IN THE UNITED STATES DISTICT COURT
FOR THE DISTRICT OF NEW JERSEY

HELENE MELZER individually and on behalf of all those similarly situated,

Plaintiff,

v.

JOHNSON & JOHNSON CONSUMER INC.,

Defendant.

No. 3:22−CV−03149 −MAS−TJB

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED CLASS ACTION COMPLAINT

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INTRODUCTION

Defendant Johnson & Johnson Consumer Inc.'s ("JJCI") motion is an unwarranted attempt to have the Court rewrite, and drastically curtail, the broad protections of the Illinois Biometric Information Privacy Act 740 ILCS 14/1, *et seq*., ("BIPA"). BIPA gives Illinois residents, such as Plaintiff Helene Melzer ("Melzer") and class members, "a right to privacy in and control over their biometric identifiers . . ."[1] BIPA defines "biometric identifiers" as "fingerprints, retina or iris scans, voiceprints, or scans of hand or face geometry." 740 ILCS 14/10. BIPA's privacy rights include the right to say no to the collection, dissemination, and sale of this data. 740 ILCS 14/15(a)-(d). JJCI, through its Neutrogena Skin360 skin diagnostic tool, violated Melzer's privacy rights because, without her informed written consent, it collected her biometric identifier, a scan of her unique face geometry. FAC ¶¶ 6-9, 30, 33-39.[2] It also disseminated it to its affiliates and third parties and profited from it. FAC ¶¶ 54-60, 61-65.

First, JJCI asserts that the scans of unique face geometry it collects are not covered by BIPA, because, it argues, an entity may freely capture, collect, possess, disseminate, and sell this data without any notice or consent so long as it does not itself use it for identification. Not only has no court ever adopted JJCI's position, but courts have also expressly rejected it finding it has no support in the statute. Rather than comply with its minimal BIPA obligations, JJCI invites the Court to be the first and only court to insert this condition into the statutory definition of "biometric identifier," which expressly omits this condition. JJCI's proposed condition is also contrary to BIPA's stated purpose to grant Illinois residents the right to privacy in and control

[1] *Rosenbach v. Six Flags Entm't Corp.*, 129 N.E.3d 1197, 1206 (Ill. 2019) (citing *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948, 953 (N.D. Cal. 2018).

[2] "FAC" refers to Melzer's First Amended Complaint, ECF 25-1.

over their biometric identifiers. 740 ILCS 14/5 (biometrics are "unique" and "once compromised" cannot be changed).

Second, based on this invented statutory condition, JJCI claims Melzer's well-pleaded allegations are conclusory and implausible. It entirely ignores her detailed explanation of how JJCI's technology needs to create and extract a faceprint to function, *i.e.*, to pinpoint and mark dark circles, wrinkles, fine lines, dark spots with precision, and that this unique digital representation of her face and its measurements can be used to identify her. FAC ¶ 33-39. JJCI never informed—let alone obtained written consent from—Melzer that the Skin360 face scan would capture her unique face geometry and not merely analyze the surface of her skin. FAC ¶¶ 68-69; Br. at 13-14.[3] Numerous courts have found allegations like Melzer's sufficient. But if there were any doubt, Melzer also alleges that another skincare company—using the same technology (Perfect Corp.'s YouCam facial recognition technology) for virtual skin diagnostics, presents its customers with a biometric notice stating the scan will capture a "scan of face geometry," and further discloses in its general privacy policy that "it may collect biometric information, such as facial geometry," if you use this specific technology. FAC ¶¶ 43-45.

Third, JJCI labels Melzer's § 15(d) dissemination claim "naked" and "conclusory" because she alleges it on information and belief. Br. at 21. But JJCI ignores the supporting allegations. Melzer supports her claim with allegations of prior reports of disclosure, broad consumer data sharing practices, third-party involvement in the underlying face scanning system, and dissemination to affiliates and technical support partners. FAC ¶¶ 33, 61-62.

Fourth, Melzer also states a § 15(c) profit claim, which is supported by JJCI's own acknowledgment to California residents that it may have sold their biometric data collected by

[3] "Br." refers to JJCI's Memorandum of Law in Support of its Motion to Dismiss, ECF 25.

Skin360. FAC ¶ 62. JJCI argues that a "sale" under California law has nothing to do with a sale under BIPA. Br. at 22 n. 5. But § 15(c)'s prohibition on "otherwise profit" means something at least as broad as a "sale" under California law. Separately, Melzer also plausibly alleges that JJCI violates §§ 15(c) and (d) of BIPA through its use and dissemination of the Skin360 technology because it incorporates her biometric identifiers into its technology. FAC ¶¶ 54-60.

Finally, Melzer plausibly alleges an unjust enrichment claim under Illinois law, which JJCI acknowledges has significantly lower pleading requirements than New Jersey law.

Accordingly, the Court should deny the motion to dismiss in its entirety.

ARGUMENT

I. BIPA does not require a "biometric identifier" to be used to identify an individual

BIPA defines a "biometric identifier," as "a retina or iris scan, fingerprint, voiceprint, or scan of the hand or face geometry." 740 ILCS 14/10. Relevant here, "scans of facial geometry" include "unique digital representations of the face" based on the "unique geometric relationship of their facial features," *In re Facebook Biometric Info. Privacy Litig.,* 185 F Supp 3d 1155, 1171 (N.D. Cal. 2016), or "a unique numerical representation of the shape or geometry" of the face." *Sosa v. Onfido, Inc*., No. 20-4247, 2022 WL 1211506, at *7 (N.D. Ill. Apr. 25, 2022).

Melzer, an Illinois resident, sought a skin assessment from Skin360, took a 180-degree selfie using a live camera and Skin360 scanned her face. FAC ¶¶ 10, 66-68. Melzer alleges that each Skin360 facial scan "captures over 200 facial landmark points" (FAC ¶¶ 34, 54) by "scan[ing], detect[ing], align[ing], and process[ing]" each users' "facial image at specific coordinates," (FAC ¶ 35), to extract facial measurements (including the distance between facial landmarks and features) and "creat[e] a unique digital representation" or faceprint. FAC ¶ 36. A faceprint is a numerical representation of the unique shape and geometry of an individual's face,

and thus, these measures can be used to identify said individual, including any time they appear on the internet or in public. FAC ¶¶ 16-17, 36-37.

A. Courts have refused to insert a "must be used to identify" condition into the definition of "biometric identifier" under BIPA

JJCI argues that a "biometric identifier" must not only satisfy the statute's definition, namely, "a retina or iris scan, fingerprint, voiceprint, or scan of the hand or face geometry," but "the data collected must [also] be used to identify an individual." Br. at 7-11. Thus, according to JJCI, it is insufficient that Melzer alleges it collects and obtains scans of Melzer's unique facial geometry. *Id.* Instead, according to JJCI, a scan of face geometry is not a "biometric identifier" unless and until JJCI uses the faceprint to identify her. *Id.*

No court has ever limited "biometric identifiers" to mean only scans of face geometry (or any of the other listed items) that a private entity actually uses to make an identification. On the contrary, JJCI ignores courts that have flatly rejected this proposition. In *Hazlitt,* as here*,* the defendant argued that "facial scans cannot qualify as biometric identifiers because Apple does not use the scans to actually identify a person." *Hazlitt v. Apple Inc*., 500 F. Supp. 3d 738, 749 (S.D. Ill. 2020), *vacated on other grounds*, *In re Apple Inc*., No. 20-8033, 2021 WL 2451296 (7th Cir. Jan. 22, 2021). The court rejected the argument because the "definition of biometric identifier explicitly includes scans of face geometry." *Id. Carpenter* also found that "pursuant to the plain language of the statute, a defendant may violate BIPA by collecting a voiceprint [or scan of face geometry] that merely *could be used to identify a plaintiff. . .even if not collected for the purpose of identifying that person.*" *Carpenter v. McDonald's Corp.,* 580 F. Supp. 3d 512, 518 n. 2 (N.D. Ill. 2022) (emphasis added); *See also Vance v. Int'l Bus. Machines Corp*., No. 20 - 577, 2020 WL 5530134, at *5 (N.D. Ill. Sept. 15, 2020) ("IBM")("The DIF Dataset includes

biometric measurements that *can be used to identify Plaintiffs*. Thus, IBM's alleged actions implicate BIPA.") (emphasis added).

Similarly, courts have found that collecting or capturing scans of facial features qualify as biometric identifiers regardless of the purpose or use of the scan. *See e.g.*, *Wilk, v. Brainshark, Inc*., No. 21-4794, 2022 WL 4482842, at *1, *5 (N.D. Ill. Sept. 27, 2022) (finding that defendant captured scans of face geometry where it scanned facial features to identify emotions—not to identify an individual) (collecting cases). *See* Order Den. Mot. to Dismiss, *Powell v. Shiseido*, 21-cv-02295 (C.D. Ill. Aug. 22, 2022) ECF. No. 18[4] (finding geometric map of user's face created by virtual makeup try-on tool qualified as a "scan of face geometry" even though it was not used to identify an individual).

Thus, JJCI's bold attempt to frame the instant case as an expansion of BIPA falls flat.

B. JJCI also has no textual or structural statutory support for its proposed must be "used to identify" condition

1. JJCI ignores the basic canon of construction that when the legislature uses certain words in one instance and omits them in another, it intended different results

JJCI's proposed "used to identify" condition or limitation also finds no support in the text or structure of the statute. To begin, the Illinois "[S]upreme [C]ourt found that the [BIPA] protects an individual in two distinct and important ways." *Mosby v. Ingalls Mem'l Hosp.,* --- N.E.3d ---, 2022 IL App (1st) 200822, 2022 WL 4696615 (2022) (citing *W. Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 183 N.E.3d 47 (Ill. 2021)). BIPA both "codifies (1) an individual's right to privacy in their biometric identifiers—fingerprints, retina or iris scans, voiceprints, or scans of hand or face geometry—and (2) an individual's right to privacy in their

[4] This Order is attached to the Declaration of Matthew R. Mendelsohn, Esq. ("Mendelsohn Decl.") as Exhibit A.

biometric information—information based on an individual's biometric identifiers *that is then used to identify an individual.*" *Id.* (emphasis added).

"Biometric information" is defined as "any information…based on an individual's biometric identifier *used to identify an individual*." 740 ILCS 14/10 (emphasis added). On the other hand, the Illinois legislature omitted the language "used to identify an individual" from the definition of "biometric identifier." *Id.* By expressly omitting this condition in the definition of "biometric identifier," the Illinois legislature intended that "a retina or iris scan, fingerprint, voiceprint, or scan of the hand or face geometry" need not actually be "used to identify" in order to qualify as a "biometric identifier." *See e.g.*, *Dana Tank Container, Inc. v. Human Rights Comm'n*, 687 N.E. 2d 102, 104 (Ill. App. Ct. 1997) ("Where the legislature uses certain words in one instance and different words in another, it intended different results.");[5] *Davis v. Toshiba Mach. Co.*, 710 N.E.2d 399, 401 (Ill. 1999) (The "language used by the legislature is the best indication of legislative intent.").

