

No. S260391

IN THE SUPREME COURT OF CALIFORNIA

JEREMIAH SMITH, Plaintiff and Appellant,

v.

LOANME, INC., Defendant and Respondent.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Two (Case No. E069752)

On Appeal from the Riverside County Superior Court
(Case No. RIC1612501; Hon. Sharon J. Waters)

**APPLICATION TO FILE REQUEST FOR JUDICIAL
NOTICE AND REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF *AMICUS* BRIEF OF *AMICUS CURIAE*
ATLANTIC CREDIT & FINANCE, INC.**

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Attorneys for Atlantic Credit & Finance, Inc.

**APPLICATION TO FILE REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF *AMICUS CURIAE* BRIEF**

Amicus Curiae Atlantic Credit & Finance, Inc. (“Atlantic Credit”) respectfully requests permission to file this Request for Judicial Notice in support of Atlantic Credit’s *Amicus Curiae* brief and Respondent LoanMe, Inc.’s Answering Brief. The Request for Judicial Notice will assist the Court in deciding this matter by including important legislative history of California Penal Code section 632.7 that was not submitted or discussed by the parties, the trial court, or the Court of Appeal.

The Request for Judicial Notice is relevant to the appeal and will provide this Court with materials documenting the events that led to the enactment of California Code of Civil Procedure section 632.7. In particular, those materials demonstrate that the Legislature commenced consideration of the statute following an incident in which an amateur radio buff used a scanner to listen into and record the conversation of two of the owners of the Sacramento Kings. When the individual was not prosecuted, a local Sacramento attorney wrote a letter to Assembly Member Lloyd Connelly contending that a new statute was warranted. This led Mr. Connelly to write AB 2465 which became Section 632.7. Mr. Connelly explained in his Statement of Intent the principal concern

for passing Section 632.7: “under [then] current law” [Section 632.6 passed in 1990], it [was] only illegal to ‘maliciously’ intercept a conversation transmitted between [cordless telephones]. There [was] no prohibition against recording a conversation transmitted between cellular or cordless telephones.” As explained in the *Amicus* Brief of *Amicus Curiae*, the interpretations urged by Appellant Jeremiah Smith (“Smith”) and the federal district court orders to which he cites cannot be reconciled with this legislative history, nor even the text of Section 632.7.

No party or counsel for a party in this pending appeal either authored any part of this *Amicus Curiae* Request for Judicial Notice nor made any monetary contribution intended to fund the preparation or submission of the Request for Judicial Notice. Further, no person or entity, other than *Amicus Curiae*, made a monetary contribution intended to fund the preparation or submission of this Request for Judicial Notice.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* respectfully requests that the Court take judicial notice of the accompanying documents.

DATED: July 17, 2020

Respectfully submitted,

BAKER MCKENZIE LLP
EDWARD D. TOTINO
BENJAMIN W. TURNER

By: /s/ Edward D. Totino
 Edward D. Totino

Attorneys for Atlantic Credit &
Finance, Inc.

**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF
AMICUS CURIAE BRIEF**

Pursuant to California Rules of Court 8.520(f)-(g) and 8.252(a) and Evidence Code sections 452(c) and 459(a), Atlantic Credit respectfully requests that this Court take judicial notice of legislative history materials in connection with the central issue presented in this case – the interpretation of California Penal Code section 632.7. These matters do not relate to proceedings occurring after the order or judgment that is the subject of the appeal, but instead provide the Court with important legislative background material leading up to the enactment of Section 632.7

Atlantic Credit requests that the Court take judicial notice of the following portions of the legislative history of section 632.7 compiled in 2011 by Legislative Research & Intent LLC:

1. Letter to Assembly Member Lloyd Connelly dated August 23, 1991 from Michael S. Sands, attached hereto as **Exhibit A**.
2. AB 2465: Author’s Statement of Intent – Assembly California Legislature, attached hereto as **Exhibit B**.

The materials are relevant to the appeal pending before the Court because they rebut Appellant Jeremiah Smith’s arguments regarding

California Penal Code section 632.7. Smith urges this Court to adopt an interpretation of Section 632.7 that would prohibit the recording without consent of any telephone call where one party used a cell or cordless phone even if the person consented to the call. These materials also rebut the federal district orders cited by Smith which neglect to evaluate this critical aspect of the legislative history. These matters were not presented to the trial court or Court of Appeal by the parties.

