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

TANYA N. SVOBODA, *et al.*,	)	
	)	Case No. 1:21-cv-05336
Plaintiffs,	)	
v.	)	Judge Jorge L. Alonso
	)	
AMAZON.COM, INC., *et al.*,	)	Mag. Judge Sheila M. Finnegan
	)	
Defendants.	)	

DEFENDANTS' MOTION TO RECONSIDER THE COURT'S CLASS CERTIFICATION ORDER

The Court should reconsider its March 30, 2024 Order certifying Plaintiffs' proposed class ("Order," Doc. No. 291) with regard to four key issues that constitute errors of law, or misapplication of the law to the facts.

First, the Court should reconsider the Order because Plaintiffs have not proven that the location of VTO use—which, per Plaintiffs' own class definition must have occurred in Illinois—can be proven classwide. The Court certified the class even though the unrebutted evidence shows that Plaintiffs lack reliable location data for ***tens of thousands*** of class members. The Court held that this discrepancy could be addressed through affidavits or other case management mechanisms, but such tools are not appropriate in cases where the record shows that individual claims are worth tens of thousands or even millions of dollars. The Court should reconsider certification under these circumstances, which were not present in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), or *Beaton v. Speedy Software*, 907 F.3d 1018 (7th Cir. 2018), the two cases upon which the Court relied.

Second, if the Court does not reconsider the Order in its entirety, the Court should revise the class definition to exclude users of the VTO eyewear feature. The Court held that Plaintiffs could adequately represent eyewear VTO users in the proposed class even though it is undisputed

that Plaintiffs never used the eyewear VTO. At the same time, the Court held that the defense that eyewear VTO users' claims are barred by BIPA's healthcare exception need not be considered at class certification because Plaintiffs did not use eyewear VTO. Respectfully, those holdings are inconsistent and should be reconsidered. At a minimum, if the Court's ruling that Plaintiffs are adequate representatives of a class of eyewear VTO users is correct, then Amazon must be permitted to raise the BIPA healthcare exception defense against them, and that unique defense defeats certification of the eyewear VTO claims.

Third, the Court should further revise the class definition to exclude any individuals for whom Amazon has no contact information in its VTO records. This is not just a matter of identifying these class members, as the Court held. Rather, such individuals have no BIPA claims at all because Amazon did not collect any of their identifying information and therefore did not collect a "biometric identifier" within the meaning of BIPA. It is legal error to certify a class that contains a significant portion of members that have no claim under BIPA.

Fourth, the Court should also revise the class definition to exclude any claims for statutory damages that predate January 25, 2019, the date the Illinois Supreme Court decided *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186. More recent caselaw, *Gagen v. Mandell Menkes, LLC*, No. 2023-L-8294 (Cook Cnty. Cir. Ct. Jan. 26, 2024), attached as **Exhibit 1**, decided after oral argument in this case, held that *Rosenbach* should be applied prospectively only because it changed a principle of law—that a plaintiff could not recover statutory damages under BIPA absent some injury—on which the defendant reasonably relied. *Rosenbach* changed the law by allowing BIPA damages claims to proceed in the absence of any injury, but its holding should only apply prospectively.

ARGUMENT

A court may reconsider its interlocutory orders "at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b); *accord Galvan v. Norberg*, 678 F.3d 581, 587 (7th Cir. 2012). Orders granting or denying class certification are "inherently interlocutory" and "subject to revision in the District Court." *Microsoft Corp. v. Baker*, 582 U.S. 23, 34 (2017) (citation omitted).

Generally, motions for reconsideration under Rule 54(b) "serve the limited function of correcting manifest errors of law or fact." *Slick v. Portfolio Recovery Assocs., LLC*, 111 F. Supp. 3d 900, 902 (N.D. Ill. 2015) (internal quotation marks and citation omitted). A motion for reconsideration may also be used to advise the court of "a significant change in the law or facts." *Janusz v. City of Chicago*, 78 F. Supp. 3d 782, 787 (N.D. Ill. 2015); *see also Bank of Waunakee v. Rochester Cheese Sales, Inc*., 906 F.2d 1185, 1191 (7th Cir. 1990) (citation omitted) ("A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court.").

I. The Court Should Reconsider the Class Certification Order Because Plaintiffs Have Not Proven That VTO Uses In Illinois Can Be Established Classwide.

