

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
and the Putative Class*

7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

<p>11 RUSSELL SMITH, individually and 12 on behalf of others similarly 13 situated,</p> <p>14 Plaintiff,</p> <p>15 vs.</p> <p>16 TD BANK, N.A.,</p> <p>17 Defendant.</p>	<p>11 CASE NO. <u>'22CV1370 AJB DDL</u></p> <p>12 <u>CLASS ACTION</u></p> <p>13 COMPLAINT FOR DAMAGES FOR 14 VIOLATIONS OF:</p> <p>15 THE CALIFORNIA INVASION OF 16 PRIVACY ACT, CAL. PEN. CODE 17 637.3 ET SEQ.</p> <p>18 JURY TRIAL DEMANDED</p>
--	--

INTRODUCTION

1
2 1. Plaintiff Russell Smith (“Plaintiff”), on behalf of Plaintiff and a Class of similarly
3 situated individuals defined below, bring this Class Action Complaint and
4 Demand for Jury Trial against Defendant TD Bank, N.A. (“Defendant”) to put an
5 end to its unlawful use, examination, and recording of Plaintiff’s and putative
6 Class members’ biometric voice prints. Plaintiff, for this Class Action Complaint,
7 allege as follows upon personal knowledge as to Plaintiff’s own acts and
8 experiences and, as to all other matters, upon information and belief.

9 **NATURE OF THE ACTION**

10 2. Defendant utilizes a system that enables it to examine the voice of anyone that calls
11 it to determine the truth or falsity of the callers’ statements. The software combines
12 audio, voice, and artificial intelligence technologies to compare the callers’ voices
13 to a comprehensive database of recordings and metrics.

14 3. The system Defendant uses allows it to authenticate or refute the true identity of
15 callers, among other things. The system contains voice recognition software that
16 creates a biometric voice print of each caller. The system then allows Defendant
17 to analyze the callers’ voice prints to determine the truth or falsity of their
18 statements.

19 4. Defendant does this for anyone that calls it, including Plaintiff and Class
20 members.

21 5. In addition to the behind-the-scenes voice examinations that Defendant performed
22 on Plaintiff and class members, Defendant published that it has a system called
23 TD VoicePrint and “TD VoicePrint is a voice recognition technology that allows
24 us to use your voiceprint – as unique to you as your fingerprint – to validate your
25 identify whenever you speak on the phone with one of our Live Customer Service
26 representatives.”¹

27
28

¹ <https://www.tdbank.com/bank/tdvoiceprint.html>

1 6. Defendant goes on to say; “TD VoicePrint system takes a "print" of your voice in
2 real time and transcribes it into mathematical data that cannot be replicated. Like
3 the lines in your finger, your voiceprint is based on your unique voice. It's
4 composed of over a hundred different characteristics that uniquely represent your
5 voice (e.g., the shape and size of your vocal tract). No one else has a voice just
6 like you.”²

7 7. While Defendant claims that consumers must enroll into TD VoicePrint, Plaintiff
8 alleges that Defendant performs the same or similar voice examinations on anyone
9 that calls it.

10 8. Plaintiff alleges that Defendant was secretly using TD VoicePrint technology for
11 years prior to publishing its existence and seeking enrollment.

12 9. Defendant does not obtain “express written consent” from any callers before
13 examining and analyzing their voices.

14 10. Even those that enroll in TD VoicePrint do it verbally over the phone³, which does
15 not satisfy the CIPA requirement of express written consent.

16 11. Recognizing the need to protect its residents from situations like these, California
17 enacted the California Invasion of Privacy Act (“CIPA”), and specifically Cal.
18 Pen. Code § 637.3, to regulate entities that examine or record California residents’
19 voice prints or voice stress patterns without obtaining the residents’ express
20 written consent first.

