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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JULIE JONES, et al.,
12 Plaintiff,
13 v.
14 PELOTON INTERACTIVE, INC.,
15 Defendant.
16

Case No.: 23-cv-1082-L-BGS

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS THE FIRST
AMENDED COMPLAINT [ECF NO.
20.]**

17 Pending before the Court in this putative class action asserting violations of
18 California privacy laws is Defendant Peloton's Motion to Dismiss the First Amended
19 Complaint. [ECF No. 20.] The Court decides the matter on the papers submitted and
20 without oral argument. See Civ. L. R. 7.1(d.1). For the reasons stated below, the Court
21 denies the Motion to Dismiss.

22 I. FACTUAL BACKGROUND¹

23 Plaintiff brings this putative class action against Peloton as the owner and operator
24 of the website <https://www.onepeloton.com> ("Website") for violations of the California
25 Invasion of Privacy Act, Cal. Penal Code § 631(a), Clause Four. (First Amended
26

27
28 ¹ The facts are taken from the Complaint.

1 Complaint “FAC” at 11). Plaintiff’s claim arises from Defendant’s use of the third-party
2 software called Drift which was embedded into the Website chat feature. Chat
3 communications with the Website are automatically intercepted and recorded by Drift
4 which creates transcripts of the conversations. Drift receives the communications while
5 they are in transit because the imbedded code routes the communications directly to Drift.
6 Website users are not informed that Drift is intercepting the communications but instead
7 consumers believe they are interacting only with a Peloton representative. Drift allegedly
8 harvests data from the chat transcripts it intercepts, and then interprets, analyzes, stores,
9 and uses the data for a variety purposes. Information collected includes the full transcript
10 of the conversation, the date and time the conversation began, the IP address of the
11 visitor, the web browser they used to access the Website, the device used and which
12 words triggered the Drift software to route the visitor to a particular Peloton
13 representative. According to Plaintiff, visitors to the Website often share personal
14 information on the chat due to the nature of Peloton’s business. Plaintiff and other class
15 members visited the Website within the class period using smart phones, and/or wifi-
16 enabled tablets and laptops.

17 II. PROCEDURAL BACKGROUND

18 On June 9, 2023, Plaintiff filed a Complaint asserting violations of CIPA, the UCL
19 and California Constitution in relation to the unauthorized interception, collection,
20 recording, and dissemination of Plaintiff’s and Class Members’ communications and
21 data. [ECF No. 1.] On August 16, 2023, Defendant a motion to dismiss which the Court
22 granted on March 12, 2024. [ECF No. 18.] Plaintiff filed a First Amended Complaint
23 containing a single CIPA Section 631(a) claim on March 15, 2024. [ECF No. 19.] On
24 March 29, 2024, Defendant filed the present Motion to Dismiss the First Amended
25 Complaint. [ECF No. 20.] On April 15, 2024, Plaintiff filed a response in Opposition.
26 [ECF No. 21.] On April 22, 2024, Defendant filed a Reply. [ECF No. 22.]

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1 III. DISCUSSION

2 Defendant seeks dismissal of this action pursuant to Federal Rule of Civil
3 Procedure 12(b)(6) for failure to state a claim.

4 A. *Failure to State a Claim*

5 A 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro v.*
6 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain, in part, “a short and
7 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
8 8(a)(2). But plaintiffs must also plead “enough facts to state a claim to relief that is
9 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also*
10 Fed. R. Civ. P. 12(b)(6). The plausibility standard demands more than “a formulaic
11 recitation of the elements of a cause of action,” or “‘naked assertions’ devoid of ‘further
12 factual enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
13 550 U.S. at 557). Instead, the complaint “must contain allegations of underlying facts
14 sufficient to give fair notice and to enable the opposing party to defend itself effectively.”
15 *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

16 In reviewing a 12(b)(6) motion to dismiss, “[a]ll allegations of material fact are
17 taken as true and construed in the light most favorable to the nonmoving party.” *Cahill v.*
18 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). However, a court need not
19 take legal conclusions as true merely because they are cast in the form of factual
20 allegations. *See Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Similarly,
21 “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a
22 motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

