

Case No. 70475

In the Supreme Court of Nevada

DITECH FINANCIAL LLC, f/k/a GREEN
TREE SERVICING, LLC,

Appellant,

vs.

SANFORD BUCKLES, on behalf of
himself and others similarly
situated,

Respondent.

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CERTIFIED QUESTION

from the United States District Court, District of Nevada
District Court Case No. 2:15-cv-01581-GMN-CWH

APPELLANT'S APPENDIX

PGS. 1-75

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19 **UNITED STATES DISTRICT COURT**
20 **DISTRICT OF NEVADA**

21 **SANFORD BUCKLES on behalf**
22 **of himself and others similarly**
23 **situated,**

24 Plaintiff,

25 v.

26 **GREEN TREE SERVICING,**
27 **LLC, and WALTER**
28 **INVESTMENT MANAGEMENT**
CORPORATION

Defendants.

Case No.: 2:15-cv-01581-GMN-CWH

FIRST AMENDED COMPLAINT
FOR CLASS ACTION COMPLAINT
FOR DAMAGES PURSUANT TO
NRS 200.600 ET SEQ.

JURY TRIAL DEMANDED

INTRODUCTION

- 1
2 1. SANFORD BUCKLES (“Plaintiff”) brings this class action for damages,
3 injunctive relief, and any other available legal or equitable remedies,
4 resulting from the illegal actions of GREEN TREE SERVICING, LLC
5 (“Green Tree”) and WALTER INVESTMENT MANAGEMENT
6 CORPORATION (“Walter Investment”), jointly as “Defendants” in
7 willfully employing and/or causing to be employed certain recording
8 equipment in order to record to the telephone conversations of Plaintiff
9 without the knowledge or consent of Plaintiff, in violation of Nevada
10 Revised Statute (“NRS”) 200.600 *et seq.*, thereby invading Plaintiff’s
11 privacy. Plaintiff alleges as follows upon personal knowledge as to his own
12 acts and experiences, and, as to all other matters, upon information and
13 belief, including the investigation conducted by his attorneys.
14
15 2. NRS 200.620 prohibits one party to a telephone call from intentionally
16 recording the same conversation without the knowledge or consent of the
17 other while the person being recorded is on a telephone. There is no
18 requirement under NRS 200.620 that the communication be confidential,
19 only that it not be for public use. Plaintiff alleges that Defendants continue
20 to violate NRS 200.620 by impermissibly recording its telephone
21 conversations with Nevada residents.
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- 1 3. While many violations are described below with specificity, this Complaint
2 alleges violations of the statute cited in its entirety.
- 3 4. Unless otherwise stated, all the conduct engaged in by Defendants took
4 place in Nevada.
- 5
- 6 5. Any violations by Defendants were knowing, willful, and intentional, and
7 Defendants did not maintain procedures reasonably adapted to avoid any
8 such violation.
- 9
- 10 6. Unless otherwise indicated, the use of Defendants' name in this Complaint
11 includes all agents, employees, officers, members, directors, heirs,
12 successors, assigns, principals, trustees, sureties, subrogees, representatives,
13 and insurers of Defendants' named.
- 14

15 **JURISDICTION AND VENUE**

- 16 7. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff is a
17 resident of the state of Nevada, seeking relief on behalf of a class, which will
18 result in at least one class member belonging to a different state than that of
19 the Defendant. Green Tree is a Delaware Limited Liability Company with a
20 principal place of business in Minnesota. Green Tree is notably listed as a
21 foreign limited-liability company with the Nevada Secretary of State,
22 carrying Nevada Business ID "NV20031086723". Walter Investment has a
23 principal place of business in Florida. Plaintiff also seeks the greater of
24 statutory damages of \$1,000 per violation per day for the three year statute
25
26
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1 of limitations pursuant to NRS 200.690 and NRS 11.190, which, when
2 aggregated among a proposed class number in the tens of thousands, exceeds
3 the \$5,000,000 threshold for federal court jurisdiction. Therefore, both
4 diversity jurisdiction and the damages threshold under the Class Action
5 Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

- 6
7 8. Venue is proper in the United States District Court for the District of Nevada
8 pursuant to 28 U.S.C. § 1391(b) because Plaintiff is a resident of Clark
9 County, the State of Nevada and Defendants are subject to personal
10 jurisdiction in the County of Clark, State of Nevada as they conduct business
11 there, and the conduct giving rise to this action occurred in Nevada. 28
12 U.S.C. § 1391(b)(2). Further, Green Tree is registered with the Nevada
13 Secretary of State with a registered agent of service in Las Vegas, Nevada.
14
15

16
17 **PARTIES**

- 18 9. Plaintiff is, and at all times mentioned herein was, a natural person residing
19 in the County of Clark, State of Nevada.
20
21 10. Green Tree is, and at all times mentioned herein was, a limited liability
22 corporation operating in Nevada, whose primary address is in St. Paul,
23 Minnesota. Green Tree is a wholly owned subsidiary of Walter Investment
24 Corporation, whose principal place of business is in Florida.
25
26 11. Green Tree is a mortgage servicer and debt collector, offering post-default
27 debt collection services on debts allegedly owed by consumers.
28

1 12. Green Tree has a policy and practice of recording telephone conversations
2 with the public, including Nevada residents. Green Tree's employees and
3 agents are directed, trained and instructed to, and do, record, telephone
4 conversations with the public, including Nevada residents.
5

6 13. Green Tree was acting as the agent for Walter Investment, the principal, at
7 all times relevant. In this capacity, Green Tree was authorized to act on
8 behalf of Walter Investment.
9

10 14. At a minimum, Green Tree maintained apparent authority to act on behalf of
11 Walter Investment, since Plaintiff reasonably believed that an agency
12 relationship existed between Defendants, and this reasonable belief was
13 traceable to a manifestation of Defendants, whose websites both clarify their
14 relationship.
15

16 15. Walter Investment knowingly accepted the benefits of the violations alleged
17 herein by receiving compensation from consumers from whom Walter
18 Investment's agents, Green Tree serviced loans and collected debts on behalf
19 of Walter Investments.
20
21

22 **FACTUAL ALLEGATIONS**

23 16. Beginning in and around early 2013, Green Tree had numerous telephone
24 conversations with Plaintiff regarding a home loan modification and debt
25 collection.
26
27
28

1 17. Over a span of months in 2013 and continuing into 2014, Plaintiff and Green
2 Tree discussed a home loan modification for Plaintiff's home in Las Vegas.
3 During this time, Plaintiff and Green Tree had at least five (5) telephone
4 communications.
5

6 18. At no time during these telephonic communications did Green Tree advise
7 Plaintiff that Green Tree was recording the conversation.
8

9 19. At no time during any telephonic conversations did Plaintiff give consent for
10 the telephone call with Green Tree to be monitored, recorded and/or
11 eavesdropped on.
12

13 20. Plaintiff had no reasonable expectation that any part of the telephone
14 conversations with Green Tree would be monitored, recorded and/or
15 eavesdropped upon because Green Tree simply did not disclose that the calls
16 were recorded, despite the fact that recording every telephone call is Green
17 Tree's policy.
18

19 21. Plaintiff did not hear intermittent beeps during the call(s) that may have
20 alerted Plaintiff to the fact Green Tree was recording the call; nor did Green
21 Tree cause intermittent beeps to be heard, which could have altered the
22 Plaintiff to the calls being recorded.
23

24 22. Plaintiff was shocked to discover Green Tree recorded, monitored and/or
25 eavesdropped upon the calls without Plaintiff's knowledge or consent.
26
27
28

1 23. During these conversations with Green Tree, Plaintiff discussed highly
2 personal and private information that Plaintiff had not openly discussed with
3 others, including Plaintiff's financial status.

4
5 24. Plaintiff had no reasonable expectation that Plaintiff's telephone
6 conversations with Green Tree would be recorded due to the private subject
7 matter being discussed.

8
9 25. During the relevant time period, Green Tree had a policy and a practice of
10 recording and/or monitoring telephone conversations with consumers.
11 Green Tree's employees and agents are directed, trained and instructed to,
12 and do, record, monitor, and/or eavesdrop upon telephone conversations
13 with the public, including Plaintiff and other Nevada residents.

14
15 26. During the relevant time period, all of Green Tree's calls to the public,
16 including those made to Nevada residents, were recorded, monitored, and/or
17 eavesdropped upon without the knowledge or consent of the public,
18 including Plaintiff and other Nevada residents.

19
20 27. During the relevant time period, all of Green Tree's outbound calls to the
21 public, including those made to Nevada residents, were recorded without the
22 knowledge or consent of the public, including Plaintiff and other Nevada
23 residents.
24
25
26
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28

1 28. Green Tree's conduct alleged herein constitutes violations of the right to
2 privacy of the public, including Plaintiff and other Nevada residents, and
3 NRS 200 *et seq.*
4

5 29. Green Tree concealed from Plaintiff and similarly situated Nevada residents
6 that Green Tree was recording the telephone calls between itself and
7 Plaintiff and other similarly situated Nevada, which calls were initiated by
8 Green Tree.
9

10 30. Green Tree concealed the fact that it was recording the aforementioned
11 phone call/s to create the false impression that calls were not being recorded.
12 Green Tree provided no warning or other disclaimers that the phone calls
13 were, or even may, be recorded.
14

15 31. Green Tree recorded the conversations with Plaintiff without obtaining
16 Plaintiff's consent, causing harm and damage to Plaintiff. At no time during
17 the telephone calls did Plaintiff give consent, whether express or implied, for
18 the telephone conversations to be recorded.
19

20 32. Reasonable Nevada residents expect that their telephone communications
21 are not being recorded in the absence of a call recording advisement of some
22 kind at the outset of the telephone call/s.
23

24 33. The calls Green Tree made to Plaintiff were not for emergency purposes.
25

26 **ACCRUAL OF RIGHTS TO PRIVACY CLAIMS, CONTINUING**
27 **VIOLATION, EQUITABLE TOLLING, AND**
28 **FRAUDULENT CONCEALMENT**

1 34. Plaintiff did not discover, and could not discover through the exercise of
2 reasonable diligence, the fact that Green Tree was recording the phone calls
3 it made to Plaintiff and members of the Nevada Class without their
4 knowledge or consent.
5

6 35. Green Tree concealed from Plaintiff and members of the Nevada Class that
7 it was recording the telephone calls between itself and Plaintiff or other
8 members of the Nevada Class.
9

10 36. Green Tree concealed the fact that it was recording the aforementioned
11 phone calls to create the false impression in the minds of Plaintiff and
12 members of the Nevada Class that they were not being recorded. At the
13 outset of the phone calls there was no warning that the phone calls were, or
14 even may, be recorded. Such warnings are ubiquitous today.
15
16

17 37. Plaintiff is justified in not bringing the claim earlier based on Green Tree's
18 failure to inform Plaintiff and other members of the Nevada Class that the
19 phone calls were being recorded as Plaintiff and his counsel were unaware
20 that Green Tree's recorded telephonic communications with Plaintiff until
21 June 2015.
22

23
24 **CLASS ALLEGATIONS**

25 38. Plaintiff brings this action on behalf of himself and on behalf of all others
26 similarly situated ("The Class").
27
28

1 39. Plaintiff represents, and is a member of, “The Class” defined as follows:

2 “All persons in Nevada whose inbound and outbound telephone
3 conversations were monitored, recorded, and/or eavesdropped upon without
4 their consent by Defendants within three (3) years prior to the filing of the
5 original Complaint in this action.”
6

7 40. Defendants, and their employees and agents are excluded from The Class.

8 Plaintiff does not know the number of members in The Class, but believes
9 this number to be in the tens of thousands, if not more. Thus, this matter
10 should be certified as a Class action to assist in the expeditious litigation of
11 this matter.
12

13 41. Plaintiff reserves the right to expand The Class definition to seek recovery
14 on behalf of additional persons as warranted as facts are learned in further
15 investigation and discovery.
16

17 42. The joinder of The Class members is impractical and the disposition of their
18 claims in the Class action will provide substantial benefits both to the parties
19 and to the Court. The Class can be identified through Defendants’ records.
20

21 43. There is a well-defined community of interest in the questions of law and
22 fact involved affecting the parties to be represented. The questions of law
23 and fact to The Class predominate over questions which may affect
24 individual Class members, including the following:
25
26
27
28

- a. Whether Defendants have or had a policy of recording, and/or eavesdropping upon and/or monitoring incoming and/or outgoing calls;
- b. Whether Defendants disclosed to callers and/or obtained their consent that their incoming and/or outgoing telephone conversations were being recorded, eavesdropped upon and/or monitored;
- c. Whether Defendants' policy of recording, eavesdropping upon and/or monitoring incoming and/or outgoing calls constituted a violation of NRS 200.600 *et seq.*;
- d. Whether Plaintiff and The Class was damaged thereby, and the extent of damages for such violations; and
- e. Whether Defendants should be enjoined from engaging in such conduct in the future.

44. Plaintiff is asserting claims that are typical of The Class because every other member of The Class, like Plaintiff, was exposed to virtually identical conduct and are entitled to the greater of statutory damages of \$100.00 per day or \$1,000 per violation pursuant to NRS 200.690.

45. Plaintiff will fairly and adequately represent and protect the interests of The Class in that Plaintiff has no interest adverse to any member of The Class. Plaintiff has retained counsel experienced in handling class action claims.

46. Plaintiff and the members of The Class have all suffered irreparable harm as a result of the Defendants' unlawful and wrongful conduct. Absent a class action, The Class will continue to face the potential for irreparable harm. In addition, these violations of law will be allowed to proceed without remedy

1 and Defendants will likely continue such illegal conduct. Because of the
2 size of the individual Class member's claims, few, if any, Class members
3 could afford to seek legal redress for the wrongs complained of herein.
4

5 47. A class action is a superior method for the fair and efficient adjudication of
6 this controversy. Class-wide damages are essential to induce Defendants to
7 comply with Nevada law. The interest of The Class members in individually
8 controlling the prosecution of separate claims against Defendants is small
9 because the maximum statutory damages in an individual action are
10 minimal. Management of these claims is likely to present significantly
11 fewer difficulties than those presented in many class claims.
12

13
14 48. Defendants have acted on grounds generally applicable to The Class, thereby
15 making appropriate final injunctive relief and corresponding declaratory
16 relief with respect to The Class as a whole.
17

18 **FIRST CAUSE OF ACTION**
19 **VIOLATION OF NEVADA REVISED STATUTE 200.620**

20 49. Plaintiff incorporates by reference all of the above paragraphs of this
21 Complaint as though fully stated herein.
22

23 50. NRS 200.620 prohibits one party to a telephone call from intentionally
24 recording the conversation without the knowledge or consent of the other
25 party. NRS 200.620 is violated the moment the recording is made without
26 the consent of all parties thereto, regardless of whether it is subsequently
27 disclosed that the telephone call was recorded. The only intent required by
28

1 NRS 200.620 is that the act of recording itself be done intentionally. There
2 is no requisite intent on behalf of the party doing the recording.

