IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FOURTH APPELLATE DISTRICT,
DIVISION TWO

JEREMIAH SMITH, individually and on behalf of all others similarly situated, Plaintiff, v. LOANME, INC., Defendant.	**No.: E069752**

APPELLANT'S OPENING BRIEF APPEALING THE NOVEMBER 21, 2017 JUDGMENT ENTERED BY THE CALIFORNIA SUPERIOR COURT, COUNTY OF RIVERSIDE

Riverside County Superior Court no. RIC1612501
Honorable Sharon J. Waters

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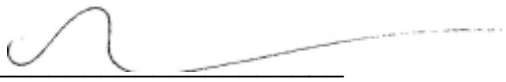
CERTIFICATE OF INTERESTED ENTITIES/PERSONS

Appellant, Jeremiah Smith, hereby certifies that he is unaware of any entities or persons with a ten (10) percent or more ownership interest in the party filing this appeal, or a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves.

Dated: September 7, 2018

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By 
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STATEMENT OF THE CASE

I. INTRODUCTION

Do beep tones, on their own, adequately advise all parties to a telephone call that it is one party's intent to record the call?

That is the fundamental question at the heart of this appeal. Appellant, Jeremiah Smith ("Smith") respectfully appeals the judgement ("Judgment") entered against him by the California Superior Court, County of Riverside ("lower Court"), on November 21, 2017 in favor of Respondent, LoanMe Inc. ("LoanMe"), subsequent to the lower Court's ruling and issuance of an Order following the bifurcated trial in the case ("Action"). Smith brings his Action on behalf of himself and a Class of similarly situated individuals against LoanMe alleging violations of Cal. Pen. C. § 632.7 by recording him on his cordless phone without his consent. The Parties agree that the only notice LoanMe provided to Smith was an intermittent "beep tone" that occurred during his telephone call.

Entangled in this issue is whether the Public Utilities Commission's ("PUC") separate regulation regarding oversight of recording conducted on the public phone system is binding on the interpretation of Cal. Pen. C. § 632.7. It is not. The regulation is completely separate and distinct from Cal. Pen. C. §§ 630 et. seq. and thus has no binding effect on how the Court reads and applies Cal. Pen. C. § 632.7 et. seq. It is at best interpretative and at worst absolutely irrelevant. Uniform beep tones alone do not inform an individual a call is being recorded.

Smith humbly requests that the Court review the lower Court's ruling *de novo,* reverse it, and either instruct the lower Court to enter an order in favor of Smith or to conduct its analysis again without giving quasi-legislative deference to the Public Utilities Commission's General Order 107-B.

II. PROCEDURAL BACKGROUND

Smith filed his Class Action Complaint against LoanMe on September 26, 2016, alleging violations of Cal. Pen. C. § 632.7 on behalf of himself and a putative Class. (Clerk's Transcript on Appeal, Vol. I ("CTA"), at 001). LoanMe filed its First Amended Answer on December 9, 2016. *Id.* at 015. The Parties jointly stipulated to and the Court ordered a bifurcated trial on the issue of beep tones on July 13, 2017. *Id.* at 026.

LoanMe filed its pretrial brief on August 25, 2017. *Id.* at 030. Smith filed his response to LoanMe's brief on September 8, 2017. *Id.* at 063. Smith filed his pretrial brief on September 11, 2017. *Id.* at 075. The Parties filed a joint statement of stipulated facts on September 11, 2017. *Id.* at 072. The Parties filed the same exhibit each, a copy of the phone recording, on October 13, 2017. *Id.* at 091.

The Court heard the bifurcated trial on October 13, 2017. (Reporter's Transcript on Appeal ("RTA"), at 001). The Court ruled in favor of LoanMe and requested a proposed judgment be lodged. *Id*. at 018. The Court entered Judgment against Plaintiff on November 21, 2017. CTA at 092. LoanMe provided notice of the entry of judgment on November 29, 2017. *Id.* at 096.

On January 2, 2018, Smith timely filed his Notice of Appeal from the Judgment. *Id.* at 105.

