IN THE 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.

No. 3:22−CV−03149 −MAS−TJB

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED CLASS ACTION COMPLAINT

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INTRODUCTION

Defendant Johnson & Johnson Consumer Inc.'s ("JJCI") second motion to dismiss seeks to have this Court apply the Illinois Biometric Information Privacy Act's ("BIPA") limited exemption for "biometric identifiers" obtained from a "patient in a health care setting" to users of JJCI's Skin360 consumer product recommendation software. 740 ILCS § 14/10.[1] In urging the Court to expansively interpret the undefined terms "patient" and "health care setting"—both of which are required to trigger the exemption—JJCI relies exclusively on three federal district cases that were since squarely rejected by an Illinois appellate court in *Marino v. Gunnar Optiks LLC*, 2024 IL App (1st) 231826 (2024).[2] The Illinois appellate court found that each of these cases interpreted this limited exemption in a manner that strayed from the legislature's intent and was "[in]consistent with [the exemption's] plain language." *Id.* at ¶ 40.

The district court cases improperly define "patient" to include the "recipient of any various services" and/or "health care" to include anything that "promote[s] someone's physical, mental, or emotional well-being." *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). The Illinois appellate court rejected these definitions because they were divorced from the plain meaning of these undefined terms. It held that the plain meaning of the term patient "is someone who is presently awaiting or receiving care and treatment *from a medical professional*."

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

[2] The *Marino* opinion was authored by Justice Mary L. Mikva, whose dissenting opinion in *Mosby* was adopted by the Illinois Supreme Court. *See Mosby v. Ingalls Mem. Hosp.*, 2023 IL 129081, ¶ 41 (2023) ("We agree with defendants and Presiding Justice Mikva's dissent . . ."); *Mosby v. Ingalls Mem. Hosp.*, 2022 IL App (1st) 200822 (2022) (Mikvah J., dissenting). *Mosby* is a recent Illinois Supreme Court case that interprets BIPA's separate, so-called "HIPAA Exemption."

Marino, 2024 IL App (1st) 231826, ¶ 27 (emphasis added). And it held that the plain meaning of the term "health care" is something done for physical, mental, or emotional well-being, "*especially when performed by trained and licensed professionals*." *Id.* at ¶ 28 (emphasis in original).[3]

Applying these commonsense dictionary definitions, individuals who used the Skin360 software are not JJCI's "patients" because they are not receiving or awaiting care and treatment from a medical professional. And the software application is not a "health care setting" merely because it analyzes skin to then promote Neutrogena's products. "[C]utting through the analysis with Occam's razor . . . the simplest explanation of BIPA is the best one" which is the "commonsense interpretation . . ." *Melzer v. Johnson & Johnson Consumer Inc.*, Civil Action No. 22-3149 (MAS) (RLS), 2023 WL 3098633, at *3 (D.N.J. Apr. 26, 2023). It is ultimately a matter of plain commonsense that by using Skin360 Plaintiffs did not become JJCI's "patients"—they are simply its potential consumers.

FACTUAL BACKGROUND

A. BIPA's Health Care Exemption

BIPA "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 biometric information—information based on an individual's biometric identifiers that is then used to identify an individual." *West Bend Mutual v. Krishna*, 2021 IL 125978, ¶ 46 (2021) (emphasis added) (citing 740 ILCS 14/10). It bars private entities from collecting or disseminating this information without informed consent and bans any selling

[3] (quoting Merriam-Webster Online Dictionary https://www.merriam-webster.com/dictionary/health care (last visited Aug. 21, 2024) (emphasis supplied by court).

or trading of it. 740 ILCS 14/15(a)-(d). In enacting BIPA, the legislature recognized that biometrics "are biologically unique to the individual" and "once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions." *Id.* at 14/5(c). Furthermore, "[t]he full ramifications of biometric technology are not fully known." *Id.* at 14/5(f). BIPA's "broad purpose" is "protecting privacy in the face of emerging biometric technology . . ." *In re Facebook Biometric Info. Priv. Litig.*, 185 F. Supp. 3d 1155, 1172 (N.D. Cal 2016).

BIPA provides two limited and independent exemptions: "biometric identifiers" do not include (1) "information captured from a patient in a health care setting" (the "Health Care Exemption") or (2) "information collected, used, or stored for health care treatment, payment or operations under the federal Health Insurance Portability and Accountability Act of 1996" (the "HIPAA Exemption").

