IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2021-000947-CA-01
SECTION: CA11
JUDGE: Carlos Lopez

Yvette Jacome
Plaintiff(s)

vs.

Spirit Airlines Inc.
Defendant(s)
_____/

ORDER GRANTING DEFENDANT SPIRIT AIRLINES, INC.'S MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT

This matter came before the Court for a Zoom virtual hearing on Friday, June 4, 2021, at 11:00 a.m., upon Defendant Spirit Airlines, Inc.'s Motion to Dismiss First Amended Class Action Complaint filed on April 8, 2021 (the "Motion to Dismiss"). The Court, having carefully reviewed the Motion, Plaintiff's opposition to the Motion, and Spirit's reply in support of the Motion to Stay, having heard the parties' oral argument during the hearing, and being otherwise duly advised in the premises, states as follows.

I. Relevant Factual Allegations

Plaintiff filed her First Amended Class Action Complaint (the "Amended Complaint") against Spirit Airlines, Inc. ("Spirit) on March 17, 2021. In her Amended Complaint, Plaintiff alleges that she visited Spirit's website, www.spirit.com (the "Website") at least six times during 2020, *id.* ¶¶ 21–22, and that while she was browsing through Spirit's Website, Spirit "utilized at least one session replay script to contemporaneously intercept the substance of Plaintiff's electronic communications with Defendant's website, including mouse clicks and movements,

keystrokes, search terms, information inputted by Plaintiff, and pages and content viewed by Plaintiff." *Id.* ¶ 33. Plaintiff claims she did not consent to the "interception of [her] electronic communications." *Id.* ¶ 46. Based on these allegations, Plaintiff brings one count for violation of the FSCA on behalf of herself and a putative class against Spirit for violations of Sections 934.03(1)(a) and 934.03(1)(d) of the Florida Security of Communications Act (the "FSCA").

II. **Motion to Dismiss Standard**

In evaluating the sufficiency of the Amended Complaint, the Court's analysis "is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party." *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So. 2d 204, 206 (Fla. 3d DCA 2003) (quotation marks omitted). The Court may also consider documents referred to and impliedly incorporated by reference into the Amended Complaint. *See One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) ("Accordingly, because the complaint impliedly incorporates the policy by reference, the trial court was entitled to review the policy in ruling on the motion to dismiss."). "[G]eneral, vague and conclusory statements are insufficient to satisfy the requirement that a pleader allege 'a short and plain statement of the ultimate facts showing the pleader is entitled to relief.'" *Jordan v. Nienhuis*, 203 So. 3d 974, 976 (Fla. 5th DCA 2016) (quoting Fla. R. Civ. P. 1.110(b)).

III. **Analysis**

Spirit contends that the Amended Complaint should be dismissed for the following reasons: (1) the FSCA does not encompass Spirit's use of session-replay technology; (2) Plaintiff fails to adequately allege that the *contents* of her electronic communications were intercepted; (ii) Plaintiff fails to adequately allege that any electronic communications were intercepted using

an electronic, mechanical, or other device; (iii) Plaintiff fails to adequately allege that any electronic communications (as that term is defined in the FSCA) were intercepted; (iv) Plaintiff fails to adequately allege that any interception occurred contemporaneously with transmission; (v) Plaintiff fails to adequately allege that she had a reasonable expectation of privacy when visiting the Website; and (vi) Plaintiff consented to any purported interception. Plaintiff denies each of these arguments and requests that the Court deny Spirit's Motion in its entirety.

For reasons discussed in further detail below, the Court will **GRANT** Spirit's Motion to Dismiss and **DISMISS** Plaintiff's First Amended Complaint.

1. **The FSCA Does Not Apply to Plaintiff's Claims.**

In its Motion to Dismiss, Spirit argues that "the FSCA's purpose is to address eavesdropping and illegal recordings regarding the substance of communications or personal and business records . . . and not to address the use by a website operator of analytics software to monitor visitors' interactions with that website operator's own website." Mot. to Dismiss at 7. Plaintiff, in its Opposition to Spirit's Motion to Dismiss (the "Opposition"), argues that the FSCA "was intended by the legislature to cover advances in technology and all forms of electronic data transfer," including the use of session replay technology, and urges the Court to find that the FSCA applies to her claims. Opp. at 5. The Court agrees with Spirit here and finds that the FSCA does ***not*** cover Plaintiff's claims seeking to penalize Spirit's use of session replay software on its Website.