III. STATEMENT OF FACTS

The Parties stipulated and agreed on all facts for the bifurcated trial and, now, for appeal. CTA at 072-75. Besides the call recording which was filed as an exhibit by both Parties and agreed to in the stipulated facts, no other evidence was introduced at trial. CTA at 091.

LoanMe is a lender that offers personal and small business loans to qualified customers. *Id.* at 073. Smith's wife is the borrower on a loan made to her by LoanMe. *Id.* In October 2015, LoanMe called the

telephone number provided to it by Smith's wife to discuss her loan. *Id.* Smith answered the phone and informed LoanMe that his wife was not home, after which the call ended. *Id.* The call lasted approximately 18 seconds. *Id.* LoanMe recorded the call. *Id.*

Approximately 3 seconds into the call, LoanMe caused a "beep tone" to sound. *Id.* A "beep tone" is played on outbound calls made by LoanMe at regular intervals every 15 seconds. *Id.* LoanMe did not orally advise Smith that the call was being recorded, and Smith did not sign any contract with LoanMe granting consent to record calls with him. *Id.* For purposes of the bifurcated bench trial and, now, appeal, LoanMe accepts that the recorded call was placed to a cordless telephone. *Id.*

LoanMe contends that causing beep tones to sound at regular intervals during a phone call puts people on notice that the call is being recorded, and that people who continued the conversation after a beep tone (or series of tones) have consented to the call being recorded as a matter of law. *Id.* Smith alleges that the use of beep tones, in the manner beep tones were used by LoanMe as demonstrated during the recorded phone call at issue, without more, is insufficient notice that the call is being recorded. *Id.*

IV. STANDARD OF REVIEW

Matters presenting pure questions of law, not involving the resolution of disputed facts, are subject to the appellate court's *independent ("de novo") review. See Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799; *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191. As noted above, the trial court was presented with a stipulation of facts and one joint exhibit, the copy of the recording. Thus, the facts were undisputed and the Court of Appeals is faced with a question of law and not bound by the findings of the trial court. *See Mole-Richardson Co. v. Franchise Tax Bd.* (1990) 220 Cal.App.3d 889, 894 Court The Court should review Smith's appeal *de novo,* in reviewing whether "beep tones" provide notice

of the recording of a call, thereby creating consent by the continuation of the call, under Cal. Pen. C. § 632.7.

V. STATEMENT OF APPEALABILITY

Smith appeals the Judgment entered by the California Superior Court, County of Riverside, against him, on November 21, 2017, in favor of LoanMe. CTA at 092. This judgment is appealable under *Cal. Civ. Code* §904.1.

VI. ARGUMENT

A. The Lower Court Erred By Finding GO 107-B Binding On Its Interpretation Of Cal. Pen. C. § 632.7, And LoanMe Did Not Provide Adequate Notice Of Recording

Do beep tones, on their own, adequately advise all parties to a telephone call that it is one party's intent to record the call? Accordingly, if a person remains on the line after hearing a beep tone, are they consenting to be recorded?

Smith's position is no, of course not. Under the plain language of the statute and case law interpreting it, a party must obtain express consent prior to recording, or notify a party of the recording and give them a chance to cease the call. Beep tones do not provide the context to let a party know they are being recorded and make that decision.

LoanMe's position is that General Order 107-B as implemented by the Public Utilities Commission ("PUC") is controlling of the interpretation of Cal. Pen. C. § 632.7. *Re Monitoring of Tel. Conversations* (June 1, 1983) 11 CPUC 2d 692 ("GO 107-B"). CRA at at 34. The lower Court agreed, finding that:

> "[T]he beep tone is something expressly authorized by the Public Utilities Commission Order is adequate notice that a call is being recorded, such that continued communication by [] [] Mr. Smith here was consent. Therefore, no violation of the statute, the Penal Code, has been stablished."
> RTA at 017:10-16.

