

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 27 2025

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CHRISTOPHER KARWOWSKI;
MELODY KLEIN; MICHAEL MCBRIDE;
AIMEN HALIM, individually and on behalf
of all others similarly situated,

Plaintiffs - Appellants,

v.

GEN DIGITAL, INC., a corporation,

Defendant - Appellee,

and

JUMPSHOT, INC., a corporation,

Defendant.

No. 24-7213

D.C. No.

3:22-cv-08981-RFL

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Rita F. Lin, District Judge, Presiding

Submitted October 23, 2025**
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: MURGUIA, Chief Judge, and OWENS and BUMATAY, Circuit Judges.

On behalf of a putative nationwide class and California subclass, Plaintiffs Grace Lau and Christopher Karwowski (“Appellants”) sued Defendant Gen Digital Inc., a computer software company, for wiretapping under the Electronic Communications Privacy Act (“ECPA”) and California Invasion of Privacy Act (“CIPA”). Appellants installed Avast Online Security & Privacy (“AOSP”), a browser extension intended to prevent third parties from surreptitiously tracking and collecting their data. Appellants allege that Gen Digital, the owner of the AOSP extension, unlawfully intercepted communication between Appellants and the Internet search engines they use—communication that Appellants allege they only shared with the AOSP extension. Appellants appeal the district court’s dismissal of their wiretapping claims. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

We review grants of motions to dismiss de novo. *Scheibe v. ProSupps USA*, 141 F.4th 1094, 1098 (9th Cir. 2025). To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

1. The ECPA prohibits the “intentional[] intercept[ion]” of any “wire, oral, or electronic communication” without the consent of at least one party. 18 U.S.C. § 2511(1)(a), (d). CIPA imposes liability on anyone who “willfully and without consent of all parties” reads or learns the “contents” of a communication “while the

same is in transit or passing over any wire.” Cal. Penal Code § 631(a). Both statutes “contain an exemption from liability for a person who is a ‘party’ to the communication.” *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 607 (9th Cir. 2020) (“*In re Facebook*”). “Courts perform the same analysis for both the Wiretap Act and CIPA regarding the party exemption.” *Id.*

Appellants argue that the AOSP extension was a known party to their browsing activity, but that the owner of the AOSP extension, Gen Digital, was not. In Appellants’ view, “AOSP and Gen Digital are different,” and “[e]ven if [Appellants] intended for the AOSP extension to receive some limited details of their communications . . . they certainly did not intend for Gen Digital to use AOSP to intercept” those communications.

This allegation that Gen Digital is not protected by the party exemption under the wiretapping acts is conclusory. One who “engage[s] in the unauthorized duplication and forwarding of unknowing users’ information” is not a party to the communication. *In re Facebook*, 956 F.3d at 608. In *In re Facebook*, we held that Facebook was not exempt as a “party” because Facebook “surreptitiously duplicate[d],” “through a separate, but simultaneous, channel in a manner undetectable by the user,” communication between a user’s browser, after the user logged out of Facebook, and the web page that the user was visiting. *Id.* at 596, 607. The plaintiffs in *In re Facebook* alleged that, “[t]ypically,” a user’s browsing

information would only be shared between the user's web browser and the third-party website; however, Facebook's plug-in directed the browsing information to be copied and sent to Facebook's servers, even when the users were not using Facebook. *Id.* at 606–07. Based on these allegations in *In re Facebook*, we held that plaintiffs sufficiently alleged that Facebook's tracking and collection practices violated EPCA and CIPA, as Facebook was not exempt from liability as a party to the communication. *Id.* at 606, 608.

Here, taking Appellants' allegations as true, Appellants fail to allege that Gen Digital was not a party to the communication. On the contrary, Appellants refer to themselves as "Gen Digital and Avast's users," explaining that, "Gen Digital and Avast's users never consented to the extraction and sale or provision of their Internet search engine keyword searches . . . to Gen Digital and Avast." Appellants' acknowledgment that they are "Gen Digital and Avast's users" is inconsistent with their argument that "Gen Digital is an unannounced second auditor and cannot hide behind the party exception." *See Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (Although this court is "obliged to presume that all factual allegations in appellants' complaint are true, . . . [this court] will examine whether conclusory allegations follow from the description of facts as alleged by the plaintiff."). Further, in trying to explain how "AOSP can function without Gen Digital's interception of [Appellants'] communications" by using a "local blacklist method," Appellants

admit that, even using the blacklist method, “AOSP could read a much more limited subset of users’ browsing data, *and transmit only the domain name of websites unlisted on the local blacklist to Gen Digital’s servers for verification.*” Appellants, here, not only fail to allege that Gen Digital is not a party to the communication but also explicitly acknowledge that Gen Digital is potentially a necessary party for website verification. Thus, Appellants fail to allege facts to survive dismissal. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).

2. Appellants also now assert two additional arguments without having presented them before the district court: (1) even if Gen Digital is a party, it is only a party to the necessary portions of Appellants’ communications, and (2), by downloading the AOSP extension, Appellants, at most, consented to AOSP accessing only the parts of the communication necessary for AOSP to perform its stated function. “Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so.” *In re Am. W. Airlines*, 217 F.3d 1161, 1165 (9th Cir. 2000). Appellants describe no exceptional circumstances that prevented them from raising these issues before the district court below. *See WildWest Inst. v. Bull*, 547 F.3d 1162, 1172 (9th Cir. 2008) (listing circumstances in which we typically exercise discretion to consider a newly raised

issue). Because Appellants' arguments were not raised before the district court, they are forfeited. *See United States v. Lara*, 815 F.3d 605, 613 (9th Cir. 2016) ("The [party] did not make this argument in the district court, and consequently it has failed to preserve this argument on appeal.").

3. The district court properly dismissed Appellants' CIPA § 632 claim because Appellants failed to respond to the arguments raised in Gen Digital's motion to dismiss this claim. *See Walsh v. Nev. Dep't of Hum. Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006); *see also Lunn v. City of L.A.*, 629 F. Supp. 3d 1007, 1014 (C.D. Cal. 2022) ("Where a party fails to address arguments against a claim raised in a motion to dismiss, the claims are abandoned and dismissal is appropriate.").

AFFIRMED.