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Superior Court of California
Santa Clara County, Unlimited Jurisdiction

8 Dan Fingerman,)
9) Case No. 1-08-CV-127344
10 Plaintiff,)
11 vs.) **Plaintiff's Opposition to Demurrers of**
12) **Defendants Capital One N.A. and James**
13 Capital One N.A., James Kaufmann, and) **Kaufmann**
14 DOES 1-100)
15 Defendants.)
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Date: February 5, 2009
Time: 9:00 am
Dept.: 10
Judge: Neal A. Cabrinha

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1 Plaintiff Dan Fingerman hereby opposes the demurrers filed by defendants Capital One N.A.
2 and James Kaufmann.

3 Introduction

4 The defendants demur — but not to the complaint. Rather, they demur to imaginary facts,
5 relying on imaginary law. Instead of addressing the complaint, the defendants misrepresent the
6 complaint to suggest that it alleges facts that they wish had occurred. The defendants also chiefly
7 rely on two flawed legal arguments: one that was expressly rejected by the Supreme Court, and the
8 other that ignores a century of precedent. Accordingly, the demurrers must be overruled.

9 This case involves five telephone calls that Capital One and James Kaufmann recorded
10 illegally. California's Invasion of Privacy Act (specifically, Cal. Penal Code § 632) prohibits
11 recording or eavesdropping upon confidential conversations without the consent of all parties. The
12 defendants violated the Act by causing Plaintiff's phone calls to be recorded without his consent.
13 Count 1 of the complaint alleges these violations. The defendants also falsely represented to Plaintiff
14 that no recordings would be made, so Counts 2–5 allege four species of fraud: intentional
15 misrepresentation, negligent misrepresentation, concealment, and false promise.

16 With respect to Count 1, the defendants ignore the facts alleged in the complaint and demur
17 instead to imaginary "facts" that they wish had occurred. They suggest that Capital One "informed"
18 Plaintiff that it would record each call and that Plaintiff consented to each recording by failing to
19 terminate each call. A simple reading of the complaint reveals that this contradicts the alleged (and
20 true) facts. The demurrers also rely on obsolete caselaw — overruled by the Supreme Court — to
21 suggest that the Invasion of Privacy Act may not protect Plaintiff's calls. Under the Supreme Court's
22 current precedent, each call was protected.

23 Counts 2–5 of the complaint allege fraud, incorporating by reference the specific allegations
24 of harm and causation in paragraphs 1–33. The defendants ignore these detailed allegations, then
25 demur that the "unignored" portions lack specificity. A simple reading of the complaint reveals that
26 Plaintiff does make specific, detailed allegations of harm and the specific causal links between that
27 harm and the defendants' false representations. The defendants also rely again on a faulty legal
28 principle, suggesting that a fraud claim requires loss of money or property. However, the law of

1 fraud does not require pecuniary harm. Rather, it merely requires harm to a legally-cognizable
2 interest. While the harm from fraud often does include losses of money or property, fraud may also
3 lie based solely on other harms. The complaint alleges in detail the harm to Plaintiff's privacy and
4 dignity. The complaint also details: (1) that plaintiff relied on the misrepresentations by continuing
5 to speak with the defendants by phone, instead of insisting that all communications occur in writing,
6 and (2) when the fraud was revealed, Plaintiff immediately insisted that all future communications
7 occur in writing. Therefore, the complaint pleads causation and harm in great detail.

8 For the reasons set forth above, and explained in more detail below, the court must overrule
9 the demurrers. However, if the court sustains the demurrers, it must grant leave to amend. With
10 respect to the fraud counts, if this court would prefer that money loss be alleged in addition to the
11 harms already alleged, then Plaintiff can and will allege money loss on amendment. Since the
12 proposed amendments set forth below would allege money loss with the specificity that the
13 defendants apparently seek, leave to amend must be granted if the demurrer is sustained.

