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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

12 HANNAH COUSIN, et al., *individually*  
13 *and on behalf of all others similarly*  
14 *situated,*

Plaintiffs,

15 v.

16 SHARP HEALTHCARE,

17 Defendant.  
18  
19

Case No.: 22-cv-2040-MMA-DDL

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS**

[Doc. No. 28]

20 This action consists of three consolidated cases brought by Hannah Cousin, Linda  
21 Camus, and Edward Barbat (“Plaintiffs”) against Defendant Sharp Healthcare  
22 (“Defendant” or “Sharp”). *See* Case Nos. 22-cv-2040-MMA-DDL, 23-cv-33-MMA-  
23 DDL, 23-cv-330-MMA-DDL. The Court previously granted Defendant’s motion to  
24 dismiss the Consolidated Class Action Complaint, *see* Doc. No. 20, and on August 2,  
25 2023, Plaintiffs filed a First Amended Consolidated Class Action Complaint, *see* Doc.  
26 No. 23 (“First Amended Complaint” or “FAC”). On August 2, 2023, Defendant filed a  
27 motion to dismiss. *See* Doc. No. 26. Plaintiffs have filed an opposition, to which  
28 Defendant replied. *See* Doc. Nos. 32, 40. The Court found the matter suitable for

1 determination on the papers and without oral argument pursuant to Civil Local Rule  
2 7.1.d.1. *See* Doc. No. 41. For the reasons set forth below, the Court **GRANTS IN**  
3 **PART** and **DENIES IN PART** Defendant’s motion to dismiss.

4 **I. BACKGROUND**<sup>1</sup>

5 The background factual allegations as set forth in the initial Consolidated  
6 Complaint remain largely unchanged in the First Amended Complaint, and so the Court  
7 incorporates its prior Order by reference here. *See* Doc. No. 22.<sup>2</sup> Defendant is a non-  
8 profit corporation that operates multiple hospitals and medical groups, and offers a  
9 healthcare plan, throughout San Diego, California. FAC ¶ 13. One such hospital  
10 operated by Defendant is Sharp Memorial Hospital (“Sharp Memorial”). *Id.* Plaintiffs  
11 are residents of California and Sharp patients, who used Defendant’s website,  
12 www.sharp.com, to either search for health care providers, schedule medical  
13 appointments, or conduct other health care related matters. *Id.* ¶¶ 10–12, 70–88.

14 Generally speaking, Plaintiffs allege that Defendant utilizes an online tracking tool,  
15 Meta Pixel, on its website sharp.com and related “subpages” to surreptitiously collect  
16 their, and other patients’, sensitive health information. *See, e.g., id.* ¶¶ 1–4, 45–48. The  
17 website and subpages are defined as “unauthenticated” because they do not require a  
18 patient or user to log in to access the websites. *See id.* ¶ 42. According to Plaintiffs, the  
19 information is shared with Meta in “data packets” labelled with personally identifiable  
20 information such as a user’s IP address, and that Meta in turn “processes this information,  
21 analyzes it, and assimilates it in order to provide targeted advertisements to businesses  
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23  
24 <sup>1</sup> Reviewing Defendant’s motion to dismiss, the Court accepts as true all facts alleged in the  
25 Consolidated Class Action Complaint and construes them in the light most favorable to the Plaintiffs.  
26 *See Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d. 1152, 1157 (9th Cir. 2017).

27 <sup>2</sup> Due to the sensitive nature of the health-related allegations, an unredacted version of the Court’s prior  
28 Order was docketed at Doc. No. 22. The Court also notes that Plaintiffs were permitted to file  
unredacted versions of their FAC and opposition under seal. Doc. Nos. 25, 39. The Court’s citations to  
the FAC, Plaintiffs’ opposition, and the Court’s prior Order are to the redacted versions, as discussion of  
the confidential allegations is unnecessary at this stage.

1 such as Sharp.” *Id.* ¶¶ 26, 29. Plaintiffs contend they did not agree to have their  
2 information collected and used this way. *See, e.g., id.* ¶ 3.

3 As a result, Plaintiffs bring the following five causes of action on behalf of a class  
4 of Sharp’ website users in California: (1) violation of common law invasion of privacy –  
5 intrusion upon seclusion; (2) invasion of privacy under the California Constitution, Art. I  
6 § 1; (3) violation of the California Confidentiality of Medical Information Act, California  
7 Civil Code § 56 *et seq.* (“CMIA”); and (4) violation of the California Invasion of Privacy  
8 Act, California Penal Code § 630 *et seq.* (“CIPA”).

