

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

I SELA CARMEAN, on behalf of herself and
all others similarly situated,

Plaintiff,

v.

MACY'S RETAIL HOLDINGS, INC.

Defendant.

Case Nos.: 1:21-cv-135

Judge: Sharon Johnson Coleman

Magistrate Judge: Maria Valdez

**MEMORANDUM IN SUPPORT OF DEFENDANT MACY'S RETAIL HOLDINGS,
INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
UNDER F.R.C.P. 12(B)(1) AND 28 U.S.C. 1407**

Defendant Macy's Retail Holdings, Inc. ("Macy's")¹, through its attorneys, and pursuant to Fed. R. Civ. P. 12(b)(1) and 28 U.S.C. § 1407, submits this memorandum in support of its motion to dismiss ("Motion") the claims raised by the multi-district litigation plaintiffs ("MDL Plaintiffs") against Macy's for lack of subject matter jurisdiction.

INTRODUCTION

This is a case where one purported MDL Plaintiff has brazenly and repeatedly used legal gamesmanship (including dismissal) to avoid complying with a Court Order, briefing schedule, local rules, and well-established case authorities — all for the improper purpose of forum shopping. This Motion seeks to terminate those efforts.

On April 9, 2021, the MDL Plaintiffs filed a Consolidated Complaint in this MDL that named Macy's as a defendant. In so doing, the MDL Plaintiffs circumvented the December 15, 2020 order of the Judicial Panel on Multidistrict Litigation ("JPML") (the "JPML Order"), which

¹ Although the prefatory paragraph of the Consolidated Complaint references "Macy's, Inc." as one of the defendants, a subsequent allegation describes "Macy's Retail Holdings, Inc." as the proper party. *See* Consolidated Complaint, ¶ 18 (defining the term "Macy's" to mean "Macy's Retail Holdings, Inc."). The MDL Plaintiffs also served the pleadings upon "Macy's Retail Holdings, Inc." and not "Macy's, Inc." *See* Dkts. 33, 35. Neither entity is a proper defendant, in part, because Macy's Retail Holdings, Inc., recently became Macy's Retail Holdings, LLC.

consolidated every underlying case between individual plaintiffs and Clearview AI, Inc. (“Clearview”) into the current MDL, but kept one case out, over the MDL Plaintiffs’ objection: *Carmean v. Macy’s*, Case No. 20-cv-4589 (the “4589 Case”). The 4589 Case was assigned at the time to the calendar of Judge Marvin E. Aspen (“Judge Aspen”). Macy’s filed a Motion to Dismiss in the 4589 Case (the “4589 Case Motion to Dismiss”), and Judge Aspen set a briefing schedule for it. Three days before Carmean’s brief was due, she voluntarily dismissed her case. Now, she and the MDL Plaintiffs have attempted to insert these same claims against Macy’s into the MDL merely by filing the Consolidated Complaint and adding Macy’s, despite the fact that (1) Carmean never moved any court to transfer the 4589 Case to the MDL, and (2) the 4589 Case *no longer exists*. Courts across the country have held that an MDL cannot receive a new plaintiff or defendant absent an underlying case involving the party that is properly transferred to the MDL.

The fact that Carmean voluntarily dismissed the 4589 Case against Macy’s eliminates any underlying case that could be consolidated into the MDL, and deprives this Court of subject matter jurisdiction. And, even if the 4589 Case still existed, the JPML Order mandated that the case stay with Judge Aspen until a proper transfer request be made, which has never occurred. Thus, by flouting the JPML Order, and filing claims against Macy’s in the MDL without ever making a transfer request, Carmean and the MDL Plaintiffs underscore the lack of subject matter jurisdiction. The claims against Macy’s must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) and 28 U.S.C. § 1407.

Separately, equitable reasons favor dismissal of any claim against Macy’s. Carmean and the MDL Plaintiffs have engaged in blatant forum-shopping, which should be discouraged. Such tactics have undermined the respect for Judge Aspen’s courtroom and the significant judicial resources he has expended to date on the 4589 Case. And, it would be unfair to Macy’s, which has expended significant financial resources defending against Carmean’s previous claims, to be

deprived of having its 4589 Case Motion to Dismiss heard due to Carmean's dismissal of the 4589 Case and refiling of it in the MDL. This Court should dismiss the MDL claims against Macy's in the interest of federal jurisdiction and notions of fairness.

FACTUAL TIMELINE

The following facts are undisputed and relevant for purposes of this Motion:

Carmean Files Her Case before Judge Aspen

One of the MDL Plaintiffs in this matter, Isela Carmean ("Carmean"), previously filed a lawsuit against Macy's on August 5, 2020. *See* 4589 Complaint, attached as Exhibit A to this Motion. This case was assigned to Judge Aspen (*Carmean v. Macy's*, Case No. 20-cv-4589) (the "4589 Case"). In the 4589 Case, Carmean alleged that Macy's violated the Illinois Biometric Information Privacy Act ("BIPA") because it allegedly contracted with Clearview to use the latter's products, and thus purportedly profited from the biometric information of Carmean and others. Clearview was not a named party in the 4589 Case.

