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

ROBIN RAPAI,

Plaintiff,

v.

HYATT CORPORATION d/b/a THE  
HYATT LODGE,

Defendant/Third-Party Plaintiff,

v.

KRONOS INCORPORATED,

Third-Party Defendant.

Case No. 2017 CH 14483

**HYATT'S RESPONSE IN OPPOSITION TO KRONOS' MOTION TO DISMISS  
HYATT'S AMENDED THIRD-PARTY COMPLAINT**

Third-Party Plaintiff, Hyatt Corporation d/b/a The Hyatt Lodge ("Hyatt"), through its attorneys, for its Response in Opposition to Kronos Incorporated's ("Kronos") Motion to Dismiss Hyatt's Amended Third Party Complaint, states as follows:

**I. SUMMARY OF ARGUMENTS**

Hyatt's Amended Third-Party Complaint seeks to hold Kronos accountable for its failure to comply with its contractual obligations. Kronos entered into a contract with Hyatt to "Process" (e.g., collect, store, retrieve, transfer, disclose or destroy) "Personnel Information" in compliance with applicable laws, including obtaining consents for the proper and lawful conduct of its business. (Kronos-Hyatt Contract, ¶¶ 17(a), 25). "Process" as defined in the agreement, means to "collect, store, record, organize, use, store, adapt, alter, retrieve, transfer, disclose or destroy." "Personnel Information" means "information relating to an identified or identifiable natural person . . . ." (Kronos-Hyatt Contract, ¶25(a)). The conduct Kronos contractually undertook to perform

is the same conduct that triggered the Biometric Information Privacy Act (“BIPA”) claims in the Rapai Lawsuit for which Hyatt incurred liability.

Kronos further agreed to defend and indemnify Hyatt for various claims, including those caused by Kronos’ breach of its contractual obligations to Hyatt. *Id.* at ¶ 18(a). Paragraph 17 of the Contract specifically required Kronos to perform its obligations in compliance with applicable laws, including any requirements to obtain necessary consents. The indemnity provision found in Paragraph 18(c) applies to Kronos’ breach of Paragraph 17 only insofar as it relates to data protection laws (as opposed to a data privacy law such as BIPA), and Kronos’ breach of Paragraph 25. Therefore, Hyatt is entitled to the full defense and indemnity protections afforded to it under Paragraph 18(a) for Kronos’ breach of Paragraph 17.

Kronos’ emphasis on cases interpreting BIPA without regard to its contractual obligations are entirely misplaced. This case differs from the BIPA cases cited by Kronos because in this case Kronos contractually agreed that it (as opposed to Hyatt) was responsible for Processing (e.g., storing, collecting, storing, retrieving, transferring, disclosing or destroying) Personnel Information (e.g., personally identifying information of Hyatt’s employees), which is the very conduct that triggered the claims under Sections 15(a) and (b) of BIPA in the Rapai Lawsuit. Moreover, Kronos ignores that the Amended Third-Party Complaint alleges that Hyatt never collected, captured, received, obtained or possessed the data at issue in the Rapai Lawsuit, a fact this Court must accept as true for purposes of considering the Motion to Dismiss. Notwithstanding, the BIPA cases to which Kronos cite for the proposition that third-party vendors are not subject to liability under BIPA are unpersuasive.

Finally, claims for equitable indemnity are designed to afford relief for this exact scenario where Hyatt, through no fault of its own, incurred liability in the Rapai Lawsuit as a result of

Kronos' breach of its contractual obligations to Process (e.g., collection, storage, transfer, destruction) the personal identifying information of Hyatt's employees in compliance with applicable law, including obtaining necessary consents, as required by Paragraph 17.

In light of these arguments, Kronos cannot establish that Hyatt cannot recover under its claims set forth in its Amended Third-Party Complaint under any set of facts. For this reason, this Court should deny Kronos' Section 2-615 Motion to Dismiss.

