

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 14

**23STCV28359**

**DARYL LEVINGS vs CHOICE HOTELS INTERNATIONAL,  
INC.**

April 3, 2024

8:30 AM

Judge: Honorable Cherol J. Nellon

Judicial Assistant: H. Garcia

Courtroom Assistant: G. Mack

CSR: None

ERM: None

Deputy Sheriff: None

---

---

**APPEARANCES:**

For Plaintiff(s): Scott J. Ferrell (via LACC)

For Defendant(s): Rachel N. Rivers (via LACC)

---

---

**NATURE OF PROCEEDINGS:** Hearing on Demurrer - with Motion to Strike (CCP 430.10);  
Case Management Conference

The Court's tentative ruling is posted online for the parties to review.

The Demurrer -with Motion to Strike is called for hearing.

After hearing oral argument, the Court adopts its tentative ruling as the final order of the Court as follows:

The Demurrer - with Motion to Strike (CCP 430.10) filed by Choice Hotels International, Inc. on 02/16/2024 is Overruled.

The Motion to Strike (not initial pleading) filed by Choice Hotels International, Inc. on 02/16/2024 is Granted.

**Case Background**

Plaintiff alleges that Defendant has improperly used “pen register” software to track his internet activity.

On November 20, 2023, Plaintiff filed his Complaint for Violation of Penal Code § 638.51 against Defendants Choice Hotels International, Inc. dba www.choicehotels.com (“Choice Hotels”).

No trial date has yet been set.

(1) Demurrer

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 14

**23STCV28359**

**DARYL LEVINGS vs CHOICE HOTELS INTERNATIONAL,  
INC.**

April 3, 2024

8:30 AM

Judge: Honorable Cherol J. Nellon

Judicial Assistant: H. Garcia

Courtroom Assistant: G. Mack

CSR: None

ERM: None

Deputy Sheriff: None

---

Defendant Choice Hotels now demurs to the TAC on the grounds that it fails to state facts sufficient to support the cause of action.

Decision

Plaintiff's Request for Judicial Notice is DENIED. Exhibits A-B do not appear to be relevant to the dispute at hand. Exhibit C is a trial court ruling from a different department. Trial court rulings in other cases are not relevant to the facts of this case and cannot be cited as precedent. See *Budrow v. Dave & Buster's of California, Inc.* (2009) 171 Cal.App.4th 875, 884-885.

The demurrer is OVERRULED.

Discussion

Penal Code § 638.51 provides as follows:

“(a) Except as provided in subdivision (b), a person may not install or use a pen register or a trap and trace device without first obtaining a court order pursuant to Section 638.52 or 638.53.

(b) A provider of electronic or wire communication service may use a pen register or a trap and trace device for any of the following purposes:

(1) To operate, maintain, and test a wire or electronic communication service.

(2) To protect the rights or property of the provider.

(3) To protect users of the service from abuse of service or unlawful use of service.

(4) To record the fact that a wire or electronic communication was initiated or completed to protect the provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful, or abusive use of service.

(5) If the consent of the user of that service has been obtained.

(c) A violation of this section is punishable by a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in the county jail not exceeding one year, or by

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 14

**23STCV28359**

**DARYL LEVINGS vs CHOICE HOTELS INTERNATIONAL,  
INC.**

April 3, 2024

8:30 AM

Judge: Honorable Chero J. Nellon

Judicial Assistant: H. Garcia

Courtroom Assistant: G. Mack

CSR: None

ERM: None

Deputy Sheriff: None

---

imprisonment pursuant to subdivision (h) of Section 1170, or by both that fine and imprisonment.

(d) A good faith reliance on an order issued pursuant to Section 638.52, or an authorization made pursuant to Section 638.53, is a complete defense to a civil or criminal action brought under this section or under this chapter.”

Penal Code § 638.50(b) defines a “pen register” as follows:

“(b) “Pen register” means a device or process that records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, but not the contents of a communication. “Pen register” does not include a device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider, or a device or process used by a provider or customer of a wire communication service for cost accounting or other similar purposes in the ordinary course of its business.”

Pursuant to Penal Code § 637.2, a victim may bring a civil suit against a violator and seek the following remedies: (1) the greater of \$5000 or treble actual damages, and/or (2) an injunction. Pursuant to Penal Code § 637.2(c) permits a plaintiff to bring such a suit even if they have no “actual damages.”

Defense challenges the pleading here on two separate grounds. First, they argue that Plaintiff has not alleged any facts to show that Defendant actually used a pen register. Second, they contend that Plaintiff consented to the use of a pen register. Neither argument can succeed at this stage.

On the first point, Plaintiff has pled (at paragraphs 16-17 of his complaint) that Defendant “deployed a software device and process” which first recorded the information being transmitted by Plaintiff’s device, and then used that information to install tracking code on Plaintiff’s device. That is sufficient to describe a pen register as defined in Section 638.50(b), and the illegal use of such a pen register as prohibited in Section 638.51(a). Plaintiff is only obliged to plead these ultimate facts; a detailed description of the software and the precise mechanism it employs are evidentiary facts which need not be included. *C.W. Johnson & Sons, Inc. v. Carpenter* (2020) 53 Cal.App.5th 165, 169.

