THE HONORABLE JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JANE DOE, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

MICROSOFT CORPORATION, a Washington Corporation; QUALTRICS INTERNATIONAL INC., a Delaware Corporation; and QUALTRICS LLC, a Delaware Limited Liability Company,

Defendants.

Case No. 2:23-cv-0718-JCC

DEFENDANT MICROSOFT CORPORATION'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

NOTE ON MOTION CALENDAR:
AUGUST 11, 2023

ORAL ARGUMENT REQUESTED

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

TABLE OF CONTENTS

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

TABLE OF AUTHORITIES

Page(s)

Cases

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

Statutes

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

Other Authorities

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

INTRODUCTION

Plaintiff claims that Kaiser Permanente used unspecified Microsoft technology on its website that allegedly sent unidentified data from Plaintiff's unspecified interactions with that website to Microsoft at unidentified times. Plaintiff refers to this Microsoft technology generically as "Microsoft software development kits" or "SDKs," but no such group of services called "Microsoft SDKs" exists.

Left to guess at the challenged technology, Microsoft speculates that Plaintiff complains about Microsoft's Universal Event Tracking or "UET" service, but there is nothing nefarious or uncommon about that customizable service. Indeed, the UET service code enables website operators to understand how their websites are used in order to improve the websites and the advertisements shown on them, much like other similar website analytics and advertising offerings in the industry. And Microsoft's UET service is privacy-protective: under the publicly available Microsoft Advertising Agreement (which applies to UET and incorporates Microsoft's Privacy Statement), website operators using UET on their websites must comply with applicable privacy laws, including (1) complying with any consent obligations under applicable laws, and (2) disclosing through the website operator's own privacy policy that a user's data may be collected and shared with Microsoft. *See* Ex. A (Microsoft Advertising Agreement); Ex. B (Microsoft's Privacy Statement).[1]

Kaiser, in turn, maintains a publicly available Privacy Statement, which states that Kaiser (1) "record[]s data about all visitors and customers who use the Site," and (2) may disclose its

[1] Microsoft requests that the Court take judicial notice of the Microsoft Advertising Agreement, the Microsoft Privacy Statement, and Kaiser's Privacy Statement. The Microsoft Advertising Agreement governs UET and is available at https://about.ads.microsoft.com/en-my/resources/policies/microsoft-advertising-agreement. The Microsoft Privacy Statement is incorporated by reference into and hyperlinked in the Microsoft Advertising Agreement and is available at https://privacy.microsoft.com/en-us/privacystatement. The Kaiser Privacy Statement, is available at https://healthy.kaiserpermanente.org/northern-california/privacy. Because all three documents are available on public websites, they are the proper subject of judicial notice. *See Hammerling v. Google LLC*, 2022 WL 17365255, at *4 (N.D. Cal. Dec. 1, 2022).

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

user's personal information "to third parties who provide services on [Kaiser's] behalf to help with [its] business activities." Ex. C (Kaiser Privacy Statement).

Nevertheless, Plaintiff asserts a scattershot complaint of nine different causes of action against Microsoft (but not Kaiser) with allegations ranging from claims of wiretapping to larceny to conversion. The Court should dismiss the Complaint against Microsoft with prejudice under Rule 12(b)(6) for the following reasons:

First, all of Plaintiff's claims against Microsoft fail because Plaintiff has not plausibly alleged that she was affected by Microsoft's purported conduct. Plaintiff does not plead when she interacted with Kaiser's website or when Microsoft allegedly received information from her unspecified interactions. She also fails to identify the information Microsoft received from Plaintiff's website activity or whether any of it was actually tied to her identity. Instead, the Complaint relies on conclusory assertions about information Microsoft allegedly received in general or from others, which is insufficient to sustain Plaintiff's claim.

Second, even if Plaintiff had sufficiently pleaded facts about her individual experience (and she has not), the claims against Microsoft would still fail because she has not plausibly alleged the essential elements of each cause of action: she does not plead facts showing (a) interception by Microsoft of the contents of communications by a covered device, with specific intent, and without consent, as required to state a California Invasion of Privacy Act ("CIPA") claim; (b) an expectation of privacy or a serious or highly egregious alleged invasion of privacy by Microsoft to sustain her common law and constitutional privacy claims; (c) her computer was hacked into or that she suffered any resulting loss under the Computer Fraud and Abuse Act ("CFAA") by Microsoft; (d) an actionable loss or an inadequate remedy at *law*, defeating her unjust enrichment claim against Microsoft; (e) statutory standing under the California Unfair Competition Law ("UCL"); and (f) a loss or theft of property by Microsoft, requiring dismissing her larceny and conversion counts.

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

Third, the Court should dismiss Plaintiff's request for punitive damages, which has no support under either California or Washington law.[2]

FACTUAL BACKGROUND

A. Plaintiff's Unspecified Use of the Kaiser Permanente Website

Plaintiff alleges that Kaiser is an "integrated managed care consortium of for-profit and non-profit entities" headquartered in Oakland, California. Compl. ¶ 28. She alleges it has operations and members in California, Washington, Oregon, Colorado, Hawaii, Georgia, Maryland, and Virginia. *Id.* She says Kaiser operates a website, http://healthy.kaiserpermanente.org, and that Kaiser members can, while logged into that website, "make appointments, search for doctors, review and manage their prescriptions, and review their medical records and medical history more broadly." *Id.* ¶ 29.

Plaintiff asserts Kaiser uses Microsoft "code," or "software development kits," which she argues "intercept[ed] and collect[ed] Kaiser Members' activity and their private data." *Id.* ¶ 30. According to her, the "software development kits" could "intercept and collect search terms, videos watched, and the URLs of links that are accessed," which Plaintiff asserts are "associated with unique identifiers that are collected and enable each Defendant to identify the Kaiser Member associated with the data." *Id.* Plaintiff also argues that Microsoft collected this information "unbeknownst to Kaiser Members." *Id.* Plaintiff does not plead any facts showing Microsoft could in fact make these associations, much less that it actually did so with respect to *her* alleged interactions with the Kaiser website.

In fact, Plaintiff pleads next to nothing about her use of the Kaiser website, and nothing about Microsoft with respect to any of *her* data. *See id.* ¶¶ 7, 105. She alleges she has used the site "for at least 10 years" and at some point she allegedly "used the search function; accessed

[2] Plaintiff asserts the same claims independently against defendants Qualtrics International, Inc., and Qualtrics LLC (together, "Qualtrics") based on Qualtrics' independent software. *See* Compl. ¶¶ 30, 60-87. Qualtrics has filed its own Motion to Dismiss. Dkt. 37.

