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−RLS

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS, AND TO DIRECT CLASS NOTICE

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I. INTRODUCTION

The parties in this putative class action, brought under the Illinois Biometric Information Privacy Act, 740 ILCS § 14/1, et seq. ("BIPA"), have reached a settlement, with the assistance of Honorable Wayne R. Andersen (Ret.). The Settlement provides Settlement Class Members with the ability to recover equal cash payments from a $4,700,000, non-reversionary Settlement Fund. If approved, the Settlement will provide significant monetary and meaningful prospective relief for Settlement Class Members.

Neutrogena Skin360 ("Skin360") is a facial scanning tool offered by Johnson & Johnson Consumer Inc. n/k/a Kenvue Brands LLC ("JJCI") that provides consumers with a personalized, virtual skin assessment and recommendations for its Neutrogena skincare products. In this class action, Plaintiffs Helene Melzer, Christine Borovoy, Andy Sajnani, and Patricia Biewald, (collectively, "Plaintiffs"), allege that JJCI collected their unique facial geometry—their biometric identifiers—through Skin360, a mobile app and a web interface available to Illinois residents during the relevant period. Plaintiffs allege that JJCI violated BIPA, a statute that protects individuals' privacy rights in their biometric data, because it captured, collected, disclosed and profited from their biometric identifiers, and did so without obtaining informed written consent, without publicly disclosing a data retention policy, and in violation of BIPA's absolute prohibition on profiting from this biometric data.

By this unopposed motion, Plaintiffs seek an order, *inter alia*, certifying the proposed Settlement Class, preliminary approving the Settlement, appointing Class Counsel, appointing Plaintiffs to represent the Settlement Class, approving the claims procedure, and proposed form and method of class notice. The Settlement Agreement is attached to the Declaration of Grace E.

Parasmo ("Parasmo Decl.") at **Exhibit 1** (the "Settlement" or "SA").[1]

II. PROCEDURAL HISTORY

A. Factual Background

Plaintiffs' claims arise under BIPA, an Illinois state law enacted in 2008 that regulates the possession, capture, and disclosure of both "biometric identifiers" and "biometric information," and mandates reasonable protections for this sensitive data. 740 ILCS 14/1 et. seq. The Illinois General Assembly enacted BIPA to address the growing use of biometric technology. 740 ILCS 14/5(a). The legislature recognized that biometrics require special protections because they are "unique" and "once compromised" cannot be changed. *Id.* at § 14/5(c). BIPA's privacy rights include the right to say "no" to the collection, dissemination, and sale of this data. Id. at § 14/15(a)-(d). 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. Relevant here, "scans of facial geometry" include "a unique digital representation of the face" based on "a unique numerical representation of the shape or geometry" of the face. *Sosa v. Onfido, Inc*., No. 20-4247, 2022 WL 1211506, at *7 (N.D. Ill. Apr. 25, 2022). "Biometric information," in turn, is defined as any information "based on an individual's biometric identifier used to identify an individual." Id.

The specific conduct regulated by BIPA is set forth in Section 15 of the statute. Section 15(a) requires a private company possessing the data to develop a public written policy governing the retention and destruction of biometric data. 740 ILCS 14/15(a). Section 15(b) further prohibits a private company from capturing, collecting, or obtaining an individual's biometric data without that person's informed written consent. *Id*. at § 15(b). Section 15(c) prohibits a private company

[1] Unless otherwise specified, capitalized terms used in this motion are intended to have the same meanings as in the Settlement.

from selling, leasing, trading, or otherwise profiting from a person's or a customer's biometric data. Id. § 15(c). Section 15(d) prohibits the disclosure or dissemination of such data without consent. Id. § 15(d). BIPA creates a private right of action, and statutory damages of $1000 for each negligent violation of the statute, and $5,000 for each intentional or reckless violation—plus costs and reasonable attorneys' fees. Id. at § 14/20. BIPA also provides for other relief, including injunctive relief. *Id.*

B. Factual Background

Neutrogena Skin360 is a facial scanning tool offered by JJCI that provides consumers with a personalized, virtual skin assessment and recommendations for its Neutrogena skincare products. Dkt. 62, Second Amended Complaint ("SAC") at ¶¶ 32-44, 59-62. Skin360 launched as a mobile software application on December 9, 2019, which was discontinued on or about April 20, 2023. *Id*. at n.1. Beginning November 1, 2020, Skin360 was also available as a web-based application accessible through Neutrogena's website at skin360.neutrogena.com and on other affiliate websites under the Neutrogena or Neostrata brands. *Id*. at ¶ 14.

Touted by JJCI as a breakthrough technology, Skin360 invites users to scan their faces using their smartphone or webcam, then instantly delivers a real-time skin assessment through an analysis of a facial scan. *Id*. at ¶ 33. To perform this skin assessment, Skin360 prompts users to align their face within a digital facial mapping interface using the camera on their device, then conducts a 180-degree facial scan—capturing the user's face from front, left, and right angles. *Id*. at ¶ 37. During the Class Period, Skin360 used Perfect Corp. to perform the skin scan and analysis portion of Skin360. *Id.* at ¶35. Plaintiffs allege that these scans constitute "scans of facial geometry" under BIPA because they extract unique facial templates that measure and record the distances between key facial landmarks that are unique to each individual and can be used to identify them. *Id*. at ¶ 39.

C. History of the Litigation

On May 26, 2022, Plaintiff Melzer filed this putative class action alleging that through its use of Skin360 in Illinois, JJCI violated Sections 15 (a), (b), (c), and (d) of BIPA. Plaintiff subsequently amended her complaint (the "First Amended Complaint" or "FAC"). Dkt. 21. On April 26, 2023, the Court granted in part and denied in part JJCI's first motion to dismiss, rejecting its argument that BIPA requires that a biometric identifier must "be used to identify an individual." Dkt 41.

On July 1, 2024, Plaintiffs filed the Second Amended Complaint adding plaintiffs Christine Borovoy, Andy Sajnani, and Patricia Biewald, and an allegation that JJCI unlawfully transferred Plaintiffs and class members' biometric identifiers to Kenvue, Inc., a newly formed entity, without disclosing or obtaining consent. Dkt. 62. On March 7, 2025, the Court denied JJCI's second motion to dismiss, holding "that individuals who used the virtual Skin360 technology are not 'patient[s]' under BIPA's health care exemption." Dkt. 74 & 75.

