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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10 **TYLER BAKER**, individually and on behalf
11 of all others similarly situated,

12 *Plaintiff,*

13 v.

14 **SUNPOWER CORP**, a Delaware
15 corporation,

16 **MODERNIZE INC.**, a Delaware corporation,
17 and

18 **QUINSTREET, INC.**, a Delaware
19 corporation,

20 *Defendants,*

Case No. 5:21-cv-790

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

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1 **CLASS ACTION COMPLAINT**

2 Plaintiff Tyler Baker (“Plaintiff”) brings this Class Action Complaint and Demand for Jury
3 Trial against Defendant SunPower Corporation (“Defendant SunPower” or “SunPower”),
4 Defendant Modernize Inc. (“Defendant Modernize” or “Modernize”), and Defendant QuinStreet,
5 Inc. to stop Defendants from violating the Telephone Consumer Protection Act (“TCPA”) by
6 making pre-recorded telemarketing calls without prior express written consent, including to
7 consumers who registered their phone numbers on the National Do Not Call registry (“DNC”).
8 Plaintiff also seeks injunctive and monetary relief for all persons injured by Defendants’ conduct.
9 Plaintiff, for this Complaint, alleges as follows upon personal knowledge as to himself and his own
10 acts and experiences, and, as to all other matters, upon information and belief, including
11 investigation conducted by his attorneys.

12 **INTRODUCTION**

13 1. As the Supreme Court explained at the end of its term this year, “Americans
14 passionately disagree about many things. But they are largely united in their disdain for robocalls.
15 The Federal Government receives a staggering number of complaints about robocalls—3.7 million
16 complaints in 2019 alone. The States likewise field a constant barrage of complaints. For nearly 30
17 years, the people’s representatives in Congress have been fighting back.” *Barr v. Am. Ass’n of*
18 *Political Consultants*, No. 19-631, 2020 U.S. LEXIS 3544, at *5 (U.S. July 6, 2020).

19 2. The National Do Not Call Registry allows consumers to register their telephone
20 numbers and thereby indicate their desire not to receive telephone solicitations at those numbers.
21 *See* 47 C.F.R. § 64.1200(c)(2).

22 3. A listing on the Registry “must be honored indefinitely, or until the registration is
23 cancelled by the consumer or the telephone number is removed by the database administrator.” *Id.*

24 4. When Congress enacted the TCPA in 1991, it found that telemarketers called more
25 than 18 million Americans every day. 105 Stat. 2394 at § 2(3).

1 corporation headquartered in Foster City, California. Defendant QuinStreet, Inc. merged with
2 (directly or indirectly), acquired substantially all the assets of, and/or otherwise assumed the
3 liabilities of Defendant Modernize, Inc., and/or there is such a unity of interest and ownership
4 between the two that separate personalities of the two corporations do not exist. In addition and/or
5 in the alternative, Defendant QuinStreet, Inc. owns and operates Modernize.com and related
6 operations. In this Complaint, Defendant Modernize, Inc. and Defendant QuinStreet, Inc. are
7 referred to collectively as “Modernize.” Modernize conducts business throughout this District, and
8 throughout the United States.

9 **JURISDICTION AND VENUE**

10 15. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331, as
11 the action arises under the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”).

12 16. This Court has personal jurisdiction over SunPower because SunPower’s principal
13 place of business is in this district, and because SunPower’s wrongful conduct giving rise to this
14 case took place in, or was directed to, this district. This Court has personal jurisdiction over
15 Modernize because Modernize’s principal place of business is in this district, and/or because
16 Modernize’s wrongful conduct giving rise to this case took place in, or was directed to, this district.

17 17. Venue is proper in this District under 28 U.S.C. § 1391(b) because Defendants
18 conduct significant amounts of business transactions within this District and because wrongful
19 conduct giving rise to this case took place in or was directed to this District. In addition, venue is
20 proper in this District because Defendants are located in this District.

