IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS

LINDABETH RIVERA, on behalf of herself and all others similarly situated, Plaintiff, v. GOOGLE INC., Defendant.	Case No.: 1:16-cv-02714 Judge: Honorable Edmond E. Chang Magistrate Judge Michael T. Mason
JOSEPH WEISS, individually and on behalf of all others similarly situated, Plaintiff, v. GOOGLE INC., Defendant.	Case No.: 1:16-cv-02870 Judge: Honorable Edmond E. Chang Magistrate Judge Michael T. Mason

GOOGLE INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS CONSOLIDATED MOTION TO AMEND THE COURT'S FEBRUARY 27, 2017 MEMORANDUM OPINION AND ORDER TO INCLUDE A CERTIFICATION UNDER 28 U.S.C. § 1292(b) AND MOTION TO STAY PROCEEDINGS PENDING APPEAL

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I. INTRODUCTION

Under 28 U.S.C. § 1292(b), a district court "shall" certify a non-final order for immediate appeal when the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). If those criteria are met, it is "the duty of the district court . . . to allow an immediate appeal to be taken." *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000).

This Court's Memorandum Opinion and Order of February 27, 2017 denying Google Inc.'s consolidated motion to dismiss ("the Order") satisfies the criteria of section 1292(b). First, the Order involves a "question of law": whether the term "biometric identifier," as defined in the Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq.*, includes information derived from photographs. Second, that legal question is "controlling" in the relevant sense: Plaintiffs' entire case rests on the premise that the alleged face templates created by Google and derived from user photographs qualify as "biometric identifiers." Third, there is a "substantial ground for difference of opinion" on the question: This Court's extensive opinion itself testifies to the closeness of the question, and another district court has resolved the same question in a different way. Finally, an immediate appeal will "materially advance the ultimate termination of the litigation": If the Seventh Circuit agrees with Google, that will be the end of the case, and even if it does not, the Seventh Circuit may clarify the meaning of the statute in a manner that will streamline discovery and trial.

This Court should therefore amend the Order to state that the criteria of section 1292(b) are met and allow the Seventh Circuit to decide, in its discretion, whether to grant Google's application for an appeal. Further, in the interest of efficiency and judicial economy, this Court should stay all proceedings until the Seventh Circuit disposes of the appeal.

II. BACKGROUND

BIPA regulates "[b]iometric identifier[s]" and "[b]iometric information." 740 ILCS 14/10. The statute defines "[b]iometric identifier" to "mean[]" six specific things: "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id.* The definition expressly excludes "writing samples, written signatures, photographs, [and] human biological samples used for valid scientific testing or screening." *Id.* "Biometric information" is defined to mean "any information, regardless of how it is captured, converted, stored, or shared, *based on* an individual's biometric identifier used to identify an individual." *Id.* (emphasis added). The statute then provides that "[b]iometric information does *not* include information derived from items or procedures excluded under the definition of biometric identifiers." *Id.* (emphasis added).

BIPA provides that a "private entity" may not "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first" obtains the subject's written release. *Id.* 14/15. BIPA also requires a "private entity in possession of biometric identifiers or biometric information [to] develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information." *Id.* And BIPA grants a private right of action to "[a]ny person aggrieved by a violation of [the statute]." *Id.* 14/20.

Plaintiffs Rivera and Weiss filed suit against Google alleging violations of BIPA. In particular, Weiss alleges that he has a Google Photos account, to which he uploaded twenty-one photos of himself. Weiss FAC ¶¶ 27, 28. He alleges that Google "extract[ed]" "geometric data" about the image of his face from the photos he uploaded, then used that data and Google's facial recognition technology to create a "face template." *Id.* ¶¶ 5, 29. Rivera does not have a Google Photos account. She alleges that someone else uploaded approximately eleven photos of her to Google Photos. Rivera FAC ¶¶ 5, 26, 27. Like Weiss, Rivera alleges that Google extracted data from the photos of her face to create a template using facial recognition technology. *Id.* ¶¶ 28-30.

Both Plaintiffs contend that these so-called templates, which are concededly derived "from photographs," Rivera FAC ¶ 18; Weiss FAC ¶ 18, amount to a "scan[]" of "face geometry" and so are "biometric identifiers" covered by BIPA. *See* Rivera FAC ¶ 43; Weiss FAC ¶ 44. In their First Amended Complaints, Plaintiffs seek to represent a class of everyone who had templates created from photographs "uploaded within the state of Illinois." Rivera FAC ¶ 35; Weiss FAC ¶ 36. This Court consolidated the two cases.