D. The Parties' Settlement Negotiations

After the Court denied JJCI's second motion to dismiss, the parties agreed to engage in private mediation. Parasmo Decl, ¶ 6. On August 5, 2025 the parties participated in a mediation before Honorable Wayne Andersen (Ret.) from JAMS in Chicago, Illinois. *Id*. As part of the mediation, Plaintiffs prepared a detailed mediation statement that put forth their respective positions on the facts, with the assistance of technical experts. *Id*. Both parties prepared mediation statements that assessed the law and the merits of the action. *Id*. With the guidance of Honorable Wayne Andersen, the parties reached an agreement in principle to settle this action. *Id*. On October 23, 2025, the Parties reached agreement regarding the material terms of the proposed settlement and executed a Settlement Term Sheet. *Id*. at 7. Over the following months, the parties negotiated the long form settlement agreement and the form of class notice, and by February 16, 2026, the

parties had executed the class action settlement agreement. *Id*.

All the terms of the Settlement Agreement are the result of arm's-length negotiations between experienced counsel for both sides. Parasmo Decl. ¶ 8. Counsel and the named Plaintiffs approve the Settlement. *Id*. ¶ 22; Melzer Decl. ¶ 9; Biewald Decl. ¶ 8; Borovoy Decl. ¶ 8; Sajnani Decl. ¶ 8.

III. SUMMARY OF THE SETTLEMENT

A. The Proposed Settlement Class

The proposed Settlement Class is defined as follows:

> All persons who, while in Illinois, performed a Skin360® skin assessment using any version of Skin360®, including Neutrogena® Skin360®, Neostrata® Skin360®, and any Skin360® collaborations with other entities, whether via mobile application or web application, between December 9, 2019 and May 5, 2023 ("Settlement Class").

Excluded from the Settlement Class are (1) Defendant, its subsidiaries, parent, and other affiliate entities, and all employees thereof; (2) the Judges presiding over this Action and their immediate family members and staff; (3) Class Counsel and Defendant's Counsel; (4) Persons who properly execute and file a timely request for exclusion from the Settlement Class; and (5) the successors or assigns of any excluded Persons. (*See* SA § III.42)

B. Monetary Relief Benefiting the Settlement Class

The Settlement provides for a non-reversionary, cash Settlement Fund of $4,700,000, which will be paid by JJCI. *See* SA § III.41 All Settlement Class Members are eligible to make claims for cash payments. *Id. at* § V.III. Settlement Class Members who submit timely and approved Claim Forms will receive an equal *pro rata* share of the Settlement Fund after payment of Settlement and Administrative Expenses, Class Counsel's Fee Award, and Service Payments. *Id. at* § V.10. No portion of the Settlement Fund will be returned to JJCI. *Id. at* § V.3.

The Parties estimate the class size at 11,000 Class Members, and assuming a reasonable

claims rate, Plaintiffs estimate that valid claimants will each receive hundreds of dollars, which is substantial compensation.

C. Prospective Relief

The Settlement provides for meaningful prospective relief requiring JJCI to destroy all the scans of Skin360 users it maintains. Within 14 days after the Effective Date, JJCI will confirm that (i) it has deleted any images obtained during a Skin360 skin assessment during the Class Period and (ii) subject to any changes in relevant authority, JJCI will maintain a user notice and written consent mechanism for Skin360 and a written policy regarding the retention and destruction of information collected through Skin360. *Id. at* § IV.B.

D. Claims Process and Settlement Payment Allocation.

Settlement Class Members who file timely and valid claims will be entitled to a *pro rata* share of any amounts paid into the Settlement Fund, net of any Fee Award to Class Counsel, Service Payments to the Class Representatives, and Settlement Administration Expenses. SA § V.9; V.10.

Settlement Class Members will be permitted to submit claims either by mail or online through the Settlement Website. SA § VIII.1. Settlement Class Members will have 90 days to submit a claim from the date the first notice is disseminated. *Id.*; § III.8. The Claim Form requires Settlement Class Members to provide a sworn affirmation, under penalty of perjury, that the Settlement Class Member used Skin360 within the state of Illinois during the Class Period. SA § VIII.2. A reminder email will be sent to Settlement Class Members who do not file claims before the Claims Deadline. SA § VII.3.

Payments to Settlement Class Members will be made within 21 days of the Effective Date. SA § V.10. Settlement Payments will be made by check or electronic payment by the method designated by the Settlement Class Member, *e.g.*, Zelle, Paypal, Venmo or other electronic

payment method. *Id*.

All funds from uncashed settlement checks or unredeemed settlement payments will be returned to the Settlement Fund for redistribution, or if redistribution is not practicable, will be allocated and distributed to a *cy pres* recipient, Electronic Privacy Information Center, subject to approval by the Court. SA § V.11.

E. Release of Liability

In exchange for the consideration set forth above, members of the Settlement Class will be bound by a release of all claims that were asserted, or could have been asserted in the Litigation, that arise out of, are based upon, or are related to the same transactions and facts alleged in the Action, *i.e*., the alleged collection, use, storage, disclosure and profiting of biometric information, biometric identifiers, or any data derived therefrom, through a Settlement Class Member's use of Skin360 ("the Released Claims"). SA § III.34. The release is no broader than necessary to resolve claims based on the same factual predicate alleged in this action. *See Varacallo v. Massachusetts Mut. Life Ins. Co.,* 226 F.R.D. 207, 244 (D.N.J. 2005) (recognizing that in class action settlements, releases may include all claims that arise out of the same course of conduct alleged in the complaint, known and unknown claims, or even claims over which the court lacked jurisdiction) (collecting cases). The Released Claims will extend to Defendant and its related entities and persons. SA § III.35.

F. Opt-outs

Settlement Class Members may opt out of the Settlement by submitting an exclusion request by email to the Settlement Administrator or downloading and submitting the exclusion request to the Settlement Administrator via first-class mail. SA § VII.3.

G. The Settlement Administrator

The Parties have agreed to Eisner Advisory Group LLC ("EAG"), as the Settlement Administrator. EAG is an experienced, qualified administrator with expertise in designing and implementing notice campaigns and efficiently processing class action settlements. *See gen*. Declaration of Brandon Schwartz ("Schwartz Decl."), ¶¶ 3-5. All Settlement Administration Expenses will be paid from the Settlement Fund. SA § V.8-9.

H. The Proposed Notice Plan

The Settlement Agreement includes a comprehensive Notice Plan to be implemented by the experienced Settlement Administrator. SA § VII; Schwartz Decl, ¶¶ 11-22. Notice will commence 30 days after entry of the Preliminarily Approval Order. *Id*. § VII.1.