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

immunization and medical records; made appointments; reviewed physician information; reviewed medical conditions; and watched videos." *Id.* ¶ 105. Plaintiff does not include any facts about when she accessed the site, what specifically she did on the site on any particular occasion, whether (much less what) data of *hers* Microsoft allegedly received or whether or how Microsoft could link that data to her specifically, or any alleged harm to her from any conduct by Microsoft.

B. Microsoft's UET Service and the Microsoft Advertising Agreement

Plaintiff does not identify an actual Microsoft service in the complaint and has refused to amend her complaint to do so (despite Microsoft's request), leaving Microsoft to speculate. Given the allegations in the similar suit in the Northern District of California against Kaiser only, Microsoft assumes that, to the extent any Microsoft services are implicated, she is referring to UET.[3] Microsoft's UET is a service that allows website operators to understand interactions with their website, including the number of people visiting a specific page and the webpage address and/or URL visited. *See* Universal Event Tracking – Microsoft Advertising, https://about.ads.microsoft.com/en-us/solutions/tools/universal-event-tracking.[4]

Microsoft offers this service in privacy-protective ways. For instance, the governing Microsoft Advertising Agreement requires customers like Kaiser to comply with all applicable privacy laws, "obtain consent in the manner dictated by applicable" privacy laws, and "maintain a prominent link to an online privacy policy … and ensure that each policy complies with this Agreement and any and all applicable privacy laws…." Ex. A, § 9(a). In addition, if website operators use UET or "otherwise disclose Personal Data to Microsoft, [they must] disclose in such online privacy … the fact that Microsoft collects or receives Personal Data from users or you to

[3] In a similar case pending in the Northern District of California, plaintiffs represented by different counsel assert similar claims based on "Bing SDK," but do not name Microsoft as a defendant. *See, e.g.*, *Doe v. Kaiser Foundation Health Plan, Inc.*, No. 3:23-cv-02865 (N.D. Cal.) (ECF #1), ¶ 5.

[4] Microsoft requests the Court take judicial notice of this publicly available webpage, which is attached as Ex. D. *See Hammerling*, 2022 WL 17365255, at *4.

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

provide Microsoft Advertising, and provide a link to the Microsoft Privacy Statement," which is hyperlinked in the Advertising Agreement. *Id.*[5]

C. Kaiser's Privacy Statement

Plaintiff is conspicuously silent about Kaiser's Privacy Statement, which is easily found on the Kaiser website's landing page, as well as on the login page to the patient portal. In fact, Kaiser advises users like Plaintiff that by logging into their account, they agree to the Kaiser Terms & Conditions and Privacy Statement.[6] Notably, Kaiser's Privacy Statement specifically discloses to its users (*i.e.*, Plaintiff) that Kaiser gathers and maintains "Web logs," and "routinely gathers data on Site activity," including logs that "record data about all visitors and customers who use the Site." *See* Ex. C, Site Visitor Data. Kaiser discloses that these logs may contain (1) the Internet domain from which the user accessed the Kaiser site; (2) IP address; (3) type of browser and operating system; (4) date and time the user visited the Kaiser site; (5) the pages or mobile screens viewed; (6) the address of any website the user linked from; and (6) if the user has logged into the website, "an individual identifier" and "the services [the user has] accessed." *See* Ex. C, § 2. The Kaiser Privacy Statement also states that Kaiser may disclose its users' "personal information" "to third parties who provide services on [Kaiser's] behalf to help with [its] business activities." *See id.* § 13.[7] And the Kaiser Privacy Statement discloses that its mobile application "contains software development kits (SDKs) that may collect and transmit information back to us or third-party partners about [a user's] usage of that mobile application or other applications on [the user's] device." *See id.*, § 4. The Kaiser Privacy Statement also discloses that Kaiser and its service providers may place "cookies" "on the computer hard drives of visitors" to the website to help

[5] The Microsoft Advertising Agreement defines "Personal Data" as "any information relating to an identified or identifiable natural person and where it is applicable, an identifiable, existing juristic person." Ex. A, § 9(c).

[6] Microsoft requests the Court take judicial notice of this publicly available webpage attached as Ex. E. *See Hammerling*, 2022 WL 17365255, at *4.

[7] The Policy defines "personal information" as "information that is individually identifiable." Ex. C, Introduction.

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

Kaiser "tailor our Site to be more helpful and efficient for our visitors." *See id.*, § 3. Kaiser explains it "contracted a third party ad network to manage our advertising," including through "cookies, Web beacons, and other tracking technologies." *Id.* Users "may opt out" of re-targeting, and Kaiser includes a hyperlink users can click on to learn how to opt out. *See id.*, § 5.

D. Plaintiff's Complaint

Without suing Kaiser, and without identifying the specific Microsoft service(s) at issue, Plaintiff alleges nine causes of action against Microsoft: (1) violations of CIPA (two causes of action); (2) violation of the right to privacy under the California Constitution; (3) intrusion upon seclusion under California law; (4) violation of the CFAA; (5) unjust enrichment; (6) violation of the UCL; (7) statutory larceny, ; and (8) conversion under California law. Plaintiff purports to represent two putative nationwide classes and two California-only classes of current or former Kaiser members, who allegedly had their PHI[8] or other private data unlawfully collected by Defendants while using the Kaiser website.

ARGUMENT

Rule 12(b)(6) requires dismissal when a plaintiff "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To state a claim, allegations must be more than "speculative," "conceivable," and possible; instead, they must be facially "plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). The court must disregard "legal conclusions" and other "conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (citation omitted). Similarly, "formulaic recitation of the elements of a cause of action" do not suffice. *Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 644 (9th Cir. 2014), *as amended* (Jan. 26, 2015). Plaintiff's Complaint fails to meet these standards and the Court should dismiss it with prejudice. *See Martin v. Sephora USA, Inc.*, 2023 WL 2717636, at *5 (E.D. Cal. Mar. 30, 2023), *report and*

[8] Plaintiff purports to define "PHI" as "medical records and other individually identifiable health information," or "protected health information." *Compare* the definition of protected health information in 45 C.F.R. § 160.103.

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

recommendation adopted, 2023 WL 3061957 (E.D. Cal. Apr. 24, 2023) (dismissing entire complaint, including CIPA claims).

