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5 *Attorneys for Plaintiff and*
6 *the Proposed Class*

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN DIEGO**

11 LYNETTE FLIEGELMAN, on Behalf of)
12 Herself and All Others Similarly Situated,)
13 Plaintiff,)
14 v.)
15 UNTUCKIT, LLC, and DOES 1 through 100,)
16 inclusive,)
17 Defendants.)
18)
19 _____)

Case No: 37-2023-00001137-CU-BT-CTL

CLASS ACTION

COMPLAINT FOR:

**STATUTORY DAMAGES AND
INJUNCTIVE RELIEF**

DEMAND FOR JURY TRIAL

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CLASS ACTION COMPLAINT

1 Plaintiff Lynette Fliegelman (“Plaintiff”), brings this action against Defendant Untuckit,
2 LLC and DOES 1-100 (collectively referred to as “Untuckit” or “Defendant”) on behalf of
3 herself, and all others similarly situated, upon information and belief, except as to her own
4 actions, the investigation of her counsel, and the facts that are a matter of public record, as
5 follows:

6 **INTRODUCTION**

7 1. This class action arises out Defendant’s policy and practice to record, without the
8 consent of all parties, telephone calls made to Defendant’s toll-free customer service telephone
9 number in violation of California’s Invasion of Privacy Act, California Penal Code §630, *et seq.*
10 Defendant’s toll-free number – 888-992-3102 – is referred to as “Defendant’s customer service
11 number.” During the relevant time period, Defendant intentionally and surreptitiously recorded
12 telephone communications made to Defendant’s customer service number. Defendant did so
13 without warning or disclosing to inbound callers that their calls might be recorded.

14 2. Defendant’s policy and practice of recording telephone conversations without the
15 consent of all parties violates the California Invasion of Privacy Act (Penal Code §§ 630, *et seq.*
16 (“CIPA”). Specifically, Defendant’s acts and practices violate Penal Code § 632.7. Penal Code
17 § 632.7 is violated the moment the recording of a telephone communication is made without the
18 knowledge or consent of all parties thereto, regardless of whether it is subsequently disclosed.
19 The only intent required is that the act of recording itself be done intentionally. There is no
20 requisite intent on behalf of the party doing the surreptitious recording to break California law, or
21 to invade the privacy rights of any other person. Moreover, there is no requirement under Penal
22 Code § 632.7 that the communication be confidential.

23 3. Penal Code § 630, *et seq.* plays an important role in protecting the privacy of
24 California residents. As recognized by the California Supreme Court, secret recording “denies
25 the speaker an important aspect of privacy of communication – the right to control the nature and
26 extent of the firsthand dissemination of his statements.” *Ribas v. Clark*, 38 Cal. 3d 355, 361
27 (1985) (citations omitted). The California Supreme Court has declared that California has a
28 “strong and continuing interest in the full and vigorous application” of the provisions that

1 prohibit “the recording of telephone conversations without the knowledge or consent of *all*
2 parties to the conversations.” *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 126
3 (2006) (italics in original). In *Kearney*, the California Supreme Court explained that if a
4 company wants to record calls as part of its routine business activity, it can avoid liability by
5 giving an appropriate warning at the beginning of each call. “A business that adequately advises
6 all parties to a telephone call, at the outset of the conversation, of its intent to record the call
7 would not violate the provision.” *Id* at 118. Furthermore, businesses can take unfair advantage
8 of consumers if they do not disclose that the calls are being recorded, by “selectively disclosing
9 recordings when disclosure serves the company’s interest, but not volunteering the recordings’
10 existence (or quickly destroying them) when they would be detrimental to the company. . .” *Id*
11 at 126. The California Supreme Court has declared that Penal Code § 632.7 makes it illegal to
12 record *any* communication involving cellular or cordless telephones without regard to whether
13 the communication is “confidential.” *Flanagan v. Flanagan*, 27 Cal. 4th 766, 771, fn. 2 (2002).
14 Moreover, in *Smith v. LoanMe, Inc.*, 11 Cal. 5th 183, 202-203 (2021), the California Supreme
15 Court held that Penal Code “section 632.7 prohibits parties as well as nonparties from
16 intentionally recording a communication transmitted between a cellular or cordless telephone and
17 another device without the consent of all parties to the communication.”

18 4. As a result of Defendant’s violations, all individuals, who called Untuckit’s
19 customer service numbers, while they were in California and were recorded by Defendant
20 surreptitiously and without disclosure are entitled to an award of statutory damages as set forth in
21 Penal Code § 637.2 and injunctive relief as detailed therein.

