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19 **UNITED STATES DISTRICT COURT**
 20 **SOUTHERN DISTRICT OF CALIFORNIA**

21 **SAMUEL PARTHEMER,**
 22 **Individually and on Behalf of All**
 23 **Others Similarly Situated,**

24 **Plaintiff,**

25 **v.**

26 **PAYMENT MANAGEMENT**
 27 **SERVICES USA, LLC,**

28 **Defendant.**

Case No: '19CV1034 H NLS

CLASS ACTION

**COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF:**

1. **UNLAWFUL RECORDING
OF CELLULAR
COMMUNICATIONS
UNDER CALIFORNIA
PENAL CODE SECTION
632.7**
2. **INVASION OF PRIVACY
INTRUSION INTO PRIVATE
AFFAIRS**

JURY TRIAL DEMANDED

INTRODUCTION

- 1
2 1. Samuel Parthemer (“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 Payment Management Services USA, LLC
5 (“Defendant”), and its present, former, or future direct and indirect parent
6 companies, subsidiaries, affiliates, agents, related entities for unauthorized
7 recordings of conversations with Plaintiff and Class Members without any
8 notification nor warning to Plaintiff or Class Members in violation of the
9 California Invasion of Privacy Act, Cal. Pen. Code § 630, et seq. (“CIPA”).
- 10 2. The California State Legislature passed CIPA in 1967 to protect the right of
11 privacy of the people of California, replacing prior laws, which permitted the
12 recording of telephone conversations with the consent of one party to the
13 conversation. California Penal Code § 632.7 was added to CIPA in 1992 due to
14 specific privacy concerns over the increased use of cellular and cordless
15 telephones. Section 632.7 prohibits intentionally recording all communications
16 involving cellular and cordless telephones, not just confidential
17 communications.
- 18 3. Plaintiff makes these allegations on information and belief, with the exception of
19 those allegations that pertain to Plaintiff, or to Plaintiff’s counsel, which
20 Plaintiff alleges on his personal knowledge.
- 21 4. Unless otherwise stated, all the conduct engaged in by Defendant took place in
22 California.
- 23 5. All violations by Defendant were knowing, willful, and intentional, and
24 Defendant did not maintain procedures reasonably adapted to avoid any such
25 violation.
- 26 6. Unless otherwise indicated, the use of Defendant’s names in this Complaint
27 includes all agents, employees, officers, members, directors, heirs, successors,
28

1 assigns, principals, trustees, sureties, subrogees, representatives, and insurers of
2 the named Defendant.

3 **JURISDICTION & VENUE**

4 7. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) Class Action Fairness Act of
5 2005 (“CAFA”) because Plaintiff, residents of the State of California, seek relief
6 on behalf of a California class, which will result in at least one class member
7 belonging to a different state than that of Defendant, a New York company.
8 Plaintiff also seeks the greater of statutory punitive damages of \$5,000 per
9 violation per violation pursuant to Cal. Civ. Code § 1785.31, which, when
10 aggregated among a proposed class number in the tens of thousands, exceeds the
11 \$5,000,000 threshold for federal court jurisdiction.

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

14 9. This court has personal jurisdiction over Defendant because Defendant conducts
15 business in California.

16 10. Venue is proper in this Court because Defendant transacts business in this
17 district and the acts and omissions alleged, specifically, Defendant invaded
18 Plaintiff’s privacy by illegally recording a conversation with Plaintiff, occurred
19 while Plaintiff was physically located in the City and County of San Diego,
20 State of California, pursuant to 28 U.S.C. § 1391(b)(2).

21 **PARTIES & DEFINITIONS**

22 11. Plaintiff is, and at all times mentioned herein was, natural person and resident of
23 the County of San Diego, State of California, in this judicial district.

24 12. Plaintiff is informed and believes, and thereon alleges, that Defendant is a New
25 York limited liability company located in Buffalo, New York and authorized to
26 conduct business in the State of California.

27 13. Defendant is, and at all times mentioned herein was, a “person”, as defined by
28 Cal. Pen. Code § 632(b).