Google filed a motion to dismiss the Complaints. It argued that the alleged face templates are not "biometric identifiers" within the meaning of BIPA, because they are derived from photographs. Further, Google contended that the Complaints should be dismissed because Plaintiffs had not plausibly alleged that Google violated BIPA *in Illinois*. Finally, Google argued that, to the extent BIPA covers its Google Photos technology, the statute violates the Dormant Commerce Clause.

In its February 27 Order, this Court denied Google's motion to dismiss. First, it rejected Google's interpretation of the definition of "biometric identifier," holding that the term includes information derived from photographs. Order at 6-21. Second, the Court agreed with Google that BIPA does not apply extraterritorially, but found that further factual development was necessary to determine where the alleged violations of BIPA occurred. *Id*. at 21-26. Finally, the Court found that further factual development was also necessary to assess Google's Dormant Commerce Clause argument. *Id*. at 26-30.

Google now asks this Court to amend its Order denying Google's motion to dismiss to include a section 1292(b) certification for interlocutory appeal. In particular, the following question satisfies the criteria of section 1292(b): whether the term "biometric identifier," as defined in BIPA, 740 ILCS 14/10, includes information derived from photographs.

III. ARGUMENT

A. Section 1292(b)'s Criteria for an Immediate Appeal Are Met.

Under section 1292(b), a district court "shall" certify an order for immediate appeal if it "involves a controlling question of law as to which there is substantial ground for difference of opinion" and if "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Interpreting that provision, the Seventh Circuit has explained that immediate appeal is appropriate when "(1) the appeal presents a question of law; (2) it is controlling; (3) it is contestable; (4) its resolution will expedite the resolution of the litigation, and (5) the petition to appeal is filed in the district court within a reasonable amount of time after entry of the order sought to be appealed." *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1007 (7th Cir. 2002) (citing *Ahrenholz*, 219 F.3d at 675). Google's request for section 1292(b) certification meets all five of those criteria.

1. The Order Resolved a Pure Question of Law.

Google seeks immediate appeal of a pure question of law—the meaning of the phrase "biometric identifier" in BIPA. The Seventh Circuit has explained that "'question of law' as used in section 1292(b) has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Ahrenholz*, 219 F.3d at 676. The question Google seeks to immediately appeal is just that. It concerns the "meaning" of a key term in BIPA—a "statutory . . . provision." *Id.* And because the meaning of that term is a "pure question of law," the Seventh Circuit "could decide [it] quickly and cleanly without having to study the record." *Id.* at 677. The Seventh Circuit should therefore "be enabled to do so without having to wait till the end of the case." *Id.*

To be sure, this Court noted in its Order that "[i]t is conceivable that discovery will reveal that what Google is *actually* doing does not fit within the definition of biometric identifier *as interpreted by the Court*." Order at 21 (second emphasis added). But that does not change the fact that the term has already been "*interpreted by the Court*." *Id.* (emphasis added). It is the

Court's *interpretation* of the statutory term—not the application of that interpretation to Google Photos—that Google seeks to have certified for an immediate appeal.

2. The Question of Law Is Controlling.

The question of the meaning of "biometric identifier" is "controlling." 28 U.S.C. § 1292(b). Indeed, the meaning of "biometric identifier" is the crux of Plaintiffs' case. If the Seventh Circuit agrees with Google's interpretation of BIPA, that is the end of this litigation: It is undisputed that the alleged face templates are derived from photographs; they are not scans conducted in person, of the geometry of a person's actual face. *See, e.g.*, Rivera FAC ¶¶ 18, 21-22; Weiss FAC ¶¶ 18, 21-22. The meaning of "biometric identifier" is therefore the central legal question in this case, and it should be settled sooner rather than later.

3. The Question of Law Is Contestable.

There is "substantial ground for difference of opinion" on the meaning of "biometric identifier" in BIPA. 28 U.S.C. § 1292(b). First of all, the meaning of "biometric identifier" in BIPA is a "question[] of first impression" in the Seventh Circuit; for that reason alone, it is "certainly contestable." *Boim*, 291 F.3d at 1007-08. Second, as this Court's extensive treatment of the issue indicates, *see* Order at 6-21, Google raised substantial arguments grounded in the text, structure, and history of BIPA in support of its interpretation of the statute. This Court is already familiar with those arguments, so Google will not rehash them here.

