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and KEITH DUGGAN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANNETTE JONCZYK, on behalf of herself and others similarly situated,

Plaintiff,

v.

FIRST NATIONAL CAPITAL CORPORATION, a California corporation; and KEITH DUGGAN, an individual,

Defendants.

CASE NO. SACV13-00959 JLS (AGRx)

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS CLASS ACTION COMPLAINT PURSUANT TO RULE 12(b)(6) AND 12(e).

Hearing:
Date: November 15, 2013
Time: 2:30 p.m.
Place: Courtroom 10A

Complaint Filed: June 25, 2013

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I. INTRODUCTION

Plaintiff Annette Jonczyk's ("Plaintiff") Complaint centers on the alleged recording of her telephone conversations by her husband's employer, Defendant First National Capital Corporation ("First National"), allegedly without her knowledge or consent. Plaintiff, a resident of the state of Missouri, claims she did not know that her telephone calls with her husband, who was working out of First National's Orange County, California offices, were recorded, though some employees and others knew that First National's incoming and outgoing calls were recorded. Plaintiff's claims fail for numerous reasons.

First Plaintiff attempts to apply California's Invasion of Privacy Act ("CIPA") to her calls even though she was located in Missouri and is a resident of Missouri. Missouri's recording laws should apply to her phone conversations, not California's. Missouri, unlike California, is a one-party consent state, meaning a party to a telephone call may legally record the call without notice to the other party. California's Supreme Court has emphasized that CIPA only applies to California residents while located in California. Moreover, under the applicable choice of law analysis, California's three-part governmental interest test, Missouri law applies to Plaintiff's claims. Plaintiff's claims should be dismissed for this reason. In addition, even if CIPA applies here in some respects, the Court should not impose CIPA's monetary penalties upon Defendants for actions that were legal under Missouri's laws.

Second, Plaintiff's claims fail against Defendant Keith Duggan ("Duggan"). Plaintiff alleges that First National, and not Mr. Duggan, recorded the calls. Mr. Duggan, acting within the scope of his employment for First National, cannot be separately held liable under CIPA.

Third, because the calls with Plaintiff were interstate telephone calls, the application of CIPA to those calls is preempted by federal law. Federal law, like

Missouri law, requires only one-party to consent to recording. And, states like California have no jurisdiction to regulate interstate calls. Plaintiff's claims should be dismissed as preempted.

Fourth, Plaintiff's damages claim should also be dismissed to the extent Plaintiff asks for fixed statutory damages "per violation" or "per occurrence." The statutory text in Penal Code section 637.2 makes clear that statutory damages for violations of CIPA are $5,000 *per action*, not per occurrence.

Finally, should the Court not dismiss Plaintiff's single cause of action for failure to state a claim under Rule 12(b)(6), the Court should require a more definite statement under Rule 12(e) because Plaintiff groups several apparently alleged penal code violations into one cause of action, even though the various statutory sections apply to different conduct. Defendants cannot formulate a proper response or defense to Plaintiff's single cause of action without knowing the particular statutes they are alleged to have violated.

II. FACTUAL ALLEGATIONS

A. Plaintiff's Individual Claims.

Plaintiff, a resident of the State of Missouri, complains that her telephone conversations with her husband, working in California, were recorded by his employer First National without her consent. Complaint, ¶ 10. Plaintiff claims these personal calls were confidential communications under CIPA, codified in Penal Code § 630 *et. seq*., and as such required all parties to consent before a call could be recorded. Complaint, ¶¶ 10, 20, 22. Plaintiff claims that her husband did not know at first that calls were recorded, and was in fact told the opposite—that First National does not record phone calls. *Id*. ¶ 10.[1] Plaintiff's husband allegedly learned that calls were recorded "months later." *Id*. Plaintiff's husband is not named as a Plaintiff, and Plaintiff does not allege when her calls were recorded or

[1] This allegation is belied by the Internet/Phone Usage Policy ("Phone Usage Policy") that Plaintiff's husband (and other employees) signed. *See* Exhibit A to Motion to Strike filed concurrently herewith.

when she learned that her calls were being recorded.

Plaintiff also claims that First National called her on a recorded line informing her of concern over her husband's medical condition, but does not state whether she knew at the time that calls were recorded. Complaint, ¶ 10.

B. Plaintiff's Class Claims

According to Plaintiff, First National recorded all incoming and outgoing "private and work-related" phone calls to and from their sales representatives. Complaint, ¶ 10. Plaintiff alleges that First National's recording practice "is not known to many…employees, is known to even fewer spouses, relatives and friends…and is known by few if any customers and prospective customers." *Id*. Plaintiff goes on to claim that Defendant Duggan, as the President of First National, misrepresented that calls were recorded, and saved the recordings so that he could "listen to them later." *Id*. Plaintiff does not state whether Mr. Duggan indeed listened to any recordings, or otherwise monitored or eavesdropped upon any calls.

