NYSBA WORKING GROUP ON FACIAL RECOGNITION TECHNOLOGY AND ACCESS TO LEGAL REPRESENTATION

FINAL REPORT TO NYSBA HOUSE OF DELEGATES

SATURDAY, NOVEMBER 4, 2023

The NYSBA Working Group on Facial Recognition Technology and Access to Legal Representation, chaired by NYSBA President-Elect Domenick Napoletano, respectfully presents this Final Report to the NYSBA House of Delegates. This Report, to be presented to the House of Delegates at the November 4, 2023 meeting in Albany, will in some respects echo the Interim Report of this Working Group presented in Cooperstown on June 10, 2023, by describing the events that led to the establishment of the Working Group, the public policy reasons that animate the Working Group's mission, the particular threats that facial recognition software and other biometric technologies create for lawyers and the legal system, and the steps the Working Group has taken to address those threats.

This Final Report contains two new, central recommendations. *First,* we recommend amending the New York Civil Rights Law to (i) expand the scope of Section 40-b, which prohibits customers with a "ticket of admission" to certain specified "places of public entertainment and amusement" from being barred from admission to, or being required to leave, those places, to include "professional or collegiate sports venues"; and (ii) expand the scope of Section 41, to increase the monetary penalties for violations of, *inter alia,* Section 40-b and to permit a court to impose injunctive relief. *Second,* we recommend that NYSBA formally support A.1362, the Biometric Privacy Act, which would provide statutory guardrails to private entities' use of private citizens' biometric information in a manner that balances the legitimate needs of certain businesses to use that information with private citizens' rights to privacy and other protected interests. The Working Group has already submitted a Memorandum in support of this proposed statute to the

Legislature, but we ask the HOD to formally support the statute so it becomes a legislative priority of the Association.

The Mission Statement of the Working Group, attached as Exhibit A, was as follows:

> The Working Group on Facial Recognition Technology and Access to Legal Representation shall examine the legal and ethical considerations surrounding the use of facial recognition and other technology to restrict individual freedoms, including but not limited to attendance at events or entrance into venues as well as the propriety of the use of this and other technology on a lawyer's ability to represent clients without fear of retribution. The Working Group will also consider how the use of technology can prohibit the ability of members of the legal profession to provide effective representation of clients and disrupt access to justice. The Working Group shall make any necessary policy recommendations to the NYSBA Executive Committee.

Why the Working Group was Established.

In late November 2022, on the weekend after Thanksgiving, Kelly A. Conlon, an associate at the law firm of Davis, Saperstein & Solomon, P.C. ("DSS"), accompanied her daughter's Girl Scout troop to see the Christmas Spectacular at Radio City Music Hall, a venue owned by Madison Square Garden Enterprises ("MSGE"). Although Ms. Conlon had a ticket, the security guards, identifying her by name and law firm affiliation, refused to let her enter. The security guards showed her that she was on an "attorney exclusion list" that MSGE and its President, James Dolan, had created.[1] Ms. Conlon had to wait outside in the rain while the rest of the troop and chaperones enjoyed the performance.[2]

[1] "Madison Square Garden Uses Facial Recognition Technology to Bar Its Owner's Enemies", N.Y. Times, 12/22/22, https://www.nytimes.com/2022/12/22/nyregion/madison-square-garden-facial-recognition.html.

[2] "Teaneck Law Firm to challenge MSG liquor license after associate barred from Rockettes show," NorthJersey.com, 12/22/22, https://www.northjersey.com/story/news/bergen/teaneck/2022/12/22/radio-city-facial-recognition-lawyer-banned-from-seeing-rockettes/69747073007/.

The incident soon went viral. MSGE defended itself by citing two notifications it had sent DSS on October 28 and November 14, 2022, informing the firm that "all its attorneys were banned from [MSGE's] venues while the firm was engaged in legal action against one of its restaurants."[3] This did little to quell the rising public disgust at MSGE's use of facial recognition technology to bar from MSGE facilities all employees at law firms with the temerity to represent clients suing MSGE – and that it was continuing to enforce that policy by barring other lawyers, from law firms other than DSS, from its facilities.

Disclosure of the policy itself also outraged the public. In an internal "policy memorandum" dated July 28, 2022, attached as Exhibit B, MSGE and its affiliates explicitly "reserve[d] the right to exclude from the MSGE Venues litigation counsel who represent parties adverse to the Companies, *and other attorneys at their law firms.*" (Emphasis added.) It went on to state that MSGE could prohibit these attorneys even from purchasing tickets to MSGE events – regardless of whether the attorneys were buying the tickets for someone else or had no personal involvement in the case. *Id.* MSGE justified the policy on the ground that adverse counsel might communicate "with employees of the Companies in violation of ethical rules, which prohibit any communication with opposing parties and their employees," and would allow lawyers to seek or attempt to seek "disclosure outside proper litigation discovery channels." *Id.*

This led to an array of public responses. New York State Attorney General Letitia James wrote a letter to MSGE executives and its legal department on January 24, 2023, attached as Exhibit C, noting that MSGE's exclusion policy affected "approximately 90 law firms," involving "thousands of lawyers" and warning that "the Policy may violate the New York Civil Rights Law and other city, state, and federal laws prohibiting discrimination and retaliation for engaging in

[3] *Id.*

protected activity." Other politicians weighed in, with one, State Senator Brad Hoylman, noting: "There's a pattern of James Dolan [the owner of MSGE] punishing those who he views as his corporate adversaries", and calling the implementation of MSGE's policy a "frightening prospect for every New Yorker and, frankly, any visitor to New York. . .. "[4] Still others started lawsuits, one of which, *Hutcher v. Madison Square Garden*,[5] brought on behalf of several partners of Davidoff Hutcher & Citrin LLP, has since had some claims brought on behalf of DHC partner Larry Hutcher rejected by the First Department, while claims on behalf of another firm partner, Myron Rabij, resulted in MSGE being fined under the N.Y. Civil Rights Law.[6] (We will explain below why the two closely-related claims achieved different results; the respective decisions are attached as Exhibits D and E, respectively.) And the New York State Liquor Authority has started proceedings to revoke MSGE's liquor licenses for violating applicable laws and regulations.

