

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

PASHA MCKENZIE individually and on behalf)	
of all others similarly situated,)	
)	
Plaintiff,)	
)	Case No. 21-cv-933
v.)	
)	
DIGITAL REALTY MANAGEMENT)	
SERVICES, LLC)	
)	
Defendant.)	

NOTICE OF REMOVAL

Defendant Digital Realty Management Services, LLC, by and through its undersigned counsel, hereby removes this action from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, to the United States District Court for the Northern District of Illinois, Eastern Division. Removal is proper and timely pursuant to 28 U.S.C. §§ 1331, 1441(a) and 1446(b)(3) because within the last thirty (30) days Defendant has received affirmative and unambiguous proof that Plaintiff Pasha McKenzie was a member of a labor union and subject to the terms of a collective bargaining agreement during the time period relevant to Plaintiff's Complaint. Consequently, Plaintiff's alleged state-law claims present a Federal Question under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 and, therefore, necessitate removal to the United States District Court for the Northern District of Illinois, Eastern Division. In further support thereof, Defendant respectfully states as follows:

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

1. On September 1, 2020, Plaintiff Pasha McKenzie ("Plaintiff") commenced this action by filing a putative Class Action Complaint ("Complaint") against Defendant Digital Realty

Management Services, LLC (“Defendant”) in the Circuit Court of Cook County, Illinois, County Department, Chancery Division. The lawsuit is captioned *Pasha McKenzie v. Digital Realty Management Services, LLC*, Case No. 2020 CH 05661 (Ill. Cir. Ct.) (the “State Court Action”). Defendant was served with the Summons and Complaint on September 18, 2020. Pursuant to 28 U.S.C. § 1446(a), a copy of Plaintiff’s Complaint, together with and all process, pleadings, and orders served in the State Court Action are attached hereto.¹

A. The Allegations and Claims in Plaintiff’s Complaint

2. The Complaint alleges a single cause of action claiming that Defendant violated the Illinois Biometric Information Privacy Act (“BIPA”), 740 ILCS 14/1, *et seq.*, by using a door entry-authentication system that allegedly collected, stored and used the biometric identifiers and biometric information of individuals to whom Defendant granted access to its facility in Chicago, Illinois.

3. Plaintiff’s Class Action Complaint alleges she “worked at” Defendant’s Chicago, Illinois facility (“Chicago Facility”) from November of 2019 to February of 2020, and that Defendant required Plaintiff to scan her fingerprint as an authentication method to access the Chicago Facility. (Ex. A ¶¶ 27-28.) Apart from Plaintiff’s allegation that she “worked at” the Chicago Facility, Plaintiff does not make any other allegations regarding the nature of her employment, nor does she allege anywhere in her Complaint that she was a member of a union or subject to the terms of a collective bargaining agreement. And there is nothing on the face of the Complaint that would suggest she was a member of a union or subject to the terms of a collective bargaining agreement.

¹ All pleadings, filings and orders from the State Court Action not specifically referenced in this Notice are attached hereto as Group Exhibit O.

4. Plaintiff alleges she never signed a written release allowing Defendant to collect or store her fingerprints. (Ex. A ¶ 32.) Plaintiff also alleges that Defendant failed to inform Plaintiff and the putative Class in writing that their biometric identifiers and biometric information were being collected and stored; failed to inform Plaintiff and the Class of the specific purpose and length of term for which their biometric identifiers or biometric information was being collected, stored, and used; and failed to publicly provide a retention schedule or guidelines for permanently destroying its employees' biometric information. (Ex. A ¶¶ 47-50.)

5. On behalf of herself and each member of the putative class, Plaintiff seeks: (1) declaratory relief; (2) injunctive and equitable relief requiring Defendant to collect, store, and use biometric identifiers or biometric information in compliance with BIPA; (3) statutory damages for each BIPA violation, pursuant to 740 ILCS 14/20; (4) reasonable litigation expenses and attorneys' fees; and (5) pre- and post-judgment interest. (Ex. A, Prayer for Relief.)

6. Plaintiff proposes certification of the following class: "All residents of the State of Illinois who had their fingerprints collected, captured, received or otherwise obtained by Defendant while residing in Illinois." (Ex. A ¶ 35.)

7. On November 9, 2020, Defendant filed its Answer and Affirmative Defenses to the Complaint. (*See* Ex. B.) On December 2, 2020, the Circuit Court entered an initial case management order. (*See* Ex. C.)

8. The State Court has not made any merits rulings in the litigation. Nor have the parties made any arguments on any potentially dispositive issues before the State Court.

B. Discovery Has Produced Unambiguous Evidence That Plaintiff Was a Member of a Union and Subject to a Collective Bargaining Agreement

9. Relevant to this Notice of Removal, on December 15, 2020, Defendant served its first set of interrogatories and requests for admission on Plaintiff. (*See* Exs. D & E, respectively.)

Plaintiff served her objections and responses to Defendant's first set of interrogatories and requests for admission on January 11, 2021. (*See* Exs. F & G, respectively.)

10. Among other things, Defendant served discovery on Plaintiff to understand the nature of Plaintiff's employment and, in particular, whether she was a member of a union, given the absence of any such allegations in the Complaint. Specifically, Defendant's interrogatories and requests for admission inquired whether Plaintiff was a member of a labor union during the time she worked at Defendant's Chicago Facility. Plaintiff denied she had been a union member, but her responses were equivocal and therefore called for deeper investigation. For example, Defendant's Interrogatory No. 8 directly asked Plaintiff if she was a member of a labor union between November 2019 and February 2020, and Plaintiff answered, "*To the best of Plaintiff's knowledge, no.*" *See* Plaintiff's Answer to Defendant's Interrogatory No. 8, Ex. F (emphasis added). Similarly, Defendant's Request for Admission No. 2 asked Plaintiff to "[a]dmit that You were a member of a labor union during Your Staffing Period" and again, Plaintiff "answer[ed] *to the best of her knowledge, Deny.*" *See* Plaintiff's Response to Defendant's Request for Admission No. 1, Ex. G (emphasis added).

11. To test the veracity of Plaintiff's discovery responses regarding union membership, on January 15, 2021, Defendant served a subpoena on nonparty Service Employees International Union, Local 1 (the "Union" or "SEIU"), requesting production of business records to determine whether Plaintiff had been a member of the Union during the time period when she worked at Defendant's Chicago Facility. (*See* Ex. H.) **On January 22, 2021**, the Union served upon Defendant its written response to the subpoena (*see* Ex. I) and also produced business records establishing that Plaintiff had been a member of the Union (*see* Grp. Ex. J). The Union's response and document production confirmed that Plaintiff had joined the Union on December 18, 2019—

i.e., during the time period when she worked at Defendant’s Chicago facility. (*See* Ex. J-1.) The Union also produced copies of the collective bargaining agreements between the Union and AlliedBarton (Plaintiff’s employer²), as well as copies of Plaintiff’s Union member profile report (Ex. J-2) and dues payment records (Ex. J-3).

II. DEFENDANT’S NOTICE OF REMOVAL IS TIMELY

12. Although civil actions generally must be removed within 30 days after the defendant’s receipt of service of the complaint, this general rule is subject to exceptions. As relevant here, “if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or *other paper from which it may first be ascertained that the case is one which is or has become removable.*” 28 U.S.C. § 1446(b)(3) (emphasis added). In this case, Section 1446(b)(3)’s exception makes the State Court Action removable notwithstanding the passage of more than 30 days since the date Defendant was served with the Complaint.

13. 28 U.S.C. § 1441(a) allows for the removal of “any civil action brought in a State court of which the district courts of the United States have original jurisdiction[.]” Discovery produced by SEIU has unambiguously confirmed that Plaintiff was a member of the Union and subject to a collective bargain agreement. For the reasons explained below, these facts now make it apparent that the State Court Action filed by Plaintiff presents a Federal Question, which vests

² In her response to one of Defendant’s requests for admission, Plaintiff stated “she was assigned to work as a temporary employee for Digital Realty through the staffing agency Allied Burton [*sic*].” *See* Plaintiff’s Response to Defendant’s Request for Admission No. 1, Ex. G; *see also* Plaintiff’s Answer to Defendant’s Interrogatory No. 7, Ex. F (“Plaintiff was assigned to work as a temporary employee for Digital Realty through the staffing agency AlliedBarton.”).

this Court with original jurisdiction under 28 U.S.C. § 1331, and thereby renders this case removable pursuant to 28 U.S.C. § 1441(a).

14. Here, the initial pleading – the Complaint – does not present a Federal Question on its face. Rather, the Complaint only alleges violations of BIPA—an Illinois state law. Further, the Complaint does not contain any allegations suggesting Plaintiff was a member of a labor union during the time period she worked at Digital’s Chicago Facility, such that Section 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185, would preempt Plaintiff’s claims. *See, e.g., Gil v. True World Foods Chi., LLC*, No. 20 C 2362, 2020 WL 7027727, at *2 (N.D. Ill. Nov. 30, 2020) (“Section 301 preempts claims founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement.” (citation & internal quotation marks omitted)). Therefore, as this case was not “removable” on the face of the Complaint, the 30-day removal clock was not triggered on the date Defendant was served with the Complaint. *See Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 823-24 (7th Cir. 2013) (“It’s clear that the 30-day removal clock is triggered *only* by the defendant’s receipt of a pleading or other litigation paper facially revealing that the grounds for removal are present.”) (emphasis in original).

