THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

Plaintiffs,

v.

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

DEFENDANTS QUALTRICS INTERNATIONAL INC. AND QUALTRICS, LLC'S MOTION TO DISMISS COMPLAINT

NOTE ON MOTION CALENDAR: August 4, 2023

ORAL ARGUMENT REQUESTED

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STATE CONSTITUTIONAL PROVISION

STATUTES

FEDERAL RULE

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Defendants Qualtrics International Inc. and Qualtrics, LLC (together, "Qualtrics"), respectfully submit this motion to dismiss Plaintiff's Complaint ("Complaint" or "Compl."), ECF No. 1, under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

Plaintiff's Complaint raises understandable concerns about nefarious companies that steal sensitive user data (like medical information) and then profit from selling or sharing that data. But her concerns do not apply to Qualtrics—as her own Complaint demonstrates.

First, Qualtrics is just a vendor whose sole purpose is to provide tools to customers like Kaiser Permanente ("Kaiser") that allow those customers to collect and analyze their own website data from their own website (like the "Kaiser Website" at issue). Qualtrics does *nothing* with this data for itself. Unlike other third-party data companies that have been the subject of recent litigation, Qualtrics does not sell user data, use the data for advertising, or use the data for its own purposes. Qualtrics' business model is selling software services, not data. Plaintiff does not and could not allege any facts showing that Qualtrics is anything other than Kaiser's vendor. Qualtrics thus stands in Kaiser's shoes for all purposes related to Kaiser customer data. It is not a third-party interloper. Courts regularly dismiss privacy actions against vendors like Qualtrics on these grounds.

Second, the Kaiser data alleged by Plaintiff is anonymous. Unlike Microsoft, Plaintiff does not allege this data contains patients' identities. Instead, as Plaintiff notes, Qualtrics assigns a randomized alphanumeric string to all Kaiser Website users. Consequently, though all of Plaintiff's claims are premised on the collection of her personal identifiable information ("PII"), she does not allege that *Qualtrics* collected anything that specifically and personally identifies Plaintiff. Because courts regularly hold that the collection of anonymized data is not an injury in fact, Plaintiff does not have standing to assert her claims. In an attempt to plead around both problems, Plaintiff resorts to group pleading, repeatedly making allegations about conduct by "Defendants." But the Defendants are differently situated, and the law treats them differently as a result.

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Third, as a Kaiser member, Plaintiff consented to the conduct about which she now complains. She cannot now turn around and sue Qualtrics for obtaining data that she agreed Kaiser could share with Qualtrics, notwithstanding her general citations to HIPAA standards and unrelated litigations.

Finally, besides these unsurmountable hurdles, Plaintiff's Complaint is replete with legal defects that are fatal to her claims. She has not identified any injury in fact and therefore does not have standing to assert her claims. She has not identified with any specificity when she used the Kaiser Website and, based on the limited allegations she does make, her claims appear untimely. She has not met the fundamental pleading requirements of her claims. And the statutes under which she sues are largely inapt and do not protect against the type of harm she alleges.

The Complaint should be dismissed with prejudice under Rules 12(b)(1) and 12(b)(6).

STATEMENT OF FACTS

A. Qualtrics

Qualtrics is a software company that provides software data tools to other companies. Compl. ¶ 9. One tool it offers is "Website Feedback," which allows companies to collect data through surveys about how their users interact with and experience the companies' websites.[1] Customers can choose which website interactions or types of visitors will trigger a survey using the "Site Intercept" feature of the tool.[2] The Site Intercept function does not "intercept" anything other than the attention of a website visitor to direct them to take the survey. It is simply a set of rules that determine when the "submit feedback" or "take survey" buttons will appear to users. The Qualtrics customer, not Qualtrics, solely determines what data to collect through the survey and how it will be used.[3]

[1] *See* Ex. 1. All references to "Ex." correspond to the exhibits submitted with the Declaration of Sophia M. Mancall-Bitel, filed concurrently herewith.

[2] *See* Ex. 2.

[3] *Id*. at 3.

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Qualtrics does not use the data customers collect for advertising or any of its own purposes. *Compare* Compl. ¶ 9 ("Qualtrics offers a cloud-based subscription software platform for 'experience management' for other organizations.") *with id.* ¶ 8 ("Among Microsoft's various business segments is its Search and News Advertising Business, which 'is designed to deliver relevant search, native, and display advertising to a global audience.'"). Nor does Qualtrics sell customer data to third parties, and Plaintiff certainly could not make such an allegation.

B. Kaiser Permanente and the Kaiser Website

Kaiser is a collection of hospitals and other medical service providers. Compl. ¶ 28. Kaiser operates the Kaiser Website, where visitors can search for general medical information. *Id.* ¶¶ 76, 79, 82, 85. Kaiser members also have access to personalized pages pertaining to their own prescriptions, medical conditions, vaccination records, and allergies. *Id.* Those personalized pages include hyperlinks to publicly available pages with more information on those prescriptions, conditions, vaccines, and allergies. *Id.*

To access those personalized pages, a member must sign in and expressly agree that "By signing in, you agree to [Kaiser's] Terms & Conditions and Privacy Statement."[4] Kaiser's Privacy Statement tells users exactly what data collection occurs with the use of Qualtrics' tools: (1) Kaiser and its "service providers" may use data collection technologies to make the Kaiser Website "more helpful and efficient"; and (2) Kaiser may "disclose your personal information to third parties who provide services on our behalf to help with our business activities."[5] With respect to the latter disclosure, Kaiser explains that service providers "are not allowed to use your personal information they receive from us for any other purpose." Ex. 4 at 8.

[4] Ex. 3.

[5] *See* Ex. 4 at 4, 8.

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C. Kaiser's Use of Qualtrics' Software

Kaiser is a Qualtrics customer and has incorporated Qualtrics' software into its website. Compl. ¶ 60. Plaintiff alleges that through this software, Kaiser collects certain user data from the Kaiser Website. *Id.* ¶ 66. According to Plaintiff, this is a multi-step process. *Id.*

First, per Plaintiff, Qualtrics' software assigns several unique user identifiers to each website user (in reality, all users of the Kaiser Website are assigned the *same* alphanumeric label, not individual labels). *Id.* ¶¶ 61–63. Those identifiers do not actually reveal the identity of an individual, but are just anonymous alphanumeric labels. *Id.* None of those labels includes the user's name or other personally identifying information. *See id.* Nor does Plaintiff allege that Qualtrics can use the data to identify users by name. *See id.* Second, the software enables customers to analyze data about what users are doing on the Kaiser Website. *Id.* ¶¶ 66, 68, 71. At this point, Plaintiff alleges that Qualtrics can match certain user data to the alphanumeric strings assigned to website users. *Id.* ¶ 66.