FACTUAL ALLEGATIONS

14. Defendant records its outbound and inbound telephonic conversations.
15. On or around February 28, 2019, Plaintiff returned a call to Defendant at (855) 229-6118.
16. During the telephonic conversation on or about February 28, 2019, Plaintiff spoke with Defendant’s representative, agent, or employee.
17. Defendant, through its representative, agent, or employee discussed with Plaintiff, Plaintiff’s financial obligations allegedly owed to Defendant. During the conversation, Plaintiff also disclosed his debit card information to Defendant.
18. At the inception of the call, Defendant did not advise Plaintiff that the call was being recorded, and Plaintiff did not consent to the call being recorded. Nonetheless Defendant was in fact recording the entire phone conversation between Plaintiff and Defendant.
19. Plaintiff was not aware the call was recorded at the time.
20. Upon information and belief Defendant recorded the February 28, 2019 telephonic call with Plaintiff, in which Plaintiff proffered personal information, all the while Defendant did not provide any disclosure to Plaintiff regarding its unauthorized and surreptitious recording.
21. Plaintiff did not realize Defendant had surreptitiously recorded his call until later when his attorney called Defendant and learned that Defendant records its calls.
22. Plaintiff was personally affected by Defendant’s aforementioned conduct because Plaintiff was shocked, upset and angry that Defendant audio recorded a telephone conversation with Plaintiff without Plaintiff’s knowledge or consent.
23. California Penal Code § 632.7(a) is very clear in its prohibition against such unauthorized tape recording without the consent of the other party to the conversation: “Every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the

1 interception or reception and intentional recordation of, a communication
2 transmitted between two cellular radio telephones, a cellular radio telephone and
3 a landline telephone, two cordless telephones, a cordless telephone and a
4 landline telephone, or a cordless telephone and a cellular radio telephone
5 [violates this section].” California Penal Code § 637.2 permits Plaintiff to bring
6 this action for any violation of California Penal Code § 632.7(a) and provides
7 for statutory damages of \$5,000.00 for each violation.

8 24. Defendant recorded or otherwise made unauthorized connections to the
9 Plaintiff’s conversations with Defendant and its employees in violation of
10 California’s statutory and common law against such unlawful intrusions into a
11 person’s private affairs, including the California Constitution’s prohibition in
12 Article 1, Section 1.

13 25. This suit seeks only damages and injunctive relief for recovery of economic
14 injury and it expressly is not intended to request any recovery for personal injury
15 and claims related thereto.

16 26. Plaintiff is informed and believes, and thereon alleges, that Defendant
17 intentionally recorded a communication transmitted between a cellular radio
18 telephone and a landline telephone without Plaintiff’s consent as prohibited by
19 California Penal Code § 632.7(a).

20 27. Defendant violated Plaintiff’s constitutionally protected privacy rights by failing
21 to advise or otherwise provide notice at the beginning of the recorded
22 conversations with Plaintiff that the call would be recorded and Defendant did
23 not try to obtain the Plaintiff’s consent before such recording.

24 28. The recordings were done over the telephone, without Plaintiff’s prior
25 knowledge or consent. Plaintiff was damaged thereby, as detailed herein, in at
26 least an amount permitted by the statutory damages mandated by California
27 Penal Code § 637.2(a).

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1 29. Defendant, and its employees and agents, surreptitiously recorded calls made
2 involving Defendant and Plaintiff. At no time before, during, or after the call
3 was Plaintiff warned, told, advised or otherwise given any indication by
4 Defendant, its employees or agents, that the call was recorded.

5 30. As a result thereof, Plaintiff has been damaged as set forth in the Prayer for
6 Relief herein.

7 31. Plaintiff seeks statutory damages and injunctive relief under California Penal
8 Code § 637.2.

9 **CLASS ACTION ALLEGATIONS**

10 32. Plaintiff brings this lawsuit as a class action on behalf of themselves and Class
11 Members of the proposed Class pursuant to Federal Rules of Civil Procedure
12 23(a) and (b)(3) and/or (b)(2). This action satisfies the numerosity,
13 commonality, typicality, adequacy, predominance, and superiority requirements
14 of those provisions.

15 33. Plaintiff proposes the following Class consisting of and defined as follows:

16 All persons in California whose cellular telephone
17 conversations were recorded without their consent by
18 Defendant and/or its agent/s within the one year prior to the
filing of the Complaint.

