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**UNITED STATES DISTRICT COURT
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-2439

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

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

6 **NATURE OF THE ACTION**

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

17 2. In or about April 2020, Ms. Yoon visited the Website. During the visit,
18 Defendants recorded Plaintiff’s electronic communications in real time, including
19 Plaintiff’s mouse clicks, keystrokes, and payment card information.

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

23 **THE PARTIES**

24 4. Plaintiff Mary Yoon is a resident of Corona, California and has an intent
25 to remain there, and is therefore a domiciliary of California. In or about April 2020,
26 prior to the filing of this lawsuit, Ms. Yoon visited the Website and made a purchase.

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28 ¹ 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 business in this State, and Plaintiff’s claims arise out of each of the Defendants’
2 forum-related activities. Furthermore, a substantial portion of the events giving rise
3 to Plaintiff’s claims occurred in this District.

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

7 **STATEMENT OF FACTS**

8 **I. Overview Of The Wiretaps**

9 14. Defendant QM develops a software of the same name that provides
10 marketing analytics.

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

13 16. Session replays are “millisecond-level chunks of data – for example,
14 representing the coordinates of a user’s mouse and associated click/tap actions –
15 being streamed and interpreted as visuals.” QM says that Session Replay allows
16 companies to “to pull up any user who had visited [a] website and watch their journey
17 as if [the company] was standing over their shoulder.” A company can “see every
18 click, every tap and exactly what the website responded with – an error, a success
19 message, or nothing.”

20 17. QM says its Session Replay feature “capture[s] all the metadata behind
21 the replay— like user platform, API calls, and network details—as well as dozens of
22 out of the box events and errors, plus the custom ones you’ll configure in our UI.”

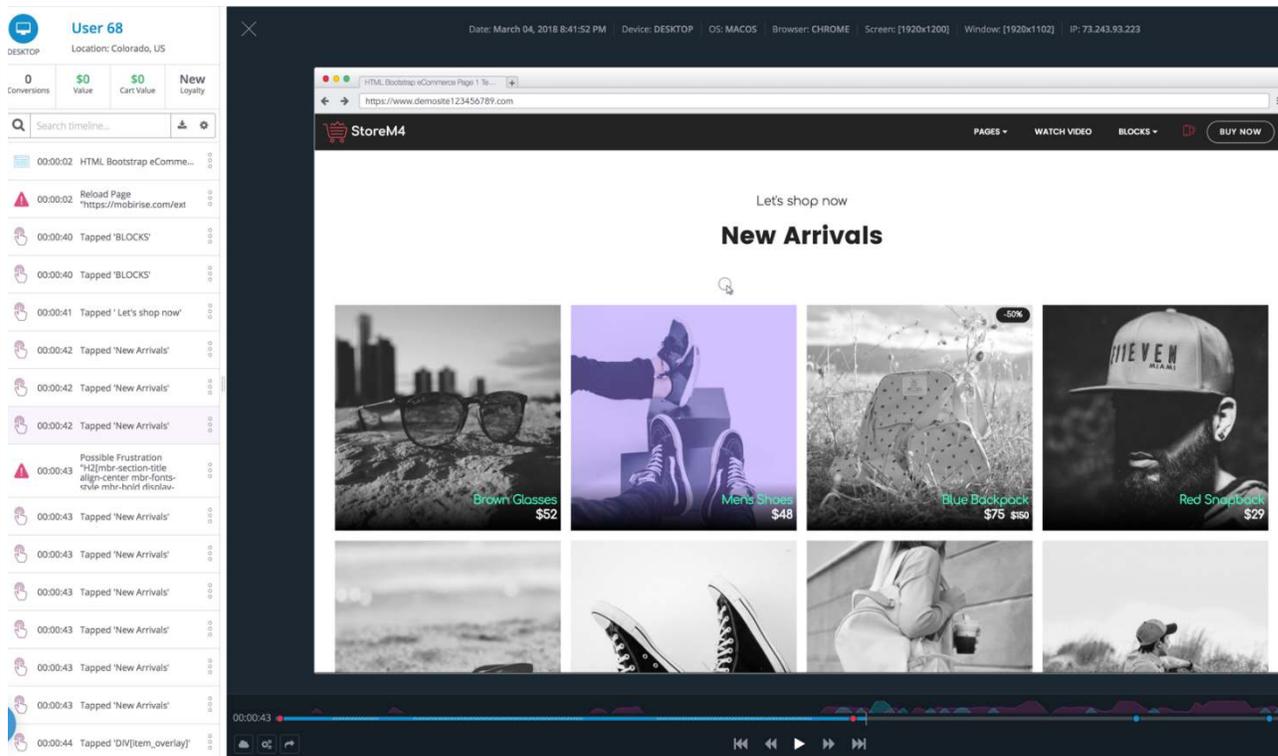
23 18. The below screenshot shows how the Session Replay interface works,
24 and shows such electronic communications as what a user clicked on, when a user
25 reloaded a page, and where a user’s mouse pointer is located:

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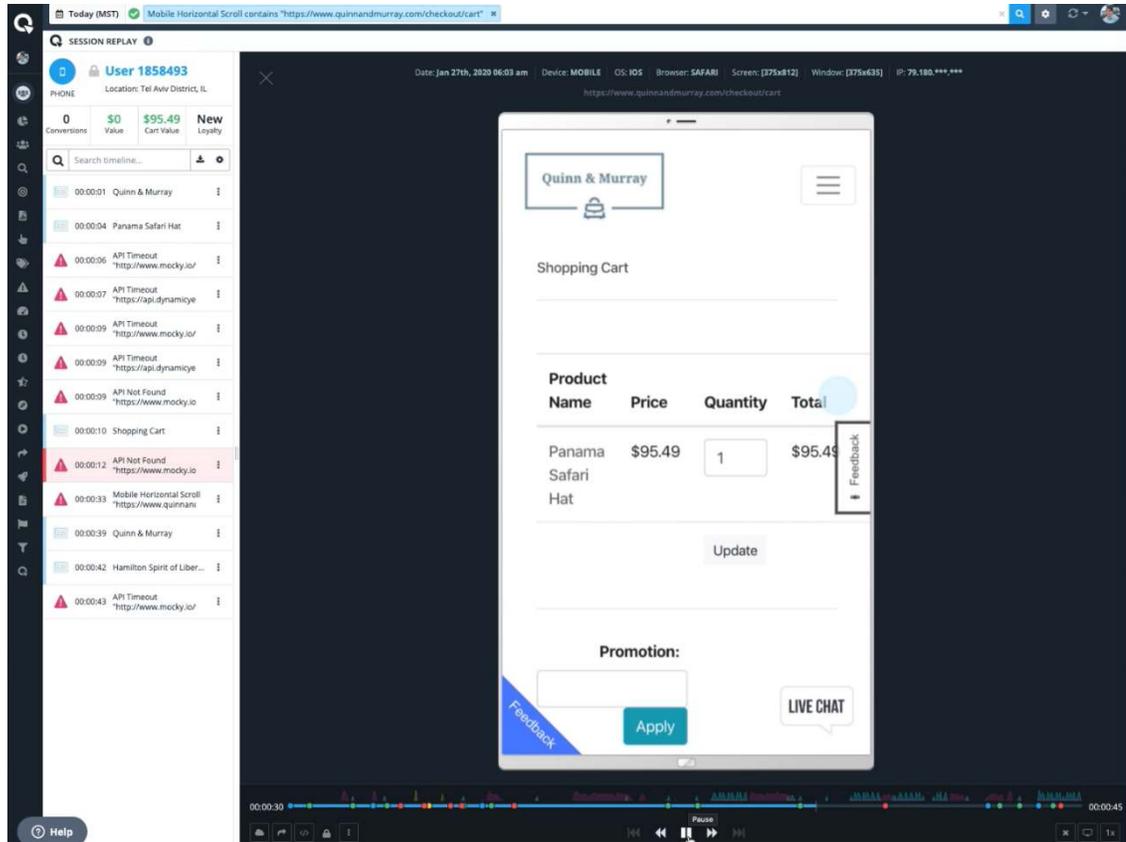