Based on these sweeping allegations, Plaintiff purports to represent an apparently nationwide class of:

> [A]ll persons who were the victims of Defendants' recording of their phone conversations involving confidential information, a group that includes current and former employees of FIRST NATIONAL, family members, friends, and other third parties who exchanged confidential information with FIRST NATIONAL employees over the phone, as well as customers and prospective customers who shared confidential information with FIRST NATIONAL over the phone within the longest time period permissible pursuant to any and all statute of limitation.

Complaint, ¶ 11. Plaintiff, of course, is not an employee or customer of First National. And her class definition also includes those who had notice or otherwise consented to the recording.

Although Plaintiff cites to the general Privacy Act, Penal Code § 630 *et. seq*., Plaintiff does not specify the particular section that governs her claim. Plaintiff asks for statutory damages under Penal Code § 637.2—which she claims are $5,000

"per occurrence." *Id*. at ¶ 23.

III. CALIFORNIA'S INVASION OF PRIVACY ACT

California's wiretapping, eavesdropping, and recording laws are set forth in the California Invasion of Privacy Act, Penal Code §§ 630 through 638. Section 630 declares Legislative findings and intent, stating: "The Legislature by this chapter intends to protect the right of privacy of *the people of this state*." (emphasis added.)

Plaintiff cites to Penal Code §§ 630, 631, 632, 632.5, 632.6 "and/or" 632.7 as presenting common questions of law, but does not specify which section(s) govern her single cause of action. *See* Complaint, ¶ 10. Most of these sections do not apply to recording. Penal Code § 631 covers "wiretapping" (not recording) by a third-party who is not a party to the conversation. *See Rogers v. Ulrich*, 52 Cal. App. 3d 894 (1975) (this section does not cover the recording of a conversation made by a participant rather than by a third party); *Membrila v. Receivables Performance Mgmt*, LLC, 2010 WL 1407274 (S.D. Cal., Apr. 6, 2010) (finding the plaintiff failed to state a claim under section 631 because that statute pertains only to eavesdropping by wire and not to recording of conversations). Likewise, sections 632.5 and 632.6 pertain to interception, not recording, by a third party and require malicious intent and the existence of a cordless or cellular telephone—facts not alleged in the Complaint. *See* Cal. Penal Code §§ 632.5, 632.6; *Simpson v. Best Western International, Inc.*, 2012 WL 5499928 at *9 (N.D. Cal. 2012).

The operative section of California Penal Code § 632 (hereafter, "Section 632"), which is the primary statute governing recording of telephone calls, provides:

> (a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, 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, shall be punished ….

Cal. Penal Code § 632(a).[2]

Plaintiff nowhere alleges that she used a cell or cordless phone and therefore Penal Code § 632.7, which deals with cellular and cordless telephones and provides in pertinent part, does not apply:

> (a) Every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, 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[.]

Cal. Penal Code § 632.7(a) (emphasis added).

A private right of action is permitted under Section 637.2, as follows:

> (a) Any person who has been injured by a violation of this chapter may bring *an action* against the person who committed the violation *for the greater of* the following amounts:
>
> (1) Five thousand dollars ($5,000).
>
> (2) Three times the amount of actual damages, if any, sustained by the plaintiff.

Cal. Penal Code § 637.2 (emphasis added).

IV. MISSOURI LAW APPLIES TO PLAINTIFF'S CLAIMS.

"When a federal court sits in diversity, it must look to the forum state's [California] choice of law rules to determine the controlling substantive law." *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir.2002); *Mattel, Inc. v. MGA*

[2] Penal Code § 632(a) applies only to telephone calls that qualify as "confidential communications." The term "confidential communication" includes "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, *or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."* Cal. Penal Code § 632(c) (emphasis added).

Entertainment, Inc., 782 F. Supp. 2d. 911 (C.D. Cal. 2011). Plaintiff alleges that First National, operating out of California, has recorded telephone conversations with Plaintiff, a resident of the State of Missouri, without her knowledge or consent. As in *Kearney v. Salomon Smith Barney, Inc*., these facts give rise to a choice of law issue, because both the California privacy statute and the relevant Missouri statute are invoked. 39 Cal. 4th 95, 99 (2006). Indeed, the *Kearney* court emphasized again and again that California law applies to interstate calls only to protect the privacy rights of California residents while they are in California:

> "California clearly has interest in protecting the privacy of telephone conversations of California residents while they are in California sufficient to permit this state, as a constitutional matter, to exercise legislative jurisdiction over such activity." *Kearney*, 39 Cal.4th at 104.
>
> "Instead, the application of California law would be limited to the defendant's surreptitious or undisclosed recording of words spoken over the telephone by California residents while they are in California." *Id.*
>
> "The legislatively prescribed purpose of the 1967 invasion-of-privacy statute, however, is 'to protect the privacy of people of this state' (§ 630), and that purpose certainly supports application of the statute in a setting in which a person outside California records, without the Californian's knowledge or consent, a telephone conversation of a California resident who is within California." *Id.* at 119.
>
> "Interpreting that statute to apply to a person who, while outside California, secretly records what a California resident is saying in a confidential communication *while he or she is within California*, however, cannot accurately be characterized as an unauthorized *extraterritorial* application of the statute, but more reasonably is viewed as an instance of applying the statute to a multistate even in which a crucial element – the confidential communication by the California resident – occurred *in California*." *Id.* (emphasis in original).
>
> "Because there can be no question but that the principal purpose of section 632 is to protect the privacy of California residents *while they are in California,* we believe it is clear that section 632 was intended, and reasonably must be interpreted, to apply in this setting." *Id.* at 119-120 (emphasis in original).