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

24 35. Plaintiff reserves the right to redefine the Class and to add subclasses as
25 appropriate based on discovery and specific theories of liability

26 36. Numerosity: The Class Members are so numerous that joinder of all members
27 would be unfeasible and impractical. The membership of the entire Class is
28 currently unknown to Plaintiff at this time; however, given that, on information

1 and belief, Defendant called thousands of class members nationwide and
2 recorded those calls during the class period, it is reasonable to presume that the
3 members of the Class are so numerous that joinder of all members is
4 impracticable. The disposition of their claims in a class action will provide
5 substantial benefits to the parties and the Court.

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

- 9 • Whether, within the statutory period Defendant recorded any call with the
10 Class Members;
- 11 • Whether Defendant had, and continues to have, a policy during the
12 relevant period of recording telephone calls made to the Class Members;
- 13 • Whether Defendant's policy or practice of recording telephone
14 communications with Class Members constitutes an invasion of privacy
15 and 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 violation; and
- 18 • Whether Defendant should be enjoined from engaging in such conduct in
19 the future.

20 38. Typicality Plaintiff's conversation was unlawfully recorded without a warning
21 of such recording, and thus, his injuries are also typical to Class Members.

22 39. Plaintiff and Class Members were harmed by the acts of Defendant in at least
23 the following ways: Defendant, either directly or through its agents, illegally
24 recorded the Plaintiff and Class Members' conversations with Defendant, and
25 Defendant invaded the privacy of Plaintiff and Class. Plaintiff and Class
26 Members were damaged thereby.

27 40. Adequacy: Plaintiff is qualified to, and will, fairly and adequately protect the
28 interests of each Class Member with whom he is similarly situated, as

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

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

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

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

1 number of similarly situated persons to prosecute their common claims
2 in a single forum simultaneously, efficiently, and without the
3 unnecessary duplication of effort and expense that numerous individual
4 actions would endanger.

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

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

12 44. The Class may also be certified because:

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

25 45. This suit seeks only damages and injunctive relief for recovery of economic
26 injury on behalf of Class Members and it expressly is not intended to request
27 any recovery for personal injury and claims related thereto.
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1 46. The joinder of Class Members is impractical and the disposition of their claims
2 in the Class action will provide substantial benefits both to the parties and to the
3 court. The Class Members can be identified through Defendant's records.

4 **FIRST CAUSE OF ACTION**
5 **ILLEGAL RECORDING OF CELLULAR PHONE CONVERSATIONS**
6 **UNDER CALIFORNIA PENAL CODE § 632.7**

7 47. Plaintiff repeats, re-alleges, and incorporates by reference, all other paragraphs.

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

12 49. At all relevant times hereto, Defendant intentionally and surreptitiously
13 recorded cellular telephone calls concerning confidential matters between
14 Defendant and Plaintiff and Class Members.

15 50. At all relevant times hereto, Defendant had and followed a policy and practice
16 of not advising or warning Plaintiff and Class Members at the beginning of a
17 conversation that their cellular telephone communications with Defendant would
18 be recorded.

19 51. Defendant failed to obtain consent of Plaintiff and Class Members prior to
20 recording any of their cellular telephone conversations.

21 52. This conduct by Defendant violated section 632.7(a) of the California Penal
22 Code.

23 53. Plaintiff and Class Members are entitled to recovery of statutory damages in the
24 amount of \$5,000.00 per violation of Cal. Pen. Code § 632.7.

25 54. Plaintiff's counsel is also entitled to attorneys' fees and costs pursuant to Cal.
26 Code of Civ. Proc. § 1021.5.

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- 1 • Injunctive relief to prevent the further occurrence of such illegal acts pursuant to
- 2 California Penal Code § 637.2(b);
- 3 • An award of costs to Plaintiff; and
- 4 • Any other relief the Court may deem just and proper including interest.

5 **INVASION OF PRIVACY**
6 **INTRUSION INTO PRIVATE AFFAIRS**

- 7 • Special, general, compensatory and punitive damages;
- 8 • Injunctive relief, prohibiting such conduct in the future; and
- 9 • Any other relief the Court may deem just and proper.

10 **TRIAL BY JURY**

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

13
14 Respectfully submitted,
15 **HYDE & SWIGART, APC**

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17 Date: June 3, 2019

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