On the second point, the various exceptions contained in Section 638.51(b) create possible

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 14

**23STCV28359**

**DARYL LEVINGS vs CHOICE HOTELS INTERNATIONAL,  
INC.**

April 3, 2024

8:30 AM

Judge: Honorable Cherol J. Nellon

Judicial Assistant: H. Garcia

Courtroom Assistant: G. Mack

CSR: None

ERM: None

Deputy Sheriff: None

---

affirmative defenses. Plaintiff is not necessarily required to plead their absence. In any event, Defense's argument appears to be that Plaintiff gave consent simply by visiting the website. Accepting this argument would allow the exception to swallow the rule whole. If merely visiting a website constitutes consent to the use of a pen register, then Section 638.51(a) would be a dead letter. It could never be violated. That is not an acceptable consequence.

**Conclusion**

Plaintiff has properly pled the ultimate facts necessary to this cause of action. Resolution of the issues raised requires discovery and the introduction of evidence. Therefore, the demurrer is **OVERRULED**.

**(2) Motion to Strike**

Defendant now moves this court for an order striking the punitive damages allegations from the Complaint.

**Decision**

The motion is **GRANTED**. The request for punitive damages is **STRICKEN**.

**Discussion**

Ordinarily, the provisions of the Penal Code do not give rise to a private right of action. See e.g. *Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal.App.4th 385, 399-400. Where, as here, the Legislature provides for a private right of action, it may or may not provide for a remedy. But it did so here. And where the Legislature creates a specific cause of action and a remedy, courts are usually confined to awarding the remedy provided for.

As the Court of Appeal explained in *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 909-913, there are essentially two ways to approach a statutory remedy provision, and both lead to the same place. The first is that if a statute creates a new right that did not exist at common law, the new right should be matched to the new remedy; unless the new remedy is obviously inadequate, the court cannot presume that the Legislature meant to bring in old remedies to a new and different situation. *Id.* at 912 (citing cases). The second is that if a statute merely creates a new theory of liability for what was already a common law tort, allowing the plaintiff to recover both statutory penalties

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 14

**23STCV28359**

**DARYL LEVINGS vs CHOICE HOTELS INTERNATIONAL,  
INC.**

April 3, 2024

8:30 AM

Judge: Honorable CheroJ. Nellon

Judicial Assistant: H. Garcia

Courtroom Assistant: G. Mack

CSR: None

ERM: None

Deputy Sheriff: None

---

and common law remedies amounts to double recovery. Id. at 912-913.[1]

The De Anza panel further explained that the Legislature knows how to draft statutes to include common law remedies if it wants to. It has frequently drafted statutes which explicitly incorporate the punitive damages statutes, or specify that the remedy is not exclusive, or otherwise indicate that the plaintiff may recover more than the given statutory language describes. De Anza, supra, 94 Cal.App.4th at 911.

Here, Penal Code § 637.2 makes no reference to the punitive damages statute. It contains no statement that the remedies permitted are “cumulative” or “non-exclusive.” Nothing in the language of the statute permits a suit for anything other than the remedies expressly listed.

It is also worth noting that, when Defendant raised this exclusivity argument in their motion (at p. 8-9), Plaintiff did not directly respond. The only mention of this issue in the opposition is an oblique assertion that Defendant “failed to distinguish” *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1256. (Opposition p. 11:18-22). That assertion misses the point. The issue is not Plaintiff’s ability to plead a common law claim for invasion of privacy. The issue is whether Plaintiff actually pled such a claim. He did not. He made no attempt to. The complaint contains only one cause of action.

#### Conclusion

Because Plaintiff has chosen to proceed solely on a statutory cause of action, Plaintiff is confined to the remedies provided by that statute. Those remedies do not include punitive damages. Therefore, the motion is GRANTED. The request for punitive damages is STRICKEN.

[1] In that situation, the Plaintiff is allowed to choose whether to pursue the statutory claim or the common law claim, each with their concomitant set of remedies. “A plaintiff who relies solely on a cause of action for a statutory violation may be deemed to have waived punitive damages.” De Anza, supra, 94 Cal.App.4th at 913.

The Case Management Conference is called for hearing.

Plaintiff waives a trial by jury.

Defendant demands a Jury Trial and is ordered to pay jury fees within 10 days.

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 14

**23STCV28359**

**DARYL LEVINGS vs CHOICE HOTELS INTERNATIONAL,  
INC.**

April 3, 2024

8:30 AM

Judge: Honorable Cherol J. Nellon

Judicial Assistant: H. Garcia

Courtroom Assistant: G. Mack

CSR: None

ERM: None

Deputy Sheriff: None

---

Final Status Conference is scheduled for 04/17/2025 at 10:00 AM in Department 14 at Stanley Mosk Courthouse.

All counsel and any unrepresented parties are to be present in person at the Final Status Conference. (REMOTE APPEARANCE NOT ALLOWED) Counsel must bring a completed joint trial binder to the Final Status Conference for court review.

Jury Trial (with a 3-5 day estimate) is scheduled for 04/28/2025 at 09:00 AM in Department 14 at Stanley Mosk Courthouse.

Counsel are ordered to comply with the Local Rule 3.25(f) in preparation of the Final Status Conference and meet and confer regarding a joint witness list, joint exhibit list, joint statement of the case, agreed upon/disputed jury instructions and special verdict form, which must be submitted five court days before the Final Status Conference.

The Court requires the parties to participate in an Informal Discovery Conference prior to any filing/hearing on Motion(s) to Compel. The parties must contact Department 14 staff for further information on scheduling an Informal Discovery Conference.

Department 14 requires a courtesy copies of Motion(s) for Summary Judgment/Adjudication and any papers filed in connection with a Motion(s) for Summary Judgment/Adjudication.

Counsel for Plaintiff is to give notice.