

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

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ORDER

ERIC GRUBER VS. YELP, INC. ET AL

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Superior Court of California
County of San Francisco
APR 16 2018
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 305

<p>ERIC GRUBER, individually and on behalf of all others similarly situated,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>YELP, INC., and DOES 1-10, inclusive,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. CGC-16-554784</p> <p>ORDER GRANTING DEFENDANT YELP, INC.'S MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, SUMMARY ADJUDICATION</p>
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Defendant Yelp, Inc. ("Defendant" or "Yelp") moved for summary judgment, or alternatively, summary adjudication on Plaintiff's Complaint for First Cause of Action for Unlawful Recording and Intercepting of Communications, Second Cause of Action for Unlawful Recording of and Eavesdropping Upon Confidential Communications, and Third Cause of Action for Unlawful Wiretapping. Code Civ. Proc. § 437c. Plaintiff opposed the motion. The motion came on for hearing on March 23, 2018, and appearances are as noted in the record. Having considered the materials submitted in support and opposition and the oral argument of counsel, the Court grants Yelp's motion in its entirety.

I. REQUESTS FOR JUDICIAL NOTICE

As a preliminary matter, the Court rules on Yelp's requests for judicial notice as follows:
Yelp requests the Court to take judicial notice of the following: (1) Digest of Senate Amendments

1 to Senate Bill No. 860; (2) Assembly Bill 2465: Author's Statement of Intent; (3) Order Sustaining
2 Demurrer and Denying Motion to Strike in *Granina v. Eddie Bauer*, No. BC569111 (L.A. Super. Ct.
3 December 2, 2015); and (4) Order Granting Charles Schwab & Co., Inc., Motions for Summary
4 Adjudication and for Summary Judgment in *Kamberian v. Charles Schwab & Co.*, No. CGC-12-518383,
5 2015 Cal. Super. LEXIS 7104 (S.F. Super. Ct. Nov. 23, 2015). The Court takes judicial notice of these
6 documents.

7 Yelp also requests the Court to take judicial notice of the following: (1) the March 1, 1967 Press
8 Release from Jesse Unruh, Speaker of the California Assembly and author of Assembly Bill 860; (2) the
9 June 30, 1967 Letter from Jesse Unruh, Assemblyman and author of A.B. 860, to San Francisco
10 Examiner; (3) the July 31, 1967 Letter from Jesse Unruh, Assemblyman and author of A.B. 860, to Hon.
11 Ronald Regan, Governor of California; and (4) the August 23, 1991 Letter from Michael S. Sands to
12 Hon. Phil Isenberg and Hon. Lloyd Connelly. The Court denies Yelp's requests for judicial notice as
13 these documents do not comport with Evidence Code section 452.

14 **II. BACKGROUND OF RELEVANT FACTS**

15 Yelp is an Internet company that publishes "crowd-sourced reviews about local businesses" on its
16 website and mobile app. Complaint ¶ 6. Yelp allows business owners to advertise their businesses on
17 its website and mobile app by purchasing advertisement space. *Id.* ¶¶ 6, 16. To sell advertisement
18 space, Yelp's sales representatives contact business owners by phone and email. *Id.* ¶¶ 6, 16, 21.

19 Plaintiff is a solo attorney practitioner and business owner. *Id.* ¶ 5. From March 2014 through
20 July 2016, Yelp's sales representatives contacted Plaintiff "a dozen times or more" by phone and email
21 to "attempt[] to sell him advertisement space." *Id.* ¶ 21. In these conversations, Plaintiff discussed his
22 confidential business and financial information over the phone with Yelp's sales representatives. *Id.*
23 Since Yelp did not provide any warning that the call would be recorded, Plaintiff believed that his
24 conversations with Yelp's sales representatives "were, and would remain, private to the parties on the
25 telephone." *Id.* ¶ 22. However, Plaintiff believes that his conversations with Yelp's sales
26 representatives were "eavesdropped on and recorded by" Yelp. *Id.* ¶ 21. Plaintiff's Complaint alleges
27 that Yelp's policy is to "illegally monitor[] and record[] calls" between its sales representatives and
28 clients without providing any notice or warning that the call will be monitored and recorded. *Id.* ¶¶ 1,

1 36, 38. Plaintiff further alleges that Yelp’s sales managers “electronically eavesdrop and record
2 conversations” between Yelp’s sales representatives and clients “without the knowledge or consent” of
3 all parties. *Id.* ¶ 1, 49-50. Plaintiff argues that these practices violate the California Invasion of Privacy
4 Act (“CIPA”) under Penal Code sections 632.7, 632, and 631. *Id.* ¶ 2.

