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*Counsel for Plaintiffs Ruby Mitchell, Edward J. Kelly, and the Classes*

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

RUBY MITCHELL and EDWARD J. KELLY,  
individually, and on behalf of a class of similarly  
situated persons,

Plaintiffs,

v.

INTERO REAL ESTATE SERVICES,  
Defendant.

Case No. 18-5623

**FIRST AMENDED CLASS ACTION  
COMPLAINT**

**JURY TRIAL DEMANDED**

Plaintiffs Ruby Mitchell and Edward J. Kelly (“Plaintiffs”), through their undersigned attorneys,  
on behalf of themselves and all persons similarly situated, complaint against Intero Real Estate Services  
 (“Intero”), as follows:

**INTRODUCTION**

1. Plaintiffs bring this class action complaint for damages, injunctive relief, and any other  
available legal or equitable remedies, resulting from the illegal actions of Intero in making unlawful calls  
to their residential telephone lines, in violation of the Telephone Consumer Protection Act, 47 U.S.C. §  
227 *et seq.* (“TCPA”) and Plaintiffs’ privacy rights.

1           2.       The TCPA exists to prevent communications like the ones described within this  
2 complaint, and to protect the privacy of citizens like Plaintiffs. “Voluminous consumer complaints  
3 about abuses of telephone technology—for example, computerized calls dispatched to private homes—  
4 prompted Congress to pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

5           3.       When it passed the TCPA, Congress intended to provide consumers a choice as to how  
6 telemarketers may call them and found that “[t]echnologies that might allow consumers to avoid  
7 receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an  
8 inordinate burden on the consumer.” Pub. L. No. 102–243, § 11. Congress also found that “the  
9 evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an  
10 invasion of privacy, regardless of the type of call . . . .” *Id.* at §§ 12-13.

11           4.       Congress also authorized the Federal Communications Commission to establish a  
12 national database of consumers who object to receiving “telephone solicitations,” which the act defined  
13 as commercial sales calls. *Id.* at § 3.

14           5.       In 2003, FCC promulgated regulations that created the National Do Not  
15 Call Registry. *See* 47 C.F.R. § 64.1200(c)(2). The National Do Not Call Registry is a list containing the  
16 residential telephone numbers of individuals who affirmatively indicate that they do not wish to receive  
17 unsolicited calls from commercial telemarketers. Do not call registrations must be honored indefinitely.  
18 *Id.*

19           6.       Today, 230 million numbers on are the National Do Not Call Registry.<sup>1</sup>

20           7.       Despite the widespread embrace of the National Do Not Call Registry, companies like  
21 Intero flagrantly ignore the National Do Not Call Registry and invade the privacy of consumers with  
22 unwanted calls.

23  
24  
25  
26 <sup>1</sup> Simon van Zuylen-Wood, *How Robo-callers Outwitted the Government and Completely Wrecked the Do Not Call*  
27 *List*, WASH. POST, (Magazine) Jan. 11, 2018, *available at*  
28 [https://www.washingtonpost.com/lifestyle/magazine/how-robo-call-moguls-outwitted-the-government-and-completely-wrecked-the-do-not-call-list/2018/01/09/52c769b6-df7a-11e7-bbd0-9dfb2e37492a\\_story.html?utm\\_term=.d13dcc7f7fc6](https://www.washingtonpost.com/lifestyle/magazine/how-robo-call-moguls-outwitted-the-government-and-completely-wrecked-the-do-not-call-list/2018/01/09/52c769b6-df7a-11e7-bbd0-9dfb2e37492a_story.html?utm_term=.d13dcc7f7fc6) (last visited September 13, 2018).

**JURISDICTION AND VENUE**

1  
2 8. This Court has original jurisdiction over this class action pursuant to 28 U.S.C. §  
3 1332(d). Plaintiffs and members of the Classes have suffered aggregate damages exceeding \$5,000,000,  
4 exclusive of interest and costs, and is a class action in which any member of the classes of plaintiffs is a  
5 citizen of a state different from any defendant.

6 9. This Court also has federal question jurisdiction over this case pursuant to 28 U.S.C. §  
7 1331, pursuant to Defendant’s violation of the TCPA, and supplemental jurisdiction over Plaintiffs’ state  
8 law claim under 28 U.S.C. § 1367.

9 10. Venue is proper in this District under 28 U.S.C. § 1391(b) because significant events  
10 giving rise to this case took place in this District.

**PARTIES**

11  
12 8. Plaintiff Ruby Mitchell is a citizen residing in Cupertino, California.

13 9. Plaintiff Edward J. Kelly is a lawful permanent resident residing in Sunnyvale,  
14 California.

15 10. Defendant Intero is a real estate brokerage firm. Its principal place of business is 10275  
16 N. De Anza Boulevard, Cupertino, California 95014.

