



“A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint.” *Yoon Ja Kim v. Jh Song*, 2016 IL App (1st) 150614-B ¶ 41. Motions brought under Section 2-615 do not raise affirmative factual defenses. *Id.* Rather, “[a]ll well-pleaded facts and all reasonable inferences from those facts are taken as true. Where unsupported by allegations of fact, legal and factual conclusions may be disregarded.” *Kagan v. Waldheim Cemetery Co.*, 2016 IL App (1st) 131274 ¶ 29. “In determining whether the allegations of the complaint are sufficient to state a cause of action, the court views the allegations of the complaint in the light most favorable to the plaintiff. Unless it is clearly apparent that the plaintiff could prove no set of facts that would entitle him to relief, a complaint should not be dismissed.” *Id.*

### III. Analysis

#### 1. Count I – Section 15(a)

Count I of the Complaint alleges that Defendant violated Section 15(a) of BIPA by failing to comply with its own policy governing the retention of biometric identifiers and information stored by Amazon Photos.

Section 15(a) provides:

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. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.

740 ILCS 14/15(a).

Under Section 15(a), Defendant is required to comply with its own policy regarding retention and destruction of biometric data. Defendant argues that Count I should be dismissed because Plaintiffs have not alleged facts indicating that Amazon failed to comply with its own policy. Specifically, Defendants argue that Plaintiffs did not allege that they performed one of the three actions that would have triggered Amazon's duty to delete their biometric data under the relevant Policies.

Amazon's "File Retention Policy" provides that all files will be deleted when a user abandons their account for two years (i.e. has not uploaded, downloaded, or signed into the account in the last two years), or until the user disables image recognition features or the user terminates their Amazon Photos account. (Def.'s Mot. to Dismiss, Ex. A). In brief, Defendant argues that Plaintiffs have failed to allege that Amazon's duty to delete their biometric data was triggered pursuant to the Policies because Plaintiffs did not allege that they abandoned the account for two years, disabled the image recognition features, or terminated their Amazon

Photos account. Plaintiffs seemingly respond that they have sufficiently alleged a cause of action because the documents referenced in Plaintiffs' Complaint show that Amazon did not follow its own policy. However, Plaintiffs' response does not squarely address Defendant's argument which is that Plaintiffs have failed to allege that they have been personally injured.

The Court agrees with Defendant. It has been observed that plaintiffs in a class action lawsuit "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. *I.C.S. Ill., Inc. v. Waste Mgmt. of Ill., Inc.*, 403 Ill. App. 3d 211, 221 (1<sup>st</sup> Dist. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 502).

Here, Section 15(a) requires Defendant to comply with its own Policies regarding retention and destruction of biometric data, and Plaintiffs are arguing that Defendant has failed to do so. However, Defendant points out that Plaintiffs have not sufficiently alleged that Amazon did not comply with its own policy in violation of Section 15(a) because Plaintiffs did not allege that they took any of the three actions described in the relevant Policies which would have triggered Amazon's duty to delete the biometric data associated with Plaintiffs specifically. Plaintiffs' reliance on documents referenced in their Complaint is misguided because such documents only refer to general injury as opposed to any specific injury to Plaintiffs resulting from Defendant's failure to comply with its own policy.

Furthermore, Plaintiffs' reliance on *Rosenbach v. Six Flags Ent. Corp.* is also misguided. In *Rosenbach*, the Court was tasked with determining whether the plaintiff had to allege an injury or harm beyond a mere statutory violation. In the passage cited by Plaintiffs, the Court reasoned that alleging a statutory violation was sufficient as such a violation is the very harm that the Illinois legislature intended to prevent. Here, Defendant is arguing that Plaintiffs have not even alleged a statutory violation. Defendants contend that dismissal is proper because Plaintiffs have failed to sufficiently allege that Amazon did not comply with its own Policies as applicable to Plaintiffs specifically. Noticeably, Plaintiffs do not address the argument that they did not allege facts indicating that they took any of the three actions described in the relevant Policies which would have triggered Amazon's duty to delete their biometric data.

