YES / (NO)

EXHIBITS

CASE NO. _____ 2019 CH 10873 _____

DATE: _____ 9/20/19 _____

CASE TYPE: _____ CLASS ACTION _____

PAGE COUNT: _____ 15 _____

CASE NOTE

12-Person Jury

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

BRADLEY ACALEY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

VIMEO, INC., a Delaware corporation,

Serve Registered Agent:
[The Corporation Trust Company, Corporation Trust Center, 1209 Orange St., Wilmington, DE 19801]

Defendant.

Case No.

(JURY TRIAL DEMANDED)

CLASS ACTION COMPLAINT

Plaintiff Bradley Acaley ("Plaintiff"), individually and on behalf of all others similarly situated,

brings this Class Action Complaint for violations of the Illinois Biometric Information Privacy Act,

740 ILCS 14/1, *et seq.* ("BIPA"), against Vimeo, Inc. ("Vimeo"), and alleges as follows based on

personal knowledge as to himself, on the investigation of his counsel and the advice and consultation

of certain third-party agents as to technical matters, and on information and belief as to all other

matters, and demands trial by jury:

NATURE OF ACTION

1.   Plaintiff brings this action for damages and other legal and equitable remedies

resulting from the illegal actions of Vimeo in collecting, storing, and using Plaintiff's and other

similarly situated individuals' biometric identifiers[1] and biometric information[2] (collectively, "biometrics") without informed written consent, in direct violation of BIPA.

2.   The Illinois Legislature has found that "[b]iometrics are unlike other unique identifiers that are used to access finances or other sensitive information." 740 ILCS 14/5(c). "For example, social security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions." *Id.*

3.   In recognition of these concerns over the security of individuals' biometrics— particularly in the City of Chicago, which was recently selected by major national corporations as a "pilot testing site[] for new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias" (740 ILCS 14/5(b))— the Illinois Legislature enacted the BIPA, which provides, *inter alia*, that a private entity like Vimeo may not obtain and/or possess an individual's biometrics unless it: (1) informs that person in writing that biometric identifiers or information will be collected or stored, *see id.*; (2) informs that person in writing of the specific purpose and length of term for which such biometric identifiers or biometric information is being collected, stored and used, *see id.*; (3) receives a written release from the person for the collection of his or her biometric identifiers or information, *see id.*; and (4) publishes publicly available written retention schedules and guidelines for permanently destroying biometric identifiers and biometric information. 740 ILCS 14/15(a).

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[1]   A "biometric identifier" is any personal feature that is unique to an individual, including fingerprints, iris scans, DNA and "face geometry," among others.

[2]   "Biometric information" is any information captured, converted, stored, or shared based on a person's biometric identifier used to identify an individual.

4.   In direct violation of each of the foregoing provisions of § 15(a) and § 15(b) of the BIPA, Vimeo is actively collecting, storing, and using—without providing notice, obtaining informed written consent or publishing data retention policies—the biometrics of thousands of unwitting individuals throughout the country whose faces appear in photographs and/or videos uploaded to the Magisto "smart video editor" application in Illinois.

5.   Specifically, Vimeo has created, collected and stored, in conjunction with its cloud-based Magisto service, thousands of "face templates" (or "face prints")—highly detailed geometric maps of the face—from thousands of Magisto users. Vimeo creates these templates using sophisticated facial recognition technology that extracts and analyzes data from the points and contours of faces that appear in photos and videos taken on mobile devices and uploaded to the Magisto app. Each face template that Vimeo extracts is unique to a particular individual, in the same way that a fingerprint or voiceprint uniquely identifies one and only one person.

6.   Plaintiff brings this action individually and on behalf of all others similarly situated to prevent Vimeo from further violating the privacy rights of Magisto users, and to recover statutory damages for Vimeo's unauthorized collection, storage, and use of these individuals' biometrics in violation of the BIPA.

PARTIES

7.   Plaintiff is, and has been at all relevant times, a resident and citizen of Illinois.

8.   Vimeo is a Delaware corporation with its headquarters at 555 West 18th Street, New York, New York 10011. Accordingly, Vimeo is a citizen of the states of Delaware and New York.

JURISDICTION AND VENUE

9.   This is a class action complaint for violations of BIPA (740 ILCS 14/1, *et seq.*), seeking statutory and actual damages.

