STATE OF SÃO PAULO COURT OF APPEALS
DISTRICT COURTS OF SÃO PAULO
CIVIL CENTRAL VENUE
37th CIVIL COURT
PRAÇA JOÃO MENDES S/Nº, São Paulo - SP - CEP 01501-900
Public Service Hours: 12:30 PM to 07:00 PM

JUDGMENT

Digital Proceeding no.:	**1090663-42.2018.8.26.0100**
Class - Subject	**Civil Public Class Action - Railroad Transport**
Petitioner:	**Idec - Instituto Brasileiro de Defesa do Consumidor**
Defendant:	**Concessionaria da Linha 4 do Metro de Sao Paulo S.a. (Via Quatro)**

Law Judge: Judge **Patrícia Martins Conceição**

Case record examined.

This is a *public class action* filed by **Instituto Brasileiro de Defesa do Consumidor** (IDEC) in face of the company **Concessionária Da Linha 4 do Metrô de São Paulo S.A. (Via Quatro).** It requests the prohibition of the collection and processing of images and biometric data taken, with no prior consent, from users of subway lines operated by the defendant, implemented in seven stations of Line 4 - Yellow: Luz, República, Paulista, Fradique Coutinho, Faria Lima, Pinheiros and Butantã. The plaintiff requested the granting of an urgent court protection for the collection of data from digital interactive doors to cease, by proving shutdown of already installed cameras, under penalty of a daily fine of fifty thousand Brazilian Reais (R$ 50,000.00). At last, it requests the defendant to be sentenced (i) not to use biometric data or any other kind of identification of public transportation consumers and users, (ii) to the payment of an indemnification for the undue use of consumers' image and (iii) indemnification for collective damages in an amount of not less than R$ 100,000,000.00. It has attached documents.

Statement by the Public Prosecutor Office on pages 259/267, for the granting of the urgent court protection for the purpose of ordering the defendant to cease the data capture by cameras installed with the digital doors' system, under penalty of a daily fine, until it proved the use of prior and proper information to consumers, as well as the obtaining of an express consent by each user who could be the object of image collection.

On pages 268/271, was included an amendment to the complaint, with a change in the request for the urgent court protection and in the definitive requests.

The urgent court protection has been granted, on pages 327/332, for the purpose of forcing the defendant party to cease the collection of images, sounds and any other data by means of cameras or other devices involving the so-called digital doors, promoting the shutdown of such cameras already installed, within forty-eight (48) hours, under penalty of a daily fine of R$ 50,000.00.

The plaintiff opposed a request for clarification, under the grounds that, even though the preliminary injunction has been granted, the additional request for urgent court protection, resulting from the complaint's amendment, has not been considered.

On page 348 was included the decision, with acceptance of the request for clarification, in order to complement the decision granting the urgent court protection, including the affirmative covenant consisting of the placement of adhesives in cameras, ensuring compliance with the court order.

On pages 360/362, the defendant informed the compliance with the urgent court protection.

On pages 363/405, it brought the defendant's answer. In preliminary arguments, it discussed the defective pleading of the complaint due to incompatibility among the requests. In the merits, it postulated the groundlessness, asserting that the digital doors do not collect defined images attributed to identified people, but rather only detects faces and expressions. It explains that the technology used is not related to facial recognition, but only to the detection of faces classifiable in categories of expressions, gender and biotypes. It added that there is neither storage of images nor personal data processing, since it only collects data for statistical purposes. It defended the legality of installations, since the Subway's concessionaire earns revenues resulting from such advertising activity, having been authorized by the assignor authority. It has attached documents.

Plaintiff's reply on pages 1,174/1,210, in which the plaintiff replied the alleged defective pleading, emphasizing that the amendment of the complaint modified the requests, eliminating any contradiction among them. With regard to the merits, it reiterated the initial pleadings, refuting the defendant's arguments, highlighting that there is the effective unauthorized collection of data of subway users, which is in violation of several consumer protection rules. It points out that the defendant mandatorily imposes an opinion survey for advertising purposes, without informing users of any of it. It challenges the pleadings that there is no image collection, and also the technical opinion submitted by the defendant, both due to the method used for an insufficient survey of the facts to be verified, and to lack of what it calls reverse engineering for the conclusion to be broader and more accurate with regard to the investigated object. It also challenged the notary's records attached by the defendant. It reiterated the request for reversal of the burden of proof.

In evidences, the defendant expressed itself on pages 1,214/1,222, understanding that its pleadings are already proven by the documents attached to the case records, and also that the notary's records have public credit. On pages 1,223/1,225, the plaintiff requested a 60-day period for the attachment of a technical opinion opposing the documents brought by the defendant.

The defendant expressed its interest in the holding of a conciliation hearing (pages 1,214/1,222).

The plaintiff requested the granting of a period of sixty (60) days to attach an opinion to prove the claimed right (pages 1,223/1,225).

On pages 1,226/1,257, the State of São Paulo Public Defenders' Office request its intervention as co-plaintiff or associate of plaintiff in suit.

On pages 1,259/1,260, the defendant expressed itself informing that in the equipment being the object of the suit, in addition to the cameras, there are screens to communicate advertising material, absolutely independent on the Digital Interactive Doors, requesting the express statement that these might be used.

