

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Steven Renderos et al
Plaintiff/Petitioner(s)
VS.
Clearview AI, Inc. et al
Defendant/Respondent(s)

No. RG21096898

Date: 06/14/2022

Time: 10:00 AM

Dept: 21

Judge: Evelio Grillo

ORDER re: Hearing on Demurrer -
without Motion to Strike

The Demurrer - without Motion to Strike filed by El Segundo Police Department on 05/16/2022 is Sustained with Leave to Amend.

The Demurrer of El Segundo to complaint is SUSTAINED WITH LEAVE TO AMEND.

BACKGROUND

This is a demurrer, so the court accepts the allegations of the complaint as true.

Clearview collects the images and biometric information of California residents (including Plaintiffs) without notice or consent by scraping images from websites and platforms, such as Facebook, Twitter, and Venmo. Clearview has promoted and sold licenses for its faceprint database throughout the State, in part by offering trial uses to government entities such as El Segundo.

Plaintiffs allege that El Segundo's use of Clearview's database aids and abets Clearview's theft of Plaintiffs' likenesses and chills Plaintiffs' right to free speech.

The complaint filed 4/22/21 suggests, but does not state clearly, causes of action 1, 2, 3, are against Clearview only and causes of action 4 and 5 are against the Municipal Defendants.

Plaintiffs' opposition clarifies that plaintiffs bring three causes of action against Clearview: (1) common law appropriation of likeness; (2) violation of Plaintiffs' right to privacy under Cal Const Art 1, Sect 1; and (3) unfair and unlawful business practices under the UCL. Plaintiffs bring two causes of action against El Segundo and the other municipal defendants: (4) aiding and abetting Clearview's tortious conduct; and (5) violating the liberty of speech under Cal. Const Art I, Sec. 2(a).

FEDERAL AUTHORITY

A federal judge in overseeing a deferral MSL has already addressed some of the issues in this motion. (In re Clearview AI, Inc., Consumer Privacy Litigation (N.D. Ill., 2022) 2022 WL 444135; In re Clearview AI, Inc. Consumer Privacy Litig. (N.D. Ill. 2022) 2022 WL 870637.)

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The court considers these for persuasive value.

“[D]ecisions by the lower federal courts are neither binding nor controlling on matters of state law.” (T.H. v. Novartis Pharmaceuticals Corp. (2017) 4 Cal.5th 145, 175.) (See also Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504, 527 fn 14 [federal district court opinions “at best” may be described as persuasive on matters of state law].)

STANDING

Plaintiffs adequately allege standing to assert a claim against El Segundo.

““As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator. ... The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical.”” (Abernathy v. Superior Court (2007) 157 Cal.App.4th 642, 646.)

“There is no general “public interest” exception to the requirement of standing.” (People ex rel. Becerra v. Superior Court (2018) 29 Cal.App.5th 486, 497.) “Public-interest standing ... is available only in a mandate proceeding, not in an ordinary civil action. ” (29 Cal.App.5th at 503.)

Defendants argue that Plaintiffs do not reside in El Segundo, have never been arrested in El Segundo, and have no direct connection to El Segundo.

Plaintiffs adequately allege beneficial standing. Plaintiffs allege that they have engaged in political actions that have been critical of the police, that El Segundo is assisting Clearview in its collection of data and knowingly furthering Clearview’s allegedly unlawful activity, and that the collection of the data harms them. The alleged harm from El Segundo’s alleged relationship with Clearview lies in the collection of the data and the threat and chilling effect that the existence of the database creates. Under plaintiffs’ theory, there is harm in El Segundo’s cooperation with Clearview even if a person is not actually arrested or convicted.

JUSTICIABILITY – RIPENESS

The claims against El Segundo are ripe for adjudication. The complaint alleges that El Segundo collects and uploads images to Clearview. (Cpt part 74) There is arguably harm in the alleged collection of data and alleged resulting intimidation even if a person is not actually arrested or convicted. (White v. Davis (1975) 13 Cal.3d 757, 761 [stating on demurrer, “we visualize a substantial probability that this alleged covert police surveillance will chill the exercise of First Amendment rights”]

GOVERNMENT CLAIMS ACT

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The Government Claims Act does not apply because plaintiffs are not seeking money damages. The Government Claims Act does not apply where plaintiffs bring “nonpecuniary actions, such as those seeking injunctive, specific or declaratory relief.” *Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal. App. 4th 914, 929.) (See also Govt Code 814.) Plaintiffs are seeking only injunctive relief. (Oppo at 7:7-9.) Plaintiffs must amend the complaint to state clearly whether they are seeking damages from the Municipal Defendants.

FOURTH CAUSE OF ACTION - AIDING AND ABETTING THE TORTS OF CLEARVIEW

Plaintiffs’ 4th cause of action is against the Municipal Defendants for aiding and abetting the torts of Clearview. (Cpt 91-95) SUSTAINED WITH LEAVE TO AMEND.

