UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

| Case No. | **CV 23-6547-KK-MARx** | Date: | July 12, 2024 |
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| Title: | *Nora Gutierrez v. Converse Inc., et al.* | | |

Present: The Honorable KENLY KIYA KATO, UNITED STATES DISTRICT JUDGE

| Noe Ponce | Not Reported |
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| Deputy Clerk | Court Reporter |
| Attorney(s) Present for Plaintiff(s): | Attorney(s) Present for Defendant(s): |
| None Present | None Present |

**Proceedings: (In Chambers) Order GRANTING Defendant's Motion for Summary Judgment [Dkt. 113]**

## I. INTRODUCTION

On July 5, 2023, plaintiff Nora Gutierrez ("Plaintiff") filed a putative class action Complaint against defendant Converse Inc. ("Defendant") in Los Angeles County Superior Court, alleging violations of California's Invasion of Privacy Act and Comprehensive Computer Data Access and Fraud Act arising from the customer service chat feature provided on Defendant's website. ECF Docket No. ("Dkt.") 1-2. On June 13, 2024, following removal of the action to this Court, Defendant filed the instant Motion for Summary Judgment ("Motion"). Dkt. 113.

The Court finds this matter appropriate for resolution without oral argument. See FED. R. CIV. P. 78(b); L.R. 7-15. For the reasons set forth below, Defendant's Motion is **GRANTED**.

## II. BACKGROUND

### A. PROCEDURAL HISTORY

On July 5, 2023, Plaintiff filed the operative Complaint against Defendant, asserting the following causes of action: (1) First Cause of Action for violation of the California Invasion of Privacy Act ("CIPA"), Section 631 of the California Penal Code; and (2) Second Cause of Action for violation of California's Comprehensive Computer Data Access and Fraud Act ("CDAFA"), Section

502 of the California Penal Code. Dkt. 1-2. The action arises out of allegations that the chat feature on Defendant's website records users' messages without their consent. Id. ¶¶ 8-10, 13.

On August 10, 2023, Defendant removed the action to this Court on the basis of diversity jurisdiction. Dkt. 1.

On September 20, 2023, Defendant filed a Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Motion to Dismiss"). Dkt. 17.

On October 27, 2023, the Court issued an Order granting in part and denying in part Defendant's Motion to Dismiss. Dkt. 24. Specifically, the Court dismissed Plaintiff's First Cause of Action under CIPA with prejudice to the extent it was predicated upon a theory of direct liability, because Defendant was an intended participant in the communications at issue and "a party cannot violate CIPA if they are an intended participant in the communication." Id. at 1, 3. However, the Court denied Defendant's request for dismissal of Plaintiff's First Cause of Action under CIPA to the extent it was predicated upon a theory of aiding and abetting liability. Id. at 3-5. The Court also dismissed Plaintiff's Second Cause of Action under CDAFA with prejudice on the ground Plaintiff could not plausibly allege Defendant overcame technical or code-based barriers – as required to establish Defendant accessed Plaintiff's data "without permission" within the meaning of CDAFA – or Plaintiff suffered damage as a result of Defendant's conduct. Id. at 6-7.

On November 10, 2023, Defendant filed an Answer to the Complaint. Dkt. 32.

On May 16, 2024, Plaintiff filed a Motion for Class Certification.[1] Dkt. 83.

On June 13, 2024, Defendant filed the instant Motion, arguing it is entitled to summary judgment on Plaintiff's remaining claim under CIPA because (1) Plaintiff lacks sufficient evidence to establish a violation of CIPA by Salesforce, Inc. ("Salesforce"), the third-party vendor of the software enabling the chat feature on Defendant's website; (2) Salesforce merely provided a tool for Defendant's use and, thus, the "party exception" to CIPA applies; (3) even if Plaintiff's evidence was sufficient to give rise to a genuine dispute of material fact regarding whether Salesforce violated CIPA, Plaintiff lacks sufficient evidence to establish Defendant aided and abetted such violation; and (4) Plaintiff's claim is vitiated by her implied consent to the recording of her communication. Dkt. 113. In support of the Motion, Defendant filed a Statement of Uncontroverted Facts, dkt.

