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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

LISA CASTRO, individually and on behalf of all  
others similarly situated,

Plaintiff,

v.

NIKE, INC.,

Defendant.

Case No.

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

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

5 **NATURE OF THE ACTION**

6 1. This is a class action suit brought against Defendant Nike, Inc.’s (“Nike” or  
7 “Defendant”) for aiding, abetting, condoning, or otherwise enabling the wiretapping the electronic  
8 communications of visitors to Nike’s website, Nike.com (the “Website”),<sup>1</sup> by FullStory, Inc.  
9 (“FullStory”). The wiretaps, which are embedded in the computer code on the Website, are used by  
10 FullStory to secretly observe and record website visitors’ keystrokes, mouse clicks,<sup>2</sup> and other  
11 electronic communications, including the entry of Personally Identifiable Information (“PII”), in  
12 real time and with users’ consent. By enabling such conduct, Defendant has violated the California  
13 Invasion of Privacy Act (“CIPA”), Cal. Penal Code § 631(a)[iv].

14 2. In October 2020, Ms. Castro visited the Website. During the visits, FullStory—as  
15 enabled by Defendant—recorded Plaintiff’s electronic communications in real time and without  
16 consent, including Plaintiff’s mouse clicks, keystrokes, and payment card information.

17 3. Plaintiff brings this action on behalf of herself and a class of all persons whose  
18 electronic communications were intercepted through the use of FullStory’s wiretap on the Website.

19 **THE PARTIES**

20 4. Plaintiff Lisa Castro is a California citizen and resident who lives in Elk Grove,  
21 California. Ms. Castro is domiciled and intends to remain in California. In October 2020, prior to  
22 the filing of this lawsuit, Ms. Castro visited the Website and browsed the selection of apparel on the  
23 Website in order to later make an in-store purchase. Ms. Castro was in Elk Grove when she visited  
24 the Website. During the visit, Ms. Castro’s keystrokes, mouse clicks, and other electronic  
25 communications were intercepted in real time and were disclosed to FullStory through the wiretap.

26 \_\_\_\_\_  
27 <sup>1</sup> NIKE, <https://www.nike.com/>.

28 <sup>2</sup> 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 FullStory’s conduct was aided, abetting, and otherwise enabled by Defendant Nike. Ms. Castro was  
2 unaware at the time that her keystrokes, mouse clicks, and other electronic communications,  
3 including the information described above, were being intercepted in real-time and would be  
4 disclosed to FullStory, nor did Ms. Castro consent to the same.

5 5. Defendant Nike, Inc. is a company incorporated under the laws of Oregon with its  
6 principal place of business at One Bowerman Drive, Beaverton, Oregon 97005.

7 6. Nike does business throughout California and the entire United States.

8 7. Nike owns and operates the Website.

9 **JURISDICTION AND VENUE**

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

14 9. This Court has personal jurisdiction over Defendant because Defendant has  
15 purposefully availed itself of the laws and benefits of doing business in this State, and Plaintiff’s  
16 claims arise out of Defendant’s forum-related activities. Furthermore, a substantial portion of the  
17 events giving rise to Plaintiff’s claims occurred in this District.

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

21 11. Defendant purposefully directed its activities at California, and the wiretapping at  
22 issue here arises from or relates to Defendant’s activities. As alleged more fully below, Defendant  
23 intentionally installed the wiretap at issue here on the Website. FullStory purposefully intercepted  
24 electronic transmissions from users of Nike’s website, and Nike purposefully aided and abetted  
25 FullStory’s conduct. The conduct also was expressly aimed at California residents. California is  
26 the largest market in the United States—indeed, if California were its own nation, California would  
27 have the fifth largest economy in the world. Defendant knew that a significant number of  
28 Californians would visit its website, because they form a significant portion of its customer base.