As set forth in *Kearney*, California applies the three part "governmental interest" test to choice of law disputes:

> First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law 'to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state.'

Kearney, 39 Cal. 4th at 107-108 (citing *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 320 (1976) (superseded by statute on other grounds)). The application of this three-part test confirms that California law does not apply here.

A. <u>California And Missouri Law Differ.</u>

Missouri is a one-party consent state, meaning that its statute permits recording a communication when one of the parties has consented. *See* Mo. Ann. Stat. § 542.402(2)(3)(Supp.); *Phillips v. American Motorist Ins. Co*., 996 S.W.2d 584, 589 (Mo. App. 1999). Missouri, like most of the other states in the United States, has adopted the federal Wiretap Act, 18 U.S.C. §§ 2510-2522. *See id*. at 588. Section 2 of 542.418 of Missouri's Wiretap Act provides that a person whose communications were recorded in violation of the Act has a civil cause of action against the person who recorded, and may recover actual damages, punitive damages, and reasonable attorney's fees and litigation costs. Mo. Ann. Stat. § 542.418.2(2)(a)-(c). It does not provide for statutory damages.

California requires, in some circumstances, all parties to consent before a telephone call is recorded. Cal. Penal Code §§ 632 *et seq*. California allows a private right of action for $5,000 in statutory damages, injunctive relief, or three times actual damages, whichever is greater. Pursuant to the reasoning in *Kearney*,

39 Cal. 4th at 119 and 122, regarding the underlying purpose of privacy statutes, both California's Invasion of Privacy Act and Missouri's Wiretap Act are intended to apply to telephone calls in which one of the parties to the call is located within the state.

Accordingly, both the California and Missouri statutes could apply to the telephone calls at issue in this case, and the law of Missouri differs from that of California with regard to the legality of Defendants' alleged conduct.

B. A True Conflict Exists In This Situation.

Like California, and in fact even more so, Missouri has a legitimate interest in the application of its law to the circumstances of the particular case. Missouri's statute "reflects legislative concern for the protection of privacy interests against excessive dissemination of information obtained by wiretap." *Phillips*, 996 S.W.2d at 588. Missouri's statute was intended to protect against electronic eavesdropping by third parties, which the Legislature believed invaded "individuality and humanity." *State v. Martinelli*, 972 S.W.2d 424, 431 (1998). In regulating third party conduct, Missouri law establishes ground rules under which businesses and others may act with regard to the recording of telephone calls—that is, it allows businesses or other participants to a call to record the communications without providing notice on every call.[3]

By contrast, although California has stricter laws with respect to participant recording, California has little interest in protecting citizens of other states. As explained above, the Legislative purpose of CIPA is to protect the privacy rights of

[3] The Supreme Court of California has recognized that, although the facts of a given case may not directly implicate the privacy interests protected by a foreign state's statute (i.e., the privacy interests of Plaintiff have not been violated in Missouri), the statute still establishes "the general ground rules under which persons in [Missouri] may act with regard to the recording of private conversations, including telephone calls." *Kearney*, 39 Cal. 4th at 123. The Court explained that states such as Missouri have "a legitimate interest in not having liability imposed on persons or businesses who have acted in [Missouri] in reasonable reliance on the provisions of [Missouri] law." *Id.*

"people of this state." Cal. Penal Code § 630. The California Supreme Court has opined that California's interest extends to "telephone conversations of California residents while they are in California sufficient to permit this state, as a constitutional matter, to exercise legislative jurisdiction over such activity." *Kearney*, 39 Cal. 4th at 104. In exercising jurisdiction over calls with California residents, the Supreme Court differentiated the case from one where a defendant's conduct affected "*another state's residents*." *Id*. (emphasis in original). Indeed, the Court also recognized that businesses could, and should, be subject to the law of other states in which they do business. *Id*. at 105. Here, First National's alleged conduct is permissible in Missouri, where First National allegedly "did business" with Plaintiff, a Missouri resident.

Thus, this case presents a true conflict of laws sufficient to warrant an analysis of which state's interest would be more impaired if its policy were subordinated to the policy of the other state.

