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7
8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**

10 JAMES HOLDEN, individually and on behalf of
11 all others similarly situated,

12 Plaintiff,

13 v.

14 FOUND HEALTH, INC. and FULLSTORY,
15 INC.,

16 Defendants.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff James Holden (“Plaintiff”), individually and on behalf of all others similarly
2 situated, by and through his attorneys, makes the following allegations pursuant to the investigation
3 of his counsel and based upon information and belief, except as to allegations specifically pertaining
4 to himself and his counsel, which are based on personal knowledge.

5 **NATURE OF THE ACTION**

6 1. This is a class action suit brought against Defendants Found Health, Inc.’s (“FHI”)
7 and FullStory, Inc. (“FullStory”) (collectively, “Defendants”) for wiretapping the electronic
8 communications of visitors to Defendant FHI’s website, Torchrx.com (the “Website”).¹ The
9 wiretaps, which are embedded in the computer code on the Website, are used by Defendants to
10 secretly observe and record website visitors’ keystrokes, mouse clicks,² and other electronic
11 communications, including the entry of Personally Identifiable Information (“PII”) and Protected
12 Health Information (“PHI”), in real time. By doing so, Defendants have violated the California
13 Invasion of Privacy Act (“CIPA”), Cal. Penal Code §§ 631 and 635, and invaded Plaintiff’s and
14 Class Members’ privacy rights in violation of the California Constitution.

15 2. In May 2020, Mr. Holden visited the Website. During the visit, Defendants recorded
16 Plaintiff’s electronic communications in real time, including Plaintiff’s name, e-mail address,
17 shipping and billing addresses, payment card information, height, weight, gender, and medical
18 conditions.

19 3. Plaintiff brings this action on behalf of himself and a class of all persons whose
20 electronic communications were intercepted through the use of Defendants’ wiretap on the Website.

21 **THE PARTIES**

22 4. Plaintiff James Holden is a California resident who lives in Sutter Creek, California.
23 In May 2020, prior to the filing of this lawsuit, Mr. Holden signed up for a subscription on the
24 Website. Mr. Holden was in Sutter Creek when he visited the website. During the visit, Mr.
25 Holden’s keystrokes, mouse clicks, and other electronic communications—including the entry of

26 _____
27 ¹ TORCHRX, <https://torchrx.com/> (last accessed Sept. 29, 2020).

28 ² As used herein, the term “mouse clicks” also refers to “touch gestures” such as the “tap,” “swipe,”
and similar gestures used on touchscreen devices.

1 his name, e-mail, address, payment card information, height, weight, gender, and other PII and
2 PHI—were intercepted in real time and were disclosed to Defendants FHI and FullStory through the
3 wiretap. Mr. Holden was unaware at the time that his keystrokes, mouse clicks, and other electronic
4 communications, including the information described above, were being intercepted in real-time
5 and would be disclosed to FullStory, nor did Mr. Holden consent to the same.

6 5. Defendant Found Health, Inc. is a Delaware corporation with its principal place of
7 business at 1 Letterman Drive, Building C, #3500, San Francisco, CA 94129.

8 6. FHI owns and operates the Website, which “provides prescription medication, health
9 coaching, and community to its members” with a focus on weight loss.

10 7. FHI does business throughout California and the entire United States.

11 8. Defendant FullStory is a Delaware corporation with its principal place of business at
12 1745 Peachtree Street Northwest, Suite G, Atlanta, Georgia 30309.

13 9. FullStory is a marketing software-as-a-service (“SaaS”) company.

14 10. FullStory provides a feature called “Session Replay,” which is at issue here and
15 described more fully below. At all relevant times here, FHI has used FullStory’s “Session Replay”
16 product on the Website.

17 **JURISDICTION AND VENUE**

18 11. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A)
19 because this case is a class action where the aggregate claims of all members of the proposed class
20 are in excess of \$5,000,000.00, exclusive of interest and costs, and at least one member of the
21 proposed class is citizen of state different from at least one Defendant.

