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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ERICA FRASCO et al.,

Plaintiff,

v.

FLO HEALTH, INC., GOOGLE, LLC,
FACEBOOK, INC., and FLURRY, INC.,

Defendants.

CASE NO. 3:21-CV-00757-JD (consolidated)

**DEFENDANT META PLATFORMS, INC.’S
NOTICE OF MOTION AND RENEWED
MOTION FOR JUDGMENT AS A MATTER
OF LAW OR, IN THE ALTERNATIVE,
MOTION FOR A NEW TRIAL**

Judge: Hon. James Donato
Court: Courtroom 11 – 19th Floor

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE THAT**, at a time convenient for the Court, the undersigned will
3 appear before the Honorable James Donato of the United States District Court for the Northern District
4 of California at the San Francisco Courthouse, Courtroom 11, 19th Floor, 450 Golden Gate Avenue,
5 San Francisco, CA 94102, and shall then and there present this renewed motion for judgment as a
6 matter of law, or in the alternative for a new trial, on behalf of Defendant Meta Platforms, Inc.

7 Meta brings this motion under Rules 50 and 59 of the Federal Rules of Civil Procedure. Meta
8 will, and hereby does, move for an order granting judgment as a matter of law or in the alternative a
9 new trial. The motion is based on this notice of motion, the following memorandum of points and
10 authorities the pleadings and other papers filed in this action, any oral argument, and any other evidence
11 that the Court may consider in hearing this motion.

12 **ISSUES PRESENTED**

13 Whether Meta is entitled to judgment as a matter of law under Federal Rule of Civil
14 Procedure 50 or a new trial under Federal Rule of Civil Procedure 59.

15
16 Dated: August 11, 2025

LATHAM & WATKINS LLP

17
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1 **I. INTRODUCTION**

2 The evidence at trial does not fit plaintiffs’ legal claim. Plaintiffs seek to hold Meta liable for
3 receiving data connected to twelve “custom app events” defined and created by Flo and sent to Meta
4 by Flo’s own app, which incorporated publicly available, open-source code from a software
5 development kit (“SDK”). At trial, plaintiffs pursued several claims against Flo for impermissibly
6 sending this information. But they had just one claim against Meta under Section 632 of the California
7 Penal Code, a criminal statute that prohibits “intentionally and without the consent of all parties to a
8 confidential communication, us[ing] an electronic amplifying or recording device to eavesdrop upon
9 or record the confidential communication.”

10 That provision—limited to intentional *eavesdropping* and *recording*—does not apply here.
11 Whether *Flo*’s decision to create and send certain data to Meta is actionable under other laws, it is not
12 “eavesdropping” or “recording”—and certainly not by Meta. Rather, as both sides’ experts testified
13 and documentary evidence confirmed, the data that Flo generated and sent to Meta is a different,
14 separate communication from what users input in the Flo App. As Plaintiff Chen put it, this situation
15 is akin to “tell[ing] your best friend” something and “trust[ing]” them “to never tell anybody,” only for
16 them to “turn around and do it” anyway. Tr. 238:17-19. Those undisputed facts cannot support a
17 Section 632 claim against Meta under settled California law. The trial evidence also revealed other
18 problems—on intent, consent, extraterritoriality, and more—compelling the same result.

19 Alternatively, a new trial is warranted on several independent grounds. First, the jury
20 instruction on Section 632’s intent standard incorrectly stated that Meta could be held liable merely for
21 acting “with the knowledge to a substantial certainty that [its] use of the equipment will result in the
22 recordation of a confidential conversation.” Dkt. 744 at 19. But under settled California law, that
23 standard does not apply in cases, like this one, involving third-party misuse of a generally available
24 product or service. In addition, the jury was exposed to highly inflammatory material, and a juror with
25 admitted anti-defendant bias was incorrectly seated.

26 **II. LEGAL STANDARD**

27 Under Rule 50(b), “[j]udgment as a matter of law is appropriate when ‘the evidence, construed
28 in the light most favorable to the nonmoving party, permits only one reasonable conclusion.’” *In re*

1 *Google Play Store Antitrust Litig.*, 2024 WL 3302068, at *3 (N.D. Cal. July 3, 2024) (Donato, J.). A
2 “proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule
3 50(a) motion.” *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009).¹ Under Rule
4 59(a), a new trial is warranted “where ‘the verdict is against the weight of the evidence’” or “the trial
5 was not fair to the [moving] party.” *Claiborne v. Blauser*, 934 F.3d 885, 894 (9th Cir. 2019).

