

1 Joshua B. Swigart (SBN 225557)
2 Josh@SwigartLawGroup.com
3 **SWIGART LAW GROUP, APC**
4 2221 Camino del Rio S, Ste 308
5 San Diego, CA 92108
6 P: 866-219-3343

Daniel G. Shay (SBN 250548)
DanielShay@TCPAFDCPA.com
LAW OFFICE OF DANIEL G. SHAY
2221 Camino del Rio S, Ste 308
San Diego, CA 92108
P: 619-222-7429

Attorneys for Plaintiff

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

<p>11 DAVID KAUFFMAN, 12 individually and on behalf of 13 others similarly situated,</p> <p>14 Plaintiff,</p> <p>15 vs.</p> <p>16 CAPITAL HOME MORTGAGE, 17 LLC,</p> <p>18 Defendant.</p>	<p>Case No: <u>'22CV1940 MMADDL</u></p> <p><u>CLASS ACTION</u></p> <p>COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF FOR:</p> <p>UNLAWFUL RECORDING OF CELLULAR TELEPHONE CALLS, CAL. PEN. CODE § 632.7</p> <p>JURY TRIAL DEMANDED</p>
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INTRODUCTION

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2 1. David Kauffman (“Plaintiff”), individually and on behalf of all other similarly
3 situated California residents (“Class Members”), brings this action for damages
4 and injunctive relief against Capital Home Mortgage, LLC (“Defendant”), and its
5 present, former, or future direct and indirect parent companies, subsidiaries,
6 affiliates, agents, related entities for unauthorized recordings of conversations
7 with Plaintiff and Class Members without any notification nor warning to Plaintiff
8 or Class Members in violation of the California Invasion of Privacy Act (“CIPA”),
9 Cal. Pen. Code § 630, et seq.
- 10 2. The California State Legislature passed CIPA in 1967 to protect the privacy rights
11 of Californians, replacing prior laws, which permitted the recording of telephone
12 conversations without consent.
- 13 3. In addition to the general protections afforded to confidential telephonic
14 communications by California Penal Code §632, California Penal Code § 632.7
15 was added to CIPA in 1992 due to specific privacy concerns over the increased
16 use of cellular and cordless telephones. Section 632.7 prohibits secretly recording
17 all communications involving cellular and cordless telephones, not just
18 confidential communications. Penal Code 637.2 permits Plaintiff to bring this
19 action for any violation of Penal Code § 632.7 and provides for statutory damages
20 of \$5,000 for each violation.
- 21 4. Plaintiff brings this class action on behalf of all persons in California whose
22 cellular telephone conversations were recorded by Defendant without their
23 consent.
- 24 5. Plaintiff makes these allegations on information and belief, with the exception of
25 those allegations that pertain to Plaintiff, or to Plaintiff’s counsel, which Plaintiff
26 alleges on personal knowledge.
- 27 6. All the conduct engaged in by Defendant took place in California.

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1 7. All violations by Defendant were knowing, willful, and intentional, and Defendant
2 did not maintain procedures reasonably adapted to avoid any such violation.

3 8. The use of Defendant’s name in this Complaint includes all agents, employees,
4 officers, members, directors, heirs, successors, assigns, principals, trustees,
5 sureties, subrogees, representatives, and insurers of the named Defendant.

6 **JURISDICTION & VENUE**

7 10. Jurisdiction is proper under the Class Action Fairness Act (“CAFA”), 28 U.S.C. §
8 1332(d)(2), because Plaintiff, a resident of the State of California, seeks relief on
9 behalf of a California class, which will result in at least one class member
10 belonging to a different state than that of Defendant, a Michigan entity
11 headquartered in Michigan.

12 11. Plaintiff is requesting statutory damages of \$5,000 per violation pursuant to Cal.
13 Civ. Code § 1785.31, which, when aggregated among a proposed class number in
14 the tens of thousands, exceeds the \$5,000,000 threshold for federal court
15 jurisdiction.

16 12. Therefore, both diversity jurisdiction and the damages threshold under CAFA are
17 present, and this Court has jurisdiction.

18 13. Because Defendant conducts business within the State of California, personal
19 jurisdiction is established.

