

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

ALEX KISLOV and NIKO HEARN,  
individually and on behalf of similarly  
situated individuals,

*Plaintiffs,*

V.

AMERICAN AIRLINES, INC.,  
a Delaware corporation,

*Defendant.*

No. 17-cv-9080

Hon. Rebecca R. Pallmeyer

Magistrate Judge Sheila Finnegan

## **PLAINTIFFS' MOTION TO REMAND**

Plaintiffs Alex Kislov and Niko Hearn (“Plaintiffs”), individually and on behalf of all similarly situated individuals, pursuant to 28 U.S.C. § 1447(c), hereby respectfully move for entry of an Order remanding their claims brought pursuant to 740 ILCS 14/15(a)<sup>1</sup> to the Circuit Court of Cook County, Illinois.

## I. INTRODUCTION

On May 5, 2020, the United States Court of Appeals for the Seventh Circuit issued its decision in *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617 (7th Cir. 2020) (hereinafter “*Bryant*”), resolving an issue that had divided courts in this District for years: whether (and which) violations of the Illinois Biometric Privacy Act, 745 ILCS 14/15 *et seq.* (“BIPA”), are injuries sufficient to confer standing under Article III of the Constitution. *Bryant* held that the disclosure obligations created by 740 ILCS 14/15(a) of BIPA (“Section 15(a)”) – which require private entities possessing biometrics to establish a publicly-available biometric retention and destruction schedule – are owed to the public generally, rather to any particular person, and are not part of

<sup>1</sup> Plaintiffs' claims under 740 ILCS 14/15(a) are asserted in Count I of their operative Third Amended Class Action Complaint. (Dkt. 93).

BIPA's "informed consent" regime. Accordingly, the Seventh Circuit held that the plaintiff in *Bryant* did not suffer a concrete and particularized injury as a result of the defendant's violation of Section 15(a), and thus lacked Article III standing to pursue that claim in federal court. On June 30, 2020, the Seventh Circuit modified its decision, but maintained its holding that an alleged violation of this first provision of Section 15(a), standing alone, does not confer Article III standing. *Bryant*, 958 F.3d at 626 (as modified).

Here, Plaintiffs seek relief only under Section 15(a)'s first provision. Thus, under *Bryant*, this Court lacks jurisdiction over Plaintiffs' Section 15(a) claim. Accordingly, because Defendant removed this case from the Circuit Court of Cook County, Illinois, Plaintiffs' Section 15(a) claim must be severed and remanded to that court as a matter of law.

## II. PROCEDURAL HISTORY

Edward Kowalski initiated this action in the Circuit Court of Cook County, Illinois on November 17, 2017, alleging that Defendant violated Section 15(a), which requires, among other things, that private entities in possession of biometric information make publicly available a biometric data retention and destruction policy and 740 ILCS 14/15(b), which requires private entities collecting biometric data to make certain disclosures and obtain the subject's informed consent to collection. On December 18, 2017, Defendant removed this action to this Court pursuant to the Class Action Fairness Act ("CAFA") 28 U.S.C. §§ 1332(a) and (d). (Dkt. 1). On June 6, 2021, Plaintiffs filed the operative Third Amended Complaint, substituting Alex Kislov and Niko Hearn as non-unionized plaintiffs asserting BIPA claims against Defendant. (Dkt. 93). On June 16, 2021, Defendant moved to dismiss Plaintiffs' claims.<sup>2</sup>

---

<sup>2</sup> As discussed in further detail in their contemporaneously filed Motion to Stay Briefing (Dkt. 99), Plaintiffs respectfully submit that briefing should be stayed on Defendant's Motion to Dismiss pending resolution of this Motion to Remand because a district court must be sure of its subject matter jurisdiction before addressing the merits of the claims before it. *See Sinochem Int'l Co. Ltd. v. Malaysia Intern.*

### III. LEGAL STANDARD

If, in a removed case, a district court finds that it lacks subject matter jurisdiction at any time, the only remedy is remand to state court. *Smith v. Wis. Dep't of Agric., Trade & Consumer Prot.*, 23 F.3d 1134, 1142 (7th Cir. 1994); *see* 28 U.S.C. § 1447(c). Article III standing is a threshold element of federal subject matter jurisdiction. *Collier v. SP Plus Corp.*, 889 F.3d 894, 896 (7th Cir. 2018). Thus, if at any time Article III standing is lacking over a removed claim, the appropriate disposition is to remand that claim to the originating state court. *See* 28 U.S.C. § 1447(c); *Collier*, 889 F.3d at 897; *Bergquist v. Mann Bracken, LLP*, 592 F.3d 816, 819 (7th Cir. 2010).

