UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICARDO VIGIL, ET AL.,

Plaintiffs, **15-cv-8211 (JGK)**

- against - **OPINION AND ORDER**

TAKE-TWO INTERACTIVE SOFTWARE, INC.,

Defendant.

JOHN G. KOELTL, District Judge:

The advent of new technologies in the field of biometrics --- the field of science relating to the identification of humans based upon unique biological traits, such as fingerprints, DNA, and retinas --- has produced new ways of conducting commercial transactions. In 2008, to promote, regulate, and safeguard the use of biometrics in financial transactions, Illinois enacted the Illinois Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/1 et seq. (the "BIPA"), which sets forth disclosure, consent, and retention requirements for private entities that collect, store, and disseminate biometric data.

The defendant, Take-Two Interactive Software, Inc. ("Take-Two"), is one such private entity that collects biometric data for use in its video games, "NBA 2K15" and "NBA 2K16." The plaintiffs, Vanessa Vigil and Ricardo Vigil, have brought this putative class action pursuant to the Class Action Fairness Act,

28 U.S.C. § 1332(d). More specifically, Ricardo Vigil bought and played NBA 2K15, and his sister Vanessa Vigil played his copy of that video game. The plaintiffs used a feature in the video game to scan their respective faces to create personalized virtual basketball players, exclusively for in-game play. Although the plaintiffs do not contend that their face scans have been disseminated, or used for any purpose, other than for playing the video game, for which they gave consent, the plaintiffs contend that Take-Two failed to comply with various provisions of the BIPA.

On January 15, 2016, Take-Two moved pursuant to Rule 12(b)(1), and Rule 12(b)(6), of the Federal Rules of Civil Procedure to dismiss the plaintiffs' claims. Subsequently, the Supreme Court issued Spokeo, Inc. v. Robin, 136 S. Ct. 1540 (2016), which clarified that for an injury-in-fact to be "concrete," it must be "real, and not abstract," and that a "bare procedural violation" under a federal statute, "divorced from any concrete harm," that "may result in no harm," would not "satisfy the injury-in-fact requirement." Id. at 1549 (internal quotation marks omitted). By Order dated July 1, 2016, this Court ruled that the plaintiffs should be allowed to replead in light of Spokeo, and denied without prejudice to renewal Take-Two's pending motion to dismiss. See Dkt. 42. The plaintiffs

filed their Second Amended Complaint, and Take-Two renewed its motion.

The parties subsequently submitted supplemental letters concerning the impact of Strubel v. Comenity Bank, No. 15-528-CV, 2016 WL 6892197 (2d Cir. Nov. 23, 2016), which interpreted Spokeo.

For the following reasons, Take-Two's motion to dismiss the Second Amended Complaint is **granted**.[1]

I.

When presented with a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and a motion to dismiss on other grounds, the first issue is whether the Court has the subject matter jurisdiction necessary to consider the merits of the action. See Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n, 896 F.2d 674, 678 (2d Cir. 1990).

In defending against a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the plaintiff bears the burden of proving the Court's jurisdiction by a preponderance of the

[1] Take-Two has moved in the alternative to strike the Second Amended Complaint's class allegations. Because the Second Amended Complaint is dismissed for want of standing, and for failure to establish a cause of action under the BIPA, it is unnecessary to reach the alternative basis for relief. Take-Two's motion to strike the Second Amended Complaint's class allegations is therefore denied as moot.