23 1. *Violation of the California Invasion of Privacy Act, Cal Penal Code § 631*

24 Section 631(a) of the California Penal Code imposes civil and criminal liability on
25 “any person who by means of any machine, instrument, or contrivance, or in any other
26 manner:

27 [1] intentionally taps, or makes any unauthorized connection, whether
28 physically, electrically, acoustically, inductively, or otherwise, with any

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

4 [2] who willfully and without the consent of all parties to the
5 communication, or in any unauthorized manner, reads, or attempts to read,
6 or to learn the contents or meaning of any message, report, or
7 communication while the same is in transit or passing over any wire, line, or
8 cable, or is being sent from, or received at any place within this state; or

9 [3] who uses, or attempts to use, in any manner, or for any purpose, or to
10 communicate in any way, any information so obtained, or

11 [4] who aids, agrees with, employs, or conspires with any person or persons
12 to unlawfully do, or permit, or cause to be done any of the acts or things
13 mentioned above in this section[.]

14 Cal. Penal Code § 631(a)(subsections added and formatted for clarity).

15 The California Supreme Court has explained that Section 631(a) consists of three
16 main clauses which cover “three distinct and mutually independent patterns of conduct”:

17 (1) “intentional wiretapping,” (2) “willfully attempting to learn the contents or meaning
18 of a communication in transit over a wire,” and (3) “attempting to use or communicate
19 information obtained as a result of engaging in either of the two previous activities.”

20 *Tavernetti v. Superior Court*, 22 Cal. 3d 187, 192 (1978). The fourth basis for liability in
21 Section 631(a) imposes liability for aiding and abetting on any person or persons who
22 “unlawfully do, or permit, or cause to be done any of the’ other three bases for liability.”

23 *Mastel v. Miniclip SA*, 549 F.Supp.3d 1129, 1134 (E.D. Cal. 2021)(quoting Cal. Penal
24 Code § 631(a)).

25 In the FAC, Plaintiff alleges that Peloton “aids and abets Drift to commit both
26 unlawful interception [Clause Two] and unlawful use [Clause Three] under Section
27 631(a), surreptitiously and as a matter of course.” (FAC ¶ 41). Plaintiff makes no
28 allegations regarding Clause One.

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1 a. *Section 631(a) Clause Two- Unlawful Interception*

2 To establish liability under the second clause of section 631(a), Plaintiff must
3 allege that Drift “willfully and without the consent of all parties to the communication, or
4 in any unauthorized manner, reads, or attempts to read, or to learn the contents or
5 meaning of any message.” Cal. Penal Code § 631(a). “[C]ourts have applied Section
6 631(a) via the language of its second clause to the internet browsing context.” *Williams v.*
7 *What If Holdings*, 2022 WL 17869275, at *2 (N.D. Cal. 2022).

8 Under this clause, a person is liable if he or she secretly listens to another's
9 conversation. *Ribas v. Clark*, 38 Cal. 3d 355, 359 (1985). Only a third party can
10 “eavesdrop” on a conversation, therefore a party to the communication is exempt from
11 liability under section 631. *See In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d
12 589, 607 (9th Cir. 2020); *Warden v. Kahn*, 99 Cal.App.3d 805, 811 (Ct. App. 1979).
13 There is no definition for the term “party” in CIPA, therefore, courts have looked to the
14 technical processes and context of the interception when considering who qualifies as a
15 third-party eavesdropper. *Facebook*, 956 F.3d at 607.

16 Defendant argues that the party exemption applies because Plaintiff’s factual
17 allegations establish that Drift provides a tool that allows Peloton to record and analyze
18 its own data in aid of its business which means it functions as an extension of Peloton
19 rather than as a third-party eavesdropper. (Mot. at 9). According to Peloton, Plaintiff’s
20 claim that Drift is a third-party because it uses the intercepted data to improve its AI
21 chatbot is insufficient to show that the data is aggregated, re-distributed or sold to other
22 vendors as required to be considered a third-party eavesdropper. (*Id.* at 7-8). In addition,
23 Plaintiff did not specifically allege that she interacted with Drift’s AI chat feature when
24 she allegedly visited the Website, but instead it appears her communications were
25 intercepted by a traditional “rule-based” chatbot. (*Id.* at 8-9).

