

1 **BURSOR & FISHER, P.A.**  
 2 L. Timothy Fisher (State Bar No. 191626)  
 3 Joel D. Smith (State Bar No. 244902)  
 4 1990 North California Blvd., Suite 940  
 5 Walnut Creek, CA 94596  
 6 Telephone: (925) 300-4455  
 7 Facsimile: (925) 407-2700  
 8 E-mail: ltfisher@bursor.com  
 9 jsmith@bursor.com

*Attorneys for Plaintiff*

10 **UNITED STATES DISTRICT COURT**  
 11 **CENTRAL DISTRICT OF CALIFORNIA**

13 MARY YOON, individually and on  
 14 behalf of all others similarly situated,

Plaintiff,

v.

16 LULULEMON USA INC. and  
 17 QUANTUM METRIC, INC.,

Defendants.

Case No. 5:20-cv-02439-JWH-SHK

**OPPOSITION TO MOTION TO DISMISS**

Date: May 28, 2021  
 Time: 9:00 a.m.  
 Ctrm: 2  
 Judge: Hon. John W. Holcomb

**TABLE OF CONTENTS**

**PAGE(S)**

1 INTRODUCTION ..... 1

2 ARGUMENT ..... 1

3 I. Plaintiff Sufficiently Alleges A Violation Of § 631(a)..... 1

4 A. QM Was Not A Party To The Communications ..... 1

5 B. Lululemon Is Liable For Enabling QM’s

6 Wiretapping ..... 7

7 C. Plaintiffs’ Website Interactions Are

8 “Communications” Under *Moosejaw, In re*

9 *Facebook*, and *In re Zynga* ..... 9

10 D. QM’s Software Intercepted Plaintiff’s Electronic

11 Communications “In Transit” ..... 11

12 E. Lululemon’s Privacy Policy Does Not Support

13 Dismissal..... 16

14 1. Plaintiff Was Wiretapped Before The

15 Hyperlink To The Privacy Policy Appeared

16 On Plaintiff’s Screen ..... 16

17 2. The Privacy Policy Arguments Fail Under

18 *Nguyen* ..... 18

19 3. At Best, Whether The Privacy Policy

20 Discloses The Wiretapping Is A Question Of

21 Fact ..... 20

22 II. Plaintiff States A Claim For Violations Of CIPA § 635

23 And Federal Wiretap Act § 2512 ..... 23

24 III. Plaintiff States A Claim For Invasion Of Privacy ..... 28

25 A. Dismissal Of The Invasion Of Privacy Claim Would

26 Be Reversible Error Under *In re Facebook*..... 28

27 B. Defendants’ Arguments And Authorities Do Not

28 Support Dismissal ..... 30

IV. *Khoja* And F.R.E. 208 Require Denial Of Defendants’

Request For Judicial Notice ..... 33

CONCLUSION..... 35

**TABLE OF AUTHORITIES**

**PAGE(S)**

**CASES**

1

2

3

4 *Ades v. Omni Hotels Mgmt. Corp.*,  
46 F. Supp. 3d 999 (C.D. Cal. 2014) .....28

5

6 *Berman v. Freedom Financial Network, LLC*,  
2020 WL 5210912 (N.D. Cal. Sept. 1, 2020) .....20

7

8 *Bonnichsen v. United States*,  
367 F.3d 864 (9th Cir. 2004) .....8

9

10 *Brown v. Google LLC*,  
2021 WL 949372 (N.D. Cal. Mar. 12, 2021) .....22

11

12 *Bunnell v. Motion Picture Ass’n of Am.*,  
567 F. Supp. 2d 1148 (C.D. Cal. 2007) .....15, 16

13

14 *Byrd v. Aaron’s, Inc.*,  
2012 WL 12887775 (W.D. Pa. 2012) .....13

15

16 *Cabral v. Supple, LLC*,  
2012 WL 12895825 (C.D. Cal. Oct. 3, 2012) .....33

17

18 *Campbell v. Facebook Inc.*,  
77 F. Supp. 3d 836 (N.D. Cal. 2014) .....5, 22, 31

19

20 *Casey v. Proctor*,  
59 Cal. 2d 97 (1963) .....17

21

22 *Colgate v. JUUL Labs, Inc.*,  
402 F. Supp. 3d 728 (N.D. Cal. 2019) .....19

23

24 *Cothron v. White Castle System, Inc.*,  
467 F. Supp. 3d 604 (N.D. Ill. 2020) .....18