5 Yelp now moves for summary judgment, or in the alternative, summary adjudication of the
6 causes of action asserted in the Complaint. Yelp argues that it has not violated CIPA because it did not
7 record, monitor, or eavesdrop on Plaintiff’s calls. For the reasons stated below, the Court finds that
8 Yelp is entitled to summary judgment as to all claims asserted against it.

9 **III. LEGAL STANDARD**

10 In the words of Code of Civil Procedure Section 437c, “a party may move for summary judgment
11 in an action or proceeding if it is contended that the action has no merit.” Code Civ. Proc. § 437c(a)(1).
12 The party moving for summary judgment “bears the burden of persuasion that there is no triable issue as
13 to any material fact and that he is entitled to a judgment as a matter of law.” *Aguilar v. Atlantic Richfield*
14 *Co.* (2001) 25 Cal. 4th 826, 850. Moreover, the moving party also “bears an initial burden of production
15 to make a prima facie showing of the nonexistence of any triable issue of material fact.” *Id.*

16 A defendant moving for summary judgment carries his burden of persuasion and/or production by
17 “present[ing] evidence that would require such a trier of fact not to find any underlying material fact more
18 likely than not. In the alternative, he may simply point out—he is not required to present evidence—that the
19 plaintiff does not possess, and cannot reasonably obtain, evidence that would allow such a trier of fact to
20 find any underlying material fact more likely than not.” *Id.* at p. 851.

21 If the moving party carries his burden of production, “he causes a shift, and the opposing party is
22 then subjected to a burden of production to make a prima facie showing of the existence of a triable issue
23 of material fact.” *Id.* at p. 850. But if the moving party fails to carry his initial burden, he would not be
24 entitled to summary judgment as a matter of law, and would have to present his evidence to a jury. *Id.* at
25 p. 851.

26 **IV. GENERAL PRINCIPLES OF STATUTORY INTERPRETATION**

27 The fundamental rule of statutory interpretation is that “a court should ascertain the intent of the
28 Legislature so as to effectuate the purpose of the law.” *Moyer v. Workmen's Comp. Appeals Bd.* (1973)

1 10 Cal.3d 222, 230. To determine the Legislature’s intent, “the court turns first to the words themselves
2 for the answer.” *People v. Knowles* (1950) 35 Cal.2d 175, 182. Courts are required to “give effect to
3 statutes according to the usual, ordinary import of the language employed in framing them.” *In re*
4 *Alpine* (1928) 203 Cal. 731, 737. “If possible, significance should be given to every word, phrase,
5 sentence and part of an act in pursuance of the legislative purpose.” *Select Base Materials, Inc. v. Bd. of*
6 *Equalization* (1959) 51 Cal.2d 640, 645. When words are used in a statute, the words “must be
7 construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.”
8 *Johnstone v. Richardson* (1951) 103 Cal.App.2d 41, 46. “Moreover, the various parts of a statutory
9 enactment must be harmonized by considering the particular clause or section in the context of the
10 statutory framework as a whole.” *Moyer, supra*, at p. 230.

11 **V. ANALYSIS**

12 Yelp moves for summary judgment, or in the alternative, summary adjudication based on the
13 following grounds: (1) Plaintiff’s claims fail as a matter of law because Yelp did not record, monitor, or
14 eavesdrop on any calls between Plaintiff and Yelp’s sales representatives; (2) Plaintiff lacks standing to
15 bring this suit because he has not suffered an “injury”; (3) calls between Plaintiff and Yelp were made
16 over VoIP, which is not covered under section 632.7; (4) calls between Plaintiff and Yelp do not violate
17 section 632.7 because they were not “intercepted” or “received”; (5) calls between Plaintiff and Yelp do
18 not violate section 631 because they were not eavesdropped on or secretly monitored by third parties;
19 and (6) Yelp records and monitors calls for quality assurance purposes, which is not prohibited by CIPA.
20 As discussed below, the Court finds that no triable issues of material fact exist, and Yelp is entitled to
21 summary judgment as to all claims asserted against it.

