

ELECTRONICALLY FILED

Superior Court of California,

County of Alameda

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7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **FOR THE COUNTY OF ALAMEDA**

10
11 FRANCISCO AVALOS, individually and on
behalf of a class of similarly situated
12 individuals,

13 Plaintiff,

14 vs.

15 AXLEHIRE, INC.; and DOES 1 through 50,
16 inclusive,

17 Defendants.
18

Case No. 22CV020643

CLASS ACTION

**DEFENDANT AXLEHIRE, INC.'S
ANSWER TO COMPLAINT**

[Assigned for all purposes to The Honorable
Brad Seligman, Dept. 23]

Action Filed: October 27, 2022

Trial Date: None Set

1 Defendant AXLEHIRE, INC. (“Defendant”) responds to the Class Action Complaint
2 (“Complaint”) filed by Plaintiff FRANCISCO AVALOS (“Plaintiff”) as follows:

3 **GENERAL DENIAL**

4 Under Code of Civil Procedure § 431.30, Defendant denies, generally and specifically,
5 every allegation contained in the Complaint. Defendant denies that Plaintiff or the proposed class
6 he seeks to represent, were injured and/or damaged in any sum or sums, and denies it committed
7 the alleged acts intentionally, negligently, carelessly, recklessly, or otherwise acted unlawfully or
8 committed any other wrongful act whatsoever.

9 Defendant further denies that by reason of any act or omission on its part, or by its agents,
10 servants or employees, or any of them, Plaintiff or the proposed class he seeks to represent were
11 injured or damaged in the amount alleged, or in any other manner or amount whatsoever, and denies
12 that Defendant, its agents, servants or employees, or any of them, acted unlawfully.

13 **AFFIRMATIVE DEFENSES**

14 Without admitting any facts alleged by Plaintiff, Defendant also pleads the following separate
15 defenses to the Complaint. The pleading of a defense as an affirmative defense is not an admission
16 or acknowledgement that Defendant bears the burden of proof on such defense, or waiver of any
17 argument that Plaintiff bears such burden.

18 **FIRST AFFIRMATIVE DEFENSE**

19 (Arbitration Agreements)

20 The Complaint is barred, in whole or in part, to the extent Plaintiff and/or members of the
21 proposed class have executed binding arbitration agreements that do not permit them to pursue claims
22 in this forum or allow them to join class actions.

23 **SECOND AFFIRMATIVE DEFENSE**

24 (Failure to State a Claim)

25 The Complaint, and each of its allegations, fails to state facts sufficient to constitute a cause
26 of action against Defendants upon which relief can be granted.

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THIRD AFFIRMATIVE DEFENSE

(Statute of Limitations)

The Complaint and each and every purported cause of action alleged therein is barred in whole or part by all applicable statutes of limitations, including but not limited to California Code of Civil Procedure §§ 337, 338, 339, 340, 343.

FOURTH AFFIRMATIVE DEFENSE

(Laches)

The Complaint, and each of its causes of action, is barred in whole or in part by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

The Complaint, and each of its causes of action, is barred in whole or in part by the doctrine of unclean hands by reason of Plaintiff’s and/or the putative class members’ actions and course of conduct.

SIXTH AFFIRMATIVE DEFENSE

(Waiver)

The Complaint is barred by the doctrine of waiver, as a result of the acts, conduct, and omissions of Plaintiff and/or other putative class members, or others that are attributable to Plaintiff and/or other putative class members.

SEVENTH AFFIRMATIVE DEFENSE

(Estoppel)

The Complaint is barred, in whole or in part, because Plaintiff and/or the putative class members are estopped by their own actions and conduct from pursuing the cause(s) of action in the Complaint.

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EIGHTH AFFIRMATIVE DEFENSE

(Res Judicata/Collateral Estoppel)

The claims in the Complaint are barred by the doctrine of *res judicata* and collateral estoppel.

NINTH AFFIRMATIVE DEFENSE

(Legitimate Business Reasons)

The Complaint, and each of its causes of action, is barred in whole or in part because Defendant had an honest, good-faith belief that all decisions with respect to Plaintiff were made for legitimate, business-related reasons and were reasonably based upon the facts as Defendant understood them at the time.

TENTH AFFIRMATIVE DEFENSE

(Acts of Another)

The Complaint, and each of its causes of action, is barred in whole or in part because any loss, injury, damage, or detriment alleged in the Complaint resulted from the acts or omissions of Plaintiff and/or other putative class members and/or other entities and was not due to any action or omission attributable to Defendant.

ELEVENTH AFFIRMATIVE DEFENSE

(Inappropriate for Class Treatment)

Plaintiffs' class claims are barred because Plaintiff cannot satisfy the commonalty, typicality and predominance requirements. Individual inquiries will be required into the nature of the alleged recording and/or monitoring communication, whether class members actually consented to recording or monitoring, and the device or means of communication utilized, among other reasons.