22 12. This Court has personal jurisdiction over Defendants because each of the Defendants
23 have purposefully availed themselves of the laws and benefits of doing business in this State, and
24 Plaintiff’s claims arise out of each of the Defendants’ forum-related activities. Furthermore, a
25 substantial portion of the events giving rise to Plaintiff’s claims occurred in this District.

26 13. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because a
27 substantial part of the events, omissions, and acts giving rise to the claims herein occurred in this
28 District.

STATEMENT OF FACTS

I. Overview Of The Wiretaps

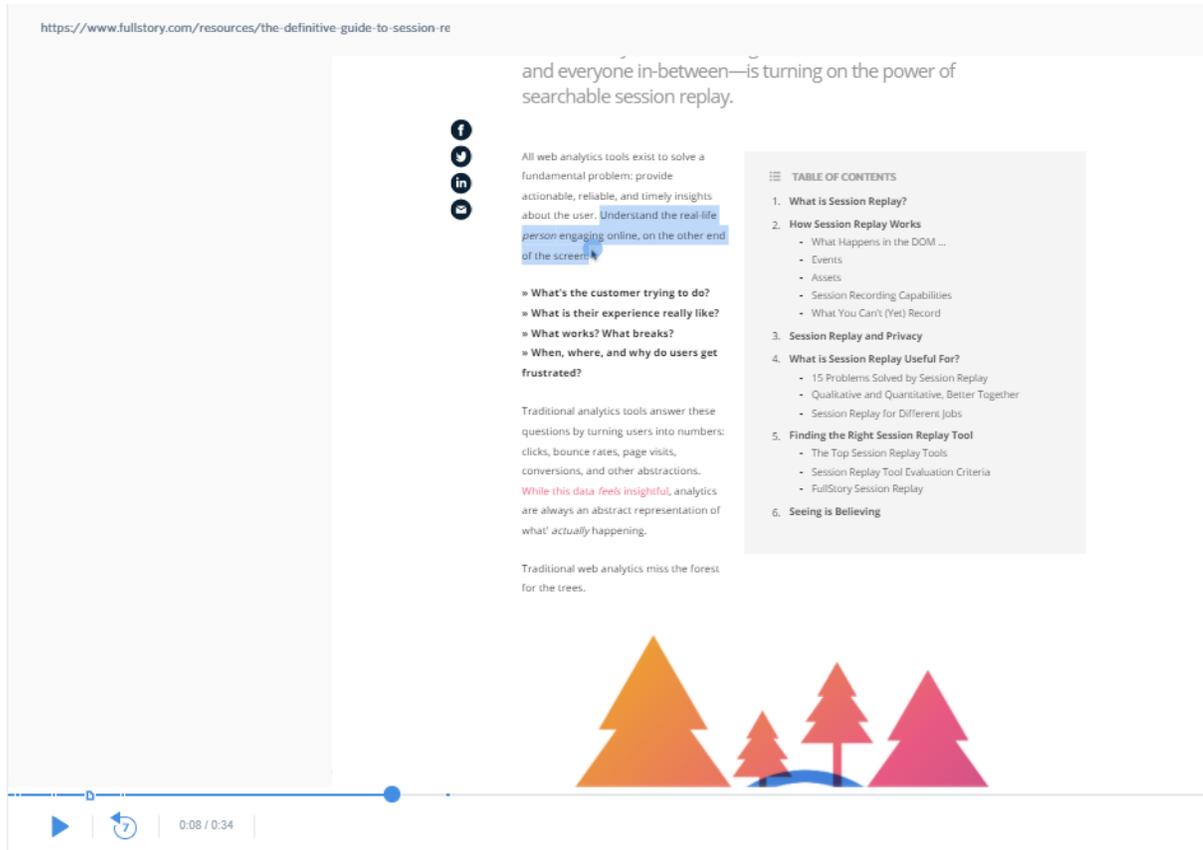
14. Defendant FullStory develops a software of the same name that provides marketing analytics.

15. One of FullStory’s features is called “Session Replay,” which purports to help businesses improve their website design and customer experience.

