

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

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

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Case No. 1:19-cv-03083

Honorable Matthew F. Kennelly

**DEFENDANT BNSF RAILWAY COMPANY’S ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFF’S FIRST AMENDED CLASS ACTION COMPLAINT**

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Defendant BNSF Railway Company (“BNSF”), by and through its attorneys, answers and otherwise responds to Plaintiff Richard Rogers’ Second Amended Class Action Complaint (“Complaint”) as follows:

1. BIPA defines a “biometric identifier” as any personal feature that is unique to an individual, including fingerprints and hand geometry. “Biometric information” is any information based on a biometric identifier, regardless of how it is converted or stored. Collectively, biometric identifiers and biometric information are known and referred to herein as “biometrics.” 740 ILCS 14/10.

ANSWER: BNSF admits that the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* (“BIPA”), defines “biometric identifier” to include a “fingerprint” or “scan of hand or face geometry” and that BIPA 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,” 740 ILCS 14/10. BNSF denies that, taken alone, these sections accurately reflect the totality of the statute. BNSF denies that BIPA defines “biometric identifier” as “any personal feature that is unique to an individual” and denies the remaining allegations in Paragraph 1.

2. Defendant is one of the largest freight railroad networks and railroad operators in North America.

ANSWER: BNSF admits the allegations in Paragraph 2.

3. Defendant requires truck drivers, including Plaintiff, who visit its four intermodal facilities located in Illinois, to provide their biometric identifiers in the form of fingerprints and related biometric information as part of the process of accessing the facilities.

ANSWER: BNSF denies the allegations in Paragraph 3. Answering further, BNSF contracted with an independent company, Remprex, LLC (“Remprex”), who provides a number of services at BNSF facilities, including controlling entry to certain BNSF intermodal facilities in Illinois. *See* Intermodal Facility Services Master Agreement between BNSF and Remprex (Aug. 1, 2018), attached as **Exhibit 1**. To the best of BNSF’s understanding, Remprex has incorporated the collection of certain information from truck drivers into those entry procedures. BNSF lacks sufficient knowledge to affirm or deny whether the allegations of Paragraph 3 are true as to Remprex. Remprex has been providing services to BNSF at its facilities, including controlling entry to BNSF facilities in Illinois, since July 1, 2007.

4. The unique nature of biometric identifiers allows private entities, such as Defendant, to instantly gather an accurate “signature” of visitors to its facilities.

ANSWER: BNSF admits that the unique nature of biometric identifiers allows private entities to instantly gather an accurate “signature” of visitors. BNSF denies the remaining allegations in Paragraph 4.

5. BIPA provides, *inter alia*, that a private entity, such as Defendant, may not collect, capture, purchase, or otherwise obtain an individual’s biometric identifiers, such as fingerprints and hand scans, or any biometric information, including any data regardless of the manner it is converted or stored, unless it first:

a. informs that person in writing that biometric identifiers or biometric information will be collected or stored;

b. informs that person in writing of the specific purpose and the length of term for which such biometric identifiers or biometric information is being collected, stored and used; and

c. receives a written release from the person for the collection of their biometric identifiers or biometric information.

740 ILCS 14/15(b)(1)–(3).

ANSWER: BNSF admits that Plaintiff summarizes select portions of 740 ILCS 14/5(b), but denies that, taken alone, these sections accurately reflect the totality of the statute. BNSF denies the remaining allegations in Paragraph 5.

6. Indeed, “biometrics are unlike other unique identifiers that are used to access finances or other sensitive information,” (740 ILCS 14/5), and therefore require special treatment compared to traditional private personal information. For example, even sensitive information like Social Security numbers, when compromised, can be changed. “Biometrics, however, are biologically unique to each individual and therefore, once compromised, such individual has no recourse, is at a heightened risk for identity theft in, and is likely to withdraw from biometric facilitated transactions.” 740 ILCS 14/5.

ANSWER: BNSF admits that language similar to the language used in Paragraph 6 appears in a portion of 740 ILCS 14/5(c), but denies that, taken alone, these sections accurately reflect the totality of the statute. BNSF denies that Plaintiff accurately quotes 740 ILCS 14/5(c) and denies the remaining allegations in Paragraph 6.

7. Plaintiff brings this action for statutory damages and other remedies as a result of Defendant’s conduct in violating his biometric privacy rights under BIPA.

