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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HELENE MELZER individually and on behalf of all those similarly situated, Plaintiff, v. JOHNSON & JOHNSON CONSUMER INC., Defendant.	Civil Action No. 22-cv-03149 (MAS)(RLS) Filed Electronically **Motion Day: December 5, 2022** **Oral Argument Requested** **NOTICE OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P 12(b)(6)**

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that on December 5, 2022, or as soon thereafter as counsel may be heard, Defendant Johnson & Johnson Consumer Inc. ("JJCI"), through its counsel, shall move before the United States District Court for the District of New Jersey for an Order dismissing Plaintiff's First Amended Class Action Complaint (Dkt. No. 21) in its entirety, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

PLEASE TAKE FURTHER NOTICE that in support of its motion, JJCI shall rely upon the enclosed Brief and other documents and pleadings already on file in this matter.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is enclosed herewith.

Pursuant to L. Civ. R. 78.1, JJCI respectfully requests oral argument on all issues raised in this motion

Dated: September 22, 2022

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DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED CLASS ACTION COMPLAINT

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INTRODUCTION

This case represents an unwarranted attempt by Plaintiff to try to expand the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA") far beyond its intended limits. The Illinois legislature enacted BIPA to address the collection and possession of biometric data. As stated in the statute, the Illinois General Assembly sought to regulate these biologically-based "unique identifiers" because of their permanence and the associated increased risk of identity theft resulting from compromised information. 740 ILCS 14/5(c). In other words, BIPA regulates the collection and possession of biometric data *because* it is used to identify individuals. Plaintiff's position, if accepted, would effectively render that premise a nullity.

Plaintiff Helene Melzer is an Illinois resident. She voluntarily downloaded Johnson & Johnson Consumer Inc.'s ("JJCI") Neutrogena Skin360 ("Skin360") application to her phone. Skin360 allows users to scan the surface of their skin and receive an assessment of their skin health. Plaintiff alleges she used Skin360 to perform such an assessment, and now brings five claims: four alleged violations of BIPA Sections 15(a)–(d) (all contained within Count I), and an unjust enrichment claim (Count II) premised on the same allegations.

JJCI moved to dismiss Plaintiff's initial complaint because, among other fatal defects, it wholly disregarded a foundational requirement for liability under BIPA: that biometric identifiers must actually identify someone. Instead of responding to JJCI's motion, and seemingly agreeing with this interpretation of BIPA, Plaintiff sought to remedy that defect by adding a single, conclusory sentence to her First Amended Complaint ("Amended Complaint" or "FAC"): that Skin360's face scans "can be used to identify" an individual. FAC ¶ 37. This new allegation comes nowhere close to stating a claim sufficient to survive a motion to dismiss;

the Amended Complaint must be dismissed because Plaintiff still pleads no specific facts permitting a plausible inference that the information collected by Skin360 is used to identify an individual, nor does Plaintiff include any facts to support its bare allegation that the face scan "can be used to identify" an individual. Rather, as Plaintiff's own allegations make clear, Skin360 operates only to analyze the surface of users' skin and provide personalized skincare recommendations. Put simply, none of the information collected by Skin360 can plausibly be considered biometric data protected by the statute, and BIPA is not intended to regulate the conduct at issue here. Indeed, this case is indicative of a broader, troubling trend in BIPA cases, where plaintiffs seek to expand BIPA beyond the identifying technologies it was intended to regulate to encompass a host of technologies that are not used to identify or authenticate the identity of an individual.

Plaintiff's claims under BIPA Sections 15(c) and 15(d) must be dismissed for additional, independent reasons. The Amended Complaint fails to plausibly allege that JJCI profited from transactions involving alleged biometric data, a requisite element of Section 15(c). Nor does Plaintiff sufficiently allege that JJCI disseminated alleged biometric data to any third party, as required under Section 15(d). Finally, Plaintiff's unjust enrichment claim fails for the same reasons the BIPA claims fail, as well as because Plaintiff fails to plead the requisite elements. Accordingly, Plaintiff has not sufficiently alleged, with the requisite factual support, any of her claims. The Amended Complaint should be dismissed in its entirety, with prejudice.

BACKGROUND

A. The Illinois Biometric Information Privacy Act

Plaintiff's claims primarily arise under BIPA, an Illinois state law enacted in 2008 that regulates the possession, collection, and disclosure of "biometric identifiers" and "biometric

information." The Illinois General Assembly enacted BIPA to address the growing use of biometric technology "in the business and security screening sectors" in Illinois. 740 ILCS 14/5(a). It found that "[m]ajor national corporations ha[d] selected the City of Chicago and other locations in [Illinois] as pilot testing sites for new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias." *Id.* § 14/5(b). The legislature also found that consumers had concerns about the "use of biometrics when such information is tied to finances" and were "deterred from partaking in biometric identifier-facilitated transactions," in part because of the "limited State law regulating the collection, use, safeguarding, and storage of biometrics." *Id.* § 14/5(d)–(e).

BIPA defines a biometric identifier as a person's "retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." 740 ILCS 14/10. "Biometric information," in turn, is defined as any information "based on an individual's biometric identifier used to identify an individual." *Id*. Importantly, BIPA does not regulate the possession, collection, and disclosure of *all* personal information or physical attributes. Indeed, the statute itself expressly excludes certain types of data and information from its scope, such as photographs and physical descriptions like "height, weight, hair color, or eye color." *Id.*

The specific conduct regulated by BIPA is set forth in Section 15 of the statute. Section 15(a) requires private companies to develop public written policies governing the retention and destruction of "biometric identifiers or biometric information" in their possession. 740 ILCS 14/15(a). Section 15(b) further prohibits a private company from collecting and storing an individual's "biometric identifier or biometric information" without that person's consent. *Id*. § 15(b). Section 15(c) prohibits a private company from selling, leasing, trading, or otherwise profiting from a person's or a customer's "biometric identifier or biometric information."