## **II. LEGAL STANDARD**

A motion to dismiss under 735 ICS 5/2-615 challenges only the legal sufficiency of the complaint and admits the truth of all well-pleaded factual allegations. The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. A cause of action should not be dismissed pursuant to § 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recover. *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2017 IL 121297 ¶ 5. It is error to determine the factual merits of a pleading instead of its legal sufficiency under Section 2-615. *Classic Hotels v. Lewis*, 259 Ill. App. 3d 55, 60 (1<sup>st</sup> Dist. 1994).

## **III. COUNTS I AND II OF HYATT'S AMENDED THIRD-PARTY COMPLAINT AGAINST KRONOS STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED**

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Kronos narrowly focuses on the interpretation of BIPA to the exclusion of the separate and distinct key issue - - the interpretation of the Kronos-Hyatt Contract. Nonetheless, the provisions of the Kronos-Hyatt Contract, when giving full effect to each provision, demonstrate that Kronos breached its agreement to lawfully perform, and obtain consents, for the very same conduct at issue in the Rapai Lawsuit, along with its obligations to defend and indemnify Hyatt.

**A. The Provisions of the Kronos-Hyatt Contract Support Hyatt's Breach of Contract Claims in Count I and its Claim for Declaratory Judgment in Count II.**

Under the general rules of contract construction, contracts are to be interpreted as a whole, giving meaning and effect, to each provision. *Srivastava v. Russell's Bar-B-Q, Inc.*, 168 Ill. App. 3d 726, 730 (1<sup>st</sup> Dist. 1988). No matter what order the provisions of the Kronos-Hyatt Contract are read, Kronos contractually agreed to Process, defined to include, without limitation, *inter alia* collect, store, retrieve, transfer, disclose or destroy, Personnel Information, defined as “information relating to an identified or identifiable natural person on behalf of [Hyatt].” (Kronos-Hyatt Contract, ¶ 25). Therefore, without even getting to the indemnity provisions of the Kronos-Hyatt Contract, Kronos has already contractually assumed obligations that solely make it responsible for conduct that triggers Sections 15(a) and (b) of BIPA (e.g., collect, store, retrieve, transfer, disclose or destroy) Personnel Information (e.g., the personal identifying information of Hyatt’s employees) vis-à-vis the time-keeping system at issue in its Contract. Kronos further agreed to “perform *its* obligations under this Agreement in compliance with applicable Laws[,] including to “obtain, before providing any Products or Services, and . . . maintain throughout the Term . . . any and all necessary . . . consents for the proper and lawful conduct of its business or other activity . . . carried on, in or at any premise owned or operated by [Hyatt].” (Kronos-Hyatt Contract, ¶ 17(a)) (emphasis added). Violation of these provisions in and of themselves give rise to a breach of contract claim. Indeed, Hyatt never collected, received, obtained or possessed any of the data at issue.

Kronos further breached the agreement by refusing to indemnify Hyatt for the Rapai Lawsuit. Paragraph 18(a) of the Kronos-Hyatt Contract provides that, “Kronos agrees to indemnify and defend [Hyatt/Customer Indemnitees] and to hold them harmless from and against

any and all claims, suits, causes of action . . . costs, fees and expenses (including reasonable legal fees) . . . alleged, asserted or brought against . . . them or incurred by any of them . . . to the extent arising out of or related to . . . (a)(ii) Damage to real or personal property, bodily injury to or death of any third-party (including [Hyatt] Personnel) arising out of Kronos' breach of its obligations hereunder," or the negligence or willful misconduct of Kronos or its personnel; (a)(iii) the gross negligence or willful misconduct of Kronos or its personnel; and (a)(iv) Kronos' breach of Section 17 except for breach of data protection laws (which are addressed below in connection with Section 18(c)).<sup>1</sup>

Kronos' discussion of Paragraphs 16(c) and 17(a)(b) is misguided where the conduct at issue in the Rapai Lawsuit was the very conduct for which Kronos assumed contractual responsibility; namely, to Process Personnel Information in compliance with applicable laws and not before obtaining all necessary consents for its activity. *Id.* at ¶ 17(a). Put another way, Kronos has liability for its Products or Services that do not comply with *its* obligations to perform its activities lawfully and without obtaining necessary consents. Kronos' argument requires the court to ignore certain provisions of its Contract in favor of others, which clearly runs afoul of the basic tenets of contract interpretation.