The Florida Legislature enacted the FSCA in 1969 and made the following findings:

2. In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, it is necessary for the Legislature to define the circumstances and conditions under which the interception of wire and oral

communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings.

3. Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

4. To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.

Fla. Stat. § 934.01 (emphasis added). Based on the terms of the FSCA alone, the Court agrees with Spirit that the FSCA was promulgated to: (1) protect the privacy of wire and oral communications, (2) prevent organized criminals from using oral and/or wire communications in their criminal activities, and (3) ensure that any information from such oral and wire communications would not be misused.

In fact, the FSCA was only amended to include the term "electronic communications" in 1988 following a similar 1986 amendment of the Federal Wiretap Act, *see State v. Jackson*, 650 So. 2d 24, 27 (Fla. 1995). Congress, however, amended the Federal Wiretap Act because it "recognize[d] that computers are used extensively today for the storage and processing of information" and "[w]ith the advent of computerized recordkeeping systems, Americans have lost the ability to lock away a great deal of personal and business information." Sen. Rep. No. 99-541, at 3 (1986). Congress was thus concerned "with the advent of "large-scale . . .

computer-to-computer data transmissions" defined as "the transmission of financial records or funds transfers among financial institutions, medical records between hospitals and/or physicians' offices, and the transmission of proprietary data among the various offices of a company." *See* Sen. Rep. No. 99-541, at 3, 8 (1986). In illustrating this issue at-hand requiring amendment of the Federal Wiretap Act, the Senate described how "hospitals maintain medical files in offsite data banks" and that amendment was necessary because "[f]or the person or business whose records were involved, the privacy or proprietary interest in that information should not change." *Id.* Given the foregoing legislative history, the Court agrees with Spirit that Congress's main concern in amending the Federal Wiretap Act to include electronic communications (which prompted the Florida legislature to likewise amend the FSCA)[1] was to protect private personal and business records (like medical records) from interception on computerized recordkeeping systems.

The Court further finds that Congress did not intend for the Federal Wiretap Act to extend to the use of commonplace analytics software to improve a website browsers' experience and the FSCA, being modeled after the Federal Wiretap Act, likewise does not extend to the use of commonplace analytics software to improve a website browsers' experience. This holding is further supported by the definition of "electronic communications" in the Federal Wiretap Act *and* the FSCA. Indeed, the term "electronic communications" in the Federal Wiretap Act is defined to exclude "any communication from a tracking device," and the FSCA was likewise amended in 1988 to exclude "[a]ny communication from an electronic or mechanical device which permits the tracking of the movement of a person or an object" (Fla. Stat. § 934.02(12)(c)) from the definition of an electronic communication. Here, Plaintiff seeks to hold Spirit liable for its use of session replay software which *tracks* a website browser's movements. Session replay software is thus definitionally excluded from the term "electronic communications" in both the Federal Wiretap Act and the FSCA, further supporting a finding that the FSCA does not apply to Plaintiff's claims here.[2]

Even if the Court found there was an ambiguity as to the FSCA's scope, the rule of lenity demands that the Court interpret the FSCA in favor of Spirit. *United States v. Santos*, 553 U.S. 507, 514 (2008); *see also N. Carillon, LLC v. CRC 603, LLC*, 135 So. 3d 274, 279–80 (Fla. 2014) (holding that the rule of lenity can be applied in civil and criminal cases where the text of a statute establishes a basis for both civil and criminal liability).

Although the Court's finding here provides grounds to dismiss Plaintiff's Amended Complaint in its entirety *with prejudice*, the Court nonetheless addresses Spirit's remaining arguments in turn.

1. **Plaintiff Fails to Adequately Allege that the Contents of her Electronic Communications were Intercepted.**

Spirit next argues that the Amended Complaint should be dismissed because Plaintiff has failed to allege that the *contents* of her communications were intercepted, as that term is defined in the FSCA. *See* Mot. at 9–12. Plaintiff asserts that the term contents should be interpreted "broadly" thus encompassing "what Plaintiff and the Class members did on Defendant's website." Opp. at 10. The Court again agrees with Spirit and finds that Plaintiff's Amended Complaint fails to allege that any *contents* of her communications were intercepted.