ANSWER: BNSF admits that Paragraph 7 contains a characterization of Plaintiff’s case and that Plaintiff seeks damages and other remedies for purported violations of BIPA, but denies that BNSF engaged in any wrongdoing, denies that it has violated BIPA, denies that it has violated Plaintiff’s “biometric privacy rights,” and denies that Plaintiff is entitled to any relief. BNSF denies the remaining allegations in Paragraph 7.

8. Compliance with BIPA is straightforward and minimally burdensome. For example, the necessary disclosures and consent may be accomplished through a single signed sheet of paper or its electronic equivalent. Indeed, other rail operators attempt to gain informed written consent for the collection of biometrics in Illinois.

ANSWER: BNSF lacks knowledge or information sufficient to form a belief regarding the truth of the allegations in the last sentence of Paragraph 8 and therefore denies the same. BNSF denies the remaining allegations in paragraph 8.

9. BIPA's requirements bestow a right to privacy in biometrics and a right to make an informed decision when individuals determine whether they will provide or withhold their biometrics.

ANSWER: BNSF denies the allegations in paragraph 9.

10. On behalf of himself and the proposed Class defined below, Plaintiff seeks an injunction requiring Defendant to comply with BIPA, as well as an award of statutory damages to the Class members and monetary damages to be determined at trial, together with costs and reasonable attorneys' fees.

ANSWER: BNSF admits that Paragraph 10 contains a characterization of Plaintiff's case and that Plaintiff seeks class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure, but denies that BNSF engaged in any wrongdoing, denies that it has violated BIPA, denies that this case is suitable for class treatment, denies that Plaintiff is similarly situated to other unnamed individuals, and denies that Plaintiff is entitled to any relief. BNSF denies the remaining allegations in Paragraph 10.

PARTIES

11. Defendant is a Delaware company that conducts, and is licensed by the Illinois Secretary of State to conduct, business in Illinois. Defendant is headquartered in Texas and conducts business throughout Illinois and Cook County.

ANSWER: BNSF admits the allegations in Paragraph 11.

12. At all relevant times, Plaintiff has been a resident and citizen of the state of Illinois and visited Defendant's facilities in Illinois, including within this District.

ANSWER: BNSF lacks knowledge or information sufficient to form a belief regarding the truth of the allegations in Paragraph 12 and therefore denies the same.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this matter pursuant to the Class Action Fairness Act, 28 U.S.C. §1322(d) et seq., because this case is a class action in which the amount in controversy exceeds the sum or value of \$5,000,000.00 exclusive of interest and costs; there are greater than 100 putative class members; at least one putative class member is a citizen of a state other than Defendant's states of citizenship; and none of the exceptions under subsection 1332(d) apply to this instant action.

ANSWER: BNSF admits the allegations of Paragraph 13.

14. This Court may assert personal jurisdiction over Defendant because it conducts substantial business throughout Illinois, including in this District.

ANSWER: BNSF admits that this Court may assert specific personal jurisdiction over BNSF in this case and that BNSF conducts business in the state of Illinois and in this District. BNSF denies the remaining allegations in Paragraph 14.

FACT SPECIFIC TO PLAINTIFF

15. During the relevant time period, Plaintiff worked as a truck driver for a third-party logistics company.

ANSWER: BNSF admits the allegations in Paragraph 15.

16. Plaintiff's work as a truck driver required him to visit various railyards, including the Illinois facilities owned and operated by Defendant. At Defendant's facilities, Plaintiff was required to register his biometric identifiers and/or biometric information into biometrically-enabled Auto-Gate Systems that partially control ingress and egress at the facilities.

ANSWER: BNSF admits that Plaintiff visited BNSF's intermodal facilities in Illinois as part of his work as a truck driver. BNSF lacks knowledge or information sufficient to form a belief regarding the truth of the remaining allegations in the first sentence in this Paragraph and therefore denies the same. BNSF denies all the remaining allegations in Paragraph 16. Answering further,

BNSF contracted with an independent company, Remprex, who provides a number of services at BNSF facilities, including controlling entry to certain BNSF intermodal facilities in Illinois. *See* Intermodal Facility Services Master Agreement between BNSF and Remprex (Aug. 1, 2018), attached as **Exhibit 1**. To the best of BNSF's understanding, Remprex has incorporated the collection of certain information from truck drivers into those entry procedures. BNSF lacks sufficient knowledge to affirm or deny whether the allegations of Paragraph 16 are true as to Remprex. Remprex has been providing services to BNSF at its facilities, including controlling entry to BNSF facilities in Illinois, since July 1, 2007.