This Court routinely takes judicial notice of legislative history documents under the authority of Evidence Code sections 452(c) and 459(a). *See, e.g., Heckart v. A-1 Self Storage, Inc.*, 4 Cal. 5th 749, 767 n.8 (2018); *White v. Davis*, 30 Cal. 4th 528, 553 n.11 (2003). This Court likewise routinely takes judicial notice of documents submitted by amici. *See, e.g., Ste. Marie v. Riverside County Regional Park & Open-Space Dist.*, 46 Cal. 4th 292, 293 n.7 (2009); *Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc.*, 26 Cal. 4th 1, 15 n.12 (2001).

DATED: July 17, 2020

Respectfully submitted,

BAKER MCKENZIE LLP
EDWARD D. TOTINO
BENJAMIN W. TURNER

By: /s/ Edward D. Totino
Edward D. Totino

Attorneys for Atlantic Credit &
Finance, Inc.

EXHIBIT A

LAW OFFICE OF
MICHAEL S. SANDS
POST OFFICE BOX 22692
SACRAMENTO, CALIFORNIA 95822-0692

(916) 739-7002 OR (916) 421-2012
August 23, 1991

*None of that stuff
see what (Simon)
Committee
says please.*

*Paul
Please
respond
MP*

Hon. Phil Isenberg
Assembly Chambers
State Capitol
Sacramento, CA 95814

Hon. Lloyd Connelly
Assembly Chambers
State Capitol
Sacramento, CA 95814

Re: ~~Eavesdropping and recording cordless telephone
conversations~~

Dear Phil and Lloyd:

I know that you are very busy with reapportionment and other year end legislative matters. However, a story recently appeared in the Bee which raises a substantial question regarding the right to privacy, and I think it requires some legislative action.

I am enclosing a copy of the article. It appears that someone deliberately used a scanner to eavesdrop on a cordless telephone conversation, and recorded the conversation. Sacramento Sheriff Glen Craig was quoted as saying that "[t]here was no provable violation of law, so we dropped the investigation", even though in the paragraph immediately above it was stated that the eavesdropping was illegal. (I do not know whether the District Attorney's office was consulted in this matter.)

I am both baffled and concerned that there was no prosecution in this case, but I can see why the present legislative scheme may have produced some confusion.

Penal Code §630 declares the general policy that we should be free from invasions of privacy when using modern means of communication. To implement this policy §632 was added making it illegal to eavesdrop upon, or record, a private communication using "a telegraph, telephone or other device, except a radio..."

It certainly appears that the conduct depicted in the article violated this section, unless a cordless telephone is interpreted to be a "radio" within the meaning of this section. This interpretation is bolstered by the fact that in 1990 the Legislature added §632.6, which had certain provisions similar to §632, including penalty. Since §632.6 expressly applies to

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c
d

One problem arises because while §632 applies to recording as well as eavesdropping, §632.6 does not. I do not know why the Legislature did not make these provisions consistent. Why should the recorded landline telephone conversation be illegal, but not the recorded cordless telephone conversation.

Obviously the cordless telephone is becoming a very common means of communication. Although it must be recognized that such a call may be inadvertently overheard because of the use of radio transmission, that is a significantly lesser danger than the person who intentionally seeks to eavesdrop on such conversations by using a scanner, and then records the conversation. If we truly value our right to privacy, then certainly the recording of the cordless telephone conversation should be as illegal as the recording of the landline conversation.

(I also do not understand why the use of the scanner did not provide the necessary evidence to prove the malice required for a prosecution under §632.6. Even the recording of the conversation, while not necessarily illegal, provides evidence of the malicious intent.)

In summary, if our citizens are going to feel free to use cordless telephones without fear of their private conversations being overheard, recorded, and then used against them, I believe that changes in our legislation may be necessary. I would greatly appreciate it if you would look into this.

Yours truly,


MICHAEL S. SANDS

cc: Hon. John Burton
Hon. Bill Lockyer
Hon. Dan Lungren
Hon. Steve White
Hon. Glen Craig
ACLU

ports, deal-makers and audiotape

re episode reveals enuti, Lukenbill tactics

Delsohn
Affairs Writer

investor to their Sacramento Sports Association
possession into territory normally reserved for law-
dry detective novels.
It began with a phone conversation between
Lukenbill and Benvenuti that was secretly being
taped.

The two men were talking about their prospec-
tive new partner, Fred Anderson — a well-respec-
ed building products manufacturer who also owns
the Sacramento Surge football team.

Benvenuti was on a portable phone at his office
and Lukenbill was at his office. Their talk was
blurt and stony.

Benvenuti was telling Lukenbill they ought to
jack up the price and get Anderson to buy them
out completely. They had him in a corner, Benve-
nuti said. Anderson's Surge team needed a home

and the SSA's North Natomas stadium was in lim-
bo due to a lack of money.