The JPML Order and the Creation of the MDL

Meanwhile, Clearview moved before the JPML to consolidate several lawsuits that were pending against it in various jurisdictions across the country. None of these cases named Macy's as a defendant.² Despite this fact, Carmean's counsel filed a Notice of Potential Tag Along Action requesting that the JPML include the 4589 Case in the consolidation. *See* Notice of Potential Tag-Along Action/Related Action, *In Re: Clearview AI, Inc., Consumer Privacy Litigation*, MDL No. 2967, Dkt. 21, attached as Exhibit B to this Motion. Macy's filed an "interested party response" before the JPML opposing this request. On December 15, 2020, the JPML consolidated every case where Clearview was a named defendant into the MDL, but did not include the 4589 Case before Judge Aspen. *See* MDL No. 2967, Dkt. 50 ("JPML Order"), attached as Exhibit C to this

² None of these cases named any other defendant that allegedly contracted with Clearview for services.

Motion. To the contrary, the JPML ordered any requests for reassignment to be made in accordance with the local rules:

Because the Carmean potential tag-along action *already is pending* in the Northern District of Illinois, we need not determine whether its inclusion in the MDL is appropriate. Rather, requests for assignment of this potential tag-along action to the Section 1407 transferee judge *should be made in accordance with local rules for the assignment of related actions*. See Panel Rule 7.2(a).

Ex. C (emphasis added).

Carmean Unsuccessfully Attempts to Halt the 4589 Case

Carmean's attempt to move the 4589 Case out of Judge Aspen's courtroom did not stop there. After Macy's filed the 4589 Case Motion to Dismiss for lack of standing and failure to plead under FRCP 12(b)(1) and 12(b)(6), (attached as Exhibit D to this Motion), and after Judge Aspen set a briefing schedule on Macy's motion, Carmean attempted to stay the 4589 Case to allow for her to seek reassignment of it to the MDL. Judge Aspen initially granted a stay one day after Carmean's request, but subsequently dissolved it, after Macy's explained to Judge Aspen the prejudice Macy's would face if a stay continued. *See* Macy's Motion to Dissolve the Stay, attached as Exhibit E to this Motion; Judge Aspen's Dissolution of the Stay, attached as Exhibit F.

Judge Aspen then set a new deadline for Carmean to respond to Macy's motion to dismiss: March 18, 2021. *See id.* Rather than respond to Macy's motion to dismiss, Carmean abruptly filed a notice of voluntary dismissal on March 15, 2021, without explanation to Macy's or the court. The case was voluntarily dismissed on March 16, 2021, two days before Carmean's response brief was due. *See* Notice of Voluntary Dismissal, attached as Exhibit G to this Motion; Dismissal Order, attached as Exhibit H.

The Consolidated Complaint

Less than one month later, on April 9, 2021, the MDL Plaintiffs filed the Consolidated Complaint, adding Macy's as a defendant in the MDL for the first time. *See* Dkt. 29. Notably, Carmean is now included amongst the MDL Plaintiffs, and her same counsel in the 4589 Case is included as one of the counsel for the MDL Plaintiffs. The Consolidated Complaint alleges the same facts as the 4589 Case, as they pertain to Macy's, *i.e.*, that Macy's is somehow liable under BIPA because it allegedly contracted with Clearview to use the latter's products, and therefore allegedly accessed and profited from the biometric information of Carmean and others. Except, there are *no allegations* in the Consolidated Complaint that Carmean or any other plaintiff actually visited a Macy's store (and thus could even be in a position to allegedly have biometric information collected). Moreover, the Consolidated Complaint does not acknowledge the existence of the 4589 Case, or Macy's previously-filed Motion to Dismiss in the 4589 Case.

LEGAL STANDARD

A plaintiff seeking to survive a Rule 12(b)(1) motion to dismiss must establish that the district court has subject-matter jurisdiction. *Zuniga v. Asset Recovery Sols.*, No. 17-CV-05119, 2018 WL 1519162, at *1 (N.D. Ill. Mar. 28, 2018). If subject matter jurisdiction "is not evident on the face of the complaint, then the Rule 12(b)(1) motion is analyzed like any other motion to dismiss, by assuming for the purposes of the motion that the allegations in the complaint are true." *Id.* (internal citations omitted). "Ordinarily, it is the plaintiff who bears the burden of demonstrating that the district court has subject-matter jurisdiction over her case and that it falls within the 'Judicial Power' conferred in Article III." *Thornley v. Clearview AI, Inc.*, No. 20-3249, 2021 WL 128170, at *2 (7th Cir. Jan. 14, 2021).

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