Courts have consistently recognized that a "biometric identifier" is distinct from "biometric information" and the omission of terms by the Illinois legislature in these definitions is purposeful. Indeed, "[i]t would have been simple enough for the Illinois legislature to include similar ["used to identify an individual"] language in the definition of "biometric identifier," but it did not." *Rivera v. Google Inc.,* 238 F. Supp. 3d 1088, 1096–97 (N.D. Ill. 2017) (rejecting argument that the conditions or limitations of "biometric information" be extended to the definition of "biometric identifier"). "Put another way, [JJCI] wishes to apply the same limitation that is placed on biometric information to biometric identifiers. . . But the Illinois legislature

[5] *See also People v. Ousley*, 919 N.E.2d 875, 885 (Ill. 2009) ("It is well established that, by employing certain language in one instance, and entirely different language in another, the legislature indicated that different results were intended").

chose not to use terms such as ["used to identify"] when defining biometric identifier." *Vance v. Microsoft Corp*., 525 F. Supp. 3d 1287, 1296 (W.D. Wash. 2021) ("*Vance I*") (declining to apply limitations of "biometric information" into the definition of "biometric identifier"); *Sosa,* 2022 WL 1211506, at *8 (same); *Monroy v Shutterfly, Inc.*, No. 16-10984, 2017 WL 4099846, at *8 (N.D. Ill. Sep. 15, 2017) (same). JJCI improperly reads into the statute conditions or limitations, but this Court should "not insert conditions or limitations into a statute that are absent from the text." *Estate of Snodgrass v. Snodgrass*, 784 N.E.2d 431, 434 (Ill. App. Ct. 2003) (citing *Davis*, 186 Ill 2d. at 184-85).[6]

2. The defined term "biometric identifier" cannot be used to supply JJCI's "used to identify" condition into the definition because doing so flouts basic canons of construction

Despite the fact "biometric identifier" is a defined term and omits a "used to identify" condition, JJCI posits that the term "biometric identifier" itself—rather than its statutory definition—"makes clear that the legislature intended to limit the statute's application to biometric data that does, in fact, identify an individual." Br. at 9.[7] This argument does not withstand scrutiny.

"[B]iometric identifier" is a defined term and "[w]hen an act defines its own terms, those terms must be construed according to the definitions given to them in the statute." *Sosa,* 2022 WL 1211506, at *6 (interpreting BIPA) (citation omitted).[8] "[W]hen the language of the statute

[6] *DeWig v. Landshire, Inc*., 666 N.E.2d 1204, 1207 (Ill. App. Ct. 1996).

[7] JJCI argues that reading the statute's definition of "biometric identifier" as written by the Illinois legislature would improperly erase the term "identifier" from the statutory text. Br. at 9. But "identifier" is the defined term, and not a part of its own definition. *See United States v. Contreras*, 739 F. 3d 592, 596 (11th Cir. 2014).

[8] *See also Vill. of Oak Park v. Illinois State Lab. Rels. Bd*., 522 N.E.2d 161, 170 (Ill. 1988) ("Statutory terms where defined must be construed according to the definition contained in the statute.")

is clear, it must be applied as written without resort to aids or tools of interpretation." *DeLuna v. Burciaga*, 857 N.E.2d 229, 236 (Ill. 2006); *Raab v. Frank*, 157 N.E.3d 470, 474 (Ill. 2019) (same). In other words, the statutory definition functions as a dictionary.

Seemingly aware of this canon, Defendant is forced to press the argument—without explanation—that the phrase "scan of face geometry" is unclear. There is nothing in the phrase "scan of face geometry" that imparts any ambiguity or that would even imply conditions based on how an entity uses that scan once collected.[9] Nor does JJCI explain its naked assertion. Numerous courts, however, have interpreted the language "scan of face geometry" and none have found the term to be unclear. *See, e.g., Wilk*, 2022 WL 4482842, at *1, *5 (rejecting argument that "scan of face geometry" is unclear) (collecting cases).[10]

Moreover, even if "scan of face geometry" were unclear, JJCI does not explain how such purported ambiguity relates to whether a "biometric identifier" must in fact be used to identify an individual (a condition the legislature expressly omitted). *Sosa*, 2022 WL 1211506, at *8. ("[W]hat constitutes a "scan of face geometry" is sufficiently clear for us to determine . . . that the information allegedly obtained by Onfido plausibly satisfies this definition."). Try as it may,

[9] Additionally, to make this argument JJCI would need to show that each of the separate items listed as definitions for biometric identifiers, namely, "a retina or iris scan, fingerprint, voiceprint, or scan of the hand or face geometry," are unclear. To claim otherwise would lead to an absurd result that only a scan of face geometry must be used to identify an individual to qualify as a biometric identifier, while, for example, a scan of hand geometry would not. There is no basis to make such distinction under the canon of *noscitur a sociis. See* Noscitur a Sociis, Black's Law Dictionary (11th ed. 2019) (defining "*Noscitur a sociis"* as a "canon of construction holding that the meaning of an unclear word or phrase, esp[ecially] one in a list, should be determined by the words immediately surrounding it").

[10] JJCI's reliance on *People v. Davison,* 906 N.E.2d 545, 551 (Ill. 2009) is misplaced. The term "biometric identifier" is not an "undefined term." To the contrary, "biometric identifier" is defined to include—a "scan of face geometry." 740 ILCS 14/10.

JJCI cannot reasonably read a "used to identify" condition into the phrase "scan of face geometry."

Finally, courts have found the word "identifier" simply connotes a type of data, not the act of using it. Indeed, *Hazlitt* rejects the very argument JJCI makes here. *Hazlitt,* 500 F. Supp. 3d at 749 (finding that Apple's reading of the word "identifier" to exclude data that does not identify an actual person was too narrow, as "[t]he word 'identifier' modifies the word 'biometric' to signal that the types of data listed *could* be used to identify a person.") (emphasis in original); *See also Rivera*, 238 F. Supp. 3d at 1094 (The meaning of the term "biometric identifier," is "a biology-based set of measurements ("biometric") that *can be used to identify a person ("identifier")*.") (emphasis added).

3. JJCI cannot draw any structural meaning from the "do not include" list

JJCI observes that the "do not include" sentences in 740 ILCS 14/10 carve out "physical descriptions such as height, weight, hair color, or eye color . . . none of which . . . are sufficient to identify a specific individual." Br. at 15 (citing 740 ILCS 14/10). It argues from this 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." *Id.*

At the outset, JJCI cannot draw any structural meaning from the "do not include" list. *See Rivera,* 238 F. Supp. 3d at 1097 ("The other fatal problem with Google's "careful structure" argument is that it depends on drawing some structural meaning from the "do not include" sentences. But that cannot be done."). That is because "the 'do not include' listings defy a common thread that sheds any additional light on the straightforward affirmative definition of "biometric identifier." *Id.* In fact, JJCI's entire premise is faulty as some of the items listed in the

"do not include" sentences can indeed identify a specific individual yet are excluded (*see e.g.,* "written signatures," "photographs"). 740 ILCS 14/10. Had the legislature wanted to exclude data not "used to identify an individual" from the definition of "biometric identifier" it could have and would have easily done so.[11]

Further, the "statute's focus is on newer technology like scans of face geometry, whose 'full ramifications' are not known . . . without including physical identifiers that are more qualitative and non-digital in nature." *In re Facebook*, 185 F. Supp. 3d at 1171 (distinguishing between scans of physical photographs that are not within BIPA's grasp and scans of digital photographs that are); 740 ILCS 14/5(f). Thus, commonplace physical characteristics are simply not governed by the statute—not because they can or cannot identify an individual—but because they are not akin to newer technologies such as a "scan of face geometry."[12]

4. The "expressions of legislative intent" support Melzer but since the statute is clear, the Court does not consider such expressions

Finally, JJCI claims that the "expressions of legislative intent" support its interpretation because "the Illinois legislature enacted BIPA to protect sensitive biometric data because it is used to identify an individual." Br. at 11. However, "where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction." *Krohe v. City of Bloomington*, 789 N.E.2d 1211, 1212 (Ill. 2003) (citation omitted). But even if

[11] "If the legislature intended the statute to mean what [defendant] argues it means, the legislature could have easily said so . . . .[W]e will not insert conditions or limitations into a statute that are absent from the text." *Estate of Snodgrass*, 784 N.E.2d 431 at 434 (citing *Davis*, 186 Ill 2d. at 184-85).

[12] JJCI's reliance on §15(e) of BIPA is also misguided. Melzer alleges that the scans of her facial geometry are unique and thus "can be used" to identify her. FAC ¶¶ 16-17, 37. This is the same language used in § 15(e). 740 ILCS 14/15(e) ("confidential and sensitive information," is information that "*can be used* to *identify an individual* . . .").

the Court turns to such expressions, those expressions support Melzer. *See e.g., Hazlitt,* 500 F. Supp. 3d at 749 (finding legislative intent supports the reading that a "biometric identifier" need not be used to identify an individual). The legislature recognized that biometrics "are biologically unique to the individual" and "once compromised, the individual has no recourse." 740 ILCS 14/5(c).[13] Nothing in the statements of legislative intent supports JJCI's contention that an entity must actually use the "biometric identifiers" to identify someone before the statute's protections take effect. On the contrary, JJCI's attempt to cabin "scans of face geometry" to apply only where the scan is actually used to identify an individual is "antithetical to [BIPA's] broad purpose of protecting privacy in the face of emerging biometric technology." *In re Facebook*, 185 F. Supp. 3d at 1172.

Nor would such a requirement satisfy BIPA's stated purpose to grant Illinois residents the right to control their biometric identifiers and information. 740 ILCS § 14/5(c) (If biometric data is compromised, the individual may be left with "no recourse" and at a "heightened risk for identity theft.").[14] JJCI's interpretation would allow private entities the unfettered right to collect, disseminate, and sell fingerprints, retina or iris scans, voiceprints, or scans of hand or face geometry without notice or consent. There is simply nothing in the text, structure, or purpose of the statute to support JJCI's assertion that a "biometric identifier" must actually be "used to identify an individual" to fall under BIPA's broad scope.

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[13] "The legislative purpose [of BIPA] is easy to discern because the legislators provided a section in the Act entitled: 'Legislative findings; intent.'" *Sekura v. Krishna Schaumburg Tan, Inc.*, 115 N.E.3d 1080, 1092 (Ill. Ct. App. 2018) (quoting 740 ILCS 14/5).

