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8   UNITED STATES DISTRICT COURT

9   CENTRAL DISTRICT OF CALIFORNIA

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11   BURHAAN SALEH,   Case No. 2:20-cv-09581-FLA (RAOx)

12   Plaintiff,
                                           ORDER GRANTING IN PART AND
13   v.   **DENYING IN PART DEFENDANTS'**
                                           MOTION TO DISMISS [DKT. 30]
14

15   NIKE, INC., et al.,

16   Defendants.

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20   **<u>RULING</u>**

21   Before the court is Defendants Nike, Inc. ("Nike") and FullStory, Inc.'s

22   ("FullStory") (collectively, "Defendants") Motion to Dismiss ("Motion"). Dkt. 30

23   (Mot.). For the reasons set forth below, the court DENIES Defendants' Motion as to

24   Plaintiff's claim against Defendant Nike under Cal. Penal Code § 631(a) for aiding

25   FullStory's alleged wiretapping and GRANTS Defendants' Motion in all other

26   respects with leave to amend. Plaintiff shall have fourteen (14) days from the date of

27   this order to file an amended complaint.

28   / / /

BACKGROUND

The following facts are alleged in the First Amended Complaint ("FAC"). Plaintiff Burhaan Saleh ("Saleh" or "Plaintiff") is a California citizen and resident living in Glendale, California. Dkt. 24 (FAC) ¶ 4. Nike is an Oregon corporation with its principal place of business in Beaverton, Oregon. *Id.* ¶ 5. FullStory is a Delaware corporation with its principal place of business in Atlanta, Georgia. *Id.* ¶ 8.

FullStory is a marketing software-as-a-service ("SaaS") company and provides Nike with "Session Replay," a feature Nike uses on its website to capture data regarding visitors to Nike's website, nike.com (the "Website" or "Nike's Website"). *Id.* ¶¶ 9, 16-17. Session Replay embeds snippets of code that watch and record, in real time, "a visitor's every move on a website." *Id.* ¶ 18. "On Nike's website, FullStory's software captures, among other things: (a) The user's mouse clicks; (b) The user's keystrokes; (c) The user's payment card information, including card number, expiration date, and CVV code; (d) The user's IP address; (e) The user's location at the time of the visit; and (f) The user's browser type and the operating system on their devices." *Id.* ¶ 44 (paragraph breaks omitted).

In May 2020, Plaintiff visited Nike's Website and completed a purchase. *Id.* ¶¶ 2, 40. During Plaintiff's visit, Defendants Nike and FullStory recorded Plaintiff's electronic communications in real time, including Plaintiff's mouse clicks, keystrokes, and payment card information. *Id.* Plaintiff was unaware at the time that his keystrokes, mouse clicks, and other electronic communications were being intercepted in real-time and would be disclosed to FullStory, nor did Plaintiff consent to the same. *Id.* ¶ 4. Nike does not ask users whether they consent to FullStory's recordation of their interactions with Nike's Website, or inform users of the recording in its Privacy Policy. *Id.* ¶¶ 45, 46.

Plaintiff initiated this putative class action on October 19, 2020 and filed the operative FAC on December 22, 2020. Dkts. 1, 24. Plaintiff brings causes of action against Defendants under the California Invasion of Privacy Act ("CIPA"), Cal. Penal

1   Code §§ 631 and 635, and for invasion of privacy under the California Constitution.

2   FAC ¶¶ 59-89. Defendants filed a Motion to Dismiss the FAC on January 22, 2021,

3   which the court took under submission on April 23, 2021. Dkts. 30 (Mot.), 46.

4   **MOTION TO DISMISS: PERSONAL JURISDICTION**

5   **I.   Legal Standard**

6   Under Fed. R. Civ. P. 12(b)(2), a party may file a motion to dismiss a complaint

7   for lack of personal jurisdiction. "When a defendant moves to dismiss for lack of

8   personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has

9   jurisdiction." *In re Western States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716,

10   741 (9th Cir. 2013); *accord Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797,

11   800 (9th Cir. 2004) (citation omitted).

12   "The court may consider evidence presented in affidavits to assist it in its

13   determination and may order discovery on the jurisdictional issues." *Doe v. Unocal*

14   *Corp.*, 248 F.3d 915, 922 (9th Cir. 2001), *overruled on other grounds as discussed in*

15   *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1021 (9th Cir. 2017). "However,

16   'when a district court acts on a defendant's motion to dismiss without holding an

17   evidentiary hearing, the plaintiff need make only a prima facie showing of

18   jurisdictional facts to withstand the motion to dismiss. That is, the plaintiff need only

19   demonstrate facts that if true would support jurisdiction over the defendant.'" *Id.*

20   (quoting *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995)).