According to the court order on page 1,261, the plaintiff expressed itself in favor of the inclusion of the Public Defenders' Office as co-plaintiff, and also reiterated the request for the granting of a period of sixty (60) days for the attachment of an opinion to prove what is claimed (pages 1,263/1,270). The defendant, in turn, was contrary to the intervention requested by the Public Defenders' Office (pages 1,271/1,289).

On pages 1,295/1,328, Instituto Alana requested its inclusion in the suit as *amicus curiae*. It claims that its institutional mission is the protection of children by means of the promotion, protection, defense and social control of human rights of children and adolescents, and also that it is an expert in the areas of children data protection and child advertising. Therefore, it understands that its material legitimacy to act as *amicus curiae* in the public class action brought by the Plaintiff Institute is proven.

On pages 1,610/1,615, there is the expression by the Public Prosecutor Office. It requested the rejection of the preliminary argument of defective pleading, since the complaint's amendment, already granted, corrected the occasional contradiction then existing among its requests. It requires the consideration of the request for a conciliation hearing brought by the defendant (pages 1,214/1,222). It did not oppose the inclusion of the Honorable Public Defenders' Office in the case records. It gave its favorable opinion for the granting of a period of sixty (60) days for the attachment of a technical opinion contrary to the opinion attached by the defendant, according to pages 1,223/1,225 and 1,263/1,270, taking into consideration the subject's complexity and the social relevance thereof. In case of denial, it requested expert evidence. With regard to Instituto Alana as *amicus curiae*, it requested that the examination of the case records is first provided to the parties.

On pages 1,618/1,623, the defendant challenged the request for expert evidence, the attachment of an expert opinion by IDEC and, with regard to the participation of Instituto Alana, it understands that the survey prioritizes people's anonymity, but subsidiarily agrees with the participation thereof, provided limited to the occasional interest of children and adolescents. At last, it requested its authorization to resume the communication of advertising material in the equipment's screens, since it would operate independently of the Ad Mobilize's system operation.

On pages 1,624/1,628, the plaintiff expressed its lack of interest in a conciliation hearing, agreed with the Instituto Alana's intervention, requested reversal of the burden of proof, expressed its lack of interest in the probational deferment, aside the authorization for the attachment of a technical opinion.

On pages 1,630/1,631, the defendant informed that it would reactive the advertising screens, since it understands that they would operate in separate from the challenged system, not implying in non-compliance with the court order.

On pages 1,632/1,634, IDEC included in the case records a technical opinion, on pages 1,635/1,664. The decision on pages 1,665/1,669 (i) rejected the preliminary argument of the complaint's defective pleading, (ii) admitted the participation of Instituto Alana as *amicus curiae* in the suit, (iii) denied the defendant's request for the determination of a conciliation hearing, (iv) ordered the defendant and the *amicus curiae* to express themselves with regard to the technical opinion on pages 1,635/1,664, and (v) documented that, concerning the requests for the use of the digital doors' screens for advertising purposes of the equipment in which the cameras are covered, there was no limitation in this regard in the decision granting the preliminary injunction, since the prohibition is related to the collection of any information on users by the cameras.

Statements by the *amicus curiae* and the defendant on pages 1,671/1,680 and 1,681/1,695, with regard to the technical opinion attached by the plaintiff on pages 1,635/1,664.

Statement by the Public Prosecutor Office on pages 1,713/1,734.

On pages 1,735/1,752, the defendant attaches a technical opinion and requests the use of an evidence previously used in another case.

The decision on pages 1,828/1,832 (i) denies the request for separation, brought by the defendant, of the technical opinion on pages 1,635/1,664, (ii) grants a period for the plaintiff and the *amicus curiae* to express themselves with regard to the technical opinion attached by the defendant on pages 1,816/1,823, an also orders the later analysis of the request for the use of the opinion on pages 1,753/1,815, included in the case records no. 1003122-02.2018.8.26.0704.

On pages 1,837/1,847, the statement by Instituto Alana with regard to the estoppel of the expert evidence and inadmissibility of the evidence previously used in the case records no. 1003122-02.2018.8.26.0704.

Included, on pages 1,848/1,851, a copy of the judgment of groundlessness rendered in case records no. 1003122-02.2018.8.26.0704 brought by the defendant.

On pages 1,861/1,886, there was a new statement by the plaintiff party with regard to the estoppel of the expert opinion and inadmissibility of the evidence previously used in the case records no. 1003122-02.2018.8.26.0704, in addition to the attachment of documents and technical opinion.

Statement by the Public Prosecutor Office on pages 2,005

Contrary statement by the *amicus curiae* on pages 2,011/2,017, with the attachment of documents (pages 2,018/2,027); contrary statement by the plaintiff party on pages 2,029/2,050; and on pages 2,190/2,195 statement by the defendant on the documents on pages 2,018/2,027, attached by Instituto Alana.

On pages 2,051/2,089, the defendant challenged the documents brought by IDEC, bringing to the case records new documents on pages 2,092/2,183; the *amicus curiae* expressed itself with regard to such documents on pages 2,218/2,227; statement by the plaintiff party on pages 2,228/2,264.

Opinion from the Public Defenders' Office on pages 2,196/2,217.

The decision on pages 2,2652,269 orders the submission of the case records to the Public Prosecutor Office for opinion, in particular with regard to the estoppel of the expert evidence and the request for the use of evidence previously used in another case.

Opinion from the Public Prosecutor Office on pages 2,278/2,280.

