UNITED STATES DISTRICT 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*.	CIVIL NO. 22-cv-03149 (MAS) (RLS) Filed Electronically **Motion Day: December 5, 2022** **ORAL ARGUMENT REQUESTED**

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

MCCARTER & ENGLISH LLP
David R. Kott, Esq.
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444

SIDLEY AUSTIN LLP
Kathleen L. Carlson, Esq. (admitted *pro hac vice*)
Lawrence P. Fogel, Esq. (admitted *pro hac vice*)
Abigail B. Molitor, Esq. (admitted *pro hac vice*)
Andrew F. Rodheim, Esq. (admitted *pro hac vice*)
One South Dearborn
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Defendant Johnson & Johnson Consumer Inc.

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. The Amended Complaint Must Be Dismissed Because Plaintiff Fails To Sufficiently Allege That Skin360 Collects Biometric Identifiers. 2

II. Plaintiff Fails To Sufficiently Allege That JJCI Disclosed Her Biometric Data. 7

III. Plaintiff Fails To Sufficiently Allege That JJCI Sold, Leased, Traded, Or Otherwise Profited From Plaintiff's Biometric Data. 11

IV. Plaintiff Fails To State An Unjust Enrichment Claim. 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Page(s)**

ACLU v. Clearview AI, Inc.,
No. 20-CH-4353, 2021 WL 4164452 (Ill. Cir. Ct. Aug. 27, 2021) 5

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....3, 4

Beauvil v. McKeon,
No. 18-991, 2018 WL 4204447 (D.N.J. Sept. 4, 2018) 6

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....3

Carpenter v. McDonald's Corp.,
580 F.3d 512 (N.D. Ill. 2022) 2

Certain Underwriters at Lloyd's, London v. U-Line Corp.,
No. 13-3203, 2013 WL 5503672 (D.N.J. Oct. 1, 2103) 3, 7

Cleary v. Philip Morris Inc.,
656 F.3d 511 (7th Cir. 2011) 15

Columbia Trading Corp. v. Green Elecs., LLC,
No. 17-1309, 2018 WL 10150930 (D.N.J. July 27, 2018) 8

Concepcion v. Silver Line Buildings Prods.,
No. 21-17920, 2022 WL 1748064 (D.N.J. May 31, 2022).....3

Cothron v. White Castle System,
467 F. Supp. 3d 604 (N.D. Ill. 2020) 9, 11

Donachy v. Intrawest U.S. Holdings, Inc.,
No. 10-4038, 2012 WL 869007 (D.N.J. Mar. 14, 2012) 14

Figueroa v. Kronos Inc.,
454 F. Supp. 3d 772 (N.D. Ill. 2020) 9, 11

Flores v. Motorola Solutions, Inc.,
No. 20-cv-01128, 2021 WL 232627 (N.D. Ill. Jan. 8, 2021).....12

Hazlitt v. Apple, Inc.,
500 F. Supp. 3d 738 (S.D. Ill. 2020).....12

Heard v. Becton Dickinson & Co.,
440 F. Supp. 3d 970 (N.D. Ill. 2020) 8

Hogan v. Amazon.com, Inc.,
No. 21 C 3169, 2022 WL 952763 (N.D. Ill Mar. 30, 2022) 14, 15

Horn v. Method Prods., PBC,
No. 21 C 5621, 2022 WL 1090887 (N.D. Ill. Apr. 12, 2022).....8, 11

In re Clearview AI, Inc. Consumer Priv. Litig.,
No. 21-cv-135, 2022 WL 252702 (N.D. Ill. Jan. 27, 2022).....14

In re Burling Coat Factory Sec. Litig.,
114 F.3d 1410 (3d Cir. 1997).....9

In re Facebook Biometric Info. Privacy Litig.,
185 F. Supp. 3d 1155 (N.D. Cal. 2016) 5

Jacobs v. Hanwha Techwin Am., Inc.,
No. 21 C 866, 2021 WL 3172967 (N.D. Ill. July 27, 2021) 3

Karling v. Samsara Inc.,
No. 22 C 295, 2022 WL 2663513 (N.D. Ill. July. 11, 2022) 5, 13

Kukovec v. Estee Lauder Cos.,
No. 22 CV 1988, 2022 WL 16744196 (N.D. Ill. Nov. 7, 2022) 6

Mahmood v. Berbix, Inc.,
No. 22 C 2456, 2022 WL 3684636 (N.D. Ill. Aug. 25, 2022).....9

Mitchell v. Walters,
No. CIV.A. 10-1061, 2010 WL 3614210 (D.N.J. Sept. 8, 2010) 4, 8

Monroy v. Shutterfly, Inc.,
No. 16 C 10984, 2017 WL 4099846 (N.D. Ill. Sept. 15, 2017).....5

N.J. Second Amendment Soc'y v. N.J. Press Ass'n,
No. 20-5228, 2021 WL 4822050 (D.N.J. Oct. 15, 2021) 9

Namuwonge v. Kronos, Inc.,
418 F. Supp. 3d 279 (N.D. Ill. 2019) 8, 11

Naughton v. Amazon.com, Inc.,
No. 20-cv-6485, 2022 WL 19324 (N.D. Ill. Jan. 3, 2022).....9

