

**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

OPINION

Frasco v. Flo Health, Inc.

PER CURIAM.

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 Health II*, 2025 WL 1433825, at *17, bearing on (1) whether the Custom Event data was “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 § 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 2 why the plain text of either subsection should be read more narrowly than their ordinary meaning 3 simply because the 2023 amendments added provisions that would overlap in some instances. See 4 *Skidgel v. Cal. Unemployment Ins. App. Bd.*, 12 Cal. 5th 1, 14 (2021) (“We begin by examining 5 the statutory language, giving it a plain and commonsense meaning.” (citation omitted)). Insofar 6 as legislative history is helpful here, it is less definitive than Flo suggests. See, e.g., Cal. Bill 7 Analysis, A.B. 254 Sen., 6/13/2023 at 6 (noting the concern that some reproductive health apps 8 would not “necessarily be captured under the existing definition of medical information”); Cal. 9 Bill Analysis, A.B. 254 Assem., 4/25/2023 at 5 (expressing concerns about “serious loopholes in 10 existing protections”). 11 Flo’s contention that the Custom Event data was not “medical information” because the 12 data was “de-identified” is also unavailing. Dkt. No. 535-3 at 21-22. As discussed in the 13 certification order, there is evidence from which a reasonable jury could find that the transmitted 14 Custom Events “include[d] or contain[ed] any element of personal identifying information 15 sufficient to allow identification of the individual.” Cal. Civ. Code § 56.05(j); *Flo Health II*, 2025 16 WL 1433825, at *5. The CMIA claim will proceed on a classwide basis. Flo’s specific objections 17 may be raised at trial as circumstances warrant. 18 Fifth, summary judgment is granted on all claims asserted by plaintiff Pietrzyk, who did 19 not start using the Flo App until long after the class period and whose claims plaintiffs did not 20 defend. See Dkt. Nos. 560-3; 579-3 at 1 n.1. 21 Finally, Flo’s suggestion in a footnote that it “incorporated” other filings, Dkt. No. 353-3 22 at 8 n.4, is misdirected. Paragraph 22 of the Court’s Standing Order for Civil Cases proscribes 23 such tactics, see J. Donato, Standing Order for Civil Cases ¶ 22, and the Court declines to root 24 through the record to make Flo’s case for it, see *Flo Health II*, 2025 WL 1433825, at *16.

25 CONCLUSION

26 Summary judgment is granted to Meta on named plaintiffs’ CDAFA, federal Wiretap Act, 27 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

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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

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