

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JULIE JONES, et al.,  
Plaintiff,  
v.  
PELTON INTERACTIVE, INC.,  
Defendant.

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

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

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

I. FACTUAL BACKGROUND<sup>1</sup>

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

---

<sup>1</sup> 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.]

27 //

28 //

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.

//

//

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.

(FAC ¶ 13).

22 After accessing customers’ communications in this manner,

23 . . . Drift analyzes and uses the chat conversations it intercepts and records  
24 to, *inter alia*, improve its SaaS platform, including proprietary machine  
25 learning for its chatbots and related technologies, all of which *independently*  
26 *benefits and serves the profit-driven equity interests of Drift’s shareholders*.  
27 In other words, Drift uses the content of the conversations that Plaintiff and  
28 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  
28



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  
21  
22  
23  
24  
25  
26  
27  
28