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

In re: Clearview AI, Inc., Consumer Privacy Litigation	Case No: 1:21-cv-135 Judge Sharon Johnson Coleman Magistrate Judge Maria Valdez

DEFENDANT MACY'S RETAIL HOLDINGS, INC.'S MOTION FOR A STAY OF DISCOVERY PENDING RESOLUTION OF ITS MOTION TO DISMISS

Defendant Macy's Retail Holdings, Inc. ("Macy's"), through its attorneys, respectfully asks this Court to stay all discovery, including responses to interrogatories and document requests, and Rule 26(a)(1) initial disclosures, pending resolution of Macy's motion to dismiss, filed on June 28, 2021 (Dkts. 111, 112-1) (the "Motion"). In support thereof, Macy's states as follows:

1. This multi-district litigation ("MDL") has focused almost exclusively on the actions of Clearview and its principals (collectively "Clearview"). Plaintiffs only recently brought Macy's into the MDL, alleging novel theories of liability based solely upon Macy's contract with Clearview. On June 28, 2021, Macy's moved to dismiss all of Plaintiffs' claims against it, raising dispositive standing and pleadings defenses under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Motion is currently pending before this Court, and is scheduled to be fully briefed by August 27, 2021

2. Macy's seeks a stay of all discovery to allow this Court to rule upon the Motion and address whether Macy's should be dismissed from this case, under recent binding case law from the United States Supreme Court and the Seventh Circuit on important issues related to Article III standing and pleading standards, including cases in the context of BIPA. Granting a stay will allow this Court to hear Macy's arguments, and it will protect Macy's from unfair

prejudice in being forced to expend significant resources to respond in discovery to specious claims involving Macy's stores across several states that no Plaintiff has ever visited.

3. Courts have broad discretion to grant a stay of discovery pending a motion to dismiss. *Sadler v. Retail Props. Of Am., Inc.*, No. 12 C 5882, 2013 WL 12333447, at *1 (N.D. Ill. Sept. 27, 2013). And, in determining whether to grant a stay, a court should consider whether a stay will: (1) "unduly prejudice or tactically disadvantage the non-moving party"; (2) "simplify the issues in question and streamline the trial"; and (3) "reduce the burden of litigation on the parties and on the court." *Id.* Macy's easily meets all three factors here.

4. As to the first prong, there is no risk of undue prejudice to Plaintiffs. Macy's has only been a formal participant in this litigation since June 7, 2021, when it was served with copies of the complaints filed in the underlying cases.[1] This is a far cry from the nearly *eighteen months* of litigation that has taken place between Plaintiffs and Clearview in this MDL and the underlying *Mutnick v. Clearview* litigation (20-cv-512), filed on June 22, 2020. Plaintiffs also cannot allege any prejudice by the fact that Clearview already commenced discovery. As explained below, Plaintiffs' claims against Clearview are very different than those against Macy's, and thus they will require different discovery. And, this Court's discovery order regarding Clearview was entered (1) in anticipation of a preliminary injunction motion against Clearview, which was never filed against Macy's (Dkts. 26–28); and (2) never challenged by Clearview, let alone on the

[1] This MDL commenced on January 8, 2021, consolidating year-old cases against Clearview. (Dkt. 1.) To date, and unlike Macy's, Clearview has not contested Plaintiffs' standing in the litigation. On March 24, 2021, and in the context of an anticipated preliminary injunction motion, this Court entered a discovery order, which did not cover Macy's, because Macy's was not yet a named defendant in the MDL. (Dkt. 28.) Plaintiffs named Macy's as a defendant on April 9, 2021. (Dkt. 29.) Macy's immediately asserted that Plaintiffs lacked subject matter jurisdiction without the existence of an underlying case (*see* Dkts. 56–57), which motivated Plaintiffs to file underlying cases against Macy's on May 25, 2021, and serve Macy's on June 7, 2021 (Dkt. 99). Macy's filed the Motion on June 28, 2021. (Dkt. 111.) Thus, less than sixty days have passed since Macy's was properly served, and less than a month since Macy's filed the Motion.

grounds that Plaintiffs lacked Article III standing under recent binding case law. Finally, the briefing schedule for the Motion will be completed by August 27, 2021, and was set in this manner to accommodate Plaintiffs' lead counsel's family vacation in early August. (*See* Dkt. 135.) Thus, Plaintiffs cannot argue any prejudice where this Court will be in a position to rule on the Motion by September 2021, resulting in only a very brief delay of discovery, to the extent such discovery is even necessary.

