

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

ADRIAN COSS and MARIBEL OCAMPO,
individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

SNAP INC.,

Defendant.

Case No. 1:22-cv-02480

Hon. Robert M. Dow, Jr.

**DEFENDANT SNAP INC.'S MEMORANDUM OF LAW IN SUPPORT OF
ITS RULE 12(b)(1) MOTION TO DISMISS**

Defendant Snap Inc. (“Snap”) is a technology company that developed and operates the “Snapchat” app, which is a smart phone camera application that was created to help people communicate through short videos and images. Snapchat includes popular features called “Lenses” and “Filters,” which allow users to edit the photos and videos they share to include real-time special effects and sounds. For example, users can add rainbows coming out of their mouths, flower crowns atop their heads, and tears streaming from their eyes.

As Snap explains to its users, Lenses and Filters do *not* use facial identification technology to place these special effects on photos or videos. Rather, Lenses use *object* recognition technology: this allows the camera to recognize that a nose (or an eye or a mouth) appears in the frame, but Lenses does *not* identify any particular nose or eye or mouth—let alone a whole face—as belonging to any specific person. And Filters do not even use object recognition technology. Rather, they simply allow users to add artistic overlays to their images—e.g. changing the color scheme to black and white or adding a stamp noting the day of the week.

Although Snapchat’s features do not implicate the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.* (“BIPA”) Plaintiffs filed a class action against Snap for alleged violations of BIPA. Plaintiffs assert Snap failed to comply with the notice and consent requirements set forth in BIPA Sections 15(a) and 15(b), “profit[ed]” from Plaintiffs’ “biometric identifiers,” in alleged violation of BIPA Section 15(c), and disclosed or disseminated Plaintiffs’ “biometric identifiers” and/or “biometric information” in violation of BIPA Section 15(d).

Plaintiffs’ Complaint, however, fails at the threshold issue of subject matter jurisdiction. Plaintiffs base jurisdiction exclusively on the Class Action Fairness Act (“CAFA”) but do not (and cannot) allege that the putative class consists of at least 100 members, the statutory requirement for CAFA jurisdiction.

Accordingly, the Court should dismiss Plaintiff’s Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.¹

FACTUAL BACKGROUND

A. The Illinois Biometric Information Privacy Act.

BIPA regulates the collection, possession, and storage of certain biometric identifiers and information, while expressly excluding other kinds of data. The statute defines “biometric identifier” using a short, exclusive list of personal data: “[b]iometric identifier’ means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.” 740 ILCS 14/10. Section 15(b) requires private entities that “collect, capture, purchase, receive through trade, or otherwise obtain a person’s ... biometric identifier or biometric information” to first (1) inform the person of that collection “in writing”; (2) inform the person “in writing of the specific purpose and length of term” regarding the collection; and (3) obtain a “written release” from the person. 740 ILCS 14/15(b). Section 15(c) further prohibits any private entity “in possession of a biometric identifier or biometric information” from “sell[ing], leas[ing], trad[ing], or otherwise profit[ing] from a person’s ... biometric identifier or biometric information.” 740 ILCS 14/15(c). Section 15(d) prohibits private entities from “sell[ing], lease[ing], trade[ing], or otherwise profit[ing] from a person’s or a customer’s biometric identifier or biometric information.” 740 ILCS 14/15(d).

B. Snap’s Alleged Conduct.

Plaintiffs incorrectly alleges that two Snapchat features – “Lenses” and “Filters” – “involved and/or involves the use of technology to create a face scan or face template of a user where the Feature involved creating, obtaining, and storing a user’s unique ‘biometric identifiers’ and/or ‘Biometric information’” and “involve and/or involved the collection, use, modification,

¹ Snap does not concede that any of Plaintiff’s allegations are accurate or that it collects, stores, uses, or disseminates any “biometric identifiers” or “biometric information” as defined by BIPA.

monetization and/or storage of the ‘biometric identifiers’ and/or ‘Biometric information’” of Plaintiffs. Compl. ¶¶ 83, 96. Plaintiffs assert in a conclusory fashion that “[e]ach time Plaintiffs used the Lenses Feature was used by Plaintiffs, the Snapchat app scanned the faces of Plaintiffs, which resulted in Defendant obtaining and/collecting Plaintiffs’ unique ‘biometric identifier’ or ‘biometric information’ as these terms are defined by BIPA.” Compl. ¶ 87. Similarly, Plaintiffs assert that “[e]ach time Plaintiffs used a Filter, the Snapchat app. scanned their faces and obtained their unique ‘biometric identifier’ or ‘biometric information’ as these terms are defined by BIPA.” Compl. ¶ 97.

Based on these conclusory allegations, Plaintiffs assert that Snap violated Sections 15(a) - (d) of BIPA.

C. Snap’s Terms of Use

As Plaintiff acknowledges, users of the Snapchat app are required to agree to the Snap Terms of Service (“Terms”) before using Snapchat. Compl. ¶¶ 25-27; Exhibit A, Hernandez Decl. ¶ 2. The Terms contain an agreement to arbitrate disputes on an individual basis. Hernandez Decl. ¶ 2. The Terms also provide that users can opt out of the arbitration agreement by e-mail or by physical mail. Hernandez Decl. ¶¶ 4 –5; *see also* Compl., ¶¶ 25-27. Plaintiff Coss and Plaintiff Ocampo both allege that they opted out of the arbitration agreement and so may proceed with their claims in this Court. Compl. ¶¶ 25, 27.

Snap updates its Terms periodically, and users are required to accept the updated version of the Terms before using Snapchat. According to Snap’s records, there are 51 Snapchat users in Illinois who have opted out of any version of Snap’s Terms. Hernandez Decl. ¶ 6. Snapchat users who have not opted out of the arbitration agreement are bound by the agreement to arbitrate disputes on an individual basis.

ARGUMENT

“[T]he objection presented by a Rule 12(b)(1) motion challenging the Court’s subject matter jurisdiction is that the Court has no authority or competency to hear and decide the case before it.” *Johnson v. Orkin, LLC*, 928 F. Supp. 2d 989, 997 (N.D. Ill. 2013) (citing *Int’l Union of Operating Eng’rs Local 150, AFL-CIO v. Ward*, 563 F.3d 276, 280-82 (7th Cir. 2009)). “As a jurisdictional requirement, the plaintiff bears the burden of establishing standing.” *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009). When a party moves to dismiss for lack of subject matter jurisdiction, a district court may look beyond the pleadings and view whatever evidence has been submitted on the issue. *Evers v. Astrue*, 536 F.3d 651, 656 (7th Cir. 2008) (citing *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999)).

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS BIPA CLAIMS

Plaintiffs cannot establish subject matter jurisdiction because their proposed class consists of, at most, 51 people—barely half the amount required under CAFA.” 28 U.S.C. § 1332(d)(5)(B) CAFA, the sole basis for jurisdiction cited in the Complaint, Compl. ¶¶ 30 – 42, confers federal jurisdiction over class actions when certain prerequisites of class size and amount in controversy are satisfied. As relevant here, under CAFA, federal courts do not have original jurisdiction over a class action if “the number of members of all proposed plaintiff classes in the aggregate is less than 100.” 28 U.S.C. § 1332(d)(5)(B); *see also Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 619 (7th Cir. 2012) (implying a requirement to satisfy a 100-person threshold for CAFA jurisdiction).

Plaintiffs acknowledge the 100-class member rule in their Complaint. Compl. ¶¶ 32–33. Plaintiffs, however, make no allegation within the “Jurisdiction and Venue” section of their Complaint regarding how many class members exist. Instead, Plaintiffs only point to the number

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