Kronos cites to Paragraph 25(a)(iii)-(iv) of its Contract for the proposition that Hyatt retained ownership and control over the Personnel Information that Kronos Processed (e.g., collected, stored, retrieved, transferred, disclosed or destroyed), but the words "ownership" and "control" do not appear in that provision. Moreover, these terms, even if Kronos wants to read

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<sup>1</sup> Kronos' breach of its contractual obligations, which subjected Hyatt (and separately Kronos) to liability under BIPA does not trigger the indemnity provision found in Paragraph 18(c). When one reads Paragraph 18(c) in its entirety, it is clear this provision relates to data protection laws designed to provide relief to individuals whose data has been subject to a data breach. *See also*, fn. 3, which discusses the distinction between "privacy laws" and "data protection laws" as used in the Kronos-Hyatt Contract.

them into its Contract, do not obviate the requirement that Kronos perform *its* contractual obligations (e.g., collect, store, transfer, or disclose) the biometric data of Hyatt's employees in a legally compliant manner and with consents. More importantly, this argument is contrary to the allegations in the Amended Third-Party Complaint that Kronos collected and possessed the relevant data at all times, and that Hyatt never collected, captured, received, obtained or possessed the data at issue in the Rapai Lawsuit. Accordingly, this argument by Kronos is simply a denial of a fact alleged in the operative pleading, and this Court cannot resolve that factual dispute at the motion to dismiss stage.

Finally, Paragraph 12.3 of Exhibit B to the Kronos-Hyatt Contract, which provides that Hyatt agrees to ensure the transfer of data complies with data protection laws is not applicable. *First*, BIPA is not a data protection law as that term is used in Kronos' Contract or otherwise.<sup>2</sup> *Second*, Kronos agreed to perform its contractual obligations, which include Processing Personnel Information in compliance with applicable laws, including obtaining and maintaining consents for the proper and lawful conduct of *its* activity before providing any Products or Services. (Kronos-Hyatt Contract, ¶ 17(a)). *Third*, contract interpretation rules under Illinois law require that each provision of the Kronos-Hyatt Contract be given full effect. As such, Paragraph 12.3 of Exhibit B to the Kronos-Hyatt Contract, under which Hyatt agreed to ensure the transfer of "data" complies with data protection laws (as opposed to privacy laws) must be read along with the remainder of

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<sup>2</sup> In fact, Paragraph 12.1 of Exhibit B to the Kronos-Hyatt Contract provides that, "Both parties agree to comply with all applicable privacy and data protection Laws governing their respective activities under the Agreement." This sentence demonstrates that "privacy" and "data protection" laws are distinct as used in Kronos' Contract, and that Kronos recognizes its ability to Process Personnel Information in compliance with both such types of laws. (In construing a contract, it is presumed that all provisions were inserted for a purpose, and conflicting provisions will be reconciled if possible so as to give effect to all of the contract's provisions. *Bruno Benedetti & Sons, Inc. v. O'Malley*, 124 Ill. App. 3d 500, 506 (1<sup>st</sup> Dist. 1984). Moreover, Kronos recognizes that BIPA is not a data protection law as it maintained that "the alleged failure to obtain employee consents or publish a privacy policy with a retention schedule and destruction guidelines under BIPA cannot be reimagined as data security breaches." (Kronos' Mot. Dismiss, pg. 12).

the contract. *Fourth*, even if an ambiguity exists in the Kronos-Hyatt Contract, as counsel for Kronos suggests, that would require further contract interpretation outside the four-corners of the document,<sup>3</sup> and make disposition of Hyatt's breach of contract claims by way of a motion to dismiss improper.

