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]

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

I. BACKGROUND

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

Yoon is a resident of Corona, California.[3] Lululemon is a Nevada corporation that does business in California, including through a website; Quantum Metric is a Delaware corporation.[4] Yoon visited and made a purchase from Lululemon's website in April 2020.[5]

Lululemon uses Quantum Metric software called "Session Replay" to captures a customer's interactions with Lululemon's webpage, including mouse movements, clicks, keystrokes, scrolls, and pageviews.[6] Quantum Metric markets this software as allowing a company "'to pull up any user who had

---

[1] Defs.' Joint Mot. to Dismiss (the "Motion") [ECF No. 23]; Req. for Judicial Notice (the "RJN") [ECF No. 24].

[2] The Court considered the following papers: (1) Pl.'s First Am. Compl. (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].

[3] Amended Complaint ¶ 4.

[4] *Id.* ¶¶ 5-8.

[5] *Id.* ¶ 4.

[6] *Id.* ¶¶ 10 & 18.

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

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

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

---

7 *Id.* ¶¶ 18, 28, & 20.
8 *Id.* ¶ 35.
9 *Id.* ¶¶ 35 & 36.
10 *Id.* ¶¶ 41 & 42.
11 *Id.* ¶ 46.
12 *Id.* ¶ 26.
13 *Id.* ¶¶ 55 & 56.
14 *Id.* ¶¶ 56 & 57.
15 *Id.* ¶¶ 63-71.

Complaint asserts the following four claims for relief against both Defendants: (1) violation of Cal. Penal Code § 631; (2) violation of Cal. Penal Code § 635; (3) invasion of privacy under California's Constitution; and (4) violation of 18 U.S.C. § 2512.[16] Defendants' Motion now stands submitted.

II. LEGAL STANDARD

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

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

[16] *See generally* Amended Complaint.

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

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

III. DISCUSSION

A. Request for Judicial Notice

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

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

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

DOCKET ALARM

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.