No. 21-2533

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Ranita Railey, individually
and on behalf of a class of similarly situated individuals,
Plaintiff-Appellee,
v.
Sunset Food Mart, Inc., an Illinois corporation,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Case No. 20 C 06758

The Honorable Harry D. Leinenweber

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT SUNSET FOOD MART, INC.

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ORAL ARGUMENT ORDERED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2533

Short Caption: ***Railey v. Sunset Food Mart, Inc.***

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Sunset Food Mart, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear for the party in this court:

Seyfarth Shaw LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A.

Attorney's Signature: ***s/Thomas E. Ahlering*** Date: **August 31, 2021**

Attorney's Printed Name: **Thomas E. Ahlering**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes.**

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A.

Attorney's Signature: ***s/Noah A. Finkel*** Date: **August 31, 2021**

Attorney's Printed Name: **Noah A. Finkel**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes.**

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N/A.

Attorney's Signature: ***s/Andrew R. Cockroft*** Date: **August 31, 2021**

Attorney's Printed Name: **Andrew R. Cockroft**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes.**

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JURISDICTIONAL STATEMENT

I. District Court Jurisdiction

On November 13, 2020, Defendant-Appellant Sunset Food Mart, Inc. ("Sunset"), timely removed this putative class action brought pursuant to the Illinois Biometric Information Privacy Act (BIPA), 740 Ill. Comp. Stat. 14/ (2019), from the Circuit Court of Cook County, Illinois, Chancery Division, Case No. 2019-CH-02122, to the United States District Court for the Northern District of Illinois ("District Court"), where it was assigned Case No. 20-06758. (R. 1).[1] On January 15, 2021, Sunset filed a Supplemental Notice of Removal stating additional grounds for removal. (R. 15). The District Court had federal subject matter jurisdiction under 28 U.S.C. §§ 1331, 1332, 1441, 1446, and 1453 because Plaintiff's claims were completely preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 *et seq*. and removable under the Class Action Fairness Act of 2005 ("CAFA"), 8 U.S.C. § 1332(d).

A. Complete Preemption By The LMRA

Sunset removed this action on the grounds of complete preemption under the LMRA. Between January 2016 and January 2018, Plaintiff was represented for the purposes of collective bargaining with Sunset by the Independent Food Clerks Union ("IFCU"). (S.A. 22-23; R. 1 ¶ 5; R. 14-1 ¶ 6.) Sunset and the IFCU were parties to a collective bargaining agreement ("CBA"), which governed Plaintiff's terms and conditions of employment. (*See* R. 14-1 ¶ 6 & Ex. 1.)

[1] References to "S.A." are to the required Short Appendix and Supplemental Appendix attached to Defendant-Appellant's Brief. References to "R." are to the ECF docket of the original District Court record.

The CBA contains a multi-step grievance procedure for the resolution of disputes arising under the CBA. (*See id.* at Article 11.) The grievance procedure states that "[t]he properly accredited officers or representatives of both parties to this Agreement shall be authorized to settle any dispute arising out of the terms, application or interpretation of this Agreement." (*See id.* at Article 11 § 11.1.) The CBA also contains a broad Management Rights provision that states as follows: "[i]t is understood and agreed that all functions of management of the Company's stores which are not specifically limited by the express language of this Agreement are retained by the Company." (*See id.* at Article 4 § 4.4.)

Such language renders Plaintiff's claims preempted under the LMRA. *See Miller v. Sw. Airlines Co.*, 926 F.3d 898, 903 (7th Cir. 2019) ("Whether Southwest's or United's unions did consent to the collection and use of biometric data, or perhaps grant authority through a management-rights clause, is a question for an adjustment board."); *see also Fox v. Dakkota Integrated Sys.*, LLC, 980 F.3d 1146, 1156 (7th Cir. 2020) (stating that "the answer" as to whether a BIPA claim was preempted by the LMRA "appears to flow directly from *Miller*"). In fact, the management rights clause here is almost identical to clause discussed in *Miller*. *Compare Miller*, Case No. 18-3476 (7th Circuit), ECF No. 20 at Appendix 29 ("The right to manage and direct the work force, subject to the provisions of this Agreement, is vested in and retained by the Company."), *with* R. 14-1 ¶ 6 & Ex. 1 at Article 4 § 4.4 ("It is understood and agreed that all functions of management of the Company's stores which are not specifically limited by the express language of this Agreement are retained by the Company.")

B. CAFA Jurisdiction

Sunset also invoked CAFA jurisdiction in their removal papers. (R. 1 ¶¶ 13-16) (citing 28 U.S.C. § 1332(d)(2)(A), (d)(5)(B))). In support of its removal under CAFA, Sunset stated:

Sunset is incorporated and headquartered in the State of Illinois. (R. 15 ¶ 6.) Sunset is therefore a citizen of Illinois. (*Id.*). Plaintiff is a citizen of the State of Georgia. (*See id.*) Under CAFA's minimal diversity requirement, only one member of the proposed class of plaintiffs need be a citizen of a different state from any defendant. 28 U.S.C. § 1332(d)(2)(A), (d)(5)(B); *see In re Safeco Ins. Co. of Am.*, 585 F.3d 326, 330 (7th Cir. 2009).

In the Complaint, Plaintiff alleged that she was a "resident" of the State of Illinois. (R. 3 ¶ 14). Plaintiff seeks to bring this action on behalf of a class defined as: "All citizens of Illinois who had their fingerprints and/or handprints and/or other biometric information collected, captured, received, otherwise obtained, used, distributed, or stored by Sunset Food Mart, Inc. in the State of Illinois." (*See id.* ¶ 20.)

Plaintiff never informed Sunset of her domicile. In January 2021, Sunset discovered through Plaintiff's social media posts that she was domiciled in the State of Georgia since at least February 8, 2020. (*See* R. 27, 27-1 ¶¶ 3-8 and Exs. 1-4.) Minimal diversity therefore exists under 28 U.S.C. § 1332(d)(2)(A) because Plaintiff's class includes a member who is a citizen of a State different from Sunset, namely herself. *See Dancel v. Groupon, Inc.*, 940 F.3d 381, 385 (7th Cir. 2019).

Moreover, Plaintiff claims that she and the putative class seek to recover damages for "each" alleged violation of the BIPA. (R. 3 ¶ 41.) From January 2016, until the date of removal, approximately 2,000 persons have used a timekeeping device in association

with work for Sunset. (R. 15 ¶ 13). Thus, the purported class's potential recovery for statutory damages for willful violations on the assumption that each class member could recover $5,000 in his or her own right would be approximately $10,000,000. Sunset denies that Plaintiff and the purported class could recover any damages, much less any damages for "willful" violations of BIPA, but for purposes of determining whether subject matter jurisdiction exists under CAFA, the amount-in-controversy is satisfied.

II. Appellate Jurisdiction

On July 15, 2021, the District Court remanded the case to the Circuit Court of Cook County, Illinois. (S.A. 11). On July 26, 2021, Defendant timely submitted their Petition For Permission To Appeal Pursuant To 28 U.S.C. § 1453(c)(1), petitioning this Court for permission to appeal the District Court's order remanding the case. On August 17, 2021, the case was docketed on this Court's Miscellaneous Docket as Case No. 21-8023, and the Petition entered at ECF No. 1. Plaintiff filed her Answer to the Petition on August 10, 2021. (No. 21-8023, ECF No. 4). On August 17, 2021, this Court granted Defendant's Petition. (No. 21-8023, ECF No. 5).[2] The appeal was docketed as Case No. 21-2533. Accordingly, jurisdiction in this Court is conferred under 28 U.S.C. § 1453(c)(1).

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in concluding that the 30-day clock for removal begins to run based only on statements made by Sunset in pleadings, filings, and other papers, as opposed to statements in pleadings, filings, and other papers *received* by Sunset.

[2] On April 20, 2021, the Seventh Circuit transferred the case from the Miscellaneous Docket to the General Docket as Case No. 21-2533.

2. Whether the District Court erred in concluding that the case was affirmatively and unambiguously removable under the LMRA based on Sunset's January 22, 2020 discovery response.

3. Whether the District Court erred in holding that removal under CAFA was untimely because Sunset did not remove under CAFA within 30 days after federal jurisdiction under the LMRA could be ascertained.

4. Whether the District Court erred in holding that Sunset's January 22, 2020 discovery response was a "paper" that was "serv[ed] by plaintiffs" within the meaning of CAFA, specifically, 28 U.S.C. § 1332(d)(7).

STATEMENT OF THE CASE

I. The Illinois Biometric Information Privacy Act

BIPA regulates the "collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g) (West 2008). BIPA defines a "biometric identifier" to include "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id.* at 14/10. "Biometric information," in turn, includes "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual," but excludes "information derived from items or procedures excluded under the definition of biometric identifiers." *Id.*

BIPA contains a number of requirements regarding the "[r]etention; collection; disclosure; destruction" of biometric identifiers and biometric information. 740 ILCS 14/15. First, the collecting entity in possession of biometric information must develop a written policy regarding the retention and destruction of biometric information. *Id.* at 14/15(a). Second, no entity may collect biometric identifiers or biometric information

unless it first satisfies three requirements: It must (1) inform the individual that his or her biometric identifier or biometric information is being collected, (2) inform the individual the purpose for which it is being collected, and the length of time that it will be collected, stored and used and (3) "receive[] a written release executed by the subject of the biometric identifier or biometric information of the subject's legally authorized representation." *Id.* at 14/15(b). "'Written release' means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment." *Id.* at 14/10.

