

1 EMILY JOHNSON HENN (SBN 269482)  
2 COVINGTON & BURLING LLP  
3 3000 El Camino Real  
4 5 Palo Alto Square, 10th Floor  
Palo Alto, CA 94306-2112  
Telephone: + 1 (650) 632-4700  
Facsimile: + 1 (650) 632-4800  
Email: ehenn@cov.com

7 SIMON J. FRANKEL (SBN 171552)  
8 PATRICK R. CAREY (SBN 308623)  
COVINGTON & BURLING LLP  
9 Salesforce Tower  
10 415 Mission Street, Suite 5400  
San Francisco, CA 94105-2533  
11 Telephone: + 1 (415) 591-6000  
Facsimile: + 1 (415) 591-6091  
Email: sfrankel@cov.com  
Email: pcarey@cov.com

14 *Attorneys for Defendants*  
15 *Nike, Inc. and FullStory, Inc.*

16 **UNITED STATES DISTRICT COURT**  
17 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

19 BURHAAN SALEH, individually and  
20 on behalf of all others similarly situated,

21 Plaintiff,

22 v.  
23

24 NIKE, INC., and FULLSTORY, INC.,

25 Defendants.

Civil Case No.: 2:20-cv-09581-FLA-RAO

**DEFENDANTS NIKE, INC. AND  
FULLSTORY, INC.'S MOTION TO  
DISMISS PLAINTIFF'S FIRST  
AMENDED COMPLAINT PURSUANT  
TO FEDERAL RULES OF CIVIL  
PROCEDURE 12(b)(1), 12(b)(2), AND  
12(b)(6)**

Hearing Date: March 5, 2021

Hearing Time: 1:30 p.m.

Honorable Fernando L. Aenlle-Rocha

## TABLE OF CONTENTS

<u>NOTICE OF MOTION AND MOTION TO DISMISS</u>	1
<u>MEMORANDUM OF POINTS AND AUTHORITIES</u>	1
I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. ALLEGATIONS OF THE COMPLAINT	3
A. Nike's Use of FullStory's Software and Services	3
B. Allegations Related to Plaintiff	4
III. LEGAL STANDARD	5
IV. ARGUMENT	6
A. FullStory Should Be Dismissed for Lack of Personal Jurisdiction	6
1. Plaintiff Does Not and Cannot Establish General Jurisdiction Over FullStory	7
2. Plaintiff Does Not and Cannot Establish Specific Jurisdiction Over FullStory	7
a) The First Amended Complaint Contains No Allegations of Purposeful Direction by FullStory	8
b) There Are No Allegations that Plaintiff's Claims Arise Out of or Relate to Forum-Related Activities by FullStory	9
c) The Exercise of Jurisdiction Over FullStory in California Is Not Reasonable	10
B. Every Claim in the First Amended Complaint Fails as a Matter of Law	11
1. The Court Should Dismiss Count 1 Because the First Amended Complaint Fails To State a Claim Under Section 631	11

1	a)	FullStory and Nike Did Not Violate Section 631 Because Nike, Using FullStory's Technology, Was a Party to Plaintiff's Purported Communications. ....	11
2	b)	FullStory and Nike Did Not Violate Section 631 Because the Software Did Not Collect the "Contents" of Plaintiff's Purported Communications.....	15
3	c)	The Conduct Alleged Did Not Violate Section 631 Because It Was Disclosed in Nike's Privacy Policy, Relied on by the First Amended Complaint.....	17
4	2.	The Court Should Dismiss Count 2 Because Plaintiff Lacks Standing To Assert Such a Claim and Because the FAC Fails To State a Claim Under Section 635. ....	19
5	a)	Plaintiff Lacks a Private Right of Action and Standing To Assert a Claim Under Section 635.....	19
6	b)	FullStory's Code Is Not a Device Primarily or Exclusively Designed for Eavesdropping. ....	20
7	c)	Even if FullStory's Code Was a Covered Device, Nike's Conduct Is Not Prohibited by Section 635. ....	22
8	3.	The Court Should Dismiss Count 3 Because Plaintiff Cannot State a Claim for Invasion of Privacy Under the California Constitution.....	23
9	V.	CONCLUSION.....	25
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