20 14. Venue is proper pursuant to 28 U.S.C. § 1391 for the following reasons:
21 (i) Plaintiff resides in the County of San Diego, State of California which is within
22 this judicial district; (ii) the conduct complained of herein occurred within this
23 judicial district; and (iii) Defendant conducted business within this judicial district
24 at all times relevant.

25 **PARTIES & DEFINITIONS**

26 15. Plaintiff is, and at all times mentioned herein was, a natural person and resident of
27 the State of California, County of San Diego, in this judicial district.

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1 16. Defendant is, and at all times mentioned herein was, a Michigan entity with its
2 headquarters located in Michigan. Plaintiff alleges that at all times relevant herein
3 Defendant conducted business in the State of California, in the County of San
4 Diego, within this judicial district. Defendant is a “person” as defined by Cal. Pen.
5 Code § 632(b).

6 **FACTS**

7 18. On June 30, 2017, Plaintiff purchased identity theft protection from Experian.
8 Plaintiff gave Experian his personal information so that Experian could monitor
9 his credit and help prevent identity theft.

10 19. Plaintiff’s agreement with Experian may have allowed Experian to share
11 Plaintiff’s information with Defendant.

12 20. On November 15, 2022, Plaintiff applied for a home equity line of credit with
13 Comerica Bank (“Comerica”) and Plaintiff gave Comerica his information.

14 21. Comerica provided Plaintiff’s information to Experian which Experian used to
15 produce Plaintiff’s credit report. Experian sent the report to Comerica as
16 requested.

17 22. Unbeknownst to Plaintiff, Experian then sold Plaintiff’s information to Defendant
18 for commercial purposes.

19 23. On November 22, 2022, an agent of Defendant called Plaintiff attempting to sell
20 Plaintiff a mortgage.

21 24. The agent did not advise Plaintiff that Defendant was recording the call or seek
22 Plaintiff’s consent to record.

23 25. The parties spoke for several minutes while the agent attempted to persuade
24 Plaintiff to apply for a loan.

25 26. Plaintiff then asked the agent if Defendant was recording the call and the agent
26 responded affirmatively.

27 27. Plaintiff was surprised and annoyed that Defendant recorded his call without
28 telling him. There was no beeping noise or any indication of recording.

1 28. Defendant records all its calls, both inbound and outbound, like the one it made to
2 Plaintiff. Defendant does not advise anyone that it is recording.

3 29. California Penal Code § 632.7(a) is clear in its prohibition against such
4 unauthorized recording of cellular communications without consent:

5 “Every person who, without the consent of all parties to a
6 communication, intercepts or receives and intentionally
7 records, or assists in the interception or reception and
8 intentional recordation of, a communication transmitted
9 between two cellular radio telephones, a cellular radio
10 telephone and a landline telephone, two cordless telephones,
11 a cordless telephone and a landline telephone, or a cordless
telephone and a cellular radio telephone [violates this
section].”

12 30. California Penal Code § 637.2 permits Plaintiff to bring this action for any
13 violation of California Penal Code § 632.7(a) and provides for statutory damages
14 of \$5,000 for each violation.

15 31. Defendant recorded or otherwise made unauthorized connection(s) to Plaintiff’s
16 conversation(s) with Defendant in violation of California’s statutory and common
17 law against such unlawful intrusions into a person’s private affairs, including the
18 California Constitution’s prohibition in Article 1, Section 1.

19 32. This suit seeks only damages and injunctive relief for recovery of economic
20 injury, and it expressly is not intended to request any recovery for personal injury
21 and claims related thereto.

22 33. Plaintiff is informed and believes, and thereon alleges, that Defendant
23 intentionally recorded communication(s) transmitted between “a cellular radio
24 telephone and a landline telephone” without Plaintiff’s consent as prohibited by
25 California Penal Code § 632.7(a).

26 34. Defendant violated Plaintiff’s constitutionally protected privacy rights by failing
27 to advise or otherwise provide notice at the beginning of the conversation(s) with
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1 Plaintiff that the call(s) would be recorded, and Defendant did not try to obtain
2 Plaintiff's consent before such recording.

3 35. The recording or other unauthorized connections were done over the telephone,
4 without Plaintiff's prior knowledge or consent. Plaintiff was damaged thereby, as
5 detailed herein, in at least an amount permitted by the statutory damages
6 mandated by California Penal Code § 637.2(a).

