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 18, 2024** **ORAL ARGUMENT REQUESTED**

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

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INTRODUCTION

JJCI's opening brief demonstrated why Plaintiffs' use of Skin360 falls within BIPA's Health Care Exemption, which excludes from the statute's reach information collected "from a patient in a health care setting." 740 ILCS 14/10. In response, Plaintiffs rely almost entirely on a recent opinion from the Illinois Appellate Court, *Marino v. Gunnar Optiks*, 2024 IL App (1st) 231826. But this Court's duty is to predict how the Illinois Supreme Court would apply the Health Care Exemption to a user of Skin360. And for a variety of reasons *Marino* is, at best, a weak guide for how *this* Court should decide *this* case.

First, *Marino* concerned a set of facts—trying on non-prescription sunglasses for aesthetic purposes—materially different from those alleged here. By contrast, Plaintiffs allege they used Skin360 to monitor their skin *health* (not just for aesthetics), receive a personalized skin *health* assessment, and receive a suggested skin care regimen. Put simply, this Court can apply the Health Care Exemption to Skin360 without calling into question the result in *Marino*, which refused to apply the same Exemption to non-prescription sunglasses.

Second, Plaintiffs press upon this Court a particularly narrow construction of the Health Care Exemption that *Marino* articulated. But that construction was not necessary to reach the result in *Marino* and is a poor guide for how the Illinois Supreme Court would construe the Exemption.

Under long-established rules of construction articulated by the Illinois Supreme Court, Skin360 falls within the Health Care Exemption. Accordingly, the Second Amended Complaint (the "SAC") should be dismissed.

ARGUMENT

In analyzing a question of Illinois law, this Court's task is to predict how the Illinois Supreme Court would rule. *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 45–46 (3d Cir. 2009). In doing so, the Court should "give due regard, but not conclusive effect," to the opinions of lower state courts. *Pac. Emps. Ins. Co. v. Glob. Reinsurance Corp. of Am.*, 693 F.3d 417, 433 (3d Cir. 2012); *see also Nat'l Sur. Corp. v. Midland Bank*, 551 F.2d 21, 29–30 (3d Cir. 1977) (explaining that while the decision of a state intermediate appellate court may "be attributed some weight, the decision is not controlling" (quoting *King v. Order of Travelers*, 333 U.S. 153, 160–61 (1948) (cleaned up)). This Court is, of course, "free to reach a contrary result." *Downs v. U.S. Pipe & Foundry Co.*, 441 F. Supp. 2d 661, 663 (D.N.J. 2006) (quoting *Nat'l Sur. Corp.*, 551 F.2d at 30).

The Court should also consider decisions of other federal courts. *See, e.g.*, *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214, 225 (3d Cir. 2020) (looking to decisions from both state and federal courts to predict how the Pennsylvania Supreme Court would rule). This includes the three federal courts discussed in JJCI's opening brief—the only courts other than *Marino*, to JJCI's knowledge, to

have considered the applicability of the Health Care Exemption to virtual technology. *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). Each of these federal courts concluded that the Health Care Exemption applies to data collected from an individual virtually trying on prescription and non-prescription eyewear, because such actions involved "efforts made to maintain or restore physical, mental, or emotional well-being." *Warmack-Stillwell*, 655 F. Supp. 3d at 746–47; *Svoboda*, 2022 WL 4109719, at *2 (same); *see also Vo*, 2020 WL 1445605, at *2 (holding Health Care Exemption applied because virtual try-on technology was "a service or procedure that affects the function of the body"). Importantly, as the court explained in *Warmack-Stillwell*, "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. *Marino*'s more limited interpretation has yet to be adopted by any other court.