Plaintiff alleges that via the Site Intercept software, Kaiser collects three types of data during step two: (1) information about the type of browser the user is using ("user agent information"); (2) the URLs of certain pages on the Kaiser Website that a user visits (including the URLs of videos the user visits), and (3) search terms that users enter on the Kaiser Website's search bar. Compl. ¶¶ 65, 68, 71, 74. She alleges that via the same software, Kaiser shares that data with Qualtrics. *Id.* ¶ 66.

D. Plaintiff and the Complaint

Plaintiff Jane Doe has been a Kaiser member for "at least 10 years." Compl. ¶¶ 7, 105. She has used the Kaiser Website "throughout" that period to search for information, interact with Kaiser, and access her own medical records. *Id.* Because she is a Kaiser member, Plaintiff consented to Kaiser's Privacy Statement every time she logged into the Kaiser Website.

Plaintiff filed her Complaint against Qualtrics and Microsoft in May 2023. She alleges that both Qualtrics and Microsoft collected her data when she used the Kaiser Website. Compl. ¶ 7. Unlike Qualtrics, Plaintiff alleges that Microsoft collects website users' real names. *Id.* ¶¶ 35, 36.

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She also alleges that Microsoft—again unlike Qualtrics—has a line of business devoted to advertising. *Id.* ¶ 8.

Plaintiff's Complaint, filed on behalf of a putative class, asserts nine causes of action: two claims under the California Invasion of Privacy Act ("CIPA"), a privacy claim under the California Constitution, intrusion upon seclusion, violation of the federal Computer Fraud and Abuse Act ("CFAA"), unjust enrichment, violation of California's Unfair Competition Law ("UCL"), statutory larceny, and conversion. Compl. ¶¶ 127–210.

ARGUMENT

I. THE COMPLAINT MUST BE DISMISSED FOR LACK OF STANDING.

As a threshold matter, Plaintiff lacks standing under Article III because she has not pleaded any injury in fact. Federal courts are courts of limited jurisdiction. Without standing, Plaintiff's suit "is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F. 3d 1169, 1174 (9th Cir. 2004). To properly assert "the irreducible constitutional minimum" of Article III standing, a plaintiff must have suffered an injury in fact that is fairly traceable to defendant's challenged conduct, and that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "The party seeking to invoke the court's jurisdiction bears the burden of establishing that jurisdiction exists." *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986).

"To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo*, 578 U.S. at 339. Even where a defendant has violated a right, a court must "independently decide whether a plaintiff has suffered a concrete harm under Article III." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021). While "Article III grants federal courts the power to redress harms that defendants cause plaintiffs," it is "not a freewheeling power to hold defendants accountable for legal infractions." *Id.* (citation omitted).

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A. Plaintiff's Improper "Group" Pleading Fails to Trace Her Alleged Injuries to Qualtrics.

The crux of each of Plaintiff's claims is that "Defendants" collected her personal health information ("PHI") and PII, and that this caused her harm. Compl. ¶¶ 128, 131-36, 144-48, 152-161, 164-173, 181-83, 186-89, 194-204, 208-09, 212-14. A complaint must contain "clear and concise averments stating which defendants are liable to plaintiffs for which wrongs, based on the evidence." *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996); *see also Hummel v. Nw. Tr. Servs.*, 2015 WL 4508823, at *7 (W.D. Wash. July 24, 2015) (a complaint may not refer to "'Defendants' generically and must specify which Defendant or Defendants are responsible for each of [plaintiff's] allegations of wrongdoing"). Because Plaintiff relies on group allegations and does not allege which conduct is traceable to Qualtrics, she cannot demonstrate standing (or state a claim). *See Boone v. Ruby*, 2021 WL 3418645, at *2 (E.D. Cal. Aug. 5, 2021) ("[A] complaint must be dismissed [if] it fails to state clearly which defendants are liable to plaintiffs for which wrongs.").

B. There Is No Injury-in-Fact from Collection of Anonymized Data.

In marked contrast to these inadequate group allegations, Plaintiff's specific fact allegations demonstrate that the data at issue was anonymized data. Compl. ¶¶ 60-65. Plaintiff alleges that Qualtrics' software uses alphanumeric labels that are tied to certain website activities, including URLs resulting from clicking on various hyperlinks and search terms. *Id.* ¶¶ 68-87. But she never alleges—nor could she allege—that these identifiers or information are tied to her name, phone number, email address, or other personal information. Instead, in an attempt to shoehorn Qualtrics into claims against Microsoft, Plaintiff relies on her allegation that Microsoft collects the names of Kaiser members, which it allegedly connects to the unique identifiers attached to users' data. *Id*. ¶¶ 35-36. Although Plaintiff asserts that Qualtrics can link specific users' identifiers with their search terms and certain URL addresses, *id*. ¶¶ 60-87, she never alleges this is anything other than anonymized identifiers, i.e., *deidentified data*. Unlike Microsoft, she never alleges that

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Qualtrics does anything independently with this information, whether it be marketing, advertising, or aggregating the data for any reason—nor could she make such an allegation.

These distinguishing facts are fatal to her claims against Qualtrics because collecting anonymous data does not give rise to an injury in fact. Plaintiff has no standing to assert her privacy claims (CIPA §§ 631, 632 (Claims I-II); constitutional invasion of privacy (Claim III); intrusion upon seclusion (Claim IV)) because a plaintiff whose collected data is anonymized has not suffered an injury in fact for purposes of a privacy-based claim.

