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

DAVID MUTNICK, for himself and others similarly situated,	)))	
Plaintiff,	))	
	)	Case No. 20-cv-512
v.	))	
	)	Hon. Sharon Johnson Coleman
CLEARVIEW AI, INC.; HOAN TON-THAT; RICHARD SCHWARTZ; and CDW GOVERNMENT LLC,	))))	
Defendants.	)	

CLEARVIEW DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff waited nearly three months into this litigation—until a contest for lead class counsel was underway—before asserting the need to stop some ongoing and imminent harm, and to ask the Court to do something that no court appears to have done before: Issue a preliminary injunction pursuant to the Illinois Biometric Information Privacy Act ("BIPA"). Plaintiff's motion (ECF Nos. 31–32, 39) (the "Motion") gives no reason for that to happen for the first time here. The Motion should be denied.[1]

Plaintiff's Motion fails to address numerous threshold issues of law.

First, for the reasons set forth in their motion to dismiss (*see* ECF Nos. 45–46), Clearview AI, Inc. and Messrs. Hoan Ton-That and Richard Schwartz (together, the "Clearview Defendants") are not subject to personal jurisdiction here. This fact alone is fatal to Plaintiff's Motion.

Second, the relief Plaintiff seeks has been mooted. Without admitting that BIPA applies to it (and for the reasons discussed below, it does not) Clearview has taken and is continuing to take comprehensive steps to prevent the collection of facial vectors from photos associated with Illinois, and to prohibit the searching of existing photos associated with Illinois. Moreover, Clearview has taken steps to secure and implement limits regarding the retention of any Illinois photos. Clearview is terminating access rights to its app for all account holders based in Illinois and is terminating the accounts of any non-law enforcement or government entity. In short, each aspect of the requested relief has been mooted. Significantly, Plaintiff does not seriously contend otherwise.[2]

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[1] Plaintiff's Motion refers only to claims under BIPA. To the extent that Plaintiff asserts he is entitled to an injunction because of any of his other claims, the Clearview Defendants reserve the right to seek leave to submit briefing addressing those claims.

[2] *See* Declaration of Lee Wolosky ("Wolosky Decl."), Exs. 1-3.

Third, BIPA does not apply to Clearview. BIPA cannot reach a defendant's conduct—like that here—occurring outside of Illinois. If BIPA were applied in an extraterritorial fashion, as Plaintiff demands, it would violate the dormant Commerce Clause. And finally, Plaintiff's allegation that Clearview is acting as an "agent" of law enforcement, *Mutnick* FAC ¶ 37, and with "state actors," *id.* ¶ 38, precludes BIPA's application here pursuant to an express exemption.

Fourth, even if the Court were to conclude that it has jurisdiction, that the Motion is not moot, and that BIPA applies to Clearview, Plaintiff cannot show that he has a likelihood of success under BIPA.

Finally, even assuming the Clearview Defendants were subject to jurisdiction in Illinois, the Motion had not been mooted by Clearview's actions, BIPA applied to Clearview, and Plaintiff could demonstrate a likelihood of success on the merits, the Motion should *still* be denied. Given the availability of statutory damages, Plaintiff cannot meet his burden of showing an inadequate remedy at law. The equities also disfavor an injunction. To take any additional steps beyond those already taken by Clearview would effectively put Clearview out of business. Conversely, in light of the actions already taken by Clearview, Plaintiff stands to gain little more from an injunction. For these reasons and those below, the Motion should be denied.

BACKGROUND

Clearview AI, Inc.

Hoan Ton-That and Richard Schwartz, both New York residents, co-founded Clearview. They respectively manage information technology and sales for the company, and Ton-That also serves as the company's chief executive officer. ECF No. 46-7, ¶ 1; ECF No. 46-2, ¶ 1.

Clearview is a startup that collects publicly-available images on the internet and organizes them into a searchable database, which Clearview's licensed users can then search. ECF No. 46-

7, ¶ 6; Declaration of Thomas Mulcaire ("Mulcaire Decl.") ¶ 3. Clearview only offers an online app through which users can search images. Mulcaire Decl. ¶ 3. Clearview's technology searches the "open web" and public sources for image files, and downloads the files and webpage URLs into a database. *Id.* ¶¶ 4, 9. The images that Clearview accesses are available to anyone with an internet connection. *Id.* ¶ 4.

Clearview has never experienced a data breach related to personal information, and it implements reasonable security safeguards for its data. *Id.* ¶¶ 12–14. Clearview does not sell, lease, or disseminate any biometric information to its customers. *Id.* ¶ 10.

Voluntary Steps Taken by Clearview

As part of an ongoing business review commenced prior to the Motion, Clearview has recently and voluntarily changed its business practices to avoid including data from Illinois residents and to avoid transacting with non-governmental customers anywhere. Specifically, Clearview is cancelling the accounts of every customer who was not either associated with law enforcement or some other federal, state, or local government department, office, or agency. Clearview is also cancelling all accounts belonging to any entity based in Illinois. *Id.* ¶ 16. All photos in Clearview's database that were geolocated in Illinois have been blocked from being searched through Clearview's app. *Id.* ¶ 17. Going forward, Clearview has constructed a "geofence" around Illinois, and will not collect facial vectors from images that contain metadata associating them with Illinois. *Id.* ¶¶ 21–24. Clearview will not collect facial vectors from images stored on servers that are displaying Illinois IP addresses or websites with URLs containing keywords such as "Chicago" or "Illinois." *Id.* ¶ 23. Clearview is also implementing an opt-out mechanism to exclude photos from Clearview's database. *Id.* ¶ 25. Clearview's terms of use require users of the Clearview app to, among other things, agree to only use the app for law

enforcement purposes and to not upload photos of Illinois residents. *Id.* ¶¶ 11, 20. To the extent that a user nonetheless tries to upload a photo with metadata associating it with Illinois, Clearview will not initiate a search with that image or generate a face vector. *Id.* ¶ 19.

Procedural History

Plaintiff filed this putative class action on January 22, 2020. ECF No. 1. On April 8, 2020 Mutnick filed this Motion. ECF Nos. 31–32, 39. Mutnick's delayed timing suggests that he was not concerned about imminent harm, but rather about positioning himself to be appointed lead counsel in this litigation. Indeed, one day after Mutnick filed the Motion, plaintiffs' lawyers in New York moved to be appointed interim lead counsel. *See Calderon v. Clearview AI, Inc.*, No. 20-cv-01296 (S.D.N.Y.), ECF No. 17. Mutnick then attempted to get plaintiffs in New York to refile their cases in Illinois, but, not succeeding, moved to intervene and to dismiss the New York cases, explicitly arguing that his case was further along because of his belated motion for preliminary injunction. *See, e.g.*, *McPherson v. Clearview AI, Inc.*, No. 20-cv-03053 (S.D.N.Y.), ECF No. 13, at 11–12. The Clearview Defendants subsequently moved to dismiss for lack of personal jurisdiction, or for a transfer to the Southern District of New York. ECF Nos. 45–46.

In advance of submitting this brief, counsel for Clearview contacted counsel for Plaintiff and explained the steps that Clearview is in the process of taking and that moot this Motion. Plaintiff's Counsel refused to withdraw his Motion. Wolosky Decl. ¶ 3. Plaintiff's insistence on proceeding further reveals that the Motion is little more than a litigation ploy, made in an effort to advance a claim to lead counsel, rather than a genuine request for meritorious relief.

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ARGUMENT

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The Court should deny Plaintiff's Motion because Clearview is not subject to jurisdiction in Illinois, because the Motion is moot, because BIPA does not apply to Clearview, and because

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