I. ***Marino* Addressed a Limited and Factually Distinct Question.**

A. ***Marino* Concerned the Applicability of BIPA's Health Care Exemption to Individuals Who Virtually Tried On Non-Prescription Sunglasses.**

The plaintiff in *Marino* filed a class action complaint alleging that the defendant, which sold "eyeglasses and other optical wear online," violated BIPA

by collecting facial geometry scans in connection with its virtual try-on software. 2024 IL App (1st) 231826, ¶ 1. The allegations concerned two types of eyewear: prescription eyeglasses and non-prescription sunglasses. *Id.* The Illinois trial court dismissed the plaintiff's claims relating to *prescription* eyeglasses, holding that the virtual try on of prescription eyeglasses fell within BIPA's HIPAA Exemption,[1] but denied the motion with respect to non-prescription sunglasses. *Marino*, 2024 IL App (1st) 231826, ¶¶ 15–16. The collection of information in connection with *prescription* eyeglasses never became the subject of appeal and is an important backdrop to the narrow scope of the issue considered by the Illinois Appellate Court.

The trial court certified only a narrow question concerning non-prescription sunglasses. The Illinois Appellate Court agreed to hear and resolve the following issue:

> Pursuant to the health care exemption under the Biometric Information Privacy Act 740 ILCS 14/10, is an individual *who tries on non-prescription sunglasses* utilizing a virtual try-on tool that captures certain biometric information, considered a patient in a health care setting?

Id. ¶ 21 (emphasis added).

[1] In addition to the Health Care Exemption, BIPA also separately excludes from the statute's reach "information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996 [HIPAA]." 740 ILCS 14/10. That exclusion is not at issue here.

As to that narrow question, the appellate court in *Marino* disagreed with the three federal cases discussed above, emphasizing that the "primary basis" for the courts' decisions in those cases was "the fact that nonprescription sunglasses are Class I medical devices." *Id.* ¶¶ 36–38 (citing *Warmack-Stillwell*, *Svoboda*, and *Vo*). However, *Marino* reasoned, "Class I medical devices include a broad range of commonly used products," and therefore "these federal courts' reliance on the fact that sunglasses are Class I medical devices [was] unpersuasive." *Id.* ¶¶ 38–39. Put simply, *Marino* disagreed with the federal courts' view that the fact that information was collected in connection with the purchase of a Class I medical device *sufficed* to trigger the Health Care Exemption in BIPA.

Ultimately, the *Marino* court ruled that there was no other plausible basis for applying the Health Care Exemption to information collected in connection with the purchase of non-prescription sunglasses. So it answered the certified question in the negative, holding that "an individual virtually trying on nonprescription sunglasses with the use of the virtual try-on software is [not] a patient in a health care setting." *Id.* ¶ 40.

B. The Skin360 Tool Is Different Than A Virtual Try-On Tool Used To Try On Sunglasses.

This case is not about collecting information in connection with trying-on non-prescription sunglasses for aesthetic purposes. Indeed, as JJCI explained in its Motion, "Plaintiffs' allegations regarding Skin360 go beyond those" related to

virtually trying-on glasses. *See* Mot. at 16. Nor is JJCI asserting here that the Exemption applies because the products suggested by Skin360 are Class I medical devices (they are not). Instead, JJCI's argument arises out of Plaintiffs' own allegations, which demonstrate the material differences between Skin360 and a virtual try-on of non-prescription sunglasses for aesthetic purposes. Skin360 provides a personalized skin health assessment, makes customized suggestions for skin health products and routines, and provides tailored coaching and skin health information to users. *See* Mot. at 4–8, 16–17 (citing SAC). Specifically, as set forth in the SAC and the attached exhibits:

- Plaintiffs each used Skin360 to obtain individualized skin health assessments. SAC ¶¶ 72, 78, 84, 90.
- Skin360 is a "virtual skin analysis tool" that provides individuals "with actionable, personalized steps to help achieve their skin health goals." Dkt. 66-3, Ex. A at 2 (cited at SAC ¶ 14); Dkt. 66-4, Ex. B at 2 (cited at SAC ¶¶ 34, 36, 60); *see also* Dkt. 66-5, Ex. C (cited at SAC ¶ 36).
- Plaintiffs used Skin360 to "measure . . . aspects of [their] skin health" and receive "a personalized at-home skin assessment." SAC ¶¶ 33–34.
- The skin assessment analyzes the surface of Plaintiffs' skin to identify "skin health issues," *id.*, and provides detailed feedback through use of a "comprehensive and highly-advanced skin health algorithm." Dkt. 66-4, Ex. B at 3 (cited at SAC ¶¶ 34, 36, 60).