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10.   No federal question is presented by this complaint. Plaintiff brings this complaint solely under state law and not under federal law, and specifically not under the United States Constitution, nor any of its amendments, nor under 42 U.S.C. § 1981 or 1982, nor any other federal statute, law, rule, or regulation. Plaintiff believes and alleges that a cause of action exists under state law for the conduct complained of herein.

11.   This class action is brought on behalf of only Illinois citizens residing within the State of Illinois whose biometric information was uploaded to Vimeo within the State of Illinois.

12.   Venue is proper under 735 ILCS 5/1-108 and 2-101 of the Illinois Code of Civil Procedure, as a substantial portion of the transactions giving rise to the causes of action pleaded herein occurred in Cook County. Specifically, upon information and belief, Vimeo's collection of Plaintiff's and numerous other class members' biometric information occurred within Cook County, Illinois.

FACTUAL BACKGROUND

I.   Biometric Technology Implicates Consumer Privacy Concerns

13.   "Biometrics" refers to unique physical characteristics used to identify an individual. One of the most prevalent uses of biometrics is in facial recognition technology, which works by scanning a human face or an image thereof, extracting facial feature data based on specific "biometric identifiers" (*i.e.*, details about the face's geometry as determined by facial points and contours), and comparing the resulting "face template" (or "faceprint") against the face templates stored in a "face template database." If a database match is found, an individual may be identified.

14.   The use of facial recognition technology in the commercial context presents numerous consumer privacy concerns. During a 2012 hearing before the United States Senate Subcommittee on Privacy, Technology, and the Law, U.S. Senator Al Franken stated that "there is nothing inherently right or wrong with [facial recognition technology, but] if we do not stop and

carefully consider the way we use [it], it may also be abused in ways that could threaten basic aspects of our privacy and civil liberties."[3] Senator Franken noted, for example, that facial recognition technology could be "abused to not only identify protesters at political events and rallies, but to target them for selective jailing and prosecution."[4]

15.   The Federal Trade Commission ("FTC") has raised similar concerns and recently released a "Best Practices" guide for companies using facial recognition technology.[5] In the guide, the Commission underscores the importance of companies obtaining affirmative consent from consumers before extracting and collecting their biometric identifiers and biometric information from digital photographs.

16.   As explained below, Vimeo failed to obtain consent from anyone when it introduced its facial recognition technology. Not only do the actions of Vimeo fly in the face of FTC guidelines, they also violate the privacy rights of individuals appearing in photos and videos uploaded to Magisto in Illinois.

II.   Illinois's Biometric Information Privacy Act

17.   In 2008, Illinois enacted BIPA due to the "very serious need [for] protections for the citizens of Illinois when it [comes to their] biometric information." Illinois House Transcript, 2008 Reg. Sess. No. 276. BIPA makes it unlawful for a company to, *inter alia*, "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifiers[6] or biometric information, unless it first:

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[3]   *What Facial Recognition Technology Means for Privacy and Civil Liberties: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 112th Cong. 1 (2012), *available at* https://www.eff.org/files/filenode/jenniferlynch_eff-senate-testimony-face_recognition.pdf (last visited Mar. 1, 2016).
[4]   *Id.*
[5]   *Facing Facts: Best Practices for Common Uses of Facial Recognition Technologies*, Federal Trade Commission (Oct. 2012), *available at* http://www.ftc.gov/sites/default/files/documents/reports/facing-facts-best-practices-common-uses-facial-recognition-technologies/121022facialtechrpt.pdf (last visited Mar. 1, 2016).
[6]   BIPA's definition of "biometric identifier" expressly includes information collected about the geometry of the face (i.e., facial data obtained through facial recognition technology). *See* 740 ILCS 14/10.

(1) informs the subject ... in writing that a biometric identifier or biometric information is being collected or stored;

(2) informs the subject ... in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative."

740 ILCS 14/15 (b).

18.   Section 15(a) of BIPA also 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.

740 ILCS 14/15(a).

19.   As alleged below, Vimeo's practices of collecting, storing, and using Magisto users' biometric identifiers and information derived from photographs and/or videos uploaded in Illinois without informed written consent violate all three prongs of § 15(b) of BIPA. Vimeo's failure to provide a publicly available written policy regarding their schedule and guidelines for the retention and permanent destruction of individuals' biometric information also violates § 15(a) of BIPA.

III.   Vimeo Violates Illinois's Biometric Information Privacy Act

20.   In 2009, Magisto was founded and released as a mobile app for automated video editing and production. In 2019, Vimeo acquired Magisto. Users of Magisto upload millions of videos and/or photos per day, making videos and photographs a vital part of the Magisto experience.