1 Indeed, Defendant’s internal data shows that millions of California consumers visited the website,  
2 and many if not all of them were recorded by FullStory. By intercepting the transmissions of Nike  
3 website users, Defendant targeted its wrongful conduct at customers, some of whom Defendant  
4 knew, at least constructively, were residents of California. It was foreseeable that Defendant’s  
5 interceptions and wiretapping would harm Plaintiff and similarly-situated individuals, and that at  
6 least some of this harm would occur in California—where Defendant knew many customers and  
7 prospective customers resided. Finally, because there is wiretapping, there is jurisdiction over  
8 Defendant. *See Johnson v. Blue Nile, Inc.*, 2021 WL 1312771, at \*3 (N.D. Cal. Apr. 8, 2021)  
9 (noting that “[i]f [a website operator] were committing a tort like wiretapping, its acts might be  
10 purposefully directed toward California customers and establish specific personal jurisdiction over  
11 it”).

12 **STATEMENT OF FACTS**

13 **I. Overview Of The Wiretaps**

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

15 13. One of FullStory’s features is called “Session Replay.”

16 14. FullStory says that “Session replay tools capture things like mouse movements,  
17 clicks, typing, scrolling, swiping, tapping, etc.” on a given website.

18 15. Session replay technologies work by using “embedded snippets of code ... [that]  
19 watch and record a visitor’s every move on a website, in real time.”<sup>3</sup>

20 16. FullStory touts that Session Replay relies on real video of a user’s interactions with a  
21 website, or, in another words, a “recorded session.”<sup>4</sup>

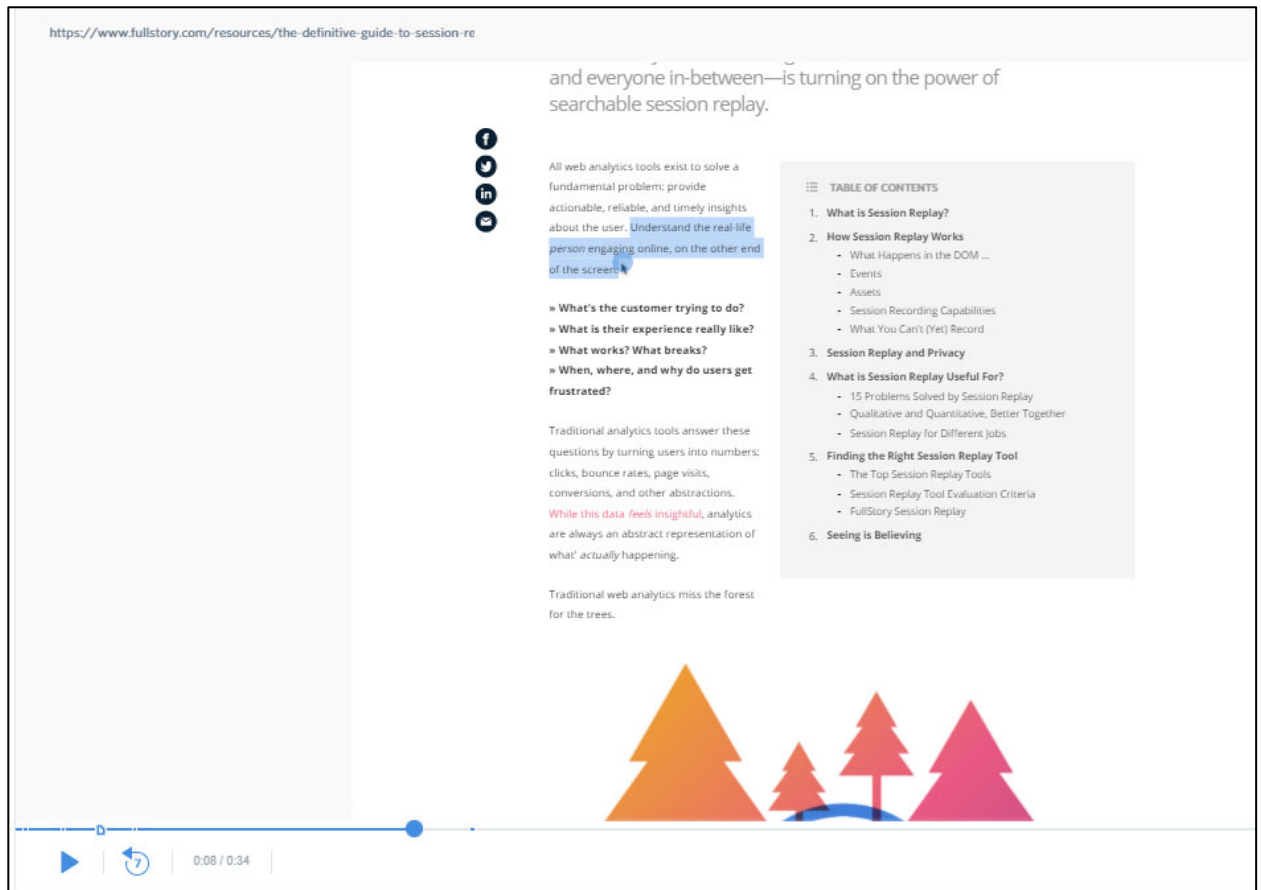
22 17. To demonstrate how Session Replay works, FullStory displays the “recorded session  
23 of a fictional user interacting with th[e] [Session Replay] Guide”:  
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26 \_\_\_\_\_  
27 <sup>3</sup> Tomas Foltyn, *What’s the Deal with Session-Replay Scripts?*, WELIVESECURITY, Apr. 20, 2018,  
<https://www.welivesecurity.com/2018/04/20/whats-deal-session-replay-scripts/>.