21 12. Despite this law, Defendant disregards California residents’ statutorily protected
22 privacy rights and unlawfully examines or records their voices in violation of
23 CIPA. Specifically, Defendant has violated (and continues to violate) CIPA
24 because it uses a system which examines or records California residents’ “voice
25
26

27 ² <https://www.tdbank.com/bank/tdvoiceprint.html>

28 ³ <https://www.tdbank.com/bank/tdvoiceprint.html>

1 prints or voice stress patterns... to determine the truth or falsity of statements”
2 without their express written consent.

3 **PARTIES**

4 13. Plaintiff is a natural person and a resident of the State of California.

5 14. Defendant is a federally chartered bank with its principal place of business located
6 outside of California.

7 **JURISDICTION AND VENUE**

8 15. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §
9 1332(d) because there are more than 100 Class members and the aggregate amount
10 in controversy exceeds \$5,000,000, exclusive of interest, fees, and costs, and at
11 least one Class member is a citizen of a state different from Defendant.

12 16. This court has personal jurisdiction over Defendant because Defendant conducts
13 business in this State and within this judicial district and the conduct alleged in
14 this Complaint occurred in, and/or emanated from, this State and within this
15 judicial district. Additionally, Plaintiff resides in this judicial district.

16 17. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because a substantial
17 part of the events giving rise to Plaintiff’s claims took place within this District.

18 **BACKGROUND**

19 **I. The California Invasion of Privacy Act**

20 18. The California Legislature enacted the Invasion of Privacy Act to protect certain
21 privacy rights of California residents. The legislature expressly recognized that
22 devices and techniques which create a serious threat to privacy and the free
23 exercise of personal liberties cannot be tolerated in a free and civilized society.

24 19. As part of the Invasion of Privacy Act, the California Legislature introduced Penal
25 Code § 637.3. The purpose of the legislation was to prohibit any person or entity
26 from using;

27 “any system which examines or records in any manner voice
28 prints or other voice stress patterns of another person to
determine the truth or falsity of statements made by such

1 person without his or her express written consent given in
2 advance of the examination or recordation.” Cal. Pen Code §
3 637.3

- 4 20. Creating a voice print requires extracting an individual’s phonetic features
5 (including their unique speech patterns, tones, and other characteristics) from their
6 voice. As such, a voice print serves as an audible “fingerprint” which can directly
7 identify an individual and can even reveal the speaker’s behavioral traits.
- 8 21. The California Legislature intended to protect individuals from the unauthorized
9 examination and recording of their voice prints, especially when it takes place
10 without an individual’s knowledge or consent. Such surreptitious examination
11 poses a serious threat to California residents’ privacy and personal liberties.
- 12 22. Individuals may bring an action against the violator of this section of CIPA to
13 recover actual damages or \$1,000 for each violation, whichever is greater under
14 Cal. Penal Code §637.3(c).

15 **II. Defendant Violated the California Invasion of Privacy Act**

- 16 23. Around 2017, Defendant integrated TD VoicePrint technology into its call
17 centers. When customers call, the system verifies their identify by using the sound
18 of their voice. The system uses over 150 different characteristics that make up
19 one’s voice and transcribes them in real time into a unique algorithm that cannot
20 be replicated.⁴
- 21 24. Defendant recognizes consumers’ identities by (1) making a recording of the
22 initial call with the consumer (2) examining that recording to identify specific
23 stress patterns and other characteristics to create a “voice print” which is entered
24 into a database then (3) examining all subsequent calls from that consumer and
25 comparing the voice prints to those already on file for that consumer.
- 26 25. Defendant determines the truth or falsity of caller statements (even for first-time
27 callers) by examining patterns. There are known audible indications of lying such
28

⁴ <https://www.thedrum.com/creative-works/project/tbwachiatday-new-york-td-bank-td-voice-print-experiment>

1 as (1) change in breathing (2) repeating words or phrases (3) difficulty speaking⁵
2 (4) change in speech patterns (5) unusual rise or fall in vocal tone⁶ (6) odd
3 inflection (7) context of use of contractions (8) lack of use of personal pronouns⁷
4 (9) using a high-pitched voice (10) sudden change of volume (11) using phrases
5 such as ‘I want to be honest with you,’ ‘honestly’ or ‘let me tell you the truth’ (12)
6 using words such as ‘uh,’ ‘like’ and ‘um’ and (13) slip-ups and corrections⁸ that
7 can indicate a caller is not being truthful.