Controlling California authority holds that a person's privacy interests are not impaired by the collection of anonymous data. *Sander v. State Bar of Cal.*, 58 Cal. 4th 300, 311, 314 P.3d 488 (2013) ("If the applicant cannot be identified, disclosure of information does not impair his or her privacy interests"); *Cnty. of L.A. v. Super. Ct.*, 65 Cal. App. 5th 621, 648-50, 280 Cal. Rptr. 3d 85 (2021) ("[P]atients have no privacy interest in data that does *not* contain personally identifiable information."). Consequently, federal courts lack Article III jurisdiction to entertain state-law privacy claims based on the alleged collection of anonymous data. *See Cahen v. Toyota Motor Corp.*, 717 F. App'x 720, 724 (9th Cir. 2017) (collection of "non-individually identifiable" data insufficient to "cause an actual injury" under Article III); *Byars v. Sterling Jewelers, Inc.*, 2023 WL 2996686, at *3 (C.D. Cal. Apr. 5, 2023) (dismissing CIPA claims for lack of standing because Plaintiff did "not allege that she disclosed any sensitive information to Defendant, much less identify any specific personal information she disclosed that implicates a protectable privacy interest"); *I.C. v. Zynga, Inc.*, 2022 WL 2252636, at *1049 (N.D. Cal. Apr. 29, 2022) (similar); *Low v. LinkedIn Corp.*, 2011 WL 5509848, at *4 (N.D. Cal. Nov. 11, 2011) (similar); *London v. New Albertson's, Inc.*, 2008 WL 4492642, at *8 (S.D. Cal. Sep. 30, 2008) (similar); *Massie v. GM LLC*, 2022 WL 534468, at *5 (D. Del. Feb. 17, 2022) (similar).

Because Kaiser at most collected anonymized data using Qualtrics' Software, Plaintiff does not have standing to assert any privacy claims. Her first four claims must therefore be dismissed with prejudice.

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C. Plaintiff Lacks Standing to Assert a CFAA, Unjust Enrichment, UCL, Statutory Larceny, or Conversion Claim Because She Has Not Alleged Any Economic Loss.

Plaintiff also lacks standing to assert CFAA (Claim V), unjust enrichment (Claim VI), UCL (Claim VII), statutory larceny (Claim VIII), or conversion (Claim IX) claims because she cannot plead any economic damages or loss.[6]

Plaintiff's alleged injuries under these claims[7] are based on a conclusory allegation that Defendants diminished the value of her private data, PHI, and PII by accessing her data without authorization. Compl. ¶¶ 103, 182, 204. But even if Qualtrics did have access to Plaintiff's personal information (it did not), Plaintiff failed to allege an injury to her personal data from diminished value. The Ninth Circuit recently held that it is not enough to provide studies claiming that "personal information may have value in general"—a plaintiff must "adequately allege that *her* personal information actually lost value." *Pruchnicki v. Envision Healthcare Corp.*, 845 F. App'x 613, 614-15 (9th Cir. 2021). To do this, "[a] plaintiff must establish the existence of a market for the personal information and an impairment of the ability to participate in that market" caused by the defendant's conduct. *Gardiner v. Walmart, Inc.*, 2021 WL 4992539, at *3 (N.D. Cal. July 28, 2021).

Plaintiff has not alleged a single fact supporting the notion that Qualtrics' use of her data diminished its value—nor could she, because Qualtrics does not buy or sell user data. She has not

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[6] *See* 18 U.S.C. § 1030(c)(4)(A)(i)(I) (CFAA requires "loss to 1 or more persons during any 1-year period … aggregating at least $5,000 in value"); *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 600 (9th Cir. 2020) (for unjust enrichment standing, Plaintiff must plead entitlement to unjustly earned profits); Cal. Bus. & Prof. Code § 17204 (UCL requires Plaintiff to show she "has suffered injury in fact and has lost money or property as a result of the unfair competition"); *see also Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 323, 246 P.3d 877 (2011) (UCL standing requires plaintiff to "demonstrate some form of economic injury"); Cal. Penal Code § 496(c) (statutory larceny requires plaintiff to prove damages to assert a private right of action); *Kremen v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003) (conversion requires showing "ownership or right to possession of property, wrongful disposition of the property right[,] and damages.").

[7] Plaintiff does not plead *any* damages with respect to her statutory larceny claim, which is required to state a private cause of action. Cal. Penal Code § 496(c).

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alleged that she has been "unable to sell, profit from, or monetize" her personal information. *Id.* (rejecting argument that plaintiff need not establish that he intended to sell his information because a monetary value could be assigned to it). Plaintiff actually claims the opposite: "Market exchanges have sprung up where individual users like Plaintiff herein can sell or monetize their own data." Compl. ¶ 94. Plaintiff never alleges that Qualtrics somehow precluded her from selling or monetizing her data in these exchanges or otherwise caused her data to lose value. She has not alleged that Qualtrics sells her data at all (and it does not). She has not even alleged that she intends to sell her personal data, let alone that she tried to do so and was unsuccessful. Thus, Plaintiff has suffered no injury and lacks standing to assert these claims. *See Moore v. Centrelake Med. Grp.*, 83 Cal. App. 5th 515, 538-40, 299 Cal. Rptr. 3d 544 (2022) ("We need not accept as true appellants' allegation that they suffered '[a]scertainable losses in the form of deprivation of the value of their PII,' as this constitutes a conclusion or deduction, unsupported by any properly pled facts.").

The fifth through ninth claims must be dismissed with prejudice.

II. THE COMPLAINT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Rule 12(b)(6) requires dismissal where a complaint fails to allege sufficient facts "to state a claim to relief that is plausible on its face" and presents nothing more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements[.]" *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007) (similar). A claim is factually plausible when a plaintiff "pleads factual content" allowing the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Freeze v. McDermott*, 2023 WL 3599585, at *4 (W.D. Wash. May 23, 2023). Courts need not credit mere "conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.* (citation omitted). Nor must courts accept as true "allegations that contradict matters properly subject to judicial notice." *Id.*

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A. Plaintiff's Failure to Plead *When* She Used the Kaiser Website Is Fatal Under Rule 8.

Plaintiff fails to plead a fundamental fact: *when* she used the Kaiser Website and thus allegedly had her data collected by Qualtrics. Plaintiff's failure runs afoul of Rule 8, which requires a plaintiff to provide "fair notice of what the … claim is and the grounds upon which it rests." *Bell Atl.*, 550 U.S. at 555 (citation omitted).