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21.   On the Magisto webpage entitled, "How Does Magisto Video Editor Work?", Vimeo touts its so-called "artificial intelligence engines" that intuitively analyze and edit video content. As part of its artificially-intelligent algorithms, Vimeo claims that Magisto employs facial detection and recognition technology: "On the visual side of things, we analyze everything from in-frame action to camera motion, **face detection** and indexing, object detection and tracking, **facial recognition and more.**" *See* https://www.magisto.com/how-it-works (last visited Aug. 27, 2019) (emphases added).

22.   Users can download and connect any mobile device to Magisto to upload and access videos and photos to produce and edit their own videos. Magisto is available through the app stores on both Android and Apple mobile devices.

23.   Unbeknownst to the average consumer, and in direct violation of § 15(b)(1) of the BIPA, Plaintiff is informed and believes that Magisto's facial recognition technology scans each and every video and photo uploaded to Magisto for faces, extracts geometric data relating to the unique points and contours (*i.e.,* biometric identifiers) of each face, and then uses that data to create and store a template of each face – all without ever informing anyone of this practice.

24.   The Magisto service uses these face templates to organize and group together videos based upon the particular individuals appearing in the videos. This technology works by comparing the face templates of individuals who appear in newly-uploaded videos or photos with the facial templates already saved in Magisto's face database. Specifically, when a Magisto user uploads a new video or photo, Magisto's sophisticated facial recognition technology creates a template for each face depicted therein, and then compares each template against Magisto's face template database. If there is a match, then the Magisto service groups the video from which the newly-uploaded face template was derived with the previously uploaded videos depicting that individual.

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25.   These unique face templates are not only collected and used by Magisto to identify individuals, but also to recognize their gender, age, and location. Accordingly, Vimeo also collects "biometric information" from non-users. *See* 740 ILCS 14/10.

26.   In direct violation of §§ 15(b)(2) and 15(b)(3) of BIPA, Vimeo never informed Illinois residents who had their face templates collected of the specific purpose and length of term for which their biometric identifiers or information would be collected, stored, and used, nor did Vimeo obtain a written release from any of these individuals.

27.   In direct violation of § 15(a) of BIPA, Vimeo does not have written, publicly available policies identifying their retention schedules or guidelines for permanently destroying any of these biometric identifiers or information.

IV.   Plaintiff's Experience

28.   In or around December 2017, Plaintiff downloaded the Magisto app on his Android mobile device as well as his iPad. After downloading the app and logging in via his Google account, Plaintiff purchased a one-year subscription for the Magisto Professional service for approximately $120.

29.   After purchasing the Magisto Professional service, Plaintiff used his Android device to take and upload numerous videos and/or photos in the State of Illinois to the Magisto app's cloud-based service while his devices were located in the State of Illinois and assigned to an Illinois-based IP address. Typically, Plaintiff's uploaded videos and photos were of him and his family, including his minor children. Plaintiff would then use the Magisto app on his iPad to edit the uploaded videos and/or create videos from the uploaded photos and videos.

30.   When his annual Magisto Professional subscription expired in or around December 2018, Plaintiff did not renew the subscription. Once his annual subscription expired, Plaintiff could no longer access the edited videos of him and his family on the Magisto app. To date, the Magisto

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app remains on Plaintiff's devices but he cannot access its video content without an active subscription. Many of the photos and videos uploaded by Plaintiff also included artwork created by Plaintiff and his family members, proprietary content which they can no longer access despite creating and owning it.

31. Immediately after upload to the Magisto app, Vimeo analyzed Plaintiff's videos and photos by automatically locating and scanning Plaintiff's face and by extracting geometric data relating to the contours of his face and the distances between his eyes, nose, and ears—data which Vimeo then used to create a unique template of Plaintiff's face.

32. The resulting unique face template was used by Vimeo to locate and group together all videos and/or photos depicting Plaintiff for organizational purposes.

33. Plaintiff's face template was also used by Vimeo to recognize Plaintiff's gender, age, race, and location.

34. Plaintiff never consented, agreed, or gave permission—written or otherwise—to Vimeo for the collection or storage of his unique biometric identifiers or biometric information.

35. Further, Vimeo never provided Plaintiff with nor did he ever sign a written release allowing Vimeo to collect or store his unique biometric identifiers or biometric information.

36. Likewise, Vimeo never provided Plaintiff with an opportunity to prohibit or prevent the collection, storage, or use of his unique biometric identifiers or biometric information.