22 **JURISDICTION AND VENUE**

23 5. This Court has subject matter jurisdiction over the cause of action asserted herein
24 pursuant to Article VI, § 10 of the California Constitution, California Penal Code §§ 632.7 and
25 637.2. In the aggregate, the damages caused to the members of the Class as defined below
26 exceed the jurisdictional minimum of this Court, but neither the Plaintiff nor any member of the
27 Class individually has suffered damages of, at least, \$75,000.

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1 retail brand for men and women and offers its products through e-commerce, live telephone order
2 sales, and brick-and-mortar stores in California and throughout the United States.

3 10. Plaintiff is informed and believes, and based thereon alleges, that Defendant’s
4 employees, agents, and representatives were and are directed, trained and instructed to, and do,
5 record incoming telephone communications between the customer service representatives and
6 callers, including California callers.

7 **C. Doe Defendants**

8 11. The true names and capacities of defendants sued in this Complaint as DOES 1
9 through 100, inclusive, are currently unknown to Plaintiff, who therefore sues such defendants by
10 such fictitious names. Plaintiff will amend this Complaint to reflect the true names and
11 capacities of the defendants designated herein as DOES 1 through 100 when such identities
12 become known. For ease of reference, Plaintiff will refer to the named defendant Untuckit, LLC
13 and the DOE defendants collectively as “Defendants.”

14 **D. Agency/Aiding And Abetting**

15 12. At all times herein mentioned, Defendants, and each of them, were an agent or
16 joint venturer of each of the other Defendants, and in doing the acts alleged herein, were acting
17 within the course and scope of such agency. Each Defendant had actual and/or constructive
18 knowledge of the acts of each of the other Defendants, and ratified, approved, joined in,
19 acquiesced and/or authorized the wrongful acts of each co-defendant, and/or retained the benefits
20 of said wrongful acts.

21 13. Defendants, and each of them, aided and abetted, encouraged and rendered
22 substantial assistance to the other Defendants in breaching their obligations to Plaintiff and the
23 Class, as alleged herein. In taking action, as particularized herein, to aid and abet and
24 substantially assist the commissions of these wrongful acts and other wrongdoings complained
25 of, each of the Defendants acted with an awareness of its primary wrongdoing and realized that
26 its conduct would substantially assist the accomplishment of the wrongful conduct, wrongful
27 goals, and wrongdoing.

1 14. Whenever reference is made in this Complaint to any act of “Untuckit” or
2 “Defendant,” such shall be deemed to mean that officers, directors, agents, employees, or
3 representatives of the Defendant named in this lawsuit committed or authorized such acts, or
4 failed and omitted to adequately supervise or properly control or direct their employees while
5 engaged in the management, direction, operation or control of the affairs of the Defendant and
6 did so within the scope of their employment or agency.

7 **CONDUCT GIVING RISE TO THE VIOLATIONS OF THE LAW**

8 **A. Plaintiff’s Contact with Defendant**

9 15. On November 16, 2022 and thereafter on November 22, 2022, while located at her
10 residence within California, Plaintiff placed telephone calls to Defendant and while using her
11 cellular telephone. On both occasions, Plaintiff called Untuckit’s toll-free customer service
12 telephone number at 888-992-3102. During the call on November 16, 2022 , Plaintiff obtained
13 information with a live representative of Defendant about Untuckit’s merchandise and made a
14 purchase. Thereafter, on November 22, 2022, Plaintiff called Untuckit’s customer service
15 number at 888-992-3102 and confirmed details of the original merchandise purchase order
16 (Order # 4047041) with a live representative of Defendant and informed the representative that
17 the wrong items were shipped by Untuckit. Plaintiff is informed and believes, and based thereon
18 alleges, that the toll-free telephone number connected Plaintiff to Defendant’s live customer
19 service representatives.

20 16. During these inbound telephone communications with employees, agents, or
21 representatives of Defendant, Plaintiff revealed sensitive, private, and confidential financial
22 information, including but not limited to her credit card number, expiration date, and email
23 address. At no point during these inbound telephone communications was Plaintiff ever informed
24 that her communications were being recorded. At no point during the inbound telephone
25 communications did Plaintiff give her consent for the telephone communications to be recorded,
26 and she was entirely unaware that Defendant was engaged in that practice during the telephone
27 communications. On information and belief, these inbound telephone communications were
28 recorded by Defendant, without Plaintiff’s knowledge or consent.