New York judges are not the only ones who have criticized MSGE's so-called "Adverse Attorney Policy." In oral argument in *In re Madison Square Garden Ent. Corp. Stockholders Litigation*, Vice Chancellor Kathaleen St. J. McCormick referred to the policy as "the stupidest thing [she's] ever read" and that she was "shocked" when she read it.[7] She also noted that the policy was potentially vindictive, stating that "whether Jim Dolan bullied his attorney into sending

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[4] "Pols, activists blast James Dolan, MSG owners for tech faceoff with unwanted fans," AMmetro New York, 1/17/'22.

[5] *Hutcher v. Madison Square Garden Entm't Corp.*, 214 A.D.3d 573 (1st Dep't 2023) (hereafter," Hutcher*"*),

https://casetext.com/case/hutcher-v-madison-square-garden-entmt-corp-5.

[6] *Hutcher v. Madison Square Garden Entm't Corp,* Index No. 653793/2022, Slip Op. at 1-2 (June 26, 2023) (hereafter, "*Rabij*").

[7] Oral Argument on Def. Madison Square Garden Ent. Corp.'s Mot. for a Protective Order, Plaintiff's Omnibus Mot. and Rulings of the Court, Held via Zoom, C.A. No. 2021-0468-KSJM (Del. Ch. Nov. 6, 2022)

a completely idiotic letter to 90 different adverse attorneys for presumptively vindictive reasons is a question for Jim Dolan."[8]

In the face of all this, on February 5, 2023, MSGE altered its policy slightly, saying it did not apply to attorneys involved in pending litigation "with Tao Group Hospitality, which includes about three dozen restaurants and clubs in the city," ostensibly because MSGE was looking to sell the chain.[9]

That same day, NYSBA President Sherry Levin Wallach appointed this Working Group, chaired by then-Treasurer, now President-Elect Napoletano, to "examine the legal and ethical considerations surrounding the use of facial recognition and other technology to restrict individual freedoms, including but not limited to attendance at events or entrance into venues as well as the propriety of the use of this and other technology on a lawyer's ability to represent clients without fear of retribution." Since then, the Working Group has met several times, formed subcommittees to address ethical issues and pending legislation, has monitored the ongoing litigation against MSGE as well as proposed legislation, and is recommending that NYSBA support certain legislative proposals that will address this problem. We now present those conclusions to the House.

Policy Considerations.

The Working Group discussed its Mission at length. We agreed on three fundamental considerations.

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[8] *Id.*

[9] "MSG Entertainment Lifts Ban for Some Lawyers Involved in Lawsuits Against the Company," nbcnewyork.com, 2/6/23, https://www.nbcnewyork.com/news/local/msg-entertainment-lifts-ban-for-some-lawyers-involved-in-lawsuits-against-company/4089798/.

First, the proper use of facial recognition and other biometric technology is an issue that far transcends Kelly Conlon, Larry Hutcher, James Dolan and MSGE – or even lawyers or the legal profession. It goes to the very core of our civil liberties, to our ability to freely move about, associate with whom we want, to organize and speak politically and culturally. The examples are legion. The Chinese government has created a massive database containing facial recognition and other biometric information on the Chinese citizenry, allowing the government to monitor all its citizens' activities, and requiring those who demonstrate against the government to mask themselves to avoid recognition and prosecution. Closer to home, many stores are using facial recognition technology to keep out customers previously accused, or even suspected, of shoplifting – even if there has been no adjudication of wrongdoing. Making this worse is that facial recognition technology has been found to be less likely to accurately identify persons of color, thus increasing the risks of misidentification and false arrests. Even if facial recognition and biometric technology improves – and it surely will – it represents a threat to our most fundamental values as a society, a threat that has the potential to alter the lives of every single person living in the United States. This threat – and how to counter it – must be our ultimate mission.

Second, as MSGE's actions have shown, facial recognition technology represents a special and unique threat to lawyers and the legal system. Our Mission Statement makes this clear, asking us to consider "how the use of [biometric] technology can prohibit the ability of members of the legal profession to provide effective representation of clients and disrupt access to justice." Ex. A. The ability of large corporations, and the government, to use this technology to zero in on lawyers whose firms represent clients suing them will inevitably chill the desire of lawyers to take on such cases and will limit ordinary citizens' access to the justice to which they are entitled. While it may seem frivolous to some, the inability of a long-time Knick season ticket holder to use

those tickets may discourage her from taking on a case against MSGE – especially if she has already paid thousands of dollars in advance for those tickets. The same is true of a regular concertgoer, who will be unable to see shows at Madison Square Garden, Radio City and any other MSGE venues. If MSGE is permitted to throw its corporate weight around in this way – and in a way that impacts not just the lawyer handling a case *but every single lawyer in their firm* -- it will become all the more difficult for potential plaintiffs to retain the lawyers they want or need to bring a lawsuit against it.

Again, this is not just about MSGE. Imagine a larger corporation – a national shopping chain, an airline, a hospital system, an online ride hailing service – that could employ this technology to prevent lawyers who sue them from using their services. In some localities, this would prevent the lawyer or their family from shopping at the only nearby food store, or flying to a particular destination, or using a particular doctor or hospital, or obtaining cab service. The larger and more powerful the corporation, the more powerful this tool can be. And the more the use of facial recognition technology can insulate that corporation from opposing lawyers and lawsuits, the more access to justice for individual citizens is imperiled.

Our mission, in short, is not just to protect our members – though that is part of it. It is to protect the very integrity of our legal system against a new tool that can insulate large, powerful institutions from being sued by targeting lawyers, their colleagues and even their families directly. Lawyers are accustomed to encountering hostility and even attacks from their adversaries, but only within the bounds of our legal system and with a judge or other neutral to control them. They do not expect to be denied public accommodation for doing their jobs – nor should they be. This Association must take steps to ensure they are not.