Pittman v. Saint Francis Hosp.,
No. 15-3371, 2015 WL 6739124 (D.N.J. Nov. 4, 2015) 15

Powell v. Shiseido Americas Corp.,
No. 21-cv-2295 (C.D. Ill. Aug. 22, 2022).....6

Rivera v. Google Inc.,
238 F. Supp. 3d 1088 (N.D. Ill. 2017) 5

Roberson v. Maestro Consulting Services,
507 F. Supp. 3d 998 (S.D. Ill. 2020) 3

Rosenbach v. Six Flags Entertainment Corp,
129 N.E.3d 1197 (Ill. 2019) 3

Sharma v. Gupta,
No. 20-3446, 2022 WL 970544 (D.N.J. Mar. 31, 2022) 13

Sosa v. Onfido, Inc.,
No. 20-cv-4247, 2022 WL 1211506 (N.D. Ill. Apr. 25, 2022) 5

Vance v. Int'l Bus. Machines Corp.,
No. 20-577, 2020 WL 5530134 (N.D. Ill. Sept. 15, 2020) 2

Vance v. Microsoft Corp.,
525 F. Supp. 3d 1287 (W.D. Wash. 2021) 5

Vance v. Microsoft Corp.,
534 F. Supp. 3d 1301 (W.D. Wash. 2021) 12, 13

Vigil v. Take-Two Interactive Software, Inc.,
235 F. Supp. 3d 499 (S.D.N.Y. 2017) 12

Wilk v. Brainshark, Inc.,
No. 21-cv-4794, 2022 WL 4482842 (N.D. Ill. Sept. 27, 2022) 6

Wise v. Ring LLC,
No. C20-1298, 2022 WL 3083068 (W.D. Wash. Aug. 3, 2022) 5

Wordlaw v. Enter. Leasing Co. of Chi.,
No. 20 CV 3200, 2020 WL 7490414 (N.D. Ill. Dec. 21, 2020) 9

Statutes

740 ILCS 14/10 4

740 ILCS 14/15 ..... *passim*

Other Authorities

Fed. R. Evid. 407 7

INTRODUCTION

Plaintiff's Opposition Brief confirms that this lawsuit is a misguided attempt to bring a BIPA claim for conduct the statute was never intended to regulate. As the Opposition concedes, to be a "biometric identifier" for purposes of BIPA, the data collected—here, a facial image—must be capable of being used to identify an individual. The Opposition, however, fails to identify any factual support in the Amended Complaint for Plaintiff's single-sentence allegation that Skin360's facial scans "can be used to identify." FAC ¶ 37. Instead, Plaintiff cites to inapposite cases where either the very purpose of the technology at issue was to make identification, or where the court did not have occasion to consider the argument JJCI makes here. *See* pp. 5–6 & n.3, *infra*. In short, nothing in the Opposition changes the fact that the Amended Complaint includes no well-pled allegations that Skin360—technology used to assess a user's skin condition and offer recommendations for skincare products—collects facial scans capable of identifying a user. This is fatal to all of Plaintiff's claims.

Plaintiff's arguments specific to her Sections 15(d) and (c) claims fare no better. Plaintiff pleads no support for her conclusory allegations that JJCI disclosed or disseminated biometric data to third parties in violation of Section 15(d), or shared biometric data with third parties in exchange for something of value in violation of Section 15(c). So instead, Plaintiff proposes a strained reading of those provisions whereby any entity that uses or profits from technology that uses biometric data is subject to liability under BIPA. This expansive interpretation finds no support in the statute or case law and should be rejected. And because Plaintiff's BIPA claim fails, her unjust enrichment claim must also be dismissed.

ARGUMENT

I. The Amended Complaint Must Be Dismissed Because Plaintiff Fails To Sufficiently Allege That Skin360 Collects Biometric Identifiers.

The Opposition stumbles right out of the gate by attacking an argument that JJCI never made. In its Motion to Dismiss, JJCI explained that BIPA's statutory text, structure, surrounding statutory provisions, and legislative purpose make clear that to be a biometric identifier, data must be *capable* of being used to identify. Mot. at 7–11. Plaintiff does not dispute this interpretation of the statute. *See* Opp. at 4 (arguing that a defendant may violate BIPA by collecting information that "*could be used to identify a plaintiff*") (quoting *Carpenter v. McDonald's Corp.*, 580 F.3d 512, 518 n.2 (N.D. Ill. 2022)); *see also id.* at 4–5 (same, citing *Vance v. Int'l Bus. Machines Corp.*, No. 20-577, 2020 WL 5530134, at *5 (N.D. Ill. Sept. 15, 2020)). Instead, Plaintiff misconstrues JJCI's statutory argument, asserting that JJCI seeks to "invent[] [a] statutory condition" that the data collected must *actually be used* by JJCI to identify someone, as opposed to being capable of identifying someone. *Id.* at 2. Plaintiff then spends over eight pages responding to an argument that JJCI has not made (*id.* at 3–11), and thus her argument and lengthy statutory analysis in this regard are simply irrelevant.