A. Plaintiff Fails to Allege Facts Plausibly Showing She was Affected by Microsoft's Alleged Conduct.

Rule 8 requires "a short and plain statement of the claim showing that [Plaintiff] is entitled to relief." Fed. R. Civ. P. 8. Plaintiff cannot satisfy this standard by relying on generalized complaints about Microsoft's alleged practices. Rather, she must state sufficient facts to show these supposed practices actually applied to and affected her individually. For instance, CIPA only provides a civil action to "[a]ny person who has been injured" by CIPA. Cal. Penal Code § 637.2. That means Plaintiff cannot base her CIPA claim on alleged interceptions involving others. Plaintiff's other causes of action also require her to show she was individually impacted by Microsoft's alleged practices. *See, e.g.*, *In re Google Location History Litig.*, 428 F. Supp. 3d 185, 193 (N.D. Cal. 2019) (plaintiff must individually have a reasonable expectation of privacy to assert constitutional and common law privacy claims); 18 U.S.C. § 1030 (providing a CFAA civil action to "[a]ny person who suffers damage or loss" from a CFAA violation).

Plaintiff cannot circumvent this basic requirement by resorting to the class action device. Even in a putative class action, the named plaintiff "must allege[] and show that [she] personally ha[s] been injured, not that injury has been suffered by other, unidentified members of the class to which [she] belong[s] and which [she] purport[s] to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *see also In re Google Assistant Privacy Litig.*, 457 F. Supp. 3d 797, 816 (N.D. Cal. 2020) (dismissing class action complaint where the allegations did not "show that Plaintiffs' own oral communications were intercepted"); *Russo v. Microsoft Corp.*, 2021 WL 2688850, at *3 (N.D. Cal. June 30, 2021) (dismissing claims where plaintiffs did not allege facts showing they were injured).

Courts have strictly applied this pleading requirement in similar privacy cases. In *Martin v. Sephora*, the plaintiff brought a CIPA claim challenging a web chat feature on the defendant's

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

website. She claimed she visited the defendant's website "within the past year" and conversed with defendant's web chat feature. 2023 WL 2717636, at *2. The court dismissed the complaint entirely, including all CIPA claims because (among other things) the conclusory allegation that the violation occurred "sometime 'within the past year'" was "impermissibly vague." *Id.* at *6. The allegations "fail[ed] to provide enough detail to guide discovery." *Id.*

Here too, Plaintiff fails to allege any facts plausibly showing any of the alleged Microsoft practices ever happened to *her*. She does not plead the dates she used the Kaiser website or when Microsoft allegedly "intercepted and collected" her data. Compl. ¶ 105; *see also id.* ¶ 7. She claims she "has been a Kaiser Member for at least 10 years and has used the Kaiser Website throughout her membership," but does not state when she allegedly "used the search function; accessed immunization and medical records; made appointments; reviewed physician information; reviewed medical conditions; and watched videos." *Id.* ¶¶ 7, 105. Nor does she plead any facts plausibly showing Kaiser disclosed any of her data, much less her personal or health information, to Microsoft, in a manner that allowed Microsoft to identify her specifically, or that Microsoft did so identify her. At bottom, Plaintiff fails to allege any facts plausibly showing Microsoft's supposed conduct impacted her in any way, merely concluding instead that "[a]s a result of Defendants' actions, Plaintiff suffered harm." *Id.* The Court should dismiss Plaintiff's "impermissibly vague" claims. *Martin*, 2023 WL 2717636, at *6.

B. Plaintiff Fails to State a Claim Under CIPA (Counts One and Two).

In Counts One and Two, Plaintiff alleges Microsoft violated Sections 631 and 632 of CIPA, respectively.[9] Section 631 prohibits "intentionally tap[ping], or mak[ing] any unauthorized connection ... with any telegraph or telephone wire, line, cable, or instrument." Cal. Penal Code § 631(a). Section 632 prohibits the "intentional[]" use of "a recording device" to record a

[9] Plaintiff also alleges a violation of CIPA Section 630, but that section provides only legislative background for the statute without a private right of action. *See* Cal. Penal Code § 630. Accordingly, the Court should dismiss any purported Section 630 claim against Microsoft.

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

"confidential communication" without "the consent of all parties to [the] confidential communication." Cal. Penal Code § 632(a).

Plaintiff's CIPA claims fail for at least four reasons. *First*, as to both CIPA claims, she does not allege facts showing the data Microsoft allegedly intercepted consists of the "contents" of any covered communication. *Second*, Microsoft required Kaiser to comply with privacy laws, disclose its data collection practices, and obtain consent, which Kaiser did through its Privacy Statement. By logging into and using the Kaiser website, Plaintiff accepted the Privacy Statement, thereby consenting to Kaiser's data collection, sharing, and use practices. *Third*, Plaintiff's Section 631 claims fail because that section applies only to communications through a telegraph or telephone. *Fourth*, Plaintiff's Section 632 claim fails because she does not and cannot plead facts showing Microsoft had the specific intent to record a confidential communication or facts showing Microsoft used an electronic amplifying or recording device.

1. Plaintiff Does Not Allege Facts Showing Microsoft Intercepted the Contents of Her Communications with Kaiser.

Plaintiff claims that Microsoft collects the URL and/or title page of webpages associated with a user's visit to the Kaiser website, including (1) the title and URL of the webpage the user visited and navigated from (Compl. ¶ 42); (2) the webpage and titles of any videos the user watched (*Id.* ¶ 45); (3) the title and URL of the "Drug encyclopedia" page a user might access regarding prescriptions, the "medication's reference number" in that encyclopedia, and "sometimes the medication's name" (*Id.* ¶ 47); and (4) search results when a user clicks on a "Learn more" hyperlink about medical conditions, immunizations, or allergies (*Id.* ¶¶ 50, 53 & 56).

Under settled law, data reflecting webpage URLs is "information" and not the "contents" of a communication subject to CIPA. *Gonzales v. Uber Technologies*, 305 F. Supp. 3d 1078 (N.D. Cal. 2018); *In re Zynga Privacy Litig.*, 750 F.3d 1098 (9th Cir. 2014)[10]; *Graham v. Noom, Inc.*,

[10] *In re Zynga* analyzed the "contents" of a communication under the federal Wiretap Act, 18 U.S.C. § 2511(3)(a), but that analysis is the same under CIPA. *See Brodsky v. Apple, Inc.*, 445 F. Supp. 3d 110, 127 (N.D. Cal. 2020).