16. FullStorySession replay provides a real-time recording of a user’s interactions on a website. FullStory says that “Session replay tools capture things like mouse movements, clicks, typing, scrolling, swiping, tapping, etc.”

17. FullStory touts that Session Replay relies on real video of a user’s interactions with a website, , or, in another words, a “recorded session.”³

18. To demonstrate how Session Replay works, FullStory displays the “recorded session of a fictional user interacting with th[e] [Session Replay] Guide”:

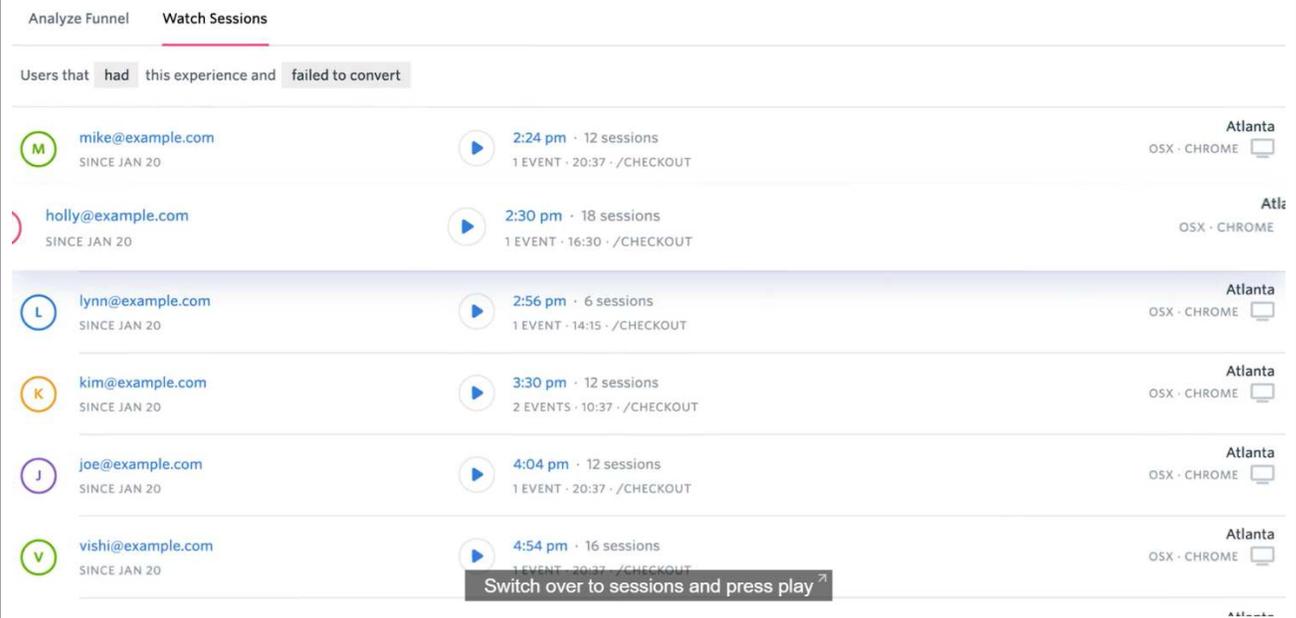


³ <https://www.fullstory.com/resources/the-definitive-guide-to-session-replay/>.

19. FullStory describes the above video as follows:

Here you can watch a FullStory session replay of a user—Daniel Falko—flipping through *The Definitive Guide to Session Replay*. **Notice how you can see interactions, mouse movements, clicks, interactions with overlays, and more**—and everything is listed in order in a stream at the right side of the replay. This is what a session replay looks like in the FullStory app.⁴

