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17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**

19 EVELYN OFITERU, individually
 20 and on behalf of all others similarly
 21 situated,

22 Plaintiff,

23 vs.

24 FIRST CALIFORNIA FINANACIAL,
 25 INC., a California corporation,

26 Defendant.

Case No. 3:21-cv-03423

CLASS ACTION

**COMPLAINT FOR
 VIOLATIONS OF THE
 TELEPHONE CONSUMER
 PROTECTION ACT, 47 U.S.C. §§
 227, ET SEQ. (TCPA)**

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

1
2 1. Plaintiff, Evelyn Ofiteru, brings this action against Defendant, First
3 California Finanacial, Inc., to secure redress for violations of the Telephone
4 Consumer Protection Act (“TCPA”), 47 U.S.C. § 227.
5

6 **NATURE OF THE ACTION**

7 2. This is a putative class action pursuant to the Telephone Consumer
8 Protection Act, 47 U.S.C. §§ 227, *et seq.* (the “TCPA”).
9

10 3. Defendant markets itself as “your full-service California home loan and
11 refinance pros.”¹
12

13 4. Defendant also uses prerecorded messages to send mass automated
14 marketing calls to individuals’ cellular phone numbers without first obtaining the
15 required express written consent.
16

17 5. Through this action, Plaintiff seeks injunctive relief to halt Defendant’s
18 illegal conduct, which has resulted in the invasion of privacy, harassment,
19 aggravation, and disruption of the daily life of thousands of individuals. Plaintiff
20 also seeks statutory damages on behalf of Plaintiff and members of the Class, and
21 any other available legal or equitable remedies.
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27 ¹ www.firstcaliforniafinancial.com/Home

JURISDICTION AND VENUE

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2 6. This Court has federal question subject matter jurisdiction over this
3 action pursuant to 28 U.S.C. § 1331, as the action arises under the Telephone
4 Consumer Protection Act, 47 U.S.C. §§ 227, *et seq.* (“TCPA”).
5

6 7. The Court has personal jurisdiction over Defendant and venue is proper
7 in this District because Defendant directs, markets, and provides its business
8 activities to this District, and because Defendant’s unauthorized marketing scheme
9 was directed by Defendant to consumers in this District, including Plaintiff.
10

11 **PARTIES**

12
13 8. Plaintiff is a natural person who, at all times relevant to this action, was
14 a resident of Sonoma County, California.

15 9. Defendant is a California corporation whose principal office is located
16 at 30531 Via Ventana, San Juan Capistrano, CA 92675. Defendant directs, markets,
17 and provides its business activities throughout the United States, including
18 throughout the state of California.
19

20
21 10. Unless otherwise indicated, the use of Defendant’s name in this
22 Complaint includes all agents, employees, officers, members, directors, heirs,
23 successors, assigns, principals, trustees, sureties, subrogees, representatives,
24 vendors, and insurers of Defendant.
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THE TCPA

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2 11. The TCPA prohibits: (1) any person from calling a cellular telephone
3 number; (2) using an automatic telephone dialing system or an artificial or
4 prerecorded voice; (3) without the recipient’s prior express consent. 47 U.S.C. §
5 227(b)(1)(A).
6

7 12. The TCPA exists to prevent communications like the ones described
8 within this Complaint. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744
9 (2012).
10

11 13. In an action under the TCPA, a plaintiff must show only that the
12 defendant “called a number assigned to a cellular telephone service using an
13 automatic dialing system or prerecorded voice.” *Breslow v. Wells Fargo Bank, N.A.*,
14 857 F. Supp. 2d 1316, 1319 (S.D. Fla. 2012), *aff’d*, 755 F.3d 1265 (11th Cir. 2014).
15
16

17 14. The Federal Communications Commission (“FCC”) is empowered to
18 issue rules and regulations implementing the TCPA. According to the FCC’s
19 findings, calls in violation of the TCPA are prohibited because, as Congress found,
20 automated or prerecorded telephone calls are a greater nuisance and invasion of
21 privacy than live solicitation calls, and such calls can be costly and inconvenient.
22 The FCC also recognized that wireless customers are charged for incoming calls
23 whether they pay in advance or after the minutes are used. *Rules and Regulations*
24
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1 *Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-
2 278, Report and Order, 18 FCC Rcd 14014 (2003).

3 15. In 2012, the FCC issued an order further restricting automated
4 telemarketing calls, requiring “prior express written consent” for such calls. *See In*
5 *the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of*
6 *1991*, 27 F.C.C.R. 1830, 1838 ¶ 20 (Feb. 15, 2012) (emphasis supplied).