JJCI's sole basis for dismissal is the Health Care Exemption. *See* JJCI Br. at 10-18. The implication of applying this exemption here is drastic: if the biometric identifiers collected from users of Skin360 fall under this exemption, they are excluded from BIPA's statutory definition of "biometric identifier." This would absolve JJCI of any obligation to obtain informed written consent before collecting biometric identifiers, and, as JJCI asserts, it would face no restrictions on selling or trading this sensitive information. *See* 740 ILCS 14/15(c) (BIPA's total ban on the sale or trade of biometrics applies only to entities in "possession of a biometric identifier"). JJCI could freely collect, sell, or trade Plaintiffs' and Class Members' facial biometrics without any legal restraint.

B. Neutrogena Skin360

Neutrogena Skin360 is a publicly available web application and software application that

can be accessed from the Neutrogena website. Second Amend. Compl. ("SAC") at ¶ 14. JJCI "describes the [Neutrogena] Skin360 as a 'breakthrough technology' that provides consumers with 'a personalized at-home skin assessment' by scanning a consumer's face and analyzing the facial scan to diagnose skin health issues, such as dark circles, wrinkles, fine lines, dark spots, and texture, and then recommending a skin care regimen consisting of Neutrogena products . . ." SAC at ¶ 33. According to JJCI, through this technology, JJCI "processes over 100,000 skin pixels from every selfie scan to measure 5 different aspects of the [consumer's] face." *Id.* at ¶ 34. JJCI integrates Skin360 with NAIA, "an artificial intelligence assistant" that "recommends Neutrogena products to consumers." *Id.* at ¶¶ 59-60. According to JJCI, NAIA "helps users identify an 8-week skincare goal that is monitored and supported with behavioral change" and "recommends a specific skin care regimen consisting of Neutrogena products to new consumers who have their face geometry analyzed by Skin360." *Id.* at ¶ 61; Certif. of David R. Kott, Ex. C (ECF 66-4).

Plaintiffs allege that they used Neutrogena Skin360 "to obtain a personalized at-home skin assessment." *Id.* at ¶ 72, 78, 84, 90. They also each allege that JJCI captured their biometric identifiers through Skin360 in violation of BIPA. *Id.* at ¶ 73, 79, 85, 91. None, however, allege that they used NAIA or purchased any Neutrogena products after receiving this skin assessment.

C. Procedural Background

Plaintiff Helene Melzer filed this putative class action on May 26, 2022, alleging that JJCI violated BIPA because it captured her facial biometric identifiers without her informed written consent, disseminated this information without first obtaining her consent, unlawfully profited from her data, and failed to abide by BIPA's retention policy requirements. (ECF 1.) Plaintiff filed a first amended complaint ("FAC") on August 12, 2022, (ECF 21), which JJCI moved to dismiss on the grounds that Melzer failed to plausibly allege any BIPA violations. (ECF 25-1.)

JJCI did not raise the health care exemption. On April 26, 2023, the Court denied JJCI's motion to dismiss Melzer's BIPA claims. See *Melzer*, 2023 WL 3098633.

On July 1, 2024, Plaintiffs filed the SAC mostly containing the same allegations as the FAC but adding three additional plaintiffs. On August 12, 2024, JJCI moved to dismiss the SAC on the grounds that Skin360 is exempt from BIPA under the Health Care Exemption. (ECF 66.) In moving to dismiss, JJCI relies on the allegations in the SAC, its press releases, and statements on its website to argue that Plaintiffs' use of Skin360 rendered them "patients in a health care setting" within the meaning of the Health Care Exemption. JJCI Br. 10-18.

ARGUMENT

I. The Health Care Exemption Does Not Extend to Skin360 Because the Software is Not a "Health Care Setting," And Its Users Are Not "Patients"

A. Under Third Circuit Authority, the Court Should Follow the Subsequent Illinois Appellate Court's Interpretation of the Health Care Exemption, and Not the Three Rejected District Court Decisions