1. Direct Email Notice

Following the Court's entry of the Preliminary Approval Order, JJCI will provide EAG with the email addresses of Settlement Class Members that can be identified in JJCI's business records through a reasonable effort ("Settlement Class List"). *Id*. § VII.A.1 Settlement Class Members for whom JJCI has a valid email address will receive direct notice by email. SA § VII.A.2. A copy of the proposed Email Notice is attached to the Agreement as **Exhibit C**. For any email notice that is returned as undeliverable, the Settlement Administrator will make additional follow-up attempts unless it determines that the email address is invalid or permanently unavailable. Schwartz Decl. ¶¶ 13-14.

2. Geo-located Internet Publication Notice

Notice will also include geo-targeted digital publication, consisting of banner advertisements displayed on advertising networks, social media platforms, and sponsored search placements that Settlement Class Members are likely to encounter during their regular internet use. SA § VII.C; Schwartz Decl., ¶¶ 15-18. The proposed banner notices, attached to the Settlement

Agreement as **Exhibit D**, will link directly to the Settlement Website, where settlement members can obtain additional information and review their rights and options, and file a claim. SA § VII.B.1; Schwartz Decl., ¶¶ 15-18.

The digital banner notices will be targeted to potential Settlement Class Members based on relevant customer demographics and location. SA § VII.C.2; Schwartz Decl., ¶ 15. They will be displayed across thousands of websites through the Google Display Network, providing broad and repeated exposure throughout the web. Schwartz Decl. ¶ 16. The Notice Plan also includes placement on Facebook and Instagram, which together reach over 250 million users in the United States. *Id*. Displaying the notices within users' social media feeds increases visibility and engagement through platforms that Settlement Class Members regularly use for communication and information. *Id*. This combined, multi-platform approach is designed to maximize reach by pairing the extensive coverage of the Google Display Network with the high engagement levels of social media advertising. Schwartz Decl. ¶ 18.

3. Statewide Press

A press release (attached to the Settlement Agreement as **Exhibit E**) will be distributed over PRNewswire's Illinois Newsline. SA § VII.D; Schwartz Decl., ¶ 19. The press release will be issued broadly to media outlets, including newspapers, magazines, wire services, television, radio, and online media nationally. *Id*. The Newsline distributes to more than 200 media outlets and contacts in Illinois. *Id*.

4. Settlement Website

The Settlement Administrator will also maintain a dedicated Settlement Website. SA § VII.B. The website address will be prominently included in the press release, Email Notice and Long Form Notice. *See* SA, Exhibits B, C and E. The Email Notice and Long Form Notice, along with the Motion for Preliminary Approval, the Preliminary Approval Order, the proposed

Settlement Agreement, the Complaint filed in this Action, the Claim Form, and other relevant case documents, will be posted on the Settlement Website for Settlement Class Members to review and download. SA § VII.B. Additional documents, including the Motion for Final Approval as well as Class Counsel's application for reasonable attorneys' fees and costs and Service Payments on behalf of the named Plaintiffs, will be added to the Settlement Website once they are filed. SA § VII.B.

5. CAFA Notice

JJCI will also send notice of the settlement to the appropriate state and federal officials, as required by the Class Action Fairness Act, 28 U.S.C. § 1715. SA § XI.1.

I. Service Awards to the Proposed Class Representatives

The Settlement requests a Service Award of $5,000 for each Plaintiff, as compensation for their efforts in the litigation and achieving settlement for the class. SA § XIII.A.

J. Attorneys' Fees, Cost and Expenses.

Plaintiffs' counsel intends to seek an attorneys' fees award in an amount not to exceed one-third of the Settlement Fund, which is $1,566,666.66. SA § XIII.B.1. In addition, they will seek reimbursement for their reasonable costs and expenses (of approximately $ 50,000) to be paid out from the Settlement Fund. SA § XIII.B.1.

IV. ARGUMENT

The Court's review of a class action settlement is a two-step process consisting of preliminary approval and final approval determinations. *Udeen v. Subaru of Am., Inc.,* No. 18-CV-17334-RBK-JS, 2019 WL 4894568, at *2 (D.N.J. Oct. 4, 2019). The first step is a preliminary review to determine whether the proposed settlement is within the range of possible approval. Fed. R. Civ. P. 23. If the Court finds the settlement proposal is within the range of possible approval the case proceeds to the second step: the final approval hearing. Fed. R. Civ. P. 23.

At this preliminary approval stage, the Court is required to determine only "whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval." *In re Nat'l Football League Players' Concussion Injury Litig. ("In re NFL")*, 301 F.R.D. 191, 198 (E.D. Pa. 2014) (quoting *Mehling v. New York Life Ins*., 246 F.R.D. 467, 472 (E.D. Pa. 2007) (citations omitted)). Under Rule 23, a settlement falls within the "'range of possible approval,' if there is a *conceivable basis* for presuming that the standard applied for final approval—fairness, adequacy, and reasonableness—will be satisfied." *In re NFL*, 301 F.R.D. at 198 (emphasis added) (citations omitted).

In addition, in this circuit "a settlement agreement is entitled to a presumption of fairness when it resulted from arm's length negotiations between experienced counsel." *Goncalves v. AJC Constr. Inc.*, No. 21-CV-04631, 2022 WL 2985636, at *3 (E.D. Pa. July 28, 2022) citing *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 800 (3d Cir. 1995); *Hunter v. M-B Cos., Inc.*, No. 19-CV-04838, 2020 WL 4059898, at *3 (E.D. Pa. July 20, 2020); *see also Udeen*, 2019 WL 4894568, at *2 ("A settlement is presumed fair when it results from 'arm's-length negotiations between experienced, capable counsel after meaningful discovery.'") (quoting *Rudel Corp v. Heartland Payment Sys., Inc.*, No. 16-CV-2229, 2017 WL 4422416, at *2 (D.N.J. Oct. 4, 2017)). This presumption applies in furtherance of the public policy favoring settlement, *see Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2010), and "settlement of litigation is especially favored by courts in the class action setting." *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 144 (D.N.J. 2013). Moreover, "the participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at

arm's length and without collusion between the parties." *In re ViroPharma Inc. Sec. Litig.*, No. 12-CV-2714, 2016 WL 312108, at *8 (E.D. Pa. Jan. 25, 2016) (quoting *Hall v. AT&T Mobility LLC*, No. 07-CV-5325, 2010 WL 4053547, at *7 (D.N.J. Oct. 13, 2010)).

