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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 TIFFANY BRINKLEY, on behalf
12 of herself and others similarly
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Plaintiff,
v.
MONTEREY FINANCIAL
SERVICES, LLC,
Defendant.

Case No.: 16-cv-1103-WQH-WVG

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss (ECF No. 100) filed by Defendant Monterey Financial Services, LLC.

I. Background

On October 15, 2013, Plaintiff Tiffany Brinkley initiated this action by filing a Complaint (ECF No. 1-3) against Monterey Financial Services, Inc. in the Superior Court of the State of California in and for the County of San Diego. On April 1, 2016, Brinkley amended the Complaint to add Monterey Financial Services, LLC as a defendant. (ECF No. 1-8 at 2). On May 6, 2016, Monterey Financial Services, Inc. and Monterey Financial Services, LLC (collectively, "Monterey") removed the matter to this court. (ECF No. 1).

1 On May 17, 2018, Plaintiff Tiffany Brinkley filed a First Amended Complaint (ECF
2 No. 97) (the “FAC”) against Monterey. The FAC brings claims for violations of California
3 Penal Code § 632, Washington Revised Code § 9.73.70.030(1)(a), California Penal Code
4 § 632.7, and California Business and Professions Code §§ 17200 *et seq.* FAC at ¶¶ 38–60.
5 The FAC seeks damages as well as injunctive relief (1) “prohibiting Defendants from []
6 overhearing, recording and listening to each and every incoming and outgoing telephone
7 conversation with California and Washington residents without their prior consent,” FAC
8 at ¶ 60; (2) “compel[ing] Defendants to institute policies and procedures which will
9 educate their employees and agents as to California and Washington privacy laws and
10 assure that such employees and agents follow such privacy laws,” *id.*; (3) “prohibiting the
11 future dissemination and disclosure of the recorded telephone conversations in the
12 possession, custody and control of Defendants,” *id.*; and (4) “requiring Defendants to
13 disgorge all ill-gotten gains and awarding Plaintiff and the Class full restitution of all
14 monies wrongfully acquired by Defendants by means of such unfair and unlawful
15 conduct,” *id.* at 26.

16 On May 31, 2018, Monterey filed the Motion to Dismiss. (ECF No. 100). On June
17 25, 2018, Brinkley filed an Opposition to the Motion to Dismiss. (ECF No. 101). On July
18 2, 2018, Monterey filed a Reply in Support of the Motion to Dismiss. (ECF No. 102).

19 On July 30, 2018, Magistrate Judge William V. Gallo issued an Order substituting
20 Monterey Financial Services, LLC for Monterey Financial Services, Inc. and directing the
21 Clerk of Court to terminate Monterey Financial Services, Inc. as a party to this case. (ECF
22 No. 104).

23 **II. Allegations**

24 [F]rom October of 2011 to October of 2013, and specifically on
25 February 14, 2013 and March 6, 2013, Plaintiff received at least one telephone
26 call from an employee and/or an agent of Defendants and made at least one
27 telephone call to an employee and/or an agent of Defendants During
28 each of these two aforementioned telephone conversations, . . . Plaintiff shared
her personal information as she believed that each of these calls was
confidential in nature and that such calls were not being monitored or

1 recorded. At no time during either of her two aforementioned telephone
2 conversations with employees and/or agents of Defendants was Plaintiff told
3 that her telephone conversations would be or may be recorded or monitored,
4 and at no time during either of her two aforementioned telephone
5 conversations with employees and/or agents of Defendants did Plaintiff give
6 her consent to Defendants to record or monitor such telephone conversations.

7 FAC at ¶ 18. “Defendants recorded all of its numerous telephone conversations with
8 Plaintiff, and all of Plaintiff’s telephone conversations with Defendants entailed Plaintiff
9 using her ‘cellular radio telephone’ as such term is defined in Cal. Penal Code
10 § 632.7(c)(1).” *Id.* at ¶ 21.

11 Plaintiff has (1) “lost money or property in that Plaintiff . . . ha[s]
12 suffered . . . statutory damages . . . pursuant to Cal. Penal Code § 637.2(a)[] and/or actual
13 damages or liquidated damages . . . pursuant to Wash. Rev. Code § 9.73.060”; (2) “suffered
14 actual damages in the form of cellular telephone service fees [she] incurred for the period
15 of time [she was] on the phone with Defendants’ employees and/or agents”; (3)
16 “surrender[ed] more in [her] transactions with Defendants than [she] otherwise would have
17 since Defendants have recorded and possess the recordings of their telephone conversations
18 without their prior permission or consent”; and (4) “ha[d] a present or future property
19 interest diminished since Defendants have recorded and possess the recordings of their
20 telephone conversations without [her] prior permission or consent.” *Id.* at ¶ 58.