[14] *See also Rosenbach*, 129 N.E.3d at 1206 ("[O]ur General Assembly has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information.") (citation omitted).

II. Melzer plausibly alleges that JJCI collects and possesses her biometric identifiers without obtaining informed written consent

JJCI argues that the FAC is conclusory and "includes a single sentence alleging that Skin 360's facial scans are "unique to an individual and can be used to identify them." Br. at 17. JJCI can only say this by ignoring all the surrounding factual allegations in the FAC from which this allegation is drawn. Melzer explains in detail over several paragraphs how Skin360 extracts and creates a unique identifier in the form of a faceprint. FAC ¶¶ 30-40. As Melzer also explains, once a person's face is scanned and its unique facial geometry is captured, computers can store this information and use it to identify that individual, including any other time that person's face appears on the internet or in public. FAC ¶¶ 16, 17.

Thus, far from conclusory, Melzer's allegations are more than sufficient to meet the minimal pleading requirements of Fed. R. Civ. P. 8(a)(2). Courts have found, in the context of BIPA, "all Plaintiffs must do is allege that Defendants collected, captured, purchased, received or obtained their [biometric identifier] without complying with BIPA's requirements." *Roberson v. Maestro Consulting Servs*., 507 F. Supp. 3d 998, 1018 (S.D. Ill. 2020); *See also King v. PeopleNet Corp*., 2021 WL 5006692 *8 (N.D. Ill. Oct. 28, 2021) (same).

Indeed, where, as here, a scan is alleged to locate facial images and create a template or faceprint of the unique numerical representation of the shape or geometry of the individual's face, courts consistently find these allegations sufficient to implicate BIPA.[15] JJCI attempts to

[15] *Compare* FAC ¶¶ 33-38 with *e.g. Sosa v. Onfido, Inc*., No. 20-CV-4247, 2022 WL 1211506, at *7 (N.D. Ill. Apr. 25, 2022)("Onfido's software scans identification cards and photographs to locate facial images and extracts a unique numerical representation of the shape or geometry of each facial image . . . The faceprints extracted by Onfido plausibly constitute scans of face geometry and, therefore, "biometric identifiers" under BIPA."); *Rivera v. Google Inc.*, 238 F. Supp. 3d 1088, 1091, 1095 (N.D. Ill. 2017) (scanning an uploaded photograph, locating the plaintiff's face, and zeroing "in on its unique contours to create a 'template' that maps and records her distinct facial measurements" constituted a scan of face geometry); *In re Facebook,*

distinguish some of these cases on their facts, arguing that "in each of those cases, the plaintiffs alleged that the purpose of the technology at issue was to identify an individual." Br. at 15. But JJCI simply recites what plaintiffs alleged the defendant's technology did in those cases—not to those court's holdings regarding what was necessary to plausibly allege the collection of biometric data.[16] Br. at 15 (citing cases). Indeed, in none of those cases was that fact relevant to the holdings of what constitutes a "biometric identifier." *See e.g.*, *Rivera*, 238 F. Supp. 3d at 1095 ("More importantly, as alleged, a face template is one of the specified biometric identifiers in the Privacy Act, namely, a "scan of . . . face geometry.") (citing 740 ILCS 14/10). Further, courts have found plaintiffs plausibly alleged a defendant was collecting and capturing "biometric identifiers" where the purpose of the facial scan was not to identify an individual. *See e.g. Wilk*, 2022 WL 4482842, at *1, *5. *See also* § I(A) at 4, *supra* (discussing that JJCI's position has been rejected by multiple courts).

The allegations in the FAC are strikingly similar to those in *Powell*, where the court recently denied a motion to dismiss. *See* Mendelsohn Decl. Ex. A, Order Den. Mot. to Dismiss at 12, *Powell*, 21-cv-02295, ECF 18. In *Powell*, plaintiffs alleged that a virtual make-up tool created a "geometric map of the user's face" to apply virtual make-up. *Id.* at 12. The court found

185 F. Supp. 3d 1155, 1171 (N.D. Cal. 2016) (scanning "user-uploaded photographs to create a unique digital representation of the face . . . based on [the] geometric relationship of [ ] facial features" constituted a scan of face geometry) (citation omitted; cleaned up); *ACLU v. Clearview AI, Inc.*, No. 20 CH 4353, 2021 WL 4164452, at *1, *5 (Ill. App. Ct. Aug. 27, 2021) (creating a faceprint by scanning a photograph, measuring and recording "data such as the shape of the cheekbones and the distance between eyes, nose, and ears," and assigning "that data a numerical value" constituted a scan of face geometry).

[16] JJCI's citation to plaintiffs' allegations in *Wise v. Ring LLC*, No. C20-1298, 2022 WL 3083068 (W.D. Wash. Aug. 3, 2022), at *1, *3 (Br. at 15) is far afield. The allegations and the ensuing discussion there centered on the distinct issue of whether and how BIPA applies to non-users of a product, not what constitutes a "scan of face geometry" under BIPA.

that "[p]laintiff's allegation that such a map was created through [d]efendant's website amount[ed] to a plausible allegation that [d]efendant actively captured and/or collected biometric identifiers." *Id*. The face scan in *Powell* was powered by Perfect Corp's YouCam technology—*the same technology that powers Neutrogena Skin360*. FAC ¶ 33.

JJCI also argues that "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." Br. at 14. But Melzer need not allege that Skin360 technology is "used to identify a user" to satisfy plausibility.[17] Rather, Melzer alleges that Skin360, in providing users with a skin analysis, collects scans of their unique facial geometry. FAC ¶¶ 30-42. Skin 360 deploys Perfect Corp.'s YouCam technology, which utilizes "precise face detection" and "advanced facial recognition." FAC ¶ 33. It "takes a scan of the front, left, and right profiles" to "ensure full facial coverage, including difficult to map areas such as chin and cheeks." FAC ¶ 35. "Skin360's algorithms extract and create a unique digital representation of the face (i.e. a face template) based on the scan of the consumer's facial landmarks and facial geometry." FAC ¶ 36. And as further explained in the FAC, "[t]hrough the scan of the consumer's unique facial geometry and the face template, Skin360 accurately detects dark circles, wrinkles, fine lines, smoothness, dark spots, and other skin concerns and displays them to the consumer by marking them at their precise location on an image of the consumer's face." FAC ¶ 39. This is also how "Skin360 knows exactly where to mark a fine line, a dark spot, or other skin concern, on the image of the consumer's face—and to do so with precision and exactitude." FAC ¶ 39. Simply

[17] "Nothing in the statute says, one way or the other, *how* the biometric measurements must be obtained (or stored, for that matter) in order to meet the definition of 'biometric identifier'…the particular biometric identifiers can, in fact, be collected in various ways without altering the fact that the measurements still are biometric identifiers." *Rivera*, 238 F. Supp.3d at 1095 (emphasis in original).

put, Melzer explains in detail that the capture of a users' unique faceprint or template is necessary for Skin360's functionality. FAC ¶ 39.

Clinique Laboratories, LLC's ("Clinique") disclosures dispel any doubt that Melzer's allegations are plausible. Melzer alleges that both Clinique, the maker of Clinique skincare products, and Skin360 deploy the same facial recognition technology for their virtual skin analysis and product recommendation tools. FAC ¶ 43 (citation omitted). Clinique's skin analysis and recommendation tool provides a "Biometric Data Notice and Consent," which (1) informs users that "*it will analyze a scan of face geometry* from your photograph" and (2) explains the reason it collects biometrics is "in order to provide you with a personalized skin care solution." FAC ¶¶ 44-45 (emphasis added). It discloses in its general privacy policy that it "may collect biometric information, such as facial geometry," and cites skin analysis facial scan as the one instance of such collection. FAC ¶ 45.

Whether or not these disclosures are "an admission by Clinique that it possesses or collects biometric data as defined by BIPA," is irrelevant. Br. at 12 n.2. These facts add plausibility to Melzer's allegations that the facial recognition technology at issue here captures and analyzes "a scan of face geometry." Melzer does not have to prove her case at the pleading stage. She has clearly pled specific facts supporting her allegations that the facial recognition technology used by Skin360 captures and collects scans of Melzer's and class members' unique facial geometry. No more is needed.

III. Melzer plausibly alleges JJCI violates Sections 15(c) and (d) of BIPA

A. Melzer plausibly alleges that JJCI discloses and disseminates her biometric identifiers to its affiliates and third-party partners in violation of Section 15(d) of BIPA

Section 15(d) of BIPA prohibits an entity in possession of a biometric identifier or biometric information from disclosing, redisclosing, or disseminating this information without consent. 740 ILCS 14/15(d).[18] The disclosure or dissemination of biometric identifiers or biometric information to affiliates and third parties is barred by BIPA. *Naughton v. Amazon.com, Inc.*, No. 20-CV-6485, 2022 WL 19324, at *4 (N.D. Ill. Jan. 3, 2022) (holding that plaintiff plausibly alleged a § 15(d) claim by alleging disclosure to affiliates and third parties without prior consent); *Wordlaw v. Enter. Leasing Co. of Chi., LLC*, No. 20-3200, 2020 WL 7490414, at *4 (N.D. Ill. Dec. 21, 2020) (same). A plaintiff is not required to plead "detailed factual allegations" to sustain a § 15(d) claim. *Id.*; *Naughton*, 2022 WL 19324, at *4. "Where pleadings concern matters peculiarly within the knowledge of the defendants, conclusory pleading on 'information and belief' should be liberally viewed." *Brown v. Budz*, 398 F.3d 904, 914 (7th Cir.

[18] JJCI does not, and cannot, challenge that Melzer sufficiently alleged JJCI had possession over the data at issue. *See* § II*, supra*. Instead, it rehashes the argument that its scans of face geometry do not qualify as biometric identifiers under BIPA. Br. at 16, 19. As explained above, JJCI's interpretation of the statute has been rejected by multiple courts and runs afoul of the plain meaning of the statute. *See* § I*, supra*. An entity possesses biometric identifiers or biometric information when it has some dominion or control over the data, though not necessarily exclusive control. *Hazlitt v. Apple Inc.*, 543 F. Supp. 3d 643, 653 (S.D. Ill. 2021). And since "Plaintiff's biometric identifiers were captured through technology placed on [d]efendant's websites. . . . it can be plausibly inferred that [d]efendant controls or holds at its disposal data generated at its own websites." Mendelsohn Decl. Ex. A, Order Den. Mot. to Dismiss at 13-14, *Powell v. Shiseido Americas Corp.*, No. 21-cv-2295, ECF 18. Melzer "need not present . . . evidence [of possession] at the pleadings stage, and it is sufficient that [s]he has alleged as much." *Calonia v. Trinity Prop. Consultants, LLC*, No. 20 C 6130, 2022 WL 2132528, at *2 (N.D. Ill. June 14, 2022); *See also Patterson v. Respondus, Inc.*, No. 20 C 7692, 2022 WL 860946, at *24 n. 20 (N.D. Ill. Mar. 23, 2022) (suggesting that "the collection of biometric data necessarily results, at least momentarily, in the possession of that data . . . ").

