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 CLEARVIEW DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE COURT'S FEBRUARY 14, 2022 MEMORANDUM AND OPINION ORDER AND PARTIAL MOTION TO DISMISS

INTRODUCTION

The Court's twenty-three page Memorandum Opinion and Order (the "Order") regarding the motion to dismiss of Defendants Clearview AI, Inc. ("Clearview"); Hoan Ton-That; Richard Schwartz; Rocky Mountain Data Analytics LLC ("Rocky Mountain"); and Thomas Mulcaire (collectively, "Defendants") reflects the Court's careful consideration of Defendants' motion. *See* Dkt. 279. In the Order, the Court largely rejected Defendants' arguments. *See id.* Unwilling to accept defeat, Defendants now accuse: (a) the Court of having made multiple "manifest errors of law"; and (b) Plaintiffs of having made false allegations to support jurisdiction. The accusations are unfounded. It is Defendants who made a manifest error in filing the present motion.

Defendants' motion for reconsideration fails because the Court did not commit any manifest errors of law. The Court properly determined that: (a) Plaintiffs have standing to assert their state claims; and (b) Defendants waived their personal jurisdiction and government-contractor arguments as to Mulcaire and Rocky Mountain. Defendants do not come close to meeting their heavy burden in seeking reconsideration.

Defendants' renewed motion to dismiss based on lack of jurisdiction also fails. As a threshold matter, the motion only addresses one of the bases upon which the Court found Plaintiffs have standing. Because the motion does not allege that there is no federal jurisdiction, it necessarily lacks merit. Moreover, contrary to their contention, Defendants do not raise a proper factual challenge to jurisdiction. The motion is premised on inadmissible and incompetent evidence. Even if the factual challenge were proper, the actual evidence in the case shows that Defendants disclosed Plaintiffs' and class members' biometric information. Indeed, such disclosure is the foundation of Defendants' entire business model.

Finally, while it is clear that the Court did not dismiss Mulcaire from this action, Defendants contend clarification is needed. Plaintiffs respectfully submit the Court should make clear that Mulcaire has not been dismissed from the case.

ARGUMENT

I. The Court Should Deny the Motion for Reconsideration Because It Did Not Commit Any Manifest Error of Law.

A. Legal Standards.

"A motion to reconsider is only appropriate to 'correct manifest errors of law or fact, to present newly discovered evidence, or where there has been an intervening and substantial change in the controlling law since the submission of the issues to the court.'" *O'Connor v. Bd. of Educ. of City of Chicago*, No. 14-cv-10263, 2018 WL 11305168, at *1 (N.D. Ill. May 30, 2018) (*quoting Sperling & Slater, P.C. v. Hartford Cas. Ins. Co.*, No. 12 C 761, 2012 WL 6720611, at *2 (N.D. Ill. Dec. 27, 2012)). A court should grant a motion to reconsider only in rare circumstances. *Id.* Thus, a party moving for reconsideration bears a heavy burden. *Id.*

B. The Court Did Not Commit a Manifest Error of Law in Finding that Plaintiffs Have Article III Standing to Assert Their State Claims.[1]

Defendants contend the Court committed a manifest error of law in finding Plaintiffs had standing to assert their state claims[2] because the Court's ruling contradicts *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241 (7th Cir. 2021), and *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (2021). Dkt. 308 at 11.[3] Not so.

As a threshold matter, Defendants have waived any *Thornley*-based argument. Defendants first raised the argument in their reply in support of their motion to dismiss and, even then, only did so in a perfunctory and undeveloped manner. *See* Dkt. 149 at 22; *see also White v. United States*, 8 F.4th 547, 552 (7th Cir. 2021). Absent waiver, the argument still fails. As this Court previously has found, the plaintiffs in *Thornley* specifically alleged that "the class members *did not suffer any injury under § 15(c)* 'other than statutory aggrievement.'" *Thornley v. Clearview AI, Inc.*, No. 20-cv-3843, 2020 WL 6262356, at *2 (N.D. Ill. Oct. 23, 2020) (emphasis added). On that record, this Court held that "plaintiffs did not allege an injury-in-fact, and thus Clearview has failed to establish Article III standing." *Id.*

In affirming this Court's decision, the Seventh Circuit noted that "allegations matter" – *i.e.*, "[o]ne plaintiff may fail to allege a particularized harm to himself, while another may assert one." *Thornley*, 984 F.3d at 1246. The Seventh Circuit further noted that the *Thornley* "complaint

