

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

In re Clearview AI, Inc., Consumer Privacy Litigation,	) ) ) ) ) )	Case No. 21-cv-135  Judge Sharon Johnson Coleman
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**MEMORANDUM OPINION AND ORDER**

Plaintiffs brought a first amended consolidated class action complaint in this multi-district litigation that alleges claims against defendant retailer Macy’s Retail Holdings, LLC (“Macy’s”) under the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* (“BIPA”), along with claims under California and New York law. Before the Court is Macy’s motion to dismiss brought pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the following reasons, the Court grants in part and denies in part Macy’s motion. Specifically, the Court grants Macy’s motion as to Count Ten, which alleges a claim under California’s Unfair Competition Law, as well as plaintiffs’ unjust enrichment claim based on New York common law in Count Fifteen. The Court denies the remainder of Macy’s motion.

**Background**

The Court presumes familiarity with its prior rulings in this multi-district litigation. In their complaint, plaintiffs contend that the Clearview defendants covertly scraped billions of photographs of facial images from the internet and then used artificial intelligence algorithms to scan the face geometry of each individual depicted in the photographs to harvest the individuals’ unique biometric identifiers and corresponding biometric information. Plaintiffs further assert that the Clearview defendants created a searchable database containing their biometrics that allowed users to identify unknown individuals merely by uploading a photograph to the database. The database can be searched remotely by licensed users of the Clearview web application.

Defendant Macy's is a private corporation that purchased access to the Clearview database and the biometrics contained therein to identify people whose images appeared in surveillance camera footage from Macy's retail stores. Plaintiffs assert that Macy's utilized Clearview's database over 6,000 times, each time uploading an image to the database to search for a match. Furthermore, plaintiffs contend that Macy's is similarly situated to other database users which comprise the Clearview Client class:

All non-governmental, private entities – including publicly-traded companies – who purchased access to, or otherwise obtained, the Biometric Database and then utilized the database to run biometric searches at a time when the Biometrics of one or more of the named Plaintiffs had already been captured, collected or obtained, and subsequently stored, by the Clearview Defendants.

In their complaint, plaintiffs bring a BIPA claim against Macy's under 740 ILCS 14/15(b), which prohibits private entities from collecting, capturing, purchasing, receiving through trade, or otherwise obtaining a person's biometric identifiers or information without first providing notice and consent. Similarly, plaintiffs bring a BIPA claim under 740 ILCS 14/15(c), which prohibits private entities from selling, leasing, trading, or profiting from a person's biometric identifiers or information. Plaintiffs also bring statutory and common law claims against Macy's under California and New York law.

### **Legal Standards**

A Rule 12(b)(1) motion challenges federal jurisdiction, and the party invoking jurisdiction bears the burden of establishing the elements necessary for subject matter jurisdiction, including standing. *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1244 (7th Cir. 2021); *International Union of Operating Eng'rs v. Daley*, 983 F.3d 287, 294 (7th Cir. 2020). Under Rule 12(b)(1), the Court accepts the well-pleaded factual allegations as true and construes all reasonable inferences in the plaintiff's favor when a defendant has facially attacked standing. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1007 (7th Cir. 2021).

A motion to dismiss brought pursuant to Rule 12(b)(6) for failure to state a claim tests the sufficiency of the complaint, not its merits. *Skinner v. Switzer*, 562 U.S. 521, 529, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011). When considering dismissal of a complaint, the Court accepts all well-pleaded factual allegations as true and draws all reasonable inferences in favor of the plaintiff. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam). To survive a motion to dismiss, plaintiff must “state a claim for relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A complaint is facially plausible when the plaintiff alleges enough “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

## Discussion

### *Article III Standing*

Macy’s first argues that the Court does not have subject matter jurisdiction by challenging plaintiffs’ Article III standing to bring their BIPA 15(b) and 15(c) claims as alleged in Counts One and Three of the first amended consolidated class action complaint. “Article III of the Constitution limits the federal judicial power to deciding ‘Cases’ and ‘Controversies’” and “as an essential part of a federal court’s authority under Article III, [the] standing doctrine ensures respect for these jurisdictional bounds.” *Prairie Rivers Network*, 2 F.4th at 1007. To establish standing under Article III, a plaintiff must show: (1) he suffered an injury-in-fact; (2) that is fairly traceable to defendant’s conduct; and (3) that is likely to be redressed by a favorable judicial decision. *Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 729 (7th Cir. 2020) (Barrett, J.).

