UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

HELENE MELZER, CHRISTINE BOROVOY, ANDY SAJNANI, and PATRICIA BIEWALD individually and on behalf of all those similarly situated, *Plaintiffs*, v. JOHNSON & JOHNSON CONSUMER INC., *Defendant*.	CIVIL NO. 22-cv-03149 (MAS) Filed Electronically **Motion Day: November 4, 2024** **ORAL ARGUMENT REQUESTED**

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

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INTRODUCTION

In their Second Amended Complaint ("SAC") Plaintiffs again claim that Defendant Johnson and Johnson Consumer Inc. ("JJCI") violated the Illinois Biometric Information Privacy Act ("BIPA") by allegedly collecting Plaintiffs' biometric data in connection with an online application called Neutrogena Skin360 ("Skin360"). The SAC should be dismissed because Plaintiffs' claims fall within BIPA's health care exemption—a statutory exemption that expressly excludes from BIPA's purview information collected "from a patient in a health care setting."

As is clear from Plaintiffs' own allegations, their use of Skin360 renders them "patients in a health care setting" under BIPA: Skin360 provides users with a personalized skin health assessment, suggests skincare products based on users' specific skin concerns and goals, and provides users access to information relating to the maintenance and improvement of their skin health. Multiple courts have dismissed similar allegations under BIPA's health care exemption. And as each of these courts held, it makes no difference whether this "health care setting" is virtual or in-person. Because Plaintiffs' use of Skin360 falls within BIPA's health care exemption, Plaintiffs' BIPA claims fail and the SAC must be dismissed with prejudice.

BACKGROUND

I. BIPA and its Health Care Exemption.

BIPA is an Illinois state law that regulates a company's possession, collection, sale, and dissemination of "biometric identifiers" and "biometric information." 740 ILCS 14/15. BIPA defines a biometric identifier as a person's "retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." 740 ILCS 14/10. "Biometric information," in turn, is defined as any information "based on an individual's biometric identifier used to identify an individual." *Id*.

The text of BIPA explicitly excludes from its definition of biometric identifier, and thus biometric information, two categories of health care related information: (1) "information captured from a patient in a health care setting"; and (2) "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996 [HIPAA]." *Id*.[1] These two exclusions are "alternatives," and "information is exempt from [BIPA] if it satisfies either statutory criterion." *Mosby v. Ingalls Mem'l Hosp.*, 234 N.E.3d 110, 119 (Ill. 2023). This motion focuses on the "health care setting" alternative, hereinafter referred to as "the Health Care Exemption."

Every opinion construing the Health Care Exemption has concluded that it

[1] Similarly, "biometric information" "does not include information derived from items or procedures excluded under the definition of biometric identifiers." 740 ILCS § 14/10.

includes virtual settings where an individual seeks products to maintain or improve their health. Specifically, and as discussed further below, courts have found that online applications that help a user select eyeglasses, including nonprescription sunglasses, constitute "health care settings" under BIPA, and that a consumer who uses those applications to virtually "try on" eyeglasses is a "patient" under BIPA. Therefore, any data collected through such applications cannot be the basis for a claim under BIPA. *See Warmack-Stillwell v. Christian Dior, Inc.*, 655 F. Supp. 3d 742, 746–48 (N.D. Ill. 2023); *Svoboda v. Frames for Am., Inc.*, 2022 WL 4109719, at *2–3 (N.D. Ill. Sept. 8, 2022); *Vo v. VSP Retail Dev. Holding, Inc.*, 2020 WL 1445605, at *2–3 (N.D. Ill. Mar. 25, 2020).

II. Neutrogena Skin360

Neutrogena is a dermatologist-recommended skincare brand owned by JJCI.[2] SAC ¶ 14; Ex. A[3] at 1 (cited at SAC ¶ 14).[4] It offers hundreds of products across a number of categories including "face, body, acne, [and] sun protection." Ex. B[5] at 3 (cited at SAC ¶¶ 34, 36, 60). Plaintiffs' allegations concern Neutrogena's Skin360 application, which is a "virtual skin analysis tool" that

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[2] JJCI was formerly a subsidiary of Johnson & Johnson ("J&J"), within J&J's consumer health segment. In November 2021, J&J announced that it would separate its consumer health segment into a new publicly traded company, later named Kenvue. *See* J&J, Current Report (Form 8-K) (Nov. 15, 2021). Kenvue became a fully independent publicly traded company in August 2023, and is "the world's largest pure-play consumer health company by revenue" with brands that are "science-backed and recommended by healthcare professionals around the world." *See* Kenvue Inc., Current Report (Form 8-K & Ex. 99.1) (Aug. 23, 2023).

[3] Exhibit A is a copy of the Neutrogena Skin360 website cited at SAC ¶ 14 and available at https://skin360.neutrogena.com/.

[4] This Court has previously determined that it may consider the websites cited by Plaintiffs on a motion to dismiss because Plaintiffs expressly rely on such websites and use those sources to frame their allegations. *See* Dkt. 41 at 2 n.2 ("Melzer expressly relies on several Neutrogena websites and uses screenshots from those websites to frame the FAC, and this Court may appropriately consider those sources." (citation omitted)); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997); *N.J. Second Amend. Soc'y v. N.J. Press Ass'n*, No. 20-5228, 2021 WL 4822050, at *5 (D.N.J. Oct. 15, 2021).