C. Missouri's Interest Would Be More Impaired If Its Law Was Not Applied.

The comparative impairment approach does not "weigh the conflicting governmental interests in the sense of determining which conflicting law manifests the better or the worthier social policy on the specific issue" *Kearney*, 39 Cal. 4th at 123 (internal quotations omitted) (citing *Bernhard*, 16 Cal. 3d at 320). Instead the process is meant to "accommodat[e] conflicting state policies" to "achieve the maximum attainment of the underlying purpose by all governmental entities." *Id*. at 124 (internal quotations omitted) (citing *Offshore Rental*, 22 Cal. 3d at 166).

The underlying purpose of CIPA is not to protect out-of-state plaintiffs, it is to protect California residents while they are in California. *See Kearney*, 39 Cal. 4th at 120 ("the principal purpose of section 632 is to protect the privacy of…California residents *while they are in California*") (emphasis in original), 107 (CIPA "would not compel any action or conduct of the business with regard to

conversations with non-California clients or consumers."), 104 ("a state may act to protect the interests of its own residents while in their home state"), 105 ("states may adopt distinct policies to protect their own residents"). *Kearney* involved a situation where a California resident's telephone calls with banking representatives in Georgia were recorded without consent. *Kearney*, 39 Cal. 4th 95. In deciding that the failure to apply CIPA would substantially undermine the protection afforded by the statute—i.e., "specifically to protect Californians from overly intrusive business practices"—the *Kearney* court found that California law applied. *Id*. at 127-128. Accordingly, California's interest would not be impaired if Missouri law was applied here.[4]

On the other hand, subordinating Missouri's law to California's law would defeat the maximum attainment of the purpose of Missouri's laws. Had Plaintiff sued Defendants in Missouri, her Complaint would have been dismissed by a Missouri court on the basis that First National could record telephone calls with Missouri residents without notice and as part of its quality assurance policy. Missouri has a legitimate and compelling interest in ensuring that its residents while located in Missouri can expect that Missouri law would apply rather than some unknown foreign law. Accordingly, Missouri's interests would be more impaired if its law was not applied.[5]

The Court should apply Missouri law here and dismiss Plaintiff's Complaint.

[4] To the extent the *Kearney* court expressed an interest in having California companies comply with California law (that is, to provide notice of recording on calls), it did so only vis-à-vis California residents. *See id*. at 126. Thus, failure to apply California law in the present context would not result in any, much less a significant, impairment of California's interests.

[5] In *Valentine v. NebuAd, Inc*., 804 F. Supp. 2d 1022 (N.D. 2011), the Northern District court found that nonresident subscribers of internet service providers had Article III standing and standing "as a matter of statutory construction" to assert claims under CIPA, but did not consider nor engage in the choice of law analysis presented herein.

D. Even If California's Two-Party Consent Requirement Applies, The Statutory Penalties Should Not Apply.

If the Court determines that CIPA applies even in the face of Missouri's legitimate interests as presented above, the Court may also decline to assess statutory damages against Defendants. As the Supreme Court stated in *Kearney*, "denying the recovery of damages for conduct that was undertaken in the past in ostensible reliance on the law of another state—and prior to [] clarification of which state's law applies in [a given] context—will not seriously impair California's interests." *Kearney*, 39 Cal. 4th at 130. Here, there has been no case applying the California two-party consent requirement or its statutory penalties to protect residents of one-party consent states. Therefore, if the Court finds that California's two-party consent requirement applies, it should not apply California's statutory penalties and dismiss Plaintiff's claim for that relief because Missouri does not allow for statutory damages but only injunctive relief (and actual damages, if any), and there is no reason to apply California statutory penalties to protect Missouri residents.

V. PLAINTIFF FAILS TO STATE A CLAIM AGAINST DEFENDANT DUGGAN.

Plaintiff alleges that Defendants "violated and continue to violate California law by wiretapping and recording phone calls that involve confidential information without notice." Complaint, ¶ 21. As stated above, Plaintiff has not alleged facts supporting a wiretapping claim under Section 631, and therefore the operative section here is Section 632 governing the recording of telephone calls. With regard to recording, Plaintiff repeatedly and consistently alleges that *First National* did the actual recording—"First National intentionally records…"; "First National's telephone recording practices…"; "First National recorded all phone calls." Complaint, ¶ 10. Plaintiff's complaint, therefore, is with First National's recording practices.

The only allegation against Mr. Duggan is that the recording was done under his direction, and that he allegedly misrepresented the company's recording practices to Plaintiff's husband. Complaint, ¶ 10. These allegations are not sufficient to impose liability on Mr. Duggan for recording of telephone calls because (1) the recording statute imposes liability only on the "person" who "intentionally records"—and such "person" includes a "business association, partnership, corporation, limited liability company, or other legal entity" (Penal Code § 632 (a) & (b)) and (2) Plaintiff has not alleged that Mr. Duggan acted outside the scope of his employment as the president of First National (Complaint, ¶ 6). Because a corporation cannot act except through its employees, a corporation and its employees generally function as a single legal unit and are the same legal "person" for purposes of imposing liability. *See Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1326 (1996).