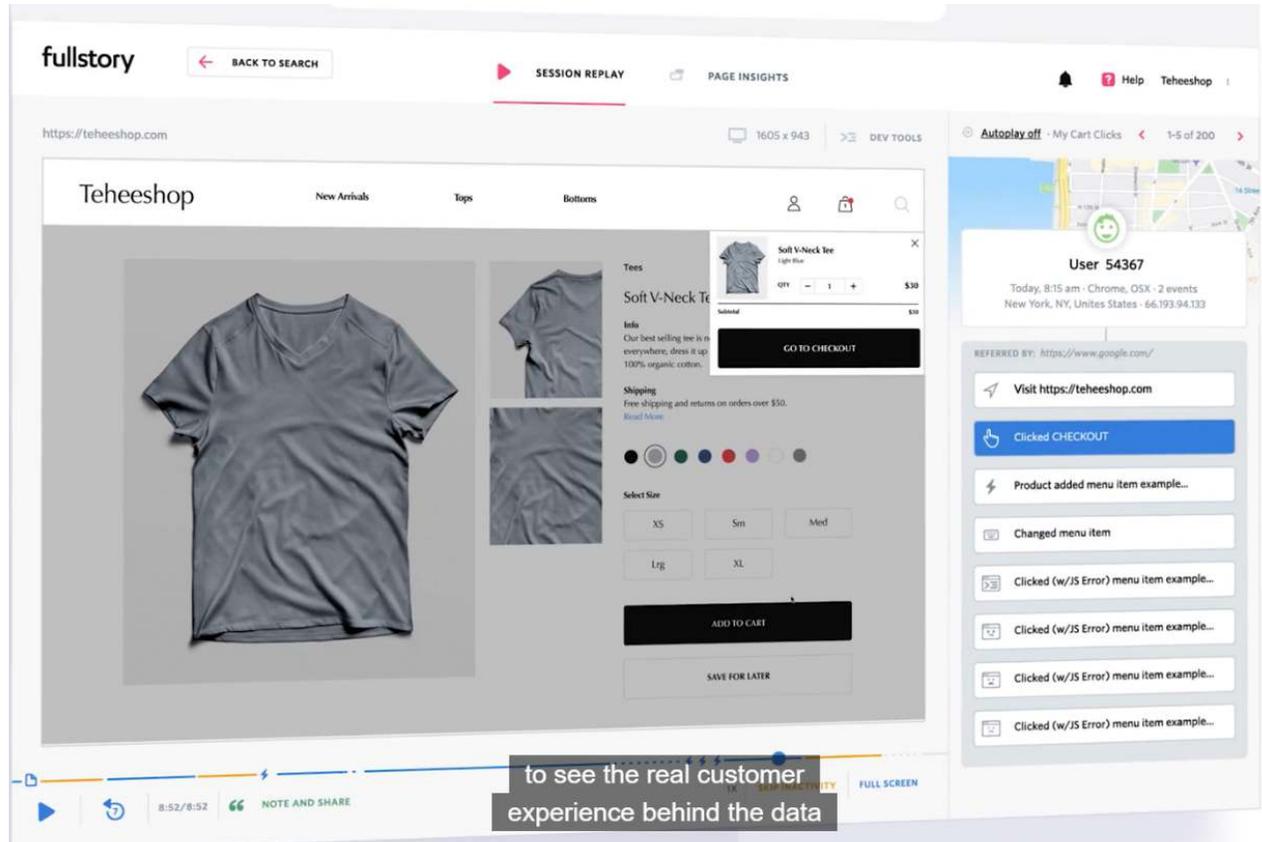
20. FullStory’s promotional video shows the behind-the-scenes features of the software. First, FullStory lets you view a list of users who visited the website, as well as the time they spent on the website:



21. Upon clicking one of these “sessions,” FullStory lets a company view the video of a user’s interaction with a website, including mouse movements, clicks, interactions with overlays, keystrokes, geographic location, IP address, and more “to see the real customer experience behind the data”:

//
//
//
//

⁴ <https://www.FullStory.com/resources/the-definitive-guide-to-session-replay/#finding-the-right-session-replay-tool> (emphasis added).



22. FullStory instructs prospective partners that “[t]he first step toward recording all in-browser interactions and making them available for pixel-perfect playback is deploying FullStory’s recording JavaScript snippet. Simply paste the snippet into the <head> element via your Content Management System (CMS), via your online store platform, or via your application’s code.”

