☐ YES ☑ NO

EXHIBITS

CASE NO. 2021 CH 2338

DATE: 5/12/2021

CASE TYPE: Class Action

PAGE COUNT: 12

CASE NOTE

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12-Person Jury

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MARIO A. PEÑA, individually and on behalf of similarly situated individuals,

Plaintiff,

v.

MICROSOFT CORPORATION, a Washington corporation,

Defendant.

No. 2021CH02338

Hon.

Jury Trial Demanded

CLASS ACTION COMPLAINT

Plaintiff Mario Peña ("Plaintiff"), individually and on behalf of other similarly situated individuals, brings this Class Action Complaint against Defendant Microsoft Corporation ("Defendant" or "Microsoft") for its violations of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA") and to obtain redress for all persons injured by Defendant's conduct. Plaintiff alleges the following based on personal knowledge as to his own acts and experiences, and as to all other matters, upon information and belief, including an investigation conducted by his attorneys.

INTRODUCTION

1. Plaintiff seeks to represent a class of individuals who were drivers for the ridesharing company Uber and had their unique facial biometrics collected and used without their consent or authorization by Microsoft when they interacted with the Uber mobile application to verify their identity.

2. Plaintiff and the other members of the putative class have suffered a concrete injury resulting from their facial biometrics being collected, disseminated, and used for profit without their knowledge or consent, thus materially decreasing the security of this intrinsically inalterable information, and substantially increasing the likelihood that they will suffer as victims of fraud and/or identity theft in the future.

3. On behalf of himself and the proposed Class defined below, Plaintiff seeks an injunction requiring Defendant to comply with BIPA, as well as an award of statutory damages to the Class, together with costs and reasonable attorneys' fees.

PARTIES

4. At all relevant times, Plaintiff has been a resident of Cook County, Illinois

5. Defendant Microsoft Corporation is a Washington corporation that conducts, and is licensed by the Illinois Secretary of State to conduct, business throughout Illinois, including in Cook County, Illinois.

JURISDICTION AND VENUE

6. This Court may assert personal jurisdiction over Defendant pursuant to 735 ILCS 5/2-209 in accordance with the Illinois Constitution and the Constitution of the United States, because Defendant conducts business within this state and because Plaintiff's claims arise out of Defendant's unlawful in-state actions, as Defendant captured, collected, stored, used and profited from Plaintiff's biometric identifiers and/or biometric information in this state.

7. Venue is proper in Cook County, Illinois pursuant to 735 ILCS 5/2-101, because Defendant conducts business in Cook County, Illinois, and thus resides there under § 2-102, and because the transaction out of which this cause of action arises occurred in Cook County, Illinois.

THE BIOMETRIC INFORMATION PRIVACY ACT

8. "Biometrics" refers to a "biology-based set[s] of measurements." *Rivera v. Google Inc.*, 238 F. Supp. 3d 1088, 1094 (N.D. Ill. 2017). Specifically, "biometrics" are "a set of measurements of a specified physical component (eye, finger, voice, hand, face)." *Id.* at 1296.

9. BIPA was enacted in 2008 in order to safeguard individuals' biometrics as the result of the "very serious need [for] protections for the citizens of Illinois when it [comes to their] biometric information." Illinois House Transcript, 2008 Reg. Sess. No. 276. BIPA is codified as Act 14 in Chapter 740 of the Illinois Compiled Statutes.

10. As set forth in BIPA, biologically unique identifiers, such as a person's unique facial geometry, cannot be changed. 740 ILCS 14/5(c). The inalterable nature of biologically unique identifiers presents a heightened risk when an individual's biometrics are not protected in a secure and transparent fashion. 740 ILCS 14/5(d)–(g).

11. As a result of the need for enhanced protection of biometrics, BIPA imposes various requirements on private entities that collect or maintain individuals' biometrics, including facial scans.

12. Among other things, BIPA seeks to regulate "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g). BIPA thus applies to entities that interact with two forms of Biometric Data: biometric "identifiers" and biometric "information." 740 ILCS 14/15(a)-(e).