evidence. Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). In considering such a motion, the Court generally must accept the material factual allegations in the complaint as true. See J.S. ex rel. N.S. v. Attica Cent. Schs., 386 F.3d 107, 110 (2d Cir. 2004). The Court does not, however, draw all reasonable inferences in the plaintiff's favor. Id.; see also Graubart v. Jazz Images-, Inc., No. 02-CV-4645 (KMK), 2006 WL 1140724, at *2 (S.D.N.Y. Apr. 27, 2006). Indeed, where jurisdictional facts are disputed, the Court has the power and the obligation to consider matters outside the pleadings, such as affidavits, documents, and testimony, to determine whether jurisdiction exists. See Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek, 600 F.3d 171, 175 (2d Cir. 2010); APWU v. Potter, 343 F.3d 619, 627 (2d Cir. 2003); Kamen v. Am. Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986). In so doing, the Court is guided by the body of decisional law that has developed under Rule 56 of the Federal Rules of Civil Procedure. Kamen, 791 F.2d at 1011; see also Aguilar v. Immigration & Customs Enf't Div. of the U.S. Dep't of Homeland Sec., 811 F. Supp. 2d 803, 821-22 (S.D.N.Y. 2011).

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the allegations in the complaint are accepted as true, and all reasonable inferences must be drawn in the plaintiff's favor. McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir.

2007). The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). The Court should not dismiss the complaint if the plaintiff has stated "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). While the Court should construe the factual allegations in the light most favorable to the plaintiff, "the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions." Id.

When presented with a motion to dismiss pursuant to Rule 12(b)(6), the Court may consider documents that are referenced in the complaint, documents that the plaintiff relied on in bringing suit and that are either in the plaintiff's possession or that the plaintiff knew of when bringing suit, or matters of which judicial notice may be taken. See Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002).

II.

Illinois enacted the BIPA in 2008. The legislative findings accompanying the BIPA explain that the BIPA was passed, in part, because the Illinois legislature anticipated that commercial businesses would increasingly use biometric data, such as fingerprints, to facilitate financial transactions. 740 Ill. Comp. Stat. 14/5(a-b). As the Illinois legislature observed, biometric data are by definition unique, and thus --- unlike a credit card number --- cannot realistically be changed if they are subject to identity theft. See 740 Ill. Comp. Stat. 14/5(c). The Illinois legislature was concerned that the failure of businesses to implement reasonable safeguards for such data would deter Illinois citizens from "partaking in biometric identifier-facilitated transactions" in the first place, and would thus discourage the proliferation of such transactions as a form of engaging in commerce. 740 Ill. Comp. Stat. 14/5(e). The BIPA represents the Illinois legislature's judgment that the collection and storage of biometrics to facilitate financial transactions is not in-of-itself undesirable or impermissible; instead, the purpose of the BIPA is to ensure that, when an individual engages in a biometric-facilitated transaction, the private entity protects the individual's biometric data, and does not use that data for an improper purpose, especially a

purpose not contemplated by the underlying transaction. See 740 Ill. Comp. Stat. 14/5(a-g).

Under the BIPA, a "biometric identifier" is "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry," while "biometric information" is information based on "biometric identifiers." 740 Ill. Comp. Stat. 14/10. Among other things, the BIPA includes a number of provisions to regulate the collection, dissemination, and storage of biometric identifiers and biometric information. First, Section 15(a) provides that:

> A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first.

See 740 Ill. Comp. Stat. 14/15(a). Second, the BIPA requires private entities to "store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry," and to treat such identifiers and information as sensitive and confidential. 740 Ill. Comp. Stat. 14/15(e).

Third, Section 15(b) provides that a private entity that collects biometric identifiers or biometric information must (1)

inform the subject in writing that a biometric identifier, or biometric information, is being collected; (2) inform the subject in writing of the purpose and length of the collection and storage; and (3) receive a written release from the subject. 740 Ill. Comp. Stat. 14/15(b). Fourth, Section 15(c) prohibits private entities from selling biometric identifiers and biometric information to third-parties. 740 Ill. Comp. Stat. 14/15(c). Finally, and relatedly, Section 15(d) prohibits private entities from disseminating biometric identifiers and biometric information without prior written consent, or unless such dissemination is necessary to complete a financial transaction authorized by the subject. 740 Ill. Comp. Stat. 14/15(d).

The BIPA provides that "any person aggrieved by a violation" of the BIPA may pursue money damages and injunctive relief against the offending party.[2] See 740 Ill. Comp. Stat. 14/20. The BIPA also provides for attorney's fees to be awarded to the prevailing party. See id.