21 **III. Legal Standard**

22 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a
23 claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil
24 Procedure 8(a)(2) provides “[a] pleading that states a claim for relief must contain . . . a
25 short and plain statement of the claim showing that the pleader is entitled to relief.” “A
26 district court’s dismissal for failure to state a claim under Federal Rule of Civil Procedure
27 12(b)(6) is proper if there is a ‘lack of a cognizable legal theory or the absence of sufficient
28 facts alleged under a cognizable legal theory.’” *Conservation Force v. Salazar*, 646 F.3d
1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699
(9th Cir. 1990)).

1 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
2 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
3 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
4 “A claim has facial plausibility when the plaintiff pleads factual content that allows the
5 court to draw the reasonable inference that the defendant is liable for the misconduct
6 alleged.” *Id.* (citation omitted). However, “a plaintiff’s obligation to provide the ‘grounds’
7 of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic
8 recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555
9 (quoting Fed. R. Civ. P. 8(a)). A court is not “required to accept as true allegations that
10 are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”
11 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “In sum, for a
12 complaint to survive a motion to dismiss, the non-conclusory factual content, and
13 reasonable inferences from that content, must be plausibly suggestive of a claim entitling
14 the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009)
15 (quotations omitted).

16 **IV. California Penal Code § 632 and California Penal Code § 632.7**

17 Monterey moves to dismiss Plaintiffs’ claims for violations of California Penal Code
18 § 632 and California Penal Code § 632.7. Brinkley contends that the FAC adequately
19 alleges that Monterey violated § 632 and § 632.7.¹

20 Section 632 prohibits “intentionally and without the consent of all parties to a
21 confidential communication . . . eavesdrop[ing] upon or record[ing] the confidential
22 communication, whether the communication is carried on among the parties in the presence
23 of one another or by means of a telegraph, telephone, or other device, except a radio.” Cal.
24 Penal Code § 632(a). Section 632 became effective in 1967.

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28 ¹ The Court will refer to California Penal Code § 632 as “§ 632” and California Penal Code § 632.7
as “§ 632.7”

1 Under Section 632.7(a), “Every person who, without the consent of all parties to a
2 communication, intercepts or receives and intentionally records . . . a communication
3 transmitted between two cellular radio telephones [or] a cellular radio telephone and a
4 landline telephone . . . shall be punished” Section 632.7 defines a “[c]ellular radio
5 telephone” as “a wireless telephone authorized by the Federal Communications
6 Commission to operate in the frequency bandwidth reserved for cellular radio telephones.”
7 Cal. Penal Code § 632.7(c)(1).

8 Section 632.7 became effective in 1992. Leading up to the passage of § 632.7, the
9 California Senate Committee on Judiciary stated that “there is currently no statute
10 prohibiting a person from intercepting and intentionally recording a communication
11 transmitted via cellular or cordless telephone.” Senate Committee on Judiciary, AB 2465,
12 at 2 (June 9, 1992). The Ways & Means Committee agreed, stating that § 632.7 “would
13 expand existing law prohibiting unauthorized recording of telephone conversations to
14 cover cordless and cellular phones.” Ways & Means Committee, AB 2465, at 1 (March 9,
15 1992). Section 632.7 was intended to “simply extend[] to persons who use cellular or
16 cordless telephones the same protection from recordation that persons using ‘landline’
17 telephones presently enjoy.” Author Lloyd G. Connelly’s Statement of Intent, Cal. Assem.
18 Bill No. 2465 (1992), at 1.