Section 934.02(3) of the FSCA defines "intercept" to mean "the aural or other acquisition of the ***contents*** of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device,"[3] and Section 934.02(7) defines "contents" as including any "information concerning the substance, purport, or meaning of that communication." In determining what exactly constitutes the "substance, purport, or meaning" of a communication, the federal Ninth Circuit's decision in *In re Zynga Privacy Litig.*, 750 F.3d 1098 (9th Cir. 2014) is instructive. There, the court analyzed Congress's intent regarding the term contents as used throughout the Federal Wiretap Act. *Id.* at 1105. The court considered the

"ordinary meaning of these terms, including their dictionary definition" and found that a "dictionary in wide circulation during the relevant time frame provides the following definitions: (1) 'substance' means 'the characteristic and essential part,' (2) 'purport' means the 'meaning conveyed, professed or implied,' and (3) 'meaning' refers to 'the thing one intends to convey by language.'" *Id.* at 1105–06. The court concluded that "Congress intended the word 'contents' to mean a person's intended message to another (i.e. the 'essential part' of the communication, the 'meaning conveyed,' and the 'thing one intends to convey).'" *Id.* at 1106. The court further found that the "language and design of the statute as a whole" made clear that "the term 'contents' refers to the intended message conveyed by the communication, and does not include record information regarding the characteristics of the message that is generated in the course of the communication." *Id.*

The court then conducted an analysis of whether the information at-issue constituted "contents" sufficient to state a claim under the Federal Wiretap Act. *Id.* at 1106–07. There, the plaintiffs were individuals who clicked on the Zynga game icon within Facebook and the "HTTP request to launch a Zynga game contained a referer header that displayed the user's Facebook ID and the address of the Facebook webpage the user was viewing before clicking on the game icon." *Id.* at 1102. Plaintiffs alleged that this referer information (i.e., information about the Facebook page where the particular user found the link) was unlawfully intercepted in violation of the Federal Wiretap Act. *Id.* at 1103. Relying on the above analysis of the definition of "contents," the court found that the plaintiffs failed to state a claim under the Federal Wiretap Act because the "information disclosed in the referer headers at issue is not the contents of a communication" and affirmed dismissal of the complaint with prejudice. *Id.* at 1109. Similarly, in *Minotty v. Baudo*, 42 So. 3d 824 (Fla. 4th DCA 2010), the court relied on federal wiretap law to conclude that "silent video surveillance is not covered by [the FSCA]" and held that the plaintiffs there "did not prove their cause of action under the act." *Id.* at 832.

Here, Plaintiff alleges that her "mouse clicks and movements, keystrokes, search terms, information inputted by Plaintiff, and pages and content viewed by Plaintiff" were intercepted by Spirit when she was browsing the Website.[4] Am. Compl. ¶ 30. But the Court holds that this is precisely the type of non-record information that courts consistently find do not constitute "contents" under the Federal Wiretap Act or any of its state analogs because it does not convey the *substance* or *meaning* of any message. *See In re Zynga Privacy Litig.*, 750 F.3d at 1109; *Svenson v. Google Inc.*, 65 F. Supp. 3d 717, 729 (N.D. Cal. 2014); *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1084 (N.D. Cal. 2015); *Cousineau v. Microsoft Corp.*, 992 F. Supp. 2d 1116, 1127 (W.D. Wash. 2012); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1062 (N.D. Cal. 2012); *see also United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008). The Court further finds this case to be directly analogous to *Minotty*, 42 So. 3d 824, because here, the Court holds that a silent video of Plaintiff's interactions with the Website is not actionable under the FSCA.[5]

1. **Plaintiff Fails to Adequately Allege that any Electronic Communications were Intercepted using an Electronic, Mechanical, or Other Device.**

The Parties next disagree over whether Plaintiff has properly pled use of an electronic, mechanical, or other device sufficient to state a claim under the FSCA. The Court find that she has not. The FSCA defines an "electronic, mechanical, or other device" as "any device or apparatus which can be used to intercept a wire, electronic, or oral communication other than . . .

> (a) Any telephone or telegraph instrument, equipment, or facility, or any component thereof: 1. Furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or 2. Being used by a provider of wire or electronic communications service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of her or his duties.
>
> (b) A hearing aid or similar device being used to correct subnormal hearing to not better

than normal.