Id. § 15(c). And Section 15(d) prohibits the dissemination of such data. *Id.* § 15(d). Each requirement—and any alleged violation—is accordingly premised on the possession and/or collection of a biometric identifier or biometric information.

B. Neutrogena's Skin360 Technology

The Amended Complaint's allegations center on JJCI's Neutrogena Skin360 technology, an electronic application that allows users to understand their skin type, evaluate their skin health, receive personalized skincare recommendations, and monitor their skin's health over time. *See* Neutrogena Skin360 App, https://www.neutrogena.com/skin360app.html (last visited Sept. 20, 2022) (cited at FAC ¶ 32)[1]; *see also* FAC ¶ 31. Skin360 is publicly available on Neutrogena's Skin360 website or via download to one's phone through the Apple App and Google Play stores. *Id.* ¶ 11. Skin360 allows users to take a "selfie scan" through which the technology evaluates the surface of a user's skin for five non-unique facial attributes: dark circles, wrinkles, fine lines, smoothness, and dark spots. *See* Neutrogena Skin360 App, https://www.neutrogena.com/skin360app.html; *see also* FAC ¶¶ 31–32. Skin360 users then receive a "Skin360 Score" on a scale of one to ten for each of the five facial attributes, as well as a combined Skin360 Score. *See* Neutrogena Skin360 App, https://www.neutrogena.com/skin360app.html.

If a user chooses to register for an account, they can save their skin assessment to their Skin360 account, which will also suggest personalized skincare recommendations based on the

[1] The Court may consider documents "*integral to or explicitly relied* upon in the complaint" on a motion to dismiss. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (quoting *Shaw v. Dig. Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996)). Plaintiff expressly relies on several Neutrogena websites and uses screenshots from those websites to frame the Amended Complaint (*see* FAC ¶¶ 31–32, 34–35, 38), and this Court may appropriately consider those sources. *N.J. Second Amend. Soc'y v. N.J. Press Ass'n*, No. 20-5228, 2021 WL 4822050, at *5 (D.N.J. Oct. 15, 2021) (considering websites cited in complaint on a motion to dismiss).

Skin360 Scores and other information provided by the user. *Id.* If a user wishes to provide more information, the Skin360 application can track additional factors that may affect skin health, including sleep, exercise, stress levels, and weather data. *Id.* Moreover, the user can track changes in their Skin360 Scores over time with a registered account, allowing users to understand factors that impact their individual skin health. *Id.*

C. Plaintiff-Specific Allegations

Plaintiff alleges that she used the Skin360 application on her phone in December 2021 or January 2022 "to obtain a personalized at-home skin assessment." FAC ¶ 66. She alleges that she used the camera on her phone to take "180-degree selfie scans, at which point [JJCI's] Neutrogena Skin360 technology scanned, collected, captured, used, and stored in an electronic database" digital copies of her facial geometry. *Id.* ¶ 67. Plaintiff does not allege that she was required to use Skin360, and appears to have voluntarily downloaded the application and used it on her phone.

The Amended Complaint makes no further allegations regarding Plaintiff's alleged use of Skin360. She does not allege that she registered for an account with Skin360 to save her skin assessment. Nor does Plaintiff allege that she used other features of the Skin360 application, including the personalized skincare product recommendations, the tracking of skin health factors, or the use of repeat skin assessment scans to monitor progress.

D. Procedural Background

Plaintiff filed her initial complaint against JJCI on May 26, 2022. Dkt. 1. The complaint brought claims under BIPA Sections 15(a)–(d) plus an unjust enrichment claim. JJCI moved to dismiss the complaint in full on the grounds that it failed to adequately allege that Skin360 collected biometric data as defined by BIPA. Dkt. 17. Specifically, the complaint did not allege

that Skin360 actually identifies any particular user by their "selfie scan," nor explain why such identification would even be necessary for Skin360 to carry out its function. *See id.*

Rather than respond to JJCI's motion, Plaintiff filed the operative First Amended Complaint, bringing the same claims as her prior complaint. *See* Dkt. 21. Seemingly in response to JJCI's identification argument, Plaintiff alleges in a single sentence that Skin360's scans are "unique to an individual and can be used to identify them." FAC ¶ 37. Plaintiff's FAC includes no other allegations to support her claim that Skin360 identifies a particular user by their "selfie scan."

ARGUMENT

To withstand a motion to dismiss, "a 'complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Bank Leumi USA v. Kloss*, 331 F. Supp. 3d 404, 408 (D.N.J. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In considering a motion to dismiss, a court must accept all well-pleaded allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Polanco v. Omnicell, Inc.*, 988 F. Supp. 2d 451, 459 (D.N.J. 2013). However, "mere restatements of the elements of a claim are not entitled to the assumption of truth." *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 224 (3d Cir. 2011) (cleaned up). Nor are "conclusory statements" without factual support. *Iqbal*, 556 U.S. at 686. And "[e]ven though a plaintiff is not required to plead its claims with intricate detail, Rule 8(a) and *Twombly/Iqbal* both require the plaintiff to provide 'some specificity' as to . . . how th[e] defendant" acted unlawfully. *Certain Underwriters at Lloyd's, London v. U-Line Corp.*, No. 13-cv-3203, 2013 WL 5503672, at *5 (D.N.J. Oct. 1, 2013); *see also Badia v. Warden, HCCC*, No. 10-cv-5662, 2011 WL 221709, at *2 (D.N.J. Jan. 19, 2011) ("The pleading requirements demand factual specificity."). Further, even allegations made upon

information and belief must be supported by "specific facts upon which the belief is reasonably based." *Columbia Trading Corp. v. Green Elecs., LLC*, No. 17-cv-1309, 2018 WL 10150930, at *4 (D.N.J. July 27, 2018) (cleaned up)).