19 **1. Section 632 and Cellular Radio Telephones**

20 Monterey contends that “Brinkley states no claim under California Penal Code
21 § 632[] because that statute does not apply to calls involving a cellular radio telephone.”
22 (ECF No. 100 at 6) (citing *McEwan v. OSP Group, L.P.*, No. 14-cv-2823-BEN (WVG),
23 2015 WL 13374016 (S.D. Cal. July 2, 2015)). Brinkley contends that § 632 does apply to
24 cellular telephone conversations, citing *Perea v. Humana Pharmacy, Inc.*, 2013 WL
25 12129618 (C.D. Cal. Jan. 23, 2013); *Nader v. Capital One Bank (USA), N.A.*, 2013 WL
26 11070244, (C.D. Cal. June 11, 2013); and *Khan v. Outrigger Enterprises, Inc.*, 2013 WL
27 12136379 (C.D. Cal. Oct. 29, 2013).

1 **A. District Court Cases Finding § 632 Applies to Cellular Radio**
2 **Phones**

3 Three courts in the Central District of California issued opinions in 2013 concluding
4 that § 632 does apply to calls involving a cellular radio telephone. In *Perea*, the court
5 observed that “Section 632 by its plain language prohibits recording ‘confidential
6 communication . . . by means of a . . . telephone, or other device.’” 2013 WL 12129618 at
7 *5 (quoting Cal. Penal Code § 632). The court held that it “need look no further than to
8 this plain language” to conclude that § 632 applies to calls involving a cellular radio
9 telephone. *Id.* The court reasoned that phrase “except a radio” did not cover cellular radio
10 telephones because “the plain language of the statute excludes conversations carried on ‘by
11 means of . . . a radio’ not by means of telephones that operate on radio frequencies.” *Id.*
12 (quoting Cal. Penal Code § 632). The court found that “a reading of section 632 that
13 includes the recording of communications between a wireless telephone and a landline
14 would not make section 632.7 redundant, because section 632 requires the additional
15 element of confidentiality.” *Id.* at *5.

16 In *Nader*, the court stated “Capital One’s claim that ‘radio’ includes a cellular phone
17 is meritless. The Court finds persuasive the reasoning from *Perea*” 2013 WL
18 11070244 at *2 n.4.

19 In *Kahn*, the court began its analysis by stating that, when interpreting a statute, a
20 court’s “task is to discern the Legislature’s intent.” 2013 WL 12136379, at *5 (quoting
21 *Wells v. One2One Learning Found.*, 141 P.3d 225, 236 (Cal. 2006)). According to the
22 court,

23 The statutory language itself is the most reliable indicator, so we start with the
24 statute’s words, assigning them their usual and ordinary meanings, and
25 construing them in context. If the words themselves are not ambiguous, we
26 presume the Legislature meant what it said, and the statute’s plain meaning
27 governs. On the other hand, if the language allows more than one reasonable
28 construction, we may look to such aids as the legislative history of the measure
and maxims of statutory construction. In cases of uncertain meaning, we may

1 also consider the consequences of a particular interpretation, including its
2 impact on public policy.

3 *Id.* (quoting *Wells*, 141 P.3d at 236).

4 The court concluded that the words of § 632 themselves are not ambiguous because
5 “the usual and ordinary meaning of the term ‘telephone’ in section 632 incorporates cellular
6 phones.” *Id.* (quoting Cal. Penal Code § 632). The Court held that the plain meaning of
7 the word “telephone” governs and § 632 applies to communications carried on by means
8 of a cellular radio telephone. *Id.* The court reasoned that interpreting § 632 to cover
9 cellular phones would not read “except for radio” out of the statute because other
10 communications occur over radios, such as communications carried on by means of
11 “traditional police dispatch systems.” *Id.* The court addressed the legislative history of
12 § 632.7 by stating

13 The Court agrees that the legislative history accompanying the 1992
14 enactment of section 632.7 does support the contention that at least some
15 California legislators did not think section 632 covered cellular phones.
16 However, courts do not generally give significant weight to the views of later
17 legislatures on the intent of an earlier one. *See Schrader v. Idaho Dept. of*
18 *Health and Welfare*, 768 F.2d 1107, 1114 (9th Cir. 1985) (“It is well settled
19 that the views of a later Congress regarding the legislative intent of a previous
20 Congress do not deserve much weight.” (citing *Consumer Product Safety*
21 *Comm’n v. GTE Sylvania*, 447 U.S. 102, 117 (1980)); *Penn Mut. Life Ins. Co.*
22 *v. Lederer*, 252 U.S. 523, 538 (1920) (stating that “no aid could possibly be
23 derived from the legislative history of another act passed nearly six years after
24 the one in question”). Further, in accordance with California’s guidelines on
25 statutory interpretation, because the Court finds the language of section 632
26 unambiguous, the legislative history of subsequent enactments need not be
27 considered.