### IV. UNDER BINDING SEVENTH CIRCUIT PRECEDENT, THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' SECTION 15(a) CLAIMS.

In this case, Plaintiffs allege that Defendant violated Section 15(a) by failing to make publicly available a biometric retention and destruction schedule. (Third Amended Class Action Complaint, Dkt. 93, ¶¶ 38, 50–59). In *Bryant*, the plaintiff's allegations were the same: that the defendant violated Section 15(a) by “possessing the Plaintiff's and the Class's fingerprints and information based on their fingerprints without creating a written policy, made available to the public, establishing a retention schedule and destruction guidelines for its possession of biometric identifiers and information.” (*See Bryant v. Compass Group, Inc.*, No. 19-cv-06622, Dkt. 1-1 (N.D. Ill.), attached hereto as Exhibit A, ¶ 52). The Seventh Circuit determined this alleged violation of Section 15(a)'s first provision was insufficient to confer Article III standing:

Bryant alleged only a claim under the provision of [Section 15(a)] requiring development of a “written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers

---

*Shipping Corp.*, 549 U.S. 422, 431 (2007) (“Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case”) (internal quotations omitted).

and biometric information,” *not under the provision requiring compliance with the established retention schedule and destruction guidelines* . . . This provision is not part of the informed-consent regime, and Bryant alleges no particularized harm that resulted from Compass's violation of section 15(a) . . . We conclude that Bryant did not suffer a concrete and particularized injury as a result of Compass's violation of section 15(a).

*Bryant*, 958 F.3d at 626 (7th Cir. 2020) (emphasis added). Accordingly, under *Bryant*, Plaintiffs’ allegations here do not confer Article III standing with respect to their Section 15(a) claims.

Following *Bryant*, the Seventh Circuit also addressed Article III in relation to Section 15(a) in *Fox v. Dakota Integrated Systems, LLC*, 980 F.3d 1146 (7th Cir. 2020). In *Fox*, the plaintiff did “not allege a mere procedural failure to publicly disclose a data-retention policy. Rather, [the plaintiff] allege[d] a concrete and particularized invasion of her privacy interest in her biometric data stemming from [the defendant’s] violation of the full panoply of its section 15(a) duties—the duties to develop, publicly disclose, and *comply with* data retention and destruction policies—resulting in the wrongful retention of her biometric data after her employment ended, beyond the time authorized by law.” *Fox*, 980 F.3d at 1149 (emphasis in original). The Seventh Circuit considered this alleged “unlawful retention” of Fox’s biometric data to be a concrete and particularized “privacy injury” similar to an unlawful collection of biometrics under 740 ILCS 14/15(b). Nonetheless, the Seventh Circuit reaffirmed its holding in *Bryant* that “a mere failure to publicly disclose a data-retention policy” is insufficient to confer Article III standing. *See id.* at 1154.

Here, like the plaintiff in *Bryant*, and unlike the plaintiff in *Fox*, Plaintiffs allege only that Defendant failed to develop a publicly available data-retention policy as required by Section 15(a). (Third Amended Class Action Complaint, Dkt. 93, ¶¶ 38, 54). Plaintiffs do not allege that

Defendant has unlawfully retained their biometrics. Courts in this Circuit have consistently held that Section 15(a) allegations which do not address unlawful retention are insufficient to confer Article III standing. *See, e.g., Colon v. Dynacast, LLC*, No. 20-cv-3317, 2021 WL 492870, at \*5 (N.D. Ill. Feb. 10, 2021) (“[T]he Court reads the complaint as alleging a section 15(a) claim based only on Defendant's failure to publish its data policy—not Defendant's failure to comply with any data policy. As explained in *Bryant*, the Court lacks jurisdiction over this claim”) (emphasis in original); *Marquez v. Google LLC*, No. 20-cv-4454, 2020 WL 6287408, at \*2 (N.D. Ill. Oct. 27, 2020) (remanding Section 15(a) claim under *Bryant* where the plaintiff alleged the defendant failed to “provide a publicly available written policy regarding its schedule and guidance for the retention and permanent destruction of individuals’ biometrics”); *Burlinski v. Top Golf USA Inc.*, No. 19-cv-06700, 2020 WL 5253150, at \*4 (N.D. Ill. Sept. 3, 2020); *Stauffer v. Innovative Heights Fairview Heights, LLC*, No. 20-cv-00046, 2020 WL 4815960, at \*7 (S.D. Ill. Aug. 19, 2020).