21 **COMMON ALLEGATIONS**

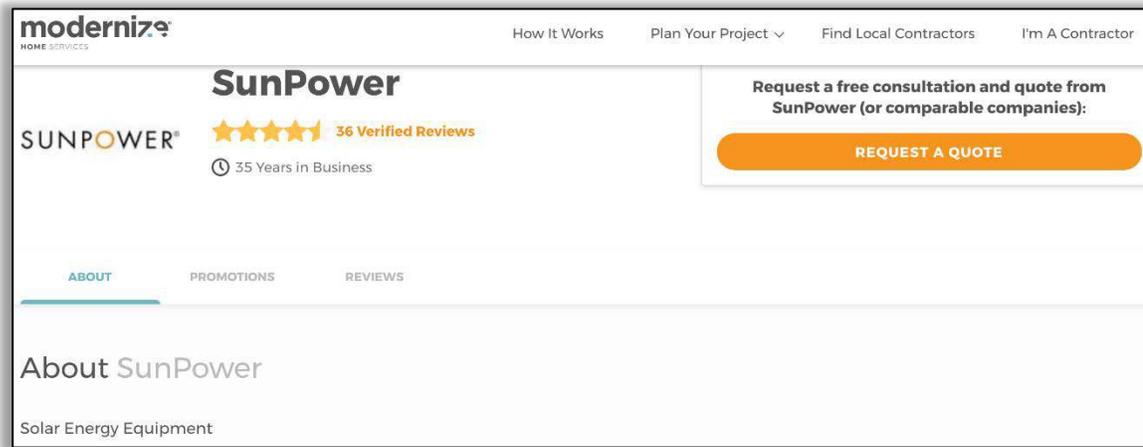
22 18. Defendant Modernize operates a platform that connects consumers with service
23 companies, including companies that provide solar panel installations.

24 19. Defendant SunPower designs and manufactures solar panel solutions for businesses
25 and residential properties.

26 20. SunPower outsources a significant part of its sales, offering commission rates of \$75
27 or more per booked solar panel installation appointment.

1 21. Modernize places outbound telemarketing calls to consumers nationwide, including
2 on behalf of SunPower to generate solar installation appointments for SunPower, as per Plaintiff's
3 experience. The express purpose of these calls is to solicit call recipients to purchase products,
4 including SunPower products. These calls use artificial and/or pre-recorded voices.

5 22. Modernize has a page on its website specifically designed to generate quotes on
6 behalf of SunPower:



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13 <https://modernize.com/contractors/ca/san-jose/sunpower-pvfmcmsochmzximn>

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15 23. In addition to the above, Modernize operates Modernize Inbound Calls, which serves
16 as a portal for contractors like SunPower to register online and begin receiving telephone leads. ¹

17 24. These leads are called by Modernize and transferred live to contractors like
18 SunPower. ²

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20 25. In a job posting for a Quality Assurance Specialist, Modernize references its
21 relationship with SunPower:
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27 ¹ [https://www.businesswire.com/news/home/20180412005338/en/ModernizeTM-Releases-](https://www.businesswire.com/news/home/20180412005338/en/ModernizeTM-Releases-%E2%80%9CInbound-Calls%E2%80%9D-to-Better-Serve-Small-Businesses-Across-the-Country)
28 ² *Id.*

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Quality Assurance Specialist

san francisco, California, United States
Upshift

Who we are :

Modernize is one of the fastest growing energy efficiency marketplaces in the USA. We've been in business for 11 years and last year we helped over 250,000 Americans save money by going green.

We partner with large solar companies like Sunpower to sell their products to homeowners.

<https://www.talent.com/view?id=9b86f5a6e395> (underlining added)

26. SunPower is aware of, consented to, and/or acquiesced in Modernize’s making the telemarketing phone calls to consumers described above. Indeed, SunPower is aware of and received leads generated from the telemarketing phone calls from Modernize.

27. SunPower pays Modernize for each lead that it provides who books an appointment for a solar quote from SunPower.

28. Based on the foregoing, Modernize was authorized by SunPower to act on SunPower’s behalf with respect to the telemarketing phone calls to consumers on behalf of SunPower. In addition and/or in the alternative, Modernize had apparent authority to act on SunPower’s behalf with respect to the telemarketing phone calls to consumers described above. In addition and/or in the alternative, SunPower ratified Modernize’s making of the telemarketing calls described above. Indeed, SunPower knew that Modernize places outbound telemarketing calls to consumers nationwide on behalf of SunPower, to generate solar installation appointments for SunPower, without prior express written consent, or otherwise had knowledge of facts that would have led a reasonable person to investigate further, and yet SunPower ratified Modernize’s conduct without further investigation. In addition and/or in the alternative, SunPower was negligent in supervising Modernize’s making of the telemarketing calls described above. Accordingly, SunPower is responsible for Modernize’s making of the telemarketing calls described above.