6 **III. ARGUMENT**

7 **A. Meta Is Entitled To Judgment As A Matter Of Law Under Rule 50(b).**

8 **1. Meta did not “eavesdrop upon” or “record” plaintiffs’ communications.**

9 Section 632 does not forbid the receipt of all confidential communications. Rather, it forbids
10 obtaining them in a particular way: by intentionally using a device to “eavesdrop upon or record” them.
11 Cal. Penal Code § 632(a). Eavesdropping means “to listen secretly to what is said in private,” *Rogers*
12 *v. Ulrich*, 52 Cal. App. 3d 894, 899 (1975), while recording requires a conversation to be “registered
13 on something (such as a disc or magnetic tape) in reproducible form,” *Record*, Merriam-Webster
14 Dictionary, <https://www.merriam-webster.com/dictionary/record> (last visited Aug. 11, 2025).
15 California law draws “a critical distinction between eavesdropping upon or recording a conversation,”
16 on the one hand, and “the secondhand repetition of the contents of a conversation,” on the other—with
17 the latter *not* covered by Section 632. *Flanagan v. Flanagan*, 27 Cal. 4th 766, 775 (2002). That makes
18 sense, as someone “who imparts private information risks the betrayal of this confidence by the other
19 party,” *id.*—who may disclose a secondhand version to a third party. Even if that betrayal violates
20 other laws, it does not make the third party liable under Section 632’s ban on eavesdropping and
21 recording. Numerous cases, old and new, have reiterated that disclosing (to say nothing of merely
22 receiving) a “secondhand repetition” of a conversation’s substance is not eavesdropping or recording.
23 *Smith v. LoanMe, Inc.*, 11 Cal. 5th 183, 200 (2021).²

24 _____
25 ¹ In presenting its Rule 50(a) motion at trial, Meta attempted to walk through each of its asserted
26 grounds for judgment as a matter of law and offered to file a written brief, but the Court declined and
27 told Meta not to “worry” and that there would be no “impediment to appeal.” Tr. 1126:1-1129:11.

28 ² *E.g.*, *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 234-35 (1998); *Ribas v. Clark*, 38 Cal. 3d 355,
360-61 (1985); *Gruber v. Yelp Inc.*, 55 Cal. App. 5th 591, 608-09 (2020); *Kight v. CashCall, Inc.*, 200
Cal. App. 4th 1377, 1389-90 (2011); *Coulter v. Bank of Am.*, 28 Cal. App. 4th 923, 929 (1994); *Frio*
v. Super. Ct., 203 Cal. App. 3d 1480, 1488 (1988); *Warden v. Kahn*, 99 Cal. App. 3d 805, 813 (1979).

1 The undisputed evidence showed that the data in the twelve custom app events at issue was, at
2 most, a secondhand repetition to Meta of plaintiffs’ communications with Flo. Sometimes, the
3 parameter values associated with a custom app event resembled the information plaintiffs input in the
4 app (e.g., “get pregnant” after a user tapped “I want to get pregnant”), Tr. 420:3-421:8, 436:4-12
5 (Egelman), just as a secondhand repetition of a conversation would resemble the original. Other times,
6 the data did not resemble the information plaintiffs input at all (e.g., “known” or “unknown” after a
7 user selected her last period date). *Id.* at 433:5-435:17, 436:4-17 (Egelman). And sometimes, it was
8 somewhere in between (e.g., an approximate calculation of a user’s age after a user input their birth
9 year). *Id.* at 436:4-24, 529:7-530:11 (Egelman). But *all* this event data was sent as separate
10 communications that were different from plaintiffs’ communications with Flo. That is true regardless
11 of whether Meta theoretically could have reverse-engineered the Flo App to figure out what questions
12 the app asked Flo users (and there was no evidence Meta ever attempted to do so). In short, no matter
13 what this data *revealed*, it was not a *recording* or *eavesdropping* as California law defines those terms.

14 The same goes for Flo’s “predictions” about a user’s place in her menstrual cycle, which
15 plaintiffs’ expert characterized as “the other half of the conversation.” *Id.* at 553:2-17 (Egelman). That
16 testimony pertained to the “SESSION_CYCLE_DAY_FIRST_LAUNCH” event, and as with the other
17 events, the communication between Flo and users was distinct from the data Flo sent to Meta. As
18 plaintiffs’ expert admitted, users would have seen in their app that they were (for example) “six days
19 to ovulation,” *id.* at 553:15-16, while Flo would have separately “communicat[ed] to Facebook that
20 this user is 16 days into her cycle,” *id.* at 437:15-17. Those are two different communications with two
21 different pieces of information, not an original and a copy.

22 Because Section 632 is a prohibition on eavesdropping and recording—not an all-purpose
23 privacy provision—it does not apply to Flo’s transmission of custom app event data here.

24 **2. Meta’s SDK code is not “an electronic amplifying or recording device.”**

25 Section 632 applies only if a defendant uses “an electronic amplifying or recording device” to
26 unlawfully eavesdrop or record. Plaintiffs claim that the portions of Meta’s SDK code used by Flo
27 qualify as such a device. *Id.* at 1188:10-15 (closing). That is wrong as a matter of law.

28 *First*, statutory text and context demonstrate that a “device” under Section 632 must be a piece

1 of *physical* equipment. “A common meaning of ‘device’ is ‘a thing made or adapted for a particular
 2 purpose, especially a piece of mechanical or electronic equipment.” *Moreno v. S.F. Bay Area Rapid*
 3 *Transit Dist.*, 2017 WL 6387764, at *5 (N.D. Cal. Dec. 14, 2017) (holding that software is not a
 4 “device” under neighboring provision); *see Device*, Black’s Law Dictionary (12th ed. 2024). Statutory
 5 context confirms this limitation: Section 632 situates the word “device” alongside other tangible
 6 objects—“telegraph, telephone, or other device, except a radio,” Cal. Penal Code § 632(a)—and under
 7 the *noscitur a sociis* canon, “a specific item in a statutory list of items is qualified by the overall type
 8 or subject matter characterizing the list,” *Davis v. Fresno Unified Sch. Dist.*, 14 Cal. 5th 671, 689
 9 (2023). Plus, when other provisions cover non-tangible processes, they do so expressly—including
 10 Section 632’s next-door neighbor, Section 631. Cal. Penal Code § 631(a) (“by means of any machine,
 11 instrument, or contrivance, *or in any other manner*”) (emphasis added); *see, e.g.*, 18 U.S.C. § 3127(4).
 12 The SDK is intangible computer code, not a tangible device. It thus falls outside of Section 632. *See*
 13 *Doe v. Microsoft Corp.*, 2023 WL 8780879, at *8 (W.D. Wash. Dec. 19, 2023).