Because there are no obvious deficiencies in the parties' Settlement Agreement in this case, nor any grounds to doubt its fairness, the standards for granting preliminary approval are satisfied. This Settlement is fair, adequate, reasonable and it is likely that the requirements for final approval will be satisfied, and Settlement Class Members will be provided with notice in a manner that satisfies the requirements of due process and Federal Rule of Civil Procedure 23(e). Therefore, Plaintiffs respectfully ask the Court to enter the proposed order, which will: (i) grant preliminary approval of the proposed settlement; (ii) find that the Settlement Class is likely to be certified pursuant to Federal Rule of Civil Procedure 23(b)(3); (iii) schedule a final approval hearing to consider final approval of the Settlement; and (iv) direct notice to Settlement Class Members.

A. The Court Should Preliminarily Approve the Settlement

At the preliminary approval stage, "[w]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *Shapiro v. All. MMA, Inc.*, No. 17-CV-2583-RBK-AMD, 2018 WL 3158812, at *3 (D.N.J. June 28, 2018). Unlike final approval, "[p]reliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient." *Zimmerman v. Zwicker & Assocs., P.C.*, No. 09-CV-3905-RMB-JS, 2011 WL 65912, at *2 (D.N.J. Jan. 10, 2011).

The settlement here is the result of extensive, arms'-length negotiations and acceptance of a mediator's proposal by the parties. Experienced counsel have analyzed this settlement and believe that it is in the best interests of the Settlement Class. The Settlement is well supported and

will eliminate the uncertainties and risks to the Parties from proceeding further in the litigation. Thus, preliminary approval should be granted.

B. The *Girsh* Factors Support Preliminary Approval

Although the foregoing analysis is sufficient for the Court to grant preliminary approval, a factor-by-factor analysis confirms this conclusion. *Udeen*, 2019 WL 4894568, at *3.[2] The following nine factors inform the analysis at the final approval stage:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) stage of the proceedings and the amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the class action through the trial; (7) ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) (cleaned up).

The court evaluates a class settlement "against the realistic, rather than theoretical, potential for recovery after trial." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 323 (3d Cir. 2011) (*en banc*). In conducting this analysis, the court also "guard[s] against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re GMC Truck Fuel Tank Prods. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995); *see also In re: Shop-Vac Mktg. & Sales*

[2] Rule 23(e) was amended in December 2018 to specify uniform standards for settlement approval. Courts in this district have continued to apply the same legal standards to preliminary approval after the 2018 amendments. *See, e.g.*, *Udeen*, 2019 WL 4894568; *Smith*, 2019 WL 3281609. Further, "[t]he 2018 Committee Notes to Rule 23 recognize that, prior to this amendment, each circuit had developed its own list of factors to be considered in determining whether a proposed class action was fair[.]" *Huffman v. Prudential Ins. Co. of Am.*, 2:10-CV-05135, 2019 WL 1499475, at *3 (E.D. Pa. Apr. 5, 2019) (citing Fed. R. Civ. P. 23(e)(2), Advisory Committee Notes). "[T]he goal of the amendment is not to displace any such factors, but rather to focus the parties [on] the 'core concerns' that motivate the fairness determination." *Id.* As such, the traditional *Girsh* factors continue to apply.

Practices Litig., No. 4:12-MD-2380, 2016 WL 3015219, at *2 (M.D. Pa. May 26, 2016) (noting that "a satisfactory settlement may only amount to a hundredth or even a thousandth part of a single percent of the potential recovery.") (cleaned up). All the *Girsh* factors that the Court can analyze at this stage support preliminary approval.

1. Complexity, Expense and Likely Duration of Litigation (Factor 1)

The first *Girsh* factor, the complexity, expense, and likely duration of litigation, considers "the probable costs, in both time and money, of continued litigation." *In re Gen. Motors*, 55 F.3d at 812 (quoting *Bryan v. Pittsburgh Glass Co.*, 494 F.2d 799, 801 (3d Cir. 1974)). Without the Settlement, the Parties would be engaged in contested motion practice and adversarial litigation for years. This Settlement affords relief to those who used JJCI's Skin360 technology and had their biometric identifiers allegedly captured without consent. The claims advanced on behalf of the Settlement Class Members involve numerous complex legal and technical issues regarding biometric data collection and BIPA compliance. Continued litigation would involve extensive motion practice, including, a motion for class certification, motions for summary judgment, motions challenging the admissibility of expert opinions on highly technical matters, pre and post-trial motions and the appellate process. Class action suits have "a well deserved reputation as being most complex." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). This matter commenced over 3 years ago and there have been two motions on the pleadings. Rather than embarking on additional years of protracted and uncertain litigation, the Settlement provides immediate, certain, and meaningful relief to all Settlement Class Members. *See In re NFL Players Concussion Injury Litig*., 821 F.3d 410, 438 (3d Cir. 2016), *as amended* (May 2, 2016). This factor weights in favor of preliminary approval.

2. The Reaction of the Class to the Settlement (Factor 2)

At the preliminary approval stage, it is impossible to know the reaction of the entire class to the Settlement. However, the Class Representatives support the settlement. Melzer Decl. ¶ 9; Biewald Decl. ¶ 8; Borovoy Decl. ¶ 8; Sajnani Decl. ¶ 8). Class members will receive notice and will be afforded the opportunity to object or opt out. This factor is neutral and will be addressed on the motion for final approval.

3. Stage of Proceedings and Discovery Completed (Factor 3)

The third factor, the stage of the proceedings and the amount of discovery completed, also supports preliminary approval. This litigation has been ongoing for over three years and Class Counsel has done significant amount of work to develop the claims. Parasmo Decl., ¶¶ 9-16.

The parties engaged in substantial discovery and factual investigation, including written discovery and the production and review of documents. *Id*. at. ¶ 9. Plaintiffs' review of JJCI's document production included, *inter alia*: JJCI's agreements with third party entities regarding the development and implementation of the Skin360 platform; technical documentation concerning the data architecture and data flows associated with the Skin360 web and mobile applications and storage of data collected by Skin360; and documents regarding JJCI's collaboration with third parties. *Id*. at. ¶ 10.

Plaintiffs also served a subpoena on Perfect Corp, the company that developed and customized the facial scanning technology used in Neutrogena's Skin360 platform. *Id*. at. ¶ 11. Perfect Corp. produced technical documentation, including documents and software describing its software development kit ("SDK") and application programming interfaces ("APIs") implemented within Skin360. *Id*. Plaintiffs, with the assistance of their retained experts, analyzed the technical aspects of how Skin360 operates, including the manner in which facial geometry and related data were allegedly captured. *Id*. at. ¶ 12. Plaintiffs' experts also assisted with the review and

interpretation of JJCI's and Perfect Corp.'s technical documentation and its software code. *Id*.. The Parties also exchanged informal discovery, and Plaintiffs' conducted their own independent investigation, relating to the class size and composition. *Id*. at. ¶ 13. Plaintiffs also conducted an independent expert investigation of JJCI's Skin360 tool and software code, and analyzed its privacy policies. *Id*. at. ¶ 14.

