

FEB 02 2016

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By Kevin E. Clark, Deputy

Attorneys for Defendant
EDDIE BAUER LLC

FILED BY FAX

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

11 YEVGENIYA GRANINA, on Behalf of
12 Herself and All Others Similarly Situated,

13 Plaintiff,

14 v.

15 EDDIE BAUER, LLC and DOES 1
16 through 100, inclusive,

Defendants.

CASE NO. BC569111

[Assigned to the Hon. Amy D. Hogue,
Dept. 307]

DEFENDANT EDDIE BAUER LLC'S
ANSWER TO FIRST AMENDED
COMPLAINT

Complaint Filed: January 12, 2015
FAC Filed: December 31, 2015

1 **ANSWER**

2 Defendant EDDIE BAUER LLC (“Defendant”) hereby answers, for itself and no others,
3 the First Amended Complaint (“Complaint”) filed by Plaintiff YEVGENIYA GRANINA
4 (“Plaintiff”) as follows:

5 **GENERAL DENIAL**

6 1. Pursuant to California Code of Civil Procedure section 431.30(d), Defendant
7 denies, generally and specifically, each and every allegation and each purported cause of action
8 contained in Plaintiffs Complaint. Defendant further denies, generally and specifically, that
9 Plaintiff has been damaged in any amount, or at all, by reason of any act or omission of
10 Defendant, its employees, agents, representatives, officers, directors, or any other person acting
11 on Defendant's behalf. Defendant further denies, generally and specifically, that Plaintiff has
12 suffered any injury or is entitled to any legal or equitable relief within the jurisdiction of this
13 Court. Defendant also denies that Plaintiff is entitled to any recovery from Defendant for the
14 cause of action alleged against it in the Complaint.

15 2. In further answer to the Complaint, and as separate and distinct affirmative
16 defenses, Defendant alleges as follows:

17 **FIRST AFFIRMATIVE DEFENSE**

18 (Failure to State a Cause of Action Upon Which Relief Can Be Granted)

19 3. The Complaint, and each purported cause of action alleged therein, fails to state
20 causes of action upon which relief can be granted.

21 **SECOND AFFIRMATIVE DEFENSE**

22 (Statute of Limitations)

23 4. The entire Complaint, and all causes of action therein, are barred by the applicable
24 statutes of limitation, including, but not limited to, California Code of Civil Procedure sections
25 312, 335.1, 337,338,340, and/or 343.

1 **THIRD AFFIRMATIVE DEFENSE**

2 (Lack of Standing)

3 5. The Complaint, and all causes of action therein, are barred in whole or in part
4 because Plaintiff and/or other putative class members lack standing to assert the causes of action
5 alleged, and/or have not been injured or suffered any damages as a result of Defendant's alleged
6 actions.

7 **FOURTH AFFIRMATIVE DEFENSE**

8 (Consent)

9 6. To the extent any calls were recorded, Plaintiff and the members of the purported
10 class consented to the recording or monitoring of their telephone calls with Defendant.

11 **FIFTH AFFIRMATIVE DEFENSE**

12 (Reasonableness and Good Faith)

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

15 **SIXTH AFFIRMATIVE DEFENSE**

16 (Applicable Statutes Ambiguous)

17 8. The applicable statutes, including but not limited to those referenced in the
18 Complaint, are ambiguous and unclear, and do not impart any notice on Defendant or others
19 similarly situated that their conduct would constitute violation of the statutes and thus violate due
20 process and other law.

21 **SEVENTH AFFIRMATIVE DEFENSE**

22 (Preemption)

23 9. Plaintiff's, and the putative class members', causes of action are invalid under and
24 preempted in whole or in part by the Commerce Clause of the United States Constitution and
25 other federal laws including, without limitation, the Communications Act of 1934, including the
26 regulations promulgated thereunder, and the Omnibus Crime Control and Safe Streets Act of
27 1968.

