

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 BURHAAN SALEH,

12 Plaintiff,

13 v.
14

15 NIKE, INC., et al.,

16 Defendants.
17
18

Case No. 2:20-cv-09581-FLA (RAOx)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS [DKT. 30]**

19
20 **RULING**

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

Code §§ 631 and 635, and for invasion of privacy under the California Constitution. FAC ¶¶ 59-89. Defendants filed a Motion to Dismiss the FAC on January 22, 2021, which the court took under submission on April 23, 2021. Dkts. 30 (Mot.), 46.

MOTION TO DISMISS: PERSONAL JURISDICTION

I. Legal Standard

Under Fed. R. Civ. P. 12(b)(2), a party may file a motion to dismiss a complaint for lack of personal jurisdiction. “When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has jurisdiction.” *In re Western States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 741 (9th Cir. 2013); *accord Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (citation omitted).

“The court may consider evidence presented in affidavits to assist it in its determination and may order discovery on the jurisdictional issues.” *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001), *overruled on other grounds as discussed in Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1021 (9th Cir. 2017). “However, ‘when a district court acts on a defendant’s motion to dismiss without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss. That is, the plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant.’” *Id.* (quoting *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995)).

“Where ... there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits.” *Id.* (citing Fed. R. Civ. P. 4(k)(1)(A)). “Personal jurisdiction over a nonresident defendant is proper if permitted by a state’s long-arm statute and if the exercise of that jurisdiction does not violate federal due process.” *Western States*, 715 F.3d at 741. California’s long-arm statute provides for jurisdiction coextensive with the Constitution of the United States. Cal. Code Civ. Proc. § 410.10. “Because California’s long-arm jurisdictional statute is coextensive with federal due process requirements, the

jurisdictional analyses under state law and federal due process are the same.”
Schwarzenegger, 374 F.3d at 800-01. Accordingly, this court’s exercise of personal jurisdiction over a non-resident defendant not present in the forum will satisfy due process if the defendant has sufficient “minimum contacts” with the forum, such that the exercise of jurisdiction “does not offend traditional notions of fair play and substantial justice.” *Schwarzenegger*, 374 F.3d at 801 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

II. Discussion

A. General Personal Jurisdiction

A district court may exercise either general or specific personal jurisdiction. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). To establish general jurisdiction over a defendant corporation, the plaintiff must demonstrate the defendant has sufficient contacts to constitute the kind of “continuous and systematic general business contacts” that approximate physical presence in the forum state. *Schwarzenegger*, 374 F.3d at 801 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)). For corporations, the place of incorporation and principal place of business are “paradigm” examples of continuous and systematic general business contacts sufficient to support general personal jurisdiction.” *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

Defendants argue the court cannot exercise general personal jurisdiction over FullStory because FullStory is incorporated in Delaware, has its principal place of business in Georgia, FAC ¶ 8, and has not otherwise established continuous and systematic contacts in California, such that it is essentially at home in the state. Mot. 7 (citing *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017)). Plaintiff appears to concede the argument, as Plaintiff does not respond and argues only that the court has specific personal jurisdiction over FullStory. Opp. 2-8. Thus, Plaintiff has not established general personal jurisdiction over FullStory, and the court will proceed to 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
8 consummate some transaction with the forum or resident thereof; or perform
9 some act by which he purposefully avails himself of the privilege of conducting
10 activities in the forum, thereby invoking the benefits and protections of its laws;
11 (2) the claim must be one which arises out of or relates to the defendant’s
12 forum-related activities; and
13 (3) the exercise of jurisdiction must comport with fair play and substantial
14 justice, i.e. it must be reasonable.

15 *Schwarzenegger*, 374 F.3d at 802. The plaintiff bears the burden to establish the first
16 two prongs, and failure to establish either one requires dismissal for lack of personal
17 jurisdiction. *Id.*

18 The first prong of the specific jurisdiction test refers to both “purposeful
19 availment” and “purposeful direction.” *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647
20 F.3d 1218, 1228 (9th Cir. 2011). A purposeful availment analysis is most often used
21 in suits sounding in contract, while a purposeful direction analysis is most often used
22 in suits sounding in tort. *Schwarzenegger*, 374 F.3d at 802; *Mavrix*, 647 F.3d at 1228.
23 The parties agree the court must apply the purposeful direction analysis here. Mot. 8;
24 Opp. 2.

25 The purposeful direction test, or “effects test,” looks to whether the defendant:
26 (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing
27 harm that the defendant knows is likely to be suffered in the forum state. *Mavrix*, 647
28 F.3d at 1228 (citing *Calder v. Jones*, 465 U.S. 783 (1984)); *Schwarzenegger*, 374 F.3d
at 803. The court will address each factor in turn.

///

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.