Accordingly, the Complaint should be dismissed as to Mr. Duggan.

VI. THE APPLICATION OF CIPA TO RECORDING OF INTERSTATE CALLS IS PREEMPTED BY FEDERAL LAW.

Federal law is the "supreme Law of the Land." U.S. Cont. art. VI, cl. 2. State laws that conflict with federal law are preempted and without effect. *See Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010). There are three types of preemption: express preemption, conflict preemption, and field preemption. *Id.* Each type of preemption applies here.

First, all of the telephone calls at issue in this action were between Missouri and California, and therefore are interstate telephone calls. *See* Complaint, ¶ 4. Regulation of interstate telephone calls is governed solely by federal law; the field is preempted. Indeed, nearly 100 years ago the Supreme Court held that federal law occupied the field of interstate telecommunications to the exclusion of state action. *See Postal Telegraph-Cable Co. v. Warren Godwin Lumber Co.*, 251 U.S. 27, 31 (1919). This occupation of the field of interstate telecommunications is now

embodied in "the Communications Act of 1934 [which] grants to the Federal Communications Commission . . . authority to regulate *interstate* telephone communications and reserves to the States authority to regulate *intrastate* telephone communications." *Mims v. Arrow Financial Services, LLC*, __ U.S. __, 132 S.Ct. 740, 745 n.1 (2012) (emphasis added); 47 U.S.C. §§ 151-152. CIPA is preempted here since Plaintiff is attempting to apply that state statute to the interstate calls at issue in this case.

Second, state regulation of the recording of interstate telephone calls is expressly preempted. In 1947, the FCC examined this very issue and found that "it clearly has the jurisdiction to act with respect to the matter of the use of recording devices in connection with interstate and foreign message toll telephone service." *Report of the Commission in the Matter of Use of Recording Devices in Connection with Telephone Service*, 11 F.C.C. 1033, 1947 WL 58823 at *11 (F.C.C. 1947). Importantly, the FCC, while confirming its jurisdiction over interstate calls, defined the limited jurisdiction of the states: "State and other local regulatory authorities remain entirely free to deal as they see fit with the use of recording devices *on intrastate calls*." *Id.* at *11 (emphasis added). Thus, the FCC expressly preempted any state regulation of the recording of interstate calls. Notably, the United States Supreme Court recently confirmed that the FCC has the power to define the scope of its regulatory authority under the Communications Act of 1934 and that the courts must give deference to that interpretation under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See City of Arlington, Texas v. Federal Communications Commission*, -- U.S. --, 2013 WL 2149789 at *7, 11 (May 20, 2013). Therefore, this Court must follow the FCC's pronouncement that the FCC alone may regulate the recording of interstate telephone calls.

Third, CIPA's requirement that notice be provided before recording an interstate telephone call conflicts with federal law. In 1981, the FCC considered,

but rejected, promulgating a rule that would subject customers of common carries to penalties under the Communications Act for recording telephone communications without beep tones or consent. *In the Matter of Use of Recording Devices in Connection with Telephone Service*, 86 F.C.C.2d at 320, 1981 WL 158531, at *4 (1981).[6] By doing so, the FCC decided that such a regulation was not appropriate, and confirmed that federal law only requires one party consent to record a telephone call. CIPA's two-party consent requirement conflicts with this federal law and is preempted.[7]

To be sure, a number of courts have found that CIPA's restrictions on telephone recording are not preempted by federal law. However, each of these courts focused on preemption under the Omnibus Act and ignored the issue of whether §§ 632 and 632.7's restrictions on recording of interstate telephone calls was preempted by the Communications Act of 1934 and the FCC regulations promulgated thereunder. For example, the California Supreme Court granted review in *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95 (2006), only "to consider the novel choice-of-law issue[,]" but in the course of the decision stated

[6] In doing so, the FCC noted that Congress enacted the Omnibus Crime Control and Safe Street Act of 1968 ("Omnibus Act"), which requires only one party consent to recording, with the intent "to create a comprehensive set of rules governing various aspects of privacy of wire and oral communication[.]" The FCC has adopted a rule imposing requirements on common carriers when they themselves record calls. *See* 47 C.F.R. § 64.501.