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

533 F. Supp. 3d 823, 833 (N.D. Cal. 2021) (Plaintiffs conceded that IP addresses, locations, browser types, and operating systems are not content.). CIPA prohibits the unauthorized collection of the "content" of a communication, which is "the intended message conveyed by the communication[.]" *In re Zynga Privacy Litig.*, 750 F.3d at 1106. CIPA does not regulate "record information regarding the characteristics of the message that is generated in the course of the communication" such as "'the name', 'address' and 'subscriber number or identity' of 'a subscriber to or customer of such service.'" *Id.*

In re Zynga is instructive on the difference between mere information and the contents of communications under CIPA. There, Zynga allegedly collected a website user's Facebook ID and URLs of the webpages that the user viewed. *Id.* at 1107. The Ninth Circuit held "these pieces of information are not the 'substance, purport, or meaning' of a communication." *Id.* Specifically, the Facebook ID functioned as the user's name, and the webpage address was akin to a street address; both names and addresses are "information" under CIPA, not the "contents" of communications. *Id.* Thus, Zynga was not liable for violating CIPA. Other courts have agreed, finding that website titles and URLs that merely contain the "address of the webpage the user was viewing before clicking on [an] icon" are not, without more, content. *Campbell v. Facebook Inc.*, 315 F.R.D. 250, 265 (N.D. Cal. 2016); *Katz-Lacabe v. Oracle Am. Inc.*, 2023 WL 2838118 (N.D. Cal. Apr. 6, 2023); *Yoon v. Lululemon USA, Inc.*, 549 F. Supp. 3d 1073, 1082-83 (C.D. Cal. 2021).

The same principle applies here. Plaintiff's claims are centered on the allegation that Microsoft collected information about the webpages that users viewed, and specifically the URL or webpage title of those pages. CIPA simply does not apply in these circumstances.[11] And to the

[11] Plaintiff also concludes Microsoft collected the identity of users visiting the Kaiser website. She bases this allegation on her conclusion that by collecting a user's "Microsoft Machine Unique Identifier" or "Windows Live ID" and "WLS identifier," Microsoft can identify specific Kaiser members. Compl. ¶¶ 35-36, 39. While Microsoft disputes these allegations, they do not state a claim. Plaintiff does not allege how this supposed identification works or that it happened to *her*, or even whether she has a Microsoft account that could generate Microsoft account IDs. These are abstract allegations about hypothetical experiences of others that say nothing about Plaintiff's own alleged experience and so do not state a claim. And even if Microsoft collected Plaintiff's user ID, that identifier is not the contents of any communication under CIPA. *See In re Zynga*, 750 F.3d at 1106-07.

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

extent Plaintiff asserts search terms and other medical information is somehow collected via the Kaiser website and disclosed to Microsoft, she pleads no facts showing that happened to *her*, much less that it did so in a way that Microsoft could identify her. Plaintiff's generalized assertions and conclusions do not state a claim. *In re Google Assistant Privacy Litig.*, 457 F. Supp. 3d at 816.

Plaintiff's reference to HIPAA does not change this outcome, because even webpages relating to specific diseases, doctors, or medications are not protected PHI under HIPAA; they constitute "general health information that is accessible to the public at large." *Smith v. Facebook, Inc.*, 262 F. Supp. 3d 943, 954-55 (N.D. Cal. 2017).

2. Plaintiff Had Notice that Kaiser Used Third-Party Software to Collect Certain Website User Information.

Plaintiff claims Microsoft allegedly collected data in a surreptitious manner "unbeknownst to Kaiser Members." Compl. ¶ 30. But the Kaiser Privacy Statement flatly contradicts this allegation and informs users that Kaiser and third-party vendors would collect the data about which Plaintiff now complains. *See Kucheynik v. Mortg. Elec. Registration Sys., Inc.*, 2010 WL 5174540, at *2 (W.D. Wash. Dec. 15, 2010) (a court need not accept as true allegations that contradict matters properly subject to judicial notice or by exhibit).[12] Because Kaiser disclosed to Plaintiff that information about her website use would be collected, and even disclosed the specific types of information that would be collected, Plaintiff cannot claim any alleged collection was done in secret. Moreover, Plaintiff admits she "logged into" her Kaiser account on the website, thereby acknowledging she registered for the Kaiser website. Compl. ¶ 7; Ex. E. In so doing, Plaintiff consented to be bound by Kaiser's Privacy Statement. *Calhoun v. Google, LLC*, 2022 WL 18107184, at *11 (N.D. Cal. Dec. 12, 2022) (account holders consented to Google's privacy policy when they created their Google accounts).

[12] The version of the Kaiser Privacy Statement attached as Exhibit C was last revised in October 2021.

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

In relevant part, the Kaiser Privacy Statement states:

- Kaiser "gathers data on Site activity," including the web pages users visit, where they come from, and how long they stay. *See* Ex. C, "Site Visitor Data."
- Kaiser will collect "unique identifiers" and "health or medical information (such as health symptoms, health conditions and medications)." *Id.* § 1 (Information Collection Use).
- Kaiser will collect and maintain certain "Web log" information, including the date and time a user visited, the pages or mobile screens they viewed, and the address of the website they linked from. *Id.* § 2 (Web logs).
- The site's mobile application "contains software development kits (SDKs) that may collect and transmit information back to us or third-party partners about [the user's] usage .... Such data, when collected by a 3rd party, may show what click path was taken, what pages users visited and how long certain pages took to display, is not identifiable to you as an individual." *Id.* § 4 (Web beacons).
- Kaiser may disclose its users' personal information "to third parties who provide services on [Kaiser's] behalf to help with [its] business activities." *Id.* § 13 (Disclosures).

These are precisely the types of data Plaintiff claims Microsoft "intercept[ed] and collect[ed] … without [her] knowledge or consent." Compl. ¶ 38. Kaiser's Privacy Statement is clear and easily found on the Kaiser website. Plaintiff therefore cannot credibly claim any secret interception occurred, defeating her CIPA claims.

3. Plaintiff Fails to Plead an Interception of a Telephone or Telegraph Communication Under California Penal Code Section 631(a).