28 <sup>4</sup> <https://www.fullstory.com/resources/the-definitive-guide-to-session-replay/>.

1 18. FullStory describes the above video as follows:

2 Here you can watch a FullStory session replay of a user—Daniel  
3 Falko—flipping through *The Definitive Guide to Session Replay*.  
4 **Notice how you can see interactions, mouse movements, clicks,**  
5 **interactions with overlays, and more**—and everything is listed in  
6 order in a stream at the right side of the replay. This is what a session  
7 replay looks like in the FullStory app.<sup>5</sup>



19. 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:

<sup>5</sup> <https://www.FullStory.com/resources/the-definitive-guide-to-session-replay/#finding-the-right-session-replay-tool> (emphasis added).

Analyze Funnel **Watch Sessions**

Users that **had** this experience and **failed to convert**

<b>M</b>	mike@example.com SINCE JAN 20	2:24 pm · 12 sessions 1 EVENT · 20:37 · /CHECKOUT	Atlanta OSX · CHROME
<b>H</b>	holly@example.com SINCE JAN 20	2:30 pm · 18 sessions 1 EVENT · 16:30 · /CHECKOUT	Atlanta OSX · CHROME
<b>L</b>	lynn@example.com SINCE JAN 20	2:56 pm · 6 sessions 1 EVENT · 14:15 · /CHECKOUT	Atlanta OSX · CHROME
<b>K</b>	kim@example.com SINCE JAN 20	3:30 pm · 12 sessions 2 EVENTS · 10:37 · /CHECKOUT	Atlanta OSX · CHROME
<b>J</b>	joe@example.com SINCE JAN 20	4:04 pm · 12 sessions 1 EVENT · 20:37 · /CHECKOUT	Atlanta OSX · CHROME
<b>V</b>	vishi@example.com SINCE JAN 20	4:54 pm · 16 sessions 1 EVENT · 20:37 · /CHECKOUT	Atlanta OSX · CHROME

Switch over to sessions and press play ↗

20. 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”:

fullstory

BACK TO SEARCH

SESSION REPLAY PAGE INSIGHTS

Autoplay off · My Cart Clicks 1-5 of 200

https://teheeshop.com 1605 x 943 DEV TOOLS

Teheeshop New Arrivals Tops Bottoms

Soft V-Neck Tee

Info: Our best selling tee is everywhere, dress it up. 100% organic cotton.

Shipping: Free shipping and returns on orders over \$50.

Select Size: XS, Sm, Med, Lrg, XL

ADD TO CART SAVE FOR LATER

GO TO CHECKOUT

User 54367

Today, 8:15 am - Chrome, OSX - 2 events  
New York, NY, United States - 66.193.94.133

REFERRED BY: https://www.google.com/

Visit https://teheeshop.com

Clicked CHECKOUT

Product added menu item example...

Changed menu item

Clicked (w/JS Error) menu item example...