15. Instead, this case first became removable on January 22, 2021 when Defendant was first served with SEIU’s response to the subpoena and business records confirming that Plaintiff was a dues-paying member of the Union when she was working at Defendant’s Chicago Facility. In particular, the Union’s response and records establish that, on December 18, 2019—just *one month after* Plaintiff started working at Digital’s Chicago Facility—Plaintiff checked “YES” on her Union authorization form indicating that she did “want to become a Member of SEIU Local 1” and provided written authorization to her employer “to deduct from [her] earnings to pay Local

1 an amount equal to the regular monthly dues and initiation fees uniformly applicable to members of Local 1.” (See Ex. J-1.) Her authorization form lists her employer as “Allied” and her worksite as “Digital.” (See *id.*)

16. The Union produced these documents in response to a subpoena served by Defendants after the State Court Action was initiated. Accordingly, the Union’s response and business records constitute “other paper” under Section 1446(b)(3) that enabled Defendant to ascertain that this case is removable. See, e.g., *Martin v. Global Experience Specialists, Inc.*, No. 13 C 07749, 2014 WL 2598788, at *6 (N.D. Ill. June 10, 2014) (stating courts construe the “other paper” requirement to include “papers that are part and parcel of the State Court proceedings having their origin and existence by virtue of the State Court Process”); *Ayotte v. Boeing Co.*, 316 F. Supp. 3d 1066, 1074 n.3 (N.D. Ill. 2018) (stating the “other paper” requirement includes any “official papers filed or exchanged in connection with the [state court] action”); *Janis v. Workhorse Custom Chassis, LLC*, 891 F. Supp. 2d 970, 973-74 (N.D. Ill. 2012) (stating the “other paper” requirement “has been interpreted broadly” and includes “documents produced in discovery”); *Wright v. Nat’l Interstate Ins. Ins. Co.*, No. 16-16214, 2017 WL 344283, at *4 (E.D. La. Jan. 24, 2017) (holding that records obtained through third party’s subpoena response were “other paper” under § 1446(b)(3) and triggered the 30-day removal clock).

17. As discussed above, Defendant had attempted to ascertain this information through discovery requests first issued to Plaintiff, but Plaintiff initially denied she was a member of a Union. Not until Defendant received the Union’s subpoena response and its records relating to Plaintiff (on January 22, 2021) did Defendant discover that Plaintiff’s Union membership overlapped with the period when she worked at Defendant’s Chicago Facility. These Union documents constitute “other paper that affirmatively and unambiguously reveals that the predicates

for removal are present.” *Walker*, 727 F.3d at 824 (establishing bright-line rule for when the 30-day removal clock begins to run under § 1446(b)).

18. In sum, the 30-day removal clock began to run, at the earliest, on January 22, 2021. Defendant files this Notice of Removal on February 19, 2021, which is the 28th day after the Union served its subpoena response on Defendant. Removal is therefore timely under 28 U.S.C. § 1446(b)(3).

19. Further, on January 28, 2021, Defendant forwarded the Union’s subpoena response and document production to Plaintiff’s counsel, plus a letter demanding that Plaintiff amend her discovery responses that denied her membership in a Union. (*See* Exs. K & L, respectively.) On February 9, 2021, Plaintiff served amended responses to Defendant’s interrogatories and requests for admission. In these amended responses, Plaintiff acknowledged for the first time that she was member of a union during the time she worked at Defendant’s Chicago Facility. (*See* Plaintiff’s Amended Answer to Defendant’s Interrogatory No. 8, Ex. M; Plaintiff’s Amended Response to Defendant’s Request for Admission Nos. 2 & 4, Ex. N.)

20. Plaintiff’s amended responses also undeniably constitute “other paper that affirmatively and unambiguously reveals that the predicates for removal are present.” *Janis v. Workhorse Custom Chassis, LLC*, 891 F. Supp. 2d 970, 973-74 (N.D. Ill. 2012).

21. Consequently, even if the Union documents produced pursuant to subpoena did not constitute “other paper”, the 30-day removal clock then began to run on February 9, 2021 when Plaintiff amended her discovery responses to confirm she was a union member during the time period when she worked at Defendant’s Chicago Facility. Defendant files this Notice of Removal on February 19, 2021, which is the 10th day after Plaintiff amended her responses to Defendant’s discovery responses. Removal is therefore also timely on this basis under 28 U.S.C. § 1446(b)(3).

III. DISCOVERY HAS REVEALED A FEDERAL QUESTION THAT PRESENTS GROUNDS FOR REMOVAL

22. Removal is proper under 28 U.S.C. § 1331, which provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” *See also* 28 U.S.C. § 1441(a).

23. Here, Plaintiff’s membership in the Union and the fact that she was subject to the Union’s collective bargaining agreement presents a Federal Question—whether Plaintiff’s claims are federally preempted under Section 301 of the LMRA, 29 U.S.C. § 185—and, therefore, confers original jurisdiction in the district courts of the United States.

24. Section 301 of the LMRA, 29 U.S.C. § 185, provides for federal subject matter jurisdiction—and federal preemption—over “claims founded directly on rights created by collective-bargaining agreements, and also claims ‘substantially dependent on analysis of a collective bargaining agreement.’” *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19 C 2942, 2020 WL 919202, at *3 (N.D. Ill. Feb. 26, 2020) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987)). As the Seventh Circuit has held, “[i]f the resolution of a state law claim depends on the meaning of, or requires interpretation of, a collective bargaining agreement, the application of state law is preempted and federal labor law principles must be employed to resolve the dispute.” *Peatry*, 2020 WL 919202, at *3 (citing *Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 499 (7th Cir. 2013)).

25. Indeed, district courts in the Seventh Circuit have consistently held that BIPA claims brought by unionized plaintiffs are preempted under the LMRA. *See, e.g., Williams v. Jackson Park SLF, LLC*, No. 19-CV-8198, 2020 WL 5702294, at *2-4 (N.D. Ill. Sept. 24, 2020) (holding LMRA preempted unionized plaintiff’s BIPA claims); *Peatry*, 2020 WL 919202, at *3 (same); *Gil*, 2020 WL 7027727, at *2 (same and citing cases); *Young v. Integrity Healthcare*

Communities, LLC, --- F. Supp. 3d ----, 2021 WL 148736, at *3 (S.D. Ill. Jan. 15, 2021) (“The Seventh Circuit has made it clear that BIPA claims are subject to complete federal preemption when the named plaintiffs are members of a union.”) (citing *Miller v. Sw. Airlines Co.*, 926 F.3d 898, 903-04 (7th Cir. 2019)); accord *Fox v. Dakota Integrated Sys., LLC*, 980 F.3d 1146, 1151 n.1 (7th Cir. 2020) (BIPA case and noting that “[u]nder the complete-preemption doctrine, ‘a plaintiff’s state cause of action [can be recast] as a federal claim for relief making [its] removal [by the defendant] proper on the basis of federal question jurisdiction’” (quoting *Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009)) (alterations in original)).

26. As relevant here, Plaintiff worked at Defendant’s Chicago Facility from November 2019 to February 2020. (Ex. A ¶ 27.) Plaintiff joined the Union on December 18, 2019 and continued to be a member until at least February 2020. (See Exs. J-1 & J-2.) As such, the terms and conditions of her employment, and her staffing at Defendant’s Chicago Facility, were subject to the terms of the operative collective bargaining agreement between her employer and the Union. Among other things, the operative CBA contains a “management rights” clause that provides Plaintiff’s employer with the exclusive right to manage and direct the work-force, including the right to plan, direct, and control all operations performed at the various locations serviced by Plaintiff’s employer. Further, the Union agreed to arbitrate grievances and disputes of Union members involving the interpretation and application of the CBA.

27. Section 301 of the LMRA grants **exclusive** jurisdiction to federal district courts over disputes involving collective bargaining agreements to promote consistent resolution of labor disputes that must be decided under federal law. See *Allis-Chalmers Corp. v. Lueck*, 417 U.S. 202, 210-11 (1985). Plaintiff’s central allegation is that her biometric information was collected, stored, and used by Defendant without her consent. But during the time when Plaintiff was servicing

Defendant's Chicago Facility, she was a member of the Union and her employment was subject to the CBA. In the specific context of BIPA, courts in this Circuit have held that "whether the CBA management rights clause [gives] rise to consent regarding biometric data is a question for an adjustment board" and thus, preempted by § 301 of the LMRA. *Williams*, 2020 WL 5702294, at *3; *see also Miller*, 926 F.3d at 903. "In these circumstances, the Seventh Circuit's guidance makes clear that Plaintiff's claims require interpretation of the CBA—at the very least the management rights clause." *Gray v. Univ. of Chi. Med. Ctr., Inc.*, No. 19-cv-04229, 2020 WL 1445608, at *4 (N.D. Ill. Mar. 26, 2020) (holding union member's BIPA claims were preempted by § 301 of the LMRA).

28. The fact that Plaintiff was a Union member for at least part of the time period when she worked at Defendant's Chicago Facility makes her BIPA claim subject to preemption. *See Williams*, 2020 WL 5702294, at *4 (concluding plaintiff's BIPA claims were preempted even if he was not a union member for the first month of his employment); *Crooms v. Sw. Airlines Co.*, 459 F. Supp. 3d 1041, 1049-50 (N.D. Ill. 2020) (rejecting plaintiffs' attempts to avoid preemption by pointing to their initial six-month probationary period before joining the union, and by trying to limit their class definition when in fact plaintiffs sought to represent all workers, union members or not).

29. For the foregoing reasons, federal preemption under Section 301 of the LMRA and related issues are central to this matter and warrant removal to, and litigation in, the appropriate federal district court. Preemption under Section 301 of the LMRA "has such 'extraordinary preemptive power' that it 'converts an ordinary state common law complaint into stating a federal claim for purposes of the well-pleaded complaint rule.'" *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1152 (9th Cir. 2019) (quoting *Metro. Life Ins. v. Taylor*, 481 U.S. 58, 65 (1987)).

IV. VENUE IS PROPER IN THE NORTHERN DISTRICT OF ILLINOIS

30. The United States District Court for the Northern District of Illinois is the appropriate venue for removal of the State Court Action. Under 28 U.S.C. § 1441, a civil action brought in any state court in which the district courts of the United States have original jurisdiction are to be removed to the district court for the district and division embracing the place where the state court action is pending. The State Court Action was filed in Cook County, Illinois, which is located in this judicial district and division.

31. As required by 28 U.S.C. §1446(a), the Complaint, Summons and all other “process, pleadings, and orders” served to date on Defendant are attached hereto.

32. As required by 28 U.S.C. §1446(d), written notice of this Notice of Removal will be sent promptly to Plaintiff’s counsel by email and U.S. Mail, and promptly filed with the Clerk of the Circuit Court of Cook County.