In its motion, Macy’s contends that plaintiffs cannot establish Article III standing because they have failed to sufficiently allege a concrete and particularized injury-in-fact. To determine whether the disclosure of plaintiffs’ private information without their consent caused a sufficiently

concrete harm to support standing, the Court looks to both history and the judgment of Congress for guidance. *Gadelbak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (Barrett, J.). The historical inquiry asks, “whether the asserted harm has a ‘close relationship’ to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms.” *TransUnion, LLC v. Ramirez*, 141 S.Ct. 2190, 2200 (2021). As the *TransUnion* Court explained, “[v]arious intangible harms can also be concrete” including “reputational harms, disclosure of private information, and intrusion upon seclusion.” *Id.* at 2204.

Here, plaintiffs have sufficiently alleged that defendant’s use of their private information without the opportunity to give their consent as required under BIPA 15(b) caused them the concrete harm of violating their privacy interests in their biometric data. *See Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 627 (7th Cir. 2020) (defendants “inflicted the concrete injury BIPA intended to protect against, *i.e.* a consumer’s loss of the power and ability to make informed decisions about the collection, storage, and use of her biometric information.”). Therefore, plaintiffs have sufficiently alleged a concrete injury-in-fact for Article III standing purposes.

Likewise, plaintiffs have sufficiently stated a concrete injury-in-fact under BIPA 15(c) by alleging that Macy’s profited from using the Clearview database to prevent losses and improve customer experience, and, that as a result of Macy’s use, plaintiffs’ biometric information was compromised. Contrary to Macy’s argument that it merely uploaded photographs onto the Clearview database, plaintiffs allege that Macy’s purchased, obtained, accessed, and used the biometrics in the database and profited from that conduct. Meanwhile, Macy’s reliance on the Seventh Circuit’s decision in *Thornley* is misplaced because in that matter, the plaintiffs purposely avoided federal court jurisdiction by bringing bare BIPA 15(c) claims alleging that they were not injured as a result of any BIPA violations. *See Thornley*, 984 F.3d at 1246; *Thornley v. Clearview AI, Inc.*, No. 20-cv-3843, 2020 WL 6262356, at \*2 (N.D. Ill. Oct. 23, 2020) (Coleman, J.) (“Plaintiffs

purposely narrowed their claim to the general prohibition of Clearview selling and profiting from plaintiffs' biometric data and filed their lawsuit in state court where such actions are allowed without the constraints of Article III standing."); *see also Rosenbach v. Six Flags Enter. Corp.*, 129 N.E.3d 1197, 1207, 432 Ill.Dec. 654, 664 (Ill. 2019) ("an individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an 'aggrieved' person."). Such is not the case here.

The Court turns to the other factors of Article III standing, namely, that the injuries alleged are fairly traceable to Macy's conduct and that the injuries are likely to be redressed by a favorable judicial decision. In its motion, Macy's argues that the relief plaintiffs seek has no bearing on their need to protect their biometric information because Macy's does not "possess" this information. Viewing the allegations in plaintiffs' favor, they have alleged that Macy's has done more than merely possess their photos, including that Macy's used the Clearview database to obtain the biometrics of millions of Illinois residents for comparing the data against the photographs Macy's uploaded. With these allegations in mind, Macy's cannot point the finger at the Clearview defendants and then ignore its own conduct in using the Clearview database. Moreover, "the prospect of statutory damages shows that such an injury is redressable." *Bryant*, 958 F.3d at 621. Macy's Article III standing argument fails.

#### *Rule 12(b)(6) Challenges to BIPA Claims*

Macy's challenges plaintiffs' BIPA claims under Rule 12(b)(6) arguing plaintiffs have failed to adequately allege these claims under the federal pleading standards per *Iqbal* and *Twombly*. First, Macy's argues plaintiffs have failed to sufficiently allege their BIPA 15(b) claim because they do not allege the who, what, where, when, or how of this claim. From Macy's argument, it appears Macy's is arguing that plaintiffs must fulfill the heightened pleading standard under Rule 9(b), *see Mamalakis v. Anesthetix Mgmt. LLC*, 20 F.4th 295, 301 (7th Cir. 2021), which is simply not the case. Meanwhile,

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