The extensive factual investigation and discovery conducted in this action, along with a thorough analysis of applicable law, allowed Plaintiffs' Counsel to make a well-informed assessment of the strength and weaknesses of the claims and defenses, and to adequately assess the fairness and reasonableness of the proposed Settlement. *Id*. at. ¶ 15. In fact, the Court's orders on the motions to dismiss provided meaningful guidance on the viability and scope of the claims and the defenses available to JJCI. Those rulings, considered in conjunction with the discovery obtained, enabled Plaintiffs' Counsel to carefully analyze the risk of future litigation in comparison to the relief offered by the Settlement.

Therefore, this factor supports approval of the settlement. *See Saini v. BMW of N. Am., LLC*, No. 12-CV-6105-CCC, 2015 WL 2448846 at *10 (D.N.J. May 21, 2015) (finding the third Girsh factor supports the settlement when the case had been litigated for two years, the parties had engaged in motion-to-dismiss briefing and informal discovery and a settlement was reached through mediation).

4. Risks of Establishing Liability (Factor 4)

While Plaintiffs believe they have strong BIPA claims, JJCI has expressed several defenses including arguments about the nature of the data collected and whether it constitutes biometric identifiers under BIPA, that present meaningful litigation risk. Parasmo Decl. at. ¶ 21.

Although the Court ruled favorably for Plaintiffs on key legal issues at the pleading stage,

including rejecting JJCI's healthcare exemption defense (*See* Dkt. 74), continued litigation would require resolution of complex technical and legal issues about how the Skin360 technology functioned, and whether the data collected constitutes biometric data collection and processing. Absent the Settlement, the risks to the Settlement Class are substantial. JJCI has expressed a firm denial of material allegations. JJCI maintains that it did not capture or collect biometric data through Skin360 and that, in any event, it did not control such data, that any processing of biometric data occurred outside of any servers owned or operated by JJCI, and that JJCI had no visibility into Perfect Corp.'s technology. Parasmo Decl., ¶ 21. JJCI thus contends it was not subject to, or obligated to comply with, BIPA's provisions. *Id.* At trial, Plaintiffs would bear the burden of proving that the data Skin360 captured and collected constituted biometric identifiers or biometric information within the meaning of BIPA. *Id.*

Therefore, this factor weighs in favor of preliminary approval.

5. Risks of Establishing Damages (Factor 5)

The amount potentially at stake on a class-wide basis at trial could reach tens or hundreds of millions of dollars if Defendant were ultimately held to have violated BIPA, and thus potentially be liable for statutory damages of $1,000 or $5,000, every time it collected a Settlement Class Members' biometric identifier, absent a written release. However, the risks of establishing damages is amplified under BIPA since Plaintiffs are seeking statutory damages and the Illinois Supreme Court has stated that damages under BIPA are discretionary—not mandatory. *See Cothron v. White Castle Sys., Inc*., 2023 IL 128004, ¶ 42, 216 N.E.3d 918, 929, as modified on denial of reh'g (July 18, 2023).

JJCI maintains that the maximum recovery Plaintiffs could ever hope to see is $1,000 per class member, which amounts to approximately $11,000,000. This difference depends on whether

BIPA's recent amendment applies retroactively. The amendment states that when a covered entity "in more than one instance, collects, captures, purchases, receives through trade, or otherwise obtains the same biometric identifier or biometric information from the same person using the same method of collection" in violation of BIPA, the entity "has committed a single violation for which the aggrieved person is entitled to, at most, one recovery." *See* 740 ILCS 14/20(b)-(c), as amended by SB 2979, Public Act 103-0769.

Plaintiffs maintain that this amendment does not apply retroactively to cover the class period in this case. *See, e.g.*, *Schwartz v. Supply Network, Inc*., No. 23-CV-14319, 2024 WL 4871408, at *1 (N.D. Ill. Nov. 22, 2024) (the amendment is a substantive change in the law rather than procedural and thus, cannot be retroactively applied.) In any event, a court could conceivably use the amendment to fashion relief in proportion to the current BIPA amendment. It is also possible that any statutory damages award would be found to be out of proportion with the alleged offense, in violation of due process, and subject to post-trial reduction. *See, e.g., In re Facebook Biometric Info. Priv. Litig.,* 522 F. Supp. 3d 617, 628 (N.D. Cal. 2021), aff'd, No. 21-15553, 2022 WL 822923 (9th Cir. Mar. 17, 2022) (noting the "potential for a due process problem when statutory damages are pursued by a large class"); *Golan v. Free Eats.com, Inc*., 930 F.3d 950, 962-63 (8th Cir. 2019) (statutory award in TCPA class action of $1.6 billion reduced to $32 million on due process grounds).

Here, the Settlement provides Settlement Class Members with a gross recovery of approximately $427, assuming 100% participation. For 11,000 estimated class members, this represents 42.7% of the statutory damages available if Plaintiffs proved that JJCI was negligent in collecting users' biometric identifiers.[3] *See, e.g*., *In re: Shop-Vac*, 2016 WL 3015219, at *2 (noting

[3] Discovery showed that, on average, each Skin360 user conducted one selfie scan.

that "a satisfactory settlement may only amount to a hundredth or even a thousandth part of a single percent of the potential recovery.") (cleaned up).

6. Risks of Maintaining Class Action Through Trial (Factor 6)

In addition to any defenses on the merits JJCI can raise, Plaintiffs would also be required to prevail on a class certification motion and summary judgment, which would be highly contested and for which success would not be guaranteed. Trial and post-trial activity would last several more years without any assurance of the relief now provided by the Settlement. *See Haas v. Burlington Cnty*., No. 08-CV-1102-NHL-JS, 2019 WL 413530, at *6 (D.N.J. Jan. 31, 2019) (granting approval where plaintiffs estimated the time to judgment, including trial, would take another three years).

Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation. If the Court approves the Settlement, the present lawsuit will come to an end and Settlement Class Members will realize both immediate and future benefits as a result. Approval would allow Plaintiffs and the Settlement Class Members to receive meaningful and significant compensation now, instead of years from now—or perhaps never. Accordingly, this factor weighs in favor of settlement.