But this position does not make sense. GO 107-B does not interpret any of Cal. Pen. C. § 630 et, seq. Instead, GO 107-B establishes a *completely distinct and separate* regulation on users of the public telephone network with a separate penalty and that is enforced by the PUC itself. GO 107-B did not supersede or overwrite Cal. Pen. C. § 630 et. seq. and PUC even acknowledges that in the Opinion implementing it. "Penal Code §§ 630 et seq. concern the specific subject of illegal wiretapping. These sections do not remove the Commission's jurisdiction to require tariff filings on the part of telephone utilities which control disconnection of service for other reasons." *Re Monitoring of Tel. Conversations* (June 1, 1983) 11 CPUC 2d 692. In light of this, GO 107-B must be given its appropriate deferential value—very limited to none as an interpretative regulation only.

The appropriate test, as promulgated by the Appellate Courts in this State, is whether the "beep tones" themselves are sufficient to explicitly inform and put on notice a consumer that the call is being recorded. This is a question of law for this Court to decide. Would an individual based on hearing an intermittent beep be sufficiently advised that the call is being recorded such that he or she could decide to continue the communication despite being recorded? The answer is clearly no. Smith respectfully requests the Court find that LoanMe did not as a matter of law obtain Smith's consent to record the call and reverse the lower Court's Order entering an Order in favor of Smith.

1. The Public Utility Commission Did Not Issue Guidance On Cal. Pen. C. § 632 With GO 107-B

LoanMe argues that beep tones are sufficient to give notice under Cal. Pen. C. § 632.7 to establish prior express consent because they are prescribed in GO 107-B, but GO 107-B concerns a completely separate regulation from the law of Cal. Pen. C. § 632.7 as is evidenced by its

creation and implementation. GO 107-B has nothing to do with § 632.7, except that both independently prohibit eavesdropping.

In 1983, the Public Utilities Commission issued regulations governing the monitoring and recording of telephone conversations in California, as to be enforced by the PUC. *See Re Monitoring of Tel. Conversations* (June 1, 1983) 11 CPUC 2d 692 ("GO 107-B"). GO 107-B states that "[m]onitoring or recording telephone conversations shall not be conducted except pursuant to this General Order." *Id.* Continuing on:

> "[n]o portion of the public utility telephone network in California . . . shall be used for the purpose of transmitting any telephone conversation which is being monitored or recorded except when:
> (a) All the parties to the conversation give their express prior consent to the monitoring or recording, or;
> (b) When notice that such monitoring or recording is taking place is given to the parties to the conversation by one of the methods required in this order."

Id. As to the methods of notice:

> "[n]otice of recording shall be given either:
> (a) By an automatic tone warning device which shall automatically produce the distinct tone warning signal known as a "beep tone" which is audible to all parties to a communication and which is repeated at regular intervals during the course of the communication whenever the communication is being recorded; or
> (b) By clearly, prominently and permanently marking each telephone instrument for company use from which communications may be recorded to indicate that a communication of the user of the instrument may be recorded without notice; provided that this method of giving notice of recording may be used only if the automatic tone warning signal is audible to all parties to the communication using telephone instruments not so marked."

Id.

Failure to comply with these requirements is a violation of an order under the Cal. Pub. Util. C. and punishable by the California Public

Utilities Commission by a penalty of not less than five hundred dollars ($500), nor more than fifty thousand dollars ($50,000) for each offense. Cal. Pub. Util. C. § 2111.

The PUC specifically noted in Opinion implementing GO 107-B that Cal. Pen. C. §§ 630 et. seq. is a completely separate law outside of the jurisdiction and purpose of GO 107-B. "Penal Code §§ 630 et seq. concern the specific subject of illegal wiretapping. These sections do not remove the Commission's jurisdiction to require tariff filings on the part of telephone utilities which control disconnection of service for other reasons." *Re Monitoring of Tel. Conversations* (June 1, 1983) 11 CPUC 2d 692. In short, the PUC has jurisdiction to issue its own regulation and requirements regarding the use of monitoring and recording equipment on its network because that regulation is explicitly separate from the illegal wiretapping issue presented by Cal. Pen. C. § 630 et. seq.

