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
	)	Magistrate Judge Maria Valdez

THE CLEARVIEW DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' AMENDED MOTION TO EXTEND THE FACT DISCOVERY DEADLINE AND TO INCREASE The NUMBER OF DEPOSITIONS PERMITTED UNDER FED. R. CIV. P. 30(a)(2)

Defendants Clearview AI, Inc. ("Clearview"), Rocky Mountain Data Analytics LLC, Hoan Ton-That, Richard Schwartz, and Thomas Mulcaire (collectively, the "Clearview Defendants"), by and through their counsel, respectfully submit this memorandum of law in opposition to Plaintiffs' Amended Motion to Extend the Fact Discovery Deadline and to Increase the Number of Depositions Permitted Under Fed. R. Civ. P. 30(a)(2) (Dkt. 441) (the "Motion").

INTRODUCTION

The Court clearly stated that the September 26, 2022 fact discovery deadline is a "FINAL extension" (Dkt. 329), and as recently as August 10, 2022, confirmed that this date remains a "hard deadline." (Dkt. 407 at 2.) Now, over 16 months into discovery, Plaintiffs respond by arguing that "circumstances have changed" to justify their request to extend the deadline for fact discovery yet again. Plaintiffs attempt to distort the chronology and events in this case, but the record makes clear the lack of diligence with which Plaintiffs have chosen to litigate this case. Each of the points they raise is unavailing:

- First, Plaintiffs argue that "document productions are ongoing, including Court-ordered document productions." (Dkt. 441 at 2.) While a small amount of data remains to be

produced by the Clearview Defendants in the coming days, the Clearview Defendants already informed Plaintiffs that they would complete the Court-ordered document productions by September 2, 2022—well before the fact discovery deadline. (Ex. 1.) The Clearview Defendants' document production was substantially complete months ago, and the few remaining documents to be produced are largely in response to Plaintiffs' belated discovery requests. Moreover, the Court set specific dates for the Clearview Defendants to complete their document production with the upcoming discovery deadline in mind.

- Second, Plaintiffs claim they "are engaged in ongoing discovery disputes" with the Clearview Defendants. (Dkt. 441 at 2.) The Court's August 18, 2022 Order on Plaintiffs' recent motion to compel already resolved many of those alleged discovery disputes. And Plaintiffs should have raised any additional purportedly "ongoing disputes"—which concern Clearview's source code—months ago. That Plaintiffs waited until the final weeks of discovery to make new and unsupported claims does not provide good cause to extend the discovery schedule.
- Third, Plaintiffs state they are "continuing to investigate" issues related to Macy's electronically stored information. (*Id*. at 2.) However, Macy's was also subject to the Court's order setting the "FINAL" deadline for fact discovery. (Dkt. 329.) And any discovery relating to alleged spoliation can proceed in parallel with other ongoing discovery. Plaintiffs fail to explain why this discrete issue warrants a wholesale extension of the fact discovery deadline for all Defendants.
- Fourth, Plaintiffs state their "inspection of . . . source code . . . is ongoing." (Dkt. 441 at 2.) However, as the Clearview Defendants have explained before, Plaintiffs had

ample opportunity to review the source code after the Amended Agreed Confidentiality Order was entered on *October 5, 2021*—but despite the numerous invitations from the Clearview Defendants, Plaintiffs refused to review the source code until *May 2022*. (Dkt. 326 at 10-11.) Since then, Plaintiffs have reviewed the source code for a total of *10 days*, and the source code remains available for their review. Plaintiffs' lack of diligence in pursuing source code reviews sooner or requesting additional days since they belatedly began the review is not good cause to extend the discovery schedule.

- Fifth, Plaintiffs point to the filing of their most recent amended complaint on August 22, 2022—a month before the close of fact discovery—which names two additional Macy's entities as defendants. (Dkt. 441 at 2.) On June 8, 2022, Plaintiffs filed a belated motion for leave to amend the complaint to name several additional corporate defendants. The Court almost entirely denied the motion, recognizing that Plaintiffs delayed in waiting until the deadline for joinder of parties had passed to add these new defendants. (Dkt. 407 at 2-3.) The Court simply allowed Plaintiffs to add two new Macy's entities, which should have almost no impact on the overall case schedule—indeed, the Court at the same time reiterated that September 26, 2022 remained a "hard deadline." (*Id.* at 2.)