14 Argument

15 I. Violations of California Penal Code § 632

16 **A. Background: California's Invasion of Privacy Act**

17 The Invasion of Privacy Act was enacted in 1967 to address a rising trend of intrusions upon
18 the liberty of Californians.¹ The preamble explains the repugnance in California's public policy "that
19 advances in science and technology have led to the development of new devices and techniques for
20 the purpose of eavesdropping upon private communications and that the invasion of privacy resulting
21 from the continual and increasing use of such devices and techniques has created a serious threat to
22 the free exercise of personal liberties and cannot be tolerated in a free and civilized society."²

23 "The purpose of the act was to protect the right of privacy by, among other things, requiring
24 that all parties consent to a recording of their conversation."³ The act of recording or eavesdropping
25

26
27 ¹ Stats. 1967 ch. 1509 § 1, pp. 3584–3588, enacting Cal. Penal Code §§ 630–637.2; *see also Kearney v. Salomon Smith*
Barney Inc., 39 Cal. 4th 95, 115–116 (2006); *Flanagan v. Flanagan*, 27 Cal. 4th 766, 768–69 (2002) (citing Van Boven,

28 ² Cal. Penal Code § 630 (preamble to the Invasion of Privacy Act, Cal. Penal Code §§ 630 – 638)

³ *Flanagan*, 27 Cal. 4th at 769

1 without consent is a violation of the Act, even if the recording is never used or disseminated.⁴ Since
2 "invasion of privacy involves an affront to human dignity," a plaintiff need not plead or prove harm,
3 other than the fact of the invasion itself.⁵ Still, the legislature recognized that civil actions are a key
4 enforcement mechanism for invasions of privacy, and it intended "that no violation of the privacy act
5 is to go unpunished."⁶ Therefore, the Act provides that a prevailing plaintiff may recover the greater
6 of: (1) three times his damages, or (2) a "minimum damages award" of \$5,000 per violation.⁷ The
7 "minimum damages award" is applied separately to each individual recording, not just once for the
8 defendant's whole course of conduct.⁸ Other recoverable damages include "legal expenses in
9 attempting to recover the recording."⁹

10 **B. The defendants demur to imaginary facts, not to the complaint**

11 (1) Plaintiff did not consent to recording or monitoring of his phone calls

12 The four elements of a civil claim for violation of § 632 are: (1) the defendant uses an
13 electronic device (2) to record or eavesdrop-upon (3) the plaintiff's confidential communication
14 (4) without the plaintiff's consent.¹⁰ The demurrers attack only elements three and four. They do not
15 dispute that the defendants recorded Plaintiff's phone calls with electronic devices.

16 The complaint alleges multiple times that Plaintiff did not consent to recording or monitoring
17 of his phone calls and that the defendants promised not to make recordings. The demurrers contradict
18 the first group of allegations and ignore the second. The demurrers state:¹¹

19 Fingerman claims he telephoned Capital One. He alleges that he was told by
20 a Capital One representative that the conversation would be recorded or
21 monitored. He alleges although he protested the recording and monitoring of
22 his telephone calls, he continued to converse with the Capital One agent. He
23 alleges that he spoke to Capital One four more times, and on each occasion
24 he was essentially told the same thing. On each occasion, he was told the

24 ⁴ See e.g., *Shulman v. Group W Productions Inc.*, 18 Cal. 4th 200, 234–35 (2000) (citing *Warden v. Kahn*, 99 Cal. App.
3d 805, 813–14 (1979)); *Coulter v. Bank of America National Trust & Savings Assn.*, 28 Cal. App. 4th 923 (1994)

25 ⁵ *Friddle v. Epstein*, 16 Cal. App. 4th 1649, 1660–61 (1993) (discussing Cal. Penal Code § 637.2(c))

26 ⁶ *Friddle*, 16 Cal. App. 4th 1649, 1660–61 (1993)

27 ⁷ Cal. Penal Code § 637.2(a); *Friddle*, 16 Cal. App. 4th at 1660 n 9 (discussing the legislature's intent in the Invasion of
Privacy Act and citing *Van Boven*, 57 Cal. L. Rev. at 1252); see also *Ribas v. Clark*, 38 Cal. 3d 355, 364–65 (1985)

28 ⁸ *Coulter*, 28 Cal. App. 4th at 935; *CashCall Inc. v. Superior Court*, 159 Cal. App. 4th 273, 293 n 11 (2008)

⁹ *Lieberman v. KCOP Television Inc.*, 110 Cal. App. 4th 156, 167 (2003)

¹⁰ Cal. Penal Code § 632(a)

¹¹ Capital One's Demurrer Memorandum of Points & Authorities at 1:11–17. Since the two demurrers are essentially
identical, all citations to the demurrers refer to the page and line numbers in Capital One's demurrer.

