IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEREMIAH SMITH, Plaintiff and Appellant, v. LOANME, INC., Defendant and Appellee.	Supreme Court No. S260391 Court of Appeal No. E069752 Superior Court No. RIC1612501

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable Douglas P. Miller
Honorable Michael J. Raphael
Honorable Frank J. Menetrez

APPELLANT'S REPLY BRIEF ON THE MERITS

After the Published Decision of the Fourth Appellate District, Second Division, County of Riverside.

Todd M. Friedman (216752)
tfriedman@toddflaw.com
Adrian R. Bacon (280332)
abacon@toddflaw.com
Thomas E. Wheeler (SBN 308789)
twheeler@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

Our privacy is ebbing away day by day. This trend concerned the Legislature, it concerns the people of California, and it should concern this Court.

What is abundantly clear from LoanMe's Brief is that aside from the Court of Appeal's decision, there is no authority to support LoanMe's position. The avalanche of authority that supports Smith's position goes largely unaddressed, and the straightforward plain meaning interpretation advanced by Smith is replaced with the same contrived interpretation that was adopted in error by the Court of Appeal. LoanMe fails to explain adequately what the term "receives" could possibly mean in the alternative, instead committing the same error as the Court of Appeal by looking at the term in relation to §§ 632.5 and 632.6, which include qualifying language that is not present in § 632.7, even after conceding that the dictionary supports Smith's reading. LoanMe then sidesteps the multi-page argument by Smith as to why the Court of Appeal's interpretation is flawed. The fact that LoanMe spends four pages of its brief arguing about the meaning of the word "receives" but fails to cite to any cases in support of its argument further demonstrates the weakness of such a position.

LoanMe's position regarding the application of the word "and" in § 632.7 merely echoes the Court of Appeal decision and adds nothing more to the analysis. No new case law or argument is raised. Such a reading turns the concept of "consent" on its head, effectively holding that consent for an inch must mean consent for a mile. Such a position is inconsistent with traditional notions of privacy and jurisprudence from this Court. Consent has consistently been understood in legal terms to be conditional, not unqualified as LoanMe argues. LoanMe never once addresses the concept of conditional consent in its brief. It provides no answer to the outrage of the consumer who exclaims in response - "yes I was speaking to you voluntarily,

but I would not have done so if I knew you were secretly recording me!" LoanMe's only answer is a contradiction in terms, which erodes the import of what it means to consent and makes light of the serious privacy concerns being addressed by the Legislature. This Court should uphold the Legislature's clear and unmistakable intent to create an expansive privacy regulation, rather than rewriting the law in a fashion that would narrow it so much as to render the limits of informed consent completely meaningless.

LoanMe ignores most of the Legislative history, just as the Court of Appeal did, and does not even provide any of its own citations to history in support of its position. Instead, LoanMe simply recites the same position advanced by the Court of Appeal and fails to address the numerous examples in the Legislative history that demonstrate that the statute was intended to broaden privacy protections for users of wireless telephone devices and safeguard from an encroachment into legal privacy that was developing in related Fourth Amendment jurisprudence in the federal courts.[1] LoanMe's reading of § 632.7 would render the statute entirely superfluous, which makes little sense in the full context of the Legislative history.

As to the Rule of Lenity Arguments raised by LoanMe, such a position attempts to fit a square peg into a round hole. First, in order to apply, the

[1] The Court of Appeal decision does effectively turn California into a one-party consent state, at least with respect to wireless or cellular phone calls which are not legally deemed confidential. The Legislature was concerned that the evolution of case law would hold that *all* cellular technology was insufficiently secure to *ever* warrant an expectation of privacy, and the implication would then be that § 632 would eventually provide no protection at all. A new law was required to safeguard this foreseeable risk to consumer privacy. Since three quarters of phone calls are made on wireless devices, with the trend increasing year by year, § 632.7 will eventually apply to virtually all phone calls, as the Legislature predicted. As such, it is of great importance that this Court reach the right decision. The Legislature worried about the "confidential" caveat, and this Court should as well, because it permits those who secretly record to avoid liability through a legal argument, when the Legislature clearly intended to ban all secret recording in fact.

Rule of Lenity requires a statute be ambiguous, which § 632.7 is not. Section 632.7 unambiguously governs surreptitious recordings made by parties to a call without consent. LoanMe's application of the Rule also fails because the rule only applies to criminal statutes. Smith has brought a civil lawsuit and requests enforcement of a civil penalty, not criminal penalties. This case has nothing whatsoever to do with criminal liability. Therefore, the rule simply does not apply.

Whether by analyzing the plain language, the harmony between various sections of the CIPA, an avalanche of persuasive legal authority, subsequent acts of the Legislature, or the Legislative History, the same conclusion must be drawn. Section 632.7 governs all wireless phone calls, and all individuals who would seek to record them surreptitiously. Interpreting the law to mean anything less would contributes to the ebbing away of our privacy rights and would defy the clear will of the Legislature. For these reasons, Smith respectfully requests that the Court of Appeal Order be reversed and remanded for further proceedings.[2]

ARGUMENT

LoanMe's bold statement that Smith failed to provide "any legitimate reason" to reverse the Court of Appeal obviously goes too far. As Smith pointed out, an avalanche of authority supports the plain language reading advanced by Smith. Only one unpublished decision supports the reading of LoanMe. The plain meaning of the statute, the dictionary, dozens of persuasive rulings from other courts, dicta from this Court, other provisions

[2] LoanMe spends eight pages arguing its beep tones provide notice of a recording practice, even though that issue was never addressed by the Court of Appeal. Smith respectfully declines to address this issue, and requests that if the Court agrees with Smith's interpretation of § 632.7, it remand the beep tone issue for review, and require the Court of Appeal to rule on the dispute it was asked by the Parties to rule. If the Court desires to reach both issues, Smith's position was thoroughly laid out in the appellate briefing.

of the CIPA, and the Legislative History all support Smith's view. Smith has not failed to provide "any legitimate reason: to reverse. Rather, LoanMe has failed to provide "any legitimate reason" to affirm.