## 9 **II. LEGAL STANDARD**

10 A Rule 12(b)(6)<sup>3</sup> motion tests the legal sufficiency of the claims made in a  
11 complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must  
12 contain “a short and plain statement of the claim showing that the pleader is entitled to  
13 relief . . . .” Fed. R. Civ. P. 8(a)(2). However, plaintiffs must also plead “enough facts to  
14 state a claim to relief that is plausible on its face.” Fed. R. Civ. P. 12(b)(6); *Bell Atl.*  
15 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard demands more  
16 than “a formulaic recitation of the elements of a cause of action,” or “naked assertions  
17 devoid of further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
18 (internal quotation marks omitted). Instead, the complaint “must contain allegations of  
19 underlying facts sufficient to give fair notice and to enable the opposing party to defend  
20 itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

21 In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth  
22 of all factual allegations and must construe them in the light most favorable to the  
23 nonmoving party. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir.  
24 1996). The court need not take legal conclusions as true merely because they are cast in  
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27 <sup>3</sup> Unless otherwise noted, all “Rule” references are to the Federal Rules of Civil Procedure.  
28 Additionally, all citations to electronically filed documents refer to the pagination assigned by the  
CM/ECF system.

1 the form of factual allegations. *See Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.  
2 1987). Similarly, “conclusory allegations of law and unwarranted inferences are not  
3 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.  
4 1998). In deciding whether to dismiss the complaint for failure to state a claim, the court  
5 is generally bound by the facts and allegations contained within the four corners of the  
6 complaint. *Hydrick v. Hunter*, 500 F.3d 978, 985 (9th Cir. 2007).

7 Where dismissal is appropriate, a court should grant leave to amend unless the  
8 plaintiff could not possibly cure the defects in the pleading. *See Knappenberger v. City*  
9 *of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122,  
10 1127 (9th Cir. 2000)).

### 11 **III. DISCUSSION**

12 As an initial matter, the Court previously addressed the issue of whether collecting  
13 and sharing of mere browsing activity on a publicly facing website is actionable. *See*  
14 *Doc. No. 20* at 6. Defendant again moves to dismiss all claims on the basis that browsing  
15 activity on a publicly facing website is not protected, relying largely on the Court’s prior  
16 Order. *See Doc. No. 28* at 14. In opposition, Plaintiffs point out that they now plead that  
17 the Department of Health and Human Services (“HHS”) issued a privacy bulletin on  
18 December 1, 2022, providing that the Health Insurance Portability and Accountability  
19 Act (“HIPAA”) applies to the use of tracking technologies such as Meta Pixel embedded  
20 on an unauthenticated webpage that, for example, “addresses specific symptoms or health  
21 conditions, such as pregnancy or miscarriage, or that permits individuals to search for  
22 doctors or schedule appointments without entering credentials may have access to PHI in  
23 certain circumstances.” FAC ¶ 101.

24 HIPAA defines “protected health information,” or “PHI” as “individually  
25 identifiable” information that is “created or received by a health care provider” and that  
26 “[r]elates to the past, present, or future physical or mental health or condition of an  
27 individual” or the “provision of health care to an individual.” 45 C.F.R. § 160.103.  
28 Having reviewed Plaintiffs’ allegations, *see* FAC ¶¶ 70–91, the Court finds that their

1 interactions on Defendant’s website, while “unauthenticated” or publicly facing,  
2 plausibly involve PHI. As to whether the information is individually identifiable, all  
3 three Plaintiffs plead that they are Facebook users. *Id.* ¶¶ 70, 75, 84. Plaintiffs allege at  
4 length how Meta Pixel uses JavaScript code to connect internet activity to a specific  
5 individual using IP addresses and Facebook credentials. *See id.* ¶¶ 23, 27–28, 50–68.  
6 Turning to the information that is tracked and whether it is protected, Plaintiff Cousin  
7 alleges that she used Sharp’s website to search for a primary care physician. *Id.* ¶ 71.  
8 Namely, she filtered the results of Sharp’s physician directory by, among other things,  
9 specialty. This just narrowly survives dismissal by demonstrating that her interactions  
10 plausibly relate to the provision of health care. Plaintiffs Camus and Barbat, on the other  
11 hand, set forth their particular medical conditions and allege that they searched  
12 Defendant’s website for doctors who specialize in these conditions and for information  
13 about their conditions (i.e., symptoms, treatments, procedures). *Id.* ¶¶ 77–82, 85–87.  
14 Camus also alleges she booked an appointment to obtain treatment for a medical  
15 condition. *Id.* ¶ 81. These interactions plausibly convey information about a present  
16 medical condition and the provision of medical care covered by HIPAA.