7. Ability of JJCI to Withstand a Greater Judgment (Factor 7)

This factor "is most relevant when the defendant's professed inability to pay is used to justify the amount of the settlement." *Tavares v. S-L Distribution Co.,* No. 1:13-CV-1313, 2016 WL 1743268, at *8 (M.D. Pa. May 2, 2016). "Where a defendant does not claim the potential for financial instability as a justification for the size of the settlement, courts have found this factor to be neutral." *Id.* Here, JJCI is not claiming its financial condition to justify the settlement. Thus, this factor weighs neither for nor against settlement.

8. Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and Attendant Risks of Litigation (Factors 8 and 9)

In evaluating the final two *Girsh* factors, the court determines "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Rescigno v. Statoil USA Onshore Props. Inc.*, No. 3:16-CV-85, 2023 WL 145008, at *11 (M.D. Pa. Jan. 10, 2023), aff'd, No. 20-2431, 2024 WL 4249491 (3d Cir. Sept. 20, 2024) *citing NFL Concussion Litig*., 821 F.3d at 440 (internal quotation marks omitted). These factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Id.* Notably, "[t]he present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *Id.*

The Settlement is also within the range of reasonableness. If Class Counsel's Fee Award and Plaintiffs' Service Awards are approved, and even assuming a 35% claims rate, claiming Settlement Class Members will receive approximately $769, which is approximately 77% of the statutory damages available for negligent violations of BIPA. *See* 740 ILCS 14/20(a)(1) (providing for $1,000 in statutory damages in cases for negligent violations of BIPA).

The amount offered by the Settlement—$4,700,000 on a non-reversionary basis for an estimated 11,000 Settlement Class Members (plus prospective relief)—represents an excellent outcome whether compared to privacy cases more generally, or BIPA cases more specifically. The relief obtained here is far superior to many other privacy cases. *See, e.g., In re Google LLC Street View Elec. Commc'ns* Litig., No. 10-MD-02184-CRB, 2020 WL 1288377, at *11–14 (N.D. Cal. Mar. 18, 2020) (finally approving, over objections of class members and state attorney general, a settlement providing only *cy pres* relief for violations of Electronic Communications Privacy Act); *Adkins v. Facebook, Inc*., No. 18-CV-05982-WHA, Dkts. 350 (N.D. Cal. May 6, 2021 and July

13, 2021) (finally approving settlement for injunctive relief only, in class action arising out of Facebook data breach). Parasmo Decl. Ex. 3.

Likewise, the Settlement is superior to the relief obtained in many other BIPA class settlements. *See, e.g., Carroll v. Crème de la Crème, Inc.,* No. 2017-CH-01624 (Cir. Ct. Cook Cnty. June 25, 2018) (providing credit monitoring only), Parasmo Decl. Ex. 4; *Salkauskaite, et al. v. Sephora USA, Inc*., No. 2018-CH-14379 (Cir Ct. Cook Cnty. June 23, 2021) ($1,250,000 for approximately 6,500 class members in virtual try-on case) *Id*., Ex. 5. And unlike other BIPA settlements that have capped monetary relief at a certain amount, with the remaining settlement funds reverting to the defendant, here any remaining settlement funds will not revert. *See e.g., Powe v. Dermalogica,* LLC, Case No. 2022LA000874 (18th Judicial Circuit, DuPage Cnty. Oct. 4, 2022) ($2,000,000 in cash and $400,000 in product vouchers and capped relief with any unclaimed funds reverting to defendant in virtual try-on skin care case) *Id*., Ex. 6.; *Marshall v. Lifetime Fitness, Inc*., 2017-CH-14262 (Cir. Ct. Cook Cnty. July 30, 2019) ($270 per claimant with credit monitoring and reverting unclaimed funds to defendant) *Id*., Ex. 7.

In the absence of settlement, the litigation would likely be expensive, long, and complex. Not only would the parties engage in extensive motion practice before ever reaching a trial on the merits, but the parties would have to assemble evidence and witnesses from across the country (and possibly, internationally, for Perfect Corp.) to testify at any trial. Moreover, the parties would certainly retain competing experts to analyze and opine on the nature of any biometric data captured and collected and whether such data falls within the ambit of BIPA. Given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on the merits and any decision on class certification. As such, the immediate and considerable relief provided to the Settlement Class under the Settlement weighs heavily in favor of its approval

compared to the inherent risk and delay of a long and drawn-out litigation, trial, and appellate process.

The *Girsh* factors, therefore, support granting preliminary approval of the Settlement.

C. The *Prudential* Factors Support Preliminary Approval

A court may also consider the additional factors identified by the Third Circuit in *In re Prudential Insurance Co. America Sales Practice Litigation*, 148 F.3d 283 (3d Cir.1998), when examining a settlement's fairness. Unlike the mandatory *Girsh f*actors, the *Prudential* factors are "permissive and non-exhaustive, 'illustrat[ing] ... [the] additional inquiries that in many instances will be useful for a thoroughgoing analysis of a settlement's terms.'" *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013) (quoting *In re Pet Food Prods. Liab. Litig.,* 629 F.3d 333, 350 (3d Cir. 2010)); *see also In re Processed Egg Prods. Antitrust Litig.,* 284 F.R.D. 249, 268 (E.D. Pa. 2012); (noting *Prudential* factors "are not essential or inexorable"). These factors include:

> [1] the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.

148 F.3d at 323–24.

The relevant *Prudential* factors weigh in favor of approving the Settlement. The first factor—maturity of the underlying substantive issues—substantially mirrors *Girsh* factor three, the stage of the proceedings. Class Counsel were able to make an informed decision about the probable outcome of trial. *See* Section IV.B.6, *supra*. All Settlement Class Members will have the

opportunity to opt out. *See* Section III.F., *supra.* Finally, the claims process is simple and straight forward and imposes no more requirements than necessary. *See* Section III.D., *supra.* Whether any provisions for attorneys' fees are reasonable is a neutral factor because Class Counsel have not yet moved for a fee award. *See Processed Egg Prods.,* 284 F.R.D. at 277 (holding fifth *Prudential* factor neutral when fee motion would be filed at a later date).

D. Certification of the Proposed Class for Purposes of Settlement Only Is Appropriate under Fed. R. Civ. P. 23

The benefits of a proposed settlement of a class action can be realized only through the certification of a settlement class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *Udeen*, 2019 WL 4894568, at *4.[4] "For the Court to certify a class for settlement, the "[s]ettlement class[] must satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the relevant 23(b) requirements." *In re GMC Pick-up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 778 (3d Cir. 1995). Plaintiffs seek certification under Rule 23(b)(3), which provides for certification where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members [predominance], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy [superiority]." Fed. R. Civ. P. 23(b)(3). As discussed below, these requirements are met for purposes of settlement in this case.