23. This snippet of code allows Defendants to record the keystrokes, mouse clicks, data entry, and other electronic communications of visitors to Website where the code is installed. It also allows Defendants to track the amount of time spent on the website, geographic location of the visitor, and other information described above.

24. FullStory records website user’s interactions locally in the user’s browser and transmits that information to FullStory’s recording servers. FullStory then makes the information available to its clients.

25. FullStory can not only record users’ electronic communications, it can also monitor them *live*. “For sessions that are actively recording and we are still receiving events from a user (meaning the last page in their session is still open), you’ll see a ‘Go Live’ button at the end of the

1 playback bar. Once you click on the button, you'll essentially be riding along in near real time with
2 the user with no need to refresh the playback.”

3 26. FullStory’s recording is not limited to desktop website, but also mobile Website and
4 mobile applications.⁵

5 27. Technology like FullStory’s Session Replay feature is not only highly intrusive, but
6 dangerous. A 2017 study by Princeton University found that session recording technologies were
7 collecting sensitive user information such as passwords and credit card numbers. The research
8 notes that this wasn’t simply the result of a bug, but rather insecure practices.⁶ Thus, session
9 recording technologies such as FullStory’s can leave users vulnerable to data leaks and the harm
10 resulting therefrom.

11 28. FullStory’s business model involves entering into voluntary partnerships with
12 various companies and providing their software to their partners.

13 29. One of FullStory’s partners is Defendant FHI.

14 30. FHI utilizes FullStory’s software on the Website.

15 31. FHI knows that FullStory’s software captures the keystrokes, mouse clicks and other
16 communications of visitors to its website, and pays FullStory to supply that information.

17 32. Pursuant to an agreement with FullStory, FHI enabled FullStory’s software by
18 voluntarily embedding FullStory’s software code on the Website.

19 33. As currently deployed, FullStory’s software, as employed by FHI, functions as a
20 wiretap.

21 **II. Defendants Wiretapped Plaintiff’s Electronic Communications**

22 34. In May 2020, Mr. Holden visited the Website, filled out a form on the Website, and
23 made a purchase.

24 35. During that visit, and upon information and belief, the Session Replay feature in
25 FullStory’s software created a video capturing each of Plaintiff’s keystrokes and mouse clicks on
26 the website. The FullStory wiretap also captured the date and time of the visit, the duration of the

27 _____
28 ⁵ <https://www.fullstory.com/mobile-apps/>.

⁶ <https://themarkup.org/blacklight/2020/09/22/how-we-built-a-real-time-privacy-inspector#survey>.

1 visit, Plaintiff's IP address, his location at the time of the visit, his browser type, and the operating
2 system on his device.

3 36. FullStory's recording of keystrokes, mouse clicks, data entry, and other electronic
4 communications begins the moment a user either accesses the information form on the Website or
5 clicks on "Shop" on the Website.

6 37. When users access the Website and make a purchase, they enter their PII.
7 FullStory's software captures these electronic communications throughout each step of the process.

8 38. FullStory's software captures, among other things:

- 9 (a) The user's name;
- 10 (b) The user's e-mail address;
- 11 (c) The user's shipping address;
- 12 (d) The user's billing address;
- 13 (e) The user's payment card information, including card number, expiration
14 date, and CVV code;
- 15 (f) The user's height and weight;
- 16 (g) Whether the user has any of a number of medical conditions;
- 17 (h) The user's IP address;
- 18 (i) The user's their location at the time of the visit; and
- 19 (j) The user's browser type and the operating system on their devices

20 39. Crucially, Defendant FHI does not ask users, including Plaintiff, whether they
21 consent to being wiretapped by FullStory. Users who simply fill out the quiz are never presented a
22 link to Defendant FHI's Privacy Policy. Therefore, these users never agree or are never given the
23 option to agree to the Privacy Policy when using the Website, nor are they on notice of the Privacy
24 Policy.