Plaintiff's Section 631(a) claim fails because, to the extent she argues that Microsoft tapped or intercepted her alleged communications (Compl. ¶ 131), she does not and cannot allege an unauthorized tapping or interception made "with 'any telegraph or telephone wire, line, cable, or instrument,'" as required. *In re Google Assistant Privacy Litig.*, 457 F. Supp. 3d at 825. Courts have strictly construed the "telegraph or "telephone" component of this provision. *Id.*; *see also Mastel v. Miniclip SA*, 549 F. Supp. 3d 1129, 1135 (E.D. Cal. 2021) ("The court will therefore follow the overwhelming weight of authority requiring a plaintiff to plausibly allege that a defendant intentionally tapped or made an unauthorized connection with a *telegraph or telephone* wire, line, cable, or instrument to state a claim under § 631(a)'s first clause ...." (emphasis in

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

original)); *Licea v. Cinmar, LLC*, 2023 WL 2415592, at *5 (C.D. Cal. Mar. 7, 2023); *Williams v. What If Holdings, LLC*, 2022 WL 17869275, at *2 (N.D. Cal. Dec. 22, 2022). Plaintiff does not allege that the data from Kaiser's website passed through *a telegraph or telephone* wire, line, or cable to Microsoft. Instead, she claims that "Private Data" was allegedly "in transit or passing over *any* wire, line, or cable." Compl. ¶ 131 (emphasis added). Her remaining allegations clarify that the alleged connection was through a computer (*e.g.*, *id.* ¶ 33-38), which cannot sustain her claims. *See, e.g.*, *Mastel*, 549 F. Supp. 3d at 1135 (rejecting argument that the first clause of Section 631 applies to tapping a computer).

4. Plaintiff Fails to Plead the Intent and Device Requirements Under California Penal Code Section 632.

Plaintiff has not alleged the specific intent required under Section 632. To do so, she must plead that "the person using the recording equipment [did] so with the *purpose or desire* of recording a confidential conversation, or with the *knowledge to a substantial certainty* that his use of the equipment will result in the recordation of a confidential conversation." *People v. Sup. Court*, 70 Cal. 2d 123, 134 (1969) (emphasis added); *see also Lozano v. City of Los Angeles*, 73 Cal. App 5th 711, 727-28 (2022) (noting that plaintiffs must plead that their confidential communication was "intentionally recorded"). This means Plaintiff must allege facts plausibly showing Microsoft intended to record specific confidential communications and acted with an impermissible purpose. *Id.* She does not. She categorically concludes that "[o]n information and belief, Defendants' interception, collection, and use of Plaintiff, class Members, and Subclass Members' Private Data, including PHI and PII, is knowing and intentional." Compl. § 148. This is simply a legal conclusion that the Court need not take as true. *Ashcroft*, 556 U.S. at 678-79. Plaintiff pleads no facts plausibly showing Microsoft had any intent to capture sensitive or confidential communications, much less for any impermissible purposes. Nor could she, as the Microsoft Advertising Agreement requires website operators to comply with data privacy laws, disclose data practices, and obtain consent from their users—as Kaiser did. *See* Ex. A. Plaintiff

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

cannot plausibly allege Microsoft intended to collect her private communications for unlawful purposes given these terms and Kaiser's Privacy Statement. *See id.*

Plaintiff's Section 632 claim also fails because she does not allege Microsoft used any "electronic amplifying or recording device[s]" to record her information. Cal. Penal Code § 632(a). A device under CIPA is a "thing made or adapted for a particular purpose, especially a piece of mechanical or electronic equipment." *Moreno v. S.F. Bay Area Rapid Transit Dist.*, 2017 WL 6387764, at *5 (N.D. Cal. Dec. 14, 2017). CIPA's definition of a covered device does not apply to software or mobile applications. *In re Google Location History Litig.*, 428 F. Supp. 3d at 193; *Moreno*, 2017 WL 6387764, at *5. Because Plaintiff alleges Microsoft recorded the alleged data using its "*software* developer kit(s)" (emphasis added), *i.e.*, an unspecified piece of code or software, her Section 632 claim fails to satisfy CIPA's device requirement. Neither software development kits nor UET is a device; UET is software code, not equipment. *See* Ex. D.

Finally, the Court should dismiss the CIPA claims as to any non-California residents of the putative nationwide class because CIPA does not apply extraterritorially. Neither Plaintiff nor Microsoft is a California citizen. Microsoft is not headquartered or incorporated in California, and there are no allegations that Microsoft intercepted in California any supposed communications of non-California residents. Compl. ¶¶ 8, 124. Plaintiff's putative nationwide classes are composed of individuals who live across the country, including outside of California. Compl. ¶ 114. For the non-California putative class members there is no connection to the state with respect to the CIPA claims against Microsoft, requiring dismissal of those claims. *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 104 (2006) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996)).[13]

[13] The same extraterritoriality and choice-of-law issues apply to the other, purported California law claims asserted on behalf of nationwide classes. Microsoft reserves the right to challenge these issues at later stages in this case if any of these claims survive this motion.

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

C. Plaintiff Fails to State a Privacy Claim Under the California Constitution or California Common Law (Counts Three and Four).

To state a claim under the California Constitution, Plaintiff must plead facts plausibly showing (1) she had a legally protected privacy interest; (2) she had a reasonable expectation of privacy; and (3) Microsoft's alleged conduct constituted a "serious invasion of privacy." *In re Google Location History Litig.*, 428 F. Supp. 3d at 196 (citing *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 35 (1994)). Similarly, to state a claim for intrusion upon seclusion, she must allege facts showing (1) intrusion into a private place, conversation, or matter, (2) that is "in a manner highly offensive to a reasonable person." 428 F. Supp. 3d at 196 (citing *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 231 (1998). Analysis of these claims is "effectively identical," and courts routinely analyze the two claims together. *In re Google Location History Litig.*, 428 F. Supp. 3d at 196; *see also In re Vizio, Inc. v. Consumer Privacy Litig.*, 238 F. Supp. 3d 1204, 1232 n.11 (C.D. Cal. 2017); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286 (2009). Further, the California Constitution and common law both "set a high bar for establishing an invasion of privacy claim." *Belluomini v. Citigroup, Inc.*, 2013 WL 3855589, at *6 (N.D. Cal. July 24, 2013).