19. QM notes that “[o]nce data is captured, it’s sent encrypted via a forward secrecy SSL connection, to the Quantum Metric cloud service, hosted in a secured Google Compute cloud.”

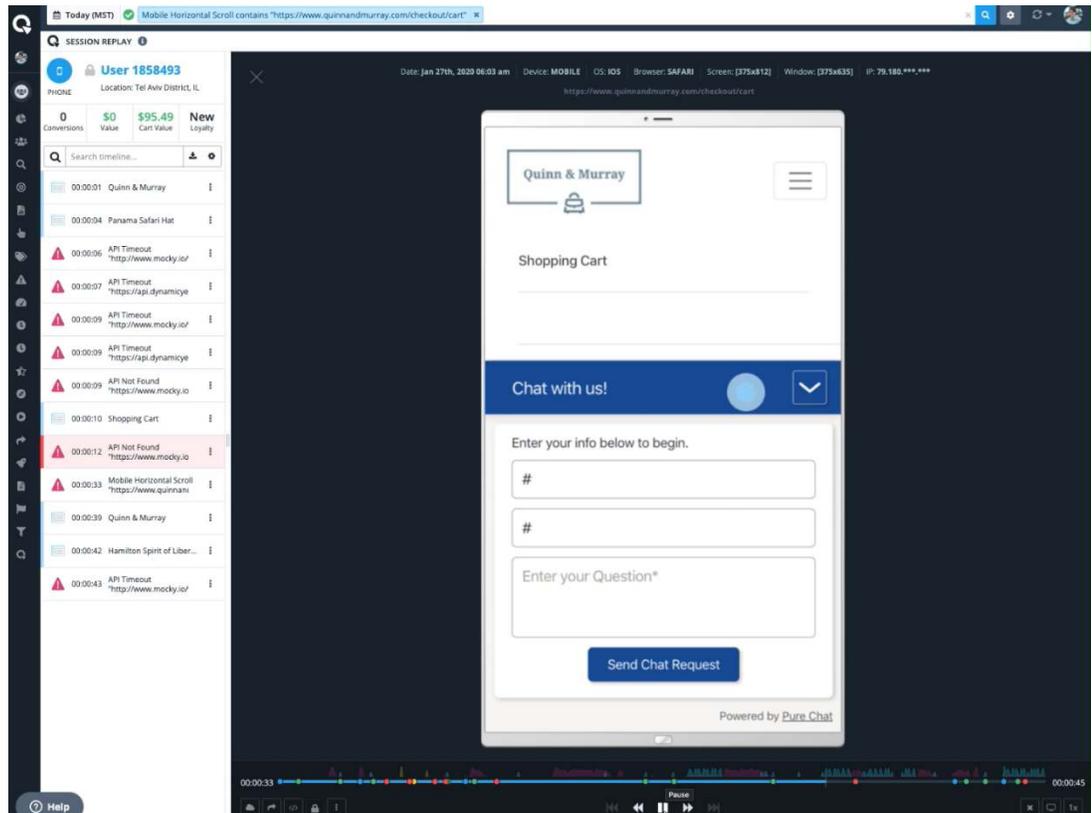
20. QM’s website includes a marketing video that discusses the Session Replay feature. The video touts that companies can “[s]ee actual customer interactions.” The marketing presentation then shows a mock mobile user interacting with a website. The video shows what items the user viewed and added to their cart:

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21. The marketing presentation then proceeds to show where exactly the mock user clicked on the website:



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

7 23. QM’s business model involves entering into voluntary partnerships with
8 various companies and providing their software to their partners.