[7] The FCC has allowed states to regulate monitoring (not recording) of intrastate, as opposed to interstate, communications. *In the Matter of Petition for Declaratory Rule and Expedited Relief filed by Aeronautical Radio, Inc. and the Air Transport Association of America*, 102 F.C.C.2d 1, 1985 WL 259923 (F.C.C. 1985), the FCC addressed the application of a California Public Utilities Commission General Order to monitoring at an airline communication center located in California. The decision did not involve the regulation of the recording of telephone calls or §§ 632 or 632.7, so the FCC did not mention or examine its prior determination that it and not the states has the authority to regulate the recording of interstate telephone calls. 102 F.C.C.2d at n.2 ("We do not here consider the recording aspects of the California Order."). Moreover, the decision did not involve interstate telephone calls, but accepted the California PUC argument that the "use of this equipment to monitor intrastate communications is a matter of local concern and is properly left to state regulation." 102 F.C.C.2d at 6; *see also Sprint Corp. v. Evans*, 818 F. Supp. 1447, 1457 n. 11 (M.D. Ala. 1993) (Aeronautical Radio "treated the regulation as involving solely *intrastate* communications.") (emphasis added).

that "there [was] no basis for concluding that application of California law is preempted by federal law." *Id.* at 99, 106. But *Kearney*'s preemption discussion relies entirely on an earlier California Supreme Court decision – *People v. Conklin*, 12 Cal.3d 259 (1974) – which did not involve interstate calls or the recording of such calls. *Id*. at 105.[8] *Kearney* merely repeated without analysis the statements made in *Conklin* that CIPA was not preempted by the Omnibus Act and did not address preemption under the Communications Act or the FCC regulations promulgated thereunder. Other courts have followed *Kearney's* lead and likewise failed to examine the Communications Act and the FCC regulations of recording of interstate telephone calls. Moreover, none of those decisions applied the United States Supreme Court's recent holding in *City of Arlington* that the FCC has the power to define its jurisdiction and the courts must give deference to the FCC when it does so. *See City of Arlington, Texas v. Federal Communications Commission*, -- U.S. --, 2013 WL 2149789 at *7, 11 (May 20, 2013). Since those decisions failed to examine preemption under the Communications Act and the FCC regulations, or the FCC's express ruling that only it has the authority to regulate the recording of interstate telephone calls, the Court should disregard those decisions, find that CIPA is preempted here, and dismiss the Complaint.

VII. THE COURT SHOULD DISMISS ANY CLAIM FOR STATUTORY DAMAGES OVER $5,000.

A motion to dismiss under Rule 12(b)(6) may be brought to challenge all or a portion of the damages sought by the plaintiff. *Danielson v. Wells Fargo Bank*, No. CV11–5927 PSG (PLAx), 2011 WL 4480849, at *3 (C.D. Cal. Sept. 26, 2011)

[8] In *Conklin*, a Los Angeles County welfare fraud investigator was charged with making an unauthorized connection with a telephone communication system after it was discovered that an unauthorized wiretapping device was connected at his office desk. *See People v. Conklin*, 107 Cal.Rptr. 771 (Cal. Ct. App. 1973) (Opinion vacated by *People v. Conklin*, 12 Cal. 3d 259 (1974)). *Conklin* thus involved wholly intrastate conduct occurring at a desk in Los Angeles—not interstate telephone calls and interstate commerce. *Id*.

(citing *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010) (noting that challenge to claim for damages may be made by motions under Rule 12(b)(6) or Rule 56, while holding that damages allegations cannot be stricken under Rule 12(f))). Here, Plaintiff seeks statutory damages that neither she nor the putative class can recover under the applicable statute.

Relying on Penal Code § 637.2, Plaintiff seeks an award on behalf of herself and the putative class of statutory damages of $5,000 "per occurrence." Complaint, ¶ 23. But neither Plaintiff nor the class she purports to represent is entitled to such relief. Statutory damages are available per action, not per occurrence.

A. The Statutory Text Does Not Support A "Per Violation" or "Per Occurrence" Interpretation.

A court's overriding purpose in construing a statute is to ascertain legislative intent and to give the statute a reasonable construction conforming to that intent. *See Padash v. I.N.S.*, 358 F.3d 1161, 1168 (9th Cir. 2004). If statutory language is unambiguous, the court presumes the Legislature meant what it said and the plain meaning of the statute controls. *See Tides v. The Boeing Co.*, 644 F.3d 809, 814 (9th Cir. 2011). Here, the plain meaning of Penal Code § 637.2 is apparent – the statute makes clear that statutory damages for violations of CIPA are $5,000 *per action*, not per violation:

> (a) Any person who has been injured by a violation of this chapter may bring *an action* against the person who committed the violation *for the greater of* the following amounts:
>
> (1) Five thousand dollars ($5,000).
>
> (2) Three times the amount of actual damages, if any, sustained by the plaintiff.

Cal. Penal Code § 637.2 (emphasis added). The prepositional phrase "for the greater of the following amounts" modifies "an action." Nowhere does the statute say that a person bringing such an action can obtain the greater of those amounts for

each violation or even for each plaintiff.

This grammatically-sound construction of the statute is also reasonable. By creating a statutory minimum damages amount, the California Legislature encourages citizens to bring suit, which would cause any violations to be corrected. A plaintiff is guaranteed a recovery of $5,000 – in effect, a reward for bringing an action – even if she cannot show any actual damages. But multiplying the "reward" on a per violation basis distorts the incentives provided by the California Legislature. Accepting Plaintiff's allegations as true, the amount to be recovered could rapidly and significantly eclipse the purported harm by tens or even hundreds of millions of dollars, depending on the number of calls. The Legislature did not intend such a draconian effect given the specific language it chose.

