

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

JOSE ANTONIO RAMOS,
Plaintiff,
v.
CAPITAL ONE, N.A., et al.,
Defendants.

Case No. 17-cv-00435-BLF

**ORDER GRANTING IN PART AND
DENYING IN PART MOTIONS TO
DISMISS**

[Re: ECF 7, 23]

Plaintiff Jose Antonio Ramos (“Ramos”) brings this suit against Defendants HSBC and Capital One, former employers of his wife, for allegedly recording personal phone calls between him and his wife on the company phone. Before the Court are Defendants’ motions to dismiss Ramos’ First Amended Complaint (“FAC”). HSBC Mot., ECF 7; Cap. Mot., ECF 23. After reviewing the parties briefing, the Court hereby rules on the motions as follows.

I. BACKGROUND

Ramos alleges the following facts in his first amended complaint (“FAC”). Notice of Removal 29 et seq., First Am. Compl., ECF 1. Plaintiff Ramos is a California resident whose wife was employed by Defendants HSBC Card Services Inc. (“Card Services”) and HSBC Technology & Services (USA) Inc. (collectively, “HSBC”) at a facility in Salinas, California, from March 2009 to May 2012. FAC ¶¶ 7, 28. As of May 1, 2012, Defendant Capital One Financial Corporation (“Capital One”) acquired certain assets of HSBC, including the Salinas facility. Ramos’ wife ceased working for Card Services and thereafter was employed by Capital One from May 1, 2012 through October 2013. *Id.* ¶¶ 28-29.

During the relevant time period, Ramos had “numerous personal telephone

1 communications” with Defendants’ employees, including his wife. *Id.* ¶¶ 30-31. According to
2 Ramos, Defendants intentionally recorded, intercepted, or received the conversations without his
3 consent or knowledge. *Id.* ¶¶ 28-39. Defendants also required their employees to keep their
4 “policies, procedures, and internal activities confidential and prohibited employees from
5 disclosing such information.” *Id.* ¶ 29. Ramos alleges that at the time he had no reason to believe
6 that his personal telephone calls were being recorded. *Id.* ¶¶ 17, 19.

7 On August 28, 2015, a plaintiff filed a case in San Diego Superior Court, alleging similar
8 claims and the same causes of actions against Defendants as those here. *Id.* ¶ 13 (citing *Ron*
9 *Kempton, et al. v. Capital One Fin. Corp.*, No. 37-2014-00023795-CU-MC-NC (Cal. Super. Ct.)
10 *sub nom. Dalia Rojas v. HSBC Card Services Inc., et al.*, No. D071442 (Cal. App. Ct. filed Nov.
11 18, 2016) (the “*Rojas* case”). On September 28, 2015, HSBC agreed to withdraw the confidential
12 designation for the recordings produced in the *Rojas* case. *Id.* ¶ 14. Thereafter, only after the
13 confidential designation was withdrawn and after Ramos’ wife was contacted as a potential
14 witness in the *Rojas* case did Ramos learn about the recording of his conversations by HSBC. *Id.*
15 ¶¶ 15-16.

16 Ramos further alleges that his claims were tolled during the pendency of two class actions
17 because he was a member of the proposed classes. *Id.* ¶ 21. On June 4, 2012, plaintiff
18 representatives Terry J. Fanning and Tatiana Jabbar filed a class action complaint against HSBC
19 for violation of the California Invasion of Privacy Act (“CIPA”). FAC ¶ 22; *Fanning v. HSBC*
20 *Card Servs. Inc.*, No. 12-00885-JVS-RNB (C.D. Cal. June 4, 2012) (the “*Fanning* case”). On July
21 29, 2014, Gail Medeiros, along with other plaintiffs, filed a class action lawsuit against HSBC and
22 its successor, Capital One, also asserting CIPA violations, in the Southern District of California
23 but that case was later transferred to the Central District as a case related to the *Fanning* case.
24 FAC ¶¶ 23-25. *Medeiros v. HSBC Card Servs. Inc., et al.*, Case No. 15-9093-JVS-AFM (C.D.
25 Cal. Nov. 21, 2014) (the “*Medeiros* case”). An order preliminarily approving class action
26 settlement was issued in both of those cases on October 19, 2016. FAC ¶ 26. Ramos asserts that
27 he intends to opt out of the settlement class. *Id.*

28 On November 18, 2016, Ramos filed a complaint in Monterey County Superior Court, and

1 later a first amended complaint, asserting that Defendants violated CIPA. Compl., Ex. A to Notice
2 of Removal, ECF 1; Cal. Penal Code §§ 632, 632.7. Pursuant to CIPA, Ramos asserts a first cause
3 of action based on California Penal Code § 632, and a second cause of action based on Penal Code
4 § 632.7. FAC ¶¶ 41-51. Ramos further requests damages in the amount \$5,000.00 per violation
5 or three times the amount of actual damages sustained, and preliminary and permanent injunction
6 to restrain Defendants from violating CIPA. *Id.* ¶¶ 45, 46, 50, 51. HSBC removed the case to this
7 Court based on diversity jurisdiction. Notice of Removal. Defendants then filed motions to
8 dismiss the case. ECF 7, 23.