28 *Id.*

24 **B. McEwan**

25 The *McEwan* court came to opposite conclusion. 2015 WL 13374016 at *3–4. The
26 court stated that the relevant question was “whether ‘telephone’ means only one type of
27 telephone (*i.e.* landline telephones), or all types of telephones.” *Id.* at *3 (quoting Cal.
28 Penal Code § 632). The court reasoned that “[t]elephone’ cannot be defined without

1 considering the qualifying phrase, ‘except a radio.’” *Id.* (quoting Cal. Penal Code § 632).
2 The court found that “[a] reading of section 632(a) exposes at least two reasonable
3 interpretations”: (1) “that the modifier ‘except a radio’ qualifies confidential
4 communications in the presence of one another, by telegraph, by telephone, *and* other
5 devices,” and (2) “that the modifier ‘except a radio’ only applies to the last item in the
6 list—‘other devices.’” *Id.* (quoting Cal. Penal Code § 632). The court reasoned that, under
7 the first reasonable interpretation, “except a radio” modifies “telephone” and § 632 does
8 not apply to communications made “by radio telephone.” *Id.* The court found that,
9 “[b]ased upon these two interpretations, the statute’s language is ambiguous.” *Id.*

10 The court resolved this “ambigu[ity]” by “look[ing] to legislative history and canons
11 of statutory construction to determine the [Legislature’s] intent.” *Id.* (citing *Wells*, 141
12 P.3d at 236). The court noted that the Legislature specifically addressed cellular radio
13 telephones in other provisions. *Id.* (citing Cal Penal Code § 632.7). The court also noted
14 that, while the word “telephone” in § 632 is not defined, “section 632 was enacted at a time
15 where only one type of phone existed—landline phones. Thus, a definition of ‘telephone’
16 was unnecessary.” *Id.* (quoting Cal. Penal Code § 632). The court also found that “[t]he
17 legislative history suggests that use of ‘telephone’ refers to landline phones only, not any
18 type of mobile phone.” *Id.* (quoting Cal. Penal Code § 632).

19 Turning to the rules of statutory construction, the court focused on the rule that
20 “[w]here a statute . . . contains a given provision, the omission of such provision from a
21 similar statute concerning a related subject is significant to show that a different intention
22 existed.” *Id.* at *4 (citing *Estate of Reeves*, 284 Cal. Rptr. 650, 653 (Cal. Ct. App. 1991)).

23 According to the court,

24 The Legislature had opportunity to amend section 632 at the time it added
25 sections 632.5, 632.6, and 632.7, but it did not. If the Legislature desired to
26 include all types of telephones in section 632, it certainly could have done so.
27 This is true especially in light of the definitions of “cellular radio telephone”
28 and “cordless telephone” added to section 632.7. As such, the addition of the
mobile phone definitions in later sections indicates that the Legislature did not
intend for section 632 to encompass those types of phones.

1 *Id.* (quoting Cal. Penal Code § 632.7). The court also applied the rule of lenity, which it
2 concluded supported construing the word “telephone” not to include cellular radio
3 telephones. *Id.* (quoting Cal. Penal Code § 632).

4 **C. Analysis**

5 This Court agrees with the courts in *Perea*, *Nader*, and *Khan* that a cellular radio
6 telephone is a “telephone” under the usual and ordinary meaning of that word. The phrase
7 “except a radio” unambiguously excludes communications carried on by means of one kind
8 of device: radios. A cellular radio telephone is not a “radio” under the usual and ordinary
9 meaning of that word. Consequently, Section 632 unambiguously applies to
10 communications carried on by means of a cellular radio telephone. Having concluded that
11 the words used in § 632 unambiguously prevent the recording of communications carried
12 on by means of a cellular radio telephone, the Court need not examine the legislative history
13 of that statute, apply any other maxims of statutory construction, or consider the
14 consequences of its interpretation. *Wells*, 141 P.3d at 236. Monterey’s motion to dismiss
15 Brinkley’s claim for violations of § 632 is denied.