TWELFTH AFFIRMATIVE DEFENSE

(Unjust Enrichment)

The Complaint and each of its causes of action are barred, in whole or in part, because any recovery from Defendant would result in Plaintiff's unjust enrichment.

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THIRTEENTH AFFIRMATIVE DEFENSE

(No Violation of Penal Code §632.7 – Means of Communication)

The claims of Plaintiff and/or other putative class members are barred, in whole or in part, to the extent the calls at issue were not made between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone or a cordless telephone and a cellular radio telephone, and therefore are not covered by Penal Code §632.7.

FOURTEENTH AFFIRMATIVE DEFENSE

(No Standing)

The Complaint and all causes of action therein, are barred in whole or in part to the extent Plaintiff and/or other putative class members lack standing because they have not sustained an injury.

FIFTEENTH AFFIRMATIVE DEFENSE

(Due Process – Ambiguous Statute)

California Penal Code §632.7 is ambiguous and unclear, and did not impart sufficient notice to Defendant or others similarly situated that their conduct could constitute violations of the statute such that Plaintiff’s complaint is violative of Defendant’s right to due process under the United States and California constitutions.

SIXTEENTH AFFIRMATIVE DEFENSE

(Service Observing or Recording for Quality Assurance)

To the extent calls were monitored or recorded, such monitoring or recording was done for purposes of quality assurance (also known as service-observing) and therefore was excepted or exempted from the restrictions imposed by Penal Code §632.7 and §637.2.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Not Confidential)

The Complaint is barred, in whole or in part, because any calls made by and/or to Plaintiff and/or the putative class were not confidential communications.

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EIGHTEENTH AFFIRMATIVE DEFENSE

(Reasonable and Good Faith Actions)

Defendant acted reasonably and in good faith at all times material herein, based on all relevant facts and circumstances known by Defendant at the time.

NINETEENTH AFFIRMATIVE DEFENSE

(Consent)

At all times as alleged in Plaintiff’s Complaint, consent, whether express or implied, had been provided by Plaintiff and/or the putative class to the communications and to the recordings or monitoring, such that neither Penal Code §632.7 nor §637.2 apply to the facts at issue.

TWENTIETH AFFIRMATIVE DEFENSE

(Knowledge)

At all relevant times, Plaintiff and the purported class had prior knowledge of the recording, interception, monitoring, or reception, if any, of their communications as alleged in the Complaint.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Due Process)

Any finding of liability on a class-wide basis would violate Defendant’s rights under the due process clauses of the United States Constitution and the California Constitution. Plaintiff’s and/or the putative class members’ recovery of their alleged statutory damages is limited by the applicable statutory, constitutional or other ceilings or limits on recoverable damages. Recovery of statutory damages on a per person or per call basis would violate due process and other protections contained in the United States Constitution, including but not limited to the Eighth Amendment, and would be similarly violative of the California Constitution.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Excessive Fines)

Plaintiff’s class claims are barred because statutory damages that are imposed without discretion, and regardless of actual damages, constitute excessive fines and violation of due process. *People ex. rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 726-730; *Hale v. Morgan* (1978) 22 Cal.3d 388, 399-404 (statutory damage award stricken as excessive); see also

1 Civil Code § 3359 (“Damages must in all cases be reasonable. . .”). Combining a minimum statutory
2 scheme with the class action mechanism “may expand the potential statutory damages so far beyond
3 the actual damages suffered that the statutory damages come to resemble punitive damages – yet
4 ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically
5 necessary in support of a punitive damages award.” *Parker v. Time Warner Entertainment* (2d Cir.
6 2003) 331 F.3d 13, 22; accord *Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436,
7 1451.

8 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

9 (Failure to Mitigate)

10 Plaintiff and/or each and every member of the putative class failed to mitigate their damages
11 by failing to exercise reasonable care and diligence to avoid loss and minimize resulting damages,
12 and that as such, Plaintiff and each and every member of the putative class cannot recover for any
13 loss that may have been prevented by reasonable efforts and expenditures.

14 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

15 (Inadequate Representative)

16 Neither Plaintiff nor any member of the putative class may maintain this lawsuit as a class
17 action because the purported class representative will not adequately represent the purported class.

18 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

19 (Commerce Clause)

20 Plaintiff’s claims are barred to the extent the statutes in question have the effect of regulating
21 out-of-state businesses who do business in California, in violation of the Commerce Clause of the
22 United States Constitution. Plaintiff and/or the putative class are not entitled to relief under the
23 statutes and legal theories invoked in the Complaint because they are preempted in whole or in part
24 by the Commerce Clause of the United States Constitution and other federal laws including, without
25 limitation, the Communications Act of 1934, including the regulations promulgated thereunder, and
26 the Omnibus Crime Control and Safe Streets Act of 1968, and/or other law.