I. The Plain Language Unambiguously Prohibits Surreptitious Recordation By Parties

LoanMe concedes that from a plain language point of view, the word "receive" unambiguously means "to come into possession of." This is consistent with Smith's position that a party to a call comes into possession of and therefore unambiguously "receives" a communication from another party to a call. The analysis of this portion of the dispute can therefore end here, and no examination of the broader statute, legislative history or any other issues is necessary with respect to the clear intent of the Legislature. It begs the question: why would the Legislature have included a term that clearly and unambiguously includes parties to a call if it did not intend for parties to a call to have their conduct regulated under § 632.7?

LoanMe's only answer to this question is to recite the same backwards reasoning applied by the Court of Appeal. Again, there are a host of problems with this approach which were addressed in Smith's Brief but never countered by LoanMe except by reciting the Court of Appeal's reasoning. Ultimately, statutory construction principles require that courts only turn for guidance through other statutory interpretation tools where there is ambiguity in a statute. LoanMe admits that there is no ambiguity as concerns the meaning of the word "receives." Therefore, the analysis can end here with respect to this issue.

The only remaining plain language argument raised by LoanMe concerns whether the consent qualifier "and" should be read in a manner that leads to an interpretation of the statute as requiring conditional consent or if the provision of consent to any aspect of the infringing conduct would by legal extension be automatically deemed unqualified and unlimited.

Without emphasis, this is what California Penal Code § 632.7 states:

> "Every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, … 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 ..."

This is how Smith asks the Court to interpret the statute:

> "Every person who, [(1)] without the consent of all parties to a communication, [(2)] intercepts **or receives and intentionally records**, … [(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 …"

Smith's proposed interpretation of the statute, which is consistent with virtually every instance where a court, legislative or executive body has interpreted the statute, treats the word "and" in the phrase "reception and intentional recordation" as a conditional qualifier for the term "consent." In other words, there must be both consent to receive and consent to record, in order for the consent standard to be met, because consent is conditional and requires both to be satisfied. Anything less would amount to uninformed consent, which deprives consumers of a meaningful choice to engage in potentially harmful conduct without full knowledge of the risks. This is consistent with the placement of the comma between sections 1 and 2 of Plaintiff's interpretation, since the phrase "intercepts or receives and intentionally records" is bookended by two commas suggesting that this phrase should be treated as one single disjunctive element that is qualified in totality by the consent requirement.

This Court placed great emphasis in the *Kearney v. Salomon Smith Barney, Inc*., (2006) 39 Cal.4th 95 decision on consumers' expectation that

they are going to be told that a call is being recorded at the outset if a recording is going to take place. Absent an advisory, consumers' default assumption is that they are not being recorded and so any consent they have given to receipt of a surreptitiously-recorded communication would be incomplete and materially uninformed. Thus, Smith's is the only interpretation that is consistent with general notions and legal notions of what it means to consent. It is consistent with the plain language of the statute to treat "consent" as conditional, because of the inclusion of the word "and" as a subsequent conditional qualifier. Smith's Opening Brief explained this in great detail and cited numerous cases where the statute was interpreted in a similar manner.

This is how LoanMe asks the Court to interpret the statute:

> "Every person who~~,~~ [intercepts a communication] without the consent of all parties to a communication, intercepts ~~or receives~~ and intentionally records, … 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 ..."

LoanMe's reading of the statute effectively removes the term "receives" from the statute entirely. According to LoanMe, it would be "absurd" for someone to be able to receive a communication from a party maliciously without consent. Such a position violates longstanding principles of statutory construction that holds that interpretations of statutes which render some words "mere surplusage" should be avoided. *People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.

LoanMe's reading also reorganizes the phraseology of the requirement of "consent" such that it applies <u>only</u> to interception (or receipt, though that term's inclusion is in LoanMe's reading "absurd"), and not to recordation. Again, LoanMe's reasoning is that it would be impossible for a

party to receive without consent and so whether they subsequently record without consent is irrelevant to determining if a violation occurs. Thus, LoanMe's interpretation does two things wrong.

First, the term "receives" is effectively written out of the statute. Second, consent is not conditional but is unqualified. LoanMe argues that consent only needs to be satisfied for *either* recordation or interception, not both. LoanMe also argues that reception does not mean anything beyond interception, since parties to the call who receive are not bound by § 632.7. Logically, it would be impossible for a surreptitious interceptor to subsequently record in a non-surreptitious manner and so the consent requirement effectively under LoanMe's reading need only apply to interception. LoanMe's reading is contrived. It requires the Court to reorganize the language of the statute and strike provisions that obviously would not have been included if the Legislature did not place weight on them. This would not be consistent with a plain meaning analysis.