3 51. Defendants employed and/or caused to be employed certain eavesdropping,
4 recording, and listening equipment on the telephone lines of all employees,
5 officers, directors, and managers of Defendants. All these devices were
6 maintained and utilized to overhear, record, and listen to each and every
7 incoming and outgoing telephone conversation over said telephone lines.
8

9
10 52. This listening, recording, and/or eavesdropping equipment was used to
11 record, monitor, or listen to the telephone conversations between Defendants
12 and Plaintiff and/or the members of The Class, all in violation of NRS
13 200.620.
14

15 53. Based on the foregoing, Plaintiff and the members of The Class are entitled
16 to, and below herein do pray for, statutory remedies and damages, including
17 but not limited to, those set forth in NRS 200.690.
18

19 **PRAYER FOR RELIEF**

20 Plaintiff respectfully requests the Court grant Plaintiff the following relief
21 against Defendants:
22

23 **FIRST CAUSE OF ACTION**
24 **VIOLATION OF NRS 200.600 ET SEQ.**

- 25 • an award of the greater of statutory damages of \$100.00 per day or
26 \$1,000.00 to each named Plaintiff and member of the Class, pursuant to
27 NRS 200.690(1)(b)(1) against Defendants;
28

- an award of punitive damages pursuant to NRS 200.690(1)(b)(2), against Defendants;
- an award of costs of litigation and reasonable attorney's fees, pursuant to NRS 200.690(1)(b)(3), against Defendants; and
- any other relief the Court may deem just and proper.

TRIAL BY JURY

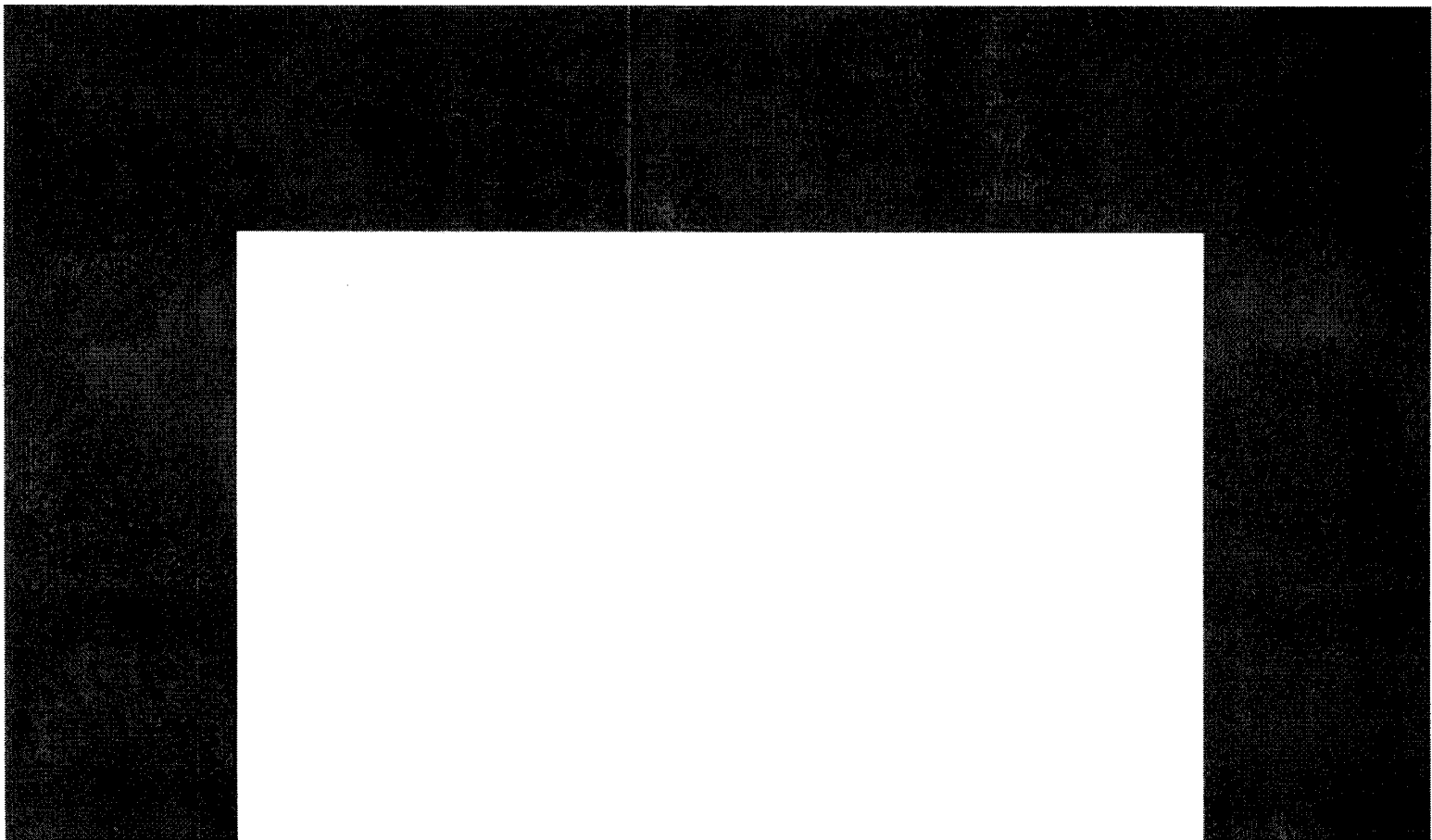
54. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Dated: November 7, 2014

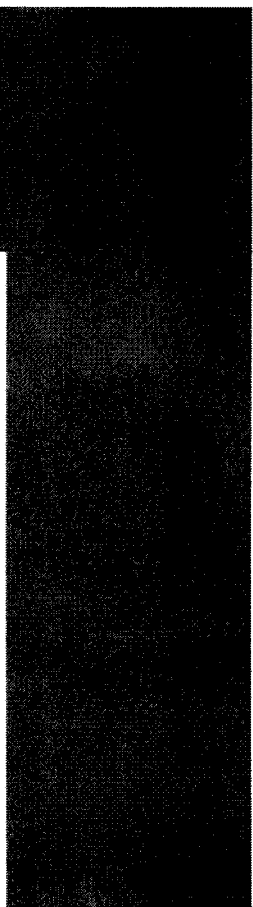
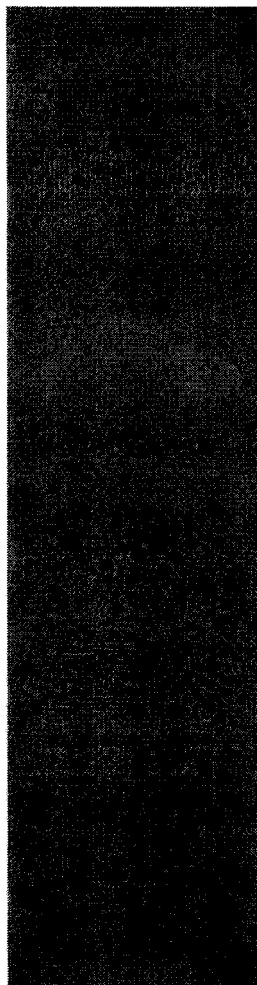
Respectfully submitted,

BY: /s/ DANNY J. HOREN

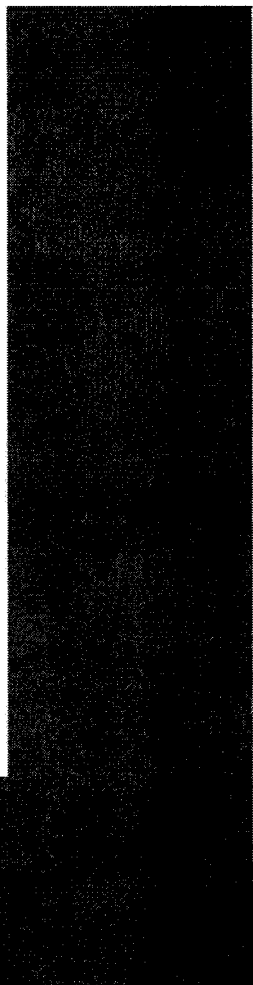
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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SANFORD BUCKLES on behalf of
himself and other similarly situated,

Plaintiff,

v.

GREEN TREE SERVICING, LLC, and
WALTER INVESTMENT
MANAGEMENT CORPORATION,

Defendants.

Case No.: 2:15-cv-01581-GMN-
(CWH)

**DEFENDANT DITECH FINANCIAL
LLC'S, fka GREEN TREE
SERVICING LLC, MOTION TO
DISMISS AMENDED COMPLAINT**

1 Ditech Financial LLC, formerly known as Green Tree Servicing LLC (**Green Tree**),¹
2 moves to dismiss Sanford Buckles' (**Plaintiff**) Amended Complaint pursuant to Federal Rules of
3 Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff's sole claim is under a statute that, as a matter of
4 Nevada law, does not apply to the conduct alleged in the Amended Complaint. Accordingly,
5 Plaintiff lacks standing to bring the claim, and Plaintiff has failed to state a claim upon which he
6 could obtain relief.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I.**

9 **INTRODUCTION**

10 Plaintiff's Amended Complaint should be dismissed because the statute that is the basis
11 for the only claim stated does not apply in this case, and Plaintiff has no standing to invoke it.
12 Plaintiff's Amended Complaint states a single claim: that Green Tree violated NRS 200.620 by
13 unlawfully recording certain telephone conversations without Plaintiff's consent. Dkt 13 at
14 ¶¶ 49-53. Plaintiff seeks to represent a putative class of individuals with the same claim. But
15 under binding precedent from the Nevada Supreme Court, NRS 200.620 does not apply to the
16 conduct alleged in the Complaint. Nevada law holds that, in determining the lawfulness of a call
17 recording, the law of the State *where the recording is made* is what governs. Yet Plaintiff does
18 not allege that Green Tree recorded telephone calls involving equipment or personnel located in
19 the State of Nevada. Nor could he. Green Tree's call recording facilities are located in Arizona
20 and Minnesota, where very different laws govern. Nor does Green Tree even have borrower call
21 centers in Nevada. Even aside from the binding on-point precedent from the Nevada Supreme
22 Court, NRS 200.620 could not apply to Green Tree's alleged conduct, because such an
23

24 ¹ On August 31, 2015, Green Tree Servicing LLC and Ditech Mortgage Corporation merged, and
25 Green Tree Servicing's name was changed to Ditech Financial LLC. Plaintiff's complaint uses
26 the name Green Tree, which was the operative name at the time of the events alleged.

extraterritorial application of the statute would violate Due Process and the Commerce Clause of the Constitution. Plaintiff both lacks standing and has failed to state an actionable claim under NRS 200.620. Accordingly, his Amended Complaint should be dismissed.

II.

PROCEDURAL HISTORY AND PLAINTIFF'S ALLEGATIONS

1. On November 7, 2015, Plaintiff filed an Amended Complaint asserting claims against Green Tree and its parent company, Walter Investment Management Corporation (**Walter Investment**).² Dkt 13 (the **Amended Complaint**).

2. Unlike the original Complaint, the Amended Complaint pleads the necessary requirements for this Court's exercise of CAFA jurisdiction over the case. Dkt 13 at ¶ 7.

3. However, just as in the original Complaint, the Amended Complaint states a single cause of action: a claim that Green Tree and Walter Investment violated NRS 200.620 by allegedly recording certain telephone conversations between Plaintiff and employees at Green Tree without his consent. Dkt 13 at ¶¶ 49-53.

4. Based on that sole cause of action, Plaintiff seeks to represent a putative class of other individuals in Nevada who have allegedly had their telephone calls unlawfully recorded by Green Tree and Walter Investment. Plaintiff seeks relief on behalf of the class in the form of statutory damages, punitive damages, costs, and attorneys' fees. Dkt 13 at pp. 13-14.

² Contemporaneously with the filing of this Motion, Walter Investment Management is separately moving to dismiss the Amended Complaint due to a lack of personal jurisdiction, as well as Plaintiff's lack of standing and failure to state a claim.

III.

LEGAL STANDARDS

As explained below, the Amended Complaint must be dismissed pursuant to Rules 12(b)(1) and 12(b)(6). Plaintiff has failed to allege facts plausibly demonstrating that he has suffered an injury cognizable under the Nevada statute because NRS 200.620 does not apply to the alleged conduct at issue. Alternatively, Plaintiff has failed to state a claim under NRS 200.620 upon which relief can be granted.

First, in order to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), a plaintiff has the burden of demonstrating that he has constitutional standing, regardless whether he has “statutory standing” under a given law. *See Jewel v. Nat’l Sec. Agency*, 673 F.3d 902, 907 n.4 (9th Cir. 2011) (explaining that constitutional standing is jurisdictional, while statutory standing—*i.e.*, a plaintiff’s right to relief under a given statute—is not); *accord Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 126 (2d Cir. 2003) (describing the differences between constitutional, prudential and statutory standing). “Article III of the Constitution limits federal-court jurisdiction to ‘Cases’ and ‘Controversies.’” *Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007). Requiring a plaintiff to demonstrate standing guarantees that “the litigant is entitled to have the court decide the merits of the dispute or of particular issues,” *Warth v. Seldin*, 422 U.S. 490, 498 (1975), by demanding that he or she “possess a ‘direct stake in the outcome’ of the case,” *Hollingsworth v. Perry*, ___ U.S. ___, 133 S. Ct. 2652, 2662 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

In cases involving statutory rights, “the particular statute and the rights it conveys [] guide the [constitutional] standing determination.” *Donoghue v. Bulldog Investors Gen. P’ship*, 696 F.3d 170, 178 (2d Cir. 2012); *accord Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1114 (9th Cir. 2014). As the Supreme Court has explained, “[e]ssentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests

1 properly can be understood as granting persons in the plaintiff's position a right to judicial
2 relief." *Warth*, 422 U.S. at 500. For example, "[c]ourts routinely dismiss claims' for lack of
3 subject-matter jurisdiction 'where no plaintiff is alleged to reside in a state whose laws the class
4 seeks to enforce' because the named plaintiff lacks standing to invoke the foreign statute."
5 *Harris v. CVS Pharmacy, Inc.*, No. ED CV 13-02329-AB, 2015 WL 4694047, at *4 (C.D. Cal.
6 Aug. 6, 2015) (quoting *In re Aftermarket Auto. Lighting Products Antitrust Litig.*, No. 09 MDL
7 2007-GW PJWX, 2009 WL 9502003, at *6 (C.D. Cal. July 6, 2009)).³

8 The question whether Plaintiff has standing to assert a claim under a given state's law
9 "goes to the heart of the Court's subject-matter jurisdiction and should be decided as soon as
10 possible." *Id.* at *5. If the statute does not apply, then Plaintiff is not "among the injured" and
11 thus lacks an injury under Article III. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014),
12 *cert. granted*, 135 S. Ct. 1892 (2015).