14 *Second*, even if a software application—such as the fully compiled Flo App—could qualify as
 15 a “device,” lines of code that do not stand alone and can do nothing on their own (like the excerpts of
 16 code Flo used from the SDK) do not. As both sides’ experts agreed, the open-source SDK code can
 17 function only if a developer integrates the code into an app, at which point the code meshes with the
 18 developer’s other code to become “a single cohesive set of instructions.” Tr. 743:5-6 (Zervas); *see id.*
 19 at 384:24-385:3 (Egelman) (describing SDKs as a “component” of apps). Whatever might be said of
 20 a software application as a whole, excerpted lines of SDK code are not a standalone device.

21 *Third*, even if SDK code is a device, it is not an “amplifying or recording” device. Cal. Penal
 22 Code § 632(a). An amplifying or recording device would pick up *users’ conversations*. *Supra* 2-3.
 23 But the data Flo sent to Meta reflects custom event names and parameters defined and created *by Flo*,
 24 not by users. Tr. 754:23-755:7 (Zervas); *see id.* at 513:2-16, 514:25-515:8 (Egelman).

25 3. Meta did not “use” any device to unlawfully eavesdrop or record.

26 Section 632 punishes a person who intentionally and without consent “uses” an electronic
 27 amplifying or recording device to eavesdrop or record. Meta’s SDK code is “open source,” meaning
 28 it is publicly available for any app developer to download and use. *Id.* at 548:11-14 (Egelman); *see id.*

1 at 722:9-723:13 (Zervas). But the undisputed evidence confirmed that *Flo*, not Meta, incorporated
 2 portions of the SDK code into the Flo App, controlled and customized that code, and chose what (if
 3 any) data to send. *Id.* at 754:23-755:7 (Zervas); *see id.* at 513:2-16, 514:25-515:8 (Egelman). It is thus
 4 app developers, not Meta, that “use” the SDK. *Cf. Bailey v. United States*, 516 U.S. 137, 144 (1995)
 5 (statute criminalizing “use” of a firearm required showing “active employment of the firearm”). Nor
 6 does it matter that Meta allegedly used the data that Flo sent; as other CIPA provisions confirm, there
 7 is a difference between using a device and using data sent by it. *Compare* Cal. Penal Code § 631(a)
 8 (separately punishing wiretapping and “us[ing] ... any information so obtained”), *with id.* § 632(a)
 9 (punishing eavesdropping and recording, but not the use of information so obtained).³

10 **4. No evidence suggested Meta acted “intentionally.”**

11 Section 632, a criminal statute, requires proof that a defendant “intentionally” used a device to
 12 eavesdrop upon or record a confidential communication. Meta respectfully submits that the jury was
 13 instructed incorrectly on this element. *Infra* 11-13. But even under the as-given instruction (and *a*
 14 *fortiori* under Meta’s proposed instruction), the trial evidence cannot support a finding of intent.

15 The jury was instructed that intent under Section 632 requires that “the person using the
 16 recording equipment does so with the purpose or desire of recording a confidential conversation, or
 17 with the knowledge to a substantial certainty that his use of the equipment will result in the recordation
 18 of a confidential conversation.” Dkt. 744 at 19. Meta presented evidence that it contractually forbade
 19 Flo from sending any “health” or “sensitive” information, and that it required Flo to “provide[] robust
 20 and sufficiently prominent notice to and obtain[] the necessary consent from [its] users” to share data
 21 with Meta. Ex. 1223 at 4. Plaintiffs focused at trial broadly on Meta’s use of data *in general* but
 22 presented no evidence showing that, contrary to these contractual provisions, Meta secretly *wanted* Flo

23 _____
 24 ³ Plaintiffs’ attempt to hold Meta liable for Flo’s use of the SDK amounts to a *de facto* aiding-and-
 25 abetting theory. But this Court already rejected that theory in granting summary judgment on plaintiffs’
 26 claim against Meta for aiding and abetting Flo’s intrusion-upon-seclusion. Dkt. 608 at 2; *see, e.g.,*
 27 *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 493 (2023) (requiring “conscious, voluntary, and culpable
 28 participation in another’s wrongdoing” for aiding-and-abetting under federal statute). No such theory
 was presented to the jury, which would fail as a matter of law anyway—as the trial record is “devoid”
 of evidence showing that Meta “had actual knowledge of Flo’s deceptive disclosure practices with
 respect to plaintiffs’ private health information.” *Frasco v. Flo Health, Inc.*, 2024 WL 4280933, at *3
 (N.D. Cal. Sept. 23, 2024) (Donato, J.).

1 to send sensitive or unconsented data. No evidence suggests that Meta intentionally obtained the
 2 “confidential communications” at issue. *See, e.g., Doe I v. Google LLC*, 2025 WL 1616720, at *2
 3 (N.D. Cal. June 6, 2025) (“[T]he question is not whether Google intended to collect any old
 4 communication. The question is whether Google intended to collect the kinds of communications at
 5 issue in this lawsuit.”); *B.K. v. Desert Care Network*, 2024 WL 1343305, at *7 (C.D. Cal. Feb. 1, 2024).

