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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**

10  
11 MIGUEL LICEA, individually and on  
behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 OLD NAVY, LLC, a Delaware limited  
15 liability company; and DOES 1 through  
25, inclusive,

16 Defendants.  
17

Case No. 5:22-cv-1413

**CLASS ACTION COMPLAINT FOR  
VIOLATION OF PENAL CODE § 631**

1 **INTRODUCTION**

2 1. Plaintiff Miguel Licea (“Plaintiff”) brings this class action on his own  
3 behalf and on behalf of all other California citizens similarly situated against Defendant  
4 for its illegal wiretapping of all communications with Defendant’s website,  
5 [www.oldnavy.gap.com](http://www.oldnavy.gap.com) (the “Website”).

6 2. Unbeknownst to visitors to the Website, Defendant has secretly deployed  
7 “keystroke monitoring” software that Defendant uses to surreptitiously intercept,  
8 monitor, and record the communications (including keystrokes and mouse clicks) of all  
9 visitors to its Website. Defendant neither informs visitors nor seeks their express or  
10 implied consent prior to this wiretapping.

11 3. Defendant has violated and continues to violate the California Invasion of  
12 Privacy Act (“CIPA”), California Penal Code § 631, entitling Plaintiff and Class  
13 Members to relief pursuant thereto.

14 **JURISDICTION AND VENUE**

15 1. This Court has subject matter jurisdiction of this action pursuant to 28  
16 U.S.C. Section 1332 of the Class Action Fairness Act of 2005 because: (i) there are 100  
17 or more class members, (ii) there is an aggregate amount in controversy exceeding  
18 \$5,000,000, exclusive of interest and costs, and (iii) there is at least minimal diversity  
19 because at least one Plaintiff and Defendant are citizens of different states.

20 2. Pursuant to 28 U.S.C. Section 1391, this Court is the proper venue for this  
21 action because a substantial part of the events, omissions, and acts giving rise to the  
22 claims herein occurred in this District: Plaintiff is a citizen of California who resides in  
23 this District; Defendant conducted a substantial portion of the unlawful activity in this  
24 District; and Defendant conducts business in this District.

25 3. Defendant is subject to personal jurisdiction in California based upon  
26 sufficient minimum contacts which exist between Defendant and California. Defendant  
27 also does business in California.

28

**PARTIES**

1  
2 4. Plaintiff is an adult citizen of California residing within the Central District  
3 of California.

4 5. Defendant is a Delaware limited liability company. Defendant does  
5 business and affects commerce within the state of California and with California  
6 residents.

7 6. The above-named Defendant, along with its affiliates, subsidiaries and  
8 agents, are collectively referred to as “Defendants.” The true names and capacities  
9 of the Defendants sued herein as DOE DEFENDANTS 1 through 25, inclusive, are  
10 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names.  
11 Each of the Defendants designated herein as a DOE is legally responsible for the  
12 unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the Complaint  
13 to reflect the true names and capacities of the DOE Defendants when such identities  
14 become known.

15 7. Plaintiff is informed and believes that at all relevant times, every  
16 Defendant was acting as an agent and/or employee of each of the other Defendants and  
17 was acting within the course and scope of said agency and/or employment with the full  
18 knowledge and consent of each of the other Defendants.

19 8. Plaintiff is informed and believe that each of the acts and/or omissions  
20 complained of herein was made known to, and ratified by, each of the other Defendants.

21 **FACTUAL ALLEGATIONS**

22 9. Without warning visitors or seeking their consent, Defendant has secretly  
23 deployed wiretapping software on its Website. This software allows Defendant to  
24 surreptitiously record every aspect of a visitor’s interaction with the Website, including  
25 keystrokes, mouse clicks, data entry and other electronic communications.

26 10. Defendant’s actions amount to the digital trifecta of looking over its  
27 consumers’ shoulders, eavesdropping on consumers’ conversations, reading consumers’  
28 journals. Defendant’s conduct is both illegal and offensive: indeed, a recent study

1 conducted by the Electronic Privacy Information Center, a respected thought leader  
2 regarding digital privacy, found that: (1) nearly 9 in 10 adults are “very concerned”  
3 about data privacy, and (2) 75% of adults are unaware of the extent to which companies  
4 gather, store, and exploit their personal data. *See*  
5 <https://archive.epic.org/privacy/survey/> (last downloaded July 2022).