On page 2,275, the *amicus curiae* submitted a new delegation of powers in the case records.

The defendant party requested a period for its closing arguments (page 2,281).

This is the report.

I give the grounds and decide.

Initially, **I deny the request for the granting of a period for closing arguments brought by the defendant**, since there is no complexity justifying it, being noted that the parties have already expressed themselves several times in the case records, including with regard to the technical issues.

Similarly, I deny the defendant's request for the use of the opinion on pages 1,753/1,815, included in the case records no. 1003122-02.2018.8.26.0704, as evidence previously used in another case.

For the possible use of an evidence previously used in another case, it is imperative that it has been carried out as per an adversary proceeding, with the participation of the party against which it should operate, or that there is the agreement by a party which has not participated in the production thereof.

Article 372 of the Civil Procedure Code expressly provides that "*The judge might admit the use of an evidence produced in another proceeding, attributing thereto the value he/she deems appropriate, in compliance with the adversary proceeding.*"

The use of an evidence previously used in another case, according to the lessons of Marcus Vinicius Rios Gonçalves, is conditioned to compliance with the adversary proceeding:

> "A question that highlights the importance of the adversary proceeding it that on the use of an evidence previously used in another case (...). The principle of the adversary proceeding requires the parties to have the opportunity to participate in the production of evidences (...). An evidence previously used in another case might only be used against someone in two circumstances: when he/she/it participated in the production of the evidence in the proceeding in which it has been produced, or, when he/she/it has not participated, he/she/it agrees with the use thereof" (GONÇALVES, Marcus Vinicius. Summarized Civil Procedure Law. 4th Ed. São Paulo: Saraiva, 2014. P. 6/65).

In this case, there is not doubt that **the expert report has been produced in the case records of proceeding no. 1003122-02.2018.8.26.0704, brought by Felipe Alves de Carvalho, Moisés Muniz Lobo and Victor Hugo Pereira Gonçalves, not included in this suit, in face of the current defendant, and that there was no participation of the plaintiff, or the Public Prosecutor Office, the Public Defenders' Office and the *amicus curiae*, which are parties hereof.**

Thus, the evidence previously used in another case is inadmissible, since acceptance thereof would imply in a true restriction to defense, since the plaintiff and the other parties involved have not participated in the preparation thereof, did not have the opportunity to ask questions or appoint technical assistants, in addition to having expressly disagreed on the opinion's use.

In the same sense, the excerpt of the Public Prosecutor Office's opinion on pages 2,278/2,280:

> "Indeed, the evidence produced in another proceeding might not be admitted due to violation to the principle of adversary proceeding, foreseen in the Federal Constitution (article 5, LV) and in article 372 of the CPC. This is because the parties should have the opportunity not only to argument the considerations made by the expert, but also and in particular to previously submit the questions to be answered by the expert. In addition, there was not even the participation of the Public Prosecutor Office in that proceeding in which an information, technical and economic disadvantaged party faced the claimant on its own; it is at least suspicious to now intend to bring a ready and finished evidence, which could have been produced in this proceeding, in case the petitioner had not waived, as it has been verified, the production thereof, being different that, herein it would count on the careful inspection by the Consumer Affairs Prosecutor Office, which in addition to the plaintiffs, would certainly imply in a result very different from that obtained therein. Therefore, the opinion should be disregarded for the purposes of evidence herein"

The State of São Paulo Court of Appeals has also expressed itself as such:

> "BILL OF APPEAL Motion to stay execution The decision ordered the expert evidence, appointing an accountant Thesis of existence of an identical evidence produced in another proceeding, which should be received as an evidence previously used in another case Impossibility Evidence produced in a proceeding involving other parties Non-compliance with the principle of adversary proceeding Free persuasion of the judge, who might order the production of evidence, in case he/she understands it is required for the suit's settlement (art. 370 of the CPC) Decision sustained Appeal denied." (TJSP; Bill of Review 2119685-06.2019.8.26.0000; Reporter: Francisco Giaquinto; Judging Organ: 13th Private Law Chamber; Civil Central Venue - 15th Civil Court; Judgment Date: 11/13/2019; Record Date: 11/14/2019)

> "EVIDENCE PREVIOUSLY USED IN ANOTHER CASE - INDEMNIFICATION ACTION - DECISION WHICH DENIED THE REQUEST FOR AN EVIDENCE PREVIOUSLY USED IN ANOTHER CASE NON PARTICIPATION OF THE PLAINTIFF IN THE PRODUCTION OF EVIDENCE - INADMISSIBILITY GRANTING WHICH WOULD IMPLY IN THE EXPRESS RESTRITION OF THE RIGHT TO DEFENSE, FOR EXAMPLE, IN FACE OF THE IMPOSSIBILITY TO PREPARE QUESTIONS AND APPOINT A TECHNICAL ASSISTANT LACK OF DIFFICULTY OR IMPOSSIBILITY TO PRODUCE THE EVIDENCE IN THE CASE RECORDS DECISION SUSTAINED APPEAL DENIED." (TJSP; Bill of Review 2191254-09.2015.8.26.0000; Reporter: Theodureto Camargo; Judging Organ: 9th Private Law Chamber; Venue of Ribeirão Preto - 8th Civil Court; Judgment Date: 11/16/2015; Record Date: 11/17/2015)

It should also be noted that the defendant, although having had more than one opportunity to specify evidences, limited itself to state that "*they are already in the case records, with such evidence provided with notorious technical excellence (in case of IBP's opinion)*" (page 1,222), **failing to request the production of technical expert evidence herein, a burden it was in charge of.**

The question being resolved, I proceed with the analysis of the merits.