9 **II. LEGAL STANDARD**

10 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
11 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation*
12 *Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d
13 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts
14 as true all well-pled factual allegations and construes them in the light most favorable to the
15 plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the
16 Court need not “accept as true allegations that contradict matters properly subject to judicial
17 notice” or “allegations that are merely conclusory, unwarranted deductions of fact, or
18 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)
19 (internal quotation marks and citations omitted). While a complaint need not contain detailed
20 factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to
21 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
22 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the
23 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

24 Where the damages sought are not recoverable as a matter of law, the damages claim may
25 be removed from the complaint pursuant to Rule 12(b)(6). *Johnson v. Napa Valley Wine Train,*
26 *Inc.*, No. 15-04515-TEH, 2016 WL 493229, at *13 (N.D. Cal. Feb. 9, 2016) (citing *Whittlestone,*
27 *Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974-95 (9th Cir. 2010)).

28

1 **III. JUDICIAL NOTICE**

2 Before turning to the merits of the parties’ arguments, the Court addresses their requests
3 for judicial notice.

4 In support of its motion to dismiss, HSBC has requested judicial notice of eight
5 documents, attached to the request as Exhibits A through H: (A) the complaint in *Fanning v.*
6 *HSBC Card Servs. Inc., et al.*, No. 12-00885-JVS-RNB (C.D. Cal. June 4, 2012), ECF No. 1 (the
7 “Fanning Complaint”); (B) the First Amended Complaint filed in the *Medeiros* case (the
8 “*Medeiros* FAC”); (C) Order Granting Joint Motion To Consolidate the *Fanning* case and
9 *Lindgren* with the *Medeiros* case, filed in *Medeiros*, ECF No. 83 (the “Consolidation Order”),
10 pursuant to which the Fanning and *Medeiros* actions were consolidated for settlement purposes;
11 (D) Order Conditionally Certifying A Settlement Class for Settlement in the *Medeiros* case, the
12 *Fanning* case, and *Lindgren v. HSBC Card Servs. Inc., et al.*, filed in *Fanning* case, ECF No. 364
13 (the “Preliminary Approval Order”); (E) The Order granting HSBC’s Motion for Summary
14 Judgment in *Ron Kempton, et al. v. Capital One Financial Corporation*, No. 37-2014-00023795-
15 CU-MC-NC (Cal. Super. Ct. Aug. 5, 2016) sub nom. *Dalia Rojas v. HSBC Card Services Inc., et*
16 *al.*, No. D071442 (Cal. App. Ct. filed Nov. 18, 2016) (the “*Rojas* MSJ Order”) (F) excerpts of the
17 certified reporter’s transcript for the November 4, 2016 hearing in the *Rojas* case; (G) Order in
18 *Yevgeniya Grania v. Eddie Bauer, LLC*, No. BC569111, slip. op. (Cal. Super. Ct. L.A. Cty. Dec.
19 2, 2015); (H) Order in *Furman v. Station Casinos LLC*, No. 56-2013-00446134-CU-BT-VTA
20 (Cal. Super. Ct. Ventura Cty. Mar. 11, 2014). HSBC RJN, ECF 8.

21 Judicial notice is appropriate with respect to Exhibits A to H because they are documents
22 publicly filed with either state or federal courts. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d
23 646, 649 (9th Cir. 1988) (court may take judicial notice of matters of public record). Ramos
24 objects to these documents to the extent HSBC seeks to have the Court take judicial notice of the
25 truth or accuracy of the facts and statements recited in these documents. Opp’n 21, ECF 18. The
26 Court does not take judicial notice of the legal reasoning or disputed facts contained therein, but
27 rather the existence of such allegations and arguments. *Lee v. City of Los Angeles*, 250 F.3d 668,
28 690 (9th Cir. 2001) (permitting a court to take judicial notice of another court’s opinion, but not

1 the truth of the facts recited therein). As such, it would not be improper to judicially notice the
2 exhibits that are public filings in other courts.

3 Ramos has submitted two exhibits in support of his sur-reply to HSBC’s motion and his
4 opposition to Capital One’s motion. ECF 29-1, 30. Although Ramos does not formally request
5 judicial notice of these two exhibits, the Court construes the submission as such a request. The
6 two exhibits are (A) *Confidential Communications: Disclosure, Hearing Before the Senate*
7 *Committee on Public Safety*, A.B. 1671, 2015-2016 Reg. Sess. (Cal. June 28, 2016) (Hearing
8 Notes, Sen. Loni Hancock, Chair) (the “June 28 Hearing Notes”); and (B) *Confidential*
9 *Communications: Disclosure, Hearing Before the Senate Committee On Appropriations*, A.B.
10 1671, 2015-2016 Reg. Sess. (Cal. August 8, 2016) (Hearing Notes, Sen. Ricardo Lara, Chair) (the
11 “August 8 Hearing Notes”). Exs. A and B to Raymond Decl., ECF 29-1.