Third, MSGE's actions have galvanized lawyers and politicians to fight back. We have closely monitored those efforts, and viewed our first task to make appropriate recommendations about legislative proposals regarding biometric technology that are currently before the New York State Senate and Assembly. On May 25, 2023, a memorandum of support of Bill S. 4457 / A.1362, which would establish the New York State Biometric Privacy Act, was submitted to the legislature on behalf of the Working Group. A copy of this memorandum is attached as Exhibit F, and a copy of the proposed statute is Exhibit G.

Ethical Considerations

The participation of lawyers, whether in-house or outside counsel, to create policies allowing their clients to use biometric technology to target lawyers at the opposing law firm (whether or not those lawyers are involved in the case) and prohibit their access to public accommodations raises serious ethical concerns. As we explained above, this conduct allows a well-heeled corporate adversary to use its economic clout and technological prowess to interfere in the private lives of those lawyers whose firm chooses to represent a client bringing an action against them. This appears intended, and will certainly have the effect, of discouraging at least some law firms from taking on these cases, thereby limiting access to justice. Moreover, the more powerful the corporation, the more clout it will have and the more effective this weapon will be.

This is bad for lawyers, and bad for the public at large, as a matter of policy and judicial administration. It is also extremely troubling from an ethical standpoint, as it allows lawyers to attack their adversaries outside the arena where their clients' dispute is supposed to be resolved (in courts and other tribunals), to directly intervene in and interfere with their private affairs, and to do so without the knowledge or supervision of the tribunal. This bullying – calling it what it is, plain and simple – appears to violate N.Y. Rule of Prof'l Conduct ("Rule") 4.4(a) ("In representing

a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person"), Rule 8.4(d) (prohibiting "conduct prejudicial to the administration of justice", and Rule 8.4(h) (prohibiting conduct "that adversely reflects on a lawyer's fitness as a lawyer"). As Comment 3 to Rule 8.4 states: "The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice," including paying a witness to be unavailable, advising a client to testify falsely or repeatedly disrupting a proceeding. The conduct here falls into the same category. Just as intimidating a witness to give false testimony or leave the jurisdiction is improper [*see* Rule 3.4, Cmt. 1 ('Fair competition in the adversary system is secured by prohibitions against . . . improperly influencing witnesses . . ."), so too is conduct which is intended to extrajudicially intimidate and discourage opposing counsel and their client from taking on or continuing a litigation. *See, e.g., Matter of Lung,* 183 A.D.3d 256, 262 (2d Dep't 2020) (disciplining lawyer under Rules 4.4(a) and 8.4(h) for sending emails disparaging opposing counsel to opposing counsel's client, in part for the purpose of disrupting the attorney-client relationship); N.Y. City 2017-3 (2017) (Rule 8.4(d) violated if counsel threatens opposing party with proceeding unrelated to the dispute he or she is handling); N.Y. City 2015-5 (2015) (threat to file grievance proceeding against opposing counsel in order to gain advantage in civil proceeding may violate Rule 8.4(d)); R. Simon, *Simon's New York Rules of Prof'l Conduct Annotated (2020-21 ed.), §* 4.4;2 at 1346 ("The main use of Rule 4.4(a) would be against a lawyer who repeatedly uses litigation techniques whose sole purpose is to embarrass third parties. . . . "[W]itnesses [and] opposing lawyers . . . fit within the rubric 'third person'. . .").

Proposed Amendment to the Civil Rights Law

Studying the *Hutcher* decisions reveals fundamental flaws in the N.Y. Civil Rights Law that we believe can and should easily be fixed.

First, the definition of "places of public entertainment and amusement" should be expanded to include "professional or collegiate sports venues". Section 40-b of the N.Y. Civil Rights Law currently reads, in pertinent part:

> No person . . . corporation or association, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public entertainment and amusement as hereinafter defined shall refuse to admit any public performance held at such place any person over the age of twenty-one years who present a ticket of admission to the performance a reasonable time before the commencement thereof, or shall eject or demand the departure of such person from such such place during the course of the performance, whether or not accompanied by an offer to refund the purchase price or value of the ticket . . . , but nothing in this section shall be construed to prevent the refusal of admission to or the ejection of any such person whose conduct or speech thereat or therein is abusive or offensive or of any person engaged in any activity which may tend to a breach of the peace.
>
> ***The places of public entertainment and amusement within the meaning of this section shall be legitimate theaters, burlesque theaters, music halls, opera houses, concert halls and circuses.*** (Emphasis added.)

The bold, italicized language led to anomalous results in *Hutcher.* The First Department rejected plaintiff Hutcher's claim because MSGE excluded him from a sporting event at Madison Square Garden, and such an event was not considered a "place[] of public entertainment and amusement" under the statute.[10] The court recognized that "Madison Square Garden is a multi-purpose venue that sometimes functions as a concert hall or theater and other times as a sports arena," but ruled that "it only falls within the ambit of Civil Rights Law § 40-b when it is being used as an enumerated purpose."[11] Thus, the plaintiff was not entitled to any relief under the statute.

[10] 214 A.D.2d at 573-74.

[11] *Id.*

But because plaintiff Rabij was ejected from an event at the Hulu Theater, another MSGE-owned venue but one which happened to be a designated "place of public entertainment and amusement" under the statute, he received the full relief available – civil penalties and a refund of his ticket.[12]

It is hard to reconcile these results from the standpoint of public policy: MSGE should not be allowed to bar lawyers from its adversary law firms from its sporting venues, while being able to do so from its theaters. Indeed, the notion that the bar applies to Madison Square Garden when it is being used for some purposes and not others does not make any sense to us. Nor has our research disclosed any reason for this distinction.

