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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DACIA THOMAS, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

PAPA JOHNS INTERNATIONAL, INC.,
D/B/A PAPA JOHNS,

Defendant.

Case No.: 22cv2012 DMS (MSB)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO DISMISS**

This case comes before the Court on Defendant Papa John’s International Inc.’s motion to dismiss for lack of personal jurisdiction and failure to state a claim. Plaintiff filed an opposition to the motion, and Defendant filed a reply. Both parties also filed supplemental authorities after the motion was submitted. For the reasons set out below, the Court denies Defendant’s motion to dismiss for lack of personal jurisdiction, but grants the motion to dismiss for failure to state a claim.

**I.
BACKGROUND**

Plaintiff Dacia Thomas is a California citizen and a resident of San Diego County. (First Am. Compl. (“FAC”) ¶5.) Defendant is a corporation organized under the laws of Delaware with its principal place of business in Atlanta, Georgia. (*Id.* ¶6.) Defendant’s

1 business operations are not limited to those jurisdictions, however. As most people know,
2 Defendant operates the website www.papajohns.com, as well as brick and mortar stores
3 throughout the United States, including 130 stores in California. (*Id.* ¶10.)

4 Plaintiff alleges that while in California she visited Defendant’s website to place
5 take-out and delivery orders for food. (*Id.* ¶8.) Plaintiff alleges she utilized the online
6 payment option on the website for those orders, and that the orders were fulfilled by
7 Defendant’s California-based stores either in-store or at her California residence. (*Id.* ¶46.)

8 Plaintiff alleges that Defendant embeds Session Replay Code on its website, and that
9 her interactions with Defendant’s website were captured by that Code without her
10 knowledge. According to Plaintiff,

11 Session Replay Code allows a website to capture and record nearly every
12 action a website visitor takes while visiting the website, including actions that
13 reveal the visitor’s personal or private sensitive data, sometimes even when
14 the visitor does not intend to submit the data to the website operator, or has
not finished submitting the data to the website operator.

15 (*Id.* ¶25.) Plaintiff alleges that after the Session Replay Code records the events from a
16 user’s session, “a website operator can view a visual reenactment of the user’s visit through
17 the Session Replay Provider, usually in the form of a video, meaning “[u]nlike typical
18 analytics services that provide aggregate statistics, these scripts are intended for the
19 recording and playback of individual browsing sessions.” (*Id.* ¶29.)

20 As a result of these events, Plaintiff, on behalf of herself and all others similarly
21 situated, filed the present case against Defendant alleging a claim under the Federal
22 Wiretap Act, 18 U.S.C. § 2510, et. seq., California’s Invasion of Privacy Act (“CIPA”),
23 specifically California Penal Code section 631(a), and a claim for invasion of privacy –
24 intrusion upon seclusion. After a status conference with the Court, Plaintiff filed the FAC
25 in which she realleged her CIPA and invasion of privacy claims, but withdrew her claim
26 under the Wiretap Act.

27 To support her assertion that this Court has personal jurisdiction over Defendant,
28 Plaintiff alleges:

1 a substantial part of the events and conduct giving rise to Plaintiff's claims
2 occurred in California. Further, Defendant purposefully directed its activities
3 to California, consummated transactions in California and purposefully
4 availed itself of the privilege of conducting activities in California thereby
5 invoking the benefits and protections of California law. Specifically, Plaintiff,
6 while in California, accessed and viewed the www.papajohns.com website
7 and placed and paid for orders for take-out and/or delivery of food from Papa
8 Johns' brick and mortar stores located in California. Further, Plaintiff paid
9 for the delivery and/or take-out orders through the www.papajohns.com
10 website.

11 (FAC ¶8.) The FAC goes on to allege:

12 Defendant knew that its practices would directly result in the collection of
13 information from California citizens while those citizens browse, and place
14 delivery and/or take-out orders on, www.papajohns.com. Defendant chose to
15 avail itself of the business opportunities of marketing and selling its goods and
16 services in California and collecting real-time data from website visit sessions
17 initiated by Plaintiff while located in California, and the claims alleged herein
18 arise from those activities.

19 (*Id.* ¶9.) Plaintiff also alleges Defendant:

20 knows that many users visit and interact with Papa Johns' websites while they
21 are physically present in California. Both desktop and mobile versions of
22 Papa Johns' website allow a user to search for nearby stores by providing the
23 user's 'current location,' as furnished by the location-determining tools of the
24 user's device or by the user's IP address (i.e., without requiring the user to
25 manually input an address). Through its website, www.papajohns.com, Papa
26 Johns represents that it has in excess of 130 stores in California. Each Papa
27 Johns retail store location takes delivery and take-out orders via the website
28 in addition to allowing the viewing of their menu.