Indeed, Smith does not disagree with LoanMe that issuing 107-B fell within the PUC's jurisdiction to issue rules regarding the use of the public phone network as provided under Cal. Pub. Util. C. § 701:

> The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

The PUC further specified that its implementing of the recording rules was under Cal. Pub. Util. C. §§ 7905 & 7906, which also fall within its jurisdiction regulating public utilities. But to the extent that the PUC was issuing a regulation regarding the interpretation and implementation of Cal. Pen. C. § 632.7, such regulation would have exceeded its jurisdictional scope and been arbitrary and capricious as argued in section B below.

There is also no dispute that LoanMe complied with the Cal. Pub. Util. C. and GO 107-B by using beep tones to provide notice as prescribed

under 107-B. In reality, they could not be at issue because Smith cannot bring private causes of action on behalf of the Public Utilities Commission to enforce its regulatory code. Where the Parties disagree is on whether the GO 107-B's regulation has any bearing on Cal. Pen. C. § 632.7 at all, particularly as it is a completely separate regulation with different requirements than the statutory requirements of Cal. Pen. C. § 632.7. It does not appear that the PUC even wanted to issue regulation governing consent under Cal. Pen. C. § 630 et. seq. instead of carving out its own rules to apply to users of the public telephone network. The lower Court found GO 107-B binding on the interpretation of Cal. Pen. C. § 632.7's consent requirement. Smith asserts that this was in error, particularly given the actual test under the statute and case law.

2. The California Invasion of Privacy Act Requires Consent

As this Action arises out of an alleged violation of Cal. Pen. C. § 632.7, the operative question is what is the actual test for violations under that law. California has a long history of statutory enforcement of the right to privacy and the prohibition of unauthorized eavesdropping and recording. In 1967, the Legislature enacted section 632 as part of the California Invasion of Privacy Act ("IPA"), to address concerns that "advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society." *Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377, 1388 (citing Cal. Pen. C. § 630). In 1974, voters further enshrined this right through the addition of the right to privacy in the California Constitution, Article 1, Section 1.

In 1993, the Legislature further enacted Cal. Pen. C. § 632.7. Cal. Pen. C. § 632.7 provides:

> "Every person who, [(1)] without the consent of all parties to a communication, [(2)] intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, [(3)] a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by a fine ... or by imprisonment...."

(emphasis added). These are the only three elements required to prove a violation of the statute. The IPA is a strict liability statute and permits private enforcement by persons harmed by violations under Cal. Pen. C. § 637.2. As Courts have put it, "any invasion of privacy involves an affront to human dignity." *Friddle v. Epstein*, (1993) 16 Cal. App. 4th 1649, 1660-61. *See also Raffin v. Medicredit, Inc*. (C.D. Cal. Dec. 19, 2016) 2016 WL 7743504 at *3 .

The facts for the second and third factors have already been stipulated to by the Parties. The Parties stipulated that LoanMe recorded Smith's call. CTA at 73:10. The Parties stipulated that, for purposes of the bifurcated trial, the call was on a cordless telephone. *Id.* at 73:11. The only legal issue is what constitutes "the consent of all parties" to be recorded.

Consent is defined under Penal Code § 632.7 in the negative, (i.e. "without consent"), the burden of proving that a business has consent to record a consumer falls on the business as an affirmative defense. This is much the same as the affirmative defense of "prior express consent" under another consumer protection law, which the Ninth Circuit has similarly held to be an affirmative defense. *See Van Patten v. Vertical Fitness Group, LLC* (9th Cir. 2017) 847 F.3d 1037, 1044.

Consent, if it exists at all, must be present at the inception of the recorded call. *Friddle v. Epstein* (1993) 16 Cal. App. 4th 1649, 1661-1662 (the Privacy Act is violated at the moment the party begins making a secret recording, and "[n]o subsequent action or inaction is of consequence to this conclusion."). The Supreme Court has held that an advisory that the call is being recorded must be given "at the outset of the conversation" and the IPA prohibits the recording of any conversation "without first informing all parties to the conversation that the conversation is being recorded." *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 118. Citing to *Kearney*, the California Court of Appeal recently observed:

> But the high court rejected the Court of Appeal's suggestion that under California law there was no need for an explicit advisement regarding the secret recording because "clients or customers of financial brokers ... 'know or have reason to know' that their telephone calls with the brokers are being recorded." [ ]