[5] Exhibit B is a copy of the *BusinessWire* Article titled *Neutrogena Relaunches Neutrogena Skin360 App to Democratize Skin Health Information* (Jan. 3, 2020), cited at SAC ¶¶ 34, 36, 60 and available at https://www.businesswire.com/news/home/20200103005398/en/NEUTROGENA%C2%AE-Relaunches-NEUTROGENA-Skin360%E2%84%A2-App-to-Democratize-Skin-Health-Information.

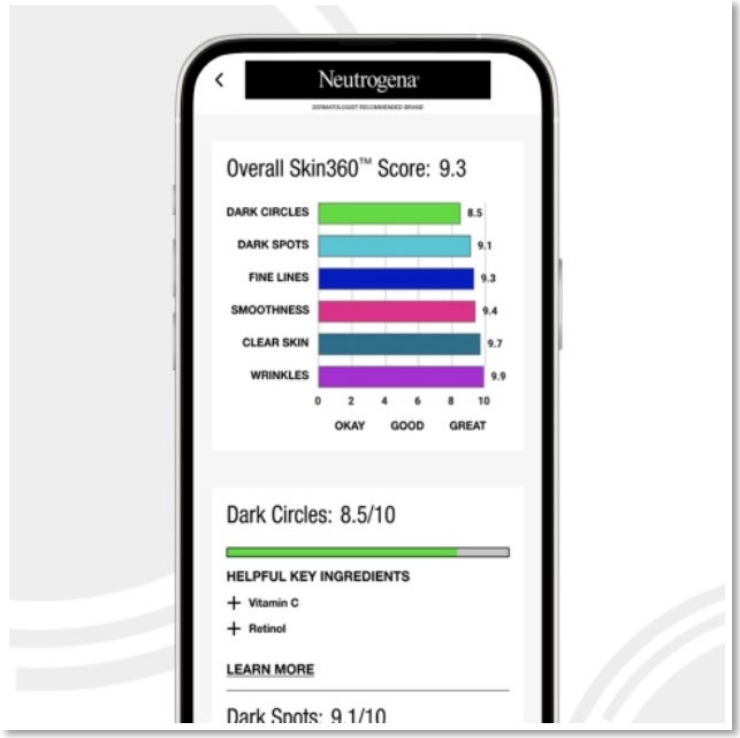
provides consumers "with actionable, personalized steps to help achieve their skin health goals." Ex. A at 2 (cited at SAC ¶ 14); Ex. B at 2 (cited at SAC ¶¶ 34, 36, 60); *see also* Ex. C[6] (cited at SAC ¶ 36). JJCI "combined 60 years of skin health experience with 30 years of proven, sustainable behavior change research" to build Skin360, "a powerful, comprehensive and highly advanced skin health algorithm." Ex. B at 3 (cited at SAC ¶¶ 34, 36, 60).

Specifically, Skin360 allows users to perform a "personalized at-home skin assessment" to evaluate their skin health, analyzing the surface of users' skin to identify "skin health issues, such as dark circles, wrinkles, fine lines, dark spots, and texture." SAC ¶ 33; *see also id.* ¶ 34 (Skin360 measures "aspects of the consumer's skin health" (cleaned up)); *id.* ¶ 41 ("Skin360 accurately detects dark circles, wrinkles, fine lines, smoothness, dark spots, and other skin concerns . . . .").

Skin360 works by comparing images of users' skin to "a database of 10,000 images that have been graded and assessed by dermatologists across ethnicities, skin types, and ages (from 7-70 years old) with more than 10 types of lighting." Ex. A at 2 (cited at SAC ¶ 14). For each skin health attribute, users receive a

[6] Exhibit C is a copy of the *Allure* article titled *Neutrogena's Updated Skin360 App Will Help You (Finally) Stick to Your Skin-Care Routine* (Jan. 3, 2020), cited at SAC ¶ 36 and available at https://www.allure.com/story/neutrogena-skin360-app-naia-assistant.

numerical score on a scale of one to ten, and those scores are then combined to determine an overall Skin360 score, an example of which is reflected in the image below as it appears on the Neutrogena Skin360 website:



Id. Users can perform repeated skin assessments to "monitor and track the progress of their skin health over time," as well as track factors that affect their skin health, including stress levels, sleep patterns, exercise routines, and weather data. SAC ¶¶ 42, 44; *see also* Ex. C at 3 (cited at SAC ¶ 36).

After completing the skin assessment, Skin360 suggests personalized skincare routines based on users' Skin360 Scores and other information provided through a questionnaire. *See* SAC ¶ 33 (Skin360 "recommend[s] a skin care regimen consisting of Neutrogena products"); Ex. A at 2 (cited at SAC ¶ 14)

("After identifying your top skin concern, Skin360 will suggest morning and evening products and key ingredients specific to your skin goal."). The suggested routines incorporate a range of skincare products, including, for example, sunscreens to protect a user's skin, acne products to improve a user's skin, and Vitamin C and retinol products to address dark circles. *See* SAC ¶¶ 33, 59, 61; Ex. A at 2 (cited at SAC ¶ 14); Ex. B. at 2 (cited at SAC ¶¶ 34, 36, 60); Ex. C at 3 (cited at SAC ¶ 36).