1 conversation would be recorded or monitored, and, on each occasion, he
2 continued to speak to a Capital One representative after being so advised.

3 These factual assertions in the demurrer ignore the central facts of the complaint. As the
4 complaint alleges, the defendants *requested consent* to record or monitor four calls, and *Plaintiff*
5 *promptly objected* each time. (In the fifth call, consent was not requested.) The defendants also
6 *promised not to record any calls* after Plaintiff objected.

7 The complaint alleges the defendants' requests and Plaintiff's objections as follows:

- 8 • May 4: "During this call, Capital One requested consent to record or monitor the call.
9 Plaintiff promptly denied consent." (§ 14)
- 10 • May 15: "Plaintiff initiated two telephone calls to Capital One. ... During both calls,
11 Capital One requested consent to record or monitor the call. Both times, Plaintiff
12 promptly denied consent." (§ 15)
- 13 • June 2: "Capital One requested consent to record or monitor the call. Plaintiff
14 promptly denied consent." (§ 22)
- 15 • September 23: "Neither Capital One nor Kaufmann requested consent to record or
16 monitor this call." (§ 30)

17 These allegations demonstrate that Plaintiff never consented to have his phone calls recorded
18 or monitored by the defendants. The complaint also goes further, detailing the defendants' promises
19 not to make recordings. California law has long recognized, "He who has fraudulently dispossessed
20 himself of a thing may be treated as if he still had possession."¹² The defendants cannot fraudulently
21 divest Plaintiff of his privacy by falsely promising to respect it. Thus, Plaintiff must be treated as if
22 his privacy were still intact.

23 The complaint details the defendants' promises, which were confirmed in writing:

24 17. During the second May 15 call (with Vince Jenness [a Capital One
25 agent]), Plaintiff expressed annoyance that Capital One had requested
26 consent to record or monitor multiple calls. Vince Jenness represented to
27 Plaintiff that Capital One honors all requests not to record or monitor calls.
28 Vince Jenness represented that if Plaintiff confirmed his nonconsent in
writing, Capital One would honor that nonconsent for all future calls without
the need for Plaintiff to expressly deny consent in each individual call.
Plaintiff understood these representations by Vince Jenness to be a binding
commitment by Capital One that it would never record or monitor any phone
calls with Plaintiff without Plaintiff's consent.

¹² Cal. Civ. Code § 3518 (enacted 1872)

1 18. Acting on the representations described in paragraph 17 of this
2 Complaint, Plaintiff wrote a letter to Capital One that same day. That letter
3 included the following two paragraphs:

4 During my second telephone call with Capital One
5 Healthcare Finance today, you requested consent to record
6 our call. I informed you immediately that I do not consent to
7 recording of my calls. You requested that I confirm my
8 nonconsent in writing and represented that this written
9 confirmation will be effective to bar recording of all future
10 calls I have with Capital One Healthcare Finance. Thus, I
11 hereby confirm in writing that I do not consent to recording
12 of my calls. Please note that (1) I withhold my consent
13 under California law, and (2) Capital One Healthcare
14 Finance has violated California law if it has recorded any of
15 my calls, including the telephone calls referenced in this
16 letter.

17 Please do not hesitate to contact me if you have any
18 questions. Please contact me immediately if anything in this
19 letter differs from your understanding.

20 22. During the June 2 call, Plaintiff spoke with two Capital One
21 agents, the second of whom was Kaufmann. Before Kaufmann joined the
22 call, Capital One requested consent to record or monitor the call. Plaintiff
23 promptly denied consent. Plaintiff reminded the first Capital One agent that
24 Capital One had promised not to record or monitor any calls with Plaintiff
25 and that Plaintiff had confirmed his nonconsent in writing. The first agent
26 indicated that he personally lacked authority to guarantee that his calls would
27 not be recorded or monitored. The first agent then represented that
28 supervisors did have such authority. The first agent then offered to transfer
the call to a supervisor so that the call could continue with assurance that it
would not be recorded or monitored. Plaintiff agreed to continue the call
with a supervisor on that basis. The first agent then transferred the call to
Kaufmann.

