

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Frasco v. Flo Health, Inc.

No. 21-cv-00757-JD (N.D. Cal. May 22, 2025) · No. 21-cv-00757-JD · Decided May 22, 2025

SUMMARY

The United States District Court for the Northern District of California resolves cross-motions for summary judgment by Meta and Flo Health in litigation concerning the collection and disclosure of users’ health and reproductive information. The court grants Meta summary judgment on the federal Wiretap Act, CDAFA, aiding-and-abetting intrusion, and UCL claims, while allowing the CIPA claims to proceed in specified respects. The court denies most of Flo’s motion, including as to timeliness and the CMIA claim, but grants judgment on all claims asserted by plaintiff Pietrzyk and certain standalone or agreed-upon claims.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	James Donato
JURISDICTION	United States District Court for the Northern District of California
DECIDED	May 22, 2025
DOCKET	21-cv-00757-JD
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiffs and defendants Flo Health, Inc. and Meta filed cross-motions for summary judgment in a putative class action involving alleged disclosure and interception of health and other personal information.
STANDARD OF REVIEW	Summary judgment is appropriate under Federal Rule of Civil Procedure 56(a) when the movant is entitled to judgment as a matter of law and no genuine dispute of material fact requires resolution by a jury.
PRECEDENTIAL VALUE	unpublished district court opinion
PARTIES	Erica Frasco, et al. v. Flo Health, Inc., et al.

TOPICS

- summary judgment
- medical records privacy
- health law
- consumer protection
- evidence

PRACTICE AREAS

civil procedure

privacy law

consumer protection

health law

evidence

QUESTIONS PRESENTED

1. Whether Meta was entitled to summary judgment on plaintiffs' federal Wiretap Act claim based on Flo's consent to Meta's data collection practices.
2. Whether disputed facts precluded summary judgment on plaintiffs' California Invasion of Privacy Act claims against Meta.
3. Whether plaintiffs could establish damage or loss for their California Comprehensive Computer Data Access and Fraud Act claim after exclusion of their proposed expert.
4. Whether Meta was entitled to summary judgment on named plaintiffs' aiding-and-abetting intrusion-upon-seclusion claim and UCL claim.
5. Whether Flo was entitled to summary judgment on statute-of-limitations grounds, based on its class-waiver provision, or on the Confidentiality of Medical Information Act claim.
6. Whether summary judgment was proper on named plaintiffs' implied-contract, unjust-enrichment, and UCL claims and on all claims asserted by plaintiff Pietrzyk.

HOLDINGS

1. Summary judgment was granted to Meta because the undisputed record showed that Flo, a party to the communications, consented to Meta's data collection practices.
2. Summary judgment was denied because genuine disputes of material fact existed concerning consent, the timing and nature of Meta's alleged interception or eavesdropping, intent, and whether communications were intercepted in transit.
3. Summary judgment was granted because plaintiffs lacked admissible, non-speculative evidence establishing damage or loss after their proposed expert was excluded.
4. Summary judgment was denied because a jury could find that Flo's disclosures did not provide constructive notice, that plaintiffs did not learn of the alleged misconduct until January 2021, and that factual issues existed concerning fraudulent concealment.
5. Flo was not entitled to enforce the class waiver in its terms of use for the reasons stated in the court's certification order.
6. Summary judgment was denied because factual disputes existed concerning whether Flo's services and practices involved individually identifiable medical information and whether Flo fell within the statutory provisions governing businesses offering software or mobile applications designed to maintain medical information.
7. Summary judgment was granted to Flo on all claims asserted by Pietrzyk because he began using the Flo App after the class period and plaintiffs did not defend his claims.

KEY QUOTATIONS

“Disputes of fact abound with respect to the scope of consent, the timing of Meta’s “interception” or “eavesdropping,” whether Meta “intended” to intercept communications, whether Meta’s interception occurred while the communications were “in transit,” and the like.” (at 23-28)

“We begin by examining the statutory language, giving it a plain and commonsense meaning.” (at II.4)

FACTUAL BACKGROUND

Plaintiffs alleged that Flo Health and Meta collected, transmitted, or intercepted data generated through the Flo fertility and pregnancy-tracking application, including Custom Event data. The record contained disputes concerning user consent, the timing and nature of Meta's alleged interception, whether the data was identifiable or medical information, and whether users had constructive or actual notice of the alleged misconduct. The court also considered the exclusion of plaintiffs' proposed expert David Hoffman and the fact that named plaintiff Pietrzyk began using the application after the relevant class period.

PROCEDURAL HISTORY

The court resolved motions for summary judgment filed by Flo and Meta. The court granted summary judgment on some claims and denied it on others, allowing specified California Invasion of Privacy Act and Confidentiality of Medical Information Act claims to proceed, including on a classwide basis where stated. The court also denied a request for judicial notice as moot.