We do note that Civil Rights Law § 40-b has long been strictly construed. In *Mandel v. Brooklyn Nat'l League Baseball Club*, 179 Misc. 27, 28 [Sup Ct, Bronx County 1942], the Court held that §40-B did not include a baseball stadium, stating that "[i]t is apparent from the reading of this section that the law as to the construction of a statute permitting a court to supply words 'ejusdem generis' does not apply, and that consequently a baseball ground cannot be held to be a place of amusement or entertainment contemplated by this section." This strict interpretation was reiterated in *Christie v. 46th St. Theatre Corp.*, 265 A.D. 255, 39 N.Y.S.2d 454 (App. Div. 1942), aff'd, 292 N.Y. 520, 54 N.E.2d 206 (1944), where the court held that the statute did not include a movie theatre.

Christie, however, may be instructive. The court stated that the inclusion of certain classes of theatres (legitimate theatre, for example), were not arbitrary because a moviegoer could see a performance at "hundreds of houses," whereas in legitimate theatre, they would be restricted to a few venues to see a play or performance. *Id.* at 458. Because live sporting events are limited in

[12] *Hutcher v. Madison Square Garden Enterprises,* Slip Op. dated 6/23/23 at 1-2.

attendance to one location, the logic applied to legitimate theaters and other limited venues should apply to them as well.

Accordingly, we recommend that the definition of "places of public entertainment and amusement" under Civil Rights Law § 40-b be extended to include "professional or collegiate sporting venues."

Second, the civil penalties under Civil Rights Law § 41 should be enhanced. Under the current statute, the penalty is limited to a monetary payment between $100 and $500, at the court's discretion. As the First Department made clear in *Hutcher,* injunctive relief is not allowed.[13] This should be changed, and the statute amended to allow the court the option of issuing injunctive relief *in addition to* the civil penalty. This will enable courts to prevent the type of concerted plan that MSGE attempted here – to systematically bar a group of people from its venue for reasons not permitted under the statute. Furthermore, the civil penalty under the statute should be increased ten-fold, to between $1000 and $5000 per instance, to keep up with inflation.

The Biometric Privacy Act

Our proposals regarding the Civil Rights Act are narrow and focus on the use of facial recognition technology in a limited context. The broader concerns mentioned earlier in this Report require a broader solution, one that addresses the myriad possible uses (and misuses) of biometric recognition by individuals and businesses throughout the state.

Our Working Group has examined a number of proposed statutes that were submitted to the Legislature earlier this year, in the wake of the revelations about MSGE. We strongly prefer the Biometric Privacy Act (the "BPA"), which proposes a new Article 32-A of the General Business Law and was introduced by sixteen members of the State Assembly. *See* Ex. F. As noted,

[13] 214 A.D.3d at 574,

we have already submitted a memorandum to the Legislature on behalf of the Working Group supporting the BPA. *See* Ex. E. We ask that NYSBA as a whole support this legislation and make it a legislative priority for the 2023-24 session.

As our memorandum states, the BPA would require private entities that have biometric data in their possession to develop written policies that are available to the public and that address retention and destruction of that data. The BPA would also require private entities to, among other things, advise a person that his or her data is being collected and stored, and obtain written consent for collection and storage. It also would bar sale or resale of data, and limit further disclosure. Finally, the BPA would allow a private cause of action for violating its terms.

Digging a bit deeper, the BPA revolves around two key defined terms. The first, the "biometric identifier", means "a retina or iris scan, fingerprint, voiceprint or scan of hand or face geometry." It thus includes facial recognition technology but goes way beyond it. Still, it is limited in scope: it specifically excludes writing samples, signatures, photographs, human biological samples used for standard medical testing, and donated body parts, among other things. The use of biometric *technology* is the focus.

The second key defined term is "biometric information", which is "any information, regardless of how it is captured, converted, stored or shared, based on an individual's biometric identifier used to identify an individual." It excludes information captured using items excluded from the definition of "biometric identifier."

The BPA would require that any "private entity" – also a defined term, covering individuals and entities – develop a written policy, available to the public, establishing a retention schedule and guidelines for destroying biometric identifiers and biometric information at the earlier of (a) the accomplishment of the initial purpose for collecting or gathering that information, or (b) three

years after the information is gathered. More significantly, it prohibits a private entity from obtaining, through trade or otherwise, biometric identifiers or biometric information unless it first: (i) informs the subject or their legally authorized representative (collectively, the "subject") in writing of: the fact that the biometric identifier or biometric information is being collected stored or used, and the purpose for which that is being done; and (ii) receives a written release from the subject permitting this. Private entities are also prohibited from "sell[ing], leas[ing], trad[ing] or otherwise profit[ing]" from a customer's biometric identifier or biometric information, or from disseminating it absent consent or legal obligation. The BPA also requires that this biometric information be stored using a "reasonable standard of care" that is at least consistent with how it protects other sensitive and confidential information, including attorney-client privileged information.

A subject whose biometric identifier or biometric information is used in violation of the BPA has a private right of action that allows recovery of the greater of $1000 or actual damages for a negligent breach, and the greater of $5,000 or actual damages for an intentional breach. In addition, the subject may recover their reasonable attorneys' fees if they prevail and, in the court's discretion, may obtain injunctive relief *in addition to* the damages.

The BPA would make a powerful tool indeed to limit the use of facial recognition and biometric technology. It would allow individuals and businesses to use such technology for legitimate purposes, such as security or customer identification, while creating guardrails that prevent misuse, improper dissemination and outright trafficking in biometric identifiers and information. By requiring customers to be informed that their biometric information is being used, and to consent to that use, it would prevent abuses such as those perpetrated by MSGE. We heartily support the BPA, and we ask this Association to do the same.

Working Group on Facial Recognition Technology and Access to Legal Representation

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*Mr. Minkoff abstains from any vote on the report.