Consent must be meaningful. LoanMe's interpretation renders it meaningless as to three quarters of the conduct to which and parties to whom one must consent to recordation under the plain meaning of the statute. LoanMe's interpretation provides no answer to the befuddled consumer who would have hung up the phone on LoanMe if he or she were advised that the call would be recorded and never consented to a reception of a recorded conversation under those terms. That choice is meaningful. The dignity of being afforded the opportunity to not be recorded over the phone if one chooses is important. If it were not, the statute would not have been drafted in such a manner. LoanMe's response is underwhelming and unpersuasive.

II. A Harmonious CIPA Requires Interpretation Of § 632.7 That Prohibits Surreptitious Recordation By Parties

LoanMe's interpretation is not consistent with other provisions of the CIPA, and its response to Smith's multifaceted argument on this point largely ignores the multitude of inconsistencies.

LoanMe dedicates a dismissive footnote to a glaring inconsistency in its position with the plain language of § 633.5. That provision of CIPA clearly and unambiguously envisions an interpretation of § 632.7 which encompasses surreptitious recordation by a party to a call. Why else would the Legislature have created a legal exemption for recording calls when parties believe another party may be committing a crime? Is the enumeration of § 632.7 within § 633.5 also "mere surplusage?" No. There can be no debate that the drafting of § 633.5 envisioned § 632.7 binding parties to a call. This is clear guidance from the Legislature on the conduct and persons they were targeting with this regulation. LoanMe summarily and without analysis dismisses this language as vague when it clearly is not. This Court should follow what others have done and give meaning to other portions of the statute. *Gamez v. Hilton Grand Vacations, Inc*. (C.D. Cal. Oct. 22, 2018) No. 18-cv-04803 GW (JPRx), 2018 WL 8050479 at * 3, n. 7.

LoanMe likewise fails to adequately address Smith's point that any reading of § 632.7 which applied only to eavesdroppers and not parties would render that <u>entire provision</u> meaningless surplusage, in light of other provisions of the CIPA. Specifically, §§ 632.5 and 632.6 already outlaw malicious interception of a call. It is hard to envision how or under what circumstances anyone could secretly intercept *and* record a call without an element of malice.[3] Therefore, the addition of a recording element, and the

[3] On the other hand, it is easy to envision how a person, especially in the days of early cellular phone technology when radio waves were used to transmit calls, could non-maliciously intercept a cellular telephone call. Indeed, a

removal of the requisite level of malice from § 632.7 do not lead to any foreseeable instances of additional liability beyond those already prohibited under §§ 632.5 and 632.6, unless that is, it *does* regulate parties. LoanMe fails to explain how or why the Legislature would have gone out of its way to enact a totally meaningless provision while subsequently emphasizing numerously how important § 632.7 was to consumer privacy. The issue goes completely unaddressed.

Moreover, for over 200 years, the principle of *expressio unius est exclusio alterius*[4] has governed the canons of construction where an ambiguity exists that would allow a court to interpret the scope or meaning of a statute. *Lanusse v. Barker* (1818) 16 U.S. 101, 148. This rule of contract interpretation states that "to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary (9th ed. 2009).[5] LoanMe fails to address the point raised by Smith regarding the term "malicious" being *included* in §§ 632.5 and 632.6 and *excluded* from § 632.7. There must be meaning behind this difference under principles of statutory construction. The meaning cannot be simply be that the Legislature was concerned that entities that were surreptitiously eavesdropping on calls might innocently record them and get away with it by arguing a lack of malice.

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passerby or neighbor might innocently or unintentionally overhear a cordless or cellular telephone call, and so obviously this type of scenario had to be excluded from liability under §§ 632.5 and 632.6. However, any subsequent action to intentionally record such a call inherently suggests a malicious motive. Why would § 632.7 be necessary if it meant what LoanMe argues?

[4] When one or more things of a class are expressly mentioned, others of the same class are excluded.

[5] *Murphy v. DirecTV, Inc*. (9th Cir. 2013) 724 F.3d 1218, 1234 ("the rule of construction *expressio unius est exclusio alterius*; i.e., that mention of one matter implies the exclusion of all others is an aid to resolve the ambiguities"); *Longview Fibre Co. v. Rasmussen* (9th Cir. 1992) 980 F.2d 1307, 1312–1313 (doctrine means that mention of one thing implies exclusion of the other).

Under what scenario would that even occur?[6] Rather, the only reasonable interpretation that leads to a harmonious CIPA and gives the term "malicious" any meaning is that § 632.7 was *also* targeting parties, who may in fact have had no malice, merely a desire to record a call for customer service or training purposes, neither of which are malicious purposes, but nonetheless invade the privacy rights of consumers if undisclosed.

LoanMe's brief does not address any of these issues or offer an explanation. The explanation that is proffered creates a bevy of conflicts with general statutory construction principles throughout the entire CIPA, and results in an inharmonious patchwork. Such is undesired. *Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 856.

III. Scarce Case Law Supports LoanMe's Position

LoanMe cites to three cases in support of its position and against the backdrop of Smith's over two dozen decisions that hold otherwise. None of these cases are persuasive.