Skin360 also provides an interactive "virtual skin health coach"—the Neutrogena AI Assistant ("NAIA")—to help users access skin health information and maintain a consistent skincare routine. SAC ¶¶ 59–61. Users can interact with NAIA "to determine their skincare personality, approach to skincare, and current routine." *Id.* ¶ 60 (quoting Ex. B at 3); *see also* Ex. C at 3 (cited at SAC ¶ 36) (NAIA "asks you about habits that might affect your skin, like your stress levels, sleep patterns, and exercise routines"). NAIA helps users identify an 8-week skincare goal and supports that goal with behavioral coaching to achieve user's desired results. SAC ¶¶ 60–61; *see also* Ex. C at 3 (cited at SAC ¶ 36) (NAIA "checks in regularly to make sure you're taking weekly progress photos and sticking to your skin-care routine").

Finally, Skin360 provides users access to "science-backed information" about skin health to inform their skincare routines. *See* Ex. B at 2–3 (cited at

SAC ¶¶ 34, 36, 60). Users can explore "educational content" to learn about the "holistic health of [their] skin," and understand the effect that seasonal, lifestyle, and hormonal changes have on skin health. *See* Ex. A at 2 (cited at SAC ¶ 14). Skin360 is designed to allow users to "identify areas of improvement" for their skin to achieve their desired state of skin health. *See id.* at 2.

III. Procedural Background

Plaintiff Melzer filed the initial complaint against JJCI in May 2022 and filed the First Amended Complaint in August 2022. Dkts. 1, 21. On April 26, 2023, the Court granted in part and denied in part JJCI's Motion to Dismiss the First Amended Complaint, dismissing Melzer's unjust enrichment claim but allowing her BIPA claims to proceed.[7] Dkt. 41. On June 9, 2023, JJCI filed its Answer (Dkt. 46), and the parties initiated discovery.

On July 1, 2024, Plaintiffs filed the SAC, which includes three additional named plaintiffs as well as certain amended allegations. Dkt. 62. Each Plaintiff,

[7] As JJCI explained in its Motion to Dismiss Plaintiff Melzer's First Amended Complaint, even if the Health Care Exemption did not apply, the SAC also fails to state a claim because it (1) does not identify any facts permitting a plausible inference that, through Skin360, JJCI possessed or collected any information that can identify an individual; (2) fails to allege that JJCI sold, leased, traded, or otherwise profited from transactions involving biometric data; and (3) fails to allege that JJCI disseminated biometric data to any third party. *See* Dkt. 25-1 at 6–22; Dkt. 37 at 2–13. JJCI acknowledges the Court's prior ruling on these issues, Dkt. 41, and instead focuses on the applicability of the Health Care Exemption in this motion.

Helene Melzer, Christine Borovoy, Andy Sajnani, and Patricia Biewald, alleges that they used Skin360 "to obtain a personalized at-home skin assessment." SAC ¶¶ 72, 78, 84, 90.

LEGAL STANDARD

To withstand a motion to dismiss, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Bank Leumi USA v. Kloss*, 331 F. Supp. 3d 404, 408 (D.N.J. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A plaintiff, however, "can plead himself out of court by alleging facts which show that he has no claim." *In re Intelligroup Sec. Litig.*, 527 F. Supp. 2d 262, 369 (D.N.J. 2007) (quoting *Gutierrez v. Peters*, 111 F.3d 1364, 1374 (7th Cir. 1997)); *see also Assoc. Builders & Contractors W. Pa. v. Cmty. Coll. of Allegheny Cnty.*, 81 F.4th 279, 289 (3d Cir. 2023) (recognizing plaintiffs can "plead themselves out of court").[8] "Allegations in a complaint are binding admissions . . . and admissions can of course admit the admitter to the exit from the federal courthouse." *Intelligroup Sec. Litig.*, 527 F. Supp. 2d at 369 (quoting *Gutierrez*, 111 F.3d at 1374).

[8] The analysis does not change if the Court considers the Health Care Exemption as an affirmative defense. Dismissal is still proper because Plaintiffs "unequivocally plead[] [themselves] out of court" and "the defense is apparent on the face of the complaint." *Smith v. Pro Custom Solar LLC*, 2021 WL 141336, at *4 (D.N.J. Jan. 15, 2021) (quoting *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 130 (3d Cir. 2018)).

ARGUMENT

I. BIPA Does Not Regulate Data Collected From a Patient in a Health Care Setting.

Under BIPA's plain language and court precedent, Plaintiffs' claims fail because they are precluded by the Health Care Exemption. There are three decisions that have addressed the Health Care Exemption within the context of online applications like Skin360, and they are instructive here.

Most recently, in *Warmack-Stillwell v. Christian Dior*, the plaintiff brought a BIPA claim alleging that her biometric data was collected when she used a "virtual try-on" application on Christian Dior's website to see how designer non-prescription sunglasses would look on her face. 655 F. Supp. 3d at 744. In considering whether the Health Care Exemption applied, the court looked to dictionary definitions to determine whether the plaintiff was a "patient in a health care setting."[9] Specifically, a "patient" is an "'individual awaiting or under medical care or treatment,' or 'the recipient of any various personal services.'" *Id.* at 746 (quoting Merriam-Webster). "Health care" means "efforts made to maintain or restore physical, mental, or emotional well-being especially by trained and licensed

[9] BIPA does not define "patient," "health care," or "setting," and thus, under rules of statutory construction, courts look to "[t]he language of the statute" and give that language its plain and ordinary meaning." *Mosby*, 234 N.E.3d at 118–20 (interpreting the Health Care Exemption and looking to dictionary definitions to determine the meaning of different statutory terms).

professionals." *Id.* at 747 (quoting Merriam-Webster). And a "setting" is the "time, place, and circumstances in which something occurs." *Id.* (quoting Merriam-Webster).