As discussed further below, Plaintiff fails to state a claim under any provision of BIPA. Plaintiff does not identify any facts permitting a plausible inference that Skin360 collects any information that can *identify* an individual. Her failure to plead this core requirement dooms all of her BIPA claims. Plaintiff also fails to allege, for purposes of her Section 15(c) claim, that JJCI sold, leased, traded, or otherwise profited from transactions *involving biometric data*. Nor does she sufficiently allege, for purposes of Section 15(d), that JJCI disseminated biometric data to any third party. Plaintiff's unjust enrichment claim must also be dismissed because it is premised on her deficient BIPA allegations.

I. The Amended Complaint Must Be Dismissed Because Skin360 Does Not Collect Biometric Identifiers Or Biometric Information.

All of Plaintiff's claims rest on the faulty premise that the information collected by Skin360 is included within BIPA's statutory definitions of "biometric identifier" and "biometric information." However, statutory analysis demonstrates that both a "biometric identifier" and "biometric information" require that the data collected must be used to identify an individual. As Plaintiff's allegations and Skin360's website—upon which Plaintiff bases her Amended Complaint—demonstrate, Skin360 is used to assess the surface of a user's skin, not to identify an individual. Thus, the information collected does not constitute a biometric identifier or biometric information, and therefore does not fall within the scope of BIPA. And Plaintiff's single allegation suggesting otherwise is conclusory and lacks any well-pleaded factual support.

A. BIPA Regulates Only Biometric Data Used To Identify An Individual.

The statutory definition of "biometric information" expressly requires that the

information be "*used to identify an individual*." 740 ILCS 14/10 (emphasis added). Therefore, the relevant question is whether the statutory term "biometric identifier" similarly requires that such identifiers also be used to identify a person. As the following analysis demonstrates, the statutory text and structure, legislative purpose, and case law all show that BIPA's regulation of "biometric identifiers" applies only to data used to identify individuals. Indeed, by amending her complaint to add a single (wholly conclusory and insufficient, *see* pp. 11–16, *infra*) allegation that scans from Skin360 "can be used to identify" individuals, FAC ¶ 37, Plaintiff seemingly admits as much.

"The cardinal rule of statutory construction, to which all other canons and rules are subordinate, is to ascertain and give effect to the intent of the legislature." *In re Hernandez*, 161 N.E.3d 135, 140 (Ill. 2020). The best evidence of legislative intent "is the language used in the statute itself," which "must be given its plain and ordinary meaning." *Id.* As relevant here, "biometric identifier" includes a "scan of . . . face geometry," but BIPA does not define the term "scan of . . . face geometry." 740 ILCS 14/10. "When [a] statute contains undefined terms, it is entirely appropriate to employ a dictionary to ascertain the plain and ordinary meaning of those terms." *People v. Davison*, 906 N.E.2d 545, 551 (Ill. 2009). Compiling definitions from *Merriam-Webster* suggests that a "scan of face geometry" can be defined as the "systematic[ ]" "examin[ation]" of "the measurement, properties, and relationships of points, lines, angles, surfaces, and solids" of the face. *See* Scan, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/scan (last visited Sept. 20, 2022); Geometry, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/geometry (last visited Sept. 20, 2022); *see also* Face, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/face

(last visited Sept. 20, 2022) ("the face as a means of identification"). Unfortunately, these definitions shed little light on the question before this Court.

More helpful is analysis of the surrounding statutory provisions. *See Lakewood Nursing & Rehab. Ctr., LLC v. Dep't of Pub. Health*, 158 N.E.3d 229, 234 (Ill. 2019) ("Because the statute is viewed as a whole, words and phrases must be construed in light of other relevant statutory provisions and not in isolation."). There are several indicators in the text and structure of BIPA to suggest that the Illinois legislature intended that a "scan of face geometry" must *identify* someone to fall within the statute's scope.

First, this reading is apparent from the plain language of the statute: a "scan of face geometry" is described as a type of "biometric *identifier*." 740 ILCS 14/10 (emphasis added). The term "biometrics" generally refers to the measurement of physical characteristics that may be used to *verify personal identity*. *See* Biometrics, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/biometrics (last visited Sept. 20, 2022) ("the measurement and analysis of unique physical or behavioral characteristics (such as fingerprint or voice patterns) especially as a means of verifying personal identity"). And if there was still any doubt, the use of the word "identifier" makes clear that the legislature intended to limit the statute's application to biometric data that does, in fact, *identify* an individual. *See* Identifier, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/identifier (last visited Sept. 20, 2022) ("one that identifies"). To conclude otherwise would be to improperly erase the term "identifier" from the statutory text.

Moreover, the other examples of "biometric identifiers" set forth in the statute—a retina or iris scan, fingerprint, voiceprint, or scan of hand geometry—all refer to unique personal identifiers, suggesting that a scan of face geometry must satisfy the same conditions. Indeed, the

statutory definition of "biometric identifier" expressly carves out "physical descriptions such as height, weight, hair color, or eye color," 740 ILCS 14/10, none of which, standing alone, are sufficient to identify a specific individual. The statutory definition thus indicates that the Illinois legislature sought to include within the scope of the statute only those unique biological characteristics used to identify an individual, rather than including a broader range of physical characteristics.

Second, additional support for this interpretation is found in Section 15(e) of the statute, which requires private entities to "store, transmit, and protect" biometric identifiers in a manner that is the same or more protective than how it treats "*other* confidential and sensitive information." 740 ILCS 14/15(e) (emphasis added). BIPA defines "confidential and sensitive information" as "personal information that can be *used to uniquely identify an individual* or an individual's account or property" such as genetic information, an account number, a driver's license, or a social security number. 740 ILCS 14/10 (emphasis added). It would be odd to require more protection for non-identifying data than required for "confidential and sensitive information" that was actually identifying. Analysis of the statute as a whole thus indicates that the Illinois legislature intended "biometric identifiers" to be limited to data used to identify an individual.