DISPOSITION

other

CASES CITED

- Frasco v. Flo Health, Inc. (Flo Health II), No. 21-cv-757-JD, 2025 WL 1433825, at *19 (N.D. Cal. May 19, 2025)
- Frasco v. Flo Health, Inc. (Flo Health II), 2025 WL 1433825, at *17-18 (N.D. Cal. May 19, 2025)
- Frasco v. Flo Health, Inc. (Flo Health I), No. 21-cv-757-JD, 2024 WL 4280933, at *3 (N.D. Cal. Sept. 23, 2024)
- LeBrun v. CBS TV Studios, Inc., 68 Cal. App. 5th 199, 211 (2021)
- Paracor Fin., Inc. v. Gen. Elec. Cap. Corp., 96 F.3d 1151, 1167 (9th Cir. 1996)
- Skidgel v. Cal. Unemployment Ins. App. Bd., 12 Cal. 5th 1, 14 (2021)

OPINION

1 2 3 4 UNITED STATES DISTRICT COURT 5 NORTHERN DISTRICT OF CALIFORNIA 6 7
ERICA FRASCO, et al., Case No. 21-cv-00757-JD 8 Plaintiffs, SUMMARY JUDGMENT
ORDER RE 9 v. META AND FLO 10 FLO HEALTH, INC., et al., Defendants. 11 12 13 This
order resolves the motions for summary judgment filed by defendants Flo and Meta. 14 Dkt. Nos.
528, 536.

The parties' familiarity with the record is assumed. Summary judgment is 15 granted and denied in part. 16 I. META'S MOTION 17 First, summary judgment is granted on the claim under the Wiretap Act, 18 U.S.C. § 2511. 18 There is no liability under the Act if "one of the parties to the communication" gives "prior 19 consent," id. § 2511(2)(d), and the undisputed record shows that Flo consented to Meta's data 20 collection practices.

The Court notes that plaintiffs did not seek class certification of this claim, 21 see Dkt. No. 477, and that the basis of dismissal re Meta was not raised by Google in its summary 22 judgment papers, see Dkt. No. 338 at 19. 23 Second, summary judgment on the claims under the California Invasion of Privacy Act 24 (CIPA), Cal. Pen. Code §§ 631-32, is denied.

Disputes of fact abound with respect to the scope of 25 consent, the timing of Meta's "interception" or "eavesdropping," whether Meta "intended" to 26 intercept communications, whether Meta's interception occurred while the communications were 27 "in transit," and the like. See, e.g., App'x 507-10, 847-48, 718-20; Dkt. Nos. 478-6 ¶¶ 82-90; 478- 1 the § 631 claim.

See *Frasco v. Flo Health, Inc. (Flo Health II)*, No. 21-cv-757-JD, 2025 WL 2 1433825, at *19 (N.D. Cal. May 19, 2025). Consequently, the § 632 claim will proceed on a 3 classwide basis for the California subclass while the § 631 claim will proceed solely for plaintiffs 4 Wellman, Chen, and Gamino. 5 Third, summary judgment on the California Comprehensive Computer Data Access and 6 Fraud Act (CDAFA) claim, Cal. Pen.

Code § 502, is granted. The sole ground advanced by 7 plaintiffs relies on their putative expert, David Hoffman, to show that the Custom Event data 8 carried "financial value" to Flo App users and that its surreptitious transmission caused them 9 "damage or loss." Dkt. No. 564-3 at 24. Hoffman has been excluded from testifying at trial under 10 Federal Rule of Evidence 702, see Dkt.

No. 597, and plaintiffs did not present an alternative, non- 11 speculative basis for showing "damage or loss." Certification was denied as to this claim, Flo 12 Health II, 2025 WL 1433825, at *17-18, so summary judgment is granted against the named 13 plaintiffs. 14 Fourth, summary judgment is granted on individual named plaintiffs' claim that Meta 15 aided and abetted Flo's intrusion upon seclusion.

Plaintiffs' evidence for this claim is not 16 materially different from the evidence they proffered in the unsuccessful assertion of a very 17 similar aiding-and-abetting claim against Google. Summary judgment is warranted here for the 18 same reasons re Google. See *Frasco v. Flo Health, Inc. (Flo Health I)*, No. 21-cv-757-JD, 2024 19 WL 4280933, at *3 (N.D.

Cal. Sept. 23, 2024). 20 Fifth, with the named plaintiffs' agreement, Dkt. No. 564-3 at 25, summary judgment is 21 granted on the UCL claim. 22 II. FLO'S MOTION 23 First, summary judgment on the ground that all claims are time barred is denied. A jury 24 will need to decide

whether Flo’s privacy disclosures sufficed to give users constructive notice of 25 the alleged misconduct, and with respect to the discovery rule, plaintiffs set forth evidence from 26 which a reasonable jury could find that they did not learn about the alleged misconduct until 27 January 2021.

See, e.g., Dkt. Nos. 535-11 at 117:23-118:6; 535-14 at 232:10-233:14; 535-18 at 1 create fact issues about the applicability of the fraudulent concealment doctrine which will need to 2 be resolved by the trier of fact. See, e.g., Dkt. No. 496-4 at 289-90; 536-60 at ECF 5. 3 Second, Flo’s request to enforce the class waiver in its terms of use is not well taken for 4 the reasons given in the Court’s certification order.