JJCI's motion relies entirely on three federal district court cases that applied the Health Care Exemption to virtual-try-ons for eyeglasses. *See* JJCI Br. at 10-16 (claiming to be analogous to *Warmack-Stillwell v. Christian Dior, Inc.*, 655 F Supp 3d 742, 746 (N.D. Ill. 2023), *Svoboda v. Frames for Am., Inc.*, No. 21 C 5509, 2022 WL 4109719, at *2–3 (N.D. Ill. Sep. 8, 2022), and *Vo v. VSP Retail Dev. Holding, Inc.*, No. 19 C 7187, 2020 WL 1445605, at *2–3 (N.D. Ill Mar. 25, 2020). Those cases improperly interpreted the statutory terms "patient" and "health care". JJCI latches onto those cases to claim that the Health Care Exemption applies to "all circumstances where an online application is offered to users for a health care purpose," JJCI Br. at 13 (citing *Warmack-Stillwell*, *Svoboda*, and *Vo)*, and anyone using the application becomes the "patient" of

the entity "offering" the virtual try-on.[4]

After JJCI filed this motion, on August 30, 2024, the Illinois Appellate Court for the First District squarely rejected the holding and reasoning of these three cases on a certified interlocutory appeal, finding that "none of these federal cases interpret the Act's exclusion for 'information captured from a patient in a health care setting' in a manner that is consistent with its plain language and the legislature's intent." *Marino*, 2024 IL App (1st) 231826, ¶ 40.

Under Third Circuit law, this Court should follow the Illinois appellate court's interpretation of BIPA, unless it is convinced by persuasive information that the Illinois Supreme Court would decide otherwise. *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 254 (3d Cir. 2010) ("Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.")(quoting *Budget Rent-A-Car Sys., Inc. v. Chappell*, 407 F.3d 166, 174 (3d Cir. 2005)). Indeed, the "decisions of a state intermediate appellate court are evidence of state law . . . and must be given significant weight.'" *Shannon v. B.L. Eng. Generating Sta.*, No. 10-04524, 2013 WL 6199173, at *12 (D.N.J. Nov. 27, 2013) (quoting *Rustay v. Conrail*, 775 F. Supp. 161, 164 (3d Cir. 1991).[5] The cases JJCI relies on interpreted the Health Care Exemption in a manner that

[4] Thus, "[j]ust as the defendants in *Warmack-Stillwell, Svoboda*, and *Vo* offered a service to 'maintain and restore' one's vision health [through eyeglasses] so too does Skin360 with respect to one's skin health." *Id.* at 13-14.

[5] And while federal decisions interpreting state statutes may also be relevant, "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same [district] judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (citation omitted). "[T]here is no such thing as 'the law of the district and *stare decisis* does not compel one district court judge to follow the decision of another." *Daubert v. NRA Group, LLC*, 861 F3d 382, 395 (3d Cir. 2017) (citation and quotations omitted).

is inconsistent with BIPA's plain language and legislative intent. On the other hand, as demonstrated below, the Illinois appellate court properly interpreted this limited exemption in line with long standing principles of statutory construction. Thus, as directed by the Third Circuit, the Court should follow the Illinois appellate court decision.

B. The District Courts on Which JJCI Relies Interpreted the Health Care Exemption Inconsistently with BIPA's Plain Language and Legislative Intent

i. *The Statutory Terms "Patient" and "Health Care Setting" Refer to Treatment and Care from Medical Professionals, Not the Mere Provision of "Wellness"*

The Illinois appellate court found that the plain meaning of the term patient "is someone who is presently awaiting or receiving care and treatment *from a medical professional*." *Marino*, 2024 IL App (1st) 231826, ¶ 27 (emphasis added). The term "patient" is critical in the Health Care Exemption because the exemption "excludes from the Act's coverage information *from a particular source*—a patient in a health care setting." *Mosby v. Ingalls Mem. Hosp.*, 2023 IL 129081, ¶ 41 (2023) (emphasis added). Further, as used in the Health Care Exemption, "health care" means "efforts made to maintain, restore, or promote someone's physical, mental, or emotional well-being *especially when performed by trained and licensed professionals*." *Id. at* ¶ 28 (quoting Merriam-Webster Online Dictionary https://www.merriam-webster.com/dictionary/health care (last visited Aug. 21, 2024) (emphasis supplied by court).[6]

[6] Both the terms "patient" and "health care setting" are necessary in the statute. Had the statute omitted the term "patient" and only said "information obtained in a health care setting," it would have extended the exemption to biometric information obtained from any person in a health care setting. On the other hand, had the statute only used the term "patient" as in "information obtained from a patient" without the qualifying term "health care setting," the exemption would have been limitless as everyone, among many other things, is a "patient." It is akin to saying information obtained from a "husband" or a "wife" or a "son" or a "daughter" without qualifying the setting or context. The terms together make clear that the biometric identifiers must be obtained from an individual in a health care setting that renders them a "patient."