[1] A district court has discretion to rule on a motion for summary judgment before deciding the class certification issue "where it is more practicable to do so and where the parties will not suffer significant prejudice[.]" Wright v. Schock, 742 F.2d 541, 543-44 (9th Cir. 1984). Here, ruling on Defendant's Motion for Summary Judgment prevents needless and costly further litigation. See id. at 544 ("It is reasonable to consider a [summary judgment] motion first when early resolution of [such] motion . . . seems likely to protect both the parties and the court from needless and costly further litigation."). Furthermore, neither party has requested a stay of Defendant's Motion pending resolution of the class certification issue, let alone identified any prejudice that would result from ruling on Defendant's Motion first. See id. ("Where the defendant assumes the risk that summary judgment in his favor will have only stare decisis effect on the members of the putative class, it is within the discretion of the district court to rule on the summary judgment motion first."). Hence, in light of this Order, Plaintiff's Motion for Class Certification is **DENIED AS MOOT**.

113-1 ("DSUF"); the declaration of Samuel C. Cortina, attaching Exhibits A through K, dkt. 113-2 ("Cortina Decl."); and the declaration of Mark Helisek, attaching Exhibits 1 through 12, dkt. 113-14 ("Helisek Decl."). Defendant concurrently filed an Application seeking to file certain exhibits to the Motion under seal pursuant to Local Rule 79-5.2.2(a). Dkt. 111.

On June 20, 2024, Plaintiff filed an Opposition. Dkt. 115. In support of the Opposition, Plaintiff filed a Statement of Genuine Disputes of Material Fact, dkt. 115-34 at 2-14 ("PSGD"); a Separate Statement of Uncontroverted Facts, dkt. 115-34 at 15-20 ("PSUF"); the declaration of Narain Kumar, attaching Exhibits 1 through 30, dkt. 115-1 ("Kumar Decl."); and the declaration of Robert Tauler, dkt. 115-32 ("Tauler Decl."). Plaintiff concurrently filed an Application seeking to file certain exhibits to the Opposition under seal pursuant to Local Rule 79-5.2.2(b). Dkt. 116. On June 25, 2024, Defendant filed a sealed declaration in support of Plaintiff's Application. Dkt. 119.

On June 27, 2024, Defendant filed a Reply. Dkt. 122. In support of the Reply, Defendant filed a Response to Plaintiff's Statement of Genuine Disputes of Material Fact, dkt. 122-1 at 2-27 ("Def.'s Resp. to PSGD"); a Response to Plaintiff's Separate Statement of Uncontroverted Facts, dkt. 122-1 at 28-62 ("Def.'s Resp. to PSUF"); and the supplemental declaration of Samuel C. Cortina, dkt. 122-2.

On July 3, 2024, Plaintiff filed an Opposition to Defendant's Application to file exhibits to the Motion under seal and Defendant's declaration in support of Plaintiff's Application to file exhibits to the Opposition under seal. Dkt. 123.

This matter, thus, stands submitted.

## B. MATERIAL FACTS

Unless otherwise indicated, the following facts are uncontroverted. To the extent certain facts are not referenced in this Order, the Court has not relied on such facts in reaching its decision. In addition, the Court considers the parties' evidentiary objections only where necessary.[2] All other objections are **OVERRULED AS MOOT**.

Defendant's website contains a chat feature that connects website users with live customer service agents.[3] DSUF ¶ 1; see also Helisek Decl., ¶¶ 4, 6. To enable this feature, Defendant licenses Service Cloud, a "software as a service" ("SaaS") application, from Salesforce, a third-party vendor. DSUF ¶¶ 1, 27; see also Helisek Decl., ¶ 4; Cortina Decl., ¶ 4, Ex. C, Expert Report of Sandeep Chatterjee ("Chatterjee Report"), ¶ 71. SaaS applications, unlike traditional software

[2] "[O]bjections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion are all duplicative of the summary judgment standard itself[.]" Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006). The Court declines to address such objections.

[3] Although Plaintiff contends "[t]he chats take place on a website owned and operated by Salesforce[,]" rather than Defendant, PSGD ¶ 1, Plaintiff's own evidence confirms the chat feature is available via a "Contact Us" link on Defendant's website, see dkt. 115-5, Declaration of Timothy Libert, ¶ 11.

applications, are web-based – i.e., accessed through online interfaces – and many SaaS applications are deployed "in the cloud." Chatterjee Report ¶¶ 66-70, 99.