8 26. Defendant’s system uses the full audio of a call to determine its characteristics,
9 meaning Defendant analyzes unique acoustic and behavioral features of a caller’s
10 voice, including stress patterns to determine truth or falsity of statements.

11 27. The system Defendant uses is very similar to a Polygraph Test. Such a system is
12 exactly what the California Legislature chose to regulate when it made it unlawful
13 to use without express written consent.

14 28. Defendant did not obtain prior express written consent from Plaintiff or Class
15 members to examine their voices or record their unique voice prints to determine
16 the truth or falsity of their statements in violation of Cal. Penal Code §637.3.

17 **FACTS SPECIFIC TO PLAINTIFF**

18 29. Over the last few years, Plaintiff has called Defendant on numerous occasions.

19 30. Starting with the first call, Defendant began examining and analyzing Plaintiff’s
20 voice attempting to ascertain the truthfulness of Plaintiff’s statements.

21 31. Defendant recorded Plaintiff’s voice and created “voice prints” associated with
22 Plaintiff.

23 32. Defendant then automatically input Plaintiff’s voice prints into its biometric voice
24 print database.

25
26
27 ⁵ <https://www.businessinsider.com/11-signs-someone-is-lying-2014-4>

⁶ <https://www.forensicscolleges.com/blog/resources/10-signs-someone-is-lying>

⁷ <https://www.cnbc.com/2022/04/07/want-to-tell-if-someone-is-lying-to-you-a-body-language-expert-shares-the-biggest-signs-to-look-for.html>

⁸ <https://time.com/5443204/signs-lying-body-language-experts/>

1 33. When Plaintiff subsequently called Defendant, Defendant utilized a system that
2 examined Plaintiff's voice again and compared it to the voice prints it stored in its
3 database from previous calls. Defendant did this to determine the truth or falsity
4 of Plaintiff's statements, including to determine the true identity of Plaintiff.

5 34. Plaintiff has called Defendant on numerous occasions since Defendant began
6 utilizing its voice analysis system. During at least one of these calls, Defendant
7 examined and recorded Plaintiff's voice print and voice stress pattern passively,
8 without Plaintiff's knowledge.

9 35. Plaintiff did not give consent – written or otherwise – to Defendant to collect voice
10 prints and examine Plaintiff's voice for any purpose whatsoever.

11 36. Any applicable statute(s) of limitations has been tolled by the “delayed discovery”
12 rule. Plaintiff did not know (and had no way of knowing) that Plaintiff's voice
13 was recorded for purposes of creating voice prints, or that Plaintiff's voice stress
14 patterns were examined, because Defendant kept this information secret.

15 37. Plaintiff has been exposed to the risks and harmful conditions created by
16 Defendant's violations of CIPA alleged herein.

17 38. Plaintiff seeks statutory damages under CIPA as compensation for the injuries
18 Defendant caused.

19 **STANDING**

20 39. Defendant's conduct constituted invasions of privacy because it disregarded
21 Plaintiff's statutorily protected rights to privacy, in violation of CIPA.

22 40. Defendant caused Plaintiff to (1) suffer invasions of legally protected interests. (2)
23 The invasions were concrete because the injuries actually existed for Plaintiff and
24 continue to exist every time Plaintiff calls Defendant. The privacy invasions
25 suffered by Plaintiff and the Class were real and not abstract. Plaintiff and the Class
26 have a statutory right to be free from voice examination without first providing
27 their express written consent. The voice examinations Defendant performed were
28 meant to determine truth or falsity of statements, similar to a polygraph test.