1 29. The Federal Communication Commission has instructed that corporations such as
2 SunPower may not avoid liability by having their telemarketing outsourced:

3 [A]llowing the seller to avoid potential liability by outsourcing its telemarketing
4 activities to unsupervised third parties would leave consumers in many cases without
5 an effective remedy for telemarketing intrusions. This would particularly be so if the
6 telemarketers were judgment proof, unidentifiable, or located outside the United
7 States, as is often the case. Even where third-party telemarketers are identifiable,
8 solvent, and amenable to judgment limiting liability to the telemarketer that
9 physically places the call would make enforcement in many cases substantially more
10 expensive and less efficient, since consumers (or law enforcement agencies) would
11 be required to sue each marketer separately in order to obtain effective relief. As the
12 FTC notes, because “[s]ellers may have thousands of ‘independent’ marketers, suing
13 one or a few of them is unlikely to make a substantive difference for consumer
14 privacy.”

15 *In re Joint Petition Filed by DISH Network, LLC et al. for Declaratory Ruling Concerning the*
16 *TCPA Rules*, 28 FCC Rcd. 6574, at ¶ 37 (201) (“FCC 2013 Ruling”) (citations omitted).

17 30. Neither Plaintiff nor the members of the proposed Classes ever provided Defendants
18 and/or their agents with prior express written consent to receive the telephone calls at issue.
19 Defendants do not have any record of express written consent to place telemarketing calls, or calls
20 featuring an artificial or pre-recorded voice, to Plaintiff or to members of the proposed Classes.

21 31. Defendant Modernize willfully violated the TCPA. Defendant Modernize was aware
22 that it was making calls that violated each element of the TCPA, as alleged above. In fact, in 2019,
23 Modernize paid \$800,000 to settle a TCPA class action based, in part, on telemarketing calls made
24 in violation of the TCPA. *Hopkins V. Modernize, Inc.*, No. 4:17-CV-40087 (D.Mass). In the
25 alternative, Modernize was reckless or willfully blind to the fact that it was making calls that
26 violated each element of the TCPA.

1 42. Again, this call was missed but Plaintiff received a pre-recorded voicemail message
2 that is identical to the message he received on May 14, 2020 and June 2, 2020.

3 43. At no time did Plaintiff provide prior express written consent to receive pre-recorded
4 or other telemarketing calls from either Defendant.

5 44. The unauthorized telephone calls that Plaintiff received from Modernize on behalf of
6 SunPower, as alleged herein, have harmed Plaintiff in the form of annoyance, nuisance, and
7 invasion of privacy, and disturbed the use and enjoyment of his phone, in addition to the wear and
8 tear on the phone's hardware (including the phone's battery) and the consumption of memory on the
9 phone.

10 45. Defendant Modernize was and is aware that the above-described telephone calls
11 were being made either by it directly, or made on its behalf, and that the telephone calls were being
12 made to consumers who had not provided prior express written consent to receive them.

13 46. Defendant SunPower was and is aware that the above-described telephone calls were
14 being made on its behalf, and that the telephone calls were being made to consumers who had not
15 provided prior express written consent to receive them.

16 **CLASS ACTION ALLEGATIONS**

17 47. Plaintiff brings this action pursuant to Federal Rules of Civil Procedure 23(b)(2) and
18 23(b)(3) and seeks certification of the following Classes and subclasses:

19 **Pre-recorded Class:** All persons in the United States who, from four years prior to
20 the filing of this action through trial received a telephone call made by or on behalf
21 of Defendants: (1) promoting home improvement products or services; (2) using an
22 artificial or pre-recorded voice; and (3) for which Defendants and their agents lacked
23 any current record of prior express written consent to place the call at the time the
24 call was made.

25 **SunPower Pre-recorded subclass:** All persons in the United States who, from four
26 years prior to the filing of this action through trial received a telephone call made by
27 or on behalf of Defendant SunPower: (1) promoting SunPower's products or
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1 services; (2) using an artificial or pre-recorded voice; and (3) for which Defendants
2 and their agents lacked any current record of prior express written consent to place
3 the call at the time the call was made.

