

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EMAD KASHKEESH and MICHAEL KOMORSKI,)	
individually and on behalf of a class of similarly)	
situated individuals,)	21 C 3229
)	
Plaintiffs,)	Judge Gary Feinerman
)	
vs.)	
)	
MICROSOFT CORPORATION,)	
)	
Defendant.)	

ORDER

For the reasons set forth below, Defendant’s motion to dismiss for lack of personal jurisdiction [64] is denied. Defendant shall answer the operative complaint by 1/3/2023 (not 12/27/2022, the date called for by the 11/7/2022 order [81]).

STATEMENT

Emad Kashkeesh and Michael Komorski, drivers for the rideshare platform Uber, bring this putative class action against Microsoft Corporation for alleged violations of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.* Doc. 28; *see* Docs. 61-62 (reported at 2022 WL 2340876 (N.D. Ill. June 29, 2022)) (severing certain claims and remanding them to state court). Microsoft licenses its Face Application Programming Interface (“Face API”) to Uber, which uses it to verify the identifies of Uber drivers: Uber prompts a driver for a photograph of himself, Doc. 33-5 at ¶ 3; Uber sends that photograph and a photograph on file to Microsoft, Doc. 33-1 at ¶ 5; and Microsoft’s API returns a predication as to whether the two photographs depict the same person, *ibid.* Microsoft—which is incorporated in and has its principal place of business in the State of Washington, Doc. 28 at ¶ 5; Doc. 33-2 at ¶ 3—moves to dismiss under Civil Rule 12(b)(2), contending that the court lacks personal jurisdiction over it because it has no control over where Uber drivers use the API and because it receives the photographs outside of Illinois. Doc. 66 at 14.

Microsoft’s motion is denied. Jurisdictional discovery revealed that Microsoft not only knew that Uber would use the Face API for drivers in Illinois, but that Microsoft modified the API specifically for Illinois drivers. In reaching their licensing agreement, Microsoft and Uber negotiated how to treat drivers in Illinois and Texas, which both have biometric privacy laws of concern to Uber. Doc. 71-2 at 2; Doc. 71-5 at 3. The companies reached an agreement under which a special header accompanies photographs from drivers in those States, and Microsoft is required to purge such photographs from its data repository within 48 hours of receiving them. Doc. 71-1 at 20; Doc. 71-3 at 8; Doc. 71-4 at 8. By modifying its business practices specifically with respect to the use of its API in Illinois, Microsoft purposefully directed its business

activities to Illinois, availed itself of the forum, and thereby subjected itself to specific jurisdiction for purposes of this suit. See *Illinois v. Hemi Grp. LLC*, 622 F.3d 754, 758 (7th Cir. 2010) (holding a company subject to personal jurisdiction in Illinois where it specifically declined to do business with New York residents due to that State’s laws); *Crumpton v. Haemonetics Corp.*, 595 F. Supp. 3d 687 (N.D. Ill. Mar. 30, 2022) (holding a company subject to the court’s jurisdiction where it “deliberately entered into contractual and business arrangements to ensure that its software collected data in Illinois and [the company] itself hosted Illinois resident’s data on its servers [in Canada]”); cf. *be2 LLC v. Ivanov*, 642 F.3d 555, 558-59 (7th Cir. 2011) (“Beyond simply operating an interactive website that is accessible from the forum state, a defendant must in some way *target* the forum state’s market.”).


Microsoft argues that this conclusion conflicts with *McGoveran v. Amazon Web Services, Inc.*, 488 F. Supp. 3d 714 (S.D. Ill. 2020), *Salkauskaite v. Sephora USA, Inc.*, 2020 WL 2796122 (N.D. Ill. May 30, 2020), and *Bray v. Lathem Time Co.*, 2020 WL 1492742 (C.D. Ill. Mar. 27, 2020). Microsoft is incorrect. In those cases, the defendants sold technology or products to others who then decided, on their own, to use the technology or products in the forum. That is plainly different from this case, where Microsoft both knew that Uber intended to use the Face API in Illinois and modified the API for that very purpose. Indeed, one of the cases cited by Microsoft supplies the key distinction, noting that the defendant there had not “modif[ied]” its technology for “state-specific objectives or needs.” *Salkauskaite*, 2020 WL 2796122, at *4.

Microsoft also argues that it lacks the necessary contacts with Illinois because it was Uber that wanted the option to tag Illinois photographs with a special header and Uber that ultimately may exercise that option. Doc. 75 at 5, 9. But that Uber prompted Microsoft to direct its business activities towards Illinois makes no difference in the personal jurisdiction analysis. Microsoft modified its contractual relationship with Uber to meet Uber’s demands, thereby directing Microsoft’s activities towards, and purposefully availing itself of, the forum.

For these reasons, Plaintiffs have established the “*prima facie* case of personal jurisdiction” required where, as here, the court rules on a Rule 12(b)(2) motion without holding an evidentiary hearing. *N. Grain Mktg., LLC v. Greving*, 743 F.3d 487, 491 (7th Cir. 2014) (internal quotation marks omitted).

One last issue requires mention. Microsoft points to evidence that Komorski has never used its Face API while in Illinois. Doc. 66 at 8; Doc. 75 at 8. Microsoft does not proceed to argue, however, that the court lacks personal jurisdiction over Microsoft as to Komorski’s claim. Cf. *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017). Accordingly, Microsoft has forfeited any argument that the court lacks jurisdiction over his claim. See *G&S Holdings LLC v. Cont’l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012) (“We have repeatedly held that a party waives an argument by failing to make it before the district court.”). In any event, even if Komorski were dismissed, the suit would proceed on Kashkeesh’s claim.

December 13, 2022



United States District Judge