Lukenbill disagreed. He told Benvenuti the sta-
dium would never get built if Lukenbill were
bought out because "Fred doesn't know his
from a hole in the ground when it comes to build-
ing a stadium." Anderson doesn't know much
about football either, Lukenbill said.

In the annals of the Lukenbill-Benvenuti part-
nership — which has often provided more excite-
ment than the Kings themselves — the conversa-
tion was not too remarkable and likely would have
faded from the two men's memory.

Unfortunately for the two partners, their tele-

See PARTNERS, page B4

Partners: 48-page report

Continued from page B1

phone talk was overheard and taped by an amateur radio buff who was scanning the frequencies used by portable phones of the type Benvenuti was using that day.

That set off a bizarre episode that is detailed in a 48-page Sacramento County sheriff's report obtained by The Bee.

Before the incident was finally put to rest, there would be an offer to sell the tape for \$200,000, a monthlong sheriff's investigation into the propriety of the taping and the sales offer, and a confrontation between Anderson and Lukenbill.

And in his statement to deputies, Lukenbill at one point "speculated that Benvenuti may have knowingly taped the call." Lukenbill later said one of his first thoughts was that someone in Benvenuti's office may have taped it "with or without Joe's knowledge" because Lukenbill is the only one with access to his phone line in his office.

Anderson first became aware of the Lukenbill-Benvenuti conversation as he was getting ready to cut his deal with the two men. He

a call from a man who said he knew that Anderson was about to make an investment with Benvenuti and Lukenbill, the police report says.

The man told Anderson he had information that could save him millions of dollars — presumably by telling him know what type of partners he was dealing with so he could pick out — if Anderson paid him \$100,000.

What Anderson would get for his money was a tape of the Lukenbill-Benvenuti conversation, which had been made by a friend who had taped an exchange off a scanner-type radio.

The eavesdropper was a 29-year-old amateur radio operator with no tie in the \$200,000 offer, said Sheriff Glen Craig, who was called Feb. 1 by Anderson, the day after he was contacted by the tape-seller.

Although Anderson eventually agreed to pay \$1,000 for the tape, the sheriff's office decided not to file charges

because they said the eavesdropping, though illegal, was not intentional, and it was not a crime to sell the tape.

"There was no provable violation of law, so we dropped the investigation," Craig said.

When Anderson received the tape, he called Lukenbill and played it for him on the phone. There were some awkward moments. Those close to Anderson said the tape hurt the 67-year-old businessman deeply.

But a month later, Anderson — apparently over his wounds — agreed to pay \$5.6 million to Benvenuti for a 7 percent share of the SSA.

To prove Lukenbill wrong in his assessment that he "doesn't know his way from a hole in the ground," Anderson put a large photo of a donkey and another photo of the unfinished stadium on his office wall. They're still there.

"This little incident doesn't change the way I feel about my partners," Anderson said Wednesday.

As for Benvenuti and Lukenbill, they were a bit sheepish when asked about the phone incident this week, but they said there was nothing wrong with their remarks.

"All we were doing was arguing about the price. We do that every day," Benvenuti said. "We're the best of friends. Business is business, but we're the best of friends. When you're buying something, you're gonna do the best you can to get the lowest price. And when you're selling, you're going to try to get the most money. That was the conversation. We were dickering back and forth. That's no big deal."

Lukenbill, who may have been involved in more disagreements with Benvenuti over the years than the number of Kings victories, said the Anderson call was just another one.

"It was a pretty standard phone call between Joe and I. We've had almost a decade of those kinds of calls. We had another one the other night. We see things differently. Our philosophies are different. I guess it makes us a target for these types of things."

Continued on page B4



Legislative Research & Intent LLC

1107 9th Street, Suite 220, Sacramento, CA 95814
(800) 530.7613 · (916) 442.7660 · fax (916) 442.1529
www.lrihistory.com · intent@lrihistory.com

Authentication of the Records and Table of Contents

Legislative History Research Report Regarding:
CALIFORNIA PENAL CODE § 632.7
As Amended By Statutes of 1992, Chapter 298, § 6, AB 2465 – Connelly

I, Carolina C. Rose, declare that this report includes:

- *Historical documents surrounding the adoption of the above enactment.* These documents were obtained by the staff of Legislative Research & Intent LLC and are true and correct copies of the originals obtained from the designated official, public sources in California unless another source is indicated, with the following exceptions: In some cases, pages may have been reduced in size to fit an 8 ½" x 11" sized paper. Or, for readability purposes, pages may have been enlarged or cleansed of black marks or spots. Lastly, paging and relevant identification have been inserted.