Applying these definitions to the plaintiff's use of Christian Dior's online application to try on designer non-prescription sunglasses, the court held that the plaintiff was a "patient" in a "health care setting" because sunglasses "protect one's eyes from the sun" and thus serve to "protect [the user's] physical health." *Id.* at 746–48. The court further reasoned that the virtual try-on application facilitated the purchase of sunglasses "to wear on one's face—which is exactly the use that fulfills that product's medical purpose." *Id.* at 747. For this same reason, the court concluded that the plaintiff's use of the virtual try-on tool was the "online equivalent" to a patient's experience at a "brick-and-mortar location" and therefore "ha[d] no trouble finding that the [virtual try-on tool] counts as a 'setting'" within the meaning of BIPA. *Id.* at 746–47.

Importantly, *Warmack-Stillwell* held that the Health Care Exemption turns on an *objective* assessment of the statutory language, not a user's subjective intent. *Id.* at 746. It accordingly did not matter whether the plaintiff "would be surprised to learn that they were entering into a provider/patient relationship" or used the virtual try-on tool "in search of sunglasses mainly for style." *Id.* (cleaned up).

The court in *Svoboda v. Frames for America, Inc.* reached a similar conclusion. It adopted the same dictionary definitions of "patient" and "health care" as *Warmack-Stillwell*, and held that the plaintiff's use of a virtual try-on tool to see how different glasses frames would look on her face fell within the Health Care Exemption. *Svoboda*, 2022 WL 4109719, at *2–3. The court explained that prescription lenses, non-prescription sunglasses, and frames are all Class I medical devices that "'maintain or restore physical . . . well-being' by correcting or protecting vision." *Id.* at *2 (quoting Merriam-Webster). Moreover, the court concluded that the Health Care Exemption applied despite the plaintiff's arguments that she was not treated by any trained and licensed professionals, was only evaluating the glasses' style, and did not purchase any glasses. *Id.* "[T]he fitting and evaluation services [the plaintiff] received still constituted a health care service" similar to those available in an optometrist's office, so, as "the recipient of a 'various personal service,'" she was a "patient receiving a health care service in a health care setting" under BIPA. *Id.* at *2–3 (quoting Merriam-Webster).

Finally, in *Vo v. VSP Retail Development Holding, Inc.*, the court similarly held that use of a virtual try-on application to remotely assess the look of eyewear fell within the Health Care Exemption. 2020 WL 1445605, at *2. Specifically, the court found that "the Virtual Try-On software provide[d] a health care service by ensuring the appropriate fit and positioning of corrective eyewear" which "affects

the function of the body—namely, vision." *Id.* As in *Warmack-Stillwell* and *Svoboda*, this remained true regardless of the plaintiff's subjective intent in utilizing the virtual try-on tool, and even if the plaintiff did not proceed beyond trying on frames to obtain an eye exam or prescription. *Id.*

II. Skin360 Users Are Patients in a Health Care Setting Within the Meaning of BIPA's Health Care Exemption.

This Court should reach the same conclusion as the courts in *Warmack-Stillwell*, *Svoboda*, and *Vo*, and hold that Plaintiffs' use of Skin360 falls within BIPA's Health Care Exemption.

As an initial matter, while the *Warmack-Stillwell*, *Svoboda*, and *Vo* courts each considered the Health Care Exemption's applicability to vision-focused online applications, the reasoning of those cases makes clear that the Health Care Exemption is not limited to eyeglasses, but applies to all circumstances where an online application is offered to users for a health care purpose. *See Warmack-Stillwell*, 655 F. Supp. 3d at 746–47 (defining "health care" as "efforts made to maintain or restore physical, mental, or emotional well-being especially by trained and licensed professionals"); *Svoboda*, 2022 WL 4109719, at *2 (same); *Vo*, 2020 WL 1445605, at *2 (concluding that "offering a service or procedure that affects the function of the body" qualifies as health care). Plaintiffs' use of Skin360 meets this standard. Just as the defendants in *Warmack-Stillwell*, *Svoboda*, and *Vo* offered

a service to "maintain and restore" one's vision health, so too does Skin360 with respect to one's skin health.

For example, like in *Warmack-Stillwell*, *Svoboda*, and *Vo*—each of which involved products designed to maintain or restore one's health by protecting a part of the body from sun exposure—Skin360 similarly provides information and suggests products designed to improve one's skin health. Once a Skin360 user has performed a skin health assessment, Skin360 suggests personalized skincare routines, products, and ingredients to address users' stated skin health concerns and goals. SAC ¶¶ 33, 59, 61; *see also* Ex. A at 2 (cited at SAC ¶ 14). These suggestions are tailored to a user's skin health concerns, taking into consideration the user's unique traits as indicated by their Skin360 score and the user's personal skincare preferences as indicated through their answers to questions within the Skin360 app. *See* SAC ¶¶ 33, 59, 61; *see also* Ex. A at 2 (cited at ¶ 14). Just as sunglasses protect one's eyes from the sun, the sunscreen and other products suggested by Skin360 also protect a user's skin. *See* Ex. A at 2 (cited at SAC ¶ 14).