Clicked (w/JS Error) menu item example...

Clicked (w/JS Error) menu item example...

Clicked (w/JS Error) menu item example...

Clicked (w/JS Error) menu item example...

to see the real customer experience behind the data

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

5 22. This snippet of code allows FullStory—as enabled by Nike—to record the  
6 keystrokes, mouse clicks, data entry, and other electronic communications of visitors to websites  
7 where the code is installed. It also allows FullStory—as enabled by Nike—to track the amount of  
8 time spent on the website, geographic location of the visitor, and other information described above.

9 23. FullStory’s code is not a cookie at all, much less a run-of-the-mill cookie. Common  
10 cookies that consumers might be familiar with do not engage in session recording or all of the  
11 features described above. FullStory’s code does far more than simply track where a visitor went on  
12 the internet, and its functionality is not limited to aggregate data. Rather, as a 2017 study by  
13 Princeton University researchers—which specifically examined FullStory—noted, “unlike typical  
14 analytics services that provide aggregate statistics, these scripts are intended for the recording and  
15 playback of individual browsing sessions, as if someone is looking over your shoulder.”

16 24. When the website user’s communications are transmitted to Nike’s Website,  
17 FullStory records the website user’s interactions locally in the user’s browser in real time, and then  
18 transmits that information to FullStory’s recording servers every few seconds. FullStory then  
19 makes the information available to its clients.

20 25. FullStory not only records users’ electronic communications in real time for later  
21 viewing, but also allows websites to monitor them *live*. “For sessions that are actively recording  
22 and we are still receiving events from a user (meaning the last page in their session is still open),  
23 you’ll see a ‘Go Live’ button at the end of the playback bar. Once you click on the button, you’ll  
24 essentially be riding along in near real time with the user with no need to refresh the playback.”

25 26. The 2017 study by Princeton University researchers shows this process in action. In  
26 the first screenshot below, a mock user visits a website and enters information:

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The screenshot shows a registration form with the following sections and fields:

- Employment**
  - Company: Multi-Systems Merchant Services
  - Occupation: Sales engineer
- Physical characteristics**
  - Height: 5' 9" (174 centimeters)
  - Weight: 204.8 pounds (93.1 kilograms)
  - Blood type: A+
- Contact Info**
  - Name: John
  - Phone: 1|
  - Email: john@example.com
  - Confirm Email: john@example.com
- Shipping**
  - Address: 123 Any Street
  - City: New York
  - State: NY
  - Zip: 10011
  - Country: USA
- Personal**
  - Mother's maiden name: [empty]
  - SSN: [empty]
  - Birthday: mm/dd/yyyy
  - Username: [empty]
  - Password: [empty]
  - Website: [empty]
  - Profession: [empty]
- Payment**
  - Name on card: Full Name
  - Card Number: [empty]
  - Card Number Last Four: [empty]

27. In the second screenshot, one can see FullStory's dashboard.<sup>6</sup> The information is simultaneously recorded by FullStory, and less than a second later, the user's actions can be seen in FullStory's recording:

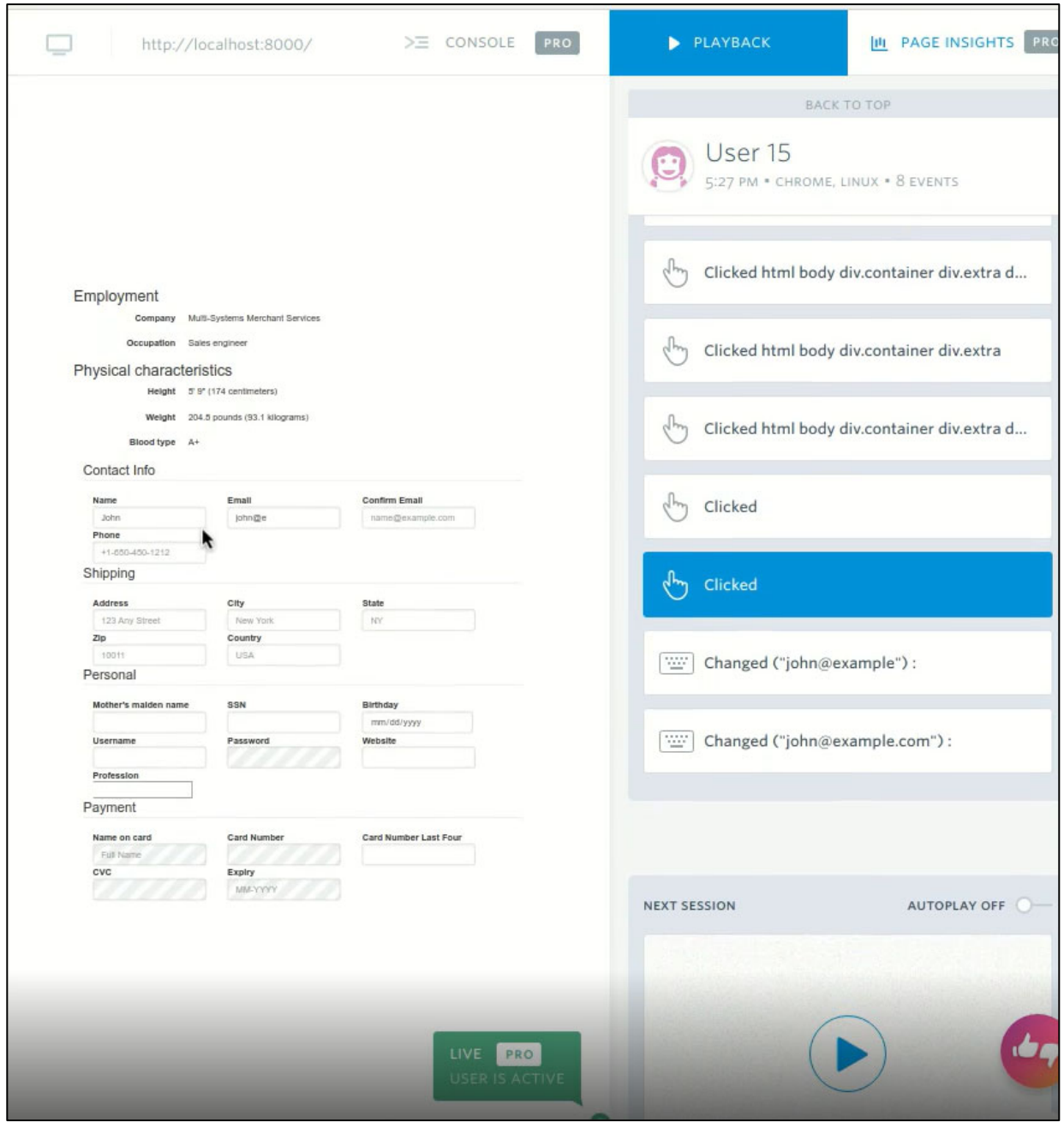
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<sup>6</sup> These two images are displayed side-by-side in the study. Plaintiff has separated the two images so that they can be made larger for clarity.



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28. The “Go Live” feature is always available as long as a user’s website session is active, meaning FullStory is always recording a user’s interactions with a website in real time, regardless of whether the video is viewed in real time.

29. FullStory’s recording is not limited to desktop website, but also mobile websites and mobile applications.<sup>7</sup>

<sup>7</sup> <https://www.fullstory.com/mobile-apps/>.

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

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

9           32.     One of FullStory’s partners is Defendant Nike.

10          33.     Nike utilizes FullStory’s software on the Website.

11          34.     Nike knows that FullStory’s software captures the keystrokes, mouse clicks and  
12 other communications of visitors to its website, and pays FullStory to supply that information.

13          35.     Pursuant to an agreement with FullStory, Nike enabled FullStory’s software by  
14 voluntarily embedding FullStory’s software code on the Website.

15          36.     As currently deployed, FullStory’s software, as employed by Nike, functions as a  
16 wiretap.

17 **II.     Defendant Wiretapped Plaintiff’s Electronic Communications**

18          37.     In October 2020, Ms. Castro visited Nike.com and browsed the selection of apparel  
19 on the Website.