**FACTS**

17  
18 11. On July 27, 2003, shortly after the creation of the National Do Not Call Registry, Ms.  
19 Mitchell placed her landline number ((408) 996-####) on the National Do Not Call Registry.

20 12. On or around February 14, 2018, Ms. Mitchell began receiving calls from agents  
21 affiliated with Intero.

22 13. On February 14, 2018, Intero agent Jackie Martin called Ms. Mitchell’s landline number  
23 using a dialing platform provided by third-party Mojo Dialing Solutions (“Mojo”). *See* Mojo-  
24 Intero0000318.csv.

25 14. On March 14, 2018, Intero agent Michael Todd called Ms. Mitchell’s landline number  
26 using the Mojo account of another Intero agent, Dominic Nicoli. *See* Mojo-Intero000228.csv.

27 15. On March 15, 2018, Intero agent Jason Traina called Ms. Mitchell’s landline number  
28 using his own Mojo account. *See* Mojo-Intero0000326.csv.

1           16.     Ms. Mitchell recalls receiving a call from an Intero agent. Although she does not recall  
2 specifically what she said on those calls, on many occasions when she receives unwanted telemarketing  
3 calls, she asks the caller not to call her back.

4           17.     Ms. Mitchell is an 82-year-old woman with chronic back problems. She sleeps late into  
5 the morning. Unwanted telemarketing calls are more than a bother to Ms. Mitchell; they can create  
6 physical problems by disturbing her much-needed sleep.

7           18.     Ms. Mitchell had not listed her property for sale, had no pre-existing relationship with  
8 Intero or any of the agents who called her, and had no interest in selling her property.

9           19.     Ms. Mitchell is retired and does not use her landline number for any business purpose,  
10 and has not used the number for any business purpose for at least ten years.

11          20.     Mr. Kelly placed his landline number ((408) 739-####) on the National Do Not Call  
12 registry years before he first received calls from Intero agents.

13          21.     On or around May 15, 2017, Intero agent Jackie Martin called Mr. Kelly on his landline  
14 number using her Mojo account. *See* Mojo-Intero0000318.csv.

15          22.     On or around August 26, 2017, Intero agent Dominic Nicoli called Mr. Kelly on his  
16 landline number using his Mojo account. *See* Mojo-Intero000228.csv.

17          23.     On or around June 5, 2018, Intero agent Tommy Tognoli called Mr. Kelly using  
18 Dominic Nicoli's Mojo account. *See* Mojo-Intero000228.csv.

19          24.     Mr. Kelly is an 80-year-old man who registered his number on the National Do Not Call  
20 Registry because he was fed up with receiving telemarketing calls. The calls from Intero agents were  
21 thus annoying and frustrating to Mr. Kelly.

22          25.     Mr. Kelly had not listed his property for sale, had no pre-existing relationship with  
23 Intero or any of the agents who called him, and had no interest in selling his property.

24          26.     Mr. Kelly is retired and does not use his landline number for any business purpose.

25          27.     Intero did not have prior express consent pursuant to 47 U.S.C. § 227(b)(1)(B) to make  
26 the calls to Ms. Mitchell or Mr. Kelly.

27          28.     Intero's calls were not made for an emergency purpose or to collect on a debt pursuant  
28 to 47 U.S.C. § 227(b)(1)(B).



1 identified in Appendix A [to ECF No. 126]; (d) in a 12-month period; (e) on their non-  
2 business telephone lines; (f) whose telephone number(s) were on the NDNCR for at  
3 least 31 days; (g) at any time since September 13, 2014.

4 b. **National Internal Do Not Call Class (“Internal DNC Class”)**: All persons in the  
5 United States who: (a) were on an internal list of persons who asked Intero not to call  
6 them (“Internal DNC List”), (b) received more than one call made on behalf of Intero  
7 by, or on behalf of, one of Intero’s California sales associates; (c) promoting Intero’s  
8 goods or services; (d) in a 12-month period; (e) on their non-business telephone line; (f)  
9 at any time since September 14, 2014.

10 38. Defendant and their employees or agents are excluded from the Classes.

11 39. Members of the Classes are so numerous that joinder is impracticable. The Classes are  
12 comprised of thousands of members geographically disbursed throughout the United States. The  
13 Classes are readily identifiable from information and records in the possession of Defendant and third  
14 parties.

