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

DAVID MUTNICK, for himself and others similarly situated,	)	Case No. 1:20-cv-00512
Plaintiff,	)	Consolidated Case Nos. 1:20-cv-00840 1:20-cv-02989
v.	)	
CLEARVIEW AI, INC.; HOAN TON-THAT; and RICHARD SCHWARTZ,	)	Judge Sharon Johnson Coleman
Defendants.	)	Magistrate Judge Maria Valdez

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER STAY ORDER

Defendants Clearview AI, Inc. ("Clearview"), Hoan Ton-That, and Richard Schwartz (together, the "Defendants") respectfully request that the Court deny Plaintiff's Motion to Reconsider Stay Order ("Motion to Reconsider"). As discussed below, the Court's decision to grant a stay was reasonable, practical, and consistent with the overwhelming majority of cases that have addressed this issue.

BACKGROUND

On August 21, 2020, the Court, "in its discretion," granted Defendants' motion to stay ("Motion to Stay") the above-captioned matter pending a decision from the Judicial Panel on Multidistrict Litigation ("JPML") on Defendants' motion to transfer this consolidated action to the Southern District of New York for coordinated or consolidated pretrial proceedings ("MDL Motion"). ECF No. 99. In response to the Court's reasonable exercise of discretion, Plaintiff filed the Motion to Reconsider, which claims that Defendants' Motion to Stay did not include two "critical facts." ECF No. 100 at 3. Plaintiff mischaracterizes both "facts."

First, Plaintiff argues that the Motion to Stay "omits that Defendants' transfer motion

before the JPML is not included on the Panel's docket for its upcoming September 24, 2020 hearing session," and that the "JPML will not address the motion until December 3, 2020 – at the earliest." *Id.* Plaintiff's prediction that the Panel will not address the MDL Motion until December is speculative and assumes the Panel will elect to hold oral argument. But the Panel may decide the MDL Motion without holding oral argument. *See* J.P.M.L. Rule 11.1(c) (providing that the Panel "may dispense with oral argument" if the "facts and legal arguments are adequately presented and oral argument would not significantly aid the decisional process"); J.P.M.L. Rule 11.1(b)(i) ("The parties affected by a motion to transfer may agree to waive oral argument.").[1] The Panel also has the authority either to add the MDL Motion to the September hearing schedule or to set another oral argument date for the MDL Motion before the December hearing. J.P.M.L. Rule 11.1(a) ("The Panel shall schedule sessions for oral argument and consideration of other matters as desirable or necessary. The Chair shall determine the time, place and agenda for each hearing session."). The rules permit Plaintiff to submit a statement to the Panel concerning these issues. J.P.M.L Rule 11.1(b). Notably, Plaintiff has remained silent. Even if the Panel does not rule until early December—which is entirely guesswork at this point—a stay of a few months in order to avoid potentially inconsistent rulings as well as a waste of party and judicial resources is entirely appropriate in the context of a complex class action that may last for years.

Second, Plaintiff argues that "Defendants' motion omits that they have not sought a parallel stay of the New York Litigation and that they do not intend to do so." ECF No. 100 at 4. This is false. As the correspondence that Plaintiff attached to his Motion to Reconsider makes clear,

[1] Defendants recognize that J.P.M.L. Rule 11.1(c) also says that the "Panel shall not consider transfer or remand of any action pending in a federal district court when any party timely opposes such transfer or remand without first holding a hearing session for the presentation of oral argument." However, the next sentence says that the "Panel may dispense with oral argument" and the prior subpart provides that the parties may "waive oral argument."

Defendants intend to request at an upcoming conference with Chief Judge McMahon that she "continue the stay she had effectively entered until the decision of the JPML." ECF No. 100-3 at 4. As Plaintiff is aware, the parallel cases pending in New York (the "New York Actions") have effectively been stayed for over three months. *Id.* On May 14, 2020, Chief Judge McMahon ordered that "Defendants' time to respond to Complaints in these actions is adjourned *sine die*." ECF No. 100-4; *see also* ECF No. 100-5 ("No one respond to anything until I say so."). On August 18, 2020, the same day Defendants filed their MDL Motion and sent a copy of the MDL Motion to Chief Judge McMahon, she scheduled a telephone conference for September 9, 2020—at which Defendants anticipate discussing the impact of the MDL Motion on the New York Actions. As Defendants explained to Plaintiff, Defendants intend to request at the conference that Chief Judge McMahon continue the stay she has effectively put in place and, "if the [C]ourt so instructs, to file a motion related to the New York cases." ECF No. 100-3 at 2.