In sum, because Plaintiffs seek relief under the first provision of Section 15(a), which *Bryant* determined insufficient to confer Article III standing, they lack Article III standing to pursue that claim in federal court. In turn, this Court lacks jurisdiction over Plaintiffs’ Section 15(a) claims, because a federal court has subject matter jurisdiction over a claim only if a plaintiff has Article III standing to bring it. *See MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 935 F.3d 573, 581 (7th Cir. 2019).

**V. THIS COURT’S LACK OF SUBJECT MATTER JURISDICTION REQUIRES REMAND OF PLAINTIFFS’ SECTION 15(a) CLAIMS TO THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.**

Plaintiffs’ Section 15(a) claims must be remanded to the Circuit Court of Cook County, Illinois – the court from which this case was removed – because where a district court lacks subject matter jurisdiction in a removed case, the only authorized result is remand to the originating state

court. 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded”); *Collier*, 889 F.3d at 897 (7th Cir. 2018) (“[Section] 1447(c) required the district court to remand this case to state court, because it does not satisfy Article III’s requirements”); *Bergquist*, 592 F.3d at 819 (where some parts of a removed case are within federal jurisdiction and others are not, partial remand is appropriate). This Court may safely follow the numerous district courts in this Circuit which have severed and remanded removed Section 15(a) claims for lack of subject matter jurisdiction. *See, e.g., Colon*, 2021 WL 492870, at \*5 (severing and remanding Section 15(a) claim to the Circuit Court of Cook County, Illinois); *Burlinski*, 2020 WL 5253150, at \*4 (“[B]ecause there is no Article III jurisdiction over the Section 15(a) claims, it makes sense to sever and remand those claims back to state court, as the Plaintiffs have requested”); *Stauffer*, 2020 WL 4815960, at \*8 (“Plaintiff does not have Article III standing for her Section 15(a) claims . . . [those claims] are remanded to the Twentieth Judicial Circuit, St. Clair County, Illinois”); *Kloss v. Acuant, Inc.*, No. 19-cv-6353, 2020 WL 2571901, at \*2 (N.D. Ill. May 21, 2020) (“Applying the *Bryant* Court’s holding, we conclude that we lack subject-matter jurisdiction over [plaintiff’s] Section 15(a) claims . . . . The Court accordingly severs and remands [plaintiff’s] claims under Section 15(a) back to state court for lack of subject-matter jurisdiction”).

Notably, Plaintiffs’ lack of standing to bring their Section 15(a) claims in *this* Court does not preclude Plaintiffs from proceeding with that claim in the Circuit Court of Cook County, Illinois, where this action was initially filed. Indeed, the Illinois Supreme Court has held that Illinois courts are “not required to follow federal law on issues of standing, and ha[ve] expressly rejected federal principles of standing.” *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895, 917 n.4

(Ill. 2010); *Greer v. Ill Hous. Dev. Auth.*, 524 N.E.2d 561, 574 (“[T]o the extent that the State law of standing varies from Federal law, it tends to vary in the direction of greater liberality”).

Accordingly, this Court should sever and remand Plaintiffs’ Section 15(a) claims to the Illinois state court with the jurisdiction to adjudicate it: the Circuit Court of Cook County.

## VI. CONCLUSION

For the foregoing reasons, Plaintiffs Alex Kislov and Niko Hearn respectfully request that the Court enter an Order: (i) remanding Plaintiffs’ claims under 740 ILCS 14/15(a) to the Circuit Court of Cook County, Illinois; and (ii) for such other and further relief the Court deems reasonable and just.

Dated: July 12, 2021

Respectfully submitted,

ALEX KISLOV and NIKO HEARN,  
individually and on behalf of similarly  
situated individuals

By: /s/ Timothy P. Kingsbury  
*One of Plaintiffs’ Attorneys*

Evan M. Meyers  
Timothy P. Kingsbury  
Brendan Duffner  
MCGUIRE LAW, P.C.  
55 W. Wacker Drive, 9th Fl.  
Chicago, IL 60601  
Tel: (312) 893-7002  
emeyers@mcgpc.com  
tkingsbury@mcgpc.com  
bduffner@mcgpc.com

*Counsel for Plaintiffs and the Putative Class*

**CERTIFICATE OF SERVICE**

I hereby certify that, on July 12, 2021, I caused the foregoing *Plaintiffs' Motion to Remand* to be electronically filed with the Clerk of the Court using the CM/ECF system. A copy of said document will be electronically transmitted to all counsel of record.

/s/ Timothy P. Kingsbury