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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 STEVEN VANCE, et al.,

11 Plaintiffs,

12 v.

13 AMAZON.COM INC.,

14 Defendant.

CASE NO. C20-1084JLR

ORDER DENYING REMAINDER  
OF AMAZON'S MOTION TO  
DISMISS

15 **I. INTRODUCTION**

16 Before the court are two remaining portions of Defendant Amazon.com Inc.'s  
17 ("Amazon") motion to dismiss. (*See* MTD (Dkt. #18).) Plaintiffs Steven Vance and Tim  
18 Janecyk (collectively, "Plaintiffs") oppose Amazon's motion. (Resp. (Dkt. # 24).) At the  
19 direction of the court, both parties filed supplemental briefs to address (1) the  
20 interpretation of "otherwise profit from" in § 15(c) of Illinois's Biometric Information  
21 Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"); and (2) whether Washington or Illinois  
22 law should govern Plaintiffs' unjust enrichment claim. (Def. Supp. Br. (Dkt. # 35); Pls.

1 Supp. Br. (Dkt. # 36); 3/15/21 Order (Dkt. # 34) at 23-24.) The court has considered the  
2 motion, the supplemental briefing, the relevant portions of the record, and the applicable  
3 law. The court additionally held oral arguments on April 13, 2021. (*See* 4/13/21 Min.  
4 Entry (Dkt. # 37).) Being fully advised, the court DENIES Amazon’s motion to dismiss.

## 5 **II. BACKGROUND**

6 The court discussed the factual and procedural backgrounds of this case in its  
7 previous order on the other portions of Amazon’s motion to dismiss. (*See* 3/15/21 Order  
8 at 2-5.) Thus, it only summarizes here the facts most relevant to the remaining portions  
9 of the motion.<sup>1</sup>

10 Plaintiffs are Illinois residents who uploaded photos of themselves to the  
11 photo-sharing website Flickr. (Compl. (Dkt. # 1) ¶¶ 6-7, 28, 66-67, 75.) Both were in  
12 Illinois when uploading the photos. (*Id.* ¶¶ 66, 75.) Unbeknownst to them, Flickr,  
13 through its parent company Yahoo!, compiled their photos along with hundreds of  
14 millions of other photographs posted on the platform into a dataset (“Flickr dataset”) that  
15 it made publicly available for those developing facial recognition technology. (*Id.*  
16 ¶¶ 29-32.) International Business Machines Corporation (“IBM”) created facial scans  
17 from the photographs in the Flickr dataset to create a new dataset called Diversity in  
18 Faces, which contained facial scans of Plaintiffs and other Illinois residents. (*Id.*  
19 ¶¶ 42-43.) Amazon obtained the Diversity in Faces dataset, including Plaintiffs’ facial

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21 <sup>1</sup> For the purposes of a motion to dismiss, the court accepts all well-pleaded allegations in  
22 Plaintiffs’ complaint as true and draws all reasonable inferences in favor of Plaintiffs. *See Wyler*  
*Summit P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998).

1 scans, from IBM. (*Id.* ¶¶ 55-56.) No company in this chain of events—Flickr, Yahoo!,  
2 IBM, or Amazon—informed or obtained permission from Plaintiffs for the use of their  
3 photographs or facial scans. (*Id.* ¶¶ 30, 47, 71-72, 79-80.)

4 Amazon used the Diversity in Faces dataset to improve “the fairness and accuracy  
5 of its facial recognition products,” which “improve[d] the effectiveness of its facial  
6 recognition technology on a diverse array of faces” and in turn made those products  
7 “more valuable in the commercial marketplace.” (*Id.* ¶¶ 64-65.) Amazon’s main facial  
8 recognition product is Amazon Rekognition, which “allows users to match new images of  
9 faces with existing, known facial images.” (*Id.* ¶ 55.) Amazon Rekognition is “a  
10 fundamental cornerstone” of other Amazon consumer products and services, including  
11 Amazon’s photo platform; Amazon’s smart home systems and cameras, such as the Ring  
12 home security cameras; and Amazon’s virtual assistant technology Alexa. (*Id.* ¶ 56.)  
13 Amazon also provides facial recognition technology and markets its Rekognition  
14 technology to law enforcement agencies, such as ICE and the FBI, to monitor individuals  
15 they consider “people of interest.” (*Id.* ¶ 57.)