In addition, the courts in *Warmack-Stillwell*, *Svoboda*, and *Vo* each relied on the fact that the FDA regulates both eyeglasses and non-prescription sunglasses as Class I medical devices. *See Warmack-Stillwell*, 655 F. Supp. 3d at 746 (citing 21 C.F.R. § 886.5850); *Svoboda*, 2022 WL 4109719, at *2 (citing 21 C.F.R. § 886.5842-50); *Vo*, 2020 WL 1445605 at *2 (citing 21 CFR

§ 886.5842-44). Here too, Skin360 users receive product suggestions for products regulated by the FDA, in this case as over-the-counter drug products, including sunscreen and acne products. *See, e.g.*, 21 C.F.R. § 352 (sunscreen); *id.* § 333.301 (acne products). Similar to how eyeglasses and sunglasses "maintain or restore physical well-being by correcting or protecting vision," *Svoboda*, 2022 WL 4109719, at *2 (cleaned up), Skin360 helps users maintain and restore their skin health by suggesting FDA-regulated skin care products to users. Ex. A at 2 (cited at SAC ¶ 14); Ex. B. at 3 (cited at SAC ¶¶ 34, 36, 60); Ex. C at 3 (cited at SAC ¶ 36).

And there can be no dispute that, like in *Warmack-Stillwell*, *Svoboda*, and *Vo*, Skin360 qualifies as a "setting" within the meaning of the Health Care Exemption. The Skin360 application is functionally identical to the try-on applications considered in each of those cases for the purposes of the statutory analysis. *See Warmack-Stillwell*, 655 F. Supp. 3d at 747 ("I have no trouble finding that the [virtual try-on tool] counts as a 'setting.'"); *Svoboda*, 2022 WL 4109719, at *2; *Vo*, 2020 WL 1445605, at *2. And, as in *Warmack-Stillwell*, *Svoboda*, and *Vo*, "[t]he outcome of the analysis should not change based on whether [Plaintiffs] use[d] [Skin360]" with the goal of receiving health care. *Warmack-Stillwell*, 655 F. Supp. 3d at 746. Nor does it matter whether Plaintiffs "ultimately purchase[d]" any of the suggested products, because Plaintiffs "cannot escape BIPA's health care

exemption simply by choosing to forego the health care service for which they were evaluated." *Svoboda*, 2022 WL 4109719, at *2 (quoting *Vo*, 2020 WL 1445605, at *2). Again, "the relevant test is not a user's subjective understanding, but rather an objective application of the text of the exemption." *Warmack-Stillwell*, 655 F. Supp. 3d at 746.

In fact, Plaintiffs' allegations regarding Skin360 go beyond those present in *Warmack-Stillwell*, *Svoboda*, and *Vo*, and even further support the Health Care Exemption's application here. Not only does Skin360 suggest health care related products like in the three prior cases, it also "*measures* . . . aspects of the consumer's skin health," "provid[ing] consumers with a personalized at-home skin *assessment*." SAC ¶¶ 33–34 (cleaned up; emphasis added). Specifically, before any products are suggested, Skin360 provides an in-depth skin assessment to help users understand different aspects of their skin's health and achieve their skin goals. *Id.*; Ex. A at 2 (cited at SAC ¶ 14). This includes allowing users to examine the surface of their skin, obtain numerical skin scores, and receive product suggestions tailored to their scores. *See* SAC ¶¶ 33, 59, 61. This assessment function provides an additional basis to conclude that information collected through Skin360 is collected in a "health care setting."

Moreover, Skin360 also offers personalized skin health information and interactive coaching to assist users in maintaining their skin health. *Id.* ¶¶ 59–61;

see also Ex. C at 1 (cited at SAC ¶ 36) ("It's like having a skin-care pro in your pocket."). As Plaintiffs allege, the Skin360 technology includes NAIA, a "virtual skin health coach" that helps users improve their skin health by developing and monitoring a user's skin care routine. SAC ¶¶ 60–61. Skin360 also directs users to educational content to help them better understand how to maintain and improve the health of their skin. Ex. A at 2 (cited at SAC ¶ 14) (explaining that you can explore "educational content" through Skin360 "to learn more about the holistic health of your skin"). Thus, it is clear from Plaintiffs' own allegations that Skin360 offers a service designed to "maintain or restore" one's health. For this and all the other reasons discussed above, Skin360 falls within the Health Care Exemption. Plaintiffs therefore cannot state a BIPA claim.

III. Plaintiffs' Claims Should Be Dismissed With Prejudice.

Because Plaintiffs' claims are precluded by BIPA's Health Care Exemption, the Court should dismiss the SAC with prejudice. Dismissal with prejudice is proper where an "amendment would be futile." *Bello v. Capital One Bank USA N.A.*, 2024 WL 2794418, at *2 (3d Cir. May 21, 2024) (citing *Forman v. Davis*, 371 U.S. 178, 182 (1962)). In particular, an amendment is futile where, "given the facts of the case" and "the legal theory presented," "it would not be possible for [the plaintiffs] to amend the complaint to cure the fundamental problem with the

complaint as it presently reads." *Maio v. Aetna, Inc.*, 221 F.3d 472, 500 n.19 (3d Cir. 2000).