Third, expressions of legislative intent further support this reading of BIPA. In construing a statute, courts may consider "the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Sigcho-Lopez v. Ill. State Bd. of Elections*, 2022 IL 127253, ¶ 28. Here, as stated in the "Legislative findings; intent" provision of the statute, the Illinois General Assembly enacted BIPA to address the increased use of biometrics in light of the fact that such information is

"biologically unique to the individual" and thus the compromise of such identifying information raised significant concerns of identity theft. 740 ILCS 14/5(c); *see also id.* (describing biometrics as a "unique identifier[]"). Put another way, the Illinois legislature enacted BIPA to protect sensitive biometric data *because* it is used to identify an individual. *Cf. id.* (noting that biometrics are permanent, unlike other unique identifiers that can be changed if compromised, like social security numbers).

Consistent with this statutory analysis, multiple courts have interpreted "biometric identifiers," as the name suggests, to mean something "used to identify." *See Rivera v. Google Inc.*, 238 F. Supp. 3d 1088, 1094 (N.D. Ill. 2017) (defining "biometric identifier" as "a biology-based set of measurements ('biometric') that can be *used to identify a person* ('identifier')" (emphasis added)); *id.* at 1096 (a biometric identifier is "a set of measurements of a specified physical component (eye, finger, voice, hand, face) *used to identify a person*" (emphasis added)); *see also Vance v. Microsoft Corp.*, 525 F. Supp. 3d 1287, 1296 (W.D. Wash. 2021) ("The bottom line is that a 'biometric identifier' is not the underlying medium itself, or a way of taking measurements, but instead is a set of measurements of a specified physical component . . . *used to identify a person*." (emphasis added) (quoting *Rivera*, 238 F. Supp. 3d at 1097)). Despite the prolific nature of BIPA lawsuits over the past several years, JJCI is not aware of a single case where BIPA was extended to cover information not used to identify an individual.

B. Plaintiff Fails to Sufficiently Allege that Skin360 Collected Biometric Identifiers Or Biometric Information.

Applying the above statutory analysis, the Amended Complaint fails to plausibly allege that Skin360 collects biometric identifiers or biometric information because Plaintiff pleads no factual basis supporting the assertion that Skin360 actually *identifies* individuals. Plaintiff's initial complaint did not even attempt to allege that the skin characteristics evaluated by Skin360

could be used to identify an individual. And the new allegations in the Amended Complaint do nothing to cure this fatal flaw.

The FAC includes a single sentence alleging that Skin360's facial scans are "unique to an individual and can be used to identify them." FAC ¶ 37. This claim is utterly conclusory and entirely void of supporting factual content. So too are Plaintiff's allegations that Skin360 utilizes "facial recognition" technology, *see id.* ¶¶ 6, 33, and that the facial scans "are attached to . . . personally identifying information, *id.* ¶ 40. Plaintiff pleads no facts explaining *how* Skin360's facial scans can actually identify an individual or *why* Skin360 would identify an individual given the purpose of the technology. Such barebone allegations are insufficient to survive a motion to dismiss. *See Johnson v. Ethicon, Inc.*, No. 21-cv-13404, 2022 WL 1744697, at *6 (D.N.J. May 31, 2022) (granting motion to dismiss where the plaintiffs "fail to explain *how*" an alleged defect caused an injury, holding that "[w]ithout such explanation, the allegations are 'conclusory,' and therefore, fail to state a claim" (quoting *Iqbal*, 556 U.S. at 678)); *Beauvil v. McKeon*, No. 18-cv-991, 2018 WL 4204447, at *5 (D.N.J. Sept. 4, 2018) (dismissing claim lacking "specificity as to when, where, why, or how" defendants acted unlawfully).[2]

[2] Plaintiff suggests that liability can be inferred because a different company that allegedly uses the same technology as JJCI for its virtual skin analysis application, Clinique Laboratories, LLC, includes a "Biometric Data Notice and Consent" and elsewhere states that it "may collect . . . biometric information, such as a facial geometry." FAC ¶¶ 43–45. But how a different company chooses to manage its products is irrelevant to the present legal analysis; it says nothing of whether Skin360 scans identify anyone or constitute biometric identifiers under BIPA. Plaintiff's allegation that "[o]ther companies disclose that they collect biometric information when consumers utilize their face mapping technologies for skin diagnostics and product recommendations," *id.* ¶ 46, suffers from the same defect and in any event, Plaintiff pleads no facts to support this allegation. Moreover, of course, the fact that Clinique includes a consent notice and a privacy policy that references biometric data is not an admission by Clinique that it possesses or collects biometric data as defined by BIPA.

Plaintiff also alleges that the Skin360 technology scans "the consumer's facial landmarks and facial geometry" in order to create a "unique digital representation of the face and its measurements (*i.e.*, a face template)," and assigns "a distinct numerical representation" to each "face template." *Id.* ¶ 36; *see also id.* ¶ 34 (alleging Skin360's scans "captures the unique facial geometry of consumers"). This allegation says nothing about whether the technology can actually *identify* an individual. Even Plaintiff admits that the supposed "scan of the consumer's unique facial geometry and the face template" is used to "detect[] dark circles, wrinkles, fine lines, smoothness, dark spots and other skin concerns." *Id.* ¶ 39. This is consistent with other factual allegations in the Amended Complaint, all of which make clear that the scans of face geometry purportedly collected by Skin360 are used not to identify an individual, but to assess a user's skin condition and offer recommendations for relevant skincare products. *See, e.g.*, *id.* ¶ 31 (describing the technology as a "personalized at-home skin assessment" to "diagnose skin health issues, such as dark circles, wrinkles, fine lines, dark spots, and texture, and then recommending a skin care regimen consisting of Neutrogena products—all in real time"), ¶ 32 (stating that the technology "processes over 100,000 skin pixels . . . to measure 5 different aspects of [the consumer's] skin health" and "identifies over 2,000 facial attributes like dark circles, wrinkles, fine lines, smoothness, and dark spots"), ¶ 41 (alleging that Skin360 "monitor[s] and track[s] the progress of [users'] skin health over time").