12 HSBC objects to these two exhibits submitted by Ramos on the grounds that they are
13 irrelevant, and lack foundation and personal knowledge. HSBC Obj., ECF 32. Specifically,
14 HSBC points out that the relevant issue here is how the 2017 amendment affects the interpretation
15 of the CIPA statute. *Id.* at 1. HSBC argues that the Senate Committee’s hearing notes are not
16 relevant because they pre-date the proposed amendment which was introduced on August 30,
17 2016. *Id.* at 2. HSBC further argues that the hearing notes discuss criminal penalties related to
18 violation of Penal Code § 632, and do not discuss the civil statutory damages relevant to this case.
19 *Id.* at 3. Finally, HSBC argues that there is an inadequate showing that Ms. Raymond has personal
20 knowledge regarding the legislative history attached as exhibits to her declaration and how the
21 exhibits were located. *Id.* Without foundation and personal knowledge, HSBC requests that the
22 exhibits be stricken. *Id.*

23 First, even though these Senate hearing notes pre-date the introduction of the amendment,
24 they can still provide the Senate’s perspective on the statute’s meaning prior to the amendment
25 and the potential purpose of the amendment. Second, such records of “[l]egislative history is
26 properly a subject of judicial notice.” *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir.
27 2012); *see also Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1241 (N.D. Cal. 2014). As such,
28 the Court grants the request for judicial notice of these exhibits. The Court agrees with HSBC that

1 these documents have limited relevance to the later amendment here at issue, and thus the Court
2 will give these documents the weight they deserve.

3 In support of HSBC’s objections to Ramos’s sur-reply, HSBC also requests judicial notice
4 of nine documents, attached as exhibits A to I: (A) A.B. 1671, 2015-2016 Reg. Sess. (Cal. Jan. 15,
5 2016) (as introduced by Assembly Member Gomez); (B) A.B. 1671, 2015-2016 Reg. Sess. (Cal.
6 Mar. 17, 2016) (as amended in Assembly); (C) A.B. 1671, 2015-2016 Reg. Sess. (Cal. Apr. 12,
7 2016) (as amended in Assembly); (D) A.B. 1671, 2015-2016 Reg. Sess. (Cal. Apr. 25, 2016) (as
8 amended in Assembly); (E) A.B. 1671, 2015-2016 Reg. Sess. (Cal. May 18, 2016) (as amended in
9 Assembly); (F) A.B. 1671, 2015-2016 Reg. Sess. (Cal. Aug. 2, 2016) (as amended in Senate); (G)
10 A.B. 1671, 2015-2016 Reg. Sess. (Cal. Aug. 16, 2016) (as amended in Senate); (H) A.B. 1671,
11 2015-2016 Reg. Sess. (Cal. Aug. 30, 2016) (as amended in Senate); (I) A.B. 1671, 2015-2016
12 Reg. Sess. (Cal. 2016) (as enacted). ECF 33.

13 Just like the California Senate Committee hearing notes provided by Ramos in support of
14 his sur-reply, these exhibits contain legislative history, which is judicially noticeable. *Anderson*,
15 673 F.3d at 1094 n.1. The parties do not dispute the authenticity of these exhibits and Ramos did
16 not file an objection to these documents. As such, the request for judicial notice is GRANTED
17 with respect to the exhibits attached to HSBC’s objections to Ramos’ sur-reply.

18
19 **IV. DISCUSSION**

20 Generally, HSBC and Capital One seek dismissal on the following grounds: 1) the action is
21 barred by the one-year statute of limitations and Ramos has failed to allege facts to support
22 delayed discovery or tolling; 2) Ramos has failed to state a claim for violations of Penal Code §§
23 632 or 632.7; and 3) Ramos’ request for statutory damages “per violation” under § 637.2 is
24 improper and, instead, limited to \$5,000 per action. The Court will assess Defendants’ motions to
25 dismiss Ramos’ request for statutory damages before addressing the other issues because the
26 damages amount bears on this Court’s subject matter jurisdiction. *Sinochem Int’l Co. Ltd. v.*
27 *Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (holding that a “federal court
28 generally may not rule on the merits of a case without first determining that it has jurisdiction over

1 the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction”).

2 **A. Statutory Damages**

3 In the FAC, Ramos requests statutory damages of \$5,000 “per violation” under California
4 Penal Code § 637.2, the section governing damages for CIPA civil suits. FAC ¶¶ 45, 50.
5 Defendants move to dismiss or strike Ramos’ claims for statutory damages because the statutory
6 damages are limited to \$5,000 “per action” and not “per violation.” HSBC Mot. 20; Cap. Mot. 15-
7 16. According to Defendants, the January 2017 amendment to § 637.2 adding “per violation”
8 demonstrates that the legislature intended the prior statute to limit statutory damage to \$5,000 per
9 action. HSBC Reply 10-11, ECF 21; Cap. Reply 11-12, ECF 34. In opposition, Ramos contends
10 that ample case law supports an award of damages on a “per violation” basis and the authorities
11 relied upon by Defendants are inapposite to the present case. Opp’n 19-20, ECF 18¹ (citing *Ades*
12 *v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999, 1018 (C.D. Cal. 2014); *Lieberman v. KCOP*
13 *Television, Inc.*, 110 Cal. App. 4th 156, 167 (2003)). Ramos further argues that the January 2017
14 amendment does not change his proffered interpretation as the amendment only sought to clarify
15 the statute’s meaning. Sur-Reply 1-2, ECF 29.