7
8
9 16. To obtain express written consent for telemarketing calls, a defendant
10 must establish that it secured the plaintiff’s signature in a form that gives the plaintiff
11 a “‘clear and conspicuous disclosure’ of the consequences of providing the requested
12 consent....and having received this information, agrees unambiguously to receive
13 such calls at a telephone number the [plaintiff] designates.” *In re Rules &*
14 *Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830,
15 1837 ¶ 18, 1838 ¶ 20, 1844 ¶ 33, 1857 ¶ 66, 1858 ¶ 71 (F.C.C. Feb. 15, 2012).

16
17
18 17. The TCPA regulations promulgated by the FCC define “telemarketing”
19 as “the initiation of a telephone call or message for the purpose of encouraging the
20 purchase or rental of, or investment in, property, goods, or services.” 47 C.F.R. §
21 64.1200(f)(12). In determining whether a communication constitutes telemarketing,
22 a court must evaluate the ultimate purpose of the communication. *See Golan v.*
23 *Veritas Entm’t, LLC*, 788 F.3d 814, 820 (8th Cir. 2015).

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1 18. “Neither the TCPA nor its implementing regulations ‘require an
2 explicit mention of a good, product, or service’ where the implication of an improper
3 purpose is ‘clear from the context.’” *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*,
4 705 F.3d 913, 918 (9th Cir. 2012)).

6 19. “‘Telemarketing’ occurs when the context of a call indicates that it was
7 initiated and transmitted to a person for the purpose of promoting property, goods,
8 or services.” *Golan*, 788 F.3d at 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii); 47 C.F.R.
9 § 64.1200(f)(12); *In re Rules and Regulations Implementing the Telephone*
10 *Consumer Protection Act of 1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003 WL
11 21517853, at *49).

14 20. The FCC has explained that calls motivated in part by the intent to sell
15 property, goods, or services are considered telemarketing under the TCPA. *See In*
16 *re Rules and Regulations Implementing the Telephone Consumer Protection Act of*
17 *1991*, 18 FCC Rcd. 14014, ¶¶ 139-142 (2003). This is true whether call recipients
18 are encouraged to purchase, rent, or invest in property, goods, or services during the
19 call *or in the future. Id.*

22 21. In other words, offers “that are part of an overall marketing campaign
23 to sell property, goods, or services constitute” telemarketing under the TCPA. *See*
24 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act*
25 *of 1991*, 18 FCC Rcd. 14014, ¶ 136 (2003).

1 22. If a call is not deemed telemarketing, a defendant must nevertheless
2 demonstrate that it obtained the plaintiff’s prior express consent. *See In the Matter*
3 *of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC
4 Rcd. 7961, 7991-92 (2015) (requiring express consent “for non-telemarketing and
5 non-advertising calls”).
6

7 **FACTS**
8

9 23. On or about January 27, 2021, Defendant caused a prerecorded voice
10 message to be transmitted to Plaintiff’s cellular telephone number ending in 5576
11 (“5576 Number”):
12

13 24. The prerecorded voice message states that they were being sent from
14 Kemmer Matteson of First California Financial and states, “just wanted to give you
15 a follow-up call on mortgage interest rates, currently we’re at 2.75% with 0 points,
16 so if you’re interested give me a call back 714 606 8400 and I’ll be happy to go over
17 the options with you. Have a great day.”
18

19 25. Plaintiff is the subscriber and/or sole user of the 5576 number.
20

21 26. The prerecorded message came from the number 949-421-1000.
22

23 27. When Plaintiff listened to the voice messages, she was easily able to
24 determine that it was a prerecorded message. *Rahn v. Bank of Am.*, No. 1:15-CV-
25 4485-ODE-JSA, 2016 U.S. Dist. LEXIS 186171, at *10-11 (N.D. Ga. June 23, 2016)
26 (“When one receives a call, it is a clear-cut fact, easily discernible to any lay person,
27
28

1 whether or not the recipient is speaking to a live human being, or is instead being
2 subjected to a prerecorded message.”).

3 28. Defendant’s prerecorded message calls constitute
4 telemarketing/advertising because they promote Defendant’s business, goods and
5 services.
6

7 29. At no point in time did Plaintiff provide Defendant with her express
8 written consent to be contacted by prerecorded message.
9

10 30. Upon information and belief, Defendant caused similar prerecorded
11 messages to be sent to individuals residing within this judicial district.
12

13 31. Defendant’s unsolicited prerecorded messages caused Plaintiff
14 additional harm, including invasion of privacy, aggravation, annoyance, intrusion on
15 seclusion, trespass, and conversion. Defendant’s call also inconvenienced Plaintiff
16 and caused disruption to Plaintiff’s daily life.
17

18 **CLASS ALLEGATIONS**

19 **PROPOSED CLASS**

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21 32. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23,
22 on behalf of herself and all others similarly situated.