Moreover, unlike a virtual try-on tool used to try on non-prescription sunglasses, Skin360 does not simply apply a user's own understanding or

preferences. Rather, Skin360 compares images of the user's skin to "a database of 10,000 images that have been graded and assessed by dermatologists," and applies data from those assessments to provide insight into each user's skin health. Dkt. 66-3, Ex. A at 2 (cited at SAC ¶ 14).

In addition, after users complete a skin assessment, Skin360 "recommend[s] a skin care regime consisting of Neutrogena products," including FDA-regulated skin care products—like acne products and sunscreen. SAC ¶¶ 33, 59, 61; Dkt. 66-3, Ex. A at 2 (cited at SAC ¶ 14); Dkt. 66-4, Ex. B at 2 (cited at SAC ¶¶ 34, 36, 60); Dkt. 66-5, Ex. C at 3 (cited at SAC ¶ 36); *see also* Dkt. 66-3, 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.").[2] Skin360 also provides an interactive "virtual skin health coach" to offer individualized coaching and information to users based on their specific health concerns and goals, to help users access skin health information and maintain a consistent skincare routine. SAC ¶¶ 59–61.

Notably, Plaintiffs' Opposition ignores their own allegations—all of which go well beyond merely trying on non-prescription sunglasses, which is more akin

[2] Plaintiffs emphasize that they do not allege that they *purchased* any Neutrogena products after receiving their skin assessment, Opp. at 4, but whether Plaintiffs purchased a product is irrelevant to whether Skin360 provides skin health guidance consistent with the Health Care Exemption.

to trying on a hat than to getting the kind of personalized skin health guidance that Skin360 provides.

II. ***Marino*'s Construction of the Health Care Exemption Went Well Beyond What Was Needed to Support Its Conclusion and Violated Long-Settled Principles of Statutory Construction in Illinois.**

Rather than address the factual circumstances that illuminate the narrow guidance *Marino* provides for this Court, Plaintiffs instead emphasize *Marino*'s statutory analysis, and urge this Court to adopt it. But for a variety of reasons *Marino*'s construction of the statute is not a strong indication of how the Illinois Supreme Court would construe the statute.

To begin, the language of the Health Care Exemption exempts from BIPA the collection of any "information captured from a patient in a health care setting." 740 ILCS 14/10. The phrase "health care setting" is notably broad, and even *Marino* recognized that the dynamic nature of the health care industry means that a health care setting might be "almost anywhere." 2024 IL App (1st) 231826, ¶ 29. Yet the factual circumstances of *Marino* provided no occasion to consider the full implications of that observation. *Marino* had before it an argument rooted in the product's status as a Class I medical device, which can be a routine consumer product like a toothbrush. *Id.* ¶ 38. Mindful of the potential for that argument, if accepted, to provide a limitless expanse to the Health Care Exemption, *Marino* determined that the Health Care Exemption applies to "an individual who is

presently awaiting or receiving medical care in a time, place, or circumstance where efforts are being made to maintain, restore, or promote that individual's well-being, especially as performed by trained and licensed professionals." *Id.* ¶ 29.

This case, by contrast, does not involve the provision of a Class I medical device, and does not present a potentially limitless expanse of the Health Care Exemption into all manner of consumer products. Skin360, instead, presents a particular application of the dynamic way people seek out health care guidance and the continually expanding ways the market attempts to meet them and deliver such advice. That is, the factual circumstances of this case present an opportunity for a more nuanced approach to statutory construction than was present in *Marino*.

And when this Court undertakes the task of statutory construction in light of settled rules of construction in Illinois, it will find that it leads to a very different place than *Marino* ended. When interpreting the scope of BIPA's statutory exemptions, a court should "give effect to the legislature's intent" by looking at the "language of the statute" and "giv[ing] that language its plain and ordinary meaning." *Mosby v. Ingalls Mem'l Hosp.*, 234 N.E. 3d 110, 118 (Ill. 2023) (interpreting BIPA). When terms are not defined within the statute, courts must look to dictionary definitions to ascertain the ordinary meaning. *Id.* at 119–20 (applying Webster's dictionary definitions to BIPA's use of "capture" and

"collect").