A Salesforce customer can elect to use some or all of Service Cloud's features. Id. ¶¶ 77-78. The customer's individualized Service Cloud application is made available through a sub-domain on Salesforce's servers and assigned a unique uniform resource locator ("URL"). Id. ¶¶ 35, 37-38, 83, 91-92. Salesforce URLs correspond to "specific instances of software and data for specific customers[.]" Id. ¶ 91 (emphasis omitted). Hence, Defendant's individualized Service Cloud application is hosted on a domain owned and operated by Salesforce, id. ¶¶ 89-92, and a user who opens the chat feature on Defendant's website is redirected to Salesforce-owned URLs,[4] dkt. 115-5, Declaration of Timothy Libert ("Libert Decl."), ¶ 11. Defendant's Service Cloud application is the "cloud-based location where the chat between [Defendant] and its customers occurs." Chatterjee Report ¶¶ 88, 90.

When a customer initiates a chat on Defendant's website, messages sent through the chat feature are transmitted from the user's device to Defendant's Service Cloud application. Id. ¶¶ 94-95; Libert Decl., ¶¶ 17-18. These messages are encrypted while in transit.[5] Chatterjee Report ¶¶ 94-95, 106-07. Furthermore, because internet communications are transmitted "in different network packets[,]" the context required to interpret such communications and understand their content is unavailable until "after receipt of the data by the . . . destination computer (using modern, layered network protocols)[.]" Id. ¶ 96. Thus, it is "virtually impossible" to learn the contents of an internet communication while it is in transit. Id. ¶ 98.

Defendant's chat data, including chat transcripts, is stored on Salesforce's servers. Chatterjee Report ¶¶ 73-74; see also Cortina Decl., ¶ 2, Ex. A at 7-9 (Non-Party Salesforce, Inc.'s

[4] Defendant disputes whether the URLs identified by Plaintiff's expert are owned and operated by Salesforce. See Def.'s Resp. to PSUF ¶¶ 3-6. However, Defendant presents no evidence controverting this fact, and Defendant's expert confirms at least one URL used to initiate a chat through Defendant's website is hosted on a domain owned and operated by Salesforce. Chatterjee Report ¶ 92.

[5] Although Plaintiff purports to dispute whether a user's messages are "encrypted from end to end[,]" see PSGD ¶ 9, Plaintiff offers no evidence controverting this fact. In support of the claimed factual dispute, Plaintiff cites (1) Exhibit 29 to the declaration of Narain Kumar – erroneously referenced as Exhibit 30 – which Plaintiff represents is a "[c]hat login spreadsheet"; and (2) a declaration from Plaintiff's counsel, Robert Tauler. See id. First, it is unclear how the "[c]hat login spreadsheet" is relevant to whether messages sent in Defendant's chat feature are encrypted. See Kumar Decl., ¶ 30, Ex. 29. Second, while Mr. Tauler states he used Google Chrome's "Developer Tools" feature to ascertain that messages sent in Defendant's chat feature are "conveyed to Salesforce in real time" without encryption, Mr. Tauler concedes he has "no training in technology" and "learned how to [use the Google Chrome tool] on [his] own." Tauler Decl., ¶¶ 5-10. Hence, Mr. Tauler's declaration fails to establish he is competent to testify regarding the meaning or significance of the information displayed in the "Developer Tools" feature or otherwise opine on the manner in which messages are transmitted from a user's machine to Salesforce servers. See FED. R. CIV. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

Resps. to Rule 31 Deposition Questions Nos. 15 through 17). However, this data is accessible only through a password-protected customer dashboard. Chatterjee Report ¶ 74; see also Cortina Decl., ¶ 2, Ex. A at 7-9 (Non-Party Salesforce, Inc.'s Resps. to Rule 31 Deposition Questions Nos. 15 through 17).