(*Id.* ¶10.) In response to the FAC, Defendant filed the present motion.

II.

DISCUSSION

In the present motion, Defendant seeks dismissal of this action for lack of personal jurisdiction and failure to state a claim. Plaintiff responds that Defendant is subject to both general jurisdiction and specific jurisdiction in this Court. She also argues her claims are pleaded sufficiently.

1 **A. Personal Jurisdiction**

2 On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden
3 “to establish the district court’s personal jurisdiction over the defendant.” *Harris Rutsky*
4 *& Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1128-29 (9th Cir. 2003).
5 When the court rules on a motion to dismiss without first holding an evidentiary hearing,
6 “the plaintiff need only make a prima facie showing of jurisdiction to avoid the defendant’s
7 motion to dismiss.” *Id.* at 1129 (citing *Doe, I v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir.
8 2001) (per curiam)). “Unless directly contravened, [plaintiff’s] version of the facts is taken
9 as true, and ‘conflicts between the facts contained in the parties’ affidavits must be resolved
10 in [the plaintiff’s] favor for purposes of deciding whether a prima facie case for personal
11 jurisdiction exists.” *Id.* (quoting *Doe, I*, 248 F.3d at 922). Because “California’s long-
12 arm statute allows courts to exercise personal jurisdiction over defendants to the extent
13 permitted by the Due Process Clause of the United States Constitution[,]” this Court “‘need
14 only determine whether personal jurisdiction in this case would meet the requirements of
15 due process.’” *Id.* (citations omitted). “For a court to exercise personal jurisdiction over a
16 nonresident defendant, that defendant must have at least ‘minimum contacts’ with the
17 relevant forum such that the exercise of jurisdiction ‘does not offend traditional notions of
18 fair play and substantial justice.’” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d
19 797, 801 (9th Cir. 2004) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316
20 (1945)).

21 1. General Jurisdiction

22 As stated above, Plaintiff asserts the Court may properly exercise both general and
23 specific jurisdiction over Defendant. In *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014),
24 the Supreme Court “explained, ‘[a] court may assert general jurisdiction over foreign
25 (sister-state or foreign-country) corporations to hear any and all claims against them when
26 their affiliations with the State are so ‘continuous and systematic’ as to render them
27 essentially at home in the forum State.’” (quoting *Goodyear Dunlop Tires Operations, S.A.*
28 *v. Brown*, 564 U.S. 915, 919 (2011)). A corporation’s place of incorporation and principal

1 place of business are paradigm bases for finding a corporation “at home” in the forum state.
2 *Goodyear*, 564 U.S. at 924.

3 Here, Defendant is neither incorporated in nor has its principal place of business in
4 California. Rather, Defendant is incorporated in Delaware, and its principal place of
5 business is in Georgia. (FAC ¶6.) The paradigm bases for finding general jurisdiction are,
6 therefore, not present in this case.

7 Instead, Plaintiff argues Defendant is subject to general jurisdiction because it
8 operates “in excess of 130 stores in California”, (*id.* ¶10), and through those stores,
9 “employs California residents, provides services and products to California residents and
10 is subject to California’s laws and regulations.” (Mem. in Opp’n to Mot. at 6.) Notably,
11 Plaintiff fails to cite any case law to support its arguments that these factors are sufficient
12 for a court to exercise general jurisdiction over a defendant. Indeed, such a finding would
13 contravene the Supreme Court’s statement that “[a] corporation that operates in many
14 places can scarcely be deemed at home in all of them.” *Daimler*, 571 U.S. at 139 n.20.

15 Plaintiff’s unsupported argument does not show that Defendant is “at home” in
16 California. Accordingly, the Court declines to find it has general jurisdiction over
17 Defendant on the present record.

18 2. Specific Jurisdiction

19 Absent a showing of general jurisdiction, Plaintiff must show Defendant is subject
20 to specific jurisdiction in this Court. The Ninth Circuit has established a three-prong test
21 for determining whether a party is subject to specific personal jurisdiction:

22 “(1) The non-resident defendant must purposefully direct his activities or
23 consummate some transaction with the forum or resident thereof; or perform
24 some act by which he purposefully avails himself of the privilege of
25 conducting activities in the forum, thereby invoking the benefits and
protections of its laws;

26 (2) the claim must be one which arises out of or relates to the defendant’s
27 forum-related activities; and
28

1 (3) the exercise of jurisdiction must comport with fair play and substantial
2 justice, i.e., it must be reasonable.”