A complaint that does not identify when the purported harm occurred does not give fair notice of the basis for a claim. Consequently, "[c]ourts often dismiss claims under Rule 8 when plaintiffs fail to allege approximately when the actionable misconduct occurred." *Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 135 (N.D. Cal. 2020) (dismissing CIPA and CFAA claims where plaintiffs failed to allege when data was collected); *see also Martin v. Sephora USA, Inc.*, 2023 WL 2717636, at *6 (E.D. Cal. Mar. 30, 2023) (dismissing CIPA claims because plaintiff pleaded only that the misconduct occurred "within the past year"). Doing so is appropriate where a defendant raises a non-frivolous statute of limitations argument. *Brodsky*, 445 F. Supp. 3d at 135; *see also Xinhua v. Oath Holdings, Inc.*, 536 F. Supp. 3d 535, 558 (N.D. Cal. 2021). The limitations period for Plaintiff's claims are not long. Plaintiff's CIPA claims are subject to a one-year limitation. *See* Cal. Code Civ. Proc. §§ 312, 340(a). The longest limit available to Plaintiff is only four years.[8] And Plaintiff's tolling allegations, Compl. ¶¶ 106–13, rely entirely on improper group allegations about unspecified "Defendants" that must be disregarded. *See Corazon v. Aurora Loan Servs. LLC*, 2011 WL 1740099, at *4 (N.D. Cal. May 5, 2011). Qualtrics may well have a viable defense on these grounds.

[8] *See* Cal. Code Civ. Proc. §§ 312, 340(a) (CIPA one year); 18 U.S.C. § 1030(g) (CFAA two years); Cal. Code Civ. Proc. § 339(1) (unjust enrichment two years); *Hart v. TWC Prod. & Tech. LLC*, 526 F. Supp. 3d 592, 598 (N.D. Cal. 2021) (constitutional and common law privacy two years); Cal. Bus. & Prof. Code § 17208 (UCL four years); Cal. Code Civ. Proc. § 338(c) (for statutory larceny, three years); *OC Kickboxing & Mixed Martial Arts v. Warrior Arts All., Inc.*, 2019 WL 3210093, at *4 (C.D. Cal. May 3, 2019) (conversion two years).

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The closest Plaintiff gets to identifying a relevant date is her allegation that she has been a Kaiser member for "at least 10 years" and "has used the Kaiser Website throughout her membership." Compl. ¶¶ 7, 105. She does not identify when she first used the Kaiser Website, when she last used it, how many times she has used it during her decade-plus Kaiser membership, or any other information that could help Qualtrics and the Court determine whether she has a basis for relief. Accordingly, the Complaint should be dismissed.

B. Plaintiff's Claims Must Be Dismissed Because She Consented to Qualtrics' Collection of Her Data.

It is a fundamental tenet of the law that "no wrong is done to one who consents." *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 26, 26 Cal. Rptr. 2d 834 (1994).

Plaintiff alleges that "while logged into" her Kaiser Website account, she undertook certain activity, such as searching the website, reviewing information, and accessing her own records. Compl. ¶ 7. And when a user is logged into the Kaiser Website, they can navigate from their personal health record page directly to pages on conditions, prescriptions, allergies, and immunizations. *Id.* ¶¶ 76, 79, 82, 85. Plaintiff alleges that because Qualtrics can see that users navigated from a link on their personal health page to those informational pages, Qualtrics "is aware that the user is a Kaiser Member and that the user suffers from the medical condition," uses the prescription medication, has the allergy, or has gotten the immunization. *Id.* Plaintiff does not suggest that Qualtrics can know the same type of information about a Kaiser Website user who is not logged in (and does not navigate to the informational pages directly from a personal health record page). Therefore, Plaintiff's claims hinge on a user—like her—being logged in.

On the log-in page, the Kaiser Website advises users that by logging in, they accept Kaiser's Terms & Conditions and Privacy Statement.[9] The Privacy Policy informs users that Kaiser may "disclose your personal information to third parties who provide services on our behalf to help with our business activities," Ex. 4 at 8, and that Kaiser and its "service providers may

[9] Ex. 3.

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place Internet 'cookies' or similar technologies … on the computer hard drives of visitors to the Site," *id*. at 4. Therefore, any logged-in user has consented to those things. They are also precisely what Plaintiff alleges happened here: Kaiser collected data via "unique user identifiers and cookies" and provided that data to a service provider (Qualtrics).

Because Plaintiff's pleading and the Kaiser Website (which the Complaint incorporates by reference) demonstrate that Plaintiff consented to her data collection on the Kaiser Website, she cannot state any of her claims. *See* Cal. Penal Code § 631(a) (prohibiting wiretapping "without the consent of all parties to the communication"); *id.* § 632 (prohibiting recording of confidential conversations "without the consent of all parties"); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993) (consent is an "absolute defense" to privacy claims); 18 U.S.C. § 1030(a)(2) (CFAA prohibits access "without authorization"); *Calhoun v. Google, LLC*, 2022 WL 18107184, at *8 (N.D. Cal. Dec. 12, 2022) (consent is a defense to UCL and statutory larceny claims), *appeal filed*, No. 22-16993 (9th Cir. Dec. 20, 2022); *People v. Brock*, 143 Cal. App. 4th 1266, 1275, 49 Cal. Rptr. 3d 879 (2006) (consent is a defense to conversion).

Accordingly, all claims against Qualtrics should be dismissed.

C. Plaintiff Fails to State Any Privacy Claim Against Qualtrics.

Plaintiff asserts violations of her right to privacy under: (1) CIPA §§ 631(a) and 632, (2) Article I, § 1 of the California Constitution, and (3) California common law right to privacy (intrusion upon seclusion).

i. Plaintiff Fails to State a CIPA § 631 Claim.

Plaintiff's Complaint demonstrates that Qualtrics was acting as an extension of Kaiser when it collected her data, so it was not an eavesdropper under Section 631.

Plaintiff alleges that Qualtrics violated Section 631 in two ways: (1) willfully and in an unauthorized manner attempting to learn the contents or meaning of a communication in transit over a wire, and (2) attempting to use or communicate information obtained as a result of improper wiretapping. Compl. ¶¶ 128, 131; *see also Mastel v. Miniclip SA,* 549 F. Supp. 3d 1129, 1134 (E.D. Cal. 2021) (identifying patterns of conduct prohibited by Section 631); Cal. Penal Code § 631(a).