Since 1983 LRI has specialized in the historical research surrounding the adoption, amendment and/or repeal of California statutes, regulations and constitutional provisions pursuant to California Code of Civil Procedure § 1859 which states in pertinent part: "In the construction of a statute the intention of the Legislature ... is to be pursued, if possible" Our research and expert witness services have assisted the courts in understanding and applying the underlying purpose of enactments in countless cases, such as *Redlands Community Hospital v. New England Mutual Life Insurance Co*, 23 Cal. App.4th 899 at 906 (1994). LRI also provides similar research for other states and at the federal level. (Formerly Legislative Research Institute and Legislative Research, Incorporated.)

- *A table of contents itemizing the documents.* This table of contents cites the sources of the documents.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that I could and would so testify in a court of law if called to be a witness.

Executed December 29, 2011, in Sacramento, California.

Carolina C. Rose, President

EXHIBIT B

FOI
270
SAC, SACRAMENTO, CA 95834
(916) 443-1183

CAPITOL OFFICE
STATE CAPITOL
P.O. BOX 942840
SACRAMENTO, CA 94248-0001
(916) 445-2464

California Legislature

LLOYD G. CONNELLY
MEMBER OF THE LEGISLATURE
SIXTH ASSEMBLY DISTRICT

UNION, SUBCOMMITTEE ON
THE ADMINISTRATION OF
JUSTICE
NATURAL RESOURCES

AB 2465: AUTHOR'S STATEMENT OF INTENT

The primary intent of this measure is to provide a greater degree of privacy and security to persons who use cellular or cordless telephones. Specifically, AB 2465 prohibits persons from recording conversations transmitted between cellular or cordless telephones.

Under current law, it is only illegal to "maliciously" intercept a conversation transmitted between the above-identified telephones. There is no prohibition against recording a conversation transmitted between cellular or cordless telephones. (See Penal Code Section 632 and Section 632.5.)

By comparison, it is currently illegal to "intentionally" intercept or record a conversation transmitted between landline, or traditional, telephones. (See Penal Code Section 632.)

AB 2465 recognizes the distinction between traditional, landline telephones and inherently, less secure (or more public) non-traditional cellular and cordless telephones. Most simply, landline telephones employ "closed" wire-to-wire systems, whereas cellular and cordless telephones employ radio waves. Generally, there is a greater expectation of privacy with regard to the former technology than the latter technology.

However, this does not mean that persons who use cellular or cordless telephones may reasonably anticipate that their conversations will be both intercepted and recorded. While there may be utility in retaining relatively unimpeded access to the public "air waves," there is no value in permitting private telephone conversations that employ the "air waves" to be indiscriminately record.

AB 2465 strikes the appropriate balance. The innocent, merely curious, or non-malicious interception of cellular or cordless telephone conversation will remain legal. However, it will be illegal to record the same conversations. Henceforth, persons using cellular or cordless telephones may do so knowing that their conversations are not being recorded.

This measure is increasingly important in light of the rapidly growing popularity of cellular and cordless telephones. As the use of this technology continues to grow, the opportunity for

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unscrupulous individuals to intercept and record conversations grows. It is estimated that as many 10 million cellular and cordless telephones will be in operation in California by the end of the century. Clearly, cellular and cordless telephone conversations require greater protection than that currently afforded by law.

AB 2465 is written in reliance on the December 17, 1991 Legislative Counsel opinion on this subject. (See Legislative Counsel opinion #27958, Invasion of Privacy.) AB 2465 comports with the evolution of our privacy laws as discussed in the opinion. Among other things, AB 2465 specifically relies on the conclusion in Question No. 4 of the above-mentioned opinion, namely, no significance should be attached to the use of "varying" terms and definitions in Chapter 1.5, commencing with Section 630.

A secondary purpose of AB 2465 is to make uniform the numerous cross-references in Chapter 1.5, commencing with Section 630, relating to increased penalties for subsequent violations of the chapter.

Lastly, it should be noted that AB 2465 comports with Section 2 of Chapter 909 of the Statutes of 1985 and Section 2 of Chapter 3457 of the Statutes of 1990.



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CALIFORNIA PENAL CODE § 632.7
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- *A table of contents itemizing the documents.* This table of contents cites the sources of the documents.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that I could and would so testify in a court of law if called to be a witness.

Executed December 29, 2011, in Sacramento, California.

