Case	3:23-cv-00314-LAB-JLB Document 1-2	Filed 02/16/23 P	ageID.15 Page 7 of 29		
1	LAW OFFICES OF ZEV B. ZYSMAN		ELECTRONICALLY FILED		
2	A Professional Corporation Zev B. Zysman (176805)		Superior Court of California, County of San Diego		
3	zev@zysmanlawca.com 15760 Ventura Boulevard, Suite 700		01/10/2023 at 04:47:36 PM Clerk of the Superior Court		
4	Encino, CA 91436 Telephone: (818) 783-8836		By Marfil Estrada Deputy Clerk		
5	Attorneys for Plaintiff and				
6	the Proposed Class				
7					
8					
9	SUPERIOR COURT OF THE STATE OF CALIFORNIA				
10	FOR THE COU	NTY OF SAN DIEG	<b>60</b>		
11					
12	LYNETTE FLIEGELMAN, on Behalf of Herself and All Others Similarly Situated,	) Case No: 37	-2023-00001137-CU-BT-CTL		
13	Plaintiff,	$() \qquad \underbrace{\text{CLASS AC}}_{)}$	<u>FION</u>		
14	V.	) COMPLAIN	NT FOR:		
15	UNTUCKIT, LLC, and DOES 1 through 100,	) ) <b>STATUTO</b> F	RY DAMAGES AND		
16	inclusive,				
17		) ) DEMAND F	OR JURY TRIAL		
18	Defendants.	) )			
19		_ ý			
20					
21					
22					
23					
24					
25					
26					
27					
28					
20					
	CLASS ACTION COMPLAINT				

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

6

#### **INTRODUCTION**

This class action arises out Defendant's policy and practice to record, without the
 consent of all parties, telephone calls made to Defendant's toll-free customer service telephone
 number in violation of California's Invasion of Privacy Act, California Penal Code §630, *et seq.* Defendant's toll-free number – 888-992-3102 – is referred to as "Defendant's customer service
 number." During the relevant time period, Defendant intentionally and surreptitiously recorded
 telephone communications made to Defendant's customer service number. Defendant did so
 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 consent of all parties violates the California Invasion of Privacy Act (Penal Code §§ 630, et seq. 15 16 ("CIPA")). Specifically, Defendant's acts and practices violate Penal Code § 632.7. Penal Code § 632.7 is violated the moment the recording of a telephone communication is made without the 17 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 requisite intent on behalf of the party doing the surreptitious recording to break California law, or 2021 to invade the privacy rights of any other person. Moreover, there is no requirement under Penal Code  $\S$  632.7 that the communication be confidential. 22

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

prohibit "the recording of telephone conversations without the knowledge or consent of all 1 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 company wants to record calls as part of its routine business activity, it can avoid liability by 4 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 of consumers if they do not disclose that the calls are being recorded, by "selectively disclosing 8 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 at 126. The California Supreme Court has declared that Penal Code § 632.7 makes it illegal to 11 record *any* communication involving cellular or cordless telephones without regard to whether 12 13 the communication is "confidential." Flanagan v. Flanagan, 27 Cal. 4th 766, 771, fn. 2 (2002). Moreover, in Smith v. LoanMe, Inc., 11 Cal. 5th 183, 202-203 (2021), the California Supreme 14 Court held that Penal Code "section 632.7 prohibits parties as well as nonparties from 15 16 intentionally recording a communication transmitted between a cellular or cordless telephone and another device without the consent of all parties to the communication." 17 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 pursuant to Article VI, § 10 of the California Constitution, California Penal Code §§ 632.7 and 24 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. 28

CLASS ACTION COMPLAINT

5

6. This Court has personal jurisdiction over the Defendant named herein because 1 2 Defendant does sufficient business in California, has sufficient minimum contacts with California 3 or otherwise intentionally avails itself of the markets within California through its sales, advertising and marketing to render the exercise of jurisdiction by California courts and the 4 5 application of California law to the claims of the Plaintiff permissible under traditional notions of 6 fair play and substantial justice. Likewise, Plaintiff's rights were violated in California and arose 7 out of her contacts with Defendant from and within California. Further, there is no federal 8 question at issue as the claims herein are based solely on California law.