25 40. Even if users do agree to the Privacy Policy when they make a purchase on the
26 Website, FHI does not mention FullStory or its Session Replay feature in the Website's Privacy
27 Policy. As such, users do not agree to be wiretapped even if they agree to the Privacy Policy.

28 41. Neither Plaintiff nor any Class member consented to being wiretapped on the

1 Website, nor to have their communications recorded and shared with FullStory. Any purported
2 consent that was obtained was ineffective because (i) Plaintiff and the Class are not asked whether
3 they consent to the Privacy Policy when taking the quiz on Defendant FHI's Website; and (ii) the
4 Privacy Policy did not disclose the wiretapping or FullStory.

5 42. Although the Terms and Conditions on the Website contain an arbitration clause,
6 Plaintiff opted out of the arbitration clause by mailing his intent to opt out to the mailing address
7 listed in the Terms and Conditions.

8 **CLASS ACTION ALLEGATIONS**

9 43. Plaintiff seeks to represent a class of all California residents who visited the Website,
10 and whose electronic communications were intercepted or recorded by FullStory. Plaintiff reserves
11 the right to modify the class definition as appropriate based on further investigation and discovery
12 obtained in the case.

13 44. Members of the Class are so numerous that their individual joinder herein is
14 impracticable. On information and belief, members of the Class number in the thousands. The
15 precise number of Class members and their identities are unknown to Plaintiff at this time but may
16 be determined through discovery. Class members may be notified of the pendency of this action by
17 mail and/or publication through the distribution records of Defendants.

18 45. Common questions of law and fact exist as to all Class members and predominate
19 over questions affecting only individual Class members. Common legal and factual questions
20 include, but are not limited to, whether Defendants have violated the California Invasion of Privacy
21 Act ("CIPA"), Cal. Penal Code § 631 and invaded Plaintiff's privacy rights in violation of the
22 California Constitution; and whether class members are entitled to actual and/or statutory damages
23 for the aforementioned violations.

24 46. The claims of the named Plaintiff are typical of the claims of the Class because the
25 named Plaintiff, like all other class members, visited the Website and had his electronic
26 communications intercepted and disclosed to FullStory through the use of FullStory's wiretaps.

27 47. Plaintiff is an adequate representative of the Class because his interests do not
28 conflict with the interests of the Class members he seeks to represent, he has retained competent

1 counsel experienced in prosecuting class actions, and he intends to prosecute this action vigorously.
2 The interests of Class members will be fairly and adequately protected by Plaintiff and his counsel.

3 48. The class mechanism is superior to other available means for the fair and efficient
4 adjudication of the claims of Class members. Each individual Class member may lack the resources
5 to undergo the burden and expense of individual prosecution of the complex and extensive litigation
6 necessary to establish Defendants' liability. Individualized litigation increases the delay and
7 expense to all parties and multiplies the burden on the judicial system presented by the complex
8 legal and factual issues of this case. Individualized litigation also presents a potential for
9 inconsistent or contradictory judgments. In contrast, the class action device presents far fewer
10 management difficulties and provides the benefits of single adjudication, economy of scale, and
11 comprehensive supervision by a single court on the issue of Defendants' liability. Class treatment
12 of the liability issues will ensure that all claims and claimants are before this Court for consistent
13 adjudication of the liability issues.

14 49. Plaintiff brings all claims in this action individually and on behalf of members of the
15 Class against Defendants.

16 **COUNT I**
17 **Violation Of The California Invasion Of Privacy Act,**
18 **Cal. Penal Code § 631**

19 50. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set
20 forth herein.

21 51. Plaintiff brings this claim individually and on behalf of the members of the proposed
22 Class against Defendants.