23 33. Plaintiff brings this case on behalf of the Class defined as follows:
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1 **NO CONSENT CLASS:** All persons in the United States who, within
2 four years prior to the filing of this action, (1) were sent a prerecorded
3 message by or on behalf of Defendant, (2) regarding Defendant's
4 goods, products or services, and (4) for which Defendant failed to
5 secure the called party's express written consent

6
7 34. Plaintiff reserves the right to modify the Class definitions as warranted
8
9 as facts are learned in further investigation and discovery.

10 35. Defendant and its employees or agents are excluded from the Class.
11 Plaintiff does not know the number of members in the Class but believes the Class
12 members number in the several thousands, if not more.

13
14 **NUMEROSITY**

15 36. Upon information and belief, Defendant has placed automated calls to
16 cellular telephone numbers belonging to thousands of consumers throughout the
17 United States without their prior express consent. The members of the Class,
18 therefore, are believed to be so numerous that joinder of all members is
19 impracticable.
20
21

22 37. The exact number and identities of the members of the Class are
23 unknown at this time and can only be ascertained through discovery. Identification
24 of the Class members is a matter capable of ministerial determination from
25 Defendant's call records.
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COMMON QUESTIONS OF LAW AND FACT

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2 38. There are numerous questions of law and fact common to members of
3
4 the Class which predominate over any questions affecting only individual members
5 of the Class. Among the questions of law and fact common to the members of the
6 Class are:

- 7 a. Whether Defendant made non-emergency calls to Plaintiff's and
8 Class members' cellular telephones using a prerecorded
9 message;
10
11 b. Whether Defendant can meet its burden of showing that it
12 obtained prior express written consent to make such calls;
13
14 c. Whether Defendant's conduct was knowing and willful;
15
16 d. Whether Defendant is liable for damages, and the amount of such
17 damages; and
18
19 e. Whether Defendant should be enjoined from such conduct in the
20 future.

21 39. The common questions in this case are capable of having common
22 answers. If Plaintiff's claim that Defendant routinely transmits calls to telephone
23 numbers assigned to cellular telephone services is accurate, Plaintiff and the Class
24 members will have identical claims capable of being efficiently adjudicated and
25 administered in this case.
26
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1 **TYPICALITY**

2 40. Plaintiff's claims are typical of the claims of the Class members, as
3 they are all based on the same factual and legal theories.

4 **PROTECTING THE INTERESTS OF THE CLASS MEMBERS**

5 41. Plaintiff is a representative who will fully and adequately assert and
6 protect the interests of the Class, and has retained competent counsel. Accordingly,
7 Plaintiff is an adequate representative and will fairly and adequately protect the
8 interests of the Class.
9
10

11 **PROCEEDING VIA CLASS ACTION IS SUPERIOR AND ADVISABLE**

12 42. A class action is superior to all other available methods for the fair and
13 efficient adjudication of this lawsuit, because individual litigation of the claims of
14 all members of the Class is economically unfeasible and procedurally impracticable.
15 While the aggregate damages sustained by the Class are in the millions of dollars,
16 the individual damages incurred by each member of the Class resulting from
17 Defendant's wrongful conduct are too small to warrant the expense of individual
18 lawsuits. The likelihood of individual Class members prosecuting their own separate
19 claims is remote, and, even if every member of the Class could afford individual
20 litigation, the court system would be unduly burdened by individual litigation of
21 such cases.
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1 43. The prosecution of separate actions by members of the Class would
2 create a risk of establishing inconsistent rulings and/or incompatible standards of
3 conduct for Defendant. For example, one court might enjoin Defendant from
4 performing the challenged acts, whereas another may not. Additionally, individual
5 actions may be dispositive of the interests of the Class, although certain class
6 members are not parties to such actions.
7

8
9 **COUNT I**

10 **Violations of the TCPA, 47 U.S.C. § 227(b)**

11 **(On Behalf of Plaintiff and No Consent Class)**

12 44. Plaintiff re-alleges and incorporates the foregoing allegations as if fully
13 set forth herein.
14

15 45. It is a violation of the TCPA to make “any call (other than a call made
16 for emergency purposes or made with the prior express consent of the called party)
17 using any ... artificial or prerecorded voice to any telephone number assigned to a ...
18 cellular telephone service” 47 U.S.C. § 227(b)(1)(A)(iii).
19

20 46. It is a violation of the TCPA regulations promulgated by the FCC to
21 “initiate any telephone call...using an... artificial or prerecorded voice to any
22 telephone number assigned to a paging service, cellular telephone service,
23 specialized mobile radio service, or other radio common carrier service, or any
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1 service for which the called party is charged for the call.” 47 C.F.R. §
2 64.1200(a)(1)(iii).