17. Thereafter, on subsequent visits to Defendant's Illinois facilities, Plaintiff was required to provide his fingerprint to Defendant for scanning.

ANSWER: BNSF denies the allegations in Paragraph 17.

18. Using the Auto-Gate Systems, Defendant collected, captured, stored, and otherwise obtained biometric identifiers and associated biometric information from Plaintiff and other truck drivers.

ANSWER: BNSF denies the allegations in Paragraph 18.

19. Although Defendant collected, captured, and stored biometric identifiers and biometric information, it failed to provide any written disclosures describing the purpose and duration of such use and failed to obtain informed written consent from Plaintiff and other truck drivers prior to collecting, capturing and storing such information, as required by BIPA.

ANSWER: BNSF denies the allegations in Paragraph 19.

CLASS ALLEGATIONS

20. Pursuant to Fed. R. Civ. P. 23, Plaintiff brings this action on behalf of himself and a class of similarly situated individuals defined as follows:

All individuals whose fingerprint information was registered using an Auto-Gate System at one of BNSF's four Illinois facilities at any time between April 4, 2014 and January 25, 2020.

ANSWER: BNSF admits that Paragraph 20 contains a characterization of Plaintiff's case and that Plaintiff seeks class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure

but denies that BNSF engaged in any wrongdoing, denies that it has violated BIPA, denies that this case is suitable for class treatment, denies that Plaintiff is similarly situated to other unnamed individuals, and denies that Plaintiff is entitled to any relief. BNSF denies the remaining allegations in Paragraph 20 and denies that this case can be maintained as a class action.

21. Excluded from the Class are any members of the judiciary assigned to preside over this matter; any officer or director of Defendant; and any immediate family member of such officer or director.

ANSWER: BNSF admits that Plaintiff seeks to exclude the individuals identified in Paragraph 21 from the putative class Plaintiff seeks to represent. Except as so admitted, BNSF denies the allegations in Paragraph 21 and denies that this case can be maintained as a class action.

22. There are at least 44,000 members of the Class, making the members of the Class so numerous that joinder of all members is impracticable.

ANSWER: BNSF denies the allegations in Paragraph 22 and denies that this case can be maintained as a class action.

23. Plaintiff's claims are typical of the claims of the Class he seeks to represent, because the basis of Defendant's liability to Plaintiff and the Class is substantially the same, and because Defendant's conduct has resulted in similar injuries to Plaintiff and to the Class.

ANSWER: BNSF denies the allegations in Paragraph 23 and denies that this case can be maintained as a class action.

24. 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 limited to, the following:

- a. Whether the Auto-Gate Systems collect, capture, or otherwise obtain biometric identifiers or biometric information;**
- b. Whether Defendant owns and/or controls the biometric information captured from the Class;**
- c. Whether Defendant obtained informed written consent from the Class before capturing, collecting, or otherwise obtaining their biometric identifiers or biometric information;**

- d. Whether Defendant's conduct violates BIPA;
- e. Whether Defendant's BIPA violations were willful or reckless;
and
- f. Whether Plaintiff and the Class are entitled to damages and injunctive relief.

ANSWER: BNSF denies the allegations in Paragraph 24 and denies that this case can be maintained as a class action.

25. Absent a class action, most members of the Class would find the cost of litigating their claims to be prohibitively expensive and would thus have no effective remedy. The class treatment of common questions of law and fact is superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants and promotes consistency and efficiency of adjudication.

ANSWER: BNSF denies the allegations in Paragraph 25 and denies that this case can be maintained as a class action.

26. Plaintiff will fairly and adequately represent and protect the interests of the other members of the Class he seeks to represent. Plaintiff has retained counsel with substantial experience in prosecuting complex litigation and class actions. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the other members of the Class and have the financial resources to do so. Neither Plaintiff nor his counsel has any interest adverse to those of the other members of the Class.

ANSWER: BNSF denies the allegations in Paragraph 26 and denies that this case can be maintained as a class action.

27. Defendant has acted and failed to act on grounds generally applicable to the Plaintiff and the other members of the Class, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class and making injunctive or corresponding declaratory relief appropriate for the Class as a whole.