29 24. [...] Kaufmann did not, however, suggest during the June 2 call
30 that any of the following was incorrect: (1) the representation by Vince
31 Jenness that Capital One honors all requests not to record or monitor calls,
32 (2) the representation by Vince Jenness that Capital One would refrain from
33 recording or monitoring all calls with Plaintiff if nonconsent is confirmed in
34 writing, and (3) the representation by the first agent who answered the June 2
35 call that supervisors (such as Kaufmann) have the authority to guarantee that
36 their calls are not recorded or monitored.

37 25. On June 3, 2008, Plaintiff wrote and faxed a letter to Kaufmann,
38 confirming their discussion during the June 2 call. At Kaufmann's request,
this June 3 fax included a copy of Plaintiff's May 15 letter (in addition to the
June 3 letter). The June 3 letter included the following two paragraphs:

1 Fifth, I confirmed that I do not consent to recording of my
2 telephone calls by COHF. This is the fourth time I have
3 expressed this nonconsent. I was told yesterday by COHF's
4 initial agent who answered my call (and who subsequently
5 transferred me to you) that he lacks the ability to control
6 what telephone calls are recorded. He transferred me to you
7 specifically so that we could converse without the call being
8 recorded. We continued our call with your knowledge that I
9 do not consent to having my calls with COHF recorded.
10 You provided your direct telephone number and extension
11 (877/762-8000 x30240) so that we can converse in the future
12 on that basis.

13 Please do not hesitate to contact me if you have any
14 questions. Please contact me immediately if anything in this
15 letter differs from your understanding.

16 26. Neither Kaufmann nor Capital One has ever suggested to Plaintiff
17 that any portion of the above-quoted paragraphs is incorrect. Before
18 September 23, 2008, Kaufmann never suggested that the portions of the May
19 15 letter quoted in paragraph 18 of this Complaint were incorrect. Plaintiff
20 relied on these representations until September 23, 2008 by, among other
21 things, continuing to communicate with Capital One via telephone and by
22 directing subsequent communications with Capital One to Kaufmann
23 personally.

24 These allegations detail Plaintiff's efforts to ensure that his privacy rights were respected and
25 the defendants' promises to respect Plaintiff's privacy. The demurrers' snide suggestion that Plaintiff
26 is merely "feigning outrage" in this lawsuit is belied by his documented vigilance concerning his
27 privacy from the inception of his relationship with Capital One.

28 Although the defendants apparently had a strong wish to record Plaintiff's calls, the law gives
Plaintiff the right to avoid being recorded. The defendants acknowledged Plaintiff's privacy and
promised to respect it. They cannot fraudulently divest Plaintiff of his privacy, then pretend that his
privacy was voluntarily relinquished. They cannot demur by ignoring some facts and inventing
others. Since the demurrers rely on contradicting the complaint, they must be overruled.

(2) Even if true, the demurrers' "facts" still prove Plaintiff's nonconsent

The demurrers rely heavily on the "fact" that the defendants communicated their wish to
record Plaintiff's phone calls. However, they also acknowledge that Plaintiff promptly objected.
Even if the defendants' "fact" were true and stood alone (without considering the defendants' fraud),

1 the Invasion of Privacy Act would still not permit their recordings.

2 Section 632 prohibits recording of calls without *consent* from *all* parties. One party may not
3 record a call merely by stating its wish to do so. Communicating such a wish does not negate a
4 prompt and clear objection by the nonconsenting party. One court has suggested in *dicta* that the
5 wishing party may infer consent if it communicates its wish to make a recording — if no objection is
6 made.¹³ However, courts that squarely addressed the issue of implied consent have held that a
7 prompt objection negates any implication of consent.¹⁴ In *Nissan Motor Co. Ltd. v. Nissan Computer*
8 *Corp.*, the court held that the wishing party does not avoid the Invasion of Privacy Act simply by
9 putting the nonconsenting party "on notice" that his calls will be recorded.¹⁵ The nonconsenting
10 party "maintained an objectively reasonable expectation of privacy regarding these conversations" by
11 making a prompt, explicit objection.¹⁶

12 The defendants admit that Plaintiff "protested the recording and monitoring of his telephone
13 calls."¹⁷ They must admit this, since they illegally recorded Plaintiff's objections along with the rest
14 of each call. This admission confirms that they heard and understood Plaintiff's objections — but
15 willfully violated the Invasion of Privacy Act anyway.