BIPA further provides that "[n]o private entity . . . may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless: (1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure." *Id.* at 14/15(d)(1).

A person "aggrieved by a violation of this Act" has a private right of action under state law and a prevailing party may recover "liquidated damages of $1,000 or actual damages, whichever is greater" for negligent violations, and "liquidated damages of $5,000 or actual damages, whichever is greater" for intentional or reckless violations, as well as fees, costs and other relief a court may find appropriate. *Id.* at 14/20.

II. Plaintiff's Complaint Allegations

Plaintiff worked for Sunset as a General Clerk at its Lake Forest, Illinois location from January 2016 through January 2018. (R. 3 ¶ 2.) Plaintiff alleged that she was a "resident" of the State of Illinois. (*Id.* ¶¶ 2, 5.) Plaintiff seeks to bring this action on behalf of a class defined as: "All citizens of Illinois who had their fingerprints and/or handprints and/or other biometric information collected, captured, received, otherwise

obtained, used, distributed, or stored by Sunset Food Mart, Inc. in the State of Illinois." (*Id.* ¶ 20.)

Plaintiff's Complaint alleges that Sunset violated BIPA by implementing a timekeeping system that relied on the collection, storage, and usage of employees' hand or fingerprints without obtaining a written release. (*Id.* ¶¶ 2, 8, 10-15, 26-42.)

III. The Collective Bargaining Agreement Between Sunset and the IFCU

Between January 2016 and January 2018, Plaintiff was represented for the purposes of collective bargaining with Sunset by the IFCU. (S.A. 22-23; R. 1 ¶ 5; R. 14-1 ¶ 6.) Sunset and the IFCU were parties to a CBA, which governed Plaintiff's terms and conditions of employment. (R. 14-1 ¶ 6 & Ex. 1.)

The CBA contains a multi-step grievance procedure for the resolution of disputes arising under the CBA. (*See id.* ¶ 6 and Ex. 1 at Article 11.) The grievance procedure states that "[t]he properly accredited officers or representatives of both parties to this Agreement shall be authorized to settle any dispute arising out of the terms, application or interpretation of this Agreement." (*See id.* at Article 11 § 11.1.) The CBA also contains a broad Management Rights provision that states as follows: "[i]t is understood and agreed that all functions of management of the Company's stores which are not specifically limited by the express language of this Agreement are retained by the Company." (*See id.* at Article 4 § 4.4.)

IV. Sunset's Removal

On November 13, 2020, Sunset timely removed the action because Plaintiff's claims were preempted completely by the LMRA, 29 U.S.C. § 185 *et seq.* (R. 1.) On January 15, 2021, Sunset supplemented its notice of removal stating that the action was subject to the District Court's original jurisdiction under CAFA. (R. 15.)

A. Removal Under The LMRA

On November 14, 2019, Sunset filed its Answer and Affirmative Defenses to Plaintiff's Complaint and in it Sunset asserted a defense of complete preemption under the LMRA as Affirmative Defense No. 13: "Plaintiff's claims and the claims of putative class members are barred and preempted by the Labor Management Relations Act, and comparable statutes, as they are subject to a collective bargaining agreement." (R. 5 at PageID #159.) On December 4, 2019, Plaintiff filed a Reply in response to Sunset's Affirmative Defenses wherein Plaintiff, without reservation, stated, "Plaintiff denies the allegations contained in Defendant's Affirmative Defense No. 13." (*See* R. 5 at PageID #163-164.)

On January 22, 2020, Sunset responded to Plaintiff's First Set of Requests for Production of Documents. In Request Seven, Plaintiff sought "[a]ny contract and/or agreement between the Defendant or any third-party entity that assigned Railey to work at Defendant, as well as any correspondence related to such contract or agreement." (S.A. 33) Sunset's response stated, in part:

> [Sunset] will produce the agreements between Defendant and the Independent Food Clerks Union, of which Plaintiff was affiliated prior to her January 1, 2018 promotion to Assistant Deli Manager[.]

(*Id.*)

On September 10, 2020, Sunset served on Plaintiff its First Set of Discovery Requests. On October 15, 2020, in response to Sunset's First Set of Discovery Requests, Plaintiff, for the first time in this litigation, admitted that she was represented by a collective bargaining representative during the time entire time she alleges Defendant collected her biometric information. Specifically, Plaintiff responded to Sunset's Interrogatory Nos. 9 and 11 as follows:

> Plaintiff recalls only that she was a union member from January 2016 until she was promoted to Assistant Deli Manager in January 2018.
>
> . . .
>
> Plaintiff first used the biometric time clock on Defendant's premises at or around the time her employment began, in January 2016.

(S.A. 22-23.)

On November 13, 2020, Sunset filed its Notice of Removal asserting complete preemption under the LMRA. (R. 1.) The Notice stated that Plaintiff's claims require an interpretation of the a CBA and were, therefore, completely preempted by the LMRA. (*See id.* ¶ 6 (citing *Miller v. Sw. Airlines Co.*, 926 F.3d 898, 903 (7th Cir. 2019); 29 U.S.C. § 185(a).) The Notice further stated that Plaintiff worked for Sunset as a General Clerk at its Lake Forest, Illinois location from January 2016 through January 2018 and that Plaintiff was represented by a collective bargaining representative during the entire time she alleges Sunset collected her biometric information. (*See id.* ¶¶ 2, 5.)

On December 14, 2020, Plaintiff filed a Motion for Remand arguing, in part, that Sunset failed to establish that a "CBA even existed during the relevant time frame[.]" (R. 12 at 9.) In response to Plaintiff's Motion for Remand, Sunset attached a copy of the CBA applicable to Plaintiff during the entire time period Plaintiff alleges Sunset violated BIPA. (R. 14-1, 14-2.) The CBA contains a three-step grievance and arbitration procedure for the resolution of disputes arising under the CBA. (R. 14 at 11, *id.* at 14-1 Ex. 1 at Article 11.) The CBA also provides that, "[i]t is understood and agreed that all functions of management of the Company's stores which are not specifically limited by the express language of this Agreement are retained by the Company." (R. 14-1 and Ex. 1 at Article 4 § 4.4.)

B. Removal Based on CAFA Jurisdiction

Sunset invoked CAFA jurisdiction because minimal diversity exists and the amount in controversy exceeds $5,000,000. Under CAFA's minimal diversity requirement, only one member of the proposed class of plaintiffs need be a citizen of a different state from any defendant. 28 U.S.C. § 1332(d)(2)(A), (d)(5)(B); *see In re Safeco Ins. Co. of Am.*, 585 F.3d 326, 330 (7th Cir. 2009). Sunset is incorporated and headquartered in the State of Illinois. (R. 15 ¶ 6.) Sunset is therefore a citizen of Illinois. (*Id.*). Plaintiff is a citizen of the State of Georgia. (*See id.*)

In the Complaint, Plaintiff alleged that she was a "resident" of the State of Illinois. (R. 3 ¶¶ 2, 5.) Plaintiff seeks to bring this action on behalf of a class defined as: "All citizens of Illinois who had their fingerprints and/or handprints and/or other biometric information collected, captured, received, otherwise obtained, used, distributed, or stored by Sunset Food Mart, Inc. in the State of Illinois." (*Id.* ¶ 20.)

Plaintiff never informed Sunset of her domicile. In January 2021, Sunset discovered through Plaintiff's social media posts that she was domiciled in the State of Georgia since at least February 8, 2020. (*See* R. 27, 27-1 ¶¶ 3-8 and Exs. 1-4.) Minimal diversity therefore exists under 28 U.S.C. § 1332(d)(2)(A) because Plaintiff's class includes a member who is a citizen of a State different from Sunset, namely herself. *See Dancel v. Groupon, Inc.*, 940 F.3d 381, 385 (7th Cir. 2019).

Moreover, based on Plaintiff's claim that she and the putative class seek to recover damages for "each" alleged violation of the BIPA, (R. 3 ¶ 41), Sunset's Supplemental Notice indicated that the amount in controversy according to Plaintiff's theory of the case—which Sunset disputes—would exceed the required threshold of $5,000,000. (R. 15 ¶ 13).

V. Procedural History After Removal

On December 14, 2020, Plaintiff filed a Motion to Remand. (R. 12). On January 15, 2021, Sunset filed its Opposition to Plaintiff's Motion to Remand. (R. 14.) On January 15, 2021, Sunset filed a Supplemental Notice of Removal and a Motion to Dismiss for Complete Preemption Under the LMRA. (R. 15-17.) On February 5, 2021, Plaintiff filed a Reply in Support of the Motion to Remand and a Response to Sunset's Supplemental Notice of Removal. (R. 24-25.) On February 26, 2021, Sunset filed a Reply in support of its Supplemental Notice of Removal. (R. 27.)

On July 15, 2021, the District Court entered an Order granting Plaintiff's Motion to Remand. (S.A. 11.) The District Court held that under *Walker v. Trailer Transit, Inc.,* 727 F.3d 819 (7th Cir. 2013), Sunset's January 22, 2020 "Response to Plaintiff's First Requests for Production of Documents . . . provide[d] notice to Sunset [that the case was removable]." (S.A. 8) The District Court concluded that Sunset's statement that it agreed to produce "the agreements between Defendant and Independent Clerks Union, of which Plaintiff was affiliated prior to her January 1, 2018 promotion to Assistant Deli Manager" constituted a "'paper' that provides unambiguous notice that the case is removable." (S.A. 8-9.)