Working Group on Facial Recognition Technology and Access to Legal Representation

Mission Statement

The Working Group on Facial Recognition Technology and Access to Legal Representation shall examine the legal and ethical considerations surrounding the use of facial recognition and other technology to restrict individual freedoms, including but not limited to attendance at events or entrance into venues as well as the propriety of the use of this and other technology on a lawyer's ability to represent clients without fear of retribution. The Working Group will also consider how the use of technology can prohibit the ability of members of the legal profession to provide effective representation of clients and disrupt access to justice. The Working Group shall make any necessary policy recommendations to the NYSBA Executive Committee.

MADISON SQUARE GARDEN ENTERTAINMENT

MADISON SQUARE GARDEN SPORTS

Policy Memorandum

Subject: Business Relationships with Counsel to Litigation Plaintiffs

Date: July 28, 2022

This Policy Memorandum outlines the internal policy (the "**Policy**") of MSG Entertainment Group, LLC ("**MSGE**") and MSG Sports, LLC (collectively, the "**Companies**"), which seeks to address serious and legitimate concerns related to protecting the Companies' interests in connection with certain ongoing litigations.

The Companies have become increasingly concerned about counsel that represent plaintiffs in certain ongoing litigation against the Companies attending events at the MSGE Venues (defined below). In addition to the adversarial nature inherent in litigation proceedings, other risks involved in adverse counsel and other attorneys in their law firm attending events at the MSGE venues include, but are not limited to:

i. Adverse counsel communicating directly with employees of the Companies in violation of ethical rules, which prohibit any communication with opposing parties and their employees;
ii. Adverse counsel seeking (or attempting to seek) disclosure outside proper litigation discovery channels as a result of their presence at the MSGE Venues, including by communicating directly with employees of the Companies or engaging in other improper evidence-gathering activities on site; and
iii. Adverse counsel otherwise undermining or harming the Companies' interests in certain ongoing litigation.

In light of these concerns, the Companies reserve the right to exclude from the MSGE Venues litigation counsel who represent parties adverse to the Companies, and other attorneys at their law firms. Similarly, the Companies may determine to prohibit any such attorney from purchasing from the Companies tickets to events at the MSGE Venues and/or utilizing the special services of dedicated MSG employees, such as the Season Membership, Group Sales or Hospitality Sales groups, to assist with or consummate their purchases.

Under applicable law, tickets to attend events at the MSGE Venues are merely licenses revocable at will. Accordingly, MSGE has discretion to exclude individuals from its premises and may remove visitors to the MSGE Venues for any reason or no reason at all. For the same reasons, the Companies have the right to decline to sell tickets for events held at the MSGE Venues to any person or group of people, except on grounds prohibited by law.

In exercising the rights being reserved under this Policy, the Companies will comply with any laws proscribing retaliation against litigants raising certain types of claims. Before making the determination on behalf of the Companies to exercise the rights reserved under this Policy, the MSGE Legal Department will carefully analyze potential conflicts in making case-by-case determinations as to whether to exercise the rights to exclude, and/or decline to sell tickets to,

adverse counsel and/or other attorneys at their law firms. This includes carefully considering whether any applicable federal, state, or local laws proscribing retaliation against litigants raising certain types of claims would be violated as a consequence of the Companies' exercise of such rights.

In those ongoing litigations where, after such analysis, the Companies exercise their right to exclude adverse counsel and/or other attorneys at their law firms, the MSGE Legal Department will send a letter to adverse counsel in that litigation, and (where applicable) to the named or managing partners at their law firms, informing them that they and the other attorneys at their law firms will not be admitted to the MSGE Venues. This communication will explain the rationale underlying this Policy and include a list of the MSGE Venues.

Subject to providing proof that a ticket purchase was made prior to their or their firms' receipt of the communication referenced above, Any attorney excluded from an MSGE Venue may request a refund of the established price of the tickets for their entire party, or for the attorney only. In the latter case the remainder of the party will be permitted to enter the MSGE Venue but the attorney will not be permitted to enter the MSGE Venue. Refunds will be processed as promptly as feasible.

As of the date of this Policy, "**MSGE Venues**" means Madison Square Garden, Hulu Theater at Madison Square Garden, Beacon Theatre, Radio City Music Hall and The Chicago Theatre. The Companies reserve the right to include in this definition additional premises owned and/or operated by MSGE or its subsidiaries.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CIVIL RIGHTS BUREAU

January 24, 2023

VIA USPS AND E-MAIL

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Dear Counsels,

The New York State Office of the Attorney General (OAG) has reviewed reports alleging that Madison Square Garden Entertainment Corp. and its affiliates (collectively, the "Company"), have used facial recognition software to forbid all lawyers in all law firms representing clients engaged in any litigation against the Company from entering the Company's venues in New York, including the use of any season tickets (the "Policy"). Reports indicate that approximately 90 law firms are impacted by the Company's Policy, constituting thousands of lawyers.

We write to raise concerns that the Policy may violate the New York Civil Rights Law and other city, state, and federal laws prohibiting discrimination and retaliation for engaging in protected activity. Such practices certainly run counter to the spirit and purpose of such laws, and laws promoting equal access to the courts: forbidding entry to lawyers representing clients who have engaged in litigation against the Company may dissuade such lawyers from taking on

legitimate cases, including sexual harassment or employment discrimination claims. *See*, *e.g.*, N.Y. Civ. Rights Law § 40-b (prohibiting wrongful refusal of admission to and ejection from public entertainment and amusement, such as legitimate theaters, burlesque theatres, music halls, opera houses, concert halls, and circuses, etc.); N.Y. State Exec. Law ("NYSHRL") § 296(2) (prohibiting public accommodations from engaging in discrimination in New York State); New York City Human Rights Law ("NYCHRL") § 8-107(4) (prohibiting public accommodations from engaging in discrimination in New York City). And attempts to dissuade individuals from filing discrimination complaints or encouraging those in active litigation to drop their lawsuits so they may access popular entertainment events at the Company's venues may violate state and city laws prohibiting retaliation. *See* NYSHRL § 296(7) (prohibiting retaliation); NYCHRL § 8-107(7) (prohibiting "retaliatory or discriminatory act or acts [that are] reasonably likely to deter a person from engaging in protected activity"). Lastly, research suggests that the Company's use of facial recognition software may be plagued with biases and false positives against people of color and women.[1]

By February 13, 2023, please respond to this Letter to state the justifications for the Company's Policy and identify all efforts you are undertaking to ensure compliance with all applicable laws and that the Company's use of facial recognition technology will not lead to discrimination. Discrimination and retaliation against those who have petitioned the government for redress have no place in New York.