16 **C. The demurrers rely on imaginary law**

17 (1) The demurrers rely on obsolete caselaw, which the Supreme Court expressly overruled

18 In addition to imaginary facts, the demurrers rely on imaginary law. They dismiss the
19 confidential nature of each illegally-recorded phone call by relying on caselaw that the Supreme
20 Court has expressly overruled.

21 The Invasion of Privacy Act protects "confidential communications" from recording.¹⁸ The
22 complaint alleges that each call was confidential, explaining that "Plaintiff had a reasonable
23 expectation that no person would record any of these calls. Plaintiff had a reasonable expectation that
24 no person other than the individual persons who were direct participants in each call would overhear
25

26 ¹³ *Kearney*, 39 Cal. 4th at 117–18

27 ¹⁴ *Nissan Motor Co. Ltd. v. Nissan Computer Corp.*, 180 F. Supp. 2d 1089 (C.D. Cal. 2002)

28 ¹⁵ *Nissan*, 180 F. Supp. 2d at 1094

¹⁶ *Nissan*, 180 F. Supp. 2d at 1094–95

¹⁷ Demurrer Memorandum of Points & Authorities at 1:12–13

¹⁸ Cal. Penal Code § 632(a)

1 each call."¹⁹ Relying solely on *Deteresa v. American Broadcasting Companies*,²⁰ the demurrers
2 wrongly suggest that this is insufficient to establish confidentiality, because it does not disclose the
3 substantive contents of each conversation. However, that 1997 decision of the U.S. Court of Appeals
4 for the Ninth Circuit was expressly overruled by the Supreme Court in 2002.²¹

5 Before 2002, two conflicting lines of cases emerged in the California Courts of Appeal,
6 construing "confidential communication" in different ways. The two leading cases with opposing
7 views were *O'Laskey v. Sortino* and *Frio v. Superior Court*.²² In 1997, the Ninth Circuit reviewed
8 these cases in *Deteresa v. American Broadcasting Companies*.²³ The Ninth Circuit predicted that the
9 California Supreme Court would resolve the split in the authorities by adopting the narrow *O'Laskey*
10 rule, rather than the more inclusive *Frio* rule.²⁴ The *Deteresa* court therefore followed *O'Laskey*,
11 which required for a communication to be confidential: (1) the subject matter of the conversation
12 must be objectively confidential and (2) the plaintiff must have a reasonable expectation that the
13 defendant would not repeat the contents of a conversation to third parties. Thus, the demurrers rely
14 on *Deteresa* to suggest that the complaint must allege the substantive contents of each conversation.²⁵

15 In 2002, in *Flanagan v. Flanagan*, the Supreme Court rejected the narrow *O'Laskey/Deteresa*
16 rule and adopted the more inclusive *Frio* rule.²⁶ It held that a conversation is "confidential" under
17 § 632 if the plaintiff has an objectively reasonable belief that it is not being overheard or recorded.²⁷
18 The contents of the discussion are irrelevant.²⁸ The Court noted that a risk always exists that one
19 party might later disclose the contents of a conversation to others. But "a substantial distinction has
20 been recognized between the secondhand repetition of the contents of a conversation and its
21 simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a
22 mechanical device."²⁹ The Court concluded: "By focusing on simultaneous dissemination, not
23

24 ¹⁹ Complaint at ¶ 10; see also ¶¶ 14, 15, 21, 24, 30

25 ²⁰ *Deteresa v. American Broadcasting Companies Inc.*, 121 F.3d 460 (9th Cir. 1997)

26 ²¹ *Flanagan*, 27 Cal. 4th 766

27 ²² *O'Laskey v. Sortino*, 224 Cal. App. 3d 241 (1990); *Frio v. Superior Court*, 203 Cal. App. 3d 1480 (1988)

28 ²³ *Deteresa v. American Broadcasting Companies Inc.*, 121 F.3d 460 (9th Cir. 1997)