16 **2. Section 632.7 and Consent**

17 Monterey contends that Brinkley’s Section 632.7 claim fails because the FAC does
18 not allege that Monterey received Brinkley’s communications without Brinkley’s consent.
19 (ECF No. 100-1 at 16). Monterey contends that “[t]he phrase ‘without the consent of all
20 parties to the communication’ is placed *before*—and therefore modifies—all of what
21 follows: ‘intercepts or receives and intentionally records.’” *Id.* (quoting Cal. Penal Code
22 § 632.7 (“Every person who, without the consent of all parties to a communication,
23 intercepts or receives and intentionally records . . . a communication transmitted between
24 two cellular radio telephones [or] a cellular radio telephone and a landline telephone . . .
25 shall be punished . . .”). Monterey contends that “[a]ccordingly, a prosecuting authority
26 or civil plaintiff must plead and prove lack of consent with respect to both (1) the
27 ‘interception or receipt’ of the communication, and (2) the ‘recording’ of the
28 communication.” *Id.* Monterey cites *Young v. Hilton Worldwide, Inc.*, which held that §

1 632.7 “restrict[s] *third-party* interception of cellular and cordless telephone radio
2 transmissions,” and “do[es] not restrict the parties to a call from recording those calls.”
3 2014 WL 3434117, at *1 (C.D. Cal. Jul. 11, 2014). Monterey also cites *Granina v. Eddie*
4 *Bauer LLC*, 2015 WL 9855304 (Cal. Super. Dec. 2, 2015), which came to the same
5 conclusion.

6 Brinkley disagrees, citing a number of district court opinions holding that § 632.7
7 applies to a party to a call who records the call without the other party’s consent. (ECF
8 No. 101 at 26–32) (citing *Ronquillo-Griffin v. Telus Communications Inc.*, 2017 WL
9 2779329 at *3 (S.D. Cal. June 27, 2017); *Horowitz v. GC Services Ltd. Partnership*, 2015
10 WL 1959377 at *11 (S.D. Cal. April 28, 2015); *Montantes v. Inventure Foods*, 2014 WL
11 3305578, at *2–4 (C.D. Cal. July 2, 2014); *Ades v. Omni Hotels Management Corporation*,
12 46 F.Supp.3d 999, 1017–1018 (C.D. Cal. 2014); *Brown v. Defender Sec. Co.*, 2012 WL
13 5308964, at *5 (C.D. Cal. Oct. 22, 2012); *Simpson v. Vantage Hospitality Group, Inc.*,
14 2012 WL 6025772 (N.D. Cal. 2012); *Simpson v. Best Western Intern., Inc.*, 2012 WL
15 5499928 (N.D. Cal. 2012)).

16 The Court finds that § 632.7 is susceptible to two different reasonable
17 interpretations. The first is the interpretation suggested by Monterey, that “without the
18 consent of all parties to the communication” modifies both “intercepts or receives” and
19 “intentionally records.” (ECF No. 100-1 at 16) (quoting Cal. Penal Code § 632.7). Under
20 this interpretation, a party who receives a communication with the consent of the
21 communicator and records that communication without the communicator’s consent does
22 not violate § 632.7. The second reasonable interpretation of § 632.7 is that “without the
23 consent of all parties to the communication” modifies two conjunctives “intercepts and
24 intentionally records” and “receives and intentionally records.” Cal. Penal Code § 632.7.
25 Under this interpretation, a party to a call who records part of the conversation without the
26 other party’s consent violates § 632.7 by “receiv[ing] and intentionally record[ing]” a
27 communication without the other party’s consent. *Id.*

1 The Court finds that the legislative history supports the second interpretation.
2 According to the author of § 632.7, it was intended to “simply extend[] to persons who
3 use cellular or cordless telephones the same protection from recordation that persons using
4 ‘landline’ telephones enjoy[ed at that time].” Connelly’s Statement of Intent, Assem. Bill
5 No. 2465 (1992), at 1. At the time § 632.7 was being debated, a party to a call conducted
6 on a landline violated § 632 by recording that call. *See* Cal. Penal Code § 632 (prohibiting
7 “intentionally and without the consent of all parties to a confidential
8 communication . . . record[ing a] confidential communication . . . carried on . . . by means
9 of a telegraph, telephone, or other device, except a radio.”). Accordingly, the Court finds
10 that § 632.7 prohibits the unauthorized recording of calls that are received with the other
11 party’s consent. Monterey’s motion to dismiss Brinkley’s claim for violations of § 632.7
12 is denied. *See Ronquillo-Griffin v. TELUS Commc’ns, Inc.*, No. 17CV129 JM (BLM),
13 2017 WL 2779329, at *4 (S.D. Cal. June 27, 2017) (denying the defendant’s motion to
14 dismiss because the legislature intended § 632.7 to apply to parties to the communication);
15 *Simpson v. Best W. Int’l, Inc.*, No. 3:12-CV-04672-JCS, 2012 WL 5499928, at *9 (same).