3 *Schwarzenegger*, 374 F.3d at 802 (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir.
4 1987)). “The plaintiff has the burden of proving the first two prongs.” *Picot v. Weston*,
5 780 F.3d 1206, 1211 (9th Cir. 2015) (citing *CollegeSource, Inc. v. AcademyOne, Inc.*, 653
6 F.3d 1066, 1076 (9th Cir. 2011)). If the plaintiff meets that burden, “the burden shifts to
7 the defendant to ‘set forth a ‘compelling case’ that the exercise of jurisdiction would not
8 be reasonable.”” *Id.* at 1212 (quoting *CollegeSource*, 653 F.3d at 1076).

9 As set out above, the first prong of the specific jurisdiction test requires that the
10 defendant either purposefully direct its activities at the forum state or a resident thereof, or
11 purposefully avail itself of the privileges of conducting activities in the forum state.
12 Although these concepts are distinct, “[a]t bottom, both purposeful availment and
13 purposeful direction ask whether defendants have voluntarily derived some benefit from
14 their interstate activities such that they ‘will not be haled into a jurisdiction solely as a
15 result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.” *Herbal Brands, Inc. v.*
16 *Photoplaza, Inc.*, 72 F.4th 1085, 1090 (9th Cir. 2023) (quoting *Glob. Commodities Trading*
17 *Grp., Inc. v. Beneficio de Arroz Choloma, S.A.*, 972 F.3d 1101, 1107 (2020)).

18 Here, Plaintiff argues Defendant purposefully directed its activities to this forum,
19 and to make that showing she relies on the “three-part ‘effects’ test traceable to the
20 Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 ... (1984).” *Schwarzenegger*,
21 374 F.3d at 803. That test “requires that the defendant allegedly have (1) committed an
22 intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant
23 knows is likely to be suffered in the forum state.”” *Id.* (quoting *Dole Food Co., Inc. v.*
24 *Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)).

25 There is no dispute the first element is satisfied here. Specifically, Defendant
26 operated its business in California in conjunction with its website, and “intentionally
27 embedded within its website the Session Replay Code at issue in this matter[.]” (Mem. in
28 Opp’n to Mot. at 7.)

1 Plaintiff relies on these intentional acts to support her argument that the second
2 element of the “effects” test, “express aiming,” is also met. Specifically, she acknowledges
3 that Defendant’s operation of its website, standing alone, may not meet the “express
4 aiming” requirement, and that “something more” is required, (*id.* at 7-8) (citing *Mavrix*
5 *Photo, Inc. v. Brand Tech., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011)), that “something
6 more” being “the operation of the 130 retail outlets” in California “and the integration of
7 the website with those stores.” (*Id.* at 8.) Defendant argues none of these acts was
8 “expressly aimed” at California, therefore the purposeful direction test is not met.

9 In *Herbal Brands*, the Ninth Circuit addressed whether the “express aiming”
10 requirement was met on a similar set of facts.¹ There, the defendant operated an interactive
11 website where “visitors can exchange information with the host computer by inputting data
12 directly.” *Herbal Brands*, 72 F.4th at 1092. In addition, the defendant sold physical
13 products to forum residents as part of its “regular course of business,” *id.* at 1094, and
14 “exercised some level of control over the ultimate distribution of its products beyond
15 simply placing its products into the stream of commerce.” *Id.* On those facts, the court
16 found the “express aiming” requirement was met. *Id.* at 1095.

17 Here, there is no dispute Defendant is operating the interactive website
18 www.papajohns.com, which allows users to browse local menus and place and pay “for
19 orders for take-out and/or delivery of food from Papa Johns’ brick and mortar stores located
20 in California.” (FAC ¶8-9.) There is also no apparent dispute that Defendant sold pizza
21 and other items to Plaintiff and other California residents as part of its “regular course of
22 business,” or that Defendant exercises “some level of control over the ultimate distribution”

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26 ¹ *Herbal Brands* was decided on July 5, 2023, after this motion was submitted. As
27 mentioned above, both parties submitted supplemental authority to the Court after the
28 motion was submitted, with Defendant submitting authority that was decided after July 5,
2023, but neither side cited *Herbal Brands*.

1 of those products to the end consumer. Thus, like the defendant in *Herbal Brands*,
2 Defendant here has “expressly aimed” its conduct at the forum state.