Kight v. Cashcall (2011) 200 Cal. App. 4th 1377, 1399 (emphasis added). Stated otherwise, in order to put a consumer on "adequate notice" that their call is being monitored or recorded, binding law holds that there must be an "explicit advisement" of such. Smith contends that beep tones do not provide adequate notice because it does not provide an explicit advisement that the call is being recorded sufficient to inform the consumer of that fact. LoanMe contends that GO 107-B provides for beep tones to be used to provide notice of recording in the absence of prior express consent and thus similarly must be adequate under Cal. Pen. C. § 632.7. But, LoanMe's position that GO 107-B should be afforded binding deference is misplaced.

3. GO 107-B Is Not Entitled To Binding Deference, And Is Only Persuasive At Best

GO 107-B is, at best, an interpretation of Cal. Pen. C. § 632.7 and, at worst, has absolutely no connection to Cal. Pen. C. § 632.7 outside of them

both serving to deter eavesdropping. While GO 107-B is itself valid and binding on users of the public phone networks in California as described above, it does not address or impact the private cause of action separately codified by the Legislature in Cal. Lab. C. § 630 *et. seq.*. Both LoanMe and the lower Court gave GO 107-B the binding deference afforded to an agency in enforcing a regulation it has created. But, this is the wrong standard and the Court is nowhere near as bound by what is, at most, an interpretative opinion.

"It is a "black letter" proposition that there are two categories of administrative rules and that the distinction between them derives from their different sources and ultimately from the constitutional doctrine of the separation of powers." *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10. Quasi-legislative rules-represents an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. *Id.* Agencies granted such substantive rulemaking power are truly "making law," and their quasi-legislative rules have the dignity of statutes. *Id.* If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end for quasi-legislative rules. *Id.* at 10-11.

In the other class of administrative rules is those "*interpreting*" a statute. *Id.* at 11 (emphasis original). Unlike quasi-legislative rules, an agency's interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts. *Id.* at 11. Because an interpretation is an agency's legal opinion, however "expert," rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree

of judicial deference. *Id.* (citing *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325-326).

The PUC did not "make law" regarding the interpretation or implementation of Cal. Pen. C. §§ 630 *et. seq.* in enacting GO 107-B. If it had done so, it would have exceeded its authority, as argued in section B below. The PUC was not given authority to implement and regulate Cal. Pen. C. §§ 630 et. seq. The PUC also explicitly delineated Cal. Pen. C. §§ 630 et. seq. from its jurisdiction to require tariff filings on the part of telephone companies which control disconnection of service for other reasons. GO 107-B.

At best, the PUC has issued an interpretation of the "consent" requirement prescribed under Cal. Pen. C. § 632.7 as being met by giving specific types of notice. But, even this argument has significant problems because the test for compliance with GO 107-B provides a complete alternative to the statutory test under Cal. Pen. C. § 632.7. Cal. Pen. C. § 632.7 provides that a person will not record a communication "<u>without the consent of all parties to a communication</u>." Cal. Pen. C. § 632.7 (emphasis added). By contrast, GO 107-B requires <u>either</u> prior express consent of all parties <u>or</u> notice of recording by one of the methods required in the order.

Thus, GO 107-B is expressly carving out that notice is not consent under the traditional principal of *expressio unius est exclusio alterius*. If notice was a type of consent, GO 107-B would have further defined consent as being obtainable through notice. Instead, notice is an alternative to obtaining consent under GO 107-B with its disjunctive test.

Under GO 107-B, a company has met its burden and is permitted to record provided it has given notice, even if a consumer then objects to or explicitly states that a recorder does not have his or her permission to record the call. This is inapposite to the requirements of Cal. Pen. C. § 632.7, which requires consent and provides no alternative "notice" test.

While Court's have agreed that express notice and continuation of the call is adequate to show consent under the common law test of consent, the important point is that this has been Court's interpreting the common law test of consent. By contrast, the PUC issued a separate regulation that could be complied with by giving notice alone.