16 **V. Washington Revised Code § 9.73.030 and California Business and Professions**
17 **Code §§ 17200 *et seq.***

18 Monterey contends that Brinkley’s claim for violations of Washington Revised Code
19 § 9.73.030 should be dismissed because “[t]he FAC contains no allegation that Brinkley
20 suffered any injury to her business, her person or her reputation.” (ECF No. 100-1 at 11).
21 Monterey contends that Brinkley’s claim for violations of California Business and
22 Professions Code §§ 17200 *et seq.* should be dismissed because the FAC “fails to plausibly
23 allege that she lost money or property *as a result of* the alleged violations.” *Id.* at 15.

24 Brinkley contends that the FAC alleges that she suffered an injury because of
25 Monterey’s violations of Washington Revised Code § 9.73.030. (ECF No. 101 at 15).
26 Brinkley contends that “Plaintiff’s ‘actual damages in the form of cellular telephone service
27 fees’ alleged in ¶ 58 are sufficient damage allegations to meet the pleading standard
28 imposed by Cal. Bus. & Prof. Code § 17204 in order to obtain restitution of such an actual

1 loss of cellular telephone charges from Defendants.” (ECF No. 101 at 23) (emphasis
2 omitted) (citing FAC at ¶ 58).²

3 Washington Revised Code § 9.73.030(1)(a) makes it unlawful to “record any private
4 communication transmitted by telephone, telegraph, radio, or other device . . . without first
5 obtaining the consent of all the participants in the communication.” Wash. Rev. Code
6 § 9.73.030(1)(a). Washington Revised Code § 9.73.060 provides that any person who
7 violates Washington Revised Code § 9.73.030(1)(a) “shall be subject to legal action for
8 damages . . . brought by any other person claiming that a violation of this statute has injured
9 his or her business, his or her person, or his or her reputation.” *Id.* at § 9.73.060.

10 To bring a claim under California Business and Professions Code § 17204, a plaintiff
11 must “(1) establish a loss or deprivation of money or property sufficient to qualify as injury
12 in fact, i.e., *economic injury*, and (2) show that economic injury was the result of, i.e.,
13 *caused by*, the unfair business practice . . . that is the gravamen of the claim.” *Kwikset*
14 *Corp. v. Superior Court*, 246 P.3d 877, 885 (Cal. 2011).

15 The unfair business practice alleged in the FAC is Monterey’s unauthorized
16 recording of the conversations between Brinkley and Monterey representatives. *See* FAC
17 at ¶¶ 18–21. That is the same conduct that Brinkley alleges violated Washington Revised
18 Code § 9.73.030(1)(a). *See id.* at ¶ 44. The FAC alleges that Brinkley “suffered actual
19 damages in the form of cellular telephone service fees [she] incurred for the period of time
20 [she was] on the phone with Defendants’ employees and/or agents.” FAC at ¶ 58.
21 However, the FAC does not allege facts showing that Brinkley would not have made the
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24 ² Brinkley also contends that FAC alleges that that she lost property in the form “statutory damages”
25 and “recordings of her telephone conversations with Monterey.” *Id.* at 24 (citing FAC at ¶ 58). However,
26 prior to Monterey recording Brinkley’s conversations with Monterey representatives, Brinkley had no
27 property interest in statutory damages or the recordings themselves (which did not exist). Accordingly,
28 Monterey’s allegedly unfair business practice (recording Brinkley’s conversations with Monterey
representatives without her consent) did not impair Brinkley’s property interest in statutory damages or
the recordings of her conversations with Monterey representatives.