Indeed, the "physical descriptions" that Skin360 identifies—dark circles, wrinkles, fine lines, dark spots, and skin texture—are akin to physical characteristics like height, weight, hair color, or eye color that BIPA expressly carves out. *See* 740 ILCS 14/10. Just as a person's height, weight, or hair and eye color are not uniquely identifying, neither are the number of wrinkles, fine lines, or dark spots on a person's face. These physical characteristics are neither

permanent nor identifying and, as such, do not fit within BIPA's scope. *See* 740 ILCS 14/5(c) (stating that BIPA was intended to protect biologically unique information that, unlike social security numbers, cannot be changed).

The Skin360 website, which is incorporated into the Amended Complaint by reference (*see* n.1, *supra*), further supports the conclusion that the selfie scans analyze a user's skin health and do not collect biometric identifiers or information. *See* "Easy as 1, 2, 3," Neutrogena Skin360 App, https://www.neutrogena.com/skin360app.html ("The Neutrogena Skin360 app evaluates your skin's health by analyzing your scan."); "How does it work?," Neutrogena Skin360 Support, https://www.neutrogena.com/skin360-support.html ("The app measures a broad range of skin parameters, such as wrinkles, fine lines, dark under-eye circles, dark spots and smoothness. The skin analysis also tracks sleep, exercise and stress levels."). Moreover, a core purpose of Skin360 is the ability to offer personalized skincare recommendations for each user based on their skin health and lifestyle needs. *See* "Personalized Skin Tips," Neutrogena Skin360 App, https://www.neutrogena.com/skin360app.html (stating that "[w]ith over 2.5 million possible recommendations, virtually no two regimens are the same" and Skin360 offers recommendations "built just for you and your skin"); "Will the Neutrogena Skin360 app work for my skin type and tone?," Neutrogena Skin360 Support, https://www.neutrogena.com/skin360-support.html (describing how the Skin360 technology works for all skin types and tones because it was "developed using more than 10,000 facial databases across ethnicities, skin types and ages (from 7-70 years old), with more than 10 types of lighting"). Nothing about Skin360's purpose or function—both as alleged in the Amended Complaint and explained on its website—indicates the technology is used to identify a user.

And when one compares Plaintiff's allegations about JJCI's technology with the allegations regarding the technology at issue in other BIPA "facial scan" complaints that have survived motions to dismiss, it is clear that the technology and allegations relating to alleged biometric data in those cases are each easily distinguishable from Plaintiff's allegations about Skin360 here. Namely, in each of those cases, the plaintiffs alleged that the *purpose* of the technology at issue was to *identify an individual*.

For example, in *Sosa v. Onfido, Inc.*, the plaintiff alleged that the defendant "markets and sells proprietary facial recognition software that is used by online businesses to *verify consumers' identities*" through comparison of a person's identification (such as a driver's license) and a photograph of the person's face. No. 20-cv-4247, 2022 WL 1211506, at *1 (N.D. Ill. Apr. 25, 2022) (emphasis added). Similarly, in *Monroy v. Shutterfly, Inc.* and *In re Facebook Biometric Information Privacy Litigation*, the plaintiffs alleged that the defendants' software scanned faces in photographs to identify the individuals depicted and either automatically "tag" or propose a "tag" for the identified individual. *Monroy v. Shutterfly, Inc.*, No. 16 C 10984, 2017 WL 4099846, at *1 (N.D. Ill. Sept. 15, 2017) ("If a face's geometry matches that of an individual already in its database, Shutterfly suggests that the user 'tag' the image with the individual's name."); *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1158 (N.D. Cal. 2016) ("To make the tagging suggestions, Facebook utilizes 'state-of-the-art facial recognition technology . . . .'"). And other facial scan cases similarly involve technology used for facial recognition. *See Wise v. Ring LLC*, No. C20-1298, 2022 WL 3083068, at *1, *3 (W.D. Wash. Aug. 3, 2022) (alleging that Ring uses facial scans "to improve its facial recognition technology" with "the ultimate goal of identifying people"); *Karling v. Samsara Inc.*, No. 22 C 295, 2022 WL 2663513, at *1 (N.D. Ill. July 11, 2022) (technology allegedly "automatically perform[s] facial

recognition to identify [plaintiff]"); *Vance*, 525 F. Supp. 3d at 1290–91 (technology allegedly used to collect scans for "facial recognition" purposes); *Rivera*, 238 F. Supp. 3d at 1091 (technology allegedly uses facial scans to group photos of identified individuals).

Unlike each of these cases, Plaintiff here has failed to adequately allege that Skin360 is used to actually identify a particular individual. The absence of these allegations is fatal to all of Plaintiff's claims, and the Amended Complaint should therefore be dismissed.

II. Plaintiff Fails To Sufficiently Allege That JJCI Profited From Plaintiff's Protected Information.

BIPA Section 15(c) states that "[n]o 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." 740 ILCS 14/15(c). As discussed above, Plaintiff has not sufficiently alleged that JJCI possessed biometric identifiers or biometric information, and therefore this claim can be dismissed on that basis alone. *See* pp. 11–16, *supra*.

Plaintiff's Section 15(c) claim also fails for the independent reason that Plaintiff has not and cannot allege that JJCI sold, leased, traded, or otherwise profited from her alleged biometric identifier or biometric information. The scope of Section 15(c) is clear on its face: it prohibits the sale, lease, or trade *of a person's biometric data* in exchange for some benefit. In other words, "§ 15(c) regulates transactions with two components: (1) access to biometric data is shared or given to another; and (2) in return for that access, the entity receives something of value." *Vance v. Microsoft Corp.*, 534 F. Supp. 3d 1301, 1307 (W.D. Wash. 2021). It does *not* prohibit a company from using technology that collects alleged biometric data to market products, like skincare goods, to customers. "That interpretation is plainly at odds with the BIPA, which is designed to regulate and promote, but not inhibit, biometric-facilitated transactions." *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 512 n.9 (S.D.N.Y. 2017), *aff'd in part,*

vacated in part on other grounds, remanded sub nom., *Santana v. Take-Two Interactive Software, Inc.*, 717 F. App'x 12 (2d Cir. 2017); *see also Vance*, 534 F. Supp. 3d at 1307; *Hazlitt v. Apple, Inc.*, 500 F. Supp. 3d 738, 747 (S.D. Ill. 2020) ("[S]ection 15(c) clearly prohibits profiting from 'a person's or a customer's' biometric identifier or biometric information, not the general sales of devices equipped with facial recognition technology."), *vacated on other grounds*, *In re Apple Inc.*, No. 20-8033, 2021 WL 2451296 (7th Cir. Jan. 22, 2021).