Here, due to the applicability of the Health Care Exemption, it is not possible for Plaintiffs to amend the SAC to state a BIPA claim. In other words, "this is not a situation in which [Plaintiffs] simply need to allege more specific factual information in order to overcome another defense motion to dismiss." *Id.* Rather, Plaintiffs *cannot* "file an amended pleading that would survive dismissal pursuant to Rule 12(b)(6)." *Id.* Indeed, in all three of the Health Care Exemption cases discussed above, the courts dismissed the complaint with prejudice. *See, e.g.*, *Vo*, 2020 WL 1445605, at *3 ("amending the BIPA claim asserted would be futile, as this scenario falls outside of BIPA's scope"); *Svoboda*, 21-cv-05509, Dkt. 31 (Sept. 8, 2022); *Warmack*, 22-cv-04633, Dkt. 30 (Feb. 10, 2023).

CONCLUSION

For the foregoing reasons, JJCI respectfully requests that the Court dismiss the SAC with prejudice.

Dated: August 12, 2024

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HELENE MELZER CHRISTINE BOROVOY, ANDY SAJNANI, and PATRICIA BIEWALD individually and on behalf of all those similarly situated, Plaintiffs, v. JOHNSON & JOHNSON CONSUMER INC., Defendant.	Civil Action No. 22-cv-03149 (MAS)(RLS) **CERTIFICATION OF DAVID R. KOTT IN SUPPORT OF DEFENDANT JOHNSON AND JOHNSON CONSUMER INC.'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED CLASS ACTION COMPLAINT**

David R. Kott, of full age, hereby certifies as follows:

1. I am an attorney-at-law of the State of New Jersey and a member of the law firm of McCarter & English, LLP, attorneys for Defendant Johnson & Johnson Consumer Inc.

2. Attached as Exhibit A is a copy of the Neutrogena Skin360 website, cited in Plaintiffs' Second Amended Complaint at ¶ 14 and available at https://skin360.neutrogena.com/. Page numbers have been added to the footer of the Exhibit.

3. Attached as Exhibit B is a copy of the *BusinessWire* Article titled *Neutrogena Relaunches Neutrogena Skin360 App to Democratize Skin Health Information* (Jan. 3, 2020) cited in Plaintiffs' Second Amended Complaint at ¶¶ 34, 36, 60 and available at https://www.businesswire.com/news/home/20200103005398/en/NEUTROGENA%C2%AE-Relaunches-NEUTROGENA-Skin360%E2%84%A2-App-to-Democratize-Skin-Health-Information. Page numbers have been added to the footer of the Exhibit.

4. Attached as Exhibit C is a copy of the *Allure* article titled *Neutrogena's Updated Skin360 App Will Help You (Finally) Stick to Your Skin-Care Routine* (Jan. 3, 2020) cited in Plaintiffs' Second Amended Complaint at ¶ 36 and available at https://www.allure.com/story/neutrogena-skin360-app-naia-assistant. Page numbers have been added to the footer of the Exhibit.

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
David R. Kott, Esq.

Dated: August 12, 2024

EXHIBIT A

DERMATOLOGIST RECOMMENDED BRAND

UNDERSTAND YOUR SKIN NEEDS WITH

SKIN360™

Neutrogena Skin360® combines decades of expertise with a database of over 10,000 images of real people – of all ages, genders, ethnicities, and skin tones. Our breakthrough technology helps you navigate products customized to your skincare needs.

GET STARTED

We do not store any images taken with our scan. We are committed to providing a secure and confidential experience for all users. PRIVACY POLICY

For the most accurate results, scan the QR code with your phone to complete the experience. Standard data rates from your carrier may apply.



STEP 1:

Snap a selfie to scan your face

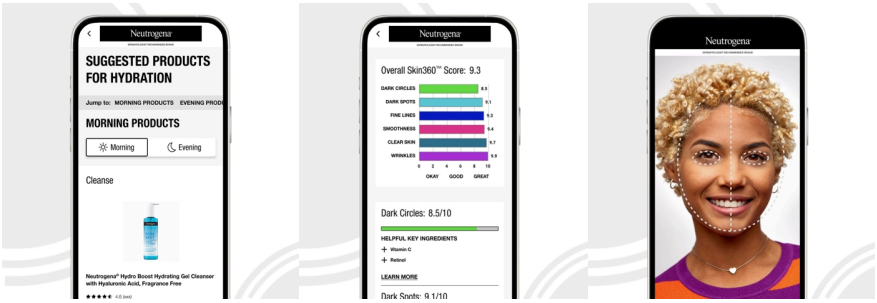
STEP 2:

Review your results and tell us about your skin

STEP 3:

Explore suggested products to help achieve your skin goals

GET STARTED



FAQS

What is Neutrogena Skin360®?

Skin360™ is a virtual skin analysis tool that helps you identify your skin goals and then provides suggested products and tips to help you achieve your skin care goals. After scanning your face, you receive scores across 6 skin attributes, laddering up to your overall skin score. After identifying your top skin concern, Skin360™ will suggest morning and evening products and key ingredients specific to your skin goal. It can even suggest a tinted sunscreen matched to your skin tone.

Who should use Skin360™?

Short answer— everyone! Whether you're a skincare newbie or experienced pro, there's something for everyone. There are lots of different ways to use the web-based tool. You can use it to help identify areas of improvement for your skin and find specific ingredients and products to help, to learn more about the holistic health of your skin, and even use it to find alternative products for your favorite out of stock or discontinued products. Our skin is constantly changing, whether due to seasonal changes, lifestyle changes, hormonal changes, or even stage of life. Neutrogena Skin360® is the perfect tool to help you find the right products for all your skin needs.

Is my facial scan stored?