22 **A. No Triable Issues of Material Fact Exist as to Whether Yelp Violated Penal Code** 23 **Section 632.7.**

24 In the First Cause of Action, Plaintiff alleges that Yelp’s policy of monitoring and recording
25 conversations between its sales representatives and clients on cellular or cordless phones violates Penal
26 Code section 632.7. Complaint ¶¶ 36, 40. Yelp argues that the First Cause of Action fails because Yelp
27 cannot be found to have violated the statute. For the reasons set forth below, the Court finds that Yelp is
28 entitled to summary adjudication of the First Cause of Action.

1 Penal Code section 632.7 provides that “[e]very person who, without the consent of all parties to
2 a communication, intercepts or receives and intentionally records, or assists in the interception or
3 reception and intentional recordation of, a communication transmitted between two cellular radio
4 telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless
5 telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be
6 punished by a fine . . .” Penal Code § 632.7, subd. (a).

7 Plaintiff does not dispute that Yelp’s sales representatives use Voice-over Internet Protocol
8 (“VoIP”) to make and receive calls to and from business owners. Plaintiff’s Separate Statement in
9 Response to Defendant’s Undisputed Material Facts (“PSSRDUMF”) No. 1; Declaration of Zachary
10 Pleau ISO Motion for Summary Judgment (“Pleau Decl.”) ¶ 3. Yelp argues that section 632.7 is
11 inapplicable to calls made on VoIP, asserting that VoIP is not regulated by the California Public Utilities
12 Commission and is not considered to be a landline, cordless phone, or cellular phone. Mtn. at p. 9. The
13 Court finds that Yelp has met its initial burden of showing section 632.7 does not apply to VoIP calls.

14 In opposition to the motion, Plaintiff contends that the Legislature intended to broadly protect any
15 conversation involving at least one cellular phone. The Court disagrees with Plaintiff’s interpretation of
16 CIPA. In looking at section 632.7, the Court must give effect to the statute “according to the usual,
17 ordinary import of the language employed in framing them.” *In re Alpine* (1928) 203 Cal. 731, 737.
18 The Court finds that the statute lists specific devices, which implies that the Legislature intended to limit
19 the types of devices that section 632.7 covers. By giving effect to the words as written in section 632.7,
20 the Court finds that section 632.7 applies only when the defendant has either intercepted or received and
21 recorded the plaintiff using the particular instruments as proscribed in the statute, which include any of
22 the following: two cellular phones, a cellular phone and a landline, two cordless phones, a cordless
23 phone and a landline, or a cordless phone and a cellular phone. *See* Penal Code § 632.7, subd. (a). By
24 reading section 632.7 in this way, Plaintiff has failed to present any persuasive evidence to allow the
25 Court to determine that VoIP can be considered a landline, cordless phone, or cellular phone.
26 Accordingly, the Court finds that Plaintiff failed to present any evidence that would create a triable issue
27 of material fact as to whether VoIP is a landline, cordless phone, or cellular phone.

28 Moreover, even if the Court found that section 632.7 applied to calls made on VoIP, Yelp argues

1 that it did not record any of the conversations that Plaintiff had with Yelp's sales representatives. Mtn.
2 at p. 3. Yelp presented evidence that Plaintiff was not recorded during any calls with Yelp and that only
3 Yelp's sales representatives were recorded on the calls. Defendant's Separate Statement of Undisputed
4 Material Facts ("DSSUMF") Nos. 3, 4; Pleau Decl. ¶¶ 8-9. Yelp argues that its one-sided recordings do
5 not violate section 632.7 and CIPA as a whole because Yelp only one-way records its sales
6 representatives, does not capture the client's side of the call, and does not record both sides of the
7 conversation. Reply at pp. 1-5. Yelp points out that Plaintiff fails to cite any case or authority that holds
8 otherwise. *Id.* at p. 4. Plaintiff admits that only Yelp's sales representatives' sides of the calls with
9 Plaintiff were recorded. PSSRDUMF No. 3. However, Plaintiff argues that Yelp's practice of one-
10 sided recording defeats the Legislature's intent of passing CIPA and does, in fact, violate section 632.7.
11 Opp. at pp. 10-13. Plaintiff has not presented any evidence or authority to allow the Court to find that a
12 one-sided recording of Yelp's sales representatives violates section 632.7.

13 Based on the foregoing, the Court finds that no triable issues of material fact exist as to the First
14 Cause of Action.