15 40. Common questions of law and fact exist as to all members of the Classes. These  
16 questions predominate over questions that may affect only individual class members because Defendant  
17 has acted on grounds generally applicable to the Classes. Such common and legal factual questions  
18 include:

- 19 a. Whether Defendant’s conduct violates the TCPA;
- 20 b. Whether Defendant’s calls were made for an emergency purpose;
- 21 c. Whether Defendant’s calls were made to collect on a debt;
- 22 d. Whether Defendant adhered to requests by Class members to stop making calls to their  
23 residential telephone numbers;
- 24 e. Whether Defendant keeps records of call recipients who revoked consent to receive  
25 calls;
- 26 f. Whether Defendant has established written procedures to comply with National Do  
27 Not Call Registry registrations;
- 28

- 1 g. Whether Defendant trains personnel on any procedures to comply with National Do
- 2 Not Call Registry regulations;
- 3 h. Whether Defendant maintains and records a list of telephone numbers that it may not
- 4 contact;
- 5 i. Whether Defendant uses any process to prevent telephone solicitations of any number
- 6 on the National Do Not Call Registry and maintain records documenting its process;
- 7 j. Whether Defendant has any written policies for maintaining an internal do not call list;
- 8 k. Whether Defendant informs and trains its personnel engaged in telemarketing in the
- 9 existence and the use of any internal do not call list pursuant to 47 U.S.C.
- 10 §64.1200(d)(2).
- 11 l. Whether individuals or entities making a call for telemarketing purposes for or on behalf
- 12 of Defendant record any request from a telephone subscriber not to receive calls and
- 13 place the subscriber's name and number on an internal do not call list pursuant.
- 14 m. Whether Plaintiffs and members of the Classes are entitled to damages, costs, or
- 15 attorney's fees from Defendant;
- 16 n. Whether Defendant violated the privacy rights of Plaintiffs and members of the Classes;
- 17 o. Whether Defendant's conduct caused Plaintiffs and members of the Classes
- 18 inconvenience or annoyance;
- 19 p. Whether Plaintiffs and members of the Classes are entitled to compensatory damages;
- 20 q. Whether Plaintiffs and members of the Classes are entitled to treble damages based on
- 21 the willfulness of Defendant's conduct;
- 22 r. Whether Plaintiffs and members of the Classes are entitled to a permanent injunction
- 23 enjoining Defendant from continuing to engage in its unlawful conduct.
- 24 41. Plaintiffs' claims are typical of the members of the National DNC Class as all members
- 25 of the National DNC Class are similarly affected by the Defendant's actionable conduct. Defendant's
- 26 conduct that gave rise to the claims of Plaintiffs and members of the National DNC Class (*i.e.* making a
- 27 call to a residential land line number that appears on the National Do Not Call Registry) is the same for
- 28 all members of the National DNC Class.

1 42. Plaintiffs’ claims are typical of the members of the Internal DNC Class as all members  
2 of the Internal DNC Class are similarly affected by the Defendant’s actionable conduct. Defendant’s  
3 conduct that gave rise to the claims of Plaintiffs and members of the Internal DNC Class (*i.e.* failing to  
4 honor a residential telephone subscriber’s do not-call request) is the same for all members of the  
5 Internal DNC Class.

6 43. Plaintiffs will fairly and adequately protect the interests of the Classes because they have  
7 no interests antagonistic to, or in conflict with, the Classes that Plaintiffs seek to represent.  
8 Furthermore, Plaintiffs have retained counsel experienced and competent in the prosecution of  
9 complex class action litigation.

10 44. Class action treatment is a superior method for the fair and efficient adjudication of this  
11 controversy, in that, among other things, such treatment will permit a large number of similarly situated  
12 persons or entities to prosecute their common claims in a single forum simultaneously, efficiently, and  
13 without the unnecessary duplication of evidence, effort, expense, or the possibility of inconsistent or  
14 contradictory judgments that numerous individual actions would engender. The benefits of the class  
15 mechanism, including providing injured persons or entities with a method for obtaining redress on  
16 claims that might not be practicable to pursue individually, substantially outweigh any difficulties that  
17 may arise in the management of this class action.

18 45. Plaintiffs know of no difficulty to be encountered in the maintenance of this action that  
19 would preclude its maintenance as a class action.

20 46. Defendant has acted or refused to act on grounds generally applicable to the Classes,  
21 thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the  
22 Classes as a whole.

23 **COUNT I**

24 **Violation of 47 U.S.C. § 227(c)(2)**

25 **(On behalf of Plaintiffs and the National DNC Class)**

26 47. Plaintiffs incorporate by reference all above paragraphs as though fully repeated herein.

27 48. The TCPA provides that any “person who has received more than one telephone call  
28 within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed



1 under this subsection may” bring a private action based on a violation of said regulations, which were  
2 promulgated to protect telephone subscribers’ privacy rights to avoid receiving telephone solicitations  
3 to which they object. 47 U.S.C. § 227(c)(5).