17 For these reasons, the Court **DENIES** Defendant’s motion to the extent it seeks to  
18 dismiss all claims on this basis.

19 **A. Claim 1: Common Law Invasion of Privacy – Intrusion Upon Seclusion**

20 “To state a claim for intrusion upon seclusion under California common law, a  
21 plaintiff must show that: (1) a defendant ‘intentionally intrude[d] into a place,  
22 conversation, or matter as to which the plaintiff has a reasonable expectation of privacy  
23 [,]’ and (2) that the intrusion ‘occurred in a manner highly offensive to a reasonable  
24 person.’” *Davis v. Facebook Inc., (In re Facebook, Inc. Internet Tracking Litig.)* 956 F.  
25 3d 589, 601 (9th Cir. 2020) (quoting *Hernandez v. Hillsides, Inc.*, 97 Cal. Rptr. 3d 274,  
26 285 (Cal. 2009)). In moving to dismiss this claim, Defendant challenges Plaintiffs’  
27 pleading of the second element, arguing that any intrusion is not “highly offensive.”  
28 Doc. No. 28 at 15–17.

1           Whether an alleged intrusion is highly offensive to a reasonable person is an issue  
2 not capable of resolution, on these facts, at the motion to dismiss stage. As both parties  
3 note, the Ninth Circuit has explained that such a determination “requires a holistic  
4 consideration of factors such as the likelihood of serious harm to the victim, the degree  
5 and setting of the intrusion, the intruder’s motives and objectives, and whether  
6 countervailing interests or social norms render the intrusion inoffensive.” *In re*  
7 *Facebook*, 956 F.3d at 606 (citing *Hernandez*, 97 Cal. Rptr. 3d at 287). Here, Plaintiffs  
8 allege that their medical conditions and statuses as patients with certain doctors were  
9 tracked on Defendant’s website and transmitted to Meta. They contend this information,  
10 which was collected during their use of Defendant’s website, was linked to them using  
11 their Facebook accounts and/or IP address. FAC ¶ 4. They assert Defendant’s use of  
12 Meta Pixel, and Meta’s collection of this information, is for targeted advertising. *Id.*  
13 ¶¶ 18, 29. And they identify a variety of sources that note privacy and policy concerns.  
14 *Id.* ¶¶ 35–40. Simply put, in light of Plaintiffs’ allegations, “[t]he ultimate question of  
15 whether [Defendant’s disclosure of their information through Meta Pixel] could highly  
16 offend a reasonable individual is an issue that cannot be resolved at the pleading stage.”  
17 *Id.* Accordingly, the Court **DENIES** Defendant’s motion on this basis.

18 **B. Claim 2: California Constitution Invasion of Privacy**

19           “A claim for invasion of privacy under the California Constitution involves similar  
20 elements.” *Id.* Plaintiffs must plead “that: (1) they possess a legally protected privacy  
21 interest, (2) they maintain a reasonable expectation of privacy, and (3) the intrusion [is]  
22 ‘so serious . . . as to constitute an egregious breach of the social norms’ such that the  
23 breach is ‘highly offensive.’” *Id.* (quoting *Hernandez*, 97 Cal. Rptr. 3d at 285).  
24 “Because of the similarity of the tests, courts consider the claims together and ask  
25 whether: (1) there exist a reasonable expectation of privacy, and (2) the intrusion was  
26 highly offensive.” *Id.* at 601.

27           Defendant challenges Plaintiffs’ second cause of action for substantively the same  
28 reason discussed above: that Plaintiffs fail to plausibly plead any invasion was

1 sufficiently egregious. Doc. No. 28 at 18. For the same reasons, the Court **DENIES**  
2 Defendant’s motion to dismiss Plaintiff’s second claim. Plaintiffs have plausibly pleaded  
3 that the alleged invasion of privacy is highly offensive.