1. Numerosity Under Rule 23(a)(1) Is Met

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[G]enerally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the [numerosity requirement] of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (citation omitted). Numerosity is

[4] Defendant has agreed to certification of the Settlement Class for settlement purposes only.

readily met here, as there are thousands of Settlement Class Members.

2. Commonality Under Rule 23(a)(2) Is Met

The second prong of Rule 23(a) – commonality – requires "consideration of whether there are 'questions of law or fact common to the class[.]" *Reyes v. Netdeposit, LLC*, 802 F.3d 369, 482 (3d Cir. 2015) (citing Fed. R. Civ. P. 23(a)(2)). "A putative class satisfies Rule 23(a)'s commonality requirement if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Id*. (quoting *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013)). This "bar is not a high one." *Reyes*, 802 F.3d at 486 (quoting *Rodriguez*, 726 F.3d at 382). The Third Circuit has "acknowledged commonality to be present even when not all plaintiffs suffered an actual injury, when plaintiffs did not bring identical claims, and, most dramatically, when plaintiffs' claims may not have been legally viable[.]" *Id.*; *see also In re Prudential Ins. Co. Sales Litig*., 148 F.3d 283, 310 (3d Cir. 1998) ("A finding of commonality does not require that all class members share identical claims, and factual differences among the claims . . . do not defeat certification").

In this case, there are numerous common questions of law and fact, including: a) whether the facial scan data collected by Skin360 constitute biometric identifiers or biometric information under BIPA, 740 ILCS 14/10; (b) whether the Skin360's use of the data means that JJCI collected, captured, obtained, or possessed biometric identifiers and biometric information within the meaning of BIPA, 740 ILCS 14/15; (c) whether JJCI disclosed to users in writing the information specified in 740 ILCS 14/15(b)(1)–(2); d) whether JJCI obtained written releases signed by Settlement Class Members, 740 ILCS 14/15(b)(3); e) whether JJCI developed a publicly available written policy governing retention and permanent destruction of biometric data related to Skin360; and f) whether JJCI's alleged BIPA violations were negligent, intentional, or reckless, 740 ILCS 14/20(1)–(2). These common issues are central to the resolution of the case and satisfy the

commonality requirement.

3. Typicality Under Rule 23(a)(3) Is Met

Rule 23(a)(3)'s typicality requirement is also met because Plaintiffs' claims are typical of the claims of the whole Settlement Class because they arise from the same alleged conduct by JJCI (i.e., the collection of biometric identifiers) and are based on the same legal theories under BIPA. *See Vasco v. Power Home Remodeling Grp. LLC,* 2016 WL 5930876, *3 (E.D. Pa. Oct. 12, 2016) (Plaintiff "demonstrates typicality because he shows Power Home engaged in the same conduct toward him and the Class Members, which caused the same injury to both him and the Class Members."); *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994); *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 149 (D.N.J. 2013) (stating "low threshold"—"if the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established.") (cleaned up).

4. Adequacy of Representation Under Rule 23(a)(4) Is Met

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see Gotthelf v. Toyota Motor Sales, U.S.A., Inc.*, 525 F. App'x 94, 100-01 (3d Cir. 2013). In assessing the adequacy of a proposed class representative, courts consider whether he or she "has the ability and incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class." *Ritti v. U-Haul Int'l., Inc.*, 05-CV-4182, 2006 WL 1117878, at *5 (E.D. Pa. Apr. 26, 2006) (quoting *Hassine v. Jeffres*, 846 F.2d 169, 179 (3d Cir. 1988)).

Here, each of the proposed Class Representatives are adequate because their claims are typical of those of other Settlement Class Members and seek the same relief as the other Settlement Class Members. *See* SAC ¶¶ 72-95; Melzer Decl.¶¶ 2-4; Borovoy Decl., ¶¶ 2-4; Sajnani Decl., ¶¶

2-4; Biewald Decl., ¶¶ 2-4. Each Plaintiff recognizes and accepts their responsibilities as a class representative, has actively participated in the litigation of this case and communicated regularly with their attorneys about the proceedings, and has approved the Settlement. Melzer Decl.¶¶ 4-9; Borovoy Decl., ¶¶ 4-8; Sajnani Decl., ¶¶ 4-8; Biewald Decl., ¶¶ 4-8.

Likewise, Class Counsel is also adequate as the attorneys drew upon their experience with complex litigation and consumer class actions, including privacy class actions involving BIPA claims (*see, e.g.* Parasmo Decl., Ex. 2; Mendelsohn Decl., ¶¶ 11-17, Schwartz Decl.. ¶¶ 13-18) to negotiate an excellent resolution for the Settlement Class. Based upon the substantial benefits offered through the settlement, Plaintiffs respectfully submit that the adequacy requirement is satisfied. Accordingly, Rule 23(a)(4) is therefore satisfied.

5. The Requirements of Rule 23(b)(3) Are Met

Plaintiffs seek to certify the Settlement Class under Rule 23(b)(3), which has two components: predominance and superiority. In making these assessments, the court may consider that the class will be certified for settlement purposes only, and there is no consideration of manageability for trial. *See Amchem*, 521 U.S. at 618 (citing Fed. R. Civ. P. 23(b)(3)(D)).

The focus of the predominance "inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan*, 667 F.3d at 298. Courts are "more inclined to find the predominance test met in the settlement context." *Vasco*, 2016 WL 5930876, at *4.

Courts have consistently found that BIPA cases are well-suited for class certification because the key issues—such as whether biometric data was collected without consent and whether the defendant's practices complied with BIPA—are common to all class members and can be resolved on a class-wide basis. *See, e.g., In re Facebook Biometric Info. Privacy Litig.*, 326 F.R.D. 535, 545 (N.D. Cal. 2018), *aff'd sub nom. Patel v. Facebook, Inc.*, 932 F.3d 1264, 1276 (9th Cir.