Thank you for your cooperation with this inquiry.

Sincerely,

/s/ Kyle S. Rapiñan, Esq.
Civil Rights Bureau
New York State Office of the Attorney General
Kyle.Rapinan@ag.ny.gov | (212) 416-8618

[1] *See* Davide Castelvecchi, Is facial recognition too biased to be let loose? Nature. Nov. 18, 2020, https://www.nature.com/articles/d41586-020-03186-4 (last accessed Jan. 18, 2023); *see also* Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification,* Proceedings of Machine Learning Research 81, 1–15, 10 (2018), http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf (last accessed Jan. 18, 2023) (finding facial recognition was more accurate for white people and men overall but less accurate for people of color and women).

No. 2022-05318
Supreme Court of New York, First Department

Hutcher v. Madison Square Garden Entm't Corp.

214 A.D.3d 573 (N.Y. App. Div. 2023) · 186 N.Y.S.3d 26 · 2023 N.Y. Slip Op. 1646
Decided Mar 28, 2023

17588-, 17589-, M-912 Index No. 653793/22 Case Nos. 2022-05178, 2022-05318

03-28-2023

Larry HUTCHER et al., Plaintiffs–Respondents–Appellants, v. MADISON SQUARE GARDEN ENTERTAINMENT CORP. et al., Defendants–Appellants–Respondents.

King & Spalding LLP, New York (Randy M. Mastro of counsel), for appellants-respondents. Davidoff Hutcher & Citron LLP, New York (Larry Hutcher of counsel), for respondents-appellants.

27 *27

King & Spalding LLP, New York (Randy M. Mastro of counsel), for appellants-respondents.

Davidoff Hutcher & Citron LLP, New York (Larry Hutcher of counsel), for respondents-appellants.

Kern, J.P., Oing, Kennedy, Pitt–Burke, Higgitt, JJ.

573 *573 Order, Supreme Court, New York County (Lyle E. Frank, J.), entered on or about November 14, 2022, and order (denominated supplemental order), same court and Justice, entered on or about November 18, 2022, which, insofar as appealed from, granted plaintiffs' motion for a preliminary injunction to the extent of enjoining defendants from denying access to a person presenting a valid ticket to a theatrical performance or a musical concert on the day of an event at defendants' venues, unanimously reversed, on the law, without costs, and the preliminary injunction vacated.

The motion court properly concluded that Civil Rights Law § 40–b requires the admission of plaintiffs to venues controlled by defendants if they arrive at the venue after it opens on the date of a theatrical performance or musical concert with valid tickets thereto. We reject the invitation of amicus curiae the New York State Trial Lawyers Association to treat defendant Madison Square Garden Entertainment Corp. as a common carrier with a more limited right to exclude.

The motion court properly excluded sporting events from its holding because Civil Rights Law § 40–b is specifically limited in application to "legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses" (*see Madden v. Queens County Jockey Club, Inc.*, 296 N.Y. 249, 254, 256, 72 N.E.2d 697 [1947], *cert denied* 332 U.S. 761, 68 S.Ct. 63, 92 L.Ed. 346 [1947] ; *Impastato v. Hellman Enters., Inc.*, 147 A.D.2d 788, 790, 537 N.Y.S.2d 659 [3d Dept. 1989] ; *Mandel v. Brooklyn Natl. League Baseball Club Inc.*, 179 Misc. 27, 28–29, 37 N.Y.S.2d 152 [Sup. Ct., Bronx County 1942]). Although Madison Square Garden is a multi-purpose venue
574 that sometimes functions as a concert hall or *574
28 theatre and other times as a sporting arena, *28 we find that it only falls within the ambit of Civil Rights Law § 40–b when it is being used for an enumerated purpose.

However, it was improper for the motion court to issue a preliminary injunction. As Civil Rights Law § 41 prescribes a monetary remedy for violations of Civil Rights Law § 40–b, plaintiffs are limited to that remedy (*see Woolcott v.*

Shubert, 169 App.Div. 194, 197 [1st Dept. 1915] ["The general rule is that where a statute creates a right and prescribes a remedy for its violation that remedy is exclusive and neither an action for damages nor for an injunction can be maintained"]; *O'Connor v. 11 W. 30th St. Rest. Corp.,* 1995 U.S. Dist LEXIS 8085 *20, 1995 WL 354904, *6 [S.D.N.Y. June 1, 1995] ; *see also Drinkhouse v. Parka Corp.,* 3 N.Y.2d 82, 88, 164 N.Y.S.2d 1, 143 N.E.2d 767 [1957], *superseded by statute on other grounds as stated in Alan J. Waintraub, PLLC v. 97–17 Realty, LLC,* 2020 N.Y. Slip Op. 34502[U], *10–11, 2020 WL 9596265 [Civ. Ct., Queens County 2020] ; *Broughton v. Dona,* 101 A.D.2d 897, 898, 475 N.Y.S.2d 595 [3d Dept. 1984], *lv dismissed* 63 N.Y.2d 769, 481 N.Y.S.2d 1025, 471 N.E.2d 464 [1984]). Even if injunctive relief were available, the existence of a statutory damages remedy would undermine plaintiffs' claims of irreparable harm (*see* Civil Rights Law § 41 ; *Woolcott,* 169 A.D. at 199, 154 N.Y.S. 643).