The Legislature in passing Cal. Pen. C. § 632.7 in 1993 is also presumed to have known about the 1983 GO 107-B's notice alternative and to have chosen not to implement it. The Legislature is presumed to be aware of existing laws and judicial decisions and to have enacted or amended statutes in light of this knowledge. *Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1008 (citing *People v. Overstreet* (1986) 42 Cal.3d 891, 897)). In turn, the Legislature in passing Cal. Pen. C. § 632.7 showed no compunction about referencing definitions as promulgated by other agencies, twice citing to definitions as authorized by the Federal Communications Commission. Under the presumption that the Legislature was aware of GO 107-B, it chose not to implement the alternative or to cite to GO 107-B as providing an adequate means for notice to be provided. "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047 (citing *People v. Snook* (1997) 16 Cal.4th 1210, 1215).

LoanMe's position is that GO 107-B is quasi-law when it comes to the interpretation and implementation of Cal. Pen. C. § 632.7. CRA at 34. The lower Court agreed and found that GO 107-B expressly authorized adequate notice through beep tones. RTA at 017:10-16. Both are, respectfully, incorrect with regards to the deference due to GO 107-B. At best and if read contrary to its actual words, it is interpretative of consent as being adequately obtained through providing two explicit types of notice. The weight of such an interpretation in a particular case depends upon the

thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. *Yamaha Corp. of America*, 19 Cal.4th at 14-15. GO 107-B provides no reasoning as to why beep tones are adequate notice or why notice alone is an adequate alternative to prior express consent. While perfectly acceptable as a quasi-law when the PUC enforces GO 107-B as described above, it fails to have any factor boosting its power to persuade as an interpretation of a statute.

"[F]inal responsibility for the interpretation of the law rests with the courts." *Yamaha Corp. of America*, 19 Cal.4th at 12 (citing *Morris v. Williams* (1967) 67 Cal.2d 733, 748). The Court is charged with interpreting what prior express consent is under Cal. Pen. C. §632.7 and should give GO 107-B its appropriate amount of deference--limited to none as an interpretation of Cal. Pen. C. § 632.7. This is exactly in line with the order of the Court in *Yamaha*, which ultimately ruled that the Appellate Court had given too much weight to an interpretative ruling and needed to reconsider after giving its appropriate limited deference. *Yamaha Corp. of America*, 19 Cal.4th at 15. This Court should analyze the issue of whether beep tones on their own actually provide explicit notice to a consumer that he or she is being recorded as has been laid forth in *Kearny*, *Kight*, and their progeny. In doing so, it is clear as a matter of law that LoanMe did not obtain Smith's consent to record him.

4. Beep Tones Are Not An Explicit Advisement Of Recording

Beep tones do not adequately advise all parties to a telephone call that one party intends to record the call under Cal. Pen. C. § 632.7. Cal. Pen. C. § 632.7 prohibits such a party from secretly or surreptitiously recording the conversation, that is, from recording the conversation without first informing all parties to the conversation that the conversation is being

recorded. *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 118. If, after being so advised, another party does not wish to participate in the conversation, he or she simply may decline to continue the communication. *Id.* A business that adequately advises all parties to a telephone call, at the outset of the conversation, of its intent to record the call would not violate the provision. *Id.* "California consumers are accustomed to being informed at the outset of a telephone call whenever a business entity intends to record the call, it appears equally plausible that, in the absence of such an advisement, a California consumer reasonably would anticipate that such a telephone call is not being recorded, particularly in view of the strong privacy interest most persons have with regard to the personal financial information frequently discussed in such calls." *Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377, 1399.

LoanMe did not orally advise Smith that the call was being recorded, and Smith did not sign any contract with LoanMe granting consent to record calls with him. CTA at 73:19-20. Instead, LoanMe caused a "beep tone" to sound three seconds into the call. *Id.* at 73:14. LoanMe contends that causing beep tones to sound at regular intervals during a phone call puts people on notice that the call is being recorded, and that people who continued the conversation after a beep tone consented to the call being recorded as a matter of law. *Id.* at 73:21-24.