33. By filing this Notice of Removal, Defendant does not waive any defenses to the claim Plaintiff asserts on behalf of herself and the putative class, including that Defendant did not violate BIPA and that class certification is inappropriate.

WHEREFORE, Defendant Digital Realty Management Services, LLC hereby removes Case Number 2020 CH 05661 pending in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, to the United States District Court for the Northern District of Illinois, Eastern Division.

Dated: February 19, 2021

Respectfully submitted,

DIGITAL REALTY MANAGEMENT
SERVICES, LLC

By: /s/ Kevin M. Cloutier
One of Its Attorneys

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Attorneys for Digital Realty Management Services, LLC

CERTIFICATE OF SERVICE

I, Kevin M. Cloutier, hereby certify that on February 19, 2021, I caused a true and correct copy of the foregoing document to be electronically filed utilizing the Court's CM/ECF system. I also transmitted copies of this Notice of Removal (and all exhibits thereto) to the following attorneys of record via email and U.S. mail:

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Mara Baltabols, Esq.
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Attorneys for Plaintiff Pasha McKenzie

/s/ Kevin M. Cloutier
Kevin M. Cloutier

EXHIBIT A

NATIONAL REGISTERED AGENTS, INC.
SERVICE OF PROCESS SUMMARY TRANSMITTAL FORM

To: Chris Visgilio
Digital Realty Trust
4 EMBARCADERO CNTR
STE 3200
SAN FRANCISCO, CA 94111

SOP Transmittal # **538268336**

312-345-4336 - Telephone

Entity Served: DIGITAL REALTY MANAGEMENT SERVICES, LLC (Domestic State: DELAWARE)

Enclosed herewith are legal documents received on behalf of the above captioned entity by National Registered Agents, Inc. or its Affiliate in the State of ILLINOIS on this 18 day of September, 2020. The following is a summary of the document(s) received:

1. **Title of Action:** PASHA MCKENZIE individually and on behalf of all others similarly situated, Pltf. vs. DIGITAL REALTY MANAGEMENT SERVICES, LLC, DFT.
2. **Document(s) Served:** Other: -
3. **Court of Jurisdiction/Case Number:** None Specified
Case # 2020CH05661
4. **Amount Claimed, if any:** N/A
5. **Method of Service:**
☐ Personally served by: ☐ Process Server ☐ Law Enforcement ☐ Deputy Sheriff ☐ U. S Marshall
☒ Delivered Via: ☐ Certified Mail ☒ Regular Mail ☐ Facsimile
☐ Other (Explain):
6. **Date of Receipt:** 09/18/2020
7. **Appearance/Answer Date:** None Specified
8. **Received From:** None Specified
9. **Carrier Airbill #** 1ZY041160198496608

10. Call Made to: Not required

11. Special Comments:
SOP Papers with Transmittal, via UPS Next Day Air
Image SOP
Email Notification, Justin Chang jchang@digitalrealty.com
Email Notification, Chris Visgilio cvisgilio@digitalrealty.com




NATIONAL REGISTERED AGENTS, INC.

CopiesTo:

Transmitted by Khalilah Starks

The information contained in this Summary Transmittal Form is provided by National Registered Agents, Inc. for informational purposes only and should not be considered a legal opinion. It is the responsibility of the parties receiving this form to review the legal documents forwarded and to take appropriate action.

ORIGINAL

	
\$1.00 us postage 1 OZ FIRST-CLASS MAIL FLATS RATE	RETAIL
	
STATUS 09/08/2020	
USPS FIRST CLASS MAIL®	
The Fish Law Firm, P.C. 200 E. 5th Ave., Suite 123 Naperville IL 60563	
SHIP TO: Digital Realty Management Services, LLC c/o National Registered Agents Inc. 208 S. La Salle St., Suite 814 Chicago IL 60604-1101	
	
C014	

**Notice and Acknowledgment of
Receipt of Summons and Complaint**

(10/12/18) CCG 0063 A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOISPASHA MCKENZIE individually and on
behalf of all others similarly situated

Plaintiff(s)

Case No. 2020 CH 05661

vs.

DIGITAL REALTY MANAGEMENT SERVICES, LLC

Defendant(s)

Defendant(s)

Amount Claimed: \$

**NOTICE AND ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND
COMPLAINT**

DIGITAL REALTY MANAGEMENT SERVICES, LLC

To: c/o National Registered Agents Inc.

Address: 208 S. LaSalle St., Suite 814

(Name)

City: Chicago

State: IL

Zip: 60604

The enclosed summons and complaint are served pursuant to section 2--213 of the Code of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 30 * days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 30 * days, you (or the party on whose behalf you are being served) may be served a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 60 ** days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this notice and acknowledgment of receipt of summons and complaint will have been mailed on 09/05/2020

Dorothy Brown, Clerk of the Circuit Court of Cook County, Illinois

cookcountyclerkofcourt.org

Notice and Acknowledgment of
Receipt of Summons and Complaint

(10/12/18) CCG 0063 B

E-filing is now mandatory for documents in civil cases with limited exemptions. To e-file, you must first create an account with an e-filing service provider. Visit <http://efile.illinoiscourts.gov/service-providers.htm> to learn more and to select a service provider. If you need additional help or have trouble e-filing, visit <http://www.illinoiscourts.gov/FAQ/gethelp.asp>.

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above captioned matter at:

(Please print or type)

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Email: _____

Relationship to Entity/Authority to Receive Service of Process: _____
(Not applicable if you are the named Defendant or Respondent.)

Dated: _____

Signature

- * (To be completed by the person sending the notice.) Date for return of waiver must be at least 30 days from the date on which the request is sent, or 60 days if the defendant is addressed outside the United States.
- ** (To be completed by the person sending the notice.) Date for answering complaint must be at least 60 days from the date on which the request is sent, or 90 days if the defendant is addressed outside the United States.

Hearing Date: 12/31/2020 10:00 AM - 10:00 AM
Courtroom Number: 2601
Location: District 1 Court
Cook County, IL

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

FILED
9/1/2020 1:55 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL

PASHA MCKENZIE individually and on
behalf of all others similarly situated,

10304196

Plaintiff,

v.

Case No.: 2020CH05661

DIGITAL REALTY MANAGEMENT
SERVICES, LLC

Defendant.

CLASS ACTION COMPLAINT

Plaintiff Pasha McKenzie (“Pasha” or “Plaintiff”) brings this Class Action Complaint against Defendant Digital Realty Management Services, LLC., (“Digital” or “Defendant”) to put a stop to its unlawful collection, use, and storage of Plaintiff’s and the putative Class members’ sensitive biometric data. Plaintiff, for Plaintiff’s Class Action Complaint, alleges as follows upon personal knowledge as to Plaintiff’s own acts and experiences and, as to all other matters, upon information and belief.

NATURE OF THE ACTION

1. Digital is a security company with over 200,000 employees and multiple locations nationwide. They currently have a Chicago, Illinois office.
2. When employees first begin their jobs at Digital, they are required to scan their fingerprint to access the doors, instead of using only key fobs or other identification cards.
3. While there are tremendous benefits to using biometric identifiers in the workplace, there are also serious risks. Unlike key fobs or identification cards—which can be changed or

replaced if stolen or compromised—fingerprints are unique, permanent biometric identifiers associated with the employee. This exposes employees to serious and irreversible privacy risks. For example, if a fingerprint database is hacked, breached, or otherwise exposed, employees have no means by which to prevent identity theft and unauthorized tracking.

4. Recognizing the need to protect its citizens from situations like these, Illinois enacted the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* (“BIPA”), specifically to regulate companies that collect and store Illinois citizens’ biometrics, such as fingerprints.

5. Despite this law, Digital disregarded the statutorily protected privacy rights of persons required to use their biometric data for door access and unlawfully collects, stores, and uses their biometric data in violation of the BIPA. Specifically, Digital has violated (and continues to violate) the BIPA because it did not:

- Properly inform Plaintiff and the Class members in writing of the specific purpose and length of time for which their fingerprints were being collected, stored, and used, as required by the BIPA;
- Provide a publicly available retention schedule and guidelines for permanently destroying Plaintiff’s and the Class’s fingerprints, as required by the BIPA; nor
- Receive a written release from Plaintiff or the members of the Class to collect, capture, or otherwise obtain fingerprints, as required by the BIPA.

6. Accordingly, this Complaint seeks an order: (i) declaring that Defendant’s conduct violates the BIPA; (ii) requiring Defendant to cease the unlawful activities discussed herein; and (iii) awarding liquidated damages to Plaintiff and the proposed Class.

PARTIES

7. Plaintiff is a natural person and citizen of the State of Illinois.

8. Defendant Digital is a Foreign Limited Liability Company, with its principal business location in Santa Ana, California.

JURISDICTION AND VENUE

9. This Court has jurisdiction over Defendant pursuant to 735 ILCS 5/2-209 because Defendant conducts business transactions in Illinois and have committed tortious acts in Illinois.

10. Venue is proper in Cook County because Defendant operates throughout this County and “resides” in Cook County within the meaning of 735 ILCS § 5/2-102(a).

FACTUAL BACKGROUND

I. The Biometric Information Privacy Act.

11. In the early 2000’s, major national corporations started using Chicago and other locations in Illinois to test “new [consumer] applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias.” 740 ILCS 14/5(b). Given its relative infancy, an overwhelming portion of the public became weary of this then-growing, yet unregulated technology. *See* 740 ILCS 14/5.

12. In late 2007, a biometrics company called Pay By Touch—which provided major retailers throughout the State of Illinois with fingerprint scanners to facilitate consumer transactions—filed for bankruptcy. That bankruptcy was alarming to the Illinois Legislature because suddenly there was a serious risk that millions of fingerprint records—which, are unique biometric identifiers, can be linked to people’s sensitive financial and personal data—could now be sold, distributed, or otherwise shared through the bankruptcy proceedings without adequate protections for Illinois citizens. The bankruptcy also highlighted the fact that most consumers who had used that company’s fingerprint scanners were completely unaware that the scanners were not actually transmitting fingerprint data to the retailer who deployed the scanner, but rather to the now-bankrupt company, and that unique biometric identifiers could now be sold to unknown third parties.

