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-00135
	)	Hon. Sharon Johnson Coleman
	)	Hon. Maria Valdez

CLEARVIEW DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION AND CLARIFICATION OF POINTS IN THE COURT'S FEBRUARY 14, 2022 MEMORANDUM OPINION AND ORDER AND PARTIAL MOTION TO DISMISS COUNTS 3-4, 8-12, AND 14 FOR LACK OF SUBJECT-MATTER JURISDICTION

Defendants Clearview AI, Inc. ("Clearview"), Rocky Mountain Data Analytics LLC ("RM"), Hoan Ton-That, Richard Schwartz, and Thomas Mulcaire (collectively, the "Clearview Defendants"), through their counsel, respectfully submit this memorandum of law in support of their motion for reconsideration of the Court's February 14, 2022 Memorandum Opinion and Order (Dkt. 279) (the "Order") and partial motion to dismiss Counts 3-4, 8-12, and 14 of the Complaint (Dkt. 116) ("Compl.") for lack of subject-matter jurisdiction.

INTRODUCTION

The Clearview Defendants respectfully request that the Court reconsider two findings in the MTD Order: that (i) Plaintiffs have Article III standing to bring the state-law claims in Counts 8-12 and 14 and (ii) Defendants Thomas Mulcaire and RM failed to adequately raise and/or waived their personal-jurisdiction defenses at the motion to dismiss stage. The Clearview Defendants understand that motions for reconsideration serve the limited purpose of correcting "manifest errors of fact or law" but respectfully submit that these holdings meet that standard.

In the MTD Order, the Court found two bases for Article III standing in connection with the state-law claims in Counts 8-12 and 14. First, the Court held that the "nonconsensual taking of plaintiffs' private information is a concrete harm because the possibility of misuse is ever present." (Order at 15.) Second, the Court concluded that Plaintiffs "sufficiently alleged that defendants' disclosure of their private information without their consent caused them the concrete harm of violating their privacy interests in their biometric data." (*Id.*) The Clearview Defendants respectfully submit that the first rationale constitutes "manifest error" because it is contrary to controlling precedent in *Thornley v. Clearview AI, Inc.*, which held that virtually identically situated plaintiffs lacked Article III standing, and *TransUnion LLC v. Ramirez*, which held that plaintiffs lacked standing to bring claims based on a theoretical risk of future harm.

As to the second rationale, the Court relied on an allegation Plaintiffs know is demonstrably false—that the Clearview Defendants have disclosed Plaintiffs' facial vectors[1] to third-parties without Plaintiffs' consent. The Court's acceptance of this allegation as true was not inappropriate, since the Clearview Defendants' motion to dismiss was a facial challenge requiring the Court to treat all well-pled allegations as true. But since challenges to subject-matter jurisdiction may raise facts outside the pleadings, the Clearview Defendants now move for a second time pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss these claims for lack of Article III standing, this time citing facts outside the pleadings that have been in the record for almost two years. In light of this evidence, Plaintiffs cannot establish standing for Counts 8-12 and 14. For the same reasons, Plaintiffs lack Article III standing to bring their § 15(c) BIPA claims in Counts 3-4, since they conflict with *Thornley*/*TransUnion* and are based on demonstrably untrue allegations.

The Clearview Defendants also submit that the Court's waiver holdings as to Mr. Mulcaire and RM's personal-jurisdiction and government-contractor defenses constitute "manifest error." On personal jurisdiction, the Court found waiver because the defense was made in a "cursory footnote." The Clearview Defendants submit that this holding was "manifest error" because, although the argument was brief, it was fully developed and cited 15 pages of briefing on this topic. Under well-established law, this is sufficient to avoid waiver. On the government-contractor defense, the Court found waiver because the defense was supposedly raised for the first time on reply. The Clearview Defendants submit that this holding was "manifest error" because the argument was made in response to a new argument in Plaintiff's opposition and relied on a key case decided after the Clearview Defendants filed their motion to dismiss. On the merits, Mr.

[1] Plaintiffs allege that facial vectors are "biometric information" or "biometric identifiers" as the terms are used in BIPA. The Clearview Defendants dispute this allegation but accept it as true solely for this motion.

Mulcaire and RM must be dismissed, since all allegations against them concern a single transaction with a government entity, which is facially exempt from BIPA, leaving no basis for jurisdiction.

Finally, the Clearview Defendants seek clarification that Mr. Mulcaire has been dismissed. The parties appear to interpret the MTD Order differently on this point and clarification is needed.