3 The final element of the “effects” test is whether the defendant’s intentional acts
4 caused harm that the defendant knows is likely to be suffered in the forum state. Here,
5 there is no dispute Defendant’s website is accessible to California residents, and that
6 California residents order and receive Defendant’s products in California through
7 Defendant’s website. There is also no dispute that Defendant is aware that the Session
8 Replay Code is embedded into its website, and that the harm alleged in the case would
9 thereby be suffered in California by California residents using the website. Accordingly,
10 the third element of the “effects” test is also met, and with it, the purposeful direction
11 requirement.

12 Returning to the broader test for specific jurisdiction, the next element is that the
13 claims “arise out of or relate to” the defendant’s forum-related activities. “Claims ‘arise
14 out of’ the defendant’s contacts with the forum state when there is a causal connection
15 between the contacts and the claims.” *In re McKinsey & Co., Inc. Nat’l Opiate Consultant*
16 *Litig.*, No. 21-md-02996-CRB, ___ F.Supp.3d ___, 2022 WL 15525768, at *8 (N.D. Cal.
17 Oct. 27, 2022). “While there is no precise test for determining whether a plaintiff’s claims
18 ‘relate to’ a defendants’ contacts, the U.S. Supreme Court has held that ‘some relationships
19 will support jurisdiction without a causal showing.’” *Id.* (quoting *Ford Motor Co. v. Mont.*
20 *Eighth Jud. Dist. Ct.*, ___ U.S. ___, 141 S.Ct. 1017, 1027 (2021)). In *Ford*, that
21 relationship consisted of (1) a car accident in each forum state, (2) involving one of the
22 defendant’s vehicles, and (3) the defendant’s advertising, sale, and service of those model
23 vehicles in each forum state “for many years.” 141 S.Ct. at 1028.

24 Plaintiff asserts that kind of relationship also exists here, because Defendant’s
25 website, with its embedded Session Replay Code, is accessible to California residents. The
26 website enables residents to obtain information about Defendant’s products and to order
27 and purchase those products from Defendant’s California stores, which products are then
28 delivered to Defendant’s customers in California. (Mem. in Opp’n to Mot. at 9.) None of

1 these facts are disputed, and they support Plaintiff’s argument that the “arise out of or relate
2 to” requirement is met.

3 Defendant attempts to avoid this result by raising a number of arguments to support
4 its position that the only “relevant conduct” here is its “operation of a nationally accessible
5 website and alleged use of ‘session replay’ technology on that website,” neither of which
6 occurred in California, (Mot. at 8-9), but none of those arguments overcomes Plaintiff’s
7 showing that her claims “arise out of or relate to” Defendant’s California-related activities.
8 First, Defendant’s attempt to paint its website as an either-or proposition, i.e., as either a
9 nationally accessible website or a California-based website, is unconvincing. Defendant’s
10 website can be both nationally accessible and create contacts with California, just like the
11 defendant’s activities in *Ford*. There, the defendant marketed, sold, and serviced its
12 products across the United States and overseas, *Ford*, 141 S.Ct. at 1022, including in the
13 forum states, but that global reach did not prevent the Court from relying on the defendant’s
14 forum-related activities to find the defendant subject to specific jurisdiction in the forum
15 states.

16 Defendant’s argument that Plaintiff’s claims arise solely out of Defendant’s use of
17 session replay technology on its website is also misguided. Indeed, it ignores Defendant’s
18 marketing and sales of its products in California, and fails to acknowledge what is
19 presumably the primary reason why Plaintiff and other California residents access
20 Defendant’s website in the first place, which is to order and pay for Defendant’s products.
21 Although Defendant attempts to segregate its use of session replay technology from its
22 California-based activities, there is no evidence to support such a bright-line distinction,
23 and the Court declines to do so.

24 There is also no evidence to support Defendant’s assertion that Plaintiff is
25 Defendant’s only link to California. (Mot. at 8.) Nowhere in the FAC does Plaintiff so
26 allege. Rather, Plaintiff alleges Defendant directed its acts towards “citizens of California
27 while they were located within California.” (FAC ¶9.) She also seeks to represent not just
28 herself, but also a class of “natural persons in California whose Website Communications

1 were captured through the use of Session Replay Code embedded in
2 www.papajohns.com[.]” (*Id.* ¶57.) Clearly, Plaintiff is not Defendant’s only California
3 customer.