13. Recognizing the “very serious need [for] protections for the citizens of Illinois when it [came to their] biometric information,” Illinois enacted the BIPA in 2008. *See* Illinois House Transcript, 2008 Reg. Sess. No. 276; 740 ILCS 14/5.

14. The BIPA is an informed consent statute which achieves its goal by making it unlawful for a company to, among other things, “collect, capture, purchase, receive through trade, or otherwise obtain a person’s or a customer’s biometric identifiers or biometric information, unless it *first*:

(1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored;

(2) informs the subject . . . in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information.

740 ILCS 14/15(b).

15. BIPA specifically applies to employees who work in the State of Illinois. BIPA defines a “written release” specifically “in the context of employment [as] a release executed by an employee as a condition of employment.” 740 ILCS 14/10.

16. Biometric identifiers include retina and iris scans, voiceprints, scans of hand and face geometry, and—most importantly here—fingerprints. *See* 740 ILCS 14/10. Biometric information is separately defined to include any information based on an individual’s biometric identifier that is used to identify an individual. *See id.*

17. The BIPA also establishes standards for how private entities must handle Illinois employees’ biometric identifiers and biometric information. *See* 740 ILCS 14/15(c)–(d). For instance, the BIPA requires companies to develop and comply with a written policy—made

available to the public—establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting such identifiers or information has been satisfied or within three years of the individual's last interaction with the company, whichever occurs first. 740 ILCS 14/15(a).

18. Ultimately, the BIPA is simply an informed consent statute. Its narrowly tailored provisions place no absolute bar on the collection, sending, transmitting or communicating of biometric data. For example, the BIPA does not limit what kinds of biometric data may be collected, sent, transmitted, or stored. Nor does the BIPA limit to whom biometric data may be collected, sent, transmitted, or stored. The BIPA simply mandates that entities wishing to engage in that conduct must make proper disclosures and implement certain reasonable safeguards.

II. Digital Violates the Biometric Information Privacy Act.

19. By the time the BIPA passed through the Illinois Legislature in mid-2008, many companies who had experimented with using biometric data as an authentication method stopped doing so, at least for a time. That is because Pay By Touch's bankruptcy, described in Section I above, was widely publicized and brought attention to consumers' discomfort with the use of their biometric data.

20. Unfortunately, Digital failed to take note of the passage of the BIPA even though it has been in effect for over a decade. As a result, Digital recklessly or willfully continued to collect, store, and use the biometric data of its employees and individuals who worked at its Chicago, Illinois in violation of the BIPA.

21. Specifically, when individuals worked at Digital, they are required to have their fingerprints scanned in order to enter and exit through the doors in the building.

22. Digital uses a digital door entry system that requires employees, and outside

contractors, to use their fingerprints as a means of authentication. Unlike a traditional doors that use key or code access, individuals have to use their fingerprint to enter and exit the building and rooms throughout the facility.

23. Digital failed to inform its employees and other individuals, such as outside contractors, who worked at Digital's Chicago facility of the complete purposes for which it collects their sensitive biometric data or to whom the data is disclosed, if at all.

24. Digital similarly failed to provide its employees and other individuals who worked at Digital's Chicago facility with a written, publicly available policy identifying its retention schedule, and guidelines for permanently destroying their fingerprints when the initial purpose for collecting or obtaining their fingerprints is no longer relevant, as required by the BIPA. An employee who leaves the company does so without any knowledge of when their biometric identifiers will be removed from Digital databases—or if they ever will be.

25. The Pay By Touch bankruptcy that catalyzed the passage of the BIPA highlights why conduct such as Digital's —whose employees are aware that they are providing biometric identifiers but are not aware of to whom or the full extent of the reasons they are doing so—is so dangerous. That bankruptcy spurred Illinois citizens and legislators to realize a critical point: it is crucial for people to understand when providing biometric data who exactly is collecting it, who it will be transmitted to, for what purposes, and for how long. But Digital disregards these obligations, and instead unlawfully collects, stores, and uses its employees' biometric identifiers and information without proper consent.

26. Ultimately, Digital disregards the statutorily protected privacy rights of individuals who work at its Illinois facilities by violating the BIPA.

FACTS SPECIFIC TO PLAINTIFF

27. Plaintiff worked at Digital's Chicago, Illinois facility from November of 2019 to February of 2020.

28. Digital required Plaintiff to scan Plaintiff's fingerprint so that it could use it as an authentication method to have access to the building. Digital subsequently stored Plaintiff's fingerprint data in its databases.

29. Each time Plaintiff entered and exited the building, Digital required a scan of Plaintiff's fingerprints.

30. Digital never informed Plaintiff of the specific limited purposes or length of time for which it collected, stored, or used fingerprints.

31. Similarly, Digital never informed Plaintiff of any biometric data retention policy it developed, nor whether it will ever permanently delete fingerprints.

32. Plaintiff never signed a written release allowing Digital to collect or store fingerprints.

33. Plaintiff has continuously and repeatedly been exposed to the risks and harmful conditions created by Digital violations of the BIPA alleged herein.

34. Plaintiff now seeks liquidated damages under BIPA as compensation for the injuries Digital has caused.

CLASS ALLEGATIONS

35. **Class Definition:** Plaintiff brings this action pursuant to 735 ILCS 5/2-801 on behalf of Plaintiff and a Class of similarly situated individuals, defined as follows:

All residents of the State of Illinois who had their fingerprints collected, captured, received, or otherwise obtained by Defendant while residing in Illinois.

The following people are excluded from the Class: (1) any Judge presiding over this action and members of their families; (2) Digital, Digital's subsidiaries, parents, successors, predecessors,

and any entity in which the Defendant or its parents have a controlling interest and its current or former officers and directors; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiff's counsel and Defendant's counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

36. **Numerosity:** The exact number of Class members is unknown to Plaintiff at this time, but it is clear that individual joinder is impracticable. Digital has collected, captured, received, or otherwise obtained biometric identifiers or biometric information from at least hundreds of employees who fall into the definition of the Class. Ultimately, the Class members will be easily identified through Defendant's records.

37. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

- a) whether Defendant collected, captured, or otherwise obtained Plaintiff's and the Class' biometric identifiers or biometric information;
- b) whether Defendant properly informed Plaintiff and the Class of its purposes for collecting, using, and storing their biometric identifiers or biometric information;
- c) whether Defendant obtained a written release (as defined in 740 ILCS 14/10) to collect, use, and store Plaintiff and the Class' biometric identifiers or biometric information;
- d) whether Defendant has sold, leased, traded, or otherwise profited from Plaintiff and the Class's biometric identifiers or biometric information;
- e) whether Defendant developed a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or

within three years of their last interaction, whichever occurs first;

f) whether Defendant complies with any such written policy (if one exists); and

g) whether Defendant used Plaintiff and the Class' fingerprints to identify them.

38. **Adequate Representation:** Plaintiff will fairly and adequately represent and protect the interests of the Class and have retained counsel competent and experienced in complex litigation and class actions. Plaintiff have no interests antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiff. Plaintiff and their counsel are committed to vigorously prosecuting this action on behalf of the members of the Class, and have the financial resources to do so. Neither Plaintiff nor their counsel have any interest adverse to those of the other members of the Class.

39. **Appropriateness:** This class action is appropriate for certification because class proceedings are superior to all others available methods for the fair and efficient adjudication of this controversy and joinder of all members of the Class is impracticable. The damages suffered by the individual members of the Class are likely to have been small relative to the burden and expense of individual prosecution of the complex litigation necessitated by Digital's wrongful conduct. Thus, it would be virtually impossible for the individual members of the Class to obtain effective relief from Digital's misconduct. Even if members of the Class could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties due to the complex legal and factual controversies presented in their Complaint. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court. Economies of time, effort, and expense will be fostered and uniformity of decisions will be ensured.

CAUSE OF ACTION
Violation of 740 ILCS 14/1, *et seq.*
(On Behalf of Plaintiff and the Class)

40. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

41. The BIPA requires companies to obtain informed written consent from employees before acquiring their biometric data. Specifically, the BIPA makes it unlawful for any private entity to “collect, capture, purchase, receive through trade, or otherwise obtain a person’s or a customer’s biometric identifiers or biometric information, unless [the entity] first: (1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the subject . . . in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; *and* (3) receives a written release executed by the subject of the biometric identifier or biometric information....” 740 ILCS 14/15(b) (emphasis added).

42. The BIPA also mandates that companies in possession of biometric data establish and maintain a satisfactory biometric data retention (and—importantly—deletion) policy. Specifically, those companies must: (i) make publicly available a written policy establishing a retention schedule and guidelines for permanent deletion of biometric data (*i.e.*, when the employment relationship ends); and (ii) actually adhere to that retention schedule and actually delete the biometric information. *See* 740 ILCS 14/15(a).

43. Unfortunately, Digital fails to comply with these BIPA mandates.

44. Digital qualifies as a “private entity” under the BIPA. *See* 740 ILCS 14/10.

45. Plaintiff and the Class are individuals who had their “biometric identifiers” collected by Digital (in the form of their fingerprints), as explained in detail in Section II. *See* 740

ILCS 14/10.

46. Plaintiff and the Class' biometric identifiers or information based on those biometric identifiers were used to identify them, constituting "biometric information" as defined by the BIPA. *See* 740 ILCS 14/10.

47. Digital violated 740 ILCS 14/15(b)(3) by failing to obtain written releases from Plaintiff and the Class before it collected, used, and stored their biometric identifiers and biometric information.

48. Digital violated 740 ILCS 14/15(b)(1) by failing to inform Plaintiff and the Class in writing that their biometric identifiers and biometric information were being collected and stored.

49. Digital violated 740 ILCS 14/15(b)(2) by failing to inform Plaintiff and the Class in writing of the specific purpose and length of term for which their biometric identifiers or biometric information was being collected, stored, and used.

50. Digital violated 740 ILCS 14/15(a) by failing to publicly provide a retention schedule or guideline for permanently destroying its employees' biometric identifiers and biometric information.

