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

In re: Clearview AI, Inc. Consumer Privacy Litigation	Civil Action File No.: 1:21-cv-00135 Judge Sharon Johnson Coleman Magistrate Judge Maria Valdez

PLAINTIFFS' OPPOSITION TO DEFENDANT MACY'S, INC.'S MOTION TO CERTIFY FOR IMMEDIATE APPEAL CERTAIN QUESTIONS ARISING FROM THE COURT'S JANUARY 27, 2022 ORDER

INTRODUCTION

After this Court largely denied the motion to dismiss of Defendant Macy's, Inc.[1] ("Macy's" or "Defendant"), Macy's now seeks the proverbial second bite of the apple through its motion to certify various issues for immediate appeal. In its motion, Defendant ignores this Court's well-reasoned January 27, 2022 Memorandum and Opinion Order (the "Order") (Dkt. 272) and fails to properly apply the legal standard governing motions brought pursuant to 28 U.S.C. § 1292(b). When this Court's Order and the governing legal standard are properly considered, it is clear that Defendant's motion does not present any controlling and contestable question of law, the resolution of which would speed up this litigation. The Court should deny the motion.

[1] The First Amended Consolidated Class Action Complaint names Macy's, Inc as a defendant. Dkt. 116 at 1, ¶ 19. Yet, Macy's brings its motion on behalf of "Macy's Retail Holdings, Inc," a non-party. *See* Dkt. 284. Macy's also cites to "Plaintiffs' proposed First Amended Consolidated Class Action Complaint" (*see id.* at 4, n.2, instead of the actual filed version of the complaint – which is Dkt. No. 116.

ARGUMENT

I. Legal Standards.

"Requests for interlocutory review are for exceptional cases." *Feit Elec. Co., Inc. v. CFL Tech., LLC*, No. 13-cv-9339, 2021 WL 4061741, at *1 (N.D. Ill. Sept. 7, 2021) (Coleman, J.); *see also Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012) (noting that interlocutory appeals are generally "frowned on in the federal judicial system"). A party seeking an interlocutory appeal under § 1292(b) must satisfy four statutory criteria: "(1) there must be a question of law; (2) the question of law must be controlling; (3) the question of law must be contestable; and (4) resolution of the question of law must speed up the litigation." *Feit Elec.*, 2021 WL 4061741, at *1 (citing *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000)). "Unless *all* these criteria are satisfied, the district court may not and should not certify its order . . . for an immediate appeal under section 1292(b)." *Ahrenholz*, 219 F.3d at 675 (emphasis in original). Whether to certify an issue for appeal under § 1292(b) is within a district court's discretion. *Feit Elec. Co.*, 2021 WL 4061741, at *1.

In the context of § 1292(b), a question of law goes to the "meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Ahrenholz*, 219 F.3d at 676. "A mere disagreement in how a court applies the law to the facts of a case is not grounds for interlocutory appeal." *Feit Elec. Co.*, 2021 WL 4061741, at *1. Further, the mere fact that a party disagrees with a court's finding does not provide grounds for a § 1292(b) interlocutory appeal. *See Gabiola v. Mugshots.com, LLC*, No. 16 C 02076, 2017 WL 11586992, at *2 (N.D. Ill. Dec. 8, 2017) (Coleman, J.).

II. Defendant Has Not Carried Its Burden With Respect to Its Claim that Plaintiffs Have Failed to Establish Article III Standing.

Ignoring Plaintiffs' allegations and the Court's ruling, Defendant seeks to certify the issue of "[w]hether, in light of the U.S. Supreme Court's decision in *TransUnion*, allegations of bare statutory violations of Illinois' Biometric Information Privacy Act ["BIPA"], unaccompanied by allegations of actual harm, confer Article III standing." *See* Dkt. 284 at 3. But Plaintiffs have not made "allegations of bare statutory violations [of BIPA], unaccompanied by allegations of actual harm." Rather, as the Court held in its Order, "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." Dkt. 272 at 4; *see also* Dkt. 116 ¶¶ 62, 81, 84.

The Court based its holding on controlling Seventh Circuit precedent. *See id.* (citing *Bryant v. Compass Grp USA, Inc.*, 958 F.3d 617, 627 (7th Cir. 2020)). In *Bryant*, the Seventh Circuit found Article III standing where the defendant "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." 958 F.3d at 627; *see also id.* at 619 ("a failure to follow section 15(b) of the law leads to an invasion of personal rights that is both concrete and particularized."). As in *Bryant*, Plaintiffs have alleged the concrete injury BIPA is intended to protect against – *i.e.*, the loss of their power and ability to make informed decisions about the collection, storage, and use of their biometric information. *See* Dkt. 116 ¶¶ 62, 81, 84.