First, Plaintiff's common law and Constitutional privacy claims fail because, again she has not alleged the contents of her communications, much less that Microsoft intercepted any such contents. Instead, she describes the data that *may* have been impacted generally (not specific to her), and in conclusory terms (which the Court must disregard on a motion to dismiss). *See* Compl. ¶¶ 7, 105. Courts agree plaintiffs alleging California constitutional and common law privacy claims must allege the contents of the data they claim was intercepted "with specificity." *E.g.*, *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1040 (N.D. Cal. 2014) (rejecting claim plaintiffs had a general privacy interest in their email and requiring plaintiffs to allege what specifically was "confidential" or "sensitive"); *see also Grafilio v. Wolfsohn*, 33 Cal. App. 5th 1024, 1034 (2019) (noting the expectation of privacy stems from personal information in a doctor's files including "symptoms, family history, diagnoses, test results, and other intimate details concerning

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

treatment"). This makes sense, as the Court must have sufficient detail to determine whether the data at issue falls within a recognized privacy interest. *In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1041 (citation omitted). Because Plaintiff pleads no such allegations, she has failed to establish a privacy interest to sustain her claims.

Second, Plaintiff also had no expectation of privacy prior to logging into the Kaiser website because any data outside of a password-protected account is not private. *See In re Zynga*, 750 F.3d at 1108. While Plaintiff claims this pre-login data constitutes PHI pursuant to HIPAA (*id.* ¶ 43), the Office for Civil Rights ("OCR") at the U.S. Department of Health and Human Services ("HHS") has a markedly different view: website tracking code is not subject to the HIPAA rules prior to a user logging into a website because, generally, that information is not PHI.[14]

Moreover, Plaintiff cannot plead a reasonable expectation of privacy in her website interactions (including her post-log in ones), because Kaiser disclosed to her that it collects information about her online activities. Kaiser's Privacy Statement discloses that Kaiser "gathers data on Site activity," including the web pages users visit and navigate from to get to the Kaiser website, among other activities. *See* Ex. C, "Site Visitor Data." This is exactly the type of activity that Plaintiff alleges is recorded, and the type of data Kaiser discloses it may collect through third-party software. Plaintiff cannot seriously claim she had an expectation of privacy in the face of this Privacy Statement.

Third, Plaintiff does not allege that any privacy invasion was "sufficiently serious" as to "constitute an egregious breach of the social norms underlying the privacy right." *Hill*, 7 Cal. 4th at 37. Here, Plaintiff must plead facts showing Microsoft obtained serious information about her with the intent of committing theft. *See, e.g.*, *Razuki v. Caliber Home Loans, Inc.*, 2018 WL 2761818, at *2 (S.D. Cal. June 8, 2018) (even negligent conduct that leads to the theft of highly

[14] *See* Ex. F, "Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates," Dep't of Health & Human Services (Dec. 1, 2022), *available at* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-online-tracking/index.html. Microsoft requests that the Court take judicial notice of this bulletin because it is incorporated by reference in Plaintiff's Complaint. *See* Compl. ¶ 21 (citing the OCR bulletin); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

personal information does not suffice). The Complaint lacks any allegations that Microsoft intended to steal her data, or even that Microsoft *actually collected* any specific information about Plaintiff. Instead, Plaintiff includes generalized allegations about broad types of data that could theoretically be collected.

Even under Plaintiff's conclusory theory, the information allegedly collected is not necessarily connected to a specific immunization or medical condition held by a particular person. For example, even if a user's website activity is allegedly attributable to that user, the website user could be looking up information for a friend or family member, or simply out of general curiosity, or perhaps because they work in healthcare. Not every search or webpage viewed on the Kaiser website can be tied to a specific person or their health/medical status, and there are no well-pleaded allegations tying any specific searches or inputs to any protected information regarding Plaintiff (or anyone else). This is fatal to her claims, because collection of non-identifiable information is not "sufficiently serious" under California law. *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012); *see also Smith*, 262 F. Supp. 3d at 954-55 (finding URLs containing information about specific, publicly available medical information was not protected PHI).

Finally, even if Plaintiff had alleged facts showing Microsoft collected any of her data (and she has not), her claims would still fail because she pleads no facts showing Microsoft used the data in a highly offensive manner. *Federated Univ. Police Officers' Ass'n v. Regents of Univ. of California*, 2015 WL 13273308, at *15 (C.D. Cal. Jul. 29, 2015); *White v. Social Sec. Admin.*, 111 F. Supp. 3d 1041, 1053 (N.D. Cal. 2015). Courts agree that collection or dissemination of identifiers like one's browsing activity, even when collected or disseminated surreptitiously, is not enough to meet the exacting "highly offensive" standard. *See In re iPhone Application Litig.*, 844 F. Supp. 2d at 1063 (dismissing claims that defendants disclosed the "unique device identifier number, personal data, and geolocation information from Plaintiffs' iDevices"); *Yunker v. Pandora Media, Inc.*, 2013 WL 1282980, at *14-15 (N.D. Cal. Mar. 26, 2013) (dismissing allegations that defendant obtained and disseminated plaintiff's PII in violation of defendant's

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

privacy policy). Indeed, courts agree disclosing a user's ID and URLs of pages viewed is not highly offensive (*Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012)); nor is collecting user data and browser history (*In re Google, Inc. Privacy Policy Litig.*, 58 F. Supp. 3d 968, 988 (N.D. Cal. 2014)).

Here, Plaintiff does not allege any facts plausibly showing collection or use of her data by Microsoft at all, much less a "highly offensive" use. Instead, she categorically asserts that Microsoft designed its "SDK" "to surreptitiously intercept, collect, and use" the Kaiser website user's data. Compl. ¶¶ 157, 168. But "[w]ithout more allegations as to what, if anything, [Microsoft improperly] did with this information, [plaintiff] has not plausibly alleged a serious invasion of privacy." *Gonzales*, 305 F. Supp. 3d at 1092-93. The Court should dismiss Plaintiff's constitutional and common law privacy claims with prejudice.

D. Plaintiff Fails to State a Claim for Violation of the CFAA (Count Five).

Plaintiff's CFAA claim makes no sense. The CFAA is "'an anti-hacking statute,' not 'an expansive misappropriation statute.'" *Andrews v. Sirius XM Radio Inc.*, 932 F.3d 1253, 1263 (9th Cir. 2019) (internal quotations omitted); *see also United States v. Nosal*, 676 F.3d 854, 858 (9th Cir. 2012) (noting that the CFAA was enacted to prevent computer hacking). It prohibits, in relevant part, intentionally accessing a computer without authorization and obtaining information from any "protected computer." 18 U.S.C. § 1030(a)(2)(C). In the computing context, "'access' references the act of entering a computer 'system itself' or a particular 'part of a computer system,' such as files, folders, or databases." *Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021). The statute's focus is limited "to harms caused by *computer* intrusions[.]" *Andrews*, 932 F.3d at 1263 (emphasis added). Further, Plaintiff must allege "loss to 1 or more persons during any 1-year period ... aggregating in at least $5,000 in value." 18 U.S.C. § 1030(g). Loss, under CFAA, refers to "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." *Id.* § 1030(e)(11).