26 In response, Plaintiff argues that Drift functions as a third-party eavesdropper
27 because it uses the intercepted data for its own purposes including to improve the
28 technological function and capabilities of its patented AI software assets for the exclusive

1 purpose of increasing the value of Drift’s shareholders equity in the company. (Oppo. at
2 4). According to Plaintiff, these uses go “beyond simply supplying this information back
3 to Defendant,” making Drift a third-party. (*Id.* at 5). Plaintiff argues it is immaterial
4 whether Plaintiff alleged she used the AI chatbot because the FAC alleges that Drift uses
5 all chat conversations, not just those intercepted from the AI chatbots, to improve its
6 SaaS platform. (*Id.*)

7 To answer the question whether a service provider like Drift is more akin to a party
8 or a third-party eavesdropper for purposes of the party exception, courts look to the
9 “technical context of the case.” *Facebook*, 956 F.3d at 607. Two lines of district court
10 cases have emerged in California addressing whether the party exemption can apply to
11 software providers. *See Javier v. Assurance*, 649 F.Supp.3d 891, 899-901 (N.D. Cal.
12 2023) (discussing two lines of cases).

13 In the first line of cases, a software provider can be held liable under the second
14 prong of section 631(a) if that entity listens in on a conversation between the participants,
15 even if one of the participants consents to the additional party’s presence, and the entity
16 uses the collected data for its own commercial purposes. *Ribas*, 38 Cal. 3d at 361-62. For
17 instance, an independent party that captures data from a hosting website to sell to
18 advertisers to generate revenue has been considered an eavesdropper. *Facebook*, 956 F.3d
19 at 607-608 (Facebook used embedded software to track its users to third-party websites
20 even when its users were not signed into Facebook, and then sold that data to
21 advertisers); *see also Revitch v. New Moosejaw*, 2019 WL 5485330, *2 (N.D. Cal. 2019)
22 (marketing company and data broker NaviStone operated as a third party because they
23 used intercepted data to “create marketing databases of identified website visitors” and
24 sold the information.)

25 In the second line of cases, if the software provider merely collects, refines, and
26 relays the information obtained on the company website back to the company “in aid of
27 [defendant’s] business” then it functions as a tool and not as a third-party. *Graham v.*
28 *Noom*, 533 F.Supp.3d 831, 832-833 (N.D. Cal. Apr. 8, 2021) (tracking service provider

1 was a participant in the conversation under § 631(a) because that defendant only stored
2 user’s data and did not use or resell that data).

3 Some district courts have cautioned against considering the use a technical partner
4 makes of the data, finding that doing so reads a use requirement into the second clause
5 and usurps the use inquiry that is contained in the third clause. *Javier*, 649 F.Supp.3d at
6 900 (“reading a use requirement into the second prong would add requirements that are
7 not present (and swallow the third prong in the process).” However, the inquiry focuses
8 on the technical processes by which the data is gathered and manipulated, a question
9 which is often intertwined with the use of that data. *Noom*, 533 F.Supp.3d at 832.

10 Therefore, the Court considers the technical aspect along with the use made by Drift of
11 the surreptitiously gathered information.

12 In the FAC, Plaintiff describes the technical manner in which Drift accesses
13 customer’s information and explains:

14 Chat communications on the Website are intercepted by Drift while those
15 communications are in transit, and this is accomplished because the
16 imbedded code directs those communications to be routed directly to Drift.
17 Drift’s chat service is an Application Programming Interface (API) that is
18 “plugged into” the Website. The chat function is run from Drift’s servers but
19 allows for chat functionality on the Website. In other words, Drift runs the
20 chat service from its own servers, but consumers interact with the chat
21 service on Defendant’s Website, so it appears they are only communicating
22 with a company representative of Defendant.