**B. Reference to BIPA Alone Does Not Resolve Kronos' Contractual Obligations as Contained in Hyatt's Amended Third-Party Complaint.**

Kronos' discussion about courts' interpretation of BIPA as related to third-party vendors is inapposite to Hyatt's Amended Third-Party Complaint, which is premised on the Kronos-Hyatt Contract. For example, in *Rogers v. CSX Intermodal Terminals, Inc.*, 409 F. Supp. 3d 612 (N.D. Ill. 2019), a case relied upon by Kronos, the federal district court simply held that plaintiff's employer was liable under Sections 15(a)(b) of BIPA. The decision in *Rogers*, however, does not provide any legal support for Hyatt's contractual claims against Kronos.

Moreover, in *Gutierrez v. Senior Lifestyle Corp.*, No. 2017-CH-11314 (Ill. Cir. Ct. Cook Cnty. July 10, 2020), another case cited by Kronos, Judge Reilly dismissed defendant's third-party claim for contribution filed against ADP and Kronos brought pursuant to the Illinois Joint Tortfeasor Contribution Act. Hyatt's claims against Kronos, however, are based upon Kronos' breach of the Kronos-Hyatt Contract.

In addition, even to the extent courts have held, when interpreting the text of BIPA, that multiple private entities can each bear responsibility for the same statutory obligations,<sup>4</sup> that is inapposite to Hyatt's breach of contract claim wherein Kronos contractually agreed that it (and not

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<sup>3</sup> If the language of the contract is susceptible to more than one meaning, then an ambiguity is present, and parol evidence may be admitted to aid the trier of fact in resolving the ambiguity. *Air Safety, Inc. v. Teacher Realty Corp.*, 185 Ill. 2d 457, 462-63 (1999).

<sup>4</sup> *Contra, Gutierrez*, No. 2017-CH-11314 (Ill. Cir. Ct. Cook Cnty. July 10, 2020) and *Figueroa v. Kronos, Inc.*, 454 F. Supp. 3d 772, 783 (N.D. Ill. 2020).

Hyatt) would Process (e.g., collect, store, retrieve, transfer, disclose or destroy) Personnel Information (e.g., the personal identifying information of Hyatt's employees) in a lawful manner and not before obtaining legally-required consents to perform its activities.

Next, Kronos devotes much of its argument to the minority position taken in only three cases - - that a third-party vendor cannot be liable under Section 15(b). See, *Namuwonge v. Kronos, Inc.*, 418 F. Supp. 3d 279, 286 (N.D. Ill. 2019), *Cameron v Polar Tech. Indus., Inc.*, No. 2019-CH-000013 (Ill. Cir. Ct. DeKalb Cnty. Aug. 23, 2019); and *Bernal v. ADP, LLC*, No. 2017-CH-12364, 2019 Ill. Cir. LEXIS 1025 (Ill. Cir. Ct. Cook Cnty. Aug. 23, 2019).<sup>5</sup> Not only has every other court that considered this issue rejected these three cases, *Namuwonge*, *Cameron*, and *Bernal* are inapposite where Kronos contractually agreed to Process (collect, store, retrieve, transfer, disclose, or destroy) Personnel Information (e.g., the personal identifying information of Hyatt's employees) in a lawfully manner and not before obtaining consents to perform its activities.