16 Prior to the amendment, California Penal Code § 637.2(a) provided:

17 (a) Any person who has been injured by a violation of this chapter may bring
18 an action against the person who committed the violation for the greater of the
19 following amounts:

- 20 1) Five thousand dollars (\$5,000).
21 2) Three times the amount of actual damages, if any, sustained by the
22 plaintiff.

23 Pursuant to the amendment effective January 1, 2017, California Penal Code § 637.2(a)
24 provides:

25 (a) Any person who has been injured by a violation of this chapter may bring
26 an action against the person who committed the violation for the greater of the
27 following amounts:

- 28 1) Five thousand dollars (\$5,000) per violation.

¹ As Ramos’ opposition to HSBC’s papers are almost identical to his opposition to Capital One’s motion, references to Ramos’ argument apply equally to both Defendants and the Court’s citations to Ramos’ opposition or sur-reply reference Ramos’ papers to HSBC’s, unless otherwise noted.

1 2) Three times the amount of actual damages, if any, sustained by the
2 plaintiff.

3 Cal. Penal Code § 637.2(a) (2016) (effective January 1, 2017).

4 In interpreting a state statute, a federal court must follow the state’s rules of statutory
5 interpretation in order to determine the meaning the state’s highest court would give to the law.
6 *Bass v. Cty. of Butte*, 458 F.3d 978, 981-82 (9th Cir. 2006) (citations omitted). “As in any case
7 involving statutory interpretation, our fundamental task is to determine the Legislature’s intent so
8 as to effectuate the law’s purpose.” *Id.* A court begins by first “examining the statute’s words,
9 giving them a plain and commonsense meaning” and “construing them in context.” *Id.*; *Martinez*
10 *v. Combs*, 49 Cal. 4th 35, 51 (2010). “If the words themselves are not ambiguous, [courts]
11 presume the Legislature meant what it said, and the statute’s plain meaning governs.” *Martinez*,
12 49 Cal. 4th at 51. However, where the language is ambiguous, the court may “turn to extrinsic
13 aids to assist in interpretation,” including legislative history, public policy, contemporaneous
14 construction by administrative agencies, and the overall statutory scheme, as well as maxims of
15 statutory construction. *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1103, 1105 (2007);
16 *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 1190 (2006).

17 Here, the parties agree that the version of the statute prior to the 2017 amendment governs
18 this case but disagree whether the 2017 amendment clarifies or changes the law. Sur-Reply 1-3.
19 “While an intention to change the law is usually inferred from a material change in the language of
20 the statute, a consideration of the surrounding circumstances may indicate, on the other hand, that
21 the amendment was merely the result of a legislative attempt to clarify the true meaning of the
22 statute.” *Martin v. Cal. Mut. Bldg. & Loan Ass’n*, 18 Cal. 2d 478, 484 (1941) (citations omitted).
23 Where “a statute merely clarifies, rather than changes existing law,” it does not operate
24 retrospectively even if applied to transactions predating its enactment. *W. Sec. Bank v. Superior*
25 *Court*, 15 Cal. 4th 232, 243 (1997). Before determining retroactivity, the Court will analyze the
26 statute as it existed prior to the effective date of the amendment to determine its meaning and
27 whether the amendment changed the existing law. *See Satyadi*, 232 Cal. App. 4th at 1029.

28 **i. Language of the Statute**

A “plain and commonsense” reading of the statute is that a plaintiff “may bring an action

1 against a person who committed the [CIPA] violation for the greater” of \$5,000 or “[t]hree times
 2 the amount of actual damages if any, sustained by the plaintiff.” Cal. Penal Code § 637.2(a).
 3 Nowhere in the statute does it recite “per violation” to modify the statutory damages of up to
 4 \$5,000. *See People v. One 1940 Chrysler Convertible Coupe*, 48 Cal. App. 2d 546, 549 (1941)
 5 (holding that “[t]he ordinary rules of grammar should be followed if by applying them such
 6 interpretation does not lead to an absurdity”). This Court would “presume the Legislature
 7 intended everything in a statutory scheme, and [would] not read statutes to . . . include omitted
 8 language.” *Jurcoane v. Superior Court*, 93 Cal. App. 4th 886, 894 (2001). In *In re Sandoval*, the
 9 court’s determination on a parallel penal code provision, § 593d, is instructive here. 341 B.R. 282,
 10 292 (Bankr. C.D. Cal. 2006). The claimant cable company claimed statutory damages for each of
 11 the debtor’s alleged violations of the anti-piracy and anti-signal theft statute. *Id.* California Penal
 12 Code § 593d(f) sets forth: “Any person who violates this section shall be liable in a civil action to
 13 the multichannel video or information services provider for the greater of the following amounts:”
 14 (1) \$5,000 or “[t]hree times the amount of actual damages if any, sustained by the plaintiff.” Cal.
 15 Penal Code § 593d(f). The court disagreed with the claimant and held that “§ 593d(f) does not
 16 provide for \$5,000 in statutory damages for each violation. It only provides a single \$5,000
 17 liability for “[a]ny person who violates this section.” *In re Sandoval*, 341 B.R. at 287. Given the
 18 similarity of the language between §§ 593d(f) and 637.2(a), *In re Sandoval*’s holding is consistent
 19 with this Court’s determination not to read “per violation” into § 637.2(a). *See also Nevarrez v.*
 20 *San Marino Skilled Nursing & Wellness Ctr.*, 221 Cal. App. 4th 102, 130 (2013) (declining to
 21 “read the phrase ‘per violation’ into [California Health & Safety Code] § 1430, subdivision (b)”
 22 because courts “are not permitted to insert qualifying provisions not included in the statute, nor
 23 edit it to conform to an assumed intention which does not appear from its language”) (internal
 24 quotation marks omitted).