Here, Plaintiff does not allege that Microsoft accessed her *computer* without her consent. Instead, her claim relates to the alleged collection of data via the Kaiser website, which is accessed through online browsers. *See, e.g.*, Compl. ¶ 181.[15] Microsoft did not "break and enter" or intrude into her computer, and Plaintiff does not and cannot allege otherwise. *See hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1196 (9th Cir. 2022) (stating the violative conduct must be analogous to breaking and entering).

Nor does Plaintiff allege a sufficient loss. Her sole alleged loss is based on "a diminution in value" of her Private Data (Compl. ¶ 182), but the Ninth Circuit has held this is insufficient. *See, e.g.*, *Andrews*, 932 F.3d at 1262 (rejecting theory that plaintiff was damaged because he lost the value of his stolen information and the opportunity to sell it); *see also Cottle v. Plaid, Inc.*, 536 F. Supp. 3d 461, 485-86 (N.D. Cal. 2021) (rejecting theory that plaintiffs lost the value of their allegedly stolen data); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 148-49 (3d Cir. 2015) (rejecting theory that plaintiffs lost the ability to sell their own private data). Although the statute refers to "loss of revenue" as a recoverable loss, that refers only to losses due to "interruption of service," which Plaintiff has not alleged. *Andrews*, 932 F.3d at 1263. Plaintiff does not and cannot plead a CFAA claim against Microsoft, requiring dismissal with prejudice.

E. Plaintiff Fails to State a Claim for Unjust Enrichment (Count Six).

In California, some courts recognize that "there is not a standalone cause of action for 'unjust enrichment.'" *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). At the very least, Plaintiff must plead facts showing (1) a benefit was received; (2) the recipient was cognizant of that benefit; and (3) the retention of the benefit, without reimbursement, would

[15] While Plaintiff claims that "Defendants intentionally accessed Plaintiff, Class Members, and Subclass Members protected computers and obtained information thereby" (Compl. ¶ 180), she provides no details about any computer of hers that Microsoft allegedly accessed, and it is clear from the remainder of the Complaint that she is concerned with data allegedly generated from the Kaiser website.

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

unjustly enrich the recipient. *Haas v. Travelex Ins. Servs. Inc.*, 555 F. Supp. 3d 970 (C.D. Cal. 2021). She must also plead that Microsoft's actions directly caused her to expend her own financial resources or caused her data to become less valuable. *Katz-Lacabe*, 2023 WL 2838118, at *10. Here, the Complaint is entirely silent as to Plaintiff's alleged loss.

Plaintiff also fails to plead that she lacks an adequate remedy at law to redress the past harms, as she must to sustain this claim. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020); *Sharma v. Volkswagen AG*, 524 F. Supp. 3d 891, 907 (N.D. Cal. 2021). To the contrary, she seeks money damages, demonstrating that legal remedies allegedly can make her whole.

Finally, an unjust enrichment claim requires Plaintiff to allege "an actionable misrepresentation or omission," but Plaintiff has alleged none. *Hammerling*, 2022 WL 17365255, at *12. For this reason, too, Plaintiff's unjust enrichment claim cannot stand.[16]

F. Plaintiff Fails to State a UCL Claim (Count Seven).

To bring a UCL claim, Plaintiff must have statutory standing, separate and apart from Article III standing. *Campbell*, 77 F. Supp. 3d at 849. Statutory standing requires allegations that, as a result of unfair competition, Plaintiff has (1) suffered an injury in fact, (2) lost money or property, and (3) the economic injury was a "result of" the unfair competition. *Id.*; *see also Gonzales*, 305 F. Supp. 3d at 1093. Plaintiff fails to meet that standard.

Plaintiff concludes she "lost consideration for provision of access to [her] private data" and suffered "diminished value of that data." Compl. ¶ 204. But even if she had pleaded supporting facts (and she did not), sharing personal information does not constitute lost money or property for UCL standing purposes. *Gonzales*, 305 F. Supp. 3d at 1093; *see also Campbell*, 77 F. Supp. 3d at 849 (courts do not consider "personal information" to be a "property interest" under the UCL);

[16] Microsoft does not concede that California law applies to Plaintiff's unjust enrichment claim under choice-of-law principles, but the same result applies here under California or Washington law because Washington law also requires pleading a cognizable loss. *Cousineau v. Microsoft Corp.*, 992 F. Supp. 2d 1116, 1130 (W.D. Wash. 2012).

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

Katz-Lacabe, 2023 WL 2838118, at *8 (noting weight of authority in the Ninth Circuit holds "the 'mere misappropriation of personal information' does not establish compensable damages").

The court in *Gonzales* found that to establish "lost money or property," a plaintiff needs to show an economic injury "such as surrendering more or acquiring less in a transaction, having a present or future property interest diminished, being deprived of money or property, or entering into a transaction costing money or property that was unnecessary." *Gonzales*, 305 F. Supp. 3d at 1093. "[N]ames, user IDs, location and other personal information" tied to a user's Uber account are not "property" under the UCL. *Id.* And personally identifiable information shared with third-party advertisers is not property under the UCL. *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 714 (N.D. Cal. 2011). This is precisely the sort of information on which Plaintiff rests her UCL claim. *See, e.g.*, Compl. ¶¶ 33-59. Because this information, even if it could be considered "personal information," is not "money or property," Plaintiff lacks standing to bring her UCL claim.

Additionally, the UCL requires a predicate statutory violation to state a claim under the "unlawful" prong. *Hammerling*, 2022 WL 17365255, at *12. Because Plaintiff's UCL claim rests on statutory claims that fail, the "unlawful" UCL claim also fails. *Kellman v. Spokeo, Inc.*, 599 F. Supp. 3d 877, 896 & n.5 (N.D. Cal. 2022). In turn, "the unfair prong of the UCL cannot survive if the claims under the other two prongs ... do not survive;" thus, Plaintiff's "unfair" claim fails as well. *Hammerling*, 2022 WL 17365255, at *12 (quotation omitted).