Next, the District Court concluded that because federal jurisdiction was "first indicated on January 22, 2020," removal under CAFA had to be filed within 30 days of that date, but that it was not asserted until January 15, 2021. (S.A. 10 (citing 28 U.S.C. § 1332(d)(7).) The District Court remanded the case to the Circuit Court of Cook County, Illinois. (S.A. 10)

SUMMARY OF THE ARGUMENT

On February 19, 2019, Plaintiff, a Sunset employee and former member of the IFCU, filed a lawsuit in Cook County Circuit Court against Sunset alleging that it violated BIPA by implementing a timekeeping system that relied on the collection, storage, and usage of employees' fingerprints and biometric information without obtaining their informed consent. (*See* R. 3 ¶¶ 2, 8-15, 26-42.)

On October 15, 2020, in response to Sunset's First Set of Discovery Requests, Plaintiff, for the first time in the litigation, stated that she was represented by a collective bargaining representative during the entire time she alleges Sunset collected her biometric information through a time-keeping device. (S.A. 22-23; R. 1.) On November 13, 2020, Sunset timely removed the case to the U.S. District Court for the Northern District of Illinois pursuant to complete preemption by the LMRA. (*See* R. 1.) Additionally, on January 15, 2021, Sunset filed a Supplemental Notice of Removal pursuant to CAFA. (*See* R. 15.) The Supplemental Notice stated that while Plaintiff alleged that she was a "resident" of Illinois at the time the Complaint was filed in February 2019, she was now domiciled in the State of Georgia. (*See id.* ¶ 9.) Plaintiff never provided Sunset any information regarding Plaintiff's domicile. Instead, in January 2021, Sunset discovered Plaintiff's domicile by investigating her social media posts in which she indicated that she was domiciled in Georgia since at least February 8, 2020. (*See* R. 27, 27-1 ¶¶ 3-8 and Exs. 1-4.)

On December 14, 2020, Plaintiff filed a Motion for Remand arguing that Sunset knew that the case was removable under the LMRA from the moment the Complaint was filed and that the Notice was insufficient to demonstrate removal under the LMRA. (R. 12.) In response to Sunset's supplemental notice of removal under CAFA, Plaintiff

argued that the supplemental notice was untimely and that Plaintiff's domicile in Georgia was irrelevant for minimal diversity under CAFA because the parties were not diverse at the time the Complaint was filed. (R. 25.)

On July 15, 2021, the District Court issued its Order granting Plaintiff's motion to remand and remanded the putative class action to state court. (S.A. 11.) With respect to removal under the LMRA, the District Court's Order held that Sunset should have removed within 30 days of issuing a discovery response to Plaintiff on January 22, 2020, in which Sunset stated:

> [Sunset] will produce the agreements between Defendant and the Independent Food Clerks Union, of which Plaintiff was affiliated prior to her January 1, 2018 promotion to Assistant Deli Manager[.]

(S.A. 8-9.) Thus, the District Court held that removal under the LMRA was untimely. (S.A. 9.)

The District Court then held that Sunset was required to remove under CAFA within that same 30 day window because "[t]he existence of Federal jurisdiction in this case was first indicated on January 22, 2020." (S.A. 10.) Because Sunset did not assert CAFA jurisdiction within 30-days of January 22, 2020, the District Court held that removal under CAFA was untimely. (*Id.*)

The District Court erred. First, removal under the LMRA was timely. In *Walker v. Trailer Transit, Inc.*, 727 F.3d 819 (7th Cir. 2013), this Court held that the 30-day clock for removal only starts once the defendant (1) receives, (2) a pleading, filing, or other paper, (3) that affirmatively and (4) unambiguously shows the conditions for removal are present. *See id.* at 821. Under this rule:

> the timeliness inquiry is limited to the examining contents of the clock-triggering pleading or other litigation paper; the question is whether *that document*, on its face or in combination with earlier-filed pleadings, provides specific and

> unambiguous notice that the case satisfies federal jurisdictional requirements and therefore is removable. Assessing the timeliness of removal should not involve a fact-intensive inquiry about what the defendant subjectively knew or should have discovered through independent investigation.

Id. at 825 (emphasis in original).

Here, the District Court impermissibly conflated the rule in *Walker* with the rule *Walker* explicitly rejected, namely that the defendant's actual or constructive knowledge triggers the 30-day clock for removal. *See id*. The District Court held that Sunset's discovery response confirmed that it knew that the case was removable. (S.A. 7-8 (rejecting other bases that did "not necessarily provide the defendant with notice or other factual basis for knowing the case is removable.") But that is not the test.

Sunset's January 22, 2020 discovery response fails *Walker*'s test in almost every respect. As an initial matter, Sunset did not "receive" its own discovery response. Likewise, the discovery response neither "affirmatively" nor "unambiguously" shows that conditions for removal under the LMRA were present. At most, the discovery response established Sunset had collective bargaining agreements with the IFCU and Sunset believed Plaintiff was affiliated with the IFCU sometime before January 1, 2018. The response does not state (1) the period plaintiff claims her biometric information was collected; (2) whether CBAs existed during that same period of time; or (3) whether the Plaintiff was actually represented by the IFCU during this same period of time. Likewise, the response does not affirmatively state anything about the interaction in time or substance between any CBA and Plaintiff's claims.

It was not until October 15, 2020, when Sunset received Plaintiff's response to Sunset's First Set of Discovery Request that Plaintiff confirmed, affirmatively and unambiguously, that she was represented by a union from the moment she was hired at

Sunset in January 2016 until January 2018, and that she was alleging that her biometric information was collected beginning January 2016. (S.A. 22-23.) Importantly, Plaintiff still has not stated when Sunset ceased allegedly collecting her biometric information.

Accordingly, the 30-day removal clock never began to run on LMRA removal. Regardless, Sunset's removal under the LMRA was timely because its January 22, 2020 discovery response fails the test outlined in *Walker*.

As to CAFA jurisdiction, the District Court erred by conditioning the timeliness of removal under CAFA on when Sunset should have removed under the LMRA. Because CAFA has "no antiremoval presumption" and was enacted to "facilitate adjudication of certain class actions in federal court," *Dart Cherokee Basin Operating Co., LLC v. Owens,* 574 U.S. 81, 89 (2014), the District Court should have decided remand based on the plain language of CAFA and read CAFA in its own context. Removal under CAFA is timely if filed within 30 days of a plaintiff's service on a defendant of a paper that affirmatively and unambiguously demonstrates the case is removable under CAFA. *See* 28 U.S.C. § 1332(d)(7). No such paper was ever served on Sunset. Thus, removal under CAFA was timely.

In sum, the Court should reverse the District Court's remand order, hold that removal was timely as to both the LMRA and CAFA, and return the case to the District Court for further proceedings.

STANDARD OF REVIEW

Section 1453(c)(1) of CAFA permits an independent right to appeal from orders remanding cases to state court that were removed pursuant to CAFA. 28 U.S.C. § 1453(c)(1) ("notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action

to the State Court from which it was removed . . . "). The District Court's July 15, 2021 order remanded this class action to state court and it is appealable pursuant to Section 1453(c)(1).

On review under CAFA, the Court is "free to consider any potential error in the district court's decision, not just a mistake in application of the Class Action Fairness Act," and "the district court's entire decision [] comes before the court for review." *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005) (citing *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996)); *see also Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 823 (7th Cir. 2013). This Court has made clear that because CAFA "makes appellate authority turn on removal under the Class Action Fairness Act, not on whether the appeal presents an issue about the interpretation of that statute," an appeal could focus on issues entirely separate from CAFA so long as CAFA was at issue in the removal. *See Miller v. Sw. Airlines Co.*, 926 F.3d 898, 902 (7th Cir. 2019) (holding that even though CAFA allowed the Court to review a lower court's decision, the Court "accept[ed] the appeal even on the assumption that the only issues concern the interaction between Illinois law and the Railway Labor Act.") Accordingly, this Court can and should review whether removal was timely under the LMRA in addition to timeliness under CAFA.

The District Court's Order was a remand order based on a jurisdictional defect. This Court reviews remands based on jurisdictional defects *de novo*. *In re Safeco Ins. Co. of America*, 585 F.3d at 329.

ARGUMENT

I. The District Court Erred In Holding That Sunset's Removal Under the LMRA Was Untimely.

A. This Court's Holding in *Walker v. Trailer Transit, Inc.*.

The timeliness of removal is governed by 28 U.S.C. § 1446. *Walker* "clarif[ied]" that § 1446 "includes two different 30–day time limits for removal." *Walker*, 727 F.3d at 823. "The first applies to cases that are removable based on the initial pleading." *Id.* (citing 28 U.S.C. § 1446(b)(1).)

> However, "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 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."

Id. (quoting 28 U.S.C. § 1446(b)(3).) Under the plain reading of § 1446, this Court explained, "[i]t'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." *Id.* at 823-24 (emphasis in original) (collecting cases.)

Based on this reading, this Court announced the following "bright-line rule": "[t]he 30–day removal clock does not begin to run until the defendant receives a pleading or other paper that affirmatively and unambiguously reveals that the predicates for removal are present." *See id.* at 824. What this means in practice is that a case may be removable even though the "removal clock never started to run." *Id.*

This Court noted several implications of this "bright-line rule." *Id.* First, this Court explained that the defendant must receive the clock-triggering paper from another party, in most cases, the plaintiff. *Id.* at 825 ("Again, as the text of the rule itself makes clear, the 30–day clock is triggered by pleadings, papers, and other litigation materials *actually received by the defendant* or filed with the state court during the

course of litigation.") (emphasis added). This element is essential to the efficiencies promoted by the "bright-line rule," in that it "discourages evasive or ambiguous statements by plaintiffs in their pleadings and other litigation papers, and reduces guesswork and wasteful protective removals by defendants." *Id.* at 824.