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TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Uncertainty)

The Complaint and each cause of action therein is vague, ambiguous and uncertain.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Attorneys' Fees Improper)

The Complaint fails to state a claim for attorney's fees or set forth facts sufficient to support such a claim. Further, California Penal Code section 632.7 does not provide for attorney's fees.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Superseding Causes)

Plaintiff's Complaint is barred in whole or in part because any and all violations alleged in the Complaint were the result of superseding or intervening causes arising from the acts or omissions of parties that Defendant neither controlled nor had the legal right to control, and such alleged violations were not proximately or otherwise caused by any act, omission, or other conduct of Defendant.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Inapplicability of California Penal Code Sections 630 *et seq*)

The provisions of California Penal Code sections 630, *et seq.*, are not applicable to the recording or monitoring of any telephone calls where the recording or monitoring took place outside the State of California.

THIRTIETH AFFIRMATIVE DEFENSE

(No Interception or Reception and Recording of Wireless Signals)

California Penal Code section 632.7 only applies where the wireless signals (radio waves) are intercepted or received and recorded. Defendant did not intercept or receive and record any wireless signals and therefore did not violate Penal Code section 632.7.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Lack of Intent)

Defendant did not know that any particular call came from a landline, cordless or cellular telephone or whether a particular individual was located in California when the call was made.

1 Therefore, to the extent any such calls were recorded or monitored, Defendant did not intend to
2 record or monitor communications made on cordless or cellular telephones from individuals located
3 in California, and did not violate California Penal Code sections 631, 632 or 632.7. In addition,
4 Defendant believed that callers were on notice of and consented to recording, and therefore had no
5 intent to record or monitor any particular call without notice or consent.

6 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

7 (Mistake of Fact)

8 Any recording or monitoring without notice or consent was the result of a mistake of fact.

9 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

10 (Set Off)

11 Any damages owed to Plaintiff and/or the putative class members must be set off against the
12 amounts that they owe to Defendant.

13 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

14 (*In Pari Delicto*)

15 If Plaintiff has suffered any harm, which Defendant expressly denies, Defendant alleges that
16 Plaintiff's recovery is barred because Plaintiff is equally responsible for the harmful conduct.

17 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

18 (Conditions Precedent)

19 Plaintiff fails to satisfy all conditions precedent and necessary to maintaining hi claims.

20 **THIRTY-SIXTH AFFIRMATIVE DEFENSE**

21 (Necessary and Indispensable Parties)

22 Plaintiff's claims are barred for failure to join necessary and indispensable parties.

23 **THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

24 (PC 632.7 Not Applicable to Defendant)

25 Plaintiff's claims are barred because Defendant is not a "person" as defined by the California
26 Invasion of Privacy Act ("CIPA") and therefore cannot be held liable for a violation of the CIPA.

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THIRTY-EIGHTH AFFIRMATIVE DEFENSE

(Compliance with All Applicable Laws)

Defendant complied with all applicable statutory, regulatory, and common law requirements and accordingly, Plaintiff’s claims are barred by Defendant’s compliance with all applicable State, Federal, and local laws and regulations.

THIRTY-NINTH AFFIRMATIVE DEFENSE

(Class Action Inconsistent with CIPA’s Legislative Intent)

Maintenance of this action as a class action is inconsistent with the legislative intent of the CIPA in that it was intended that claims under the CIPA proceed as individual claims.

FORTIETH AFFIRMATIVE DEFENSE

(Ratification)

Plaintiff’s claims are barred by the doctrine of ratification.

RESERVATION OF RIGHTS

Defendant presently has insufficient knowledge or information upon which to form a belief as to whether there may be additional, and as yet unstated, affirmative defenses. Defendant reserves the right to assert additional affirmative defenses by way of future amendment.

RELIEF REQUESTED

WHEREFORE, Defendant requests as follows:

- 1. That Plaintiff takes nothing by the Complaint;
- 2. That the Court deny Plaintiff’s request to proceed on a class and/or representative basis;
- 3. That the Complaint be dismissed in its entirety with prejudice;
- 4. That Defendant recovers its costs of suit herein, including reasonable attorney fees;
- and
- 5. That the Court award such other and further relief as it deems appropriate.

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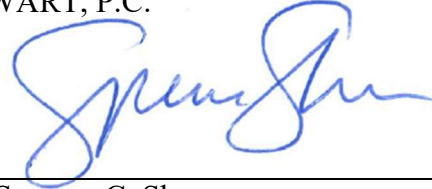
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JURY DEMAND

Defendant hereby demands a trial by jury on all issues, if any, triable to a jury.

DATED: December 27, 2022

OGLETREE, DEAKINS, NASH, SMOAK &
STEWART, P.C.



By: _____

Spencer C. Skeen
Janna I. Jamil

Attorneys for Defendant AXLEHIRE, INC.