6 Nor can the “substantial certainty” prong rescue plaintiffs. For one thing, even under the
 7 as-given instruction, that prong applies only when a party knows that “*his use* of the equipment will
 8 result in the recordation of a confidential conversation,” Dkt. 744 at 19 (emphasis added), and as
 9 explained, Flo—not Meta—was the party who “used” the SDK code. Regardless, no evidence supports
 10 a finding that Meta “kn[ew] to a substantial certainty” that Flo would use the open-source SDK code
 11 to transmit the data at issue in this case—much less (1) that such data would qualify as confidential
 12 under Section 632(c), *infra* 8-9, or (2) that Flo would fail to properly notify its users and obtain consent
 13 (as this Court already concluded in granting summary judgment on plaintiffs’ aiding-and-abetting
 14 claim, *supra* n.2). The evidence showed only that Meta knew of a *risk* that somebody, somewhere
 15 could misuse the code by sending prohibited data, and that Meta undertook steps to address that risk.
 16 *See, e.g.,* Tr. at 893:20-24 (Satterfield); *id.* at 959:15-22, 961:10-19 (Wooldridge). At the same time,
 17 un rebutted testimony established that Meta did not know Flo (or any other developer) might *actually*
 18 be sending potentially sensitive health information until February 2019, when the Wall Street Journal
 19 published allegations to that effect. *Id.* at 959:8-14, 961:10-19, 963:8-14, 997:2-11 (Wooldridge).⁴
 20 Furthermore, purported knowledge that developers might use SDK code to define, create, and send
 21 custom event data to Meta is not the same thing as knowledge that developers would use the SDK code
 22 to “record” users’ confidential communications without proper consent (even assuming that is what
 23 happened here). Dkt. 744 at 19. So under any standard, the trial evidence is insufficient to prove intent.

24 5. Plaintiffs consented to Meta’s receipt of data from Flo.

25
 26 ⁴ In an apparent attempt to plug this evidentiary hole, plaintiffs submitted two exhibits showing
 27 automated email notifications from Meta to Flo in December 2018 and January 2019 indicating that
 28 some of the data Flo sent “may violate [Meta’s] Business Tools Terms.” Exs. 383, 536. But it is
 undisputed that these emails were triggered by Meta’s PII filter, not its later-enacted health filter. *See*
 Tr. 872:8-11, 874:4-7 (Satterfield); *id.* at 968:13-19 (Wooldridge).

1 Section 632 prohibits eavesdropping and recording only if done “without the consent of all
2 parties.” And where a plaintiff agrees to “disclosures [that] ‘explicitly notify’ users of the conduct at
3 issue,” that establishes consent. *Calhoun v. Google, LLC*, 113 F.4th 1141, 1147 (9th Cir. 2024).

4 There is no question that Flo consented. *See, e.g.*, Ex. 1223; Dkt. 608 at 1 (holding at summary
5 judgment that “the undisputed record shows that Flo consented to Meta’s data collection practices”).
6 And all three named plaintiffs testified that they used Facebook, which required them to agree to Meta’s
7 Terms of Service and Data Policy. *See* Tr. 216:7-12, 216:15-218:21 (Wellman); *id.* at 259:11-15
8 (Chen); *id.* at 314:18-23, 315:13-14 (Gamino); *id.* at 898:6-15, 929:5-12 (Satterfield). Meta’s policies
9 clearly and broadly disclosed that Meta could receive data from third-party apps reflecting users’
10 activity on those apps—and use that data for advertising. *See, e.g.*, Ex. 70 at 3-4; Ex. 1224 at 2, 4, 7,
11 10; Ex. 1226 at 2-3, 7-8, 13-15. As the Ninth Circuit has recognized, “[a] reasonable person viewing
12 those disclosures would understand that Facebook maintains the practices of (a) collecting its users’
13 data from third-party sites and (b) later using the data for advertising purposes.” *Smith v. Facebook,*
14 *Inc.*, 745 F. App’x 8, 8-9 (9th Cir. 2018). That establishes consent as a matter of law. *See id.*

15 Plaintiffs argued that the breadth of Meta’s policies was “crazy.” Tr. 1200:17 (closing). But
16 Meta’s policies are valid and enforceable, and a “contractual term is not ambiguous just because it is
17 broad.” *F.B.T. Prods., LLC v. Aftermath Recs.*, 621 F.3d 958, 964 (9th Cir. 2010). The Ninth Circuit
18 recently reiterated that principle in assessing Google’s privacy policy, rejecting a district court’s narrow
19 reading where the policy broadly “disclose[d] Google’s collection of user activity in third-party apps.”
20 *Hammerling v. Google, LLC*, 2024 WL 937247, at *2 (9th Cir. Mar. 5, 2024). The court emphasized
21 that “where a contract expressly defines a term, we cannot reject that definition simply because it may
22 deviate from our expectations.” *Id.* So too here. Indeed, Plaintiff Wellman herself acknowledged that
23 Meta’s terms were “pretty broad” in disclosing websites’ sending data to Meta. Tr. 217:10-218:4.