51. By collecting, storing, and using Plaintiff's and the Class' biometric identifiers and biometric information as described herein, Digital violated Plaintiff's and the Class' rights to privacy in their biometric identifiers or biometric information as set forth in the BIPA, 740 ILCS 14/1, *et seq.*

52. On behalf of themselves and the Class, Plaintiff seek: (1) injunctive and equitable relief as is necessary to protect the interests of the Plaintiff and the Class by requiring Defendant's to comply with the BIPA's requirements for the collection, storage, and use of biometric identifiers

and biometric information as described herein; (2) liquidated damages for each of Defendant's violations of the BIPA pursuant to 740 ILCS 14/20; and (3) reasonable attorneys' fees and costs and expenses pursuant to 740 ILCS 14/20(3).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and the Class, respectfully requests that the Court enter an Order:

- A. Certifying this case as a class action on behalf of the Class defined above, appointing Plaintiff as representative of the Class, and appointing their counsel as Class Counsel;
- B. Declaring that Defendant's actions, as set out above, violate the BIPA;
- C. Awarding statutory damages for each of Defendant's violations of the BIPA, pursuant to 740 ILCS 14/20;
- D. Awarding injunctive and other equitable relief as is necessary to protect the interests of the Class, including an Order requiring Defendant to collect, store, and use biometric identifiers or biometric information in compliance with the BIPA;
- F. Awarding Plaintiff and the Class their reasonable litigation expenses and attorneys' fees;
- G. Awarding Plaintiff and the Class pre- and post-judgment interest, to the extent allowable; and
- H. Awarding such other and further relief as equity and justice may require.

Dated: September 1, 2020

Respectfully submitted,

**Pasha McKenzie, individually and on behalf of
all others similarly situated,**

By: /s/ Mara Baltabols
One of Plaintiff's Attorneys

David Fish
dfish@fishlawfirm.com
Mara Baltabols
mara@fishlawfirm.com
THE FISH LAW FIRM, P.C.
200 East Fifth Avenue, Suite 123
Naperville, Illinois 60563
Tel: 630.355.7590
Fax: 630.778.0400
Cook Cnty #: 44086
docketing@fishlawfirm.com

Hearing Date: 12/31/2020 10:00 AM - 10:00 AM
Courtroom Number: 2601
Location: District 1 Court
Cook County, IL

FILED
9/1/2020 1:55 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL

10304196

2120 - Served 2121 - Served
2220 - Not Served 2221 - Not Served
2320 - Served By Mail 2321 - Served By Mail
2420 - Served By Publication 2421 - Served By Publication
Summons - Alias Summons

(08/01/18) CCG 0001 A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PASHA MCKENZIE individually and on
behalf of all others similarly situated,

(Name all parties)

v.

DIGITAL REALTY MANAGEMENT SERVICES, LLC

Case No. 2020CH05661

☒ **SUMMONS** ☐ **ALIAS SUMMONS**

DIGITAL REALTY MANAGEMENT SERVICES, LLC

To each Defendant: c/o National Registered Agents Inc., 208 S. LaSalle St., Suite 814, Chicago, IL 60604

YOU ARE SUMMONED and required to file an answer to the complaint in this case, a copy of which is hereto attached, or otherwise file your appearance and pay the required fee **within thirty (30) days after service of this Summons**, not counting the day of service. To file your answer or appearance you need access to the internet. Please visit www.cookcountyclerkofcourt.org to initiate this process. Kiosks with internet access are available at all Clerk's Office locations. Please refer to the last page of this document for location information.

If you fail to do so, a judgment by default may be entered against you for the relief requested in the complaint.

To the Officer:

This Summons must be returned by the officer or other person to whom it was given for service, with endorsement of service and fees, if any, immediately after service. If service cannot be made, this Summons shall be returned so endorsed. This Summons may not be served later than thirty (30) days after its date.

Dorothy Brown, Clerk of the Circuit Court of Cook County, Illinois
cookcountyclerkofcourt.org

Summons - Alias Summons

(08/01/18) CCG 0001 B

E-filing is now mandatory for documents in civil cases with limited exemptions. To e-file, you must first create an account with an e-filing service provider. Visit <http://efile.illinoiscourts.gov/service-providers.htm> to learn more and to select a service provider. If you need additional help or have trouble e-filing, visit <http://www.illinoiscourts.gov/FAQ/gethelp.asp>, or talk with your local circuit clerk's office.

Atty. No.: 44086

Witness: _____

Atty Name: The Fish Law Firm, P.C.

9/1/2020 1:55 PM DOROTHY BROWN

Atty. for: Plaintiff

DOROTHY BROWN, Clerk of Court

Address: 200 E. 5th Ave., Suite 123

City: Naperville

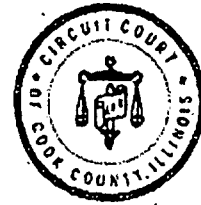
Date of Service: _____

(To be inserted by officer on copy left with Defendant or other person):

State: IL Zip: 60563

Telephone: 630-355-7590

Primary Email: docketing@fishlawfirm.com



CLERK OF THE CIRCUIT COURT OF COOK COUNTY OFFICE LOCATIONS

- Richard J Daley Center
50 W Washington
Chicago, IL 60602
- District 2 - Skokie
5600 Old Orchard Rd
Skokie, IL 60077
- District 3 - Rolling Meadows
2121 Euclid
Rolling Meadows, IL 60008
- District 4 - Maywood
1500 Maybrook Ave
Maywood, IL 60153
- District 5 - Bridgeview
10220 S 76th Ave
Bridgeview, IL 60455
- District 6 - Markham
16501 S Kedzie Pkwy
Markham, IL 60428
- Domestic Violence Court
555 W Harrison
Chicago, IL 60607
- Juvenile Center Building
2245 W Ogden Ave, Rm 13
Chicago, IL 60602
- Criminal Court Building
2650 S California Ave, Rm 526
Chicago, IL 60608
- Daley Center Divisions/Departments**
- Civil Division
Richard J Daley Center
50 W Washington, Rm 601
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
- Chancery Division
Richard J Daley Center
50 W Washington, Rm 802
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
- Domestic Relations Division
Richard J Daley Center
50 W Washington, Rm 802
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
- Civil Appeals
Richard J Daley Center
50 W Washington, Rm 801
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
- Criminal Department
Richard J Daley Center
50 W Washington, Rm 1006
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
- County Division
Richard J Daley Center
50 W Washington, Rm 1202
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
- Probate Division
Richard J Daley Center
50 W Washington, Rm 1202
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
- Law Division
Richard J Daley Center
50 W Washington, Rm 801
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm
- Traffic Division
Richard J Daley Center
50 W Washington, Lower Level
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm

hearing Date: 12/31/2020 10:00 AM - 10:00 AM
Courtroom Number: 2601
Location: District 1 Court
Cook County, IL

FILED
9/1/2020 1:55 PM
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COOK COUNTY, IL

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(08/01/18) CCG 0001 A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PASHA MCKENZIE individually and on
behalf of all others similarly situated,

(Name all parties)

v.

DIGITAL REALTY MANAGEMENT SERVICES, LLC

Case No. 2020CH05661

☒ **SUMMONS** ☐ **ALIAS SUMMONS**
DIGITAL REALTY MANAGEMENT SERVICES, LLC

To each Defendant: c/o National Registered Agents Inc., 208 S. LaSalle St., Suite 814, Chicago, IL 60604

YOU ARE SUMMONED and required to file an answer to the complaint in this case, a copy of which is hereto attached, or otherwise file your appearance and pay the required fee **within thirty (30) days after service of this Summons**, not counting the day of service. To file your answer or appearance you need access to the internet. Please visit www.cookcountyclerkofcourt.org to initiate this process. Kiosks with internet access are available at all Clerk's Office locations. Please refer to the last page of this document for location information.

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To the Officer:

This Summons must be returned by the officer or other person to whom it was given for service, with endorsement of service and fees, if any, immediately after service. If service cannot be made, this Summons shall be returned so endorsed. This Summons may not be served later than thirty (30) days after its date.

Dorothy Brown, Clerk of the Circuit Court of Cook County, Illinois
cookcountyclerkofcourt.org

Summons - Alias Summons

(08/01/18) CCG 0001 B

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Atty. No.: 44086

Witness: _____

Atty Name: The Fish Law Firm, P.C.

9/1/2020 1:55 PM DOROTHY BROWN

Atty. for: Plaintiff

DOROTHY BROWN, Clerk of Court

Address: 200 E. 5th Ave., Suite 123

City: Naperville

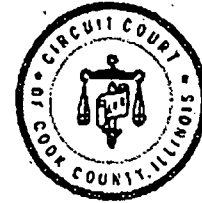
Date of Service: _____

State: IL Zip: 60563

(To be inserted by officer on copy left with Defendant or other person):

Telephone: 630-355-7590

Primary Email: docketing@fishlawfirm.com



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- District 5 - Bridgeview
10220 S 76th Ave
Bridgeview, IL 60455
- District 6 - Markham
16501 S Kedzie Pkwy
Markham, IL 60428
- Domestic Violence Court
555 W Harrison
Chicago, IL 60607
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Chicago, IL 60602
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Hours: 8:30 am - 4:30 pm
- Traffic Division
Richard J Daley Center
50 W Washington, Lower Level
Chicago, IL 60602
Hours: 8:30 am - 4:30 pm

**Notice and Acknowledgment of
Receipt of Summons and Complaint**

(10/12/18) CCG 0063 A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PASHA MCKENZIE individually and on
behalf of all others similarly situated

Plaintiff(s)

Case No. 2020 CH 05661

vs.

DIGITAL REALTY MANAGEMENT SERVICES, LLC

Defendant(s)

Amount Claimed: \$

Defendant(s)

**NOTICE AND ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND
COMPLAINT**

DIGITAL REALTY MANAGEMENT SERVICES, LLC

To: c/o National Registered Agents Inc.