2005) (citation omitted); *Cf. Koninklijke Philips N.V. v. IdeaVillage Prods. Corp.*, No. 21-8706, 2022 WL 2713936, at *8 (D.N.J. July 13, 2022) (Even when plaintiff pleaded "thin" information and belief allegations, the claim was sustained because such allegations "could plausibly give rise to a cause of action, a fairly low threshold even after *Twombly/Iqbal.*").

Melzer alleges, on information and belief, that JJCI discloses and disseminates her and the class members' biometric identifiers and biometric information directly to JJCI's "affiliates" and "third-party partners, including partners that provide technical and other services for its Skin360 technology without consent" in violation of §15(d). FAC ¶¶ 61-64, 87. Melzer provides significant factual support for her dissemination claim. Melzer alleges that JJCI uses third-party technology from Perfect Corp., and "exchanges consumer information with its affiliates and third-party providers." FAC ¶¶ 33, 62. Melzer further alleges that JJCI acknowledged to its "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 during the prior year." FAC ¶ 62.

Courts have found the allegation that a defendant uses third-party technology itself creates a plausible inference of dissemination. *See Cothron v. White Castle Sys.*, 467 F. Supp. 3d 604, 618 (N.D. Ill. 2020) (sustaining dissemination claim on information and belief where plaintiff alleged that "White Castle uses an employee authentication software system supplied by Cross Match . . .") (citations and quotations omitted). In addition to JJCI's relationship with Perfect Corp., Melzer also alleges that JJCI has a practice to share consumer data to its affiliates and third-party service providers—and has stated that it may have disclosed biometric data in the

past. FAC ¶ 62.[19] These allegations support Melzer's dissemination claim. *Mahmood v. Berbix, Inc.*, No. 22-2456, 2022 WL 3684636, at *3 (N.D. Ill. Aug. 25, 2022) (holding that defendant plausibly alleged a § 15(d) claim where defendant acknowledged in its privacy policy that it "may share personal and identity information and data with third parties"); *Heard v. Becton, Dickinson & Co.*, 440 F. Supp. 3d 960, 969 (N.D. Ill. 2020) (noting that reports of past dissemination can provide legitimate reason to suspect disclosure). "When considering a motion to dismiss, a district court cannot weigh competing inferences and forgo drawing a reasonable one in the plaintiff's favor." *Bagic v. Univ. of Pittsburgh*, 773 F. App'x 84, 88-89 (3d Cir. 2019).

While Melzer has supported her allegations with substantial facts, the standard to plead a § 15(d) claim is low. Courts have recognized that the facts underlying a defendant's dissemination are peculiarly within defendant's control, and, thus, some courts have even accepted bare information and belief allegations—without the facts pleaded here—because the generic existence of basic relationships itself creates a plausible inference of dissemination. *See*

[19] In the event the Court concludes that the §15(d) allegations in the FAC are otherwise insufficient, in its opening brief JJCI cites to its Privacy Notice for California Residents on its Neutrogena360 website, (Br. at 22 n. 5), which JJCI says is incorporated into the FAC by reference. Br. at 4 n. 1. In this statement, JJCI says that in 2019 "[w]e collected one or more of the following specific pieces of personal information . . .biometric information[,]" and "we do share your personal information with our affiliates and trusted partners in arrangements that may meet the broad definition of "sale" under California law." *See* Neutrogena Skin360 Privacy Notice for California Residents, available at: https://www.neutrogena.com/customer-service/privacy-security/privacy-policy.html#privacynotice-california. JJCI's general Neutrogena360 Privacy Policy is contained on the very same webpage and document. It says that JJCI discloses information collected through the Service," defined as "the website or application," to affiliates and third parties, including "our third party service providers . . . in order to enable them to provide services." *See* Neutrogena Skin360 Privacy Policy, available at: https://www.neutrogena.com/customer-service/privacy-security/privacy-policy.html#privacynotice-california. Thus, in its general privacy policy, JJCI says it shares data it collects from the website and application and, in its California statement in 2020 it admitted to past dissemination of its California customers' biometric data. These documents further support the inference that JJCI shares biometric data, while not even disclosing that it collects this data.

Wordlaw, 2020 WL 7490414, at *4 (upholding § 15(d) claim with bare information and belief allegation that "defendants shared her biometrics with third parties, such as other Enterprise subsidiaries, data storage vendors, and payroll service providers without her consent") (citations and quotations omitted);[20] *Figueroa v. Kronos, Inc.*, 454 F. Supp. 3d 772, 785 (N.D. Ill. 2020) (upholding § 15(d) claim predicated on the simple information and belief allegation that "[d]efendant systematically disclosed [p]laintiffs' biometric identifiers and biometric information to other currently unknown third parties, which hosted the biometric data in their data centers") (citations and quotations omitted);[21] *Cf. Naughton*, 2022 WL 19324, at *4 (accepting bare allegation of dissemination to Amazon affiliates and "to third-party biometric device and software vendor(s) and other possible third parties").

JJCI concedes that Melzer may plead her dissemination claim on information and belief where, as here, "the requisite factual information" of JJCI's dissemination "is peculiarly within the defendant's knowledge or control." Br. at 20 (quoting *Verify Smart Corp. v. Bank of Am., N.A.*, 2020 WL 3542430, at *4 (D.N.J. June 29, 2020). JJCI argues, however, that Melzer has not adequately pleaded "factual allegations that make [her] theoretically viable claim plausible." Br. at 20 (quoting *McDermott v. Clondalkin Grp., Inc.*, 649 F. App'x 263, 268 (3d Cir. 2016).[22] JJCI does not grapple with, or even acknowledge, the substance of Melzer's supporting factual

[20] Notice of Removal, Ex. 1, Compl. ¶ 20, *Wordlaw*, 1:20-cv-03200 (N.D. Ill. May 29, 2020), ECF 1-1.

[21] *See* Notice of Removal, Ex 1, Compl. ¶ 79, *Figueroa*, 1:19-cv-01306 (N.D. Ill. Feb. 21, 2019), ECF 1-1.

[22] JJCI separately cites to *Colombia Trading Corp. v. Green Elecs.*, LLC, 2018 WL 5503672 (D.N.J. Oct. 1, 2013), Br. at 20, but that case merely reiterates that "[p]arties 'may plead facts based upon 'information and belief,' but they must 'set forth the 'specific facts upon which the belief is reasonably based.'" *Id.*, *10 (quoting *ICU Medical, Inc. v. RyMed Technologies, Inc.*, 752 F.Supp. 2d 486, 488 (D. Del. 2010). Melzer does exactly that.

allegations and the plausible inferences that may be drawn from them. Br. at 21. JJCI cites to four BIPA cases that dismissed § 15(d) claims, but these cases stand for the undisputed and unremarkable proposition that information and belief allegations can be insufficient to state a §15(d) claim when the plaintiff provides no basis for the belief. Br. at 20-21. These courts acknowledged that facts like those alleged by Melzer here support an information and belief claim.[23]

Melzer has pleaded facts that make her § 15(d) claim plausible. *See Mahmood,* 2022 WL 3684636, at *3; *Cothron*, 467 F. Supp. 3d at 618*; Heard*, 440 F. Supp. 3d at 969*; Wordlaw*, 2020 WL 7490414, at *4. Since the "the requisite factual information" of JJCI's dissemination, "is peculiarly within the defendant's knowledge and control," she can plead her claim on "information and belief" *McDermott*, 649 F. App'x at 267–68 (quotations and citations omitted). She has "pleaded [the] information that triggered her suspicion," *Cothron*, 467 F. Supp. 3d at 618, and facts "that make [her] theoretically viable claim plausible." *McDermott*, 649 F. App'x at 268 (quotations and citations omitted).

[23] In *Heard,* the court rejected the plaintiff's information and belief claim only because, unlike here, the plaintiff provided "no basis for the allegation that [defendant] disclosed his biometric data." 440 F. Supp. 3d at 969. The court recognized "reports that [defendant] has unlawfully disseminated biometric data in the past," had they been pleaded, as they are here, would be "a legitimate reason to suspect disclosure . . ." *Id.* The court in *Jacobs v. Hanwha Techwin Am., Inc.* likewise rejected information and belief allegations only because the plaintiff pleaded "no basis to even suspect that defendant disseminated the biometric data at issue." No. 21 C 866, 2021 WL 3172967, at *4 (N.D. Ill. July 27, 2021). The court expressly cited to the *Heard* court's statement that allegations such as past reports of dissemination support an information and belief claim. In *Horn v. Method Prods., PBC*, the plaintiff neither pleaded the basis for its belief nor "include[d] any allegations suggesting that [defendant] used any third-party vendors to support such an inference [of dissemination]." No. 21 C 5621, 2022 WL 1090887, at *3 (N.D. Ill. Apr. 12, 2022). Finally, in *Namuwonge v. Kronos, Inc.*, the plaintiff not only failed to allege any basis to allege dissemination, but, in fact, pleaded that the class members "have no idea whether any [d]efendant sells, discloses, re-discloses, or otherwise disseminates their biometric data." 418 F. Supp. 3d 279, 285 (N.D. Ill. 2019) (citation and quotation omitted).