25 **ii. Case Law on California Penal Code § 637.2**

26 The state of the law prior to the Legislature’s amendment of California Penal Code § 637.2
 27 does not persuade this Court otherwise. The California Supreme Court in *Ribas v. Clark*
 28 considered this statute in a case that concerned only one instance of CIPA violation, where the

1 defendant eavesdropped on a telephone conversation between the plaintiff and the plaintiff's wife,
2 who were undergoing an acrimonious divorce proceeding. 38 Cal. 3d 355, 358 (1985). Among
3 various reasons in support of a reversal of the lower court's dismissal on a demurrer, the court held
4 that actual injury need not be proven because the statute authorized civil statutory awards. *Id.*
5 The court then stated without further analysis that the statute authorized "civil awards of \$3,000
6 for each violation of the Privacy Act despite a party's inability to prove actual injury." *Id.*

7 In *Lieberman v. KCOP Television, Inc.*, the court also considered the statute in response to
8 the defendant's argument that a plaintiff may not recover damage without showing actual injuries
9 caused by the violation. 110 Cal. App. 4th 156, 166 (2003). In reaching its conclusion that actual
10 injuries were not necessary, the *Lieberman* court stated that a plaintiff may recover up to \$5000 in
11 statutory damages "for each incident," citing to *Ribas v. Clark*. *Id.* at 167 (citing 38 Cal. 3d at
12 358). See also *Ades v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999, 1018 (C.D. Cal. 2014) (in
13 response to the defendant's argument that the plaintiffs could not demonstrate that they suffered an
14 injury to sustain a CIPA action, holding that the statutory damages were "for each violation of
15 CIPA") (citing *Lieberman*, 110 Cal. App. 4th at 167); *CashCall, Inc. v. Superior Court*, 159 Cal.
16 App. 4th 273, 293 n.11 (2008) (on a motion for precertification discovery, stating in a footnote
17 without citation that the statute provides for damages of not less than \$5,000 per violation).²

18 Although Ramos proffered the above-cited cases as interpreting § 637.2 to permit statutory
19 damages of up to \$5,000 per violation, these cases were in fact silent on the matter. The cases
20 analyzed whether a plaintiff would need to allege or prove actual injuries caused by the CIPA
21 violation and did not analyze the statute for the purpose of determining whether the statutory
22 damages should be assessed per violation versus per action. These cases thus are "not authority
23 for propositions neither considered nor discussed in the opinion." *Hager v. Cty. of Los Angeles*,
24 228 Cal. App. 4th 1538, 1551 (2014) (citing *In re Muszalski*, 52 Cal. App. 3d 500, 504 (1975));

25 _____
26 ² Ramos also cites *Flanagan v. Flanagan* but this opinion has been depublished and is not citable.
27 77 Cal. App. 4th 122, 91 Cal. Rptr. 2d 422, 429 (1999), *review granted, superseded, and rev'd*,
28 27 Cal. 4th 766 (2002). Before California Rules of Court 8.1105(e) was amended on July 1, 2016,
"[a]n opinion [was] no longer considered published if the Supreme Court grants review and may
not be relied on or cited." *People v. Kennedy*, 209 Cal. App. 4th 385, 400 (2012) (citing Cal. R.
Ct. 8.1105).

1 *see also Satyadi v. W. Contra Costa Healthcare Dist.*, 232 Cal. App. 4th 1022, 1030-31 (2014) (in
2 determining whether a statutory amendment changed the exhaustion requirement, considering the
3 holdings in *Lloyd* but not those in *Campbell* because *Lloyd* “squarely confronted the argument”
4 presented).