1 Plaintiff and Class members were completely unaware they were being subject to
2 such a test. Plaintiff's injuries were not divorced from concrete harm in that
3 privacy has long been protected in the form of trespassing laws and the Fourth
4 Amendment of the U.S. Constitution for example. Like here, an unreasonable
5 search may not cause actual physical injury, but is considered serious harm,
6 nonetheless. (3) The injuries here were particularized because they affected
7 Plaintiff in personal and individual ways. The injuries were individualized rather
8 than collective since Plaintiff's unique voice was examined without consent during
9 different calls on separate occasions. (4) Defendant's past invasions were actual
10 and future invasions are imminent and will occur next time Plaintiff calls
11 Defendant. Defendant continues to examine voices in California without express
12 written consent. A favorable decision by this court would redress the injuries of
13 Plaintiff and the Class.

14 CLASS ACTION ALLEGATIONS

15 41. **Class Definition:** Plaintiff brings this action pursuant to Federal Rules of Civil
16 Procedure 23 and on behalf of Plaintiff and a Class defined as follows:

17 All residents of the State of California that had their voice
18 prints or other voice stress patterns examined or recorded by
19 Defendant to determine the truth or falsity of their statements.

20 42. The following people are excluded from the Class: (1) any Judge or Magistrate
21 presiding over this action and members of their families; (2) Defendant,
22 Defendant's subsidiaries, parents, successors, predecessors, and any entity in
23 which the Defendant or its parents have a controlling interest and their current or
24 former officers and directors; (3) persons who properly execute and file a timely
25 request for exclusion from the Class; (4) persons whose claims in this matter have
26 been finally adjudicated on the merits or otherwise released; (5) Plaintiff's counsel
27 and Defendant's counsel; and (6) the legal representatives, successors, and assigns
28 of any such excluded persons.

1 43. **Ascertainability and Numerosity:** The exact number of Class members is
2 unknown to Plaintiff at this time, but Defendant is a very large entity with millions
3 of customers in the United States and California. Members of the Class will be
4 easily identified through Defendant's records.

5 44. **Commonality and Predominance:** There are many questions of law and fact
6 common to the claims of Plaintiff and the Class, and those questions predominate
7 over any questions that may affect individual members of the Class. Common
8 questions for the Class include, but are not necessarily limited to the following:

- 9 a. Whether Defendant used a system which examined, or recorded Plaintiff's
10 and the Class's voice prints or voice stress patterns;
- 11 b. Whether Defendant used voice prints or voice stress patterns to determine the
12 truth or falsity of statements made by Plaintiff and the Class; and
- 13 c. Whether Defendant obtained prior express written consent from Plaintiff and
14 the Class members.

15 45. **Typicality:** Plaintiff's claims are typical of the claims of all the other members of
16 the Class. Plaintiff and the Class members sustained substantially similar injuries
17 as a result of Defendant's uniform wrongful conduct, based upon the same
18 interactions with Defendant that were made without exception as to Plaintiff and
19 the Class.

20 46. **Adequate Representation:** Plaintiff will fairly and adequately represent and
21 protect the interests of the Class and have retained counsel competent and
22 experienced in complex litigation and class actions. Plaintiff has no interest
23 adverse to the Class, and Defendant has no defenses unique to Plaintiff. Plaintiff
24 and Plaintiff's counsel are committed to vigorously prosecuting this action on
25 behalf of the members of the Class and have the financial resources to do so.
26 Neither Plaintiff nor Plaintiff's counsel have any interest contrary to those
27 interests of the of the Class.
28