But, a beep tone by itself does not advise a California consumer that a call is being recorded. There is nothing remotely explicit about hearing a beep in the background of a phone call. A beep could mean any number of things. A smoke alarm could be going off, somebody's nearby cell phone could have received a text message or email notification, or perhaps the caller is near a construction site and a cement truck is backing up. Beeps don't inherently give rise to reasonable notice that somebody is recording you. Nobody would know that out of either instinct or common sense.

LoanMe points to GO 107-B in support of its position that a "beep" is adequate in giving notice that a call is being recorded. But, as discussed above, while a "beep" is adequate in order to comply with the Cal. Pub. Util. C. § 7905 & 7906, it has no binding authority, and at best very limited persuasive authority, on the actual test under Cal. Pen. C. § 632.7 as laid out by the Court. The test is: Does a beep tone inform consumers that a call is being recorded? After hearing a beep tone, has a California consumer been sufficiently advised that the call is being recorded such that he or she may simply decline to continue the communication? *Kearney,* 39 Cal.4th at 118. If not, a privacy violation has immediately occurred at the moment the party begins making a secret recording, and "[n]o subsequent action or inaction is of consequence to this conclusion." *Friddle v. Epstein* (1993) 16 Cal. App. 4th 1649, 1661-1662. *See also Raffin v. Medicredit, Inc.* (C.D. Cal. Jan. 3, 2017) 2017 WL 131745; *Zaklit et. al. v. Nationstar Mortgage, LLC* (C.D. Cal. July 24, 2017) 2017 WL 3174901.

Kearny, *Kight*, and their progeny are inconsistent with the notion that a beep tone constitutes adequate and explicit notice to a consumer that their call is being recorded. Because LoanMe's beeps never gave Smith adequate notice that the call was being recorded, Smith was denied the opportunity to decline to continue the communication because he was being recorded. By secretly recording the call, LoanMe infringed on Smith's right to privacy guaranteed by the California Constitution. *See Kearney,* 39 Cal.4th at 125 (citing *Rattray v. City of National City* (9th Cir.1994) 51 F.3d 793, 797). In doing so, LoanMe violated Cal. Pen. C. § 632.7.

B. If The PUC Did Issue Quasi-Law on Cal. Pen. C. § 630 Et. Seq., It Exceeded Its Authorization

In the alternative, should the Court find that the Public Utilities Commission did issue a regulation impacting the interpretation of Cal. Pen.

C. § 632, Smith asserts that such regulation was outside its rulemaking authority and was arbitrary, capricious, or without rational basis.

1. The PUC Did Not Have Authority To Issue A Regulation Of Cal. Pen. C. § 630 Et. Seq.

The PUC's mandate is to regulate every public utility in the State of California, and does not include the California Penal Code's provisions on eavesdropping which are completely separate and exceed the public utilities bounds.

An implementing regulation may be challenged on the ground that it is "in conflict with the statute" (Cal. Gov. C. § 11342.2) or does not "lay within the lawmaking authority delegated by the Legislature." *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415. Only where a rulemaking body is found to have been granted Congressional rulemaking authority to interpret statutes and "fill up the details," is such an agency granted a "deferential standard" under its reasonable interpretations of the statute at issue. *PaintCare v. Mortensen*, (2015) 233 Cal.App.4th 1292, 1304-1308.

The PUC's jurisdiction to issue rules regarding the use of the public phone network as provided under Cal. Pub. Util. C. § 701:

> The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

The PUC was not granted lawmaking authority regarding the implementation and interpretation of Cal. Pen. C. § 630 *et. seq.*, which was implemented to "protect the right of privacy of the people of this state" and provides for a private cause of action. Cal. Pen. C. § 630. Cal. Pen. C. § 632.7, among other provisions of §§ 630 *et. seq.* actually explicitly carves out much of the domain that the PUC occupies, noting that it does not apply

to "[a]ny public utility engaged in the business of providing communications services and facilities . . . (2) The use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of the public utility." Had the Legislature wanted to enable the PUC to issue regulations, it would have explicitly enacted legislation in either Cal. Pen. C. §§ 630 et. seq. or otherwise to do so. Instead, the Public Utility Code does not give the Public Utility Commission rulemaking authority to regulate the California Penal Code. If GO 107-B and its notice requirements are binding as quasi-law issued by a regulatory agency, it exceeded the lawmaking authority of the PUC and should be overturned.