The parties dispute whether Defendant has granted Salesforce access to Defendant's customer dashboard. See PSGD ¶¶ 11, 13, 20; Def.'s Resp. to PSGD ¶¶ 11, 13, 20. According to Defendant's expert, "[t]he only time that Salesforce might have access to [Defendant's] chat data is if [Defendant] requests technical support or assistance from Salesforce, and provides Salesforce with access." Chatterjee Report ¶ 101. Additionally, Defendant presents the declaration of Mark Helisek, Defendant's eCommerce Tech Lead, in which Mr. Helisek states Defendant has not provided Salesforce with permission to access Defendant's Service Cloud. Helisek Decl., ¶¶ 2, 5. In support of her contention that Defendant has provided such permission, Plaintiff presents a purported "[c]hat login spreadsheet"[6] showing logins from "Integration SFCC Connector," "IIQ Integration User," "Integration User," "Chatter Expert – Salesforce.com," and "Insights Integration." Kumar Decl., ¶ 30, Ex. 29 (rows 35, 89, 122, 798, and 899). However, Plaintiff offers no evidence regarding the identities of these users or otherwise indicating how the login activity of five unidentified users establishes Salesforce has been granted access to Defendant's dashboard.

On February 24, 2023, Plaintiff used the mobile browser application on her iPhone to utilize the chat feature on Defendant's website. PSUF ¶ 1; Helisek Decl., ¶ 12, Ex. 12 (Plaintiff's chat transcript). It is undisputed that Plaintiff visited Defendant's website as a "statutory tester." DSUF ¶ 28; PSGD ¶ 28; see also Cortina Decl., ¶ 5, Ex. D at 4-5 (Pl.'s Suppl. Resps. to Def.'s First Set of Interrogs. Nos. 3 and 4). Plaintiff sent one message using the chat feature, stating she was "looking for a particular item," but sent no further messages, and has not made any purchases on Defendant's website. See Helisek Decl., ¶ 12, Ex. 12 (Plaintiff's chat transcript); Cortina Decl., ¶ 5, Ex. D at 4-5 (Pl.'s Suppl. Resps. to Def.'s First Set of Interrogs. Nos. 3 and 5). At her deposition, Plaintiff testified she has brought multiple lawsuits with respect to the chat features on different websites and is "aware that there's a possibility that what [she has] characterized as eavesdropping or wiretapping might be happening" when she uses the chat features on these websites. Cortina Decl., ¶ 8, Ex. G at 103:13-16, 104:2-5, 104:11-16.

## III.
## LEGAL STANDARD

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact" and the moving party "is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A fact is "material" if it "might affect the outcome of the suit[.]" Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1147 (9th Cir. 2012) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A dispute of material fact is "genuine" if "the

[6] While the declaration authenticating the exhibit fails to offer any information regarding what the data in the spreadsheet represents, see Kumar Decl., ¶ 30, the exhibit appears to be identical to Exhibit 1 to the declaration of Mark Helisek submitted by Defendant, which is "a true and accurate list of all logins to [Defendant's] instance of the Service Cloud between July 1, 2021, and February 23, 2024[,]" Helisek Decl., ¶ 5, Ex. 1.

evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

The party moving for summary judgment bears the initial burden of identifying the portions of the pleadings and record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the party moving for summary judgment does not have the ultimate burden of persuasion at trial, the moving party "must either produce evidence negating an essential element of the nonmoving party's claim . . . or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial[.]" Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts to the non-moving party to "go beyond the pleadings" and "designate specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324 (quoting FED. R. CIV. P. 56(e)) (internal quotation marks omitted). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Furthermore, the nonmoving party "cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." S. A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidde & Co., 690 F.2d 1235, 1238 (9th Cir. 1982).

In deciding a motion for summary judgment, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus., 475 U.S. at 587. Summary judgment is, therefore, not proper "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts[.]" Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1335 (9th Cir. 1980). Furthermore, the court does not make credibility determinations with respect to the evidence offered. See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

## IV.
## DISCUSSION

### A. THE APPLICATIONS TO FILE DOCUMENTS UNDER SEAL ARE GRANTED

#### 1. Applicable Law

"[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records[.]" Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1096 (9th Cir. 2016). Thus, there is "a strong presumption in favor of access to court records." Id. Generally, to overcome this presumption, a party must demonstrate "compelling reasons" to seal a document. Id. Courts apply the "compelling reasons" standard to applications to seal documents relating to summary judgment. See Krommenhock v. Post Foods, LLC, 334 F.R.D. 552, 586 (N.D. Cal. 2020) (holding defendant was required to satisfy "compelling reasons" standard to seal documents filed in connection with motion for summary judgment because such motion is "central to the merits of th[e] case").