5 **iii. Legislative History**

6 Given that the statute is not ambiguous, this Court need not resort to legislative history as
7 an extrinsic aid. *See Murphy*, 40 Cal. 4th at 1103 (noting that “[o]nly when the statute’s language
8 is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to
9 extrinsic aids to assist in interpretation). Nonetheless, the legislative history surrounding the
10 January 1, 2017 amendment further supports the conclusions that § 637.2 did not provide statutory
11 damages “per violation” prior to the 2017 amendment; and that the amendment in fact changed the
12 law, and did not merely clarify it, as argued by Ramos. The parties did not provide the Court with
13 any legislative history regarding enactment of the prior law applicable in this case.³

14 As a preliminary matter, the January 1, 2017 amendment inserting “per violation” is
15 consistent with this Court’s conclusion that prior to the amendment, the statute did not permit
16 recovery of damages “per violation.” “Where the Legislature makes express statutory distinctions,
17 [this Court] must presume it did so deliberately, giving effect to the distinctions, unless the whole
18 scheme reveals the distinction is unintended.” *Jurcoane*, 93 Cal. App. 4th at 894. Further, the
19 Legislative Counsel’s Digest relevant to this amendment specifies that the bill was to amend §
20 637.2 and explicitly states that “this bill would provide that the monetary damages be imposed per
21 violation” in the context of a civil suit. Ex. H to HSBC’s RJN ISO Objections, Legislative
22 Counsel’s Digest for Assem. B. No. 1671 (2016-16 Reg. Sess.) (amended Aug. 30, 2016), ECF
23 33-1; *Jones v. Lodge at Torrey Pines P’ship*, 42 Cal. 4th 1158, 1170 (2008) (noting that
24 “[a]lthough the Legislative Counsel’s summaries are not binding they are entitled to great
25 weight”). Since this legislative history shows that the legislators intended to amend the code

26 _____
27 ³ The Court has reviewed the Summary Digest of chapter 1509 of the statutes of 1967, the
28 enacting legislation, which states only that the bill “provides for enforcement by civil actions for
injunctions or damages . . .” Legislative Counsel’s Digest for Assem. B. No. 860 (1967 Reg.
Sess.) 2 Stats. 1967, Summary Dig., p. 5219.

1 section to impose monetary damages per violation, the amendment actually changed § 637.2 and
2 did not merely clarify it.

3 The legislative history submitted by Ramos from the California Senate Committee on
4 Public Safety does not demonstrate otherwise. First, the Committee’s notes pre-date the
5 amendment in question and thus cannot be interpreted as giving meaning to a non-existent
6 proposal. Second, the notes from the Senate Committee on Public Safety state that the purpose of
7 the bill was to “make it a wobbler to intentionally distribute or aid and abet the distribution of, a
8 confidential communication with a health care provider that was obtained unlawfully.” Ex. A to
9 Raymond Decl. 2, 5, ECF 30-1. It goes on to state this “bill clarifies the prohibition on recording
10 a confidential communication applies to each violation.” *See also* Ex. B to Raymond Decl. 1-2,
11 ECF 30-1. The notes are entirely in the context of criminal penalties and make no reference to the
12 statutory damages in civil suits, and rightly so, as the notes are clear in stating that the purpose
13 was to make the crime an alternate felony-misdemeanor offense. *Id.* Accordingly, these
14 legislative notes proffered by Ramos are not squarely on point and do not change this Court’s
15 conclusion.

16 Having determined that the January 2017 amendment changed the law and did not merely
17 clarify it, the Court now turns to the issue of retroactivity. On the issue of retroactivity, the parties
18 do not dispute that the version of the statute prior to the amendment governs this case, and the
19 general proposition that “a new statute is presumed to operate prospectively absent an express
20 declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended
21 otherwise,” *Tapia v. Superior Court*, 53 Cal. 3d 282, 287 (1991); HSBC Reply 10-11; Sur-Reply
22 1-3 (citing *Satyadi*, 232 Cal. App. 4th at 1028) (noting the “well-established presumption that
23 statutes apply prospectively in the absence of a clearly expressed contrary intent”) (citation
24 omitted)). If the amendment does not operate retroactively, the addition of “per violation” would
25 not apply to the present case. There is no clearly expressed intent by the legislature to provide
26 retroactive application of this amendment and on that basis, the Court concludes that it is
27 prospective only. Accordingly, the Court GRANTS Defendants’ motion to dismiss the claims for
28 statutory damages on a “per violation” basis. The claim for statutory damages totaling \$5,000 is

1 proper.

2 **B. Tolling of the Statute of Limitations**

3 The Court now turns to Defendants’ others grounds for dismissing Ramos’ claims. First,
4 Defendants argue that the CIPA claims are untimely because the allegations are insufficient and
5 without specificity to show that the statute of limitations period should be tolled. “In California,
6 the discovery rule postpones accrual of a claim until ‘the plaintiff discovers, or has reason to
7 discover, the cause of action.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir.
8 2008) (quoting *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999)). To satisfy the pleading
9 requirement on the discovery rule, Ramos must specifically plead facts showing “(1) the time and
10 manner of discovery and (2) the inability to have made earlier discovery despite reasonable
11 diligence.” *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 808 (2005); *id.* at 815 (holding
12 that “[a] plaintiff seeking to utilize the discovery rule must plead facts to show his or her inability
13 to have discovered the necessary information earlier despite reasonable diligence”).