Moreover, the only other district court to address the meaning of biometric identifier in any detail took a different approach to interpreting the statute. *See In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155 (N.D. Cal. 2016). In that case, the court construed the term "photographs" to refer only to "paper prints of photographs, not digitized images." *Id.* at 1171. This Court expressly declined to "adopt" that interpretation in its own opinion. Order at 12 n.7. That disagreement is strong evidence that the question of the meaning of "biometric identifier" is contestable.

4. Immediate Appeal Will Expedite Resolution of this Litigation.

If the Seventh Circuit agrees with Google's reading of BIPA, that will be the end of the case. Allowing the Seventh Circuit to take up the question now could therefore substantially "expedite the resolution of the litigation." *Boim*, 291 F.3d at 1007. Indeed, it would be wasteful and unfair to Google to delay resolution of this pure question of law until after discovery, motion practice, and trial. *See In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625-26 (7th Cir. 2010). Further, even if the Seventh Circuit affirms this Court's bottom line, it may clarify the meaning of "biometric identifier" in a manner that focuses discovery and trial preparation, and therefore helps the parties and the Court resolve this litigation as efficiently as possible. An "immediate appeal" will thus "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

5. This Motion Is Filed Within a Reasonable Amount of Time.

The Federal Rules do not set a time limit within which a party must ask a district court to certify an interlocutory order for immediate appeal. The Seventh Circuit has said only that a request must be "filed in the district court within a reasonable amount of time after entry of the order sought to be appealed." *Boim*, 291 F.3d at 1007. Here, at the March 2 status conference, this Court set a due date of March 9 for Google to move for section 1292(b) certification—10 days after the entry of the initial order. *See* Dkt. 62. This motion is filed by the deadline set by the Court, and is "reasonable."

B. This Court Should Amend Its Order To Include the Statement Required by Section 1292(b).

Because the statutory criteria are met, under section 1292(b) this Court "shall so state in writing" in the Order. As the Seventh Circuit has explained, it is a district court's "duty . . . to allow an immediate appeal to be taken when the statutory criteria are met," as they are here. *Ahrenholz*, 219 F.3d at 677. By fulfilling that duty and allowing an application for appeal to be filed, a district court properly gives the court of appeals an opportunity to decide, "in its discretion," whether to "permit an appeal." 28 U.S.C. § 1292(b).

This Court's Order did not include the requisite statement. Google therefore moves the Court to amend the Order. Federal Rule of Appellate Procedure 5(a)(3) specifically authorizes a district court to amend an order to add the findings necessary for an interlocutory appeal to proceed. *See* Fed. R. App. P. 5(a)(3) ("If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement."). Because the criteria for interlocutory appeal are satisfied, this Court should amend the Order here to include the requisite section 1292(b) certification.

C. This Court Should Stay Proceedings Pending a Decision by the Seventh Circuit.

An application for appeal under section 1292(b) does not automatically stay proceedings in the district court. *See* 28 U.S.C. § 1292(b) ("[An] application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."). This Court should stay proceedings in order to realize the main benefit of an interlocutory appeal—preserving this Court's and the parties' resources. As the Seventh Circuit has noted, discovery is "burdensome," and to "immerse the parties in the discovery swamp" based on a legal error is an "irrevocable as well as unjustifiable harm to the defendant that only an immediate appeal can avert." *In re Text Messaging Antitrust Litig.*, 630 F.3d at 625-26. This Court should therefore stay proceedings while Google seeks permission to appeal from the Seventh Circuit and, if such permission is granted, until the interlocutory appeal is resolved.

IV. CONCLUSION

Because the criteria under 28 U.S.C. § 1292(b) are satisfied, this Court should amend its February 27, 2017 Order to certify it for interlocutory appeal. The Court should also stay proceedings in this Court while Google seeks permission from the Seventh Circuit to take an appeal and, if an appeal is permitted, until the appeal is decided.

Dated: March 9, 2017

GOOGLE INC.,

By: */s/ Neal Kumar Katyal*
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