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Both prongs require a third-party eavesdropper. *In re Facebook Tracking*, 956 F.3d at 607 (Section 631 prohibits "eavesdropping by a third party." (citation omitted).

"Parties to a conversation cannot eavesdrop on their own conversation." *Williams v. What If Holdings, LLC*, 2022 WL 17869275, at *2 (N.D. Cal. Dec. 22, 2022), *appeal filed*, No. 23-15337 (9th Cir. Mar. 7, 2023); *see also Ribas v. Clark*, 38 Cal. 3d 355, 359, 212 Cal. Rptr. 143 (1985); *Rogers v. Ulrich*, 52 Cal. App. 3d 894, 899, 125 Cal. Rptr. 306 (1975). Where software providers are merely an "extension" or "tool" of the website that employs them, they fall within this party exception. This inquiry turns on whether the provider is alleged to have used the data for its own purposes, and not for the sole benefit of the party to the communication. *See, e.g.*, *Graham v. Noom*, 533 F. Supp. 3d 823, 831 (N.D. Cal. 2021); *Johnson v. Blue Nile, Inc.*, 2021 WL 1312771, at *2 (N.D. Cal. Apr. 8, 2021); *Williams*, 2022 WL 17869275, at *2; *Byars v. Hot Topic, Inc.*, 2023 WL 2026994, at *10 (C.D. Cal. Feb. 14, 2023); *Licea v. Am. Eagle Outfitters, Inc.*, 2023 WL 2469630, at *7-8 (C.D. Cal. Mar. 7, 2023).[10]

Graham involved a website software vendor that would "capture and analyze data so that the clients can see how visitors are using their websites. The clients put [the vendor's] code on their websites to capture the data, and then they can review the data, which is stored in the cloud on [the vendor's] servers." 533 F. Supp. 3d at 828. The court distinguished vendors such as Facebook that "aggregate[e] data for resale" or otherwise "intercept[] and use[] the data itself." *Id.* at 832; *see also Revitch v. New Moosejaw, LLC*, 2019 WL 5485330, at *1 (N.D. Cal. Oct. 23, 2019) (tool exception did not apply to vendor that captured users' data, de-anonymized it, and matched it with other databases, allowing it to create marketing databases of identified website visitors). When a vendor's sole purpose is to allow a website "to record and analyze its own data

[10] While there is a dissenting line of cases holding that such providers are third parties for purposes of Section 631, these cases represent a small minority of cases on the topic and would essentially prohibit any service-as-a-software (SaaS) activity. *See, e.g.*, *Javier v. Assurance IQ, LLC*, 2023 WL 114225 (N.D. Cal. Jan. 5, 2023); *Yoon v. Lululemon USA, Inc.*, 549 F. Supp. 3d 1073 (C.D. Cal. 2021). These holdings should not be followed.

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in aid of [the website's] business," the vendor is a "tool" and "not a third-party eavesdropper." *Graham*, 533 F. Supp. 3d at 832-33.

Just like the defendant in *Graham*, Qualtrics does not use Kaiser user data for any purpose; it simply provides tools for Kaiser to analyze its user data. Plaintiff concedes this, admitting that Qualtrics offers a subscription software platform "for 'experience management' *for other organizations*." Compl. ¶ 9 (emphasis added). Plaintiff does not assert a single fact suggesting that Qualtrics sells the data. Nor does she allege that Qualtrics uses the data for targeted advertising. At most, she makes a generalized allegation about "revenues and profits resulting from targeted advertising and other uses of such data by Defendants." *Id.* ¶ 186. As explained above, this group allegation must be disregarded. *See Corazon*, 2011 WL 1740099, at *4.

Plaintiff's Section 631 claim must be dismissed because Qualtrics is an extension of Kaiser for purposes of its data collection on the Kaiser Website.

ii. Plaintiff Fails to State a CIPA § 632 Claim.

CIPA Section 632 penalizes someone who "intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication[.]" Cal. Penal Code § 632.

Qualtrics did not use the device. Per the statutory language, only the party that "uses" the device can be liable under Section 632. Here, it is Kaiser—not Qualtrics—that "uses" the recording device (Qualtrics' software) to provide better service to its website users. Plaintiff concedes this, alleging that Kaiser "incorporates [Qualtrics' software] into the Kaiser Website." Compl. ¶ 60. She also alleges that Qualtrics' code is "implemented on the Kaiser Website"—a website that she does not allege Qualtrics is the webmaster for or otherwise controls. *Id.* ¶¶ 5, 30. These allegations betray a fundamental fact: Kaiser is the one that added Qualtrics' software to its site and configured

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it to collect user information.[11] Kaiser is the one that "used" the device, so Qualtrics cannot be liable under Section 632.

Qualtrics did not intend to record confidential communications without consent. By its terms, Section 632 only prohibits intentional recording of confidential communications. *See* Cal. Penal Code § 632(a). "[D]eploying recording devices that *might happen* to record a confidential communication" without consent is not sufficient to establish intent under CIPA. *See Lozano v. City of L.A.*, 73 Cal. App. 5th 711, 728, 288 Cal. Rptr. 3d 674, 688 (2022). For this reason, creating and selling a tool that customers can use to collect data from others cannot be the basis for a Section 632 claim. For example, in *Federated Univ. Police Officers' Ass'n v. Regents of the Univ. of Cal.*, plaintiffs filed CIPA and common law invasion of privacy claims against a company that installed and maintained recording devices in a police department. 2015 WL 13273308, at *1 (C.D. Cal. July 29, 2015). Plaintiffs alleged that the company "installed the listening devices to record private communications without Plaintiffs' knowledge or consent and was 'a direct participant in the audio recording scheme.'" *Id.* The court dismissed the claims because nothing in the complaint "suggest[ed] that [the company] acted as anything other than a seller and installer … or acted intentionally in eavesdropping on/recording Plaintiffs' confidential communications." *Id.* at *6-7, 10, 16. Just as selling and installing recording devices does not violate CIPA or intrude on an individual's privacy, *see id.*, creating a customer feedback tool for customers (like Kaiser) to choose where and how to install does not establish intent to record confidential communications. For this reason, too, Plaintiff's Section 632 claim must be dismissed.

iii. Plaintiff Fails to State a Constitutional Right to Privacy Violation.