24 Nor can plaintiffs carve out exceptions to Meta’s disclosures by demanding hyper-specific
25 language about every app that might use SDK code and every type of data that might be sent. Plaintiffs
26 argued, for example, that Meta’s policies did not establish consent because they did not specifically
27 mention “fertility apps,” “private health information,” or “the Flo Health app.” Tr. 1200:21-1201:10
28 (closing); *see id.* at 935:22-936:14 (questions to Satterfield). Plaintiffs’ demand for a catalogue of apps

1 and data types conflicts with their critique that Meta’s “nine-page data policy” was too long, *id.* at
 2 942:18-943:21 (Satterfield)—hundreds of thousands of apps incorporate Meta’s pre-written code and
 3 are programmed to send the data (if any) that their developers choose to send, consistent with their
 4 contractual commitments to Meta, *see id.* at 514:25-515:8, 548:11-14 (Egelman); *id.* at 717:8-19,
 5 725:19-727:9 (Zervas). But more fundamentally, a broad disclosure covering a particular issue need
 6 not list every example to be effective. *See Hammerling*, 2024 WL 937247, at *2; *Smith*, 745 F. App’x
 7 at 8-9; *F.B.T. Prods.*, 621 F.3d at 964. Here, Meta’s policies clearly disclosed that third-party apps
 8 could use the SDK to send data reflecting user activity on those apps, and that Meta could then use the
 9 data for advertising. *See, e.g.*, Ex. 70 at 3-4; Ex. 1224 at 2, 4, 7, 10; Ex. 1226 at 2-3, 7-8, 13-15. That
 10 is precisely the conduct at issue here, and Meta’s policies were not required to (and could not
 11 reasonably) identify every app that uses Meta’s tools or every type of data that might be sent.⁵

12 In addition, plaintiffs’ consent to *Flo*’s policies independently established consent by disclosing
 13 that *Flo* used “Facebook Analytics.” *E.g.*, Tr. 200:3-5 (Wellman). Plaintiff Wellman testified that she
 14 “would have known that *Flo* was using Facebook Analytics” if she had read this policy. *Id.*

15 6. Communications with *Flo* were not “confidential” under Section 632(c)

16 Section 632 is limited to “confidential communication[s].” Cal. Penal Code § 632(a). That
 17 does not simply mean “private” or “sensitive.” Rather, “confidential communication” is a defined term
 18 that explicitly “*excludes* a communication made in a public gathering or in any legislative, judicial,
 19 executive, or administrative proceeding open to the public, or in *any other circumstance in which the*
 20 *parties to the communication may reasonably expect that the communication may be overheard or*
 21 *recorded.” Id.* § 632(c) (emphases added); *see, e.g., Flanagan*, 27 Cal. 4th at 774-77. Importantly,
 22 that definition is agnostic as to *who* is recording—so long as a party reasonably expects that *someone*
 23 is recording the communication, the communication by definition is not “confidential.” Here, because
 24 plaintiffs reasonably expected that (at least) *Flo* was recording their responses in the app, their

25 _____
 26 ⁵ For the same reasons, district court decisions that have carved out exceptions to Meta’s policies at the
 27 motion-to-dismiss stage for “protected health information from a medical provider,” *In re Meta Pixel*
 28 *Healthcare Litig.*, 647 F. Supp. 3d 778, 794 (N.D. Cal. 2022), are inconsistent with how the Ninth
 Circuit interprets contractual disclosures—and *Flo* is not a “provider of healthcare,” as this Court
 recognized in addressing *Flo*’s Rule 50(a) motion on plaintiffs’ CMIA claim. Tr. 1095:18-23.

1 communications are not “confidential” as Section 632 defines that term.

2 This very problem doomed a Section 632 claim in *Rodriguez v. Google*, 2021 WL 2026726
 3 (N.D. Cal. May 21, 2021). The plaintiffs there had “plausibly demonstrate[d] an ‘objectively
 4 reasonable expectation’ that their communications with third party apps would not be ‘recorded’ by
 5 Google,” but that “expectation, fair as it [wa]s, [did] not reasonably give rise to the expectation that
 6 nobody (including the apps’ developers) would record the communication,” as required by Section
 7 632(c). *Id.* at *7. Plaintiffs’ Section 632 claim here fails for the same reason: Because they
 8 indisputably expected *Flo* to record their conversations—the period-tracking app could not function
 9 otherwise—those conversations were not “confidential” under Section 632, regardless of whether or
 10 not plaintiffs expected *Flo* to share that information with Meta. *See id.*; *Campbell v. Facebook Inc.*, 77
 11 F. Supp. 3d 836, 849 (N.D. Cal. 2014) (observing that “California appeals courts have generally found
 12 that Internet-based communications are not ‘confidential’ within the meaning of [S]ection 632, because
 13 such communications can easily be shared by, for instance, the recipient(s) of the communications”).

14 **7. No evidence shows plaintiffs completed Flo’s onboarding in California.**

15 “Under California law, a presumption exists against the extraterritorial application [of] state
 16 law.” *O’Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 1004 (N.D. Cal. 2014). Courts must
 17 “presume the Legislature did not intend a statute to be ‘operative, with respect to occurrences outside
 18 the state, unless such intention is clearly expressed or reasonably to be inferred from the language of
 19 the act or from its purpose, subject matter or history.’” *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191,
 20 1207 (2011). Nothing in Section 632 rebuts that presumption—and in fact, the statute’s “principal
 21 purpose” is “to protect the privacy of confidential communications of California residents *while they*
 22 *are in California.*” *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 119-20 (2006).