"[A] court may not 'depart from a statute's plain language by reading into the law exceptions, limitations, or conditions that the legislature did not express.'" *Id.* at 118 (citation omitted). A court must also "construe the statute so that each word, clause, and sentence, if possible, is given a reasonable meaning and not rendered superfluous, avoiding an interpretation which would render any portion of the statute meaningless or void." *Sylvester v. Indus. Comm'n*, 756 N.E. 2d 822, 827 (Ill. 2001) (citations omitted). *Marino*'s interpretation of BIPA's Health Care Exemption violates both of these principles.

First, *Marino* improperly construed the meaning of "patient in a health care setting" by adopting a strained and overly narrow reading of the term "patient." As *Marino* recognized, Merriam-Webster's definition of a "patient" is "an individual awaiting or under medical care and treatment" or "the recipient of any of various personal services." 2024 IL App (1st) 231826, ¶ 25 (quoting the Merriam-Webster Online Dictionary). The court excluded from its analysis the latter definition because "[m]any 'personal services' simply have nothing to do with health care." *Id.* That is true, but beside the point, because the Health Care Exemption already limits the term "patient" to those "*in a health care setting*":

> Biometric identifiers do not include information captured from a patient ***in a health care setting*** or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996.

740 ILCS 14/10 (emphasis added). In other words, there is no need for the term "patient" to restrict the Health Care Exemption's application to health care contexts because the statutory text itself imposes that limitation. *See Marino*, 2024 IL App (1st) 231826, ¶ 25 (noting the remaining text of the Exemption indicates it "ha[s] to do with health or medical care"); *see also* Opp. at 7 n.6 ("Both the terms 'patient' and 'health care setting' are necessary in the statute.").

To the contrary, the fact that the statute expressly states that it applies to patients "in a health care setting" must mean that the meaning of "patient" in isolation does not *already* carry that limitation. The statute's reference to a "health care setting" would otherwise be surplusage. *See Sylvester*, 756 N.E. 2d at 827 (explaining that the court must construe a statute so that "each word" has meaning).

This internal inconsistency in *Marino*'s reasoning becomes further apparent in how the court construed the term "health care." As the court observed, "health care" is defined as "efforts made to maintain, restore, or promote someone's physical, mental, or emotional well-being ***especially*** *when performed by trained and licensed professionals*." *Marino*, 2024 IL App (1st) 231826, ¶ 28 (bolded emphasis added). Even accepting this understanding, the term "especially" does not mean "exclusively." Indeed, "[r]eading the entire phrase together," *Marino* itself implicitly recognized that one can be a "patient in a health care setting"

without the provision of medical care by a licensed professional. *See id.* ¶ 29.

This reading makes sense of the language of the Exemption as a whole. For the reasons discussed above, a "patient" need not be limited to individuals presently awaiting or receiving medical care guidance from a licensed professional, but includes anyone receiving "various personal services." So it should come as no surprise that the "health care setting" in which such personal services are delivered need not be a setting populated by licensed professionals. Accordingly, to the extent Plaintiffs' argument rests on their assertion that the Health Care Exemption applies only to individuals that receive "treatment and care from medical professionals," Opp. at 7, 13–14, they are wrong.