14 Here, the FAC sufficiently alleges facts demonstrating that Ramos’ claims did not accrue
15 until September 2015. FAC ¶¶ 14-16. Ramos’ wife was employed by Card Services from March
16 23, 2009 to about May 1, 2012, and by Capital One from about May 1, 2012 through October
17 2013. *Id.* ¶¶ 28-29. Ramos did not file his suit until November 18, 2016. However, HSBC did
18 not remove the confidential designation from the transcripts of recording in the *Rojas* case until
19 September 2015, and his wife was only contacted as a potential witness thereafter. *Id.* ¶¶ 14-16.
20 Ramos then learned about the recording and his wife being contacted as a potential witness in or
21 around November 2015. *Id.* ¶¶ 16-17. Prior to November 2015, Ramos had no reason to believe
22 that his personal telephone calls were recorded, received, or intercepted by Defendants. *Id.* ¶ 17.
23 Defendants fault Ramos for not alleging reasons why he could not have discovered the alleged
24 CIPA violation from his wife earlier than November 2015, who had been Defendants’ employee
25 and would have been privy to Defendants’ recording practices. However, the Court finds that the
26 FAC has plausibly alleged that Ramos had no reason to suspect that his phone conversations were
27 recorded and would not be subject to an inquiry notice to question his wife in regards to
28 Defendants’ recording practices. Accordingly, the Court DENIES the motions to dismiss on the

1 ground that the claims are untimely.

2 **C. Sufficiency of the Allegations for Count I for Violation of California Penal Code**
3 **§ 632**

4 Defendants further contend that the FAC is devoid of any facts regarding their purported
5 intent to record Ramos’s personal conversations because merely installing a recording device on
6 company phones does not meet the “intentional” requirement of Cal. Pen. Code § 632. HSBC
7 Mot. 14-15; Cap. Mot. 12-13. Defendants argue that the California Supreme Court’s ruling in
8 *People v. Superior Court of Los Angeles Cty.* (“Smith”) controls. 70 Cal. 2d 123, 133 (1969).
9 Defendants submit that under *Smith*, Ramos must allege facts showing that Defendants intended to
10 record his personal conversations. Defendants further rely on a California Superior Court ruling in
11 the *Rojas* case. Exs E and F to HSBC’s RJN. Ramos counters that he has alleged sufficient facts
12 to support his claim.

13 The defendant in *Smith* moved to suppress evidence in a criminal action brought against
14 him because the evidence was obtained in violation of CIPA. 70 Cal. 2d at 125. The defendant
15 hired a private investigator “to install a recording system which was voice activated and which
16 tape recorded all conversations, including telephone conversations, in all of defendant’s offices” to
17 try to “expose the source of substantial annual losses to his companies caused by an internal
18 ‘leak.’” *Id.* at 126. The private investigator installed the recording system, and left it in
19 “automatic mode” to test its performance, which later automatically recorded conversations
20 between the defendant and other individuals. *Id.* These taped recordings were subsequently
21 delivered to a law enforcement officer and used “to refresh the memories” of the persons who
22 participated in the conversations with the defendant. *Id.* at 126-27. Finding no violation of CIPA,
23 the court reasoned that intention to start the equipment without more did not satisfy the
24 requirement of intent under the statute. *Id.* at 132. The court also noted that the “statute does not
25 isolate the actor’s intent from the object to which it is directed, namely the confidential
26 communication; the two are inextricably bound together.” *Id.* at 133. As such, the *Smith* case
27 appears to support the proposition that the “intentional” element could not be met by merely
28 placing a recording device without a specific intention to record or intercept a conversation of a

1 target person. However, even if this Court were to wholly accept this interpretation of
2 “intentional,” proffered by Defendants, the Court is satisfied that Plaintiff has alleged sufficient
3 facts to state his claim. As such, the Court DENIES Defendants’ motion to dismiss Count I.

4 **D. Sufficiency of the Allegations for Count II for Violation of California Penal**
5 **Code § 632.7**

6 California Penal Code § 632.7 makes unlawful conduct by any person who, without
7 consent, “intercepts or receives and intentionally records” personal communications transmitted
8 between telephones. Defendants reiterate the same argument as those set forth for Count I that the
9 FAC fails to allege that they “intentionally” recorded Ramos’ personal conversation. HSBC Mot.
10 15; Cap. Mot. 13. Defendants also contend that the statute only prohibits interception or reception
11 by a third party and they are not considered such third parties since Ramos voluntarily called or
12 received calls from Defendants’ phones. HSBC Mot. 16-19; Cap Mot. 13-14.

13 As to Defendants’ argument on the requirement that the interception or reception of
14 communication be “intentional,” the Court DENIES their motions to dismiss for the same reasons
15 as set forth in the discussion on Count I above.

16 With respect to Defendants’ argument that the recording or the interception occurred on
17 their phone lines and that they are not considered third-parties under the statute, the Court finds
18 that the statute could still apply to them. In *Simpson v. Best W. Int’l, Inc.*, the court was
19 confronted with this exact same issue and held that § 632.7 applies to parties to the
20 communications as well as third parties. No. 12-04672-JCS, 2012 WL 5499928, at *8 (N.D. Cal.
21 Nov. 13, 2012). The plaintiff in *Simpson* called Best Western’s reservation center to make hotel
22 reservations, and her calls were allegedly recorded without her knowledge or consent. *Id.* at *3.
23 The defendant argued on a motion to dismiss that the claim fails because it was a party to the
24 alleged communications. *Id.* at *6. After examining the case law and the legislative history, the
25 court concluded that the law prohibits any party, not just third parties, to a confidential
26 communication from recording that communication without knowledge or consent of the other
27 party. *Id.* at *7-8. *Young v. Hilton Worldwide, Inc.*, cited by Defendants, does not change
28 *Simpson*’s analysis as the *Young* court was only concerned with a § 632 claim, and not § 632.7.