“Aiding-abetting focuses on whether a defendant knowingly gave ‘substantial assistance’ to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct. [¶] ... [W]hile aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. A plaintiff’s object in asserting such a theory is to hold those who aid and abet in the wrongful act responsible as joint tortfeasors for all damages ensuing from the wrong.” ... The aider and abetter’s conduct need not, as “separately considered,” constitute a breach of duty.” (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802 fn 10.) (CACI 3610)

The complaint is less than clear because it asserts that the Municipal Defendants aided and abetted the torts of Clearview but does not identify the torts of Clearview. The demurrer is sustained with leave to amend so that plaintiffs can state claims for aiding and abetting specific torts.

The briefing on this cause of action did not directly address the cause of action.

First, El Segundo argues that the complaint does not state a claim for invasion of privacy against El Segundo. (Moving at 5-6.) That is correct, the claim against El Segundo is that it aided and abetted Clearview’s torts. The court will not decide in the El Segundo demurrer whether plaintiffs state a claim against Clearview. Plaintiffs may amend to allege a claim against El Segundo that it aided and abetted Clearview’s invasion of privacy. The court notes that in *In re Clearview AI, Inc. Consumer Privacy Litig.* (N.D. Ill. 2022) 2022 WL 870637 at *3-4, the federal court held that the plaintiffs did not state such a claim.

Second, El Segundo argues that the complaint does not state a claim under the UCL against El Segundo. (Moving at 6-7.) Plaintiffs do not assert a UCL claim against El Segundo. (Oppo at 7:18-19 [“Plaintiffs UCL claim is against Clearview only, not El Segundo”].) Plaintiffs may amend to allege a claim against El Segundo that it aided and abetted Clearview’s alleged violation of the UCL.

The court encourages plaintiff to research the issue of whether a person can assert a claim against a public entity for aiding and abetting a violation of the UCL given that a person cannot assert a

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claim directly against a public entity for a violation of the UCL. (People for Ethical Treatment of Animals, Inc. v. California Milk Producers Advisory Bd. (2005) 125 Cal.App.4th 871, 878.)

Third, El Segundo argues that the complaint does not state a claim for appropriation of likeness against El Segundo. (Moving at 7-8.) That is correct, the claim against El Segundo is that it aided and abetted Clearview's torts. The court will not decide in the El Segundo demurrer whether plaintiffs state a claim against Clearview. Plaintiffs may amend to allege a claim against El Segundo that it aided and abetted Clearview's appropriation of likeness.

Fourth, El Segundo argues that the complaint does not state a claim for common law aiding and abetting against El Segundo on any claims because claims against public entities must be permitted by statute. (Gov Code 815) (Moving at 7-8.) Plaintiffs cannot assert a claim against El Segundo for damages unless it is under a statute. The court does not address or decide whether a party can bring a statutory or non-statutory claim for aiding and abetting against a public entity for assisting a private entity seeking only injunctive relief against the public entity.

FIFTH CAUSE OF ACTION - LIBERTY OF SPEECH CLAIM

Plaintiffs' 5th cause of action is against the Municipal Defendants for infringing on liberty of speech. (Cpt 96-98) OVERRULED.

Cal Const, Art I, sec 2(a) stated: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

"[T]he free speech clause of article I, section 2(a) "is self-executing, and ... even without any effectuating legislation, all branches of government are required to comply with its terms. Furthermore, it also is clear that, like many other constitutional provisions, this section supports an action, brought by a private plaintiff against a proper defendant, for declaratory relief or for injunction." (Degrassi v. Cook, (2002) 29 Cal.4th 333, 338.)

Plaintiffs assert that the City of El Segundo's alleged use of Clearview's services "chill[ed] plaintiffs and plaintiffs' members from exercising the liberty of speech granted by the California Constitution" under Article I Section 2.

A person can assert a claim "to ensure that legitimate speech is not chilled or punished." (Taking Offense v. State (2021) 66 Cal.App.5th 696, 718.)

The court has considered In re Clearview AI, Inc. Consumer Privacy Litig. (N.D. Ill. 2022) 2022 WL 870637 at *2-3, where the federal court held that the defendant did not meet the "heavy burden" that there is no "reasonable possibility" plaintiffs can establish their speech/right to assemble claim against the municipal defendants."

The complaint adequately alleges a Liberty of Speech claim directly against El Segundo based on its actions in providing biometric data to Clearview and in using Clearview's services might chill legitimate speech.

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FURTHER PROCEEDINGS

Plaintiffs must file a First Amended Complaint on or before 7/8/22.

The Court orders counsel to obtain a copy of this order from the eCourt portal.

Dated: 06/14/2022



Evelio Grillo / Judge