Rather, as JJCI explained in its Motion, the Amended Complaint is deficient because it includes no "facts to support its bare allegation that the face scan [performed by Skin360] '*can be used to identify*' an individual." Mot. at 2 (emphasis added); *see also*, *e.g.*, *id*. at 11–12 (arguing Amended Complaint fails to allege "that the skin characteristics evaluated by Skin360 *could be used to identify an individual*" (emphasis added)); *id*. at 12 ("Plaintiff pleads no facts explaining how Skin360's facial scans *can actually identify an individual*." (emphasis added)); *id*. at 13 (allegation deficient because it "says nothing about whether the technology *can actually*

identify an individual" (emphasis added)). While the Opposition attempts to make a case that the Amended Complaint meets this burden, Plaintiff falls woefully short.

Plaintiff first argues that the Amended Complaint "explains in detail over several paragraphs how Skin360 extracts and create[s] a unique identifier in the form of a faceprint." Opp. at 12 (citing FAC ¶¶ 30–40). But Plaintiff does not explain what in Paragraphs 30 through 40 plausibly alleges that the data collected by Skin360 can be used to identify an individual. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see, e.g.*, *Jacobs v. Hanwha Techwin Am., Inc.*, No. 21 C 866, 2021 WL 3172967, at *2–4 (N.D. Ill. July 27, 2021) (citing *Iqbal* and *Twombly* and granting motion to dismiss entire BIPA complaint for failure to allege a plausible claim).[1]

Within these paragraphs is the conclusory allegation that JJCI, through Skin360, "actively collects, captures, obtains, uses, possesses, and stores biometric identifiers and/or biometric information of consumers in Illinois." FAC ¶ 30; *see also id.* ¶ 40. Plaintiff further alleges in a single sentence that "[e]ach face template is unique to an individual and can be used to identify them." *Id.* ¶ 37. But these allegations are void of factual support. *See Concepcion v. Silver Line Buildings Prods.*, No. 21-17920, 2022 WL 1748064, at *2 (D.N.J. May 31, 2022)

[1] Plaintiff's quotation of *Roberson v. Maestro Consulting Services*, 507 F. Supp. 3d 998, 1018 (S.D. Ill. 2020) (Opp. at 12) to purportedly describe the BIPA pleading standard is misplaced. The court was simply describing the Illinois Supreme Court's holding in *Rosenbach v. Six Flags Entertainment Corp*, 129 N.E.3d 1197 (Ill. 2019), that a plaintiff need not allege actual damages to recover under BIPA. There can be no dispute that the *Twombly/Iqbal* plausibility standard applies, and "Rule 8(a) and *Twombly/Iqbal* both require the plaintiff to provide 'some specificity' as to ... how th[e] defendant" acted unlawfully. *Certain Underwriters at Lloyd's, London v. U-Line Corp.*, No. 13-3203, 2013 WL 5503672, at *5 (D.N.J. Oct. 1, 2103).

(Shipp, J.) (explaining that courts must "ignore legal conclusions or factually unsupported accusations that merely state 'the-defendant-unlawfully-harmed-me.'" (quoting *Iqbal*, 556 U.S. at 678)).

The remaining paragraphs Plaintiff points to merely explain how Skin360 works and include no facts supporting the allegation that the data can be used to identify an individual. For example, Plaintiff alleges that Skin360 takes a "180-degree facial scan" in order to "detect, align, and process a consumer's facial image at specific coordinates." FAC ¶ 35. This includes Skin360 processing "skin pixels," identifying "facial attributes," and capturing "facial landmark points." *Id.* ¶¶ 32–33. Put differently, Plaintiff alleges that Skin360 scans "the consumer's facial landmarks and facial geometry" in order to create a "unique digital representation of the face and its measurements." *Id.* ¶ 36. But, as explained in JJCI's Motion, these allegations say nothing about whether Skin360 collects facial scans that can be used to identify an individual. Mot. at 13. Nor does Plaintiff's conclusory allegation that Skin360 captures "unique facial geometry." FAC ¶ 34. That allegation simply copies the language of the definition of "biometric identifier" from BIPA, 740 ILCS 14/10, without considering whether the "facial geometry" can identify the user. *See Mitchell v. Walters*, No. CIV.A. 10-1061, 2010 WL 3614210, at *6 (D.N.J. Sept. 8, 2010) ("The Supreme Court's holdings in *Twombly* and *Iqbal* make clear that pleadings that merely parrot legal standards will not suffice to state a claim to relief.").[2]

In fact, Plaintiff's allegations undermine its claim that Skin360 can be used to identify an individual. Specifically, Plaintiff alleges that the purpose of the technology is to provide

[2] Plaintiff also cites paragraphs 16–17 of the Amended Complaint. Opp. at 12. Those paragraphs say nothing about JJCI or Skin360. They simply allege that it is theoretically possible to capture biometric identifiers from a face scan, and when biometric identifiers are in-fact collected, they can be used to identify an individual.

consumers like Plaintiff with "a personalized at-home skin assessment" and "to diagnose skin health issues, such as dark circles, wrinkles, fine lines, dark spots, and texture, and then recommend[] a skin care regimen consisting of Neutrogena products." FAC ¶ 31; *see also id.* ¶ 39 ("Through the scan of the consumer's unique facial geometry and the face template, Skin360 accurately detects large 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."). In other words, these allegations illustrate that the purpose of Skin360 is not to identify an individual, but to assess a user's skin condition and offer recommendations for relevant products.