LoanMe cites to *Young v. Hilton Worldwide, Inc.* (C.D. Cal. July 11, 2014) 2014 WL 3434117, the only federal court decision to partly support its reading of the law. Numerous courts have thoroughly and summarily disagreed with this decision, including *Horowitz v. GC Services Ltd. Partnership*, (S.D. Cal. April 28, 2015) 2015 WL 1959377, which cited to the overwhelming weight of authority holding that there's no third party eavesdropping requirement under § 632.7:

> "Although Defendant cites to *Young v. Hilton Worldwide, Inc.*, 2014 WL 3434117 (C.D. Cal. July 11, 2014) to support its contention that section 632.7 is restricted to third party interceptions, the Court is not persuaded. Contrary to *Young*, most district courts in the Ninth Circuit have found section 632.7 applies both to parties of a communication as well as third parties. See, e.g., *Brown*, 2012 WL 5308964, at *4–5; see also *Ades v. Omni Hotels Mgmt. Corp*., 46 F.Supp.3d 999, 1017–18 (C.D. Cal. Sept. 8, 2014) (finding that section 632.7 "prevents a party to a cellular telephone conversation

[6] Surely LoanMe is not suggesting that the Legislature was so concerned with innocent recordation during interception (a ridiculous and implausible scenario to envision) that it went out of its way to create new legislation.

> from recording it without the consent of all parties to the conversation" and is not limited to third parties); *Simpson v. Vantage Hospitality Grp., Inc*., 2012 WL 6025772, at *6 (N.D. Cal. Dec.4, 2012) (rejecting the defendant's argument that section 632.7 only applies to third parties); *Simpson v. Best W. Int'l, Inc*., 2012 WL 5499928, at *9 (N.D. Cal. Nov.13, 2012) ("Interpreting section 632.7 to only apply to third parties would defeat the Legislature's intent.").

Id. at *11. In fact, *Young* does not analyze the issue at all. It merely concludes without any analysis that § 632.7 applies only to eavesdroppers, in an unsupported two-page opinion. It is not persuasive of anything.

The only other cases cited by LoanMe are both unpublished trial court opinions. *Granina v. Eddie Bauer LLC* (Cal. Sup. Ct. Dec. 2, 2015) 2015 WL 9855304, at *4 held that because "speech is a voluntary process, it is difficult to imagine how someone talking to [a] known party via wireless telephone could fail to consent to that party's receipt of the communication." *Id*. at *4. As former California Central District Chief Judge George King recently put it, the basis of the decision in *Granina* "is merely another way of saying that a recording must be made by a third party to be actionable," because "[o]nly when an unknown party is listening to a conversation would someone not have consented to that party's receipt of communication." *Raffin v. Medicredit, Inc*. (C.D. Cal. Jan. 3, 2017) 2017 WL 131745, at *6. *Granina* held that § 632.7 should be interpreted that "a person may not be punished unless he or she engages in both the unconsented receipt and intentional unconsented recording of a telephone call." *Granina*, 2015 WL 9855304, at *4. The Court came to this conclusion even after conceding that the statute "broadly prohibit[s] 'every person' from maliciously eavesdropping on wireless telephone calls." *Id*.

The court's error was made in a grammatical and semantical misreading of §632.7, described above with respect to the conditional nature of consent. The statute plainly says that you need consent to both receive and record a qualifying conversation. It is not written in the disjunctive, like

the *Granina* court suggests, nor is the requirement on a consumer to show a lack of consent to receipt of a communication, because lack of consent to record alone is enough. That's why the statute says that you need "consent" to both "receive" **and** "record" a "communication." Recordation without an advisory is the privacy violation that courts have referred to when holding that having one's voice recorded without knowledge or consent is "'an affront to human dignity,'" *Raffin v. Medicredit, Inc*. (C.D. Cal. Dec. 19, 2016) 2016 WL 7743504 at *3 (quoting *Friddle v. Epstein* (1993) 16 Cal. App. 4th 1649, 1660-61(.

The case of *Burkley v Nine West Holdings Inc*. (Cal. Super. Sep. 05, 2017) 2017 WL 4479316 likewise reached the wrong conclusion, which error can be identified by the cases and history described throughout Smith's briefing. The court ruled "[w]hen a statute uses the same term or phrase as a previously enacted statute in a similar context, it should be assumed that the Legislature intended the term or phrase to have a similar meaning…" and went on to analyze the word "receives" as being the same as the word used in § 632.5 and § 632.6. As has been explained throughout this brief, such a reading has many flaws, which are not addressed by the Court of Appeal or by LoanMe's Brief.

This represents the full extent of all legal authority in support of LoanMe's position – a two page summary decision with no analysis from an oft-overturned district court judge, a four page unpublished trial court opinion with very little analysis, and another unpublished trial court opinion with numerous shortcomings that have not been addressed by LoanMe or the Court of Appeal.[7] LoanMe goes on to attempt to discount the avalanche of

[7] LoanMe's citation to unpublished trial court opinions also likely runs afoul of Cal. R. Ct. 8.1115, which prohibits the citation of unpublished opinions of California state courts, with certain limited exceptions because they have no precedential authority. *See, e.g., Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal. App. 4th 1290, fn. 5.

authority that disagrees with its position, but these efforts are unpersuasive. LoanMe does not conduct any analysis in its Opposition Brief as to why the decisions reached by these courts were in error, merely taking the position that the cases conducted only a "superficial" or "deficient" analysis. LoanMe does not explain what is meant by such a characterization, nor is that a fair characterization of the opinions.