²⁴ *Deteresa*, 121 F.3d at 464

²⁵ Demurrer Memorandum of Points & Authorities at 5:23 – 6:2

²⁶ *Flanagan*, 27 Cal. 4th 766

²⁷ *Flanagan*, 27 Cal. 4th at 775

²⁸ *Flanagan*, 27 Cal. 4th at 775

²⁹ *Flanagan*, 27 Cal. 4th at 775 (quoting *Ribas*, 38 Cal. 3d at 360–61)

1 secondhand repetition, the *Frio* definition of 'confidential communication' that we here endorse better
2 fulfills the legislative purpose of the Privacy Act by giving greater protection to privacy interests than
3 does the *O'Laskey* standard. The latter protects against recording or eavesdropping only if a party
4 seeks to keep the *content* of the conversation secret."³⁰

5 The complaint alleges for each phone call what the Supreme Court required in *Flanagan*:
6 "Plaintiff had a reasonable expectation that no person would record any of these calls. Plaintiff had a
7 reasonable expectation that no person other than the individual persons who were direct participants
8 in each call would overhear each call."³¹ No more detail is required. But the complaint also goes
9 further, detailing how the defendants promised not to record the calls, showing that Plaintiff's beliefs
10 were known to the defendants and reasonable. Accordingly, the demurrers must be overruled.

11 (2) Confidentiality need not be pled with specificity

12 The complaint alleges what *Flanagan* requires: "Plaintiff had a reasonable expectation that no
13 person would record any of these calls. Plaintiff had a reasonable expectation that no person other
14 than the individual persons who were direct participants in each call would overhear each call."³²
15 The demurrers suggest that these allegations are insufficient because they lack details such as where
16 Plaintiff was physically located when each call occurred. However, they cite no authority requiring
17 claims under the Invasion of Privacy Act to be pled with such specificity. Such specificity is
18 ordinarily required only for few claims, such as fraud.

19 Accordingly, the demurrers must be overruled. However, if they are sustained, the court must
20 grant leave to amend, to allege the following additional facts. The above allegations demonstrate that
21 no person should have been able to record or overhear any of the calls on Capital One's end. If the
22 court would like the complaint to include additional details about the circumstances of each call on
23 the Plaintiff's end, Plaintiff will amend the complaint to (truthfully) allege that he participated in each
24 call in his office or home, and that no other persons were present at the time of each call.

25 **II. Fraud**

26 **A. The demurrers ignore the detailed allegations of harm and causation**

27 _____
28 ³⁰ *Flanagan*, 27 Cal. 4th at 775 (citations and quotation marks omitted; emphasis in the original)

³¹ Complaint at ¶ 10

³² Complaint at ¶ 10

1 Counts 2–5 of the complaint assert four species of fraud. Again, the demurrers rely on
2 imaginary facts and contradict the complaint. They ignore the most detailed allegations of causation
3 and harm, then argue that the "unignored" portions of the complaint lack specificity. They do not
4 argue that any other element of fraud is not adequately pled.

5 Each fraud count incorporates by reference paragraphs 1–33 of the complaint. Those earlier
6 paragraphs detail the harm to Plaintiff's privacy and dignity: the defendants illegally recorded
7 Plaintiff's telephone calls in which they discussed Plaintiff's private financial information.³³ They
8 also clearly state the causal link between the defendants' false representations and the harm: if the
9 defendants had not promised to refrain from making recordings, Plaintiff would have insisted that all
10 communications occur in writing.³⁴ Those promises were the sole reason why subsequent calls
11 occurred: when the fraud was revealed, Plaintiff immediately insisted that all future communications
12 occur in writing.³⁵

13 Each fraud count incorporates these specific allegations, then contains a purely summarizing
14 allegation that Plaintiff was harmed.³⁶ The demurrers ignore the detailed allegations, then pretend
15 that the "unignored" summarizing allegations exist alone. They must therefore be overruled.

16 **B. The demurrers ignore a century of precedent holding that fraud does not require loss of**
17 **money or property**

18 A fraud claim need not allege loss of money or property. The demurrers' argument to the
19 contrary ignores nearly a century of California precedent.

20 "Ordinarily, the damage [for fraud] is pecuniary or property loss", since "the great majority of
21 fraud cases involve transfer of property or payment of money in reliance on the misrepresentation."³⁷
22 However, loss of money or property is not required.³⁸ Since at least 1912, California courts have
23 sustained fraud claims where the plaintiff's harm was incurred to a legally-protected interest but no
24 money or property was lost.