This is important, because as JJCI demonstrated in its Motion, other "facial scan" BIPA cases that have survived a motion to dismiss concerned technology where the alleged purpose was to *identify an individual*. Mot. at 15–16.[3] Plaintiff does not disagree with this distinction, instead insisting that "in none of those cases was that fact relevant to the holdings of what constitutes a 'biometric identifier.'" Opp. at 13. But Plaintiff misses the point. JJCI is not arguing that, for technology to collect a "biometric identifier," its purpose must be to collect data used to identify an individual. Rather, the key is that in cases where the plaintiff alleged that the very purpose of the technology was to identify, a plaintiff's (potentially otherwise conclusory)

[3] *See Sosa v. Onfido, Inc.*, No. 20-cv-4247, 2022 WL 1211506, at *1 (N.D. Ill. Apr. 25, 2022); *Monroy v. Shutterfly, Inc.*, No. 16 C 10984, 2017 WL 4099846, at *1 (N.D. Ill. Sept. 15, 2017); *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1158 (N.D. Cal. 2016); *Wise v. Ring LLC*, No. C20-1298, 2022 WL 3083068, at *1, *3 (W.D. Wash. Aug. 3, 2022); *Karling v. Samsara Inc.*, No. 22 C 295, 2022 WL 2663513, at *1 (N.D. Ill. July. 11, 2022); *Vance v. Microsoft Corp.*, 525 F. Supp. 3d 1287, 1290–91 (W.D. Wash. 2021); *Rivera v. Google Inc.*, 238 F. Supp. 3d 1088, 1091 (N.D. Ill. 2017). The same is true in *ACLU v. Clearview AI, Inc.*, No. 20-CH-4353, 2021 WL 4164452 (Ill. Cir. Ct. Aug. 27, 2021) (cited in Opp. at 13 n.15). There, the defendant sold access to technology whereby consumers upload a photo when they "want[] to identify someone." *Id.* at *1.

allegation that a face scan collected by the technology was capable of identifying the user becomes more plausible. Here, by contrast, where even Plaintiff admits that the purpose of Skin360 has *nothing to do with* identifying an individual—but rather, to evaluate skin and recommend products—her conclusory allegations fail to state a claim. *See Beauvil v. McKeon*, No. 18-991, 2018 WL 4204447, at *5 (D.N.J. Sept. 4, 2018) (dismissing complaint lacking "specificity as to when, where, *why*, or how" defendants acted unlawfully (emphasis added)).

Plaintiff's remaining arguments are likewise unavailing. Plaintiff places significant emphasis on another "facial scan" BIPA case, *Powell v. Shiseido Americas Corp.*, No. 21-cv-2295 (C.D. Ill. Aug. 22, 2022) (cited in Opp. at 13–14 & attached as Opp. Ex. A), but that case is inapposite. Unlike here, the defendant in *Powell* did not make—so the court did not have an opportunity to consider—the argument that the plaintiff did not sufficiently allege that the technology actually collected biometric identifiers. As the court expressly observed, "Defendant does not seem to make the argument that VTO or the YouCam Makeup application does not capture or collect biometric identifiers." *Id.* at 12. The same is true for *Kukovec v. Estee Lauder Cos.*, No. 22 CV 1988, 2022 WL 16744196, at *6–7 (N.D. Ill. Nov. 7, 2022), which Plaintiff submitted with her Notice of Supplemental Authority: the defendant did not argue that the plaintiff failed to sufficiently allege that the try-on tool captured data that was capable of identifying the user. *See* Memo. of Law in Support of Its Mot. to Dismiss Pl.'s Compl. at 12–14, *Kukovec*, No. 22-cv-01988 (N.D. Ill. May 27, 2022), ECF No. 31. And in *Wilk v. Brainshark, Inc.*, No. 21-cv-4794, 2022 WL 4482842, at *4 (N.D. Ill. Sept. 27, 2022) (cited in Opp. at 13), the court rejected the argument that a "video of a face" cannot fall within BIPA's definition of biometric identifier, but like *Powell* and *Kukovec*, the court did not consider the sufficiency of the plaintiff's allegations regarding the technology's ability to use data to identify a user.

Finally, Plaintiff points to her allegations about a *different company*, Clinique Laboratories, LLC, marketing a *different product* that allegedly uses the same platform as JJCI for its virtual skin analysis application. Opp. at 15 (citing FAC ¶¶ 43–45). But how a different company chooses to manage its product and potential litigation risk[4] says nothing about whether Skin360 facial scans are capable of identifying a user and constitute biometric identifiers. Moreover, as Plaintiff acknowledges (Opp. at 15), Clinique's Notice and Consent and privacy policy do not mean that Clinique actually possesses or collects biometric data. As Plaintiff notes, Clinique's "Notice and Consent" merely seeks consent that Clinique will collect "face geometry" to "provide [a user] with a personalized skin care solution" (*id.* (quoting FAC ¶¶ 44–45)), but says nothing about whether that "face geometry" can be used to identify, and is thus a biometric identifier under BIPA. Therefore, Plaintiff has not adequately alleged any violation of BIPA.