BACKGROUND

A. The Court Finds That Plaintiffs Plausibly Alleged Article III Standing.

On April 9, 2021, Plaintiffs filed their first consolidated complaint, alleging violations of §§ 15(b)-(e) of BIPA by Clearview, Hoan Ton-That, and Richard Schwartz, but asserting no claims against Mr. Mulcaire or RM. Throughout the complaint, Plaintiffs alleged that Clearview disclosed Plaintiffs' biometric information to third-parties. (*See* Dkt. 29 ¶¶ 13, 20, 30, 42, 52-53, 56, 58, 60-61, 89, 111, 118, 177, 193, 198, 201, 202-204, 206.) On the same day, Plaintiffs moved for a preliminary injunction, which required the parties to submit evidence on this topic, all of which showed that Clearview never discloses its facial vectors. For example, Clearview's General Counsel, Thomas Mulcaire, submitted a declaration in which he stated under oath that:

- "Clearview does not provide the . . . facial vectors of any individuals to users of the app." Mulcaire Decl. (Dkt. 43-1) ¶ 14.

- "Under no circumstances does Clearview sell, lease, trade, disseminate, disclose, or provide access to any facial vectors to its customers." *Id.* ¶ 15.

- "At no point in using Clearview's app, do any Clearview customers collect, capture, purchase, receive, or obtain any facial vector related to any individual. Clearview's customers are never able to see, access, or control in any way any facial vectors of any individual." *Id.* ¶ 16.[2]

Plaintiffs had an opportunity to question Mr. Mulcaire about this testimony during a full-day deposition less than two weeks later, during which Mr. Mulcaire testified under oath that:

[2] In opposition to the *Mutnick* plaintiffs' motion for preliminary injunction, Mr. Mulcaire submitted a similar declaration in May 2020 (*Mutnick* Dkt. 56-2) (Kurtzberg Decl. Ex. 1) that likewise stated that "Clearview does not . . . disseminate . . . any biometric information to its customers." *Id.* ¶ 10.

- "[T]he user would never see the facial vectors. They would—it would just be presented with the photos and links that are, you know, responsive to their search." Mulcaire Dep. (Kurtzberg Decl. Ex. 2) at 182.

- Q: "You made an affirmative statement here that, 'Clearview does not sell, lease, trade, or disseminate any biometric information to its customers,' and I'm asking when you use that phrase, what did you mean?" A: "I meant that we only sell photos—or we only provide [photos] and URLs to our customers, none of which are biometric information by any conceivable stretch of the imagination." *Id.* at 220.

- "You know, I think it's important to understand that Clearview neither provides facial vectors nor anything that could be conceivably termed as biometric information, you know, via sale, lease, trade, dissemination or disclosure, you know, to its users." *Id.* at 225.

By contrast, Plaintiffs presented no evidence that Clearview has ever disclosed Plaintiffs'—or anyone else's—biometric information. Ultimately, the Court denied Plaintiffs' motion because Plaintiffs had failed to establish irreparable harm. (*See* Dkt. 105.)

On May 25, 2021, Plaintiffs filed a second complaint, again alleging violations of §§ 15(b)-(e) of BIPA, but adding Macy's as a Defendant, along with Mr. Mulcaire and RM based on a single unconsummated alleged transaction with the Ill. Secretary of State. (*See, e.g.*, Dkt. 90 ¶¶ 14-15.) Although Mr. Mulcaire had testified less than two weeks earlier that Clearview never discloses facial vectors to its customers, Plaintiffs repeated this allegation no fewer than 18 times in the complaint. (*See id.* ¶¶ 11, 18, 28, 40, 48-49, 52, 54, 56-57, 85, 107, 114, 130, 135, 138-141, 143.)

That month, Plaintiffs filed a motion to intervene in the *Thornley* action, which was then pending in Illinois state court. In opposing that motion, the *Thornley* Plaintiffs stated—based in part on Mr. Mulcaire's declaration and in part on discovery in *Thornley*—that they believed there was no good-faith basis to allege (as Plaintiffs have here) that Clearview disclosed biometric information in Illinois. (*See* Kurtzberg Decl. Ex. 3 (Thornley Pl.'s' Opp. Brief) at 9 ("[C]ritically, Plaintiffs do *not* see any good-faith basis for alleging that Clearview disclosed or disseminated their biometric data to users of Clearview's facial recognition software application in Illinois.").)

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