25 In 1912, the Supreme Court held in *Work v. Campbell* that a wife stated a valid fraud claim

26 ³³ Complaint at ¶¶ 10, 14, 15, 21, 24, 30

27 ³⁴ Complaint at ¶¶ 10, 26

28 ³⁵ Complaint at ¶¶ 31

³⁶ Complaint at ¶¶ 44, 53, 66, 76

³⁷ 5 Witkin, *Summary of California Law*, 10th ed. (2005) ("Witkin") at § 817 (citation omitted)

³⁸ Witkin at § 817

1 "against a third person who, by false representations, induced plaintiff to mistreat her husband,
2 causing them to separate."³⁹ For 97 years since *Work v. Campbell*, California courts have reaffirmed
3 that a fraud claim may lie where any legally-cognizable interest is harmed. As recently as 2005, the
4 court in *Maffei v. Allstate Ins. Co.*, sustained a fraud claim where the only alleged harm was to the
5 plaintiff's reputation and integrity.⁴⁰ The *Maffei* court rejected the defendant's argument that fraud
6 requires monetary harm and sustained the plaintiffs' "fraud allegations for damage to their reputation
7 and integrity," even though this harm has no direct monetary value.⁴¹ Other jurisdictions also follow
8 the rule that the law of fraud protects any legally-protected interest and does not require loss of
9 money or property.⁴²

10 In all fraud claims (including those involving money loss), the causation requirement protects
11 defendants from allegations that are far removed from the harm actually suffered. The court in
12 *O'Hara v. Western Seven Trees Corp.* explained:⁴³

13 A deceit action more commonly seeks to recover pecuniary loss. But, there is
14 no essential reason to prevent a deceit action from being maintained, for
15 intentional misstatements at least, where other types of interests are invaded;
16 and there are a few cases in which it has been held to lie for personal injuries.
17 "One who willfully deceives another with intent to induce him to alter his
18 position to his injury or risk, is liable for any damage which he thereby
19 suffers." (Civ. Code, § 1709.) The statute does not limit recovery to
20 pecuniary loss. Accordingly, the court in *Work v. Campbell* held that a
21 woman could maintain an action for deceit against a defendant whose
22 intentional misrepresentations caused the plaintiff's husband to desert her. ...
23 The harm suffered must be one which the defendant must reasonably have
24 contemplated when making fraudulent statements.

25 In this case, the complaint details Plaintiff's vigilance about his privacy from the inception of
26 his relationship with Capital One and how the defendants falsely represented that they respected, and
27 would continue to respect, Plaintiff's privacy. Those promises were the sole reason why subsequent
28 calls occurred, since Plaintiff would have otherwise insisted that all communications occur in
writing.⁴⁴ When the fraud was revealed, Plaintiff did promptly insist that all future communications

³⁹ *Work v. Campbell*, 164 Cal. 343 (1912), discussed in Witkin at § 817

⁴⁰ *Maffei v. Allstate Ins. Co.*, 2006 U.S. Dist. Lexis 66726 (E.D. Cal. 2006)

⁴¹ *Maffei*, 2006 U.S. Dist. Lexis 66726, at 9–12

⁴² See e.g., *Hartmann v. Prudential Ins. Co. of America*, 9 F.3d 1207, 1213–14 (7th Cir. 1993) (collecting cases)

⁴³ *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 805 (1977) (some quotation marks and citations omitted)

⁴⁴ Complaint at ¶¶ 10, 26

1 occur in writing.⁴⁵ The defendants' illegal recordings violated the very privacy they had promised to
2 respect, so they "must reasonably have contemplated" the harm to Plaintiff's privacy "when making
3 [their] fraudulent statements."⁴⁶ This level of detail satisfies the requirement that harm and causation
4 be pled with particularity, so the demurrer must be overruled.