II. Plaintiff Fails To Sufficiently Allege That JJCI Disclosed Her Biometric Data.

Plaintiff additionally fails to allege that JJCI disclosed her biometric data as required to state a claim under BIPA Section 15(d). Perhaps recognizing the weakness of her Section 15(d) allegations, Plaintiff argues that "the standard to plead a § 15(d) claim is low." Opp. at 18. But, of course, the "standard to plead a § 15(d) claim" is the standard set forth by the Supreme Court in *Twombly* and *Iqbal*: "Rule 8(a) and *Twombly/Iqbal* both require the plaintiff to provide 'some specificity' as to ... how th[e] defendant" acted unlawfully. *Certain Underwriters at Lloyd's, London v. U-Line Corp.*, No. 13-3203, 2013 WL 5503672, at *5 (D.N.J. Oct. 1, 2013). Moreover, and contrary to Plaintiff's argument, case law is clear that a plaintiff must do more than simply assert unfounded assertions based upon "information and belief." Rather, allegations

[4] Companies regularly implement policies to avoid even the specter of liability without admitting that their conduct would otherwise be unlawful. *Cf.* Fed. R. Evid. 407.

made upon information and belief must be supported by "specific facts upon which the belief is reasonably based." *Columbia Trading Corp. v. Green Elecs., LLC*, No. 17-1309, 2018 WL 10150930, at *4 (D.N.J. July 27, 2018) (citation omitted). In the context of Section 15(d), courts have recognized that this means that a plaintiff must plead the facts that "triggered his suspicion" and provided a "legitimate reason to suspect" that the defendant disclosed biometric data. *Horn v. Method Prods., PBC*, No. 21 C 5621, 2022 WL 1090887, at *3 (N.D. Ill. Apr. 12, 2022) (quoting *Heard v. Becton Dickinson & Co.*, 440 F. Supp. 3d 970, 969 (N.D. Ill. 2020)). Plaintiff comes nowhere close to meeting this pleading requirement.

First, several of Plaintiff's Section 15(d) allegations merely parrot the statutory language (*see* FAC ¶¶ 63–64, 87) and thus do not state a plausible claim. *See Mitchell*, 2010 WL 3614210, at *6; *see also, e.g.*, *Horn*, 2022 WL 1090887, at *3 ("[Plaintiff's] conclusory allegations of disclosure, which merely parrot BIPA's statutory language, require the court to dismiss his § 15(d) claim.").

Second, Plaintiff alleges in a single sentence, supported only "[u]pon information and belief," that JJCI disclosed Plaintiff's biometric data to "Defendant's affiliates and third-party partners." FAC ¶ 61. This is likewise insufficient to state a claim. Numerous courts have dismissed Section 15(d) claims where, as here, the plaintiff alleged only that the defendant disclosed supposed biometric data to unnamed third-parties, without any factual support such as to whom, when, or how the data was supposedly transferred. *See, e.g.*, *Horn*, 2022 WL 1090887, at *3; *Namuwonge v. Kronos, Inc.*, 418 F. Supp. 3d 279, 285 (N.D. Ill. 2019). And simply attaching the label "affiliate" or "partner" to the unnamed third-party cannot save Plaintiff's allegation. *See Horn*, 2022 WL 1090887, at *3 (dismissing Section 15(d) claim where plaintiff alleged the defendant disclosed biometric data to "third-party vendors"). Plaintiff's cited cases

are not to the contrary. In *Cothron v. White Castle System*, 467 F. Supp. 3d 604 (N.D. Ill. 2020) (cited in Opp. at 17), for example, the plaintiff actually named the third-parties to whom she alleged that the defendant disclosed her biometric data. *See* Second Am. Class Action Compl. ¶ 55, *Cothron*, 19-cv-00382 (N.D. Ill. Apr. 11, 2019), ECF No. 44 (alleging defendant "disseminated her biometric identifiers and biometric information to third parties, including Cross Match and DigitalPersona").[5]

Third, Plaintiff vaguely asserts that JJCI "exchanged consumer information" with third parties, and points to JJCI's publicly available supplemental "Privacy Notice for California Residents" that became effective on January 1, 2020. Opp. at 17 (citing FAC ¶ 62).[6] Notably, this policy "applies only to California residents" and has *nothing* to do with data that *Skin360* allegedly collected from Plaintiff and other putative class members—all Illinois residents—or Illinois' BIPA statute.[7] Moreover, JJCI's California Privacy Notice lists "biometric information"

---

[5] *See also Wordlaw v. Enter. Leasing Co. of Chi.*, No. 20 CV 3200, 2020 WL 7490414, at *4 (N.D. Ill. Dec. 21, 2020) (cited in Opp. at 19) (alleging disclosure to specific categories of third parties: "subsidiaries, data storage vendors, and payroll service providers"); *Naughton v. Amazon.com, Inc.*, No. 20-cv-6485, 2022 WL 19324, at *4 (N.D. Ill. Jan. 3, 2022) (cited in Opp. at 19) (alleging disclosure to "other Amazon entities" and "third-party biometric device and software vendor(s)"); *Figueroa v. Kronos Inc.*, 454 F. Supp. 3d 772, 785–86 (N.D. Ill. 2020) (cited in Opp. at 19) (defendant made statutory analysis argument regarding the meaning of Section 15(d) and did not argue plaintiff's allegations lacked the requisite factual support to survive motion to dismiss).