Plaintiffs defined the class to include all individuals who used a VTO feature "while in Illinois." Order at 1-2. Having chosen to define the class in this manner, Plaintiffs had the burden of proving that VTO uses "in Illinois" could be proven with classwide evidence. *See Halliburton Co. v. Erica P. John Fund, Inc*., 573 U.S. 258, 275 (2014) (plaintiff must "actually prove—not simply plead—that their proposed class satisfies each requirement of Rule 23").

Opposing certification, Amazon argued that the location-related data it maintains is insufficient to show VTO uses in Illinois: billing address data is not tied to location of use, particularly given that VTO may only be used on mobile platforms. And IP address data is not a

reliable indicator of usage in Illinois for numerous reasons. *See* Order at 20. The Court rejected these arguments in favor of Plaintiffs' argument that "Illinois billing addresses, IP addresses from which the VTO was used, and geo-location data identifying the region of the user based on the IP address will identify persons who used the VTO while in Illinois, and claim-form affidavits can serve as an additional cross-check." *Id.* at 21. The Court reached this conclusion even though the unrefuted evidence shows that Amazon's geolocation coding is only 74% accurate in identifying whether an IP address is even within 100 kilometers of a given U.S. city. Order at 7. That means that there could be tens of thousands of class members—the precise number is definitionally unknown—for which geolocation data is accurate less than three-quarters of the time. This includes, for example, any use in Chicago, which is within 100 kilometers of Indiana.

Amazon acknowledges that it is not necessary for Plaintiffs to prove they can identify every single class member. Order at 23 (citation omitted). But the mechanism Plaintiffs have proposed and the Court has accepted is fundamentally flawed because there are a very large number of class members it cannot identify. Geolocation data that shows "the region of the user based on the IP address" does not work when applied to a class of hundreds of thousands of people where the ***average*** claim is worth $60,000, and some claims reach into the millions of dollars. Doc. 212, Resp. to Mot. for Class Cert. at 20.[1]

[1] Respectfully, the Court's reliance on *In re Facebook Biometric Info. Priv. Lit.*, 326 F.R.D. 535 (N.D. Cal. 2018) in rejecting Amazon's geolocation argument was misplaced. Order at 21-22. The issue in *Facebook* was not whether class members' who used Facebook in Illinois could be identified. The issue was instead whether Facebook's location of its servers outside of Illinois raised an issue of extraterritorial application of BIPA that precluded class certification. *Id.* at 547. The Court rejected this extraterritoriality argument because the case was "deeply rooted in Illinois" based on many other factors not present here. *Id.* In this case, there is no legal dispute concerning the extraterritorial application of BIPA: Facebook contested whether the statute would apply to Illinois Facebook users given the location of its servers, but Amazon acknowledges that BIPA can apply to uses of VTO that occurred in Illinois. Here, the location of a use of VTO, and Plaintiffs' ability to prove the location based on classwide evidence, is important only because Plaintiffs have chosen to define the class solely by reference to use of VTO "while in Illinois." Order at 1-2.

To bridge the acknowledged gap in geolocation evidence, Plaintiffs argued, and the Court accepted, that "claim form affidavits" could be used as "an additional cross-check" to establish use of VTO in Illinois. Order at 21. The Court cited *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), and *Beaton v. Speedy Software*, 907 F.3d 1018 (7th Cir. 2018), which approved use of class member affidavits and other "creative solutions" to identifying class members and establishing liability. *Mullins*, 795 F.3d at 672; *Beaton*, 907 F.3d at 1023.

While *Mullins* and *Beaton* hold that the Court may within its discretion make use of affidavits to establish class membership and liability, the cases do not ***require*** this procedure, and the Court's reliance on *Mullins* and *Beaton* here was misplaced because those cases are readily distinguishable from this one. First, both cases were traditional consumer class actions in which the amount each class member could recover was well-defined and relatively small—the price of a $69.99 supplement product in *Mullins*, and a $39.94 software license in *Beaton*. *Mullins*, 795 F.3d at 654; *Beaton*, 907 F.3d at 1023.[2] The *Mullins* court described the claims as "low-value claims" that would never be pursued individually. *Mullins*, 795 F.3d at 665. By contrast, the average class's member's claim in this case is worth $60,000 for the subsection of the class for which Amazon has data alone. And under an affidavit approach, the size of the claim for any class member for which Amazon does not have data (including, for example, individuals who used the ModiFace technology but did not add a product to their shopping cart) would depend entirely on the class member's recollection of how many products they tried on with VTO technology.