To state a privacy claim under California's Constitution, a plaintiff must plead facts demonstrating that "(1) they possess a legally protected privacy interest, (2) they maintain a

[11] In a pending action against Kaiser in California based on Kaiser's purported data-sharing with third parties, those plaintiffs plainly allege that Kaiser installed third-party code on its website to collect user data. *See Doe v. Kaiser Found. Health Plan, Inc.*, No. 3:23-cv-02865-EMC (N.D. Cal. June 9, 2023), Dkt. No. 1, ¶¶ 4–5. Plaintiff acknowledges an earlier version of this lawsuit that was voluntarily dismissed. Compl. at 32 n.19.

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reasonable expectation of privacy, and (3) the intrusion is 'so serious … as to constitute an egregious breach of social norms' such that the breach is highly offensive." *In re Facebook Tracking*, 956 F.3d at 601. This is a high bar. *McCoy v. Alphabet, Inc.*, 2021 WL 405816, at *8 (N.D. Cal. Feb. 2, 2021). Plaintiff has not met it.

1. No Legally Protected Privacy Interest

First, because Qualtrics is merely an extension of Kaiser, this claim fails. *See* Section II.C.i; *see also, e.g.*, *Graham*, 533 F. Supp. 3d at 836 (dismissing constitutional privacy claim because defendant was a "tool" of the website).

Plaintiff fails to establish a legally protected interest for another reason: courts are generally unwilling to find a legally protected privacy interest where defendant has only collected browsing data from one site, as opposed to across the Internet. *See Yoon v. Lululemon USA, Inc.*, 549 F. Supp. 3d 1073, 1086 (C.D. Cal. 2021) (no legally protected privacy interest in browsing data from a single website); *see also In re Google Location Hist. Litig.*, 428 F. Supp. 3d 185, 198 (N.D. Cal. 2019) (no legally protected privacy interest where Google "only tracked and collected data during use of Google services"). Plaintiff alleges only that her data was collected while using the Kaiser Website. She does not allege that Qualtrics tracked her activity across the Internet. And while Plaintiff makes conclusory allegations that the data collected from her browsing activity includes medical information, de-identified medical information does not constitute a legally protected privacy interest. *See* Section I.B.

To determine whether a plaintiff has a reasonable expectation of privacy, courts consider whether an "objective entitlement" is present from the "customs, practices, and physical settings surrounding particular activities," as well as "advanced notice" and "the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests." *Hill*, 7 Cal. 4th at 37. Here, Plaintiff has not established a reasonable expectation of privacy because she consented to Kaiser's Privacy Policy, which disclosed that data is shared with third-party partners like Qualtrics for the reasons disclosure was made to Qualtrics. *See* Section II.B.

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2. No Highly Offensive Intrusion

In assessing whether a plaintiff has stated a privacy claim, courts undertake a "holistic consideration of factors" that include "the likelihood of serious harm to the victim" and "the degree and setting of the intrusion." *Hammerling v. Google LLC*, 615 F. Supp. 3d 1069, 1090 (N.D. Cal. 2022) (citation omitted). Based on these factors, Kaiser's collection of data through Qualtrics' software was not highly offensive.

First, Kaiser collected only anonymized data through Qualtrics' software that cannot be linked to any specific Kaiser Website user. *See* Section I.B. The collection of anonymized data is not, as a matter of law, highly offensive. *Id.*; *McCoy*, 2021 WL 405816, at *8 (dismissing privacy claims where "app activity data was not tied to any personally identifiable information, was anonymized, and was aggregated"); *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012) ("Although Plaintiffs postulate that these third parties could, through inferences, de-anonymize this data, it is not clear that anyone has actually done so, or what information, precisely, these third parties have obtained."); *Moreno v. S.F. Bay Area Rapid Transit Dist.*, 2017 WL 6387764, at *8 (N.D. Cal. Dec. 14, 2017) (dismissing constitutional privacy claim because the collection of anonymous phone identifier and location data was not highly offensive). This makes sense because the release of anonymized data presents zero likelihood of harm to the purported victim.

Second, the data collected through Qualtrics' software was merely routine and therefore not highly offensive. *See Hammerling*, 615 F. Supp. 3d at 1090–91. Collecting browser history, unique device identification numbers, personal data, and even Social Security numbers is not "highly offensive" but rather routine commercial behavior. *Id.*; *see also Low*, 900 F. Supp. 2d at 1025 (disclosure of unique user ID and browsing data was not highly offensive). Collecting website user data to improve a public platform—as Kaiser did here with Qualtrics' software—is the type of ordinary commercial behavior that does not state a claim. *See McCoy*, 2021 WL 405816, at *1, 8 (allegation that Google collected user data "to obtain lucrative behind the scenes

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technical insight that it can use to develop competing apps against its competitors" was not a highly offensive intrusion).

Third, a highly offensive intrusion requires improper *use* of the data. *See Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 993, 125 Cal. Rptr. 3d 260 (2011) (courts do not "impose liability based on the defendant obtaining unwanted access to plaintiff's private information which did not also allege that the use of plaintiff's information was highly offensive"); *Gonzales v. Uber Techs., Inc.*, 305 F. Supp. 3d 1078, 1092-93 (N.D. Cal. 2018) ("Without more allegations as to what, if anything, Uber did with [plaintiff's] information, Plaintiff has not plausibly alleged a serious invasion of privacy."); *see also Mastel v. Miniclip SA*, 549 F. Supp. 3d 1129, 1140-41 (E.D. Cal. 2021) (dismissing privacy claims where plaintiffs failed to allege that defendants "used his information for any purpose at all, much less a purpose that could plausibly constitute an egregious breach of social norms"); *Doe I v. Sutter Health*, 2021 Cal. Super. LEXIS 105307, at *27 (Oct. 14, 2021) (dismissing privacy claims against healthcare defendant where plaintiffs failed to allege a "highly offensive use" of their medical information). As explained in Section II.C.i, Qualtrics did not use the data for its own aims. It merely provided a tool for Kaiser to improve its own website.

iv. Plaintiff Fails to State an Intrusion Upon Seclusion Claim.