What constitutes a "compelling reason" is "left to the sound discretion of the trial court." Ctr. for Auto Safety, 809 F.3d at 1097 (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 599 (1978)). Examples of compelling reasons for sealing court records include use of documents "to gratify private spite or promote public scandal, to circulate libelous statements, or as sources of

business information that might harm a litigant's competitive standing." Id. (quoting Nixon, 435 U.S. at 598-99) (internal quotation marks omitted).

**2. Analysis**

The Court finds Defendant has established compelling reasons to seal Exhibits 1, 2, and 4 through 11 to the Motion in their entirety, Exhibits 21 through 25 and 28 through 30 to the Opposition in their entirety, and portions of Exhibits 26 and 27 to the Opposition. Specifically, Defendant has presented declarations from Carolyn Gutsick, the Director of Litigation Paralegals at Nike, Inc., who is "familiar with information that [Defendant] keeps confidential, does not disclose publicly, and that may cause competitive harm to [Defendant] if publicly disclosed." Dkt. 112-11, Sealed Gutsick Decl. Re: Mot., ¶ 2; dkt. 119-3, Sealed Gutsick Decl. Re: Opp'n, ¶ 2. According to Ms. Gutsick's declarations, the documents at issue encompass names and login information for system administrators and other individuals with access to Defendant's Salesforce platform, the public disclosure of which could compromise the security of Defendant's internal systems; information regarding the commercial agreements governing Defendant's use of Salesforce products, the public disclosure of which would permit Defendant's competitors to negotiate similar contractual terms without the same investment of resources in research and development; information regarding Defendant's internal privacy audits, which likewise are the result of Defendant's investment of resources in researching and developing privacy and security requirements for third-party vendors; and proprietary information, including computer code and internal systems configurations. Sealed Gutsick Decl. Re: Mot., ¶¶ 5-8; Sealed Gutsick Decl. Re: Opp'n, ¶¶ 5-9. This evidence is sufficient to demonstrate compelling reasons to overcome the strong presumption in favor of public access to court records.[7] Accordingly, the Applications to file Exhibits 1, 2, and 4 through 11 to the Motion, Exhibits 21 through 25 and 28 through 30 to the Opposition, and portions of Exhibits 26 and 27 to the Opposition under seal are **GRANTED**.

## B. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S REMAINING CLAIM FOR VIOLATION OF CIPA

Section 631(a) of the California Penal Code ("Section 631(a)"), a provision of CIPA, "broadly prohibits the interception of wire communications and disclosure of the contents of such intercepted communications." Tavernetti v. Superior Ct., 583 P.2d 737, 739 (Cal. 1978) (en banc). The first three clauses of Section 631(a) prohibit "intentional wiretapping, [willfully] attempting to learn the contents or meaning of a communication in transit over a wire, and attempting to use or communicate information obtained as a result of engaging in either of the previous two activities." Id. at 741. The fourth clause of Section 631(a) prohibits aiding and abetting any such acts. Cal. Penal Code § 631(a). A private right of action exists for a person injured by a violation of any of CIPA's provisions, including Section 631(a). Cal. Penal Code § 637.2.

[7] The Court rejects Plaintiff's argument that the reasons for sealing the documents at issue offered by Defendant are "generic and unspecific[.]" See dkt. 123 at 24. Furthermore, Plaintiff's unsworn assertions that Defendant's competitive interests and security will not be impaired by public disclosure of certain documents are unsupported and do not constitute evidence. See id. at 16, 19, 21-23; see also J & J Sports Prods., Inc. v. Jimenez, No. 11-CV-5435-LHK, 2012 WL 4713716, at *2 (N.D. Cal. Oct. 1, 2012) (concluding "unsworn statement" in party's briefing "is not evidence") (citing United States v. Zermeno, 66 F.3d 1058, 1062 (9th Cir. 1995)).

Here, Plaintiff asserts Defendant is liable for aiding and abetting violations of Section 631(a) by Salesforce. See dkt. 1-2 ¶ 25; dkt. 24 at 8. However, as discussed below, Plaintiff's evidence is insufficient to establish a genuine dispute of material fact as to whether Salesforce has violated the first or second clause of Section 631(a)[8] and, therefore, no genuine dispute of material fact exists as to whether Defendant has aided and abetted Salesforce in violation of the fourth clause of Section 631(a).

