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 MEMORANDUM IN SUPPORT OF ITS MOTION TO CERTIFY FOR IMMEDIATE APPEAL CERTAIN QUESTIONS ARISING FROM THE COURT'S JANUARY 27, 2022 ORDER

Defendant Macy's Retail Holdings, Inc. ("Macy's"), pursuant to 28 U.S.C. § 1292(b), submits this memorandum in support of its Motion to Certify for Immediate Appeal Certain Questions Arising from the Court's January 27, 2022 Order ("Motion for Certification"). Three questions presented in the Court's January 27, 2022 Order (the "Order," Dkt. 272) involve controlling questions of law, as to which there are substantial grounds for differences of opinion. An immediate appeal definitively answering those questions will materially advance this litigation.

INTRODUCTION

The importance of this case goes far beyond the dispute between Plaintiffs and Macy's. The Order has significant, immediate implications for hundreds of other companies that have allegedly contracted with Clearview and may soon be swept into this litigation. Plaintiffs purport to name Macy's as the representative of a putative defendant class comprised of over two hundred companies that were Clearview customers. This nearly unprecedented tactic underscores why the stakes surrounding the Motion for Certification are of the highest category.

The legal questions raised in the Order are crucially important to Article III standing and biometric privacy law. Plaintiffs claim that *everyone* (millions of people throughout the United States) whose information is contained in the Clearview Database can sue not only Clearview –

the collector and possessor of their biometric information – but also any Clearview customer that, like Macy's, uploaded a photo to the Clearview Database for identification and theft prevention purposes. Plaintiffs nowhere allege that they were the subject of one of Macy's searches (*i.e.*, a person in the photograph) or the object of the search results (*i.e.*, an individual identified by the algorithm), or that any adverse actions were taken against them as a result of any particular search. Plaintiffs do not even allege that they ever walked into a Macy's store.

TransUnion LLC v. Ramirez, 141 S.Ct. 2190 (2021) sheds significant light on what harm must be alleged to confer standing to maintain a data privacy claim in federal court as a matter of law. *TransUnion* underscored that statutory violations – without any actual harm caused by the defendant – are not enough to confer Article III standing. Although *TransUnion* addressed Fair Credit Reporting Act claims, it is a landmark ruling in the broader context of data privacy litigation. Reasonable minds can differ as to what *TransUnion* means for plaintiffs alleging BIPA claims without pleading actual harm. Allowing the Seventh Circuit to clarify the applicability of *TransUnion* to BIPA will not only materially advance the termination of the claims against Macy's, but also, the hundreds of claims Plaintiffs seek to assert against the "defendant class."

Furthermore, Plaintiffs have brought a host of California and New York statutory and common law claims based on the same allegations as their BIPA claims. The Order dismissed some of these claims, but ruled that most of them could proceed. This ruling has important implications for hundreds of companies doing business in California and New York, as it could be used to impose a novel Illinois statute on California and New York companies without their legislatures or courts creating – or even contemplating – the creation of such rights within their borders. Macy's respectfully contends that an interlocutory appeal would provide clarity – one way or another – as to the application of BIPA-like rights outside Illinois.

Finally, permitting an interlocutory appeal will conserve judicial and party resources. A

ruling by the Seventh Circuit will clarify whether Plaintiffs can proceed on their claims as a matter of law. If those claims are barred, it will save the parties and this Court the significant time and resources required to adjudicate them. It will also conserve countless resources in other related and copycat cases. On the other hand, if the Seventh Circuit affirms the Order, it may encourage the parties to narrow the issues by agreement or even promote a potential settlement.

Macy's respectfully asks this Court to certify three legal issues for interlocutory appeal to the Seventh Circuit to settle the positions and expectations of the parties and others interested, and to ensure that significant resources are not wasted in years of potentially unnecessary litigation:

1. Whether, in light of the U.S. Supreme Court's decision in *TransUnion*, allegations of bare statutory violations of Illinois' Biometric Information Privacy Act, unaccompanied by allegations of actual harm, confer Article III standing.

2. Whether, as a matter of law, a company's use of a biometric database for loss prevention suffices to allege "profit" under Section 15(c) of BIPA.

3. Whether California and New York statutes and common law protect the same set of rights secured by BIPA.

All of these questions are issues of first impression. *See Brewton v. City of Harvey*, 319 F. Supp. 2d 890, 893 (N.D. Ill. 2004) (granting certification motion and noting questions are "contestable" where they appear to be matters of first impression).