Courts often consider—and dismiss—intrusion upon seclusion claims alongside constitutional privacy claims because the two are highly similar. *See In re Google*, 428 F. Supp. 3d at 199 (dismissing constitutional and common-law privacy claims for the same reasons). Plaintiff's intrusion upon seclusion claim should be dismissed for the same reasons as her constitutional claim and because it requires intent, which Plaintiff has not shown. *See* Section II.C.ii.

D. Plaintiff Fails to State a CFAA Claim.

The CFAA is a criminal statute focused on deterring computer hackers, not a vendor hired to improve a company's website. For civil liability to attach, a plaintiff must allege "that the defendant violated one of the provisions of § 1030(a)(1)-(7), and that the violation involved one of the factors listed in § 1030(c)(4)(A)(1)." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1131

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(9th Cir. 2009); 18 U.S.C. § 1030(g). Here, Plaintiff pleads her claim under § 1030(a)(2)(C) and §1030(c)(4)(A)(i)(I), (IV).

i. Qualtrics Did Not Exceed Authorized Access to Kaiser's Website Under 18 U.S.C. § 1030(a)(2)(C).

Section 1030(a)(2)(C) applies when a defendant intentionally accesses a computer "without authorization" or "exceeding authorized access." *Van Buren v. United States*, 141 S. Ct. 1648, 1662, 1666 (2021); *Brodsky*, 445 F. Supp. 3d at 118. Plaintiff only alleges that Defendants' access falls under the "exceeded authorized access" prong. Compl. ¶ 180. Exceeding authorized access happens when someone "accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off limits to him." *Van Buren*, at 1662. The key question is whether *access* was unauthorized, not whether *use* was unauthorized. *Id*. (must obtain data that is off limits); *United States v. Nosal*, 676 F.3d 854, 857 (9th Cir. 2012) (CFAA is an "anti-hacking" statute and not a "misappropriation statute.").

Plaintiff never alleges that Qualtrics hacked into the Kaiser Website or accessed any files, folders, databases, or anything else on the website that Kaiser did not authorize it to access. Nor would this be a plausible allegation, as Kaiser not only authorized but purchased Qualtrics' software to improve its website and user experience.

Nor does Plaintiff allege that Defendants intended to exceed authorized access, as required for CFAA liability: "Defendants intentionally accessed Plaintiff['s] … protected computer[] and obtained information thereby, and in doing so exceeded any authority granted by Plaintiff[] … to access the protected computer[]." Compl. ¶ 180. But intent must extend to the unauthorized character of the access. See, e.g., *United States v. Thompson*, 2022 WL 5155113, at *2 (W.D. Wash. Oct. 5, 2022) ("§ 1030(a)(2)'s 'intentionality' mens rea applies to both 'accessing' the computer and doing so 'without authorization'"). Kaiser purchased Qualtrics' software and implemented that software on the Kaiser Website as it saw fit. *See* Compl. ¶ 60 ("Kaiser incorporates into the Kaiser Website Qualtrics' Experience Management Site Intercept

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software[.]"). It would be impossible for Qualtrics to intentionally exceed access without appropriate authorization.

ii. Plaintiff Cannot Establish Monetary Loss or a Threat to Public Health or Safety Under 18 U.S.C. § 1030(c)(4)(A)(i)(I), (IV).

Plaintiff alleges she meets two factors listed in § 1030(c)(4)(A)(i): "loss to 1 or more persons during any 1-year period … aggregating at least $5,000 in value," § 1030(c)(4)(A)(i)(I); and "a threat to public health or safety." § 1030(c)(4)(A)(i)(IV).

The CFAA uses a "narrow conception of 'loss.'" *Andrews v. Sirius XM Radio Inc.*, 932 F.3d 1253, 1262 (9th Cir. 2019). A mere conclusion of damage or loss is insufficient. *Synopsys, Inc. v. Ubiquiti Networks, Inc.*, 313 F. Supp. 3d 1056, 1070 (N.D. Cal. 2018). The Supreme Court recently clarified that loss is limited to "costs," including "costs caused by harm to computer data, programs, systems, or information services." *Van Buren*, 141 S. Ct. at 1659-60. In other words, the focus of loss is on "technological harms to computer data or systems." *Id.* at 1651. "Limiting …'loss' in this way makes sense in a scheme 'aimed at preventing the typical consequences of hacking.'" *Id.* at 1660 (citation omitted).

Plaintiff's diminution in value theory is not a technological harm or cost and thus not a loss this statute recognizes. Even if it did, Plaintiff has not alleged that she herself suffered $5,000 in losses; she alleges only that the entire class suffered losses "easily aggregating at least $5,000 in value." Compl. ¶ 182. Plaintiff cannot rely on harms to "millions of class members" to meet the $5,000 loss threshold. CFAA plaintiffs "must meet the damages requirement themselves, and cannot rely on absent members of their putative class." *Walsh v. Microsoft Corp.*, 63 F. Supp. 3d 1312, 1320 (W.D. Wash. 2014).

Plaintiff's alternative theory—that Qualtrics' access to her information somehow constitutes "a direct threat to public health and safety," Compl. ¶ 183—is conclusory and lacks any nexus to the allegation of exceeded authorized access, so it must be dismissed. *See GateGuard, Inc. v. Amazon.com Inc*., 2023 WL 2051739, at *4 n.3 (S.D.N.Y. Feb. 16, 2023) ("To the extent GateGuard seeks to rely on the factor concerning 'threat[s] to public health or safety,' *id.*

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§ 1030(c)(4)(A)(i)(IV), the [Complaint] lacks specific factual allegations to support that theory of CFAA liability.").

E. Plaintiff Fails to State a UCL Claim.

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice," Cal. Bus. & Prof. Code § 17200.

Under the unlawful prong, "UCL provides an independent cause of action but requires an underlying violation because '[S]ection 17200 borrows violations of other laws and treats them as unlawful practices.'" *Williams*, 2022 WL 17869275, at *4 (quoting *Davis v. HSBC Bank*, 691 F.3d 1152, 1168 (9th Cir. 2012)). Plaintiff's "unlawful" UCL claim fails because her other claims fail.