Address: 208 S. LaSalle St., Suite 814

(Name)

City: Chicago

State: IL Zip: 60604

The enclosed summons and complaint are served pursuant to section 2--213 of the Code of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 30 * days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 30 * days, you (or the party on whose behalf you are being served) may be served a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 60 ** days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this notice and acknowledgment of receipt of summons and complaint will have been mailed on 09/05/2020

Dorothy Brown, Clerk of the Circuit Court of Cook County, Illinois

cookcountyclerkofcourt.org

Notice and Acknowledgment of
Receipt of Summons and Complaint

(10/12/18) CCG 0063 B

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ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above captioned matter at:

(Please print or type)

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Email: _____

Relationship to Entity/Authority to Receive Service of Process: _____
(Not applicable if you are the named Defendant or Respondent.)

Dated: _____

Signature

- * (To be completed by the person sending the notice.) Date for return of waiver must be at least 30 days from the date on which the request is sent, or 60 days if the defendant is addressed outside the United States.
- ** (To be completed by the person sending the notice.) Date for answering complaint must be at least 60 days from the date on which the request is sent, or 90 days if the defendant is addressed outside the United States.

EXHIBIT B

Return Date: No return date scheduled
Hearing Date: 12/31/2020 10:00 AM - 10:00 AM
Courtroom Number: 2601
Location: District 1 Court
Cook County, IL

FILED
11/9/2020 4:37 PM
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CIRCUIT CLERK
COOK COUNTY, IL
2020CH05661

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

PASHA MCKENZIE individually and on behalf)
of all others similarly situated,)

11077327

Plaintiff,)

Case No. 2020CH05661

v.)

Honorable Judge Raymond W. Mitchell

DIGITAL REALTY MANAGEMENT)
SERVICES, LLC)

Defendant.)

**DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES
TO CLASS ACTION COMPLAINT**

NOW COMES Defendant Digital Realty Management Services, LLC ("Digital"), by and through its undersigned counsel, as and for its Answer and Affirmative Defenses to the Class Action Complaint ("Complaint") filed by Plaintiff Pasha McKenzie ("Plaintiff").

NATURE OF THE ACTION

1. Digital is a security company with over 200,000 employees and multiple locations nationwide. They currently have a Chicago, Illinois office.

ANSWER: Digital denies that it is a security company with over 200,000 employees.

Answering further, Digital admits that it has multiple locations in the United States, including a data center in Chicago, Illinois.

2. When employees first begin their jobs at Digital, they are required to scan their fingerprint to access the doors, instead of using only key fobs or other identification cards.

ANSWER: Digital denies the allegations in paragraph 2.

3. While there are tremendous benefits to using biometric identifiers in the workplace, there are also serious risks. Unlike key fobs or identification cards – which can be changed or replaced if stolen or compromised – fingerprints are unique, permanent biometric identifiers associated with the employee. This exposes employees to serious and irreversible privacy risks. For example, if a fingerprint database is hacked, breached, or otherwise exposed, employees have no means by which to prevent identity theft and unauthorized tracking.

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ANSWER: In response the first sentence of paragraph 3, Digital admits only that as a general matter there may be benefits to using biometric identifiers in the workplace; Digital denies the remainder of the allegations in the first sentence of paragraph 3. In response to the second sentence of paragraph 3, Digital admits that fingerprints are unique, permanent biometric identifiers. Digital denies the allegations in the third and fourth sentences of paragraph 3.

4. Recognizing the need to protect its citizens from situations like these, Illinois enacted the Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* (“BIPA”), specifically to regulate companies that collect and store Illinois citizens’ biometrics, such as fingerprints.

ANSWER: Digital states that paragraph 4 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies the allegations set forth in paragraph 4.

5. Despite this law, Digital disregarded the statutorily protected privacy rights of persons required to use their biometric data for door access and unlawfully collects, stores, and uses their biometric data in violation of the BIPA. Specifically, Digital has violated (and continues to violate) the BIPA because it did not:

- Properly inform Plaintiff and the Class members in writing of the specific purpose and length of time for which their fingerprints were being collected, stored, and used, as required by the BIPA;
- Provide a publicly available retention schedule and guidelines for permanently destroying Plaintiff’s and the Class’s fingerprints, as required by the BIPA; nor
- Receive a written release from Plaintiff or the members of the Class to collect, capture, or otherwise obtain fingerprints, as required by the BIPA.

ANSWER: Digital states that paragraph 5 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies the allegations set forth in paragraph 5.

6. Accordingly, this Complaint seeks an order: (i) declaring that Defendant’s conduct violates the BIPA; (ii) requiring Defendant to cease the unlawful activities discussed herein; and (iii) awarding liquidated damages to Plaintiff and the proposed Class.

ANSWER: Digital admits only that the Complaint seeks the relief described in paragraph

6. Digital denies that there is any factual or legal basis for the claims alleged or the relief sought.

PARTIES

7. Plaintiff is a natural person and citizen of the State of Illinois.

ANSWER: Digital lacks sufficient knowledge or information regarding the allegations in paragraph 7, and on that basis denies them.

8. Defendant Digital is a Foreign Limited Liability Company, with its principal business location in Santa Ana, California.

ANSWER: Digital admits only that it is a foreign limited liability company. Digital denies that its principal business location is in Santa Ana, California. Answering further, Digital states that its principal place of business is in San Francisco, California.

JURISDICTION AND VENUE

9. This Court has jurisdiction over Defendant pursuant to 735 ILCS 5/2-209 because Defendant conducts business transactions in Illinois and have committed tortious acts in Illinois.

ANSWER: Digital admits only that this Court has jurisdiction over Digital pursuant to 735 ILCS 5/2-209 because Digital conducts business transactions in Illinois. Except as so admitted, Digital denies the remaining allegations set forth in paragraph 9.

10. Venue is proper in Cook County because Defendant operates throughout this County and “resides” in Cook County within the meaning of 735 ILCS § 5/2-102(a).

ANSWER: Digital admits the allegations in paragraph 10.

FACTUAL BACKGROUND

I. The Biometric Information Privacy Act.

11. In the early 2000’s, major national corporations started using Chicago and other locations in Illinois to test “new [consumer] applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias.” 740 ILCS 14/5(b). Given its relative infancy, an overwhelming portion of the public became weary of this then-growing, yet unregulated technology. *See* 740 ILCS 14/5.

ANSWER: In response to the first sentence of paragraph 11, Digital admits only that

Plaintiff has partially quoted, with modification, from 740 ILCS 14/5(b); Digital, however, denies that Plaintiff has accurately quoted or paraphrased 740 ILCS 14/5(b) and respectfully refers the Court to the statutory text of 740 ILCS 14/15(b) for its accurate and complete contents. Digital further answers that it lacks sufficient knowledge or information regarding the remaining allegations in paragraph 11, and on that basis denies them.

12. In late 2007, a biometrics company called Pay By Touch – which provided major retailers throughout the State of Illinois with fingerprint scanners to facilitate consumer transactions – filed for bankruptcy. That bankruptcy was alarming to the Illinois Legislature because suddenly there was a serious risk that millions of fingerprint records – which, are unique biometric identifiers, can be linked to people’s sensitive financial and personal data – could now be sold, distributed, or otherwise shared through the bankruptcy proceedings without adequate protections for Illinois citizens. The bankruptcy also highlighted the fact that most consumers who had used that company’s fingerprint scanners were completely unaware that the scanners were not actually transmitting fingerprint data to the retailer who deployed the scanner, but rather to the now-bankrupt company, and that unique biometric identifiers could now be sold to unknown third parties.

ANSWER: Digital lacks sufficient knowledge or information regarding the allegations in paragraph 12, and on that basis denies them.

13. Recognizing the “very serious need [for] protections for the citizens of Illinois when it [came to their] biometric information,” Illinois enacted the BIPA in 2008. *See* Illinois House Transcript, 2008 Reg. Sess. No. 276; 740 ILCS 14/5.

ANSWER: Digital admits only that BIPA came into effect on October 3, 2008. Digital lacks sufficient knowledge or information regarding the remainder of the allegations in paragraph 13, and on that basis denies them.

14. The BIPA is an informed consent statute which achieves its goal by making it unlawful for a company to, among other things, “collect, capture, purchase, receive through trade, or otherwise obtain a person’s or a customer’s biometric identifiers or biometric information, unless it *first*:

- (1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored;
- (2) informs the subject . . . in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information.

740 ILCS 14/15(b).

ANSWER: Digital states that paragraph 14 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies that paragraph 14 accurately conveys BIPA's meaning. Answering further, Digital respectfully refers the Court to the statutory text of 740 ILCS 14/15(b) for its accurate and complete contents.

15. BIPA specifically applies to employees who work in the State of Illinois. BIPA defines a "written release" specifically "in the context of employment [as] a release executed by an employee as a condition of employment." 740 ILCS 14/10.

ANSWER: Digital states that paragraph 15 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital admits only that the partially quoted language in the second sentence of paragraph 15 appears in 740 ILCS 14/10 and respectfully refers the Court to the statutory text of 740 ILCS 14/10 for its accurate and complete contents. Answering further, Digital admits that BIPA applies to employees who work in the State of Illinois; Digital denies, however, that Plaintiff was ever an employee of Digital.

16. Biometric identifiers include retina and iris scans, voiceprints, scans of hand and face geometry, and – most importantly here – fingerprints. *See* 740 ILCS 14/10. Biometric information is separately defined to include any information based on an individual's biometric identifier that is used to identify an individual. *See id.*

ANSWER: Digital states that paragraph 16 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital admits that 740 ILCS 14/10 defines "biometric identifiers" to include the following: "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry" and that 740 ILCS 14/10 defines "biometric information" as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." Digital respectfully refers the Court to the statutory text of 740 ILCS 14/10 for the full and complete

definitions of “biometric identifiers” and “biometric information”. Except as so expressly admitted, the remaining assertions in paragraph 16 are denied.

17. The BIPA also establishes standards for how private entities must handle Illinois employees’ biometric identifiers and biometric information. *See* 740 ILCS 14/15(c)-(d). For instance, the BIPA requires companies to develop and comply with a written policy – made available to the public – establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting such identifiers or information has been satisfied or within three years of the individual’s last interaction with the company, whichever occurs first. 740 ILCS 14/15(a).