13 Second, the standard for dismissal of a complaint for failure to state a claim under Rule
14 12(b)(6) due to a lack of statutory standing is well established. "To survive a motion to dismiss,
15 a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that
16 is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial
17 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
18 inference that the defendant is liable for the misconduct alleged." *Id.* However, "courts are not
19 bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v.*

20
21 ³ *Accord, e.g., In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1075 (N.D. Cal. 2015) ("Plaintiffs do
22 not have standing to assert claims from states in which they do not reside or did not purchase
23 their mobile device."); *Fenerjian v. Nongshim Co., Ltd.*, 72 F. Supp. 3d 1058, 1082-83 (N.D.
24 Cal.2014) ("None of the named . . . plaintiffs reside[d] in, or suffered an injury in" 24 states in a
25 national class action and "therefore lack[ed] standing to assert claims based on those states'
26 laws."); *Pardini v. Unilever United States, Inc.*, 961 F. Supp. 2d 1048, 1061 (N.D. Cal. 2013)
27 ("Here, there is only one named plaintiff and she has not alleged that she purchased [the
28 offending product] outside of California. Thus, Plaintiff does not have standing to assert a claim
under the consumer protection laws of the other states named in the Complaint.").

1 *Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted); *accord Associated Gen.*
2 *Contrs. of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (“[C]onclusory
3 allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.”)
4 (internal quotation marks omitted). Moreover, “[f]actual allegations must be enough to raise a
5 right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

6 IV.

7 **UNDER BINDING NEVADA LAW, NRS 200.620 DOES NOT APPLY TO CALL**
8 **RECORDINGS MADE OUTSIDE OF THE STATE.**

9 Plaintiff’s only claim is that he was injured by Green Tree’s alleged violation of NRS
10 200.620.⁴ But under on-point binding law from the Nevada Supreme Court, NRS 200.620 does
11 not and cannot apply to the conduct Plaintiff alleges in the Amended Complaint. Accordingly,
12 this Court lacks subject-matter jurisdiction, and the Amended Complaint fails to state a claim
13 upon which relief can be granted.

14 The statute at issue purports to apply to both law enforcement and private parties, and
15 provides several kinds of remedies for its violation: civil penalties, criminal penalties, costs and
16 attorneys’ fees, and punitive damages. See NRS 200.690. However, the Nevada Supreme Court
17 has limited its application to recordings that take place with recording equipment in the State of
18 Nevada. In *McLellan v. State*, 182 P.3d 106, 109 (Nev. 2008), the Court considered whether a
19 telephone call made by a Nevada participant that was recorded with equipment in California was
20 properly admitted at trial against the Nevada defendant, or whether NRS 200.620 made the

21 ⁴ Plaintiff does not claim that he suffered any actual, personal injury as a result of Green Tree’s
22 alleged violation of the statute. While the Ninth Circuit has held that a mere statutory violation
23 may satisfy the injury requirement for the purposes of Article III, *see Spokeo*, 742 F.3d at 412-
24 13, the United States Supreme Court has granted certiorari to review the Ninth Circuit’s decision
25 in the *Spokeo* case and may reverse it. *See Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015).
26 Green Tree expressly reserves its right to argue that Plaintiff’s failure to allege anything more
27 than a bare statutory violation as the basis for his injury demonstrates his lack of standing and
28 should require dismissal of the Amended Complaint on that ground.

1 recording unlawful and thus inadmissible. In deciding which State's law to apply, the Court
2 looked to the place where the recording itself was made and held that California law would
3 govern. *Id.* at 109-10. And because California law permitted the recording in question, the
4 Nevada Supreme Court held that the call recording was lawful and properly admitted at trial
5 against the defendant. *Id.* at 110.

6 The *McLellan* Court's imposition of this strict territorial limit on the application of NRS
7 200.620 makes sense in light of NRS 200.620's uniquely onerous requirements. NRS 200.620
8 not only adopts the minority view that recording a phone call requires the consent of both parties
9 to the communication (a view contrary to federal law and the laws of 38 other States),⁵ but also
10 can cause a violator to be guilty of a felony. *See* NRS 200.690(1)(a). Giving NRS 200.620
11 extraterritorial effect would create serious due-process problems if applied to a party whose
12 conduct takes place outside the State of Nevada. *See State Farm Mut. Auto. Ins. Co. v.*
13 *Campbell*, 538 U.S. 408, 421 (2003) ("A State cannot punish a defendant for conduct that may
14 have been lawful where it occurred.").

15 In reaching its conclusion, the *McLellan* Court adopted the choice-of-law analysis
16 employed by the Washington Supreme Court in *State v. Fowler*, 139 P.3d 342 (Wash. 2006). In
17 *Fowler*, the trial court admitted into evidence call recordings of the defendant speaking with his
18 alleged victim. The defendant was in Washington when he spoke on the phone, but the calls
19 were recorded in Oregon; the defendant claimed that the recording should not have been
20 admitted into evidence because Washington law prohibited call recordings without the consent of
21 both parties to the conversation. *Id.* at 343-44. The Washington Supreme Court held that
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25 ⁵ *See* Cynthia A. Brown and Carol M. Bast, *Professional Responsibility: Making "Smart"*
26 *Ethical Decisions while Making the Most of "Smart" Technology*, 48 CREIGHTON L. REV. 737,
27 744 (2015)

1 because the call was recorded by a participant located in the State of Oregon, using equipment in
2 the State of Oregon, Oregon law governed the legality of the recording.⁶

3 In *Fowler*, the Washington Supreme Court relied heavily on its earlier decision in
4 *Kadoranian v. Bellingham Police Department*, 829 P.2d 1061 (Wash. 1992) (en banc), a civil
5 case that also required analyzing which jurisdiction's laws applied to a call recording. In
6 *Kadoranian*, a Canadian citizen sued a Washington police department, alleging that the police
7 had illegally recorded her telephone conversation with a police informant under Canadian law
8 because she was in Canada at the time the call was placed. *Id.* at 1065. The Washington
9 Supreme Court rejected the argument that Canadian law governed the interception of the call:
10 **"Interceptions and recording occur where made.** Whether the interception of [the plaintiff's]
11 conversation was lawful is thus determined according to the laws of the State of Washington, the
12 place where the conversation was intercepted and recorded, not according to the law of Canada."
13 *Id.* (emphasis added).

14 Here, under the Nevada Supreme Court's binding decision in *McLellan*—and consistent
15 with the Washington Supreme Court's decisions in *Fowler* and *Kadoranian*—NRS 200.620 does
16 not apply to Green Tree's alleged conduct. As the Supreme Court made clear in *McLellan*,

17 ⁶ *Fowler* relied on several other decisions also holding that call recordings were governed by the
18 law of the location where the recording was made, not where the call was initiated. *See Fowler*,
19 829 P.2d at 1065 n.16 (citing *Stowe v. Devoy*, 588 F.2d 336, 341, n. 12 (2d Cir. 1978), *cert*
20 *denied*, 442 U.S. 931 (1979); *United States v. Tirinkian*, 502 F. Supp. 620, 627 (D.N.D. 1980);
21 *State v. Fleming*, 755 P.2d 725 (Or. Ct. App. 1988), *review denied*, 763 P.2d 152 (Or. 1988)).
22 *Accord Huff v. Spaw*, 794 F.3d 543, 547 (6th Cir. 2015) (in civil action with cause of action for
23 violation of wiretapping statute, holding that "[t]he relevant location is not where the [plaintiff's]
24 conversations took place, but where [the defendant] used a device to acquire the contents of
25 those conversations."); *MacNeil Eng'g Co. v. Trisport, Ltd.*, 59 F. Supp. 2d 199, 202 (D. Mass.
26 1999) (holding that motion for leave to amend civil complaint was futile because proposed
27 additional claim for violation of Massachusetts's dual-consent wiretapping statute only applied
28 to calls recorded or intercepted within Massachusetts's borders); *Larrison v. Larrison*, 750 A.2d
895, 898 (Pa. Super. Ct. 2000) (holding that New York's single-party consent wiretapping act
applied to telephone call recorded in New York, instead of Pennsylvania's dual-party statute,
even though call was placed from Pennsylvania).

1 Nevada applies the law of the State where a call recording is made and the recording equipment
2 is located to determine the lawfulness of the recording. *McLellan*, 182 P.3d at 109. But Plaintiff
3 does not allege anywhere in the Amended Complaint that Green Tree recorded any of his calls in
4 the State of Nevada, that any of Green Tree's recording equipment was located in Nevada, or
5 that anyone participating in the calls on behalf of Green Tree was located in Nevada. Nor could
6 Plaintiff make any such allegation, as demonstrated by the Declaration of Martha Sternitzke,
7 which Green Tree has attached to this motion as **Exhibit A**.⁷ Not one of Green Tree's calls with
8 Plaintiff (either initiated by Green Tree or by Plaintiff) was recorded in the State of Nevada. *Id.*
9 at ¶ 5. Nor does Green Tree have any customer call centers located in the State. *Id.* at ¶ 6.

10 Without a basis for stating a claim under NRS 200.620, Plaintiff lacks statutory and
11 Article III standing and cannot plausibly state any cause of action. Dismissal is therefore
12 warranted both under Rule 12(b)(1) and Rule 12(b)(6). *See e.g., Kadoranian*, 829 P.2d at 1065
13 (dismissing civil claim made under Canadian law regarding call recorded in Washington because
14 Washington law governed the lawfulness of the recording); *MacNeil*, 59 F. Supp. 2d at 202
15 (holding plaintiff's motion for leave to amend civil complaint to add claim based on state
16 wiretapping statute was futile because call in question was recorded in another State).
17 Accordingly, Plaintiff's sole claim should be dismissed.

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22 ⁷ The Court may consider the Sternitzke Declaration without requiring the conversion of Green
23 Tree's motion into one for summary judgment under Fed. R. Civ. P. 12(d) because Green Tree
24 submits the Declaration in support of its motion to dismiss for lack of subject-matter jurisdiction
25 under Rule 12(b)(1). *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988)
26 ("[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not
27 restricted to the face of the pleadings, but may review any evidence, such as affidavits and
28 testimony, to resolve factual disputes concerning the existence of jurisdiction.").

V.

**INTERPRETING NRS 200.620 AS APPLYING TO GREEN TREE'S
EXTRATERRITORIAL CONDUCT WOULD VIOLATE THE COMMERCE CLAUSE.**

If NRS200.620 were to be applied to recordings that take place outside Nevada despite the Nevada Supreme Court's contrary ruling discussed above, that would render the statute unconstitutional under the Commerce Clause. NRS 200.620 is a state statute that cannot be applied to regulate commerce extraterritorially beyond Nevada's borders. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (holding statute unconstitutional because it had the extraterritorial effect of regulating distillers' market conduct in other states); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013) ("[T]he dormant Commerce Clause holds that any 'statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority.'" (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989))).⁸ To hold otherwise would unlawfully impose the policy considerations of the Nevada Legislature on each of the 49 other States.

For example, consider the instance of a Green Tree customer who lives in Delaware (where he owns a home securing a mortgage loan serviced by Green Tree), but takes a short tourist trip to Las Vegas. While in Las Vegas, the tourist places a telephone call to Green Tree's toll-free customer support number, where it is processed by a Green Tree employee in Arizona,

⁸ *Cf. New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound."); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.").

1 and the communication is recorded by equipment located in Arizona. Green Tree would not
2 even have a way to know that the customer is placing the call while he is physically in Nevada's
3 borders. Likewise, when the call is received by Green Tree, Green Tree may have no idea where
4 the call is coming from or whom the call is from until the call progresses. Yet under Plaintiff's
5 reading of the statute, Green Tree would be liable for statutory penalties for recording that
6 telephone call, and one of its employees may even be guilty of a felony.

7 Precisely due to concerns like this, the Commerce Clause places "an implicit or
8 'dormant' limitation on the authority of States to enact legislation affecting interstate
9 commerce." *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989). Accordingly, the Commerce
10 Clause "precludes the application of a state statute to commerce that takes place wholly outside
11 of the State's borders, whether or not the commerce has effects within the State." *Edgar v. MITE*
12 *Corp.*, 457 U.S. 624, 642-43 (1982). The purpose of the Commerce Clause's limitations on
13 extraterritorial application of state law is to prevent an individual or entity from being "subject to
14 haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never
15 intended to reach and possibly was unaware were being accessed." *American Library Ass'n v.*
16 *Pataki*, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997).

17 The United States Supreme Court has held that a state law applying to extraterritorial
18 conduct was unconstitutional under the Commerce Clause, even though the conduct affected
19 citizens of the State whose law was sought to be enforced. In *Edgar v. MITE Corp.*, 457 U.S.
20 624 (1982), a Delaware corporation with its principal place of business in Connecticut made a
21 hostile takeover offer to purchase the shares of an Illinois corporation. Under Illinois law, any
22 hostile takeover attempt of an Illinois corporation required registration with the Illinois Secretary
23 of State; rather than abide by that law, the offering corporation filed a lawsuit, alleging that
24 Illinois's law was unconstitutional because it violated the Commerce Clause. The United States
25 Supreme Court agreed, holding that the Illinois statute was unconstitutional. *Id.* at 640-46. The
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1 Court concluded that because the Illinois law “purports to regulate directly and to interdict
2 interstate commerce, including commerce wholly outside the State, it must be held invalid.” *Id.*
3 at 643.

4 Interpreting NRS 200.620 as applying to Green Tree’s extraterritorial recordings of
5 telephone calls for training and customer service improvement purposes would violate the
6 Commerce Clause because it would cause Nevada law to regulate conduct that takes place
7 entirely outside of the State. As courts have repeatedly held, the conduct in question in an
8 alleged violation of a wiretapping statute is *not* the telephone call that was recorded, but the act
9 of recording itself. *See, e.g., Huff*, 794 F.3d at 547 (“The relevant location is not where the
10 [plaintiff’s] conversations took place, but where [the defendant] used a device to acquire the
11 contents of those conversations.”). Here, that conduct took place entirely outside the boundaries
12 of the State of Nevada, and inside the boundaries of States where such recordings are
13 permissible. *See Sternitzke Decl.* ¶ 5; ARIZ. REV. STAT. ANN. §§ 13-3005, -3012(9); MINN. STAT.
14 § 626A.02(2)(c). Accordingly, the Commerce Clause precludes extraterritorial application of
15 NRS 200.620 because that would cause the statute to impermissibly “regulate directly and to
16 interdict interstate commerce, including commerce wholly outside the State.” *Edgar*, 457 U.S. at
17 643. Moreover, Nevada law cannot extend to penalize Green Tree for its extraterritorial conduct
18 because “[a] State cannot punish a defendant for conduct that may have been lawful where it
19 occurred.” *Campbell*, 538 U.S. at 421.

20 Even a facially non-discriminatory statute is unconstitutional under the Dormant
21 Commerce Clause if its incidental harmful effects on interstate commerce outweigh the benefit
22 of the public interest served. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under that
23 rationale, the United States Supreme Court has held state laws unconstitutional when they
24 impose an unjustifiably onerous burden on interstate commerce by creating requirements out of
25 step with the requirements of other States. *See, e.g., Kassel v. Consolidated Freightways Corp.*

1 of *Delaware*, 450 U.S. 662 (1981) (holding that the safety interest offered by Iowa to justify a
2 law “out of step with the laws of all other Midwestern and Western States” that barred use of
3 certain trucks on its interstate highways was insufficient to overcome the burden upon interstate
4 commerce where trucking companies that wished to continue to use such trucks faced increased
5 costs of business); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959) (holding that
6 Illinois statute requiring use of contoured mudguards on trucks and trailers operated on state
7 highways, as opposed to the conventional mudguards permissible in at least 45 states, placed an
8 unconstitutional burden on interstate commerce).