**TABLE OF AUTHORITIES**

	Page(s)
<b>Cases</b>	
<i>Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.</i> , 480 U.S. 102 (1987).....	5
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	5
<i>BNSF Ry. Co. v. Tyrrell</i> , 137 S. Ct. 1549 (2017).....	7
<i>Boschetto v. Hansing</i> , 539 F.3d 1011 (9th Cir. 2008) .....	9
<i>Brainerd v. Governors of the Univ. of Alta.</i> , 873 F.2d 1257 (9th Cir. 1989) .....	5
<i>Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty.</i> , 137 S. Ct. 1773 (2017).....	6, 9, 10
<i>Brodsky v. Apple Inc.</i> , 445 F. Supp. 3d 110 (N.D. Cal. 2020).....	15
<i>Catsouras v. Dep't of Cal. Highway Patrol</i> , 181 Cal. App. 4th 856 (2010) .....	24
<i>Cohen v. Casper Sleep, Inc.</i> , 2018 WL 3392877 (S.D.N.Y. July 12, 2018).....	19
<i>Cole v. Sunnyvale</i> , 2010 WL 532428 (N.D. Cal. Feb. 9, 2010) .....	2
<i>Daimler AG v. Bauman</i> , 571 U.S. 117 (2014).....	6, 7
<i>Davis v. Fed. Election Comm'n</i> , 554 U.S. 724 (2008).....	20
<i>Epic Sys. Corp. v. Lewis</i> , 138 S. Ct. 1612 (2018).....	23

---

DEFENDANTS NIKE, INC. AND FULL STORY, INC.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

1	<i>In re Facebook, Inc. Internet Tracking Litig.,</i>	
2	956 F.3d 589 (9th Cir. 2020) .....	11, 13, 14
3	<i>In re Facebook Internet Tracking Litig.,</i>	
4	140 F. Supp. 3d 922 (N.D. Cal. 2015) .....	21
5	<i>In re Facebook Internet Tracking Litig.,</i>	
6	263 F. Supp. 3d 836 (N.D. Cal. 2017) .....	22, 24
7	<i>Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.,</i>	
8	905 F.3d 597 (9th Cir. 2018) .....	8
9	<i>Garcia v. Enter. Holdings, Inc.,</i>	
10	78 F. Supp. 3d 1125 (N.D. Cal. 2015) .....	18
11	<i>In re Gilead Scis. Sec. Litig.,</i>	
12	536 F.3d 1049 (9th Cir. 2008) .....	5
13	<i>In re Google, Inc. Priv. Pol'y Litig.,</i>	
14	58 F. Supp. 3d 968 (N.D. Cal. 2014) .....	25
15	<i>Hill v. Nat'l Collegiate Athletic Ass'n,</i>	
16	7 Cal. 4th 1 (1994) .....	23, 24
17	<i>In re iPhone Application Litig.,</i>	
18	844 F. Supp. 2d 1040 (N.D. Cal. 2012) .....	25
19	<i>In re Lenovo Adware Litig.,</i>	
20	2016 WL 6277245 (N.D. Cal. Oct. 27, 2016) .....	19
21	<i>Low v. LinkedIn Corp.,</i>	
22	900 F. Supp. 2d 1010 (N.D. Cal. 2012) .....	23, 25
23	<i>Lujan v. Defs. of Wildlife,</i>	
24	504 U.S. 555 (1992) .....	6
25	<i>LVRC Holdings LLC v. Brekka,</i>	
26	581 F.3d 1127 (9th Cir. 2009) .....	21
27	<i>Membrila v. Receivables Performance Management, LLC,</i>	
28	2010 WL 1407274 (S.D. Cal. Apr. 6, 2010) .....	13, 14
	<i>Navarro v. Block,</i>	
	250 F.3d 729 (9th Cir. 2001) .....	5

DEFENDANTS NIKE, INC. AND FULL STORY, INC.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

# Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

### API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

### LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

### FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

### E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.