To this end, the "bright-line rule" acknowledges that the onus is on a party other than the defendant to serve the clock-triggering paper. Indeed, in announcing this rule's application to the amount-in-controversy, this Court acknowledged that every state in the Seventh Circuit restricts plaintiffs from explicitly stating the amount-in-controversy in the complaint. *See id.* at 824 n.4. This Court, nonetheless, acknowledged that other mechanisms exist for the amount-in-controversy to be stated unambiguously and affirmatively by the plaintiff, i.e., "[j]urisdictional requests for admission[s]" served by the defendant. *Id.* Other Courts of Appeals, utilizing this same bright-line rule, have also noted that the plaintiff may simply serve a document stating affirmatively and unambiguously that the conditions for removal are met. *See, e.g.*, *Roth v. CHA Hollywood Med. Ctr., L.P.*, 720 F.3d 1121, 1126 (9th Cir. 2013) ("[P]laintiffs are in a position to protect themselves. If plaintiffs think . . . the defendant might delay filing a notice of removal until a strategically advantageous moment, they need only provide to the defendant a document from which removability may be ascertained.")

Second, the timeliness of removal is dictated by what is contained in the four corners of the "clock-triggering pleading or other litigation paper[.]" *Walker*, 727 F.3d at 825; *see also id.* at 824 (quoting *Lovern v. Gen. Motors Corp.*, 121 F.3d 160, 162–63 (4th Cir. 1997) (grounds for removal must be "apparent within the four corners of the initial pleading or subsequent paper"). What a defendant knows or should have known is irrelevant to whether removal is timely; the timeliness of removal should not be a

"fact-intensive inquiry." *Id.* ("Assessing the timeliness of removal should not involve a fact-intensive inquiry about what the defendant subjectively knew or should have discovered through independent investigation.") (citations omitted.) Instead, "the question is whether *that document*, on its face or in combination with earlier-filed pleadings, provides specific and unambiguous notice that the case satisfies federal jurisdictional requirements and therefore is removable." *Id.* (emphasis added).

Third, this Court, along with every other Court of Appeals, has rejected the notion that a defendant must remove once it is *possible* for the defendant to remove:

> Walker insists that the 30–day removal clock should begin to run the first moment it becomes possible for the defendant to remove the case. No court of appeals has adopted this rule, and for good reason. The moment a case becomes removable and the moment the 30–day removal clock begins to run "are not two sides of the same coin."

Id. at 824-825 (emphasis added) (quoting *Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1141 n.3 (9th Cir. 2013)) (citing *Mumfrey v. CVS Pharmacy, Inc.*, 719 F.3d 392, 400 n.13 (5th Cir. 2013).) As such the "bright-line rule" adopted by this Court acknowledges that a defendant could remove at any time, but the question of timeliness is simply when they are required to remove. *See Mumfrey*, 719 F.3d at 400 n.13 ("We note that CVS likely could have removed immediately after Mumfrey filed his Original Petition, giving rise to an amount dispute case if Mumfrey had sought to remand by arguing that the amount-in-controversy was not satisfied. But even if CVS could have removed immediately, Mumfrey's Original Petition did not start the clock such that CVS was required to remove if it wanted to.")

A corollary to this implication is that § 1446(b) permits strategic removals even after significant discovery and the filing of dispositive motions so long as the removal is not untimely under the bright-line rule. *See, e.g.*, *Roth*, 720 F.3d at 1126. Even in

Walker, the defendant did not remove until after the plaintiff had responded to the defendant's motion for summary judgment. *See Walker*, 727 F.3d at 821-822 (noting that, prior to removal, the state court had already certified a class action and the plaintiff had already filed a response to the defendant's motion for summary judgment.) The stage of the litigation did not implicate the timeliness of removal whatsoever; it was simply a matter of identifying the clock-triggering paper which had yet to be served. *See id.* at 825 ("Neither Walker's summary-judgment response nor the follow-up e-mail was sufficient to start the removal clock.")

Fourth, "affirmative and unambiguous" means "affirmative and unambiguous." As explained by the Honorable Judge Gary Feinerman in *Curry v. Boeing Co.*, if the pleading or litigation paper "leaves *any* work" for the defendant, "the removal clock does not start to run." *Curry v. Boeing Co.*, No. 20 C 3088, 2021 WL 1088325, at *10 (N.D. Ill. Mar. 22, 2021) (emphasis in original). Even the receipt of an admission from a plaintiff from which it could reasonably follow that the jurisdictional prerequisites are met is not enough to trigger the 30-day window for removal. *See Walker*, 727 F.3d at 825-826. Likewise, evidence that the defendant has used information provided by the plaintiff to reach a conclusion that the case is removable does not trigger the clock. *See id.* Rather, the 30-day period begins to run *only* when all the jurisdictional prerequisites have been affirmatively and unambiguously revealed to the defendant. *See id.* Thus, in some cases, the 30-day clock will never begin to run, as demonstrated by this Court's application of this bright-line rule to the facts in *Walker*:

> The earliest possible trigger for the removal clock was Walker's response to Trailer Transit's requests for admission seeking formal clarification of the theory of damages. . . . Even that document, however, did not affirmatively specify a damages figure under the class's new theory. So the removal clock never actually started to run. Although Trailer Transit filed

> its notice of removal within 30 days of receiving that response, the removal was not based on Walker's response to the requests for admission alone; it took Walker's admission and an estimate from a Trailer Transit executive to show that the jurisdictional limits were met. Removal was not untimely, and the district court properly denied the motion to remand.

Walker, 727 F.3d at 825-826.

B. *Walker*'s Bright-Line Rule Applies With Equal Force To Removal Based on Complete Preemption.

The timeliness of removal based on complete preemption under the LMRA is governed by 28 U.S.C. § 1446. *See, e.g.*, *Tifft v. Commonwealth Edison Co.*, 366 F.3d 513, 516 (7th Cir. 2004). Accordingly, the "bright-line rule" from *Walker* also governs whether removal is timely with respect to complete preemption under the LMRA.

Consistent with *Walker*, this Court's jurisprudence with respect to removal based on complete preemption exists to account for a plaintiff's choice to artfully plead in avoidance of federal jurisdiction. *Cf. Walker*, 727 F.3d at 824 (explaining that § 1446's "bright-line rule . . . discourages evasive or ambiguous statements by plaintiffs in their pleadings and other litigation papers, and reduces guesswork and wasteful protective removals by defendants.") Removal based on complete preemption is a recognized exception to the "well-pleaded complaint" rule precisely because "a plaintiff cannot avoid a federal forum by 'artfully pleading' what is, in essence, a federal claim solely in terms of state law." *Tifft*, 366 F.3d at 516; *see also Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 707 F.3d 883, 890 (7th Cir. 2013), *as amended* (Apr. 29, 2013) ("[A] 'plaintiff cannot frustrate a defendant's right to remove by pleading a case without reference to any federal law when the plaintiff's claim is necessarily federal.'") (quoting 14B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3722 (4th ed.).) A case that could be removed based on complete

preemption is simply a case in which the plaintiff has yet to articulate the controlling federal claim. *See id.*

It is of no moment that *Walker* concerned the timeliness of removal with respect to the amount-in-controversy under the Class Action Fairness Act ("CAFA"). *See Walker*, 727 F.3d at 820 ("Trailer Transit removed the suit to federal court under the Class Action Fairness Act ('CAFA'), id. § 1332(d)(2). Walker moved to remand, contending that the removal was untimely.") In reaching the "bright-line rule" described in *Walker*, this Court did not rely on the text of the CAFA; instead, this Court interpreted the text of the general removal statute, specifically 28 U.S.C. § 1446(b)(3), and applied the "bright-line rule" from the statute to the amount-in-controversy requirement under CAFA. *See Walker,* 727 F.3d at 824 ("The 30–day removal clock does not begin to run until the defendant receives a pleading or other paper that affirmatively and unambiguously reveals that the predicates for removal are present. With respect to the amount in controversy in particular, the pleading or other paper must specifically disclose the amount of monetary damages sought."); *see id.* at 825 ("As applied to the amount-in-controversy requirement, the clock commences only when the defendant receives a post-complaint pleading or other paper that affirmatively and unambiguously specifies a damages amount sufficient to satisfy the federal jurisdictional minimums.") This Court did not state in *Walker* that some special feature of a plaintiff's damages calculation necessitated the "bright-line rule" repeatedly referenced throughout the Opinion. Rather, the "bright-line rule" is a restatement of when the removal clock starts based on the text of 28 U.S.C. §§ 1446(b)(1) and 1446(b)(3).

C. Sunset's January 22, 2020 Discovery Response Did Not Initiate The 30-Day Clock For Removal.

Sunset's January 22, 2020 discovery response fails *Walker*'s "bright-line rule" in almost every respect. In contravention of *Walker*, the District Court held that Sunset's own discovery response, served only on Plaintiff, was sufficient to trigger the 30-day clock for removal when the response merely stated:

> [Sunset] will produce the agreements between Defendant and the Independent Food Clerks Union, of which Plaintiff was affiliated prior to her January 1, 2018 promotion to Assistant Deli Manager[.]

(S.A. 8-9.) The District Court concluded that because Sunset possessed collective bargaining agreements, it followed that Sunset knew when and how the collective bargaining agreements applied and how those facts matched Plaintiff's allegations:

> Sunset admits that it did have possession of the documents and did eventually provide them to Railey. The Court will not credit the time period between which a defendant agrees to produce a document and the actual production of the document, as this time period is entirely within the control of the defendant. . . . In summary, Sunset sent a certified response [citation] to Plaintiff claiming that there was a collective bargaining agreement during the relevant time period, and, from that point onwards, the parties had notice that the Labor Management Relations Act applied.