13. BIPA defines a "biometric identifier" as any personal feature that is unique to an individual, including fingerprints, voiceprints, palm scans and facial geometry. "Biometric identifiers" are physiological, as opposed to behavioral, characteristics. BIPA's text provides a

non-exclusive list of protected "biometric identifiers," including "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." 740 ILCS 14/10.

14. "Biometric information" is defined by BIPA as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." *Id*. This definition helps ensure that information based on a biometric identifier that can be used to identify a person is covered by BIPA. Collectively, biometric identifies and biometric information are known as "biometrics."

15. In BIPA, the Illinois General Assembly identified four distinct activities that may subject private entities to liability:

a. possessing biometrics without a proper policy publicly available, 740 ILCS 14/15(a);

b. collecting biometrics, 740 ILCS 14/15(b);

c. profiting from biometrics, 740 ILCS 14/15(c); and

d. disclosing biometrics, 740 ILCS 14/15(d).

16. As the Illinois Supreme Court has held, BIPA "codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information." *Rosenbach v. Six Flags Entm't Corp*., 2019 IL 123186, ¶ 33, 129 N.E.3d 1197, 1206 (Ill. 2019). The Illinois Supreme Court further held that when a private entity fails to comply with BIPA "that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach." *Id.*

FACTUAL BACKGROUND

17. In an effort to provide its customers biometric authentication services, Defendant Microsoft Corporation developed a software known as the Face Application Programming Interface (or "Face API").

18. Defendant's Face API software is incorporated into its customers' mobile or internet-based applications and operates by collecting and analyzing individuals' facial biometrics as needed by Defendant's customers.

19. One of the most well-known and largest users of Defendant's Face API technology is Uber Technologies Inc. ("Uber"). Uber is one of the biggest ride-share companies in the world, connecting thousands of riders with its drivers through its mobile Uber application.

20. Since 2016 Uber has utilized Defendant's Face API software to periodically verify the identity of its drivers by extracting and comparing unique biometric facial geometry templates of its drivers.[1]

21. Specifically, Uber integrated Defendant's Face API into its mobile phone application as part of its security feature "Real Time ID Check." Upon registering to become an Uber driver, Plaintiff and the other Class members were required to enter certain identifying information including, but not limited to, their full name, vehicle information, and driver's license, into the Uber rideshare app. Critically, Uber drivers are also required to provide a profile picture featuring their face by either taking a picture or providing a picture from their driver's license.

22. After initially registering, Uber drivers are occasionally asked to undergo a security check by taking a "selfie" picture of themselves before they are allowed to use their Uber application to verify that the person driving the vehicle is the same individual who originally registered with the application. Unbeknownst to the Uber drivers such Plaintiff and the other Class members, Uber's "Real Time ID Check" works by taking the driver's picture and providing it to Defendant's Face API software which extracts their facial biometrics to create a geometric

[1] https://customers.microsoft.com/en-us/story/731196-uber (last accessed May 11, 2021).

template that it then compares with the geometric template obtained from the original picture taken by the driver when they first enrolled.

23. However, even though Defendant obtained Plaintiff's and the other Class members' facial biometrics, Defendant failed to obtain proper written consent as required by BIPA to collect their facial biometrics, including from Plaintiff and the other Class member.

24. Furthermore, Defendant also failed to make publicly available a policy as to Defendant's collection, storage, deletion, retention, and security practices regarding the biometric information in its possession.

25. Defendant also unlawfully profited from the facial biometrics it obtained from Uber drivers, including Plaintiff and the other Class members, as Defendant was paid by Uber for its use of Defendant's Face API software to verify Uber drivers' facial biometrics through its Real Time ID Check feature.

FACTS SPECIFIC TO PLAINTIFF PEÑA

26. Plaintiff Mario Peña was a driver for Uber from 2016 to 2018, working primarily in Chicago, Illinois. Upon registering as an Uber driver, Plaintiff, like all other Uber drivers in Illinois, was required to submit a headshot picture to Uber through its mobile application.

