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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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BURHAAN SALEH, individually and on behalf of all others similarly situated, Plaintiff, v. NIKE, INC. and FULLSTORY, INC., Defendants.	Case No. 2:20-cv-09581-FMO-RAO **FIRST AMENDED CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiff Burhaan Saleh ("Plaintiff"), individually and on behalf of all others similarly situated, by and through his attorneys, makes the following allegations pursuant to the investigation of his counsel and based upon information and belief, except as to allegations specifically pertaining to himself and his counsel, which are based on personal knowledge.

NATURE OF THE ACTION

1.   This is a class action suit brought against Defendants Nike, Inc.'s ("Nike") and FullStory, Inc. ("FullStory") (collectively, "Defendants") for wiretapping the electronic communications of visitors to Defendant Nike's website, Nike.com (the "Website").[1] The wiretaps, which are embedded in the computer code on the Website, are used by Defendants to secretly observe and record website visitors' keystrokes, mouse clicks,[2] and other electronic communications, including the entry of Personally Identifiable Information ("PII"), in real time. By doing so, Defendants have violated the California Invasion of Privacy Act ("CIPA"), Cal. Penal Code §§ 631 and 635, and invaded Plaintiff's and Class Members' privacy rights in violation of the California Constitution.

2.   In May 2020, Mr. Saleh visited the Website. During the visit, Defendants recorded Plaintiff's electronic communications in real time, including Plaintiff's mouse clicks, keystrokes, and payment card information.

3.   Plaintiff brings this action on behalf of himself and a class of all persons whose electronic communications were intercepted through the use of Defendants' wiretap on the Website.

THE PARTIES

4.   Plaintiff Burhaan Saleh is a California citizen and resident who lives in Glendale, California. Mr. Saleh is domiciled and intends to remain in California. In

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[1] NIKE, https://www.nike.com/.

[2] As used herein, the term "mouse clicks" also refers to "touch gestures" such as the "tap," "swipe," and similar gestures used on touchscreen devices.

1 May 2020, prior to the filing of this lawsuit, Mr. Saleh visited the Website and

2 purchased shoes from the Website. Mr. Saleh was in Glendale when he visited the

3 website. During the visit, Mr. Saleh's keystrokes, mouse clicks, and other electronic

4 communications—including the entry of his payment card information—were

5 intercepted in real time and were disclosed to Defendants Nike and FullStory through

6 the wiretap. Mr. Saleh was unaware at the time that his keystrokes, mouse clicks, and

7 other electronic communications, including the information described above, were

8 being intercepted in real-time and would be disclosed to FullStory, nor did Mr. Saleh

9 consent to the same.

10   5.   Defendant Nike, Inc. is a company incorporated under the laws of

11 Oregon with its principal place of business at One Bowerman Drive, Beaverton,

12 Oregon 97005.

13   6.   Nike does business throughout California and the entire United States.

14   7.   Nike owns and operates the Website.

15   8.   Defendant FullStory is a Delaware corporation with its principal place of

16 business at 1745 Peachtree Street Northwest, Suite G, Atlanta, Georgia 30309.

17   9.   FullStory is a marketing software-as-a-service ("SaaS") company.

18   10.   FullStory provides a feature called "Session Replay," which is at issue

19 here and described more fully below. At all relevant times here, Nike has used

20 FullStory's "Session Replay" product on the Website.

21   **JURISDICTION AND VENUE**

22   11.   This Court has subject matter jurisdiction pursuant to 28 U.S.C. §

23 1332(d)(2)(A) because this case is a class action where the aggregate claims of all

24 members of the proposed class are in excess of $5,000,000.00, exclusive of interest

25 and costs, and at least one member of the proposed class is citizen of state different

26 from at least one Defendant.

27   12.   This Court has personal jurisdiction over Defendants because each of the

1 business in this State, and Plaintiff's claims arise out of each of the Defendants'

2 forum-related activities. Furthermore, a substantial portion of the events giving rise

3 to Plaintiff's claims occurred in this District.

4   13.   Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this

5 action because a substantial part of the events, omissions, and acts giving rise to the

6 claims herein occurred in this District.

7   14.   Both Defendants also purposefully directed their activities at California,

8 and the wiretapping at issue here arises from or relates to Defendants' activities. As

9 alleged more fully below, Defendants intentionally installed the wiretap at issue here

10 on Nike's Website. Defendant FullStory purposefully intercepted electronic

11 transmissions from users of Nike's website, and Nike purposefully aided and abetted

12 FullStory's conduct. The conduct also was expressly aimed at California residents.

13 California is the largest market in the United States—indeed, if California were its

14 own nation, California would have the fifth largest economy in the world.

15 Defendants knew that a significant number of Californians would visit Nike's

16 website, because they form a significant portion of Nike's customer base. By

17 intercepting the transmissions of Nike website users, Defendants targeted their

18 wrongful conduct at customers, some of whom Defendants knew, at least

19 constructively, were residents of California. It was foreseeable that Defendants'

20 interceptions and wiretapping would harm Plaintiff and similarly-situated individuals,

21 and that at least some of this harm would occur in California—where Defendants

22 knew many customers and prospective customers resided.