(S.A. 8-9.)[3]

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[3] For the purposes of a complete record, Sunset seeks to clarify a related issue raised in Plaintiff's Response In Opposition To Sunset's Petition For Permission to Appeal. There, Plaintiff claims that Sunset never produced any collective bargaining agreements to Plaintiff: "[i]n violation of the discovery rules, Defendant did not produce the responsive documents in the state court litigation." (*See* 21-8023, ECF No. 4 at 2.) This is misleading in two respects. First, Plaintiff acknowledged in her own Motion for Remand that Sunset produced the current (as of that date) collective bargaining agreement between Sunset and the IFCU and the current (as of that date) collective bargaining agreement between Sunset and the Commercial Workers International Union. (*See* R 12, Plaintiff's Motion for Remand at 3 ("January 23, 2020: Defendant produced two CBAs to Plaintiff via email.").) Second, Plaintiff never requested any additional collective bargaining agreements following the production of the two collective bargaining agreements Sunset produced on January 23, 2020.

Fundamentally, the District Court's holding impermissibly conflated this Court's holding in *Walker* with the timeliness standard *Walker* explicitly rejected, namely that the defendant's actual or constructive knowledge triggers the 30-day clock for removal. *See* 727 F.3d at 825. Rather than confining its timeliness analysis to whether the contents of a specific document or set of documents demonstrated that the prerequisites for removal under complete preemption had been met, the District Court instead asked if the documents demonstrated whether Sunset *knew* the prerequisites for removal under complete preemption had been met.

Indeed, the District Court rejected two other supposedly clock-triggering documents because they merely "preserve[d] legal arguments and do not necessarily provide the defendant with notice or other factual basis for knowing the case is removable." (S.A. 8.) Though the District Court correctly concluded that these documents could not trigger the 30-clock for removal,[4] the District Court arrived at that conclusion by assessing whether the document demonstrated that Sunset knew the case was removable as opposed to what to *Walker* commands: "whether *that document*, on its face or in combination with earlier-filed pleadings, provides specific and unambiguous notice that the case satisfies federal jurisdictional requirements and therefore is removable." *Walker*, 727 F.3d at 825.

[4] Neither Sunset's filing of its affirmative defenses, nor the statements Sunset made in the Joint Status Report filed by the parties on June 17, 2020 trigger the 30-day clock for removal. *See Ayotte v. Boeing Co.*, 316 F. Supp. 3d 1066, 1073 (N.D. Ill. 2018) ("It is true, as Plaintiff points out, that Boeing asserted an affirmative defense based on government contractor immunity months before removing the case. The Court does not find this dispositive, however, because the standards governing assertion of an affirmative defense and the decision to remove a case to federal court are quite different.") (citations omitted).

The District Court thus erred in several respects. First, Sunset's discovery response did not "affirmatively" and "unambiguously" show that conditions for removal under the LMRA were present. A cause of action is only preempted under the LMRA when several conditions are met that simply are not identified in the discovery response. The mere existence of a collective bargaining agreement is insufficient to establish complete preemption and, thus, more is required to establish that the conditions of removal are affirmatively and unambiguously present. *See*, *e.g.*, *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417, 1423 (7th Cir. 1995) ("[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.") (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994).) Likewise, the plaintiff must actually be represented by the collective bargaining representative. *See Pruell v. Caritas Christi*, 645 F.3d 81, 83–84 (1st Cir. 2011) (remanding to determine whether named plaintiffs were union members and whether court had subject-matter jurisdiction as a result); *Hinterberger v. Catholic Health Sys., Inc.*, 548 F. App'x 3, 5–6 (2d Cir. 2013) (same). Moreover, because a claim is completely preempted only when its resolution "depends on the meaning of or requires the interpretation of, a collective bargaining agreement," *Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 499 (7th Cir. 1996), it is essential that there be overlap in time between the collective bargaining agreements and the relevant time period of the plaintiff's claims.

Every one of these essential elements is missing from Sunset's January 22, 2020 discovery response. At most, the discovery response established Sunset had collective bargaining agreements with the IFCU and Sunset believed Plaintiff was affiliated with

the IFCU sometime before January 1, 2018. The response does not state (1) the period Plaintiff claims her biometric information was collected; (2) whether collective bargaining agreements existed during that same period of time; or (3) whether the Plaintiff was actually represented by the IFCU during this same period of time. (S.A. 33.) Likewise, the response does not affirmatively state anything about the interaction in time or substance between any collective bargaining agreement and Plaintiff's claims. (*Id.*) Accordingly, Sunset's January 22, 2020 discovery does not reveal the conditions for removal "on its face," and, thus, cannot trigger the 30-day clock. *See Walker*, 727 F.3d at 825.

Second, Sunset's January 22, 2020 discovery response cannot satisfy *Walker*'s bright-line rule because Sunset did not receive its own discovery response. *See id.* at 821. Rather, Sunset served its discovery response on Plaintiff. For this simple reason, the response could not, on its own, trigger the 30-day clock for removal. *See id.*at 823-24 ("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); *id.* at 825 ("Again, as the text of the rule itself makes clear, the 30–day clock is triggered by pleadings, papers, and other litigation materials *actually received by the defendant* or filed with the state court during the course of litigation.") (emphasis added).

Third, the District Court's blending of *Walker*'s bright-line rule with a knowledge requirement divorced Plaintiff and Plaintiff's litigation tactics from the test outlined in *Walker*. *Walker* emphasized that the text of 28 U.S.C. § 1446(b)(3) "discourages evasive or ambiguous statements by plaintiffs in their pleadings and other litigation papers, and reduces guesswork and wasteful protective removals by defendants." *Walker*, 727 F.3d

at 824. Here, the District Court's holding permitted such evasive and ambiguous statements from Plaintiff. Before Sunset served its January 22, 2020 discovery response, Plaintiff filed a Reply to Sunset's Affirmative Defenses where Plaintiff "denie[d]" that any "collective bargaining agreements" applied to Plaintiff. (*See* R. 5 at PageID #159, 163-164.) Several months after January 22, 2020, Plaintiff still contested that a collective bargaining agreement applicable to Plaintiff "even existed during the relevant time frame[.]" (R. 12 at 9.)

Though *Walker* does not require a plaintiff to concede that a case is completely preempted, the "bright-line rule" explicitly does not permit a plaintiff to be ambiguous about whether a case is removable if the plaintiff plans to contend that removal was untimely. *See Walker*, 727 F.3d at 824 ("This bright-line rule promotes clarity and ease of administration for the courts, discourages evasive or ambiguous statements by plaintiffs in their pleadings and other litigation papers, and reduces guesswork and wasteful protective removals by defendants.") If Sunset had actually received a litigation paper that affirmatively and unambiguously revealed the conditions for removal under the LMRA on January 22, 2020, it would have been impossible for Plaintiff, several months later, to question the existence of a collective bargaining agreement during the "relevant time frame." (R. 12 at 9.)[5]

[5] Though this Court has counseled that the "timeliness question [and] the factual inquiry into whether the case is substantively appropriate for removal" are not the same because "[t]he removing defendant has the burden of proving the jurisdictional predicates for removal," *Walker*, 727 F.3d at 824-825, an affirmative and unambiguous statement that the conditions for removal have been met likely aids the defendant in meeting this burden with regard to undisputed matters of fact. For example, if the plaintiff has served upon the defendant a paper that "specifically discloses the amount of monetary damages sought," as *Walker* requires to trigger the timeliness of removal under CAFA or diversity jurisdiction, this Court would likely not permit that plaintiff to then contend

Here, Plaintiff was more than capable of protecting herself from LMRA removal at a "strategically advantageous moment." *Roth v. CHA Hollywood Med. Ctr., L.P.*, 720 F.3d 1121, 1126 (9th Cir. 2013). Plaintiff was a union member for two years and likely knew that the union who represented her had agreements that could have applied to her claims. (S.A. 22-23.) She was fully within her power to, for example, respond to Sunset's affirmative defenses by stating that (1) Sunset had collective bargaining agreements with the IFCU, (2) Plaintiff was represented by the IFCU, (3) Plaintiff was represented by the IFCU with a contract during the entire time she alleges her biometric information was collected, but (4) she nonetheless contends that Sunset will not be able to establish complete preemption under the LMRA.

Rather than exercising control over the timeliness of removal, Plaintiff asserted a non-specific denial of Sunset's defense and then proceeded throughout the rest of litigation to serve and file papers that actively created ambiguity about whether the case was affirmatively and unambiguously removable. (*See* R. 5 at PageID #159, 163-164; R. 12 at 9.) Contra the rule in *Walker*, the District Court's Order permitted Plaintiff to contest the factual predicates for LMRA removal throughout the entirety of litigation only to later argue that it was "affirmative and unambiguous" that those predicates existed earlier in the litigation.