B. The California Legislature Uses The Language "Per Violation" When It Intends A Statutory Minimum To Apply On A "Per Violation" Basis.

Courts may not embellish statutes by inserting language that the Legislature omitted. *See Chowdhury v. I.N.S.*, 249 F.3d 970, 973 (9th Cir. 2001); Cal. Civ. Proc. Code § 1858 (in interpreting and applying California statute, court "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted").

Interpreting the statute to assess penalties for each "violation" or each "occurrence" would require the court to impermissibly read "per violation" or "for each violation" language into the statute. This is particularly inappropriate where the California Legislature has repeatedly shown that it knows how to ensure that a minimum damages amount applies on a per violation or per occurrence basis by issuing many statutes specifically referencing the penalties associated with "each" violation. Indeed, the Legislature has enacted numerous statutes specifically referencing the penalties associated with "each" violation including the following:

- Cal. Civil Code § 52 (penalty for discrimination by businesses: "*for each and every offense*").
- Cal. Labor Code § 6505.5 ("A civil penalty of not more than two thousand dollars ($2,000) *for each violation*, to be imposed pursuant to the procedures set forth in Sections 6317, 6318, and 6319.").
- Cal. Civ. Code § 1745.5 ("Any person who violates any provision of this title may also be liable for a civil penalty not to exceed one thousand dollars ($1,000) *for each violation*, which may be assessed and recovered in a civil action . . . .").
- Cal. Bus. & Prof. Code § 17206 ("Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) *for each violation*, which shall be assessed and recovered in a civil action").
- Pub. Util. Code § 2876(a) ("Any person violating this article is guilty of a civil offense and is subject to either or both of the following penalties: A fine of not to exceed five hundred dollars ($500) *for each violation* . . . .").

As these and many other statutes show (in all, there are around 100 statutes where the California Legislature used the words "per violation"), the California Legislature knows how to make clear a "per violation" minimum damages amount when it so desires. *See People v. Trevino*, 26 Cal. 4th 237, 242 (2001) ("When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning."); *In re Voeurn O.*, 35 Cal. App. 4th 793, 796 (1995) ("reference to related statutes shows the Legislature clearly knows how to draft a law [with specific language from those statutes] . . . By foregoing such . . . language in [the provision at issue], it is logical to conclude the Legislature

intended the statute to have [a different] scope."); *Wright v. Fin. Serv. of Norwalk, Inc.*, 22 F.3d 647, 650 (6th Cir. 1994) (*en banc*) ("Congress certainly knows how to write statutes that make each separate violation subject to a separate penalty"). Here, the Legislature specifically did not use such language in § 637.2, and that decision should be given its intended legal effect.

C. A Similar California Penal Code Provision Has Been Interpreted As Providing A "Per Action" And Not A "Per Violation" Statutory Minimum.

In *In re Sandoval*, 341 B.R. 282 (Bankr. C.D. Cal. 2006), the court construed the California Penal Code to create a "per action" rather than "per violation" $5,000 minimum damages amount. Penal Code § 593d prohibits unauthorized cable hookups and converter boxes and provides a civil remedy – in language that is structurally identical to § 637.2:

> Any person who violates this section shall be liable in a civil action . . . for the greater of the following amounts:
> (1) Five thousand dollars ($5,000).
> (2) Three times the amount of actual damages, if any, sustained by the plaintiff plus reasonable attorney's fees.

Cal. Penal Code § 593d(f). In *Sandoval*, the cable company argued that it was entitled to statutory damages of "at least $30,000" based on "at least six violations of § 593d." *In re Sandoval*, 341 B.R. at 292. But the court rejected this argument, stating:

> [Section] 593d(f) does not provide for $5,000 in statutory damages for each violation. It only provides a single $5,000 liability for "[a]ny person who violates this section[.]

Id. at 292. The court concluded that the damages award provided by § 593d applied to the action, not to every possible violation which may have occurred in the action. *Id.* This Court should reach a similar conclusion here.

D. Interpreting The $5,000 As A Ceiling For The Statutory Damages Available In The Action, Instead Of "Per Violation," Avoids An Otherwise Unconstitutional Result.

Determining that Penal Code § 637.2 provides for a statutory damages award of $5,000 per action, not per violation, avoids an otherwise unconstitutional result. As the United States Supreme Court recently emphasized, "it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so." *Nat'l Federation of Independent Bus. v. Sebelius*, 132 S. Ct. 2566, 2593 (2012).