Second, *Marino*'s statutory analysis renders the Health Care Exemption duplicative of BIPA's HIPAA Exemption, a separate statutory exemption that excludes from BIPA "any information" collected "in connection with health care treatment." *Mosby*, 234 N.E. 3d at 120. In *Mosby*, the Illinois Supreme Court made clear that the Health Care Exemption and HIPAA Exemption are "alternatives," that "information is exempt from [BIPA] if it satisfies either statutory criteria," and that the two exemptions should be interpreted to "avoid[] any redundancy." *Id.* at 119–20 (interpreting BIPA to ensure each word is "not rendered superfluous"). Limiting the Health Care Exemption, as *Marino* did, to information from someone "awaiting or under medical care and treatment" means that the Health Care

Exemption applies only to scenarios already covered by the HIPAA Exemption.[3] So the legislature must have intended for the Health Care Exemption to cover other kinds of activity.[4]

Indeed, as noted above and as *Marino* recognized, technological advancements such as telehealth have allowed for the expansion of health care services into almost any setting. 2024 IL App (1st) 231826, ¶ 29. It is thus reasonable to conclude, in light of the increasingly common adoption of new technologies, that those settings would include circumstances where an individual is not necessarily awaiting or receiving medical care, but receiving other services that still "maintain, restore, or promote someone's physical, mental, or emotional well-being." *Id.* ¶ 28.

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[3] Although the HIPAA Exemption is broader—encompassing information not only from patients but also from health care providers and others—based on *Marino*'s interpretation, there is no "information captured from a patient in a health care setting" that is not also "information collected, used, or stored for health care treatment, payment, or operations under [HIPAA]." 2024 IL App (1st) 231826, ¶ 16.

[4] The Court need not delve into the legislative history to resolve the plain meaning of the statute. Nonetheless, Plaintiffs' reference to the remarks of Representative Kathleen Ryg is overstated. Opp. at 9 n.12. In a short statement made prior to calling a vote, Representative Ryg mentioned only as illustrative examples that BIPA included various exemptions, including "hospitals, organ donation efforts, licensed fingerprint vendors working with State Police doing background checks and private subcontractors working for a state or a local unit of government and banks that are covered under Federal Law." 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249.

Additionally, this Court need not be concerned with Plaintiffs' speculation that a ruling in JJCI's favor will mean that the Health Care Exemption applies to any "bodega" or "gas station." Opp. at 11–12. That concern confuses this case for the factual circumstances of *Marino*. This is not a case about the mere sale of ordinary Class I medical devices. Unlike a gas station that sells a Class I medical device like sunglasses, Skin360 evaluates users' specific skin health needs and suggests products and other skincare advice tailored to each user's current skin condition. That Skin360 can be used outside of a licensed physician's office is no reason to deny that those using it are placing themselves in a health care setting and are obtaining the kind of personal services that fall comfortably within the Health Care Exemption.

Finally, Plaintiffs are wrong that JJCI's interpretation "leads to [] absurd and unjust results" because "biometric information collected from patients by licensed medical professionals would generally be already protected from disclosure, sale and trade," while "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." Opp. at 12. Under Plaintiffs' reading, the Health Care Exemption would apply *only* to "biometric information collected from patients by licensed medical professionals." As discussed above, this renders the Health Care Exemption duplicative of the HIPAA

Exemption and effectively writes the Health Care Exemption out of the statute. The fact that Plaintiffs may disagree with the Health Care Exemption does not make its existence absurd.

For all of these reasons, the *Marino* decision presents a flawed statutory analysis of the Health Care Exemption that is at odds with the statutory text and decisions by the Illinois Supreme Court construing BIPA. This Court should not adopt it. Instead, this Court should interpret "patient in a health care setting" to include a person receiving personal services that maintain, restore, or promote their physical, mental, or emotional well-being, which includes Plaintiffs' use of Skin360.

CONCLUSION

In light of the Health Care Exemption, it is not possible for Plaintiffs to amend their allegations to state a BIPA claim. Mot. at 17–18. Therefore, JJCI respectfully requests that the Court dismiss the SAC with prejudice.

Dated: November 12, 2024

Respectfully Submitted,

/s/ *David R. Kott*

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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) Filed Electronically **CERTIFICATE OF SERVICE**

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. On November 12, 2024, I caused to be filed via ECF with the Clerk for the United States District Court of the District of New Jersey the following documents:

(a) Defendant's Reply in Support of Its Motion to Dismiss the Second Amended Class Action Complaint; and

(b) Certificate of Service.

3. On November 12, 2024, copies of the aforementioned documents were served on all counsel of record via ECF.

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: November 12, 2024