4 49. Under 47 C.F.R. § 64.1200(c)(2), “[n]o person or entity shall initiate any telephone  
5 solicitation” to “[a] residential telephone subscriber who has registered his or her telephone number on  
6 the national do-not-call registry of persons who do not wish to receive telephone solicitations that is  
7 maintained by the federal government.”

8 50. A caller is not liable for violating the TCPA if it can demonstrate that its violation “is  
9 the result of error and that as part of its routine business practice, it meets the following standards:

10 (A) Written procedures. It has established and implemented written procedures to  
11 comply with the national do-not-call rules;

12 (B) Training of personnel. It has trained its personnel, and any entity assisting in its  
13 compliance, in procedures established pursuant to the national do-not-call rules;

14 (C) Recording. It has maintained and recorded a list of telephone numbers that the  
15 seller may not contact;

16 (D) Accessing the national do-not-call database. It uses a process to prevent telephone  
17 solicitations to any telephone number on any list established pursuant to the do-not-  
18 call rules, employing a version of the national do-not-call registry obtained from the  
19 administrator of the registry no more than 31 days prior to the date any call is made,  
20 and maintains records documenting this process.”

21 47 C.F.R. § 64.1200(c)(2)(i).

22 51. Defendant initiated, or caused to be initiated, telephone solicitations to residential  
23 telephone subscribers like Plaintiffs and National DNC Class members who registered their respective  
24 telephone numbers on the National Do Not Call Registry, a listing of persons who do not wish to  
25 receive telephone solicitations that is maintained by the federal government.

26 52. Upon information and belief, Defendant does not have written procedures to comply  
27 with the national do not call rules, pursuant to 47 C.F.R. § 64.1200(c)(2)(i)(A).

28 53. Upon information and belief, Defendant does not train its personnel in procedures  
established pursuant to national do not call rules, pursuant to 47 C.F.R. § 64.1200(c)(2)(i)(B).

54. Upon information and belief, Defendant does not maintain or record a list of telephone  
numbers that it may not contact, pursuant to 47 C.F.R. § 64.1200(c)(2)(i)(C).



1 procedures for maintaining a list of persons who request not to receive telemarketing calls made by or  
2 on behalf of that person or entity. The procedures instituted must meet certain minimum standards,  
3 including:

4 “(3) Recording, disclosure of do-not-call requests. If a person or entity making a call  
5 for telemarketing purposes (or on whose behalf such a call is made) receives a request  
6 from a residential telephone subscriber not to receive calls from that person or entity,  
7 the person or entity must record the request and place the subscriber’s name, if  
8 provided, and telephone number on the do-not call list at the time the request is made.  
9 **Persons or entities making calls for telemarketing purposes (or on whose behalf  
10 such calls are made) must honor a residential subscriber’s do-not-call request  
11 within a reasonable time from the date such request is made.** This period may  
not exceed thirty days from the date of such request . . . .

(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing  
purposes must maintain a record of a consumer’s request not to receive further  
telemarketing calls. **A do-not-call request must be honored for 5 years from the  
time the request is made.”**

12 47 C.F.R. § 64.1200(d)(3), (6) (emphasis added).

13 64. Internal DNC Class members made requests to Defendant not to receive calls from  
14 Defendant.

15 65. Defendant failed to honor Internal DNC Class members’ requests.

16 66. Upon information and belief, Defendant has not instituted procedures for maintaining a  
17 list of persons who request not to receive telemarketing calls made by or on behalf of their behalf,  
18 pursuant to 47 C.F.R. § 64.1200(d).

19 67. Because Plaintiffs and Internal DNC Class members received more than one telephone  
20 call in a 12-month period made by or on behalf of Defendant in violation of 47 C.F.R. § 64.1200(d), as  
21 described above, Defendant violated 47 U.S.C. § 227(c)(5).

22 68. Plaintiffs and members of the Internal DNC Class seek injunctive relief prohibiting  
23 Defendant’s illegal conduct in the future, pursuant to 47 U.S.C. § 227(c)(5). Plaintiffs and members of  
24 the Internal DNC Class do not seek statutory damages for Count II.

25 **COUNT III**

26 **Violation of Cal. Bus. & Prof. C. § 17200, et seq.**

27 **(On behalf of Plaintiffs and All Classes)**



3. Actual and punitive damages arising from Defendant's wrongful and illegal conduct;
4. A permanent injunction prohibiting Defendant from using artificial or prerecorded messages to make calls without recipients' prior express consent;
5. Attorney's fees;
6. Litigation expenses and costs of the instant suit; and
7. Such other or further relief as the Court deems proper.

**JURY DEMAND**

Plaintiff demands trial by jury on all counts for which a jury trial is permitted.

Dated: April 8, 2021

Respectfully submitted,

**TYCKO & ZAVAREEI LLP**

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