**1. No Genuine Dispute of Material Fact Exists as to Whether Salesforce Has Violated the First Clause of Section 631(a)**

**a. Applicable Law**

The first clause of Section 631(a) prohibits intentionally tapping or making any unauthorized connection "with any telegraph or telephone wire, line, cable, or instrument[.]" Cal. Penal Code § 631(a). "Courts have consistently interpreted this clause as applying only to communications over telephones and not through the internet." Licea v. Cinmar, LLC, 659 F. Supp. 3d 1096, 1104 (C.D. Cal. 2023); see also Valenzuela v. Keurig Green Mountain, Inc., 674 F. Supp. 3d 751, 755-56 (N.D. Cal. 2023) (rejecting argument that Section 631(a)'s first clause applies to communications made using "a smart phone's internet capabilities" because "the statute – by its plain terms – does not apply to technologies other than telegraphs and telephones"); Williams v. What If Holdings, LLC, No. C 22-3780-WHA, 2022 WL 17869275, at *2 (N.D. Cal. Dec. 22, 2022) ("[T]he first clause of Section 631(a) concerns telephonic wiretapping specifically, which does not apply to the context of the internet.").

**b. Analysis**

Here, no genuine dispute of material fact exists as to whether Salesforce has violated the first clause of Section 631(a) because Plaintiff has presented no evidence from which a reasonable jury could conclude Defendant's website involves telephone communications. Rather, it is undisputed the chat feature on Defendant's website involves internet communications. See Chatterjee Report ¶ 90. It is also undisputed Plaintiff used her smart phone's internet capabilities to utilize the chat feature. PSUF ¶ 1; Helisek Decl., ¶ 12, Ex. 12. The first clause of Section 631(a) is, therefore, inapplicable. See Licea, 659 F. Supp. 3d at 1104.

[8] Plaintiff does not argue Salesforce violated the third clause of Section 631(a), which prohibits "us[ing], or attempt[ing] to use . . . or to communicate" any information obtained through a violation of Section 631(a)'s first or second clause. See Cal. Penal Code § 631(a); see also dkt. 115 at 7-24. Failure to address a claim or theory in opposition to a motion for summary judgment constitutes abandonment of the claim or theory. See Jenkins v. Cnty. of Riverside, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (concluding plaintiff "abandoned" claims not raised in opposition to motion for summary judgment); Ramirez v. City of Buena Park, 560 F.3d 1012, 1026 (9th Cir. 2009) ("A party abandons an issue when it has a full and fair opportunity to ventilate its views with respect to an issue and instead chooses a position that removes the issue from the case."). Accordingly, the Court declines to address whether Salesforce violated Section 631(a)'s third clause.

While Plaintiff cites cases in support of her claim that Section 631(a)'s first clause encompasses internet communications, these cases are either inapposite or unpersuasive. First, Plaintiff cites Javier v. Assurance IQ, LLC, No. 21-16351, 2022 WL 1744107 (9th Cir. May 31, 2022), Byars v. Goodyear Tire & Rubber Co., 654 F. Supp. 3d 1020 (C.D. Cal. 2023), and Garcia v. Yeti Coolers, LLC, No. CV 23-2643-RGK-RAOx, 2023 WL 5736006 (C.D. Cal. Sept. 5, 2023), however, none of these cases addresses the first clause of Section 631(a). Similarly, Plaintiff cites Brown v. Google LLC, 525 F. Supp. 3d 1049 (N.D. Cal. 2021), which considers only whether internet communications are confidential within the meaning of Section 632 of the California Penal Code – a distinct CIPA provision. In addition, Adler v. Community.com, Inc., No. CV 21-2416-SB-JPRx, 2021 WL 4805435 (C.D. Cal. Aug. 2, 2021) concerns text messages, not internet communications. Finally, the Court finds the reasoning in the two state court rulings cited by Plaintiff – that Section 631(a)'s first clause applies to communications made using a smart phone's internet capabilities because the statute does not distinguish between different functions of a telephonic device – unpersuasive.[9] See Kumar Decl., ¶¶ 2-3, Exs. 1-2.