16 Plaintiffs assert various claims in their class action suit against Amazon. (*See*  
17 *generally id.*) Relevant here are two of those claims: (1) violation of § 15(c) of BIPA (*id.*  
18 ¶¶ 106-12); and (2) unjust enrichment (*id.* ¶¶ 113-22).<sup>2</sup> The court in its March 15, 2021,  
19 order found that additional briefing from the parties would be beneficial, as neither party  
20 meaningfully analyzed critical legal questions behind both claims in their original

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21  
22 <sup>2</sup> Amazon also challenged Plaintiffs’ other claims, and the court resolved those  
challenges in its previous order. (*See* 3/15/21 Order at 6-19, 23.)

1 briefing. (3/15/21 Order at 20, 22-23.) Specifically, the court ordered the parties to file  
2 supplemental briefing on (1) “the definition of ‘otherwise profit from’ in the context of  
3 § 15(c)”; and (2) “which state law should govern [Plaintiffs’ unjust enrichment claim]  
4 under Washington’s ‘most significant relationship’ test.” (*Id.*) The parties subsequently  
5 filed their supplemental briefing. (*See* Pls. Supp. Br.; Def. Supp. Br.)

### 6 III. ANALYSIS

7 When considering a motion to dismiss under Rule 12(b)(6), the court construes the  
8 complaint in the light most favorable to the nonmoving party. *Livid Holdings Ltd. v.*  
9 *Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept  
10 all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff.  
11 *Wyler Summit P’ship*, 135 F.3d at 661. The court, however, is not required “to accept as  
12 true allegations that are merely conclusory, unwarranted deductions of fact, or  
13 unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th  
14 Cir. 2001). “To survive a motion to dismiss, a complaint must contain sufficient factual  
15 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*  
16 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
17 570 (2007)); *see also Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir.  
18 2010). “A claim has facial plausibility when the plaintiff pleads factual content that  
19 allows the court to draw the reasonable inference that the defendant is liable for the  
20 misconduct alleged.” *Iqbal*, 556 U.S. at 677-78. Dismissal under Rule 12(b)(6) can be  
21 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged  
22 under a cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699

1 (9th Cir. 1990). Utilizing this standard, the court addresses the BIPA § 15(c) and unjust  
2 enrichment claims in turn.

3 **A. Profit Under BIPA § 15(c)**

4 Section 15(c) states that “[n]o private entity in possession of a biometric identifier  
5 or biometric information may sell, lease, trade, or otherwise profit from a person’s or a  
6 customer’s biometric identifier or biometric information.” 740 ILCS 14/15(c). The  
7 parties disagree on how broadly to read “otherwise profit from.” Amazon argues that  
8 “otherwise profit” requires “an entity receiving a pecuniary benefit in exchange for a  
9 person’s biometric data.” (MTD at 21; Def. Supp. Br. at 1.) Plaintiffs propose that  
10 “otherwise profit” means any use of biometric data that generates profits. (Resp. at 21;  
11 Pls. Supp. Br. at 3-4.) The court finds that the proper interpretation of §15(c) falls  
12 somewhere in between the two parties’ proposals.

13 The court begins, as it must, with the statutory language. *See Lacey v. Village of*  
14 *Palatine*, 904 N.E.2d 18, 26 (Ill. 2009). “Profit” as a verb means “to be of service or  
15 advantage” or “to derive benefit.” *Profit*, Merriam-Webster.com, [https://www.merriam-](https://www.merriam-webster.com/dictionary/profit)  
16 [webster.com/dictionary/profit](https://www.merriam-webster.com/dictionary/profit) (last accessed Apr. 1, 2021); *see also Profit*, Oxford  
17 English Dictionary, <https://www.oed.com/view/Entry/152098> (last accessed Apr. 1,  
18 2021) (defining “profit” as “[t]o be of advantage or benefit to”). “Otherwise” means  
19 “[i]n a different manner; in another way, or in other ways.” Black’s Law Dictionary  
20 1101 (6th ed. 1990). Thus, in the context of § 15(c), sale, lease or trade are examples of  
21 what the Illinois legislature had in mind as ways to derive benefit from biometric data,

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