6 11. Within the past year, Plaintiff visited Defendant’s Website. Defendant’s  
7 website secretly recorded plaintiff’s visit to Defendant’s website using a “session  
8 replay” program that captures and replays a video reproduction of a user’s experience  
9 on the website – including all mouse movements, clicks, page visits, and scrolling.

10 12. The existence of the website’s deployment of sessions replay has been  
11 confirmed by a team of independent experts using a complex two-step process. First,  
12 the experts inserted a unique text string into a page on the website and then searched  
13 page traffic for evidence of that “fingerprint” being sent to a third party. They found  
14 that the “fingerprint” was sent by Defendant to a dedicated URL at Clicktale.net, a  
15 spyware company now owned by Contentsquare. As second-step confirmation, the  
16 independent experts injected a large chunk of data into a page and tracked an identical  
17 corresponding “bump” in the size of the data sent to Clicktale.

18 13. In addition, Plaintiff communicated with someone that Plaintiff believed to  
19 be customer service representative. In actuality, Defendant’s Website utilizes a  
20 sophisticated “chatbot” created by a company known as PolSource. That program  
21 convincingly impersonates an actual human that encourages consumers to share their  
22 personal information. At the same time, the Defendant simultaneously logs, records  
23 and stores the entire conversation using secretly embedded wiretapping technology.

24 14. Both the “chatbot” and “replay” technology were created by third party  
25 providers who license the technology to Defendant and with whom Defendant routinely  
26 shares the contents of the wiretapped communications for both storage and data  
27 harvesting purposes.

28

1 15. Defendant did not inform Plaintiff, or any of the Class Members, that  
2 Defendant was secretly monitoring, recording, and sharing their communications.

3 16. Defendant did not seek Plaintiff's or the Class Members' consent to  
4 monitoring, recording, and sharing the electronic communications with the Website.

5 17. Plaintiff and Class Members did not know at the time of the  
6 communications that Defendant was secretly intercepting, monitoring, recording, and  
7 sharing the electronic communications.

8 **CLASS ALLEGATIONS**

9 18. Plaintiff brings this action individually and on behalf of all others similarly  
10 situated (the "Class") defined as follows:

11 **All persons within California who: (1) within one year of the filing of**  
12 **this Complaint visited Defendant's website, and (2) had their**  
13 **electronic communications intercepted, recorded, monitored, and/or**  
14 **shared by Defendant without prior consent.**

15 19. NUMEROSITY: Plaintiff does not know the number of Class Members  
16 but believes the number to be in the tens of thousands, if not more. The exact identities  
17 of Class Members may be ascertained by the records maintained by Defendant.

18 20. COMMONALITY: Common questions of fact and law exist as to all Class  
19 Members, and predominate over any questions affecting only individual members of the  
20 Class. Such common legal and factual questions, which do not vary between Class  
21 members, and which may be determined without reference to the individual  
22 circumstances of any Class Member, include but are not limited to the following:

- 23 a. Whether Defendant caused Plaintiff's and the Class's electronic  
24 communications with the Website to be recorded, intercepted and/or  
25 monitored;
- 26 b. Whether Defendant violated CIPA based thereon;
- 27 c. Whether Plaintiff and Class Members are entitled to statutory damages  
28 pursuant to Cal. Penal Code § 631(a);

1 d. Whether Plaintiff and Class Members are entitled to punitive damages  
2 pursuant to Cal. Civil Code § 3294; and

3 e. Whether Plaintiff and Class Members are entitled to injunctive relief.

4 21. TYPICALITY: As a person who visited Defendant’s Website and had her  
5 electronic communications recorded, intercepted and monitored, Plaintiff is asserting  
6 claims that are typical to the Class.

7 22. ADEQUACY: Plaintiff will fairly and adequately protect the interests of  
8 the members of The Class. Plaintiff has retained attorneys experienced in the class  
9 action litigation. All individuals with interests that are actually or potentially adverse to  
10 or in conflict with the class or whose inclusion would otherwise be improper are  
11 excluded.

12 23. SUPERIORITY: A class action is superior to other available methods of  
13 adjudication because individual litigation of the claims of all Class Members is  
14 impracticable and inefficient. Even if every Class Member could afford individual  
15 litigation, the court system could not. It would be unduly burdensome to the courts in  
16 which individual litigation of numerous cases would proceed.