Finally, Plaintiffs' request to take additional depositions is unsupported and appears to be another delay tactic to push back the discovery schedule. Notably, as of this date, less than a month before the close of discovery, Plaintiffs have not taken or even noticed *any* depositions since their preliminary injunction motion was briefed fifteen months ago, which speaks to their lack of diligence in observing court-ordered deadlines and the complete conjecture associated with their position that they will need double the number of depositions beyond what the Rules provide.

The record shows that the Clearview Defendants have been reasonable—they twice agreed to two-month extensions to the discovery deadline, but when the Court provided for a "FINAL" deadline, the Clearview Defendants took it seriously. By contrast, throughout this litigation, Plaintiffs have engaged in a well-documented strategy of delay in their endless quest to extend the discovery schedule and impose extraordinary costs on the Clearview Defendants. The Court should enforce the "FINAL" fact discovery deadline and deny the Motion in its entirety.

FACTUAL BACKGROUND

When this multidistrict litigation commenced, Plaintiffs stated that they would only need seven months for fact discovery, and that discovery should therefore close on October 21, 2021. (Dkt. 27 at 2-3.) The Court set an initial fact discovery deadline of January 26, 2022. (Dkt. 28.) The parties exchanged initial disclosures on May 7, 2021, and Plaintiffs served their first set of interrogatories and requests for production on May 24, 2021—sweeping discovery requests that covered all aspects of this litigation. The Clearview Defendants timely responded to this discovery on July 1, 2021, and began producing documents on a rolling basis on August 20, 2021. The Clearview Defendants also emailed an updated list of ESI search terms to Plaintiffs on September 10, 2021. Plaintiffs then waited over six weeks, until October 26, 2021, to raise objections to the September 10, 2021 search terms. (*See* Dkt. 219 at 5.) Then, four and a half months after the Clearview Defendants served their discovery responses, Plaintiffs filed their first motion to compel on November 15, 2021. (Dkt. 213.) On December 20, 2021, the Court entered an order that granted in part and denied in part Plaintiffs' motion to compel. (Dkt. 237.) Plaintiffs filed objections to the Court's order, which were subsequently overruled. (Dkt. 408.)

In August 2021, Plaintiffs indicated that they sought to review Clearview's proprietary source code. The parties spent nearly eight weeks negotiating an amended confidentiality order to

allow Plaintiffs to pursue this discovery while protecting Clearview's valuable source code from disclosure or improper use. (*See* Dkts. 168; 173; 175; 177.) The Amended Agreed Confidentiality Order was eventually entered on October 5, 2021 (the "Confidentiality Order"). (Dkt. 183.) Plaintiffs were then free to review Clearview's source code, subject to the conditions of the Confidentiality Order. However, Plaintiffs did not request a source code review for seven months, despite no less than five express invitations from the Clearview Defendants, dating back to December 17, 2021. (*See* Dkts. 326 at 10-11; 392-8 at 1.) And, since requesting their first source code review in May 2022, Plaintiffs have only used 10 days to review the source code.

On January 21, 2022, the parties moved jointly to extend the fact discovery schedule. (Dkt. 264.) While the Clearview Defendants proposed a two-month extension of time to March 28, 2022, noting that they had "completed the vast majority of their document productions" in response to Plaintiffs' initial discovery requests, Plaintiffs requested an indefinite extension. (*Id*. at 6.) The Court then set a May 26, 2022 deadline to complete fact discovery. (Dkt. 265.)

In the meantime, Plaintiffs continued to create obstacles to completing fact discovery, and Plaintiffs' delays have had a cascading effect. After the Court's order on Plaintiffs' first motion to compel, which required Plaintiffs to narrow certain discovery requests, Plaintiffs waited until February 2022, over six weeks after the December 20, 2021 order, and after the Clearview Defendants' production was substantially complete—to serve the new discovery requests. (*See* Dkt. 264 at 6.) Not only could these new discovery requests have been served much earlier, but many of them were duplicative of Plaintiffs' prior requests that were found to be overbroad and objectionable. (Dkts. 326 at 12-13; 402 at 7.)

Further, as noted in the parties' April 13, 2022 joint status report, Plaintiffs refused to move forward with any review of Clearview's source code despite their ability to review the source code

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