15 **B. No Triable Issues of Material Fact Exist as to Whether Yelp Violated Penal Code**
16 **Section 632.**

17 In the Second Cause of Action, Plaintiff alleges that Yelp's practice of monitoring and recording
18 conversations between its sales representatives and clients without the knowledge or consent of the
19 clients violates Penal Code section 632. Complaint ¶¶ 43, 47. Yelp argues that the Second Cause of
20 Action fails because Plaintiff cannot support his claim. As discussed below, the Court finds that Yelp is
21 entitled to summary adjudication as to the Second Cause of Action.

22 Penal Code section 632 provides as follows: "A person who, intentionally and without the
23 consent of all parties to a confidential communication, uses an electronic amplifying or recording device
24 to eavesdrop upon or record the confidential communication, whether the communication is carried on
25 among the parties in the presence of one another or by means of a telegraph, telephone, or other device,
26 except a radio, shall be punished by a fine . . ." Penal Code § 632, subd. (a).

27 Yelp argues that it did not violate section 632 because it did not record or eavesdrop on any of the
28 conversations that Plaintiff had with Yelp's sales representatives. Mtn. at p. 11. Plaintiff and Yelp

1 agree that only Yelp's sales representatives were recorded on the calls. As discussed above in Part V.A
2 *ante*, the Court finds that Plaintiff has failed to present any evidence or authority to allow the Court to
3 find that a one-sided recording of Yelp's sales representatives violates section 632. For this reason, the
4 Court finds that no triable issues of material fact exist as to the Second Cause of Action.

5 **C. No Triable Issues of Material Fact Exist as to Whether Yelp Violated Penal Code**
6 **Section 631, and Plaintiff Does Not Have a Right to Precertification Class Discovery.**

7 Plaintiff has not alleged facts or evidence that Plaintiff's conversations with Yelp were
8 wiretapped, or that Yelp engaged in wiretapping within the meaning of section 631. Because Plaintiff
9 acknowledges that the Third Cause of Action does not apply to him, Plaintiff requests that the Court
10 postpone ruling on the Third Cause of Action to allow Plaintiff to find a substitute class representative.
11 Opp. at pp. 20-21. Plaintiff relies on *CashCall, Inc. v. Superior Court* ("*CashCall*") to assert that if the
12 Court grants summary adjudication on this claim, Plaintiff would be foreclosed from identifying further
13 class representatives, which, Plaintiff argues, is what the court in *CashCall* sought to prevent. *Id.* at p.
14 20; 159 Cal.App.4th 273. The Court finds that *CashCall* is distinguishable from the case here because
15 the defendant in *CashCall* admitted that it had illegally and secretly monitored telephone calls ^{Id.} 159
16 Cal.App.4th at 280. As a result, the *CashCall* court allowed plaintiffs to engage in precertification
17 discovery to find replacement class representatives because without precertification discovery, the class
18 members had "virtually no practical possibility" of ever obtaining relief for defendant's "alleged
19 violations of their privacy rights." *Id.* at 293.

20 Absent any allegations that Yelp engaged in such a practice, there is no basis for the Court to
21 allow Plaintiff to conduct additional discovery to allow Plaintiff to substitute a named representative.
22 Therefore, the Court denies Plaintiff's request to conduct precertification discovery. Accordingly, the
23 Court finds that no triable issues of material fact exist as to the Third Cause of Action.

24 Based on the foregoing, the Court finds that the evidence presented by Yelp demonstrates the
25 existence of no triable issues of material fact. Accordingly, the Court grants Yelp's motion for summary
26 judgment.

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CONCLUSION

Defendant Yelp's motion for summary judgment is granted.

IT IS SO ORDERED.

Dated: April 16, 2018



Mary E. Wiss
Judge of the Superior Court

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Superior Court of California
County of San Francisco

ERIC GRUBER, individually and on behalf of all
others similarly situated,

Plaintiffs,

vs.

YELP, INC, et al.,

Defendants.

Case Number: CGC-16-554784

**CERTIFICATE OF
ELECTRONIC SERVICE**
(CCP 1010.6(6) & CRC 2.260(g))

I, T. Michael Yuen, Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On April 16, 2018, I electronically served the ORDER GRANTING DEFENDANT YELP, INC.'S MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, SUMMARY ADJUDICATION via File&ServeXpress® on the recipients designated on the Transaction Receipt located on the File&ServeXpress® website.

Dated: April 16, 2018

T. MICHAEL YUEN, Clerk

By: 

Sean Kane, Deputy Clerk