The Illinois appellate court flatly rejected the reasoning of the federal court in *Svoboda*, a virtual try-on case involving non-prescription eyeglass. *Svoboda* adopted a secondary definition of "patient" contained in the Merriam Webster's Online Dictionary, "the recipient of a various personal service," that "is too broad to be helpful in understanding the Act's health care exclusion." *Marino*, 2024 IL App (1st) 231826, ¶ 36.[7] Rather, the appropriate dictionary definition is "the first [Merriam Webster's Online] dictionary definition of 'patient'" which defines that word to mean "an individual awaiting or under medical care and treatment." *Id.* at ¶ 25.[8] This "is supported by Black's Law Dictionary (11th ed. 2019), which defines 'patient' as '[a] person under medical or psychiatric care.'" *Id*.[9]

Other dictionaries used by Illinois courts also support this definition. For example, the Oxford Online English Dictionary defines "patient" in its primary definition as "[a] person receiving or (in later use) registered to receive medical treatment, esp. at a particular establishment or from a particular practitioner; a person staying in a hospital for medical treatment."[10]; *See W. Bend Mut. Ins. Co.*, 2021 IL 125978, ¶ 40 (citing Oxford English Dictionary Online). The Cambridge Learner's Dictionary defines "patient" to mean "someone who is being treated by a doctor, nurse, etc."[11] *Commonwealth Edison Co. v. Illinois Commerce Commn.*, 2014 IL App (1st)

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[7] (quoting Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/patient (last visited Aug. 21, 2024) [https://perma.cc/JZX7-CRV5]).

[8] (quoting Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/patient (last visited Aug. 21, 2024) [https://perma.cc/JZX7-CRV5]).

[9] The Illinois Supreme Court has looked to Black's Law Dictionary to construe undefined terms. *See e.g., W. Bend Mut. Ins. Co. v Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶ 40 (2021).

[10] Patient, Oxford English Dictionary, available at: https://www.oed.com/dictionary/patient_adj?tab=meaning_and_use#31769348.

[11] Patient, Cambridge Learner's Dictionary, available at https://dictionary.cambridge.org/us/dictionary/learner-english/patient.

132011, ¶ 33 (2014) (citing Cambridge Learner's Dictionary).

The Illinois appellate court's rejection of the Merriam Webster's secondary definition accords with the Illinois Supreme Court's directive that courts should reject secondary definitions that do not comport with the term's "commonly understood meaning." *People v. Ward*, 215 Ill 2d 317, 325-326 (2005) (rejecting secondary definition because "[w]e find no indication, however, that the legislature intended to depart from the ordinary and popular meaning of 'possession' when it included this term in the harmful material statute."); *People v. Gutman,* 2011 IL 110338, ¶ 37 (2011) (same)*; Fair Empl. Practices Com. v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 41 Ill App 3d 712, 716 (1976) (same). In other words, "[t]here is a reason why secondary definitions are *secondary*." *Marsh v. CSL Plasma Inc.*, 503 F. Supp. 3d 677, 683 (N.D. Ill. 2020) (emphasis in original)[12]

It similarly accords with the Illinois Supreme Court's directive that courts should construe a term such as "patient" as it is "understood by reasonable persons." *Home Star Bank & Fin. Servs. v. Emergency Care & Health Org., Ltd.*, 2014 IL 115526, ¶ 39 (2014). Here, reasonable persons would not understand Skin360 users, who JJCI itself refers to as "consumers" (*see e.g.* ECF 66-4 at 3-4), to be JJCI's "patients." This must inform the Court's interpretation of the plain meaning

[12] Though the Court need not look beyond the statute itself to discern its intent, to the extent it did, the statute's statement of intent, 740 ILCS 14/5, and its legislative history also shows that BIPA was intended to provide protections for biometric data with only limited exemptions. Illinois courts focus on the remarks of the bill's sponsor when looking at legislative history. *Maschek v. City of Chicago*, 2015 IL App (1st) 150520, ¶ 62 (2015). Here, the remarks of Representative Kathleen Ryg, the House sponsor, immediately before the House's passage of the Act, further support a narrow reading of the terms "patient" and "health care setting." In referencing the list of exemptions contained in Sections 10 and Section 25 of BIPA, she focused on "hospitals" with respect to the health exemptions, indicating that the Health Care Exemption was intended to be limited, and to cover information provided from "patients" to "medical professionals." *See* 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (statement of Representative Ryg).