Fla. Stat. § 934.02(4). In her Amended Complaint, Plaintiff alleges that the purported session replay software "constitute[s] an electronic or other device under the FSCA ***as*** (1) it is not a telephone or telegraph equipment, or any component thereof; and/or (2) it was not furnished to [Spirit] by a provider of electronic communication services." Am. Compl. ¶ 68 (emphasis added). Plaintiff fails to allege in the first instance that the session replay software at-issue is a "device or apparatus which can be used to intercept a wire, electronic, or oral communication" and thus the Amended Complaint must be dismissed on this separate pleading failure.

The Court further notes that other courts have held that software, email servers, and drives to not constitute devices under the wiretapping statutes. *See Potter v. Havlicek*, No. 3:06-CV-211, 2008 WL 2556723, at *8 (S.D. Ohio June 23, 2008) (dismissing federal wiretap claim because "the word 'device' does not encompass software"); *Ideal Aerosmith, Inc. v. Acutronic USA, Inc.*, No. 07-1029, 2007 WL 4394447, at *4 (E.D. Pa. Dec. 13, 2007) ("The drive or server on which an e-mail is received does not constitute a device for purposes of the Wiretap Act."); *Crowley v. CyberSource Corp.*, 166 F. Supp. 2d 1263, 1269 (N.D. Cal. 2001) ("Holding that Amazon, by receiving an e-mail, intercepted a communication within the meaning of the Wiretap Act . . . would effectively remove from the definition of intercept the requirement that the acquisition be through a 'device.' Therefore, the amended complaint fails to state a claim against Amazon under the Wiretap Act, and Amazon's motion to dismiss that claim is granted."); *see also Ultimate Outdoor Movies, LLC v. FunFlicks, LLC*, No. CV SAG-18-2315, 2019 WL 2233535, at *21 (D. Md. May 23, 2019) ("Moreover, the emails were sent, as addressed, to Defendants' funflicks.com server, and that server is not a 'device' used for interception as defined by the Wiretap Act.").

1. **Plaintiff Fails to Adequately Allege that any Electronic Communications were Intercepted.**

The Parties next disagree over whether Plaintiff has properly pled that any electronic communications were intercepted sufficient to state a claim under the FSCA. The FSCA defines "electronic communication" to mean the "transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects intrastate, interstate, or foreign commerce," but specifically excludes "[a]ny communication from an electronic or mechanical device which permits the tracking of the movement of a person or an object." Fla. Stat. § 934.02(12)(c). The Court finds that the session replay software at-issue here is a "device which permits the tracking of the movement of . . . an object" (*see* Am. Compl. ¶ 30) and thus falls outside the definition of "electronic communications" under the FSCA. Plaintiff's Amended Complaint must also be dismissed on this independent pleading failure.

1. **Plaintiff Fails to Adequately Allege that Any Communication was Intercepted Contemporaneously with Transmission.**

The Parties also disagree over whether Plaintiff has properly pled interception contemporaneously with transmission sufficient to state a claim under the FSCA. The FSCA defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." *See* Section 934.02(3). The Parties here agree that "electronic communications, in order to be intercepted, must be acquired ***contemporaneously with transmission*** and that electronic communications are not intercepted within the meaning of the Federal Wiretap Act if they are retrieved from storage." *O'Brien v. O'Brien*, 899 So. 2d 1133, 1136 (Fla. 5th DCA 2005) (emphasis added). *See* Mot. to Dismiss at 16–17; Opp. at 14. Plaintiff alleges that "[u]pon information and belief, during one or more of Plaintiff's visits to Defendant's website, Defendant utilized at least one session replay script to contemporaneously intercept the substance of

Plaintiff's electronic communications with Defendant's website," Am. Compl. ¶ 30, and that "the session replay technology utilized by Defendant gave Defendant the ability to view Plaintiff's website visits live in real-time as they were occurring." *Id.* ¶ 36. The Court finds that these allegations without pleading any ultimate facts in support are insufficient to demonstrate that any interception happened contemporaneously with transmission as opposed to being retrieved from storage. Indeed, the Amended Complaint includes allegations suggesting the latter to be the case. *Id.* ¶ 5 (suggesting that the software allows for a reconstruction from stored data in alleging that Plaintiff's "communications are then ***stored*** by Defendant using an outside vendor's services and can later be viewed and utilized by Defendant to create a session replay, which is ***essentially a video*** of a Class member's entire visit to Defendant's website.") (emphasis added). The Amended Complaint must be dismissed on this pleading failure as well.