1 **EIGHTH AFFIRMATIVE DEFENSE**

2 (Improper Class Action)

3 10. To the extent Plaintiff purports to certify a class, Plaintiff's allegations do not give
4 rise to class status as there is no typicality, numerosity, commonality, ascertainability or adequate
5 representation present in this action. The class action is also not manageable or superior to
6 individual actions.

7 **NINTH AFFIRMATIVE DEFENSE**

8 (Proximate Cause)

9 11. The damages alleged by Plaintiff and/or the putative class members were not
10 proximately caused by any act or omission on the part of Defendant.

11 **TENTH AFFIRMATIVE DEFENSE**

12 (Limitation on Recoverable Damages)

13 12. Plaintiff and/or the putative class members' recovery of their alleged statutory
14 damages are limited by the applicable statutory and other ceilings or limits on recoverable
15 damages. In addition, under Penal Code section 637.2, the maximum amount of statutory
16 damages without proof of actual damages that can be recovered in this action is \$5,000.
17 Recovery of statutory damages on a per person or per call basis would violate due process
18 protections contained in the United States Constitution, including, but not limited to, the Eighth
19 Amendment, and the Constitution of the State of California since there are no or minimal actual
20 damages.

21 **ELEVENTH AFFIRMATIVE DEFENSE**

22 (Justification)

23 13. At all relevant times, the acts or omissions of Defendant was legally justified and
24 therefore Defendant cannot be liable for those acts or omissions.

25 **TWELFTH AFFIRMATIVE DEFENSE**

26 (Due Process)

27 14. The application of Penal Code section 632 to Defendant violates due process
28 because it is improper for California to regulate recording that takes place outside of its borders.

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THIRTEENTH AFFIRMATIVE DEFENSE

(Uncertainty)

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

FOURTEENTH AFFIRMATIVE DEFENSE

(Attorney's Fees Improper)

16. 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 § 632.7 does not provide for attorney's fees.

FIFTEENTH AFFIRMATIVE DEFENSE

(Cause in Fact)

17. Plaintiff's cause of action is barred in whole or in part because no act by Defendant was the cause of any injury, damages or loss of money or property by Plaintiff.

SIXTEENTH AFFIRMATIVE DEFENSE

(Performance of Duties)

18. Defendant has performed any and all contractual, statutory, and other duties owed to Plaintiff, and Plaintiff is therefore estopped from asserting any cause of action against Defendant.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Estoppel)

19. The Complaint is barred, in whole or in part, because Plaintiff is estopped by her own actions and conduct from pursuing the causes of action in the Complaint.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Unjust Enrichment)

20. An award to Plaintiff or the purported class would constitute unjust enrichment.

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NINETEENTH AFFIRMATIVE DEFENSE

(Service Observing)

21. To the extent any calls were recorded, any recording of telephone calls was done for purposes of quality assurance (also known as service-observing) and therefore was excepted from the restrictions imposed by Penal Code section 632.

TWENTIETH AFFIRMATIVE DEFENSE

(Superseding Causes)

22. Plaintiff's cause of action 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-FIRST AFFIRMATIVE DEFENSE

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

23. 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.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Waiver)

24. 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.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Section 632 Not Applicable to Cell or Cordless Phone Calls)

25. California Penal Code section 632 is not applicable to the calls at issue in this case because Section 632 does not apply to calls made on a cell phone or by a cordless phone.

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TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Lack of Intent)

26. Defendant did not intend to record confidential communications from individuals located in California, and did not violate California Penal Code section 632.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Mistake of Fact)

27. Any violation of the law was the result of a mistake of fact since Defendant believed that all persons calling it were being notified that their calls may be recorded.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Communication not Confidential)

28. The facts and circumstances relating to the calls made to Defendant did not reasonably indicate that any party to the communications desired them to be confined to the parties thereto and, in fact, the facts and circumstances were such that parties to the communications should have reasonably expected that the communications may be overheard or recorded.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Right to Raise Other Defenses)

29. Plaintiff and the putative class members have not set out their causes of action with sufficient particularity to permit Defendant to raise all appropriate affirmative defenses. Defendant has not knowingly or intentionally waived any applicable affirmative defenses, but Defendant reserves the right to assert and to rely upon additional affirmative defenses not stated here, including such other defenses as may become available or apparent during discovery of this action and reserve the right to amend this Answer to assert any such defenses.