As such, the District Court should have concluded that, per *Walker*, the 30-day removal clock never began to run because Sunset never received a litigation paper that affirmatively and unambiguously demonstrated that the case was removable under the LMRA. Nor could it have ever received such a litigation paper since throughout briefing

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that the defendant has failed to prove that the amount-in-controversy exceeds the jurisdictional limit. *See id.* at 824.

on Plaintiff's Motion to Remand, Plaintiff continued to question the existence of a collective bargaining agreement that applied to Plaintiff during the relevant time period. (R. 12 at 8-9.) Even if such statements and arguments from Plaintiff were permissible, the affirmative and unambiguous conditions for removal under the LMRA were not in any paper or filing until October 15, 2020, at the earliest, because Plaintiff's discovery responses served that day admitted for the first time that she was represented by a union during the time she alleges her biometric information was collected by Sunset. (S.A. 22-23.) Indeed, before service of Plaintiff's discovery responses (and contrary to the District Court's Order), Plaintiff had never specified the time period when Sunset began allegedly collecting her biometric information, i.e., the start of "the relevant time period." (S.A. 9.) Likewise, Plaintiff has yet to affirmatively and unambiguously state when Sunset ceased allegedly collecting her biometric information, i.e., the end of "the relevant time period." (S.A. 9.)

Accordingly, the District Court's holding that removal was untimely under the LMRA should be reversed.

II. The District Court Erred In Holding That Removal Under CAFA Was Untimely.

The District Court erred by holding that Sunset had to remove under CAFA within 30 days of it having grounds to remove under the LMRA. (S.A. 10.) The District Court interpreted 28 U.S.C. § 1332(d)(7) to mean that a case cannot be removed under CAFA if it would be untimely to remove the case under a different theory of federal jurisdiction. (*See id.*) Such an interpretation of 28 U.S.C. § 1332(d)(7) contravenes and undermines the purpose of CAFA and should be rejected by this Court.

Instead, the District Court should have held that Sunset's removal under CAFA was timely because Plaintiff never served on Sunset any litigation paper that affirmatively and unambiguously revealed that the jurisdictional prerequisites for CAFA had been met. *See Walker*, 727 F.3d at 825.

A. CAFA Permits Removal Even If Other Basis For Removal Are Untimely.

Congress enacted CAFA "to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 550, (2014). The enactment of CAFA was motivated by Congress's belief that there had been "[a]buses in class actions" filed in state and local courts which were "undermin[ing] the national judicial system." Class Action Fairness Act of 2005, PL 109–2, February 18, 2005, 119 Stat 4. "The language and structure of CAFA . . . indicate[ ] that Congress contemplated broad federal court jurisdiction with only narrow exceptions." *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 621 (7th Cir. 2012) (internal quotations omitted). To this end, this Court has "never applied or endorsed [] an anti-removal presumption [to CAFA]." *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 356 (7th Cir. 2017) (citing *Johnson v. Pushpin Holdings, LLC*, 748 F.3d 769, 773 (7th Cir. 2014); *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008). The Supreme Court in *Dart Cherokee* "ratified [this Court's] understanding of the statute." *Id.* (citing *Dart Cherokee*, 574 U.S. at 89 ("[N]o antiremoval presumption attends cases invoking CAFA[.]")

Understanding CAFA's structure and purpose, this Court has explained that "1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class

actions should be heard in a federal court if properly removed by any defendant." *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 681 (7th Cir. 2006) (quoting S. Rep. 14, 109th Cong. 1st Sess. 43 (2005), 2005 U.S.C.C.A.N. 3, 41) (internal quotations omitted)).

As such, this Court should follow the Sixth and Ninth Circuits in holding that a case may be removed under CAFA even if it would be untimely to remove the case under a different theory of federal jurisdiction. *See Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277, 287 (6th Cir. 2016); *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1184 (9th Cir. 2015). Like this Court, both the Sixth and Ninth Circuits have held that federal jurisdiction under CAFA serves different policy purposes than federal jurisdiction over ordinary diversity cases or cases arising under federal-question jurisdiction and, therefore, should be construed liberally. *See Graiser*, 819 F.3d at 287 ("Federal jurisdiction under CAFA . . . serves different policy purposes than federal jurisdiction over ordinary diversity cases or cases arising under federal-question jurisdiction."); *Jordan*, 781 F.3d at 1184 ("Congress and the Supreme Court have instructed us to interpret CAFA's provisions under section 1332 broadly in favor of removal, and we extend that liberal construction to section 1446. A case becomes 'removable' for purposes of section 1446 when the CAFA ground for removal is disclosed.") Since this Court acknowledges those same policy preferences for certain class actions to be heard in federal court, *see Hart,* 457 F.3d at 681, it follows that this Court should not tether the timeliness of CAFA removal to the timeliness of other bases of federal jurisdiction. As the Sixth Circuit stated in *Grasier*:

> A defendant may choose to litigate a case in state court even if diversity jurisdiction exists, believing that the state is nonetheless an hospitable forum; this same defendant may make a different calculation if later

> developments show that the case is a CAFA class action. Because Congress clearly "intended [CAFA] to expand substantially federal court jurisdiction over class actions" and directed that CAFA's "provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant," S. Rep. 109–14, at 43 (2005), we read § 1446(b) as permitting defendants to make this choice.

Graiser, 819 F.3d at 287.

Likewise, the plain text of CAFA supports the conclusion that timeliness of removal pursuant to CAFA and the timeliness of removal under federal question and diversity jurisdiction are not one in the same. Though *Walker* requires a party other than the defendant to serve on the defendant the clock-triggering document for removal, that party need not necessarily be the plaintiff. *See Walker*, 727 F.3d at 824. CAFA, on the other hand, expressly states that "the date of *service by plaintiffs* of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction" is when the clock for removal may begin to run, at least with respect to minimal diversity and the citizenship of the class. 28 U.S.C. § 1332(d)(7) (emphasis added). Because the clock for removal under federal question and diversity jurisdiction can be triggered by a broader set of litigation papers than the papers that can initiate the clock for removal under CAFA, the 30-day clock for CAFA removal is not the same as the 30-day clock for other bases of removal.

Accordingly, the purpose and text of CAFA permits removal when the prerequisites of CAFA can be established, regardless of whether a class action defendant could have removed under an alternative theory of jurisdiction.

B. The District Court's Decision Contravenes And Undermines The Purpose Of CAFA.

The District Court's reading of CAFA is at odds with the choices CAFA affords class action defendants and strictly construes CAFA such that the very class actions Congress sought to have heard in federal court would be effectively barred from that forum before the class action defendant could even determine whether the jurisdictional perquisites are met. *See Hart,* 457 F.3d at 681. Under the District Court's ruling, class action defendants would likely waive the opportunity for removal under CAFA simply because they chose not to remove on other grounds even if the class action defendant had not yet had the opportunity to discern the class size, the potential amount-in-controversy, or the citizenship of class members.

Here, for example, the District Court's reading of CAFA would have almost certainly prevented Sunset from ever removing under CAFA. Plaintiff has yet to affirmatively or unambiguously state where she was domiciled at the time the Complaint was filed or if that domicile ever changed. Those facts had to be discovered by Sunset through Plaintiff's social media posts. Plaintiff first posted that she was in Tucker, Georgia on February 8, 2020, but even that post left it ambiguous whether Plaintiff was domiciled in Georgia. (*See* R. 27-1 ¶¶ 5-6 and Exs. 2-3.) Under the District Court's ruling, removal under CAFA would have been untimely after February 21, 2020. (S.A. 10.) Thus, Sunset would have had less than two weeks to find Plaintiff's social media post, guess that it indicated domicile in Georgia (since 14 days is not enough time for jurisdictional discovery to be answered), and then file for removal under CAFA. Accordingly, the District Court's ruling effectively barred Sunset from ever removing pursuant to CAFA.

Likewise, the District Court's reading of the statute means that, 31-days after Sunset served its January 22, 2020 discovery response, Plaintiff was free to admit to each and every jurisdictional prerequisite for CAFA and Sunset would have been unable to remove on *any* grounds regardless of whether Sunset had actually chosen to remove on these other grounds. (S.A. 10.) Such a reading hardly interprets 28 U.S.C. § 1332(d) broadly, as instructed by this Court. *See Hart,* 457 F.3d at 681.

Finally, the District Court strictly construed 28 U.S.C. § 1332(d) in ways that even disregarded the explicit text of CAFA. CAFA requires that the documents triggering the timeliness of removal must be "serv[ed] by [the] plaintiff[s]." 28 U.S.C. § 1332(d)(7) ("Citizenship of the members of the proposed plaintiff classes shall be determined . . . as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, *as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.*") (emphasis added)). Yet, the District Court held that Sunset's own discovery response, which it served on Plaintiff, was sufficient to render removal under CAFA untimely. (S.A. 10 ("The allegations regarding the domicile of Railey on January 15, 2021, however, is eleven months after the 30-day window, and thus untimely and irrelevant for the purposes of this motion.").) Such a reading is plainly contrary to the text and purpose of CAFA and should be reversed.

As such, the timeliness of removal pursuant CAFA is guided by the "bright-line rule" stated in *Walker* and without regard to any alternative basis of removal. *See Walker*, 727 F.3d at 825. Because neither Plaintiff nor the District Court has identified

any document served by Plaintiff that affirmatively and unambiguously reveals that the conditions for CAFA removal have been met, removal under CAFA was timely.[6]

C. The Prerequisites For CAFA Jurisdiction Were Satisfied.

Though not reached by the District Court, Sunset has satisfied the prerequisites for CAFA jurisdiction. There is no dispute regarding whether the amount-in-controversy exceeds CAFA's jurisdictional limit. (R. 15 ¶ 13.)[7] Plaintiff only disputes whether minimal diversity has been satisfied. Plaintiff does not dispute that at the time of removal under CAFA, she was domiciled in the State of Georgia and that Defendant

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[6] Whether Sunset's January 15, 2021 Supplemental Notice of Removal pursuant to CAFA constitutes an amendment to its original notice of removal is of no consequence because the timeliness of an amendment to a notice of removal is also governed by 28 U.S.C. § 1446(b) and this Court's decision in *Walker*. *See Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 368 (7th Cir. 1993), *holding modified by Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006) ("Removal petitions may be freely amended for thirty days after a defendant receives a copy of the state court complaint, or is served, whichever comes first") (citing 28 U.S.C. § 1446(b).); *Walker*, 727 F.3d at 821 (interpreting § 1446(b)(3) as stating that "[t]he 30–day removal clock is triggered by the defendant's receipt of a pleading or other paper that affirmatively and unambiguously reveals that the case is or has become removable.")