PROCEDURAL POSTURE AND FACTUAL BACKGROUND

On April 9, 2021, Plaintiffs filed the Complaint against Clearview[1] and Macy's. Dkt. 29. The Complaint alleges very different facts against Macy's than it does against Clearview, differences that are relevant to the legal questions raised in this Motion for Certification.

Plaintiffs' Allegations against Clearview

Plaintiffs allege Clearview covertly scraped three billion photographs of facial images from the Internet, including photographs Plaintiffs posted of themselves and others on public websites

[1] Plaintiffs also sued individuals affiliated with Clearview, collectively referred to as the "Clearview Defendants."

while residing in Illinois, New York, California and Virginia, without Plaintiffs' consent, using artificial intelligence algorithms to scan face geometry. *See e.g.*, Complaint, ¶¶ 43–51, 56-57. Clearview purportedly used the scraped images to create the "Clearview Database," consisting of "the Biometrics of millions of American residents, including residents of Illinois, California, New York and Virginia." *Id.* ¶ 5. Clearview allegedly sold software subscriptions to companies so they could "identify unknown individuals merely by uploading a photograph to the database." *Id.* ¶ 1.

Plaintiffs' Allegations against Macy's

The Complaint never alleges that any Plaintiff visited a Macy's store or that Macy's photographed them in a Macy's store, submitted their photo to Clearview, or took any action against them based upon any findings from the Clearview Database. To the contrary, Plaintiffs' legal theories are not predicated on such facts. *See* Plaintiffs' Opposition to Macy's Motion to Dismiss, Dkt. 152, pp. 5, 8 (agreeing Plaintiffs' claims are not based on entering a Macy's store).

Instead, Plaintiffs allege each time Macy's and other Clearview customers uploaded a photo to the Clearview Database, Clearview's algorithm compared the biometric information Clearview collected from the photo subject's face (which Plaintiffs concede is not them) to the biometric information of millions of individuals in the Clearview Database, including Plaintiffs. *Id.* ¶¶ 4, 23.[2] Plaintiffs claim this act alone confers Article III standing on them and millions of others to bring BIPA claims (and other claims) against Macy's and all Clearview's customers.

Plaintiffs' Claims against Macy's

Plaintiffs bring two counts against Macy's under BIPA: Counts I and III, for purportedly violating Sections 15(b) and (c) of BIPA by "collecting" and "profiting" from Plaintiffs' biometric information without consent. Plaintiffs also bring various statutory and common law claims against Macy's under the laws of California and New York based on the exact same conduct that comprises

[2] For ease of reference, Macy's cites to the paragraph numbers used in Plaintiffs' proposed First Amended Consolidated Class Action Complaint. Dkt. 109-1.

Plaintiffs' BIPA claims, including: California's Unfair Competition Law (Count X); the California Civil Code's "commercial misappropriation" provisions (Count XI); California common law "right of publicity" (Count XII); California's Constitution (Count XIII); New York's civil rights statutory laws (Count XIV); and New York common law unjust enrichment (Count XV).[3]

Plaintiffs' Attempt to Have Macy's Stand in the Shoes of over 200 Companies

Plaintiffs did not merely sue Macy's in its individual capacity. Rather, the Complaint styles Macy's as a representative of the "Clearview Client Class," which is defined as:

> All non-governmental, public entities – including publicly-traded companies – who purchased access to, or otherwise obtained, the [Clearview] 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.

Dkt. 29, ⁋ 65. Plaintiffs claim there are at least 200 companies in the defendant class. *Id.* ⁋ 32.

The January 27 Order

On January 27, 2022, the Court issued the Order, finding Plaintiffs had Article III standing to assert claims against Macy's and plausibly alleged BIPA claims against it. The Court dismissed Counts X (California's Unfair Competition Law) and XV (New York common law unjust enrichment), but allowed the remaining non-BIPA statutory and common law claims to proceed.

ARGUMENT

A district court may certify questions for interlocutory appeal if the relevant "order involves a controlling question of law as to which there is substantial ground for difference of opinion," and "if an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also A.D. by & through Serrano v. Credit One Bank, N.A.*, No. 14 C 10106, 2016 WL 10612609, at *1 (N.D. Ill. Dec. 11, 2016) (granting

[3] Count XVI of the Complaint asserts a claim against Macy's under the Declaratory Judgment Act, 28 U.S.C. § 2201, but that statute "provides no independent source of federal subject-matter jurisdiction." *Manley v. Law*, 889 F.3d 885, 893 (7th Cir. 2018). Macy's reserves the right to challenge the non-dismissal of this claim at the appropriate time.

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