B. Melzer plausibly alleges that JJCI profits from its commercial disclosure and dissemination of her biometric identifiers to its affiliates and third-party partners in violation of Section 15(c) of BIPA

Section 15(c) of BIPA bars JJCI, an entity possessing this information, from "sell[ing], lease[ing], trad[ing], or otherwise profit[ing] from a person's or a customer's biometric identifier or biometric information." 740 ILCS 14/15(c). Section 15(c) "does not require a direct sale of biometric data." *Mayhall v. Amazon Web Servs.*, No. 21-1473, 2022 WL 2718091, at *11 (W.D. Wash. May 24, 2022) (citation omitted). "Section 15(c) applies to 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.'" *Id.* at *32-33 (quoting *Vance v. Amazon.com Inc.*, 534 F. Supp. 3d 1314, 1322 (W.D. Wash. 2021) ("*Vance II*"). The value received need be only "some sort of gain, whether pecuniary or not." *Id.* (citation omitted).[24]

Melzer alleges, on information and belief, that JJCI commercially disseminates her and the class members' biometric identifiers and biometric information to JJCI's affiliates and other third parties for its own benefit. FAC ¶ 65. In its California notice, JJCI acknowledged that it may have sold such data as defined under California law. FAC ¶ 62; *See also* § III(B) n. 17, *supra*. The Cal. Civ. Code § 1798.140(ad)(1) expressly equates "[s]ell,' 'selling,' 'sale,' or 'sold,'" to "mean[] . . . disclosing, disseminating, making available, transferring . . . a consumer's personal information by the business to a third party for monetary or other valuable consideration." *Id.*

[24] Few courts have addressed the exact reach of § 15(c)'s ban on "otherwise profit from." The courts in *Vance I* and *Vance II* addressed the provision and rejected the most expansive reading. *Vance I*, 534 F. Supp. 3d at 1307*; Vance II*, 534 F. Supp. 3d at 1324. These courts ruled that § 15(c) prohibits a party in possession of this data from transferring it for a benefit, whether monetary or otherwise, even where such transfer does not otherwise constitute a sale, trade, or lease. *Id.*

JJCI seeks to minimize its notice by arguing that "whether an action is a 'sale' under California law has nothing to with whether that action would violate BIPA." Br. at 18 n. 3. JJCI is wrong because courts have interpreted "otherwise profit" in § 15(c) to be at least as broad as a sale under California law. *See e.g., Vance II*, 534 F. Supp. 3d at 1322 ("[O]therwise profit' encompasses commercial transactions . . . during which the biometric data is transferred or shared in return for some benefit."). Further, that JJCI can offer a competing inference cannot be credited on a motion to dismiss. *Bagic*, 773 F. App'x 84 at 89.

JJCI's acknowledgement that it may have transferred consumer data, including biometric data, for valuable consideration provides a plausible basis for Melzer to allege that it commercially disseminated her biometric data for its own profit in violation of § 15(c). *See Mahmood*, 2022 WL 3684636, at *3 (holding that acknowledgment in a company's privacy policy that it may disseminate data was sufficient to support an information and belief dissemination claim)*; Heard*, 440 F. Supp. 3d at 969 (noting that reports of past conduct can support an information and belief claim). With this information in JJCI's peculiar possession, Melzer may plead her claim on information and belief. *McDermott,* 649 F. App'x at 267-68; *Koninklijke*, 2022 WL 2713936, at *8.

C. Melzer plausibly, and separately, alleges that JJCI unlawfully disseminates and profits from biometric identifiers by incorporating them into its Skin360 technology in violation of Sections 15(c) and (d) of BIPA

As detailed above in §§ III(A) and (B), *supra*, Melzer plausibly alleges that JJCI violates §§ 15(c) and (d) through direct dissemination of her data to its affiliates and to third-parties. Apart from those violations, Melzer alleges that JJCI violates §§ 15(c) and (d) because "it so integrates their biometric identifiers and/or biometric information into its Skin360 technology such that this data is inextricably intertwined with the technology itself, and Defendant's further

use of the technology commercially disseminates their biometric identifiers and/or biometric information" and profits from it. FAC ¶¶ 54-59.

JJCI argues that these allegations do not state a § 15(d) dissemination without consent claim or a § 15(c) for profit claim because BIPA regulates only biometric data, not the disclosure, marketing, or profiting from technology that "may use biometric data in some way" or that "happens to be capable of collecting biometric information." Br. at 19. JJCI ignores that Melzer is alleging that JJCI is expropriating and using *her* biometric data, not biometric data in general. FAC ¶ 59. It cites to *Hazlitt*, but the court there expressly said "[i]mportantly, Plaintiffs do not allege that Apple sold or otherwise profited from their individual biometric data." 500 F. Supp. 3d 738 at 747 (emphasis in original).

Other courts have expressly declined to endorse JJCI's blanket statement. *Karling v. Samsara Inc.*, No. 22 C 295, 2022 WL 2663513, at *7 (N.D. Ill. July 11, 2022) (expressly declining to endorse defendants' argument that "BIPA applies to the sale of biometric data, not to the sale of biometric technology"); *Cf. Flores v. Motorola Sols., Inc.*, No. 20-01128, 2021 WL 232627, at *3 (N.D. Ill. Jan. 8, 2021) (declining to decisively decide whether § 15(c)'s ban on "profit" "evince[s] a legislative intent to encompass the sale of biometric *technology* as opposed to data.") (citation omitted) (emphasis in original). JJCI cites to *Vance I*, but Melzer has plausibly alleged a § 15(c) claim as articulated by *Vance I*. Unlike *Vance I*, where the plaintiff did not actually plead "that the biometric data is itself so incorporated into Microsoft's product that by marketing the product, it is commercially disseminating the biometric data," (*Vance I*, 534 F. Supp. 3d at 1309), here Melzer has pled exactly that. FAC ¶¶ 54-59.

Furthermore, *Vance I*'s standard for a § 15(c) "for profit" claim does not extend to dissemination under § 15(d), which, based on the statutory language and purpose, has a lower

standard to qualify as dissemination. In fact, the *Vance I* court was animated, in part, by the fact that, unlike § 15(d) [dissemination], "§ 15(c)['s bar on profit] is a flat out prohibition" which applies "even if [the private entity] inform[s] and obtain[s] permission from the subject." *Vance*, 534 F. Supp. 3d at 1308. Thus, *Vance I* was concerned that "taken to its logical end, [such a] reading of § 15(c) would prohibit the sale of any product containing biometric technology because any such feature had to be developed or built with biometric data." *Id.* This concern does not apply to § 15(d), which is merely a consent provision, not an outright prohibition, and gives individuals the simple right to say no to the disclosure or dissemination of their biometric data. In fact, Melzer is unaware of any court that has ruled that a defendant may freely incorporate an individual's biometric data into its products and then disseminate those products without consent.

Section 15(d) expressly regulates "disclosure," "redisclosure," and "dissemination." The statutory terms "disclose," "redisclose," and "otherwise disseminate" are undefined. The dictionary is useful "to ascertain the meaning of an otherwise undefined word or phrase." *People v. Beachem*, 890 N.E.2d 515, 520 (Ill. 2008). "Disseminate" is defined as "to spread abroad as though sowing seed" and "to disperse throughout." Disseminate, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/disseminate. "Disclose," on the other hand is defined as "to make known or public" or "to expose to view." Disclose, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/disclose.

"Disseminate" in § 15(d) means to "broadly disperse" in a manner that is not a "disclosure" or "redisclosure," that is, in a manner that does not make the data itself "known to the public" or "expose it to view." Any other interpretation runs afoul of BIPA's core purpose to give individuals "a right to privacy in *and control over* their biometric identifiers and biometric

information." *Rosenbach*, 129 N.E.3d at 1206 (emphasis added).[25] This is also how Illinois courts have interpreted the term "otherwise" when preceded by one or two items. *Lacey v. Vill. of Palatine*, 904 N.E.2d 18, 26 (Ill. 2009) (interpreting a statute containing the word "otherwise" to refer to something other than what preceded it); *Swank v Dept. of Revenue*, 785 N.E.2d 204, 209 (Ill. App. Ct. 2003) (interpreting a statute containing the word "otherwise" to mean something "other than," "or different from," from the two acts preceding it). Further, any other interpretation would erase the facially apparent distinction between "disseminate" and "disclose." *Figueroa*, 454 F. Supp. 3d at 785 ("Section 15(d) covers not just the 'disclosure' of biometric data, but also its 'dissemination.'").

Here, Melzer has plausibly alleged that JJCI violated both § 15(c)'s bar on profit and § 15(d)'s prohibition on disclosure and dissemination without consent because JJCI has so incorporated this biometric data, captured and used without consent, that her "biometric identifiers are inextricably intertwined with the Neutrogena Skin360 technology," and JJCI's marketing and use of the technology disseminates her biometric data, including for JJCI's profit. FAC ¶ 54-59; *Vance II*, 534 F. Supp. 3d at 1324. Furthermore, even to the extent JJCI argues Melzer's claim does not fit *Vance I*'s standard for a § 15(c) profit claim, and it does, she has still sufficiently alleged a § 15(d) dissemination claim.

[25] "[C]ourts look first to the plain language of the statute or rule and the legislative purpose behind its enactment. Where statutory language and objective appear with reasonable clarity, they are not to be overcome by resort to mechanical rules of construction, whose function is not to create doubts but to resolve them when the real issue or statutory purpose is obscure." *Rucker v. Wabash R. Co.*, 418 F.2d 146, 149-50 (7th Cir. 1969). The meaning ascribed "take[s] into account the entire statute" and "the intent of the legislature." *Gaffney v. Bd. of Trs.*, 969 N.E.2d 359, 378 (Ill. 2012). Only when there is ambiguity does a court resort to cannons of construction. *See Cont'l W. Ins. Co. v. Cheese Merchs. of Am.,* No. 21-1571, 2022 WL 4483886, at *11 (N.D. Ill. Sept. 27, 2022). The doctrine of *ejusdem generis* can be used with provisions containing "a specific-specific-specific-general architecture," (*id.*), which is absent here.

IV. Melzer plausibly alleges an unjust enrichment claim under Illinois law

JJCI urges the Court to adopt New Jersey's unjust enrichment law and dismiss the unjust enrichment claim because "'no real conflict' exists between New Jersey and Illinois law." Br. at 22. But it does identify a significant conflict: under New Jersey law, a plaintiff must plead actual economic loss, while "under Illinois unjust enrichment law . . . 'a plaintiff need not necessarily show that they suffered a loss or damages.'" *Id.* at 24 (quoting *Hogan v. Amazon.com, Inc.*, No. 21-cv-3169, 2022 WL 952763, at *7 (N.D. Ill. Mar. 30, 2022)). As JJCI acknowledges, New Jersey, in contrast to Illinois, requires that Melzer plead she would have reasonably expected to be compensated for her biometric data—that she was economically damaged. *Castro v. NYT Tel.*, 370 N.J. Super. 282, 299 (N.J. Super. Ct. App. Div. 2004) (In New Jersey, unjust enrichment "liability will be imposed only if plaintiff expected remuneration from the defendant, or if the true facts were known to plaintiff, he would have expected remuneration from defendant, at the time the benefit was conferred.") (citations and quotations omitted).

