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

RICHARD ROGERS, individually and on behalf of similarly situated individuals,	)	
Plaintiff,	)	No. 19-cv-03083
v.	)	Hon. Matthew F. Kennelly
BNSF Railway Company, a Delaware corporation,	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR RECONSIDERATION

Introduction

At 10pm the night before a trial day, and after a three-day weekend with ample opportunity to provide Plaintiffs more notice, Defendant filed a motion *in limine* seeking to cut off the majority of the statutory damages Plaintiffs have been seeking in this case. Defendant did not lodge this filing until the last minute despite knowing for months and arguably years of Plaintiffs' theory that each scan constitutes a violation of BIPA – both the entry scans and the three digits. Plaintiffs' counsel responded during the hearing after the jury left but, in fairness, they were involved in trial the entire day, leaving counsel no opportunity to marshal their evidence and arguments in opposition to Defendant's late motion.

Plaintiffs have now had several hours after court to review the law and facts and they submit that the Court should reconsider its ruling for several reasons. Put simply, Defendant is wrong on the law and the facts.

I. Plaintiffs previously informed Defendant of the approximate amount of the violations they proved at trial as well as the fact that they sought the statutory liquidated damages for each violation

At the outset, it is not clear that the Rule 26(a)(1)(A)(iii) even governs the type of statutory remedy at issue here. The 9th Circuit recently held that the rule does not apply to the computation of civil penalties in a private right of action, stating: "The text of the Rule therefore is limited in its reach to the calculation of *damages*, as opposed to the calculation of other kinds of remedies." Hamilton v. Wal-Mart Stores, Inc., 39 F.4th 575, 590 (9th Cir. 2022) (emphasis in original). The statute at issue there allowed recovery of a civil penalty based on the proven number of violations. Although BIPA refers to its remedy as liquidated damages, the same issue is implicated here because the amount of damages is statutorily set and flows from the number of violations proven at trial. That type of remedy does not raise the same issues as the typical damages claim and therefore Plaintiffs did not run afoul of Rule 26(a)(1)(A)(iii). For this reason alone, they should be allowed to present their claims to the jury.

Regardless, Plaintiffs have complied in substance with the requirements of FRCP 26(a)(1)(A)(iii) -- to provide a "computation of each category of damages" as well as the evidence on which such computation is based.

From the outset of the case, Plaintiffs made clear that they are not seeking actual damages, only the statutory penalties. *See* Complaint, Dkt. 1 at 9 (seeking only the $1,000/$5,000 per violation proved at trial); First Amended Complaint, Dkt. 18 at 10. Moreover, Defendant was both on notice and actually aware of the fact that Plaintiffs sought to recover these penalties for each scan and. Plaintiffs' correspondence with Defense counsel states that they sought penalties "per scan" proved at trial. See 11/12/20

email from Plaintiffs Counsel to Defense Counsel, Exh 1, hereto ("[W]e already have very detailed class data including 1) the number of scans per class member; and 2) the date(s) biometric information was captured. So, we don't really understand what additional discovery would be needed to address any outstanding issues with respect to SOL or 'per scan' liability."). Similarly, Defendant was aware of the three finger scans per registration. Deposition of Defense Expert Kalat, Exh. 2 hereto, at 36:8-22 (recognizing that each registration of the class members included the scan of three different fingers).

The only missing element, if it is required, is notice of the specific number of violations Defendants faced. At the outset, these violations can be calculated from same data possessed by both sides and which each made available to their own experts, referenced in the 11/12/20 letter. Equally important, Plaintiffs did provide Defendant with estimates of the number of violations, and these estimated are not materially different than what Plaintiffs offered into evidence at trial: 1 million total violations and three violations per class member. *See* 4/20/22 Mediation position letter, Exh. 3 hereto, at 2 ("In total, this amounts to approximately 1,000,000 actionable violations of BIPA"); 3/24/21 Mediation position letter, Exh, 4 hereto, at 12-13 ("Plaintiff believes he has a clear path to proving at least three violations per class members" for "liability of approximately $815,000,000"). Plaintiffs reached these figures using theories that have changed over time, so they are not claiming that these are perfect disclosures.[1]

[1] For example, Plaintiffs claimed violations of three statutory sections per class member when calculating the three violations. Id. Nevertheless, Defendant also knew that there were three scans per registration, Kalat Exh. 2, and were aware of the issue no later than Messrs. Ash and Diebes' deposition in December of 2020. *See* 12/9/20 Ash Dep. at

Nevertheless, Defendant certainly had notice of the magnitude of the liability Plaintiffs would seek at trial and the per scan basis.

II. Defendant forfeited any argument by failing to move in advance of trial

Defendant has also forfeited this argument. No later than the pretrial conference in early September, Defendant was expressly on notice that Plaintiffs would argue to the jury for three penalties for each registration, and one penalty for each scan thereafter. Defendant was subjectively aware, and has been for years.

Despite being on notice before trial that Plaintiffs intended to submit a verdict form with both registration and scan damages, Defendant did not file any motion *in limine* on the subject – not on the court's schedule and not before trial began.

During Plaintiff's opening statement, counsel stated without objection (or claim of surprise) what the evidence was going to show not just the registration damages but also:

> You're also going to have to determine what we're going to call the "scan damages." Every time the truck drivers came back, they, again, gave their biometrics; they didn't give consent. And since the process was flawed, that's going to be an additional set of damages. And that one is going to be substantial. If we're talking about four rail yards -- the lawsuit here involves four rail yards in Illinois: Corwith; Cicero; LPC it's called, Logistics Park Chicago; and Willow Springs. And at each of those, there were hundreds of drivers going through every day. The class is a five-year period, so the damages start in 2014, and they end in about 2020, about five and a half years. So there's a lot of scans. And you'll hear evidence on that, and you'll decide how many violations.

Then, when the trial proceeded, Plaintiff proved the scan damages (and without Defendant raising a disclosure objection). The evidence to support the number of penalties is now in the record. Plaintiff should be permitted to argue the evidence in the record during closing.

144:5-145:7; 12/11 /20 Diebes Dep. at 94:17-24 (four prints); Exhs. 5 and 6 hereto, respectively.

III. The Court should permit the jury to decide the matter, which would allow the appellate court, if necessary, to resolve whether this category of damages was proper

In light of the fact that the evidence came in at trial without a disclosure objection, the safest route is to permit the jury to decide the question, and then allow a timely consideration of whether the category is proper. Indeed, Defendant has no one to blame but itself. BNSF waited until 24 hours before closing argument to bring a motion *in limine* that could and should have been addressed before trial. The fact that there is insufficient time for careful consideration should not inure to their benefit. At this point, the evidence is in the record, and the jury should be asked to decide the question. What happens to those penalties post-trial or on appeal can be decided later.

If Defendant is correct, that category can always be eliminated and nullified. But if Plaintiffs (with more time for development and reasoned consideration of the law and the facts) ultimately persuade this Court or another that these penalties should have been part of this trial, there will be no remedy unless the penalty numbers are adjudicated. In short, nothing is lost by allowing the question to be answered by the jury now.

Dated: October 12, 2022

Respectfully submitted,

RICHARD ROGERS, individually and on behalf of a class of similarly situated individuals

By: /s/ Michael Kanovitz
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CERTIFICATE OF SERVICE

I hereby certify that, on October 12, 2022, I caused the foregoing *Motion for Reconsideration* to be electronically filed with the Clerk of the Court using the CM/ECF system. A copy of said document will be electronically transmitted to all counsel of record:

/s/ Michael Kanovitz