1 No. 12-01788, 2014 WL 3434117, at *2 (C.D. Cal. July 11, 2014) (holding that “to any extent that
2 Hilton received such calls, it had the consent from the caller”). *Simpson* is thus more persuasive to
3 the Court with respect to § 632.7. The Court is satisfied that Ramos has adequately pled this
4 claim. Defendants’ motions to dismiss Count II are DENIED.

5 **E. Jurisdiction**

6 This Court may assert subject matter jurisdiction over a case when the amount in
7 controversy exceeds \$75,000 and the parties are citizens of different states. 28 U.S.C. § 1332.
8 There is a strong presumption against the exercise of removal jurisdiction. *Gaus v. Miles, Inc.*,
9 980 F.2d 564, 566 (9th Cir. 1992). If it is unclear from the complaint what amount of damages
10 plaintiff seeks, “the defendant bears the burden of actually proving the facts to support
11 jurisdiction, including the jurisdictional amount.” *Id.* The Court may raise the issue of subject
12 matter jurisdiction sua sponte. *Galt G/S v. Hapag-Lloyd AG*, 60 F.3d 1370, 1373 (9th Cir. 1995).
13 “Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first
14 instance.” *Gaus*, 980 F.2d at 566.

15 As the removing parties invoking the Court’s diversity jurisdiction, Defendants bear the
16 burden of establishing by a preponderance of the evidence that the amount in controversy exceeds
17 \$75,000. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). In its notice of
18 removal, Defendants solely referenced the allegations directed to statutory damages in support of
19 the amount in controversy. Notice of Removal 2-3, ECF 1. Now that the Court has dismissed
20 Ramos’ statutory damages claim alleged on a “per violation” basis, the statutory damages can no
21 longer meet the jurisdictional amount.

22 Ramos also seeks “three times the amount of actual damages” but only conclusorily pleads
23 “loss of privacy, loss of security, shock, upset, fear, anger, sadness, and other forms of emotional
24 distress” in support of actual damages. FAC ¶¶ 39, 45, 50. Ramos in opposition also proffers no
25 additional facts in support of the claim for actual damages. The vagueness of actual damages
26 sought in Ramos’ FAC is not sufficient to satisfy the jurisdictional amount. *Sanchez*, 102 F.3d at
27 404 (holding that “the relevant standard in the Ninth Circuit is whether given the absence of
28 specifics and the record, is it more likely than not that the amount in controversy exceeds

1 \$75,000”). Thus, it is not “facially apparent” from the notice of removal, the FAC, and even
2 Ramos’ opposition papers, that the jurisdictional amount could be satisfied. *Singer v. State Farm*
3 *Mut. Auto., Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997).

4 **F. Leave to Amend**

5 In deciding whether to grant leave to amend, the Court must consider the factors set forth
6 by the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), and discussed at length by the
7 Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2009). A district
8 court ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1)
9 undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by
10 amendment, (4) undue prejudice to the opposing party, and (5) futility of amendment. *Eminence*
11 *Capital*, 316 F.3d at 1052.

12 Here, having granted Defendants’ motions to dismiss Ramos’ requests for statutory
13 damages on a “per violation” basis, the case now lacks sufficient pleading to support a claim
14 meeting the required monetary amount in controversy to invoke this Court’s jurisdiction. The
15 Court recognizes that the burden is on Defendants to demonstrate the sufficiency of the
16 jurisdictional amount. Nonetheless, the Court grants Ramos leave to amend the allegations
17 directed to actual damages to show that at least \$75,000 is in controversy, in the event Ramos
18 desires an opportunity to make such an amendment. Because this Court has denied Defendants’
19 motions to dismiss on the remainder of the grounds submitted, there is no leave to amend any
20 other part of the complaint.

21
22 **V. ORDER**

23 For the foregoing reasons, the Court GRANTS IN PART Defendants’ motions to dismiss
24 claims of statutory damages on a “per violation” basis with leave to amend only allegations
25 directed to actual damages;

26 The Court DENIES IN PART Defendants’ motions to dismiss Counts I and II based on the
27 statute of limitations and a failure to state a claim.

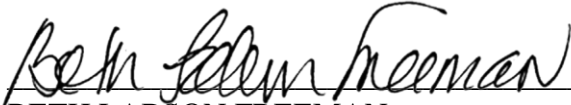
28 If desired, Ramos shall file an amended complaint by August 24, 2017. Failure to meet the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

deadline to file an amended complaint would result in the remand of this case without further notice.

IT IS SO ORDERED.

Dated: July 27, 2017


BETH LABSON FREEMAN
United States District Judge