The court's decision in *Vance* is instructive. In *Vance*, the plaintiffs alleged that Microsoft used biometric data to "improve its facial recognition products and technologies, which improved the effectiveness of those products and made them more valuable in the commercial marketplace." 534 F. Supp. 3d at 1309 (cleaned up). The court found that "[w]hile these allegations support the inference that Microsoft may have received some benefit from increased sales of its improved products, these allegations do not establish that Microsoft disseminated or shared access to biometric data through its products. Plaintiffs do not allege that Microsoft directly sold biometric data." *Id.* The court accordingly dismissed the plaintiffs' Section 15(c) claim. *Id.*

The same analysis applies here, as Plaintiff has not alleged that JJCI directly sold, leased, or traded her alleged biometric data. Instead, Plaintiff merely alleges that JJCI used the data it collected to "improve" its products and standing in the marketplace. *See e.g.*, FAC ¶ 58 ("On information and belief, Defendant uses the biometric identifiers and/or biometric information it collects from Plaintiff[] and Class members to enhance, enrich, improve, and perfect Skin360 (including NAIA) to better solicit sales from future customers."), ¶ 60 (JJCI "gained a competitive advantage in Illinois, including increased sales of Neutrogena products to consumers in the state of Illinois and valuable consumer insights about its Illinois residents' skin

conditions."). In her Amended Complaint, Plaintiff attempts to get around the language of Section 15(c) by claiming that the data is "inextricably intertwined with the technology itself" such that "[b]y continuing to market and disseminate [the Skin360] technology on its website, on social media, on YouTube, and elsewhere," JJCI is "directly profiting from" the data itself. *Id.* ¶ 59. This new allegation does nothing to remedy the fatal flaw in Plaintiff's Section 15(c) allegation: there is no claim that JJCI profits from sharing Plaintiff's alleged biometric data with a third party.[3]

Finally, to the extent Plaintiff relies on the catchall phrase "otherwise profit" in Section 15(c), that is similarly of no help. "[W]hen a statutory clause specifically describes several classes of . . . things and then includes 'other . . . things,' the word 'other' is interpreted to mean 'other such like.'" *Pooh-Bah Enters., Inc. v. County of Cook*, 905 N.E.2d 781, 799 (Ill. 2009) (quoting *People v. Davis*, 766 N.E.2d 641, 645 (Ill. 2002)). Therefore, as multiple courts interpreting Section 15(c) have held, like "sell," "lease," and "trade," "otherwise profit" also requires that the entity receive a benefit *in exchange* for biometric data. *See Vance*, 534 F. Supp. 3d at 1307 ("'otherwise profit' encompasses commercial transactions—such as a sale, lease or trade—during which the biometric data is transferred or shared in return for some benefit"); *Vigil*, 235 F. Supp. 3d at 512 n.9 ("In relation to the other terms in Section 15(c)—'selling,' 'leasing,' and 'trading'—'otherwise profiting' is a catchall for prohibiting commercially

[3] The Amended Complaint also alleges that in 2020, JJCI "notified California consumers that it collected their personal information, including biometric information, and shared it with its affiliates and unidentified partners in transfers that could be considered 'sales' under California law." FAC ¶ 62. This allegation is completely beside the point: it has absolutely nothing to do with Skin360 or the Illinois BIPA statute, which does not apply to California consumers. Whether an action is a "sale" under California law has nothing to do with whether that action would violate BIPA.

transferring biometric information and biometric identifiers in a manner not contemplated by the original biometric-facilitated transaction . . . .").[4]

In sum, Section 15(c) prohibits a private entity from transferring biometric information for profit, not from marketing and profiting from *technology* that happens to be capable of collecting biometric information. Plaintiff does not allege that JJCI sold, transferred, leased, or otherwise profited from transferring her alleged biometric information. Therefore, her claim for relief under Section 15(c) must be dismissed.

III. Plaintiff Fails To Sufficiently Allege JJCI Disclosed Protected Information.

Section 15(d) applies only to entities that possess biometric data. 740 ILCS 14/15(d). Again, Plaintiff does not plausibly allege that JJCI possessed her alleged biometric data, so her Section 15(d) claim must be dismissed on that basis alone. *See* pp. 11–16, *supra*. Plaintiff's Section 15(d) claim must also be dismissed because Plaintiff fails to sufficiently allege that JJCI "disclose[d], redisclose[d], or otherwise disseminate[d]" her alleged biometric data to a third party without consent. *See* 740 ILCS 14/15(d).

First, Plaintiff alleges that "Defendant commercially disseminates" biometric data by marketing its product on its website, social media, YouTube, and elsewhere. *See* FAC ¶ 59. But this argument fails for similar reasons as Plaintiff's Section 15(c) claim. Section 15(d) prohibits the disclosure or dissemination of biometric data itself, not the disclosure or marketing of a product that may use biometric data in some way. *See* 740 ILCS 14/15(d). And again, Plaintiff's new allegation that JJCI somehow disseminates alleged biometric data itself through its use of its

[4] BIPA's legislative history also supports this reading of the statute. *See Sekura v. Krishna Schaumburg Tan, Inc.*, 115 N.E.3d 1080, 1094 (Ill. App. Ct. 2018) (noting "the primary impetus behind the bill" was the concern that bankruptcy courts might sell biometric information (citing 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (statement of Representative Ryg))).

technology because that "data is inextricably intertwined with the technology itself," FAC ¶ 59, does not save its Section 15(d) claim. Plaintiff's revised allegation is still focused on JJCI's development and advertising of technology, not the actual disclosure or dissemination of her alleged biometric data.