[2] Specifically, the BIPA provides that the prevailing party may recover the greater of $1,000 in liquidated damages, or actual damages, for each negligent violation of the BIPA, and the greater of $5,000 in liquidated damages, or actual damages, for each reckless or intentional violation of the BIPA. See 740 Ill. Comp. Stat. 14/20.

III.

A.

Take-Two is a Delaware corporation, with its headquarters and principal place of business located in New York, New York, that publishes, develops, and distributes video games. SAC ¶¶ 1, 9. Among numerous other video games, Take-Two publishes, develops, and distributes the popular video games "NBA 2K15" and "NBA 2K16" (collectively, the "NBA 2K Games") that are playable on personal computers and other gaming platforms. SAC ¶ 1. The NBA 2K Games are basketball simulation video games that allow a gamer to play as, and against, virtual basketball players, many of whom are designed based upon real professional players from the National Basketball Association. SAC ¶ 27. A gamer can play the NBA 2K Games in multiplayer mode with other gamers over the Internet. See, e.g., SAC ¶ 36.

The NBA 2K Games include the "MyPlayer" feature, which allows a gamer to create a "personalized basketball avatar" based upon a three-dimensional rendition of the gamer's face. SAC ¶¶ 27, 29. To create the avatar, the NBA 2K Games use cameras connected to the gaming platform to scan the gamer's face and head. SAC ¶ 29. The scanning is a lengthy and involved process that takes about 15 minutes, during which time the gamer must stare up-close at the camera while also turning his or her head from side-to-side at regular intervals. SAC ¶ 29.

The plaintiffs allege that Take-Two's proprietary technology extracts geometric data from the scan related to the unique points and contours of the gamer's face, and converts that data into a personally identifying animated rendition of the gamer's face. SAC ¶¶ 29-31. The rendition then becomes the face of the gamer's personalized basketball avatar for in-game play. SAC ¶ 29. The MyPlayer feature's only alleged purpose is to create personalized basketball avatars. See SAC ¶ 27.

If a gamer wishes to use the MyPlayer feature, the gamer must first agree to the following terms and conditions:

> Your face scan will be visible to you and others you play with and may be recorded or screen captured during gameplay. By proceeding you agree and consent to such uses and other uses pursuant to the End User License Agreement.
> www.take2games.com/eula

See SAC ¶ 28.[3] Third-party gamers can view the rendition if the gamer choses to play with the personalized basketball avatar in multiplayer mode. See SAC ¶ 35. There is no requirement that a gamer who uses the MyPlayer feature be an actual purchaser or owner of an NBA 2K Game. See SAC ¶ 40.

The plaintiffs allege that Take-Two indefinitely stores the biometric information it collects through the face scans on its servers. SAC ¶ 28. They also allege that Take-Two transmits unencrypted biometric information through the "open commercial

[3] The hyperlink in the terms and conditions links to Take-Two's "Limited Software Warranty and License Agreement."

Internet." SAC ¶ 35. The plaintiffs further allege that Take-Two markets and advertises the MyPlayer feature. SAC ¶ 36.

B.

The plaintiffs, Ricardo Vigil and Vanessa Vigil, are siblings, and are alleged to be residents and citizens of Illinois. SAC ¶¶ 7-8, 39-40. The Second Amended Complaint alleges that Ricardo Vigil is the purchaser and owner of a copy of NBA 2K15, and that Vanessa Vigil played her brother's copy of the game. SAC ¶¶ 39-40.

The plaintiffs allege that they each used the MyPlayer feature to scan their faces to create their own personalized basketball avatars. SAC ¶ 41. Prior to the scanning, the plaintiffs allege that they each agreed to the MyPlayer terms and conditions described above. SAC ¶ 41. The plaintiffs allege that they subsequently chose to enter a multiplayer game with their personalized basketball avatars, meaning that the digital renditions of their faces, which the plaintiffs claim constitute biometric information under the BIPA, were visible to third-parties also playing NBA 2K15. SAC ¶ 45. The Second Amended Complaint contains no allegations regarding the quality of the plaintiffs' personalized basketball avatars, such as the degree to which the digitized faces of the plaintiffs' avatars resembled the plaintiffs.