PRAYER

WHEREFORE, Defendant prays for judgment as follows:


1. That Plaintiff take nothing by her Complaint;
2. That judgment be entered in favor of Defendant and against Plaintiff on all causes of action;

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- 3. That Defendant be awarded the costs of suit herein incurred; and
- 4. That Defendant be awarded such other and further relief as the Court may deem appropriate.

Dated: February 2, 2016

DLA PIPER LLP (US)

By 

PERRIE M. WEINER
EDWARD D. TOTINO
MONICA D. SCOTT
Attorneys for Defendant
EDDIE BAUER LLC

1 **PROOF OF SERVICE**

2
3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not
5 a party to the within action; my business address is: 2000 Avenue of the Stars, Suite 400 North
Tower, Los Angeles, California 90067-4704.

6 On February 2, 2016, I served the foregoing document(s) described as:

7 **DEFENDANT EDDIE BAUER LLC'S ANSWER TO FIRST AMENDED COMPLAINT**

8 on interested parties in this action by placing the original true copy(ies) thereof enclosed in
9 sealed envelopes as stated below.

10 Zev B. Zysman, Esq.
LAW OFFICES OF ZEV B. ZYSMAN
11 15760 Ventura Boulevard, 16th Floor
Encino, CA 91436
12 Tel: (818) 783-8836
Fax: (818) 783-9985
13 e-Mail: zev@zysmanlawca.com

Attorneys for Plaintiff and Proposed Class
YEVGENIYA GRANINA

14 **(BY ELECTRONIC SERVICE)** I electronically submitted a true and correct copy of
the above-entitled document(s) to **Case Anywhere** for service on counsel of record.

15 **(BY MAIL)** The envelope was mailed with postage thereon fully prepaid. As follows:
16 I am "readily familiar" with the firm's practice of collection and processing
correspondence for mailing. Under that practice it would be deposited with U.S. postal
17 service on that same day with postage thereon fully prepaid at Los Angeles, California in
the ordinary course of business. I am aware that on motion of the party served, service is
18 presumed invalid if postal cancellation date or postage meter date is more than one day
after date of deposit for mailing in affidavit.

19 **(BY FACSIMILE)** I delivered such document by facsimile to the following persons at
20 the facsimile telephone numbers listed above.

21 **(BY HAND DELIVERY)** I delivered the within documents to Legal Support Unlimited
for delivery to the above address(es) with instructions that such envelope be delivered
22 personally on February 2, 2016 to the above named individuals.

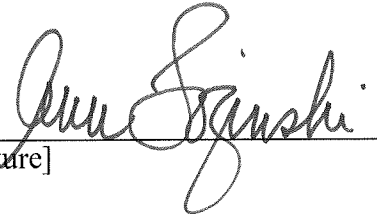
23 **(BY OVERNIGHT MAIL)** I am readily familiar with the firm's practice of collection
and processing correspondence for mailing with an overnight courier service. Under that
24 practice it would be deposited with said overnight courier service on that same day with
delivery charges thereon billed to sender's account, at Los Angeles, California in the
25 ordinary course of business. The envelope was sealed and placed for collection and
mailing on that date following ordinary business practices.

1 (STATE) I declare under penalty of perjury under the laws of the State of California that
the above is true and correct.

2 (FEDERAL) I declare that I am employed in the office of a member of the bar of this
3 court at whose direction the service was made.

4 Executed on February 2, 2016, at Los Angeles, California.

5 Ann Lozinski
6 [Print Name Of Person Executing Proof]


[Signature]

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