1 **B. Defendant’s Conduct Violated Penal Code Penal Code § 632.7**

2 17. Plaintiff is informed and believes and thereon alleges, that Defendant recorded
3 said inbound telephone communications. Defendant failed to verbally warn Plaintiff, at the
4 outset of the telephone communications, of Defendant’s intent to record the communications.
5 Defendant failed to provide an automated, pre-recorded warning at the call outset or a
6 periodically repeated, audible “beep tone” or other sound throughout the duration of the
7 telephone communications to warn Plaintiff that the communications were being recorded.
8 Plaintiff did not give, and could not have given consent for the telephone communications to be
9 recorded because she was entirely unaware that Defendant was engaged in that practice during
10 the telephone communications.

11 18. Because Defendant failed to warn Plaintiff at the outset of the telephone
12 communications that the communications were being recorded and her consent for recording of
13 the telephone communications never was sought, Plaintiff had an objectively reasonable
14 expectation that her telephone communications with Defendant’s employees, agents, or
15 representatives were not being recorded. That recording occurred without her consent, is highly
16 offensive to Plaintiff and would be highly offensive to a reasonable person, including members of
17 the Class proposed herein.

18 19. Plaintiff is further informed and believes and thereon alleges, that during the
19 Class Period, Defendant has intentionally utilized certain computer hardware and/or software
20 technology and/or other equipment (“Call Recording Technology”) to execute a company-wide
21 policy and practice of recording inbound telephone communications with callers, including
22 California callers.

23 20. Plaintiff is further informed and believes and thereon alleges, that Defendant
24 installed and/or utilized Call Recording Technology on its consumer-facing telephone line. This
25 Call Recording Technology enabled Defendant to record telephone communications with callers,
26 including California callers, and allowed them to store and listen to these recordings for various
27 purposes.

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1 telecommunications and toll-free service providers' records regarding calls from California area
2 codes to Defendant's toll-free customer service telephone numbers. Such records, including
3 without limitation call detail records, purchase records, customer records, call lists, and the secret
4 recordings themselves, can be used to determine the size of the Penal Code § 632.7 Class and to
5 determine the identities of individual Penal Code § 632.7 Class members. This information may
6 then be used to contact potential Class members.

7 27. There is a well-defined community of interest in the questions law and fact
8 affecting the parties represented in this action.

9 28. Common questions of law and fact exist as to all members of the Class. These
10 common questions predominate over the questions affecting only individual members of the
11 Class.

12 29. Among the questions of law and fact common to the Class are, *inter alia*:

13 a. Whether Defendant has or had a policy and practice of recording inbound
14 telephone calls made to Untuckit's customer service number at 888-992-3102;

15 b. Whether Defendant installed Call Recording Technology to implement its
16 policy of recording inbound telephone calls with callers;

17 c. Whether Defendant's employees, agents, or representatives were directed, trained,
18 and instructed to, and did, record inbound telephone calls with callers in order to implement the
19 Defendant's policy and practice of recording telephone calls with callers;

20 d. Whether Defendant's policy and practice of recording inbound telephone calls
21 included a policy and practice of warning Class members, including the Plaintiff, at the outset of
22 each recorded telephone call that the telephone call was being recorded;

23 e. Whether Defendant failed to warn Class members who participated in an inbound
24 telephone call with the Defendant that the telephone call was being recorded;

25 f. Whether Defendant has or had a policy or practice of not obtaining consent to
26 record telephone calls made to Untuckit's customer service number at 888-992-3102;

27 g. Whether Defendant's recording of Plaintiff's and Class members' inbound
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1 telephone calls without warning or disclosure at the call outset constitutes violations of
2 California Penal Code § 632.7;

3 h. Whether Plaintiff and each Class member are entitled to statutory damages of five
4 thousand dollars (\$5,000) under California Penal Code § 637.2(a)(1) for each violation of
5 California Penal Code § 632.7; and

6 i. Whether Plaintiff and Class members are entitled to injunctive relief under
7 California Penal Code § 637.2(b) to enjoin or restrain the Defendant from committing further
8 violations of California Penal Code § 632.7.

9 30. Plaintiff's claims are typical of the claims of all of the other members of the Class.
10 Plaintiff's claims and the Class member's claims are based on the same legal theories and arise
11 from the same unlawful conduct, resulting in the same injury to Plaintiff and to all of the other
12 Class members.

13 31. Plaintiff will fairly and adequately represent the interests of the Class, she has no
14 conflicts of interest with other Class members, is subject to no unique defenses, and has retained
15 counsel competent and experienced in the prosecution of complex litigation and class actions.