25

26 *Cullinane v. Uber Tech., Inc.*,  
893 F.3d 53 (1st Cir. 2018) .....19

27

28 *Dufour v. Allen*,  
748 F. App’x 150 (9th Cir. 2019) .....21

1 *ENTTech Media Grp. LLC v. Okularity, Inc.*,  
 2 2021 WL 916307 (C.D. Cal. Mar. 10, 2021).....5, 31

3 *Farrell v. Boeing Employees Credit Union*,  
 4 761 F. App’x 682 (9th Cir. 2019) .....34

5 *Fleury v. Union Pac. R.R. Co.*,  
 6 2021 WL 1124309 (N.D. Ill. Mar. 24, 2021) .....17

7 *Foglestrom v. Lamps Plus, Inc.*,  
 8 195 Cal. App. 4th 986 (2011) .....32

9 *Franco v. Greystone Ridge Condominium*,  
 10 39 Cal. App. 5th 221 (2019) .....18

11 *Fredenburg v. City of Fremont*,  
 12 119 Cal. App. 4th 408 (2008) .....33

13 *Gollehon v. Mahoney*,  
 14 626 F.3d 1019 (9th Cir. 2010) .....27

15 *Graham v. Noom, Inc.*,  
 16 2021 WL 1312765 (N.D. Cal. Apr. 8, 2021).....5, 6

17 *Harris v. Harris*,  
 18 935 F.3d 670 (9th Cir. 2019) .....8

19 *Heeger v. Facebook, Inc.*,  
 20 2020 WL 7664459 (N.D. Cal. Dec. 24, 2020).....32, 33

21 *Hill v. Nat’l Collegiate Athletic Ass’n.*,  
 22 7 Cal. 4th 1 (1994) .....30, 33

23 *In re Carrier IQ, Inc.*,  
 78 F. Supp. 3d 1051, (N.D. Cal. 2015)..... Passim

24 *In re Facebook Internet Tracking Litig.*,  
 25 956 F.3d 589 (9th Cir. 2020) ..... Passim

26 *In re Google Assistant Priv. Litig.*,  
 27 457 F. Supp. 3d 797 (N.D. Cal. 2020).....21, 29

28

1 *In re Google Inc.*,  
 2 2013 WL 5423918 (N.D. Cal. Sept. 26, 2013)..... Passim

3 *In re Google Location Hist. Litig.*,  
 4 428 F. Supp. 3d 185 (N.D. Cal. 2019).....33

5 *In re Google, Inc. Privacy Policy Litig.*,  
 6 58 F. Supp. 3d 968 (N.D. Cal. 2014).....33

7 *In re iPhone Application Litig.*,  
 8 844 F. Supp. 2d 1040 (N.D. Cal. June 12, 2012) .....21, 33

9 *In re Lenovo Adware Litig.*,  
 10 2016 WL 6277245 (N.D. Cal. Oct. 27, 2016) .....8

11 *In re Pharmatrak, Inc.*,  
 12 329 F.3d 9 (1st Cir. 2003).....10

13 *In re Vizio, Inc. Consumer Priv. Litig.*,  
 14 238 F. Supp. 3d 1204 (C.D. Cal. 2017) .....30

15 *In re Yahoo Mail Litig.*,  
 16 7 F. Supp. 3d 1016 (N.D. Cal. 2014).....33

17 *In re Zynga Privacy Litig.*,  
 18 750 F.3d 1098, 1107 (9th Cir. 2014) (9th Cir. 2014) .....10, 11

19 *In re: Zoom Video Commcn’s Inc. Privacy Litig.*,  
 20 2021 WL 930623 (N.D. Cal. Mar. 11, 2021) .....33

21 *Ion Equip. Corp. v. Nelson*,  
 110 Cal. App. 3d 868 (1980) .....24

22 *Javier v. Assurance IQ, LLC*,  
 23 2021 WL 940319 (N.D. Cal. Mar. 9, 2021) .....18, 20

24 *Kauders v. Uber Techs., Inc.*,  
 25 2019 WL 510568 (Mass. Super. Ct. Jan. 3, 2019).....17

26 *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*,  
 27 133 Cal. App. 4th 26 (2005) .....28

28

# 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.