ANSWER: BNSF denies the allegations in Paragraph 27 and denies that this case can be maintained as a class action.

COUNT I

**Violations of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, et seq.
(On behalf of Plaintiff and the Class and against Defendant BNSF)**

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

ANSWER: BNSF incorporates the foregoing responses as if fully set forth herein.

29. Defendant is a private entity under BIPA.

ANSWER: BNSF admits that it is a “private entity” as defined by BIPA but denies that it has violated BIPA or is in any way liable to Plaintiff.

30. Defendant collects, captures, receives through trade, or otherwise obtains Plaintiff’s and Class members’ biometric identifiers and/or biometric information through its Illinois Auto-Gate Systems.

ANSWER: BNSF denies the allegations in Paragraph 30 and denies that this case can be maintained as a class action

31. In violation of 740 ILCS 14/15(b)(1), Defendant failed to inform Plaintiff and the Class members that their biometric identifiers or biometric information were being collected or stored prior to such collection or storage.

ANSWER: BNSF denies the allegations in Paragraph 31 and denies that this case can be maintained as a class action.

32. In violation of 740 ILCS 14/15(b)(2), Defendant failed to inform Plaintiff and the Class members of the specific purpose and length of term for which their biometric identifiers or biometric information were being collected, stored and used prior to such collection, storage or use.

ANSWER: BNSF denies the allegations in Paragraph 32 and denies that this case can be maintained as a class action.

33. In violation of 740 ILCS 14/15(b)(3), Defendant failed to obtain informed written consent, and thus failed to receive a written release, from Plaintiff and the Class members prior to collecting, capturing, receiving through trade, or otherwise obtaining their biometric identifiers and/or biometric information.

ANSWER: BNSF denies the allegations in Paragraph 33 and denies that this case can be maintained as a class action.

34. BIPA provides for statutory damages of \$5,000 for each willful and/or reckless violation of BIPA and, alternatively, damages of \$1,000 for each negligent violation of the BIPA.

ANSWER: BNSF admits that Plaintiff summarizes select portions of 740 ILCS 14/20, but denies that, taken alone, these sections accurately reflect the totality of the statute. BNSF denies the remaining allegations in Paragraph 34.

35. Defendant's violations of BIPA, as set forth herein, were knowing and willful, or were at least in reckless disregard of the statutory requirements. Alternatively, Defendant negligently failed to comply with BIPA in the course of its conduct, or omissions, as set forth herein.

ANSWER: BNSF denies the allegations in Paragraph 35.

36. Accordingly, Plaintiff, on behalf of himself and the proposed Class, prays for the relief set forth below.

ANSWER: BNSF denies it has engaged in any wrongdoing, denies that it has violated BIPA, denies that this case is suitable for class treatment, denies that Plaintiff is similarly situated to other unnamed individuals, and denies that Plaintiff is entitled to any relief. BNSF denies any remaining allegations in Paragraph 36.

PRAYER FOR RELIEF

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

- a. Certifying the Class as defined above, appointing Plaintiff as class representative and the undersigned as class counsel;**
- b. Declaring that Defendant's actions, as set forth herein, violate BIPA;**
- c. Awarding injunctive and equitable relief as necessary to protect the interests of Plaintiff and the Class by requiring Defendant to comply with BIPA;**
- d. Awarding statutory damages of \$5,000 for each willful and/or reckless violation of the BIPA, pursuant to 740 ILCS 14/20(1);**
- e. Awarding statutory damages of \$1,000 for each negligent violation of the BIPA, pursuant to 740 ILCS 14/20(3);**

- f. **Awarding reasonable attorneys' fees, costs, and other litigation expenses, pursuant to 740 ILCS 14/20(3);**
- g. **Awarding pre- and post-judgment interest, as allowable by law; and**
- h. **Awarding such further and other relief as the Court deems just and equitable.**

ANSWER: BNSF denies it has engaged in any wrongdoing, denies that it has violated BIPA, denies that this case is suitable for class treatment, denies that Plaintiff is similarly situated to other unnamed individuals, and denies that Plaintiff is entitled to any relief. BNSF denies any remaining allegations in this PRAYER FOR RELIEF.

JURY DEMAND

Plaintiff requests trial by jury of all claims that can be so tried.