Second, Plaintiff alleges, only "[u]pon information and belief," that JJCI "transfers[] and disseminates Plaintiff and the Class members' biometric identifiers and/or biometric information directly to [its] affiliates and third-party partners" that purportedly "provide technical and other services." FAC ¶ 61. But this allegation is completely without basis. Plaintiff does not identify which third parties, when or how the data was supposedly transferred to them, or include any other facts to support this allegation. *See Namuwonge v. Kronos, Inc.*, 418 F. Supp. 3d 279, 285 (N.D. Ill. 2019) (because plaintiff "did not allege . . . specifics related to any disclosure by [defendant] to a third party," plaintiff did not "plead[] sufficient factual allegations that plausibly suggest that [defendant] disclosed or distributed her data to a third party" and could not "proceed on such speculative allegations").

To be sure, under certain circumstances, a plaintiff might be able to state a claim based on allegations pleaded only upon information and belief—for example, if "the requisite factual information is peculiarly within the defendant's knowledge or control." *Verify Smart Corp. v. Bank of Am., N.A.*, No. 17-4248, 2020 WL 3542430, at *4 (D.N.J. June 29, 2020) (quoting *McDermott v. Clondalkin Grp., Inc.*, 649 F. App'x 263, 267–68 (3d Cir. 2016)). Still, Plaintiff cannot make "*boilerplate and conclusory allegations*," and she must "*accompany [her] legal theory with factual allegations that make [her] theoretically viable claim plausible*." *Id.* (quoting *McDermott*, 649 F. App'x at 268). This means that Plaintiff must explain what she did to learn facts alleged on information and belief. *See Columbia*, 2018 WL 10150930, at *4.

Here, Plaintiff does not support her Section 15(d) allegations with any of the requisite investigation and support. "If [Plaintiff] has a legitimate reason to suspect that [JJCI] disclosed [her] biometric data or that of the putative class members, [s]he surely possesses information of some kind that triggered [her] suspicion." *See Horn v. Method Prods., PBC*, No. 21 C 5621, 2022 WL 1090887, at *3 (N.D. Ill. Apr. 12, 2022) (quoting *Heard v. Becton, Dickinson & Co.*, 440 F. Supp. 3d 960, 969 (N.D. Ill. 2020)). Without any allegations regarding even the source of Plaintiff's belief regarding disclosure, the Complaint fails to state a claim. *See id.* (dismissing Section 15(d) allegations made only on information and belief that "do[] not contain any specifics concerning the basis for [plaintiff's] belief that [defendant] disclosed his biometric information"); *Jacobs v. Hanwha Techwin Am., Inc.*, No. 21 C 866, 2021 WL 3172967, at *4 (N.D. Ill. July 27, 2021) (dismissing Section 15(d) claim because "plaintiff offer[ed] no basis for its allegation that defendant disclosed his biometric data," nor did plaintiff "present[] any legitimate reason to *suspect* that defendant disclosed his biometric data or that of the putative class members" (emphasis added)); *Heard*, 440 F. Supp. 3d at 969 (dismissing Section 15(d) claim because plaintiff's complaint "contain[ed] no allegations of fact which, if true, suggest there is any basis to even *suspect* that [defendant] disseminated the biometric data at issue").

Finally, Plaintiff makes conclusory allegations, again without support, that JJCI "discloses" or "disseminates" alleged biometric information. FAC ¶¶ 8, 59, 61, 63–64, 87, 89. These naked allegations do not suffice to state a claim because they merely "parrot BIPA's language." *See Horn*, 2022 WL 1090887, at *3 ("[Plaintiff's] conclusory allegations of

disclosure, which merely parrot BIPA's statutory language, require the Court to dismiss his § 15(d) claim.").[5]

IV. Plaintiff Fails To State An Unjust Enrichment Claim.

This Court must also dismiss Plaintiff's unjust enrichment claim, which is premised on the same allegations as her BIPA claims. While New Jersey and Illinois "define[] the elements of unjust enrichment slightly differently," the New Jersey and Illinois standards are essentially the same and "'require[] proof of essentially the same three elements: (1) a benefit is conferred upon the defendant; (2) at the plaintiff's expense; (3) under circumstances that would make defendant's retention unjust.'" *Sharma v. Gupta*, No. 20-3446, 2022 WL 970544, at *5 (D.N.J. Mar. 31, 2022) (quoting *Powers v. Lycoming Engines*, 245 F.R.D. 226, 230–31 (E.D. Pa. 2007), *vacated on other grounds* 328 F. App'x 121 (3d Cir. 2009)). Accordingly, "no real conflict" exists between New Jersey and Illinois law, and because this Court sits in New Jersey, it should apply New Jersey law to Plaintiff's unjust enrichment claim. *Id.* But regardless whether Illinois or New Jersey "unjust enrichment elements are applied, the result is the same." *Id.* (quoting *Powers*, 245 F.R.D. at 231). The Amended Complaint must be dismissed for multiple reasons.

First, Plaintiff's unjust enrichment claim is based on the same conduct as Plaintiff's BIPA claim—and specifically, Plaintiff's Section 15(c) claim. *See* FAC ¶ 96 (alleging that JJCI "appreciated . . . economic benefits through their sale and trade, or otherwise profited" from "Plaintiff and Class members' biometric information and biometric identifiers"), ¶ 97 (alleging JJCI "received a financial benefit from the sale, trade, or profiting from Plaintiff and Class members' biometric information and biometric identifiers"). As discussed above, all of

[5] For the reasons discussed above, Plaintiff's new allegation about Neutrogena's 2020 supplemental privacy notice to California residents has no impact on the plausibility of her allegations that JJCI violated BIPA through its Skin360 technology. *See* n.3, *supra*.