The requests are valid in part.

This is a public class action filed by Instituto Brasileiro de Defesa do Consumidor (IDEC) and the Public Defenders' Office in face of the company Concessionária Da Linha 4 do Metrô de São Paulo S.A. (Via Quatro), in which is discussed the **practice of collection, use and storage of users' personal data by the digital platform implemented by the defendant company in Line 4 Yellow stations, with no prior consent from consumers and, consequently, the occurrence of moral damages and collective damages.**

The plaintiffs intend the defendant to be sentenced (i) not to use biometric data or any other kind of identification of public transportation consumers and users, without the user's consent; (ii) to the payment of an indemnification for the undue use of consumers' image and (iii) indemnification for collective damages in an amount of not less than R$ 100,000,000.00.

The defendant, in turn, defends the legality of the use of the concerned equipment, arguing that there is neither collection nor storage of personal data in the system, but only facial detection for statistical purposes, so that the generated data does not specifically identify the passenger.

However, it is true that **such system limitation, of only using users' images for statistical purposes, without the effective collection, recording or identification, is not proven in the case records**, a burden the defendant was in charge of, as per article 373, II of the Civil Procedure Code.

In view of the uncontroversial fact that there were equipment recording users' images for advertising and statistical purposes in stations managed by the defendant, it was in charge of, in the capacity of a public service concessionaire, wholly proving that the system does not store personal data of the platform's users, and that neither does it carry out the facial recognition by the installed equipment, lack of storage or filming of users, and the true destination provided to the obtained material, if applicable, which did not take place.

It should be noted that the defendant, in more than one occasion, **failed to request the conduct of an expert examination in the operating equipment and systems connected thereto**, an evidence critical for proving its pleadings, only requiring, in general terms, the use, as an evidence previously used in another case, of the expert report produced in case records no. 1003122-02.2018.8.26.0704, an inadmissible measure, as already analyzed.

And, even if it was not for that, in a brief analysis of the report in reference, it is already possible to conclude that the **expert examination has been carried out indirectly, without having had the examination of actual and specific equipment and the respective operating systems being the object hereof** - "*For this purpose, identical equipment have been used, with the same configurations existing in the DEFENDANT's premises, in order to reproduce the conditions found at the location and noted during the conduct of the first diligence"* (page 1,755).

Thus, **without having had the defendant's interest in specifically proving herein the actual destination granted to the information unequivocally collected by the company holding the equipment installed in the managed stations' premises, it is concluded that an impeditive or extinctive fact of the right proven by the plaintiff has not been proven.**

And even if it was specifically verified the lack of effective facial recognition by the installed equipment, **there are no doubts that there is the collection of users' image, without their knowledge or even consent for commercial purposes benefiting the defendant and the company hired by it.**

The defendant admits that there is detection of users' image and that such data is used for statistical purposes "*There is the detection, by means of an image, of facial features fully unconnected to the identity of a person, upon the use of computing algorithms*" and that they generate "*the result of the use thereof, only statistical data, absolutely unable to identify the user*". It also proceeds by stating that the "*the technology integrated in the Digital Interactive Doors is limited to counting people, visualizations, period of permanence, attention time, gender, age groups, emotions, vision factor, visualization rush hours and detection distance, without collecting any personal data from an individualized person for this purpose. Only merely statistical data is generated*" (page 369).

Therefore, there is no controversy concerning the detection of users' image, as well as the collection and recognition of information such as gender, age group, reaction to advertising communicated in the same equipment, and others.

Is spite of Law no. 13,709/2018 (General Data Protection Act, ŁGPD) being subsequent to the beginning of the collection of images being the object of the case records, the matter regarding the affirmative and negative covenant claimed by the plaintiff and the processing of the collected data, with future effects, is subject to the enforcement thereof.

Such Law, in its article 1, sets forth as the object "*the processing of personal data, including by digital means, by a natural person or a public or private law legal entity, for the purpose of protecting the fundamental rights of freedom and privacy and the free development of the natural person's personality*."

Article 5, II of such legal document, in turn, conceptualizes the sensitive personal data as:

> "the personal data on the racial or ethnical origin, religious belief, political opinion, membership to labor union or organization of a religious, philosophical or political nature, data referring to health or sexual life, **genetic or biometric data**, when connected to a natural person"

Notwithstanding the lack of clarifications on the reach of the items presented in such article, the **biometric data** have been later detailed by means of Decree 10,046/2019, which sets forth, in its article 2, II: "*measurable biological and behavioral features of the natural person which might be collected for automated recognition purposes, such as the palm of the hand, fingerprints, retina or iris, the shape of the face, voice and gait*".

As such, **the facial recognition, or even the mere facial detection, without being possible the specific identification of the individual, but with access to his/her image and face, seems to already touch the concept of biometric data, legally deemed a sensitive personal data, and therefore it deserves special treatment by virtue of Law no. 13,709/2018.**

It should be noted that LGPD set forth a special protection to sensitive personal data, authorizing the processing thereof **only in case there is a clear and specific consent by the data subject**, i.e., without the subject's consent, in the cases listed in item II of article 11 of LGPD, not being foreseen any of the cases of the concerned situation.