7 36. Defendant, its employees or agents, secretly recorded calls, or parts of calls, it
8 placed to Plaintiff. Defendant did not warn Plaintiff at the outset of the call(s) that
9 it was recording the call(s).

10 37. As a result thereof, Plaintiff has been damaged as set forth in the Prayer for Relief
11 herein.

12 38. Plaintiff seeks statutory damages and injunctive relief under California Penal Code
13 § 637.2.

14 CLASS ACTION ALLEGATIONS

15 39. Plaintiff brings this lawsuit as a class action on behalf of Plaintiff and Class
16 Members. This action satisfies the numerosity, commonality, typicality, adequacy,
17 predominance, and superiority requirements of those provisions.

18 40. Plaintiff proposes the following Class consisting of and defined as follows:

19 "All persons in California whose cellular telephone
20 communications were recorded by Defendant or its
21 agents."

22 41. Excluded from the Class are: (1) Defendant, any entity or division in which
23 Defendant has a controlling interest, and its legal representatives, officers,
24 directors, assigns, and successors; (2) the Judge to whom this case is assigned and
25 the Judge's staff; and (3) those persons who have suffered personal injuries as a
26 result of the facts alleged herein.

27 42. Plaintiff reserves the right to redefine the Class and to add subclasses as
28 appropriate based on discovery and specific theories of liability.

1 43. Numerosity: The Class Members are so numerous that joinder of all members
2 would be unfeasible and impractical. Given that, on information and belief,
3 Defendant called thousands of class members statewide and recorded those calls
4 during the class period, it is reasonable to presume that the members of the Class
5 are so numerous that joinder of all members is impracticable. The disposition of
6 their claims in a class action will provide substantial benefits to the parties and the
7 Court.

8 44. Commonality: There are common questions of law and fact as to Class Members
9 that predominate over questions affecting only individual members, including, but
10 not limited to:

- 11 • Whether Defendant recorded calls with the Class Members;
- 12 • Whether Defendant had, and continues to have, a policy of recording
13 telephone calls made to the Class Members;
- 14 • Whether Defendant's policy or practice of recording calls with Class
15 Members constitutes a violation of Cal. Penal Code § 632.7;
- 16 • Whether Plaintiff and the Class Members were damaged thereby, and the
17 extent of damages for such violations; and
- 18 • Whether Defendant should be enjoined from engaging in such conduct in
19 the future.

20 45. Typicality: Plaintiff's conversations were unlawfully recorded without a warning
21 of such recording at the outset, and thus, Plaintiff's injuries are typical to Class
22 Members. Plaintiff and Class Members were harmed by the acts of Defendant
23 because Defendant, either directly or through its agents, illegally recorded
24 Plaintiff and Class Members' conversations with Defendant, invading the privacy
25 of Plaintiff and the Class. Plaintiff and Class Members were damaged thereby.

26 46. Adequacy: Plaintiff is qualified to, and will, fairly and adequately protect the
27 interests of each Class Member with whom he is similarly situated, as
28 demonstrated herein. Plaintiff acknowledges that he has an obligation to make

1 known to the Court any relationships, conflicts, or differences with any Class
2 Member. Plaintiff's attorneys, the proposed class counsel, are well versed in the
3 rules governing class action discovery, certification, and settlement. In addition,
4 the proposed class counselors are experienced in handling claims involving
5 consumer actions and violations of the California Penal Code section 632.7.
6 Plaintiff has incurred, and throughout the duration of this action, will continue to
7 incur costs and attorneys' fees that have been, are, and will be, necessarily
8 expended for the prosecution of this action for the substantial benefit of each
9 Class Member.

10 47. Predominance: Questions of law or fact common to the Class Members
11 predominate over any questions affecting only individual members of the Class.
12 The elements of the legal claims brought by Plaintiff and Class Members are
13 capable of proof at trial through evidence that is common to the Class rather than
14 individual to its members.