9 24. One of QM’s partners is Defendant Lululemon.

10 25. Lululemon utilizes QM’s software on the Website.

11 26. Lululemon knows that QM’s software captures the keystrokes, mouse
12 clicks and other communications of visitors to its website, and pays QM to supply
13 that information.

14 27. In fact, Lululemon admits that it spies on users accessing the Website
15 using QM’s software. For instance, after a user views a product on the Website,
16 Lululemon will send a user an email such as the following, which says that
17 Lululemon “see[s] you [the user] looking”:

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28. Pursuant to an agreement with QM, Lululemon enabled QM’s software by voluntarily embedding QM’s software code on the Website.

29. As currently deployed, QM’s software, as employed by Lululemon, functions as a wiretap.

II. Defendants Wiretapped Plaintiff’s Electronic Communications

30. In or about April 2020, Ms. Yoon visited Lululemon.com and made a purchase.

31. During that visit, and upon information and belief, the Session Replay feature in QM’s software created a video capturing each of Plaintiff’s keystrokes and mouse clicks on the website. The QM wiretap also captured the date and time of the visit, the duration of the visit, Plaintiff’s IP address, her location at the time of the visit, her browser type, and the operating system on her device.

1 32. QM's recording of keystrokes, mouse clicks, data entry, and other
2 electronic communications begins the moment a user accesses or interacts with the
3 Website.

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

7 34. QM's software captures, among other things:

- 8 (a) The user's mouse clicks;
- 9 (b) The user's keystrokes;
- 10 (c) The user's email address;
- 11 (d) The user's shipping and billing address;
- 12 (e) The user's payment card information, including card number,
13 expiration date, and CVV code;
- 14 (f) The user's IP address;
- 15 (g) The user's their location at the time of the visit; and
- 16 (h) The user's browser type and the operating system on their devices

17 35. Crucially, Defendant Lululemon does not ask users, including Plaintiff,
18 whether they consent to being wiretapped by QM. Users are never actively told that
19 their electronic communications are being wiretapped by QM, nor does Lululemon's
20 Privacy Policy disclose as much (not that users had notice of the Privacy Policy
21 anyway).

22 36. Therefore, users like Plaintiff never agree or are never given the option
23 to agree to the Privacy Policy when using the Website, nor are they on notice of the
24 Privacy Policy.

25 37. Neither Plaintiff nor any Class member consented to being wiretapped
26 on the Website, nor to have their communications recorded and shared with QM.
27 Any purported consent that was obtained was ineffective because (i) the wiretapping
28 began from the moment Plaintiff and Class members accessed the Website; (ii) the

1 Privacy Policy did not disclose the wiretapping or QM; and (iii) the hyperlink to the
2 Privacy Policy is inconspicuous and therefore insufficient to provide notice.

3 **CLASS ACTION ALLEGATIONS**

4 38. Plaintiff seeks to represent a class of all California residents who visited
5 the Website, and whose electronic communications were intercepted or recorded by
6 QM. Plaintiff reserves the right to modify the class definition as appropriate based on
7 further investigation and discovery obtained in the case.

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

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

21 41. The claims of the named Plaintiff are typical of the claims of the Class
22 because the named Plaintiff, like all other class members, visited the Website and had
23 her electronic communications intercepted and disclosed to QM through the use of
24 QM’s wiretaps.

25 42. Plaintiff is an adequate representative of the Class because her interests
26 do not conflict with the interests of the Class members she seeks to represent, she has
27 retained competent counsel experienced in prosecuting class actions, and she intends
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1 to prosecute this action vigorously. The interests of Class members will be fairly and
2 adequately protected by Plaintiff and her counsel.

