brant Constr. Co., Inc.*, 780 F.2d 691, 694 (7th Cir. 1985) ("When a case proceeds on parallel tracks in state and federal court, the threat to efficient adjudication is self-evident.").

7. Employer state citizenship presents individualized questions

Kronos may advance a heightened negligence defense as to employees of its non-Illinois customers, such as NFI Industries (a New Jersey company, *see* Ex. E, ¶ 18); Southwest Airlines (a Texas company, *see* Ex. F, ¶ 24); and Signature Healthcare Services (a Michigan company, *see* Ex. P, ¶ 11), among many others. To recover under BIPA, plaintiffs must prove more than a mere violation—they must show that Kronos acted *negligently*, *recklessly*, or *intentionally* in committing the violation. *See* 740 ILCS 14/20(1)–(2). Kronos argues that even if it owed duties under BIPA (it did not) and violated them (it did not), Plaintiffs still cannot recover because Kronos

did not act negligently, recklessly or intentionally. This defense is even stronger as to employees of its non-Illinois customers. Kronos could not have anticipated accruing a statutory duty to a group of Illinois workers with whom it has no relationship based solely on a transaction it executed with a company based in New Jersey or Michigan. Such would not be the result of negligence, much less recklessness or intentional conduct. This further casts doubt on predominance. *See, e.g.*, *Hill*, 946 F. Supp. 2d at 831 ("[P]redominance . . . begins, of course, with the elements of the underlying cause of action.").

III. PLAINTIFFS CANNOT SATISFY RULE 23(A)

Plaintiffs also cannot satisfy Rule 23(a)'s adequacy and commonality requirements. Plaintiffs' own BIPA class action claims against their employers prevent them from "protecting the different, separate, and distinct interests of the class members." *Gordon*, 2019 WL 498937 at *8. As argued more fully in Kronos' accompanying Motion to Dismiss and Memorandum, Plaintiff Figueroa purports to represent Tony's Finer Foods employees in *Figueroa v. Tony's Finer Foods, Inc., et al.*, No. 2018-CH-15728 (Cook Cnty. Ill. Cir. Ct., filed Dec. 19, 2018), and Plaintiff Burton seeks to represent BWAY employees in *Burton v. BWAY Corp.*, No. 2018-CH-09797 (Cook Cnty. Ill. Cir. Ct., filed Aug. 1, 2018) (Exs. Q, R). Contrary to Plaintiffs' assertions, *see* Compl. ¶ 66, this situation creates conflicts of interest between them and this putative class.

"A class is not fairly and adequately represented" where, as here, "class members have antagonistic or conflicting claims." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). Plaintiffs' interests and those of the putative class are not aligned. Rather than dedicating themselves to pursuing this potentially massive class' interests, Plaintiffs will be focused on litigating their own claims for two other putative classes, which are already being challenged on grounds, such as statutes of limitations, that could adversely impact the rights of the putative class members here. Plaintiffs have no vested interest in arguing against the exclusion of class members

that are subject to defenses such as labor law preemption, or who have signed individual arbitration agreements, and may pursue positions adverse to these interests. Plaintiffs could sell this putative class short in favor of their employer-specific suits, which could prove easier to resolve. Finally, because this action cannot "generate common *answers*'" apt to resolve the dispute, Plaintiffs also cannot satisfy "the true test of commonality." *Pumputiena*, 2017 WL 66823 at *9 (noting that commonality and predominance are similar) (citation omitted); *see also supra* at Part II.

CONCLUSION

"The legitimacy of the court system in the eyes of the public and fairness to the individual litigants . . . are endangered by duplicative suits that are the product of gamesmanship or that result in conflicting adjudications." *Lumen Constr., Inc.,* 780 F.2d at 694. This class action is the epitome of gamesmanship and disregard for fair adjudicatory process. It rehashes the allegations from Plaintiffs' multiple previously-filed suits in a gambit to create a "mega" class derived from thousands of unidentified employers, intentionally glossing over numerous, employer-specific factual and legal differences so that Plaintiffs can leverage a massive recovery that is completely disproportionate to any possible BIPA liability they could hope to prove. For all the foregoing reasons, Kronos respectfully asks that this Court strike Plaintiffs' class allegations from the Complaint.

Dated: April 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019**,** I electronically filed the foregoing **KRONOS INCORPORATED'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all Counsel of Record. Parties may access this filing through the Court's system.

/s/ Melissa A. Siebert