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**

APPEAL FROM THE NOVEMBER 21, 2017 JUDGMENT ENTERED BY THE CALIFORNIA SUPERIOR COURT, COUNTY FOR RIVERSIDE

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

APPELLANT'S REPLY BRIEF

Todd M. Friedman (216752)
tfriedman@toddflaw.com
Adrian R. Bacon (280332)
abacon@toddflaw.com
LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21550 Oxnard St., Suite 780
Woodland Hills, CA 91367
Phone: (877) 206-4741
Fax: (866)633-0228
Attorneys for Appellant/Plaintiff, Jeremiah Smith

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INTRODUCTION

Once again, the issue presented on appeal by Appellant Jeremiah Smith ("Appellant" or "Smith") is: 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?

In its response, Respondent LoanMe Inc. ("Respondent") argues, as expected, that the Public Utility Commission's ("PUC") General Order 107-B proscribes the use of beep tones to obtain consent. *See Re Monitoring of Tel. Conversations* (June 1, 1983) 11 CPUC 2d 692 ("GO 107-B"). Respondent additionally attempts to incorporate GO 107-B into this matter by citing to the exceptions provided Cal. Pen. C. § 632.7(b) that:

> "This section shall not apply to any of the following . . . (2) [t]he use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of the public utility."

But in doing so, Respondent proves Appellant's case for him. Respondent has provided no evidence that the equipment it used for recording was pursuant to the tariffs of the public utility it contracts with. In fact, Respondent provided no evidence as to the identity of any such public utility in the first place. The California Supreme Court has ruled that the defendant bears the burden of proving such issue in asserting its defense and Respondent has clearly failed to assert adequate facts to do so.

Respondent's citation to Cal. Pen. C. § 633.1(a) also presents more problems than solutions for Respondent, because it provides an exception to Cal. Pen. C. § 632.7, not the rule for § 632.7. Beep tones may be used for providing a caller notice when a caller uses a number known to the public to be a means of contacting airport law enforcement officers. Cal. Pen. C. § 633.1(a). In other words, under *ejusdem generis*, beep tones are

not adequate generally under the Cal. Pen. C. § 632.7 to obtain consent to record.

Again, 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.

ARGUMENT

I. Respondent Has Not Demonstrated That It Uses Any Instrument, Equipment, Facility, Or Service Furnished And Used Pursuant To The Tariffs Of The Public Utility And Thus Cannot Assert An Exemption

Respondent seeks to exempt itself from Cal. Pen. C. § 632.7 by noting that GO 107-B would be the relevant regulation for the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of the public utility (citing Cal. Pen. C. § 632.7(b)(2)), but in doing so points to a significantly bigger problem with this position—Respondent has no factual evidence to support that the equipment it used was provided pursuant to such a tariff. The California Supreme Court has ruled that it is respondent's burden to show that it comes within the exception of subdivision (b) of the statute and to make a showing of fact to that effect. *Ribas v. Clark*, (1985) 38 Cal. 3d 355, 362. In *Ribas*, defendant failed to submit any evidence that the extension telephone used by defendant was furnished by the telephone company and thus failed to demonstrate compliance with any relevant tariffs. *Id.* In doing so, defendant could not meet its burden to assert the affirmative defense of the exemption.

The Federal Courts when analyzing this issue have come to the same conclusion. *See Ades v. Omni Hotels Management Corp.* (C.D. Cal. 2014) 46 F.Supp.3d 999, 1006 (citing *Ribas v. Clark*, 38 Cal.3d 355 and *Bales v. Sierra Trading Post, Inc.* (S.D.Cal. Dec. 3, 2013) 2013 WL 6244529, at *4). To the extent such exemption applies, clear evidence that the recording was done through the "use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of the public utility" is required.

Here, Respondent suffers from the same deficiency as the *Ribas* and *Bales* defendants, it has provided no evidence that the recording system it

used was furnished and used pursuant to the tariffs of a public utility. *See, e.g., Stipulated Facts*, CT pp. 73-74. Respondent has failed to submit any evidence as to what public utility that even is, let alone the system it used to record the phone calls. Accordingly, Respondent cannot prove that the exemption under Cal. Pen. C. § 632.7(b) applies to it.

Similarly, Respondent has pointed out a significant weakness in its argument that GO 107-B should be used in interpreting Cal. Pen. C. § 632.7. To the extent GO 107-B is binding on the method of call recording, such proscription would only apply to those within the purview of its operation, namely those already exempted under Cal. Pen. C. § 632.7(b). Again, as argued in the opening brief, the regulations of Cal. Pen. C. § 630 et. seq. have been ruled separate and apart by the CPUC. *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.

Additionally, as noted in Appellant's Opening Brief, GO 107-B requires either prior express consent of all parties or notice of recording by one of the methods required in the order (a.k.a. beep tones) whereas Cal. Pen. C. § 632.7 provides that a person will not record a communication "without the consent of all parties to a communication." Cal. Pen. C. § 632.7 (emphasis added). 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.