2. If The PUC Did Have Authority To Issue Regulations Interpreting Cal. Pen. C. §§ 630 Et. Seq., GO 107-B Would Be Arbitrary, Capricious, Or Without Rational Basis

Smith also challenges that the regulation if within the scope of the PUC's authority and interpreted to apply against Cal. Pen. C. § 632.7, is arbitrary, capricious, and without rational basis.

As the Supreme Court held, the second inquiry for a reviewing court is whether the challenged regulations were "necessary" to carry out the statutory provisions at issue. *Credit Ins. Gen. Agents Assn. v. Payne*, (1976) 16 Cal.3d 651, 657. This question of necessity is the second prong of the analysis under California Government Code § 11342.2, which provides that implementing regulations must be "reasonably necessary to effectuate the purpose of the statute." When a regulation is challenged on this basis, "our inquiry is confined to whether the rule is arbitrary, capricious, or without rational basis." *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415.

The PUC's promulgation that a pattern of "beep tones" is adequate to provide notice and thus consent under Cal. Pen. C. § 632.7 is arbitrary,

capricious, and without basis. A beeping noise is an arbitrary sound effect, which no consumer would naturally associate with a recording device. That is because recording devices are inherently silent, unlike the slew of other items that do beep. Cell phones beep, computers beep, dryers beep, vehicles beep, microwaves beep, coffee machines beep, watches beep, alarm clocks beep, techno music beeps, ovens beep, smoke alarms beep, the roadrunner beeps, washing machines beep, hair curling irons beep, toasters beep, video game consoles beep, tracking devices beep, television and radio bad word censorships beep, security alarms beep, supermarket scanners beep, waffle irons beep, egg timers beep, thermometers beep, thermonuclear devices beep, crosswalk notifications for the visually impaired beep, humidifiers beep, refrigerators left open too long beep, cameras beep, fax machines beep, stud finders beep, the emergency broadcast channel beeps, and electric toothbrushes beep. Moreover, most people don't ever have the chance to program or use recording devices, so they wouldn't know what they sound like anyways.

The PUB's regulation, if interpreting Cal. Pen. C. § 632.7, that notice of recording may be given by "beep tones" is explicitly contrary to the binding decisions of California appellate courts and the Supreme Court that a recording business must ***explicitly*** put a reasonable person on ***adequate notice***, that they are being recorded. The decision to make such notice a series of "intermittent beeps" only further highlights how arbitrary, capricious, and without rational basis such an interpretation would be. GO 107-B as it applies to Cal. Pen. C. § 632,7 should be overturned.

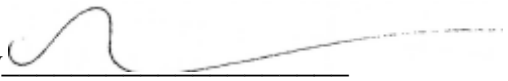
VII. CONCLUSION

As a matter of law, does a beep tone provide sufficient notice to an individual that a call is being recorded under Cal. Pen. C. § 632.7 to then obtain the consent of that individual? No, because a beep tone on its own provides no information about its meaning.

For the reasons argue above, Smith humbly requests that the Court reverse the lower Court's ruling granting Judgment in favor of LoanMe and direct the lower Court to enter an Order in favor of Smith.

Dated: September 7, 2018

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By 
Todd M. Friedman, Esq.
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CERTIFICATION PURSUANT TO Cal. R. Ct. 8.883

Appellant, Jeremiah Smith, hereby certifies that the word count for this brief, inclusive of footnotes and exclusive of information listed on the cover page, any table of contents or table of authorities, the certificate under subsection one or any signature blocks, is 6,198 words.

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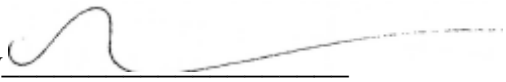
By 
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The Honorable Sharon J. Waters
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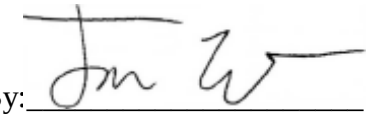
By: 
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Law Offices of Todd M. Friedman, PC

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