37. Nevertheless, when videos and photos of Plaintiff were automatically uploaded to Magisto from within the state of Illinois, Vimeo located Plaintiff's face in the videos and/or photos, scanned Plaintiff's facial geometry, and created a unique face template corresponding to Plaintiff, all in direct violation of the BIPA.

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CLASS ALLEGATIONS

38.   **Class Definition**: Plaintiff brings this action pursuant to 735 ILCS 5/2-801, individually on behalf of a class of similarly situated individuals, defined as follows (the "Class"):

> All Illinois citizens who are users of the Magisto service and had their biometric identifiers, including scans of face geometry, collected, captured, received, or otherwise obtained by Vimeo from videos and/or photographs uploaded within the state of Illinois.

The following are excluded from the Class: (1) any Judge presiding over this action and members of his or her family; (2) Vimeo, Vimeo's subsidiaries, parents, successors, predecessors, and any entity in which Vimeo or its parent has a controlling interest (as well as current or former employees, officers and directors); (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiff's counsel and Vimeo's counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

39.   **Numerosity**: The number of persons within the Class is substantial, believed to amount to thousands of persons. It is, therefore, impractical to join each member of the Class as a named Plaintiff. Further, the size and relatively modest value of the claims of the individual members of the Class renders joinder impractical. Accordingly, utilization of the class action mechanism is the most economically feasible means of determining and adjudicating the merits of this litigation.

40.   **Commonality and Predominance**: There are well-defined common questions of fact and law that exist as to all members of the Class and that predominate over any questions affecting only individual members of the Class. These common legal and factual questions, which do not vary from Class member to Class member, and which may be determined without reference to the individual circumstances of any class member include, but are not limited to, the following:

    (a)   whether Vimeo collected or otherwise obtained Plaintiff's and the Class's biometric identifiers or biometric information;

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(b) whether Vimeo properly informed Plaintiff and the Class that it collected, used, and stored their biometric identifiers or biometric information;

(c) whether Vimeo obtained a written release (as defined in 740 ILCS 1410) to collect, use, and store Plaintiff's and the Class's biometric identifiers or biometric information;

(d) whether Vimeo developed 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 three years of their last interaction, whichever occurs first;

(e) whether Vimeo used Plaintiff's and the Class's biometric identifiers or biometric information to identify them; and

(f) whether Vimeo's violations of BIPA were committed intentionally, recklessly, or negligently.

41. **Adequate Representation**: Plaintiff has retained and is represented by qualified and competent counsel who are highly experienced in complex consumer class action litigation. Plaintiff and his counsel are committed to vigorously prosecuting this class action. Neither Plaintiff nor his counsel has any interest adverse to, or in conflict with, the interests of the absent members of the Class. Plaintiff is able to fairly and adequately represent and protect the interests of such a Class. Plaintiff has raised viable statutory claims of the type reasonably expected to be raised by members of the Class, and will vigorously pursue those claims. If necessary, Plaintiff may seek leave of this Court to amend this Class Action Complaint to include additional Class representatives to represent the Class or additional claims as may be appropriate.

42. **Superiority**: A class action is superior to other available methods for the fair and efficient adjudication of this controversy because individual litigation of the claims of all Class members is impracticable. Even if every member of the Class could afford to pursue individual litigation, the Court system could not. It would be unduly burdensome to the courts in which individual litigation of numerous cases would proceed. Individualized litigation would also present the potential for varying, inconsistent or contradictory judgments, and would magnify the delay and

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expense to all parties and to the court system resulting from multiple trials of the same factual issues. By contrast, the maintenance of this action as a class action, with respect to some or all of the issues presented herein, presents few management difficulties, conserves the resources of the parties and of the court system and protects the rights of each member of the Class. Plaintiff anticipates no difficulty in the management of this action as a class action. Class-wide relief is essential to compel compliance with BIPA.

FIRST CAUSE OF ACTION
Violation of 740 ILCS 14/1, *et seq.*
(On Behalf of Plaintiff and the Class)

43.   Plaintiff incorporates the foregoing allegations as if fully set forth herein.

44.   BIPA makes it unlawful for any private entity to, among other things, "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifiers or biometric information, unless it first: (1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the subject . . . in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and (3) receives a written release executed by the subject of the biometric identifier or biometric information . . . ." 740 ILCS 14/15(b) (emphasis added).