It is not excessive to remind that article 2 of such law advocates as a fundamentals of the subject of data protection, among others, the respect for privacy, informative self-determination, inviolability of intimacy, honor and image, consumer defense, human rights, free development of personality and dignity.

In addition, the **purpose of the processing should have legitimate, specific, explicit objectives, informed to the subject**, with no possibility of later processing inconsistently with such purposes (art. 6, I).

On the other hand, § 3 of article 11 provides that "*The communication or shared use of sensitive personal data among controllers for the purpose of **obtaining an economic advantage might be the object of a prohibition** or of regulation by the national authority, with the Public Power sectorial organs being heard, in the scope of their competences.*" g.N.

The situation exposed in the specific case is very different from the images' collection by security systems for the purpose of improving the service provision, users' safety or law enforcement, which would not only be acceptable, but necessary in face of the public service's provider duty to look after the safety of its users inside its premises. It is **clear that the image's collection presently discussed is used for advertising purposes and consequently of a commercial nature, since, in general terms, it intends to detect the main features of individuals circulating in certain locations and times, as well as the emotions and reactions presented to the advertising communicated in the equipment.**

Moreover, **it has resulted uncontroversial that users have not been warned or communicated, previously or subsequently, with regard to the use or collection of their image by totems installed in the platforms, i.e., users did not even have knowledge on the practice carried out by the defendant**, which obviously violates their right to clear and proper information on the products and services, as well as protection against misleading and abusive advertising, coercive or unfair commercial methods, both listed in article 6, III and IV of the Consumer Defense Code.

Article 31 of the same legal document, in turn, sets forth that "*The offer and presentation of products or services should ensure **correct, clear, accurate information**, ostensive and in Portuguese, on their features, qualities, quantity, composition, price, warranty, expiration date and origin, among other data, as well as on the risks they represent to consumers' health and safety.*"

It should not be forgotten that, in its capacity as a public service concessionaire, the defendant was in charge of bearing the risk of the economic activities explored by it, in particular due to involving the fundamental rights to intimacy, privacy, image and honor (art. 5, X of the Federal Constitution), which did not occur, since the users' images collected during the provision of the public service have been used for commercial purposes.

It should be added thereto the understanding stated by the Public Prosecutor Office in its final opinion on pages 1,713/1,734, presently supported:

> "The most grave abuse consists in the mandatory character of the demographic survey. The activity is expressly illegal and contrary to the concession's contractual terms, misrepresenting the object thereof, which should be limited to the provision of the public transportation service. The subway's consent is irrelevant, because the act remains being illegal, since the State might not dispose of the citizens' fundamental rights and, contrary to what has been pleaded by the defendant, such economic exploitation absolutely does not interfere in the warranty of the moderateness of the tariff's prices, because the profit reverts exclusively in favor of ViaQuatro. There is clear offense to article 6, item IV, combined with article 39, both of the Consumer Defense Code. Nothing justifies the mandatory nature of the demographic survey. And not even by far might the survey be included in the permit for the exploitation of an advertising space, because it might not be confounded with the same. The consumer is not even informed that his/her expressions and impressions (on the advertising's approval or disapproval) are collected and analyzed upon a film of his/her face, in violation of articles 4, main section and 6, item III, both of the Consumer Defense Code. In addition, the survey is fully useless for the end activity, since the data is not employed to improve the quality of the public transportation service, but rather to comply with market purposes" (pages 1,730/1,731)

In the same sense, the representative of the Public Defenders' Office also stated that:

> "When the required publicity is not granted to the practice of analyzing the emotions of male and female users of the public transportation service, the Defendant directly violated the Consumer Defense Code, since it has not provided minimum information for the consumers to be able to protest against the collection of their data, in case they choose to do so" (...) there is not any impediment to the exploitation of advertising services in spaces under the Defendant's concession. A different situation is the collection of personal data from male and female users of the public service and the invasion of their intimacy for the advertising's direction (...) the invasive and pernicious characters inherent to the Doors represent the true systematic commercialization of users, which are not even informed with regard to the practice" (pages 1,236 and 1.245/1.246)

It is inevitable to recognize that, among users whose images are being collected, there are children and adolescents users of the public service, whose protection and preservation of image and rights is an absolute State priority,

as provided for in article 227 of the Federal Constitution. LGPD also establishes special protection to the child and adolescent, as per its article 14: "*The processing of personal data of children and adolescents should be carried out to their best interest, according to the terms hereof and of the relevant legislation.*"

In the same sense, article 17 of ECA ensures to the child and to the adolescent "*The right to respect consists in the inviolability of physical, psychic and moral integrity of the child and of the adolescent, **encompassing the preservation of the image**, identity, autonomy, values, ideas and beliefs, spaces and personal objects.*" g.n. –

Article 37, § 2 of the Consumer Defense Code provides that: "*It is abusive, among others, the discriminatory advertising of any nature, which incites violence, explores fear or superstition, benefits from the child's deficient judgment and experience, disrespects environmental values, or which is able to induce the consumer to behave in a manner that is prejudicial or dangerous to his/her health or safety.*"

It is noted that the defendant failed to specifically challenge the arguments brought by the *amicus curiae*, **in particular concerning the special protection granted to the child and adolescent, including with regard to the preservation of his/her image**, limiting itself to provide generic pleadings on the lack of circumstances involving personal data processing, already denied above.