Amazon submits that it would be an abuse of the Court's discretion, and a violation of Amazon's due process rights, to allow people to use affidavits to establish class membership or

[2] Neither decision mentions the price of the product, but the *Mullins* complaint alleges that price of the supplement was "approximately $69.99." *Mullins*, No. 13-cv-1820, Doc. No. 1 at ¶ 11. The *Beaton* complaint states that the software license cost $39.94. *Beaton*, No. 13-cv-8389, Doc. No. 1 at ¶ 38.

liability for these significant statutory damages claims without the opportunity for individual cross-examination. *See Mullins*, 795 F.3d at 669-670 (recognizing that "a defendant has a due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability" and that the process to protect this right must be "tailored to the individual case."). In this regard, the *Beaton* court's suggestion that the defendant could obtain "the testimony of a representative sample of the class members" would also be both unworkable and legally deficient in this case. *Beaton*, 907 F.3d at 1030. As a practical matter, it is not clear how a "representative sample" could be drawn given that, at least for class members for whom Amazon has no VTO data, the inquiry would focus entirely on each class member's statements about where they were located when they used the VTO technology and how many times they used it, which is simply an individual inquiry, not one from which reliable conclusions could be drawn based on sampling.[3] And as a legal matter, using affidavits to establish class membership or liability for a claim worth less than $40 is a fundamentally different proposition than using such affidavits for claims that are often worth tens of thousands of dollars or more, and in fact are theoretically limitless.

Second, this case also differs from *Mullins* and *Beaton* because those cases involved speculative concerns about identifying class members. Here, there is no doubt that testimony would be required from many thousands of class members to establish class membership via use

[3] For example, suppose a sample were drawn in which 80 percent of the members of the sample testified they were in Illinois when using VTO technology. No one could conclude from that sample that 20 percent of the class should simply be dropped. Or suppose the average number of VTO uses in the sample was 10. Putting aside that the average claim would be ***$50,000***, there would be no basis to find that every class member would be entitled to $50,000. That would be grossly unfair to Amazon, which has the right to determine whether a class member should be paid $50,000 for ten uses of VTO technology, or $5,000 for one use. And it would be grossly unfair to a class member who may have used VTO technology dozens, hundreds, or even thousands of times and would be entitled to a much larger award. *See* Opp., Doc. 210, at 16.

of VTO technology and—in the case of class members from whom Amazon does not have data—to establish liability. Thus, certifying the class with the knowledge that a complex process will be required to establish both class membership and liability "only pushes these [class identification] problems down the road." *In re Facebook*, 326 F.R.D. at 542.

Amazon is unaware of a single case in which class member affidavits without meaningful opportunity for individualized discovery or cross-examination were used to verify class membership or liability for individual claims worth tens of thousands of dollars each. Plaintiffs have cited none. *Mullins* stands for the principle that a court may "tailor fair verification procedures to the particular case" consistent with due process—not that a plaintiff can use affidavits to establish class membership or liability in every class action regardless of the size or nature of the claim. *Mullins*, 795 F.3d at 670. Doing so in this case to establish whether class members used VTO in Illinois would violate Amazon's due process rights; in holding otherwise, the Court misapplied *Mullins.* Accordingly, the Court should reconsider the Class Certification Order.

II. If The Court Does Not Reconsider the Class Certification Order, the Court Should Narrow The Class Definition.

If the Court declines to reconsider certification as a whole, Amazon respectfully requests the Court revise and narrow the class definition as follows.

A. Eyewear Users Should Be Excluded From the Class.

First, the Court should reconsider its inclusion of users of eyewear VTO technology in the certified class. In opposing class certification, Amazon argued that Plaintiffs are not adequate class representatives for two reasons. First, they did not use the eyewear VTO—a fact that is undisputed—so they have no BIPA claim based on eyewear usage; and second, because they did not use eyewear VTO, they do not have incentive to vigorously contest Amazon's health-care exemption BIPA defense. Opp. at 24-25. The Court recognized that the existence of a significant

defense that applies only to one portion of the class may make class representatives inadequate, but the Court dismissed that concern here because Plaintiffs, having admittedly never used VTO for eyewear, are not personally subject to that defense (although they are at the same time adequate representatives of class members who did so and are subject to the defense). Order at 13.