15 48. Superiority: A class action is a superior method for the fair and efficient
16 adjudication of this controversy because:

- 17 a. Class-wide damages are essential to induce Defendant to comply with
18 California law.
- 19 b. Because of the relatively small size of the individual Class Members'
20 claims, it is likely that only a few Class Members could afford to seek
21 legal redress for Defendant's misconduct.
- 22 c. Management of the claims here will present far fewer difficulties than
23 those presented in many other class actions.
- 24 d. Absent a class action, most Class Members would likely find the cost
25 of litigating their claims prohibitively high and would therefore have
26 no effective remedy at law.
- 27 e. Class action treatment is manageable because it will permit a large
28 number of similarly situated persons to prosecute their common claims

1 in a single forum simultaneously, efficiently, and without the
2 unnecessary duplication of effort and expense that numerous individual
3 actions would create.

4 f. Absent a class action, Class Members will continue to incur damages,
5 and Defendant's misconduct will continue without remedy.

6 49. Plaintiff and the Class Members have all suffered and will continue to suffer harm
7 and damages as a result of Defendant's unlawful conduct. A class action is
8 superior to other available methods because individual Class Members have no
9 way of discovering that Defendant recorded their conversations without their
10 knowledge or consent.

11 50. The Class should be certified because:

- 12 • The prosecution of separate actions by individual Class Members would
13 create a risk of inconsistent or varying adjudication with respect to
14 individual Class Members, which would establish incompatible standards
15 of conduct for Defendant;
- 16 • The prosecution of separate actions by individual Class Members would
17 create a risk of adjudications with respect to them that would, as a
18 practical matter, be dispositive of the interests of other Class Members
19 not parties to the adjudications, or substantially impair or impede their
20 ability to protect their interests; and
- 21 • Defendant has acted or refused to act on grounds generally applicable to
22 all Class Members, thereby making injunctive relief related to all Class
23 Members appropriate.

24 51. This suit seeks only statutory damages and injunctive relief and does not request
25 recovery for personal injury claims.

26 52. The Class Members can be identified through Defendant's records.

27 53. The joinder of the Class Members is impractical and the disposition of their claims
28 in this action will provide substantial benefits to the parties and the court.

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CAUSE OF ACTION
RECORDING OF CELLULAR CALLS
UNDER CALIFORNIA PENAL CODE § 632.7

54. At all relevant times hereto, Defendant had and followed a policy and practice of using a telecommunications system that enabled it to surreptitiously record cellular telephone communications between Defendant and Class Members like Plaintiff.

55. Defendant intentionally and secretly recorded cellular telephone calls between Defendant and Class Members like Plaintiff.

56. Defendant had and followed a policy and practice of not advising or warning Class Members like Plaintiff that their cellular telephone communications with Defendant would be recorded.

57. Defendant failed to obtain consent from Class Members like Plaintiff prior to recording their cellular telephone conversations.

58. Defendant’s conduct violated Section 632.7(a) of the California Penal Code.

59. Plaintiff and Class Members are entitled to statutory damages of \$5,000 per violation of Cal. Pen. Code § 632.7 under Cal. Pen Code § 637.2(a).

60. Plaintiff’s counsel is entitled to attorneys’ fees and costs pursuant to Cal. Code of Civ. Pro. § 1021.5.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and Class Members pray for the following;

- Certification of the Class;
- Appointment of Plaintiff to serve as Class Representative;
- Appointment of Plaintiff’s Counsel as Class Counsel;
- An award of \$5,000 for each violation of Cal. Pen. Code § 632.7 to Plaintiff and every Class Member pursuant to Cal. Pen. Code § 637.2(a);
- Injunctive relief to prevent the further occurrence of the illegal acts pursuant to Cal. Pen. Code § 637.2(b);

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- Reasonable attorneys’ fees and costs pursuant to Cal. Code of Civ. Proc. § 1021.5;
- Any other relief the Court may deem just and proper including interest.

TRIAL BY JURY

87. Pursuant to the Seventh Amendment to the Constitution of the United States of America, Plaintiff and Class Members are entitled to, and demand, a trial by jury.

Respectfully submitted,

SWIGART LAW GROUP

Date: December 8, 2022

By: s/ Joshua Swigart
Joshua B. Swigart, Esq.
Josh@SwigartLawGroup.com
Attorneys for Plaintiff

LAW OFFICE OF DANIEL SHAY

Date: December 8, 2022

By: s/ Daniel Shay
Daniel G. Shay, Esq.
DanielShay@TCPAFDCPA.com
Attorneys for Plaintiff

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Class Action Alleges Mortgage Lender Unlawfully Recorded Calls with Potential Buyers](#)