If the basis of removal is timely under *Walker*, the basis of removal is timely as an amendment to a notice of removal. A contrary rule would not serve judicial economy especially because this Court has long held that multiple, sequential removals are permitted by § 1446, especially when "matters change." *See Benson v. SI Handling Sys., Inc.*, 188 F.3d 780, 782 (7th Cir. 1999) ("Nothing in § 1446 forecloses multiple petitions for removal."). Indeed, in *Collier v. SP Plus Corp.*, 889 F.3d 894 (7th Cir. 2018), this Court affirmed remand because the defendant failed to establish an injury-in-fact sufficient for Article III standing, but nonetheless concluded that a removal at a later date was permitted if the plaintiff amended their complaint or if the defendant received a paper that satisfied the test in *Walker*. *See id.* at 897 (quoting *Walker*, 727 F.3d at 824.)

[7] Sunset denies that Plaintiff and the purported class could recover any damages, much less any damages for "willful" violations of BIPA, but for purposes of determining whether subject matter jurisdiction exists under CAFA, the amount-in-controversy is satisfied.

was a citizen of the State of Illinois. As such, minimal diversity existed at the time of removal.

Minimal diversity was satisfied at removal because Plaintiff has failed to allege her domicile or citizenship in this case; Plaintiff has only alleged that she was a "resident" of the State of Illinois. (R. 3 ¶ 2, 5.) It is well-established that allegations of residence are insufficient to confer citizenship. *See Am.'s Best Inns, Inc. v. Best Inns of Abilene, L.P.,* 980 F.2d 1072, 1074 (7th Cir. 1992) ("In federal law citizenship means domicile, not residence.")

As such, the only allegation of Plaintiff's domicile at any point in this litigation is Sunset's undisputed averment that Plaintiff has been domiciled in the State of Georgia since at least February 2020. (*See* R. 15 ¶ 9; R. 27; R. 27-1 ¶¶ 3-8 and Exs. 1-4); *see also Miller v. Sw. Airlines Co*., 926 F.3d 898, 903 (7th Cir. 2019) (noting that "[i]t seems likely to us that at least one person domiciled in southern Wisconsin or northwest Indiana works for United at O'Hare Airport, which is in commuting distance from both states"); *Dancel v. Groupon, Inc.*, 940 F.3d 381, 385 (7th Cir. 2019) (noting that an allegation "even if only 'on information and belief,' that a specific member of the putative class had 'a particular state of citizenship'" may be preliminarily accepted as a basis for subject matter jurisdiction). Because "jurisdiction is determined at the time of removal," *In re Burlington N. Santa Fe Ry.*, 606 F.3d 379, 380–81 (7th Cir. 2010), minimal diversity has been satisfied.

Alternatively, if the Court finds that Plaintiff sufficiently alleged domicile in Illinois earlier in the litigation, this Court should nonetheless hold that Plaintiff's change in domicile prior to removal is sufficient to establish minimal diversity. The plain language of the CAFA statute states that the citizenship of any class member, including a

named-Plaintiff, can be determined even after the time of the initial filing. *See* 28 U.S.C. § 1332(d)(7) ("Citizenship of the members of the proposed plaintiff classes shall be determined . . . as of the date of filing of the complaint or amended complaint, *or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction*.") (emphasis added)).

While the time-of-filing rule may inhibit a defendant from manipulating its own citizenship in order to establish minimal diversity under CAFA,[8] the statute makes explicit reference to the citizenship of class members being determined at the time of removal. *See* 28 U.S.C. § 1332(d)(7). Importantly, this section of CAFA includes no exceptions or qualifiers for a named-Plaintiff—the citizenship of a named-Plaintiff, like any other "members of the proposed plaintiff classes," may change after the initial pleading without the named-Plaintiff filing a new Complaint. *See id.*; *see also Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 153 (3d Cir. 2009) ("Class actions, of course, often involve more parties than traditional bipolar litigation and thus a greater likelihood that some parties will change. In fact, 28 U.S.C. § 1332(d)(7) accounts for this aspect of class actions by explicitly providing that class member citizenship may be determined even after the time-of-filing [of the initial pleading].")

In this way, CAFA accords with the more general rule that if a plaintiff undertakes a voluntary act—for example, by changing domicile—and thereby creates a basis for federal jurisdiction, then the case may be properly removed. *See, e.g., Powers*

[8] *See Sanchez v. Ameriflight, LLC*, 724 F. App'x 524, 526 (9th Cir. 2018) ("The operative complaint was filed in July, 2014. Ameriflight does not dispute that it was not diverse from Sanchez at that time. Ameriflight's post-filing change in citizenship did not render the parties minimally diverse under CAFA.")

v. Chesapeake & Ohio Ry., 169 U.S. 92, 101 (1898) (discussing plaintiff's fraudulent joinder to evade removal); *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1988); *DeBry v. Transamerica Corp.*, 601 F.2d 480, 486–87 (10th Cir. 1979); *Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 754–55 (4th Cir. 1996); *Self v. Gen. Motors Corp.*, 588 F.2d 655, 657 (9th Cir. 1978); *see also Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 72 (7th Cir. 1992).[9]

Therefore, Sunset has established minimal diversity at the time of removal and, thus, the perquisites for CAFA removal have been met.

CONCLUSION

Sunset respectfully requests that the Court reverse the District Court's remand order and return the case to the District Court for further proceedings.

DATED: August 31, 2021

Respectfully submitted,

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[9] The rationale for this rule is that although a defendant should not be allowed to change domicile after the complaint is filed for the sole purpose of effectuating removal, there is no reason to protect the plaintiff against the adverse consequences of her own voluntary acts. *See Yarnevic*, 102 F.3d at 754–55.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

The undersigned, counsel of record for Defendant-Appellant, furnishes the following in compliance with Fed. R. App. P. Rule 32 and Circuit Rule 32:

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CIRCUIT RULE 30(D) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rules 30(a) and (b) is included in the Short Appendix.

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PROOF OF SERVICE

The undersigned, counsel for Defendant-Appellant, hereby certifies that on August 31, 2021, the Brief of Defendant-Appellant Sunset Food Mart, Inc. was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, which will send notice to all counsel of record:

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ATTACHED REQUIRED SHORT APPENDIX

TABLE OF CONTENTS OF SUNSET FOOD MART, INC.'S SHORT APPENDIX

Date	Document	Citation
7/15/2021	District Court's Order Granting Plaintiff's Motion for Remand	S.A. 1-11

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

RANITA RAILEY,	
Plaintiff,	**Case No. 20 C 6758**
v.	**Judge Harry D. Leinenweber**
SUNSET FOOD MART, INC.,	
Defendant.	

ORDER

Plaintiff Ranita Railey's Motion for Remand (Dkt. No. 12) is granted. The Court strikes Defendant's Supplement to its Notice of Removal (Dkt. No. 15) as untimely. The case is remanded to state court. The clerk shall remand this case forthwith.

I. BACKGROUND

On February 19, 2019, Plaintiff Ranita Railey ("Railey") filed suit against Sunset Food Mart, Inc. ("Sunset") in the Circuit Court of Cook County, Illinois, alleging violations of the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS § 14/1, on behalf of herself and all others similarly situated. (State Compl. ¶¶ 1-3, Dkt. No. 3.) Railey sought $1,000 to $5,000 for each violation in statutory damages. (*Id.* ¶ 41.) Railey alleges that, from January 2016 onwards, she and the other putative class members had biometric information collected in violation of BIPA when they

were "required to place their entire hands on a panel to be scanned in order to 'clock in' and 'clock out' of work." (*Id.* ¶¶ 7-11.)

Defendant Sunset Food Mart, Inc, was served on February 27, 2019. (*Id.*) On November 14, 2019, Sunset filed its Answer and Affirmative Defense. (Mot. at 3, Dkt. No. 12.) In it, Sunset stated that "Plaintiff's claims and the claims of the putative class members are barred and preempted by the Labor Management Relations Act, and comparable statutes, as they are subject to a collective bargaining agreement." (*Id.*) On January 22, 2020, Sunset responded to Plaintiff's First Set of Requests for Production of Documents. (Def.'s Resp., Mot., Ex. C, Dkt. No. 12-1.) In Request Seven, Plaintiff sought "[a]ny contract and/or agreement between the Defendant or any third-party entity that assigned Railey to work at Defendant, as well as any correspondence related to such contract or agreement." (Def.'s Resp. at 7.) Sunset responded: "Defendant states that it will produce the agreements between Defendant and the Independent Food Clerks Union, of which Plaintiff was affiliated prior to her January 1, 2018 promotion to Assistant Deli Manager, and the United Food Commercial Workers International Union, upon entry of a protective order," as well as "seasonably supplement as its investigation continues." (*Id.* at 7-8.) On June 17, 2020, the parties filed a joint status report before the Circuit Court of Cook County, where they identified a "major legal

issue" as "whether Plaintiff and/or any putative class members' claims are preempted by the Labor Management Relations Act." (Mot. at 3.)