23 52. To establish liability under section 631(a), Plaintiff need only establish that
24 Defendants, "by means of any machine, instrument, contrivance, or in any other manner," did any
25 of the following:

26 Intentionally taps, or makes any unauthorized connection, whether
27 physically, electrically, acoustically, inductively or otherwise, with
28 any telegraph or telephone wire, line, cable, or instrument, including
the wire, line, cable, or instrument of any internal telephonic
communication system,

Or

1 Willfully and without the consent of all parties to the communication,
2 or in any unauthorized manner, reads or attempts to read or learn the
3 contents or meaning of any message, report, or communication while
the same is in transit or passing over any wire, line or cable or is
being sent from or received at any place within this state,

4 *Or*

5 Uses, or attempts to use, in any manner, or for any purpose, or to
6 communicate in any way, any information so obtained,

7 *Or*

8 Aids, agrees with, employs, or conspires with any person or persons
9 to unlawfully do, or permit, or cause to be done any of the acts or
things mentioned above in this section.

10 53. Section 631(a) is not limited to phone lines, but also applies to “new technologies”
11 such as computers, the Internet, and email. *See Matera v. Google Inc.*, 2016 WL 8200619, at *21
12 (N.D. Cal. Aug. 12, 2016) (CIPA applies to “new technologies” and must be construed broadly to
13 effectuate its remedial purpose of protecting privacy); *Bradley v. Google, Inc.*, 2006 WL 3798134,
14 at *5-6 (N.D. Cal. Dec. 22, 2006) (CIPA governs “electronic communications”); *In re Facebook,*
15 *Inc. Internet Tracking Litigation*, 956 F.3d 589 (9th Cir. 2020) (reversing dismissal of CIPA and
16 common law privacy claims based on Facebook’s collection of consumers’ Internet browsing
17 history).

18 54. FullStory’s software, including its Session Replay feature, is a “machine, instrument,
19 contrivance, or ... other manner” used to engage in the prohibited conduct at issue here.

20 55. At all relevant times, by using FullStory’s technology, Defendants intentionally
21 tapped, electrically or otherwise, the lines of internet communication between Plaintiff and Class
22 Members on the one hand, and FHI’s Website on the other hand.

23 56. At all relevant times, by using FullStory’s technology, Defendants willfully and
24 without the consent of all parties to the communication, or in any unauthorized manner, read or
25 attempted to read or learn the contents or meaning of electronic communications of Plaintiff and
26 putative Class Members, while the electronic communications were in transit or passing over any
27 wire, line or cable or were being sent from or received at any place within California.
28

1 57. Defendants aided, agreed with, and conspired with each other to implement
2 FullStory's technology and to accomplish the wrongful conduct at issue here. In addition, FHI
3 employed FullStory to accomplish the wrongful conduct at issue here.

4 58. Plaintiff and Class Members did not consent to any of Defendants' actions in
5 implementing FullStory's wiretaps on the Website. Nor have Plaintiff nor Class Members
6 consented to Defendants' intentional access, interception, reading, learning, recording, and
7 collection of Plaintiff and Class Members' electronic communications.

8 59. The violation of section 631(a) constitutes an invasion of privacy sufficient to confer
9 Article III standing.

10 60. Unless enjoined, Defendants will continue to commit the illegal acts alleged here.
11 Plaintiff continue to be at risk because he frequently uses the internet for shopping. He continues to
12 desire to use the internet for that purpose, including for the purpose of shopping for clothing.
13 Defendant FullStory provides its software, including the Session Replay feature, to many other
14 website operators who offer a wide array of services. Further, Defendant FHI operates other
15 Website, and may employ FullStory's software on these Website. For many Website that Plaintiff
16 may or is likely to visit in the future, he has no practical way to know if his website
17 communications will be monitored or recorded by FullStory.

18 61. Plaintiff and Class Members seek all relief available under Cal. Penal Code § 637.2,
19 including injunctive relief and statutory damages of \$5,000 per violation.

20 **COUNT II**
21 **Violation Of The California Invasion Of Privacy Act,**
22 **Cal. Penal Code § 635**

23 62. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set
24 forth herein.

25 63. Plaintiff brings this claim individually and on behalf of the members of the proposed
26 Class against Defendants.