No, we do not store your facial images. Once your scan is processed, it is immediately deleted.

How are my scores calculated?

When you scan your face, Neutrogena Skin360® uses over 100,000 skin pixels to analyze over 2,000 facial attributes. Your images are then compared to a database of 10,000 images that have been graded and assessed by dermatologists across ethnicities, skin types, and ages (from 7-70 years old) with more than 10 types of lighting to determine your scores. You'll receive scores across 6 skin attributes, including an in-depth breakdown for clear skin, that reliably helps identify your skin strengths as well as areas you may want to focus on improving.

How long does the skin analysis take?

The skin assessment starts with a quick skin scan. You will take 3 selfies, one looking straight on, and one from each side. After your scan is complete and you view your scores, you can answer a few questions to see skin tips and products you may like. The survey only takes a few minutes to complete. While the scan and questions can be completed in less than 5 minutes, the full experience is based on how much time you spend exploring the additional educational content and products. You can purchase your suggested products through the Neutrogena® website or at a later time from the Skin360™ email you'll receive.

Can I save my results?

Since you don't need an account to use Neutrogena Skin360®, we aren't able to save your results. However, you will receive an email with your top skin concern, your scores, and your suggested products. Keep this email to compare your scores over time or have easy access to repurchase your favorite products.

Do I have to download an app to use the tool?

You don't need an account or need to download an app to enjoy all the great features of the Skin360™ web-based tool. We've made it as easy as possible to use, you can access the web-tool either from your phone or computer. We do however encourage you to use your phone to complete your scan since it provides higher quality images and more accurate results.

Can't find what you're looking for?

SEE ALL FAQS

COOKIES SETTINGS

[illegible] This website is intended for visitors from the United States.

VE PERSONAL INFORMATION

CONTACT U

EXHIBIT B

businesswire
A BERKSHIRE HATHAWAY COMPANY

Neutrogena Skin360™

NEUTROGENA® Relaunches NEUTROGENA Skin360™ App to Democratize Skin Health Information

Now tool-free, an AI powered skin health coach with behavioral training helps users create and stick with a skincare routine to achieve their best skin ever



January 03, 2020 06:56 PM Eastern Standard Time

LOS ANGELES--(BUSINESS WIRE)--America's #1 facial skincare brand will debut the new NEUTROGENA Skin360™ app at Consumer Electronics Showcase (CES)* in Las Vegas next week.[1] The NEUTROGENA Skin360™ app combines advanced skin imaging, behavior coaching and artificial intelligence to empower consumers with actionable, personalized steps to help achieve their skin health goals.

“The next generation of skincare must be tailored to individual needs, concerns and goals as consumers crave a holistic view of factors impacting their skin and they want expert guidance on how to achieve their best skin ever,” said Kerry Sullivan, Vice President and General Manager of NEUTROGENA® at Johnson & Johnson Consumer Health. “The NEUTROGENA Skin360™ app helps bridge the gap in knowledgeable, personalized, science-based skincare and supports users in sticking to a routine that helps deliver their personal skin health goals.”

After the 2018 launch of the first-gen NEUTROGENA Skin360™ app, which required a skin scanning tool, the NEUTROGENA® Skin Tech team received valuable insight into what consumers wanted and optimized the NEUTROGENA Skin360™ app based on key learnings such as: more science-backed information, access to experts, personalized recommendations, tool-free analysis, and an ability to track any skincare product used to understand how an end-to-end skincare routine impacts skin health over time.

At the heart of the app is the NEUTROGENA® AI Assistant (NAIA™), a virtual skin health coach. Powered by artificial intelligence and behavior change techniques NAIA™ builds a relationship with users by initiating a text conversation to determine their skincare personality, approach to skincare and current routine. NAIA™ then helps users identify an 8-week skincare goal that is monitored and supported with behavioral coaching.

“As part of the world’s largest healthcare company, we combined 60 years of skin health experience with 30 years of proven, sustainable behavior change research to build a powerful, comprehensive and highly-advanced skin health algorithm.” said Dr. Michael Southall, Global R&D Lead, NEUTROGENA® Skin Tech, Johnson & Johnson Consumer Health. “As more data is tracked, NAIA™ will use machine learning to improve analysis and recommendations, getting more precise and intelligent.”

About the NEUTROGENA Skin360™ app

Starting today, US consumers can download the NEUTROGENA Skin360™ app from both the App Store (click to download) and Google Play (click to download) for free, for use on both iPhone and Android devices.

In shifting away from a physical tool, the 180-degree selfie analysis is now powered by Perfect Corp’s YouCam technology, which provides a lightning fast analysis for a broad range of skin parameters (wrinkles, fine lines, dark under-eye circles, dark spots and smoothness). The skin analysis boosted with the extensive NEUTROGENA® skincare experience and the individual’s sleep, exercise and stress levels is what creates a unique Skin360 Score. Users can also input a self-assessment of important attributes such as moisture, clarity, tone and radiance.

The skin analysis algorithm:

- Analyzes more than 100,000 skin pixels over 2,000 facial attributes.
- Developed using more than 10,000 facial databases across ethnicities, skin types and ages (from 7-70 years old) with greater than 10 types of lighting.
- With more than 2.5 million possible product recommendations, virtually no two routines are exactly the same.