9 Applying NRS 200.620 to Green Tree’s conduct would mean that a company engaged in
10 interstate commerce across State lines that lawfully can record telephone calls with its customers
11 in the States where its recording equipment is located, and in the vast majority of other states,⁹
12 could nonetheless be held liable for civil and criminal penalties for recording a call placed to or
13 received from a person in Nevada. In the same way that the Supreme Court struck down laws
14 out-of-step with the laws of other States as unconstitutional under the dormant Commerce Clause
15 because they placed too heavy of a burden on companies engaging in interstate commerce in
16 *Kassel* and *Bibb*, NRS 200.620 imposes far too high of a burden on national companies doing
17 business in Nevada.

18 CONCLUSION

19 Plaintiff’s only claim depends on the application of a Nevada statute to conduct that
20 occurred completely outside the State’s boundaries and that was lawful where it took place. The
21 Nevada Supreme Court has already held that the statute cannot be interpreted to reach such
22 conduct. Under binding Nevada law, the Constitution, and common sense, Plaintiff’s Amended
23 Complaint should be dismissed.

24
25 _____
26 ⁹ See n.5, *supra*.

1 DATED November 25, 2015.

2
3 /s/ Gregg A. Hubley

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EXHIBIT A

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EXHIBIT A

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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF NEVADA**

15 SANFORD BUCKLES on behalf of
16 himself and other similarly situated,

17 Plaintiff,

18 v.

19 GREEN TREE SERVICING LLC, and
20 WALTER INVESTMENT
21 MANAGEMENT CORPORATION,

22 Defendants.

Case No.: 2:15-cv-01581-GMN-
(CWH)

**DECLARATION OF MARTHA
STERNITZKE**

1 Martha Sternitzke declares as follows:

2 1. I am over 19 years of age and I am employed as an Assistant Vice President at
3 Ditech Financial LLC, formerly known as Green Tree Servicing LLC (**Green Tree**), which is a
4 named defendant in the above-referenced action.

5 2. As a result of my employment, my review of the Amended Complaint filed in the
6 above-captioned action, and my investigation into the matters contained in this declaration, I
7 have personal knowledge of the facts set forth herein, and am competent to testify as to such
8 facts.
9

10 3. I have reviewed and am familiar with the allegations in the Amended Complaint
11 filed by Sanford Buckles, on behalf of a putative class of other individuals, in the United States
12 District Court for the District of Nevada, Case Number 2:15-CV-01581-GMN (Dkt 13). From
13 reading the Amended Complaint, I am aware that the allegations in this case generally concern
14 Green Tree's alleged recordings of certain telephone communications between Green Tree's
15 employees and individuals in the State of Nevada.
16

17 4. As an Assistant Vice President for Green Tree, I am personally familiar with
18 Green Tree's procedures for recording telephone calls.

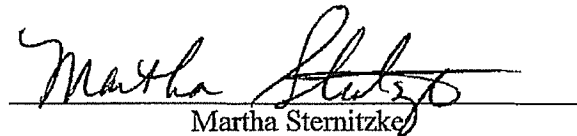
19 5. Green Tree uses two telephone communication "recording environments," which
20 contain all of the equipment for recording telephone communications. These two "recording
21 environments" are located in the cities of St. Paul, Minnesota and Tempe, Arizona. All
22 telephone communications recorded by Green Tree are recorded by equipment located in St. Paul
23 and Tempe. Since at least the beginning of 2012, Green Tree has not maintained any call
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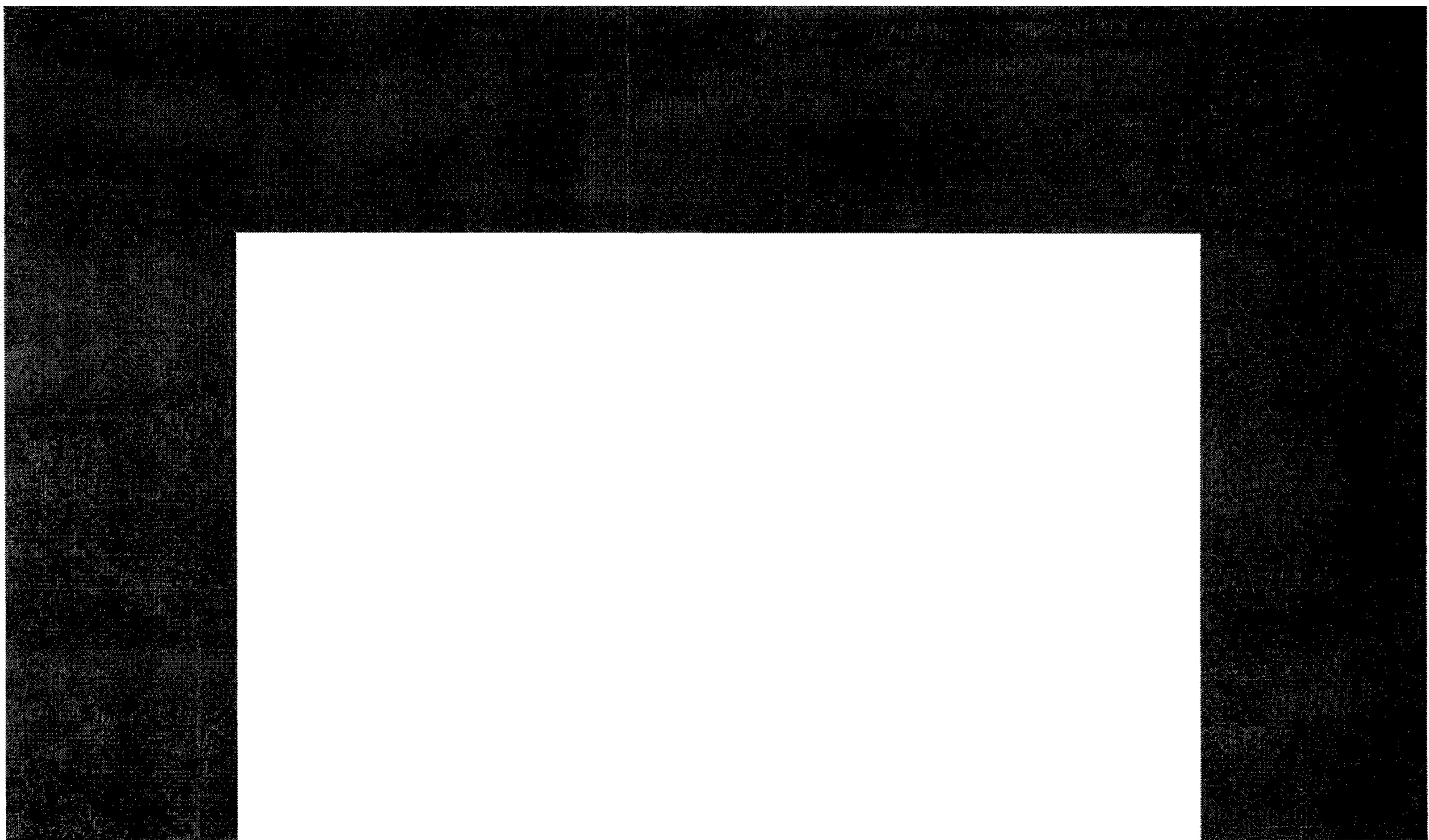
1 recording equipment in any other State, and has not recorded telephone communications in any
2 other location.

3 6. Since at least the beginning of 2012, Green Tree has not had any customer call
4 centers located in the State of Nevada.

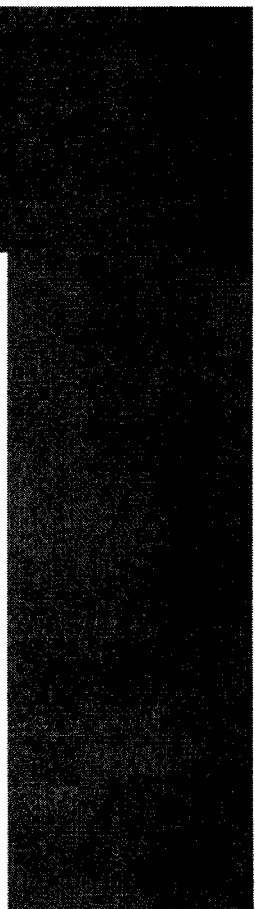
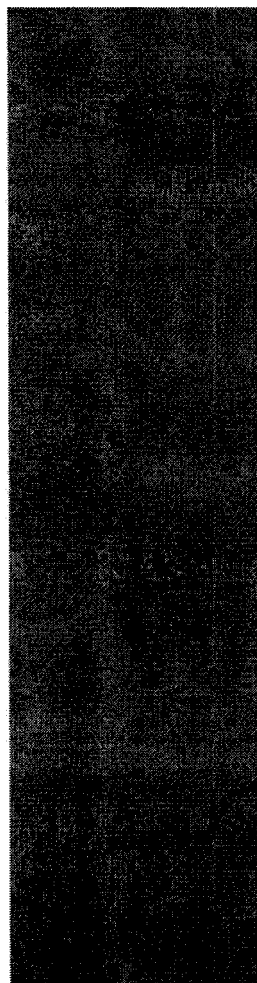
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6 I declare under penalty of perjury that the foregoing is true and correct.

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9 EXECUTED on November 26, 2015 in Tempe, AZ.

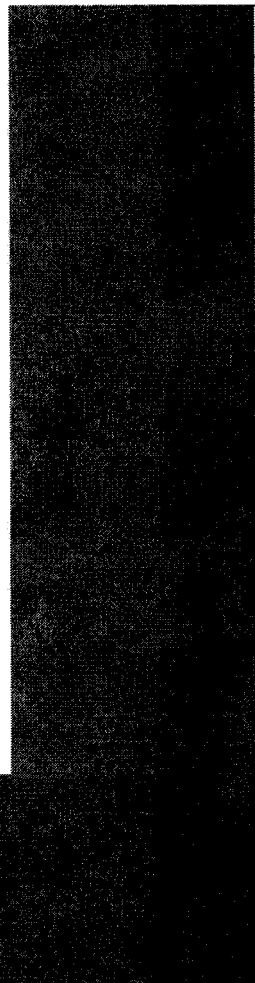
10
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3



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12 **IN THE UNITED STATES DISTRICT COURT**
13 **DISTRICT OF NEVADA**

14 SANFORD BUCKLES, on behalf
of himself and others similarly
situated,

15 Plaintiff,

16 v.

17 GREEN TREE SERVICING, LLC
18 and WALTER INVESTMENT
CORPORATION,

19 Defendants.

Case No.: 2:15-cv-01581-GMN-(CWH)

**PLAINTIFF'S OPPOSITION TO
DEFENDANT DITECH
FINANCIAL LLC F.K.A GREEN
TREE SERVICING, LLC'S
MOTION TO DISMISS FIRST
AMENDED COMPLAINT
PURSUANT TO F.R.C.P. 12(b)(1),
(b)(6)**

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Nev. Rev. Stat. § 48.0778, 9
Nev. Rev. Stat. § 179.400 to 179.5156
Nev. Rev. Stat. § 200.600 *et seq.*3
Nev. Rev. Stat. § 200.620passim
Nev. Rev. Stat. § 209.4196
Nev. Rev. Stat. § 704.1956

Rules

Fed. R. Civ. P. 12(b)(1)..... 2, 3, 18
Fed. R. Civ. P. 12(b)(2).....3, 17
Fed. R. Civ. P. 12(b)(6).....2, 3, 4, 18
Local Rule 7-2(d) 17

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff Sanford Buckles, on behalf of himself and others similarly
3 situated, (“Plaintiff”) hereby submits his opposition to Defendant Ditech
4 Financial LLC F.K.A Green Tree Servicing, LLC’s (“Defendant”) Motion to
5 Dismiss pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil
6 Procedure.

7 **I. BACKGROUND**

8 Mr. Buckles lives in Clark County, Nevada. *See* First Amended
9 Complaint, ¶15, ECF No. 13, p. 4. Beginning in and around early 2013,
10 Defendant had numerous telephone conversations with Mr. Buckles in Nevada
11 regarding Mr. Buckles’ home in Nevada. *Id.* at ¶ 16 - 17, ECF No. 13, pp. 5 - 6.
12 During these conversations, Mr. Buckles and Defendant discussed highly
13 personal and private information, including Plaintiff’s financial capabilities. *Id.*
14 at ¶ 16, ECF No. 13, p. 5. At no time during these conversations did Defendant
15 advise Mr. Buckles that Defendant was recording the conversations. *Id.* at ¶ 19,
16 ECF No. 13, p. 6. Mr. Buckles never consented to any of these phone
17 conversation recordings. *Id.* at ¶ 18, ECF No. 13, p. 6.

18 On August 18, 2015, Mr. Buckles, on behalf of himself and others
19 similarly situated, filed in this Court a Complaint for Damages, claiming that

1 Defendant and Walter Investment Management Corporation (“Walter
2 Investment”) violated Nev. Rev. Stat. § 200.600, et seq. ECF No. 1. On
3 October 29, 2015, Walter Investment filed a Motion to Dismiss the Complaint
4 Pursuant to Fed. R. Civ. P. 12(b)(2). ECF No. 9. On October 30, 2015,
5 Defendant filed a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1). ECF
6 No. 10. On November 7, 2015, Plaintiff filed its First Amended Complaint.
7 ECF No. 13. On November 25, 2015, Defendant filed the pending Motion to
8 Dismiss the First Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and
9 12(b)(6). ECF No. 14.

10 **II. STANDARDS OF LAW**

11 **A. Motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1)**

12 There are three components of standing—injury, causation, and
13 redressability:

- 14 (1) the plaintiff has suffered an ‘injury in fact’ that is (a)
15 concrete and particularized and (b) actual or imminent,
16 not conjectural or hypothetical; (2) the injury is fairly
17 traceable to the challenged action of the defendant; and
18 (3) it is likely, as opposed to merely speculative, that the
19 injury will be redressed by a favorable decision.
20

1 *Robins v. Spokeo, Inc.*, 742 F. 3d 409 (9th Cir. 2014) (quotations omitted) (citing
2 *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 180-81
3 (2000)). Although more may be required at later stages of the litigation, on a
4 motion to dismiss, “general factual allegations of injury resulting from the
5 defendant's conduct may suffice.” *Id.*; *Lujan v. Defenders of Wildlife*, 504 U.S.
6 555, 561 (1992).

7 The injury required by Article III can exist solely by virtue of “statutes
8 creating legal rights, the invasion of which creates standing.” *Edwards v. First*
9 *American Corp.*, 610 F. 3d 514 (9th Cir. 2010) (citing *Fulfillment Services v.*
10 *United Parcel Service*, 528 F. 3d 614, 618-19 (9th Cir. 2008) (quoting *Warth v.*
11 *Seldin*, 422 U.S. 490, 500 (1975)). “Essentially, the standing question in such
12 cases is whether the constitutional or statutory provision on which the claim rests
13 properly can be understood as granting persons in the plaintiff's position a right to
14 judicial relief.” *Edwards*, 610 F. 3d at 517. Thus, the Court must look to the text
15 of statute to determine whether it prohibited the defendants' conduct; if it did,
16 then Plaintiff has demonstrated an injury sufficient to satisfy Article III. *Id.*

17 **B. Motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)**

18 In considering a motion to dismiss, “all well-pleaded allegations of
19 material fact are taken as true and construed in a light most favorable to the non-
20

moving party.” *In Re Wal-Mart Wage and Hour Employment Practices*, 490 F. Supp. 2d 1091 (D. Nev. 2007) (citing *Wyler Summit P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). There is a strong presumption against dismissing an action for failure to state a claim. *See, e.g., Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). The issue is not whether the plaintiff ultimately will prevail, but whether he may offer evidence in support of his claims. *See Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Consequently, the Court may not grant a motion to dismiss for failure to state a claim “unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).