In view of all that has been exposed, **it is undeniable that the defendant's conduct obviously violates the right to the image of consumers users of the public service, the provisions with regard to the special protection granted to the sensitive personal data collected, in addition to the violation of consumer's basic rights, notably to information and protection related to abusive commercial practices, and therefore the request for negative covenant consisting in not to use biometric data or any other kind of identification of consumers and users of the public transportation, without proof of the due consumer's consent, is valid.**

With regard to the request for positive covenant, the validity thereof is a consequence of the own granting of the negative covenant, since, in case it intends to resume the practices processed in the case records, the defendant should obtain the users' prior consent upon the clear and specific information on the data collection and processing, with the adoption of the relevant tools.

On the other hand, **being categorized the illegal conduct and the chain of causation, in relation to the moral damages and collective damages intended by the plaintiff, the requests** are in part valid.

The indemnifiable moral damage, examined under the perspective of diffuse and collective rights, finds legal support on article 6, VI and VII, of the Consumer Defense Code, as well as in article 1 of the Public Class Action Act.

It is important to consider that the collective moral relief is admitted as a kind of relief for damages suffered by the collectivity, *a priori* driving away from the concept of individual moral damage. This means that the homogeneous individual and collective damages are not to be confounded, being the coexistence of both kinds of damages, in thesis, fully possible.

However, even though the plaintiff has brought a request for damages it states to be autonomous and independent from each other, **duplicity is not verified in the specific case, because the intended moral damages to the collectivity of people visiting the defendant's premises is certainly confounded with the collective moral damages foreseen in the specific case.**

It should be emphasized that the plaintiff, in its exordium, **although generically stating that an indemnification to users would be applicable based on article 403 of E. STJ, failed to specifically clarify its intention or to bring specific data enabling the damage's quantification, even if in the future, and limited itself by requesting the defendant to submit documents, without even having brought any formal request in this regard.**

The plaintiff itself stated in its exordium, with regard to such damages, that "the proof of damage would not be absolutely difficult" (page 47), but has attached nothing to the case records in this regard, and also has not requested any kind of evidence on the applicable occasion, both to indicate which would have been the magnitude of the occasional homogeneous individual damages, and to show which would have been the economic advantage earnt by the defendant with the use of such images, in order for the arbitration of homogeneous individual damages to be possible.

The same understanding is not applicable to the collective moral damage, represented by the prejudice to image, to moral concept and to the values of a group or class of individuals, resulting from the fact occurred and not from the developments thereof, which was clearly shown in the specific case. Refer to the understanding already adopted by the Superior Court of Justice in this regard:

> "ADMINISTRATIVE - TRANSPORTATION - FREE PASS - ELDERLY - COLLECTIVE MORAL DAMAGE - UNNECESSARY PROOF OF PAIN AND SUFFERING - EXCLUSIVE APPLICATION TO INDIVIDUAL MORAL DAMAGE - REGISTRATION OF THE ELDERLY FOR THE ENJOYMENT OF RIGHT - ILLEGALITY OF THE REQUIREMENT BY THE TRANSPORTATION COMPANY - ART. 39, § 1 OF THE STATUTE OF THE ELDERLY - LAW 10741/2003 TRANSPORTATION COMPANY NOT PREVIOUSLY INQUIRED. 1.

The collective moral damage, being understood as such the one that is trans-individuals and that impacts a specific class of people, or not, is amenable to be proven with the presence of prejudice to the collective image and moral of the individuals as a summary of the individualities perceived as a segment, resulting from the same basic legal relationship. 2. The collective extra-patrimonial damage does not require proof of pain, suffering and psychological disturbance, susceptible to verification in the scope of the individual, but inapplicable to the diffuse and collective interests. 3. In the case, the collective damage pointed out has been the submission of the elderly to a registration procedure for the enjoyment of the free pass, the displacement of which has been borne by the interested parties, when the Statute of the Elderly, art. 39, § 1, only requires the submission of an identity card. 4. Unlawful conduct of the transportation company, if the normative system is taken into consideration. 5. With the pecuniary sanction being denied by the Court which took into consideration the factual and probation circumstances and being the Statute of the Elderly left with no prior inquiries, the decision is sustained. 5. Special appeal granted in part." (REsp 1057274/RS, Reporter Justice ELIANA CALMON, SECOND PANEL, judged on 12/01/2009, DJe 02/26/2010) (G.N.)