21   "Where … there is no applicable federal statute governing personal jurisdiction,

22   the district court applies the law of the state in which the district court sits." *Id.* (citing

23   Fed. R. Civ. P. 4(k)(1)(A)). "Personal jurisdiction over a nonresident defendant is

24   proper if permitted by a state's long-arm statute and if the exercise of that jurisdiction

25   does not violate federal due process." *Western States*, 715 F.3d at 741. California's

26   long-arm statute provides for jurisdiction coextensive with the Constitution of the

27   United States. Cal. Code Civ. Proc. § 410.10. "Because California's long-arm

28   jurisdictional statute is coextensive with federal due process requirements, the

1 jurisdictional analyses under state law and federal due process are the same."

2 *Schwarzenegger*, 374 F.3d at 800-01. Accordingly, this court's exercise of personal

3 jurisdiction over a non-resident defendant not present in the forum will satisfy due

4 process if the defendant has sufficient "minimum contacts" with the forum, such that

5 the exercise of jurisdiction "does not offend traditional notions of fair play and

6 substantial justice." *Schwarzenegger*, 374 F.3d at 801 (quoting *Int'l Shoe Co. v.*

7 *Washington*, 326 U.S. 310, 316 (1945)).

8 **II.   Discussion**

9 **A.   General Personal Jurisdiction**

10 A district court may exercise either general or specific personal jurisdiction.

11 *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). To

12 establish general jurisdiction over a defendant corporation, the plaintiff must

13 demonstrate the defendant has sufficient contacts to constitute the kind of "continuous

14 and systematic general business contacts" that approximate physical presence in the

15 forum state. *Schwarzenegger*, 374 F.3d at 801 (quoting *Helicopteros Nacionales de*

16 *Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)). For corporations, the place of

17 incorporation and principal place of business are "paradigm" examples of continuous

18 and systematic general business contacts sufficient to support general personal

19 jurisdiction." *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

20 Defendants argue the court cannot exercise general personal jurisdiction over

21 FullStory because FullStory is incorporated in Delaware, has its principal place of

22 business in Georgia, FAC ¶ 8, and has not otherwise established continuous and

23 systematic contacts in California, such that it is essentially at home in the state. Mot.

24 7 (citing *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017)). Plaintiff appears to

25 concede the argument, as Plaintiff does not respond and argues only that the court has

26 specific personal jurisdiction over FullStory. Opp. 2-8. Thus, Plaintiff has not

27 established general personal jurisdiction over FullStory, and the court will proceed to

28 assess the parties' arguments regarding specific personal jurisdiction.

1   **B.   Specific Personal Jurisdiction**

2   For a court to exercise specific personal jurisdiction over a defendant, "the suit

3   must arise out of or relate to the defendant's contacts with the forum." *Bristol-Myers*,

4   137 S. Ct. at 1780 (internal brackets and quotation marks omitted). The Ninth Circuit

5   has established a three-prong test for analyzing a claim of specific personal

6   jurisdiction:

7   (1) The non-resident defendant must purposefully direct his activities or
     consummate some transaction with the forum or resident thereof; or perform
8   some act by which he purposefully avails himself of the privilege of conducting
     activities in the forum, thereby invoking the benefits and protections of its laws;
9
10   (2) the claim must be one which arises out of or relates to the defendant's
     forum-related activities; and
11
     (3) the exercise of jurisdiction must comport with fair play and substantial
12   justice, i.e. it must be reasonable.

13   *Schwarzenegger*, 374 F.3d at 802. The plaintiff bears the burden to establish the first

14   two prongs, and failure to establish either one requires dismissal for lack of personal

15   jurisdiction. *Id.*

16   The first prong of the specific jurisdiction test refers to both "purposeful

17   availment" and "purposeful direction." *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647

18   F.3d 1218, 1228 (9th Cir. 2011). A purposeful availment analysis is most often used

19   in suits sounding in contract, while a purposeful direction analysis is most often used

20   in suits sounding in tort. *Schwarzenegger*, 374 F.3d at 802; *Mavrix*, 647 F.3d at 1228.

21   The parties agree the court must apply the purposeful direction analysis here. Mot. 8;

22   Opp. 2.

23   The purposeful direction test, or "effects test," looks to whether the defendant:

24   (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing

25   harm that the defendant knows is likely to be suffered in the forum state. *Mavrix*, 647

26   F.3d at 1228 (citing *Calder v. Jones*, 465 U.S. 783 (1984)); *Schwarzenegger*, 374 F.3d

27   at 803. The court will address each factor in turn.

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