In *Namuwonge*, the court dismissed plaintiff's Section 15(b) claim without prejudice based on her "more precise" allegation that her employer, and not Kronos, collected her fingerprints. 418 F. Supp. 3d at 286. *Namuwonge* did not hold as matter of law that *only* an employer (and not a biometric time clock vendor) owes a plaintiff any duties under Section 15(b). *Id.* In *Bernal*, Judge David Atkins dismissed plaintiff's Section 15(b) BIPA claims without prejudice reasoning plaintiff did not allege facts sufficient for the court to assess ADP's "actual involvement, relevant to the biometric scanning technology, beyond the fact that [ADP] supplied [plaintiff's employer]

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<sup>5</sup> ADP reached a Rule 23 class action settlement in *Bernal, et al.* for \$25 million. [http://www.adpbipasettlement.com/media/3132154/stipulation\\_of\\_class\\_action\\_settlement\\_dated\\_june\\_30\\_\\_2020\\_\\_fully\\_executed\\_.pdf](http://www.adpbipasettlement.com/media/3132154/stipulation_of_class_action_settlement_dated_june_30__2020__fully_executed_.pdf)  
[http://www.adpbipasettlement.com/media/3272131/2-10-21\\_adp\\_final\\_approval\\_order\\_and\\_judgement.pdf](http://www.adpbipasettlement.com/media/3272131/2-10-21_adp_final_approval_order_and_judgement.pdf)



with the technology.” 2019 Ill. Cir. LEXIS 1025, at \* 4. Judge Atkins’ passing reference as to whether Section 15(b) applies to a third-party is *dicta* reduced to fn. 8 (not fn. 3 as incorrectly cited by Kronos). *Id.* at 9.

Nonetheless, the majority of courts have rejected the suggestion that Section 15(b) applies to only a plaintiff’s employer. *See Flores v. Motorola Sols., Inc.*, No. 1:20-cv-01128, 2021 U.S. Dist. LEXIS 21937, at \*6-7 (N.D. Ill. Jan. 8, 2021) (the court will not apply the interpretation articulated by Judge Atkins in *dicta* where the requirement of a relationship between the collector and individual does not appear in the statutory text and persuasive authority holds otherwise). (citing *Monroy v. Shutterfly*, No. 16 C 10984, 2017 U.S. Dist. LEXIS 149604, at \*1 (N.D. Ill. Sept. 15, 2017)); *see also, Heard v. Becton, Dickinson & Co.*, 524 F. Supp. 3d 831, 842-43 (N.D. Ill. March 9, 2021 (rejecting *Bernal* and *Cameron* noting “the courts’ discussion of Section 15(b) is cursory and ultimately unpersuasive,” and “the court’s decision in *Bernal* rested not on the applicability of Section 15(b) to third-party vendors but on the insufficiency of plaintiff’s complaint on that count.”) *See also, Figueroa*, 454 F. Supp. 3d at 784-85; *Neals v. PAR Tech. Corp.*, 419 F. Supp. 3d 1088, 1092 (N.D. Ill. 2019); *King v. People Net Corp.*, No. 21-CV-2774, 2021 U.S. Dist. LEXIS 207694, at \* 19, fn. 11 (N.D. Ill. Oct. 28, 2021) (the court “decline[s] to follow an interpretation of § 15(b) under which third parties in employment situations (parties other than the employer) owe no duties to employees whose information they obtain.”) *See, Ronquillo v. Doctor’s Assocs., LLC*, No. 21-C-4903, 2022 U.S. Dist. LEXIS 62730, at \* 10 (N.D. Ill. Apr. 4, 2022) (“*Bernal* appears to be an outlier with the language on which [defendants rely appearing only in *dicta*.”)

**C. No Court has Accepted Kronos’ Argument of Impracticability or Difficulty in Requiring it to Perform its Contractual Obligations.**

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No court has accepted Kronos' argument that it would be "highly complicated" or "outright impossible" to comply with publishing a data retention policy as required by Section 15(a), or the informed written consent obligations of Section 15(b), even in the absence of Kronos contractually assuming responsibility for the *inter alia* collection and storage of personal identifying information compliant with applicable laws, including obtaining necessary consents. (Kronos-Hyatt Contract, ¶ 17(a)). Therefore, where this argument was rejected in the absence of Kronos' contractual obligations, such argument falters even more in the case *sub judice*. In *Figueroa*, Judge Feinerman rejected Kronos' almost identical argument reasoning, "Kronos could have complied by, for example, requiring Plaintiffs' employers, as a contractual precondition of using a Kronos biometric timekeeping device, to agree to obtain their employees' written consent to Kronos obtaining their data." 454 F. Supp. 3d at 783. Judge Feinerman further reasoned that Kronos was not precluded from complying with Section 15(b)(1) and (b)(2) by informing individuals that it was collecting or obtaining their biometric data, for what purpose and for how long, and that Kronos was able to comply with Section 15(a). *Id.* at 779.<sup>6</sup>