27. On multiple occasions throughout Plaintiff's time as a driver for Uber, Uber's mobile application required Plaintiff to take a picture of his face in real time through Uber's "Real Time ID Check" security feature to gain access to Uber's platform and begin driving.

28. Each time Plaintiff submitted a picture through Uber's Real Time ID Check, the picture was provided to or otherwise transferred to Defendant's Face API software which then extracted Plaintiff's facial biometric profile to create a geometric template that was used to confirm

that Plaintiff had the same facial biometrics as identified by Defendant's Face API in prior pictures Plaintiff had provided to Uber.

29. Plaintiff, like the thousands of other Illinois Uber drivers who are members of the Class, never provided written consent allowing Defendant to capture, store, or disseminate his facial biometrics.

30. Plaintiff, like the other members of the Class, was also never informed that Defendant collected and/or possessed his facial biometrics, nor did Defendant have a publicly available policy regarding its practices for collection, storage, retention period, or deletion of the biometric identifiers it collects from Uber drivers like Plaintiff and the other members of the Class.

31. Plaintiff to this day does not know the whereabouts of his facial biometrics which Defendant obtained from him.

CLASS ALLEGATIONS

32. Plaintiff brings this action on behalf of himself and a class of similarly situated individuals pursuant to 735 ILCS § 5/2-801. Plaintiff seeks to represent a Class defined as follows:

> **Class**: All individuals whose facial biometric identifiers or biometric information were collected, captured, stored, transmitted, disseminated, or otherwise used by Defendant as part of Uber's Real Time ID Check within the state of Illinois any time within the applicable limitations period.

33. Excluded from the Class are any members of the judiciary assigned to preside over this matter; any officer or director of Defendant; and any immediate family member of such officer or director.

34. There are thousands of members of the Class, making the members of the Class so numerous that joinder of all members is impracticable. Although the exact number of members of the Class is currently unknown to Plaintiff, the members can be easily identified through Defendant's records.

35. Plaintiff's claims are typical of the claims of the Class he seeks to represent, because the basis of Defendant's liability to Plaintiff and the Class is substantially the same, and because Defendant's conduct has resulted in similar injuries to Plaintiff and to the Class.

36. There are many questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not limited to, the following:

a. Whether Defendant collects, captures, or otherwise obtains facial biometric identifiers or biometric information from Illinois residents who are drivers for Uber;

b. Whether Defendant disseminated facial biometrics;

c. Whether Defendant obtained a written release from the Class members before capturing, collecting, or otherwise obtaining their facial biometric identifiers or biometric information;

d. Whether Defendant's conduct violates BIPA;

e. Whether Defendant's BIPA violations are willful or reckless; and

f. Whether Plaintiff and the Class are entitled to damages and injunctive relief.

37. Absent a class action, most members of the Class would find the cost of litigating their claims to be prohibitively expensive and would thus have no effective remedy. The class treatment of common questions of law and fact is superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants and promotes consistency and efficiency of adjudication.

38. Plaintiff will fairly and adequately represent and protect the interests of the other members of the Class he seeks to represent. Plaintiff has retained counsel with substantial experience in prosecuting complex litigation and class actions. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the other members of the Class and

have the financial resources to do so. Neither Plaintiff nor his counsel have any interest adverse to those of the other members of the Class.

39. Defendant has acted and failed to act on grounds generally applicable to the Plaintiff and the other members of the Class, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class and making injunctive or corresponding declaratory relief appropriate for the Class as a whole.

COUNT I
Violations of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq*.
(On behalf of Plaintiff and the Class)

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

41. Defendant Microsoft is a private entity under BIPA.

42. BIPA requires a private entity, such as Defendant, to obtain informed written consent from individuals before acquiring their biometric information. Specifically, BIPA makes it unlawful to "collect, capture, purchase, receive through trade, or otherwise obtain a person's or customer's biometric identifiers or biometric information unless [the entity] first: (1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the subject . . . in writing of the specific purpose and length of for which a biometric identifier or biometric information is being captured, collected, stored, and used; and (3) receives a written release executed by the subject of the biometric identifier or biometric information . . . ." 740 ILCS 14/15(b).