17 **CAUSE OF ACTION**

18 **Violations of the California Invasion of Privacy Act**

19 **Cal. Penal Code § 631**

20 24. Section 631(a) of California’s Penal Code prohibits and imposes liability  
21 upon any entity that “by means of any machine, instrument, contrivance, or in any other  
22 manner,” (1) “intentionally taps, or makes any unauthorized connection, whether  
23 physically, electrically, acoustically, inductively, or otherwise, with any telegraph or  
24 telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument  
25 of any internal telephonic communication system,” or (2) “willfully and without the  
26 consent of all parties to the communication, or in any unauthorized manner, reads, or  
27 attempts to read, or to learn the contents or meaning of any message, report, or  
28 communication while the same is in transit or passing over any wire, line, or cable, or is

1 being sent from, or received at any place within this state” or (3) “uses, or attempts to  
2 use, in any manner, or for any purpose, or to communicate in any way, any information  
3 so obtained, or who aids, agrees with, employs, or conspires with any person or persons  
4 to unlawfully do, or permit, or cause to be done any of the acts or things mentioned  
5 above in this section”.

6 25. Section 631 of the California Penal Code applies to internet  
7 communications and thus applies to Plaintiff’s and the Class’s electronic  
8 communications with Defendant’s Website. (“Though written in terms of wiretapping,  
9 Section 631(a) applies to Internet communications. It makes liable anyone who ‘reads,  
10 or attempts to read, or to learn the contents’ of a communication ‘without the consent of  
11 all parties to the communication.’ Cal. Penal Code § 631(a).” *Javier v. Assurance IQ,*  
12 *LLC*, 21-16351, 2022 WL 1744107, at \*1 (9th Cir. May 31, 2022).

13 26. The software employed by Defendant on its Website to record Plaintiff’s  
14 and the Class’s electronic communications qualifies as a “machine, instrument,  
15 contrivance, or ... other manner” used to engage in the prohibited conduct alleged  
16 herein.

17 27. At all relevant times, Defendant intentionally caused the internet  
18 communication between Plaintiff and Class Members with Defendant’s website to be  
19 tapped and recorded.

20 28. At all relevant times, Defendant willfully, and without the consent of all  
21 parties to the communication, caused to be intercepted, read or attempted to be read,  
22 logged, and stored, the contents of electronic communications of Plaintiff and Class  
23 Members with its Website, while the electronic communications were in transit over  
24 any wire, line or cable, or were being sent from or received at any place within  
25 California.

26 29. Plaintiff and Class Members did not consent to any of Defendant’s actions  
27 in implementing wiretaps on its Website, nor did Plaintiff or Class Members consent to  
28 Defendant’s intentional access, interception, recording, monitoring, reading, learning

1 and collection of Plaintiff and Class Members' electronic communications with the  
2 Website.

3 30. Defendant's conduct constitutes numerous independent and discreet  
4 violations of Cal. Penal Code § 631(a), entitling Plaintiff and Class Members to  
5 injunctive relief and statutory damages of at least \$2,500.00 per violation.


6  
7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff prays for the following relief against Defendant:

- 9 1. An order certifying the Class, naming Plaintiff as the representative  
10 of the Class and Plaintiff's attorneys as Class counsel;
- 11 2. An order declaring Defendant's conduct violates CIPA;
- 12 3. An order of judgment in favor of Plaintiff and the Class and against  
13 Defendant on the cause of action asserted herein;
- 14 4. An order enjoining Defendant's conduct as alleged herein and any  
15 other injunctive relief that the Court finds proper;
- 16 5. Statutory damages to Plaintiff and the Class pursuant to Cal. Penal  
17 Code § 631(a);
- 18 6. Punitive damages to Plaintiff and the Class pursuant to Cal. Civil  
19 Code § 3294;
- 20 7. Prejudgment interest;
- 21 8. Reasonable attorneys' fees and costs; and
- 22 9. All other relief that would be just and proper as a matter of law or  
23 equity, as determined by the Court.

24 Dated: August 10, 2022

PACIFIC TRIAL ATTORNEYS, APC

25  
26 By:   
27 Scott J. Ferrell  
28 Attorneys for Plaintiff



# ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [‘Illegal Wiretapping’: Class Action Claims Old Navy Secretly Records Website Visitors’ Communications](#)

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