[6] *See* Privacy Notice for California Residents, NEUTROGENA, https://web.archive.org/web/20220609150711/https://www.neutrogena.com/customer-service/privacy-security/privacy-policy.html#privacynotice-california (visited Nov. 29, 2022) [hereinafter "California Privacy Notice"]. The Court can consider the policy because it is "*explicitly relied* upon in the complaint." *N.J. Second Amendment Soc'y v. N.J. Press Ass'n*, No. 20-5228, 2021 WL 4822050, at *5 (D.N.J. Oct. 15, 2021) (quoting *In re Burling Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)).

[7] *See* California Privacy Notice. For that reason, Plaintiff's allegations are distinct from those in *Mahmood v. Berbix, Inc.*, where the plaintiff cited to a privacy policy that actually applied to the plaintiff. No. 22 C 2456, 2022 WL 3684636, at *3 (N.D. Ill. Aug. 25, 2022) (cited in Opp. at 18);

only as one of several types of personal information that Neutrogena *may* have collected and *may* have shared with third parties in 2019.[8] So the notice is not an admission that JJCI in-fact collected or disclosed that type of information. To the extent Plaintiff now seeks to rely on JJCI's general policy, which, contrary to Plaintiff's suggestion, is not specific to Skin360 (*see* Opp. at 18 n.19), Plaintiff makes no allegations regarding that policy in her Amended Complaint, and, in any event, it says *nothing* about *biometric* data.[9]

Finally, Plaintiff argues that she plausibly pled that JJCI violated Section 15(d) based on her allegation that JJCI "so integrates [her] biometric identifiers and/or biometric information into its Skin360 technology such that this data is inextricably intertwined with the technology itself, and [JJCI's] further use of the technology commercially disseminates [her] biometric identifiers and/or biometric information." Opp. at 22–23 (quoting FAC ¶ 59). In Plaintiff's view, even though a Section 15(d) violation is premised on the disclosure or dissemination of a customer's data to a third-party, JJCI can be liable under this provision without actually sending biometric data to any third party. "[A]ny other interpretation," according to Plaintiff, "would erase the facially apparent distinction between 'disseminate' and 'disclosure.'" *Id.* at 25.

Plaintiff is wrong. No court has adopted this interpretation of Section 15(d), and for good reason—Section 15(d) unambiguously regulates the disclosure or dissemination of biometric data itself, not the disclosure or dissemination of a product that may use biometric data in some

---

see Pl.'s Memo. of Law in Opp'n to Def.'s Mot. to Dismiss at 2 & Ex. A, *Mahmood*, No. 22 C 2456 (N.D. Ill. July 8, 2022), ECF Nos. 27, 27-1.

[8] *See* California Privacy Notice.

[9] Plaintiff also cites Paragraph 33 (Opp. at 17), but that paragraph simply alleges that "Skin360 deploys Perfect Corp.'s YouCam technology," and the "YouCam technology ... is integrated with the Skin360 app." It does not allege that JJCI disclosed or disseminated to Perfect Corp. alleged biometric data.

way. Plaintiff cites *Figueroa v. Kronos Inc.* for the notion that "disclosure" and "dissemination" mean something different (*id.*), but *Figueroa* is clear that such disclosure or dissemination must be "of biometric data" itself. 454 F. Supp. 3d at 772, 785 (N.D. Ill. 2020); *see also e.g.*, *Horn*, 2022 WL 1090887, at *3 ("Section 15(d) provides that private entities in possession of biometric information cannot disclose *such information* except under certain circumstances." (emphasis added)); *Cothron*, 467 F. Supp. 3d at 613 (cited in Opp. at 17) ("Section 15(d) requires entities to obtain a person's consent when disclosing or disseminating *an individual's biometric data*." (emphasis added)); *Namuwonge*, 418 F. Supp. 3d at 183 ("entities ... may not disclose or otherwise disseminate *the data*" (emphasis added)). Accordingly, Plaintiff has failed to allege a Section 15(d) claim.

III. Plaintiff Fails To Sufficiently Allege That JJCI Sold, Leased, Traded, Or Otherwise Profited From Plaintiff's Biometric Data.

Plaintiff also fails to allege that JJCI shared her biometric data in exchange for something of value in violation of BIPA Section 15(c). Plaintiff first argues that she sufficiently alleged that JJCI profited from a transaction directly involving her biometric data. Opp. at 21–22. This argument relies on the single conclusory sentence that JJCI "commercially benefits from its commercial disclosure and dissemination" of biometric data. FAC ¶ 65. Plaintiff's allegation utterly fails to state a claim and is completely devoid of factual support. Next, Plaintiff again relies on JJCI's Privacy Notice for California Residents, and claims that "[i]n its California notice, JJCI acknowledged that it may have sold [biometric] data as defined under California law." Opp. at 21 (citing FAC ¶ 62). But again, the Privacy Notice for California Residents expressly applies only to California residents, so it is unquestionably not referring to the sale of Plaintiff's data, as she is an Illinois resident to whom the policy does not even apply.