"SPECIAL APPEAL. CIVIL AND CONSUMER PROCEEDING. CONSUMER COLLECTIVE ACTION. REQUEST FOR CLARIFICATION. OMISSION, CONTRADICTION OR OBSCURITY. NON-VERIFICATION. ABUSIVE ADVERTISING. ART. 37, § 2, OF THE CDC. MORALLY SENSITIVE SUBJECT. COLLECTIVE MORAL DAMAGE. EXTRA-PATRIMONIAL DAMAGE. SOCIETY'S FUNDAMENTAL VALUES. SPECIFIC HYPOTHESIS. OCCURRENCE. 1. Consumer collective action, by which means the abusive nature of an advertising treating a morally sensitive subject is inquired and in which it is requested to prohibit the communication of the reprehended advertising and to compensate the collective moral damages. 2. Special appeal filed on: 02/25/2015; conclusion to the Cabinet on: 25/08/2016; applicability of the CPC/73. 3. The appeal's purpose consists in deciding if: a) there was denial of jurisdictional service; and b) if, in the specific case, the communication of the advertising deemed abusive is able to categorize a collective moral damage. 4. Being absent the vices of art. 535 of the CPC/73, the request for clarification is denied. 5. The collective moral damages are categorized in the own illegal practice, do not require proof of the effective damage or suffering of the society and are based on the liability having an objective nature, which does not require proof of fault or willful misconduct, which is justified by the phenomenon of rights' socialization and collectivization, typical of mass suits. 6. Moreover, the collective moral damages are intended to repress and prevent the practice of conducts offensive to the society, in addition to representing a means to revert the economic advantage individually obtained by the damage's causative agent for the benefit of the collectivity as a whole. 7. The inquired advertising reproduces the following dialogue: - May I bring my boyfriend to sleep here, spend the whole night having hardcore sex and waking up the whole neighborhood? - Yes, son. - Awesome dad, thank you! I knew u would let me. - Wow! I thought he would ask me to borrow the car! 8. In the specific circumstance, having the entry of judgment recognized the disapproval nature of the advertising content, deeming it abusive, it could not fail to sentence the appellee to reimburse the collective moral damages, under penalty of rendering defective the legal protection against the undue damage of trans-individuals interests, failing to apply the preventive and educational function typical of such damages and allowing the individual appropriation of advantages resulting from the damage to social interests.

9. Special appeal granted in part. Sentence Restored". (STJ, REsp 1655731/SC, Reporter Justice NANCY ANDRIGUI, THIRD PANEL, j. on 05/14/2019).

Similarly, the lesson by Carlos Alberto Bittar Filho on the collective moral damage: *"(...) the unfair damage of the moral scope of a certain community, i.e., is the unlawful violation of a certain circle of collective values" and "When it comes to a collective moral damage, it is being mentioned the fact that the valuation patrimony of a certain (major or minor) community, ideally taken into consideration, has been assaulted in a manner absolutely unjustifiable from the legal point of view; or rather, in the last instance, that the culture itself has been harmed, in its immaterial aspect"*. (in Do Dano Moral Coletivo no Atual Contexto Jurídico Brasileiro, Revista de Direito do Consumidor, v. 12, p. 55).

And, taking into consideration the specific court protection of the consumer's right, the STJ's jurisprudence has already noticed that "*...not any assault to consumers' right might result in a diffuse moral damage. It is necessary for the offensive fact to be of reasonable significance and surpass the limits of tolerability. It should be severe enough to produce true suffering, social unrest and relevant changes in the collective extra-patrimonial order"* (REsp nº 1.221.756/RJ, reporter Justice Massami Uyeda, j. on 02/02/2012, DJe 02/10/2012).

In this regard, with the collective moral damage being categorized, mainly due to being violated the significantly reasonable consumers' rights, which surpasses the limits of tolerability, it is understood that it is "*unnecessary to prove the effective damage, being enough the potentiality thereof*" (STJ, AgRg in REsp 1283434/GO, Reporter Justice Napoleão Nunes Maia Filho, 1st Panel, judged on 04/07/2016, DJe 04/15/2016). On the subject, refer to the statement of Precedent 403 of the Superior Court of Justice: "*The indemnification for unauthorized publication of an individual's image for economic or commercial purposes is independent of proof on loss.*"

In addition, the Civil Code, in its article 20, also states that "*Except if authorized, or if required for the administration of justice or for maintaining the public order, the communication of wordings, the transmission of the word, or the publication, exposure or use of the image of a person might be prohibited, at his/her request and without prejudice to the applicable indemnification, in case they affect the honor, good reputation or respectability, or in case they are intended for commercial purposes.*"

In this case, **the possibility of facial recognition, the facial detection, the use of images collected from the subway's users, with an evidently commercial purpose, as well as the lack of prior authorization or mere awareness for the collection of the images,**

reveals a very reprehensible conduct, able to affect the moral and collective values, especially taking into consideration the incalculable number of individuals visiting the defendant's platform on a daily basis, including children and adolescents, whose image enjoys higher and notorious protection, in the terms of article 17 of ECA.

It should be noted that there was no performance of a merely illegal act by the defendant, but rather a true conduct in violation of the image of the subway's consumer users, which surpasses the limits of tolerability.

For the setting of the collective moral damage, there is lack of specific legal criteria, in particular there is compliance with the parameters set forth by jurisprudence: **(i) the reasonable significance of the offensive fact and (ii) social rejection, provided surpassing the limits of tolerability.** *In verbis:*

> "LACK OF PROCEDURAL INTEREST - Non-occurrence - Request for abstention of future apprehension Existing interest in acting - Public Prosecutor Office, which holds legitimacy to defend collective rights. PUBLIC CLASS ACTION - Intent for the condemnation for collective moral damages by virtue of a traffic infringement resulting from the undue use of a parking lot intended for disabled people Inadmissibility Collective moral damage demanding reasonable significance and surpassing of the limits of tolerability - Mere violation of law is not enough, an encumbrance enough to reflect the social change is necessary - Lack thereof herein - Justice appeal not granted."
> (TJSP; Civil Appeal 1032783-04.2019.8.26.0506; Reporter: Fermino Magnani Filho; Judging Organ: 5th Public Law Chamber; Venue of Ribeirão Preto - 7th Civil Court; Judgment Date: 07/10/2020; Record Date: 07/10/2020)

In addition, it is imperative for the amount to have a punitive purpose and the purpose of discouraging the reiteration of the same conduct by the same defendant and also by other social factors. There is an effective educational function, which might not be despised. Moreover, the amount might not be set in a level representing the unlawful enrichment of the offended party, in effective compliance with the principles of reasonability and proportionality.