Hence, because the first clause of Section 631(a) does not apply to communications sent through the chat feature on Defendant's website, no genuine dispute of material fact exists as to whether Salesforce has violated this clause.

**2. No Genuine Dispute of Material Fact Exists as to Whether Salesforce Has Violated the Second Clause of Section 631(a)**

**a. Applicable Law**

The second clause of Section 631(a) prohibits willfully reading or attempting to read or learn the contents of a message without the consent of the parties to the communication "while [such message] is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state[.]" Cal. Penal Code § 631(a). Liability under this clause arises only when the defendant "read or learned the contents of a communication while the communication was in transit, or in the process of being sent or received." Mastel v. Miniclip SA, 549 F. Supp. 3d 1129, 1136 (E.D. Cal. 2021) (emphasis in original).

**b. Analysis**

Here, no genuine dispute of material fact exists as to whether Salesforce has violated the second clause of Section 631(a), because Plaintiff has presented no evidence from which a reasonable jury could conclude Salesforce intercepts messages sent through Defendant's chat feature "while . . . in transit" or reads or attempts to read or learn the contents of such messages. See Cal. Penal Code § 631(a). Defendant's uncontroverted evidence establishes messages sent through Defendant's chat feature are encrypted while in transit and, moreover, it is "virtually impossible" to learn the contents of an internet communication while it is in transit because internet

[9] Moreover, contrary to the reasoning by these state courts, "[s]tatutory interpretation under California law begins with the words themselves, giving them their plain and commonsense meaning[.]" Herrera v. Zumiez, Inc., 953 F.3d 1063, 1071 (9th Cir. 2020). The language of Section 631(a)'s first clause "describ[es] 'telephone wires, lines, or cables' which refers to specific technology." Licea, 659 F. Supp. 3d at 1105 (emphasis in original).

communications are transmitted "in different network packets[.]" Chatterjee Report ¶¶ 94-96, 98, 106-07.

Plaintiff argues messages sent through Defendant's chat feature are "routed to Salesforce" because a user who opens the chat feature on Defendant's website is redirected to Salesforce-owned URLs. See dkt. 115 at 13 (citing Libert Decl., ¶¶ 11-12). However, this argument misapprehends the operation of SaaS applications. Defendant's Service Cloud application, which is the "cloud-based location where the chat between [Defendant] and its customers occurs[,]" is hosted on a domain owned and operated by Salesforce. Chatterjee Report ¶¶ 88-92. Thus, the fact that a user is redirected to a Salesforce-owned URL upon opening the chat feature on Defendant's website does not establish the user's messages are sent to Salesforce or Salesforce reads or attempts to read or learn the contents of such messages. Rather, this fact simply establishes – as Defendant concedes – the user's messages are transmitted to Defendant's Service Cloud application. See id. ¶ 95.

Furthermore, while Defendant's chat data is stored on Salesforce's servers, it is accessible only through a password-protected customer dashboard. Id. ¶¶ 73-74; see also Cortina Decl., ¶ 2, Ex. A at 7-9 (Non-Party Salesforce, Inc.'s Resps. to Rule 31 Deposition Questions Nos. 15 through 17). Plaintiff contends Defendant has granted Salesforce access to its dashboard, see PSGD ¶¶ 11, 13, 20, but presents no evidence establishing such access would enable Salesforce to read real-time messages, let alone any evidence establishing Salesforce actually read or attempted to read or learn the contents of real-time messages while accessing Defendant's customer dashboard. See Matsushita Elec. Indus., 475 U.S. at 586 (holding a nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts" to survive summary judgment). In fact, according to Defendant's expert, "[t]he only time that Salesforce might have access to [Defendant's] chat data is if [Defendant] requests technical support or assistance from Salesforce, and provides Salesforce with access." Chatterjee Report ¶ 101. Plaintiff has presented no evidence controverting this fact.