III. DISCUSSION

A. THIS COURT SHOULD DENY DEFENDANT’S MOTION BECAUSE PLAINTIFF HAS STANDING SINCE NEV. REV. STAT. § 200.620 APPLIES TO INTERCEPTIONS RECORDED OUT OF STATE.

Defendant argues that Nev. Rev. Stat. § 200.620 permits recording phone conversations with Nevada residents, without all parties’ consent, if the

1 recording is made out of state. Defendant's Motion to Dismiss; ECF No. 14, p.
2 4. There is no on-point caselaw on this issue. Still, a plain reading of the
3 statute, dicta in a Nevada Supreme Court opinion and a California Supreme
4 Court decision, on this exact issue, dictates that the opposite is true.

5 *1. A Plain Reading Of The Statute Shows That Nev. Rev. Stat. § 200.620*
6 *Applies To Interceptions That Are Recorded Outside Of Nevada.*

7 In interpreting a statute, courts ordinarily turn first to the plain language of
8 the statute. *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 US 235, 240
9 (1989) (“[A]s long as the statutory scheme is coherent and consistent, there
10 generally is no need for a court to inquire beyond the plain language of the
11 statute.”). In relevant part, Section 200.620 states:

12 1. Except as otherwise provided in NRS 179.410 to 179.515
13 inclusive, 209.419 and 704.195, it is unlawful for any person to
intercept or attempt to intercept any wire communication unless:

- 14 (a) The interception or attempted interception is made with the
15 prior consent of one of the parties to the communication; and
16 (b) An emergency situation exists and it is impractical to
17 obtain a court order as required by NRS 179.410 to 179.515,
18 inclusive, before the interception, in which event the
19 interception is subject to the requirements of subsection 3.

20 Nev. Rev. Stat. § 200.620. Plainly, one-party consent is only permissible under
Nevada law when there is *also* an emergency.

1 Nevada is well established as a two-party consent state. “NRS 200.620
2 dictates that *all* parties to a communication must consent to the interception of
3 wire or oral communication for it to be lawful.” *McLellan v. State*, 182 P. 3d
4 106, 109 (Nev. 2008) (emphasis in original); *see also Lane v. Allstate Ins. Co.*,
5 969 P. 2d 938, 940 (Nev. 1998) (Single party interception must be judicially pre-
6 approved or judicially ratified where an emergency exists to make preapproval
7 impractical.).

8 Defendant is incorrect that Section 200.620 does not apply to interceptions
9 recorded outside Nevada because the statute does not have any such exception.
10 The statute makes no distinctions as to where the interceptions are recorded. The
11 plain language of Section 200.620, therefore, dictates that the statute applies to
12 Defendant’s actions in this case.

13 2. *The Nevada Supreme Court Has Recognized in Dicta That Nev. Rev.*
14 *Stat. § 200.620 Applies To Interceptions That Are Recorded Outside Of*
15 *Nevada.*

16 Defendant is mistaken in its reliance on *McLellan*, a case about the
17 admissibility of evidence and decided based on an Evidentiary rule and not
18 about the application of Section 200.620. In *McLellan v. State*, the Nevada
19 Supreme Court decided whether a recording of a phone conversation with a
20

1 person in Nevada was admissible in a criminal trial when the recording was
2 made outside of Nevada. 182 P. 3d 106. In dicta, the Court recognized that
3 such a recording—even though it had been recorded in California—had been
4 unlawful under Nevada law. *Id.* at 109. Of course, had the Court determined
5 that Section 200.620 did not apply to recordings made out of state, as Defendant
6 incorrectly suggests, the analysis would end there since lawful recordings are
7 certainly admissible, subject to applicable rules of evidence. *Id.*

8 Since the recording violated Nevada law—because there was neither two-
9 party consent nor an emergency—the Court next turned to Nev. Rev. Stat. §
10 48.077, a rule of evidence, to determine whether such unlawful recordings are
11 admissible in a Nevada criminal trial.

12 NRS 48.077 allows the admission of "the contents of any
13 communication lawfully intercepted under the laws of . . .
14 another jurisdiction . . . if the interception took place within
15 that jurisdiction. Thus, if the interception was lawfully
16 made in California, it is admissible in Nevada under NRS
17 48.077.

18 *Id.* Although the recording was unlawful, the Court held that the recording was
19 admissible under § 48.077, a rule of evidence that deems admissible recordings
20

1 whenever those recordings were lawful in the state *where they were made*. This
2 does not affect § 200.620 which prohibits recording phone conversations unless
3 all parties to the conversation consent, or an emergency exists. To the contrary,
4 the Court turned to the evidentiary rule, § 48.077, precisely because the
5 recording—even though recorded outside Nevada—was unlawful under Nevada
6 law.

7 Defendant is also incorrect in its interpretation that “the *McLellan* Court
8 adopted the choice-of law analysis employed by the Washington Supreme Court
9 in *State v. Fowler*.” 182 P. 3d 106; 157 Wash.2d 387, 139 P.3d 342 (2006);
10 Defendant’s Motion to Dismiss ECF No. 14, p. 7. The Supreme Court did not
11 enter a choice-of-law analysis. Rather, the Nevada Supreme Court was
12 “persuaded” by the Washington Supreme Court decision in connection with its
13 discussion *on the admissibility* of out-of-state recordings: “In *Fowler*, the court
14 concluded that telephone calls lawfully recorded in Oregon, with the aid of
15 Oregon law enforcement and the consent of one party as required in Oregon,
16 were admissible in Washington—a two-party consent state.” *Id.* Thus, although
17 there is no binding Nevada Supreme Court case on the underlying issue in this
18 case, *McLellan* strongly suggests that Section 200.620 applies to interceptions
19 that are recorded outside of Nevada.
20

1 3. *This Court Should Reach The Same Conclusion As Kearney, A*
2 *California Supreme Court Case Involving Identical Facts, And Hold*
3 *That Section 200.620 Applies To Recordings Made Out Of State.*

4 The issue of whether a two-party consent statute applies to recordings
5 made out of state is not new. In a California Supreme Court case, *Kearney v.*
6 *Salomon Smith Barney*, with almost identical facts as this case, California
7 consumers filed a putative class action against a out of state company seeking to
8 obtain injunctive relief against its Georgia-based branch's continuing practice of
9 recording telephone conversations, resulting from calls made to and from
10 California, without knowledge or consent of the California clients, and also
11 seeking to recover damages and/or restitution based upon recording that
12 occurred in the past. 137 P. 3d 914 (Cal. 2006). The California Supreme Court
13 held that California's two-party consent statute applied to recordings made
14 outside California because to apply the statute otherwise would disadvantage
15 California residents. *Id.*

16 Just as *Kearney* found in applying the California statute, the failure to
17 apply Nev. Rev. Stat. 200.620 here in this case would substantially undermine
18 the protection afforded by the statute. Many companies who do business in
19 Nevada are national or international firms that have headquarters, administrative
20

1 offices, or—in view of the recent trend toward outsourcing—at least telephone
2 operators located outside of Nevada. *See, generally, Kearney*, 137 P. 3d 914
3 (finding the same arguments dispositive in applying Cal. Penal Code § 632 to
4 phone recordings made outside of California). If businesses could maintain a
5 regular practice of secretly recording all telephone conversations with their
6 Nevada clients or customers in which the business employee is located outside
7 of Nevada, that practice would represent a significant inroad into the privacy
8 interest that the statute was intended to protect. *See Id.* An out-of-state
9 company that does business in another state is required, at least as a general
10 matter, to comply with the laws of a state and locality in which it has chosen to
11 do business. *Id.*; *See, e.g., Watson v. Employers Liability Assurance Corp.*, 348
12 U.S. 66, 72 (1945) (“As a consequence of the modern practice of conducting
13 widespread business activities throughout the entire United States, this Court has
14 in a series of cases held that more states than one may seize hold of local
15 activities which are part of multistate transactions and may regulate to protect
16 interests of its own people, even though other phases of the same transactions
17 might justify regulatory legislation in other states.”).

18 In applying the two-party consent statute to recordings where one party
19 was in California and the phone call was recorded outside California, *Kearney*
20

1 *also* considered the fairness to local companies. The same reasoning applies in
2 analyzing the Nevada two-party consent statute. If section 200.620—and, by
3 analogy, other similar consumer-oriented privacy statutes that have been enacted
4 in Nevada—could not be applied effectively to out-of-state companies but only
5 to Nevada companies, the unequal application of the law very well might place
6 local companies at a competitive disadvantage with their out-of-state
7 counterparts. *See, Id.* To the extent out-of-state companies may utilize such
8 undisclosed recording to further their economic interests—perhaps in selectively
9 disclosing recordings when disclosure serves the company's interest, but not
10 volunteering the recordings' existence (or quickly destroying them) when they
11 would be detrimental to the company—Nevada companies that are required to
12 comply with Nevada law would be disadvantaged. *See, e.g., Id.* By contrast,
13 application of section 200.620 to all companies in their dealings with Nevada
14 residents would treat each company equally with regard to Nevada's concern for
15 the privacy of the State's consumers. *See, e.g., Id.* The failure to apply Nevada
16 law in the present context would result in a significant impairment of Nevada's
17 interests, just as *Kearney* found would result to California's interests.

18 A plain reading of the statute, dicta in a Nevada Supreme Court opinion
19 and *Kearney*, a directly on-point California Supreme Court decision, involving
20

1 identical facts, dictates that Section 200.620 applies to interceptions recorded
2 outside Nevada.

3 **B. THIS COURT SHOULD DENY DEFENDANT’S MOTION BECAUSE**
4 **NRS 200.620 DOES NOT VIOLATE THE COMMERCE CLAUSE.**

5 Courts have found that a two party consent law generally does not violate
6 the constitution. *See, e.g., Id.* at 737. This is because it is generally accepted
7 that the federal system contemplates that individual states may adopt distinct
8 policies to protect their own residents and generally may apply those policies to
9 businesses that choose to conduct business within that state. *See, e.g., Allstate*
10 *Ins. Co. v. Hague*, 449 U.S. 302, 317-318 (1981) (plur. opn. by Brennan, J.);
11 *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 181-182 (1964).

12 Defendant argues that the Section 200.620 would violate the Commerce
13 Clause. U.S. Const., art. I, § 8, cl. 3; Defendant’s Motion to Dismiss; ECF No.
14 14 pp. 10-13. An identical argument was made in *Kearney*, challenging
15 California’s two-party consent statute. *Kearney*, 137 P. 3d 914. The California
16 Supreme Court held that the two-party consent statute did not violate the
17 commerce clause or the constitution generally. *Id.* The California Supreme
18 Court reasoned that the two-party consent law would affect only a business’s
19 undisclosed recording of telephone conversations with clients or consumers in
20

1 California and would not compel any action or conduct of the business with
2 regard to conversations with non-California clients or consumers. *See,*
3 *generally, Kearney*, 137 P. 3d 914 (Cal. Penal Code § 632 does not violate the
4 commerce clause). Here too, application of the Nevada law here at issue would
5 affect only a business's undisclosed recording of telephone conversations with
6 clients or consumers in Nevada and would not compel any action or conduct of
7 the business with regard to conversations with non-Nevada clients or consumers.

8 Defendant cites many cases that the *Kearney* determined are
9 distinguishable from cases involving two-party consent statutes. For example,
10 Defendant cites *Healy v. The Beer Institute*, a United States Supreme Court
11 decision that held "the 'Commerce Clause . . . precludes the application of a
12 state statute to commerce that takes place wholly outside the State's borders,
13 whether or not the commerce has effects within the State.'" 491 U.S. 324, 336
14 (1989). As *Kearney* makes clear, *Healy's* holding is inapplicable in connection
15 with two-party consent statutes where the recording is made out of state, since
16 the occurrences here quite clearly did not take place "wholly outside
17 [California's] borders." *Id.*; *Kearney* 137 P.3d at 739. The same applies in this
18 case and *Healy* does not apply since the occurrence here is not "wholly outside"
19 Nevada's borders.
20

1 The same is true for the other cases cited by Defendant that all involve
2 action wholly outside the state, and are therefore inapplicable here. *E.g.*,
3 *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 US
4 573, 582 (1986) (involving a New York pricing statute that regulated conduct
5 occurring wholly outside the state and thereby violated the Commerce Clause);
6 *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013)
7 (involving a statute that controlled commerce “wholly outside” the State); *Edgar*
8 *v. MITE Corp.*, 457 U.S. 624 (1982) (involving a statute that forced a merchant
9 to seek regulatory approval in one State before undertaking a transaction wholly
10 outside that State). As *Kearney* makes very clear, the California wire
11 interception statute affects only a business’s undisclosed recording of telephone
12 conversations with clients or consumers in state and would not compel any
13 action out of state. Here, NRS 200.620 affects only a business’s undisclosed
14 recording of telephone conversations with Nevada clients or consumers in
15 Nevada and would not compel any action wholly outside Nevada.

16 Defendant’s reliance on *Kassel v. Consolidated Freightways Corp. of*
17 *Del.*, 450 US 662 (1981) (involving an Iowa statute that prohibited certain trucks
18 on its interstate highways) and *Bibb v. Navajo Freight Lines, Inc.*, 359 US 520
19 (1959) (involving an Illinois statute that required mudguards on trucks using the
20

1 State's highways) is also misplaced here since those cases involved States'
2 restrictions on interstate channels. By contrast, application of the statute here
3 regulates phone calls purposefully directed at Nevada residents in Nevada and is
4 easily distinguishable.