9 7. Venue is proper in this Court since because California Code of Civil Procedure
10 §§395 and 395.5, and case law interpreting those sections, provide that if a foreign business
11 entity fails to designate with the office of the California Secretary of State a principal place of
12 business in California, it is subject to being sued in any county in the State that plaintiff desires.
13 On information and belief, as of the date this Complaint is filed, Defendant is a foreign business
14 entity that has failed to designate a principal place of business in California with the office of the

THE PARTIES

16

17

# A. Plaintiff

#### 18 8. Plaintiff Lynette Fliegelman (herein referred to as "Plaintiff") is an individual and 19 resident of California. It is alleged that on November 16, 2022 and November 22, 2022, while 20 Plaintiff was physically present in the State of California, she called Untuckit's customer service 21 toll-free number 888-992-3102 and had telephonic communications with live representatives of Defendant while using her cellular telephone. Plaintiff is informed and believes and thereon 22 23 alleges, that the communications were surreptitiously recorded by Defendant, without first 24 providing her notice and without first obtaining her consent to record the telephone communications. 25

26

#### B. Defendant

27 9. Defendant Defendant Untuckit, LLC is a Delaware corporation, with its
28 headquarters located in New York, New York. Untuckit is a leading direct-to-consumer apparel

3

### CLASS ACTION COMPLAINT

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

10. Plaintiff is informed and believes, and based thereon alleges, that Defendant's
employees, agents, and representatives were and are directed, trained and instructed to, and do,
record incoming telephone communications between the customer service representatives and
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
ioint venturer of each of the other Defendants, and in doing the acts alleged herein, were acting
within the course and scope of such agency. Each Defendant had actual and/or constructive
knowledge of the acts of each of the other Defendants, and ratified, approved, joined in,
acquiesced and/or authorized the wrongful acts of each co-defendant, and/or retained the benefits
of said wrongful acts.

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

28

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

7

8

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

#### A. Plaintiff's Contact with Defendant

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

16. 20 During these inbound telephone communications with employees, agents, or representatives of Defendant, Plaintiff revealed sensitive, private, and confidential financial 21 information, including but not limited to her credit card number, expiration date, and email 22 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 recorded by Defendant, without Plaintiff's knowledge or consent. 28

CLASS ACTION COMPLAINT

8

1

В.

#### 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 outset of the telephone communications, of Defendant's intent to record the communications. 4 5 Defendant failed to provide an automated, pre-recorded warning at the call outset or a periodically repeated, audible "beep tone" or other sound throughout the duration of the 6 7 telephone communications to warn Plaintiff that the communications were being recorded. Plaintiff did not give, and could not have given consent for the telephone communications to be 8 9 recorded because she was entirely unaware that Defendant was engaged in that practice during the telephone communications. 10

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.

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

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

28

1	21. Plaintiff is further informed and believes and thereon alleges, that Defendant's			
2	employees, agents, and representatives were and are directed, trained, and instructed to,			
3	and did record inbound telephone communications made to Untuckit's toll-free customer service			
4	number at 888-992-3102 from California callers, including Plaintiff, without their consent.			
5	PLAINTIFF'S CLASS ACTION ALLEGATIONS			
6	22. Plaintiff brings this lawsuit on behalf of an ascertainable statewide Class			
7	consisting of the following (the "Class"):			
8	All persons who, while located in California at any time during the one-year			
9	period of time preceding the filing of the Complaint in this matter and until said			
10	practice is terminated ("Class Period"), called Defendant's customer service			
11	number, from a cellular or cordless telephone, engaged in a telephone			
12	conversation with Defendant's employee(s) or representative(s) and were recorded			
13	by Defendant without warning or disclosure at the call outset.			
14	23. Excluded from the Class are all employees of Defendant, all attorneys and			
15	employees of Defendant's counsel, all attorneys and employees of Plaintiff's Counsel, and the			
16	judicial officers to whom this matter is assigned and their staff.			
17	24. Plaintiff reserves the right under Rule 3.765 of the California Rules of Court to			
18	amend or otherwise alter the Class definition presented to the Court at the appropriate time, or			
19	propose or eliminate subclasses, in response to facts learned through discovery, legal argument			
20	advanced by Defendant, or otherwise.			
21	25. This action has been brought and may properly be maintained as a class action			
22	pursuant to California Code of Civil Procedure § 382, and case law thereunder, to which the			
23	California trial courts have been directed by the California Supreme Court to look for guidance.			
24	26. The members of the Class are so numerous that joinder of all members is			
25	impracticable. While the exact number of Class members is unknown to Plaintiff at this time,			
26	Plaintiff estimates that there are more than 100 persons. Moreover, Plaintiff alleges that the			
27	precise number of Class members and their location can be ascertained though appropriate			
28	discovery and records held by Defendant and/or Defendant's telephone company's and/or other			
	CLASS ACTION COMPLAINT 7			
	10			