Finally, because the UCL does not apply extraterritorially, the Court should dismiss this claim as to any non-California residents, as the alleged conduct occurred outside of California. *See Northwest Mortgage, Inc. v. Sup. Ct.*, 72 Cal. App. 4th 214, 225 (1999).

G. Plaintiff Fails to State a Claim for Statutory Larceny (Count Eight).

Statutory larceny requires stolen property and that does not exist here. Specifically, larceny requires "that (i) property was stolen or obtained in a manner constituting theft, (ii) [Microsoft] knew the property was so stolen or obtained, and (iii) [Microsoft] received or had possession of

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

the stolen property." *Switzer v. Wood*, 35 Cal. App. 5th 116, 126 (2019); *see also* Cal. Penal Code § 496. Even if Plaintiff had alleged facts showing her personal information to be at issue, personal information does not constitute "property." *Low,* 900 F. Supp. 2d at 1030. Nor does Plaintiff plausibly allege facts showing Microsoft stole her data or took it in a manner constituting theft. The Kaiser Privacy Statement disclosed to Plaintiff that her activity on the Kaiser website would be logged and that software on the website "may collect and transmit information back to [Kaiser] *or third-party partners* about [Plaintiff's] usage." *See* Ex. C, "Site Visitor Data" (emphasis added); *see also id.* §§ 1, 4, 13.

Further, even according to Plaintiff's allegations, Kaiser—a party to any alleged communications on its website—voluntarily sent that information to Microsoft. *See People v. Romo*, 220 Cal. App. 3d 514, 517 (1990) ("It is an established principle of the law of theft that a *bona fide* belief of a right or claim to the property taken, even if mistaken, negates the element of felonious intent."). Microsoft did not steal anything, and it required Kaiser to comply with applicable privacy laws and the Microsoft Advertising Agreement when using UET on its website. Ex. A. Thus, Plaintiff cannot plead or establish criminal larceny by Microsoft. As a result, the Court should dismiss this claim with prejudice.

This claim, too, cannot be applied extraterritorially, and the Court should also dismiss this claim as to any non-California residents, as it is based on alleged conduct outside of California. *Dfinity USA Research LLC v. Bravick*, 2023 WL 2717252, at *4 (N.D. Cal. Mar. 29, 2023).

H. Plaintiff Fails to State a Claim for Conversion (Count Nine).

Plaintiff's conversion claim fails because she cannot plead that Microsoft exercised control over her "property interest." On this point, Plaintiff conflates "privacy interest" with "property interest." Again, courts have held that personal information is not property. *Low*, 900 F. Supp. 2d at 1030 ("[P]laintiffs' 'personal information' does not constitute 'property.'"); *In re iPhone Application Litig.*, 844 F. Supp. 2d at 1074-75 (same); *Thompson v. Home Depot, Inc.*, 2007 WL 2746603, at *3 (S.D. Cal. Sept. 18, 2007) (same); *In re Facebook Privacy Litig.*, 791 F. Supp. 2d

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

705, 715 (N.D. Cal. 2011) (same); *White*, 111 F. Supp. 3d at 1052 (same). Because Plaintiff's alleged personal data cannot form the basis for her conversion claim, the Court should dismiss this claim at the outset. *Low*, 900 F. Supp. 2d at 1030-31.

In addition, damages are an essential component of the conversion claim, and Plaintiff has not alleged the value of the alleged personal data or information that she asserts Microsoft converted. *Id.* at 1030. For this independent reason, her conversion claim also fails.[17]

I. The Court Should Dismiss Plaintiff's Request for Punitive Damages.

Under either California or Washington law, Plaintiff's request for punitive damages fails. To seek punitive damages in California, Plaintiff must allege facts showing Microsoft is guilty of "oppression, fraud, or malice," or "evil motive" against her. *Grieves v. Sup. Court*, 157 Cal. App. 3d 159 (1984); *Scott v. Phoenix Schools, Inc.*, 175 Cal. App. 4th 702, 716 (2009). Because Microsoft is a corporate defendant, Plaintiff must plead facts showing that an officer, director, or managing agent authorized or ratified the wrongful conduct. Cal. Civil Code § 3294(b). She pleads no such allegations, merely concluding that "[p]unitive damages are warranted because Defendants' malicious, oppressive, and willful actions were calculated to injure Plaintiff, Class Members, and Subclass Members and were made in conscious disregard of [their] rights." Compl. ¶ 161. The Court need not take this legal conclusion as true. Further, Plaintiff is a stranger to Microsoft—Plaintiff alleges she is a Kaiser customer and went to the Kaiser website, not Microsoft's. Microsoft cannot act with malice or an intent to injure Plaintiff if Microsoft does not know who she is. The same result arises under Washington law, which prohibits punitive damages unless they are expressly allowed by statute. *Pac. 5000, LLC v. Kitsap Bank*, 511 P.3d 139, 147 (Wash. Ct. App. 2022). Plaintiff does not identify any Washington statute allowing punitive damages. The Court should dismiss any punitive damages claim with prejudice.

[17] Again, Microsoft does not concede that California law applies to Plaintiff's conversion claim but assuming it did, the claim would fail.

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401

CONCLUSION

For all these reasons, Microsoft respectfully requests that the Court dismiss the Complaint under Rule 12(b)(6) with prejudice.

Dated: July 13, 2023

Respectfully submitted,

By: */s/ Patricia A. Eakes*

Patricia A. Eakes, WSBA #18888
MORGAN, LEWIS & BOCKIUS LLP
1301 Second Avenue, Suite 2800
Seattle, WA 98101
Phone: (206) 407-2200
Fax: (206) 407-2278
Email: patty.eakes@morganlewis.com

Kathryn Deal, *pro hac vice* submitted
MORGAN LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Phone: (215) 963-5000
Email: kathryn.deal@morganlewis.com

Phillip J. Wiese, *pro hac vice* submitted
MORGAN LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, CA 94105
Phone: (415) 442-1000
Email: phillip.wiese@morganlewis.com

Attorneys for Microsoft Corporation

CERTIFICATION

I certify that this memorandum contains 8,386 words, in compliance with the Local Civil Rules.

/s/ Patricia A. Eakes
Patricia A. Eakes

MORGAN, LEWIS & BOCKIUS LLP
ATTORNEYS AT LAW
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL +1.206.274.6400 FAX +1.206.274.6401