4 **Do Not Call Class:** All persons in the United States who, from four years prior to the
5 filing of this action through trial, received more than one telephone call made by or
6 on behalf of Defendants within a 12-month period (1) promoting home improvement
7 products or services; (2) at a telephone number that had been listed on the National
8 Do Not Call Registry for at least thirty days at the time of each call; (3) where such
9 individual had not entered into any purchase or transaction with Defendants within
10 the 18 months preceding such calls; and (4) for which Defendants and their agents
11 lacked any current record of prior express written consent to place the call at the time
12 the call was made.

13 **SunPower Do Not Call Class:** All persons in the United States who, from four years
14 prior to the filing of this action through trial, received more than one telephone call
15 made by or on behalf of Defendant SunPower within a 12-month period (1)
16 promoting SunPower's products or services; (2) at a telephone number that had been
17 listed on the National Do Not Call Registry for at least thirty days at the time of each
18 call; (3) where such individual had not entered into any purchase or transaction with
19 Defendants within the 18 months preceding such calls; and (4) for which Defendants
20 and their agents lacked any current record of prior express written consent to place
21 the call at the time the call was made.

22 The following individuals are excluded from the Classes: (1) any Judge or Magistrate
23 presiding over this action and members of their families; (2) Defendants, their subsidiaries, parents,
24 successors, predecessors, and any entity in which either Defendant or their parents have a
25 controlling interest and their current or former employees, officers and directors; (3) Plaintiff's
26 counsel and their experts and consultants; (4) persons who properly execute and file a timely
27 request for exclusion from the Classes; (5) the legal representatives, successors or assigns of any
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1 such excluded persons; and (6) persons whose claims against Defendants have been fully and
2 finally adjudicated and/or released. Plaintiff anticipates that the Class definitions may need to be
3 amended following appropriate discovery.

4 **Rule 23(a)**

5 48. **Numerosity and Ascertainability:** The exact sizes of the Classes are unknown and
6 not available to Plaintiff at this time, but it is likely that Defendants made telephone calls to
7 thousands of consumers who fall into each of the Classes, such that individual joinder of all
8 members is impracticable. Members of the Classes can be identified through Defendants' records.

9 49. **Commonality:** There are many questions of law and fact common to the claims of
10 Plaintiff and the Classes. Common questions for the Classes include the following:

11 **Pre-recorded Class**

- 12 • whether Defendants' conduct violated the TCPA;
- 13 • whether Defendants placed, or caused to be placed on their behalf, telephone calls
14 using an artificial or pre-recorded voice to Plaintiff and members of the Pre-recorded
15 Class;
- 16 • whether Defendants and/or their agents had prior express written consent to place
17 such calls;
- 18 • whether Plaintiff and the members of the Pre-recorded Class are entitled to treble
19 damages based on the willfulness of Defendants' conduct.

20 **Do Not Call Class**

- 21 • whether Defendants' conduct violated the TCPA;
- 22 • whether Defendants placed multiple calls within a 12-month period to Plaintiff and
23 other consumers whose telephone numbers were registered with the National Do Not
24 Call Registry for at least 30 days at the time of each call;
- 25 • whether Defendant engaged in telemarketing without implementing adequate
26 internal policies and procedures for maintaining an internal do not call list;
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- whether members of the Classes are entitled to treble damages based on the willfulness of Defendants' conduct.

50. **Typicality:** Plaintiff's claims are typical of the claims of other members of the Classes, in that Plaintiff and the members of the Classes sustained damages arising out of Defendants' uniform wrongful telemarketing conduct toward Plaintiff and each of the Classes. As a result of this uniform misconduct, Plaintiff and the other members of the Classes suffered the same injuries (in the form of the violations of their statutory rights under the TCPA) and are entitled to identical calculations of statutory damages (per call).

51. **Adequacy:** Plaintiff will fairly and adequately represent and protect the interests of the Classes, and has retained counsel competent and experienced in class actions. Defendants have no defenses unique to Plaintiff. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the members of the Classes, and have the financial resources to do so. Neither Plaintiff nor his counsel have any interest adverse to the Classes.

Fed. R. Civ. P. 23(b)(2)

52. Defendants have acted or refused to act on grounds generally applicable to the Classes and as a whole, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Classes and making final class-wide injunctive relief appropriate.