Plaintiff's BIPA claims fail, including those brought under Section 15(c), so there can be no unjust enrichment claim. *See Donachy v. Intrawest U.S. Holdings, Inc.*, No. 10-4038, 2012 WL 869007, at *9 (D.N.J. Mar. 14, 2012) ("Where, as here, Plaintiffs have failed to aver allegations sufficient to support the underlying conduct on which the unjust enrichment claim is based, there is no injustice and Plaintiffs' unjust enrichment claim must be dismissed."); *see also In re Clearview AI, Inc. Consumer Priv. Litig.*, No. 21-cv-135, 2022 WL 252702, at *6 (N.D. Ill. Jan. 27, 2022) (noting, in the context of BIPA, that "[i]f an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim" (quoting *Cleary v. Philip Morris, Inc.*, 656 F.3d 511, 517 (7th Cir. 2011))).

Second, even if the Court does not dismiss Plaintiff's BIPA claim in its entirety, it should still dismiss the unjust enrichment claim because Plaintiff fails to allege the elements of unjust enrichment. Although Plaintiff alleges that JJCI benefited from Plaintiff's alleged biometric data (FAC ¶¶ 95–101), she does not sufficiently allege that this purported enrichment caused her to suffer any corresponding expense or detriment. Vague references to "heightened risk of privacy and informational harms" and loss of "control over [her] biometric data" (*id.* ¶ 96) do not suffice under New Jersey law. *See In re Am. Med. Collection Agency, Inc. Customer Data Sec. Breach Litig.*, No. 19-md-2904, 2021 WL 5937742, at *18 (D.N.J. Dec. 16, 2021) (holding plaintiff failed to state a claim for unjust enrichment, where "beyond vague allegations that Defendants collected information for 'commercial gain,' the [complaint] contain[s] no facts showing how Defendants reaped monetary benefits or otherwise profited from Plaintiffs' Personal Information" (citation omitted)); *see also Mount v. PulsePoint, Inc.*, 684 F. App'x 32, 36 (2d Cir. 2017) ("plaintiffs' failure to allege specific loss or deprivation of opportunity to profit from

[personal] information warranted dismissal of their [unjust enrichment] claim"); *Cousineau v. Microsoft Corp.*, 992 F. Supp. 2d 1116, 1130 (W.D. Wash. 2012) (granting motion to dismiss unjust enrichment claim and noting that unjust enrichment does not apply "outside the context of an 'expense' stemming from some tangible economic loss to a plaintiff")[6]; *cf. Welborn v. Internal Revenue Serv.*, 218 F. Supp. 3d 64, 78 (D.D.C. 2016) ("Courts have routinely rejected the proposition that an individual's personal identifying information has an independent monetary value." (citing cases)).

While, under Illinois unjust enrichment law (if the Court were to apply Illinois law here), "a plaintiff need not necessarily show that they suffered a loss or damages," Illinois law does require that "a plaintiff must show a detriment, and a connection between that detriment and the defendant's retention of a benefit." *Hogan v. Amazon.com, Inc.*, No. 21 C 3169, 2022 WL 952763, at *7 (N.D. Ill. Mar. 30, 2022) (citing *Cleary*, 656 F.3d at 518) (dismissing unjust enrichment claim where "alleged detriment is [defendant's] violation of BIPA"). Plaintiff's conclusory allegation that her alleged biometric information somehow improved the Skin360 technology is too attenuated to plead the requisite connection. *See id.* at *8 (holding plaintiffs failed to state an unjust enrichment claim because they "do not allege which images are being used unjustly," "do not allege facts to show exactly how [defendant] is profiting from Plaintiffs' images," and "fail to allege how their specific images made [defendant's technology] more valuable or profitable to [defendant]").

[6] The Second Circuit in *Mount* applied New York unjust enrichment law; "there is no conflict between New York and New Jersey law with regards to Plaintiff's claim for unjust enrichment." *Tobin v. Samsung Elecs. Am., Inc.*, No. 18-12473, 2019 WL 1399557, at *9 (D.N.J. Mar. 27, 2019). Likewise, in *Cousineau*, the court applied Washington law; there is no conflict between Washington and New Jersey unjust enrichment law either. *Weske v. Samsung Elecs. Am., Inc.*, No. 10-4811, 2012 WL 833003, at *7 (D.N.J. Mar. 12, 2012).

CONCLUSION

For the foregoing reasons, JJCI respectfully requests that the Court dismiss the First Amended Complaint with prejudice. Plaintiff has already amended her complaint once, and dismissal with prejudice is appropriate because further amendment would be futile. The Amended Complaint incorporates several JJCI websites explaining the function of Skin360, all of which demonstrate that Skin360 evaluates one's skin surface and does not identify individuals. *See Pittman v. Saint Francis Hosp.*, No. 15-3371, 2015 WL 6739124, *3 (D.N.J. Nov. 4, 2015) (dismissing complaint with prejudice where "no amendment would cure the fatal flaws in the Complaint").

Dated: September 22, 2022

Respectfully Submitted,

/s/ *Brendan M. Walsh*

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HELENE MELZER individually and on behalf of all those similarly situated, Plaintiff, v. JOHNSON & JOHNSON CONSUMER INC., Defendant.	Civil Action No. 22-cv-03149 (MAS)(RLS) **ORDER AND JUDGMENT DISMISSING PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT**

THIS MATTER having been opened to the Court by Defendant Johnson & Johnson Consumer Inc. ("JJCI"), through its counsel, Pashman Stein Walder Hayden, P.C. and Sidley Austin LLP, by way of a Motion to Dismiss Plaintiff's First Amended Class Action Complaint in its entirety, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted; and the Court having considered the submissions of the parties; and for good cause shown,

IT IS on this ___ day of _____, 2022,

ORDERED that JJCI's Motion to Dismiss is GRANTED and Plaintiff's First Amended Class Action Complaint is dismissed with prejudice; and it is further

ORDERED that final judgment is entered in favor of JJCI.

_____
Hon. Michael A. Shipp, U.S.D.J.

CERTIFICATION OF SERVICE

I hereby certify that on September 22, 2022, I caused the foregoing notice of motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), brief, and proposed form of Order to be filed and served upon all counsel of record by CM/ECF.

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