On September 10, 2020, Sunset issued its First Set of Interrogatories to Railey. (Def.'s First Interrogs., Not., Ex. B, Dkt. No. 4.) In Interrogatory Nine, Sunset asked Railey to "[i]dentify all unions or collective bargaining representative which you are or were affiliated with during your employment by Defendant, including the dates encompassing your affiliation(s)." (*Id.* at 7.) On October 15, 2020, Railey served her response, as follows: "Plaintiff does not recall the name of the union with which she was affiliated during her employment. Plaintiff recalls only that she was a union member from January 2016 until she was promoted to Assistant Deli Manager in January 2018." (*Id.* at 11.)

On November 13, 2020, Sunset filed its Notice of Removal. (Dkt. No. 1.) In the Notice, Sunset stated that Railey had not alleged that she had a collective bargaining representative in her initial Complaint, and Sunset had not received any other papers that "affirmatively and unambiguously disclosed Plaintiff's representation by a collective bargaining representative" prior to the interrogatories responses. (Not. at 3, Dkt. No. 1.) Because the removal was within 30 days of Railey's interrogatory responses,

Sunset Food Mart alleged the notice was valid and timely under 28 U.S.C. §§ 1441 and 1446.

On December 14, 2020, Railey filed a Motion to Remand. (Dkt. No. 13.) On January 15, 2021, Sunset Food Mart filed its Response and a Supplement to the Notice of Removal. (Dkt. Nos. 14, 15.) In its supplemental notice, Sunset alleged that Railey was now domiciled in Georgia, and the suit was thus appropriately removed to federal court based on the Class Action Fairness Act, 28 U.S.C. § 1711. On February 5, 2021, Railey filed her Reply and Motion to Strike the supplemental reason for removal, asking the Court to find the notice untimely filed. (Dkt. Nos. 24, 25.) On February 26, 2021, Sunset filed a Response to the Motion to Strike. (Dkt. No. 27.) The Court now decides the Motion to Remand and the subsequent Motion to Strike the supplemental notice.

II. DISCUSSION

Federal district courts have original jurisdiction over all civil actions arising from laws of the United States. 28 U.S.C. § 1331. "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction may be removed by the defendant." 28 U.S.C. § 1441(a). The party seeking removal bears the burden of establishing federal jurisdiction. *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 352 (7th

Cir. 2017). The notice of removal must be filed within 30 days of the complaint, or, if the complaint does not initially state a removable pleading, within 30 days of the defendant receiving "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)(1), (3).

In its Notice of Removal, Sunset states that the first paper indicating original federal jurisdiction pursuant to 28 U.S.C. §§ 1446(b)(3) was Railey's responses to its First Set of Interrogatories on October 15, 2020. In it, Railey stated that she was represented by a union during her employment and during the alleged collection of biometric information in violation of BIPA. As a result of this union representation, Sunset states that Railey's claim is preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Because Sunset "did not receive any pleading or other paper that affirmatively and unambiguously disclosed Plaintiff's representation" until Railey's response to Defendant's Interrogatories, Sunset alleges that its notice of removal is timely. (Not. at 3-4, Dkt. No. 1.)

Railey's Motion to Remand challenges the statements put forth in Sunset's notice. Railey claims that Sunset had previously ascertained that the Labor Management Relations Act was applicable on at least three prior occasions. First, Railey states that Sunset

was aware of its preemption claims when it claimed LMRA preemption as an affirmative defense in November 2019. Second, Sunset agreed to produce the collective bargaining agreements to Railey approximately nine months prior to the removal. Finally, Railey points to a June 2020 joint status report filed before the Circuit Court of Cook County where both parties identified the Labor Management Relations Act as an ongoing issue in the litigation.

"The 30-day removal clock is triggered by the defendant's receipt of a pleading or other paper that affirmatively and unambiguously reveals that the case is or has become removable." *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 821 (7th Cir. 2013). "This bright-line rule promotes clarity and ease of administration for the courts, discourages evasive or ambiguous statements by plaintiffs in their pleadings and other litigation papers, and reduces guesswork and wasteful protective removals by defendants." *Id.* at 824. In *Walker*, the plaintiff filed a class-action complaint in Indiana state court asserting contract violations against its employer. *Id.* The case progressed to summary judgment, and, in response to the employer's summary judgment motion, the plaintiff filed its own theory of how damages could be calculated. *Id.* at 821–22. Upon receipt of this theory of damages, the employer made its own calculations and found the total to be greater than $5 million, and subsequently filed a notice of removal. *Id.* at

822. The Seventh Circuit held that, because the plaintiff never "affirmatively specif[ied] a damages figure," the "removal clock never actually started to run." *Id.* at 825

The bright-line rule adopted in *Walker* applies to the current case. Railey admits that she did not set forth in her pleadings any allegations that she was part of a union during the times she alleged violations of BIPA. As a result, the Court looks for defendant's receipt of another paper during the course of the litigation that affirmatively and unambiguously reveals that the case is capable of being removed to federal court. Specifically, the Court reviews: (1) Sunset's affirmative defense, (2) Sunset's response that it will produce the collective bargaining agreements that were applicable to the relevant time period, and (3) the Joint Status Report filed by the parties to the Circuit Court.

Two of these documents, Sunset's affirmative defense and the Joint Status report, discuss legal arguments that preserved by Sunset and thus do not qualify as notice that the case is actually removable. As explained in *Ayotte v. Boeing Co.*, "the standards governing assertion of an affirmative defense and the decision to remove a case to federal court are quite different." 316 F.Supp.3d 1066, 1076 (N.D. Ill. 2018). Whereas an affirmative defense need not be plausible, a defendant seeking removal has the burden of persuasion based on factual evidence. *Id.* (citing *Bond v. Am.*

Biltrite Co., No. CV 13-1340-SLR-CJB, 2014 WL 657402, at *4 (D. Del. Feb. 20, 2014)). Similarly, the Joint Status Report highlights the legal dispute between the parties by identifying the problem of "whether Plaintiff's and/or any putative class members' claims are preempted." (Mot. at 3.) Further, this statement is ambiguous as to the nature of the disagreement, i.e., whether the LMRA is applicable, or, assuming it is applicable, whether it preempts Railey's claim. As a result, both of these documents seek to preserve legal arguments and do not necessarily provide the defendant with notice or other factual basis for knowing the case is removable.

The Court finds the Defendant's Response to Plaintiff's First Requests for Production of Documents, however, did provide notice to Sunset. In its January 22, 2020 response to Railey's general request for production of third-party contracts, Sunset agreed to produce "the agreements between Defendant and the Independent Food Clerks Union, of which Plaintiff was affiliated prior to her January 1 2018 promotion to Assistant Deli Manager, and the United Food Commercial Workers International Union, upon entry of a protective order." (Def.'s Resp. at 7–8.) Sunset objects on the grounds that it produced the wrong documents to Railey in response to this request. However, Sunset admits that it did have possession of the documents and did eventually provide them to Railey. The

Court will not credit the time period between which a defendant agrees to produce a document and the actual production of the document, as this time period is entirely within the control of the defendant. To hold otherwise would create perverse incentives for defendants to delay production of documents during litigation in an attempt to manipulate the forum.

In summary, Sunset sent a certified response, *see* Def.'s Resp. at 27, to Plaintiff claiming that there was a collective bargaining agreement during the relevant time period, and, from that point onwards, the parties had notice that the Labor Management Relations Act applied. Sunset does not argue that it attempted to retract its statement regarding the collective bargaining agreements at any point in the intervening months, nor could it, as Sunset filed these documents as part of the basis for removing the case eight and a half months later. As a result, the Court holds that Sunset's response to Railey's production request is a "paper" that provides unambiguous notice that the case is removable. This response was provided to Railey on January 22, 2020, over 30 days prior to Sunset's December 14, 2020 notice of removal and in contravention of the requirements set forth in 28 U.S.C. 1446(b)(3).

The Court also considers Sunset's supplemental jurisdictional filing and Railey's Motion to Strike. After Railey filed a Motion to Remand, Sunset filed a Supplemental Notice of Removal based on

the Class Action Fairness Act. In it, Sunset alleged that Railey is now domiciled in Georgia, creating diversity jurisdiction as set forth in 28 U.S.C. § 1332(d)(2). In response, Railey argued that diversity jurisdiction is calculated at the time the suit commences, and thus it does not matter whether Railey was domiciled in a different jurisdiction on January 15, 2021.

As set forth in 28 U.S.C. § 1332(d)(7), "[c]itizenship of the members of the proposed plaintiff classes shall be determined . . . as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction." The existence of Federal jurisdiction in this case was first indicated on January 22, 2020. Sunset then had a 30-day window to reconsider domicile as set forth in 28 U.S.C. 1446(b). *See Pinnacle Performance v. Garbis,* No. 12 C 1136, 2012 WL 1378673, at *1 (N.D. Ill. Apr. 20, 2012) ("Defendants may freely amend a notice of removal during that 30-day window.") The allegations regarding the domicile of Railey on January 15, 2021, however, is eleven months after the 30-day window, and thus untimely and irrelevant for the purposes of this motion. The Court grants Railey's Motion to Strike the pleading.

III. CONCLUSION

For the reasons stated herein, the Court finds that Section 1446(b)(3) does not permit removal of this case. Due to the complicated issues presented, the Court exercises its discretion and denies Railey's request for attorney's fees. Railey's Motion for Remand (Dkt. No. 12) is otherwise granted. The Court strikes Defendant's Supplemental Notice of Jurisdiction (Dkt. No. 15). The case is remanded to state court.

Harry D. Leinenweber, Judge
United States District Court

Dated: 7/15/2021