For example, *Simpson v. Vantage Hospitality Grp., Inc*. (N.D. Cal. Dec.4, 2012) 2012 WL 6025772 hardly involved a superficial analysis. The Court concluded that under a plain meaning analysis, it was foreclosed from ruling in a manner that would excise words from the statute. Reading the statute to apply only to interception (i.e. not to parties) would excise the word "receives" from the statute. Therefore, such a reading would clearly be in error. Just because this ruling is straightforward does not mean that it is superficial. It was detailed and thorough. Sometimes the simplest explanation is simply the best explanation.[8]

Simpson v. Best Western Int'l, Inc. (N.D. Cal. Nov. 13, 2012) 2012 WL 5499928, was even more thorough. While the court entertained the same reasoning as in *Vantage Hospitality*, it went on to consider the legislative history, playing devil's advocate and giving the defendant the benefit of the doubt that there might be two plausible readings of § 632.7. Even after reviewing the legislative history, it came to the same conclusion as Smith. LoanMe's statements that these cases are flawed and superficial are ironically themselves flawed and superficial because they fail to address any of the points raised by Smith in the opening brief.

[8] LoanMe summarily dismisses the *Ades v Omni* decision as well, but this decision was nothing if not thorough. The court simply concluded that the argument made by LoanMe fell flat out of the gates, which is accurate. LoanMe's mere disagreement with the conclusions of the over two dozen contrary decisions does not in itself render them all flawed.

Gamez v. Hilton Grand Vacations, Inc., (C.D. Cal. Oct. 22, 2018) 2018 WL 8050479 is another example of this recurring deficiency in LoanMe's Brief. LoanMe simply dismisses the case by summarily saying "the court relied on the flawed reasoning from Ades, McEwan, and Simpson." However, *Gamez* also considered other provisions in the CIPA, including recent amendments which were made by the legislature with knowledge of the application by courts of § 632.7 to parties.

Finally LoanMe addresses the case of *Brinkley v. Monterey Fin. Servs., LLC* (S.D. Cal. 2018) 340 F. Supp. 3d 1036. LoanMe's response to this case is merely to recite the holding of the Court of Appeal. But this position ignores many things: 1) consent is clearly conditional under the plain language of the statute because of its organization and the conditional qualifier's application to two conjunctives, 2) § 632.7 becomes toothless and meaningless if applied only to interlopers because it only prohibits conduct already prohibited by §§632.5 and 632.6, 3) interpreting § 632.7 to apply only to third-parties excises the word "receives" from the statute and renders is mere surplusage, 4) interpreting § 632.7 to apply to only third-parties conflicts with other language in § 633.5 rendering that language mere surplusage, and 5) interpreting §§ 632.5 and 632.6 to apply only to third-parties either requires excising the word "receives" or placing undue emphasis on the word "malicious," which is not present in § 632.7 and therefore to equate these different words the same meaning is a strawman argument with a false premise. Beyond these reasons, the legislative history and subsequent actions of the Legislature, as discussed below and in the Opening Brief, support Smith's view and the *Brinkley* decision. None of these issues are persuasively addressed by LoanMe. Thus, LoanMe's attempt to distinguish the numerous cases cited by Smith in support of a broad reading of § 632.7 is unpersuasive and superficial.

IV. The Legislature Was Concerned That § 632 Would Be Rendered Legally Obsolete And Passed § 632.7 In Response To Those Concerns

A brief citation to the *Brinkley* case is warranted with respect to framing one of the issues present in the Legislative History that strongly supports Smith's reading of the statute. In *Brinkley v. Monterey Fin. Servs., LLC* (S.D. Cal. 2018) 340 F. Supp. 3d 1036, Monterey argued that § 632 "does not apply to calls involving a cellular radio telephone." *Id*. at 1040. Several cases were cited supporting this view. The reasoning behind this argument was multifaceted, but in part focusses on the inclusion of the phrase "except a radio" in § 632. The reason for this is clear - radio waves are inherently insecure. They can be easily intercepted. They are thus not confidential. In the early days of cellular technology, cell phones ran on radio waves. The *Brinkley* court, citing to *Kahn v. Outrigger Enterprises*, Inc. (C.D. Cal. Oct. 29, 2013) 2013 WL 12136379, observed that

> the legislative history accompanying the 1992 enactment of section 632.7 does support the contention that at least some California legislators did not think section 632 covered cellular phones.

Id. at *5. While the Court *Brinkley* and *Kahn* courts declined to give weight to the 1992 legislature's concerns about § 632 for purposes of interpreting § 632, (since it had been on the books for approximately 25 years at the time and these concerns obviously did not bear on or evidence the intent of the 1967 legislature), there can be no doubt that those same concerns *should* act as a guidepost for why the 1992 legislature chose to enact § 632.7. This is clear evidence of motive and intent. The Legislature was worried that an evolution of legal principles concerning confidentiality, and technological evolution regarding phone calls made via radio waves would be excluded from privacy protections under CIPA. *This is the very reason that § 632.7*

was enacted, and it definitively proves what the Legislature was trying to accomplish. Here is a relevant excerpt from the Legislative history:

> "Section 632 generally prohibits the eavesdropping upon, or recording of, a confidential communication if done intentionally and without the consent of all parties to the communication, and by means of an electronic amplifying or recording device (see Becker v. Computer Sciences Corp. (S.D. Tex. 1982), 541 F. Supp. 694, 706), whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, **except a radio**. Thus, while Section 632 provides a right of privacy to confidential communications carried over landline telephones, **it does not provide a right of privacy to communications carried over radio telephones**.
>
> In 1985, in response to a concern that, with the advent of high-technology mobile telecommunications as well as the popularity and availability of electronic scanners which can pick up the specific frequencies used by car telephone customers, "conversations over cellular equipment have not been guaranteed [the same] privacy as the conversations in one's home over landline systems,'' the Legislature enacted the Cellular Radio Telephone Privacy Act of 1985 (S.B. 1431; Ch. 909, stats. 1985; see Analysis of S.B. 1431, as amended April 22, 1985, Sen. Comm. Energy and Pub. Util.). According to an express statement of legislative intent, the Cellular Radio Telephone Privacy Act of 1985 was enacted in order to extend the right of privacy, and provide a legal recourse, to those persons whose private cellular radio telephone communications have been maliciously invaded by persons not intended to receive those communications (Sec. 2, ch. 909, stats. 1985).
> …
> According to pages 2 and 3 of a report by the Senate Committee on Judiciary analyzing A.B. 3457, as amended April 26, 1990 (hereafter "Analysis of A.B. 3457 by the Senate Judiciary Committee"), the need to specifically protect cordless telephone conversations by providing statutory protection for these communications was made clear "earlier this year when the United States Supreme Court declined to review a federal appeals court decision holding that cordless telephone conversations were not entitled to constitutional

> protection under the Fourth Amendment (Tyler v. Berodt (8th Cir. 1989), 877 F. 2d 705, cert. den. 107 L. Ed. 2d 743)" as well as by the fact that "Congress decided to expand the privacy protections enjoyed by telephone users to cellular telephones but not to cordless telephones in the Electronic Communications Privacy Act of 1986."

Letter from Bion M. Gregory to Lloyd G. Connelly re: Invasion of Privacy - #27958 (December 17, 1991) at pp. 2-4 (attached as Ex. 3 to Request for Judicial Notice) (emphasis added). The *Tyler* case was quite direct in its holding. The Eighth Circuit Court of Appeals held that users of cordless telephones did not have a justifiable expectation of privacy. *Tyler v. Berodt* (8th Cir. 1989), 877 F. 2d 705, 706-07. The reasoning was simple – those calls that could be easily intercepted could not be deemed private. In express terms, the Legislative history for § 632.7 flagged this issue as a concern, while simultaneously pointing out that § 632 arguably did not provide protections beyond landlines due to the "besides a radio" language in the plain language of the statute. In other words, there were two reasons that the Legislature was concerned § 632 was not enough to protect cellular and cordless phone users from surreptitious recording practices. The concern was tangentially about eavesdropping, but not because the Legislature was trying to outlaw eavesdropping so much as it was concerned that the existence of eavesdroppers eroded privacy such that § 632 would be interpreted over time to not prohibit recordation of what the Legislature viewed to be the majority of phone calls in the future. The Legislature's intentions are abundantly clear from a review of this language, but the evidence does not end there:

> The legislative history of Sections 632, 632.5, and 632.6 set forth above indicates that the intent of the Legislature in enacting these provisions was to extend a right of privacy, as defined in each section, first to persons who communicate over a landline telephone, then to persons who communicate over a

> cellular telephone, and finally to persons who communicate over a cordless telephone.
> …
> Thus, if the Legislature had intended to prohibit the recording of a communication between two telephones, one of which is a cordless telephone or a cellular telephone, that intent could easily have been expressed in Section 632.5 or 632.6. The failure of the Legislature to do so, while specifically prohibiting the recording of a confidential communication between two landline telephones, raises a presumption that the Legislature did not intend to prohibit per se the recording of a communication between two telephones, one of which is a cordless telephone or a cellular telephone.
> …
> However, while Sections 632.5 and 632.6 do not expressly prohibit the recording of a communication between two telephones, one of which is a cordless telephone or a cellular telephone, **a person who does record such a communication may be subject to sanctions under Section 632.5 or 632.6 since the recording may be evidence of a malicious interception** or reception prohibited by these sections (see Analysis No. 3, infra).

Id. (emphasis added). In other words, just as Smith argues above, the requirement of malice under §§ 632.5 and 632.6 would be evidenced by an individual's recordation of an intercepted call. This point by the Legislature demonstrates that they were aware of the implausibility of a scenario where somebody could non-maliciously intercept *and* record a phone call. The implication of course is that such conduct was not the target of § 632.7, and that the enactment of this new provision in 1992 was designed to target recordation by parties to cellular phone calls, in order to shore up eroding privacy protections on that separate front, just as Smith argues. Again, from the Legislative history:

> The issue of whether or not the eavesdropping on, or recording of, a telephone communication constitutes an unlawful act under Section 632 depends, in part, upon whether the parties to the communication have a reasonable expectation of its confidentiality (see People v. suite, 101 Cal. App. 3d 680, 688).

…
The federal courts have held that under the federal wiretap law (18 U.SC.A. Sec. 2510 and following), a speaker has no justifiable expectation of privacy concerning voice communications transmitted by radio waves (see Edwards v. Bardwell (M.D. La. 1986), 632 F. Supp. 584, 589, aff'd. 808 F. 2d 54, but compare United States v. Hall', supra). On pages 2 and 3 of the Analysis of A.B. 3457 by the Senate Judiciary Committee, supra, the committee compared cellular, cordless, and wire-to-wire telephone technologies, as follows:

"The technologies compared "Cordless telephones operate by broadcasting over a narrow but open band of radio frequencies which can be picked up by other cordless telephones and scanners. Cellular telephone technology differs slightly in that scores of low-powered receiver transmitters are used to pick up conversations as users drive from cell' to 'cell.' Monitoring of cellular phone conversations over the radio frequencies is possible with very sophisticated scanning equipment. Wire-to-wire telephone communications over a 'closed' system offer the most privacy protection.