See pp. 9–10, *supra*. Moreover, the notice does not include any admission that biometric information was in-fact collected or disclosed to third parties. *See id.*

In the alternative, Plaintiff argues that she sufficiently pled a Section 15(c) claim for the same reason she claims she sufficiently pled a Section 15(d) claim: the data is "inextricably intertwined with the technology itself," so "[b]y continuing to market and disseminate the [Skin360] technology on its website, on social media, on YouTube, and elsewhere," JJCI is "directly profiting" from the data itself. FAC ¶ 59; *see also* Opp. at 22–23 (citing FAC ¶¶ 54–59). For the reasons explained in JJCI's Motion (Mot. at 16–19), Plaintiff misinterprets Section 15(c). As multiple courts have recognized, the scope of Section 15(c) is clear on its face; it regulates transactions where an entity "receives something of value" in exchange for *actually sharing* "access to biometric data." *Vance v. Microsoft Corp.*, 534 F. Supp. 3d 1301, 1307 (W.D. Wash. 2021); *see also Hazlitt v. Apple, Inc.*, 500 F. Supp. 3d 738, 747 (S.D. Ill. 2020) ("[B]y its plain language, [S]ection 15(c) clearly prohibits profiting from 'a person's or a customer's' biometric identifier or biometric information, not the general sales of devices equipped with facial recognition technology."), *vacated on other grounds, In re Apple Inc.*, No. 20-8033, 2021 WL 2451296 (7th Cir. Jan. 22, 2021); *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 512 n.9 (S.D.N.Y. 2017) ("Section 15(c) is clearly geared toward prohibiting the unauthorized dissemination of biometric information ...."), *aff'd in part, vacated in part on other grounds, remanded sub nom.*, *Santana v. Take-Two Interactive Software, Inc.*, 717 F. App'x 12 (2d Cir. 2017).[10] Plaintiff has not, and cannot, make this showing.

[10] Plaintiff cites just two cases that she says reject this interpretation. Opp. at 23. Each is distinguishable. In *Flores v. Motorola Solutions, Inc.*, the court denied a motion to dismiss where the plaintiff alleged that the defendant gave a third-party access, for a fee, to a database that allegedly stored biometric data. No. 20-cv-01128, 2021 WL 232627, at *3 (N.D. Ill. Jan. 8,

Plaintiff contends that the Amended Complaint here is distinguishable from the complaint dismissed by the court in *Vance* because, unlike in *Vance*, she pled that "biometric data is itself so incorporated into [Skin360] that by marketing the product, it is commercially disseminating the biometric data." Opp. at 23 (quoting *Vance*, 534 F. Supp. 3d at 1309). But as explained in JJCI's Motion, the court in *Vance* held that "[w]hile [plaintiff's] allegations support the inference that Microsoft may have received some benefit from increased sales of its improved products, these allegations do not establish that Microsoft disseminated or *shared access to biometric data through its products*. Plaintiffs do not allege that Microsoft *directly sold biometric data*." 534 F. Supp. 3d at 1309 (emphasis added). So too here. Plaintiff does not allege, with any factual support, that JJCI actually shared access to biometric data—as opposed to using data to "'improve' its products and standing in the marketplace." *See* Mot. at 17 (citing FAC ¶¶ 58, 60). Thus, Plaintiff has failed to state a claim for a violation of Section 15(c).

IV. Plaintiff Fails To State An Unjust Enrichment Claim.

For the reasons explained in JJCI's Motion, this Court should apply New Jersey law to evaluate Plaintiff's unjust enrichment claim. Mot. at 22. This court has already compared the elements of unjust enrichment under Illinois and New Jersey law and determined that while Illinois and New Jersey "define[] the elements of unjust enrichment slightly differently," "no real conflict exists." *Sharma v. Gupta*, No. 20-3446, 2022 WL 970544, at *5 (D.N.J. Mar. 31, 2022) (Shipp, J.). Plaintiff argues that the only reason the Court in *Sharma* reached this conclusion is because "choice of law was not outcome determinative in that case." Opp. at 27. But that turns

2021). And in *Karling*, the court declined to analyze the question, concluding that even under the defendant's interpretation—that Section 15(c) "applies to the sale of 'biometric data, not to the sale of biometric technology'"—the plaintiff adequately stated a claim. 2022 WL 2663513, at *7.

the choice of law inquiry on its head; the court in *Sharma* appropriately compared New Jersey and Illinois law and determined there was no conflict.