Carolina C. Rose, President

PROOF OF SERVICE

I am over the age of eighteen years and am not a party to the within action. I am employed in the County of Los Angeles, State of California, at the law offices of Baker & McKenzie LLP, members of the bar of this Court. My business address is 1910 Avenue of the Stars, Suite 950, Los Angeles, California 90067. On July 17, 2020, I served a true copy document(s) described as:

APPLICATION TO FILE REQUEST FOR JUDICIAL NOTICE AND REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF AMICUS BRIEF OF AMICUS CURIAE ATLANTIC CREDIT & FINANCE, INC.

✓ BY ELECTRONIC TRANSMISSION THROUGH TRUEFILING: Pursuant to Rule 2.251(b)(1)(B) of the California Rules of Court, I caused the document(s) to be sent to the parties on the attached Service List who have registered for electronic service in this action at the electronic mail addresses listed.

✓ BY UNITED STATES MAIL: On July 20, 2020, I caused the document(s) listed above to be served by mail from Los Angeles, California by placing the documents for collection and mailing following our ordinary business practices. I am readily familiar with Baker McKenzie's business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct. Executed on July 20, 2020.

/s/ Edward D. Totino

Edward D. Totino

Jeremiah Smith v. LoanMe, Inc.
Case No. RIC 1612501
Appellate No. E069752
Supreme Court Case No. S260391
SERVICE LIST

VIA TRUEFILING Todd M. Friedman LAW OFFICES OF TODD M. FRIEDMAN, P.C. 21550 Oxnard Street, Suite 780 Woodland Hills, CA 91367 877.206.4741 866.633.0228 – Fax tfriedman@toddfirm.com	Attorneys for Plaintiff and Appellant Jeremiah Smith
VIA TRUEFILING Michael R. Williams mwilliams@ftrlfirm.com Jared M. Toffer jtoffer@ftrlfirm.com FINLAYSON TOFFER ROOSEVELT & LILLY LLP 15615 Alton Parkway, Suite 250 Irvine, California 92618 Telephone: (949) 759-3810	Attorneys for Defendant and Respondent LOANME, INC.
VIA TRUEFILING The Supreme Court of the State of California	
VIA TRUEFILING Fourth Appellate District, Second Division County of Riverside	
VIA FIRST CLASS MAIL Clerk of the Superior Court Attn: Judge Sharon J. Waters Superior Court of Riverside County Riverside Historic Courthouse 4050 Main Street Department 10 Riverside, CA 92501	

No. S260391

**IN THE SUPREME COURT OF
CALIFORNIA**

JEREMIAH SMITH, Plaintiff

and Appellant, v.

LOANME, INC., Defendant and Respondent.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Two
(Case No. E069752)

On Appeal from the Riverside County
Superior Court
(Case No. RIC1612501; Hon. Sharon J. Waters)

**[PROPOSED] ORDER GRANTING
REQUEST FOR JUDICIAL NOTICE OF
AMICUS CURIAE
ATLANTIC CREDIT & FINANCE, INC.**

[PROPOSED] ORDER

The Court grants the Request for Judicial Notice filed by *Amicus Curiae* Atlantic Credit & Finance, Inc. and takes judicial notice of the following documents:

1. **Exhibit A:** Letter to Assembly Member Lloyd Connelly dated August 23, 1991 from Michael S. Sands.
2. **Exhibit B:** Author’s Statement of Intent – Assembly California Legislature.

IT IS SO ORDERED

Dated _____, 2020

By: _____
Justice of the Supreme
Court

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **SMITH v.
LOANME**

Case Number: **S260391**

Lower Court Case Number: **E069752**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **Edward.Totino@bakermckenzie.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	2020 0717 Smith_Amicus_Brief_of_Atlantic_Credit_Finance
ADDITIONAL DOCUMENTS	2020 0717 Smith_Amicus_RFJN_of_Atlantic_Credit_Finance
ADDITIONAL DOCUMENTS	2020 0717 Proposed_Order_for_RJN_-_Atlantic_Amicus[FINAL]

Service Recipients:

Person Served	Email Address	Type	Date / Time
Todd Friedman Law Offices of Todd M. Friedman, P.C. 216752	tfriedman@toddfllaw.com	e-Serve	7/17/2020 8:23:42 PM
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Benjamin W. Turner	Ben.Turner@bakermckenzie.com	e-Serve	7/17/2020 8:23:42 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

7/17/2020

Date

/s/Edward Totino

Signature

Totino, Edward (169237)

Last Name, First Name (PNum)

Baker & McKenzie.com

Law Firm