5 Finally, as *Kearney* points out in applying the identical California statute
6 to recordings made outside California, such a statute does not completely
7 preclude a party to a telephone conversation from recording the conversation,
8 but rather simply prohibits such a party from secretly or surreptitiously
9 recording the conversation. *Kearney*, 137 P. 3d 914, 5 Cal. Rptr.3d at 749.
10 Here, Nev. Rev. Stat. 200.620 also does not completely preclude a party to a
11 telephone conversation from recording the conversation, but rather simply
12 prohibits such a party from secretly or surreptitiously recording the
13 conversation, that is, from recording the conversation without first informing all
14 parties to the conversation that the conversation is being recorded. *See Id.* If,
15 after being so advised, another party does not wish to participate in the
16 conversation, he or she simply may decline to continue the communication. *Id.*
17 A business that adequately advises all parties to a telephone call, at the outset of
18 the conversation, of its intent to record the call would not violate the statute. *Id.*
19
20

1 *Kearney*'s rationale in finding California's statute as non-violative of the
2 commerce clause applies equally to Nevada's two-party consent statute. This
3 Court should deny Defendant's motion to dismiss because Nev. Rev. Stat.
4 200.620 does not violate the commerce clause.¹

5 **III. CONCLUSION**

6 Defendant's motion to dismiss should be denied because NRS 200.620
7 applies to recordings where one party is in Nevada and the recording is made
8 outside Nevada. First, the language of the statute does not make any distinction
9 as to where the recording is made. Second, *McLellan*—a Nevada Supreme
10 Court case about the admissibility in a criminal trial of a recorded phone call
11 where one party was in Nevada and the recording was made outside Nevada—
12 strongly suggests that the recording did violate Nevada law by turning to a
13 specific rule of evidence in admitting the recorded phone conversation. Third,
14 *Kearney*, a California Supreme Court case involving practically identical facts

15 ¹ Defendant, in a footnote, adds a comment claiming that Walter Investment has
16 moved this Court to dismiss the Amended Complaint "due to a lack of
17 jurisdiction, as well as Plaintiff's lack of standing and failure to state a claim."
18 See Defendant's Motion to Dismiss, ECF No. 14, p. 3, n. 2. While Plaintiff
19 has been served with Walter Investment's motion to dismiss pursuant to Fed.
20 R. Civ. P. 12(b)(2), ECF No. 15, Plaintiff has not been served by Walter
Investment with a motion to dismiss "due to a lack of standing and failure to
state a claim." To the extent that this Court considers this motion at all, it
should be denied pursuant to Local Rule 7-2(d) and the points made by
Plaintiff in this opposition to Defendant's motion to dismiss.

1 about a substantively identical statute held that the two-party consent statute
2 applies to recordings made outside California. For all these reasons, 200.620
3 applies to recordings of phone conversations where one party is in Nevada and
4 the recording is made outside Nevada

5 In addition, Defendant's motion to dismiss should be denied since NRS
6 200.620 does not violate the commerce clause because the application of the
7 statute here would affect only a business's undisclosed recording of telephone
8 conversations with clients or consumers in Nevada. It would not compel any
9 action or conduct of the business with regard to conversations with non-Nevada
10 clients or consumers, as the California Supreme Court found, in *Kearney*, in
11 upholding a substantively identical statute. Based on the foregoing, Plaintiff
12 respectfully requests that this Court deny Defendant's motion to dismiss
13 Plaintiff's First Amended Complaint pursuant to Rule 12(b)(1) and (b)(6).

14 DATED this 12th day of December 2015.

15 KAZEROUNI LAW GROUP, APC

16
17 BY: /s/ Michael Kind
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CERTIFICATION OF SERVICE

I HEREBY CERTIFY pursuant to Rule 5 of the Federal Rules of Civil Procedure that on December 12, 2015, the foregoing **PLAINTIFF'S** **OPPOSITION TO DEFENDANT DITECH FINANCIAL LLC F.K.A GREEN TREE SERVICING, LLC'S MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO F.R.C.P. 12(b)(1), (b)(6)** was served on all parties via CM/ECF:

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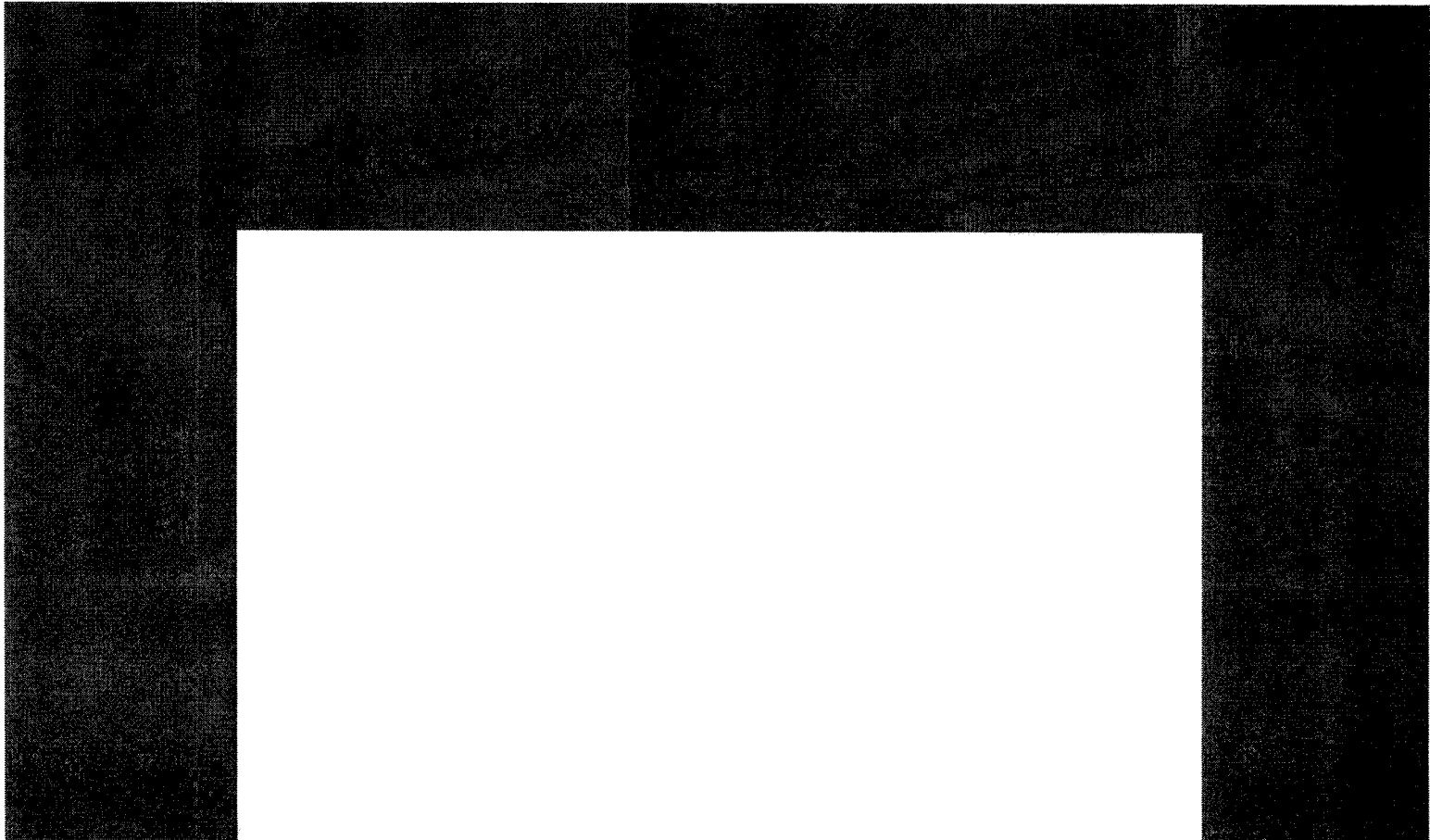
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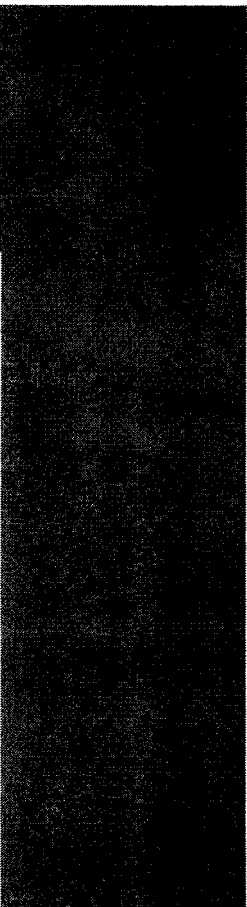
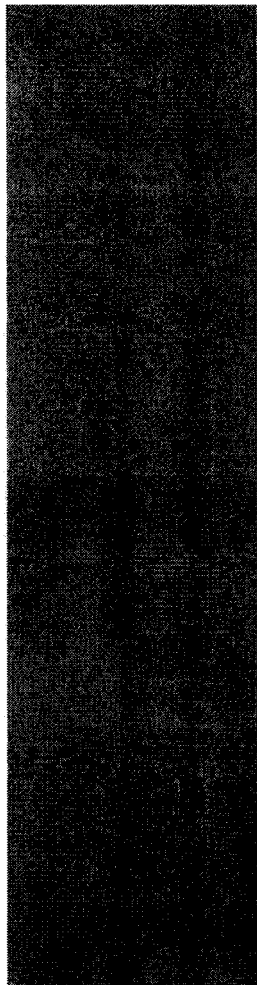
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BY: /s/ Michael Kind

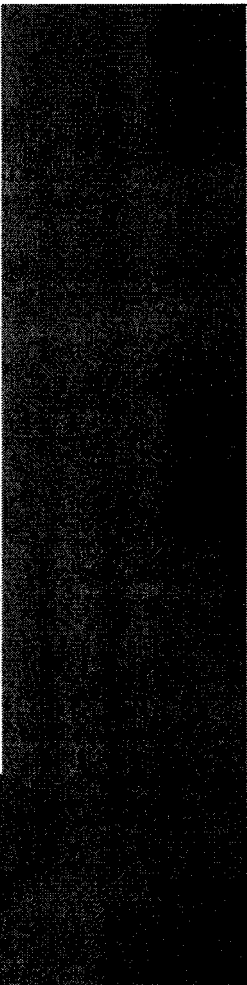
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11 *Attorneys for Ditech Financial LLC f/k/a Green Tree Servicing LLC,*
12 *and Walter Investment Management Corporation*

13 **UNITED STATES DISTRICT COURT**

14 **DISTRICT OF NEVADA**

15
16 SANFORD BUCKLES on behalf of himself
and other similarly situated,

17
18 Plaintiff,

19 v.

20 GREEN TREE SERVICING, LLC, and
21 WALTER INVESTMENT MANAGEMENT
CORPORATION,

22
23 Defendants.

Case No.: 2:15-cv-01581-GMN-(CWH)

**DEFENDANT DITECH FINANCIAL
LLC'S REPLY IN SUPPORT OF
MOTION TO DISMISS AMENDED
COMPLAINT**

24
25 Ditech Financial LLC, formerly known as Green Tree Servicing LLC (**Green Tree**), submits
26 this reply in support of its motion to dismiss Sanford Buckles' (**Plaintiff**) Amended Complaint
27 pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). As explained in the
28 Memorandum supporting the Motion to Dismiss, Plaintiff's only claim is under NRS 200.620, which

1 does not apply to the conduct alleged in the Amended Complaint. Plaintiffs' arguments that this
2 Court should ignore the on-point precedent from the Nevada Supreme Court and instead follow the
3 California's Supreme Court's precedent in interpreting a California statute are unavailing. The
4 United States District Court is not the proper forum to bring claims calling for novel and
5 unprecedented expansions of state substantive law at odds with binding authority from the State's
6 Supreme Court. Accordingly, Plaintiff's Amended Complaint should be dismissed.

7
8 **I.**

9 **NRS 200.620 PROVIDES NO INDICATION THAT IT APPLIES TO CONDUCT TAKING**
10 **PLACE OUTSIDE OF NEVADA'S BORDERS.**

11 Plaintiff's argument that the text of NRS 200.620 indicates that the statute applies to
12 extraterritorial conduct is a paradigmatic exercise in question-begging. Green Tree's present motion
13 does not dispute that under the Nevada Supreme Court's holding in *Lane v. Allstate Insurance Co.*,
14 969 P.2d 938 (Nev. 1998), NRS 200.620 generally requires that both parties to a covered telephone
15 call must consent in order to allow the call to be recorded or intercepted.

16 But Plaintiff misses the point entirely. The issue is whether the statute applies
17 extraterritorially to Green Tree's act of recording calls in the States of Arizona and Minnesota. The
18 fact that the Nevada statute requires dual consent has no bearing on that question. Not all calls cross
19 state lines. The fact that this statute, which includes criminal as well as civil penalties, does not
20 explicitly mention interstate calls, and does not explicitly say that it prohibits recording that takes
21 place entirely in other states, is certainly no indication that the statute was intended to so apply.

22 Plaintiff's contention that the text of the statute silently provides the answer to the geographic
23 scope of its application is baseless. If statutory silence meant there was no geographic limitation,
24 then the statute would *ipso facto* apply to calls where *both parties* are outside Nevada. After all, NRS
25 200.620 expressly applies to "any person," and neither NRS 200.620 nor the general definition of
26 "person" under Nevada law limits the meaning of "person" to persons in Nevada. NRS 0.039.

27 Instead, the most natural reading of the statute is how the Nevada Supreme Court has
28 interpreted it: as applying only to call interceptions and recordings that are made in the State of
Nevada. That reading is consistent with the fundamental canon of statutory interpretation that

dictates “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). Given the harsh criminal sanctions of the statute, *see* NRS 200.690(1)(a), reading it as only applying to recordings and interceptions actually created in the State of Nevada is also appropriate in light of the rule of lenity that dictates that ambiguous statutes with potential criminal implications must be read narrowly and in favor of an alleged violator. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (explaining that, if a statute has criminal applications, “the rule of lenity applies” to the Court’s interpretation of the statute “[b]ecause [the Court] must interpret the statute consistently, whether [it] encounter[s] its application in a criminal or noncriminal context”).

II.

THE NEVADA SUPREME COURT’S DECISION IN *MCLELLAN* DICTATES THAT NRS 200.620 DOES NOT APPLY TO EXTRATERRITORIAL CONDUCT.

Here, however, this Court need not speculate as to whether this proscriptive statute applies to conduct outside Nevada’s borders. Binding authority from the Nevada Supreme Court holds that NRS 200.620 does not apply to call recordings made in other states. In the only case that touched on the issue, the Nevada Supreme Court ruled that the statute has no extraterritorial application. In *McLellan v. State*, 182 P.3d 106, 109 (Nev. 2008), the Court considered whether a telephone call made by a Nevada participant that was recorded by persons in California with equipment in California was properly admitted at trial against the Nevada defendant, or whether NRS 200.620 applied. If NRS 200.620 applied, then the recording was inadmissible in the Nevada trial of the pedophile whose conversation was recorded under the express terms of the statute. In deciding which state’s law to apply, the Court looked to the place where the recording itself was made and held that California law would govern. *Id.* at 109-10. And because California law permitted the recording in question, the Nevada Supreme Court held that the call recording was lawful and properly admitted at trial against the defendant. *Id.* at 110.

Plaintiff’s argument that *McLellan* helps his case is backwards. Plaintiff contends that in *McLellan*, the Court’s inquiry was restricted to the application of an evidentiary statute, NRS 48.077, and included as a statement of dicta that the out-of-state call recording at issue was impermissible

1 under NRS 200.620. *See* Doc. 20 at 7-9. Although in *McLellan* the Court did consider NRS 48.077
2 in determining whether the recorded call was admissible, the Court made clear that this is the same
3 inquiry required under NRS 200.620. According to the Court, NRS 48.077 would make a call
4 recording admissible if the recording were lawful where the recording took place, even though “the
5 manner of interception would violate Nevada law **had the interception taken place in Nevada.**”
6 *McLellan*, 182 P.3d at 109 (emphasis added). Stated differently, the *McLellan* Court made clear that
7 NRS 200.620 did not apply to the out-of-state call recordings at all **because the interception did not**
8 **take place in Nevada.** Plaintiff reads right over that key text and, in so doing, misses the entire point
9 of the decision.