Fed. R. Civ. P. 23(b)(3)

53. **Predominance:** Questions of law and fact common to the class predominate over any questions affecting only individual members, because the claims of Plaintiff and the other members of the Classes all arise from Defendants' uniform campaign of making unauthorized calls to their telephones. Defendants' liability for all of the calls to all class members hinges on the same law and substantially similar conduct by Defendants, not on law or facts specific to Plaintiff or any other individual class member. The main issues to be decided, such as the ones identified above in paragraph 49, are common to all class members who received calls as part of Defendants' uniform

1 campaign of making unauthorized calls. Moreover, the answers to such common questions will be
2 based on common proof, primarily from information to be found within Defendants' own records.

3 54. **Superiority:** Class action treatment is superior to all other available methods for the
4 fair and efficient adjudication of this controversy, and joinder of all parties is impracticable. The
5 damages suffered by individual members of the Classes will likely be small relative to the burden
6 and expense of individual prosecution of the complex litigation necessitated by Defendants' actions.
7 Thus, it would be virtually impossible for the members of the Classes to obtain effective relief from
8 Defendants' misconduct on an individual basis. A class action provides the benefits of single
9 adjudication, economies of scale, and comprehensive supervision by a single court. Furthermore,
10 the common questions of law and fact in this case can be readily answered with common proof,
11 often from Defendants' own records. Economies of time, effort, and expense will be fostered and
12 uniformity of decisions ensured.

13
14 **FIRST CLAIM FOR RELIEF**
15 **Telephone Consumer Protection Act**
16 **(Violation of 47 U.S.C. § 227)**

17 **(On Behalf of Plaintiff and the Pre-recorded Class with respect to Defendant Modernize, and**
18 **on Behalf of Plaintiff and the SunPower Pre-recorded Class with respect to Defendant**
19 **SunPower)**

20 55. Plaintiff repeats and realleges the prior allegations of this Complaint and
21 incorporates them by reference herein.

22 56. Defendant Modernize and/or its agents made unwanted solicitation telephone calls to
23 Plaintiff and the other members of the Pre-recorded Class in an effort to sell home improvement
24 goods and services. When those calls were made to sell Defendant SunPower's goods and services,
25 Defendant Modernize and/or its agents were acting as agents of Defendant SunPower.

26 57. These calls used artificial or pre-recorded voices.

27 58. These pre-recorded voice calls were made without the prior express written consent
28 of Plaintiff and the other members of the Pre-recorded Class.

1 telephone numbers. We believe that wireless subscribers should be afforded the same protections as
2 wireline subscribers.”

3 64. 47 C.F.R. § 64.1200(d) further provides that “[n]o person or entity shall initiate any
4 call for telemarketing purposes to a residential telephone subscriber unless such person or entity has
5 instituted procedures for maintaining a list of persons who request not to receive telemarketing calls
6 made by or on behalf of that person or entity” and then describes certain minimum standards for
7 those procedures.

8 65. Defendant Modernize and/or its agents made more than one unsolicited
9 telemarketing call to Plaintiff and members of the Do Not Call Class within a 12-month period
10 without having prior express written consent to place such calls. Each such call was directed to a
11 telephone number that had been registered with the National Do Not Call Registry for at least 30
12 days at the time of the call. When those calls were made to sell Defendant SunPower’s goods and
13 services, Defendant Modernize and/or its agents were acting as agents of Defendant SunPower.
14 Plaintiff and members of the Do Not Call Class did not provide consent to receive such
15 telemarketing calls from Defendants or their agents and/or neither Defendants nor their agents have
16 any record of consent to place such telemarketing calls to Plaintiff or the members of the Do Not
17 Call Class.

18 66. Defendant violated 47 C.F.R. §§ 64.1200(d) and (e) by causing calls to be initiated
19 for telemarketing purposes to residential and wireless telephone subscribers, such as Plaintiff and
20 the Do Not Call Class, without instituting procedures that comply with the regulatory minimum
21 standards for maintaining a list of persons who request not to receive telemarketing calls.

22 67. Defendants violated 47 U.S.C. § 227(c)(5) because Plaintiff and the Do Not Call
23 Class received more than one telephone call in a 12-month period made by or on behalf of
24 Defendants in violation of 47 C.F.R. § 64.1200, as described above.

25 68. As a result of Defendants’ conduct as alleged herein, Plaintiff and the Do Not Call
26 Class suffered actual damages and, under section 47 U.S.C. § 227(c), are entitled, inter alia, to
27 receive up to \$500 in damages for such violations of 47 C.F.R. § 64.1200.
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Attorneys for Plaintiff and the putative Classes