ANSWER: Digital states that paragraph 17 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required to the first sentence of paragraph 17, Digital denies that 740 ILCS 14/15(c) or 740 ILCS 14/15(d) specifically discusses how “employers” must handle the biometric identifiers and biometric information of “employees” and respectfully refers the Court to the statutory text of 740 ILCS 14/15(c) and 740 ILCS 14/15(d) for its accurate and complete contents. Answering further, Digital denies that the second sentence of paragraph 17 accurately conveys that meaning of 740 ILCS 14/15(a) and thereby respectfully refers the Court to the statutory text of 740 ILCS 14/15(a) for its accurate and complete contents.

18. Ultimately, the BIPA is simply an informed consent statute. Its narrowly tailored provisions place no absolute bar on the collection, sending, transmitting or communicating of biometric data. For example, the BIPA does not limit what kinds of biometric data may be collected, sent, transmitted, or stored. Nor does the BIPA limit to whom biometric data may be collected, sent, transmitted, or stored. The BIPA simply mandates that entities wishing to engage in that conduct must make proper disclosures and implement certain reasonable safeguards.

ANSWER: Digital states that paragraph 18 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies that paragraph 18 accurately conveys the meaning of BIPA. Digital respectfully refers the Court to the statutory text of BIPA for its accurate and complete contents.

II. Digital Violates the Biometric Information Privacy Act.

19. By the time the BIPA passed through the Illinois Legislature in mid-2008, many companies who had experimented with using biometric data as an authentication method stopped

doing so, at least for a time. That is because Pay By Touch's bankruptcy, described in Section I above, was widely publicized and brought attention to consumers' discomfort with the use of their biometric data.

ANSWER: Digital lacks sufficient knowledge or information regarding the allegations in paragraph 19, and on that basis denies them.

20. Unfortunately, Digital failed to take note of the passage of the BIPA even though it has been in effect for over a decade. As a result, Digital recklessly or willfully continued to collect, store, and use the biometric data of its employees and individuals who worked at its Chicago, Illinois in violation of the BIPA.

ANSWER: Digital denies the allegations in paragraph 20. Answering further, Digital issues "smart cards" to individuals who require access to its facilities in Illinois. These smart cards utilize a unique hash for purposes of authenticating access to Digital's Illinois facilities, and that unique hash is created with a proprietary algorithm that extracts unique data (minutia) from the temporary scan of an individual's fingerprint and converts these data points into binary code which is then encrypted using AES 256 encryption. All authentication and matching of the hash is completed via the smart card—no biometric data is collected or stored on any server or database.

21. Specifically, when individuals worked at Digital, they are required to have their fingerprints scanned in order to enter and exit through the doors in the building.

ANSWER: Digital denies the allegations as written in paragraph 21.

22. Digital uses a digital door entry system that requires employees, and outside contractors, to use their fingerprints as a means of authentication. Unlike a traditional doors [*sic*] that use key or code access, individuals have to use their fingerprint to enter and exit the building and rooms throughout the facility.

ANSWER: Digital denies the allegations as written in paragraph 22. Answering further, Digital states that smart cards are utilized to authenticate and grant individuals access to Digital's Illinois facilities.

23. Digital failed to inform its employees and other individuals, such as outside contractors, who worked at Digital's Chicago facility of the complete purposes for which it collects their sensitive biometric data or to whom the data is disclosed, if at all.

ANSWER: Digital denies the allegations in paragraph 23. Answering further, Digital denies that it collects biometric data in violation of BIPA.

24. Digital similarly failed to provide its employees and other individuals who worked at Digital's Chicago facility with a written, publicly available policy identifying its retention schedule, and guidelines for permanently destroying their fingerprints when the initial purpose for collecting or obtaining their fingerprints is no longer relevant, as required by the BIPA. An employee who leaves the company does so without any knowledge of when their biometric identifiers will be removed from Digital databases – or if they ever will be.

ANSWER: Digital denies the allegations in paragraph 24. Answering further, Digital neither retains nor collects individuals' fingerprint data.

25. The Pay By Touch bankruptcy that catalyzed the passage of the BIPA highlights why conduct such as Digital's – whose employees are aware that they are providing biometric identifiers but are not aware of to whom or the full extent of the reasons they are doing so – is so dangerous. That bankruptcy spurred Illinois citizens and legislators to realize a critical point: it is crucial for people to understand when providing biometric data who exactly is collecting it, who it will be transmitted to, for what purposes, and for how long. But Digital disregards these obligations, and instead unlawfully collects, stores, and uses its employees' biometric identifiers and information without proper consent.

ANSWER: Digital lacks sufficient knowledge or information regarding the allegations in paragraph 25, and on that basis denies them.

26. Ultimately, Digital disregards the statutorily protected privacy rights of individuals who work at its Illinois facilities by violating the BIPA.

ANSWER: Digital states that paragraph 26 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies paragraph 26.

FACTS SPECIFIC TO PLAINTIFF

27. Plaintiff worked at Digital's Chicago, Illinois facility from November of 2019 to February of 2020.

ANSWER: Digital lacks sufficient knowledge or information regarding the allegations in paragraph 27, and on that basis denies them. Answering further, Plaintiff has never been an employee of Digital; at all times relevant to the Complaint, Plaintiff was employed as a security

guard by a third-party company.

28. Digital required Plaintiff to scan Plaintiff's fingerprint so that it could use it as an authentication method to have access to the building. Digital subsequently stored Plaintiff's fingerprint data in its databases.

ANSWER: Digital denies the allegations as written in paragraph 28. Answering further, Digital has never stored Plaintiff's fingerprint data in any of its databases.

29. Each time Plaintiff entered and exited the building, Digital required a scan of Plaintiff's fingerprints.

ANSWER: Digital denies the allegations in paragraph 29.

30. Digital never informed Plaintiff of the specific limited purposes or length of time for which it collected, stored, or used fingerprints.

ANSWER: Digital denies the allegations in paragraph 30. Answering further, Digital has never collected, stored, or used Plaintiff's fingerprints.

31. Similarly, Digital never informed Plaintiff of any biometric data retention policy it developed, nor whether it will ever permanently delete fingerprints.

ANSWER: Digital denies the allegations in paragraph 31. Answering further, Digital did not retain Plaintiff's fingerprints or any other type of biometric data.

32. Plaintiff never signed a written release allowing Digital to collect or store fingerprints.

ANSWER: Digital admits that Plaintiff never signed a written release allowing Digital to collect or store her fingerprints. Answering further, Digital denies that it collected or stored Plaintiff's fingerprints, and therefore, no written release from Plaintiff was required under BIPA.

33. Plaintiff has continuously and repeatedly been exposed to the risks and harmful conditions created by Digital violations of the BIPA alleged herein.

ANSWER: Digital denies the allegations in paragraph 33.

34. Plaintiff now seeks liquidated damages under BIPA as compensation for the injuries Digital has caused.

ANSWER: Digital admits that Plaintiff seeks liquidated damages under BIPA, but Digital

denies there is any factual or legal basis for the relief sought. Answering further, Digital denies it caused any injuries to Plaintiff.

CLASS ALLEGATIONS

35. **Class Definition:** Plaintiff brings this action pursuant to 735 ILCS 5/2-801 on behalf of Plaintiff and a Class of similarly situated individuals, defined as follows:

All residents of the State of Illinois who had their fingerprints collected, captured, received, or otherwise obtained by Defendant while residing in Illinois.

The following people are excluded from the Class: (1) any Judge presiding over this action and members of their families; (2) Digital, Digital's subsidiaries, parents, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and its current or former officers and directors; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiff's counsel and Defendant's counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

ANSWER: Digital states that paragraph 35 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital admits only that Plaintiff purports to bring this action under 735 ILCS 5/2-801 on behalf of herself and on behalf of a putative statewide class; but Digital denies that any class should be certified here and denies all remaining allegations in paragraph 35.

36. **Numerosity:** The exact number of Class members is unknown to Plaintiff at this time, but it is clear that individual joinder is impracticable. Digital has collected, captured, received, or otherwise obtained biometric identifiers or biometric information from at least hundreds of employees who fall into the definition of the Class. Ultimately, the Class members will be easily identified through Defendant's records.

ANSWER: Digital states that paragraph 36 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies the allegations of paragraph 36.

37. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

- a) whether Defendant collected, captured, or otherwise obtained Plaintiffs and the Class' biometric identifiers or biometric information;
- b) whether Defendant properly informed Plaintiff and the Class of its purposes for collecting, using, and storing their biometric identifiers or biometric information;
- c) whether Defendant obtained a written release (as defined in 740 ILCS 14/10) to collect, use, and store Plaintiff and the Class' biometric identifiers or biometric information;
- d) whether Defendant has sold, leased, traded, or otherwise profited from Plaintiff and the Class's biometric identifiers or biometric information;
- e) whether Defendant developed a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within three years of their last interaction, whichever occurs first;
- f) whether Defendant complies with any such written policy (if one exists); and
- g) whether Defendant used Plaintiff and the Class' fingerprints to identify them.

ANSWER: Digital states that paragraph 37 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies the allegations of paragraph 37.

38. **Adequate Representation:** Plaintiff will fairly and adequately represent and protect the interests of the Class and have retained counsel competent and experienced in complex litigation and class actions. Plaintiff have no interests antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiff. Plaintiff and their counsel are committed to vigorously prosecuting this action on behalf of the members of the Class, and have the financial resources to do so. Neither Plaintiff nor their counsel have any interest adverse to those of the other members of the Class.

ANSWER: Digital states that paragraph 38 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies the allegations of paragraph 38.

39. **Appropriateness:** This class action is appropriate for certification because class proceedings are superior to all others available methods for the fair and efficient adjudication of this controversy and joinder of all members of the Class is impracticable. The damages suffered by the individual members of the Class are likely to have been small relative to the burden and

expense of individual prosecution of the complex litigation necessitated by Digital's wrongful conduct. Thus, it would be virtually impossible for the individual members of the Class to obtain effective relief from Digital's misconduct. Even if members of the Class could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties due to the complex legal and factual controversies presented in their Complaint. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court. Economies of time, effort, and expense will be fostered and uniformity of decisions will be ensured.

ANSWER: Digital states that paragraph 39 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies the allegations of paragraph 39.