Contrary to Defendant's contention (*see* Dkt. 284 at 6-8), the Supreme Court's opinion in *TransUnion v. Ramirez,* 141 S.Ct. 2190 (2021), does not transform this Court's straightforward and uncontestable ruling into one that is proper for interlocutory appeal. Indeed, *TransUnion* bolsters this Court's ruling.

In *TransUnion*, the Supreme Court considered whether two groups of class members asserting claims under the Fair Credit Reporting Act suffered a concrete injury in fact under Article III. *Id.* at 2208-2213. With respect to the first group of class members, the defendant had disseminated a misleading credit report to a third party. *Id.* at 2208-09. In contrast, while a misleading remark appeared on the credit reports of the second group of class members, those reports were not disseminated to a third party. *Id.* at 2209. Based on those facts, the Supreme Court held that the first group of class members had suffered a concrete injury-in-fact under Article III, whereas the second group had not. *Id.*

Contrary to Defendant's contention (Dkt. 284 at 7), *TransUnion* does not stand for the proposition that a victim of a privacy harm can only suffer an injury-in-fact if the information is disseminated to a third party. As this Court explained in the Order: "[a]s the *TransUnion* Court explained, '[v]arious intangible harms can also be concrete' including 'reputational harms, disclosure of private information, and intrusion upon seclusion.'" Dkt. 272 at 4 (citing *TransUnion*, 141 S.Ct. at 2200).

Plaintiffs, here, have sufficiently alleged they suffered concrete harm when Defendant obtained their sensitive biometric data without Plaintiffs having had the opportunity to consent to that obtainment and subsequent use. *See Bryant*, 958 F.3d at 627. While Defendant tries to downplay its conduct, it did "more than merely possess [Plaintiffs'] photos, including that Macy's used the Clearview database to obtain the biometrics of millions of Illinois residents," including the biometric data of the Illinois Plaintiffs, "for comparing the data against the photographs Macy's uploaded." Dkt. 272 at 5. Nothing about *TransUnion* results in there being a controlling and contestable question of law with respect to Plaintiffs' Article III standing.[2]

[2] While it does not appear that Defendant claims that Plaintiffs have failed to sufficiently allege an Article III injury-in-fact with respect to their BIPA § 15(c) claim, out of an abundance of caution, Plaintiffs briefly

Unable to find a controlling and contestable question of law that would provide grounds for a § 1292(b) interlocutory appeal, Defendant makes one up. Specifically, Defendant incorrectly claims that the "Order cites to *Rosenbach [v. Six Flags Entertainment Corp.*] for the proposition that any person 'aggrieved' by a violation of BIPA has established a concrete injury-in-fact for purposes of Article III even if they have not alleged an actual injury or other adverse effect beyond a violation of rights under the statute." *See* Dkt. 284 at 6, n.4. However, the Court cited *Rosenbach* for the opposite proposition – namely, that federal jurisdiction could be avoided by a plaintiff who asserts "bare BIPA 15(c) claims alleging that they were not injured as a result of any BIPA violations." Dkt. 272 at 4-5. The Court specifically found that "*[s]uch is not the case here.*" *Id.* at 5 (emphasis added). While the Court addressed this issue in the context of BIPA § 15(c), its finding that "such is not the case here," applies with equal force to Plaintiffs' BIPA § 15(b) claim.

Defendant's contention that Plaintiffs failed to properly plead an injury-in-fact under well-settled standards governing Fed. R. Civ. P. 12(b)(6) motions (*see* Dkt. 284 at 8-10) lacks merit. *See In re: Mack Indust., Ltd.*, No. 21-cv-3123, 2021 WL 5280937, at *1 (N.D. Ill. Nov. 12, 2021) (Coleman, J.) ("A mere disagreement in how a court applies a well-settled standard to the particular facts of a case is not grounds for interlocutory appeal.").

Similarly, Defendant's contention that "reasonable minds can differ" as to whether Plaintiffs' allegations are enough to confer Article III standing (*see* Dkt. 284 at 8) is another improper attack on this Court's application of the Rule 12(b)(6) standard. Moreover, the contention raises a question of fact as to what Plaintiffs' allege their injury to be. As discussed above,

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address that claim. In its Order, the Court properly found that Plaintiffs "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." Dkt. 272 at 4. As the Court found, "plaintiffs allege that Macy's purchased, obtained, accessed, and used the biometrics in the database and profited from that conduct." *Id.*

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