[1] In their initial motion to dismiss, Defendants did not seek dismissal of Counts 3 and 4 of the operative complaint which allege violations of § 15(c) of Illinois' Biometric Information Privacy Act ("BIPA"), 740 Ill. Comp. Stat. 14/1, *et seq.* Defendants' bases for seeking dismissal of those counts in their present motion mirror their arguments for seeking reconsideration/dismissal of Plaintiffs' state claims in Counts 8-12 and 14. For the same reasons the arguments fail as to the state claims, they fail as to the BIPA § 15(c) claims.
[2] Defendants seek reconsideration of the Court's jurisdictional ruling as to Counts 8-12 and 14. However, the Court previously dismissed Count 10. Dkt. 279 at 17-18.
[3] Citations to docketed entries are to the CM/ECF-stamped page numbers.

concedes that none of the named plaintiffs, and no class member, 'suffered any injury as a result of the violations of Section 15(c) of BIPA other than the statutory aggrievement alleged [in the complaint].'" *Id.* (emphasis added). As a result, the Seventh Circuit held that the plaintiffs "have described only a general, regulatory violation, not something that is particularized to them and concrete." *Id.* at 1248. The Seventh Circuit further held that others may sue and include an allegation of injury and noted that "there are a number of class actions pending against Clearview, many of which appear to be broader than [*Thornley*]." *Id.*

Unlike the plaintiffs in *Thornley*, Plaintiffs, here, did not formulate their allegations "to steer clear of federal court." *See id.* Rather, Plaintiffs have included "allegations of injury" in the operative complaint, including allegations that Defendants' nonconsensual taking and use of Plaintiffs' biometrics have exposed them to numerous imminent and certainly impending injuries. *See* Dkt. 116 ¶¶ 61-64. As the Court correctly held, "the nonconsensual taking of plaintiffs' private information is a concrete harm because the possibility of misuse is ever present." Dkt. 279 at 15. That is especially true here, where the magnitude of Defendants' misconduct has been concealed from Plaintiffs and class members. *See* Dkt. 116 ¶ 63; *see also Thornley,* 984 F.3d at 1247 (injury may include allegations that "the act of selling [the] data amplified the invasion of . . . privacy that occurred when the data was first collected, by disseminating it to some unspecified number of other people."). Because this case and *Thornley* involve different allegations, Defendants' claim that the Court's ruling on their motion to dismiss, if proper, would require a different result in *Thornley* (*see* Dkt. 308 at 10-11), lacks merit.

Defendants' contention regarding *TransUnion* (Dkt. 308 at 11) also fails. According to Defendants, the Court failed to address "*TransUnion*'s core holding – that individuals whose credit reports had not been disclosed to third-parties had not suffered a concrete harm and thus lacked

standing." *See id.* at 11, n.3. As this Court recently held in denying Macy's, Inc.'s motion to certify an interlocutory appeal, unlike here, the violation of the statute at issue in *TransUnion* was analogous to the common-law tort of defamation – which requires publication. *See* Dkt. 314 at 4. Here, Defendants' alleged state law violations are more analogous to the torts of trespass, *see Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 624 (7th Cir. 2020), and intrusion upon seclusion because Defendants obtained Plaintiffs' and class members' private information without their consent and deprived them of their ability to make informed decisions about the use of that information. *See* Dkt. 314 at 3 (discussing *TransUnion* in context of BIPA § 15(b)).

C. The Court's Holding that Mulcaire and Rocky Mountain Waived Their Personal Jurisdiction Argument Was Not a Manifest Error of Law.

In Defendants' motion to dismiss, they perfunctorily asserted in a four-line footnote that: (a) "Mulcaire and Rocky Mountain also should be dismissed because the Court lacks personal jurisdiction over them"; and (b) "[f]or similar reasons previously discussed by Clearview, Mulcaire and Rocky Mountain did not purposefully avail themselves of Illinois to establish minimum contacts with the state." *See* Dkt. 88 at 12, n.2. Defendants did not make any attempt to describe how the fact-specific arguments previously made and discussed as to Clearview, Ton-That and Schwartz were "similar to" the unspecified bases upon which Defendants perfunctorily sought dismissal of Mulcaire and Rocky Mountain. *See id.* This Court properly addressed the perfunctory and undeveloped argument by finding that Defendants waived it. Dkt. 279 at 11, n.2.

Defendants now seek to blame the Court for their failure to make a proper argument, accusing the Court of committing manifest error. *See* Dkt. 308 at 14. According to Defendants, the four-line footnote was "fully developed" and "cited to substantial authority." *Id.* The argument is specious. Defendants made no effort to discuss the nature of their jurisdictional argument as to

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