"Comparing the openness' of cordless telephone communications which could be picked up by other cordless telephones in the vicinity with the comparatively more secure cellular and wire-to-wire systems, one can see why a court may rule that cordless telephone communications do not carry the same expectations of privacy as a wire-to-wire telephone communication. For perhaps the same reasons, Congress decided to expand the privacy protections enjoyed by telephone users to cellular telephones but not to cordless telephones in the Electronic Communications Privacy Act of 1986.

Proponents [of A.B. 3457] respond that people expect their telephone conversations to be private, notwithstanding the form of transmitter used, and that all telephone communications should be protected."

Based on the legislative history of Sections 632.5 and 632.6, we conclude that the Legislature wanted to extend privacy rights to communications transmitted between two telephones, one of which is a cordless telephone or a cellular telephone,

> and that in order to do this, where the technologies involved make the communications inherently public rather than confidential, the Legislature had to eliminate the requirement that a communication must be confidential before it will be protected from eavesdropping.
>
> Accordingly, we conclude that the effect of the fact that Section 632 applies only to "confidential communications" while Sections 632.5 and 632.6 apply to "communications" is that a communication for which a speaker may have no justifiable expectation of privacy concerning that communication, and thus which would not be protected under Section 632, would be protected under Section 632.5 or 632.6.

Id. at pp. 5-7 (emphasis added). This Legislative history in no uncertain terms expressly states that the purpose of §§ 632.5 and 632.6 was to protect wireless technology from eavesdropping, because legally and factually, the technology was evolving to become public in nature, while consumers desired it remain private. This strongly supports Smith's view of § 632.7, i.e. that the statute was meant to simply create a § 632 extension by prohibiting all recordation (by both parties and interlopers, i.e. interception or receipt), just as §§ 632.5 and §§ 632.6 extended the eavesdropping prohibitions in § 632 to the same technology. Obviously eavesdropping can only be perpetrated by eavesdroppers. A party cannot eavesdrop by definition. But this is why §§ 632.5 and 632.6 are not the proper reference point for analyzing § 632.7, as the Court of Appeal erroneously focused its analysis. The reference point is § 632, with §§ 632.5 and 632.6 extending its prohibitions as to eavesdropping (as it relates to otherwise vulnerable wireless technology), and § 632.7 closing the final loophole by extending its recordation prohibitions to the same. Thus, because § 632 prohibits surreptitious recordation by both parties and interlopers, so too does § 632.7. Such a reading is consistent with the clear Legislative intent to broaden privacy protections in a world where technology was evolving beyond the

outdated letter of the law. It is there in black and white, and while Smith's counsel pleaded with the Court of Appeal during oral argument to read this very history, the decision never once mentions it, nor does LoanMe's briefing.

LoanMe's remaining arguments regarding statutory history are cherry-picked and merely recite the flawed Court of Appeal Order, as expected. Any full reading of the Legislative history strongly supports Smith's view, though it is unnecessary to reach this stage of the analysis, because the statute is plain on its face.

V. The Rule of Lenity Does Not Apply

LoanMe's final argument concerning the rule of lenity has zero application to this case for two reasons. First, this is a civil case, and does not involve a criminal prosecution. Second, § 632.7's application to parties to a call is not ambiguous under the plain meaning of the statute.[9] *People v. Morrison* (2011) 191 Cal. App. 4th 1551, 1556 ("The rule of statutory construction that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impractical.").

As LoanMe acknowledges, § 637.2 of the CIPA subjects persons who violate the statute to civil penalties. Smith filed a case seeking civil penalties for LoanMe's alleged surreptitious recording practices. Smith does not seek criminal penalties and has not pressed criminal charges. This is not a criminal case, nor are any of the remedies or penalties sought criminal in nature. Smith seeks only statutory civil penalties, i.e. a civil remedy.

[9] Smith has extensively discussed the plain language of the statute's lack of ambiguity in other areas of briefing and incorporates those arguments by reference herein for brevity. It is worth noting that the Rule would not even arguably apply if the statute is deemed unambiguous by the Court.

Although the CIPA is contained in the Penal Code, this case is governed by rules of construction applicable to civil cases. By undersigned counsel's review, there have been eighty-seven instances where the California Supreme Court has addressed application of the Rule of Lenity. Never once has the Court applied the Rule in the context of a civil penalty, and in fact, the Court has declined to do so. In *Smith v. Superior Court* (2006) 39 Cal.4th 77, this Court expressly declined to apply the Rule of Lenity in a case where the plaintiff was seeking statutory civil penalties under the California Labor Code. The Court observed that the rule of strict construction of penal statutes applies generally only to criminal statutes rather than statutes which prescribe civil monetary penalties. Moreover, the Court went on to reaffirm its position that civil statutes for the protection of the public, are generally broadly construed in favor of that protective purpose. *Id*. at 228. The sole distinguishing fact between the case at bar, and *Smith v Superior Court* is that the CIPA's civil penalties provisions are technically part of the Penal Code. This is a superficial distinction which this Court has previously addressed.