20          38.     During those visits, and upon information and belief, the Session Replay feature in  
21 FullStory’s software created a video capturing each of Plaintiff’s keystrokes and mouse clicks on  
22 the website. The FullStory wiretap also captured the date and time of the visits, the duration of the  
23 visits, Plaintiff’s IP addresses, their location at the time of the visits, their browser types, and the  
24 operating system on their devices.

25          39.     FullStory’s recording of keystrokes, mouse clicks, data entry, and other electronic  
26 communications begins the moment a user accesses or interacts with the Website.

1           40.     When users access the Website and make a purchase, they enter their PII.  
2 FullStory’s software captures these electronic communications throughout each step of the process.  
3 Even if users do not complete the form, the Website nonetheless captures users’ electronic  
4 communications throughout his or her visit.

5           41.     On Nike’s website, FullStory’s software captures, among other things:  
6                   (a) The user’s mouse clicks;  
7                   (b) The user’s keystrokes;  
8                   (c) The user’s payment card information, including card number, expiration  
9                   date, and CVV code;  
10                  (d) The user’s IP address;  
11                  (e) The user’s location at the time of the visit; and  
12                  (f) The user’s browser type and the operating system on their devices.

13           42.     Crucially, Defendant Nike does not ask users, including Plaintiff, whether they  
14 consent to being wiretapped by FullStory. Users are never told that their electronic  
15 communications are being wiretapped by FullStory.

16           43.     Nike’s Privacy Policy did not disclose the wiretapping for two reasons. First, to the  
17 extent Nike’s home page contained a link to the Privacy Policy, it was buried at the very bottom of  
18 the webpage in tiny, 7.5 non-contrasting font that was designed to be unobtrusive and easy to  
19 overlook. Further, even though users are presented with a hyperlink to Nike’s Privacy Policy at the  
20 checkout process, FullStory began recording users long before this moment, *i.e.*, any purported  
21 disclosure was made *after* the wiretap had already begun.

22           44.     Moreover, users are not on notice of the hyperlink to the Privacy Policy when they  
23 click the “Place Order” button.

24           45.     Second, even if users do agree to the Privacy Policy by using the Website or  
25 otherwise—and they do not for the reasons stated above—Nike does not mention FullStory or its  
26 Session Replay feature in Nike’s Privacy Policy. At best, the Privacy Policy discusses Nike’s use  
27 of “Cookies and Pixel Tags” to collect information, *not* that users are actively having their website  
28 sessions recorded in real time. Indeed, unlike Nike, other companies actively disclose the use of

1 session recording technology on their websites by implementing a pop-up screen that a user must  
2 acknowledge before advancing further on the website. That practice goes to show that companies  
3 know how to disclose the use of session recording technology when they want to.

4 46. Further, Nike states in its Privacy Policy that *Nike may* use “cookies and pixel  
5 trackers” to collect “click behavior.” But this does not disclose the wiretapping for several reasons.  
6 First, Nike only discloses that it—and not a third party—may collect “click behavior.” Second,  
7 disclosing that Nike has the *capacity* to monitor certain information is not the same as disclosing  
8 that it *does in fact* collect mouse clicks, keystrokes, and other communications in real time. And  
9 third, a reasonable consumer might suspect that Nike keeps track of what that consumer purchases  
10 after the fact for marketing purposes. But a reasonable consumer would *not* expect to have their  
11 mouse clicks, keystrokes, and other communications monitored by a third party in real time and  
12 conglomerated into a video recording, whether or not that user made a purchase. Indeed, as the  
13 2017 Princeton University study researchers recognized, “the extent of data collected by these  
14 services **far exceeds user expectations** [1]; text typed into forms is collected before the user  
15 submits the form, and precise mouse movements are saved, all without any visual indication to the  
16 user. This data can’t reasonably be expected to be kept anonymous.”

17 47. For these reasons and more, users do not agree to be wiretapped even if they agree to  
18 the Privacy Policy.

19 48. Neither Plaintiff nor any Class member consented to being wiretapped on the  
20 Website, nor to have their communications recorded and shared with FullStory. Any purported  
21 consent that was obtained was ineffective because (i) the wiretapping began from the moment  
22 Plaintiff and Class members accessed the Website; (ii) the Privacy Policy did not disclose the  
23 wiretapping or FullStory; and (iii) the hyperlink to the Privacy Policy is inconspicuous and  
24 therefore insufficient to provide notice.