43. Plaintiff and the other Class members have had their "biometric identifiers," namely their facial geometry and face prints, collected, captured, or otherwise obtained by Defendant when they interacted with Defendant's Face API via Uber's "Real Time ID Check" security feature. 740 ILCS 14/10.

44. Each instance when Plaintiff and the other Class members interacted with Defendant's Face API by using Uber's mobile application, Defendant captured, collected, stored, and/or used Plaintiff's and the other Class members' facial geometry and face print biometric identifiers without valid consent and without complying with and, thus, in violation of BIPA.

45. Defendant's practice with respect to capturing, collecting, storing, and using biometrics fails to comply with applicable BIPA requirements:

a. Defendant failed to provide a publicly available retention schedule detailing the length of time for which the biometrics are stored and/or guidelines for permanently destroying the biometrics it stores, as required by 740 ILCS 14/15(a);

b. Defendant failed to inform Plaintiff and the members of the Class in writing that their biometrics were being collected and stored, prior to such collection or storage, as required by 740 ILCS 14/15(b)(1);

c. Defendant failed to inform Plaintiff and the Class in writing of the specific purpose for which their biometrics were being captured, collected, stored, and used, as required by 740 ILCS 14/15(b)(2);

d. Defendant failed to inform Plaintiff and the Class in writing the specific length of term their biometrics were being captured, collected, stored, and used, as required by 740 ILCS 14/15(b)(2);

e. Defendant failed to obtain a written release, as required by 740 ILCS 14/15(b)(3); and

f. Defendant failed to obtain informed consent to disclose or disseminate the Class' biometrics, as required by 740 ILCS 14/15(d)(1).

46. By providing Uber paid access to its Face API software which uses facial geometry and face print biometrics to verify Uber's drivers' identities, Defendant profited from Plaintiff's and the other Class members' facial biometrics in violation of 740 ILCS 14/15(c). Defendant knew, or was reckless in not knowing, that the Face API software that it provided and operated and which thousands of Illinois residents interacted with, would be subject to the provisions of BIPA, yet failed to comply with the statute.

47. By capturing, collecting, storing, using, and disseminating Plaintiff's and the Class' facial biometrics as described herein, Defendant denied Plaintiff and the Class their right to statutorily required information and violated their respective rights to biometric information privacy, as set forth in BIPA.

48. BIPA provides for statutory damages of $5,000 for each willful and/or reckless violation of BIPA and, alternatively, damages of $1,000 for each negligent violation of BIPA. 740 ILCS 14/20(1)-(2).

49. Defendant's violations of BIPA, a statute that has been in effect since 2008, were knowing and willful, or were at least in reckless disregard of the statutory requirements. Alternatively, Defendant negligently failed to comply with BIPA.

50. Accordingly, with respect to Count I, Plaintiff, individually and on behalf of the proposed Class, prays for the relief set forth below.

PRAYER FOR RELIEF

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

a. Certifying the Class as defined above, appointing Plaintiff as class representative and the undersigned as class counsel;

b. Declaring that Defendant's actions, as set forth herein, violate BIPA;

c. Awarding injunctive and equitable relief as necessary to protect the interests of Plaintiff and the Class by requiring Defendant to comply with BIPA;

d. Awarding statutory damages of $5,000 for each willful and/or reckless violation of BIPA, pursuant to 740 ILCS 14/20(2);

e. Awarding statutory damages of $1,000 for each negligent violation of BIPA, pursuant to 740 ILCS 14/20(1);

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

g. Awarding pre- and post-judgment interest, as allowable by law; and

h. Awarding such further and other relief as the Court deems just and equitable.

JURY DEMAND

Plaintiff requests trial by jury of all claims that can be so tried.

Dated: May 12, 2021

Respectfully Submitted,
MARIO A. PEÑA, individually and on behalf of similarly situated individuals

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