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 UNOPPOSED MOTION FOR A STAY PENDING THE ILLINOIS SUPREME COURT'S DECISION IN *COTHRON v. WHITE CASTLE*

Defendant Snap Inc. ("Snap") respectfully seeks a temporary stay of this action pending the Illinois Supreme Court's decision in *Cothron v. White Castle, Inc.*, No. 128004. *Cothron*, which has already been fully briefed and argued, addresses issues that are key to whether this Court has subject matter jurisdiction over Plaintiffs' claims brought under the Illinois Biometric Information Privacy Act ("BIPA"). Plaintiffs do not oppose the relief requested in this motion. In support of its motion, Snap states as follows.

1. Snap is a technology company that developed and operates the "Snapchat" app, which is a smart phone camera application created to help people communicate through short videos and images. Snapchat includes popular features called "Lenses" and "Filters," which allow users to edit their photos and videos to include real-time special effects and sounds.

2. On May 11, 2022, Plaintiffs filed a class action against Snap alleging that Lenses and Filters violate BIPA, and asserting that this Court has jurisdiction over the claims under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). On July 1, 2022, Snap filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the number of individuals who opted

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out of Snap's arbitration agreement was too small to support the statutory minimum of $5 million required under CAFA. Dkt. 11.

3. In response to Snap's motion to dismiss, Plaintiffs filed an amended complaint on August 9, 2022. Dkt. 15. The amended complaint is no longer pleaded as a class action and is instead brought by 31 plaintiffs individually. Plaintiffs allege subject matter jurisdiction under the ordinary diversity jurisdiction statute, 28 U.S.C. § 1332(a), and not under CAFA. Under Section 1332(a), each plaintiff must be diverse from each defendant and each plaintiff must plead at least $75,000 individually. 28 U.S.C. § 1332(a)(1); *Clark v. State Farm Mut. Auto. Ins. Co.*, 473 F.3d 708, 711 (7th Cir. 2007) ("It is well settled that ... the separate claims of multiple plaintiffs against a single defendant cannot be aggregated to meet the jurisdictional amount.").

4. Each of the 31 Plaintiffs alleges he or she is a citizen of Illinois and is therefore diverse from Snap, which is a citizen of California and Delaware. Am. Compl. ¶ 27. And each Plaintiff alleges he or she each incurred more than the required minimum of $75,000 in damages. *Id.*

5. BIPA provides for statutory damages of $1,000 per "violation" (if negligent) or $5,000 per "violation" (if reckless or intentional). 740 ILCS 14/20. To allege an amount in controversy of more than $75,000, Plaintiffs rely on what is widely referred to as the "per scan" theory of BIPA liability. Under this theory, a separate violation of BIPA occurs each time a defendant collects a plaintiff's biometric data. *See Cothron v. White Castle System, Inc.*, 20 F.4th 1156, 1162 (7th Cir. 2021). Plaintiffs allege they each used the Snapchat app at least 75 times, Am. Compl. ¶ 28, and that they therefore have satisfied the amount in controversy requirement.

6. Snap, however, rejects the "per scan" theory and contends that a plaintiff is "aggrieved" only by the initial collection of his or her biometric data, and a new claim does not

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accrue with each subsequent collection. *Cothron*, 20 F.4th at 1162. If this single-violation theory is correct, Plaintiffs could recover only for Snap's initial alleged collection of their biometric data, limiting their damages to $1,000 (or $5,000 for a reckless or intentional violation). Because each Plaintiff could recover at no more than a maximum of $5,000 in statutory damages, the Court would lack subject matter jurisdiction.

7. In *Cothron*, the Seventh Circuit addressed these competing theories of claim accrual and statutory damages. After addressing the arguments on both sides, the court found itself "genuinely uncertain" as to the correct answer to the "novel[] and uncertain[]" question. *Id.* at 1166. The Seventh Circuit therefore certified the question to the Illinois Supreme Court. *Id.* The Illinois Supreme Court accepted the certified question. The appeal is briefed and the court heard oral argument on May 15, 2022. A decision is expected at any time.

8. The Illinois Supreme Court's decision in *Cothron* likely will resolve (or at least shed light on) the question of this Court's subject matter jurisdiction.

9. In these circumstances, Snap respectfully submits that this Court should stay this action pending the Illinois Supreme Court's decision in *Cothron*, which is expected to issue shortly. It does not make sense to move forward when the threshold issue of subject matter jurisdiction is in doubt, and the *Cothron* decision should soon clarify that issue.

10. Counsel for Snap has conferred with counsel for Plaintiffs, and Plaintiffs do not oppose a stay pending the Illinois Supreme Court's decision in *Cothron.*

WHEREFORE, Snap respectfully requests that the Court enter an order staying this action pending the Illinois Supreme Court's decision in *Cothron.* Within 14 days after *Cothron* is decided, the parties will confer and submit to the Court a proposed course of action, depending on the outcome of *Cothron*.

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Dated: August 16, 2022

Respectfully submitted,

SNAP INC.

By: */s/ Elizabeth B. Herrington*
By Its Attorney

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CERTIFICATE OF SERVICE

I, Elizabeth B. Herrington, hereby certify that on this 16th day of August, 2022, I caused a copy of the foregoing UNOPPOSED MOTION FOR A STAY to be served upon all counsel of record via the Court's CM/ECF system.

/s/ Elizabeth B. Herrington
Elizabeth B. Herrington

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