### 25 **CLASS ACTION ALLEGATIONS**

26 49. Plaintiff seeks to represent a class of all California residents who visited the Website,  
27 and whose electronic communications were intercepted or recorded by FullStory. Plaintiff reserves  
28

1 the right to modify the class definition as appropriate based on further investigation and discovery  
2 obtained in the case.

3 50. Members of the Class are so numerous that their individual joinder herein is  
4 impracticable. On information and belief, members of the Class number in the thousands. The  
5 precise number of Class members and their identities are unknown to Plaintiff at this time but may  
6 be determined through discovery. Class members may be notified of the pendency of this action by  
7 mail and/or publication through the distribution records of Defendant.

8 51. Common questions of law and fact exist as to all Class members and predominate  
9 over questions affecting only individual Class members. Common legal and factual questions  
10 include, but are not limited to, whether Defendant has violated the California Invasion of Privacy  
11 Act (“CIPA”), Cal. Penal Code § 631; and whether class members are entitled to actual and/or  
12 statutory damages for the aforementioned violations.

13 52. The claims of the named Plaintiff are typical of the claims of the Class because the  
14 named Plaintiff, like all other class members, visited the Website and had her electronic  
15 communications intercepted and disclosed to FullStory—as enabled by Nike—through the use of  
16 FullStory’s wiretaps.

17 53. Plaintiff is an adequate representative of the Class because her interests do not  
18 conflict with the interests of the Class members she seeks to represent, she has retained competent  
19 counsel experienced in prosecuting class actions, and she intends to prosecute this action  
20 vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and  
21 her counsel.

22 54. The class mechanism is superior to other available means for the fair and efficient  
23 adjudication of the claims of Class members. Each individual Class member may lack the resources  
24 to undergo the burden and expense of individual prosecution of the complex and extensive litigation  
25 necessary to establish Defendant’s liability. Individualized litigation increases the delay and  
26 expense to all parties and multiplies the burden on the judicial system presented by the complex  
27 legal and factual issues of this case. Individualized litigation also presents a potential for  
28 inconsistent or contradictory judgments. In contrast, the class action device presents far fewer

1 management difficulties and provides the benefits of single adjudication, economy of scale, and  
2 comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment  
3 of the liability issues will ensure that all claims and claimants are before this Court for consistent  
4 adjudication of the liability issues.

5 55. Plaintiff brings all claims in this action individually and on behalf of members of the  
6 Class against Defendant.

7 **COUNT I**  
8 **Violation Of The California Invasion Of Privacy Act,**  
9 **Cal. Penal Code § 631**

10 56. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set  
11 forth herein.

12 57. Plaintiff brings this claim individually and on behalf of the members of the proposed  
13 Class against Defendant.

14 58. To establish liability under section 631(a), Plaintiff need only establish that  
15 Defendant, "by means of any machine, instrument, contrivance, or in any other manner," did any of  
16 the following:

17 Intentionally taps, or makes any unauthorized connection, whether  
18 physically, electrically, acoustically, inductively or otherwise, with  
19 any telegraph or telephone wire, line, cable, or instrument, including  
20 the wire, line, cable, or instrument of any internal telephonic  
21 communication system,

22 *Or*

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

28 *Or*

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

*Or*

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

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

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

13 61. At all relevant times, by using its technology, FullStory—as enabled by Defendant  
14 Nike—intentionally tapped, electrically or otherwise, the lines of internet communication between  
15 Plaintiff and Class members on the one hand, and Nike’s Website on the other hand. *Saleh v. Nike,*  
16 *Inc.*, --- F. Supp. 3d ---, 2021 WL 4437734, at \*11 (C.D. Cal. Sept. 27, 2021) (“Viewing the  
17 allegations as true and accepting all reasonable inferences in favor of Plaintiff, Saleh pleads  
18 sufficient facts regarding FullStory’s conduct to state a claim for violation of § 631(a).”).