Under Illinois law, the assertion that plaintiffs are "'exposed to a heightened risk of privacy harm' and 'have been deprived of their control over their biometric data' [in violation of the BIPA statute] sufficiently states an unjust enrichment claim." *Vance I*, 525 F. Supp. 3d at 1299 (quoting *IBM*, 2020 WL 5530134, at *5). In Illinois, "unjust enrichment does not seek to compensate a plaintiff for loss or damages suffered but seeks to disgorge a benefit that the defendant unjustly retains." *Cleary v Philip Morris Inc.*, 656 F.3d 511, 518 (7th Cir. 2011). Thus, "a plaintiff need not show loss or damages" but only "a detriment" connected to the retention of the benefit. *Id.* at 518-519. Where unjust enrichment claims are based on statutory violations, there is no requirement that the plaintiff have a reasonable expectation of payment. *IBM*, 2020 WL 5530134, at *5.

JJCI, nonetheless, points out that this Court made a finding that there are no real substantive differences between the unjust enrichment laws among the states. Br. at 22 (citing *Sharma v. Gupta*, No. 20-3446, 2022 WL 970544, at *5 (D.N.J. Mar. 31, 2022)). But this was because choice of law was not outcome determinative in that case. *Id.* As JJCI acknowledges, what is required to plead an unjust enrichment claim in Illinois and New Jersey in this case is significantly, indeed decisively, different. Br. at 22. Courts in this Circuit have found that there can be real differences between New Jersey and other states' unjust enrichment laws. *See e.g., In re Riddell Concussion Reduction Litig.*, 121 F. Supp. 3d 402, 423-24 (D.N.J. 2015) (recognizing significant differences between Illinois and New Jersey unjust enrichment laws); *Montich v. Miele USA, Inc.,* 849 F. Supp. 2d 439, 459 (D.N.J. 2012); *Gray v. BMW of N. Am., LLC*, 22 F. Supp. 3d 373, 381 (D.N.J. 2014) (finding conflict between New Jersey and California unjust enrichment law); *In re Actiq Sales & Mktg. Practices Litig.*, 307 F.R.D. 150, 165-166 (E.D. Pa. 2015) (finding conflicts between unjust enrichment laws); *In re Flonase Antitrust Litig.*, 692 F. Supp. 2d 524, 541 (E.D. Pa. 2010). Other courts addressing conflicts of law in the specific context of BIPA claims have recognized a similar actual conflict between Illinois and other states' unjust enrichment laws. *Vance II*, 534 F. Supp. 3d at 1324 (finding actual conflict between Illinois and Washington unjust enrichment laws); *See also Vance I*, 525 F. Supp. 3d at 1315; *Mayhall*, 2022 WL 2718091, at *13-14.

Melzer and the class members plausibly allege an unjust enrichment claim under Illinois law because they allege they have "been deprived of their control over their biometric data' [in violation of the BIPA statute]," (*Vance I*, 525 F. Supp. 3d at 1299 (quoting *IBM*, 2020 WL 5530134, at *5)), and JJCI has unlawfully disseminated their data and benefited itself to their detriment. FAC ¶¶ 54-65, 96-99. These allegations sufficiently state an unjust enrichment claim

under Illinois law. *Vance I*, 525 F. Supp. 3d at 1299. Unlike *Hogan*, where the court dismissed an unjust enrichment claim because "[p]laintiff did not allege which images are being used unjustly" or "allege facts to show how Amazon is profiting from [p]laintiffs' images[,]" (*Hogan*, 2022 WL 952763, at *7 (N.D. Ill. Mar. 30, 2022)), here Melzer has plausibly alleged that JJCI took her biometric identifiers and biometric information without her informed consent and then directly disseminated this protected information to its affiliates and partners, and also integrated it into its facial scanning technology, for its own benefit and to her detriment. FAC ¶¶ 54-65.

JJCI does not engage in a Restatement § 221 analysis to support the application of New Jersey law.[26] Indeed, "[t]here is a long line of cases in this Circuit holding that a consumer's home state law should apply to transactions that bear no relationship to New Jersey other than the location of the defendant's headquarters." *Feldman v. Mercedes-Benz United States, LLC*, No. 11-00984, 2012 WL 6596830, at *7 (D.N.J. Dec. 18, 2012) (citations and quotations omitted, cleaned up). Since Melzer has pled an unjust enrichment claim under Illinois law, the Court should deny the motion or, in the alternative, defer any ruling until it determines choice of law. *Prudential Ins. Co. of Am. v. Bank of Am.*, 14 F. Supp. 3d 591, 611 (D.N.J. 2014) (finding choice of law was premature to decide on a motion to dismiss) (citing cases).

[26] *Gray*, 22 F. Supp. 3d at 381 (evaluating choice of law for unjust enrichment claims under § 221(2)); *Montich*, 849 F. Supp. 2d at 461 (same).

CONCLUSION

For the forgoing reasons, JJCI's motion to dismiss the FAC should be denied, or in the alternative, leave to amend be granted to cure any pleading deficiencies identified by the Court. *See Shane v. Fauver*, 213 F.3d 113, 117 (3d Cir. 2000) (dismissal without leave to amend is justified only on the grounds of bad faith, undue delay, prejudice, or futility).

Dated: October 27, 2022

/s/ Matthew R. Mendelsohn

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IN THE UNITED STATES DISTICT COURT
FOR THE DISTRICT OF NEW JERSEY

HELENE MELZER individually and on behalf of all those similarly situated,

Plaintiff,

v.

JOHNSON & JOHNSON CONSUMER INC.,

Defendant.

No. 3:22−CV−03149 −MAS−TJB

DECLARATION OF MATTHEW R. MENDELSOHN

I, Matthew R. Mendelsohn, declare under 28 U.S.C. § 1746(2) that the following is true and correct:

1. I am a partner in the law firm of Mazie Slater Katz & Freeman, LLC ("Mazie Slater") and counsel for Plaintiff in the above-captioned action. I respectfully submit this Declaration in Support of Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss the First Amended Class Action Complaint.

2. Attached as Exhibit A is a true and correct copy of the Order Denying Motion To Dismiss entered in *Powell v. Shiseido*, 21-cv-02295 (C.D. Ill. Aug. 22, 2022). ECF. No. 18.

Under 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2022

/s/ Matthew R. Mendelsohn
MATTHEW R. MENDELSOHN

EXHIBIT A

E-FILED
Monday, 22 August, 2022 09:18:27 AM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

GEORGE R. POWELL,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 21-CV-2295**
	)	
SHISEIDO AMERICAS CORPORATION,	)	
	)	
	)	
Defendant.	)	

ORDER

Plaintiff, George R. Powell, filed a putative class action Complaint (#1-1) in the circuit court of Vermilion County, Illinois. In the Complaint, Plaintiff alleges that Defendant, Shiseido Americas Corporation, violated sections 15(a) and 15(b) of the Illinois Biometric Information Privacy Act ("BIPA"). 740 Ill. Comp. Stat. 14/1 et seq. Defendant removed (#1) the matter to this court on November 30, 2021.

Presently before the court are Defendant's Motion to Strike Class Allegations (#6) and Motion to Dismiss (#7). Plaintiff has filed Responses (#10, #11) to each Motion, and Defendant has filed Replies (#14, #17). The case is currently stayed pending a ruling on the outstanding motions. For the reasons set forth below, Defendant's Motion to Strike Class Allegations (#6) and Motion to Dismiss (#7) are DENIED.

BACKGROUND

The following facts are taken from the allegations in Plaintiff's Complaint, which, for the purposes of addressing Defendant's Motion to Dismiss, the court accepts as true. See *Alam v. Miller Brewing Co.*, 709 F.3d 662, 665–66 (7th Cir. 2013). Moreover, all reasonable inferences are drawn in Plaintiff's favor at this stage of the proceedings. *League of Women Voters of Chicago v. City of Chicago*, 757 F.3d 722, 724 (7th Cir. 2014).

Likewise, "where, as here, a defendant attempts to preemptively strike class allegations on the face of the complaint prior to the plaintiff's motion for class certification and before discovery has been conducted, the court accepts the plaintiff's allegations supporting class certification as true." *Drake v. Mirand Response Sys., Inc.*, 2020 WL 4218335, at *2 (S.D. Ind. July 22, 2020).

Defendant is a global beauty supply company that, among other things, sells makeup products on various websites. Some of Defendant's websites offer a virtual try-on tool ("VTO") to consumers visiting the site. VTO is offered on at least four of Defendant's websites: bareminerals.com, narscosmetics.com, lauramercier.com, and cledepeaubeaute.com. When a consumer views a specific makeup product for which VTO is available, the websites present a button beneath the image of the product, labeled "Try On," "Try It On," or "Try Now."

When a consumer clicks one of those buttons, they are taken to the VTO page, where they can use the camera on their computer or phone to display a real-time photograph of themselves, or, depending on the specific website, upload a previously saved photograph. Once an image is displayed, VTO automatically overlays the

selected makeup product on the image of the consumer's face. The consumer has the option of downloading or being e-mailed the resulting image.

VTO "is powered by an application called 'YouCam Makeup.'" The application operates by "capturing the facial geometry of the users' photos," regardless of whether the consumer uploaded a photo or captured a live image via camera feed. The Complaint further alleges: "According to the developer of YouCam Makeup, the application uses 'proprietary AgileFace® technology to deliver ultra-accurate face tracking' and 'precise makeup product application that stays in the correct position with head movements, allowing [the user] to examine the look and see the tutorials from multiple angles.'" The YouCam Makeup application utilizes 100 points on the face for facial recognition and skin-tone matching.

The Complaint alleges that Defendant does not inform consumers using VTO that it is capturing or collecting biometric data, nor does it inform them as to the purpose or length of time for which it stores such data. The Complaint further alleges that Defendant does not make publicly available any written policy relating to biometric data. Finally, the Complaint alleges: "Upon information and belief, Defendant has not developed a written policy establishing retention schedules and guidelines for permanently destroying consumers' biometrics and does not destroy such data within the timeframes established under BIPA."

Plaintiff is "an accomplished entertainer who regularly performs in drag shows." Beginning around late-February 2021, Plaintiff visited bareminerals.com to search for makeup products. He visited the website and used VTO approximately six times. The Complaint alleges:

> "32. Each time [Plaintiff] used the bareMineral Virtual Try On tool, Defendant captured and collected his facial geometry.
>
> 33. Upon information and belief, Defendant also stored his facial geometry thereafter.

Plaintiff was never informed in writing that the scans of his facial geometry were being captured, collected, or stored. Nor was he informed as to the purpose or length of time for which the data would be collected, stored, or used. Plaintiff does not know whether Defendant has destroyed or ever will destroy the biometric data collected from him.

In his Complaint, Plaintiff defines his proposed class as follows:

> All persons whose biometric identifiers were captured by Defendant through use of the Virtual Try On tool on Defendant's websites, including bareminerals.com, narscosmetics.com, lauramercier.com, and cledepeaubeaute.com, while residing in Illinois from five years preceding the date of the filing of this action to the present.