4 Defendant also moves to dismiss this claim to the extent Plaintiffs seek monetary  
5 damages. *Id.* As the Court previously explained, “California’s ‘constitutional provision  
6 protecting the right of privacy . . . supports a cause of action for an injunction’ but it does  
7 not confer on a litigant a private right of action for damages.” *Moore v. Rodriguez*, No.  
8 20-cv-01481-BAS-BGS, 2021 U.S. Dist. LEXIS 103725 at \*58–59 (S.D. Cal. June 2,  
9 2021) (dismissing an invasion of privacy claim against private defendants under Rule  
10 12(b)(6) because the plaintiffs only sought “damages, and not an injunction, as relief”)  
11 (citing *Clousing v. San Francisco Unified Sch. Dist.*, 271 Cal. Rptr. 72, 78, (Cal. Ct. App.  
12 1990)). Plaintiffs do not address this argument in opposition, and therefore seemingly  
13 concede they cannot seek monetary damages in connection with this claim. Therefore,  
14 the Court **GRANTS** Defendant’s motion to dismiss Plaintiff’s claim for monetary  
15 damages under Article 1, Section 1 of the California Constitution.

16 **C. Claim 3: Violation of CMIA**

17 CMIA prohibits the unauthorized disclosure of medical information and the  
18 negligent maintenance or preservation of medical information. Cal. Civ. Code  
19 §§ 56.10(a), 56.101(a). CMIA defines “Medical Information” as “any individually  
20 identifiable information, in electronic or physical form, in possession of or derived from a  
21 provider of health care, health care service plan . . . regarding a patient’s medical history,  
22 mental health application information, mental or physical condition, or treatment.” Cal.  
23 Civ. Code § 56.05(i). “‘Individually identifiable’ means that the medical information  
24 includes or contains any element of personal identifying information sufficient to allow  
25 identification of the individual, such as the patient’s name, address, electronic mail  
26 address, telephone number, or social security number, or other information that, alone or  
27 in combination with other publicly available information, reveals the identity of the  
28 individual.” *Id.*

1 It is clear that the California Civil Code’s definition for information protected by  
2 CMIA largely tracks HIPAA’s definition of PHI. Therefore, for the reasons discussed  
3 above, the Court finds that Plaintiffs have plausibly pleaded their protected medical  
4 information, as defined by HIPAA and California Civil Code § 56.05, was disclosed by  
5 Defendant. For this reason, the Court **DENIES** Defendant’s motion to dismiss Plaintiffs’  
6 CMIA claim on this basis.

7 Defendant also argues that Plaintiffs fail to allege their information was transmitted  
8 or viewed and therefore have not plausibly pleaded their claim. Doc. No. 28 at 19–23.  
9 However, Plaintiffs do plead their information was transmitted to Meta. *See, e.g.*, FAC  
10 ¶¶ 29, 74, 83, 88. Plaintiffs must also plausibly plead that their medical information was  
11 “improperly viewed or otherwise accessed.” *Stasi v. Inmediata Health Grp. Corp.*, 501  
12 F. Supp. 3d 898, 923 (S.D. Cal. 2020) (citing *Regents of Univ. of Cal. v. Superior Court*,  
13 163 Cal. Rptr. 3d 205, 208 (Cal. Ct. App. 2013)). Here Plaintiffs allege upon information  
14 and belief that “Meta regularly viewed” the information. FAC ¶ 29. Plaintiffs also plead  
15 information regarding Meta’s business model and how it uses the information for targeted  
16 advertising. *See, e.g., id.* ¶ 174. Whether Meta, as an entity and not a human being, can  
17 “view” information for CMIA purposes is a question the Court cannot resolve at this  
18 stage. Similarly, whether the alleged use by Meta of the information, through perhaps  
19 algorithms, amounts to viewing or accessing under CMIA is a question the Court cannot  
20 answer on Defendant’s motion to dismiss. It is sufficiently plausible at this time that  
21 Plaintiffs’ information was “viewed or otherwise accessed” as contemplated by CMIA.  
22 Accordingly, the Court **DENIES** Defendant’s motion to dismiss Plaintiff’s CMIA claim  
23 on this basis as well.

#### 24 **D. Claim 4: Violation of CIPA**

25 CIPA “broadly prohibits the interception of wire communications and disclosure of  
26 the contents of such intercepted communications.” *Tavernetti v. Superior Court of San*  
27 *Diego Cty.*, 148 Cal. Rptr. 883, 885 (Cal. 1978). Namely, it prohibits the use of  
28 electronic means to “learn the contents or meaning of any message, report, or



1 communication” “without the consent of all parties to the communication.” Cal. Pen.  
2 Code § 631(a). Liability may be had against those who aid another in violating this  
3 statute. *Id.*