1 47. **Superiority:** This case is appropriate for class certification because class
2 proceedings are superior to all other available methods for the fair and efficient
3 adjudication of this controversy because joinder of all parties is impracticable. The
4 damage suffered by the individual members of the Class will likely be relatively
5 small, especially given the burden and expense of individual prosecution of the
6 complex litigation necessitated by Defendant’s actions. Thus, it would be virtually
7 impossible for the individual members of the Class to obtain effective relief from
8 Defendant’s misconduct. Even if members of the Class could sustain such
9 individual litigation, it would still not be preferable to a class action because
10 individual litigation would increase the delay and expense to all parties due to the
11 complex legal and factual controversies presented in this Complaint. By contrast,
12 a class action presents far fewer management difficulties and provides the benefits
13 of single adjudication, economies of scale, and comprehensive supervision by a
14 single Court. Economies of time, effort, and expense will be fostered, and
15 uniformity of decisions ensured.

16 **CAUSE OF ACTION**

17 **Violation of Cal. Penal Code § 637.3**

18 **(On Behalf of Plaintiff and the Class)**

- 19 48. Plaintiff incorporates the foregoing allegations as though fully set forth herein.
- 20 49. CIPA prohibits any person or entity from using “any system which examines or
21 records in any manner voice prints or other voice stress patterns of another person
22 to determine the truth or falsity of statements made by such person without his or
23 her express written consent given in advance of the examination or recordation.”
24 Cal. Penal Code § 637.3(a).
- 25 50. Defendant is a bank and therefore an “entity” under CIPA. *Id.*
- 26 51. Defendant utilizes software that creates a “system” under CIPA because it
27 examines, or records Plaintiff’s and the Class’s voice prints or other voice stress
28 patterns.

1 52. Defendant utilized the system to examine or record the voice prints of Plaintiff
2 and the Class when they called Defendant’s customer support lines that were
3 connected to the voice printing and analysis system.

4 53. Defendant examined or recorded Plaintiff’s and Class members’ voice prints to
5 determine the truth or falsity of their statements – including, for example, their
6 statements about who they claimed to be.

7 54. Defendant did not obtain prior express written consent from Plaintiff and the Class
8 to use, examine, or record their voice prints or voice stress patterns for any purpose
9 whatsoever.

10 55. On behalf of Plaintiff and the Class, Plaintiff seeks: (1) injunctive and equitable
11 relief as is necessary to protect the interests of Plaintiff and the Class by requiring
12 Defendant to comply with CIPA’s requirements for the use, recording, and
13 examination of voice prints or other voice stress patterns as described herein; and
14 (2) damages of \$1,000 for each violation of CIPA pursuant to Cal. Penal Code §
15 637.3(c).

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff, on behalf of Plaintiff and the Class,
18 respectfully requests this Court to enter an order:

19 A. Certifying this case as a class action on behalf of the Class defined above
20 pursuant to Federal Rule of Civil Procedure 23, appointing Plaintiff as the
21 representatives of the Class, and appointing Plaintiff’s counsel as Class
22 Counsel;

23 B. Declaring that Defendant’s actions, as described above, violated CIPA;

24 C. Awarding statutory damages of \$1,000 for each violation of CIPA pursuant to
25 Cal. Penal Code § 637.3(c);

26 D. Awarding injunctive and other equitable relief as is necessary to protect the
27 interests of the Class;

28 ///

- 1 E. Awarding Plaintiff and the Class their reasonable litigation expenses and
- 2 attorneys' fees;
- 3 F. Awarding Plaintiff and the Class pre- and post-judgement interest, to the extent
- 4 allowable; and
- 5 G. Awarding such other and further relief as equity and justice may require.

6 **JURY TRIAL**

7 Pursuant to the Seventh Amendment of the United States Constitution, Plaintiff
8 demands a trial by jury for all issues so triable.

9
10 Respectfully submitted,

11 **SWIGART LAW GROUP**

12
13
14 Date: September 11, 2022

15 By: s/ Joshua Swigart
16 Joshua B. Swigart, Esq.
17 Josh@SwigartLawGroup.com
18 Attorney for Plaintiff
19
20
21
22
23
24
25
26
27
28