Motion for leave to file an amicus curiae brief granted.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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INDEX NO. 653793/2022

MOTION DATE N/A

MOTION SEQ. NO. 004

LARRY HUTCHER, JEFFREY CITRON, SID DAVIDOFF, HOWARD WEISS, IAN BRANDT, LESLIE BARBARA, CHARLES CAPETANAKIS, ADAM CITRON, ROBERT COSTELLO, SEAN CROWLEY, ARTHUR GOLDSTEIN, PATRICIA GRANT, CHARLES KLEIN, JOSH KRAKOWSKY, GARY LERNER, ELLIOT LUTZKER, WILLIAM MACK, STEVE MALITO, HOWARD PRESANT, ERIC PRZYBYLKO, ROBERT RATTET, PETER RIPIN, MARTIN SAMSON, STEVE SPANOLIOS, WILLIAM WALZER, MICHAEL WEXELBAUM, DEREK WOLMAN, JUDITH ACKERMAN, NICK ANTENUCCI, MYRON RABIJ, ASHWINI JAYARATNAM, ALEXANDER MCBRIDE, RICHARD WOLTER, STEVEN APPELBAUM, MAX DUVAL, ELI GEWIRTZ, DANIEL GOLDENBERG, CAROLINE HALL, MICHAEL KATZ, DAVID LEVINE, BENJAMIN NOREN, FEDERICA PANTANA, JOSEPH POLITO, ASHWANI PRABHAKAR, NICOLE SANTO, MICHAEL APPELBAUM, JAMES GLUCKSMAN, JOSEPH ASIR, HENRY CITTONE, JOHN CORRIGAN, WILLIAM COX, JOHN KIERNAN, ROBERT LEVINE, MARK SPUND, NICHOLAS TERZULLI, ALEXANDER VICTOR, DAVIDOFF HUTCHER & CITRON, LLP

Plaintiff,

- v -

MADISON SQUARE GARDEN ENTERTAINMENT CORP., HAROLD WEIDENFELD,

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 126, 127, 129, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion to dismiss is granted in part.

This Court has previously ruled that only section 40-b of the Civil Rights Law ("CRL") is applicable to this matter. As such, of the first nine causes of action, all are dismissed except the third and eighth causes of action, which allege violations of CRL § 40-b. Moreover, as the

Appellate Division, First Department, has ruled that injunctive relief is not appropriate in this case, the causes of action requesting injunctive relief are among the claims dismissed.

As to the new cause of action, the tenth, that cause of action must also be dismissed. The Court agrees with the defendant that plaintiffs have failed to state a claim pursuant to CRL §§ 50 and 51. It is undisputed that to state a claim pursuant to CRL §51, plaintiffs must allege "(i) usage of plaintiff's name, portrait, picture, or voice, (ii) within the State of New York, (iii) for purposes of advertising or trade, (iv) without plaintiff's written consent" (*Molina v Phoenix Sound, Inc*., 297 AD2d 595, 597 [1st Dept 2002]).

Here, plaintiffs' complaint contains no factual allegations that defendants are using or are intending to use plaintiffs' photographs for advertising or trade. Further, plaintiffs in opposition to defendants' motion, allege that defendants' economic benefit is derived from its policy of banning attorneys to gain favorable settlements, this argument however is unpersuasive. Plaintiffs also contend that defendants may use the photographs for advertising r trade in the future is inadequate to maintain this cause of action. Based on the foregoing, it is hereby

ORDERED that the complaint is dismissed, with the exception of the third and eighth causes of action, which remain.

20230626152051LFRANK30B39BA639C4FC39A275B4018A40A8E

6/26/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

----------X

INDEX NO. 653793/2022

MOTION DATE 06/23/2023

MOTION SEQ. NO. 005

LARRY HUTCHER, JEFFREY CITRON, SID DAVIDOFF, HOWARD WEISS, IAN BRANDT, LESLIE BARBARA, CHARLES CAPETANAKIS, ADAM CITRON, ROBERT COSTELLO, SEAN CROWLEY, ARTHUR GOLDSTEIN, PATRICIA GRANT, CHARLES KLEIN, JOSH KRAKOWSKY, GARY LERNER, ELLIOT LUTZKER, WILLIAM MACK, STEVE MALITO, HOWARD PRESANT, ERIC PRZYBYLKO, ROBERT RATTET, PETER RIPIN, MARTIN SAMSON, STEVE SPANOLIOS, WILLIAM WALZER, MICHAEL WEXELBAUM, DEREK WOLMAN, JUDITH ACKERMAN, NICK ANTENUCCI, MYRON RABIJ, ASHWINI JAYARATNAM, ALEXANDER MCBRIDE, RICHARD WOLTER, STEVEN APPELBAUM, MAX DUVAL, ELI GEWIRTZ, DANIEL GOLDENBERG, CAROLINE HALL, MICHAEL KATZ, DAVID LEVINE, BENJAMIN NOREN, FEDERICA PANTANA, JOSEPH POLITO, ASHWANI PRABHAKAR, NICOLE SANTO, MICHAEL APPELBAUM, JAMES GLUCKSMAN, JOSEPH ASIR, HENRY CITTONE, JOHN CORRIGAN, WILLIAM COX, JOHN KIERNAN, ROBERT LEVINE, MARK SPUND, NICHOLAS TERZULLI, ALEXANDER VICTOR, DAVIDOFF HUTCHER & CITRON, LLP

Plaintiff,

- v -

MADISON SQUARE GARDEN ENTERTAINMENT CORP., HAROLD WEIDENFELD,

Defendant.

----------X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion for partial summary judgment is granted.