23 Here, undisputed evidence at trial showed that the twelve custom app events at issue would
 24 have been triggered only when a user first completed the *Flo* App’s initial onboarding process. *See Tr.*
 25 *498:18-499:10* (Egelman); *id.* at 667:18-668:4 (Karkanias); *id.* at 748:20-749:14 (Zervas). And there
 26 is no evidence in the trial record—none—that any named plaintiff completed that onboarding process
 27 while in California. True enough, they testified that they *lived* in California. *See Tr.* 146:12-15
 28 (Wellman); *id.* at 229:12-13 (Chen); *id.* at 289:14-17 (Gamino). But merely being a California resident

1 does “not create a reasonable inference that [plaintiffs were] in California” when they completed Flo’s
 2 onboarding process. *Doe v. Call-On DOC, Inc.*, 2025 WL 1677632, at *6 (S.D. Cal. June 13, 2025);
 3 *cf.* Dkt. 605 at 32-33 (denying class certification for Section 631 claim given that individualized
 4 inquiries are needed to show that a California resident “completed the onboarding process in
 5 California”).⁶ Plaintiffs therefore cannot press a Section 632 claim.

6 **8. Plaintiffs are not entitled to relief under Section 637.2.**

7 Even if plaintiffs had proved any violation of Section 632—a criminal statute—they lack a
 8 private cause of action under Section 637.2 for two independent reasons.

9 *First*, the private cause of action is limited to “[a]ny person *who has been injured* by a
 10 violation.” Cal. Penal Code § 637.2(a) (emphasis added). Plaintiffs introduced no evidence of injury.
 11 They never claimed they received targeted ads based on data shared by Flo, and they introduced no
 12 evidence that any data Meta received was ever viewed (let alone understood) by any human before it
 13 was automatically deleted. To the contrary, plaintiffs’ own expert admitted that Meta’s systems need
 14 not and did not understand the “semantic meaning” of the event data—*i.e.*, what event names like
 15 R_CHOOSE_GOAL or parameter values like “get_pregnant” actually meant. *See* Tr. 1088:13-
 16 1091:16 (Golbeck). Plaintiffs instead focused on Meta’s purported ability to improve its ad-targeting
 17 and content-delivery systems by using data from third-party apps like Flo. But that does not show any
 18 *injury* suffered by plaintiffs—particularly since plaintiffs’ expert admitted that Meta’s systems did not
 19 rely on the “semantic meaning” of the event data. *Id.* That is presumably why plaintiffs testified they
 20 were never even aware that anything had happened until they were contacted by lawyers. *See* Tr.
 21 184:14-17 (Wellman); *id.* at 232:13-15 (Chen); *id.* at 318:24-319:2 (Gamino). And conclusory claims
 22 of embarrassment are insufficient. *See, e.g., Freeman v. Ocwen Loan Serv., LLC*, 113 F.4th 701, 711
 23 (7th Cir. 2024) (“psychological harm” insufficient); *Knights v. Experian Info. Sols., Inc.*, 2025 WL
 24 21944, at *1 (E.D.N.Y. Jan. 3, 2025).

25 _____
 26 ⁶ In the class certification order, this Court relied on Section 631’s express geographical limitation and
 27 observed that “[d]efendants do not explain why this might be relevant to the § 632 claim as nothing in
 28 the plain text of that section suggests such a geographic limitation.” Dkt. 605 at 32. But as cases like
O’Connor, Sullivan, and Kearney confirm, the presumption against extraterritoriality fills that statutory
 silence. *Supra* 9-10; *Kearney*, 39 Cal. 4th at 119.

1 *Second*, plaintiffs are not entitled to any relief authorized by Section 637.2. They have
 2 disclaimed any actual damages. Dkt. 656 at 17. They do not claim any ongoing harm that could justify
 3 an injunction, and in fact Flo has ceased sending the at-issue data and Meta already deleted all relevant
 4 Flo data pursuant to existing retention policies. Tr. 1029:18-25 (Woolridge); 715:2-8 (Zervas); And
 5 statutory damages would be inappropriate under *Campbell v. Facebook Inc.*, 315 F.R.D. 250, 268 (N.D.
 6 Cal. 2016), because: (1) any violation was not “sever[e],” given Meta’s role as a mere recipient of data
 7 Flo chose to send and the lack of any actual harm to plaintiffs; (2) plaintiffs have disclaimed any “actual
 8 damage”; (3) “the extent of any intrusion” into plaintiffs’ “privacy” was minimal, particularly where
 9 there was no evidence anyone at Meta—human or machine—ever understood the meaning of the data
 10 Flo sent or that Meta ever shared any data it received; (4) there was no “financial burden[]” on
 11 plaintiffs; (5) SDKs serve a ubiquitous, helpful, and “reasonable purpose” in allowing app developers
 12 to understand and improve their apps and deliver targeted ads; and (6) no “useful purpose” would be
 13 served “by imposing [a] statutory damages amount” that would far outpace any actual harm. *Id.* at 268.

14 **B. At Minimum, The Court Should Order A New Trial Under Rule 59(a).**

15 In the alternative, a new trial is warranted. For the above reasons, even if the Court concluded
 16 that the evidence was technically sufficient, the verdict is at a minimum “contrary to the clear weight
 17 of the evidence.” *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 842, 846-47
 18 (9th Cir. 2014) (trial evidence “is not required” to be viewed “in the light most favorable to the verdict”
 19 under Rule 59(a)). Additionally, three more sets of errors each independently require a new trial.