10 Moreover, Plaintiff’s interpretation of *McLellan* would produce grossly absurd results. The
11 criminal and civil penalties of NRS 200.620(1) apply to both law enforcement and private citizens.
12 *See* NRS 200.610; NRS 200.620; NRS 200.690. According to the Plaintiff, a call recorded outside of
13 Nevada may be admissible as evidence but is still illegal under NRS200.620, making any person
14 outside Nevada who records a call with a person inside Nevada guilty of a felony and liable for
15 statutory damages. Thus, according to plaintiff’s argument, the California sheriff deputies who
16 recorded the call in the *McLellan* investigation would presumably be very surprised to learn that they
17 had committed a felony in Nevada without ever setting foot there, and even after the Nevada Supreme
18 Court’s decision in their favor.

19 In the same way that he misreads the *McLellan* decision’s implications for this case, Plaintiff
20 mistakenly suggests that the Court should feel free to ignore the precedents from the Washington
21 courts (cited in Green Tree’s Memorandum supporting the Motion to Dismiss, Doc. 14 at 7-8) that
22 the *McLellan* Court expressly relied upon in reaching its decision. *See McLellan*, 182 P.3d at 109-
23 10. Plaintiff suggests that those cases can be ignored because the Washington Supreme Court’s
24 *Fowler* decision concerned the admission of evidence rather than civil liability for a call recording.
25 Doc. 20 at 9. That argument is wrong for two reasons. **First**, just as with *McLellan*, the *Fowler*
26 decision required the Court to decide which state’s law governed the legality of a call recording, and
27 thus its admission into evidence. *See State v. Fowler*, 139 P.3d 387, 393-95 (Wash. 2006). Plaintiff
28 fails to offer any reason why that inquiry did **not** involve a choice-of-law analysis. **Second**, as Green

1 Tree noted in its Memorandum supporting the Motion to Dismiss, the *Fowler* Court relied heavily on
2 *Kadoranian v. Bellingham Police Department*, 829 P.2d 1061 (Wash. 1992) (en banc), a civil case
3 where the Washington Supreme Court expressly adopted the rule that “the place where the
4 conversation was intercepted and recorded” dictates which jurisdiction’s law applies. The Nevada
5 Supreme Court’s endorsement of Washington’s approach is conclusive here. Furthermore, both
6 *Fowler* and *Kadoranian* are consistent with the decisions of the overwhelming majority of courts that
7 have reached the issue.¹

8 Contrary to the Nevada Supreme Court’s holding in *McLellan* and the majority rule, Plaintiff
9 hopes to convince this Court to change Nevada law based on the California Supreme Court’s holding
10 in *Kearney v. Salomon Smith Barney, Inc.*, 137 P. 3d 914 (Cal. 2006). That argument is fatally
11 flawed. As a court sitting in diversity, this Court must “apply the substantive law of [Nevada], as
12 interpreted by the [Nevada] Supreme Court.” *Lord v. Swire Pac. Holdings, Inc.*, 203 F. Supp. 2d
13 1175, 1178 (D. Idaho 2002); *accord, e.g., Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973
14 F.2d 688, 692 (9th Cir. 1992); *Ins. Co. of N. Amer. v. Howard*, 679 F.2d 147, 149 (9th Cir. 1982). As
15 already noted above, in *McLellan*, the Nevada Supreme Court expressly indicated that a violation of
16 NRS 200.620 would have occurred in the case “**had the interception taken place in Nevada.**” 182
17 P.3d at 109 (emphasis added). The same rule applies here—NRS 200.620 only provides a cause of
18 action if the acts of recording telephone calls in question had “taken place in Nevada.”

19 In any case, even if *McLellan* were not the starting and ending point for the inquiry, Plaintiff’s
20 argument is misguided. Even if Plaintiff were correct that *McLellan*’s holding concerns only NRS

21
22 ¹ See, e.g., *Huff v. Spaw*, 794 F.3d 543, 547 (6th Cir. 2015) (in civil action with cause of action for
23 violation of wiretapping statute, holding that “[t]he relevant location is not where the [plaintiff’s]
24 conversations took place, but where [the defendant] used a device to acquire the contents of those
25 conversations.”); *Stowe v. Devoy*, 588 F.2d 336, 341, n. 12 (2d Cir. 1978) (“The law of the locality in
26 which the tap exists (and where the interception takes place) governs its validity. . . .”), *cert denied*,
27 442 U.S. 931 (1979); *MacNeil Eng’g Co. v. Trisport, Ltd.*, 59 F. Supp. 2d 199, 202 (D. Mass. 1999)
28 (holding that motion for leave to amend civil complaint was futile because proposed additional claim
for violation of Massachusetts’s dual-consent wiretapping statute only applied to calls recorded or
intercepted within Massachusetts’s borders); *United States v. Tirinkian*, 502 F. Supp. 620, 627
(D.N.D. 1980) (“it is the point of interception which governs”); *State v. Fleming*, 755 P.2d 725, 727
(Or. Ct. App. 1988) (“The recording was made in Oregon lawfully, and Washington law simply does
not apply.”); *Larrison v. Larrison*, 750 A.2d 895, 898 (Pa. Super. Ct. 2000) (holding that New York’s
single-party consent wiretapping act applied to telephone call recorded in New York, instead of
Pennsylvania’s dual-party statute, even though call was placed from Pennsylvania).

1 48.077, he would then have to argue that the Nevada Supreme Court would take a drastically
2 different approach in interpreting NRS 200.620—one that would make other states’ residents and
3 public officials recording calls with individuals in Nevada (like the sheriff’s deputies in *McLellan*)
4 guilty of a felony. It would be improper for this Court to greatly expand Nevada law in such an
5 unreasonable fashion. “Federalism concerns require that [state courts be permitted] to decide whether
6 and to what extent they will expand state . . . law.” *City of Philadelphia v. Lead Indus. Ass’n, Inc.*,
7 994 F.2d 112, 123 (3d Cir. 1993). Thus, a federal court should not be the first to read Nevada law in
8 a new, expansive fashion, particularly when it conflicts with existing state-law precedent. *See id.* (“In
9 a diversity case . . . federal courts may not engage in judicial activism.”); *accord Curry v. Fred Olsen*
10 *Line*, 367 F.2d 921, 924 (9th Cir. 1966) (“We do not make California law, even interstitially”);
11 *Lewis v. J.C. Penney, Inc.*, 12 F. sup. 2d 1083, 1088 (E.D. Cal. 1998) (“Plaintiff’s suggestion that a
12 federal trial court, sitting in a diversity case, should extend the [state] law of negligent spoliation . . .
13 based on dicta in the decision of a state intermediate court of appeal is rejected.”).

14 Settled Nevada law makes clear that NRS 200.620 does not apply to Green Tree’s alleged
15 conduct. Without a basis for stating a claim under the geographic scope of NRS 200.620 as
16 established by the Nevada Supreme Court, Plaintiff lacks statutory and Article III standing and cannot
17 plausibly state any cause of action. Dismissal is therefore warranted both under Rule 12(b)(1) and
18 Rule 12(b)(6).

19 III.

20 **THE COMMERCE CLAUSE PRECLUDES APPLICATION OF NEVADA LAW TO MAKE** 21 **CALL RECORDINGS MADE IN OTHER STATES UNLAWFUL.**

22 Plaintiff’s argument that his interpretation of NRS 200.620 would not violate the Commerce
23 Clause is also fatally flawed. Plaintiff argues, *inter alia*, that his interpretation of NRS 200.620
24 would not violate the Commerce Clause because it would only make unlawful conduct that is not
25 “wholly outside” of Nevada’s borders. *See* Doc. 20 at 14. But here, the conduct is “wholly outside”
26 of Nevada’s borders—there is no dispute that the call recordings in question were recorded on
27 equipment located in the states of Arizona and Minnesota, states where such recordings are
28 permissible. *See* Doc. 14-1 (Sternitzke Decl.) at ¶ 5. And by Plaintiff’s own admission, a state law

1 regulating purely extraterritorial conduct violates the Commerce Clause and is unconstitutional. *See*
2 Doc. 20 at 14 (quoting *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989): “the ‘Commerce Clause
3 . . . precludes the application of a state statute to commerce that takes place wholly outside the State’s
4 borders, whether or not the commerce has effects within the State.’”). The fact that a person
5 travelling through or residing in Nevada may have placed the call does not change the fact that any
6 recording by Green Tree took place entirely outside the state.

7 Giving NRS 200.620 extraterritorial effect would create serious due-process problems if
8 applied to a party whose *conduct* takes place exclusively outside the State of Nevada. Under the
9 United States Supreme Court’s holding in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408,
10 421 (2003), “[a] State cannot punish a defendant for conduct that may have been lawful where it
11 occurred.” Green Tree relied on that fundamental principal of law in recording calls using equipment
12 in Arizona and Minnesota, where ARIZ. REV. STAT. ANN. §§ 13-3005, -3012(9) and MINN. STAT.
13 § 626A.02(2)(c) expressly authorize such recordings. Plaintiff’s effort to expand NRS 200.620 to
14 cover such wholly extraterritorial conduct would result in a gross violation of the Commerce Clause
15 and the Due Process Clause.

16 The unstated premise to Plaintiff’s argument—that a call recorded on equipment outside of
17 Nevada is conduct within the State of Nevada if the other party to the call is in the state—is
18 demonstrably incorrect. Most significantly, it is the same argument that the Nevada Supreme Court
19 rejected in *McLellan*. Furthermore, the argument has no limiting principle. Under Plaintiff’s
20 interpretation of a statute, a company like Green Tree that does business in any other state and which
21 lawfully records telephone calls under the laws of other jurisdictions would immediately become
22 potentially liable under NRS 200.620 the first time an individual placed a call to the company while
23 travelling in the State of Nevada—even if the company has no way to know where the caller is
24 located. Again, as Green Tree pointed out in the Memorandum supporting the Motion to Dismiss, a
25 Green Tree customer with a mortgaged home in Delaware who places a call to Green Tree’s customer
26 service number while traveling in Las Vegas may be a member of Plaintiff’s putative class, even
27 though Green Tree would lack any way to determine the location of the caller in that scenario. And
28 although Plaintiff argues that the NRS 200.620 only “regulates phone calls purposefully directed at

1 Nevada residents in Nevada,” Doc. 20 at 16, neither the Amended Complaint nor the text of NRS
2 200.620 suggests that there is any such limitation.

3 In short, Plaintiff seeks to use NRS 200.620 to hold Green Tree liable for conduct that took
4 place in states that expressly authorize the very conduct in question. Reading NRS 200.620 in such a
5 manner would violate Green Tree’s due process rights, as well as the constitutional limitations of the
6 Commerce Clause.

7 **CONCLUSION**

8 For the reasons stated above, and in Green Tree’s Memorandum Supporting its Motion to
9 Dismiss, Plaintiff’s Amended Complaint should be dismissed.

10
11 DATED December 22, 2015.

12
13 /s/ Gregg A. Hubley

14 MICHAEL R. BROOKS, ESQ.

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22 *Servicing LLC, and Walter Investment Management*
23 *Corporation*
24
25
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28

CERTIFICATE OF SERVICE

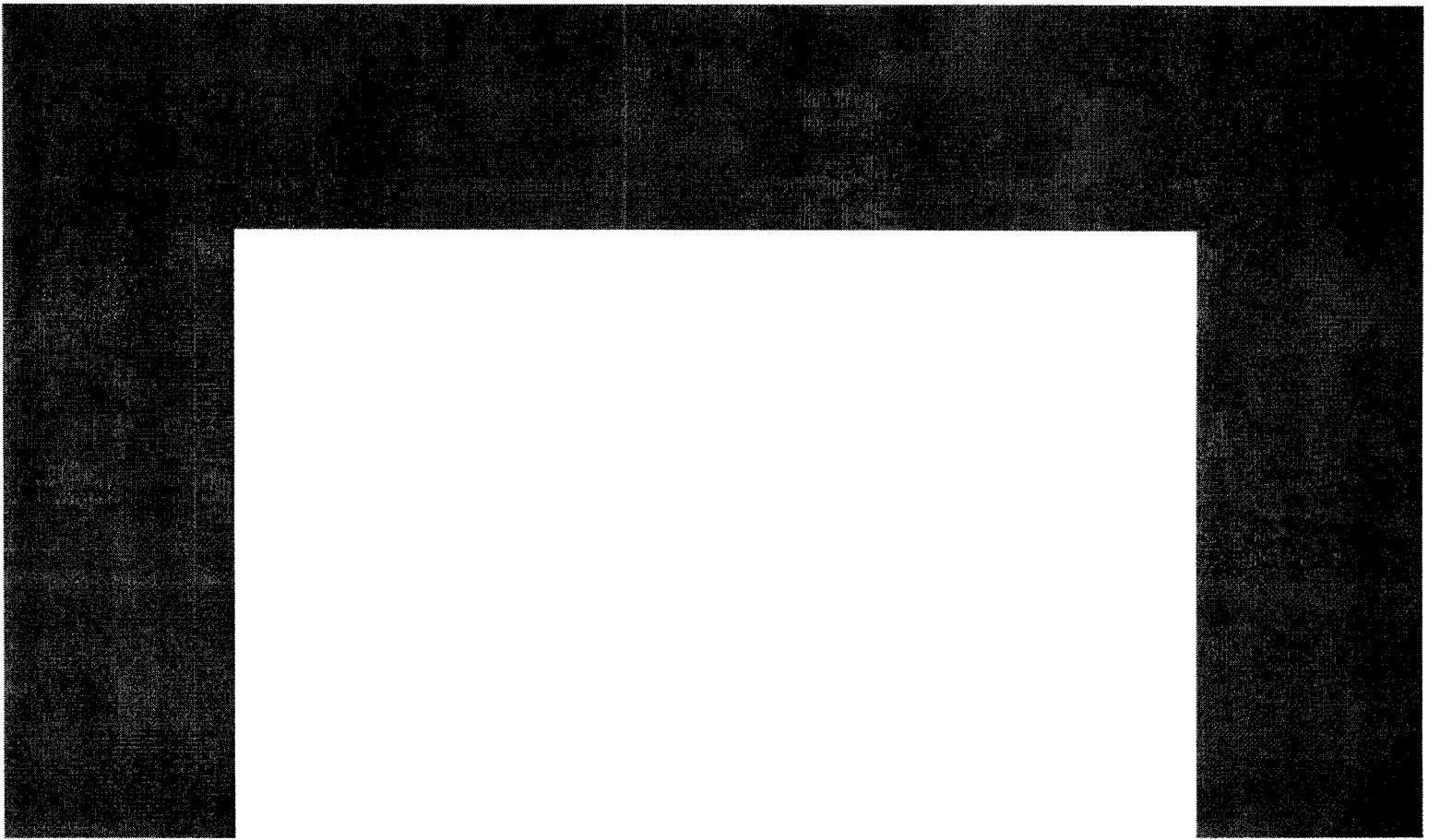
I HEREBY CERTIFY that on December 22, 2015 and pursuant to FRCP 5, I served through this Court's electronic service notification system CM/ECF a true and correct copy of the foregoing **DEFENDANT DITECH FINANCIAL LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT** on all parties and counsel as identified on the Court generated notice of electronic filing.