23   **STATEMENT OF FACTS**

24 **I.   Overview Of The Wiretaps**

25   15.   Defendant FullStory develops a software of the same name that provides

26 marketing analytics.

27   16.   One of FullStory's features is called "Session Replay."

17.   FullStory says that "Session replay tools capture things like mouse movements, clicks, typing, scrolling, swiping, tapping, etc." on a given website.

18.   Session replay technologies work by using "embedded snippets of code … [that] watch and record a visitor's every move on a website, in real time."[3]

19.   FullStory touts that Session Replay relies on real video of a user's interactions with a website, or, in another words, a "recorded session."[4]

20.   To demonstrate how Session Replay works, FullStory displays the "recorded session of a fictional user interacting with th[e] [Session Replay] Guide":
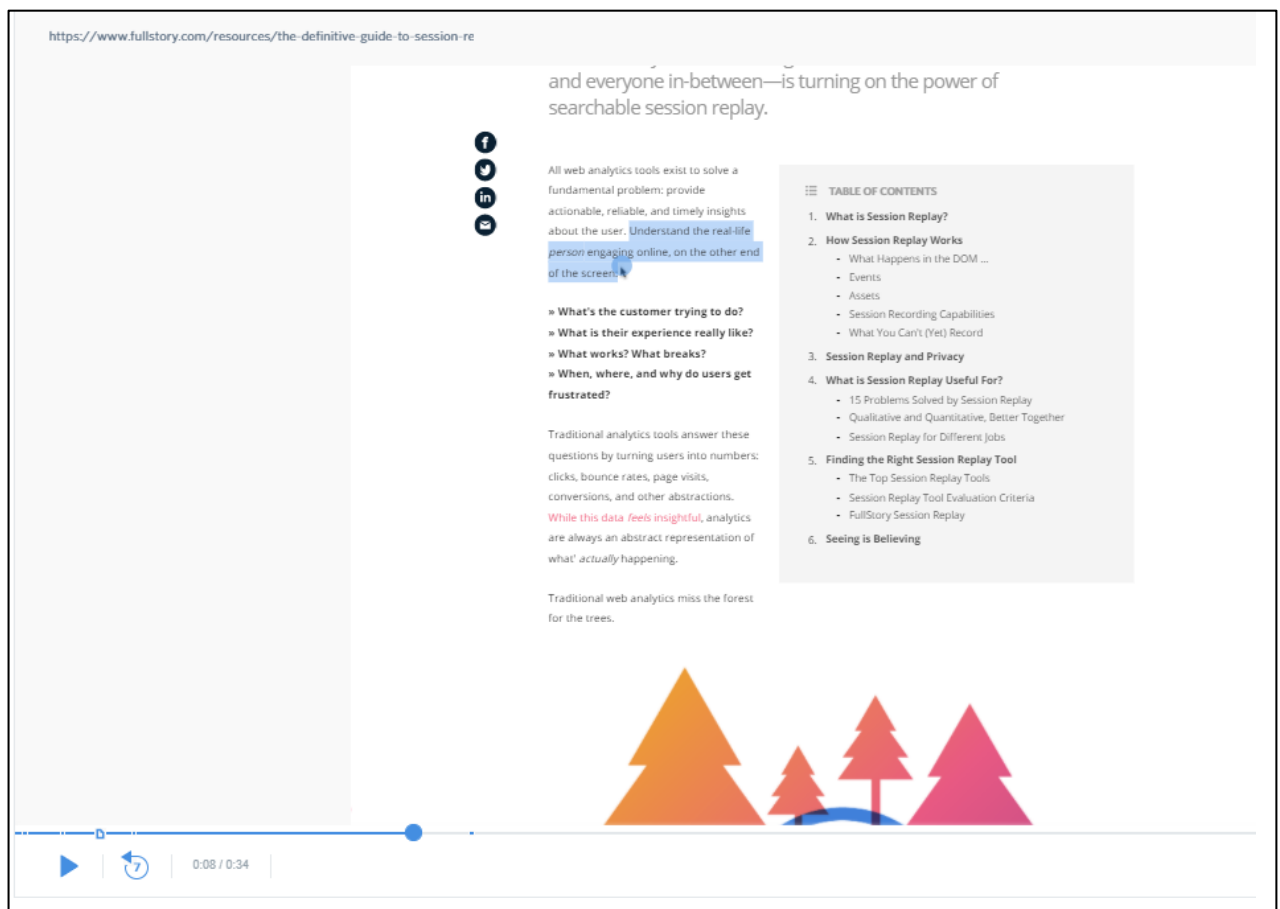
21.   FullStory describes the above video as follows:

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[3] Tomas Foltyn, *What's the Deal with Session-Replay Scripts?*, WELIVESECURITY, Apr. 20, 2018, https://www.welivesecurity.com/2018/04/20/whats-deal-session-replay-scripts/.

[4] https://www.fullstory.com/resources/the-definitive-guide-to-session-replay/

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