Nonetheless, it is not clear that Plaintiffs can allege no set of facts entitling recovery. A complaint may be dismissed with prejudice only where it is clearly apparent that the Plaintiffs can plead no set facts entitling recovery. *Friedman v. Gingiss*, 182 Ill. App. 3d 293, 295 (1<sup>st</sup> Dist. 1989). Accordingly, Count I of the Complaint is dismissed without prejudice.

## 2. Count II – Section 15(e)

Count II of the Complaint alleges that Defendant violated Section 15(e) by failing to securely store and transfer biometric identifiers and information obtained through Amazon Photos. Section 15(e) provides:

A private entity in possession of a biometric identifier or biometric information shall:

- (1) 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
- (2) store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.

740 ILCS 14/15(e).

Defendant argues that Count II should be dismissed because the Complaint does not allege any facts showing that Amazon does not store, transmit, or protect biometric data from Amazon Photos in a manner less protective or not the same as the manner in which it stores other confidential and sensitive information. Defendant further contends that the Complaint does not contain allegations addressing the manner in which they store, transmit, or protect biometric data.

The Court disagrees. First, Section 15(e) requires that Amazon store, transmit, and protect biometric data "using the reasonable standard of care" within the industry. Section 15(e) also requires Amazon to store, transmit, and protect biometric data in a manner that is the same as or more protective than the manner that Amazon stores, transmits, and protects other confidential and sensitive information. Plaintiff first alleges that Amazon's internal documents state that Amazon has "historically invested minimally in [Photos] security as a whole, dedicating zero headcount toward actively identifying flaws in [its] systems" and that certain services upon which Amazon Photos was built still pose a risk to Photos customer content as these services were built during a time when security was not a concern. (Pl.'s Compl. ¶ 94).

The Complaint also alleges that Amazon devotes fewer resources to protecting Photos data than it does to protect similarly confidential and sensitive payment information and that Amazon devotes the same amount of money and fewer staff to Photos infrastructure in comparison to other projects involving less sensitive data. (Pls.' Compl. ¶¶ 96-97). The Complaint alleges that most services in Amazon Photos require infrastructure resources to be managed manually which has led to several issues in the past, including deletion of critical resources and broadened resource permissions scope. (Pls.' Compl. ¶ 98). The Complaint further alleges that critical customer metadata is stored in a manner that is "vulnerable to attacks" which can lead to clients reading customer metadata that they should not have access to. (Pls.' Compl. 98). Finally, the Complaint alleges that Amazon failed to encrypt biometric data stored in one of its databases. (Pls.' Compl. ¶ 99-100).

The Court finds that these allegations sufficiently state a cause of action under Section 15(e) when read in a light most favorable to Plaintiffs. Therefore, Defendant's Motion to Dismiss Count II for failure to state a claim is properly denied.

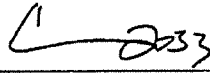
**IV. Conclusion**

1. Defendant's Motion to Dismiss as to Count I is GRANTED, Count I is dismissed without prejudice with leave to replead;
2. Defendant's Motion to Dismiss as to Count II is DENIED.
3. The court date of August 11, 2023 is stricken.
4. The matter is continued for status on case management to September 7, 2023 at 11:00 AM via Zoom.
5. Zoom Details:
  - i. Zoom ID: 952 6244 1199
  - ii. Zoom Password: 541722
  - iii. Zoom Dial-In: (312) 626-6799
6. For questions regarding proceedings or accessing Zoom, litigants shall refer to:
  - i. Calendar 10's Standing Order: available online & link provided upon e-mail request
  - ii. JusticeCorps Court Information Helpline: (872) 529-1093
  - iii. Contacting Calendar 10, e-mail is most efficient:
    1. CCC.ChanceryCalendar10@cookcountyil.gov
    2. (312) 603-6041

Judge Caroline Kate Moreland

AUG 07 2023

Dated  
Circuit Court - 2033



Judge Caroline Kate Moreland No. 2033