Danny J. Horen, Esq.
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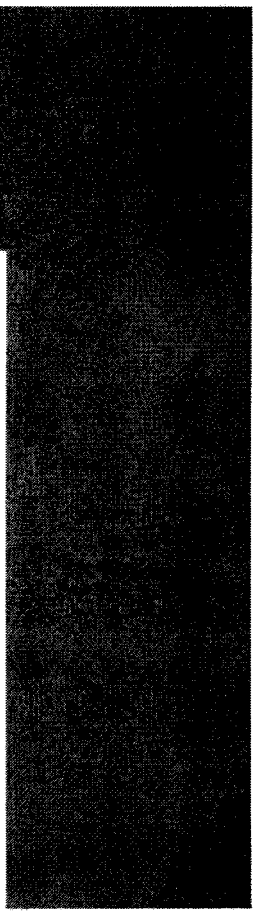
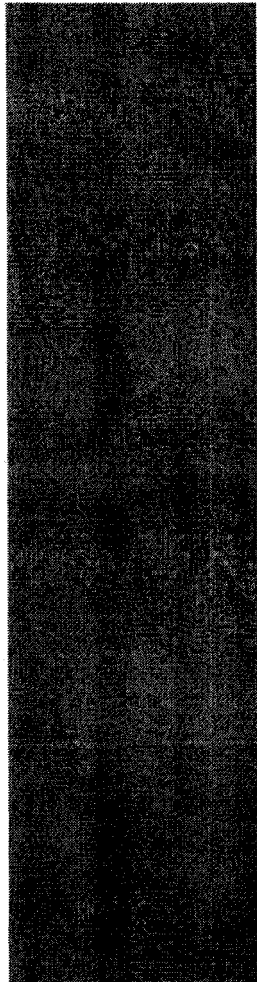
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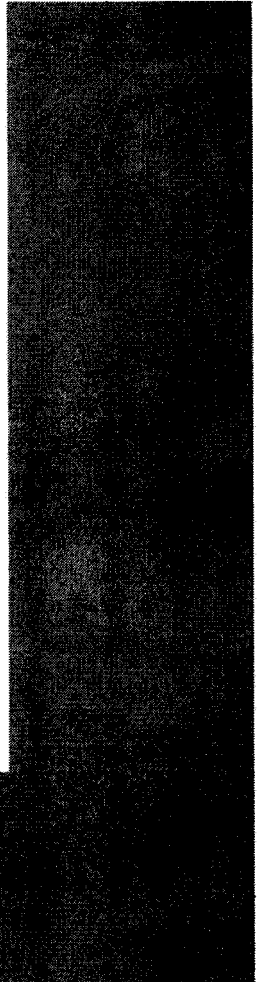
/s/ Nicole L. Lane
An employee of BROOKS HUBLEY LLP



5



5



**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SANFORD BUCKLES, on behalf
of himself and others similarly
situated,

Plaintiff,

v.

GREEN TREE SERVICING, LLC
and WALTER INVESTMENT
MANAGEMENT
CORPORATION,

Defendants.

Case No.: 2:15-cv-01581-GMN-(CWH)

**CERTIFICATION ORDER TO
THE NEVADA SUPREME COURT**

Before the Court is Defendant Ditech Financial LLC's (formerly known as Green Tree Servicing LLC) ("Ditech") motion to dismiss the amended complaint in this putative class action (ECF No. 14). Plaintiff Sanford Buckles ("Plaintiff") filed a response (ECF No. 20), and Ditech filed a reply (ECF No. 24). For the reasons discussed below, the Court has decided that the motion to dismiss raises a statutory "question of law of this state which may be determinative of the cause" as to which it appears to the Court that "there is no controlling precedent" in the decisions of the Nevada Supreme Court. *See* NEV. R. APP. P. 5(a). The Court therefore certifies questions of Nevada statutory law to the Nevada Supreme Court.

I. NATURE OF THE CASE

Plaintiff has filed a putative class action against mortgage servicer Ditech, claiming it violated Nevada Revised Statutes 200.620 by recording telephone conversations involving him and other class members without each class member's consent. ECF No. 13 (amended complaint). Plaintiff has defined the class to

1 include “All persons in Nevada whose inbound and outbound telephone
2 conversations were monitored, recorded, and/or eavesdropped upon without their
3 consent by [Ditech] within three years prior to the filing of the original Complaint
4 in this action.” *Id.* ¶ 39.

5 Ditech moved to dismiss the complaint, arguing (1) that Nevada Revised
6 Statutes 200.620 does not govern telephone calls recorded by persons outside
7 Nevada on equipment located outside of Nevada, and (2) that the United States
8 Constitution precludes extraterritorial application of Nevada Revised Statutes
9 200.620 to telephone recordings made outside of Nevada. This Court has
10 determined that Ditech’s motion turns on a dispositive question of Nevada’s
11 statutory law best decided by the Nevada Supreme Court, since “there is no
12 controlling precedent in the decisions of the Supreme Court of this state.” *See*
13 *NEV. R. APP. P. 5(a)*.

14 **II. STATUTES AT ISSUE**

15 Nevada Revised Statutes 200.620(1) provides, in relevant part:
16 Except as otherwise provided in NRS 179.410 to 179.515, inclusive,
17 209.419 and 704.195, it is unlawful for any person to intercept or
18 attempt to intercept any wire communication unless:

- 19 (a) The interception or attempted interception is made with the
20 prior consent of one of the parties to the communication; and
21 (b) An emergency situation exists and it is impractical to obtain
22 a court order as required by NRS 179.410 to 179.515, inclusive,
23 before the interception, in which event the interception is
24 subject to the requirements of subsection 3. If the application
25 for ratification is denied, any use or disclosure of the
26 information so intercepted is unlawful, and the person who

1 made the interception shall notify the sender and the receiver of
2 the communication that:

3 (1) The communication was intercepted; and

4 (2) Upon application to the court, ratification of the
5 interception was denied.

6 The Nevada Revised Statutes include the following definitions:

7 1. "Person" includes public officials and law enforcement officers of
8 the State and of a county or municipality or other political subdivision
9 of the State.

10 2. "Wire communication" means the transmission of writing, signs,
11 signals, pictures and sounds of all kinds by wire, cable, or other
12 similar connection between the points of origin and reception of such
13 transmission, including all facilities and services incidental to such
14 transmission, which facilities and services include, among other
15 things, the receipt, forwarding and delivering of communications.

16 3. "Radio communication" means the transmission of writing, signs,
17 signals, pictures, and sounds of all kinds by radio or other wireless
18 methods, including all facilities and services incidental to such
19 transmission, which facilities and services include, among other
20 things, the receipt, forwarding and delivering of communications. The
21 term does not include the transmission of writing, signs, signals,
22 pictures and sounds broadcast by amateurs or public or municipal
23 agencies of the State of Nevada, or by others for the use of the general
24 public.

25 Nev. Rev. Stat. 200.610.
26

1 “Intercept” means the aural acquisition of the contents of any wire,
2 electronic or oral communication through the use of any electronic,
3 mechanical or other device or of any sending or receiving equipment.
4 Nev. Rev. Stat. 179.430.

5 The Nevada Revised Statutes contain the following penalties:
6 A person who willfully and knowingly violates NRS 200.620 to
7 200.650 inclusive:

8 (a) Shall be punished for a category D felony as provided in
9 NRS 193.130.

10 (b) Is liable to a person whose wire or oral communication is
11 intercepted without his or her consent for:

12 (1) Actual damages or liquidated damages of \$100 per
13 day of violation but not less than \$1,000, whichever is
14 greater;

15 (2) Punitive damages; and

16 (3) His or her costs reasonably incurred in the action,
17 including a reasonable attorney’s fee,

18 all of which may be recovered by civil action.

19 Nev. Rev. Stat. 200.690(1).

20 **III. STATEMENT OF RELEVANT FACTS**

21 Ditech is a Delaware limited liability company which was headquartered in
22 Minnesota at the time the complaint was filed, and which has since moved its
23 headquarters to Florida. Ditech has customer call centers equipped to record
24 telephone calls. Those call centers are located in Arizona and Minnesota. The
25 company does not have any telephone recording equipment in Nevada. Ditech is a
26 home mortgage servicer that regularly services mortgages of Nevada properties.

1 Plaintiff resides in Nevada in a home whose mortgage is serviced by Ditech.
2 Plaintiff alleges that from 2013 through 2014, Ditech engaged in telephone
3 conversations with Plaintiff regarding the Plaintiff's mortgage and recorded such
4 telephone conversations without Plaintiff's consent.

5
6 **IV. ARGUMENTS OF THE PARTIES**

7 The Nevada Supreme Court has interpreted Nevada Revised Statutes
8 200.620 to "prohibit the taping of telephone conversations with the consent of only
9 one party." *Lane v. Allstate Ins. Co.*, 969 P.2d 938, 940 (Nev. 1998). Ditech has
10 moved to dismiss Plaintiff's complaint, arguing Nevada Revised Statutes 200.620
11 does not apply to telephone calls recorded outside of Nevada. Specifically, Ditech
12 argues that NRS 200.620 applies only to recordings that take place with recording
13 equipment in the State of Nevada.

14 Ditech relies primarily on *McLellan v. State*, 182 P.3d 106 (Nev. 2008). In
15 that case, the Nevada Supreme Court held that a telephone recording made in
16 California was admissible against a Nevada defendant who was party to the call
17 because the recording was not made in Nevada and thus 200.620 did not apply. *Id.*
18 at 109–10. Ditech also relies on authority from the Washington Supreme Court,
19 followed in *McLellan*, holding that the law of the State where the recording is
20 made determines whether interception of the telephone call is lawful. *See State v.*
21 *Fowler*, 139 P.3d 342, 347 (Wash. 2006) (en banc); *Kadoranian v. Bellingham*
22 *Police Dept.*, 829 P.2d 1061, 1065 (Wash. 1992) (en banc).

23 Plaintiff argues that 200.620 applies to telephone calls recorded outside of
24 the State if a person in Nevada is party to the call and does not consent. Plaintiff
25 argues that *McLellan* is distinguishable because it turned on an evidentiary rule
26 (Nevada Revised Statutes 48.077), not 200.620. Plaintiff relies primarily on a
California Supreme Court decision, *Kearney v. Salomon Smith Barney*, 137 P.3d

1 914 (Cal. 2006). *Kearney* held that California’s two-party consent statute applied
2 to recordings made outside California because to hold otherwise would
3 disadvantage California residents. *Id.* at 917, 937.

4 **V. DISCUSSION**

5 If Nevada revised Statutes 200.620 does not apply to recordings made
6 outside of Nevada by Ditech, Ditech’s motion to dismiss is due to be granted. If
7 the statute applies to telephone recordings made outside of Nevada by Ditech,
8 however, this Court must decide Ditech’s constitutional challenge to the statute
9 under the Due Process Clause and the Dormant Commerce Clause of the United
10 States Constitution. The necessity of reaching these serious constitutional
11 questions depends upon resolution of prior, potentially dispositive, questions of
12 Nevada statutory law. This Court believes there is “no controlling precedent” from
13 the Nevada Supreme Court on these precise “questions of law” and therefore has
14 decided to certify the questions to that court. *See* NEV. R. APP. P. 5(a).

15
16 **VI. PARTIES’ PROPOSED CERTIFIED QUESTIONS OF STATE LAW**

17 The Parties have met and conferred on the issue but could not agree as to the
18 language of the question(s) of law to be certified to the Nevada Supreme Court.
19 They therefore respectively propose the following:

20
21 **Plaintiff’s proposed question:** Does Nev. Rev. Stat. 200.620 apply to
22 telephone recordings made by a party outside Nevada, who regularly records
23 telephone conversations with Nevada residents, of telephone conversations with a
24 person in Nevada without that person’s consent?

25 **Defendant’s proposed question:** Does Nev. Rev. Stat. 200.620 apply to
26 telephone recordings made by a party outside Nevada who uses equipment outside
Nevada to record telephone conversations with a person in Nevada without that

1 person's consent? If so, does that decision apply retroactively or prospectively
2 only?

3 **Parties' explanation for competing positions:**

4 First, Plaintiff maintains that the question presented should include the fact
5 that Defendant "regularly records telephone conversations with Nevada residents,"
6 a fact that was considered in *Kearney*. Defendant maintains that the question
7 presented should not include this because the allegation is not relevant. Defendant
8 believes the question should include the fact that the equipment used to record is
9 also located outside Nevada. Plaintiff proposes not to include that concept.

10 Second, Defendant believes that implicit in the question to be certified is
11 whether any decision to apply the statute to recording that takes place on
12 equipment outside Nevada should apply retroactively or prospectively only.
13 Defendant submits that this issue is subsumed within the question to be certified
14 but should be made explicit, is raised by Plaintiff's reliance on *Kearney*¹, and is
15 now appropriate to raise since the Nevada Supreme Court is the court with the
16 power to make application of the statute prospective only. Plaintiff disagrees that
17 this is appropriate since this issue has never been raised in the Parties' briefing
18 and, furthermore, it is outside of the scope of this Court's Order for the Parties to
19 submit this joint brief.

20 Accordingly, the parties have submitted competing proposals on the
21 question(s) to be certified.
22
23
24

25 ¹ The California Supreme Court applied its decision in *Kearney* prospectively,
26 however, due to prior uncertainty in the law. *Id.* at 937–39.

1 **VII. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Defendant Ditech's motion to dismiss
3 (ECF No. 14) is **DENIED without prejudice**, with permission to renew the
4 motion within 30 days of the resolution of the Court's certified question to the
5 Nevada Supreme Court.

6 **IT IS FURTHER ORDERED** that the following questions of law are
7 **CERTIFIED to the Nevada Supreme Court** pursuant to Nevada Rule of
8 Appellate Procedure 5:

9 **Plaintiff's position:** Does Nev. Rev. Stat. 200.620 apply to telephone
10 recordings made by a party outside Nevada, who regularly records telephone
11 conversations with Nevada residents, of telephone conversations with a person in
12 Nevada without that person's consent?

13 **Defendant's position:** Does Nev. Rev. Stat. 200.620 apply to telephone
14 recordings by a party outside Nevada who uses equipment outside Nevada to
15 record telephone conversations with a person in Nevada without that person's
16 consent? If so, does that decision apply retroactively, or prospectively only?
17 *See* NEV. R. APP. P. 5(c)(1). The nature of the controversy and a statement of the
18 facts are discussed above. *See* NEV. R. APP. P. 5(c)(2)–(3). Because Defendant
19 Ditech is the movant, Ditech is designated the Appellant and Plaintiff Buckles is
20 designated the Respondent. *See* NEV. R. APP. P. 5(c)(4). The names and addresses
21 of counsel are as follows:

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See NEV. R. APP. P. 5(c)(5). Further elaboration upon the certified question is included in this Order.

1 **IT IS FURTHER ORDERED** that the Clerk of the Court shall forward a
2 copy of this Order to the Clerk of the Nevada Supreme Court under the official
3 seal of the United States District Court for the District of Nevada. *See* NEV. R.
4 APP. P. 5(d).

5 **DATED** this 25 day of May, 2016.

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10 Gloria M. Navarro, Chief Judge
11 United States District Court
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