1 calls that Monterey recorded, or would have ended those calls sooner, if Monterey had not
2 recorded the calls, or if Monterey had informed Brinkley that the calls were being recorded.
3 Consequently, the FAC does not allege that Monterey’s alleged violations of California
4 and/or Washington law caused Brinkley to incur any cellular telephone service fees.
5 Monterey’s motion to dismiss Brinkley’s claims for violations of Washington Revised
6 Code § 9.73.030 and California Business and Professions Code §§ 17200 *et seq.*
7 is granted.³

8 **VI. Injunctive Relief**

9 Monterey contends that Brinkley does not have standing to bring her claims for
10 injunctive relief because the FAC “does not—and cannot—allege any real and immediate
11 threat of either Defendant recording a future call with her without her knowledge or
12 consent.” (ECF No. 100-1 at 12). Brinkley contends that she has standing to bring her
13 claims for injunctive relief because the FAC alleges violations of her statutory rights. (ECF
14 No. 101 at 16). Brinkley contends that “California Penal Code § 637.2(b) gives Plaintiff
15 the statutory authority to seek injunctive relief.” *Id.* at 17. Brinkley contends that the FAC
16 alleges facts demonstrating a “real and immediate threat of repeated injury” in the form of
17 Monterey disseminating recordings of her conversations with Monterey representatives.
18 *Id.* at 19. Brinkley contends that Monterey should not be able to “avoid injunctive relief
19 by removing the action to federal court.” *Id.* at 19.

20 Monterey contends that state laws like California Penal Code § 637.2(b) do not
21 “obviate the Article III standing requirement.” (ECF No. 102 at 9 n.3). Monterey contends
22 that, even if the FAC adequately alleged a real and immediate risk of Monterey
23 disseminating a recording, that would not give Brinkley standing to pursue her claims for
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26 ³ The Court finds that neither *Kearney v. Kearney*, 974 P.2d 872 (Wash. 1999) nor *In re Carrier IQ*,
27 *Inc.*, 78 F. Supp. 3d 1051, 1091 (N.D. Cal. 2015) establishes that the invasion of privacy inherent in the
28 unauthorized recording of an individual’s conversation satisfies the personal injury requirement of
Washington Revised Code § 9.73.060.

1 injunctive relief because “the violation alleged by Brinkley is *unconsented recording*, not
2 dissemination.” *Id.* at 9.

3 To establish standing to pursue injunctive relief, a plaintiff must allege a ‘real and
4 immediate threat of repeated injury’ in the future.” *Chapman v. Pier 1 Imports (U.S.) Inc.*,
5 631 F.3d 939, 946 (9th Cir. 2011) (citing *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d
6 1075, 1081 (9th Cir. 2004)). This rule applies in federal courts even where a state statute
7 allows plaintiffs to seek an injunction in state court without meeting its requirements. *See*
8 *SourceAmerica v. SourceAmerca*, No. 314CV00751GPCAGS, 2018 WL 2193261, at *5
9 (S.D. Cal. May 14, 2018) (“[A] default rule under California law that would *not* require a
10 plaintiff seeking injunctive relief to offer evidence of future unlawful activity would
11 squarely conflict with this Court’s Article III constraints.”).

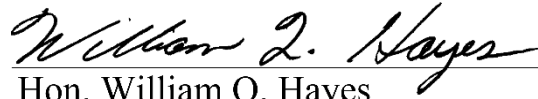
12 The Court finds that the FAC does not allege a real and immediate threat of repeated
13 injury in the future. The FAC does not allege that Monterey has previously disseminated
14 any recordings. Accordingly, any injury that Brinkley suffers from Monterey
15 disseminating recordings would not be a “repeated injury.” *Chapman*, 631 F.3d at 946
16 (citing *Fortyune*, 364 F.3d at 1081); *see also Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th
17 Cir. 2006) (Plaintiffs seeking injunctive relief “must demonstrate that they are realistically
18 threatened by a *repetition* of the violation.”). The Court finds that Brinkley does not have
19 standing to pursue her requests for injunctive relief.⁴
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27 ⁴ Brinkley’s request that the Court “sever and remand Brinkley’s injunctive relief claims back to state
28 Court” is denied. *See* ECF No. 101 at 21.

1 **VII. Conclusion**

2 Monterey's Motion to Dismiss (ECF No. 100) is GRANTED IN PART and
3 DENIED IN PART. Brinkley's claims for violations of Washington Revised Code
4 § 9.73.030 and California Business and Professions Code §§ 17200 *et seq.* are DISMISSED
5 without prejudice. Monterey's Motion to Dismiss (ECF No. 100) is DENIED in all other
6 respects. Any motion to amend shall be filed on or before October 22, 2018.

7 Dated: September 13, 2018

8 
9 Hon. William Q. Hayes
United States District Court