Plaintiff alleges that, upon information and belief, there would be more than 40 class members, such that individual joinder would be impractical. Plaintiff further alleges that certain questions of fact—such as those regarding Defendant's practices with respect to biometric data—and questions of law—such as whether those practices violate BIPA—predominate over any individualized questions.

Plaintiff's Complaint alleges two violations of BIPA on Defendant's part. In Count I, Plaintiff alleges that Defendant violated § 15(b) of BIPA in that it failed to inform in writing and obtain a written release from consumers prior to capturing, collecting, or storing biometric identifiers. See 740 Ill. Comp. Stat. 14/15(b). In Count II, Plaintiff alleges that Defendant violated § 15(a) of BIPA in that it possessed biometric identifiers and failed to develop and make publicly available a written policy for retention and destruction thereof. See *Id*. § 15(a).

ANALYSIS

In order to survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 545. In ruling upon a motion to dismiss, the court must draw all reasonable inferences in favor of the plaintiff but need not accept as true any legal assertions, threadbare recitals of the elements of a cause of action, or conclusory statements. See *Iqbal*, 556 U.S. at 678.

This case is in federal district court pursuant to 28 U.S.C. § 1332(d)(2), which provides the court with original jurisdiction over class actions where there is minimal diversity and the total amount in controversy exceed $5 million. Where federal jurisdiction is based upon diversity of citizenship, the substantive rights of the parties

are governed by state law. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The parties do not dispute that Illinois law governs. This court must therefore apply the law as the Supreme Court of Illinois would apply it to the issues presented. See *Brunswick Leasing Corp. v. Wis. Cent., Ltd.*, 136 F.3d 521, 527 (7th Cir. 1998).

BIPA

Section 15(a) of BIPA mandates that any private entity "in possession of biometric identifiers or biometric information" develop a written policy establishing a retention and destruction schedule for that data and make said written policy available to the public. 740 Ill. Comp. Stat. 14/15(a). Section 15(b) of BIPA mandates that no private entity may "collect, capture, purchase, receive through trade, or otherwise obtain" a person's biometric identifiers or information without (1) informing the person in writing that the data is being collected or stored, (2) informing the person of the purpose and length of time for which the data will be stored, and (3) obtaining a written release from the person. *Id.* § 15(b). The definition of "biometric identifier" provided in BIPA includes "face geometry." *Id.* § 10.

BIPA does not define the terms "possession," "collect," or "capture" as used in §§ 15(a) and 15(b). The Illinois Supreme Court has made clear that undefined statutory terms must be given their popularly understood meanings, or, where appropriate, their "settled legal meaning." *Rosenbach v. Six Flag Entertainment Corporation*, 129 N.E.3d 1197, 1205 (Ill. 2019); see also *People v. Chapman*, 965 N.E.2d 1119, 1126 (Ill. 2012) ("When a statute contains a term that is not specifically defined, it is entirely appropriate to look to the dictionary to ascertain the plain and ordinary meaning of the term.").

The Illinois Supreme Court has held that "possession, as ordinarily understood, occurs when a person has or takes control of the subject property and holds the property at his or her disposal." *People v. Ward*, 830 N.E.2d 556, 560 (Ill. 2005). "The ordinary meaning of possession does not contemplate exclusive control, and nothing in the BIPA indicates that the ordinary definition of possession does not apply." *Heard v. Becton, Dickinson, & Co.*, 440 F.Supp.3d 960, 968 (N.D. Ill. 2020).

As most relevant to BIPA, the term "capture" can mean "to record in a permanent file (as in a computer)." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/capture (last visited Aug. 19, 2022); *Watson v. Legacy Healthcare Fin. Servs.*, —N.E.3d—, 2021 WL 5917935, *7 (Ill. App. Ct. Dec. 15, 2021) (applying that definition in BIPA context). "Collect" may be defined as "to bring together into one body or place" or "to gather or exact from a number of persons or sources." https://www.merriam-webster.com/dictionary/collect (last visited Aug. 19, 2022); *Watson*, 2021 WL 5917935, *8 (applying the "gather" definition).

Defendant's Motion to Dismiss

In its Motion to Dismiss, Defendant contends that Plaintiff failed to plausibly allege that Defendant captured or collected (pertaining to Count I, an alleged violation of § 15(b)) or possessed (pertaining to Count II, an alleged violation of § 15(a)) Plaintiff's facial geometry. Thus, Defendant argues, Plaintiff failed to adequately allege that Defendant was even subject to BIPA's requirements.

Defendant raises a number of distinct arguments in support of those central claims. The court will begin by addressing those arguments that apply to both Count I and Count II and will then proceed to address the count-specific claims.

Defendant first argues that Plaintiff's allegations, on both counts, "do nothing more than parrot the statutory language of BIPA." Defendant characterizes Plaintiff's Complaint as "bare-bones" and "formulaic," and decries "[t]he absence of any factual content" relating to Plaintiff's personal use of VTO on Defendant's website. Defendant maintains that these shortcomings are "plainly evident" in Paragraphs 32 and 33 of the Complaint, wherein Plaintiff alleges that Defendant "captured and collected" his facial geometry and, by information and belief, stored it thereafter.

Defendant is correct in at least this sense: If Paragraphs 32 and 33 were the only substantive paragraphs of the Complaint, it would be insufficient. But Defendant seems to neglect the remainder of the Complaint in making its argument. The Complaint alleges in relatively thorough detail the process by which a visitor to Defendant's websites would find and make use of VTO, as well as the process by which VTO works, including the creation of a detailed geometric map of the user's face. Where the Complaint alleges that Plaintiff used VTO on Defendant's website, it can be inferred that his experience aligned with that detailed earlier in the Complaint. The paragraphs cited by Defendant as conclusory *are* conclusory, because they are conclusions drawn from the preceding factual allegations.

Defendant next argues—again as to both counts—that Plaintiff has "pleaded himself out of court" because his allegations "affirmatively demonstrate" that a third-party developer, rather than Defendant, "may have been solely responsible" for the alleged collection and possession of biometric data.

Where a plaintiff provides additional facts in his complaint, he cannot prevent a defendant from suggesting that those same facts undermine his claim for relief. *McReady v. eBay, Inc.*, 453 F.3d 882, 888 (7th Cir. 2006). A plaintiff can "plead himself out of court by pleading facts that show that he has no legal claim." *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011). In other words, "a plaintiff pleads himself out of court when it would be necessary to contradict the complaint in order to prevail on the merits." *Epstein v. Epstein*, 843 F.3d 1147, 1150 (7th Cir. 2016).

Defendant accurately points out that Plaintiff alleged that VTO is "powered by" an application developed and marketed by a third party. Defendant's theory, it seems, is that the Complaint leaves open the possibility that the third party, through its application, collected (and thus possessed) the biometric identifiers while Defendant itself was completely walled off from the process, such that the third party "may have been solely responsible" for the conduct that violated BIPA.

Defendant's own use of the phrase "may have been" indicates that Plaintiff has not necessarily contradicted his own claim. See *id*. Is it possible that the application was implemented on Defendant's website in such a way that the third party, and only that third party, captured, collected, and possessed the facial geometry in question? Perhaps.

But that is far from a necessary conclusion to be drawn from Plaintiff's allegations. Plaintiff has not pled himself out of court.

Capture/Collection in Violation of § 15(b) (Count I)

A violation of § 15(b) of BIPA requires "an active step to 'collect, capture, purchase, receive through trade, or otherwise obtain' biometric data." *Heard*, 440 F. Supp. 3d at 966 (quoting 740 Ill. Comp. Stat. 14/15(b)). Defendant insists that Plaintiff has failed to plausibly allege that Defendant was "actually involved" in the capture or collection of biometric data or that it engaged in any affirmative act of collection.

In *Heard*, the plaintiff alleged that his biometric data had been collected through an automated medication dispensing system manufactured by the defendant, which required a fingerprint for access. *Id*. at 962. The plaintiff, a respiratory therapist, had worked with the device at multiple hospitals. *Id*. He alleged that the defendant had violated § 15(b). After determining that a § 15(b) violation required an "active step," the *Heard* court concluded that the plaintiff had not adequately pled that the defendant "took any such step." *Id*. at 966.

Other cases have been decided on the same basis, if not always invoking the "active step" language. In *Namuwonge v. Kronos, Inc*., 418 F. Supp. 3d 729 (N.D. Ill. 2019), the plaintiff alleged that Kronos provided her employer, Brookdale Senior Living, Inc., with an employee timekeeping system that operated via scanned fingerprint. The court dismissed the plaintiff's § 15(b) claim against Kronos, pointing out that it was "Brookdale [that] collected the fingerprints using a system that Kronos supplied to Brookdale." *Id*. at 286.

Similarly, in *Bernal v. ADP, LLC*, 2019 WL 5028609 (Cook Cnty. Ill. Cir. Ct. Aug. 23, 2019), a case relied upon by the *Namuwonge* court, the plaintiff was required by his employer to clock in and clock out using biometric identifiers, through technology provided by the defendant. The circuit court dismissed the § 15(b) claim, reasoning that the Illinois legislature did not intend for that subsection to apply to third-party entities and that "there is nothing to suggest that BIPA was intended to apply to situations wherein the parties are without any direct relationship." *Id*. at *1.

Finally, in *Jacobs v. Hanwha Techwin America, Inc*., 2021 WL 3172967 (N.D. Ill. July 27, 2021), the defendant was the manufacturer of security cameras capable of performing facial recognition. The plaintiff alleged that multiple such cameras were installed at a T.J. Maxx store that he visited. *Id*. at *1. Like the *Heard* court, the *Jacobs* court determined that "an active step to collect [or] capture" was required under § 15(b). *Id*. at *2. The court dismissed the claim, concluding: "[A] complete reading of the complaint makes clear that defendant is merely a third-party technology provider (that is, merely provided the cameras), and that the active collector and processor of the data is T.J. Maxx." *Id*. at *3.

Defendant relies heavily on each of the above cases in ostensible support for its claim that Plaintiff has not plausibly alleged any active step to collect biometric data. However, clearly, the facts in each of those cases are diametrically opposed to the facts in this case.

Defendant is not a developer or manufacturer of biometric-data-collecting technology who sells that technology to clients. Defendant *is* the client.

The allegations in Plaintiff's Complaint, taken as true, establish that Defendant procured the YouCam Makeup application, placed it on its bareminerals.com website under the name Virtual Try On, and put buttons or links to that application on pages for a number of its makeup products, thus directing website users to the application. Defendant refers in its Motion to "the mere ***passive*** activity of making a VTO feature available on the Website." (Emphases in original). But simply calling its own activities "passive" does not make them so. In fact, it ignores the multiple affirmative steps necessary for Defendant to bring VTO to its customers.