19 62. At all relevant times, by using its technology, FullStory—as enabled by Nike—  
20 willfully and without the consent of all parties to the communication, or in any unauthorized  
21 manner, read or attempted to read or learn the contents or meaning of electronic communications of  
22 Plaintiff and putative Class members, while the electronic communications were in transit or  
23 passing over any wire, line or cable or were being sent from or received at any place within  
24 California. *Saleh*, 2021 WL 4437734, at \*11 (“Viewing the allegations as true and accepting all  
25 reasonable inferences in favor of Plaintiff, Saleh pleads sufficient facts regarding FullStory’s  
26 conduct to state a claim for violation of § 631(a).”).

27 63. As FullStory notes on its website, “When an end user session is recorded by the  
28 FullStory script, FullStory starts by recording event data locally in the browser. Every few seconds,

1 this local event data is packaged up and sent to FullStory recording servers in the form of bundles.”  
2 Such local recording is plainly occurring in real-time, and is, at worst, “transitory electronic  
3 storage” that is “part of the overall transmission process,” which has been held to constitute  
4 communications “in transit.”

5 64. Indeed, FullStory offers website operators the ability to “Go Live” with currently  
6 active website sessions (*i.e.*, users still have the website open on their browser), which would not be  
7 possible if FullStory was not recording users in real time.

8 65. At all relevant times, FullStory—as enabled by Defendant Nike—intercepted the  
9 “content” of Plaintiff’s communications. *Saleh*, 2021 WL 4437734, at \*9 (“Plaintiff has met his  
10 burden to allege facts plausibly showing Defendants recorded Plaintiff’s content communications  
11 with Nike by recording, among other things, keystrokes and a video of Plaintiff’s interactions with  
12 Nike’s website.”).

13 66. Defendant Nike aided, agreed with, and conspired with FullStory to implement  
14 FullStory’s technology and to accomplish the wrongful conduct at issue here. In addition, Nike  
15 employed FullStory to accomplish the wrongful conduct at issue here. *Saleh*, 2021 WL 4437734, at  
16 \*11 (“[T]he court will not dismiss Count 1 against Nike for allegedly aiding, agreeing, or conspiring  
17 with FullStory to provide FullStory with Plaintiff’s communications with Nike.”).

18 67. Plaintiff and Class members did not consent to any of Defendant’s actions in  
19 implementing FullStory’s wiretaps on the Website. Nor have Plaintiff nor Class Members  
20 consented to FullStory’s intentional access, interception, reading, learning, recording, and collection  
21 of Plaintiff’s and Class Members’ electronic communications—as enabled by Defendant Nike.

22 68. The violation of section 631(a) constitutes an invasion of privacy sufficient to confer  
23 Article III standing.

24 69. Plaintiff and Class members seek all relief available under Cal. Penal Code § 637.2,  
25 including injunctive relief and statutory damages of \$5,000 per violation.

26 70. Identical allegations have already been sustained in another lawsuit against  
27 Defendant. *See generally Saleh*, 2021 WL 4437734, at \*7-12.



1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seek  
3 judgment against Defendant, as follows:

- 4 (a) For an order certifying the Class under Rule 23, naming Plaintiff as the  
5 representative of the Class, and naming Plaintiff’s attorneys as Class  
6 Counsel to represent the Class;
- 7 (b) For an order declaring that the Defendant’s conduct violates the statutes  
8 referenced herein;
- 9 (c) For an order finding in favor of Plaintiff and the Class on all counts  
10 asserted herein;
- 11 (d) For compensatory, punitive, and statutory damages in amounts to be  
12 determined by the Court and/or jury;
- 13 (e) For prejudgment interest on all amounts awarded;
- 14 (f) For an order of restitution and all other forms of equitable monetary relief;
- 15 (g) For injunctive relief as pleaded or as the Court may deem proper; and
- 16 (h) For an order awarding Plaintiff and the Class their reasonable attorneys’  
17 fees and expenses and costs of suit.

18 **DEMAND FOR TRIAL BY JURY**

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

21 Dated: September 30, 2021

Respectfully submitted,

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

23 By:           /s/ Joel D. Smith            
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