20 **1. A critical error in the intent instruction warrants a new trial.**

21 “Jury instructions must be formulated so that they fairly and adequately cover the issues
 22 presented, correctly state the law, and are not misleading.” *Mockler v. Multnomah Cnty.*, 140 F.3d 808,
 23 812 (9th Cir. 1998). “Erroneous jury instructions are a sufficient basis for a new trial.” *MGA Ent. Inc.*
 24 *v. Harris*, 2023 WL 6194387, at *5 (C.D. Cal. Sept. 15, 2023). The intent instruction given at trial was
 25 incorrect, misleading, and highly prejudicial to Meta.

26 As Meta explained in objecting to Instruction No. 17, *see* Tr. 1136:17-1138:16; Dkt. 699 at
 27 45-47, the standard for intent under Section 632 tracks the federal Wiretap Act’s standard, which
 28 requires a defendant to have obtained confidential communications “purposefully and deliberately,”

1 and “not as a result of accident or mistake,” *United States v. Christensen*, 828 F.3d 763, 790 (9th Cir.
2 2015); *see Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 126 (N.D. Cal. 2020) (Koh, J.). The jury should
3 have been instructed that Meta must have acted with the “conscious objective” of obtaining the kinds
4 of confidential communications at issue here. *Id.* at 791. But the jury was instead told that it could
5 find intent based merely on “knowledge to a substantial certainty that his use of the equipment will
6 result in the recordation of a confidential conversation.” Dkt. 744 at 19. On the facts of this case,
7 where plaintiffs sought to hold Meta liable for *Flo*’s misuse of the SDK, that instruction was incorrect
8 as a matter of California law and highly confusing.

9 The California Supreme Court has made clear that a defendant accused of unauthorized
10 eavesdropping or recording must act with the “intent to bring about the proscribed result rather than an
11 intent merely to do an act which unintentionally brought about that result.” *Est. of Kramme*, 20 Cal.
12 3d 567, 572 n.5 (1978). It is not enough for a defendant to have “understood it was deploying recording
13 devices that might happen to record a confidential communication.” *Lozano v. City of Los Angeles*, 73
14 Cal. App. 5th 711, 727-28 (2022). But the instruction given at trial invited the jury to find just that.

15 In justifying this erroneous instruction, the Court invoked cases holding that a defendant can be
16 liable under Section 632 for knowing “to a substantial certainty” that *its own use* will result in the
17 recording of a confidential conversation. In *Rojas v. HSBC*, for example, a jury could find that HSBC
18 intended to record confidential communications when HSBC *itself* “purposefully was recording [] *all*
19 of the calls, having previously told its employees that they were authorized to use HSBC telephones
20 for personal use.” 20 Cal. App. 5th 427, 435 (2018); *see People v. Super. Ct.*, 70 Cal. 2d 123, 126
21 (1969) (detective’s own use of a recording device). But the same reasoning does not apply when a
22 defendant merely makes a product generally available for third parties to use. For instance, even though
23 a “manufacturer of knives can easily predict that a certain number of persons using its knives will
24 inadvertently cut themselves,” a knife manufacturer “do[es] not intentionally cause the injuries that
25 result.” Restatement (3d) of Torts: Phys. & Emot. Harm § 1, cmt. e (2010). With hundreds of
26 thousands of app developers incorporating the SDK code into their apps, Meta is in an analogous
27 position to a knife manufacturer—with the notable exception that knives obviously pose dangers that
28 open-source SDK code does not, and Meta contractually required app developers *not* to send sensitive

1 data. So contrary to the intent instruction given at trial, Meta could not be liable under Section 632
2 merely for knowing that someone, somewhere could misuse the SDK.

3 This erroneous intent instruction was highly prejudicial. Intent was a heavily disputed issue
4 throughout trial. The evidence showed that Meta required developers to agree to a “binding contract”
5 promising they would “not share information that includes health” or other “information they did not
6 have consent to send.” Tr. 1216:24-1218:3 (closing). Evidence at trial also detailed Meta’s significant
7 “efforts taken to protect against receiving this data,” including educating developers and creating
8 filters. *Id.* at 1223:5-22; *see id.* at 843:16-19, 892:21-893:2 (Satterfield); 968:14-969:3, 988:20-991:25
9 (Woolridge). Despite that evidence, the instruction’s watered-down intent standard let plaintiffs
10 argue—and the jury find—that Meta acted with the requisite intent merely for having “identified the
11 risk that apps could send potentially sensitive health information.” Tr. 960:9-961:22 (Woolridge);
12 *see, e.g., id.* at 1196:9-19 (closing). That violates California law and warrants a new trial.

13 2. Erroneous evidentiary rulings independently warrant a new trial.

14 A new trial is warranted where “the jury’s verdict is more probably than not tainted” by
15 evidentiary error. *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 888 (9th Cir. 1991). Four
16 evidentiary errors exposed the jury to inflammatory and irrelevant evidence. Each warrants a new trial.