Finally, Plaintiff argues "Salesforce decrypts [a chat message] when [it] arrive[s] at the [Salesforce domain], appends a [Universally Unique Identifier ("UUID") to the message], adds technical data, and retransmits to another Salesforce address before encrypting the chat again to send to [Defendant's] customer service representative." Dkt. 115 at 14 (emphasis in original). However, Plaintiff cites no evidence in support of this contention, and Plaintiff "cannot manufacture a genuine issue of material fact merely by making assertions in [her] legal memoranda." See S. A. Empresa, 690 F.2d at 1238. While Plaintiff's expert states he found "what appears to be a[] UUID value . . . attached to chat messages sent to the [Salesforce domain]," meaning "Salesforce can connect the dots between different data the user generates across Salesforce owned and operated web addresses[,]" this evidence fails to demonstrate Salesforce decrypts a chat message when it arrives at the Salesforce domain, "adds technical data," and re-encrypts the message to send to Defendant's customer service representative. See Libert Decl. ¶¶ 28-29. Moreover, the existence of UUID values attached to chat messages and the mere possibility Salesforce "can" use these values to "connect the dots" between data are insufficient to establish a genuine issue of material fact as to whether Salesforce reads or attempts to read users' messages while they are in transit. See Balboa Cap. Corp. v. Shaya Med. P.C. Inc., 623 F. Supp. 3d 1059, 1065 (C.D. Cal. 2022) ("[S]peculative testimony . . . is insufficient to raise triable issues of fact and defeat summary judgment.").

Hence, because Plaintiff has not presented any evidence from which a reasonable jury could conclude Salesforce reads or attempts to read or learn the contents of communications while they

are in transit, no genuine dispute of material fact exists as to whether Salesforce has violated the second clause of Section 631(a).

**3. No Genuine Issue of Material Fact Exists as to Whether Defendant Has Violated the Fourth Clause of Section 631(a)**

**a. Applicable Law**

The fourth clause of Section 631(a) prohibits aiding, agreeing with, employing, or conspiring with any person "to unlawfully do, or permit, or cause to be done any of the acts or things" prohibited by the first three clauses of Section 631(a). Cal. Penal Code § 631(a). A defendant cannot be liable for aiding and abetting another party in violation of this clause absent a predicate violation of Section 631(a)'s first three clauses. See Cody v. Ring LLC, No. 23-CV-562-AMO, 2024 WL 735667, at *7 (N.D. Cal. Feb. 22, 2024) (dismissing claim under Section 631(a)'s fourth clause where plaintiff failed to establish "underlying third-party violation" of preceding clauses).

**b. Analysis**

Here, Plaintiff has presented no evidence from which a reasonable jury could find Defendant violated the fourth clause of Section 631(a). As discussed above in Sections IV.B.1.b and IV.B.2.b, no genuine dispute of material fact exists as to whether Salesforce engages in intentional wiretapping or willfully attempts to learn the contents or meaning of a communication in transit in violation of the first or second clause of Section 631(a). Thus, because Plaintiff has not established an underlying violation of Section 631(a)'s first or second clause by Salesforce, Defendant cannot be liable for aiding and abetting Salesforce. See Cody, 2024 WL 735667, at *7. Hence, no genuine dispute of material fact exists as to whether Defendant has violated the fourth clause of Section 631(a).

* * *

Accordingly, no genuine dispute of material fact exists as to Plaintiff's First Cause of Action under CIPA, and Defendant is entitled to judgment as a matter of law.[10] Defendant's Motion is, therefore, **GRANTED**.

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[10] Because Plaintiff has presented no evidence from which a reasonable jury could find a violation of CIPA, the Court declines to address Defendant's alternative arguments that (1) the "party exception" to CIPA applies, and (2) Plaintiff consented to the recording of her communication, thereby vitiating her CIPA claim. See dkt. 113 at 24-28, 30-31. However, the Court notes it appears Plaintiff – who visited Defendant's website as a "statutory tester" – was aware of the possibility that "eavesdropping or wiretapping might be happening" when she used the chat feature on the website. See DSUF ¶ 28; PSGD ¶ 28; Cortina Decl. ¶ 5, Ex. D at 4-5 (Pl.'s Suppl. Resps. to Def.'s First Set of Interrogs. Nos. 3 and 4); Cortina Decl., ¶ 8, Ex. G at 103:13-16, 104:2-5, 104:11-16.

## V.
## CONCLUSION

For the reasons set forth above, Defendant's Motion is **GRANTED**.

**IT IS SO ORDERED.**