5 **C. The court should take judicial notice of monetary harm already suffered by Plaintiff**

6 Even if money loss were required to state a fraud claim, the court should take judicial notice
7 of certain money losses already incurred by Plaintiff and overrule the demurrers. The demurrers
8 acknowledge that a court may consider judicially-noticed facts at the demurrer stage.⁴⁷

9 At least one California court has already considered and rejected the demurrers' whimsical
10 suggestion that "it is unimaginable that Fingerman suffered any resulting harm whatsoever" merely
11 because the defendants are not accused of using or disseminating their illegal recordings.⁴⁸ In
12 *Lieberman v. KCOP Television Inc.*, the plaintiff sued a television station and its reporter for invasion
13 of privacy for surreptitiously making and then broadcasting recordings of his conversations.⁴⁹ The
14 court thoroughly examined the various kinds of harm that Mr. Lieberman alleged. It concluded that
15 the making of an illegal recording, standing alone, can give rise to money losses — even if that
16 illegal recording is never disseminated or used. The *Lieberman* court held: "A victim of a
17 surreptitious recording may incur legal expenses in attempting to recover the recording."⁵⁰

18 In this case, Plaintiff has already incurred legal expenses in his attempts to recover the illegal
19 recordings made by Capital One and Mr. Kaufmann. Plaintiff filed this action to vindicate his
20 privacy rights by recovering damages and injunctive relief. As discussed above, the defendants'
21 fraudulent representations caused Plaintiff to change his position to a place where the defendants
22 could invade his privacy. Since the fraud was a proximate cause of several of the invasions,
23 Plaintiff's expenditures as a result of the invasions also arise from the fraud.

24 The court can (and should) take judicial notice of its own fee schedule and records, which
25

26 ⁴⁵ Complaint at ¶¶ 31

27 ⁴⁶ *O'Hara*, 75 Cal. App. 3d at 805

28 ⁴⁷ Demurrer Memorandum of Points & Authorities at 3:9–18 (quoting from *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 605 (1981))

⁴⁸ Demurrer Memorandum of Points & Authorities at 4:22–23

⁴⁹ *Lieberman v. KCOP Television Inc.*, 110 Cal. App. 4th 156 (2003)

⁵⁰ *Lieberman*, 110 Cal. App. 4th at 167

1 reflect that Plaintiff paid a fee of \$320 to file the complaint. A copy of Plaintiff's receipt for this fee
2 accompanies this brief, as Exhibit 1. Thus, even if money loss were required to state a fraud claim,
3 the court should take judicial notice of this portion of Plaintiff's money damages to satisfy this
4 requirement. The full extent of such damages are not ascertainable at this stage of litigation, so the
5 full extent need not be pled to survive demurrer — only the existence and type of damages must be
6 pled with specificity to satisfy the heightened pleading requirements for fraud. Since the court should
7 take judicial notice that it received Plaintiff's filing fee, the demurrer must be overruled.

8 **D. If the demurrer is sustained, the court must grant leave to amend the fraud claims**

9 If the court sustains the demurrers to the fraud counts, it must allow leave to amend. On
10 amendment, Plaintiff will allege with greater detail the legal expenses he has already incurred and
11 will continue to incur as a result of the defendants' conduct. On amendment, Plaintiff can also allege
12 other monetary losses. For example, the defendants' dishonest acts (including some acts not alleged
13 in the initial complaint) caused Plaintiff to suspect broader wrongdoing. As a result of those acts,
14 Plaintiff was forced to act quickly to protect himself against likely future losses that he would incur
15 as a result of the defendants' conduct. Plaintiff was forced to pay off the balance of his Capital One
16 loan before it became due, in order to sever his relationship with Capital One. To make this early
17 payment, Plaintiff had to use funds that had been dedicated to other purposes — and therefore lost the
18 investment income from those funds as a direct result. Accordingly, if the demurrer is sustained, the
19 court must grant leave to amend to allege the above monetary losses.

20 **Conclusion**

21 The demurrers rely on imaginary facts and law. They contradict the complaint, rely on
22 caselaw overruled by the Supreme Court, and ignore a century of California precedent. Count 1 of
23 the complaint properly alleges that the defendants surreptitiously recorded Plaintiff's confidential
24 conversations, in violation of the Invasion of Privacy Act. Counts 2–5 properly allege four species of
25 fraud with great detail. Since each count of the complaint states facts sufficient to constitute a cause
26 of action, the demurrers must be overruled.

27 Dated: January 23, 2009

28 _____
Dan Fingerma n, Plaintiff