2019) ("There is no doubt that a template-based class poses common legal and factual questions, namely: did [the defendant]'s. technology [at issue] harvest biometric identifiers as contemplated under BIPA, and if so, did [the defendant] give users prior notice of these practices and obtain their consent?"); *accord Svoboda v. Amazon.com, Inc*., 2024 WL 1363718, at *8 (N.D. III. Mar. 30, 2024) (granting class certification in a BIPÁ case involving "virtual try on" technology, finding that "the questions of law and fact underlying the class members' BIPA claims are essentially identical"), rearg. den., 2025 WL 2240408 (N.D. III. Jan. 6, 2025); *see also Tapia-Rendon v. United Tape & Finishing Co., Inc*., 2023 WL 5228178, *8 (N.D. III. Aug. 15, 2023), rearg. denied, 2024 WL 406513 (N.D. III. Feb. 2, 2024); *see also Howe v. Speedway LLC*, No. 1:19-CV-01374, 2024 WL 4346631, *17 (N.D. III. Sept. 29, 2024). Accordingly, predominance is satisfied.

The second prong of Rule 23(b)(3)—that a class action be superior to other available methods for the fair and efficient adjudication of the controversy—is also readily satisfied. *See* Fed. R. Civ. P. 23(b)(3). Superiority requires the Court to consider whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Sullivan*, 667 F.3d at 296 (citations omitted); *see McCoy v. Health Net, Inc*., 569 F. Supp. 2d 448, 457 (D.N.J. 2008). Given that an individual action under BIPA requires expert opinion and significant discovery, it will likely dissuade Skin360 users from bringing a case. Here, for example, Plaintiffs utilized technical experts from the outset of the case. The substantial costs of expert discovery and related litigation expenses render it financially infeasible for individuals to pursue these claims on an individual basis against a large, well-resourced company such as JJCI. *See, e.g., In re Facebook Biometric Info. Priv. Litig.,* 326 F.R.D. 535, 548 (N.D. Cal. 2018) ("While not trivial, BIPA's statutory damages are not enough to incentivize individual plaintiffs given the high costs of pursuing discovery on Facebook's software and code base and Facebook's willingness to

litigate the case.") *aff'd sub nom. Patel v. Facebook, Inc.,* 932 F.3d 1264 (9th Cir. 2019). Indeed, "[common] class issues often will be the most complex and costly to prove". *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 760 (7th Cir. 2014).

Moreover, the parties' settlement will relieve the "needless duplication of effort," burdens, and other inefficiencies that would result from repeated adjudication of the same issues. *Henderson v. Volvo Cars of N. Am., LLC*, No. 09-CV-4146-CCC, 2013 WL 1192479, at *6 (D.N.J. Mar. 22, 2013) (citing *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244, 252-53 (S.D. Tex. 1978)). The Settlement Agreement provides Settlement Class Members with prompt, certain, and adequate relief, and establishes clearly defined administrative procedures to ensure due process and preservation of rights.

Thus, a class action for settlement purposes is a superior means of resolving this controversy. Accordingly, Plaintiffs request that the Court certify the Settlement Class. *See* Fed. R. Civ. P. 23(e)(1)(B).

E. The Court Should Approve the Notice Program

Rule 23(e)(1) requires the Court to "direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement. Class members are entitled to the "best notice that is practicable under the circumstances, which may be provided by "United States mail, electronic means, or other appropriate means." Fed. R. Civ. P. 23(c)(2)(B). To comply with due process, notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods. v. Windsor,* 521 U.S. 591, 617.

The proposed Notice Program easily meets these standards. It provides for (1) direct email notice to Settlement Class Members that can be identified in JJCI's business records through a reasonable effort; (2) a robust, targeted digital advertising campaign designed to reach Settlement

Class Members based on relevant demographics and geographic location, (3) a statewide press release and (4) a dedicated Settlement Website hosting the Long Form Notice and important settlement document.

This multi-channel approach is appropriate here. All Settlement Class Members necessarily accessed JJCI's Skin360 tool online, and therefore presumptively have internet access. The Notice Plan mirrors the manner in which JJCI interacted with Settlement Class Members in the first instance—through email and online platforms—making it well-tailored to actually reach the Settlement Class. Courts routinely approve such combined individual and publication notice. *See Rivera v. Lebanon Sch. Dist.*, No. 1:11-CV-147, 2013 WL 877161, at *2 (M.D. Pa. Mar. 8, 2013) ("Rule 23(c)(2) requires the best notice "practicable" under the circumstances, including individual notice to all members who can be identified through reasonable effort. For individuals whose names and addresses cannot be determined by reasonable efforts, notice by publication will suffice under Rule 23(c)(2) and the Due Process Clause.") (citing *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 317–18 (1950)).

The Long Form Notice, which will be posted on the Settlement Website, satisfies Rule 23(c)(2)(b). It clearly and concisely explains, in plain language: (i) the nature of the action; (ii) the definition of the Settlement Class; (iii) the common claims, issues, and defenses; (iv) the material terms of the proposed settlement; (v) the right of Settlement Class Members to appear through counsel; (vi) the procedures and deadlines for objecting to or excluding themselves from the Settlement; and (vii) the binding effect of a final judgment on Settlement Class Members. Consistent with Third Circuit precedent, the Notice provides all information necessary for a reasonable person to understand both the benefits and consequences of the Settlement, including that continued membership in the Settlement Class will result in being bound by all orders and

judgments of the Court. *Perrigo Institutional Inv. Grp. v. Papa*, 150 F.4th 206, 221 (3d Cir. 2025).

Accordingly, the proposed Notice Plan constitutes the best notice practicable under the circumstances, satisfies Rule 23 and due process, and should be approved.

F. A Final Approval Hearing Should Be Scheduled

Finally, the Court should schedule a final approval hearing to decide whether to grant final approval to the settlement, consider Class Counsel's request for attorneys' fees, expenses, and service awards for the Class Representatives, consider any objections and exclusions, and determine whether to dismiss this action with prejudice. *See* Fed. Jud. Ctr., *Manual for Complex Litig.* Fourth, § 30.44 (2004); *In re Nat'l Football League Players Concussion Injury Litig*., 775 F.3d 570, 581-83 (3d Cir. 2014). The hearing may be conducted via video conference, telephonically or in-person, at the Court's discretion. If the Final Approval Hearing is held telephonically or via Zoom, instructions on how Settlement Class Members can participate will be posted on the Settlement website. Plaintiffs respectfully request that the final approval hearing be scheduled for at least 120 days from the date the preliminary approval order is entered.

V. CONCLUSION

Plaintiffs respectfully request that this Court enter an Order: (1) finding that this case is likely to be certified as a class action pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(3) for the purpose of settlement; (2) preliminarily approving the settlement; (3) directing notice to Settlement Class Members; (4) appointing Plaintiffs as Class Representatives; (5) appointing Class Counsel; and (6) scheduling a final approval hearing.

Dated: February 17, 2026

By: */s/ Matthew R. Mendelsohn*

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