Both this Court and the Appellate Division, First Department have held that the actions of the defendants, with regard to its refusal of entry to people with valid tickets violates Civil Rights Law Section 40-b. As such, plaintiff Myron Rabij, has established *prima facie* entitlement to

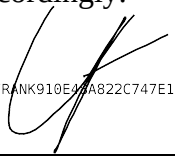
judgment as a matter of law, by showing that he was denied entry to an event where he presented a ticket that had not been revoked,

The arguments made by the defendants, are unavailing. The defendants argue that by revoking all tickets to the subject plaintiffs, that the plaintiffs could never possess a valid ticket and insists that by barring these plaintiffs it renders all tickets, whether having already been issued and not yet issued, as revoked. This Court has previously rejected such an argument, requiring that the revocation be specific as to time, date, and seat location. To do otherwise would turn Section 40-b into a nullity. The Court declined to do this before and declines to do so again.

As the defendants have continually knowingly violated the law even following this Court's determination that their actions were violative of the law, the Court believes that the maximum penalty allowed by law along with the cost of the ticket is mandated. It is therefore

ADJUDGED that the motion for partial summary judgment is granted, and plaintiff Myron Rabij is entitled to judgment as against the defendants in the amount of $662.35; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.



6/26/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

Memorandum in Support

WORKING GROUP ON FACIAL RECOGNITION TECHNOLOGY

Facial Recognition #1 May 25, 2023

S.4457 By: Senator Liu
A.1362 By: M of A Gunther
Senate: Consumer Protection
Assembly: Consumer Affairs and Protection
Effective Date: 90th day after it shall have become a law

AN ACT to amend the General Business Law, in relation to biometric privacy.

LAW AND SECTIONS REFERRED TO: adds new article 32-A of the General Business Law

THE WORKING GROUP ON FACIAL RECOGNITION TECHNOLOGY SUPPORTS THIS LEGISLATION

This bill would add a new article 32-A of the General Business Law titled, "the Biometric Privacy Act."

Recent events at an entertainment venue in New York State have demonstrated that biometric data about a person can be used to, among other things, deny access to that venue. More broadly, the capture, storage, use, and resale of that data by private entities can invade legitimate privacy interests of persons that are not protected by existing federal or New York State law.

The Biometric Privacy Act would require private entities that have biometric data in their possession to develop written policies that are available to the public and that address retention and destruction of that data. The Act would also require private entities to advise a person that his or her data is being collected or stored, to obtain written consent for collection or storage, bar sale or resale of data, and limit further disclosure. The Act would also allow a private cause of action for violation of its terms.

The capture and use of biometric data by private entities, often without knowledge of that capture or use by an affected person, is ubiquitous. Certainly, biometric data can be used for legitimate purposes by private entities. This bill would not prohibit private entities from doing so. However, it would install "guardrails" to protect the privacy interests of persons and to provide clear guidance to private entities. This will benefit the people of New York State as well as the entities that do business here.

For the above reasons, the NYSBA Working Group on Facial Recognition Technology **SUPPORTS** this legislation.

STATE OF NEW YORK

4457

2023-2024 Regular Sessions

IN SENATE

February 9, 2023

Introduced by Sen. LIU -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to biometric privacy

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The general business law is amended by adding a new article 32-A to read as follows:

ARTICLE 32-A
BIOMETRIC PRIVACY ACT

§ 676. Short title. This article shall be known and may be cited as the "biometric privacy act".

§ 676-a. Definitions. As used in this article: 1. "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Biometric identifiers shall not include writing samples, written signatures, photographs, human biological samples used for valid scientific testing or screening, demographic data, tattoo descriptions, or physical descriptions such as height, weight, hair color, or eye color. Biometric identifiers shall not include donated body parts as defined in section forty-three hundred of the public health law or blood or serum stored on behalf of recipients or potential recipients of living or cadaveric transplants and obtained or stored by a federally designated organ procurement agency. Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Porta-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD01142-01-3

bility and Accountability Act of 1996. Biometric identifiers do not include an X-ray, roentgen process, computed tomography, magnetic resonance imaging, positron-emission tomography scan, mammography, or other image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening.

2. "Biometric information" means any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual. Biometric information shall not include information derived from items or procedures excluded under the definition of biometric identifiers.

3. "Confidential and sensitive information" means personal information that can be used to uniquely identify an individual or an individual's account or property which shall include, but shall not be limited to, a genetic marker, genetic testing information, a unique identifier number to locate an account or property, an account number, a personal identification number, a pass code, a driver's license number, or a social security number.

4. "Private entity" means any individual, partnership, corporation, limited liability company, association, or other group, however organized. A private entity shall not include a state or local government agency or any court in the state, a clerk of the court, or a judge or justice thereof.

5. "Written release" means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment.

§ 676-b. Retention; collection; disclosure; destruction. 1. 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 three 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.

2. No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:

(a) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;

(b) informs the subject or the subject's legally authorized representative 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

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

3. No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information.

4. No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a

person's or a customer's biometric identifier or biometric information unless:

(a) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure;

(b) the disclosure or redisclsoure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information or the subject's legally authorized representative;

(c) the disclosure or redisclosure is required by federal, state or local law or municipal ordinance; or

(d) the disclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction.

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

(a) 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

(b) 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.

§ 676-c. Right of action. Any person aggrieved by a violation of this article shall have a right of action in supreme court against an offending party. A prevailing party may recover for each violation:

1. against a private entity that negligently violates a provision of this article, liquidated damages of one thousand dollars or actual damages, whichever is greater;

2. against a private entity that intentionally or recklessly violates a provision of this article, liquidated damages of five thousand dollars or actual damages, whichever is greater;

3. reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and

4. other relief, including an injunction, as the court may deem appropriate.

§ 676-d. Construction with other laws. 1. Nothing in this article shall be construed to impact the admission or discovery of biometric identifiers and biometric information in any action of any kind in any court, or before any tribunal, board, agency, or person.

2. Nothing in this article shall be construed to conflict with the federal Health Insurance Portability and Accountability Act of 1996.

3. Nothing in the article shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999.

4. Nothing in this article shall be construed to apply to a contractor, subcontractor, or agent of a state agency of local government when working for that state agency of local government.

§ 2. This act shall take effect on the ninetieth day after it shall have become a law.