45.   Vimeo is a Delaware corporation and thus qualifies as a "private entity" under the BIPA. *See* 740 ILCS 14/10.

46.   Plaintiff and Class members are Magisto users who had their "biometric identifiers," including scans of face geometry, collected, captured, received, or otherwise obtained by Vimeo from photos and/or videos that were uploaded to Magisto from within the state of Illinois. *See* 740 ILCS 14/10.

47.   Plaintiff and Class members are individuals who had their "biometric information" collected by Vimeo (in the form of their gender, age and location) through Vimeo's collection and use of their "biometric identifiers."

48.   Vimeo systematically and automatically collected, used, and stored Plaintiff's and Class members' biometric identifiers and/or biometric information without first obtaining the written release required by 740 ILCS 14/15(b)(3).

49.   In fact, Vimeo failed to properly inform Plaintiff or the Class in writing that their biometric identifiers and/or biometric information were being "collected or stored" on Magisto, nor did Vimeo inform Plaintiff or Class members in writing of the specific purpose and length of term for which their biometric identifiers and/or biometric information were being "collected, stored and used," as required by 740 ILCS 14/15(b)(1)-(2).

50.   In addition, Vimeo does not publicly provide a retention schedule or guidelines for permanently destroying the biometric identifiers and/or biometric information of Plaintiff or Class members, as required by BIPA. *See* 740 ILCS 14/15(a).

51.   By collecting, storing, and using Plaintiff's and the Class's biometric identifiers and biometric information as described herein, Vimeo violated the rights of Plaintiff and each Class member to keep private these biometric identifiers and biometric information, as set forth in BIPA.

52.   On behalf of himself and the proposed Class members, Plaintiff seeks: (1) injunctive and equitable relief as is necessary to protect the interests of Plaintiff and the Class by requiring Vimeo to comply with BIPA's requirements for the collection, storage, and use of biometric identifiers and biometric information as described herein; (2) statutory damages of $5,000.00 for the intentional and reckless violation of BIPA pursuant to 740 ILCS 14/20(2), or alternatively, statutory damages of $1,000.00 pursuant to 740 ILCS 14/20(1) if the Court finds that Vimeo's violations were negligent;

and (3) reasonable attorneys' fees and costs and other litigation expenses pursuant to 740 ILCS 14/20(3).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Bradley Acaley, on behalf of himself and the proposed Class, respectfully requests that this Court enter an Order:

A.   Certifying this case as a class action on behalf of the Class defined above, appointing Plaintiff as representative of the Class, and appointing his counsel as Class Counsel;

B.   Declaring that Vimeo's actions, as set out above, violate BIPA, 740 ILCS 14/1, *et seq.*;

C.   Awarding statutory damages of $5,000.00 for each and every intentional and reckless violation of BIPA pursuant to 740 ILCS 14/20(2), or alternatively, statutory damages of $1,000.00 pursuant to 740 ILCS 14/20(1) if the Court finds that Vimeo's violations were negligent;

D.   Awarding injunctive and other equitable relief as is necessary to protect the interests of the Class, including, *inter alia*, an order requiring Vimeo to collect, store, and use biometric identifiers or biometric information in compliance with BIPA;

E.   Awarding Plaintiff and the Class their reasonable litigation expenses and attorneys' fees;

F.   Awarding Plaintiff and the Class pre- and post-judgment interest, to the extent allowable; and

G.   Awarding such other and further relief as equity and justice may require.

JURY TRIAL

Plaintiff demands a trial by jury for all issues so triable.

Respectfully submitted,

Dated: September 20, 2019   By: /s/ Jad Sheikali

Myles McGuire
mmcguire@mcgpc.com

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Jad Sheikali
jsheikali@mcgpc.com
Timothy P. Kingsbury
tkingsbury@mcgpc.com
McGuire Law, P.C.
55 West Wacker Drive, 9th Fl.
Chicago, Illinois 60601
Telephone: (312) 893-7002

Tina Wolfson*
twolfson@ahdootwolfson.com
Bradley King*
bking@ahdootwolfson.com
AHDOOT & WOLFSON, PC
10728 Lindbrook Drive
Los Angeles, California 90024
Telephone: (310) 474-9111
Facsimile: (310) 474-8585

Frank S. Hedin*
fhedin@hedinhall.com
HEDIN HALL LLP
1395 Brickell Avenue, Suite 900
Miami, Florida 33131
Telephone: (786) 831-6555

Pro Hac Vice Application Forthcoming

Counsel for Plaintiff and the Putative Class

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ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Vimeo Hit with Illinois BIPA Class Action Lawsuit Over Magisto App's Facial Recognition Technology](#)