Respondent's only remaining argument is that Cal. Pen. C. § 630 et. seq. incorporates the beep tones as notice of recording, but this argument suffers from yet another problem demonstrating that the statute should not be construed that way.

II. Cal. Pen. C. § 633.1(a) Makes It Clear That Beep Tones Alone Are Inadequate To Satisfy The Consent Requirements

Respondent cites to Cal. Pen. C. § 633.1(a) for the premise that "a series of electronic tones" places "the caller on notice that his or her telephone call is being recorded," but to arrive at that conclusion requires ignoring the construction of the clause as a whole and its place within the statute. Cal. Pen. C. § 633.1(a) provides:

> "Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits <u>any person regularly employed as an airport law enforcement officer</u>, as described in subdivision (d) of Section 830.33, acting within the scope of his or her authority, <u>from recording any communication which is received on an incoming telephone line, for which the person initiating the call utilized a telephone number known to the public to be a means of contacting airport law enforcement officers. In order for a telephone call to be recorded under this subdivision, a series of electronic tones shall be used, placing the caller on notice that his or her telephone call is being recorded.</u>"

(emphasis added). If a series of electronic tones were sufficient on their own to provide notice that <u>any</u> telephone call were being monitored or recorded under Cal. Pen. C. § 632.7, there would be no reason to have a specific carve out for calls made to airport law enforcement officers. In reality, this exception makes the default rule that electronic tones alone <u>do not place the caller on notice that the call is being recorded</u> so as to permit him or her to make a decision to continue the call and for consent to be

obtained. To interpret it otherwise would fly in the face of two canons of construction.

Under *ejudsem generis*, where specific words follow general words in a statute or vice versa, the general term or category is 'restricted to those things that are similar to those which are enumerated specifically.' *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 342 (citing *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160, fn. 7). "The canon presumes that if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would be surplusage." *Id.* Thus, electronic tones are adequate to provide notice that a telephone call is being recorded and thus exempt from the requirements of Cal. Pen. C. § 632.7 only when done by an airport law enforcement officer on an incoming line known to the public to be used as a means of contacting airport law enforcement officers. The peculiar and specific example is so limited.

Additionally, the "words [of a statute] must, of course, be read in the context of the provision as a whole" and in the context of the statutory scheme as a whole. *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.*, (2018) 4 Cal.5th 1082, 1090 (citation removed). "In other words, "we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 535 (citing *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83). If Cal. Pen. C. § 632.7 innately permitted beep tones to provide notice in order to obtain consent, the exemption of Cal. Pen. C. § 633.1(a) would be rendered useless and ineffective, and the Legislature is presumed to not pass useless and ineffective provisions when

it makes law. The correct way to harmonize the statute is to read it as a whole: Cal. Pen. C. § 632.7 makes it illegal to record calls without consent, and Cal. Pen. C. § 633.1(a) permits a narrow exception that electronic beep tones may be used to provide notice of recording only when used by airport enforcement officers.

Cal. Pen. C. § 633.1(a) must be read for what it is, a narrow exception that permits beep tones to provide notice for calls made to airport law enforcement officers. Accordingly, beep tones are not adequate to provide notice of recording so as to permit an individual to provide informed consent, and thus Respondent recorded Appellant without consent.

III. Respondent's Cited Cases Are Non-Binding And Non-Persuasive

Respondent cites to several cases in its Brief, none of which actually stand for any of the legal positions advanced in its papers. Clarification of these rulings is thus necessary.

NEI Contracting and Engineering, Inc. v. Hanson Aggregates Pacific Southwest, Inc. involves a series of decisions over the course of several years of litigation, including an order denying class certification, reconsideration granting class certification, a decertification order, and thereafter, a judgment from a bench trial. In reviewing these numerous decisions, what is clear is that the parties were not litigating the issue of whether beep tones provide notice of a recording practice.

> Prior to July 15, 2009, Defendants utilized "beep tone generators" to notify customers that their calls were being recorded. Both parties agree that the generators satisfied the notice requirements for recording set forth by the PUC. Thus, prior to July 15, 2009, Plaintiff had no cause of action against Defendants.

NEI Contracting and Engineering, Inc. v. Hanson Aggregates Pacific Southwest, Inc., (S.D. Cal. March 24, 2015) Case No. 3:12–cv–01685–

BAS(JLB) 2015 WL 1346110 at *4. This case history shows that the district court was operating in all of its subsequent rulings from the position that the parties were not challenging application of the PUC Opinion, because the class period in the case covered a completely separate period of time where beep tones were not even used. While the term "beep tone" was mentioned in passing in some of the orders, there was no litigation about whether beep tones act as sufficient notice of a recording practice. At best, the mention of beep tones in these decisions qualifies as irrelevant dicta. *NEI* is dispositive of absolutely nothing, and even if it were, this an unpublished federal court decision, which can be ignored by This Court.