4 Also contrary to Defendant’s suggestion, this case is nothing like *Walden v. Fiore*,
5 571 U.S. 277 (2014). (*See* Mot. at 8.) In that case, “no part of [the defendant’s] course of
6 conduct occurred” in the forum state. *Walden*, 571 U.S. at 288. The defendant “never
7 traveled to, conducted activities within, contacted anyone in, or sent anything or anyone”
8 to the forum state. *Id.* at 289. “In short, ... [the defendant] formed no jurisdictionally
9 relevant contacts” with the forum state. *Id.* That is not the case here. Unlike the defendant
10 in *Walden*, Defendant makes its website accessible to and usable by California residents.
11 It also “has in excess of 130 stores in California.” (FAC ¶10.) Through its website and the
12 California stores, Defendant receives orders and payments from California residents, and
13 it delivers products to California residents. Defendant’s citation to *Walden* does not
14 advance Defendant’s position, and it does not refute Plaintiff’s showing that the “arises out
15 of or relates to” element for specific jurisdiction is satisfied.

16 Having satisfied the first two prongs of the specific jurisdiction test, the burden now
17 shifts to Defendant to show it would be unreasonable for the Court to exercise specific
18 jurisdiction in this case. Defendant offers no argument on this prong, and thus has not met
19 its burden.

20 For the reasons set out above, the Court finds it has specific jurisdiction over
21 Defendant here. Accordingly, Defendant’s motion to dismiss for lack of personal
22 jurisdiction is denied.

23 **B. Failure to State a Claim**

24 Turning to Plaintiff’s substantive claims, Defendant raises a number of arguments
25 as to why they are not pleaded sufficiently and should therefore be dismissed. On
26 Plaintiff’s CIPA claim, this Court has addressed many of the same or similar arguments in
27 other cases. *See Garcia v. Build.com, Inc.*, Case No. 22cv1985 DMS (KSC), 2023 WL
28 4535531 (S.D. Cal. July 13, 2023); *Esparza v. UAG Escondido AI Inc.*, Case No. 23cv0102

1 DMS (KSC), 2023 WL 4834945 (S.D. Cal. July 27, 2023). Given the overlap between the
2 arguments raised here and the arguments raised in those cases, this Court incorporates the
3 reasoning of *Garcia* to this case, as well, *see Garcia*, 2023 WL 4535531, at *4-6, and grants
4 Defendant’s motion to dismiss Plaintiff’s CIPA claim.

5 This leaves only Plaintiff’s claim for invasion of privacy. “California recognizes
6 four categories of the tort of invasion of privacy: (1) intrusion upon seclusion, (2) public
7 disclosure of private facts, (3) false light in the public eye, and (4) appropriation of name
8 or likeness.” *Bartolone v. Ocwen Mortg. Servicing, Inc.*, No. 8:17-cv-00821-JLS-JDE,
9 2017 WL 8186686, at *2 (C.D. Cal. Nov. 15, 2017) (citations omitted). Here, Plaintiff
10 alleges a claim for intrusion upon seclusion. This claim has two elements. “First, the
11 defendant must intentionally intrude into a place, conversation, or matter as to which the
12 plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a
13 manner highly offensive to a reasonable person.” *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th
14 272, 286 (2009).

15 Defendant argues Plaintiff has failed to plead either of these elements. Plaintiff
16 disagrees, and cites several portions of her FAC to demonstrate that these elements are
17 properly pleaded. (*See* Mem. in Opp’n to Mot. at 21.) None of the cited portions of the
18 FAC, however, pleads any specific facts to support either of these elements. Rather, those
19 portions of the FAC allege, in general, how Session Replay Code works. (*See* FAC ¶¶24-
20 39, 44, 51.) Because Plaintiff has failed to plead any specific facts to support her invasion
21 of privacy claim, that claim is dismissed, as well.

22 **III.**
23 **CONCLUSION**

24 For the reasons set out above, the Court denies Defendant’s motion to dismiss this
25 case for lack of personal jurisdiction, but grants Defendant’s motion to dismiss for failure
26 to state a claim. In accordance with *Garcia*, Plaintiff’s CIPA claim is dismissed without

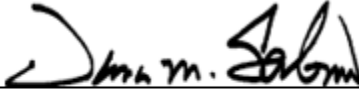
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1 leave to amend. If Plaintiff wishes to amend her invasion of privacy claim, she shall file a
2 Second Amended Complaint no later than **August 28, 2023**.

3 **IT IS SO ORDERED.**

4 Dated: August 14, 2023

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7 Hon. Dana M. Sabraw, Chief Judge
8 United States District Court
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