CAUSE OF ACTION
Violation of 740 ILCS 14/1, *et seq.*
(On Behalf of Plaintiff and the Class)

40. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

ANSWER: Digital incorporates its responses to the foregoing allegations as if fully set forth herein.

41. The BIPA requires companies to obtain informed written consent from employees before acquiring their biometric data. Specifically, the BIPA makes it unlawful for any private entity to "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifiers or biometric information, unless [the entity] first: (1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the subject . . . in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; *and* (3) receives a written release executed by the subject of the biometric identifier or biometric information. . . ." 740 ILCS 14/15(b) (emphasis added).

ANSWER: Digital states that paragraph 41 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies that paragraph 41 accurately and completely summarizes the contents of 740 ILCS 14/15(b). Answering further, Digital respectfully refers the Court to statutory text of 740 ILCS 14/15(b) for its accurate and complete contents.

42. The BIPA also mandates that companies in possession of biometric data establish

and maintain a satisfactory biometric data retention (and – importantly – deletion) policy. Specifically, those companies must: (i) make publicly available a written policy establishing a retention schedule and guidelines for permanent deletion of biometric data (*i.e.*, when the employment relationship ends); and (ii) actually adhere to that retention schedule and actually delete the biometric information. *See* 740 ILCS 14/15(a).

ANSWER: Digital states that paragraph 42 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies that paragraph 42 accurately and completely summarizes the contents of 740 ILCS 14/15(a). Answering further, Digital respectfully refers the Court to statutory text of 740 ILCS 14/15(a) for its accurate and complete contents.

43. Unfortunately, Digital fails to comply with these BIPA mandates.

ANSWER: Digital denies the allegations in paragraph 43.

44. Digital qualifies as a “private entity” under the BIPA. *See* 740 ILCS 14/10.

ANSWER: Digital states that paragraph 44 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital admits it is a “private entity” as defined under BIPA.

45. Plaintiff and the Class are individuals who had their “biometric identifiers” collected by Digital (in the form of their fingerprints), as explained in detail in Section II. *See* 740 ILCS 14/10.

ANSWER: Digital states that paragraph 45 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies paragraph 45.

46. Plaintiff and the Class’ biometric identifiers or information based on those biometric identifiers were used to identify them, constituting “biometric information” as defined by the BIPA. *See* 740 ILCS 14/10.

ANSWER: Digital states that paragraph 46 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies paragraph 46.

47. Digital violated 740 ILCS 14/15(6)(3) by failing to obtain written releases from Plaintiff and the Class before it collected, used, and stored their biometric identifiers and biometric information.

ANSWER: Digital states that paragraph 47 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies paragraph 47.

48. Digital violated 740 ILCS 14/15(6)(1) by failing to inform Plaintiff and the Class in writing that their biometric identifiers and biometric information were being collected and stored.

ANSWER: Digital states that paragraph 48 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies paragraph 48.

49. Digital violated 740 ILCS 14/15(b)(2) by failing to inform Plaintiff and the Class in writing of the specific purpose and length of term for which their biometric identifiers or biometric information was being collected, stored, and used.

ANSWER: Digital states that paragraph 49 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies paragraph 49.

50. Digital violated 740 ILCS 14/15(a) by failing to publicly provide a retention schedule or guideline for permanently destroying its employees' biometric identifiers and biometric information.

ANSWER: Digital states that paragraph 50 contains legal assertions or conclusions to which no responsive pleading is required. To the extent an answer is required, Digital denies paragraph 50.

51. By collecting, storing, and using Plaintiff's and the Class' biometric identifiers and biometric information as described herein, Digital violated Plaintiff's and the Class' rights to privacy in their biometric identifiers or biometric information as set forth in the BIPA, 740 ILCS 14/1, *et seq.*

ANSWER: Digital states that paragraph 51 contains legal assertions or conclusions to

which no responsive pleading is required. To the extent an answer is required, Digital denies paragraph 51.

52. On behalf of themselves and the Class, Plaintiff seek: (1) injunctive and equitable relief as is necessary to protect the interests of the Plaintiff and the Class by requiring Defendant's to comply with the BIPA's requirements for the collection, storage, and use of biometric identifiers and biometric information as described herein; (2) liquidated damages for each of Defendant's violations of the BIPA pursuant to 740 ILCS 14/20; and (3) reasonable attorneys' fees and costs and expenses pursuant to 740 ILCS 14/20(3).

ANSWER: Digital admits that Plaintiff seeks the relief requested in paragraph 52 on behalf of herself and the putative class; but Digital denies there is any factual or legal basis for the relief sought.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and the Class, respectfully requests that the Court enter an Order;

A. Certifying this case as a class action on behalf of the Class defined above, appointing Plaintiff as representative of the Class, and appointing their counsel as Class Counsel;

B. Declaring that Defendant's actions, as set out above, violate the BIPA;

C. Awarding statutory damages for each of Defendant's violations of the BIPA, pursuant to 740 ILCS 14/20;

D. Awarding injunctive and other equitable relief as is necessary to protect the interests of the Class, including an Order requiring Defendant to collect, store, and use biometric identifiers or biometric information in compliance with the BIPA;

F. Awarding Plaintiff and the Class their reasonable litigation expenses and attorneys' fees;

G. Awarding Plaintiff and the Class pre- and post-judgment interest, to the extent allowable; and

H. Awarding such other and further relief as equity and justice may require.

ANSWER: Digital denies that Plaintiff is entitled to the relief requested herein.

DEFENDANT'S AFFIRMATIVE DEFENSES

Without waiving the foregoing denials, Digital asserts the following affirmative defenses. By pleading these defenses, Digital does not intend to alter the burden of proof and/or burden of persuasion that otherwise exists regarding any of the issues in this action. All affirmative defenses are pleaded in the alternative and do not constitute an admission of liability or an admission that Plaintiff or any member of the putative class is entitled to any relief whatsoever arising out of the allegations in Plaintiff's Class Action Complaint. Further, Digital expressly reserves the right to amend these affirmative defenses based upon additional facts and information that may be ascertained through discovery.

FIRST AFFIRMATIVE DEFENSE

The Complaint is barred, in whole or in part, because Plaintiff and all putative class members consented to the conduct that allegedly violated BIPA. Plaintiff and each putative class member consented to the practices the Complaint challenges by voluntarily agreeing to have their fingerprint temporarily scanned in order to generate a unique hash for their smart cards in order to obtain access to Digital's Illinois facilities.

SECOND AFFIRMATIVE DEFENSE

The Complaint is barred, in whole or in part, because Plaintiff has failed to state a claim upon which relief may be granted under BIPA. Specifically, Digital does not store, collect or use biometric information or biometric identifiers of any individuals. Digital issues "smart cards" to individuals who require access to its facilities in Illinois. These smart cards utilize a unique hash for purposes of authenticating access to Digital's Illinois facilities,, and that unique hash is created with a proprietary algorithm that extracts unique data (minutia) from the temporary scan of individual's fingerprint and converts these data points into binary code which is then encrypted

using AES 256 encryption. All authentication and matching of the hash is completed via the smart card, which always remains in the possession of the individual. Digital does not retain copies of the hashes contained on each smart card, and no biometric data is collected or stored on any of Digital's servers or databases. Plaintiff and the putative class members accordingly have failed to state a claim under BIPA.

THIRD AFFIRMATIVE DEFENSE

The Complaint is barred, in whole or in part, by the terms and conditions to which Plaintiff – a union member – agreed pursuant to the collective bargaining agreement in effect at all relevant times with her then employer. Upon information and belief, Plaintiff waived her ability to bring an individual lawsuit or putative class action lawsuit under the terms and conditions of the collective bargaining agreement.

FOURTH AFFIRMATIVE DEFENSE

The Complaint is barred, in whole or in part, under the doctrine of unclean hands. Plaintiff and the putative class members approved of and consented to the practices the Complaint challenges by voluntarily agreeing to have their fingerprint temporarily scanned in order to generate a use hash for their smart cards in order to obtain access to Digital's Illinois facilities. Plaintiff and the putative class members did not sustain any actual injuries or incur any damages as a result of the conduct alleged in the Complaint.

FIFTH AFFIRMATIVE DEFENSE

The Complaint is barred, in whole or part, because Plaintiff fails to allege facts showing Digital acted intentionally, recklessly, or negligently with respect to its alleged violations of BIPA.

SIXTH AFFIRMATIVE DEFENSE

The Complaint is barred, in whole or in part, because any actual harm experienced by

Plaintiff or the putative class members was *de minimis*, and therefore, an award of statutory damages ranging from \$1,000 to \$5,000 for *each violation* of BIPA during a five-year period would result in a damages award that is grossly disproportionate and excessive, in violation of Digital's due process rights under the Fourteenth Amendment of the U.S. Constitution.

SEVENTH AFFIRMATIVE DEFENSE

The Complaint is barred, in whole or in part, because Plaintiff does not satisfy the necessary elements for certification of a class action under 735 ILCS 5/2-801.

EIGHTH AFFIRMATIVE DEFENSE

The Complaint is barred, in whole or in part, by preemption under the Illinois Workers' Compensation Act.

NINTH AFFIRMATIVE DEFENSE

Plaintiff fails to state a claim for violation of 740 ILCS 14/15(a) because "the duty to disclose under section 15(a) is owed to the public generally, not to particular persons whose biometric information the entity collects." *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 626 (7th Cir. 2020). Therefore, Plaintiff and putative class members lack statutory standing to allege a violation of 740 ILCS 14/15(a).

Dated: November 9, 2020

Respectfully submitted,

DIGITAL REALTY MANAGEMENT
SERVICES, LLC

By: /s/ Kevin M. Cloutier
One of Its Attorneys

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CERTIFICATE OF SERVICE

Kevin M. Cloutier, an attorney, hereby certifies that on November 9, 2020 he caused a true and correct copy of the foregoing **DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S CLASS ACTION COMPLAINT** to be electronically filed using this Court's e-filing platform and further, emailed a copy of this document to the following counsel of record:

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ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Biometrics Lawsuit Claims Digital Realty Management Services Scanned Workers' Fingerprints Without Consent](#)