The amount intended by the plaintiff, R$ 100,000,000.00, is extremely excessive, since it is outside the above determined parameters, and it is not consistent with the damage suffered by the collectivity, in particular because **in the case records, there is no proof that the images have been shared and stored permanently or published in a communications means with easy and broad release.**

It should be noted that the calculation criterion submitted by the plaintiff, which uses as calculation basis for the quantification of the damage the average number of subway users in Line Yellow, multiplied by the amount of the unit pass and in observance with the defendant's gross revenue in the period, appears to be reasonable,

and in addition due to not having been expressly challenged by the defendant, which was in charge of proving that the submitted amounts would be incorrect, or that the average number of users is less than what has been mentioned. However, the percentage applied on such basis and the conclusion in the amount of R$ 100 million Brazilian Reais is not reasonable and, including, might have a negative impact on the quality of provision of the concerned public service or on the future amount of the fee.

Therefore, in compliance with the specific criteria for setting the collective moral damage and also based on the principles of reasonability, proportionality and prudence in judicial decisions, **it is applicable to decrease the indemnification for collective moral damage to the level of R$ 100,000.00.**

The other points raised, in thesis, are not able to inform the understanding presently reached, and therefore I cease to face them, as per the terms of article 489, § 1, item IV, of the Civil Procedure Code.

In view of what has been exposed, **I GRANT the requests IN PART, with the settlement of the merits, as per article 487, I of the Civil Procedure Code, so as to (i) order the defendant to refrain from collecting the images, sounds and any other personal data of consumer users, by means of cameras or other devices involving the equipment installed in subway Line 4 Yellow, without the prior consent from consumer, confirming the preliminary injunction granted by the decision on pages 327/332; (ii) order the defendant to, in case it intends to resume the practices addressed in the case records, obtain the prior consent from users by means of clear and specific information on the data collection and processing, with the adoption of the relevant tools; and (iii) sentence the defendant to the payment of an indemnification for collective moral damages in the amount of R$ 100,000.00, adjusted for inflation as per the practical table of the São Paulo Court of Appeals, from the date of the sentence's publication, and with interests of 1% per month, accruing as of summons, due to being a breach of contract, as per article 405 of the Civil Code, to be reverted to Fundo de Defesa de Direitos Difusos FDD, established as per article 13 of Law no. 7,347/85.**

I cease to condemn the plaintiff party to the attorney's fees, procedural costs and expenses, due to lack of bad-faith, as per article 18 of Law no. 7,357/85.

In view of the reciprocal loss of suit with regard to IDEC and with the plaintiff party being exempted, I sentence the defendant to the payment of **half** of the procedural expenses and costs, including those initial, in compliance with the amount updated to 2021 and the maximum amount of 3,000 UFESP,

adjusted for inflation from the date of payment, according to the practical table of the São Paulo Court of Appeals, and with the accrual of interests on arrears of 1% per month, at the time of the definitive execution, from the end of the 15-day period for the payment of the presently set debt, in accordance with article 523, of the Civil Procedure Code, as well as attorneys' fees for the benefit of the plaintiff, arbitrated in the level of 10% of the condemnation's adjusted amount, as per the terms of article 85, § 2, of the Civil Procedure Code and with the addition of interests on arrears of 1% per month, as mentioned above for the costs and expenses.

With regard to the Public Defenders' Office, I sentence the defendant to the payment of procedural costs and expenses, adjusted for inflation from the date of payment, according to the practical table of the São Paulo Court of Appeals, and with the accrual of interests on arrears of 1% per month, from the end of the 15-day period for the payment of the presently set debt, in accordance with article 523, of the Civil Procedure Code, as well as attorneys' fees for the benefit of the organ, arbitrated, by equity, in R$ 5,000.00, as per the terms of article 85, §§ 2 and 8, of the Civil Procedure Code and with the addition of interests on arrears of 1% per month, as mentioned above, **to be reverted to the fund managed by the Public Defenders' Office, as per articles 85, § 19 and 91 of the Civil Procedure Code and article 4, XXI, of LC no. 80/94.**

With no condemnation of fees with regard to the *amicus curiae*, due to lack of legal support.

In case an appeal is filed, the appellee is to be summoned to bring counter-arguments within fifteen days and, thereafter, the case records should be sent to the competent Chapter of the Court of Justice, together with occasional medias and objects filed in the court clerk's office, regardless of the judgment of admissibility, as per the terms of art. 1,010, § 3, of the Civil Procedure Code.

With the *res judicata*, await for five (5) days for an occasional request for compliance with the sentence. Thereafter, with the relevant measures for the collection of the costs due being taken, to be sent for filing, in compliance with the legal provisions.

Published, Register, Notify and the Public Prosecutor Office's awareness.

São Paulo, May 07, 2021.

DOCUMENT DIGITALLY EXECUTED AS PER THE TERMS OF LAW 11,419/2006, ACCORDING TO THE PRINT AT THE RIGHT MARGIN.