An 8-week personalized skincare routine will be recommended based on an individual’s Skin360 Score and their specific skincare goals. This custom advice will include:

- Specific morning and evening routines
- Relevant tips and content to help users build a healthy habit and stick to it
- Coaching, with behavior change techniques, to overcome barriers and challenges
- Science-backed content on areas of interest and concern for each user

Over time, as Skin360 scores change, the user can learn what’s working, or not, and adjust routines accordingly.

The launch of the NEUTROGENA Skin360™ app sets the foundation for a pipeline of hyper-personalized and customized products such as NEUTROGENA MaskiD™, a patent pending, personalized 3D-printed sheet mask that will launch in Q3 2020 and will be available exclusively through the app.

About NEUTROGENA®

NEUTROGENA®, #1 dermatologist recommended skincare brand, has brought groundbreaking skincare solutions to consumers for more than 60 years. Today the brand offers more than 650 products worldwide in the face, body, acne, sun protection, makeup, men’s care, and anti-wrinkle categories. By creating, innovating and rethinking what is possible, NEUTROGENA® products consistently deliver real results without compromises.

"CES® is a registered trademark of Consumer Technology Association (CTA)"

[1] 2018 Euromonitor Passport Data (pulled 1/3/2020) and Nielsen Skin Health Flash Report (pulled 1/3/2020)

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Social Media Profiles

Facebook

Twitter

Instagram

EXHIBIT C

AN APP FOR THAT

Neutrogena's Updated Skin360 App Will Help You (Finally) Stick to Your Skin-Care Routine

It's like having a skin-care pro in your pocket.

BY JESSICA CRUEL

January 3, 2020



SAVE THIS STORY

Now more than ever, the beauty experience begins and ends on a cell phone. First, you might discover a product in your favorite influencer's Instagram feed, then you head to an online retailer to read reviews and add to cart, and finally you take a selfie to show the world your purchase once it's arrived. Back in 2018, Neutrogena gave our cell phones a whole new level of power when it launched the Skin360 app and SkinScanner device, which transformed the average iPhone into a high-powered camera that could analyze the skin on a pore-level — that's the type of

technology that was once exclusive to dermatologist offices. In 2020, the drugstore-favorite brand is upgrading the app with even better tech, and *Allure* has the exclusive details.

At next week's Consumer Electronics Showcase (CES) in Las Vegas, Neutrogena will unveil the new-and-improved Skin360 app, which only requires the camera on your phone to get a deep, in-depth assessment of your skin. Unlike the original version, which required the $50 SkinScanner tool to assess the skin with a 30-times magnification lens and 12 high-powered lights, the updated Skin360 app only needs your front-facing camera to work.

When you first open up the app, you are prompted to take selfies, a practice most beauty lovers are familiar with. With the help of Perfect Corp's YouCam technology, the camera takes images from the front and both sides within seconds. Then the images are analyzed using Neutrogena's database of 10,000 other selfies from a range of age groups and ethnicities. The Skin360 app then gives you a score between one and 10 in five areas — dark spots, fine lines, wrinkles, dark circles, and smoothness — plus an overall average (mine hovered just above seven).

Neutrogena Skin360 app screenshot.

What really sets this app apart from its first-gen version is NAIA, the Neutrogena AI Assistant. NAIA is like a skin therapist that helps you set goals for yourself. The assistant asks you about habits that might affect your skin, like your stress levels, sleep patterns, and exercise routines. Then, the app creates an eight-week skin-care regimen for you based on your personality type (are you a 10-step routine person or a five-minutes-and-done type). While the recommendations are all from Neutrogena, you can input any other skin-care products you're already using and track the efficacy of your routine over time.

NAIA isn't just a helper for the start-up process. The assistant checks in regularly to make sure you're taking weekly progress photos and sticking to your skin-care routine. "As more data is tracked, NAIA will use machine learning to improve analysis and recommendations, getting more precise and intelligent," said Michael Southall, the global research and development lead of Neutrogena Skin Tech.

The new Neutrogena Skin360 app is available in the Apple and Google Play stores now for free. Later in 2020, the app will be an integral tool in Neutrogena's personalized face masks, called Neutrogena Mask iD. The technology creates a micro 3-D-printed face mask that's customized in both shape and ingredients — all with a few taps on your phone. You can target different skin concerns in different parts of the face, so discoloration under the eyes or redness around the cheeks.

The final creation is a feat of multi-masking, and while this technology doesn't launch until later this year, you'll want to start collecting your skin-care data now so that you'll know exactly how to customize your mask when the time comes.

More from beauty tech:

- Neutrogena Launches Skin360 and SkinScanner With FitSkin

- Neutrogena Is Launching Personalized, 3-D Printed Face Masks
- The Future of Personalized Beauty Lies in the Tech Industry

Now, see how skin care has evolved within the last 100 years:

You can follow Allure on Instagram and Twitter, or subscribe to our newsletter to stay up to date on all things beauty.



Jessica Cruel is the editor in chief of *Allure*, where she leads the development of multiplatform editorial content for print, digital, and video platforms. At *Allure*, she spearheaded the launch of The Melanin Edit, a new platform exploring all things relating to Black beauty.

In her decade-long career, Jessica... Read more

Editor in Chief

KEYWORDS NEUTROGENA SKINCARE BEAUTY TECHNOLOGY SKIN TECH SKIN-CARE DEVICE

Allure Daily Beauty Blast

Get the latest beauty news and product launches in your inbox daily. As a bonus, on Wednesdays you will receive The Beauty Edit, which gives you an inside look into what our editors are using and talking about.

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