In *Kearney*, the Court explained that the Privacy Act is to be construed as if "the Legislature had adopted three separate statutes—one declaring that the prohibited conduct was unlawful, a second specifying the civil sanctions that could be imposed upon such unlawful conduct, and a third specifying the penal sanctions that could be imposed for such conduct—and had placed the first two statues in the Civil Code and the third in the Penal Code." *Kearney v. Salomon Smith Barney, Inc*., (2006) 39 Cal.4th 95, 116 n. 6.[10] Because *Kearney* involved a civil cause of action, the Court found it

[10] The statutory minimum damages provision reflects the Legislature's intent to compensate victims of privacy violations, recognizing damages for the violation of privacy are often "obscure and difficult to prove." *Murphy v. Kenneth Cole Prods., Inc*. (2007) 40 Cal. 4th 1094, 1112; *Kearney*, 39 Cal. 4th at 116, n.6.

unnecessary to address arguments that could arise in the context of a criminal prosecution. *Id*. Similarly, in *Kight v. CashCall, Inc*. (2011) 200 Cal. App. 4th 1377, the Court of Appeal applied only rules of construction applicable to civil cases. *Id*. at 1388 ("[T]he sole issue before us is whether CashCall may be held civilly liable. We thus apply interpretation principles applicable to a civil statute and make no attempt to determine whether our interpretation extends to a criminal matter.")[11]

LoanMe does not cite to a single case that supports its position that a civil statutory penalty should be strictly construed, merely due to its incidental inclusion within a statute that separately imposes criminal liability under other sections of the same statute. Smith is aware of no such authority. Moreover, as is evident in the *Smith v Superior Court* matter, this Court has declined to do so in relationship to civil penalties imposed under provisions of the California Labor Code, irrespective of the fact that the California Labor Code additionally imposes criminal liability under Sections 216[12] and 227.[13] Indeed, the California Labor Code appears to similarly be a hybrid statute with both civil and criminal components, but this has not relegated the entire Labor Code to strict interpretation. Quite the opposite in fact. The same can be said for any hybrid statute, like the CIPA, where both civil and criminal penalties are available.[14] For these reasons, LoanMe's reliance on the Rule of Lenity is misplaced.

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[11] While far from binding, the decision of *Stoba v. Saveology.com, LLC,* (S.D. Cal. July 18, 2014) No. 13-CV-2925-BAS NLS, 2014 WL 3573404 at *3 has a thorough discussion of this issue that is highly persuasive.

[12] § 216 makes it a misdemeanor to willfully fail to pay wages.

[13] § 227 makes it a misdemeanor to willfully fail to pay benefits to a health or welfare fund, pension fund or vacation plan.

[14] Under LoanMe's reasoning, the California False Advertising Law Cal. Bus. & Prof. Code §§ 17500 *et seq*. should also be strictly construed because it states that falsely advertising products is a misdemeanor. Cal. Bus. & Prof. Code § 17500 ("Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding

CONCLUSION

The privacy rights of citizens of this State are under a constant barrage of fire from every angle. Whether it is Facebook selling our data without permission to the highest bidder, Google spying on us and selling data to the NSA, or LoanMe recording Mr. Smith without ever telling him they were doing so, it seems now more than ever, whatever we do, and wherever we turn, we are being monitored, recorded, archived, bought and sold, and we have no control over any of it. Privacy is important. It is embedded in Article 1 of the California Constitution as a specific enumerated right. This Court should not allow an overly clever argument that ultimately makes no sense assist further in the ebbing away of our privacy rights. It is time to say that enough is enough.

For reasons set forth herein, in Smith's Petition and Opening Brief, Smith respectfully requests the Court reverse and remand.

Dated: June 19, 2020

Respectfully submitted,

/s/ Todd M. Friedman
Todd M. Friedman
State Bar No. 216752
Adrian R. Bacon
State Bar No. 280332
Thomas E. Wheeler
State Bar No. 308789
Attorneys for Plaintiff and Appellant
Jeremiah Smith

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six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine."). And yet, the primary remedy sought by civil litigants in such cases is restitutionary and injunctive in nature, which are decidedly not criminal penalties. Surely such inclusion of language would not mean that a broad consumer protection statute that has long been held to broadly protect consumers from deceptive sales practices should suddenly become narrowly construed by courts merely due to the provision for incidental remedies that are not at issue in a civil case.

CERTIFICATION OF WORD COUNT

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

Dated: June 19, 2020

Respectfully submitted,

/s/ Todd M. Friedman
Todd M. Friedman
State Bar No. 216752
Adrian R. Bacon
State Bar No. 280332
Thomas E. Wheeler
State Bar No. 308789
Attorneys for Plaintiff and Appellant
Jeremiah Smith

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Fourth Appellate District, Second Division, County of Riverside

Jared Toffer & Matthew Lilly
Attorneys for Respondent LoanMe, Inc.

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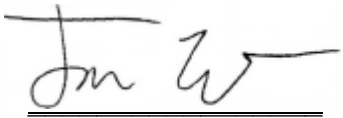
By: 
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Zach Dostart Dostart Hannink & Coveney LLP 255071	zdostart@sdlaw.com	e-Serve	6/19/2020 6:05:58 PM

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/s/Todd Friedman

Signature

Friedman, Todd (216752)

Last Name, First Name (PNum)

Law Offices of Todd M. Friedman, PC

Law Firm