17 *First*, the Court let plaintiffs—over Meta’s contemporaneous objection—read into the record
18 jokes made by Meta employees claiming to be “the keeper of everyone’s ovulation and menstruation
19 data” and quipping “may the flow be with you.” Ex. 652; Tr. 877:3-15 (Satterfield); *see id.* 877:20-
20 878:21.⁷ This questioning was improper. For starters, it lacked foundation, as Mr. Satterfield was not
21 listed on the chat log and had never even seen it until his deposition on the eve of trial. *Id.* at 877:22-
22 878:2. It was also “highly prejudicial and at most marginally probative” under Rule 403. *United States*
23 *v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992). The messages were irrelevant, “inherently inflammatory,”
24 and clearly intended to prejudice the jury against Meta. *United States v. Davis*, 2024 WL 222271, at
25 *2 (9th Cir. Jan. 22, 2024). Plaintiffs’ counsel deployed them to great effect, asking Mr. Satterfield
26

27 ⁷ Meta objected to this line of questioning when it occurred. Tr. 878:10-11. Meta also repeatedly
28 attempted to follow up to preclude similar testimony going forward. *Id.* at 921:12-17, 1107:4-7,
1129:24-1130:3. This was not a retroactive objection.

1 whether he found the jokes “funny” and had disciplined the employees involved (who did not report to
2 him) six years after the fact. Tr. 877:20-879:4.

3 *Second*, the Court overruled Meta’s objection to inflammatory questions posed to Mr.
4 Satterfield about “opioid manufacturers” and “opioid distributors,” purportedly arguing that they
5 followed industry standards. Tr. 845:15-24. Arguments made (or not) by opioid manufacturers or
6 distributors in other litigation have no relevance to this case. And even in cases *involving opioid*
7 *manufacturers or distributors*, courts have excluded evidence about the “opioid epidemic,” given “the
8 danger of unfair prejudice.” *Garren v. CVS RX Servs., Inc.*, 2021 WL 781677, at *16 (E.D. Tenn.
9 Mar. 1, 2021); *accord Teva Pharms. Int’l GmbH v. Eli Lilly & Co.*, 2022 WL 10489059, at *5 (D.
10 Mass. Oct. 17, 2022). The questioning was purely inflammatory and should not have been permitted.

11 *Third*, the Court denied Meta’s motion in limine to exclude other sensitive information users
12 may have entered into the Flo App that was *not* at issue, *i.e.*, information other than the 12 custom app
13 events plaintiffs claimed Flo improperly sent to Meta. Dkt. 629 at 5. Pursuant to that order, the Court
14 permitted a raft of testimony and evidence related to the Flo App’s “very sensitive question[s]” about
15 things like “symptoms,” “body fluids,” and “sex.” Tr. 94:10-16, 1179:19-20; *see id.* at 158:14-161:16
16 (Wellman), *id.* at 325:13-18 (Frasco); *id.* 293:24-294:8 (Gamino). This testimony improperly raised
17 the specter of information that plaintiffs did *not* show was ever sent to Meta, and which they conceded
18 was not the basis for liability. *See* Dkt. 364 at 12; Dkt. 477 at 3-4. And it was “fraught with the twin
19 dangers of unfairly prejudicing the defendant and misleading the jury.” *Hitt*, 981 F.3d at 424.

20 *Fourth*, the Court permitted plaintiffs to emphasize the possibility of pregnancy-related
21 information being disclosed, even though no class representative was pregnant when they filled out the
22 Flo App’s onboarding survey. Plaintiffs elicited testimony that “Meta is also recording when a woman
23 is pregnant, how far into her pregnancy she is, and what day or week of her pregnancy she’s in ... and
24 who she is.” Tr. 451:15-23 (Egelman). They repeatedly stated that Meta got “period and pregnancy
25 information.” Tr. 99:12-25; *see, e.g., id.* at 97:21-23, 590:8-22 (Egelman); *id.* at 695:14-20
26 (Karkanias); *id.* at 970:16 (Woolridge). And they claimed to represent the purportedly “millions of
27 women who did answer [the pregnancy] questions”—even though *none* of the class representatives did
28 so. *Id.* at 590:8-14. This evidence was improper because no named plaintiff suffered that alleged injury

1 (i.e., transmission of pregnancy information) and thus cannot represent a class with that injury.
2 Plaintiffs' repeated references to pregnancy information improperly invited the jury to find Meta liable
3 for obtaining *that* type of information without consent.

4 **3. The seating of an admittedly biased juror likewise warrants a new trial.**

5 Finally, the Court erred in seating a juror who should have been struck for cause. Juror #4
6 indicated a belief on his questionnaire that “if you’re on trial, you’re guilty” and “[i]f you’re in a civil
7 case, you should get money.” Tr. 66:23-67:2. Meta argued that this “evidence[d] a bias.” *Id.* After
8 Juror #4 testified that he “just sp[oke] for [him]self” in answering that he believed civil plaintiffs should
9 get money, the Court said it was “not doing a for-cause challenge[.]” *Id.* at 67:13-68:20. Juror #4 also
10 stated that he was friends with Brian Acton, who founded WhatsApp and had public disagreements
11 with Meta after his company was acquired. *Id.* at 64:21-66:4. But because Meta was “out” of
12 peremptory strikes, Juror #4 was seated on the jury despite his professed—and never coherently
13 disclaimed—bias. Rejecting a for-cause challenge was an abuse of discretion. *See Image Tech. Servs.,*
14 *Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1220-21 (9th Cir. 1995). And because “[t]he presence of
15 a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.”
16 *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998).

17 **IV. CONCLUSION**

18 The Court should grant judgment for Meta as a matter of law or, alternatively, order a new trial.
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