Respondent's citations to *Air Transportation Association of America v. Public Utilities Commission of State of California*, (9th Cir. 1987) 833 F.2d 200, are equally irrelevant. That case involved a Ninth Circuit appeal of district court order striking down the PUC Opinion, due to it being preempted by the FCC Act. In a decision which purposefully avoided making any merits inquiry into the content of the PUC Opinion, leaving this to state courts, the Ninth Circuit reversed. The basis was due to a lack of preemption and conflict with the FCC Act. Importantly, the Ninth Circuit stated "we express no opinion as to the validity of G.O. 107–B under California law, or the availability of remedies under California law." *Id*. at 207. This decision expressly left all issues open as to whether the PUC Order applies to the case at bar, or whether it is even enforceable or authorized by California law. This task lies with California Courts to decide whether the PUC exceeded its authority in issuing the Opinion, or whether the Opinion is arbitrary, capricious, whether it even applies to the facts of a case, or is otherwise unenforceable. The language cited to by Respondent is again, nothing but irrelevant dicta.

The only other case cited by Respondent is *Kight v. CashCall, Inc.*, (2011) 200 Cal. App. 4th 1377. Again, this case has nothing to do with

beep tones. The plaintiff sued defendant collection agency for Penal Code §632 violations alleging secret monitoring of telephone conversations by employees without borrower knowledge or consent. Defendant filed a motion for summary judgment, on the basis that eavesdropping or monitoring required a third party to be listening in on the conversation, and an employee of defendant listening to a conversation of another employee of defendant did not count. Summary judgment was granted, and thereafter plaintiff appealed. The Court of Appeal held that a company recording calls is potentially liable for eavesdropping if it directed an employee to secretly listen on a conversation, and the borrower had an expectation of privacy. On this basis, summary judgment was reversed and remanded. The case did not involve beep tones. Rather, the defendant had (just like here) cited to an unpublished federal court decision which referred to the PUC Opinion. The Court of Appeal stated that such references were "unhelpful" had "no applicability" and were "not relevant." *Id*. at 1394. There was no analysis of the beep tone issue at all in this decision. That Defendant is citing to it as legal authority is suspect.

In sum, the cases offered by Respondent as legal authority in support of its position are no support at all. The only reason Respondent cited to them is because there are no other cases that reference beep tones or the PUC Opinion. One has to ask themselves, why has there been no litigation on this topic with a defendant arguing that its beep tones were sufficient notice? In 35 years, one would think there would have been at least one court opinion on the issue. It is because beep tones are disfavored in the industry and have largely been phased out over the years, because companies recognize that beep tones do not sufficiently notify anyone of consent, and because there are cases out there like *Kight* and *Kearney*, which expressly create binding law on courts that notice of a recording advisory has to put a consumer on "adequate notice" that their call is being

monitored or recorded, which requires an "explicit advisement" of such. The reality is that companies do not want to litigate this issue, because they know that hearing a beep doesn't really notify a consumer of anything. Again, *Kearney* is instructive:

> "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 disclosed in such calls."

Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal.4th 95, 198 fn 10. It is clear that there is no judicial authority that supports Respondent's position. It is also clear that binding decisions interpreting the Invasion of Privacy Act are directly at odds with the notion that hearing a beep could constitute notice of anything. Thus, the only authority supporting Respondent's position is the PUC Opinion itself, which itself states it is separate and apart from Cal. Pen. C. § 630 et. seq., and for which Cal. Pen. C. § 630 et. seq. includes specific carve outs for both public utility tariffs and the use of beep tones as argued above.

IV. Beep Tones Are Inadequate To Provide Notice of Recording, Such That Respondent Did Not Have Consent To Record Appellant

If LoanMe recorded Smith without his consent, LoanMe violated Cal. Pen. C. § 632.7. Cal. Pen. C. § 632.7 prohibits 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. 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.*

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. "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.

There is nothing inherent about a beep tone that would inform or advise a party that a call is being recorded such that he or she could make a decision to continue the call and thus give consent. A beep could mean any number of things. Beeps don't inherently give rise to reasonable notice that somebody is recording you. The statute itself acknowledges that beep tones only provide notice when used by airport law enforcement officers on an incoming telephone line known to the public to be a means of contacting airport law enforcement. This narrow exception is not present here.

Because Smith was not given notice that the call was being recorded by LoanMe, Smith never gave his consent to be 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.

CONCLUSION

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? 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? The answer is clearly no. No, because a beep tone on its own provides no information about its meaning and the statute makes clear that no meaning should innately be ascribed to it.

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: January 25, 2019

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

By_____
Todd M. Friedman, Esq.
Attorneys for Appellant/Plaintiff

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, this certificate or any signature blocks, is 3,446 words.

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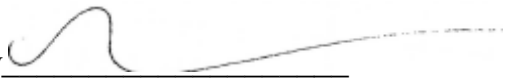
By 
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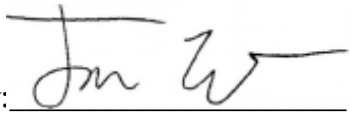
By: 
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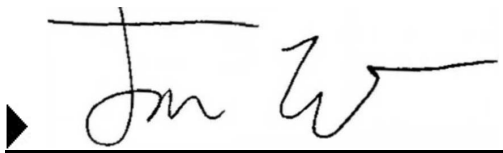

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