The California Supreme Court also follows this interpretive rule. In *Hale v. Morgan*, 22 Cal. 3d 388 (1978), that court interpreted a statutory penalty of $100 "for each day or part thereof" that a tenant is deprived of utility service. *Id.* at 393. Recognizing that a statute should be narrowly construed to avoid reaching a constitutional issue, the court held that the statute nonetheless "produce[s] constitutionally excessive penalties" and could not be narrowly drawn to avoid an unconstitutional result. The Court thus ruled the penalty unconstitutional because it "mandates essentially that a single wrongful act . . . if not corrected, will subject [the defendant] to potentially infinite penalties, regardless of the circumstances of the violation, the offender, the victim or the damage caused." *Id*. at 402-03.

Here, applying "per occurrence" statutory damages to each recorded call would lead to an unconstitutional and unintended result – for the legitimate business decision to record telephone calls, the business could be subjected to damages in the tens of millions or hundreds of millions of dollars, based only on multiplication and regardless of the lack of ill-intent or actual harm.

As federal courts have recognized, the aggregation of individual claims "may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages." *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *Moeller v. Taco Bell Corp*., C

02-5849 MJJ, 2004 WL 5669683 at *3 (N.D. Cal. Dec. 7, 2004) (aggregating statutory damages "could violate due process if the penalty prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable'"). The Court can and should avoid such a draconian result by interpreting § 637.2 as it was intended and concluding that the $5,000 damages referenced in the Section are "per action" and not "per occurrence." To obtain more, Plaintiff can show actual damages if she has sustained any. [9]

VIII. PLAINTIFF SHOULD BE REQUIRED TO CLARIFY HER COMPLAINT.

"A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e); *Gregory Village Partners, L.P. v. Chevron U.S.A., Inc.*, 805 F.Supp.2d 888, 896 (N.D. Cal. 2011). Where several separate causes of action are jumbled together in a "shotgun pleading," a motion for more definite statement may be used to require pleading "separate counts" under Rule 10(b), where the failure to do so prevents defendant from preparing an adequate response. *Anderson v. District Bd. of Trustees of Central Florida Comm. College,* 77 F.3d 364, 366 (11th Cir. 1996); *Phillips v. Girdich,* 408 F3d 124, 128 (2nd Cir. 2005).

[9] No reported decision has been located where a California court specifically addressed the question of whether the text of Penal Code § 637.2 limits statutory damages to $5,000 per action or per violation. To be sure, unreasoned *obiter dicta* from certain cases have stated that the $5,000 is "per violation." *See, e.g., Coulter v. Bank of America*, 28 Cal. App. 4th 923, 928 (1994). But the case that first used the "per violation" language in connection with CIPA statutory damages involved only a single monitored call, so the court had no reason to examine the issue. *See Ribas v. Clark*, 38 Cal. 3d 355, 358-59 (1985) (relying on *Ion Equipment* and addressing single incident of eavesdropping). Such *dicta* did not even purport to analyze whether a "per violation" interpretation would have the unintended result – which it would – of exposing companies to hundreds of millions of dollars in liability for technical violations of a statute resulting in little or no harm. Accordingly, that stray language, used in passing in cases involving only a single call, has no precedential value whatsoever under the traditional rules governing the holdings of judicial opinions. *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363, 126 S. Ct. 990, 996 (2006) ("we are not bound to follow our *dicta* in a prior case in which the point now at issue was not fully debated").

Here, Plaintiff asserts one cause of action for "unlawful wiretapping and recording without notice phone calls involving confidential information" pursuant to Cal. Penal Code § 630 *et seq*.— California's entire Privacy Act statutory scheme that covers more than just wiretapping or recording of phone calls. Plaintiff then cites to multiple statutory sections in the Complaint without explaining which apply and why. *See* Complaint, ¶ 17(d) ("Whether Defendants' conduct is a violation of California Penal Code §§ 630, 631, 632, 632.5, 632.6 and/or 632.7…"). Defendants cannot reasonably respond since they do not know whether Plaintiff is asserting more than just recording of "confidential communications" under Section 632. To the extent Plaintiff is asserting violations of the wiretapping statute (section 631) or the cordless and cellular phone statutes (sections 632.5, 632.6 and 632.7), Plaintiff must allege facts demonstrating a right to recover under those statutes. Defendants cannot prepare an adequate response or move to dismiss those claims unless Plaintiff pleads them in separate counts with the relevant facts alleged in those counts. Moreover, a motion for more definite statement is necessary so as to clarify the scope of Defendants' disclosure obligations under Federal Rule 26(a)(1)(A)(i), (ii) (requiring early disclosure of witnesses and documents "that the disclosing party may use to support its claims or defenses, unless solely for impeachment.") Accordingly, Defendants' motion for more definite statement should be granted.

IX. CONCLUSION

Plaintiff's claims fail at every level. If any state law applies to Plaintiffs' calls, it is Missouri law, not California law as Plaintiff is a Missouri resident and received the calls in Missouri. But the calls at issue were all interstate calls, governed solely by federal law. Therefore the application of any state laws to those calls is preempted. Defendants respectfully request that the Court dismiss Plaintiff's Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), or, in the alternative, require a more definite statement under

Rule 12(e).

Dated: October 2, 2013

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