23 (FAC ¶ 13).

24 After accessing customers’ communications in this manner,

25 . . . Drift analyzes and uses the chat conversations it intercepts and records
26 to, *inter alia*, improve its SaaS platform, including proprietary machine
27 learning for its chatbots and related technologies, all of which *independently*
28 *benefits and serves the profit-driven equity interests of Drift’s shareholders*.
In other words, Drift uses the content of the conversations that Plaintiff and
Class Members have with Defendant—without Plaintiff’s or Class
Members’ consent—to improve the technological function and capabilities
of its proprietary, patented artificial intelligence software assets for the

1 exclusive purpose and benefit of increasing the value of Drift shareholders'
2 equity in the company and its technologies.

3 (FAC. ¶ 17)(emphasis in original).

4 The FAC alleges, “Drift’s exploitation, modernization, use of, and interaction with
5 the data it gathers through the chat feature in real time makes it more than a mere
6 ‘extension’ of Defendant.” (FAC ¶ 19).

7 Taking these allegations as true for purposes of the present motion, the Court finds
8 Plaintiff has sufficiently alleged that Drift’s software surreptitiously intercepts the data
9 entered by Peloton’s customers through the embedded API and uses “the data for their
10 own benefit and not for the sole benefit of the party to the communication [Peloton],”
11 therefore Drift functions as a third-party eavesdropper within the meaning of section
12 631(a). *Javier*, 649 F.Supp.3d at 899; *Esparza v. UAG Escondido AI Inc.*, 2024 WL
13 559241, at *7 (S.D. Cal. 2024) (allegations that a chat service provider “profit[s] from
14 secretly exploiting” the ability to identify individuals who visited Defendant's website led
15 to a plausible inference that the chat service provider is using the information for its own
16 purposes.) For these reasons, the Court finds that the party exemption does not apply and
17 Plaintiff has sufficiently stated a claim under clause two of § 631(a). Accordingly,
18 Defendant’s motion to dismiss is denied on this ground.

19 *(b) Section 631(a) Clause Three “Use” Claim and Clause Four “Aiding and*
20 *Abetting”*

21 Maintaining a claim under the third clause of § 631 requires “attempting to use or
22 communicate information obtained as a result of engaging in either of the two previous
23 activities” i.e. intentional wiretapping (clause one) or willfully attempting to learn the
24 contents of a communication in transit over a wire (clause two). *Tavernetti*, 22 Cal. 3d at
25 192. As noted above, Plaintiff has sufficiently alleged a claim under clause two because
26 she asserts that Drift uses intercepted communications to improve its SaaS platform,
27 including its proprietary machine learning software, which yields a monetary benefit to
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1 Drift. In response, Defendant argues only that Plaintiff fails to state claim for clause one
2 or two, therefore her claim under clause three also fails.

3 Plaintiff has stated a claim under clause three of Section 631 because she has
4 maintained a claim under clause two. *Cahill*, 80 F.3d at 337–38 (9th Cir. 1996). For the
5 same reasons, Plaintiff asserts a plausible claim for relief under clause four for aiding and
6 abetting. Cal Penal Code § 631(a). In light of the above, Defendant’s motion to dismiss is
7 denied as to these claims.

8 *A. Injunctive Relief*

9 Plaintiff has chosen to withdraw her claim for injunctive relief (Oppo. at 13),
10 therefore, the Court dismisses the injunctive relief claim with prejudice. *Hipschman v.*
11 *Cnty. Of San Diego*, No. 22-CV-00903, 2023 WL 5734907, at * 9 (S.D. Cal. Sept. 5,
12 2023) (dismissing abandoned claim without leave to amend). Defendant’s motion to
13 dismiss is denied as moot to this claim.

14 IV. CONCLUSION AND ORDER

15 For the forgoing reasons, Defendant’s motion to dismiss is DENIED.

16 **IT IS SO ORDERED.**

17 Dated: July 5, 2024

18 
19 Hon. M. James Lorenz
20 United States District Judge
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