In any event, the choice of law question is not determinative here, either. Plaintiff does not dispute that her unjust enrichment claim is based on the same conduct as her Section 15(c) claim. *See* Opp. at 27 (arguing Plaintiff plausibly alleged unjust enrichment because she alleged "JJCI has unlawfully disseminated [her] data and benefited itself to [her] detriment." (citing FAC ¶¶ 54–65, 96–99)). As discussed above, Plaintiff fails to sufficiently allege that JJCI violated Section 15(c) because she makes no well-pled allegations that JJCI profited from the sale of her data. *See* pp. 11–13, *supra*. Accordingly, because Plaintiff has "failed to aver allegations sufficient to support the underlying conduct on which the unjust enrichment claim is based, ... Plaintiffs' unjust enrichment claim must be dismissed." *Donachy v. Intrawest U.S. Holdings, Inc.*, No. 10-4038, 2012 WL 869007, at *9 (D.N.J. Mar. 14, 2012) (applying New Jersey law); *see also In re Clearview AI, Inc. Consumer Priv. Litig.*, No. 21-cv-135, 2022 WL 252702, at *6 (N.D. Ill. Jan. 27, 2022) (same, applying Illinois law in the context of BIPA).

Even if her BIPA Section 15(c) claim survives, Plaintiff's unjust enrichment claim still should be dismissed—under either New Jersey or Illinois law. Plaintiff does not allege any actual detriment other than "heightened risk of privacy and informational harms" (FAC ¶ 96), which, as Plaintiff does not dispute, is insufficient to state a claim under New Jersey law. *See* Mot. at 23. And Plaintiff cannot state an unjust enrichment claim under Illinois law simply by alleging, without more, that she was "deprived of [her] control over [her] biometric data" and that JJCI "benefited itself to [her] detriment" by disseminating her data to unnamed third parties. *See* Opp. at 27. Plaintiff ignores that, under Illinois law, she must "show a detriment, and a connection between that detriment and the defendant's retention of a benefit." *Hogan v. Amazon.com, Inc.*,

No. 21 C 3169, 2022 WL 952763, at *8 (N.D. Ill Mar. 30, 2022) (citing *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 518 (7th Cir. 2011)). Like in *Hogan*, Plaintiff's conclusory allegation that JJCI somehow used her alleged biometric data to improve the Skin360 technology or gain some other benefit is far too attenuated to plead the requisite connection.

CONCLUSION

Plaintiff fails to allege, with any factual support, that the facial scans captured by Skin360 are capable of identifying her. Because this defect is incurable—Plaintiff already amended her complaint once—this Court should dismiss the Amended Complaint with prejudice. *See Pittman v. Saint Francis Hosp.*, No. 15-3371, 2015 WL 6739124, at *3 (D.N.J. Nov. 4, 2015) (dismissing complaint with prejudice where "no amendment would cure the fatal flaws in the Complaint").

Dated: December 1, 2022

Respectfully Submitted,

Kathleen L. Carlson, Esq.
Lawrence P. Fogel, Esq.
Abigail B. Molitor, Esq.
Andrew F. Rodheim, Esq.
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
(312) 853-7000

/s/ *David R. Kott*
David R. Kott, Esq.
MCCARTER & ENGLISH LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444

Attorneys for Defendant
Johnson & Johnson Consumer Inc.

McCARTER & ENGLISH, LLP
David R. Kott, Esq.
Four Gateway Center
100 Mulberry Street
P.O. Box 652
Newark, New Jersey 07101-0652
(973) 639-2056
(973) 624-7070 FAX

SIDLEY AUSTIN LLP
Kathleen L. Carlson, Esq. (*pro hac vice*)
Lawrence P. Fogel, Esq. *pro hac vice*)
Abigail B. Molitor, Esq. (*pro hac vice*)
Andrew F. Rodheim, Esq. (*pro hac vice*)
One South Dearborn
Chicago, IL 60603
(312) 853-7000
(312) 853-7036 FAX

Attorneys for Defendant
Johnson & Johnson Consumer Inc.

UNITED STATES DISTRICT 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.

Civil Action No. 3:22-cv-03149-MAS-RLS

Honorable Michael A. Shipp
Honorable Rukhsanah L. Singh

CERTIFICATE OF SERVICE

DAVID R. KOTT, of full age, hereby certifies and states as follows:

1. I am an attorney-at-law of the State of New Jersey, duly admitted to practice before the United States District Court for the District of New Jersey, and am a Partner with the law firm of McCarter & English, LLP, attorneys for defendant Johnson & Johnson Consumer Inc.

2. On December 1, 2022 I caused to be filed via ECF with the Clerk for the United States District Court for the District of New Jersey, the following documents:

(a) Defendant's Reply in Support of its Motion to Dismiss the First Amended Class Action Complaint;

3. On December 1, 2022, copies of the aforementioned documents were served via ECF upon all Counsel on the ECF Service list

4. On December 1, 2022, a courtesy copy of the aforementioned documents were served via First Class mail to:

Honorable Michael A. Shipp, U.S.D.J.
United States District Court for the District of New Jersey
Clarkson S. Fisher Bldg. & U.S. Courthouse
402 E. State Street, Court Room 5 W
Newark, New Jersey 07101

Honorable Rukhsanah L. Singh, U.S.M.J.
United States District Court for the District of New Jersey
Clarkson S. Fisher Bldg. & U.S. Courthouse
402 E. State Street, Court Room 7 W
Newark, New Jersey 07101

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

s/David R. Kott

Dated: December 1, 2022