Even though the plaintiffs agreed to the MyPlayer terms and conditions, the plaintiffs allege that they failed to appreciate the gravity associated with using MyPlayer --- especially that renditions of their face scans would be allegedly indefinitely stored on Take-Two's servers, transmitted over the commercial Internet, and subject to allegedly inadequate protections --- because they did not receive adequate written disclosures from Take-Two. See SAC ¶¶ 42-52. The plaintiffs allege that they have both "become weary" of participating in biometric-facilitated transactions, and have since refrained from participating in such transactions due to their experience with NBA 2K15. SAC ¶ 61.

The Second Amended Complaint alleges that Ricardo Vigil's purchase of NBA 2K15 was motivated in material part by his desire to use the MyPlayer feature, but that he did not at the time of the purchase understand Take-Two's alleged practices with respect to biometric information. SAC ¶¶ 53-55. The Second Amended Complaint alleges that, "After purchasing and opening the packaging on the NBA 2K15 video game, Plaintiff Ricardo Vigil had no option to return the video game for a monetary refund," and that he has therefore suffered tangible, monetary harm. SAC ¶ 55.

There is no allegation that the plaintiffs did not realize that their own faces were unique identifiers prior to using the

MyPlayer feature. There is no allegation that the plaintiffs did not understand that the only purpose of the MyPlayer feature was to create a personalized basketball avatar for in-game play, including in multiplayer mode. And there is no allegation that the plaintiffs' face scans have been disseminated in any form other than to the gamers who played in multiplayer games with the plaintiffs.[4]

The plaintiffs claim that Take-Two has violated the BIPA in almost every respect. First, the plaintiffs claim that Take-Two did not publicly provide a retention schedule or guidelines for permanently destroying biometric identifiers in violation of Section 15(a). SAC ¶¶ 38, 75. Second, they claim that Take-Two failed to inform the plaintiffs properly in writing that their biometric identifiers would be collected, and failed to explain the purpose and length of that collection, in violation of Section 15(b). SAC ¶¶ 32-33, 73. Third, the plaintiffs claim that Take-Two collected biometric information without first obtaining a written release from the plaintiffs, also in violation of Section 15(b). SAC ¶¶ 34, 74. Fourth, the plaintiffs claim that Take-Two disclosed and disseminated their biometric identifiers without obtaining adequate consent in

[4] Counsel for the plaintiffs made clear at oral argument that the plaintiffs are not seeking to base their claims on their volitional entrance into multiplayer games, where the digital renditions of their faces on the personalized basketball avatars could be viewed by third-parties.

violation of Section 15(d). SAC ¶¶ 35, 76. Fifth, the plaintiffs claim that Take-Two failed to transmit their biometric identifiers with industry-standard reasonable care in violation of Section 15(e). SAC ¶¶ 35, 37, 77. Finally, the plaintiffs claim that Take-Two has profited from the plaintiffs' biometric identifiers in violation of Section 15(c). SAC ¶¶ 36, 57, 78.

The plaintiffs seek money damages, injunctive relief, and reasonable attorney's fees. SAC ¶¶ 79-80.

IV.

The plaintiffs have compiled a long list of purported technical violations of the BIPA. In an effort to create standing to pursue their claims for these technical violations, the plaintiffs try several different alleged theories of harm, variously arguing that they have suffered from the procedural violations themselves (including from "informational injuries" and the enhanced risk of harm that their face scans will be subject to a data breach); apprehension about engaging in future biometric-facilitated transactions; misappropriation; intrusion on seclusion; and a diminished benefit-of-the-bargain associated with purchasing NBA 2K15.

Take-Two has moved to dismiss the Second Amended Complaint for two reasons. First, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Take-Two argues that the plaintiffs do not have Article III standing to pursue their claims under the