3 47. Additionally, it is a violation of the TCPA regulations promulgated by
4 the FCC to “[i]nitiate, or cause to be initiated, any telephone call that includes or
5 introduces an advertisement or constitutes telemarketing, ...artificial or prerecorded
6 voice ...other than a call made with the prior express written consent of the called
7 party or the prior express consent of the called party when the call is made...” 47
8 C.F.R. § 64.1200(a)(2).

9
10
11 48. Defendant – or third parties directed by Defendant – used prerecorded
12 messages to make non-emergency telephone calls to the cellular telephones of
13 Plaintiff and the other members of the Class defined below.

14
15 49. Defendant – or third parties directed by Defendant – used prerecorded
16 messages to make non-emergency telephone calls to the telephones of Plaintiff and
17 other members of the Class.

18
19 50. These calls were made without regard to whether or not Defendant had
20 first obtained express permission from the called party to make such calls. In fact,
21 Defendant did not have prior express consent to call the cell phones of Plaintiff and
22 the other members of the putative Class when its calls were made.

23
24 51. Defendant has, therefore, violated § 227(b)(1)(A)(iii) of the TCPA by
25 using a prerecorded message to make non-emergency telephone calls to the cell
26
27

1 phones of Plaintiff and the other members of the putative Class without their prior
2 express written consent.

3 52. Defendant has therefore violated § 64.1200(a)(1)(iii) and §
4 64.1200(a)(2) by using prerecorded messages to make non-emergency telephone
5 calls to the telephones of Plaintiff and the other members of the putative Class
6 without their prior express written consent.
7

8 53. Defendant knew that it did not have prior express consent to make these
9 calls, and knew or should have known that it was using prerecorded messages. The
10 violations were therefore willful or knowing.
11

12 54. As a result of Defendant's conduct and pursuant to § 227(b)(3) of the
13 TCPA, Plaintiff and the other members of the putative Class were harmed and are
14 each entitled to a minimum of \$500.00 in damages for each violation. Plaintiff and
15 the members of the Class are also entitled to an injunction against future calls. *Id.*
16
17

18 **PRAYER FOR RELIEF**

19 **WHEREFORE**, Plaintiff, individually and on behalf of the Class, prays for
20 the following relief:
21

- 22 a) An order certifying this case as a class action on behalf of the Class as
23 defined above, and appointing Plaintiff as the representative of the
24 Class and Plaintiff's counsel as Class Counsel;
25

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28

- 1 b) An award of actual and statutory damages for Plaintiff and each
2 member of the Class;
- 3 c) As a result of Defendant’s negligent violations of 47 U.S.C. §§ 227, *et*
4 *seq.*, Plaintiff seeks for herself and each member of the Class \$500.00
5 in statutory damages for each and every violation pursuant to 47 U.S.C.
6 § 277(b)(3)(B);
- 7 d) As a result of Defendant’s knowing and/or willful violations of 47
8 U.S.C. §§ 227, *et seq.*, Plaintiff seeks for herself and each member of
9 the Class treble damages, as provided by statute, up to \$1,500.00 for
10 each and every violation pursuant to 47 U.S.C. § 277(b)(3)(B) and §
11 277(b)(3)(C);
- 12 e) An order declaring that Defendant’s actions, as set out above, violate
13 the TCPA;
- 14 f) An injunction requiring Defendant to cease all unsolicited call activity,
15 and to otherwise protect the interests of the Class;
- 16 g) An injunction prohibiting Defendant from using, or contracting the use
17 of, prerecorded messages without obtaining, recipient’s consent to
18 receive calls made with such equipment;
- 19 h) An award of reasonable attorneys’ fees and costs pursuant to, *inter alia*,
20 California Code of Civil Procedure § 1021.5; and
21
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1 i) Such further and other relief as the Court deems necessary.

2 **JURY DEMAND**

3 Plaintiff hereby demand a trial by jury.

4 **DOCUMENT PRESERVATION DEMAND**

5
6 Plaintiff demands that Defendant take affirmative steps to preserve all records,
7 lists, electronic databases or other itemization of telephone numbers associated with
8 Defendant and the calls as alleged herein.
9

10 Respectfully submitted,

11
12 Dated: May 6, 2021

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