More importantly, such an inquiry is outside the scope of the pleadings to be considered by this Court on Kronos' Section 2-615 Motion to Dismiss. Kronos may not now look outside the pleadings to argue that, in hindsight, it could not have performed its clear contractual obligations without difficulty. This Court should reject their attempt to do so.

Finally, holding Kronos to its contractual obligations is not tantamount to Kronos providing legal compliance services. It is certainly convenient for Kronos to take an undefined, general term such as "legal compliance services," for which it did not assume contractual responsibility, and

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<sup>6</sup> On February 18, 2022, Judge Feinerman preliminarily approved a Rule 23 class action settlement wherein Kronos agreed to pay Plaintiffs and the Class for \$15.3 million. 1:19-cv-01306 (ECF Nos. 342, 358).

label its contractual obligations as falling under such exclusion. Fatal to Kronos' argument is that there is no support in its Contract, or in the text of BIPA, to label its contractual obligation (or breaches thereof) as legal compliance services. Hyatt alleges that Kronos failed to meet its own compliance obligations, not that it failed to advise Hyatt of Hyatt's legal obligations. The Contract is clear—Kronos agreed to Process Personnel Information in compliance with applicable laws and to obtain necessary consents to conduct its activities. (Kronos-Hyatt Contract, ¶ 17(a)). The Amended Third-Party Complaint alleges that Kronos was the only party with access to this data, and that it failed to meet the foregoing obligations.

#### **IV. HYATT'S IMPLIED INDEMNITY CLAIM IN COUNT III WITHSTANDS KRONOS' MOTION TO DISMISS**

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Kronos' arguments in support of Hyatt's equitable indemnity claim in Count III of its Amended Third-Party Complaint are equally unavailing. *First*, after attacking Hyatt's breach of contract claim, Kronos now argues that Hyatt cannot circumvent those very same contractual provisions by pursuing an equitable indemnity claim in Count III. Notably, however, Kronos provides no support for this statement. Even if Kronos is correct, which Hyatt disputes, Kronos fails to recognize that a complaint may properly plead alternative theories of recovery despite any inconsistency. *See, Gagnon v. Schickel*, 2012 IL App (1<sup>st</sup>) 120645 ¶ 25.

*Next*, Kronos claims that its failure to obtain employee consents or publish a privacy policy with a retention schedule and destruction guidelines "cannot be reimagined as security breaches." (Kronos' Mot. Dismiss, pg. 12). Kronos overlooks the distinction between "data privacy" and "data protection" as those terms are referred to in its Contract. Nonetheless, Kronos' breach of its obligations caused Hyatt to be subject to legal exposure in the Rapai Lawsuit. Had Kronos performed *its* obligations to *inter alia* collect, store, transfer, and destroy the biometric data at issue

in compliance with applicable laws and not before obtaining consents for its activity, Hyatt would not have been subjected to legal costs and exposure in connection with the Rapai Lawsuit. This is the exact scenario for which implied indemnity claim provides redress.

WHEREFORE, Hyatt Corporation d/b/a The Hyatt Lodge, respectfully requests that this Court denies Kronos Incorporated's Motion to Dismiss Hyatt's Amended Third-Party Complaint and award all other relief that it deems just and equitable.

Respectfully submitted,

**Hyatt Corporation d/b/a The Hyatt Lodge, Third-Party Defendant**

By: /s/ Lisa Handler Ackerman  
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 2022, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing by electronic mail to all ECF participants.

By: /s/ Lisa Handler Ackerman