1. **Plaintiff Fails to Adequately Allege that She had a Reasonable Expectation of Privacy when Visiting the Website.**

The Parties next argue over whether the FSCA requires that Plaintiff had a reasonable expectation of privacy when visiting the Website in order to state a claim under the FSCA for interception of electronic communications. Spirit argues that Plaintiff must have a reasonable expectation of privacy, Mot. to Dismiss at 17–19, while Plaintiff argues that the FSCA does not require such an expectation as to electronic communications but rather only oral communications. Opp. at 15. The Court agrees with Spirit and finds that Plaintiff must plead that she had a reasonable expectation of privacy when visiting the Website to state a claim for interception of electronic communications under the FSCA. Indeed, the *O'Brien*, 899 So. 2d 1133 decision cited by Plaintiff in her Amended Complaint and throughout her Opposition demands such a conclusion. There, when analyzing an electronic communications FSCA claim, the court discussed how "[e]nactment of [the FSCA] connotes a policy decision by the Florida legislature to allow each party to a conversation to have an expectation of privacy from

interception by another party to the conversation. The purpose of the Act is to protect every person's right to privacy and to prevent the pernicious effect on all citizens who would otherwise feel insecure from intrusion into their private conversations and communications." *O'Brien*, 899 So. 2d at 1135 (citations and quotation marks omitted). "This expectation of privacy does not contemplate merely a subjective expectation on the part of the person making the uttered oral communication but rather contemplates a reasonable expectation of privacy. A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy as well as whether society is prepared to recognize this expectation as reasonable." *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985).

Having found that Plaintiff must plead a reasonable expectation of privacy, the Court holds that Plaintiff's singular conclusory allegation that she had a reasonable expectation of privacy when browsing the Website, Am. Compl. ¶ 72, is not sufficient to meet Florida's pleading standards as there can be no reasonable expectation of privacy from a third-party website owner when Plaintiff voluntarily browses through that third-party's website. The Amended Complaint must therefore also be dismissed on this basis.

1. **Plaintiff Consented to any Purported Interception.**

Lastly, Spirit contends that "Plaintiff was informed on *two* separate occasions that her browsing of the Website would be monitored by Spirit and her continued use of the Website indicated her assent to any purported interception" through Spirit's cookie banner and Privacy Policy.[6] Mot. to Dismiss at 19. Plaintiff argues that Spirit's cookie banner and Privacy Policy are "unenforceable browsewrap agreements." Opp. at 16. The Court finds that Spirit's cookie banner and Privacy Policy both put Plaintiff on inquiry notice of any purported interception. Plaintiff thus accordingly consented to any such interceptions.

Indeed, upon first accessing the Website, Plaintiff was presented with a banner (as

depicted on page 13 of Spirit's Reply in Support of its Motion to Dismiss) that explicitly warned her that "by continuing to use [the] [W]ebsite, [Plaintiff] acknowledge[s] the use of cookies"—the functional equivalent of calling a customer service line and hearing "Your call is being recorded for quality assurance purposes." *See United States v. Mitchell*, No. 3:11-CR-248(S1)-J-34, 2013 WL 3808152, at *11 (M.D. Fla. July 22, 2013) ("Defendant initiated calls to Newby and discussed his personal affairs with her, despite the fact that every call he initiated started with an automated warning that 'all inmate telephone calls are recorded.' This conduct demonstrates Defendant's consent to being recorded, and therefore, the recording of Defendant's phone calls to Newby did not violate the Fourth Amendment or the Wiretap Act.") (citations omitted); *Jackson v. State*, 18 So. 3d 1016, 1030 (Fla. 2009) (inmate impliedly consented to interception of his phone calls after being given notice they were subject to recording). Given that Plaintiff had to affirmatively ex out of the cookie banner for it to no longer be visible on Spirit's Website, the Court is hard-pressed to find that Plaintiff was not aware that her interactions with the Website were being monitored.