4 Here, Defendant argues that Plaintiffs fail to allege facts showing that “contents of  
5 communications are at issue.” Doc. No. 28 at 24. “The analysis for a violation of CIPA  
6 is the same as that under the federal Wiretap Act.” *Cline v. Reetz-Laiolo*, 329 F. Supp. 3d  
7 1000, 1051 (N.D. Cal. 2018) (internal citation omitted). The Wiretap Act defines the  
8 term “contents” as “any information concerning the substance, purport, or meaning of  
9 that communication.” 18 U.S.C. § 2510. The Ninth Circuit has held that “contents”  
10 means “the intended message conveyed by the communication and does not include  
11 record information regarding the characteristics of the message that is generated in the  
12 course of the communication.” *Graf v. Zynga Game Network, Inc. (In re Zynga Privacy*  
13 *Litig.)*, 750 F.3d 1098, 1107 (9th Cir. 2014). Defendant discusses *Zynga* as supporting its  
14 position. *See* Doc. No. 28 at 24. But the Ninth Circuit in *Zynga* expressly left open the  
15 possibility that transmission of electronic data such as URLs could amount to the  
16 conveyance of the content of a communication: “Under some circumstances, a user’s  
17 request to a search engine for specific information could constitute a communication such  
18 that divulging a URL containing that search term to a third party could amount to  
19 disclosure of the contents of a communication.” 750 F.3d at 1108–09. Thereafter, in *In*  
20 *re Facebook*, the Ninth Circuit explained that search “terms and the resulting URLs could  
21 divulge a user’s personal interests, queries, and habits on third-party websites” but did  
22 not consider whether such information amounted to “content” for the purpose of CIPA or  
23 the federal Wiretap Act. 956 F.3d at 605, 607.

24 The Court finds the approach and discussion in *Hammerling v. Google, LLC*,  
25 persuasive.

26  
27 Courts employ a contextual “case-specific” analysis hinging on “how much  
28 information would be revealed” by the information’s tracking and disclosure.  
*Google Cookie Placement*, 806 F.3d at 137-38. Generally, customer

1 information such as a person’s name, address, and subscriber number or  
2 identity is record information, but it may be contents when it is part of the  
3 substance of the message conveyed to the recipient. *See id.* at 137; *Zynga*, 750  
4 F.3d at 1104, 1108-09. Similarly, URLs are record information when they  
5 only reveal a general webpage address and basic identification information,  
6 but when they reproduce a person’s personal search engine queries, they are  
7 contents. *See id.* at 1108; *Forrester*, 512 F.3d at 510 n.6.

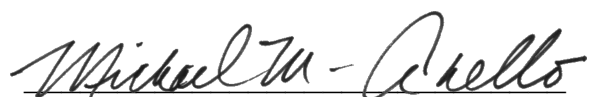
8 615 F. Supp. 3d 1069, 1092–93 (N.D. Cal. 2022). However, unlike the information  
9 collected by Google in *Hammerling*, which merely involved “usage and engagement”  
10 data, *id.* 1078, here Plaintiffs allege that their data included personal search queries—  
11 such as specialty healthcare providers and treatments for medical conditions—and  
12 therefore plausibly conveyed content: their PHI. *See In re Google RTB Consumer Priv.*  
13 *Litig.*, 606 F. Supp. 3d 935, 949 (N.D. Cal. 2022); *see also Gershzon v. Meta Platforms,*  
14 *Inc.*, No. 23-cv-00083-SI, 2023 U.S. Dist. LEXIS 147448, at \*35 (N.D. Cal. Aug. 22,  
15 2023); *In re Meta Pixel Healthcare Litig.*, No. 22-cv-03580-WHO, 2022 U.S. Dist.  
16 LEXIS 230754, at \*36 (N.D. Cal. Dec. 22, 2022). Accordingly, the Court **DENIES**  
17 Defendant’s motion to dismiss Plaintiff’s CIPA claim on this basis.

#### 18 **IV. CONCLUSION**

19 Based upon the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART**  
20 Defendant’s motion to dismiss. Namely, the Court **DISMISSES** Plaintiffs’ invasion of  
21 privacy claim under the California Constitution (Claim 2) only to the extent Plaintiffs  
22 seek monetary damages. The Court **DENIES** the remainder of Defendant’s motion. The  
23 Court **DIRECTS** Defendant to file an answer within **twenty-one (21) days** of the date of  
24 this Order.

25 **IT IS SO ORDERED.**

26 Dated: November 17, 2023



27 HON. MICHAEL M. ANELLO  
28 United States District Judge