Defendant does not seem to make an argument that VTO or the YouCam Makeup application does not capture or collect biometric identifiers. Rather, its argument seems limited to the contention that Defendant itself cannot be said to have actively participated in the collection or capture. Indeed, the Complaint alleges that the technology on Defendant's websites creates a 100-point geometric map of the user's face. Defendant does not dispute that such a map amounts to "face geometry," which is included in BIPA's definition of biometric identifiers. See 740 Ill. Comp. Stat. 14/10. Plaintiff's allegation that such a map was created through Defendant's website amounts to a plausible allegation that Defendant actively captured and/or collected biometric identifiers.

Possession in Violation of § 15(a) (Count II)

The parties agree that in order to be in "possession" of biometric data under BIPA, one must have control over the data or otherwise have it at their disposal. See *Heard*, 440 F. Supp. 3d at 968 (citing *Ward*, 830 N.E.2d at 560).

Defendant points out that, in Paragraph 33 of the Complaint, Plaintiff alleges that "Upon information and belief, Defendant also stored [Plaintiff's] facial geometry." Defendant calls this allegation "rank speculation," and cites to *Heard* for the assertion that a plaintiff may not "plead possession solely upon 'information and belief.'"

Initially, *Heard* does not support that proposition. In fact, while the *Heard* court ultimately found the plaintiff's pleading insufficient, it affirmed that "'[t]he *Twombly* plausibility standard . . . does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant.'" *Id*. at 969 (quoting *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)). More importantly, Plaintiff's allegation with respect to Defendant's purported *storage* of biometric data has no bearing on its *possession* of that data, as BIPA itself makes clear that those are distinct concepts. See 740 Ill. Comp. Stat. 14/15(e)(1) (requiring entities in "possession" of biometric data to "store" the data in prescribed fashion). Indeed, even if Defendant disposed of the data, it must have first held the data at its disposal.

In any event, Plaintiff's allegations as to possession go beyond information and belief. As discussed above, Plaintiff's biometric identifiers were captured through technology placed on Defendant's websites. At this stage of the proceedings, it can be

plausibly inferred that Defendant controls or holds at its disposal data generated at its own websites. See *Taha v. Int'l Bhd. of Teamsters, Loc. 781*, 947 F.3d 464, 469 (7th Cir. 2020) (observing that the court must "construe the complaint in the light most favorable to plaintiff, accept all well-pleaded facts as true, and draw reasonable inferences in plaintiff's favor.").

Accordingly, Defendant's Motion to Dismiss (#7) is DENIED.

Defendant's Motion to Strike Class Allegations

In its Motion to Strike Class Allegations (#6), Defendant seeks to strike allegations relating to three other websites owned by Defendant—those for Nars Cosmetics, Laura Mercier, and Cle de Peau—which Plaintiff alleged also feature VTO. Defendant points out that Plaintiff never visited those websites and thus never suffered any injury related to them. Accordingly, Defendant argues that Plaintiff "does not have standing to bring claims for BIPA violations in connection with" those websites. Without standing to himself raise claims concerning those other websites, Defendant contends, Plaintiff cannot represent a class that includes those who suffered injury through those websites.

Defendant additionally argues that Plaintiff's purported lack of standing, while itself a basis for striking the class allegations, also renders him unable to satisfy the class requirements of Federal Rules of Civil Procedure 23(a) and (b). Specifically, Defendant claims that Plaintiff cannot meet the "typicality" and "adequacy of representation" requirements. See Fed. Rs. Civ. P 23(a)(3) & (a)(4).

Motions to strike class allegations are not analyzed under Rule 12(f), but under Rule 23. *Buonomo v. Optimum Outcomes, Inc.*, 301 F.R.D. 292, 295 (N.D. Ill. 2014). Such motions are appropriate at the pleading stage where "it is clear from the pleadings that the class claims are defective. But if the issues concerning class certification are factual, requiring discovery to determine whether certification is appropriate, a motion to strike class allegations at the pleading stage is premature." *Garrard v. Rust-Oleum Corp.*, 575 F. Supp. 3d 995, 999 (N.D. Ill. 2021).

To be sure, Defendant has identified *a* difference between Plaintiff and others in the class he seeks to represent. Plaintiff would have suffered his injury while visiting Defendant's bareminerals.com website, while others in the class would have suffered their injuries at websites never even visited by Plaintiff. Still, the injuries suffered by the class members, including Plaintiff, would otherwise be remarkably similar. Namely, all would have had their facial geometry captured by Defendant while utilizing the VTO feature at one of Defendant's websites.

As the First Circuit has explained:

> [T]he question of standing is not: Are there differences between the claims of the class members and those of the class representative? Rather, the pertinent question is: Are the differences that do exist the type that leave the class representative with an insufficient personal stake in the adjudication of the class members' claims?

In re Asacol Antitrust Litig., 907 F.3d 42, 49 (1st Cir. 2018). The *Asacol* decision was itself based in large part on the Supreme Court's decision in *Gratz v. Bollinger*, 539 U.S. 244 (2003). There the Court rejected the notion that minor differences between a named plaintiff and the class he seeks to represent deprive that plaintiff of Article III standing.

Id. at 245-46. In that case, the Court found that the plaintiff had standing to challenge a university admissions process where he had sought to transfer into the university while the class would also include freshman applicants, given that the processes for evaluation for the different groups were nearly identical. *Id*.

The Seventh Circuit, for its part, has rejected the very notion of "standing to bring a class action" as a concept distinct from standing itself. *Arreola v. Godinez*, 546 F.3d 788, 795 (7th Cir. 2008) (citing *Payton v. County of Kane*, 308 F.3d 673, 677 (7th Cir. 2002)). It has stated that such a phrase "conflat[es] the standing inquiry with the inquiry under Rule 23 about the suitability of a plaintiff to serve as a class representative[.]" *Payton*, 308 F.3d at 677. The court has concluded: "In our view, it is best to confine the term 'standing' to the Article III inquiry and thus to keep it separate from the plaintiff's entitlement to relief or her ability to satisfy the Rule 23 criteria." *Arreola*, 546 F.3d at 795; see also *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 967 (9th Cir. 2019) ("[O]nce the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met." (cleaned up)).

It is undisputed that Plaintiff has standing—what Defendant might call individual standing—to bring a claim against Defendant. Defendant conceded as much in its Notice of Removal. See Docket Entry #1 ("Plaintiff Has Alleged Concrete Material Harms Sufficient to Establish Article III Standing."). If further Article III analysis is required beyond that, it is sufficient to observe that the differences between Plaintiff and the potential class are not of a type that would leave Plaintiff without a personal

stake in the adjudication of the claims. See *In re Asacol Antitrust Litig.*, 907 F.3d at 49. Indeed, the injury of Plaintiff or any class member—again, the capturing of biometric identifiers through VTO—would be identical regardless of through which website the person accessed VTO. See *Gratz*, 539 U.S. at 246.

Still, it remains to be considered whether, at this early stage, it is clear from the pleadings that Plaintiff cannot satisfy the Rule 23 requirements. Defendant contends that the same differences between Plaintiff and other class members—the use of different websites—also defeats typicality under Rule 23(a)(3) and the adequacy of representation under Rule 23(a)(4).

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). A claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and [named plaintiff's] claims are based on the same legal theory." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). Some factual variations will not defeat typicality, as long as "the named representative's claims have the same essential characteristics as the claims of the class at large." *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006).

According to the Complaint, there is no consequential difference between the VTO offered on the bareminerals.com website and on any of Defendant's other websites.

Plaintiff's claim is based on essentially the same course of conduct as would the claims of any class members who visited the other websites, and the legal theory under BIPA would be identical. Thus, the differences identified by Defendant do not defeat typicality.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "In order to be an adequate representative, the named plaintiff must 'be part of the class and possess the same interest and suffer the same injury as the class members.'" *Conrad v. Boiron, Inc.*, 869 F.3d 536, 539 (7th Cir. 2017) (quoting *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997)).

Defendant asserts that adequacy is lacking because "Plaintiff is plainly not a member of any aggrieved class of individuals who used the Nars Cosmetics, Laura Mercier, and Cle de Peau websites." Of course, if the proposed class was defined as individuals who used those three websites, Defendant would once again be correct. But the proposed class is defined, in part, as "All persons whose biometric identifiers were captured by Defendant through use of the Virtual Try On tool on Defendant's websites, including bareminerals.com, narscosmetics.com, lauramercier.com, and cledepeaubeaute.com[.]" Plaintiff clearly *is* a member of this class.

Finally, Defendant makes a cursory assertion that Plaintiff cannot meet the commonality requirement (see Fed. R. Civ. P. 23(a)(2)) or any one of the Rule 23(b) requirements (see Fed. R. Civ. P. 23(b)). However, Defendant's only "argument" on

those points is a reference to its earlier contention that Plaintiff lacks standing. That argument having already been rejected, the court need not conduct any further analysis.

In sum, the court finds it is not "clear from the pleadings that the class claims are defective." *Garrard*, 575 F. Supp. 3d at 999. Accordingly, Defendant's Motion to Strike Class Allegations (#6) is DENIED.

IT IS THEREFORE ORDERED THAT:

(1) Defendant's Motion to Dismiss (#7) is DENIED.

(2) Defendant's Motion to Strike Class Allegations (#6) is DENIED.

(3) The stay is lifted and the matter is referred to the Magistrate Judge for further proceedings.

ENTERED this 22nd day of August, 2022.

s/Colin Stirling Bruce
COLIN S. BRUCE
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTICT COURT
FOR THE DISTRICT OF NEW JERSEY

HELENE MELZER individually and on behalf of all those similarly situated,

Plaintiff,

v.

JOHNSON & JOHNSON CONSUMER INC.,

Defendant.

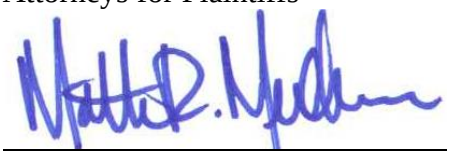
No. 3:22−CV−03149 −MAS−TJB

CERTIFICATE OF SERVICE

I, Matthew R. Mendelsohn, certify that on the below date, copies of Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss the First Amended Class Action Complaint; Declaration of Matthew R. Mendelsohn; and this Certificate of Service were filed with the United States District Court for the District of New Jersey and served on all counsel of record through the electronic filing service system. A courtesy copy was also sent out for service via Lawyers Service on:

Honorable Michael A. Shipp, U.S.D.J.
United States District Court
402 East State Street, Room 5000
Trenton, New Jersey 08608

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Attorneys for Plaintiffs



MATTHEW R. MENDELSOHN

Dated: October 27, 2022