Moreover, Spirit's cookie banner aside, Spirit's Privacy Policy also put Plaintiff on inquiry notice of any purported interception. Spirit's Privacy Policy (available through a hyperlink on the bottom of every page of the Website) explicitly alerts internet browsers (like Plaintiff) that Spirit uses "technology to monitor ***how you interact with our website***. This may include which links you ***click*** on, or ***information that you type*** into our online forms. This may also include information about your device or browser." Mot. to Dismiss at Exs. A–B, p. 3 (emphasis added). The Privacy Policy further makes clear that Spirit may use any information obtained "to conduct analytics." *Id.* Plaintiff was thus also expressly put on notice that Spirit tracks "mouse clicks and movements" and "information inputted" by her when browsing the Spirit Website, and, by continuing to browse Spirit's Website, Plaintiff assented to such tracking. The Amended Complaint must therefore be dismissed.

IV. **Conclusion**

For the foregoing reasons, the Court hereby **GRANTS** Spirit's Motion to Dismiss and **DISMISSES** the Amended Complaint in its entirety, with leave to Amend within 20 days.

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[1] *See 1988 Summary of General Legislation*, available at FlSumGenLeg1988.pdf (fsu.edu), at 109 (last accessed Mar. 3, 2021).

[2] Indeed, as one Florida federal court recently put it in ruling on a motion to stay discovery in a session replay wiretapping case, "there is no case law as of right now that applies the FSCA [to the use of session replay software]." Order [D.E. 30], *Smart v. Home Depot, Inc.*, Case No: 5:21-cv-153-JSM-PRL, at *4 (M.D. Fla. June 3, 2021); *see also* Order [D.E. 45], *Zarnesky v. Adidas America, Inc.*, Case No. 6:21-cv-540-PGB-GJK, at *6 (M.D. Fla. June 10, 2021) ("Plaintiff's [FSCA] claim [based on the use of session replay software] is unlike any the Court has seen before. The motion to dismiss appears to have serious merit, such that there is a real possibility it will be granted."). The Court is aware of the order denying a motion to dismiss in *Swiggum v. Beall's, Inc.*, Case No. 2021-CA-000168 (Fla. 12th Cir. Ct. 2021) entered on June 11, 2021, but this Court respectfully disagrees with that ruling for the reasons set forth herein.

[3] The Federal Wiretap Act defines "intercept" identically. *See* 18 U.S.C. § 2510(4). Likewise, the Federal Wiretap Act defines "contents" identically. *See* 18 U.S.C. § 2510(8).

[4] The Court finds it notable that Plaintiff amended her complaint once and had the opportunity to allege what specific "content" she allegedly inputted in the Website that was intercepted by Spirit, but failed to do so.

[5] Plaintiff's reliance on *Revitch v. New Moosejaw, LLC*, No. 18-CV-06827-VC, 2019 WL 5485330 (N.D. Cal. Oct. 23, 2019) and *Alhadeff v. Experian Information Solutions, Inc.*, No. 8:21-00395-CJC (KES) (C.D. Cal. May 25, 2021) at [D.E. 23] concerning the scope of "contents" is misplaced. *See* Opp. at 8; Plaintiff's Notice of Supplemental Authority filed on May 27, 2021. First, in *Revitch*, 2019 WL 5485330, the Court never undertook a *contents* analysis under the Federal Wiretap Act or any of its state analogs. And, in *Alhadeff*, No. 8:21-00395-CJC (KES), the court undertook a contents analysis under the FSCA using the wrong standard. There the court held that the plaintiff adequately alleged interception of *contents* because the plaintiff "allege[d] that the information Defendant obtained is very communicative." *Id.* at 5. But whether information is "communicative," as discussed above, is not the proper standard. The Court finds the decisions in *Graham et al., v. Noom, Inc.*, et al., Case No. 3:20-cv-06903 (N.D. Cal. April 8, 2021), *Johnson v. Blue Nile, Inc. et al.*, Case No. 3:20-cv-08183 (N.D. Cal. April 8, 2021), and *Yale v. Clicktale, Inc.*, Case No. 20-cv-07575 (N.D. Cal. April 15, 2021) to be more persuasive in determining what constitutes "contents" under the various wiretapping statutes.

[6] The Court takes judicial notice of the cookie banner and Privacy Policy pursuant to Sections 90.202(11)–(12), Florida Statutes and finds that the Court may rely on them when ruling on Spirit's Motion to Dismiss because Plaintiff's Amended Complaint refers to the Spirit Website and her claims are based on her interactions with the Website.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 17th day of June, 2021.

2021-000947-CA-01 06-17-2021 1:44 PM

2021-000947-CA-01 06-17-2021 1:44 PM
Hon. Carlos Lopez

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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