Flo Health II, 2025 WL 1433825, at *9-11. 5 Third, with the named plaintiffs’ agreement, Dkt. No. 560-3 at 24 n.14, summary judgment 6 is granted on their implied contract and UCL claims. Summary judgment is also granted on 7 named plaintiffs’ unjust enrichment claim to the extent it is asserted as an independent cause of 8 action, as it overlaps with plaintiffs’ other substantive claims.

See *LeBrun v. CBS Tv. Studios, 9 Inc.*, 68 Cal. App. 5th 199, 211 (2021); *Paracor Fin., Inc. v. Gen. Elec. Cap. Corp.*, 96 F.3d 1151, 10 1167 (9th Cir. 1996). Insofar as plaintiffs pursue equitable remedies, like disgorgement, not as 11 independent causes of action but pursuant to other claims, like intrusion upon seclusion, Flo did 12 not meet its burden of showing its entitlement to judgment and the absence of fact disputes 13 concerning the adequacy of legal remedies.

Fed. R. Civ. P. 56(a). 14 Fourth, summary judgment on the Confidentiality of Medical Information Act (CMIA) 15 claim, Cal. Civ. Code §§ 56 et seq., is denied. Flo’s arguments are not well taken. Dkt. No. 535-3 16 at 18-22. Flo says that it is not a “Provider of health care” as contemplated by § 56.05(p) and that 17 the CMIA was amended in 2023 to include express references to “[r]eproductive or sexual health 18 application information.” *Id.* at 18-19.

As a result, Flo says the “CMIA did not apply to 19 pregnancy and fertility tracker apps like Flo from 2016 through 2019.” *Id.* at 19. This argument 20 was not raised in connection with class certification, and it does not now sink plaintiffs’ claims. 21 Flo ignores the plain text of both § 56.05(j) and § 56.06(b). There are fact disputes about 22 Flo’s services and practices, based on the evidence discussed in the certification order, see Flo 23 Health II, 2025 WL 1433825, at *17, bearing on (1) whether the Custom Event data was 24 “individually identifiable information... in possession of... a provider of health care...

25 regarding a patient’s medical history, mental or physical condition, or treatment,” Cal. Civ. Code 26 § 56.05(j) (2019); and (2) whether Flo is a “business that offers software... including a mobile 27 application... that is designed to maintain medical information, as defined in subdivision (j) of 1 allowing the individual to manage his or her information,” *id.* § 56.06(b) (2019).

Flo did not say why the plain text of either subsection should be read more narrowly than their ordinary meaning simply because the 2023 amendments added provisions that would overlap in some instances. See *Skidgel v. Cal. Unemployment Ins. App. Bd.*, 12 Cal. 5th 1, 14 (2021) (“We begin by examining the statutory language, giving it a plain and commonsense meaning.” (citation omitted)).

Insofar as legislative history is helpful here, it is less definitive than Flo suggests. See, e.g., Cal. Bill Analysis, A.B. 254 Sen., 6/13/2023 at 6 (noting the concern that some reproductive health apps would not “necessarily be captured under the existing definition of medical information”); Cal. Bill Analysis, A.B. 254 Assem., 4/25/2023 at 5 (expressing concerns about “serious loopholes in existing protections”).

Flo’s contention that the Custom Event data was not “medical information” because the data was “de-identified” is also unavailing. Dkt. No. 535-3 at 21-22. As discussed in the certification order, there is evidence from which a reasonable jury could find that the transmitted Custom Events “include[d] or contain[ed] any element of personal identifying information sufficient to allow identification of the individual.” Cal. Civ.

Code § 56.05(j); *Flo Health II*, 2025 WL 1433825, at *5. The CMIA claim will proceed on a classwide basis. Flo’s specific objections may be raised at trial as circumstances warrant. Fifth, summary judgment is granted on all claims asserted by plaintiff Pietrzyk, who did not start using the Flo App until long after the class period and whose claims plaintiffs did not defend.

See Dkt. Nos. 560-3; 579-3 at 1 n.1. Finally, Flo’s suggestion in a footnote that it “incorporated” other filings, Dkt. No. 353-3 at 8 n.4, is misdirected. Paragraph 22 of the Court’s Standing Order for Civil Cases proscribes such tactics, see J. Donato, Standing Order for Civil Cases ¶ 22, and the Court declines to root through the record to make Flo’s case for it, see *Flo Health II*, 2025 WL 1433825, at *16.

CONCLUSION Summary judgment is granted to Meta on named plaintiffs’ CDAFA, federal Wiretap Act, aiding-and-abetting intrusion upon seclusion, and UCL claims but is denied in all other respects. 1 of unjust enrichment insofar as that is asserted as a standalone claim. Summary judgment is also 2 || granted to Flo on all claims asserted by plaintiff Pietrzyk but is denied in all other respects.

The 3 request for judicial notice, Dkt. No. 563, is denied as moot. 4 IT IS SO ORDERED. 5 || Dated: May 22, 2025 6 7 JAM ONATO 8 Unitg# States District Judge 9 10 11 12 13 © 15 16 = 17 Z 18 19 20 21 22 23 24 25 26 27 28