The "unfair" prong, meanwhile, fails because it "overlaps entirely with the conduct alleged in the …unlawful prong[]" and if the "unlawful" prong fails, the "unfair" prong does "not survive." *Hammerling*, 615 F. Supp. 3d at 1094. Plaintiff claims that "Defendants engaged in unfair *and* unlawful business practices by intercepting, collecting, viewing, accessing, storing, improperly using, and transmitting Plaintiff['s] … Private Data, including PHI and PII, in violation of the UCL." Compl. ¶ 194. The conduct alleged is identical.

Additionally, Plaintiff's UCL claim fails because she has not "suffered injury in fact [or] lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. To have standing to assert a UCL claim, Plaintiff must "demonstrate some form of economic injury." *See Kwikset Corp. v. Super. Ct.*, 51 Cal. App. 4th 310, 323, 246 P.3d 877 (2011). Plaintiff's sole claimed injury is Qualtrics' capture and use of her personal data. "[S]everal courts have held that the unauthorized release of 'personal information' does not constitute a loss of money or property for purposes of establishing standing under the UCL." *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 811 (N.D. Cal. 2011); *see also M.K. v. Google LLC*, 2023 WL 2671281, at *5-6 (N.D. Cal. Mar. 27, 2023) (similar). Because Plaintiff's claim is premised solely on Qualtrics' access to her personal data, she has not suffered economic injury under the UCL and has no standing to sue under it.

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Even if the release of personal data could theoretically support a UCL claim (and it cannot), Plaintiff has not pleaded a single fact demonstrating that Qualtrics' access to her data diminished its value. Plaintiff discusses at length the purported economic value of personal data *generally*. *See* Compl. ¶¶ 88-102. Based on these generalized allegations, she concludes that "[t]he unauthorized access to Plaintiff's … Private Data … has diminished the value of that Private Data." *Id*. ¶ 104. But this conclusory allegation should be given no weight. *See Ashcroft*, 556 U.S. at 678. For the reasons explained in Section I.C above, Plaintiff has not sufficiently alleged that she suffered any economic harm. Plaintiff cannot state a UCL claim.

F. Plaintiff Fails to State a Statutory Larceny Claim.

California Penal Code § 496(a) is a criminal statute that prohibits buying or receiving stolen property. Section 496(c) creates a private right of action if a plaintiff can prove damages. Thus, Plaintiff must demonstrate that: (1) her property was "stolen or obtained in a manner constituting theft," (2) Qualtrics "knew the property was so stolen or obtained," (3) Qualtrics "received or had possession of the stolen property," and (4) this caused Plaintiff damages. *Siry Inv., L.P. v. Farkhondehpour*, 13 Cal. 5th 333, 354-55, 513 P.3d 166 (2022); Cal. Penal Code § 496(a), (c).

Plaintiff alleges that Defendants' use and control over her "Private Data, including PHI and PII" constitutes theft. Qualtrics did not have access to Plaintiff's PHI or PII because it only received anonymized data. Further, Kaiser did not steal *any* data and give it to Qualtrics. Kaiser members voluntarily shared information with the Kaiser Website. Nor did Qualtrics steal the data from Kaiser—Kaiser purchased Qualtrics's software to improve its website.

Plaintiff does not even allege that she was damaged by this alleged "theft," Compl. ¶¶ 206-210, which is required to for a private right of action. *See* Cal. Penal Code § 496(c); *Siry Inv.*, 13 Cal. 5th at 354-55.

Moreover, Plaintiff fails to sufficiently plead that Qualtrics had actual knowledge that it was receiving stolen property. "[F]ailure to plead facts sufficient to establish requisite knowledge under Section 496 is fatal at the pleading stage." *LA Tech & Consulting, LLC v. Am. Express Co*.,

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2022 WL 17350939, at *4 (C.D. Cal. Nov. 28, 2022), *appeal filed*, No. 22-56221 (9th Cir. Dec. 28, 2022).

G. Plaintiff Fails to State an Unjust Enrichment Claim.

Plaintiff's unjust enrichment claim fails for at least four reasons.

First, Plaintiff fails to allege which state's common law applies to this claim and thus must be dismissed under Rule 8.

Second, assuming California law applies, "California does not recognize a separate cause of action for unjust enrichment." *Brodsky*, 445 F. Supp. 3d at 132; *see also Hill v. Roll Int'l. Corp.*, 195 Cal. App. 4th 1295, 1307, 128 Cal. Rptr. 3d 109 (2011) ("Unjust enrichment is not a cause of action, just a restitution claim."). Consequently, courts consistently dismiss standalone claims for unjust enrichment. *See, e.g.*, *Low*, 900 F. Supp. at 1031.

Third, Plaintiff has not alleged that Qualtrics defrauded or coerced Plaintiff or had any direct communication with her at all. Instead of pleading a stand-alone claim, she pleads one that is derivative of her other claims. Thus, once the Court dismisses those claims, this claim should also be dismissed. *See Sloan v. Gen. Motors LLC*, 2017 WL 3283998, at *10 (N.D. Cal. Aug. 1, 2017) (unjust enrichment claim dependent on a failed claim also fails).

Finally, Plaintiff's unjust enrichment claim fails for a separate reason: she has not established that she lacks an adequate legal remedy, as required. *See, e.g.*, *In re Apple Processor Litig.*, 2022 WL 2064975, at *11 (N.D. Cal. June 8, 2022). Because legal damages are sufficient, equitable relief is unavailable.

H. Plaintiff Fails to State a Conversion Claim.

To establish conversion, Plaintiff must show "ownership or right to possession of property, wrongful disposition of the property right[,] and damages." *Kremen v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003) (citation omitted). To establish a property right, the property must be capable of exclusive possession or control and Plaintiff must demonstrate she has a legitimate claim to exclusive possession or control. *Taylor v. Google LLC*, 2022 WL 4635969, at *3 (N.D. Cal. Sep. 30, 2022), *appeal filed*, No. 22-16654 (9th Cir. Oct. 25, 2022).

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Plaintiff's conversion claim fails because she has not asserted (nor can she) that her interest in the information Kaiser collects is capable of exclusive possession or control, nor has she established a legitimate claim to exclusivity. And for the same reasons Plaintiff cannot demonstrate damages in her other claims, she cannot do so here.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed for lack of subject matter jurisdiction and failure to state a claim.

Dated: July 10, 2023

I certify that this memorandum contains 8,328 words, in compliance with the Local Civil Rules.

Respectfully submitted,

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