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

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

Plaintiff,

v.

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

Defendants.

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

**ORDER GRANTING-IN-PART
AND DENYING-IN-PART
DEFENDANTS' MOTION TO
DISMISS [ECF No. 23]**

1 Before the Court is the motion of Defendants Lululemon USA, Inc. and
 2 Quantum Metric, Inc. to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules
 3 of Civil Procedure.¹ The Court finds this matter appropriate for resolution
 4 without a hearing. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the
 5 papers filed in support and in opposition,² the Court orders that the Motion is
 6 **GRANTED IN PART** and **DENIED IN PART**, as set forth herein.

7 **I. BACKGROUND**

8 Yoon alleges the following facts in her Amended Complaint, which the
 9 Court assumes to be true for the purposes of the instant Motion. *See, e.g., Cahill*
 10 *v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996) (on motion to dismiss
 11 for failure to state a claim, “[a] allegations of material fact are taken as true and
 12 construed in the light most favorable to the nonmoving party”).

13 Yoon is a resident of Corona, California.³ Lululemon is a Nevada
 14 corporation that does business in California, including through a website;
 15 Quantum Metric is a Delaware corporation.⁴ Yoon visited and made a purchase
 16 from Lululemon’s website in April 2020.⁵

17 Lululemon uses Quantum Metric software called “Session Replay” to
 18 captures a customer’s interactions with Lululemon’s webpage, including mouse
 19 movements, clicks, keystrokes, scrolls, and pageviews.⁶ Quantum Metric
 20 markets this software as allowing a company “to pull up any user who had
 21

22 ¹ Defs.’ Joint Mot. to Dismiss (the “Motion”) [ECF No. 23]; Req. for
 23 Judicial Notice (the “RJN”) [ECF No. 24].

24 ² The Court considered the following papers: (1) Pl.’s First Am. Compl.
 25 (the “Amended Complaint”) [ECF No. 20]; (2) the Motion; (3) Pl.’s Opp’n to
 the Motion (the “Opposition”) [ECF No. 25]; and (4) Defs.’ Reply in Support
 of the Motion (the “Reply”) [ECF No. 28].

26 ³ Amended Complaint ¶ 4.

27 ⁴ *Id.* ¶¶ 5-8.

28 ⁵ *Id.* ¶ 4.

⁶ *Id.* ¶¶ 10 & 18

1 visited [a] website and watch their journey as if [the company] was standing over
 2 their shoulder’” and “[s]ee actual customer interactions.’” Quantum Metric
 3 has obtained patent protection for its Session Replay technology, which
 4 Quantum Metric touts as giving companies “‘real-time visibility into all
 5 behavioral, technical, and segment data.’”⁷ The monitoring that Quantum
 6 Metric’s technology provides extends beyond the computer “cookies” with
 7 which ordinary consumers are familiar.⁸ One 2017 study found that products
 8 similar to Session Replay collected users’ passwords and credit card numbers.⁹
 9 Lululemon is aware of this monitoring.¹⁰

10 When Yoon visited Lululemon’s website, Session Replay captured her
 11 keystrokes and clicks; pages viewed; shipping and billing information; date,
 12 time, and duration of visit; IP address and physical location; and browser type
 13 and operating system.¹¹ Quantum Metric then supplies that information back to
 14 Lululemon.¹² The home page and checkout page of Lululemon’s website
 15 contain links to a Privacy Policy in size 7.5 non-contrasting font.¹³ Lululemon
 16 did not ask Yoon to agree to the Privacy Policy; rather, Lululemon instructed
 17 Yoon that she could “learn more” about the Privacy Policy when she placed her
 18 order.¹⁴

19 Yoon seeks to represent a class of similarly situated consumers;
 20 certification of that class is not currently before the Court.¹⁵ The Amended
 21

22 ⁷ *Id.* ¶¶ 18, 28, & 20.

23 ⁸ *Id.* ¶ 35.

24 ⁹ *Id.* ¶¶ 35 & 36.

25 ¹⁰ *Id.* ¶¶ 41 & 42.

26 ¹¹ *Id.* ¶ 46.

27 ¹² *Id.* ¶ 26.

28 ¹³ *Id.* ¶¶ 55 & 56.

¹⁴ *Id.* ¶¶ 56 & 57.

¹⁵ *Id.* ¶¶ 63-71

1 Complaint asserts the following four claims for relief against both Defendants:
2 (1) violation of Cal. Penal Code § 631; (2) violation of Cal. Penal Code § 635;
3 (3) invasion of privacy under California’s Constitution; and (4) violation of 18
4 U.S.C. § 2512.¹⁶ Defendants’ Motion now stands submitted.

5 **II. LEGAL STANDARD**

6 Under Rule 12(b)(6), a party may make a motion to dismiss for failure to
7 state a claim upon which relief can be granted. Rule 12(b)(6) must be read in
8 conjunction with Rule 8(a), which requires a “short and plain statement of the
9 claim showing that a pleader is entitled to relief,” in order to give the defendant
10 “fair notice of what the claim is and the grounds upon which it rests.” *Bell*
11 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Horosny v. Burlington*
12 *Coat Factory, Inc.*, 2015 WL 12532178, at *3 (C.D. Cal. Oct. 26, 2015). When
13 evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in
14 the complaint—as well as any reasonable inferences to be drawn from them—as
15 true and must construe them in the light most favorable to the non-moving
16 party. *See, e.g., Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005).
17 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
18 detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of
19 his ‘entitlement to relief’ requires more than labels and conclusions, and a
20 formulaic recitation of the elements of a cause of action will not do.” *Twombly*,
21 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint
22 “must be enough to raise a right to relief above the speculative level.” *Id.*

23 Although the scope of review on a Rule 12(b)(6) motion to dismiss is
24 limited to the contents of the complaint, the Court may consider certain
25 materials, such as documents attached to the complaint, documents
26 incorporated by reference in the complaint, or matters of judicial notice. *United*
27

28 ¹⁶ *See generally* Amended Complaint

1 *States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003). Under the incorporation
2 by reference doctrine, the Court may consider documents not attached to the
3 pleading if: (1) those documents are referenced extensively in the complaint or
4 form the basis of the plaintiff's claim; and (2) no party questions their
5 authenticity. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

6 Generally, "a district court should grant leave to amend even if no request
7 to amend the pleading was made, unless it determines that the pleading could
8 not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d
9 1122, 1127 (9th Cir. 2000) (*en banc*) (internal quotations omitted).

10 **III. DISCUSSION**

11 **A. Request for Judicial Notice**

12 "A court shall take judicial notice if requested by a party and supplied
13 with the necessary information." Fed. R. Evid. 201(d). An adjudicative fact
14 may be judicially noticed if it is "not subject to reasonable dispute in that it is
15 either (1) generally known within the territorial jurisdiction of the trial court, or
16 (2) capable of accurate and ready determination by resort to sources whose
17 accuracy cannot reasonably be questioned." *Id.*

18 Defendants request that the Court take notice of the following
19 documents:

- 20 • U.S. Patent No. 10,656,984 (the "Session Replay Patent I") [ECF
21 No. 24, Ex. A];
- 22 • Screenshots of the "Frequently Asked Questions" and "Data Privacy and
23 Security" sections of Quantum Metric's website, captured on
24 October 30, 2020, by the Wayback Machine ("QM Website
25 Screenshots") [ECF No. 24, Ex. B];
- 26 • U.S. Patent No. 10,146,752 (the "Session Replay Patent II") [ECF
27 No. 24, Ex. C];

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