ANSWER: BNSF admits that Plaintiff requests a trial by jury of all claims that can so be tried. BNSF denies it has engaged in any wrongdoing, denies that it has violated BIPA, denies that this case is suitable for class treatment, denies that Plaintiff is similarly situated to other unnamed individuals, and denies that Plaintiff is entitled to any relief.

* * *

DEFENDANT BNSF RAILWAY COMPANY'S AFFIRMATIVE DEFENSES

BNSF, without admitting any of the allegations of the Complaint and without admitting or acknowledging that BNSF bears any burden of proof as to any of them, Defendant asserts the following additional defenses. BNSF expressly reserves the right to raise additional defenses, amend its answers and affirmative and other defenses, and assert counterclaims as they may become known through the course of further investigation and discovery:

First Defense (Failure to State a Claim)

The Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

**Second Defense
(Statute of Limitations)**

1. Claims of Plaintiff and the putative class are barred to the extent that they arose outside the applicable statutes of limitations and repose.
2. Plaintiff and the putative class cannot seek recovery for alleged violations that took place prior to the applicable statute of limitations.

**Third Defense
(No Relationship to BNSF)**

The claims of Plaintiff and the putative class are barred to the extent Plaintiff and the putative class were not employed by BNSF and/or have no relationship with BNSF.

**Fourth Defense
(BNSF Not Liable for Acts of Third Parties)**

1. To the extent that Plaintiff and the putative class suffered any damages, such resulted, in whole or in part, from their own conduct and/or the conduct of third parties.
2. BNSF is not jointly and severally liable for the actions of third parties, including Remprex, whether through operation of *respondeat superior*, the law of agency, alter ego, common law joint and several liability, or any other theory of liability.
3. Remprex is not the agent or alter ego of BNSF as Remprex is an independent contractor and an independent business, who provides a number of services at BNSF facilities, including controlling entry to BNSF facilities in Illinois.

4. Any alleged activity related to “processing individuals and truck driver into BNSF facilities” and the alleged use of “fingerprints” would have been provided to and at the request of Remprex.

5. To the extent Plaintiff alleges that BNSF is liable for the acts of Remprex regarding compliance with BIPA, Plaintiff’s claims are barred.

**Fifth Defense
(No Negligent, Intentional, or Reckless Conduct)**

Plaintiff’s claims are barred in whole or in part by BNSF’s good faith, and the absence of negligent, intentional, or reckless conduct. To the extent that BIPA applies to BNSF’s conduct, BNSF is not liable because it relied in good faith upon a reasonable interpretation of BIPA’s statutory language and any alleged violation was not negligent, intentional, or reckless

**Sixth Defense
(No Punitive or Exemplarily Damages)**

BNSF acted at all times in good faith and without malice, willfulness, or reckless indifference, barring any recovery of punitive or exemplary damages by Plaintiff and the putative class.

**Seventh Defense
(Consent)**

To the extent Plaintiff alleges that BNSF is liable because Plaintiff’s and/or putative class members’ biometric information was collected without their consent, such claims are barred because Plaintiff and/or putative class members voluntarily consented (either implicitly or expressly) to the collection of such information.

**Eighth Defense
(No Attorneys' Fees)**

1. Any request by Plaintiff of the putative class for attorneys' fees is contrary to public policy, and Plaintiff and/or the putative class cannot prove they are entitled to attorneys' fees for purported violations of BIPA.

2. Plaintiff and the putative class can recover attorneys' fees under BIPA only if they are the "prevailing party." *See* 740 ILCS 14/20.

3. Because Plaintiff's claims are unfounded, Plaintiff is not the "prevailing party" under BIPA and therefore is not entitled to attorneys' fees.

**Ninth Defense
(No Ratification)**

Plaintiff and the putative class are not entitled to some or all of the relief requested in the Complaint because, even if any unlawful practice(s) occurred, which BNSF denies, such practice(s) was/were prohibited by BNSF's policies and was/were not committed, countenanced, ratified, or approved by BNSF.

**Tenth Defense
(Not Reasonable Estimate of Actual Damages)**

The claims of Plaintiff and the putative class are barred because the recovery requested would not be a reasonable estimate of any actual damages, but instead would amount to a disparate penalty, akin to punitive damages for strict liability, given that Plaintiff and the putative class members have not suffered any injury or incurred any harm to warrant such relief.

**Eleventh Defense
(Failure to Mitigate Damages)**

Plaintiff and the putative class members have failed to mitigate their damages, if any, and any recovery should be reduced or denied accordingly.