5. As to the second prong, a stay of discovery will simplify the issues before this Court. The litigation in this complex MDL is focused almost exclusively on the actions of Clearview, its related companies, and its executives — as evidenced by the fact that Macy's was not even *mentioned* in any of the contentious briefing on Plaintiffs' request for injunctive relief, or in the several amicus briefs that have been filed with the Court. Further, Plaintiffs have alleged novel theories of liability against Macy's under a web of Illinois, California and New York state law, most of which have nothing to do with biometric information. Eliminating these claims will not only simplify the issues in this case, but also potentially eliminate the need for discovery related to Macy's stores in states across the country. Put another way, Macy's asks this Court to determine, through its ruling on the Motion, what the parameters of any discovery are. The implications of this Court's ruling could eliminate irrelevant but highly burdensome discovery on Macy's national operations.

6. Furthermore, a stay is particularly warranted here because the Motion raises threshold problems with Plaintiffs' standing that could dispose of the claims against Macy's entirely. *See Bilal v. Wolf*, No. 06 C 6978, 2007 WL 1687253, at *1 (N.D. Ill. June 6, 2007) ("Stays of discovery are not disfavored and are often appropriate where the motion to dismiss can resolve the case — at least as to the moving party …, or where the issue is a threshold one, such as jurisdiction … [or] standing ….")*; accord Liggins v. Reicks*, 3:19-CV-50303, 2021 WL 2853359,

at *1 (N.D. Ill. July 8, 2021). Because Plaintiffs' standing to pursue their claims against Macy's remains in doubt, focusing on Macy's potentially dispositive motion is especially likely to "substantially streamline the proceedings." *Sterigenics U.S., LLC v. Kim*, No. 19 C 1219, 2019 WL 10449289, at *2 (N.D. Ill. Mar. 8, 2019).

7. As Macy's explains at length in its Motion, Plaintiffs lack Article III standing because they cannot allege any injury in fact that is fairly traceable to Macy's and that can be redressed through a decision against Macy's. Whereas Plaintiffs allege that Clearview violated BIPA by collecting biometric information through photographs on the internet without informed notice and written consent, and then compiling it into a database (the "Clearview Database"); Plaintiffs claim that Macy's is liable under BIPA and a variety of other state laws merely for *contracting* with Clearview. However, Plaintiffs do not allege that any of them actually entered a Macy's store, let alone a particular location, nor do Plaintiffs allege that Macy's took and submitted their photograph to Clearview for analysis. (*See* Dkts. 111, 112-1 (summarizing Plaintiffs' claims against Macy's).) Thus, even accepting as true Plaintiffs' scant allegations against Macy's, Plaintiffs have not alleged that Macy's caused them the kind of "concrete injury" Article III requires. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2206 (2021).

8. Moreover, because the Motion challenges Plaintiffs' Article III standing, adjudication of this Motion is potentially dispositive as to not only Macy's, but also other third-party companies that Plaintiffs allege Macy's somehow represents as a "class defendant." The Motion highlights the fact that the Consolidated Complaint does not come close to alleging plausible claims against Macy's, as *Iqbal-Twombly* requires, let alone contain the requisite allegations for the certification of a defendant class. *See Adams v. City of Indianapolis*, 742 F.3d 720, 728 (7th Cir. 2014) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged." (quoting *Iqbal v. Ashcroft*, 556 U.S. 662, 678 (2009))).

9. The final prong — the burden of litigation on the parties and the Court — weighs heavily in favor of Macy's. If a stay is not granted, Macy's will suffer significant prejudice by having to produce documents related to its operations in several states, across several stores, and related to claims for which Plaintiffs have not demonstrated Article III standing and that ultimately should be dismissed. *See Sadler*, 2013 WL 12333447, at *1 ("Granting the stay will reduce the burden on the parties until the Court rules on the motions to dismiss. . . ."). On the other hand, Plaintiffs cannot plausibly assert that they will be prejudiced by a brief stay of any discovery while this Court considers Macy's potentially dispositive Motion.

10. For these reasons, Macy's asks this Court to grant a stay of discovery pending this Court's consideration of and ultimate ruling upon the Motion, and for any other relief that this Court deems proper.

Dated: July 27, 2021

Respectfully submitted,

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