Respectfully, the Court misapplied Seventh Circuit precedent in reaching its conclusion. The Court held that Plaintiffs were adequate class representatives for eyewear VTO users because all VTO users suffered the same injury—a violation of BIPA. Amazon disputes the premise that lipstick and eyewear VTO users suffered the same injury.[4] Yet even if they have, the two class members' claims are ***not*** the same: the first is subject to a dispositive defense based on a BIPA exemption and the other is not. The two types of claims cannot be treated equally for class certification purposes. *C.E. Design Ltd. V. King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011) (citation omitted) ("even an arguable defense" applicable to part of the plaintiff class may destroy adequacy and typicality).

The Court dismissed Amazon's argument that Plaintiffs lacked incentive to vigorously contest the healthcare exemption defense as "speculative." Order at 14. In fact, the lack of incentive is concrete because the Court also held that the defense does not even apply to Plaintiffs, because they did not try on eyewear. *Id.* at 13. Plaintiffs cannot adequately represent the class on an issue that the Court has held is inapplicable to their claims. The conflict between lipstick VTO users and eyewear VTO users inherent in the class cannot be so easily dismissed. If the only plaintiffs in this case were eyewear VTO users, they would be inadequate to represent the lipstick VTO users because the "fear" is that such plaintiffs would "become distracted by the presence of a possible defense applicable only to [them]"—the healthcare exemption defense—would be manifest. *See*

[4] *See* Opp., Doc. 210, at 5-6 (explaining differences between operations of eyewear VTO and lipstick VTO).

Order at 13 (quoting *CE Design*, 637 F.3d at 726). Both law and logic confirm that this tension between class members does not go away merely because Plaintiffs happen to be lipstick VTO users. And it is inappropriate to hold that Plaintiffs can adequately represent eyewear VTO users and certify the class without also making them confront the healthcare exemption defense. In other words, if Plaintiffs are adequate to represent eyewear VTO users even though they never used the technology themselves, they must also be subject to the same defenses as the class members they represent. *See* Fed. R. Civ. P 23(a)(3); *Panwar v. Access Therapies, Inc.*, 2015 WL 329013, at *4 (S.D. Ind. Jan. 22, 2015) (class representative's claims must be "subject to the same defenses" as other class members) (citing *Oshana v. Coca-Cola Co.*, 472 F. 3rd 506, 514 (7th Cir. 2008)).

Thus, even if the Court's holding that all VTO claims can be treated the same for purposes of class certification because all class members suffered the same injury is correct, it follows that the Court must also consider the argument that Plaintiffs are inadequate because they are subject to the unique BIPA eyewear exemption defense as to those claims. *See C.E. Design*, 637 F.3d at 726.

Then, the Court erred in holding that Plaintiffs could represent a class of eyewear users while at the same time declining to consider the healthcare exemption in the class certification analysis. Had the Court conducted the correct analysis under Seventh Circuit precedent, it should have concluded that the healthcare exemption defense, which applies to only a subset of the class, precludes a finding of adequacy and typicality as to the named Plaintiffs. *C.E. Design*, 637 F.3d at 726. As Amazon noted in opposing class certification, courts in this district have repeatedly and without exception applied BIPA's healthcare exemption to claims involving use of VTO technology to try on eyewear, regardless of whether the VTO use involved prescription eyewear or occurred in a healthcare setting. *See* Opp. at 25 (citing cases); Doc. No. 282 (Amazon Notice of

Supp. Authority). The Court erred in not holding that the unique healthcare exemption defense destroys adequacy and typicality as to eyewear VTO users. The Court should revise the class definition to exclude eyewear VTO users.[5]

B. VTO Uses Not Linked to an Amazon Account Should Be Excluded From the Class.

The Court recognized in its Order that the class definition "is not tied to whether Amazon has a record of [VTO] use." Order at 24. Thus, the certified class necessarily includes many thousands of people for whom Amazon has no record whatsoever of VTO usage. Amazon has records of VTO usages while logged into an Amazon account on the Amazon app or mobile website (for all uses of the Amazon VTO, and for uses of the ModiFace VTO where the user added a product to their shopping cart). Amazon does not have records of other VTO uses, including any use of the VTO technology on the mobile website by users who are not logged in to an account, and any uses by individuals who use the ModiFace VTO but do not add a product to their cart. Opp. at 10-11, Order at 23.