of who qualifies as a "patient."[13]

ii. The District Courts Erroneously Found That the Potential Provision of FDA Regulated Products Equates to the Provision of "Health Care" Within the Meaning of the Health Care Exemption

Svoboda, as well as *Warmack-Stilwell,* another non-prescription eyeglass case rejected by the Illinois appellate court, "relied on the fact that nonprescription sunglasses are considered Class I medical devices by the Food and Drug Administration." *Marino*, 2024 IL App (1st) 231826, ¶ 36. But "Class I medical devices" are only subject to general controls, and "include a broad range of commonly used products such as adhesive bandages (21 C.F.R. § 880.5240 (2001)), tongue depressors (*id.* § 880.6230), bedpans, (*id.* § 880.6730), crutches and canes (*id.* §§ 890.3150, 890.3075), and manual and powered toothbrushes (*id.* §§ 872.6855, 872.6865)." *Id.* "We cannot agree that a person providing their biometric identifiers to obtain any of those products becomes a 'patient in a healthcare setting' under the Act and therefore falls outside of the Act's protections." *Id.* at¶¶ 38-39.

Thus, under *Marino*, it is of no moment that "Skin360 users receive product suggestions for products regulated by the FDA, in this case as over-the-counter drug products like sunscreen and acne products. *See, e.g.*, 21 C.F.R. § 352 (sunscreen); *id.* § 333.301 (acne products)." JJCI Br. at 15. Or that "[s]imilar to how eyeglasses and sunglasses maintain or restore physical well-being by correcting or protecting vision . . . Skin360 helps users maintain and restore their skin health by suggesting FDA-regulated skin care products to users." *Id*. (citations omitted). Even assuming

[13] JJCI cites to *Warmack-Stillwell*, a case rejected by *Marino*, for the proposition that it does not matter that "VTOT users would be surprised to learn that they were entering into a provider/patient relationship," because the "relevant test is not a user's subjective understanding, but rather an objective application of the text of the exemption." 655 F. Supp. 3d at 746. But an "objective application of the text of the exemption" *requires first* understanding how the term patient "is understood by reasonable persons." *Home Star Bank & Fin. Servs. v. Emergency Care & Health Org., Ltd.*, 2014 IL 115526, ¶ 39 (2014)).

Plaintiffs alleged (they did not) that they received a recommendation for an FDA regulated product, the recommendation of these commonly used Class I products does not render consumers "patients in a health care setting."

Marino's interpretation is also supported by the Illinois Supreme Court directive that when "construing a statute, the court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Mosby*, 2023 IL 129081, ¶ 31 (citations and quotations omitted); *See also BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 33 (2014). The remedial purpose of statute—to protect biometric identifiers because they are unique and irreplaceable and to place an absolute bar on their for-profit sale or trade—supports *Marino*'s commonsense reading of the term "patient" and "health care setting" to refer to a limited exemption.[14]

Further, the Illinois Supreme Court has directed that "when construing a statute, courts are to assume that the legislature did not intend to produce absurd or unjust results." *People v. Whitehead*, 2023 IL 128051, ¶ 18 (2023). Any interpretation where "health care" is effectively "wellness" and "patients" are the "recipients of services," leads to absurd consequences, as almost any entity would qualify under the Health Care Exemption, including gas stations, grocery stores,

[14] BIPA was intended to provide broad protections for this irreplaceable information and to prevent for-profit transactions in it. "The judgment of Illinois's General Assembly is that the sensitivity of biometric information and the risk of identity theft or other privacy or economic harm that may result from its dissemination, necessitates that people be given the opportunity to make informed choices about to whom and for what purpose they will relinquish control of that information." *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 626 (7th Cir. 2020). Further, to protect this data, the statute "flatly prohibits for-profit transactions." *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1247 (7th Cir. 2021). The plain meaning of the terms "patient" and "health care setting"—when read in conjunction with these purposes—suggests a limited exemption and does not support JJCI's proffered interpretation whereby it, and commercial entities like it offering wellness services to individuals, would be free to sell and trade in this data.

bodegas, and department stores. These businesses sell FDA Class I regulated products and products that contribute to "wellness." Construed broadly, gym memberships, sunscreen, restaurants, food products, and even hats would be deemed health care and their recipients "patients," as each could be construed as "wellness." The Health Care Exemption would apply equally to a skincare counter at a Macy's department store selling Neutrogena products as to a doctor seeing their patient.