**Twelfth Defense
(Substantial Compliance)**

The claims of Plaintiff and the putative class are barred because Defendant substantially complied with BIPA.

**Thirteenth Defense
(Injunctive Relief Not Warranted)**

The claims of Plaintiff and the putative class for injunctive relief are barred as there is no danger of immediate, irreparable harm.

**Fourteenth Defense
(Adequate Remedy at Law)**

To the extent the Complaint seeks equitable relief against BNSF, such claims are barred because Plaintiff has adequate remedies at law. Specifically, the Complaint alleged that Plaintiff and the putative class are entitled to damages for alleged violation of BIPA, which will result in monetary recovery if any such alleged violations are proven.

**Fifteenth Defense
(Unconstitutional)**

Any award of statutory or punitive damages would constitute an unconstitutional penalty under the circumstances of this case, and would violate the due process and equal protection guarantees, and other substantive and procedural safeguards afforded by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and comparable provisions of the Illinois Constitution.

**Sixteenth Defense
(No Extraterritorial BIPA Application)**

The claims of Plaintiff and the putative class are barred, in whole or in part, on the grounds and to the extent they require the extraterritorial application of BIPA and/or violate the Dormant Commerce Clause.

**Seventeenth Defense
(Class Action Jury Trial Unconstitutional)**

As a matter of constitutional right and substantive due process, BNSF would be entitled to contest by jury its liability to any particular individual plaintiff, even if the representative of the purported plaintiff class prevails on her claims. Trying this case as a class action would violate the U.S. Constitution and the Illinois Constitution.

**Eighteenth Defense
(Preempted by the Interstate Commerce Commission Termination Act)**

Plaintiff and putative class members' claims are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101 *et seq.*

**Nineteenth Defense
(Preempted by the Federal Railroad Safety Act)**

Plaintiff and the putative class members' claims are preempted by the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*

**Twentieth Defense
(Preempted by the Federal Aviation Administration Authorization Act)**

Plaintiff and the putative class members' claims are preempted by the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c) *et seq.*

**Twenty-first Defense
(Setoff and Recoupment)**

To the extent that Plaintiff and the putative class suffered any damages, the claims of Plaintiff and the putative class are subject to setoff and recoupment.

**Twenty-second Defense
(Estoppel, Waiver, Laches, Unclean Hands)**

The claims of Plaintiff and the putative class are barred by estoppel, waiver, laches, unclean hands, and/or other equitable defenses because Plaintiff and putative class members voluntarily participated in the conduct alleged in the Complaint and never objected to the conduct alleged in the Complaint before filing this lawsuit.

**Twenty-third Defense
(Barred by Illinois Worker's Compensation Act)**

The claims of Plaintiff and the putative class are barred by the Illinois Worker's Compensation Act.

**Twenty-fourth Defense
(No Biometric Information)**

Any information collected from Plaintiff and the putative class does not constitute "biometric information" or "biometric identifiers" under BIPA.

**Twenty-fifth Defense
(Assumption of the Risk)**

The claims of Plaintiff and the putative class are barred by the doctrine of primary assumption of the risk.

**Twenty-sixth Defense
(Ratification and Acquiescence)**

The claims are barred in whole or in part by the doctrines of ratification and acquiescence. Upon information and belief, Plaintiff and the putative class members approved and, in some cases, participated in the complained-of conduct. Accordingly, they are barred from bringing their claims under the doctrines of ratification and acquiescence.

**Twenty-seventh Defense
(Failure to Join Required Party)**

Plaintiff has failed to join an indispensable party because he has failed to join Rempres.

PRAYER

WHEREFORE, having answered the Complaint, BNSF respectfully requests:

1. That Plaintiff takes nothing for each and every claim for relief averred in the Complaint;
2. That judgment on the Complaint, and each and every claim for relief therein, be entered in favor of BNSF and against Plaintiff; and
3. For such other and further relief as the Court deems just and proper.

Dated: September 24, 2021

Respectfully submitted,

BNSF RAILWAY COMPANY

By: /s/ Elizabeth B. Herrington

By Its Attorneys

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CERTIFICATE OF SERVICE

I, Elizabeth B. Herrington, certify that on September 24, 2021, I caused a copy of the foregoing to be served upon all counsel of record via the Court's CM/ECF system.

/s/ Elizabeth B. Herrington _____

Elizabeth B. Herrington