The Court did not exclude any VTO users from the certified class, reasoning that "Illinois billing addresses, IP addresses, and geo-location data will identify persons who used the VTOs while in Illinois, and claim-form affidavits can serve as an additional cross-check." Order at 24-25. As set forth above (at Part II.A), Amazon respectfully disagrees that these mechanisms can reliably identify class members. But the Court's ruling overlooks a more fundamental problem: people who used VTO technology for whom Amazon does not have a record ***have no claims under BIPA at all.*** That is because, for such users, even if Amazon collected their biometric data—which

[5] The Court can also rule at this juncture that class members' eyewear VTO claims are barred as a matter of law. Doing so would be consistent with the Court's obligation to consider merits issues that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Order at 8 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013).

it did not, as no information related to faces ever left users' devices—Amazon has no means of using that data to identify an actual person (such as by linking the user to a name, email address, or physical address, as Amazon can do for uses from Amazon accounts). *See* Doc. 280 (Amazon Notice of Supp. Authority, submitting *Castelaz v. Estee Lauder Cos.*, No. 22-cv-5713). In *Castelaz*, the court dismissed a BIPA claim involving VTO technology where the plaintiff did not allege that the defendant was capable of determining "Plaintiffs and members of the Illinois class members' identities by using the collected facial scans, whether alone or in conjunction with other methods or sources of information available to [defendant.]." Doc. 280-1, at 9; *see also Clarke et al. v. Aveda Corp.*, -- F. Supp. 3d. --, 2023 WL 9119927, at *2 (N.D. Ill. 2023) (dismissing VTO BIPA claim based on the same analysis).

Uses of VTO not linked to an Amazon account are in the same position as the plaintiffs in *Castelaz* and *Clarke.* Amazon has no information, such as their name or email address, that can be used to identify them. This is not an issue of identifying class members that have claims, so it is not a problem that can be resolved by class members' self-identifying through affidavits or otherwise. Under *Castelaz* and *Clarke*, such individuals cannot state a claim under BIPA at all because Amazon has never collected a "biometric identifier" or "biometric information" from them. *See Castelaz*, Doc. 280-1, at 10 ("Plaintiffs have failed to plead the most foundational aspect of a BIPA claim"); *Clarke*, 2023 WL 9119927, at *2 (granting motion to dismiss and stressing that "Plaintiffs' complaint contains *no plausible allegations* that Aveda's collection of their biometric data made [Aveda] capable of determining their identities.") (emphasis in original). Therefore, the Court erred in certifying a class containing a large number of members who have no claim.

See Oshana, 472 F.3d at 514. The Court should revise the class definition to exclude individuals who used VTO technology from whom Amazon collected no data regarding their use of the VTO.[6]

C. Individuals Who Used The VTO Technology Before January 25. 2019 Should Be Excluded From the Class.

Finally, the Court should amend the class definition to exclude individuals who used VTO technology January 25, 2019, the date of the Illinois Supreme Court's decision in *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, which held that a person is "aggrieved" within the meaning of BIPA based on a statutory violation alone and without the need to show any injury. *Id.* ¶ 40. As the court recently held in *Gagen v. Mandell Menkes, LLC*, which was decided after oral argument in this case, *Rosenbach* should be applied prospectively only because it changed a principal of law on which defendant's reliance was reasonably placed. *See Gagen*, No. 2023-L-8294 (Cook Cnty. Cir. Ct. Jan. 26, 2024), Ex. 1, at 4 ("To hold a defendant liable, at the outset of a matter, for actions that later became violations of a statute without additional facts would be to punish defendant prematurely."). The *Gagen* court dismissed all claims for statutory damages that predated *Rosenbach.* Consistent with *Gagen*, the class cannot include alleged BIPA violations for uses of VTO technology before January 25, 2019.

CONCLUSION

For the foregoing reasons, the Court should reconsider the Class Certification Order and deny Plaintiffs' motion for class certification. If the Court declines to do so, the Court should revise the class definition as set forth in this Motion.

[6] Even with this limitation, the class would still include people who cannot be identified from Amazon's data, e.g., someone who used a VTO feature on a device connected to a friend or family member's account.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2024, I caused a true and correct copy of the foregoing document to served the below Counsel of Record via electronic mail:

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