27 64. California Penal Code § 635 provides, in pertinent part:

28 Every person who manufactures, assembles, sells, offers for sale,
advertises for sale, possesses, transports, imports, or furnishes to

1 another any device which is primarily or exclusively designed or
2 intended for eavesdropping upon the communication of another, or any
3 device which is primarily or exclusively designed or intended for the
4 unauthorized interception or reception of communications between
5 cellular radio telephones or between a cellular radio telephone and a
6 landline telephone in violation of Section 632.5, or communications
7 between cordless telephones or between a cordless telephone and a
8 landline telephone in violation of Section 632.6 , shall be punished by
9 a fine not exceeding two thousand five hundred dollars.

6 65. At all relevant times, by implementing FullStory’s wiretaps, each Defendant
7 intentionally manufactured, assembled, sold, offered for sale, advertised for sale, possessed,
8 transported, imported, and/or furnished a wiretap device that is primarily or exclusively designed or
9 intended for eavesdropping upon the communication of another.

10 66. FullStory’s code is a “device” that is “primarily or exclusively designed” for
11 eavesdropping. That is, the FullStory’s code is designed to gather PII, including keystrokes, mouse
12 clicks, and other electronic communications.

13 67. Plaintiff and Class Members did not consent to any of Defendants’ actions in
14 implementing FullStory’s wiretaps.

15 68. Plaintiff and Class Members seek all relief available under Cal. Penal Code § 637.2,
16 including injunctive relief and statutory damages of \$5,000 per violation.

17 **COUNT III**
18 **Invasion Of Privacy Under California’s Constitution**

19 69. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set
20 forth herein.

21 70. Plaintiff brings this claim individually and on behalf of the members of the proposed
22 Class against Defendants.

23 71. Plaintiff and Class Members have an interest in: (1) precluding the dissemination
24 and/or misuse of their sensitive, confidential PII; and (2) making personal decisions and/or
25 conducting personal activities without observation, intrusion or interference, including, but not
26 limited to, the right to visit and interact with various Internet sites without being subjected to
27 wiretaps without Plaintiff’s and Class Members’ knowledge or consent.
28

1 72. At all relevant times, by implementing FullStory's wiretaps on FHI's Website, each
2 Defendant intentionally invaded Plaintiff's and Class Members' privacy rights under the California
3 Constitution, and procured the other Defendant to do so.

4 73. Plaintiff and Class Members had a reasonable expectation that their PII and other
5 data would remain confidential and that Defendants would not install wiretaps on the Website.

6 74. Plaintiff and Class Members did not consent to any of Defendants' actions in
7 implementing FullStory's wiretaps on the Website.

8 75. This invasion of privacy is serious in nature, scope and impact.

9 76. This invasion of privacy alleged here constitutes an egregious breach of the social
10 norms underlying the privacy right.

11 77. Plaintiff and Class Members seek all relief available for invasion of privacy claims
12 under California's Constitution.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks
15 judgment against Defendants, as follows:

- 16 (a) For an order certifying the Class under Rule 23 and naming Plaintiff as the
17 representative of the Class and Plaintiff's attorneys as Class Counsel to
18 represent the Class;
- 19 (b) For an order declaring that the Defendants' conduct violates the statutes
20 referenced herein;
- 21 (c) For an order finding in favor of Plaintiff and the Class on all counts
22 asserted herein;
- 23 (d) For compensatory, punitive, and statutory damages in amounts to be
24 determined by the Court and/or jury;
- 25 (e) For prejudgment interest on all amounts awarded;
- 26 (f) For an order of restitution and all other forms of equitable monetary relief;
- 27 (g) For injunctive relief as pleaded or as the Court may deem proper; and
28

1 (h) For an order awarding Plaintiff and the Class their reasonable attorneys'
2 fees and expenses and costs of suit.

3 **DEMAND FOR TRIAL BY JURY**

4 Pursuant to Federal Rules of Civil Procedure 38(b), Plaintiff demands a trial by jury of all
5 issues so triable.

6 Dated: October 2, 2020

7 Respectfully submitted,

8 **BURSOR & FISHER, P.A.**

9 By: /s/ Joel D. Smith
Joel D. Smith

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