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

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

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

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

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

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

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

g. Whether Defendant's recording of Plaintiff's and Class members' inbound
28

11

CLASS ACTION COMPLAINT

telephone calls without warning or disclosure at the call outset constitutes violations of 1 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. Plaintiff's claims and the Class member's claims are based on the same legal theories and arise 10 from the same unlawful conduct, resulting in the same injury to Plaintiff and to all of the other 11 Class members. 12

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

16 32. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all members is impracticable, the damages 17 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. Plaintiff knows of no difficulty to be encountered in the management of this action which would 22 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.

///

- 27
- 28 ///

CLASS ACTION COMPLAINT

12

34. Defendant has acted, or refused to act, on grounds generally applicable to the 1 2 Class, thereby making injunctive relief and statutory damages pursuant to California Penal Code § 637.2 appropriate with respect to the Class as a whole. Likewise, Defendant's conduct as 3 4 described above is unlawful, capable of repetition, and could continue unless restrained and 5 enjoined by the Court. 35. 6 Plaintiff explicitly reserves the right to add additional class representatives, 7 provided that Defendant is given an opportunity to conduct discovery on the chosen 8 representative(s). Plaintiff will identify and propose class representatives with the filing of 9 Plaintiff's motion for class certification. 10 FIRST CAUSE OF ACTION 11 FOR VIOLATIONS OF CALIFORNIA PENAL CODE § 632.7 (By Plaintiff and the Class Against Defendant Untuckit, LLC and DOES 1 through 100, 12 Inclusive) 13 36. Plaintiff re-alleges and incorporates by reference the allegations contained in the 14 preceding paragraphs above as if fully set forth herein and further alleges as follows. 15 37. On November 16, 2022 and thereafter on November 22, 2022, and while 16 physically present in California, Plaintiff used her cellular telephone to call Defendant's 17 toll-free customer service telephone number at 888-992-3102 and participated in telephone 18 communications with Defendant's live customer service representatives. 19 38. Plaintiff alleges on information and belief that, within the applicable statute of 20 limitations, Plaintiff and the Class members, while physically present in California, called 21 Defendant's customer service number 888-992-3102 and participated in telephone 22 communications with live representatives of Defendant while using a cellular or cordless 23 telephone, which communications were recorded by Defendant without the consent of Plaintiff 24 and the Class members. Defendant did not notify Plaintiff and the Class members at the call 25 outset that their communications were being recorded. Nor did Defendant provide an automated, 26 pre-recorded warning at the call outset that their communications were being recorded. Further, 27 there were no beeps or similar sounds throughout the duration of the telephone communications 28

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

3 39. Penal Code § 632.7 prohibits the intentional recording of *any* communication without the consent of all parties where at least one of the parties to the communication is using a 4 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 believes and thereon alleges that, Defendant as a standard business practice, has intentionally 8 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 888-992-3102 on cellular or cordless telephones, without obtaining their consent. 11

12 40. Because Defendant did not disclose to Plaintiff or Class members who called the toll-free telephone number 888-992-3102, at the call outset, that their calls were being recorded, 13 Defendant did not obtain, and could not have obtained, Plaintiff or Class members consent to the 14 recording of those conversations. Indeed, Plaintiff and the Class had an objectively reasonable 15 16 expectation that their calls were not being recorded. That expectation and its objective reasonableness arises, in part, and is supported by the fact that: (1) Defendant is required by law 17 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 call or receive calls from, at the outset of the communication; and (3) Defendant did not inform 2021 Plaintiff and Class members who called 888-992-3102, at the outset of the communications, that their telephone communications were being recorded, nor did Defendant seek to obtain their 22 consent to record. In the business-call context, the California Supreme Court has stated, "in light 23 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

28

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 Civi1 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 Civi1 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.			
26	///			
27	///			
28	///			
	CLASS ACTION COMPLAINT 12			
	15			
	•			

# 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

# LAW OFFICES OF ZEV B. ZYSMAN

A Professional Corporation

By: Zev B. Zysman

15760 Ventura Boulevard, Suite 700 Encino, CA 91436 Telephone: (818) 783-8836

Attorneys for Plaintiff and the Proposed Class

CLASS ACTION COMPLAINT

# **ClassAction.org**

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: <u>Class Action Says UNTUCKit Secretly</u> <u>Recorded Customer Service Calls</u>