16 32. A class action is superior to other available methods for the fair and efficient
17 adjudication of this controversy because joinder of all members is impracticable, the damages
18 suffered by each Class member are low, the likelihood of individual Class members prosecuting
19 separate claims is remote and individual Class members do not have a significant interest in
20 individually controlling the prosecution of separate actions. Relief concerning Plaintiff's rights
21 under the laws alleged herein and with respect to the Class as a whole would be appropriate.
22 Plaintiff knows of no difficulty to be encountered in the management of this action which would
23 preclude its maintenance as a class action.

24 33. The prosecution of individual actions by California Penal Code § 632.7
25 Class members would run the risk of establishing inconsistent standards of conduct for
26 Defendant.

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1 that would lead Plaintiff and the Class members to believe that their communications were being
2 recorded.

3 39. Penal Code § 632.7 prohibits the intentional recording of *any* communication
4 without the consent of all parties where at least one of the parties to the communication is using a
5 cellular or cordless telephone. There is no requirement under Penal Code § 632.7 that the
6 communication be confidential. Defendant violated Penal Code § 632.7 in its telephone
7 communications with Plaintiff and the Class during the Class Period. Plaintiff is informed and
8 believes and thereon alleges that, Defendant as a standard business practice, has intentionally
9 made use of a Call Recording Technology that enabled Defendant to surreptitiously record
10 communications with Plaintiff and the Class members, that were made to telephone number
11 888-992-3102 on cellular or cordless telephones, without obtaining their consent.

12 40. Because Defendant did not disclose to Plaintiff or Class members who called the
13 toll-free telephone number 888-992-3102, at the call outset, that their calls were being recorded,
14 Defendant did not obtain, and could not have obtained, Plaintiff or Class members consent to the
15 recording of those conversations. Indeed, Plaintiff and the Class had an objectively reasonable
16 expectation that their calls were not being recorded. That expectation and its objective
17 reasonableness arises, in part, and is supported by the fact that: (1) Defendant is required by law
18 to inform persons it receives calls from, at the outset of the communication, of its intent to record
19 the calls; (2) Businesses that record telephone calls customarily do so inform the persons they
20 call or receive calls from, at the outset of the communication; and (3) Defendant did not inform
21 Plaintiff and Class members who called 888-992-3102, at the outset of the communications, that
22 their telephone communications were being recorded, nor did Defendant seek to obtain their
23 consent to record. In the business-call context, the California Supreme Court has stated, “in light
24 of the circumstances that California consumers are accustomed to being informed at the outset of
25 a telephone call whenever a business entity intends to record the call, it appears equally plausible
26 that, in the absence of such an advisement, a California consumer reasonably would anticipate
27 that such a telephone call is *not* being recorded, particularly in view of the strong privacy interest
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1 most persons have with regard to the personal financial information frequently disclosed in such
2 calls.” *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 118 (2006).

3 41. Due to these violations as set forth herein, Plaintiff and Class members are entitled
4 to an award of five thousand dollars (\$5,000) per violation pursuant to California Penal Code
5 § 637.2(a)(1), even in the absence of proof of actual damages, an amount deemed proper by the
6 California Legislature. Plaintiff and the Class are also entitled to injunctive relief to enjoin
7 further violations pursuant to California Penal Code § 637.2(b).

8 42. Plaintiff and Class members are entitled to recover reasonable attorneys’ fees
9 pursuant to California Code of Civil Procedure § 1021.5, the substantial benefit doctrine and/or
10 the common fund doctrine.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff, on behalf of herself and members of the Class, prays for
13 judgment against Defendant as follows:

- 14 1. For an order certifying this matter as a class action;
- 15 2. For an order declaring that Defendant’s actions, as described herein, violate
16 California Penal Code § 632.7;
- 17 3. For an order awarding Plaintiff and each member of the Class statutory damages
18 of five thousand dollars (\$5,000) per violation under California Penal Code § 637.2(a)(1);
- 19 4. For appropriate injunctive relief under California Penal Code § 637.2(b);
- 20 5. For an award of attorneys’ fees as authorized by statute including, but not limited
21 to, the provisions of California Code of Civil Procedure § 1021.5, and as authorized under the
22 “common fund” doctrine, and as authorized by the “substantial benefit” doctrine;
- 23 6. For costs of the suit incurred herein;
- 24 7. For prejudgment interest at the legal rate; and
- 25 8. For such other and further relief as the Court may deem proper.

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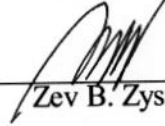
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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury for Plaintiff and the Class on all claims so triable.

Dated: January 10, 2023

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*Attorneys for Plaintiff and
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ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Class Action Says UNTUCKit Secretly Recorded Customer Service Calls](#)