ARGUMENT

The authorities cited by Plaintiff make clear that motions to reconsider are "rarely" granted because they require unusual circumstances, such as "where the Court has patently misunderstood a party." *See* ECF No. 100 at 5 (quoting *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990)); *see also id.* (quoting *Ahmed v. Ashcroft*, 388 F.3d 247, 249 (7th Cir. 2004) ("To be within a mile of being granted, a motion for reconsideration has to give the tribunal to which it is addressed a reason for changing its mind.")). Plaintiff argues that reconsideration is appropriate when a court has "made an error not of reasoning but of apprehension," *id.*, but here the Court made a fully informed, reasonable, and discretionary decision to grant the Motion to Stay.

Instead of addressing the numerous cases cited by Defendants that have granted stays in

these exact circumstances, Plaintiff relies exclusively on a single case, *Terkel v. AT&T Inc.*, Nos. 06 C 2837, 06 C 2680, 2006 WL 1663456 (N.D. Ill. June 9, 2006). But *Terkel* is distinguishable in at least two crucial ways.

First, Plaintiff argues that the defendants in *Terkel* "had not sought a stay of the litigation in the other forum where related cases were pending." ECF No. 100 at 6. However, in *Terkel*, the defendants' motions to dismiss in the related case were "currently being briefed," and oral argument on those motions was scheduled for "well over a month before the earliest date that defendants say the JPML might consider" the pending MDL motion. 2006 WL 1663456, at *2. As a result, the *Terkel* court concluded that the defendants "appear to be willing to have more than one judge decide the allegedly common or overlapping issues." *Id.* By contrast, here, there is no activity in the New York Actions, no motions are pending or due, and, contrary to the facts in *Terkel*, Defendants intend to ask Chief Judge McMahon at the upcoming conference to continue the stay that is effectively in place, including by filing a formal motion if necessary.

Second, the plaintiffs in *Terkel* sought a preliminary injunction because the "information in which they have a significant statutory privacy interest has been and is still being disclosed." *Id.* at *3 (emphasis added). Here, by contrast, Plaintiff is not subject to any alleged ongoing harm. As a threshold matter, Plaintiff has not and cannot credibly allege that his image is even included in Clearview's database; Plaintiff's standing to be before the Court as a class representative will be addressed as appropriate at a future point in these proceedings. But even if Plaintiff's image is in the database, he suffers no legally cognizable ongoing harm as a result of Clearview's voluntary changes to its business practices in and around May 2020. Clearview presently operates exclusively as a "contractor, subcontractor, or agent of a State agency or local unit of government." 740 ILCS 14/25(e); ECF No. 56-2 ¶ 16 (Clearview has cancelled the account of every user who is

not a "law enforcement body or other federal, state or local government department, office or agency"). This means Clearview's current operations are expressly exempt from BIPA (assuming it applies to Clearview)—a fact that Plaintiff does not deny.[2] Thus, unlike the plaintiffs in *Terkel*, Plaintiff and the putative class members are not suffering any alleged ongoing harm and are not prejudiced by the stay entered by the Court. In short, the *Terkel* comparison is a false one.

Relatedly, Plaintiff criticizes Defendants for not pursuing a stay in the *Thornley* case, where a motion to remand is now fully briefed. However, far from being a "strateg[ic]" decision, the case cited by Plaintiff shows precisely why Defendants did not seek a stay in *Thornley*. ECF No. 100 at 9 n.9 (citing *Bd. of Trs. of the Teachers' Ret. Sys. of the State of Ill. v. Worldcom, Inc.*, 244 F. Supp. 2d 900 (N.D. Ill. 2002)). As *Worldcom* explained, "when remand motions in cases potentially subject to MDL consolidation raise unique issues of law or fact, channeling the decisions to a single court would result in little or no savings of judicial resources." 244 F. Supp. 2d at 903. Such is the circumstance in *Thornley*, where the remand motion raises a unique Article III standing issue and is the only remand motion that has been filed in any of the actions against Clearview. Accordingly, Defendants did not believe the law supported a stay in that case before the Court decides the threshold issue of subject-matter jurisdiction. As previously explained, if the Court ultimately denies the motion to remand, *Thornley* should be consolidated with this action and would therefore be subject to any stay entered in this consolidated action. ECF No. 98 at 2 n.1.[3]

Also unavailing is Plaintiff's argument that his supposed prejudice is "particularly acute,

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[2] Clearview's voluntary steps also include implementing technical solutions to prevent the collection of data from Illinois. ECF No. 56 at 6-7.

[3] Similarly, Plaintiff argues that "the entry of a stay precludes Plaintiff from relating and consolidating" a recent BIPA class action against Macy's that is pending before Judge Aspen. ECF No. 100 at 9; *Carmean v. Macy's Retail Holdings, Inc.*, No. 20-cv-4589 (N.D. Ill.). But a case involving a different plaintiff, a

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