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

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

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

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

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

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

27 Intentionally taps, or makes any unauthorized connection,
28 whether physically, electrically, acoustically, inductively or
otherwise, with any telegraph or telephone wire, line, cable,

1 or instrument, including the wire, line, cable, or instrument
2 of any internal telephonic communication system,

3 *Or*

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

10 *Or*

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

13 *Or*

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

17 48. Section 631(a) is not limited to phone lines, but also applies to “new
18 technologies” such as computers, the Internet, and email. *See Matera v. Google Inc.*,
19 2016 WL 8200619, at *21 (N.D. Cal. Aug. 12, 2016) (CIPA applies to “new
20 technologies” and must be construed broadly to effectuate its remedial purpose of
21 protecting privacy); *Bradley v. Google, Inc.*, 2006 WL 3798134, at *5-6 (N.D. Cal.
22 Dec. 22, 2006) (CIPA governs “electronic communications”); *In re Facebook, Inc.*
23 *Internet Tracking Litigation*, 956 F.3d 589 (9th Cir. 2020) (reversing dismissal of
24 CIPA and common law privacy claims based on Facebook’s collection of consumers’
25 Internet browsing history).

26 49. QM’s software, including its Session Replay feature, is a “machine,
27 instrument, contrivance, or ... other manner” used to engage in the prohibited
28 conduct at issue here.

50. At all relevant times, by using QM’s technology, Defendants
intentionally tapped, electrically or otherwise, the lines of internet communication

1 between Plaintiff and Class Members on the one hand, and Lululemon’s Website on
2 the other hand.

3 51. At all relevant times, by using QM’s technology, Defendants willfully
4 and without the consent of all parties to the communication, or in any unauthorized
5 manner, read or attempted to read or learn the contents or meaning of electronic
6 communications of Plaintiff and putative Class Members, while the electronic
7 communications were in transit or passing over any wire, line or cable or were being
8 sent from or received at any place within California.

9 52. Defendants aided, agreed with, and conspired with each other to
10 implement QM’s technology and to accomplish the wrongful conduct at issue here.
11 In addition, Lululemon employed QM to accomplish the wrongful conduct at issue
12 here.

13 53. Plaintiff and Class Members did not consent to any of Defendants’
14 actions in implementing QM’s wiretaps on the Website. Nor have Plaintiff nor Class
15 Members consented to Defendants’ intentional access, interception, reading, learning,
16 recording, and collection of Plaintiff and Class Members’ electronic communications.

17 54. The violation of section 631(a) constitutes an invasion of privacy
18 sufficient to confer Article III standing.

19 55. Unless enjoined, Defendants will continue to commit the illegal acts
20 alleged here. Plaintiff continue to be at risk because she frequently uses the internet,
21 including for the purpose of shopping, and she continues to desire to use the internet
22 for that purpose. Defendant QM provides its software, including the Session Replay
23 feature, to many other website operators who offer a wide array of services. For
24 many websites that Plaintiff may or is likely to visit in the future, she has no practical
25 way to know if her website communications will be monitored or recorded by QM.

26 56. Plaintiff and Class Members seek all relief available under Cal. Penal
27 Code § 637.2, including injunctive relief and statutory damages of \$5,000 per
28 violation.

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

57. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set forth herein.

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

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

Every person who manufactures, assembles, sells, offers for sale, advertises for sale, possesses, transports, imports, or furnishes to another any device which is primarily or exclusively designed or intended for eavesdropping upon the communication of another, or any device which is primarily or exclusively designed or intended for the unauthorized interception or reception of communications between cellular radio telephones or between a cellular radio telephone and a landline telephone in violation of Section 632.5, or communications between cordless telephones or between a cordless telephone and a landline telephone in violation of Section 632.6 , shall be punished by a fine not exceeding two thousand five hundred dollars.

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

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

62. Plaintiff and Class Members did not consent to any of Defendants’ actions in implementing QM’s wiretaps.