The expansive interpretation rejected by *Marino* also leads to other absurd and unjust results. The Health Care Exemption, read with commonsense, exempts from BIPA's coverage biometric information already otherwise generally protected from disclosure and sale by a variety of federal and state statutes protecting information acquired during health care treatment.[15] Under JJCI's expansive interpretation, however, while biometric information collected from patients by licensed medical professionals would generally be already protected from disclosure, sale and trade, that same biometric information collected by JJCI and other national corporations selling routine products would have no protection at all and could be freely sold and traded in a for-profit marketplace that BIPA was expressly designed to prevent. This absurd and unjust result cannot be what the legislature intended. "When a proffered reading of a statute leads to absurd results or results that the legislature could not have intended, courts are not bound to that construction; and the reading leading to absurdity should be rejected." *Dawkins v. Fitness Intl., LLC*, 2022 IL 127561, ¶ 27 (2022).

[15] *See, e.g.*, 735 ILCS 5/8-802 ("No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient . . .").

iii. Even If JJCI Provides "Health Care" within the Meaning of BIPA, Skin360 Users Are Not JJCI's "Patients"

The Illinois appellate court also rejected the holding in *Vo*, where the virtual try-on tool involved fitting both prescription and non-prescription eyeglasses. *Vo*, 2020 WL 1445605, at *2–3. Though finding that the *Vo* court erroneously adopted an inapplicable HIPAA definition of "health care," the Illinois appellate court did not stop there; it found that even had the *Vo* court been correct in finding that selling prescription eyeglasses through its virtual try-on service could be considered "health care," its customers still were not "patients" and thus still would not qualify under the Health Care Exemption. *Marino*, 2024 IL App (1st) 231826, ¶ 34. ("Even if we agreed" that the virtual try-on vendor of prescription eyeglasses offered a "service that could be considered health care, the person using the software was not a 'patient' under the dictionary definition that we think is clearly what the legislature had in mind."). [16] This is because the term "patient" plainly refers to "someone who is presently awaiting or receiving care and treatment *from a medical professional*." *Id.* at ¶ 27 (emphasis added).

Thus, try as it may, JJCI's attempt to construe Skin360, a consumer product recommendation tool, as a "health care setting" is futile, as even if its product recommendation software was deemed a "health care setting," that does not transform its potential customers into "patients" and allow it to freely collect and sell its customers biometric data. Like the prescription glasses virtual try-on customers in *Vo*, Skin360 users are not "presently awaiting or receiving care

[16] *Vo* improperly relied on the HIPAA definition of health care. 2020 WL 1445605, at *2. The Illinois Supreme Court in *Mosby* subsequently ruled that the HIPAA definitions apply only to the HIPAA Exemption and not to the Health Care Exemption at issue in JJCI's motion. 2023 IL 129081, ¶ 37 (The "Illinois legislature used the disjunctive 'or' to separate the Act's reference to 'information captured from a patient in a health care setting' from 'information collected, used, or stored for health care treatment, payment, or operations under [HIPAA].'"). Thus, "[t]he HIPAA definitions apply only to the second part of the Act's health care exclusion . . ." *Marino*, 2024 IL App (1st) 231826, ¶ 34.

and treatment *from a medical professional*." *Marino*, 2024 IL App (1st) 231826, ¶ 27 (emphasis added). Hence, it does not matter that according to JJCI's own press release, Skin360 purports to "measure[] . . . aspects of the consumer's skin health," "provid[ing] consumers with a personalized at-home skin assessment," JJCI Br. at 16 (citing SAC ¶¶ 33–34) (cleaned up), or that JJCI, according to an article in Allure magazine referenced in the SAC, offers "personalized skin health information and interactive coaching [from NAIA] to assist users in maintaining their skin health." JJCI Br. at 16. Even if these were deemed to be "health care," and even if Plaintiffs alleged (they did not) that they used these services, Plaintiffs, Class Members, and other Skin360 users, would not be JJCI's "patients" under the plain meaning of the term; they are simply potential customers. Thus, Plaintiffs' claims are not covered by the Health Care Exemption.

CONCLUSION

Marino provides the most current and persuasive interpretation of BIPA's health care exemption and is consistent with Illinois Supreme Court precedent on statutory construction. For the foregoing reasons, Defendant's motion to dismiss the SAC should be denied. To the extent the Court finds any defects in the SAC, Plaintiffs respectfully request leave to replead.

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